



Submission

to the

South African Law Reform Commission

on the

Single Marriage Statute

Isbn: 978-0-621-49077-0 (January 2021)

By

Al Jama-Ah Political Party

APRIL 2021

c/o The Secretary

South African Law Commission

Via email: pvanwyk@justice.gov.za

CLOSING DATE: 31 MARCH 2021

EXTENDED CLOSING DATE: 17 MAY 2021

The South African Law Reform Commission (SALRC) has called for comments on its discussion paper focusing on a single marriage statute for South Africa.

The Single Marriage Statute Bill undertakes a significant mandate in an effort to achieve its goals of redress and equality in South Africa. With this being said, the importance of public comment to this Bill cannot be underrated.

This public participation process presents an opportunity for interested parties to have their voices heard and concerns considered by SALRC. The bills seek to provide for the recognition, in terms of option one, of protected relationships or, in terms of option two, of marriages and life partnerships, entered into by parties regardless of the religious, cultural or any other beliefs of the parties, or the manner in which the relationship was entered into.

The Bill requires attention if it is to achieve its intended purpose. Therefore, public participation is of vital importance. After consultation with members of the Muslim community, the following areas are required to be addressed prior to the Bill's enactment in order to allow for the proper implementation of all individuals commitment to the Bill, without infringing on an individual's Constitutional rights. We have identified five main sections:

1.
 - “4. *Validity requirements for protected relationships***
 - (1) *A protected relationship entered into after the commencement of this Act is valid if the following requirements have been met –*
 - (a) *all the parties must be at least 18 years or older on the date of entering into the protected relationship;”*

Section 4(1)(a) of the Bill sets out the age of the parties entering into the protected relationship. The age of a parties entering into a marriage in terms of Muslim rights and the Islamic Legal System and/or rulings is not restricted to the age of 18. The individual must have attained a level of maturity in order to enter into such a marriage.

2.

“5. Minimum age requirement

- (1) *No person or institution can provide consent for any person under the age of 18 years to enter into a protected relationship.”*

Section 5(1) requires clear attention followed by section 4(1)(a) above. Currently in our legislation, minors wanting to enter into a marriage must obtain consent from their parents or legal guardians and in certain circumstances from the Minister of Home Affairs. These requirements should remain in place as it will accommodate Muslim minors from entering into a marriage. In terms of Islamic Law, an individual must have reached an age of maturity before entering into a marriage.

3.

“6. Consent requirement

- (4) *The male party to a subsisting polygynous protected relationship who wishes to enter into a further protected relationship must notify all the female parties to their subsisting relationship in the prescribed form of his intention to enter into a further relationship to obtain the consent of all the female parties who must indicate their consent in the prescribed form, before he may enter into such a further relationship, provided that if he enters into a further relationship without the consent of all the female parties to the subsisting polygynous relationship, that further relationship entered into will be void; and provided further that the registering officer must enquire into the existence of such consent having been sought and granted when the further relationship is registered.”*

Section 6(4) provides that consent is required for a further marriage. This is inconsistent with Islamic rulings. A further marriage may be entered into without the consent of all female parties. As we may appreciate the fact that women in a marriage and/or further marriages should be protected, we are not allowed to deviate from the actual Islamic Rulings in relation to this. Our duty and obligation is to uphold our Islamic Ruling and Rights at all times.

4.

“12. Legal consequences and dissolution of protected relationships

Whenever legislation or the common law attaches consequences to protected relationships marriage or life partnership, the relationships as defined in this Act are deemed to be referred to regardless of whether they have been registered in terms of this Act or the Marriage Act, 1961, (Act No. 25 of 1961), the Civil Union Act, 2006 (Act No. 17 of 2006) or the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998).”

Section 12 provides for the legal consequences of marriage. We propose an opt out clause or “in terms of the tenets of a religion” which will bring the consequences in terms of Islamic Marriage Law and enabling Muslims to practice their faith.

5.

