



CEDAW Shadow Report

20 September 2021

Submitted by the Muslim Personal Law Network

(South Africa)

Contents

| | |
|--|---|
| 1. Introduction | 1 |
| 2. Legal Framework | 1 |
| 3. Background | 2 |
| 4. Non-Compliance with CEDAW Articles | 3 |
| <i>a) Discrimination, Policy Measures, Rights Protection and Law (Articles 1, 2, 3, and 5)</i> | 3 |
| i. Muslim Women’s lived experience of discrimination | 4 |
| ii. Redress Through Court processes | 4 |
| <i>b). Marriage (Article 15 and 16)</i> | 5 |
| i. Imam marriage officers | 6 |
| ii. Muslim Women’s Inequality before the Law | 6 |
| iii. The States Responses to Legal Challenges | 7 |
| 5. Conclusion and Recommendations | 8 |

1. Introduction

The Muslim Personal Law (MPL) Network submits this thematic report on Articles 1, 2, 3, 5, 15 and 16 for consideration by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee in its review of the Government of South Africa, initially scheduled for reporting before the 78th session of the CEDAW Committee in October 2020. The focus of this report is the lack of legal recognition and regulation of Muslim marriages. The MPL Network is a diverse, national collective of women working for change in gender-based consequences of the legal non-recognition of religious marriages and advocating for gender-egalitarian approaches to Muslim family laws. This report is submitted in consultation with Musawah, the global movement for equality and justice in the Muslim family.

This is the CEDAW Committee's fifth engagement with South Africa which, after signing the CEDAW Convention on 29th January 1993, ratified it on 15th December 1995, without reservations. In response to the Committee's list of issues and questions concerning the fifth periodic report by the South African state, the MPL Network proposes our report be used as a tool for constructive engagement with the State to recognise and protect the lives and dignity of Muslim women as wives in South Africa vis-à-vis intersecting forms of inequality and discrimination in their lived experience of marriage and family law.

2. Legal Framework

South Africa is a secular, liberal, 26-year-old democracy with an estimated population of just under 59 million, of which Muslims constitute approximately one million. Democracy gave rise to the enactment of a Constitution based on the values of dignity, equality and freedom. The Constitution, South Africa's apex law, includes the Bill of Rights which provides for the rights to equality, dignity, privacy, freedom and security, religion and children, amongst others.

South Africa's domestic, international and regional legal frameworks are set out in **Appendix A**. These legal frameworks form a firm basis for various pieces of legislation¹ that govern marriage, divorce, customary marriages and civil unions.

In the context of marriage law, South Africa operates from a position of legal pluralism. In light of this legal leeway, the Constitutional Court has, on several occasions, been confronted with constitutional challenges to legislation which failed to recognise Muslim marriages in circumstances where the rights of a woman were violated.

3. Background

South Africa's current legislative framework does not meet the needs of its diverse religious and ethnic groups. Civil marriages are registered in terms of the apartheid- era Marriage Act 25 of 1961 which is based on monogamous, heterosexual, Christian principles.

Post-apartheid, the State has enacted legislation to recognise and regulate polygynous African customary marriages and same-sex unions through the Recognition of Customary Marriages Act and the Civil Unions Act respectively. This points to the State's capacity to meet constitutional imperatives outlined in the Bill of Rights — particularly the right to equality and the right to access to justice. However, in the case of Muslim and other religious marriages, the state has, over 27 years, failed to provide legal protections, perpetuating the vulnerability of women and children.

In the context of Muslim Personal Law, the State embarked on extensive community consultations 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. Two options were tabled by the Department of Justice's Law Reform Commission (SALRC) – a Single Marriage Statute or an Omnibus Statute. In 2020, the Green Paper on Single Marriages Policy by the Department of

¹ Marriages Act 25 of 1961; the Recognition of Customary Marriages Act 120 of 1998; Civil Unions Act 17 of 2006, Divorce Act 70 of 1979; the Wills Act 7 of 1953; Intestate Succession Act 81 of 1987; Maintenance of Surviving Spouses Act 27 of 1990 and Maintenance Act 99 of 1998.

