

The Next Step for Muslim Marriages

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On Wednesday April 30 Imams selected from the Kwa-Zulu Natal and Western Cape provinces graduated as marriage officers in a pilot project announced by the Department of Home Affairs. This is a significant development in the legal recognition of Muslim marriage, a process until now dominated by the Muslim Marriages Bill. Popular understanding is that Muslim marriages are henceforth recognised in South Africa. However, as the Ministry has announced: *“Muslim marriages conducted by these Imams will be recorded on the National Population Register, [and] thereby receive legal status and recognition afforded by the Constitution.”* (emphasis added).

While the announcement confirms government’s intent to regularise the Population Register, which requires an accurate reflection of the marital status of all citizens, the designation of Imams as marriage officers does not now confer legal recognition on all Muslim marriages, neither retroactively nor prospectively. Only Muslim marriages performed by an Imam designated as a marriage officer will have the status of a civil union and enjoy the associated legal protection and status.

Most religious marriages occur through a two stage process of solemnisation and registration. This has now been rolled into one process. All marriages solemnised by the Imams, whether via the Arabic formula required by Islamic law or otherwise, and provided the Imam complies with the prescriptions of the Marriage Act (25 of 1961), will be entered into the Population Register.

The announcement indicates a concerted effort by the Department of Home Affairs to promote the legal recognition of Muslim marriages. However, this facility is not wholly new. It has been available to Imams and other Muslims since the 1970 amendment of s30(1) of the Marriage Act, which allowed non-Christians to solemnise marriage using formulas from other traditions.



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with the prescribed formula;
Step 7 – 8: The Imam issues the marriage certificate and submits a copy of the Register to the Department of Home Affairs within three days.

Further points to bear in mind are that Imams designated as marriage officers may not perform a polygynous marriage. To do so will be in contravention of the Act. As in the past, second, third and fourth marriages performed by Imams will not be entered into the Population Register. These wives will also not have the protection granted to the first wife married by a designated marriage officer; this marriage alone will be afforded the appropriate civil protections and status.

Local Muslim theological practice is frequently biased against marriages in community of property. This will require that Imams counsel couples to enter into an antenuptial contract; how many working class prospective spouses are likely to invest their meagre salaries in notarising and registering an antenuptial contract prior to marriage remains to be seen.

In terms of larger questions of gender equality and administrative justice, this compulsory registration of a civil union will no doubt address many of the gross inequalities and hardships arising from non-recognition.



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While this development is no doubt a step in the right direction for South African Muslims, it is not without its challenges. The main challenge is in terms of the dissolution of these marriages. We cannot yet be sure how the relevant laws of divorce or dissolution by death might apply to these marriages. The civil law consequences attaching to the marriage will have the consequence that disputes arising and attaching to the marriage will be adjudicated by the courts in accordance with secular law but we cannot know how the Muslim spouses

will combine these processes with Islamic law requirements for dissolution of the religious aspects of their marriage.

Second, we are not certain how this process will intersect with the Muslim Marriages Bill whose many protagonists now feel marginalised. They have not been consulted in this latest process and many first came to know about it through recent media reports. According to Minister Chohan, however, once the Bill is enacted into law the “existence of a cohort of seasoned marriage officers who are Imams will serve to accelerate the implementation of the law”.

Third, female representation amongst the graduates is absent, yet Muslim women do solemnise marriages in South Africa.

A further significant challenge relates to compliance or the capacity of Imams designated as marriage officers to invest many hours in complying with the processes set for them without any remuneration for their time and efforts. A brief summary of this process is as follows:

- Step 1: The couple requests the Imam to perform a Muslim marriage. The Imam hosts an informal premarital consultation where the various matrimonial property regimes are explained, confirms the status of the couple to ensure, amongst other things, that this is not a polygynous union or one of convenience, that the parties are majors and/or their respective families have no objection to the union;
- Step 2 – 4: The couple may choose to negotiate an antenuptial contract which they must have notarised. The Imam verifies the documents provided, obtains identification details of the various parties, and sets a date to perform the Muslim marriage;
- Step 5 – 6: The Imam completes the Register, takes thumb prints, solemnises and then confirms the marriage in accordance

Parties will be afforded structured recourse with legal certainty in the event of disputes arising out of, *inter alia*, dissolution of marriages, maintenance claims, custody and access of minor children.

Most encouraging, however, is the emphasis this new approach might place on a marriage contract. The first consultation affords an opportunity for pre-marital counselling. Many young couples are found struggling in their marriages for the main reason that they failed to negotiate the proprietary and other terms of their marriage. Handled appropriately, and with advice from scholars trained in Islamic marriage and divorce law, couples may now negotiate empowering and protective property and rights regimes. ♦

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