



MARRIAGE BILL 2022 DOES NOT MEET CONCOURT ORDER

PRESENTATION TO POSTGRADUATE STUDENTS CONTEMPORARY ISLAMIC LAW ISLAMIC PEACE UNIVERSITY OF SA (IPSA) CAPE, TOWN

Introductory Remarks

Those 'Ulama (Religious) bodies, who condemned AL JAMA-AH for playing its role as a political party in Parliament, must re-examine their position, as their reaction was based on 'injustice.' AL JAMA-AH cannot be blamed for 'circulars' issued by government departments to comply with interim orders from the ConCourt; more so, after the conclusion of these court cases in which 'Ulama bodies, like the Mujlisul Ulema of SA (MUSA) and UUCSA (United Ulama Council of South Africa), participated.

AL JAMA-AH welcomes the invitation from IPSA lecturer (Dr. Shaykh M. Abduroaf) and his postgraduate students; it was asked to explain its stance on the government's Marriage Bill 2022. At the outset, the party categorically stated and reiterates that it rejects this Bill; and besides, it wishes to argue that it envisages the formation of a 'Bench of Qadis (Muslim Judges)' to deal with Muslim Personal Law (MPL) matters.

Citizens' Constitutional Rights

Every South African born on this soil has a right to be given 'an unabridged birth certificate' with the names and the 'dates of birth' of both parents included on it. When one travels overseas, many countries request 'an unabridged birth certificate;' a certificate that is recorded in the South African National Population Register in terms of the Population Register Act. It is the constitutional right of every South African to get 'an identity card' (ID), so too is it their right to be issued with a 'South African marriage certificate' after they have performed a *nikah* (marriage in accordance with Islamic Law [*Shari'ah*]).

DHA's Interim Arrangements

The Department of Home Affairs (DHA) has put in place interim arrangements in the form of an administrative structure as ordered by the ConCourt for Muslims who have performed a *nikah* to get

a valid 'South African (SA) marriage certificate.' The DHA issued a 'Circular 2/2023' (dated 27 July 2023) informing all departmental heads of the registration of the *nikah*. The '*nikah* certificate' can be presented to the front desk of any DHA office to be issued with a valid 'South African marriage certificate.' The Minister has saved Muslim couples up to R10,000 as they no longer need a marriage contract or a notarial deed after a *nikah*. All these will be processed over the counter at DHA offices. There will be a statutory form for couples to complete when choosing a marital proprietary regime.

Requirements to register one's *nikah* at any DHA office:

- Have a *nikah* certificate
- Show the ID cards of husband and wife;
- Both husband and wife must be present;
- If one lost one's *nikah* certificate and cannot get a copy, then one should get an affidavit from the police station; and
- The couple must state that they are in a *Shari'ah* marriage. They will then be given a form to choose their proprietary rights, which, according to the *Shari'ah*, is "out of community of property."

A *nikah* certificate can also be presented to change the entry on the death certificate posthumously from "never married" to "married." In the case of a spouse, who has died, the surviving spouse can still apply for a SA marriage certificate.

Not only did the non-recognition of Muslim marriages harm the women, but the policy also harmed the children born as they were seen as 'illegitimate' and several researchers described them as 'bastards.' The recognition of the *nikah* returns the dignity of Muslim wives who were labelled as 'whores,' as well as the children who were described as 'illegitimate.' It is important to have a SA marriage certificate as the marriage is registered and

recorded in the South African population register.

- It will show both male and female's marital status;
- In the case of the male, it will show each of his marriages;
- The population register will also show if there was a *talaq* (divorce);
- It will match the children with their respective fathers and mothers; and
- Register their deaths.

Benefits to register the *Nikah*:

- A South African marriage certificate will enable wives to get their proprietary rights in terms of the *Shari'ah*;
- Make it easier for the wife to claim maintenance from the father of their children;
- Access to the family advocate if there are disputes about family plans for children when their parents live apart;
- In the case of a spouse's death, the marriage certificate that now states married will assist the surviving spouse to get pension, UIF, Workmen's Compensation, and Provident Fund;
- It will, furthermore, be easier to transfer the house on the surviving spouse's name; transfer of accounts such as electricity and water;
- The Master of the High Court will find it easier to wind up the Estate; and
- Those working overseas will have no challenges with getting one's wife or husband to join as it will be easier for the Department of International Relations to "attest" the marriage certificate.

