

The Recognition of Muslim Marriages

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Are Muslim Marriages Recognised In South Africa?

Religious marriages, such as Muslim Marriages, have no legislative framework governing them. These religious marriages are not legally recognised as marriages. The consequence of this is that there are no legislative protections for persons married according to religious rites, which includes Muslim rites.

The delay in reform has prompted the WLC (and others) to litigate on these matters to extend benefits such as pensions, inheritance, and maintenance, to religious marriages. Over the past twenty years, WLC has made the government aware that the lack of legal recognition of Muslim marriages which has resulted in Muslim women being treated unfairly upon the dissolution of marriage. A process was started in 1996 by government to recognise Muslim marriages but came to a halt in 2012 after the Bill was published for comment.

What Relief Is The Women's Legal Centre Seeking From The Court?

WLC has launched an application in the Western Cape High Court in the public interest seeking relief aimed at providing women in Muslim marriages, and the children born of such marriages, with legal protections, primarily upon the dissolution of such marriages.

The relief is sought due to the continued failure on the part of government to fulfil the obligations imposed on it by the Constitution to recognise Muslim marriages as valid marriages for all purposes in South Africa, and to regulate the consequences of such recognition.



Why Is The Women's Legal Centre Bringing The Case To Court?

The non-recognition of Muslim marriages has far-reaching implications and consequences for women in Muslim marriages, as they do not have the protections offered to women in civil marriages. Religious and cultural tribunals or religious decision-making bodies that aim to assist women lack the enforcement powers to ensure rulings are implemented.



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Some Of The Issues That Continue To Impact Upon Muslim Women Includes:

- The right to be included as spouse/s in terms of the Wills Act upon repudiation of benefits by the beneficiary;
- Whether spouses in a Muslim marriage are entitled to a decree of divorce, transfer of assets, or to seek the forfeiture of the patrimonial benefits of the marriage in terms of the Divorce Act;
- The challenge of enforcing maintenance orders during and after divorce;
- Whether a wife and her children can claim the marital home registered in her husband's name upon divorce;
- Access to pension benefits of her husband on dissolution of the marriage.

In the meantime, women entering into Muslim marriages have not been able to enjoy the same rights and legal protection as those entering into civil marriages, customary marriages, or civil unions. The government's failure to introduce legislation to legally recognise Muslim marriages thus results in unfair discrimination against those who are a party to such marriages.

The WLC wants the government to address this unfair discrimination, and promote the right to equality.

Can Muslim Marriages Be Registered In Terms Of The Marriage Act, And What Are The Consequences Of Doing So?



The Marriage Act 25 of 1961 aims to set out the rules and regulations relevant to parties that enter into marriages and it affords parties rights and protections as spouses. Civil marriages are often entered into at religious structures i.e. temples, churches, etc., Home Affairs and places compliant in terms of the Act.



The Act defines marriage as a union between one man and one woman. Muslim parties can get married in terms of the Marriage Act. However, the Marriage Officer cannot register a polygynous marriage as polygynous marriages are not recognised by the Marriage Act, and thus cannot be registered. Therefore, in some instances, this registration is not possible.



Religious leaders, including Muslim clerics, are able to become marriage officers in terms of the Marriage Act, and to register Islamic marriages under the terms of this Act. At present more than 200 Muslim clergy are registered as marriage officers in South Africa. These Clergy can register marriages in terms of the Act. There are three types of marriages i.e. in community of property, out of community of property or out of community with accrual. All these types of marriages do not allow for polygynous marriages.



1

The right of a Muslim spouse(s) to **inherit from her deceased husband**

2

The right to **claim maintenance** as a surviving spouse, and the right to a duty of support

3

The right to **claim interim maintenance** pending divorce

4

In addition, certain legislation recognises partners to a Muslim marriage as spouses. Example, **Domestic Violence Act and Insolvency Act.**

Though the courts have removed some of the unconstitutional consequences against Muslim women on a piecemeal and limited basis, the default position remains one of exclusion and marginalisation. As many of the aforementioned issues have not yet been the subject of litigation or specific legislation, the law currently affords only limited recognition of Muslim marriages, and therefore only limited protection to spouses in Muslim marriages and the children born of such marriages. Thus there is a critical need for legislative recognition.

What Is The Effect Of Not Recognising Muslim Marriages?

By not recognising Muslim marriages under common law, Muslim women are not afforded legal protection and do not have access to the courts to assert their rights.

The inaccessibility to the courts means that those married as per Muslim law (Shari'ah law) must obtain divorces under Shari'ah law instead of through the court system. As a result, Muslim women have often found it exceptionally hard to obtain divorces. In addition, Shari'ah law often favours the male spouse in divorce proceedings. Therefore, Muslim women are vulnerable to being economically disadvantaged in the event of divorce.

Similarly, because the Marriage Act does not recognise polygynous marriages, in cases of death or divorce, it can be difficult for the female surviving spouses to access justice and a fair share of the marital assets. This unequal treatment under the law violates Muslim women's access to their constitutional rights.



Without legislation to protect Muslim women in marriage, the following constitutional rights are violated:



The Right to Equality:

"everyone is equal before the law and has the right to equal protection and benefit of the law"



The Right to Dignity:

"everyone has inherent dignity and the right to have their dignity respected and protected" – By treating women differently in Muslim marriages to those married in civil or customary marriages, the law perpetuates an idea that Muslim women are unworthy of the same protection



The Right to Freedom and Security:

"everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause" – Without legal recognition of their right to seek divorce, Muslim women can be trapped within unhappy marriages, being denied their freedom and autonomy under the law



The Right to Protection against Arbitrary Deprivation of Property:

"no law may permit arbitrary deprivation of property" – As a result of the lack of legal recognition Muslim husbands have the unilateral right to divorce, often exercised suddenly, wives are deprived of their maintenance as well as any money and property they contributed to the marriage.

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