# Muslim Personal Law, Yes and No: Religious Leader's Views on its Legalization

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## Abstract

Muslim personal law (MPL) has been a controversial issue in South Africa. Proponents of it becoming legalized in South Africa, say that women would be handed benefits which they do not have because their marriages lack legal recognition. Women lack support from theological bodies which are largely male dominated. These bodies have been accused of adopting a conservative view of Islam and of wanting to maintain the patriarchal *status quo*. It can be argued that such views are culturally and structurally violent, as they lead to direct violence, as women are denied important resources such as divorce which could be legally ratified in a court where MPL is recognized. Religious leaders who are against MPL, are in a state of 'hysteresis' as Bourdieu would say. Theological bodies, on the other hand, state that MPL cannot be intertwined with secular laws that are contrary to *Shariah* (Islamic law). They criticize the clergy who were in favor of MPL becoming legalized. My doctoral research focused on religious leaders' views of domestic violence experienced by Muslim women. Using a qualitative research methodology, their views were obtained, using in-depth interviews. Thereafter, their opinions were organized in the form of themes. One of the core themes that emerged from the data, was Muslim religious leaders' views on MPL. In conjunction with the literature, it was found that there are religious leaders against the legalization of MPL and those who favor MPL becoming legalized.

**Keywords**: Muslim religious leaders, Muslim personal law, cultural violence, structural violence, habitus, field, capitals


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## Introduction

In 2018, the high court judge, Shiraz Desai ordered that the Muslim Marriages Bill be enacted by the president of the country as well as the Department of Justice and Home Affairs within 24 months of the ruling. In that time, Desai ordered that the Divorce Act of 1979 be used to assist Muslim women married under Muslim customs. While indicating that 24 months is long, the ruling was welcomed by the Women's Legal Centre (Dano 2018). The Muslim Judicial Counsel (MJC), which came under severe scrutiny for dealing with domestic violence in the Muslim community in Cape Town, also welcomed the ruling (Hoel 2012:187; Dano 2018). The organization's deputy president stated: 'The significance of this judgment is that the president of the country has now been tasked to enforce the legislation. We would like to remind the president that he can make his mark in history by recognising the Muslim community in their marriages – which is long overdue' (Dano 2018).

The MJC's response is one which is welcomed, given that religious organizations have been accused of adopting a conservative approach when it comes to dealing with marital disputes (Hoel 2012:187). Religious leaders play an important role in dealing with marital disputes within the Muslim community. However, they have been accused of adopting a conservative approach in how they handle these issues. Their approach regarding the legalization of MPL is an example of this, whereby some religious leaders who are against its implementation, are viewed as conservative and wanting to maintain the *status quo* that is largely male dominated (Surtee 2012).

My doctoral research[1] focuses on religious leaders' views on domestic violence. One of the issues I dealt with, was asking religious leaders their views on MPL. The reason why I probed this issue was because it was felt that MPL was a legal outlet for many women who are abused in a patriarchal society. This article represents a segment of my doctoral research that covers the opinions of some of the religious leaders' views on the legalization of MPL. Using the theories of violence and the concepts of field, habitus, and capitals of Bourdieu (quoted in Bourdieu & Wacquant 1992:104-122), theoretical sense will be made of religious leaders' views on the legalization of MPL. It will be argued that those who are against MPL are creating an envi-

[1] My thesis was conducted at the University of Johannesburg, supervised by Proff Kammila Naidoo and Yousuf Dadoo.

ronment where Muslim women will be subjected to different types of violence in marriages.

## Muslim Personal Law in India and Tunisia

Before discussing MPL in South Africa, I will discuss it in two other contexts to conduct a comparative analysis: India and Tunisia. India, having been a British colony, was chosen, as it is a country where Muslims are a minority. Tunisia, on the other hand, was chosen because it was a French colony, still being a Muslim majority country.

In India, according to Engineer (2009), what is known as MPL is not *Shariah* law, despite its proponents calling it so. *Shariah* law is based solely on the *Quran* and the *Sunnah.* It was introduced by the Prophet Muhammad (peace be upon him) who introduced laws which awarded women many rights which they did not have, such as becoming heirs. He also put a stop to female infanticide (Patel 2009:44; Sultana 2014). What is known as MPL in post-colonial India, was introduced during the colonial period in India in 1935 (Engineer 2009; Patel 2009:45-46; Sultana 2014:29). The British government applied laws based on the work of Marghayani who, in Islamic jurist terms, originated from the Hanafi school of law. Marghayani's work was known as Hidayah. The courts would hear cases relating to divorce, polygamy, and inheritance. In dealing with matters relating to the Muslim community, the British colonial courts applied procedural law, which was influenced by British and substantive law which were based on Hidayah. This came to be known as Anglo Muhammadan Law (Engineer 2009; Sultana 2014:30). MPL was treated as fixed and inflexible. It ignored the fact that the Muslims in India were not a homogenous social category. This social category was made up of diversified social groups, belonging to different casts in India. They also belonged to groups that adhered to different sects of Islam (Patel 2009:46; Sultana 2014:30).

MPL, created by British colonists, was driven by their political interests. This allowed them to solve issues surrounding land entitlement and wealth succession (Patel 2009:46). It created a problem of identity politics within the Muslim community in India. Fundamentalists accepted this form of law as binding and divine. Groups such as the MPL Board, Muslim League, and the Deoband movement were proponents of this form of law

(Patel 2009:46; Engineer 2009). All the challenges to MPL were fanned by these groups (Patel 2009). One of the problems with MPL in India was that it put women in a precarious position (Patel 2009:46; Sultana 2014:30).

Patel (2009:46) suggests that in its present form, MPL does not stand in accordance with gender equality. Polygamy and divorce, initiated by men, tend to put women in a difficult position. Engineer (2009) thus calls for MPL to be codified according to the *Quran* and *Sunnah*. He is of the view that in its original spirit, Islam awards gender justice in relation to marriage, inheritance, and divorce (Engineer 2009). During the course of history, it was prevailing norms and values of particular societies that took precedence over Islamic law (Engineer 2009). Through the codification of Islamic law, it can return to its original spirit. Engineer (2009) states that religious leaders from Lucknow, Deoband, Aligarh, and Azamgarh were in favor of MPL becoming codified. These religious leaders indicated that polygamy cannot be practiced in an unregulated fashion. Citing the holy *Quran* 4:3 and 4:129, these religious leaders argued that if a husband wants to engage in polygamy, but justice would not be done to all his wives, then he should stay in monogamy (Engineer 2009).

Engineer (2009) further states that prominent religious leaders from the abovementioned areas in India, are in favor of abolishing triple *talaq* (divorce). One religious leader pointed out that if groups such as the MPL Board want to retain it, they should apply the punishments that come with practicing such an act. While Caliph Umar permitted this practice of triple *talaq*, he used to punish those who acted upon it. These religious leaders argue that *talaq* should be given within three different settings. In this way, it is possible to evaluate whether reconciliation is possible. Even before issuing a *talaq*, arbitration should be practiced as indicated in the holy *Quran* 4:35 (Engineer 2009). If couples fail to reconcile after arbitration, then divorce procedures should be initiated. Engineer (2009) points out that divorce should be practiced according to the *Quran* and the *Sunnah* to ensure fairness to women. Even in cases where one feels that there is no other option but divorce, then women should be treated in a just manner, according to the *Quran* 2:229, which states that a man should either choose to remain in marriage or allow the woman to 'leave her in kindness' (Engineer 2009:par 20). Engineer (2009) argues that a rethink of personal law does not in any way look to go against the divine statues of Islamic law, if ever it is to bring it closer to di-

vine statues. Even if this goal cannot be achieved completely, there will be a system of law in place which will ensure that women receive justice.