Home Affairs (DHA) was published for comment. These two unrelated processes suggest limited coordination between these two departments.

In our inputs to the State on both processes, the MPL Network supports any attempts to recognise and regulate Muslim marriages in South Africa. 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.

4. Non-Compliance with CEDAW Articles

In its periodic CEDAW report the State contends that through the judgement in the *Hassam*² matter (para. 26), Muslim marriages have been recognised in the context of intestate succession regarding polygamous Muslim marriages. However, eleven years after this judgment, no legislation has been passed to confirm this recognition. The State report fails to outline any further initiatives it has taken, the resulting increase in litigation by women and community NGOs for the recognition of Muslim marriages, and reasons for the State's delay and lack of political will to legislate around Muslim marriages. International, regional and domestic laws require the State to enact legislation that recognises and regulates Muslim marriages in order to alleviate discriminatory challenges faced by women.

Whilst acknowledging the landmark *Hassam* judgement, which at the time was indeed indicative of the Constitutional Court's alignment with CEDAW Articles 1, 2, 3, 5, 15 and 16,³ this report by the MPL Network interrogates the South African State's evasive and nonchalant attitude in providing legal protections to Muslim marriages.

a) Discrimination, Policy Measures, Rights Protection and Law (Articles 1, 2, 3, and 5)

In this section, our report details the State's non-compliance with requirements of CEDAW Articles 1, 2, 3 and 5. The lack of appropriate policies and legislation has meant that existing laws, regulations, customs and practices continue to constitute discrimination against Muslim

² *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC).

³ Periodic report at paras 46 and 179. The report submitted to the United Nations High commissioner for Human Rights on marriage, family and a unified code mentioned in para 179 is not publicly available and therefore we were unable to verify or respond to any of the content addressed in the report.

women who cannot exercise and enjoy human rights and fundamental freedoms on a basis of equality with men and other South African women.

This has manifested in the lived realities of Muslim women⁴ What follows is an overview of Muslim women's lived experience and the civil legal system's responses to these, in the face of the State's contravention of these CEDAW articles.

i. Muslim Women's lived experience of discrimination

The lived experiences of Muslim personal law in South Africa inform research and advocacy undertaken by the MPL Network. Muslim women often have limited knowledge of their Islamic rights in marriage and feel compelled to approach the exclusively male *Ulama* councils (religious authority forums) for a religious divorce. In these spaces, the lack of state protections and the absence of gender analysis in adjudication and application of religious law leave women financially, psychologically and emotionally depleted. These processes are designed to extend the life of the marriage and so women remain stuck in unwanted marriages, without recourse. The case studies discussed in **Appendix B**, illustrate these challenges.

The MPL Network asserts that legal recognition of Muslim marriages will mitigate, if not redress, the intersecting forms of discrimination Muslim women and children endure.

Issues that directly result from non-adherence to the core principles of CEDAW:

- **inequality of spouses in marriages,**
- **violence against women in family,**
- **unregulated polygamous marriage,**
- **denial of divorce rights to women,**
- **custody, care and contact of children,**
- **women's financial incapacity after divorce, and**
- **denial of and unequal inheritance rights.**

ii. Redress Through Court processes

South African courts have come to the aid of women by recognising Muslim marriages on an ad hoc basis. They have adjudicated matters involving disputes relating to the interpretation of the Intestate Succession Act⁵ to allow for women to claim for maintenance against their late

⁴ See Appendix B.

⁵ *Daniels v Campbell* 2004 (5) SA 331 (CC).

husband's estate, and for women in polygynous marriages to claim an inheritance from their late husband's estate.⁶ Muslim wives now have a right to claim money from the Road Accident Fund as a result of the law recognising a Muslim marriage in terms of the Multilateral Motor Vehicles Act.⁷ The courts have also assisted women to claim interim maintenance in terms of rule 43 of the Uniform Rules of Court.⁸ In these cases, the Courts have referenced the protection of the right to religion and equality.

