

Trajectories in Muslim Family Law Reform in South Africa

Fatima Seedat
University of Cape Town

Abstract

In the context of a review of the study of Islam in South Africa, this paper traces an intellectual and activist journey working in Muslim family law reform. Analytically, it focuses on changes in Muslim legal practice that were born from the hardships produced by the legal non-recognition of Muslim marriages in South African law, the social and legal marginalisation of Muslim women and the resultant impoverishment of Muslim wives. The paper finds that in the gap produced by legal non-recognition, some new legal practices have emerged. Bookended by the work of the Commission for Gender Equality in the late nineties and that of the Muslim Personal Law Network more than twenty years later, key themes running through the decades-long process include a concern for the nature and integrity of the *shariah* in the processes of reform, as well as the location and value of women's experiences of (un)ethical outcomes in the application of Islamic laws of marriage and divorce. Responses to the law reform process bring to light a normative and reinterpreted approach, the former characterised by ideas of gender complementarity and the latter by gender equality. Further, as the State and *Ulama* have struggled over who and what would constitute *shariah* and the substance of Islamic laws on marriage and

divorce, through the efforts of gender activists and reform-minded scholars and practitioners there has emerged a parallel process of applied law reform, represented in the practice of personalised *nikāh* contracts and women's *khul'a* pronouncements, both guided by the idea that women in Muslim marriage (ought to, if they do not already) hold full legal capacity. This legal responsiveness is producing new Muslim family law practices, which allows us to suggest that Muslim family law functions as a living law guided by ethical outcomes. The study of Islamic Law in South Africa is potentially set to encompass these new trends through a new degree offering at the University of Cape Town (UCT).

Introduction

The study of Islam in South Africa has historically been linked with management and authority over the community of Muslims who, before 1994, arrived or were brought to the southern parts of Africa from across the globe, including areas which are now Zanzibar, India, Indonesia, and Malaysia. Post 1994, many others came, and in the transition between these two moments, the study of Islam also shifted. Following European trajectories in the study of Islam, which originated first in the imperial and later in the colonial context, the early study of Islam in South Africa was in the service of governing enslaved, and later indentured Muslim populations on the Atlantic and Indian Ocean coastlines. The seventies, eighties and nineties saw what we might call the localisation of the study of Islam, as local Muslim communities were recruited into existing university spaces, developed new spaces, and funded Muslim scholars to lead the study of Islam from 'insider' perspectives.

The study of gender and sexuality in these processes was not a priority and arose only early in the new millennium, replicating similar shifts in the focus of the study of gender and religion internationally, and reflecting post-apartheid concerns for gender equality in South Africa. In the transition from an imperial to a colonial and now democratic space, the place of *shariah* and the nature of Muslim marriage has similarly

shifted through these moments. As we move forward now, the scene is set for a space that allows for a deep focus on Islam, sexuality, gender and the ethical challenges of navigating religious marriage in a constitutional context that enables religious freedom and equality similarly. This paper places the study of Islam in South Africa in the context of the evolving debates on Muslim marriage in the last 23 years, channelled through my journey as an activist and intellectual, to reflect simultaneously on the challenges and consequences of legal non-recognition of Muslim marriage for Muslim women and the study of Islam in South Africa.

Activist and Academic Intersections

My interest in the *fiqh* of *nikāḥ* and *talāq* began in my undergraduate studies, but my work in the Muslim family law process in South Africa formally began when I became a Parliamentary Officer at the Commission for Gender Equality (CGE), in the late nineties. I worked with the late Commissioners Elize Delpont and Zubeida Barmania, as well as Professors Vivian Taylor, Gertrude Fester and Farid Esack. Following the South African Law Reform Commission's (SALRC) release of Issue Paper 15 produced by "Project 59 Islamic Marriages and Related Matters" in May 2000, the CGE held consultative workshops, focus groups and meetings with communities and Muslim judicial bodies across the country to inform the CGE's response to the Issue Paper.¹ In its conclusions, the report supported State recognition of Muslim marriage only through the existing civil law, not through a new statute on Muslim family law.

1 South African Law Reform Commission. 'Islamic Marriages and Related Matters Issue Paper 15'. May 2000. ISBN: 0-621-30089-6. Available here https://www.justice.gov.za/salrc/ipapers/ip15_prj59_2000.pdf. The SALRC report on the submissions three years later lists the various opinions and views, available here https://www.justice.gov.za/salrc/reports/r_prj59_2003jul.pdf. South African Law Reform Commission, Project 59, 'Islamic Marriages and Related Matters Report', July 2003. For a review of the various debates and positions on the recognition of Muslim marriage over this time see S. Dangor and N. Moosa (eds.) *Muslim Personal Law in South Africa: Evolution and Future Status*, edited by Cape Town: Juta Press. 2019, and Waheeda Amien "Overcoming the Conflict between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages", *Human Rights Quarterly*, 28 (2006) 729-754.

Importantly, for our purposes, it noted an ongoing debate within the community and amongst *‘ulama* on how a new legal regime would impact what constitutes *shariah* and the place or rather absence of women’s voices and experiences in that determination.²

Not long after that, Waheeda Amien and I, together with the Women’s Legal Centre and others, co-founded Shura Yabafazi, an NGO that would channel a gender-focused approach to the law reform processes, before we both left to study further, each taking up studies in different aspects of Muslim family law. Waheeda left first, for Ghent University in Belgium, where she obtained a degree in human rights law, and I followed soon after to study Islamic law at McGill University in Montreal, focusing on the concept of legal capacity. Among other courses, Assoc. Prof. Amien now teaches South African Muslim family law at UCT and facilitates a regular summer course on Muslim marriage contracts. I too, am back at UCT, and have recently stepped into leadership of the Department of African Feminist Studies (previously Gender Studies) at the African Gender Institute where, since 2017, I had also introduced the study of religion and law at the intersections of gender and sexuality. This was first as a segment in other courses and then through an Honours level (now also Masters level) postgraduate elective. In 2018 Prof. Sa’diyya Shaikh and I began developing an interdisciplinary stream bringing together these Gender Studies offerings with courses on religion and sexuality, which she had offered since 2005 in the former Religious Studies Department (now Department for the Study of Religions). In 2023 we will offer a new Masters qualification in ‘Islam, Gender, Sexuality’, which will combine our expertise in law and sufism to allow students to specialise in Islamic law and spiritual ethics. This new degree offering reflects efforts to curate and correct the absence of a dedicated academic space to study the intersections of law, ethics, gender and sexuality in the context of Muslim society. The long interregnum from the turn of the millennium until now represents the long law reform processes that began prior to 1994 and remain ongoing; the new degree offering promises a means to integrate the learnings of