There are two infamous cases which relate to MPL: The Shah Bano case which occurred between 1978 and 1985, and the Shayara Bano case which occurred in 2017 (Sultana 2014:31; Fayiza 2021:122-123). Shah Bano, an elderly woman who was 62 years old, filed a case for maintenance to the lower courts in 1978, due to her husband divorcing her after 46 years of marriage. The lower courts awarded her a small amount of maintenance. She was not happy with the amount and took the case to the higher court. The higher court ordered that she be paid 179.20 rupees per month. However, her husband contested the case in 1985, arguing that under MPL she was to be paid maintenance for only three months (*Iddah* period) (Sultana 2014:31; Fayiza 2021:123). However, the supreme court dismissed his claim and instead ruled in favor of his wife by applying section 125 of the criminal procedure code (CrPc). This code ensures that a women receive financial maintenance from the ex-husband. This ruling caused a huge uproar within the Muslim community. Muslim religious leaders viewed the ruling as a threat to the Muslim minority community in India. Groups such as Jamiat-Ulema-i-Hind, Jamiat-e-Islami, All India Muslim Personal Law Board (AIMPLB), and the Muslim league strongly opposed the bill ruling (Sultana 2014:32; Fayiza 2021:124). The AIMPLB argued that the ruling by the supreme court interfered with the MPL in India, as well as the freedom of religion set out by certain articles of the Indian Constitution. Hence they sent a memorandum to the prime minister of India, in which they opposed the ruling of the supreme court. Not wanting to upset the Muslim minority any further after opening the Babri masjid to Hindus, the Indian government passed the Muslim Women's Act (MWA). The act stated that a woman was to receive maintenance from her husband for a period lasting three menstrual cycles, also known as the *Iddah* period. Her husband was to pay any outstanding amounts of *Mehr* which was agreed upon by the parties. He had to pay maintenance for a child over a period of two years. If a woman could not financially maintain herself, she should receive support from her family or the State *Waqf* Board (Sultana 2014:33; Fayiza 2021:124).

This act excluded Muslim women from applying for maintenance as set out by section 125 of the Criminal Procedures Act. Some feminist scholars decreed this judgment, arguing that freedom of religion took precedence over gender equality as set out by the constitution. Fayiza indicates that femi-

nists such as Zoya Hasan (quoted in Fayiza 2021:125) are pointing out that the amount of Muslim women filing cases under section 125 outweighs the number of cases filed under the MWA. Hasan (quoted in Fayiza 2021:127) also portrays the *Waqf* board as corrupt and the Muslim family structure as patriarchal. These two factors make it difficult for women to live a financially stable life. Sultana (2014:33) indicates that some people argue that the MWA would pit women against their families in courts to demand maintenance. Furthermore, Sultana (2014:33) is of the view that most *Waqf* boards are bankrupt, thus not having the financial ability to assist women as set out by the MWA. Fayiza (2021:125) points out that other feminist scholars such as Flavia Agnes (quoted in Fayiza 2021:125) and Sylvia Vatuk (quoted in Fayiza 2021:125) argue that the MWA is actually a positive stride made by the Indian government that would assist women. Agnes (quoted in Fayiza 2021: 127) argues that women, especially those that come from a middle class background would receive more maintenance from the MWA, compared to section 125 of the CrPc. Agnes (quoted in Fayiza 2021:127) further argues that the MWA was the first attempt to actually codify the MPL. This is important for a Muslim minority that faces antagonism from Hindu nationalists.

The Bharatiya Janata Party (BJP) argued for the implementation of a uniform civil code for Muslim women to be safeguarded from their husbands (cf. Fayiza 2021:124). Fayiza (2021:124), however, claims that this was an attempt by the political party to undermine Muslim minority rights within India. Given the political tension and interreligious conflicts that surrounded the case, Sha Bano withdrew her case (Fayiza 2021:124).

In 2016, Shayara Bano, hailing from Uttarkhand in India, filed a public interest litigation in the supreme court of India. Bano received triple *talaq* from her husband. She sought the assistance of the supreme court to protect Muslim women from polygamy, *Nikah Halala*[2], and triple *talaq*. The supreme court ruled the triple *talaq* as invalid (Fayiza 2021:126). Similar to the Sha Bano case, there were multiple actors that had a say about the judgment. However, there were also differences. Muslim rights groups such as the All India Muslim Women Personal Law Board and the Bharatiya Muslim Mahila

[2] *Nikah Halala* takes place when a female divorcee wants to remarry her first husband. She first has to get married to another man, thereby consummating the marriage, then she gets divorced from that man and remarry her first husband (Fayiza 2021:138).

Andolan (BMMA) were more proactive compared to the Sha Bano case. The BMMA were campaigning to ban triple *talaq*. Zoya Hasan (quoted in Fayiza 2021:130) was appreciative of the women's rights groups that took a stand in this case. She was also happy that secular principles took precedence over religious principles with regards to MPL. Hasan (quoted in Fayiza 2021:130) was not in favor of the feminists who felt that MPL should be handled by Muslim religious groups, as they were conservative in nature. It seems that Hasan (quoted in Fayiza 2021:130) is arguing for Muslim women to be more active and take a secular route to ensure their rights because they are socially, politically, and economically marginalized in India. The BJP welcomed the judgment by the supreme court. They went on to pass a bill in the Indian parliament to declare triple *talaq* a criminal offense. Some feminists and Muslim rights groups disagreed with the BJP regarding the contents of the bill, arguing that if a husband is in prison, then who is going to fend for his wife and family (Fayiza 2021:126)? Such a decision is actually a detriment to the women in India. Flavia Agnes argued that a rise in Hindu nationalism has resulted in the Muslim community being vilified by being victims of mob lynching and cow vigilantism. Under such circumstances, it is difficult for the Muslim community to think about reforms where their autonomy is compromised and they lack the infrastructure to do so. She also points out that it is surprising to see that there is an outrage when Muslim women are marginalized, yet nothing is said when Hindu women are left destitute (Fayiza 2021: 132).

***Muslim Personal Law in Tunisia***

Between 1881 and 1956, Tunisia was a French colony with a majority Muslim population. During this time, the Muslims were under the influence of the Hanafi and Maliki schools of thought (Booley 2019:6-7). According to Booley (2019:7), this form of Islam allowed for a close bond to be developed between members of the same kin, which was known as 'kind based patriarchy' (Booley 2019:7). This allowed men to control their women folk. Family law was dealt with by religious leaders. The French felt that if they interfered with the MPL, they would face social discord from the Muslim public who regarded Islam as paramount to their identity. However, this led to women being put in a vulnerable position.

In terms of marriage, there were no age restrictions. As long as couples were in a stage of puberty, they could get married. Furthermore, a wom-

an was represented by her father or a male guardian. She was not allowed to attend the ceremony. This practice was common within Muslim countries (Booley 2019:7).