In terms of inheritance, the Courts have also supported the recognition of Muslim marriages in the respective disputes on the basis that civil union marriages were recognised. Monogamous and polygamous Muslim marriages were read in 'spouse' in the Intestate Succession Act in *Daniels*⁹ and *Hassam*¹⁰ respectively. In addition, in 2018 the Constitutional Court rendered section 2C(1) of the Wills Act unconstitutional as it failed to recognise Muslim marriages.¹¹ A spouse in a polygamous marriage was not entitled to inherit if the beneficiaries renounced their benefit. The Court held that the Wills Act was unconstitutional for its failure to recognise monogamous and polygamous Muslim marriages.

In summary, against the backdrop of these gains in the courts, Muslim women are forced to resort to costly litigation to have marriages recognized and regulated. The states non-committal approach to create legislation has been in direct non-compliance with Articles 1, 2, 3 and 5 of CEDAW and has manifested in Muslim women's ongoing lived experience with discriminatory practices of Muslim family law in South Africa.

b). Marriage (Article 15 and 16)

The State's failure and blatant opposition to provide legal protections for Muslim marriage and divorce directly contravenes Articles 15 and 16. It has maintained inequality before the law, prolonged and made expensive divorce processes, given unequal rights and responsibilities at dissolution, and perpetuated difficulties in maintenance matters. The State's non-compliance with these articles is illustrated through: 1) Its positioning in the Muslim marriage officers programme; 2) The ways in which Muslim women are treated unequally in civil divorce processes; and 3) The State's responses to legal challenges.

⁶ *Hassam v Jacobs* note 2 above.

⁷ *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753.

⁸ *Hoosein v Dangor* [2010] 2 All SA 55 (WCC).

⁹ *Daniels v Campbell* note 5 above.

¹⁰ *Hassam v Jacobs* note 2 above.

¹¹ *Moosa NO and Others v Minister of Justice and Correctional Services and Others* 2018 (5) SA 13 (CC).

i. Imam marriage officers

The contractual nature of an Islamic marriage and narrow androcentric applications of it by religious authority community forums creates difficulties in terms of both Article 5 and 15(3).

In 2016, the Department of Home Affairs undertook a pilot project to register Imams as marriage officers for the purposes of adequately managing the population registry. The project only registered men. After constant persistence, three women were enrolled, two of whom are part of MPL Network. To date, Imam marriage officers conduct *nikah* ceremonies without ensuring that marriages are registered with the State. Most male imams who do register marriages under the Marriages Act will only do so if the marital property regime is an out of community of property without accrual. They refuse to register marriages wherein couples agree to alternative property regimes, thereby contributing to understandings of stereotypical roles and male superiority. Their position further diminishes the legal capacity of women as required by CEDAW Article 15 because choice, in terms of accrued marital property, is not considered. Critiquing this initiative, scholars like Seedat argue that the power afforded to religious authorities by the State legitimises androcentric doctrinal practices.¹² Reinforcing the perpetual exclusion of women from religious practice, this State initiative as implemented has failed to protect the rights of Muslim women.

ii. Muslim Women's Inequality before the Law

With regard to Articles 15 and 16, Muslim women are not treated equally to other South African women in civil divorce proceedings. If a Muslim woman is intent on the material benefits that ordinarily accrue through marriage (or access to the marital property which the couple had worked for collectively) she is first compelled to launch an application in the High Court for legal recognition of her marriage. This is a costly process and places severe hardships on Muslim women and children.