2 Seedat, F. “Determining the Application of a system of Muslim Personal Law in South Africa”, *ARISA*, University of Cape Town, June 2000.

that process into a broader project of ethics-based social change. It reflects how the study of gender and law in South Africa might evolve, guided by an ethics of justice that recognises the full humanity of all people, and inclusive of the widest possibilities for social and spiritual justice.

Commission for Gender Equality

In 2001, a research report from the CGE noted three issues that stood out during their consultations. First it noted community concerns for what the new legislation would be as a reflection of *shariah*, specifically for how it might disrupt or indeed ‘contaminate’ it; embedded in this was also a discussion on its distinction from, or definition as ‘Islamic law’ and more specifically as Muslim family law. A further concern appeared to be for the future of the exclusively male judicial bodies who ordinarily managed the practice of *nikāḥ*, *talāq*, and *faskh*. Being one of the two most common forms of divorce at the time (*faskh* being the other), *talāq* was common across the country, while *faskh* was practiced more widely in the Cape among the predominantly *Shafi’i* community. The third concern highlighted women’s experiences of the application of the *fiqh* of *nikāḥ*, *talāq*, and *faskh*, including the nature and form of marriage contracts that would finally govern marital property in Muslim marriages. Amongst the findings was that women experience “extreme hardship” in both Muslim marriage and civil law marriage, and that there was a significant disparity of marital rights, especially matrimonial property rights, for Muslim women married through *nikāḥ* only, compared to women married under civil law in South Africa.³

These were also the challenges that had prompted the emergence of Shura Yabafazi, and the organisation would make important contributions to the law reform process over the years that followed. Apart from formal submissions to the SALRC, they also initiated a short-lived but important legal clinic for assistance with divorce matters and in accessing the South African courts for maintenance after *talāq* or *faskh*. Shura Yabafazi also facilitated community discussions on Muslim family laws and, through a small grant received from the Women’s

3 Seedat, 2000.

Development Fund in 2001, the organisation also funded a study on polygyny in Cape Town.⁴

Soon after Shura was established, I had the opportunity of a work-study with Women Living Under Muslim Laws, an international UK-based NGO that at the time was in the concluding phase of a 10-year project collecting information on the Muslim family law practices of more than 60 countries. Collating the country reports into a series of chapter, each focusing on a specific aspect of the law, the result was an immensely useful compilation titled *Knowing our Rights: Women, Family, Laws and Customs in the Muslim World*, designed as “an essential resource for those taking a critical and questioning approach to rights, laws, and constructions of womanhood in Muslim countries and communities and beyond”.⁵ The country specific laws in each section were evaluated for the options they provided for women and girls in Muslim societies. These ranged from more, to median and, finally, to ‘less option giving’.

CEDAW

Moving forward two decades, in November 2021, South Africa reported for the third time to the Committee of United Nations Convention on the Elimination of all forms of Discrimination against Women (CEDAW) following a delay of 10 years since our last report in 2011.⁶ In previous reports to the CEDAW Committee, Muslim marriages are mentioned only incidentally, and the Concluding Observations of the Committee in 2011 make brief mention of the lack of recognition of Muslim marriages, encouraging the State to:

4 Early members of Shura Yabafazi included Wahidah Baroodeen, Reyhana Parker, Shireen Ebrahim, and Lulama Nongogo. The group supported work toward a PhD project namely, Bangstad, Sindre. *Global Flows, Local Appropriations Facets of Secularisation and Re-Islamization Among Contemporary Cape Muslims*, PhD Dissertation, ISIM, Amsterdam University Press, 2007. Available here: <https://library.oapen.org/handle/20.500.12657/35297>

5 Women Living under Muslim Laws, 2006, *Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World*, first published in 2003 and again in 2006, this time with an update, both by Women Living Under Muslims Laws in London, UK.

6 An initial delay of nine years was followed by a further two years delay, some of it due to Covid in 2020. This report contained the combined reports of the 2nd, 3rd and 4th previous reporting periods.

“(p)repare a unified family code in conformity with the Convention in which unequal inheritance rights, property and land rights and polygamy are addressed, with the aim of abolishing them, including the option of civil provisions available for all women.”⁷

For the 2021 session, the Committee received the first ever Shadow Report on Muslim Marriage in South Africa, presented by the Muslim Personal Law Network and supported by Musawah.⁸ The report summarises the history of the process over 27 years thus:

“... the State embarked on extensive community con-sultations from 1994 to 2003 when a first draft of the Muslim Marriages Bill (MMB) was developed for community comment. In 2010, after extensive revisions and consultations, the Muslim Marriages Bill (2010) was submitted to Parliament, but never tabled for deliberations. Instead, the MMB has become a political toy brought out at every election to garner Muslim votes for the ruling party. More recently in 2018, the State instituted a process toward a single Marriage Act for South Africa to include the registration of all religious marriages. In 2020, a further Green Paper on Single Marriages Policy by the Department of Home Affairs (DHA) was published for comment ... The State has not provided timelines for enactment of legislation and given its procrastination for 27 years, urgent action is required to hold it accountable. The ongoing delay and obvious lack of political will to recognise Muslim marriages has exacerbated hardship for Muslim women.”