In terms of divorce, the Maliki school of thought gave men a unilateral right to divorce women. There was no need for judicial intervention, as the husband only required two males as witnesses for the divorce to take place. This put women in a difficult position as they had no protection with regards to their own wellbeing or that of their children. Their only recourse was going to their own family to request the husband not to divorce his wife. Women could only ask for divorce under special circumstances such as abandonment, and financial and physical abuse (Booley 2019:8). Even in these cases, women had to appeal to a religious judge, something which men did not have to do when they issued a divorce (Booley 2019:8).

Tunisia reached independence in 1956 with Habib Bourguiba as its first president. Six months after independence, Bourguiba introduced changes to Family Law through the introduction of the Code of Personal Status (CPS). The introduction of the CPS was regarded as a monumental step towards Tunisia becoming a modern state, diffusing tribalism, classism, and kind based communities within the rural and urban areas of Tunisia (Booley 2019:10; Zayat 2020). The *Shariah* courts that existed prior to independence, were removed. All legal matters were to be dealt with by the national courts. Bourguiba consistently maintained that the CPS was in alignment with *Shariah* and the Maliki school of thought. The CPS dealt with the following matters: 'Marriage, divorce, child custody, determination of parenthood, abandoned children, missing individuals, and inheritance' (Booley 2019:11).

In terms of marriage, both partners needed to give their consent of marriage. Two witnesses of either gender needed to be present with the dower being specified. The CPS did not require the permission of a father to marry off his daughter (Booley 2019:11). Booley (2019:11) indicates that this could have perpetuated forced and arranged marriages during the time of pre-independence. In terms of age, a male partner needed to be at least 18, while the female partner needed to be 15. Polygamy, which was considered a controversial topic in an Islamic context, was completely prohibited, much to the dismay of traditional religious leaders who cited Quranic texts to ensure equality as a 'moral suggestion' (Booley 2019:12). A husband only had to treat his wives equally in terms of financial and other considerations. If a person engaged in polygamy, they could face one year imprisonment and/or a

fine. Booley (2019:12) feels that the prohibition of polygamy brought psychological comfort to women who were afraid that their husbands would take another wife.

Divorce took place within the courts in Tunisia and in no other context. The court had to determine indemnity due to either party, when the court felt that they were entitled to it. The court would also determine why efforts regarding reconciliation failed. The court was also responsible for looking after the wellbeing of children in terms of their accommodation and upbringing (Booley 2019:13).

## Reforms to the Code of Personal Status

After the CPS was introduced, it was amended several times. In terms of marriage, both partners needed to be present in terms of when and where the marriage took place. The marriage had to take place in the presence of someone who worked for the civil registry. A certificate would be provided as proof that the marriage took place (Booley 2019:14). A father could no longer force his daughter to get married to a groom that he had chosen. Both husband and wife had to be 18 years old if they wanted to get married. Regulating marriage by age was regarded as both physically and socially advantageous to women. Women who were not physically mature to give birth, could have their reproductive and sexual health compromised (Booley 2019:14-15). Furthermore, by regulating marriage to the age of 18, women had the chance to pursue their personal education and careers (Booley 2019:15). Both partners of the couple were responsible for creating a conducive environment where their emotional wellbeing could be maintained (Booley 2019:16). The husband's role as head of the household remained. This was interpreted as him making important decisions relating to the family or providing for his family within his means. If a wife had the financial means, then she was required to contribute towards the family (Booley 2019:16-17).

Whereas a husband was allowed to engage in a practice called 'unilateral repudiation', whereby he could divorce his wife at any given time without any consequences, this practice was changed, as divorce was only allowed to take place within the realms of the court. There were three instances in which a divorce could take place: First, via mutual consent of both partners; second, if one spouse wanted to remove themselves from the rela-

tionship because the other spouse inflicted some form of harm; third, divorce was allowed at the request of the husband. Furthermore, a husband was not allowed to marry his wife again if he had engaged in 'triply divorce'. This entailed a scenario whereby a husband would tell his wife that he divorce her *three times in one sitting* (Booley 2019:17).

In 2011, laws on violence against women were approved. Article 227(a), which allowed rapists to marry their victims so that they did not face any punishments, was removed (Zayat 2020). The new law also amended the meaning of violence, stating that it includes 'any physical, moral, sexual or economic aggression against women based on discrimination between the two sexes and resulting in damage or physical, sexual, psychological or economic suffering to the woman' (Zayat 2020:par 13). This law was introduced in order to ensure that women who suffered approximately 50 percent from some form of domestic violence, were protected (Zayat 2020).

## Enacting Muslim Personal Law in South Africa

As Islamic law was historically not recognized in South Africa, Muslim women suffered different forms of abuse (Domingo 2005:72-73; Moosa & Abduroaf 2022:11). Men divorced their wives verbally without providing them with any legal documentation. Religious leaders accepted the divorce without listening to the wife's side of the story. Women who were housewives and who had contributed emotionally and financially towards the marriage, were left destitute. A woman who was economically dependent on her husband, found it difficult to leave the abusive relationship (Domingo 2005: 71). Boonzaier and De La Rey (2003:1015), as well as Hoel (2012:187-192) indicate that religious leaders used a 'reconciliation at all cost' approach when women, who experienced different forms of abuse, approached them for assistance. Furthermore, women were intimidated by male religious leaders whose assistance they sought (Hoel 2012:194). Domingo (2005:72) adds that some women refused to annul the marriage because religious leaders demanded a huge sum of money to annul the marriage, and the process was often humiliating for them.

Importantly, religious organizations that were mostly male dominated, were likely to have no legal authority, hence their decisions were not binding. Abrahams-Fayker (2011:47) states that as long as Muslim marriages

were not legally recognized, Muslim women did 'not enjoy the protections offered by civil marriages'. Despite this, there were religious leaders that were against Islamic law becoming legalized in South Africa. Surtee (2012) makes reference to religious leaders' antagonism towards the proposed Muslim Marriages Bill. Ebrahim Moosa (2010:333, 340-341), as well as Dadoo and Cassim (2012:277-278), provide reasons for the antagonistic attitude adopted by religious leaders.

Legislating MPL in South Africa can be traced back to the time when the Nationalist government was in power. In 1987, the South African Law Commission asked Muslim religious organizations to complete a questionnaire relating to issues on MPL. This initiative was supported by prominent theologians such as the *Jamiatul Ulema* (*religious leaders*), MJC, *Majlisul Ulema*[3] and the Islamic Council of South Africa. These groups were considered conservative in nature. However, progressive groups such as *Qibla* and the Muslim Youth Movement were against this initiative because they saw such engagement as collaborating with the apartheid regime. Both sides saw the need for the legislation of MPL, as it would affect the lives of ordinary Muslims on the ground. However, differing political opinions led to the issue becoming controversial. The African National Congress (ANC) promised to deal with the issue of MPL once it came into power. The reason why the government decided to initiate this process, was because women and children were denied benefits due to Islamic law being practiced on a *de facto* basis (Nadvi 2008:625; Moosa 2010:332-334). The government was serious about addressing Islamic beliefs as secular courts were dealing with issues relating to Muslims such as marriage, which was not recognized by the government. What the newly elected government failed to realize, were the deep divisions entrenched in the South African Muslim community. The ANC created a body called the MPL Board that consisted of all the major stakeholders. This, however, was not successful, as conservative religious leaders did not want to liaise with women, and there was a re-emergence of old feuds with progressive religious leaders (Nadvi 2008:626; Moosa 2010:332-334; Dadoo & Cassim 2012:274-275). Due to the irreconcilable differences, this body was dissolved (Moosa 2010:334-335).