Government's Non-Compliant to the Marriage Bill 2022

Now that Circular No 2/2023 is in place enabling the *nikah* certificates to trigger a marriage certificate, we turn our attention to the Marriage Bill 2022. The Bill was put out for public comment by the cabinet and the deadline for comments has expired on 31 August 2023.

The AL JAMA-AH party has rejected the Bill because it is non-compliant with the ConCourt judgment that states an Islamic *Shari'ah* marriage is a valid South African

marriage, and that legislation must be put in place that will reflect this in 24 months. The proposed Marriage Bill 2022 does not have any reference to a *Shari'ah* marriage and the definition of a *Shari'ah* marriage, the heart of the judgment.

Strangely enough the advocate which represented MUSA and bodies associated with it in the ConCourt case as a 'friend of the Court' has come out on 27 August 2023 supporting the Bill because it does not have the words Islamic or Muslim in its title and content. Every other 'Ulama body has rejected the Bill. The *Majlis* publication has also rejected the Marriages Bill 2022.

AL JAMA-AH has the support of the government, the ANC, the DA, and other political parties for Hon Ganief Hendricks' Private Members' Bill (PMB) called the "Registration of Muslim Marriages Bill (RMMB) 2022." Clauses and provisions of this Bill are in the 'Circular 2/2023' (dated 27 July 2023); it will later be accommodated in legislation to comply with the ConCourt judgment and to be in line with the agreement; one that was reached between Hon. Hendricks and the Minister of Home Affairs.

It was agreed to withdraw the RMMB as (a) to avoid two bills being up for public participation, (b) to comply with the ConCourt judgment as that may create confusion; and (c) to include all the provisions as an interim arrangement in Circular 2/2023; these provisions will either be accommodated as an additional section in the Marriage Act 2022 or integrated in the clauses of this legislation.

It is likely that the government will not meet the court's deadline of 28 June 2024, and it will request an extension. The Marriage Act 2022 will most likely be passed only in the 7th Parliament in 2026; and the Circular 2/2023, which was issued by the Minister of Home Affairs, will continue to serve as an interim arrangement complying with the ConCourt judgment until 2026. So, there are interim arrangements for three years to

present *nikah* certificates for marriage certificates:

- AL JAMA-AH'S stance and vision for the way forward on matters relating to MPL is in line with IPSA Dr Shaykh Abdul Kariem Toffar's proposal to government as discussed in his doctorate thesis; and
- SALRC's chair, the late Chief Justice Ismail Mahomed said: "the only way forward for MPL is that matters and disputes in law be dealt with by a "Bench of Qadis."

AL JAMA-AH's Bench of Qadis PMB

Hon. Ganief Hendricks has submitted another PMB for a 'Bench of Qadis' (BoQ) in line with AL JAMA-AH'S stance and vision. The first steps for this Bill have been taken and the Speaker has allocated an advocate from Parliament's Legislative drafting team to assist Hon Hendricks. Determinations of the BoQ will be enforceable in terms of the Arbitration Act. After the BoQ is in place, Muslims who approach the courts for relief will be seen as turning their backs on the *Shariah*. AL JAMA-AH does not want *Shariah's* MPL matters to be dealt with in South African courts but prefers an Alternative Dispute Resolution structure (ADR) that is headed by a Benches of Qadis. AL JAMA-AH is not waiting for the finalization for legislation and will have the first BoQ in 2023 in place.

Party's Offices

Al jama-ah has a National hotline and will soon have advisory desks at selected Home Affairs offices, namely: Gauteng: New Government Building, Cnr Harrison and Plein Street, Newtown, JHB Western Cape: 2 Maynard Mall, 70 Main Rd, Wynberg and Alpha Street, Beacon Valley, Mitchells Plain KZN: Umgeni Rd, Durban Ethekwini For assistance contact Al Jama-ah's hotline number (021) 023 4424 **Visit our National Parliamentary offices:** Office 7, 1st floor, Howard Centre, Pinelands, Cape Town Corner Rose and Nirvana Drive ext 5, Lenasia, JHB Visit our other office in Umzinto, lot 290, Main rd