To summarise, the Report argued that the State’s “non-committal approach continues to violate Muslim women’s constitutional rights to equality and dignity” highlighting these violations under Articles 1, 2, 3, 5, 15 and 16 of the Convention. Significantly, the three main concerns of the CGE report, 20 years before, continue to reflect in the Shadow Report where the judicial groupings continue to be exclusively male, and in the absence of State recognition of Muslim marriage, the application of the *fiqh* of *nikāḥ* and *talāq* continues to produce hardship for Muslim women, whose experiences remain tangential to demands for the application

7 The Concluding Observations of the Committee are available here CEDAW/C/ALB/CO/3/CRP (ohchr.org)

8 Muslim Personal Law Network. 2021. CEDAW Shadow Report, 20 September 2021 (South Africa). Available here: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ZAF/INT_CEDAW_CSS_ZAF_47136_E.docx

of the law. Discussion on the nature and character of *shariah* are also significantly pronounced now; new judicial bodies have been formed, some have supported and others exited the State legislation making processes, critiquing the authenticity and legitimacy of the *shariah* value of any new legislation that might eventually emerge.

Legal Capacity

In the years between my work on the CGE and the CEDAW reports, I read for a doctorate to equip myself for the local debates on Muslim family law reform. The privilege that male students have accessing the study of *fiqh*, whether through *Azhari* of Cairo, the colleges, merkses and madrassahs of Mauritania, Hadhramauth or the Indian subcontinent, are not on offer for female students. Furthermore, there were then, as now, few spaces in which to study Islamic law and gender simultaneously. The curriculum I finally followed was developed over many years through trial and error, as I sought out teachers and texts that would teach what I wanted to learn. I eventually found my conceptual project would not rest as much in the application of family law as it would in *usul al-fiqh*, namely the concept of 'legal capacity' or *al-ahliyya*, which I read through Mulla Jīwan's *Nur al-Anwar*, a 17th-century commentary on Imam Nasafi's 13th century *al-Manar*. Importantly, this text also forms part of the curriculum at some South African madrassahs.⁹ However, I still drew my research questions from the experiences of the women I'd met working with the CGE, Shura Yabafazi and others who struggled to accept the inequality they experienced in the judicial councils' application of the *fiqh* of *nikah* and *talaq*.

My research questions asked about the individual that the law imagined when it legislated for Muslim men and women, but particularly for women. Guided by Judith Butler and Michel Foucault, I studied how legal texts produce legal subjects even as they legislate upon them, slowly learning that 'the legal subject does not exist before or after its discursive

9 Jīwan, ibn Abī Sa'īd ibn 'Ubayd Allāh. *Nūr Al-Anwar ala Qamar Al-Aqmar*, Delhi: Kutub Khanah Rashidiyah, 1960. Amongst others, the text is taught at *Madrassah Ta'leemuddeen* in Isipingo Hills, *Madrassah Inaamiyyah* in Camperdown and *Darul Uloom Zakariyya* in Lenasia.

production in the text'.¹⁰ My interests collected themselves into two central questions: who is the 'woman' of Islamic law and how does sex difference determine legal capacity?

For the study of legal capacity, I found in Mulla Jīwan's work a historical notion that does not match similar contemporary notions of women's legal capacity. Represented by the work of Imran Ahsan Khan Nyazee and Mahdi Zahraa, contemporary understandings of women's legal capacity offer two different approaches; as subjects of law they consider women's legal capacity to be either entirely different from men's, or not at all different.¹¹ Nyazee takes the first view, arguing that women function within a host of differentiated legal possibilities enumerated in the restrictions on leadership, *imamate*, inheritance, witnessing and *talaq*. Mahdi Zahraa takes the alternate view, that is, that women are undifferentiated from men in terms of legal capacity, even as he argues that restrictions on inheritance, witnessing, etc. are necessary.

This contradictory framing was surprisingly different from Mulla Jīwan and his predecessors, whose list of impediments to full legal capacity did not include being a woman or even gender. The historical scholars work with a list of impediments to legal capacity distinguished between those which are God-given and those which are personally acquired. God-given impediments to *ahliyya* are minority, mental incompetence, slavery, mental deficiency, forgetfulness, sleep, unconsciousness, illness, menstruation and post-partum bleeding, and death. Acquired impediments to *ahliyya* are ignorance, drunkenness, jest, travel, reckless spending, error, and force.¹²

Emerging from the CGE debates and the practice of *nikāḥ* and *talāq* that rest on ideas of women's diminished legal capacity, especially where

10 Butler, Judith. *Gender Trouble: Feminism and the Subversion of Identity*. New York: Routledge Press, 2008, p. 8; Seedat, Fatima 2014. *Sex and the legal subject: Women and legal capacity in Ḥanafī law*. PhD Dissertation, McGill University, Montreal, Canada.

11 Nyazee, Imran Ahsan Khan. *Islamic Jurisprudence: Uṣūl Al -Fiqh*. Islamabad: International Institute of Islamic Thought : Islamic Research Institute, 2000; Zahraa, Mahdi. "The Legal Capacity of Women in Islamic Law." *Arab Law Quarterly* 11, no. 3 (1996): 245-63.

12 Jīwan, 1960.

women are prevented from exiting *nikāh* on their own legal capacity and without a *talāq* or *faskh*, as they are, generally, in South Africa, had not prepared me for the classical law understandings of legal capacity. I was particularly perplexed by the absence of ‘women’ or ‘gender’ as an impediment to legal capacity. As my activist mind was being challenged by my academic one, I felt a deep impact on my understanding of how sex difference and gender feature in Islamic law generally, and in the *fiqh* of *nikāh* and *talāq* more specifically. The conclusions of my dissertation project pointed to a disjunct between historical and contemporary understandings of women as subjects of law, to indicate that the legal category ‘woman’ is also not historical, rather, it is a contemporary category that rests on biological definition.¹³ By contrast, the *fiqh* of *nikāh* and *talāq* work with a category of woman that is specifically a wife; being in the legal situation of a ‘wife’, a woman, or the female legal subject, occupies a form of legal subjectivity that is significantly different from that of ‘woman’ generally.¹⁴

The Muslim Personal Law Network

In 2014, the Masters programme in Gender, Religion and Health, at the University of Kwazulu-Natal, funded by the Church of Sweden expanded to include the study of Islam alongside the long-standing study of gender and Christian theology. In 2016, the programme hosted a roundtable discussion on Muslim Personal Law Reform inaugurated by a keynote address by Zainah Anwar who was then the director of Musawah, an organisation that since 2010 had extended the work begun by activist groups such as Women Living Under Muslim Laws (WLUML) and Sisters in Islam (SIS), a Malaysian NGO of which Anwar was a founder member. Musawah enjoys observer status at the United Nations and, in 2021, started the ‘Global Campaign for the Reform of Muslim Family Laws’.