“13. Offences and penalties

(3) Any person who knowingly solemnises a protected relationship or registers a relationship or fails to register a protected relationship in contravention of the provisions of this Act, shall be guilty of an offence and liable on conviction to a fine or, in default of payment, to imprisonment for a period not exceeding six months.”

Section 13(3) provides the offences and penalties of a marriage officer. We bring to your attention, our Muslim marriage officers are commonly religious leaders who are graduates of Islamic institutions. These leaders will be forced to comply with this act in order to avoid violating its provisions. However, in protecting this act, they are forced to violate the Islamic rulings. Therefore, this puts our religious leaders in a much compromised position in the eyes of Allah (God) and the Muslim community. This compromised position is a major transgression and sin in terms of the tenets of Islam.

SUBMISSIONS

1. We submit that there should be different regulatory regimes for different types of marriages in South Africa. In particular, it is long overdue that Muslim marriages should be given specific recognition in such a way that it uphold the tenets of Islam together with South African Law. Al Jama-ah Political Party has submitted a private members bill in this regard. We annexed hereto marked "A" for your consideration. This private members bill should assist parliament meet the 2022 deadline handed down by the SCA.
2. We submit that the disadvantages of an omnibus bill will bring about various concerns in terms of infringements of rights and may complicate matters further. These concerning factors may bring about unnecessary litigation and unnecessary strain within the community. Should this bill be enacted, it will be in conflict with the recent SCA judgement relating to Muslim marriages.
3. We submit that an alternative dispute resolution such as mediation and arbitration is essential in the dissolution and consequences of Muslim marriages. We direct you to annexure "A" for a detailed layout of a proposed alternative dispute resolution process. This bill does not cover these solutions and we emphasise the importance thereof. This would certainly minimise the court rolls.
4. On or about 17 February 2021, Al Jamah-ah has made application for an extension of this public participation. Same was extended to 17 May 2021 by Mr. Pierre van Wyk respectively. See annexed hereto marked "B" for your ease of reference. Furthermore, kindly provide us with confirmation that this information was brought to the public's attention and to what extent did the SALRC publicise this public participation.

CONCLUSION

5. We humbly request that the SALRC takes our comments and submissions into consideration as this would be in the best interest of the Muslim community of South Africa.

“A”

RECOGNITION OF RELIGIOUS MARRIAGES BIL

BILL

To make provision for the recognition of religious marriages

1. Definitions

In this Act unless context otherwise indicates,

‘court’ means a High Court of South Africa or a court for the Regional Division as provided for in section 29(1)(b) of the Magistrates court Act 1944;

‘religion’ means any of the following religions but not limited thereto - Islam, Christianity, Hinduism, Judaism, Bhuddism;

‘marriage officer’ is an officer appointed for the purposes of registration of marriages as contemplated in the Marriages Act 25 of 1961;

2. **Application**

- (1) The provisions of this Act shall apply to any religious marriage concluded after the commencement of the act where the parties to the marriage elect, in their contract of marriage, to be bound by the provisions of this Act.
- (2) This Act shall apply to all religious marriages concluded before the commencement of the Act, unless the parties, within a period of 36 months or such longer period as may be prescribed, as from the date of the commencement of the Act, jointly elect, in the prescribed manner, not to elect to be bound by the provisions of this Act, in which event the provisions of this Act shall not apply to such marriage.

3. **Recognition of Religious Marriages**

- (1) All religious marriages concluded under the prescripts of any religion are given full force and are recognized in South African Law.
- (2) The consequences of all religious marriages are also recognized as they relate to,
 - i. maintenance;
 - ii. custody and access;
 - iii. proprietary consequences of a marriage and divorce.
 - iv. The law governing the termination of marriages under the religious system.