¹² Seedat, Fatima. 2019. 'Intersections and Assemblages: South African's Negotiating Privilege and Marginality through Freedom of Religion and Sexual Difference' in Forster, Dion., Gerle, Elisabeth. and Gunner, Goran. ed. Freedom of Religion at Stake: Competing Claims among Faith Traditions, States, and Persons. Oregon: Pickwick Publishers. 199-220.

iii. The States Responses to Legal Challenges

In 2009, informed by the high levels of hardship experienced by Muslim women, the Women's Legal Centre (WLC), a feminist law clinic, instituted an application directly to the Constitutional Court¹³ in which it sought an order against the Department of Justice and the Legislature to enact legislation. The Constitutional Court dismissed the application on the basis that they were unable to hear it on direct access.

In late 2014, the WLC instituted strategic litigation, which sought an order: (1) declaring that the State's failure to legislate for the recognition of Muslim marriages is an infringement of its constitutional obligations; (2) declaring that the Marriages Act, Divorce Act and Recognition of Customary Marriages Act are unconstitutional for failing to provide for Muslim marriages; and (3) that pending amendment of the legislation, all Muslim marriages be regulated in terms of the Recognition of Customary Marriages Act and the Divorce Act.¹⁴

In August 2018, the Cape High Court handed down its judgment and ordered that the State had failed in its constitutional obligation to recognise Muslim marriages. The Court further ordered that the State enact legislation within 24 months of the order. Should the State fail to do so, the Court provided that a union, validly concluded as a marriage in terms of *Shari'ah* law and which subsists at the time this order becomes operative, may (even after its dissolution in terms of *Shari'ah* law) be dissolved per the Divorce Act and all the provisions of that Act shall be applicable, provided that section 7(3) shall apply to such a union regardless of when it was concluded; and in the case of a husband who is a spouse in more than one Muslim marriage, the Court shall consider all the factors and make and order as it deems just and equitable and order for joinder of any interested parties.¹⁵

The State appealed the decision to the Supreme Court of Appeal (SCA). In December 2020, the SCA ruled that the State had infringed its constitutional obligations. The State held that both the Marriages Act and Divorce Act are unconstitutional for failing to include Muslim

¹³ *Women's Legal Centre Trust v President of the Republic of South Africa and Others, Faro v Bingham N.O. and Others, Esau v Esau and Others* 2018 (6) SA 598 (WCC).

¹⁴ *Id* at paras 33-39.

¹⁵ *Id* at para 252.

marriages.¹⁶ The matter was thus referred to the Constitutional Court for confirmation of the invalidity and to resolve the issue of retrospectivity.

In August 2021, the matter was heard by the Constitutional Court. The WLC argued that the Court should decide that the recognition takes place from 1994. The retrospective nature of the order would be in line with the Constitutional Court's jurisprudence pertaining to customary law matters. The State conceded that they were in breach of their constitutional obligations to recognize Muslim marriages but argued that they have no constitutional obligation to legislate the regulation of Muslim marriage. Judgment has been reserved in this matter.

To summarise, the State's failure to provide legal protection for Muslim marriage and divorce has contravened CEDAW Articles 5, 15 and 16. Muslim women continue to be relegated to inferior positions and stereotypical roles by religious authorities who are now propped by the State through the Imam marriage officer initiative. Equality, access to justice and legal protections in marriage on an equal basis to other South African women is hindered. Despite earlier State-led initiatives to recognise Muslim marriage, the State has since argued that it is not constitutionally obligated to legislate the regulation of Muslim marriage. The ongoing lack of adequate legal protections continues to perpetuate discrimination against Muslim women 27 years into democracy. Waiting on the Constitutional Court judgment, women can likely look forward to a further protracted process of law-making, and/or expensive legal disputes before any substantive relief is available.

5. Conclusion and Recommendations

This report, with its appendices, highlights discrimination in the realm of Muslim personal law in issues relating to polygyny, gender-based violence, inheritance rights, interests of children, maintenance, access to justice, and inequality before the law. Despite a progressive legal framework, the State has persistently delayed a reform of the law and to provide access to justice for Muslim families, particularly women and children. **This non-committal approach continues to violate Muslim women's constitutional rights to equality and dignity, and Articles 1, 2, 3, 5, 15 and 16 of CEDAW.**

MPL Network recommends that the CEDAW Committee urges the South African State to:

¹⁶ *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* [2020] ZASCA 177 para 51 (1.1).

