

# Muslim Marriages Bill cannot make life worse for Muslims

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**(On behalf of the  
Recognition of Muslim  
Marriages Forum)**

THESE appears to be considerable confusion about the Muslim Marriages Bill ('Bill'). The purpose of this article is to help clear the confusion by drawing attention to how the Bill was drafted, by whom it was drafted and what significance it will have for South African Muslims.

While we have always been able to practise Muslim family law in the privacy of our homes and community, our marriages have never been legal.

Thus, Muslim spouses are not always able to enjoy the same benefits that spouses who are married in court enjoy e.g. division of pension benefits upon divorce.

We are also not always able to legally enforce our Islamic Law rights and we cannot hold the ulama accountable for discriminatory decisions.

During the negotiations process preceding the 1994 elections, the African National Congress promised our Muslim community that Muslim Personal Law ('MPL') would be recognised.

In 1999, the government fulfilled its election promise by enabling a Project Committee of the South African Law Reform Commission to draft legislation to recognise most aspects of MPL, including Muslim marriages and divorces.

The Project Committee comprised Justice Mohammed Narsa, Shaikh Faaik Gamieldien,

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Maulana A A Jeena, Ms Farida Mahomed, Prof Najma Moosa, Mr M S Omar, Dr R A M Saloojee and Ms Zubaida Seedar.

Of the eight members on the Project Committee, at least three were ulama members and three were women.

After four years of consultation with the South African Muslim community, the Project Committee drafted a Bill that proposes to recognise Muslim marriages and divorces, which was submitted to the Minister of Justice and Constitutional Development ('Minister') in July, 2003.

The Minister is therefore in possession of a Bill that was drafted by Muslims for Muslims and has obtained overall support within the Muslim community including many of the ulama bodies. However, it is still waiting to be enacted.

Some Muslims oppose the Bill because they believe it is not Shar-

'ah compliant.

They represent a minority viewpoint and their concern can be alleviated by the knowledge that the Bill recommends regulation of Muslim marriages and divorces according to Islamic Law.

If the Bill is enacted, it will constitute legislation. Therefore, it must also be consistent with the Constitution. This surely cannot be problematic since the Constitution encompasses similar values to Islam e.g. equality and justice.

Others such as women's rights activists believe that the Bill is not sufficiently gender sensitive. Yet, many women's rights activists realise that if the Bill is passed, it will have the potential to make life better for Muslims. At the very least, it cannot make life worse!

The following are examples of how the Bill proposes to regulate Muslim marriages and divorces:

- Muslim marriages that have been entered into before the Bill was passed will be legal and will be regulated by the Bill.
- If parties do not want the Bill to apply to their marriages, they may choose to exclude them from the ambit of the Bill. In that case, the marriages will be considered illegal and the parties will not be able to access benefits provided by the Bill.
- If the parties are not married in court, they will also not be able to access benefits provided by civil law.
- If, before the Bill is passed, parties are married by Muslim rites and in court, the Muslim marriage will be legal but the proprietary consequences of the court marriage will apply.
- For a Muslim marriage to be legal, the parties would have to be of opposite sexes and consent to be married to each other in the presence of two witnesses. The nikah could be solemnised by an imam and involve either the bride or her wali and the groom uttering the prescribed marriage formula including 'Tazawwajtuba' and 'Nakahthuba'.
- The marriage would also have to be registered by a marriage officer who would have to be a Muslim person with knowledge in Islamic Law.
- If an imam is appointed as a marriage officer under the Bill, he could register a legal Muslim marriage immediately after he performs the nikah.
- Parties would not be allowed to simultaneously enter into a legal Muslim marriage and a legal court marriage.
- The husband would have to pay his wife mahr and he would have to maintain her during the marriage and iddah. Maintenance of the wife during the marriage would include separate remuneration for a breastfeeding period of two years. After divorce, if the children are in the wife's custody, the husband would have to provide her with a separate residence.
- A father would be obliged to support his children until they become self-supporting.
- While a husband would be allowed to simultaneously have up to four wives, he would have to apply for court approval. Any existing wives would have to be informed about his application and would be able to inform the court about their views of the proposed marriage.
- The court would have to grant the application if the husband proves that he 'is able to maintain equality between his spouses as prescribed by the Holy Qur'an'.
- The estates of the parties would be kept separate throughout the marriage unless the parties agree otherwise, in which case they would have to record their agreement in an antenuptial contract.
- If the spouses wish to separate, their dispute would first be referred to an accredited Mediation or Arbitration Council. It would only be adjudicated by a court if the spouses are unable to reach a suitable agreement.

- Divorce orders to dissolve the Muslim marriage would be granted by a secular court. If the matter is unopposed, it would be presided over by a Muslim judge. If it is opposed, two Muslim assessors with specialised knowledge in Islamic Law would adjudicate with the Muslim judge. The use of Islamic Law experts to assist in the decision-making process means that the judgment will emanate from Muslim authorities.
  - Different forms of Muslim divorce would be recognised namely, talaq, tafwid-ul-talaq, faskh and khul'a. Talag is available only to men unless it is delegated by a husband to his wife through tafwid-ul-talaq. The husband would have to register an irrevocable talag and serve it on his wife or her representative in the presence of two witnesses. Thereafter, he would have to institute legal action in court to dissolve the Muslim marriage by way of talag. The same process would apply to a wife who issues talag via tafwid-ul-talaq. Parties who contravene the Bill's provisions relating to polygynous marriages and talag would be guilty of a criminal offence and could be fined. The Bill also enables a wife to obtain a faskh from a court on grounds that are permissible by Islamic Law e.g. shiqaq, which is when the marriage between the parties breaks down to such an extent that divorce is a reasonable option. If the parties agree, a wife may also apply for khul'a, which would be granted by a court if both parties consent to dissolve the marriage and the wife pays compensation to her husband. She need not prove any grounds to obtain khul'a. Interestingly, the Bill does not incorporate the interpretation of khul'a that is part of Egyptian divorce law namely, that a wife does not require her husband's consent to obtain khul'a. In fact, the Bill confuses khul'a with mubara'a, which is a Muslim divorce based on mutual agreement and does not require either spouse to pay compensation.
  - The court would also be able to grant relief in the following instances:
    - If parties do not have an antenuptial contract and either one or both assisted or rendered services in the family business or contributed to the maintenance or increase of the other's estate, the court may order that the spouse who contributed should be compensated.
    - The court may further award mut'ah (conciliatory gift) to an innocent spouse where it would be just and equitable to do so.
    - When determining guardianship, custody and access of a minor child, the court would have to consider 'Al-Hadanaah' under Islamic Law, the Family Advocates' Report and the best interests of the child.
    - Finally, a court would not be able to grant a court marriage unless it is satisfied that a Muslim divorce has been granted. Where the husband refuses to issue talag, the wife would be able to obtain a faskh.
- It is clear that the Bill attempts to recognise the Islamic Law rights of parties. Given the inability of the 'vitama to provide intervention where required for example, while talag is easily available to men, women have great difficulty being granted a faskh or khul'a, the Bill constitutes a necessary mechanism to enable parties to enforce their Islamic Law rights.
- If enacted, the Bill will also: hold spouses accountable to their marriage obligations; provide protection to them; and potentially prevent an abusive application of Islamic Law.