Anwar’s visit proved catalytic; participants at the roundtable stayed in contact through a WhatsApp group which eventually became the

¹³ Seedat, 2014.

¹⁴ Seedat, 2014.

Muslim Personal Law Network, a collective of South African activists, scholars, lawyers, counsellors, and lay people who advocate for gender-based reforms in the practices of Muslim marriage and divorce, and in some ways also continue the work initiated by Shura Yabafazi 20 years before. The chair of the Muslim Personal Law Network first devolved upon Aneesa Vawda, a Durban-based occupational therapist and established community activist. The MPL Network is presently chaired by Ayesha Royker, a candidate attorney whose own divorce brought her to the study of law. Rifqah van Schalkwyk, a Masters student in Religious Studies at UCT is the current secretary. The MPL Network continues to work in close collaboration with Musawah, and since 2018 has also been supported by the Legal Experience Project located at the African Gender Institute at UCT. For three years now, the Legal Experience Project and the MPL Network co-hosted an annual keynote lecture amidst a series of roundtable discussions focused on gendered approaches to Muslim marriage, divorce and inheritance. The aim of these convenings is to share knowledge and experience of how the systems of Muslim family law work in the three main urban areas Durban, Johannesburg and Cape Town.¹⁵

Focus groups at these convenings gathered the experiences of women as wives, counsellors, advocates, lawyers, activists and academics.¹⁶ A 2018 focus group in Cape Town echoed many of the sentiments of the 2000 focus group convened by the CGE. While there was much interest in marriage contracts, most of the women felt that they did not know enough before they married. They were also mostly married without

15 Beginning in 2018, "The Legal Experience Project: Gender and Islamic Law in South Africa" (funded by an NRF Thuthuka grant) conducted focus groups in Durban, Cape Town and Johannesburg, with 37 women over three years, recording their experiences of Muslim marriage and divorce law. Gathered through a convenience sampling method, the women who contributed their time and stories were between 23 and 75 years old, they were mostly Coloured, Malay or Indian women, four were African and one was White. For more on the Legal Experience Project, <http://www.agi.ac.za/agi-legal-experience>.

16 However, we could not gather the views of women as 'ulama. Anecdotally, we know of two and perhaps three women whom the judicial bodies also consider to be legal scholars; none have entered the family law reform debates, made submissions to the SALRC or featured in these debates over the years.

a marriage contract and so had not negotiated financial matters prior to marriage. *Mahr*, or *miskawi*, as it is called in the Cape, was a common and, in some cases, the only legal aspect that couples discussed before marriage. A common practice was for *mahr* to either be borrowed by the future husband or gifted to him by friends, family, and even his future father in-law. More frequently, however, it was provided by the bride herself. In terms of marital property regimes, most of the women had not discussed this prior to marriage, and most had also struggled to receive any once the marriage ended.¹⁷

What had changed in the years between 2001 and 2021 was access to the internet, which meant that many women could and had read about the various options for divorce. However, the situation didn't change much; few of these women, if any, could easily exercise these options through the judicial bodies that ultimately held exclusive authority to determine Islamic marriage and divorce laws. In the views of some women who have accessed the judicial bodies, the tight hold these organisations had on the processes, as well as their reluctance to pronounce divorce when it was sought by women, had changed only negligibly. Judicial bodies remained insistent on maintaining marriages even when wives clearly indicated the need to exit; a common theme was of these women returning to the Muslim Judicial Council (MJC) in Cape Town, or the Jamiatul Ulama South Africa (JUSA) in Johannesburg and the Jamiatul Ulama KZN (JUKZN) in Durban many times, to the point that after too much to-ing and fro-ing, they would turn to other organisations for help. In Cape Town, many of the women seeking divorce and frustrated by the inaction of those judicial bodies approached a second organisation Majlisush Shura Al-Islami, known as Shura, which seems to have been more sympathetic to women's concerns; in Durban, women in the same position approached the Darul Ihsan organization, which seemed somewhat more accessible, though was not necessarily very different to the Muslim judicial bodies.¹⁸

17 Legal Experience Project, Focus Group, Cape Town, April 2018, African Gender Institute, UCT.

18 Legal Experience Project, Focus Group, Durban, July 2019, Islamic Studies Research Unity, University of Kwazulu Natal.

Women who had been in more than one marriage also spoke about their varied experiences of divorce. In one account a woman in Cape Town stated that when she asked for a *talāq*, her first husband pronounced *talāq* in person, and with witnesses. Her second husband, however, after being emotionally abusive, pronounced a triple *talāq* on the phone, which she refused to consider a valid pronouncement. She asked the MJC for a *faskh*, instead, detailing in her application the abuse she'd endured. At the end of their meeting, as the MJC planned to issue a *faskh*, her husband insisted upon pronouncing a triple *talāq* instead.¹⁹

In Johannesburg and Durban, it was not unusual to find women struggling with the judicial bodies to facilitate their exit from marriages of two or three decades; in most of these cases women had to also come to terms with relinquishing their claims to any matrimonial property at divorce. One person ran a shop from her garage and a series of other business ventures through the 50 years of a marriage that began in the sixties. Her income was always deposited into her husband's bank account, and she did not participate in any other finance arrangements. From small beginnings, they later became wealthy. He financed the children and household expenses but refused to give her a personal allowance. When she finally left the marriage in 2015, he refused to give her any property, agreeing only to share a small income from one property. He eventually pronounced *talāq* three years later. She says of her marriage: "I was abused in every way that you can think of".²⁰

Through these interviews, it became clear that discussions on gender-based violence (GBV) are now a regular feature within Muslim community spaces, and in the Cape it appeared to be one of the grounds

19 Legal Experience Project, Focus Group, Cape Town, April 2018, African Gender Institute, UCT. The distinction between these two ways to end a *nikah* are important when the process of *faskh* also allows women to air their own grievances through the process, rather than a *talaq* where they may play no role and find themselves compelled into silent acceptance instead. For this person, the *talaq* on the phone did not allow her the active presence she wanted in her divorce; so she requested the *faskh* through the judicial body, where she would also be present, contribute her narrative and so also participate in the process of her divorce.

