

SUBMISSION

TO THE

S A LAW REFORM COMMISSION

PROJECT 144 – ISSUE PAPER 35

SINGLE MARRIAGE STATUTE

1 PROFILE OF THE UNITED ULAMA COUNCIL OF SOUTH AFRICA (UUCSA)

1.1 The United Ulama Council of South Africa (UUCSA) was founded in 1994 with the object of providing unified, credible and competent leadership on behalf of the major theological formations in South Africa. The advent of a new democratic dispensation created the need for a cohesive forum that would lend itself towards the preservation, promotion and protection of the distinct Muslim identity in South Africa. As a major initiative, it championed the cause for the recognition of Muslim personal law in South Africa. It interacted and cooperated closely with the South African Law Reform Project Committee 59, headed by Justice Mohammed Navsa. UUCSA had two members represented on the Project Committee 59. It has ever since engaged with various stakeholders including our former President Nelson Mandela and has played an active role in the quest of appropriate legislation.

2 FUNCTIONS

2.1 UUCSA is a voluntary association of Muslim theologian bodies, the members of which usually officiate at the various mosques under their jurisdiction. These mosques are usually attached to affiliated seminaries. UUCSA through its affiliates has been responsible for the solemnization and the provision of the marriage certificates of Muslim marriages. It is also responsible for mediating marital disputes with the view of effecting a reconciliation.

In the absence of such reconciliation, it has the necessary religious authority to pronounce on the dissolution of the marriage in the case of a dispute between the parties.

Members of UUCSA therefore are acutely aware of the social problems that arise from the non-recognition of Muslim marriages and have the necessary experience and expertise concerning the administration pertaining to Muslim marriages and the consequences flowing from such marriages.

2.2 The overarching functions of the affiliate bodies include:

- 2.2.1 Establishment and management of Islamic seminaries
- 2.2.2 Issuance of religious edicts
- 2.2.3 Welfare Services
- 2.2.4 Social Services
- 2.2.5 Marriage Counselling
- 2.2.6 Mediation and Arbitration Services
- 2.2.7 Liaison with national and provincial governmental structures
- 2.2.8 Regulation of Muslim dietary needs

3 COMPOSITION

3.1 The United Ulama Council of South Africa (UUCSA) is an umbrella body comprising of the major Muslim theological formations in South Africa. It comprises of the following nine affiliates:

3.1.1 Jamiatul Ulama South Africa – Established in 1923

3.1.2 Muslim Judicial Council of South Africa – Established in 1945

3.1.3 Jamiatul Ulama KZN – Established in 1955

3.1.4 Sunni Jamiatul Ulama of South Africa – Established in 1978

3.1.5 Sunni Ulama Council of South Africa – Established in 1992

3.1.6 Eastern Cape Islamic Congress – 1996

3.1.7 Council of Ulama Eastern Cape - 1999

3.1.8 Darul Ihsan Humanitarian Centre - 2000

3.1.9 Northern Cape Ulama Council –2005

4 REPRESENTATION

4.1 UUCSA is representative of and enjoys the confidence and support of the vast majority of the Muslim populace in South Africa. UUCSA represents approximately 1500 members made up mostly of Muslim scholars. Geographically, UUCSA represents all nine

provinces of South Africa. More specifically UUCSA through its affiliates represents approximately 400 Mosques and 200 educational institutes and religious seminaries in South Africa.

5 LEGAL RECOGNITION

5.1 Article 15 of the Constitution entrenches the right to freedom of conscience, religion, thought, belief and opinion. The Bill of Rights also gives recognition to such rights by empowering the legislator to pass legislation of general application recognising marriages of persons professing a particular religion. Implicit in such a constitutional imperative is:

- a) Recognition of faith based marriages and their consequences
- b) The need of the legislature to pass legislation of general application to give recognition to such constitutional provisions

5.2 Chapter 2 - Article 31 of the Bill of Rights also provides for the recognition of cultural, religious and linguistic communities and the right to enjoy their cultural practice, their religion and the use of their language or to form their own cultural, religious and linguistic associations.

5.3 Unlike other democratic countries where religious, personal and family law is accommodated albeit reluctantly, in South Africa such rights are championed as first generation rights. Any attempt at providing for the legal recognition of faith based

marriages and their consequences must therefore be viewed through this constitutional prism in order to give content to the constitutional imperative.