With priority,

- As an interim measure (within 3 months) and while awaiting the Constitutional Court judgment, immediately enact amendments to the Divorce and Marriages Acts, by including provisions which specifically recognise Muslim marriages until a viable legislative framework is developed.

In the Short Term,

- Immediately table the Muslim Marriages Bill, prioritise its passage through legislative processes and ensure its enactment within 6 months; OR ensure that the SALRC Project 144 concludes with the enactment of either the Single Statute or Omnibus Bill within 12 months.
- Coordinate the Department of Home Affairs marriage policy development process with the SALRC process,
- Create a regulatory framework which holds Imam marriage officers accountable to anti-discriminatory and gender-inclusive imperatives.

In the Medium Term,

- Within one year, the Department of Justice should provide additional resources to support easy access to justice to legal-aid clinics, family and maintenance courts and the Department of Social Development should increase their resource support to counselling centres and women's shelters.
- Within one year of enacting the above legislation, to consult with women through community forums and organisations on lived experiences of such legislation in order to inform and improve its ongoing development.

Appendix A

International and Regional Frameworks

South Africa has acceded to several international treaties since its democratic status. It has signed the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1994 and ratified in 2015 and has ratified the CEDAW in 1995, the African Charter on Human and People's Rights (African Charter) in 1996, and the International Covenant on Civil and Political Rights (ICCPR) in 1998

At a regional level, the African Charter on Human and Peoples' Rights (African Charter) sets out a duty to all States to ensure equality and dignity for all persons. Stating all persons are equal before the law;¹ it provides for the enjoyment of rights without any distinction of race, ethnicity, sex or religion,² and it guarantees freedom of conscience, profession and free practice of religion.³ It further protects cultural life and traditional values,⁴ and seeks to eliminate all discrimination against women as stipulated in CEDAW and other international declarations and conventions.⁵

South Africa is one of fifteen nations that have ratified the Maputo Protocol, formally called the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. The Maputo Protocol was adopted by the African Union in July 2003 and came into force on 25 November 2005. The Protocol speaks to the protection of women in the context of religious marriages.⁶ It further states that women should be consulted and involved in all matters regarding cultural policies.⁷ The Protocol is explicit that women are to be involved in matters concerning their marriages regardless of race, religion and ethnicity.

¹ Article 2 of the African Charter.

² Article 3 of the African Charter.

³ Article 8 of the African Charter.

⁴ Article 17(2) and (3) of the African Charter.

⁵ Article 18(3) of the African Charter.

⁶ Article 6 of the Protocol ensures equality in marriages and calls for the protection of all polygamous marriages. Article 7 states that "States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage."

⁷ Article 17 of the Maputo Protocol.

Domestic Legal Frameworks

Domestically, the South African constitutional framework forms a firm basis for recognition. This includes, firstly, South Africa's obligation to consider international law as stated in Section 39(1)(b) of the Constitution.

“When interpreting the Bill of Rights, a court, tribunal or forum—

...

(b) must consider international law.

...”

The Constitution provides for equality between religion, sexes, nationality, ethnicity and other groups listed in section 9(1)(a).⁸ The Constitutional Court has adopted a substantive interpretation of equality.⁹

Section 15 of the Constitution provides for the freedom of religion, belief and culture. More particularly, section 15(3), applicable in this context, states:

“3(a) This section does not prevent legislation recognising—

- (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
- (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.”

Section 3(b) is an internal limitation that the legislation can only be passed if it is consistent with the Constitution.

⁸ Section 9 of the Constitution provides for the right to equality. Section 9 can be accessed [here](#).

⁹ The Constitutional Court discussed substantive equality in the matters of *Bhe and Others v Khayelitsha Magistrate and Others* [2005 \(1\) SA 580 \(CC\)](#) at para 50 and *Daniels v Campbell and Others* [2004 \(5\) SA 331 \(CC\)](#) at para 22.