20 Legal Experience Project, Focus Group, Johannesburg, June 2020, Zoom.

for which women could be granted a *faskh*.²¹ In Durban this was not as easily the case, but it appears that compared to 2000, the Hanafi judicial councils in the Gauteng and KZN regions have become more sympathetic and seemingly more willing to facilitate exit from a physically abusive marriage.²² Overall, however, not much has changed with regard to hardships in women's lived experiences of *nikah* and *talaq*, namely in terms of their capacity to exit marriage on their own terms or to access matrimonial property either within marriage or on exit.

The work of the MPL Network has focused on empowering women as wives as they enter and exit *nikāḥ*. The focus is on negotiated, personalised *nikāḥ* contracts and facilitated *khul'a* pronouncements. In the first instance, the Network encourages a process of pre-marital coaching which results in a *nikāḥ* contract that may include the marital property regime, procedures for how the couple might exit the *nikāḥ* later, stipulations on polygyny, financial arrangements during the marriage, care-giving arrangements, childcare plans, meeting in-law obligations, and anything else the couple may choose to stipulate. Often the last recourse for women who have been exhausted by the processes at the judicial bodies, the Network also facilitates when women choose to pronounce *khul'a* to exit a *nikāḥ*. The *khula* presents the wife's reasons for exiting, an explanation of how the *mahr* is returned and a pronouncement that she releases herself from the *nikāḥ*. More recently the MPL Network has also developed strategies for estate planning that enables wives to build and preserve assets within the *nikāḥ*. They have also begun to advocate for open discussions on sexuality, desire, consent and rape in *nikāḥ*.²³ Most recently, the Network presented their complaint to CEDAW,

21 Legal Experience Project, Focus Group, Cape Town, April 2018, African Gender Institute, UCT.

22 Legal Experience Project, Focus Group, Pietermaritzburg, May 2019, Pietermaritzburg.

23 Farhana Ismail, a Johannesburg-based activist and researcher on Muslim family law, has developed the practice on marriage contracts, and I have developed the practice on *khula*. Rumana Mahomed, a Durban based attorney and longstanding chairperson of Taking Islam to the People (TIP) has led the practice on estate planning; the work on sexuality is guided by Dr Mariam Bibi Khan, a natural medicine health professional and PhD candidate at Wits University focusing on bio-medical ethics for Muslim medical practitioners.

as above, in a Shadow report led by Zeenat Sujee, a Johannesburg-based legal scholar. In summary, the work of the MPL Network is guided by three principles: a *tawhidic* paradigm, a *tafsir* of praxis, and an *ahliyyah* approach that proceeds from an understanding of women as legal subjects who hold full legal capacity within their marriage.²⁴

‘Shariah’ and Women’s Experiences

To theorise some of these developments against scholarship on law reform in Muslim communities, an analysis of the concern for what *shariah* is suggests that this law reform process is arguably unlike earlier colonial processes of codification; in fact, this process works in the opposite direction of what Armando Salvatore characterised as an ‘implosion of *shariah*’ into a hardened kernel-like notion of normativity.²⁵ The idea of a normative and unchanging or static concept prevails in the South African debate too. Yet, while some have insisted that *shariah* is immutable, as well as also impossible under a secular state, others have been asking for *shariah* to be responsive to present realities. We might call this a ‘re-explosion of *shariah*’, or a process of popping open the hardened kernel (think popcorn) to reveal and come to know the inner workings, concepts, and mechanism of *shariah* formation in Muslim communities.²⁶ The distinction is reflected in the argument amongst judicial bodies, which have either remained in the legislation-making process (however reluctantly), exited it, or advocated for an independent *Shariah* Bench within the South

24 Meeting, Muslim Personal Law Network, November 2021, Antique Café, Durban. The *tawhidic* paradigm is drawn from the work of amina wadud, the *tafsir* of praxis from the work of Sa’diyya Shaikh, and the *ahliyya* approach from my doctoral dissertation (Seedat 2014); Wadud, Amina *Qur’an and Women* (1992). Penerbit Fajar Bakti, Kuala Lumpur. Shaikh, Sa’diyya (2012) *Sufi narratives of intimacy: Ibn Arabi, gender, and sexuality*. Chapel Hill, NC: University of North Carolina Press).

25 Salvatore, Armando (2004) ‘The Islamic reform project in the emerging public sphere: the meta normative redefinition of shariah’. In *Between Europe and Islam: shaping modernity in a transcultural space*. Edited by Almut Hefert and Armando Salvatore. Brussels: P.I.E.-Peter Lang, pp. 89-108.

26 Seedat, F. (2020) “Gender and the Study of Islamic law: From Polemic to Ethics”, in *The Routledge Handbook on Gender and Islam*, Edited by Justine Howe. Routledge, New York: NY. Pp. 83-98. <https://www.routledge.com/The-Routledge-Handbook-of-Islam-and-Gender/Howe/p/book/9780815367772>.