In 2003, the South African Law Reform Commission looked at the issue of MPL. A draft bill was produced relating to issues on economic equity

[3] *Majlisul Ulema* is a theological body based in Gqeberha (Dangor 2019:245).

related to marriage, polygamy, and divorce. Men and women were viewed as equal in terms of their rights awarded to them. Both were regarded as intellectual equals who could acquire finance independently of the other. Polygamy was to be regulated to see if a husband was treating his wives equally. Marriage was to be consented at the age of 18. Muslim judges were to be used in dealing with cases. Women were given rights to divorce through *Faskh* (*annulment*) and divorce via mutual consent. Couples were required to go for mediation before a marriage was dissolved (Dadoo & Cassim 2012: 275-277). Women were entitled to 'maintenance in arrears' (Dadoo & Cassim 2012:278). The draft bill was regarded as an important resource for women who could now add rights to an ante-nuptial contract. These rights included their right to dower, education, and employment. They could also ask their husbands to delegate divorce to them or their representatives without providing reasons for divorce. A woman could stipulate in the contract that she would not be happy if her husband takes a second wife, thereby refusing him to take a second wife (Domingo 2005:74). However, this draft bill was met with antagonism by ultra-conservative religious leaders. The organization, *Majlisul Ulema*, convinced certain sections of religious bodies whose origins could be traced back to Deoband in India, that the draft bill was un-Islamic (Moosa 2010:340). Those considered to be moderate religious leaders, were heavily chastised by the conservatives. These moderate religious leaders were considered as demons for viewing MPL positively (Moosa 2010:340).

In this regard, Tayob (quoted in Surtee 2012) makes a crucial point, which highlights the importance of the study. He feels that this antagonism towards the MPL by conservative religious leaders is rooted in the patriarchal *status quo*, which will be challenged by this bill. Dadoo and Cassim (2012: 278) make a similar point by referring to the *Majlisul Ulema* in Gqeberha (previously Port Elizabeth). This organization has produced a 12-page document, showing their disagreement with the Muslim Marriages Bill of 2010, arguing that it is a form of 'unjustified state control over Muslim Personal Affairs' (Dadoo & Cassim 2012:278). The *Majlisul Ulema* has argued that a secular court cannot rule on matters pertaining to *Shariah*, even if Muslim assessors assist the court. The *Shariah* is absolute and cannot be changed, which opposes the argument of the proponents of the MPL. The MPL, according to *Majlisul Ulema*, contravenes the constitution (Dangor 2019). According to Dadoo and Cassim (2012:278), this is a manifestation of tradition-

al Muslim religious leaders, wanting to keep control over Muslim personal matters.

In 2010, a new draft was created. In this draft, judges who were not Muslim were allowed to preside over issues relating to MPL. Arbitration was abolished (Dadoo & Cassim 2012:277). Those religious leaders who supported the 2003 bill were unhappy with the new reforms, specifically with the use of non-Muslim judges and the removal of arbitration (Dadoo & Cassim 2012:278). Amien (quoted in Surtee 2012) argues that this bill gave a Muslim woman a much-needed platform to address the abuse that she has endured in marriage, and a 'much-needed protection' as a result of her husband's lack of adherence to *Shariah* (Islamic Law).

In 2009, the Women's Legal Centre Trust took the government to court in a bid to have the MPL recognized. It took its application directly to the Constitutional Court. The Constitutional Court rejected the application, citing that other courts would be more appropriate in dealing with the issue. The Constitutional Court also rejected the case on the basis that certain state organs, such as the Ministry of Justice and Home Affairs, played an important role in the implementation of legislation (Moosa & Abduroaf 2022: 12). Judge Rogers, who presided over the case between Farro and Bingham in a Muslim marriage application, ordered the Department of Justice and Constitutional Development to look into the progress made by government with regards to the Muslim Marriages Bill of 2011. The government, however, did not follow this judgment. Instead, they decided to increase the amount of Muslim marriage officers who were religious leaders (Moosa & Abduroaf 2022:12-13).

Due to the government ignoring the judgment made by Judge Rogers, the Women's Legal Centre Trust decided to take the case to the high court against the government in order to speed the process of recognition of Muslim marriages. Judges Shiraz Desai and Salie Hlophe were included as part of a three judge panel because they were Muslim and would understand the situation that Muslim women find themselves in on the ground. The court ruled in favor of the Women's Legal Centre Trust, arguing that the government failed 'in their constitution obligation to enact legislation' (Moosa & Abduroaf 2022:14). The state was ordered to enact legislation by January 31, 2020. Until legislation was implemented, women were to be provided relief via the Divorce Act of 1979. The state appealed the decisions at the Supreme Court of Appeal. During December 2020, the Supreme Court of Appeal ruled in

favor of the state, arguing that the state president, cabinet, or parliament had no obligation to recognize MPL, but ordered interim relief since it found that both the Divorce Act of 1979 and Civil Marriage Act of 1961 did not recognize Muslim marriages and were hence unconstitutional (Moosa & Abduroaf 2022:14-17). The Department of Home Affairs which is responsible for registering marriages, indicated that as per the Supreme Court of Appeal judgment, it was directed to register Muslim marriages as customary marriages under the Recognition of Customary Marriages Act. The problem with this is that Muslims want to marry according to Islamic law and not customary law and deal with the consequences of marriages as laid out by their own religious law (Moosa & Abduroaf 2022:16-18).

There are similarities between the different contexts provided. In all three cases, it is found that during colonial rule or in the case of South Africa, apartheid rule, MPL was practiced separately from other forms of law. In both India and South Africa, Muslim women who formed part of a minority were in a subordinate position. In India, Muslim women were disadvantaged politically, economically, and socially. This implies that they depended on their husbands to survive. Similarly, in South Africa, some women found themselves depending on their husbands. This made the argument that MPL should be legally recognized, even stronger. However, in both countries, there were divisions between Muslim religious leaders. As pointed out by Engineer (2009), some Muslim religious leaders were in favor of MPL being codified. Others were, however, against it, wanting to maintain the *status quo*. Likewise, in South Africa, there were similar divisions with groups such as the *Majlisul Ulema* wanting that Muslim affairs be dealt within the Muslim community without any interference, thus maintaining the *status quo*.

Currently, an important implication regarding religious leaders can be made here. Religious leaders play an important role in the communities where they are working. However, the problem that Muslims face in South Africa is that not one particular body can claim to speak for all Muslims in South Africa and India (Engineer 2009; Moosa & Dangor 2019:13). With regards to MPL, even the United Ulema Council of South Africa, that claims to provide a united front of all Muslim bodies in South Africa, is divided regarding the recognition of MPL (Islamic Focus n.d.). While the MJC accepts the need for the recognition of MPL, the *Jamiatul Ulema* in Durban does not (Moosa & Dangor 2019:18, 24).