5.4 UUCSA, in principle supports the legal recognition of Muslim Marriages and their consequences. Legal recognition should however not be the proverbial Trojan horse used to 'make a break' with the past but will in effect change and adulterate what Muslims believe to be immutable. Muslims believe that certain laws pertaining to marriage and divorce are of Divine origin. Any change to an explicit text of Islamic Law is proscribed in the following words of the Quran: "And if any fail to judge by what God has revealed, they are indeed wrong doers" (Chapter 5, Verse 47).

5.5 This brings into focus one of the more vexing issues that fuelled opposition to previous attempts at seeking legal recognition of Muslim marriages more commonly known as the Muslim Marriage Bill (MMB) i.e. The question of doctrinal entanglement.

5.6 In *De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another* 2015 (1) SA 106 (SCA) at para 39 the SCA pointed out that: 'A court should only become involved in a dispute [involving religious doctrine] where it is strictly necessary for it to do so. Even then it should refrain from determining doctrinal issues in order to avoid entanglement.' It reasoned that 'a proper respect for freedom of religion precludes our courts from pronouncing on matters of religious doctrine.' The difficulty that comes with

adjudicating religious disputes was highlighted in *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC) at para 42 where Ngcobo J (as he then was) observed that: ‘Human beings may freely believe in what they cannot prove’ and that although ‘their beliefs are bizarre, illogical or irrational to others, or are incapable of scientific proof, [this] does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion’ and they ‘should not be put to the proof of their beliefs or faith.’ The doctrine also draws from the widely accepted principle that a state (and its organs) should be a-religious to ensure religious freedom and equality.

6 ISSUE PAPER 35

The Issue Paper proposes two options and raises a number of questions. It is extremely difficult to comment on the two options in the absence of conceptual clarity. The Issue Paper does not sufficiently elaborate on the nature and ambit of different chapters in the proposed omnibus statute.

7 SEPARATE ACT

7.1 We are in favour of an independent statute, which provides for the legal recognition of Muslim marriages and their consequences. The act should allow for compulsory mediation and voluntary arbitration. The statute should recognise the marriage as a legally

valid marriage including the consequences of that marriage as regulated by the tenets of religion with the right of parties to resort to mediation/arbitration.

7.2 In terms of Islamic Law a marriage between the spouses is a contract. In terms of South African Law any dispute arising from a contract, other than matrimonial and status disputes, can be the subject matter of arbitration, provided the parties agree thereto.

7.3 The Arbitration Act provides “For the settlement of disputes by arbitration tribunals in terms of a written arbitration agreement and for the enforcement of the awards of such arbitration tribunals”. The courts therefore will always have an oversight role in ensuring that the award made by the Arbitrator does not adversely affect the matrimonial causes and the status of the parties. Likewise the best interests of minor children are safeguarded through the provision of the Family Advocate reports to the court on the award pertaining to minor children before such award is confirmed by the court.

7.4 Arbitration is cheaper, speedier and more conducive to the settlement of acrimonious marital disputes in private. It lends itself to the fabric of the Muslim community where disputes are not generally ventilated in the atmosphere of the courts, with all its attendant drama and expose.

7.5 Needless to say that the court will still have an oversight role:

(a) As the upper guardian where minor children are involved, and

(b) To protect the status of persons

7.6 *Section 6 and 7 above serves as a response to and 1.51 raised in the Issue Paper.*

8 We have limited our responses to questions that are germane to our position.

Response to Questions:

8.1 Question 1.46: The Issue Paper points out that the SALRC “noted that despite the sound arguments in favour of a unified marriage law, a measure of dualism was inevitable, and a compromise on the issue of unification was required by ss 30 and 31 of the Bill of Rights.” We are of the view that the position remains unchanged; hence a unified marriage law remains untenable.