African court system. Among reformists, the discussion is on *shariah* in the context of change, interrogating the limited scope and selectivity of Muslim legal practices and looking to a wider range of historical legal interpretations than previously available in the South African Muslim legal landscape. These have been countered by judicial bodies, which have held the traditional monopolies over interpretation, and legal knowledge, contesting definitions and content of what may be deemed '*shariah*'.²⁷

Two examples illustrate this. First, when the first Muslim Personal Law Board was constituted in 1994, it was disbanded rather quickly, and among the issues that arose was a *shariah*-based dispute regarding the presence of women who chose not to cover their hair when attending these meetings. In the opinion of the judicial bodies present, hair coverings are a *shariah* requirement and they would brook no dissent on the matter. The second example refers to an incident that occurred when, after more than 15 years of community consultation, the Muslim Marriages Bill (MMB) was completed in 2010 and submitted to Parliament for tabling. In 2011, some 28 members of the *Ulama* representing institutes and madrassahs signed a letter to the President stating that the MMB was unnecessary and impossible from a *shariah* perspective. Using the well-worn trope of *shariah* as immutable and intolerant to encroachments of a secular system of law, they further argued that the Bill is in "conflict with the *shariah* (Islamic Religious Law)" and that it would inevitably lead to "contamination and altering of the *shariah*". Moreover, they added that even a *shariah*-compliant Bill would be impossible "under a dominant Secular System".²⁸ In contrast to these arguments supporting the immutability and hardened kernel-like notion of *shariah*, submissions

27 An article published in 23 Feb 2011 on the Jamiatul Ulama Online Newsletter (Vol.6 No.8.) website gives some indication of this discussion, it is no longer available on the original website, but a re-publication is available on the website of the Maraisburg Muslim Jamaat <http://www.maraisburg.co.za/2011/03/07/weekly-jamiat-jhb-message-2/>. A second piece from a more extreme viewpoint shows some of the complexities the judicial bodies are managing within their own ranks. http://themajlis.co.za/index.php?option=com_content&view=article&id=105:comments-on-the-muslim-marriages-bill-by-the-majlisush-shura-al-islam&catid=30:mpl&Itemid=41.

28 The letter is available as a booklet online, published under the name of the United Ulama Council, which name is disputed between an original group of

from advocates for gender-based reform have in turn argued for a broadened understanding of *shariah*, focusing on ideas of justice drawn from Qur'an and Hadith, putting aside historical legal interpretations in favour of contemporary analysis of 'justice and equity', and making attempts to align the MMB with *shariah*. One submission argued that the Bill "is in keeping with the spirit of justice and equity as embodied by the Qur'an and *Sunnah*, and reflected in Islamic Law".²⁹

Some of the debate has also focused on stipulating exactly what the new law would be, rather than accepting vague references to *shariah* or Islamic Law principles which are not specifically spelt out in the Bill. Commenting on a 2006 version of the Bill which listed the grounds for *faskh* as "any ground or basis permitted by Islamic Law", a submission argued instead for "(a) closed list of grounds that is defined by the proposed Act, and which are accepted as definite grounds upon which spouses may apply for a *faskh*"³⁰ Whereas some judicial bodies preferred a broader scope for the various definitions of *faskh*, advocates for reform preferred a clear indication of the parameters of *shariah* within the Bill. The preference for definition and precision is important for those vulnerable sections of the community who have had a history of struggle using South African law to access Islamic law rights. To summarise, where some judicial bodies fear contamination of *shariah*, reformists have sought alignment and inclusion of specific South African realities within a broad scope of Islamic law.

Ulama that came together under this name early in the legislation making process in 1994, and a new group that contests the first groups legitimacy, and uses the name also. The distinction between the groups is discernible in the address used by the second group which is located in Meyerton. <https://www.asic-sa.co.za/images/books/MMB Ulama%20Objection%20Letter..pdf.pdf>

29 Amien, W., Seedat, F. and Ebrahim, S. 'Submission to the South African Law Commission Project Committee ('Project 59') on the amended draft Islamic Marriages Bill'. Presented to the SALRC Project Committee on Islamic Marriages. Compiled on behalf of Shura Yabafazi ('Consultation of Women'); UWC Legal Aid Clinic; Nadel (Western Cape); Nadel Human (11) (PDF) *Submission to the South African Law Reform Commission Project 144 on its Issue Paper 35 entitled the 'Single Marriage Statute'*. Available from: https://www.researchgate.net/publication/335572414_Submission_to_the_South_African_Law_Reform_Commission_Project_144_on_its_Issue_Paper_35_entitled_the_'Single_Marriage_Statute'.

30 Ibid.

While there is lingering concern for *shariah*, there remains concern, too, for how to include women's experiences of the law. There are at least two discernible views on gender in terms of Islamic law that are relevant for the South African debates. A normative view that is popular in orthodox Muslim narratives explains sex difference through gender complementarity. It is contrasted by a second view advanced in reformist efforts through narratives of gender equality and human rights.³¹ The complementarity narrative of mainstream scholarship is reflected in the work of Abdul Rahman Doi (who also taught Islamic Studies at Rand Afrikaans University in the nineties), Jamal Badawi and Murtaza Mutahhari, the latter of whom also influenced Muslim readings of Islam and gender during the anti-apartheid struggle and the early years of the reform process.³² This scholarship advances a view of Islam as having granted women liberty at its inception, which in their view also renders Islam exceptional in its treatment of gender difference. Some judicial groups have also used this argument to mean that legislation is indeed not necessary for the aspirations of good Muslim women.

By contrast, the gender equality view takes a reinterpretive approach and argues that the problems Muslim women face in Muslim marriage laws do not reflect an inherent problem within Islam or its laws, rather a peculiar and problematic interpretation of the law.³³ It holds the juristic tradition to account for having failed to realise the latent sense of gender justice in the Qur'an and in some Hadith too.³⁴ The works of Azizah al-Hibri and Ziba Mir Hosseini, accompanied by the networks of activism produced through SIS, WLUM and Musawah, have all supported this approach.³⁵

31 Seedat, 2020.

32 Doi, Abdur Rahman (1989) *Women in shariah (Islamic Law)*. UK: London: Taha Publishers Ltd. Mutahhari, Murtaza. (1981) *The rights of women in Islam*. 1st ed. Tehran, Iran: World Organization for Islamic Services. Badawi, Jamal (1999). *Gender equity in Islam: basic principles*. Plainfield, IN: American Trust Publications.

33 al-Hibri, Azizah. (2000) "Muslim Women's Rights in the Global Village: Challenges and Opportunities," *Journal of Law and Religion* XV, no. 1 & 2, pp. 37-66;

34 Seedat, 2020.

35 Mir-Hosseini, Ziba (2003) The construction of gender in Islamic legal thought and strategies for reform. *Hawwa* 1(1), pp. 1-28.