## Theoretical Framework

Galtung (1990:291-292) distinguishes between three forms of violence. The first form of violence is direct or visible. In its most visible form, direct violence results in individuals killing each other, for example in war. Direct violence can also occur when aggressors maim their opposition, for example through boycotts and sanctions. Due to maiming, individuals lack important access to resources such as medical resources and supplies which can result in them dying. The victims of direct violence are also repressed, as they are either detained or expelled from society. Furthermore, they are re-socialized into the culture of the oppressors, whereby they reject the parent culture and adopt the culture of the oppressors (Galtung 1990:295; 1996:198).

Violence exists not just in its direct or visible forms, it also exists in an invisible form. According to Galtung (1969:170-171), violence in its invisible form exists in the form of structural violence, when resources are distributed unequally and one group benefits more than the other. Bourgois (2009: 19) refers to structural violence as 'political-economic forces, international terms of trade, and unequal access to resources, services rights and security that limits life chance'.

Galtung (1990:293) uses the topdog-underdog analogy to explain how structural violence manifests itself in society. The 'top dogs' exploit the 'underdogs' so that they benefit more from the relationships. They penetrate the minds of the 'underdogs', causing them to think that the violence that they are going through is necessary (Springs 2013:383-384). A process of segmentation also takes place, where the 'underdogs' are given a partial sense of reality. They are also marginalized, therefore being kept on the margins of society. The 'top dogs' make sure that the 'underdogs' go through a process of fragmentation, thereby not interacting with each other. Individuals forming part of the 'underdogs', are either constantly miserable, living in constant fear, or they die because of malnutrition (Galtung 1990:293-294; 1996:198-199).

State institutions normalize structural violence within societies. They introduce policies such as austerity within countries, resulting in one group benefiting over another. Sometimes they do not realize that these policies result in others suffering (Hodgett, Chamberlin, Groot, & Tankel 2014:2038). Direct and structural violence are only possible through cultural violence (Galtung 1990:291). Galtung (1990:291) defines cultural violence as

> those aspects of culture, the symbolic sphere of our existence – exemplified by religion and ideology, language and art, empirical science and formal science (logic, mathematics) – that can be used to justify or legitimize direct or structural violence. Stars, crosses and crescents; flags, anthems and military parades; the ubiquitous portrait of the Leader; inflammatory speeches and posters – all these come to mind.

According to Dorworth (2001), one group devalues another group, based on their race, gender, and/or sexual orientation. According to Rodriguez, Rodriguez, Saborido, Segovia, & Mires (2014:360), cultural violence justifies other forms of violence, using 'religion, ideology, language, art, science, laws, media, education, etc.'. Galtung (1990:291; 1996:196) argues that cultural violence paves the way for allowing structural and direct violence to occur. It is not necessary for an entire culture to become culturally violent. It can be one aspect of a particular culture that is violent. For example, the caste system in India, which creates a status hierarchy that prevents some groups from achieving certain goals or resources, can be viewed as being culturally violent (BBC 2019). However, this does not mean that the Indian culture as a whole is violent.

In order to sociologically understand violence, Bourdieu's concepts of capitals, fields, and habitus are useful (Bourdieu 1986:241-258; Bourdieu & Wacquant 1992:104-122). To understand the social world, it is important to consider its history. This history cannot be comprehended without understanding the different capitals which people have at their disposal. There are different types of capitals. The most obvious form is economic capital, which refers to money. The second type that people possess is symbolic capital, which refers to one's status in a particular society. Third, there is cultural capital, referring to the knowledge that an individual possesses. Finally, there is social capital which refers to one's networks, as well as the relationships that people have (Bourdieu 1986:241-252). These capitals are important when one finds oneself within a field. A field refers to networks where people occupy different positions. The positions that they occupy, could be domination or subordination. This depends on the amount of capital that each individual possesses (quoted in Bourdieu & Wacquant 1992:97-115).

Each field follows a different logic. The artistic field, for example, operates very differently from an economic field. In the artistic field, one will

not find an individual that is focused on money. Bourdieu (quoted in Bourdieu & Wacquant 1992:97-115) indicates that there is no trans-historic relations between different fields when referring to the meta-field – while alluding to the state. Here he refers to different fields occupying different positions, either forming alliances or competing with one another. How an individual operates in the field, will be determined by their habitus (Bourdieu & Wacquant 1992:127).

'Habitus' refers to a mental understanding of the social environment in which an individual resides. The habitus is structured by its social surroundings and is formed through an individual's interaction with specific structures. Human action cannot be regarded as 'instantaneous reaction to immediate stimuli' (Bourdieu & Wacquant 1992:124). Bourdieu (quoted in Bourdieu & Wacquant 1992:124) is critical of the rational choice theory. He argues that rational choice theorists ignore the fact that decisions made by people, whether they are social or economic, are based on the social or economic conditions to which they are accustomed. Different people who interact with the same structures are thought to have a similar habitus (Bourdieu & Wacquant 1992:125, 140; Bourdieu quoted in Ritzer & Stepnisky 2014: 521). Bourdieu (quoted in Bourdieu & Wacquant 1992:126-127) mentions: 'The individual whether [they like] it or not, is trapped – save to the extent where [they become] aware of it – within the limits of [their] brain'.

Bourdieu (quoted in Bourdieu & Wacquant 1992:126-127) states that the habitus, which is possessed by an individual, is actually social in nature. The human mind is not only 'generically limited', making it incapable of solving different issues, but it is also socially structured (Bourdieu & Wacquant 1992).

Through the habitus, people reproduce structures, while structures, in turn, create the habitus (Bourdieu & Wacquant 1992:126-127, 139-140; Bourdieu quoted in Ritzer & Stepnisky 2014:521). By making decisions which are based on structural guidelines, people are re-creating structures (Bourdieu & Wacquant 1992:126-129, 139-146; Bourdieu quoted in Ritzer & Stepnisky 2014:521). Different fields and structures are influencing how an individual behaves. At the same time, the habitus reproduces the structures and fields by acting according to the norms of particular structures and fields. While the habitus is influenced by fields and structures at an unconscious level, in its conscious level it is able to decide whether it wants to conform or deviate from norms that are dictated to by the fields (Bourdieu & Wacquant

1992). When the habitus is not able to adjust to the changing nature of the fields, it is said to be suffering from a state of hysteresis (Bourdieu & Wacquant 1992:130).

## Methodology

Qualitative research methods were used for this study. The reason for using this approach was because of its emphasis on understanding. It is important to understand people's opinions based on the contexts in which they find themselves (Tucker 1965:158-159; Bryman 1988:57; Neuman 2000:71; Henning, Van Rensburg, & Smit 2004:20; Glass 2005:2 of 15; Chesebro & Borisoff 2007:11). I used purposive and snowball sampling to gain access to the population. Purposive sampling was chosen, as participants needed to fit a specific criterion, i.e., being a Muslim religious leader (Neuman 2000:98; Babbie 2001:179; Henning *et al*. 2004:71). Due to trust issues, I had to rely on snowball sampling. One religious organization declined to take part in the study as they did not believe that their responses would be presented objectively. Using networks and participants who agreed to take part, the sample snowballed as they referred me to potential participants (Babbie 2001:180). A semi-structured interview schedule proved to be useful, as it allowed for probes (Berg 1995:33; Babbie 2001:292). Sometimes, participants answered questions in more detail than expected, thereby answering follow-up questions before they were asked to. Data were analyzed, using thematic analysis via the use of open coding and axial coding. Open coding was used in the initial stages to identify similar ideas from the different participants that led to the development of social categories and themes. Axial coding was useful as it allowed one to use theory to answer the research question (Neuman 2000: 420-423; Creswell 2009:184).