8.2 Question 1.47, 1.48, 1.49 and 1,50: We propose that different regulatory regimes for different forms of marriages should be maintained in South Africa. We have reservations regarding the proposed options; single or omnibus statutes for the following reasons:

8.2.1 It may result in diluting the distinct ethos of various matrimonial regimes

8.2.2 It may not adequately satisfy a first generation right as enshrined in Section

15 (3) (a) of the Constitution

- 8.2.3 A single statute would require a sufficiently pliant definition of marriage to accommodate a myriad of matrimonial regimes which will invariably create inherent practical difficulties
- 8.2.4 It may inadvertently lead to transmutation of religious law
- 8.2.5 Blending various legal systems in a synthetic code may result in a legal quagmire
- 8.3 Question 1.50: The Act should only cover marriages and not unmarried partnerships.
- 8.4 Question 1.51: The Act should only set out requirements for valid marriages and not unmarried partnerships.
- 8.5 Response to Question 2.3- “Muslim Marriage” means a marriage between a man and a woman contracted in accordance with Islamic law.
- 8.6 Response to question 2.4: Yes, each subsequent marriage should be regulated by a contract having due regard to the interests of all affected parties.
- 8.7 Response to question 2.5: Not germane to our response.
- 8.8 Response to Question 2.17 – There is a need to reform.
- 8.9 Response to Question 2.18 – Yes.
- 8.10 Response to Question 2.19 – Yes, we support the principle of informed consent.

8.11 Response to Question 2.20 - The concept of “mental capacity” is wide-ranging and difficult to determine. However, we are not opposed to this in principle and the concept of proxy marriages may provide relief in this regard.

8.12 Response to question 2.21: The validity of a subsequent marriage does not depend upon the permission of existing wife/wives in terms of Islamic law.

8.13 Response to Question 2.28: No

8.14 Response to Question 2.29: The act contemplated should make provision for exemptions, envisaged as follow: “The Cabinet member responsible for home affairs or any Muslim person or Muslim body authorised in writing thereto by him or her, may grant written permission to a person under the requisite age to conclude a Muslim marriage if the Cabinet member or the person or body in question considers the marriage to be desirable and in the interests of the parties in question. ...”

8.15 Response to Question 2.32, 2.33 and 2.34 - We are not in favour of “marriage licenses” due to the undue administrative burden on both the state and the populace. Over regulation may inadvertently lead to non-compliance.

8.16 Response to Question 2.41: Yes.

8.17 Response to Question 2.42: Yes.

8.18 Response to Question 2.43: Yes.

NB: Exemptions should be granted to marriage officers who wish not to solemnize and register certain types of marriages on religious grounds. Marriage officers should solemnize and register the marriages.

We are not against the current requirements as prescribed by the state. However, we propose marriage officers to be specific to different matrimonial regimes as this would obviate several moral and religious difficulties.

8.19 Response to Question 2.63 - Yes, provided we have the separate act as contemplated above.

8.20 Response to Question 2.64 - No, it should not impact on the validity of a marriage.

8.21 Response to Question 2.65 - The Marriage Officer's Certificate.

8.22 Response to Question 2.66 – This appears to be specific to issues related to customary marriages and we are, therefore, not in a position to comment.

8.23 Response to Question 2.67 – As per our response to question 2.66 above.

8.24 Response to Question 2.77 – We agree that the state should have no interest in how the religious or cultural rituals are conducted in a marriage ceremony. However, Muslim marriages are formulaic by definition and therefore, are closer to the Marriage Act of 1961's position.

8.25 Response to Question 2.78 -The formula we contemplate at the time of solemnization does give legal certainty to the marriage.

8.26 Response to Question 2.86 - A Muslim marriage is deemed to be a marriage out of community of property excluding the accrual system, unless the proprietary consequences governing the marriage are regulated by mutual agreement of the spouses.

8.27 Response to Question 2.87 – We do not support a single statute regulating the consequences of all marriages. The consequences of each matrimonial regime should be legislated independently.

8.28 Response to Question 2.88 – Marriage contracts should play a central role in regulating property regimes.

8.29 Response to Question 2.100 - In view of the fact that we do not support the regulation of unmarried partnerships the question is not germane to us.

8.30 Response to Question 2.101 – As per our response to question 2.100 above.

8.31 Response to Question 2.107 – Whilst we do not support a single marriage statute, we do however, support that provision should be made for conclusion, registration and enforcement of antenuptial agreements.

8.32 Response to Question 2.114 – UUCSA supports ongoing engagements with the SALRC for amendments to the Arbitration Act to allow for arbitration of family law matters.

8.33 Response to Question 2.120 – We are not in a position to comment on this, as this is a criminal matter and beyond our domain.

10 CONCLUSION

10.1 A pluralistic society such as ours which is both religious and culturally diverse can only flourish where all religions and cultures are accorded an equal measure of protection and recognition by the state. UUCSA is more than willing to engage in the process to ensure that such an ideal is accomplished.

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Secretary General

26 August 2019