

**The Muslim Marriages Bill ('MMB'):  
Is it the answer to the dilemma of non recognition of Muslim marriages in South  
Africa?**

**Waheeda Amien**

In the December 2008 issue of the Muslim Views, Moghammad Cassiem De Vries raised several concerns about the Muslim Marriages Bill ('MMB'). Some of those concerns are encapsulated in the following questions: Were the Muslim communities consulted in the drafting of the MMB? To what extent is the MMB compliant with the *Shari'a*? Does the MMB constitute piecemeal recognition of Muslim Personal Law ('MPL')? Must the MMB be consistent with the South African Constitution? Should the MMB be implemented by *Shari'a* or secular courts? Will Muslims be bound by the MMB if it is enacted? What will the consequences be if the MMB is not enacted? This article attempts to address these and other questions relating to the MMB.

***Consultation with the Muslim communities?***

In 1999, the South African Law Reform Commission appointed a Project Committee to draft legislation to afford legal recognition to Muslim marriages in South Africa. The Project Committee members were appointed by way of public nominations. During that process, the Muslim communities were involved in the composition of the Project Committee. As a consequence, the Project Committee comprised Muslims who had the support of the Muslim communities and were respected members of those communities. The Project Committee members included a Supreme Court of Appeal judge, a Law Professor, a Member of Parliament, legal practitioners, a member of the South African Law Reform Commission and members of the *'ulama*. For a period of four years after its inception, the Project Committee consulted widely within the Muslim communities throughout the country. In particular, it held workshops that were well attended by the Muslim communities in the Western Cape, Eastern Cape, KwaZulu-Natal and Gauteng. It also participated in ongoing Muslim community radio shows for example, the Voice of the Cape where it provided pertinent information about the MMB and received comments from the Muslim communities that were considered and debated. Furthermore, the Project Committee invited and received numerous written comments about the MMB before it published the final version in its July 2003 Report. The final version of the MMB is a result of widespread consultations with different role-players within the Muslim communities and with human rights organisations in the broader society. There can therefore be no doubt that the MMB was drafted in extensive consultation with the Muslim communities throughout South Africa. To assert differently would be a misrepresentation of what had taken place over the four year period since 1999.

***Is the MMB compliant with the Shari'a?***

The MMB is formulated within a *Shari'a* framework and follows, among others, the Pakistani and Malaysian models for the recognition of Muslim marriages. In fact, the MMB incorporates rules and practices from mostly the *Shafi'i* and *Hanafi* schools of

thought. Given the diversity of opinions that exist within the South African Muslim communities regarding MPL, the MMB constitutes a reasonable arrangement between extreme positions. For example, although certain people within the Muslim communities argued for a minimum marriageable age of nine years for females, the MMB proposes a minimum marriageable age of 18 years for females and males. It cannot seriously be contended that the broader Muslim communities within South Africa would support their daughters marrying at the age of nine!

### ***Piecemeal or comprehensive recognition of MPL?***

The MMB deals comprehensively with almost all aspects of a Muslim marriage and divorce, including the requirements for a valid *nikah*; *mahr*; proprietary consequences of the marriage; a husband's maintenance obligations toward his wife and children; various forms of dissolution of the marriage including *talaq*, *tafwid al-talaq*, *faskh* and *khula'*; *iddah*; custody, guardianship and access of the minor children born of the marriage; polygyny; mediation and arbitration preceding divorce etc. Since MPL encompasses marriage, divorce, polygyny, custody and guardianship of children and inheritance, the MMB is in fact proposing to recognise all aspects of MPL with the exception of inheritance. Given that inheritance constitutes a substantive area of law by itself, it is appropriate that it is dealt with separately and not within the MMB. Therefore, the MMB proposes to afford comprehensive recognition to MPL in South Africa.