Participants were provided with consent forms to sign. These forms ensured that their participation was voluntary. They were also assured of anonymity and confidentiality. Information from the consent form was also verbally communicated to them before the interview started (Bless & Higson-Smith 1995:102-103).

## Results

The results show that the participants agreed with the literature (Moosa 2010; Dadoo & Cassim 2012). Participants code named Umar, Irshaad, Abdur Razaaq, and Abdur Rahman indicated that they did not agree with MPL. Umar argued:

> MPL, yes, there is [a] few good points, but…[what] I am not happy with is that they want to put the court in charge of what needs to be decided in a marriage. For example, [it] give[s] the wife the right to…come and just ask for a divorce...and put[s] the judge and the court of law…in place of the *Quran* [holy scripture of Islam] and the *Sunnah* [practices and sayings of the Prophet Muhammad (peace be unto him)]. If you study Islam properly, then you find that a wife has more rights than a man, but we do not exercise it. They do not know it, and if we practice it and we implement it, then you [will] find that we have a much better Muslim community. But the problem that we have, is that we have too much of…[the] Western…way of life…incorporated in our life…We have *Allah* [God], we have the *Quran…*There [is] nothing else that we need. We do [not] need a judge to overrule all of that and to tell us what we need to do.

Irshaad supports Umar on this point:

> Personally, I am not [in] agreement with that, right because…it [is] not fully representative of Islam. Okay, it comes with clauses that, in my opinion, basically…seem like it [is] a kind of a scam, you know, to appease the Muslim masses, that we are concerned for you…but ….what it actually comes down to is, you have got the non-Muslims trying to run the Muslim law in their country and apply it to them.

In his view, the state does not regard *Shariah* as valid, and is therefore not authorized to decide on matters relating to *Shariah*.

> Similarly, when it comes to the issue of *Halal* [actions and behavior which are allowed] and *Haram* [actions which are forbidden], they do [not] believe in the *Quran*, they do [not] believe in the *Hadith* [say-

> ings of the Prophet Muhammad (peace be unto him)], they do [not] believe that Islam is the final religion, so then on what pretext and on what grounds do you then want to come and apply the laws, taught to us in the *Quran* and *Sunnah* and by *Allah* as Muslims, when you do [not] even believe…they are valid?…There are clauses in…MPL that are against *Shariah*. I mean things like...they want…women [to] have the right to divorce their husbands freely. Now, [a] woman can come and…say that, 'I do [not] want to be married to this man anymore and I can go and file for a divorce and that [is] it, and it will go through the court'…[A] non-Muslim judge will then decide that it [is] over. You can[not] have that.

Abdur Rahman agrees with this view:

> It's a waste of time. It can never happen because the people who are promoting it, have a hidden agenda. And the hidden agenda is they want to become magistrates and judges, so I call them 'scholars for dollars'. They are selling the dream…If a person wants to commit fornication and adultery, then it is permissible, according to South African law, but if you were to take a second wife, then you have to pay a penalty. So what Islamic law are you talking about?

Umar, Irshaad, and Abdur Rahman give an opinion based on a society that is traditionally Islamic, where Muslims follow the *Quran* and *Sunnah*. Their opinions mostly agree with the *Mujlisul Ulema*. Like the *Majlisul Ulema*, they feel that a secular court cannot pass judgment on issues relating to *Shariah.* Similar to the *Majlisul Ulema*, they seem to doubt the intentions of implementation, arguing that it is some sort of scam being introduced (Dangor 2019:246). However, even by their own admission, they themselves acknowledge that Muslim men are not adhering to Islamic law. Abdur Razaaq gives a similar opinion as the preceding participants:

> I do not want to say that the *Quranic* law is subject to the South African Constitution…I [am] not in favor of that, but there [is] another reason why…There are a lot of things in the constitution which are contradictory to…Islamic law. For instance, if a couple comes, as a marriage officer, you are compelled to marry people of the same sex.

Unlike Umar, Irhsaad, and Abdur Rahman, he provides an alternative:

> What you do is, make a contract, right? On the reverse side of *Nikah* [marriage], you say 'right, these are the conditions', and…if you [have] got a problem, you must go for…arbitration. Then jointly with the South African Marriage Act [of] 1961, I see it completes the whole thing. So this is complementary to each other. You make a good contract.

The above examples indicate the importance of the point made by Moosa (2010) and Engineer (2009). There are different groups who have different opinions on MPL. Umar, Abdur Rahman, and Abdur Razaaq appear to belong to the conservative view. Abdur Rahman's castigation on those favoring MPL, resonates with Moosa's assertion of those favoring MPL as demonic (Moosa 2010:340). While these participants are against MPL, they admit that they are limited in what they can do. This is in agreement with literature, which points out that religious leaders' decisions are not legally binding (Domingo 2005:71; Moosa & Dangor 2019:4). Abdur Razaaq indicates that he was once threatened with a gun while in a counselling session. Abdur Rahman points out that if one uses any force, they will be viewed negatively. Umar points out that he always refers victims to family courts. If one is using state resources such as the family courts, why then not favor legislation founded by the state? This is the same point raised by Sultana (2014:32) in the context of India. Sultana (2014:32) indicates that Muslim clerics prefer to use the law of the land in other issues which they are faced with, yet when it comes to MPL, they do not want to legalize it. Therefore, there seems to be contradictions in their own taught patterns. Other participants acknowledge these difficulties, yet they feel that, despite these difficulties raised by participants who do not support MPL, there is a place for it to be used in South Africa.

Participants code named Ahmed, Ighsaan, Usman, and Zaheer are in favor of MPL being legalized. Ahmed understands why leaders like Irshaad and Umar do not want Islamic law to be legalized. However, he calls for a realistic view to be adopted:

> The point of departure here is that there are those who say, 'Well, if you are not getting 100% *Shariah* compliance in MPL within a secu-

> lar state, then you must abandon it altogether because down the road it [is] going to create confusions where people…are going to assume [something] to be *Shariah*, whereas it is not…because it [is] done in the name of *Shariah*'. And it [is] a valid argument.

Ahmed does not dispute the argument made by the previous participants. However, he opts for a stronger counterargument, which in his view, is more realistic:

> But there is another argument which is equally valid and perhaps, in my opinion, a bit stronger…You have got to be somewhat realistic, you are not living [in a Muslim country], and the *Shariah* law within the courts is going to develop, whether you like it or not. Either it is going to develop in a structured way where you have a MPL which is adopted and is made part of the framework or ring-fenced, it [is] not going to be 100% *Shariah* compliant but…you are going to get a lot out of it, which is going to be in compliance with *Shariah*. On the other hand, if you do [not] do it, it does [not] mean nothing is going to happen; it means that each judge is going to come to [their] own ruling on different opinions, different circumstances, creating legal precedent[s], all over the show, and you are going to get 'hodge-podge' of what is then going to be anyway, a kind of default MPL.