The MMB represents examples of re-interpretation in at least two instances; first, the Bill promotes the idea of a marriage contract with various provisions and second, the Bill attempts to temper the unilateral *talaq* through the possibilities of a delegated *talaq*, a wider interpretation of *faskh*, and the inclusion of *khul'a*. A reinterpretation approach and commitment to an inherently gender-just system of law are also evident in reform-based submissions to the SALRC, among which are those of Shura Yabafazi and the Muslim Youth Movement Gender Desk, and more recently, the MPL Network.³⁶

Emerging Practices

While these processes of legal recognition unfolded over the years, communities and individuals have also developed strategies to manage the hardships brought by the lack of State recognition of Muslim marriage. These reinterpetive approaches have centred the experiences of women and made gender justice a key concern, and they are evident in the newly emerging practices of *nikah* contracts and *khul'a*. I offer one example of each of these here.

In the mid-nineties, when the possibilities of State recognition of Muslim marriage still created excitement, a few young couples wrote their own contracts. The process began with detailed discussions on who would work for an income, divisions of care work and sharing marital property, and concluded in a marriage contract signed by both partners and their witnesses at the *nikah*. The assumption was that a marriage contract negotiated by the couples would ensure that the processes of marriage and the eventual exit, whether by death or divorce would also be Islamic, equitable, and eventually also recognised by the state. One particular contract that was celebrated as ground-breaking in the late 1990s, and shared widely as an example of good practice, has recently been brought into the courts for adjudication.³⁷ Regrettably, the interim 23 years have not proven the hope it had first inspired. In

³⁶ SALRC, 2003. The SALRC report on the submissions lists the various opinions and views.

³⁷ Legal Experience Project; Telephone interview, December 2021.

the marriage contract, the couple had agreed that if one spouse chose to carry childcare responsibilities fully then the other would carry full financial responsibilities for the family and that the two would share equally in the benefits of both, namely that theirs would be a marriage in community of property. Through the 23 years of the marriage the wife left her career to focus on raising a number of children, while the husband dedicated himself to a lucrative career and amassed a substantial estate. He also avoided registration of the *nikah* in civil law. As the marriage became difficult, he pronounced a unilateral *talaq* twice, each time returning to the marriage, and eventually also having an extra-marital relationship. The marriage was finally terminated when they agreed that the wife would pronounce a *khul'a* and return her *mahr*, and they would thereafter negotiate the 50% division of assets that their marriage contract stipulated. Taking an unethical but not uncommon path, he thereafter also refused to share any of the assets earned in the marriage. When he also refused to pay spousal or child maintenance, he forced her into a court battle where he also claimed the *khul'a* was an annulment and that he therefore had no spousal maintenance obligations. The wife subsequently had to reskill herself in the profession she had left 20 years earlier to return to an entry level job while at the same time supporting their children. Evidently, in the absence of State recognition of Muslim marriage and the consequent requirement to prove the existence of the marriage, the enforceability of a Muslim marriage contract relies in large part on the ethics of both parties in the marriage in maintaining the integrity of the contract and not challenging the validity of the marriage or the contract in the courts at the point of divorce. All too often the case has been that husbands have refused to honour property and other commitments contained in their marriage contracts, challenged the legal recognition of their own marriage, contested the validity of the contract and thus reduced the value of the marriage contracts as a means of law reform.

A second interpretive effort is in the use of *khul'a* as a form of exit. At the turn of the new millennium, Mr. Mia and Mr. Abdul Kader Abdul Samad of Pretoria founded The *Khul'a* Society which established a

detailed process for adjudicating a *khul'a* where a husband was reluctant to pronounce a *talāq*. The two-step process first asked the husband to pronounce *talāq* and informed him that failure to do so would result in the organisation's pronouncement of *khul'a*. Once the deadline had passed without the husband doing so, they would adjudicate a *khul'a*, arrange for the return of the *mahr* and release the wife from the *nikāḥ*. Some gender activists, had come across this and used the *Khul'a* Society templates to facilitate *khul'a* for 'stuck' wives, some of whom had spent years trying to exit their marriage through the judicial bodies without any recourse.

We tried the two-step process until it proved cumbersome and we transformed it into a single step. The adjudication process was also amended to one of pronouncement. This process is now also part of the work of the MPL Network; women who cannot obtain a *talāq* are provided with support to make their own *khul'a* pronouncement. To return to the case mentioned earlier, where the husband had reneged on the marriage contract he had entered into 20 or so years before, the wife proposed the pronouncement of *khul'a* and the husband agreed to it; this would avoid a third *talāq*, which might also have prevented the couple from reconciling at a later stage if they had wished to do so.³⁸ When he subsequently refused to acknowledge her part in the wealth produced during their marriage and she was forced to ask for this through the courts, he argued at court that the *khul'a* was an annulment (in other words, a declaration that the marriage had never existed) and so there was no marriage between them that might give her rights and access to matrimonial property. A legal opinion presented by local scholars has argued otherwise, recalling the relevant Qur'an and hadith text, and the opinion that *khul'a* is amongst the rights that allows a wife to pronounce her exit from her marriage with or without her husband's agreement or pronouncement of *talāq*. The wife in question remains in a protracted court battle to prove that she was married, contributed to the marital estate and so has a right to benefit from it.

38 Legal Experience Project; Telephone interview, December 2021.

Shariah-impoverished Muslim Wives

Before we conclude, I'd like to discuss a little book that was penned anonymously at the time of the Constitutional Court hearings on State responsibility to legislate the recognition and regulation of Muslim marriages, in the case brought by the Women's Legal Centre.³⁹ Titled *50 Steps to Leave a Muslim Wife Destitute*, it was the culmination of a concept that began life as a WhatsApp post. 50 Steps was illustrated and published by volunteers (with a foreword provided by the MPL Network), and highlights the material impacts of the protracted discussions on what is considered *shariah* as well as the negation of women's experiences of the law, and argues that the lack of recognition of Muslim marriages in South Africa results in a "system [*that*] is perfectly designed to impoverish Muslim wives".