### ***Consistency between the MMB and the Constitution?***

All law in South Africa must be consistent with the Constitution. If passed, the MMB will constitute law and will therefore also have to be consistent with the Constitution. It must further be borne in mind that the Muslim communities are a minority in South Africa. Islam exhorts Muslims to follow the laws of the country in which they are a minority. Consequently, it is incumbent on South African Muslims to respect the laws of South Africa including the Constitution with which the MMB must be consistent. Presently, South African Muslims are willing to comply with the criminal, civil, traffic and commercial laws in this country, which are all required to be consistent with the Constitution. Why then are some Muslims resistant to MPL being consistent with the Constitution? More so since the latter recognises numerous human rights including freedom of religion and gender equality, which Islam also encompasses. Therefore, if the Constitution is compatible with Islam, consistency between the MMB and the Constitution would also be compatible with Islam.

### ***Shari'a courts or secular courts to interpret and apply the MMB?***

The MMB proposes that its interpretation and application should be undertaken mostly by Muslim judges within the secular judiciary. In some instances, Muslim assessors will also be used. Again, if South African Muslims are willing to accept the judgments of a secular court in respect of other areas of law, why is it difficult to accept the decisions of a Muslim judge in those secular courts regarding MPL? Establishment of separate *Shari'a* courts is an unreasonable prospect because this will place an additional burden on

government expenditure. It is also highly probable that *Shari'a* courts may render gender insensitive decisions that will conflict with the Constitution. This in turn may perpetuate the inequities currently faced by Muslim women and children within the Muslim communities. Therefore, the existing court infrastructures should be used to interpret and apply the MMB. While the Constitution protects freedom of religion, it does not do so at the expense of gender equality or at the expense of the interest of families and children.

***Is there a governmental obligation to recognise MPL?***

The government is not obliged to recognise MPL. The Constitution simply enables it to do so. However, since African customary marriages and same-sex marriages have been recognised, it would arguably be unconstitutional for Muslim marriages to not also be recognised.

To honour its pre-1994 election promise to the Muslim communities to afford recognition to MPL, the government enabled the appointment of the Project Committee to draft the MMB. Yet, to date, the government has failed to fulfill its promise for reasons that are not clearly evident. The Muslim communities now need to agitate the government to meet its promise to recognise MPL through the enactment of the MMB.

***Can the MMB be challenged? Will Muslims be bound by the MMB?***

For those who wish to challenge the provisions of the MMB in its current form, there will be further opportunities during the parliamentary process to do so. Even after it is passed, it could still be challenged in the Constitutional Court and thereafter amended. That is the beauty of living in a democracy – we can question and contest that which we do not agree with without fear of reprisal. Moreover, the MMB will not be imposed on members of the Muslim communities. Everyone will have a choice whether or not they wish to have the MMB apply to their marriages. This includes those who are currently married by Muslim rites and those who will marry after the MMB is enacted.

***Consequences of not enacting the MMB?***

The MMB is a reflection of the views as expressed by the majority of Muslims who participated in the drafting process. Yet, the MMB may not meet every demand of the different sections within the Muslim communities. For example, the MMB falls short of women's rights in a number of ways. However, it will offer women, particularly the poor and illiterate, greater protection than they currently have. For instance, many Muslim women find themselves destitute when their marriages end because they are unable to find recourse in the secular courts and *'ulama* bodies have proven to be of little (if any) assistance when husbands refuse to meet their *Shari'a* obligations. If enacted, the MMB will enable those women to be provided with relief in the secular judicial system.

We are all aware that South African Muslims have been struggling for a long time to have their marriages recognised. This is mainly because non recognition of Muslim marriages has caused grave hardships to Muslims. The hardest hit has been women. If

Muslim marriages are not legally recognised, the status quo will continue and Muslim women will continue to suffer. Are South African Muslims prepared to forsake the women in their communities? Because that is exactly what will happen if the MMB is not enacted.

**Waheeda Amien is a Law Lecturer at the University of Cape Town. Her research expertise is Muslim Family Law and Human Rights. She has written in her personal capacity. Email: [Waheeda.Amien@uct.ac.za](mailto:Waheeda.Amien@uct.ac.za)**

The MMB can be accessed at [http://www.doj.gov.za/salrc/reports/r\\_prj59\\_2003jul.pdf](http://www.doj.gov.za/salrc/reports/r_prj59_2003jul.pdf)