Ighsaan gives a similar view to Ahmed:

> Personally, actually I spoke to one friend of mine, he was involved in it. And I know we have two sets of *Ulema* (religious leaders) that are debating very openly and very publicly, which is very wrong, firstly. My view on it is that, listen, it would be better for us as Muslims to have something that is 60 or 70% correct that can help us, than to have nothing at all. Nothing in this world will be 100%.

Zaheer stated that it would help in cases of domestic violence:

> MPL? Definitely it would help. Yes, I mean there maybe, I do [not] know how it would work but if they could draft it, I mean the three conditions we mention all the time; if...there is physical abuse, she

> immediately qualifies for the *talaq* [divorce], maybe they could pass something like that, and that is from *Shariah*, that [is] not from anywhere else.

The different conditions he indicated as grounds for divorce, are referring to different forms of abuse and infidelity. Yet he argues that the law could only be successful if people adhere to it. People will always look at what benefits them. They will only adhere to Islamic Law if they internalize Islamic norms and follow these norms. Zaheer's opinion resonates with what is found in Tunisia where laws against domestic violence are implemented to protect women from different forms of abuse (Zayat 2020).

Taufeeq is in support of the MPL, but opposes the use of non-Muslims presiding over the case:

> The United *Ulema* Council of South Africa has gone through a major process in…their submission and we went through a major process as well…We were trying to marry the *Shariah* aspect with regard to the legal aspect, but…there are some areas…of concern….which we are not willing to negotiate on…I will give you one example of that…We cannot expect a non-Muslim judge to pronounce on something with regard to Islam…when he is not equipped to do that.

Taufeeq's point is in agreement with Dadoo and Cassim (2012) who state that the 2010 draft bill upset those who were in favor of the 2003 bill that restricted judges to only be Muslim. However, as pointed out by Moosa and Abduroaf (2022:12), government looked to increase the numbers of Muslim marriage officers. It could be argued that this was done to deal with issues relating to problematic Muslim marriages. Overall, the argument made by Irshaad and Ahmed resonates with the point made by Engineer (2009) regarding MPL. Engineer (2009) indicates that nothing will be perfect. However, it is important to bring it as close as possible to the *Quran* and *Sunnah*, so that women can enjoy the rights which they are entitled to. As pointed out by Moosa and Abduroaf (2022:11), Muslim women do not enjoy rights as compared to those who are married within civil marriages, leaving them in a precarious position. It can thus be argued that women would be awarded rights which would remove them from this precarious situation in which they find themselves.

## Analysis

Despite all the religious leaders who participated in this study, agreeing that domestic violence is clearly not allowed in Islam, the results clearly agree with the available literature on MPL (Engineer 2009; Moosa 2010:340; Dadoo & Cassim 2012:278). There are scholars who agree that it is important to use MPL. They would be classified as moderate, while others who are conservative feel that it cannot be combined with the laws of a specific country. Irshaad and Abdur Rahman doubt the intentions of those who promote the legalization of MPL. Abdur Rahman calls people who promote the legalization of MPL, 'scholars for dollars'. These participants are the same individuals who have indicated that they would only play advisory roles. Abdur Rahman indicates that, were they to use any force, they would likely be viewed in an antagonistic manner. Irshaad actually resorts to threatening husbands with physical violence if they abuse their wives. Ahmed and Ighsaan indicate that they understand why some religious leaders are against legalizing MPL, as it is not fully *Shariah*-compliant. However, as Ahmad points out, pragmatism is required: Therefore, rather take what can be implemented and make sure it is implemented in the correct way. Ighsaan indicates that even in Muslim dominant countries, Islamic law is not practiced properly. Zaheer suggests that the legalization of Islamic law would assist in issues such as domestic violence.

Religious leaders such as Abdur Razaaq are against the legalization of MPL because homosexuality is something which Islam seriously prohibits. However, the laws of South Africa consider homosexuality as normal. Ighsaan and Ahmed agree that the laws of the country are not fully in compliance with *Shariah*. However, they are prepared to adjust their habitus by being in favor of MPL in a country which is secular, as they realize that not adjusting their position, would lead to more social challenges than solutions. It is important to keep in mind that violence is a pandemic in South Africa, and that Muslims are a minority within this country (Johnston 2007). In order to solve this problem where Muslim women are victims of domestic violence, the concept of *Fiqh for Minorities* can be applied.

Two principles of *Fiqh for Minorities*, namely *Taysir al Fiqh* and *Maslaha* are relevant here. *Taysir al Fiqh* refers to practicing Islamic *Fiqh* in an easy way (Fishman 2006). Being one of the proponents of *Fiqh for Minorities*, Al Qardawi (quoted in Fishman 2006:10 of 18) states that leniency is favored over strictness. he cites prophetic sayings to further his argument.

The first saying states: 'Allah would rather that concession be given on His behalf and hates to be disobeyed', while the second saying indicates, 'Truly, Allah desires that His concessions be carried out [just] as He desires His injunctions to be observed' (Fishman 2006:10 of 18). Based on these sayings, Al Qardawi (quoted in Fishman 2006:10 of 18) indicates that there is no intention to create a new form of Islam law. One rather needs to look at the situations that Muslim minorities find themselves in. Al Qardawi (quoted in Fishman 2006:11 of 18) argues that if Muslims find themselves in a position of weakness, they should be treated more leniently. If one considers Muslim women who are victims of domestic violence, in a country such as South Africa where violence is a pandemic, it can be argued that they are in a position of weakness. The position taken by Ighsaan and Ahmed can be viewed in this light: Rather legalize Islamic law even though it will not be implemented strictly, but it will help those who find themselves in a position of weakness.

The second concept of *Fiqh for Minorities* is called *Maslaha*, which is a methodological tool referring to public interest. *Maslaha* is the view to Al Ghazali, which 'represents the ultimate purpose of the *sharia*, which is to maintain religion, life, offspring, reason and property. Whatever furthers these aims should be defined as *maslaha*' (Fishman 2006:9). *Maslaha* consist of three principles: '*Al-Darurat* (*necessities*), *Alhajiyyat* (*needs*), and *al-tahsinat* (*improvements*)' (Fishman 2006:9 of 18). When one considers *Darurat*, it can be argued that MPL becomes a necessity for Muslims in South Africa, given the veracity of the problem of domestic violence, experienced by this minority group (Johnston 2007).

Those participants who are against Islamic personal law becoming legalized, are against domestic violence. It is important to make this clear. Irshaad and Abdur Rahman are passionately pointing this out. However, it seems as if they are adopting a romanticized view on the issue of personal law in a society where Muslims make up a minority. They are only considering the Islamic field. As a result, they are not confronting some of the social realities that Muslim women are facing. The religious field is intersecting with the field of the family and patriarchy. The social context is one where patriarchy is present. It is a society where they themselves point out that men do not appreciate the status, or as Bourdieu (1986:245) would argue, the symbolic capital that Islam awards to women. According to Irshaad,

> she is at home the whole day, looking after you and your children and your house, and then when you come home at night you still want to put your finger in her face and tell her stuff. So all those kinds of sacrifices she makes [a]nd then you know how woman always…must go the extra mile…So they put their emotions into what they do. Then if we do [not] appreciate that…it breaks her heart immediately. You know a simple thing like she cooks a nice meal, and she puts those little candles…now she thinks she is going to have a nice little romantic meal with you for the first time in forever because the kids are sleeping, finally, right and you come home and you do [not] like the food. And you tell her in her face, 'I do [not] like your food. Why did you cook this for me'? Now, not only must she go and change the food, okay…but you have destroyed the entire evening, broken her heart, broken her feelings. She will never want to do something like that for you ever again. You understand…That [is] why Islam said, 'Appreciate your wife'.