“(D)ivorce generally impoverishes women across the board. But what’s insidious about the process in Muslim marriage is the way we use religion and ideas of ‘shariah’ to support that impoverishment. There’s an entire art to how it’s done, and that’s the real reason our Muslim boys and their supporters have to make sure that Muslim marriage is not recognised by the State.”

This is a sampling of some of those 50 steps:

1. Marry a woman in Islamic law/rites only.
2. If she asks for a Civil Marriage, tell her it's *haram*, we can rely on the 'shariah' to protect us.
3. If she insists on an Islamic Marriage contract, ensure it's not in community of property, pretend like that's *haram* ...
14. Over the years your wife will probably ask again to register the marriage, make sure you resist, stall, find a way out ...

39 Video of the Constitutional Court Proceedings are available online here: <https://www.youtube.com/watch?v=nyrFrzZfNTA>. A news report on the hearing is available here: <https://www.iol.co.za/capeargus/news/constitutional-court-reserves-judgment-in-muslim-marriages-application-feeedd66-6b0c-4a5c-b926-43dfc3f13703>. The earlier Judgement of the Supreme court is available here: *President of the RSA and Another v Womens Legal Centre Trust and Others*; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others (612/19) [2020] ZASCA 177; [2021] 1 All SA 802 (SCA); 2021 (2) SA 381 (SCA) (18 December 2020).

16. Make sure your wife can never have a share in any of your assets, now or in the future ...
23. When you buy property, always put it in your name only, after all, your wife only works in the house, not like she earns real money ...
28. If you're in financial trouble, and you were crazy enough to give a few Kruger Rand or something valuable for *mahr*, ask for it now ...
29. If you're doing well, as you accumulate wealth, set up a Trust, without your wife's name... say you're protecting her from the taxman ...
33. At death or divorce, if you do all of this, all the assets will either be in your name or in a trust.
34. When you divorce, rather spend money fighting your wife in court than let her share any assets you earned while married to her.
35. Force your wife to go to court to prove that your Islamic marriage is actually a marriage ...
48. Don't feel guilty if, after 10/20/40/50 years married to you, your wife will have no assets to show for the time and effort she spent caring for you, the family and the home ...
50. Again, don't be guilty, keep pretending this is what Allah wants, keep pretending you're just doing things the 'shariah' way.

The practices outlined in *50 Steps* are the real experiences of women in Muslim marriage. The hardship of impoverishment emerges from both the State's reluctance to recognise Muslim marriage and essentialist understandings of *shariah* that prevent context-based responsiveness in the *fiqh* of *nikāḥ* and *talāq*. The exclusion of women's experience from interpretation and application of the law have meant that the majority of women leaving Muslim marriage do so having been impoverished by the application of the *shariah* norms which preclude them from any claims to matrimonial property, among other things. *Shariah*, in this context, has become the application of agreed-upon rules, rather than the requirement for ethical outcomes. Women's demands for ethical outcomes in the practice of Muslim family law raises concerns for law as living practice and ethical conduct.

Ethical Outcomes and a Living Law

The system of marriage and divorce law promoted by the judicial bodies works in concert with the absence of State recognition of Muslim marriage to punitively preclude Muslim women from owning matrimonial property, unlike other South African wives. Against this background, there is a demand for ethical outcomes that recognise husband and wife as partners with full and equal legal capacity in a Muslim marriage. One could arguably say that facilitated by reformist approaches to the law, the practice of Islamic law in South Africa is shifting and changing to accommodate the realities of Muslim families living in democratic spaces.

The work of family law reform reveals the strong fault lines that characterise South African Muslim society and the different ways of being Muslim in the world. The law reform process has shown that the study of gender and Islamic law could broaden to include an interrogation of debates on what *shariah* is, ideas of gender and legal capacity, and theoretical approaches to the study of Muslim women's lived experiences. These concerns were raised early in the process and persist more than two decades later. In the absence of a meaningful State response to the legal recognition and regulation of Muslim marriage, local practices are changing, even amid strong resistance from the judicial bodies or other traditional holders of knowledge of Islamic law. In the interstices of the debates, guided by ideas of autonomy and women's full legal capacity, we have witnessed new forms of *nikāh* practices which include personalised marriage contracts, couples agreeing to share marital property, despite 'ulama insistence that this is not Islamic, and women using *khul'a* to exit *nikah* where husbands or judicial bodies refuse to pronounce *talāq talaq* or adjudicate for a *faskh*. The result is the emergence of new practices in Muslim marriage and divorce, much like a living law, guided by demands for an ethics of justice that resides beyond the rules.

Conclusion

Gender-based reform has troubled the static approaches to *shariah*, and 'popped' the received kernel of normativity and piety that it represents. As activists and academics, over 27 years of law reform many of us have

grown from young students into greying scholars and teachers, and at the same time the study of Islam in South Africa has expanded and developed over more than a quarter of a century. In contemplating the future study and trajectory of practice of Islamic law in South Africa, we may also be guided by an understanding of law as a living practice that alters as justice and social needs change. Hence the need to imagine new paths for the study of Islam in South Africa, to open space and create opportunities to contemplate these evolving ways of being.

Broadly, the work of gender-based reform has been to retain both piety and a commitment to the redress of unequal power relations traced along the lines of gender and sexual difference. Using the lived experiences of laws that are ostensibly intended to elevate the human relation to the Divine, reform-orientated believers are bringing attention to the norms that function beyond the law; the unethical practice of impoverishment or denial of women's selves denigrates from their direct connection with the Divine. And so, 'good Muslim women' are advocating for ethical outcomes from *shariah* processes by interrogating the inner workings of the law, the gendered systems that produce the law and the gendered assumptions that the law rests upon. In prompting important changes in the lived experiences of the law, they maintain the vitality of the law as a living law, reminding us of the ethical norms beyond the practical rules, of the need to be responsive to new realities and long-established commitments to the Divine. Moving forward, our work in the academy is to make this visible and capture its transformative potential; thus, to increase the possibilities of justice, both socially and spiritually.