Appendix B

Case Studies

Case Study 1: Ms A was married in terms of Islamic rites. The couple entered into a verbal agreement to split the estate equally upon dissolution. After nineteen years of marriage, with three children and a history of disrespect from her husband and his family, Ms A requested a divorce from her husband. Whilst the divorce was granted, the six-year legal battle that ensued in seeking a fair distribution of their acquired assets left her financially, emotionally, and psychologically strained. Due to these challenges, she decided to settle out of court for much less than the fifty per cent as initially claimed.

Case Study 2: Ms B was married in terms of Islamic rites. After 21 years of marriage and three children, having spent her entire marriage living in her in-laws granny cottage, her husband informed her he was taking a second wife and had purchased a home for himself and the second wife. Unwillingly to be in a polygamous marriage she asked him for a divorce. After his refusal, she approached an Ulama council who advised her polygyny is not valid grounds for divorce. With no financial stability, education or support structure, Ms B has nowhere to go. Her husband's new home is registered on his father's name and in anticipation of a maintenance order; he has cleared his bank accounts. Ms B has been in limbo for the past two years amid minimal funds, death threats and consistent psychological trauma. Her maintenance application has been pending since March of this year. Her son refuses to launch a maintenance application of his own against his father. Her children are also displaying signs of psychological trauma. With minimal funds, she is unable to access efficient legal services and litigate.

Case Study 3: Ms C has been married in terms of Islamic rites for 15 years. After several years of emotional and psychological abuse, she took her children and left the marital home to return to her parent's home. Her husband refuses to divorce her despite her assurances of no need for financial support from him. She and her children rely on her parents for financial support and their standard of living has been affected but she has decided to forfeit launching a maintenance application as a trade-off for a divorce, despite legal advice to the contrary. Despite her concession, her husband is not willing to consider granting her a divorce. The Ulama council seems unable to reconcile her

withdrawal from her marriage to her husband's promises of wanting to build a future together. Her children have settled happily into a new environment and her husband does not ask to see them; she would be willing to make the necessary arrangements should he ask. She has indicated feeling "trapped" by the attitude of the Ulama council who refuse to see lack of love and affection as grounds for divorce. She has not approached the Ulama council in the last few months, having lost faith in their ability to assist her.

Case Study 4: Ms D was under the impression that she was married in terms of civil law and realised after 25 years of marriage, three children (one of whom is a minor) and on seeking a divorce, that she was married by Islamic rites only. Due to a breakdown in their relationship resulting from years of financial abuse, lack of emotional support, physical and overall aggression, it took her three years after requesting a separation which he refused, unfruitful counselling and seeking assistance from family members, to have the courage to leave. After several failed attempts to acquire her divorce through an Ulama council, she eventually decided to choose the route of a *khula* (divorce instituted by the woman by returning her dowry). After returning her *mahr* (dowry), pronouncing her *khula* and completing her *iddah* (waiting period observed by the woman upon divorce or death of her husband), her ex-husband refuses to acknowledge the *khula* and considers her as still being married to him

Case Study 5: Mr E was married in terms of Civil and Islamic laws to wife 1 with whom he had 1 son and 4 daughters. He married wife 2, with whom he had only 1 son, in terms of Islamic law only. Wife 2 predeceased Mr E. Mr E died leaving a standard *Shari'ah* Will subject to a special bequest in favour of his son from his first marriage. The son from the first marriage was appointed as one of the Executors and refuses to acknowledge the son from the second marriage as a legitimate *Shari'ah* heir. He alleges in the absence of a valid *nikah* (marriage) certificate to prove otherwise, this son was born less than 6 months after his parents may have made *nikah*. He is therefore deemed illegitimate and disqualified from inheriting in terms of their father's estate. The Ulama councils are unable to assist as they lack legal capacity to address such an issue.