Imtiaz also indicates that the work that mothers do, is not appreciated:

> Muhammed: 'Do you think that emotional labor is appreciated today by men'?
> Imtiaz: 'Very few men, hey…[laughing] I think the men who appreciate it, are the men who perhaps go through some turbulence in their life, perhaps they went through a divorce and then they got married and then they would maybe appreciate the next wife because of perhaps what…they experienced in the past, and those men maybe show some appreciation, or those men…grew up in a home where there was a lot of gratitude shown. You know, from their mothers to their fathers and to one another…but generally by and large very few men really understand the role of the woman and really appreciate what they do in their homes'.

An important part of what Imtiaz is alluding to, is how important Islamic norms of equality need to be internalized. Due to motherhood lacking monetary value, Abdur Razaaq argues that men take advantage of this:

> You see, motherhood plays a very important role…You find that in every culture, not only Muslim. The man takes advantage over the woman because you know she is the mother. Where will she go? How would she bring up the children? She can[not] go in the street, she can[not] go back, who is going to look after her?

It is not just stay-at-home mothers who lack appreciation. According to Umar,

> what happens in most cases, where I find out, is that the wife must still do everything. She comes home, she must still clean, she must still cook, she must still look after the children, bath them, get their homework [done], everything. Where [is] the husband? Lying on the couch! So, that [is] not the ideal situation. So, if both of them are working, so share the responsibilities. That is what we want…Again, communication and consulting with one another, this is what we [are] going to do. That [is] your ideal situation, but it [is] not happening now. Very few, maybe 2,3% of…men are doing it, but men feel that…'Coming home, I need a cooked meal'. The wife, again, because of her…motherly nature, she will not do that. She will come home, and she will start doing the work, but then it puts a lot of strain on her.

Imtiaz adds:

> Unfortunately, today, because [of] the lack of motherhood, boys grow up without understanding responsibility. So it is nice for me to get married and have a wife, but the responsibility of looking after the wife is not there. And you find in many cases…the wife has to come home from work, she has got to cook, she has got to clothe, she has got to feed the children, she has got to clean the house, she has got to do everything and she has got to get up and go to work again the next day but the husband…does [not] have a job.

Islam views men and women as equal, performing different yet complementary roles (Nawab 1997:27; Ansari 2006:222). However, as pointed out by Irshaad, Abdur Razzaq, and Shakeel, the notion of male dominance is still

predominant in today's society. Shakeel claims that men use the verses of the *Quran* in isolation to assume a dominant role in the marital relationship. Ahmed also indicates that women are exercising a level of agency whereby they negotiate their roles in the marital relationship, showing that sources of *Shariah* are misused by men to create a relationship whereby they assume a dominant position. The extent of patriarchy in the Muslim community is beyond the scope of this paper. However, it can be stated that a patriarchal culture exists within certain parts of the Muslim community. It is in these types of communities that violence is perpetuated. Participants themselves have indicated that women are victims of different forms of abuse. According to Umar,

> from day one, if not, before marriage, they are being abused. If not… verbal abuse, mental abuse…Physical abuse comes in the later stage, but all that mental abuse and…verbal abuse and all these things, it [is] a common factor. It [is] there, it [is] rife, and the thing is what women do is, which I think is a…very serious…thing, is that they keep quiet.

Abdur Rahman mentions how emotional abuse manifests itself: 'Many a time the husband, they are masters of manipulation, they play…mind game[s], if the husband is having an affair, so he will tell [his] wife, "You are the cause". If [he is] addicted to porn, so he will tell [his] wife, "You are not doing these things"'.

It is not just emotional abuse that they are subjected to. They are also subjected to financial, physical, and sexual abuse.

> Umar: 'We had a lot of cases where women were locked up by their spouses, you know, no food, no nothing. So all these things, it [is] not right, you know'.
> Muhammed: 'Locked up in the home'?
> Umar: 'Locked up in the home…keys are taken away; food is locked up in garages...So [there are] a lot of…cases that we had here'.

Shakeel provides a very gruesome example of physical abuse:

> And technically he was no good, but she stuck with him until he died. The day, I remember seeing her face, when we did the funeral rites, the *Janazah* (*funeral*), she was sitting there and they, the kids were prompting her to cry. You lost your husband. We lost our father, they were crying. She was sitting there with a straight face. And I understood the straight face. Right, she was patient. So for her patience that is a different type of patience. It does not mean that because of the abuse that she had to leave, she had made a conscientious decision, but I can tell you it was 32…stabbings, stab wounds. Because she literally wanted to show me and I said, 'No it [is] okay, I take your word for it'.

Shakeel has also provided a very disturbing example of sexual abuse:

> And she was diminutive, nothing more than three foot five or maybe four feet, that was her height, and she said to the *Imam* (*religious leader*), 'The type of things that he wants, he wants to enact upon me, he even took a bottle and put it up me. Now, what do you do then'?

Therefore, in such an environment, advice alone cannot assist women in a patriarchal environment. Domingo (2005:71) indicates that women who are dependent on their husbands, do not initiate divorce proceedings. They need a form of support which will bring an end to the violence that they are experiencing. It can be argued that MPL is one such avenue.

By not confronting the realities of the intersection of different fields, some religious leaders are in a state of hysteresis (Bourdieu & Wacquant 1992:130). Because they are not supporting MPL, they are inadvertently creating a space for patriarchy to continue its predominance. Such an environment is culturally violent. Galtung (1990:291) indicates that structural and direct violence are only possible if cultural violence exists. Hodgett *et al*. (2014:2038) point out that sometimes people are not aware of the structural violence which they purport. Irshaad and Abdur Rahman are against the direct violence that women experience, but by not supporting the legalization of MPL, they are in fact denying women a resource which they would be able to use to emancipate themselves from abusive relationships. In doing so, they

are unknowingly promoting structural violence. When women are denied structural resources such as MPL, they can be vulnerable and susceptible to direct and visible violence.

## Conclusion

The literature indicates that there is a difference of opinion regarding religious leaders' views on legalizing MPL. Certain religious leaders are in favor of MPL becoming legalized in the country, while there are some who are not in support of it because for them, Islamic law cannot be intertwined with the South African law. These findings are in agreement with the likes of Moosa (2010:340), as well as Dadoo and Cassim (2012:278), who have indicated that some religious leaders are conservative in their thinking, thereby not wanting MPL to be legalized. At the same time, there are religious leaders who are open to change, as they realize the nature of the social context in which Muslims in South Africa find themselves.

What was surprising when dealing with this issue, was that the same religious leaders who were against the legalization of MPL, still advocated for women to use family courts – a resource provided by the same state that they do not agree with. They still have a traditionalistic notion of the practice of Islamic law in a society where Muslims constitute a minority. While they are against domestic violence, they are ignoring the realities posed by these intersecting fields. In this sense, it is argued that they are suffering from hysteresis as suggested by Bourdieu (quoted in Bourdieu & Wacquant 1992:130) and are unintentionally causing structural and direct violence by being against a form of law, which will be an important resource to women facing problems in their marriages such as domestic violence.

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