4. **Voluntary Mediation and Arbitration**

- (1) The parties to any religious marriage may in their contract elect to mediate all disputes that may arise during the subsistence of such marriage or on termination of that marriage to a mediator to be agreed between them.
- (2) The parties may furthermore in their contract of marriage agree that if the mediation fails they will refer such dispute to an arbitrator agreed to between them to resolve their dispute.
- (3) An arbitrator arbitrating a dispute under this Act shall have the power to arbitrate any dispute including disputes relating to the validity of the marriage, termination thereof, the proprietary consequences of a divorce, maintenance, custody and access.
- (4) To the extent necessary the provisions of this Act amend the Arbitration Act 42 of 1965.
- (5) The arbitration award issued by the arbitrator shall be final and binding.

5. **Review of Arbitration Awards by Private Arbitrators**

- (1) A party dissatisfied with the ruling of an arbitrator made in terms of this Act shall have the right to apply within 6 weeks of the date of the ruling to a court for an order reviewing and setting aside such arbitration award only on the following grounds :
 - (i) Misconduct
 - (ii) Fraud
 - (iii) Excess of power

- (iv) Gross irregularity
- (2) For the purposes of this Act a gross irregularity shall not include a review for reasonableness.

6. **Compulsory Mediation and Arbitration**

- (1) In the event that the parties do not elect to mediate their disputes or arbitrate their disputes by way of private mediation and arbitration in terms of the previous section, then the following shall apply.
- (2) In the event of any dispute arising during the subsistence or otherwise or the termination of a religious marriage, prior to instituting legal proceedings, the parties must refer the dispute for mediation to a prescribed and accredited mediation council.
- (3) The mediation council must attempt to resolve the dispute by means of mediation within a period of 30 days from the date of the referral thereof and the parties may each be represented at the mediation proceedings by a representative of their choice.
- (4) The mediation council must upon resolution of the dispute, submit the mediation agreement to court, within 45 days and the court, must if satisfied, confirm the mediation agreement unless there is evidence that it is not binding under the religious system recognized by the parties.
- (5) In the event that a mediation fails, either party may have recourse to a court. The court hearing the matter may, if it is expedient to do so, direct that the parties resolve the dispute through arbitration and may for that purpose appoint an arbitrator to arbitrate such dispute in the event that the parties are not in agreement to that arbitrator's identity.

- (6) Any arbitrator appointed by the court to arbitrate that dispute must be qualified to resolve that dispute under the laws applicable to the religious system.

7. **Amendment of Laws**

The Acts specified in the Schedule are hereby amended to the extent set out in the third column of the Schedule.

8. **Short title and commencement**

This Act is called Recognition of Religious Marriages Act 20... And comes into operation on a date fixed by the President by proclamation in the Gazette.

SCHEDULE

The following Act is amended :

Arbitration Act 42 of 1965 Amendment of Section 2(a) by the introduction of the words
“unless the arbitration is concluded under the Recognition of Religious Marriages Act” after the
word ‘or any cause’ in subsection (a) so that the section reads **“reference to arbitration shall not be
permissible in respect of :**

- (a) **any matrimonial cause or any matter incidental to such cause unless such
arbitration is conducted in terms of the Recognition of Religious Marriages Act...”**

“B”

RE: MARRIAGE STATUTE SALRC extension of closing date for comment

Inbox

Van Wyk Pierre <PVanWyk@justice.gov.za>

Wed, Feb 24, 1:45 PM

to Ayesha, me

Dear Ms Patel

Thanks once again for the communication requesting extension of the losing date for comment on the SA Law Reform Commission's discussion paper 152.

We will issue a media statement in March 2021 announcing the extension of the closing date for comment until 17 May 2021.

Regards

Pierre van Wyk

From: Van Wyk Pierre

Sent: Wednesday, February 17, 2021 11:26 AM

To: 'Ayesha Allie-Patel' <aallie-patel@parliament.gov.za>

Cc: miran.yusuf@gmail.com

Subject: RE: MARRIAGE STATUTE

Dear Ms Patel

We appreciate the communication from Mr Hendricks and will revert.

We already anticipate that there will be more requests for extension of the closing date for comment.

Regards

Pierre van Wyk