THE MPL ISSUE

THE MUSLIM MARRIAGES BILL

A SCARY SCENARIO – NAIVETY AT ITS HIGHEST

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INTRODUCTION

In his article appearing in the ensuing pages, Maulana Ali Moosagie of the Islamic Research Academy of Cape Town, who also is a lecturer at the University of Cape Town, points out the grave dangers of the proposed MPL (Muslim Personal Law) bill or MMB (Muslim Marriages Bill).

Should the MMB ever be promulgated as law, subservience of the Shariah to the secular courts will be axiomatic. The courts are constrained to interpret any law in the light and ethos of the Constitution of the country. It is the ethos of the Constitution which will resolve any conflict – and there will be many – between the Shariah and the laws of the land. In this regard Maulana Moosagie says:

"In deciding any matter placed before the Supreme Court of Appeal or the Constitutional Court, judges are obliged to take into account those secular legal principles and values which transcend religion, race and gender. To expect these courts to jettison any of those fundamental principles in favour of any religious practice is naivety at its highest."

Once the MMB is adopted as law, the interpretation of any Shariah substance contained in such an Act will not be within the control of Muslims. It will be tantamount to handing over the Shariah to the secular courts for interpretation and decision. In this regard, Maulana Moosagie says:

"Muslims will lose control over how it will be interpreted by the Supreme Court of Appeal or the Constitutional Court. Moreover, whatever ruling is handed down by the High Court's becomes instantly applicable and binding upon all those who have opted for it. This is indeed a scary scenario."

It behoves the Ulama who are campaigning for the MMB to reflect and try to understand the disastrous consequences of the danger inherent in assigning the Shariah to secular court interpretation. Regarding the Ulama advocates of the bill, Maulana Moosagie says:

"The ulama who actively campaign for the adoption of the Bill can in no way guarantee that the Bill they now support in its current form will remain true to the values they infused into it."

Here it will be prudent to say that the Bill in its current form is already in glaring conflict with the Shariah. This conflict is even before it has been submitted to the secular courts for interpretation. The ultimate outcome is a truly 'scaring scenario'. The article, *THE LAW OF THE LAND WILL PREVAIL,* at the end of this booklet, confirms the 'scary scenario' envisaged by Maulana Moosagie.

Although Maulana Moosagie has furnished his article to the protagonists of the Bill, none of them has responded to his arguments. The protagonists of the MPL bill (MMB) have hitherto failed miserably to rationally respond to, or refute any of the Shar'i arguments which have been presented against the Kufr Bill.

Mujlisul Ulama of S.A.

The Muslim Marriage Bill: A Legal Quagmire?

The Interim and Final Constitutions, in guaranteeing freedom of religion, provided that the State may pass legislation recognising systems of personal and family law, but subject to the Constitution.

Under the new political dispensation, various endeavours on the part of the Muslim community to seek legal recognition of aspects of Muslim Personal Law, finally led to the establishment of a Project Committee of the South African Law Commission, in respect of its investigation into Islamic Marriages and Related Matters.

The sheer diversity of the Muslim community of South Africa, has complicated the introduction of any legislation aimed at giving legal status to Muslim Marriages. This diversity is clearly reflected in the varied expectation of the Muslim Marriage Bill.

In this article I explore the question of whether the proposed Muslim Marriage Bill (Bill) is able to accommodate the various competing expectations and whether it will be able to overcome the challenges it faces, given the supremacy and secular nature of the Constitution.

The quite distinct and sometimes, mutually exclusive set of expectations expressed by different groups, each seeking specific legislative guarantees and protective measures, has infused a measure of emotive rhetoric into an already charged issue. I have not focussed on the content of the proposed Bill for reasons that will become obvious.

I shall attempt to briefly sketch the aspirations and concerns of the major groups. I then proceed to examine whether the Bill will be able to satisfy such a diverse set of competing expectations. Secondly, I will argue that the current secular legal dispensation in which the Constitution reigns supreme, is not likely to condone some aspects of the proposed Bill nor is the Bill capable of satisfying such diverse expectations and deliver those guarantees. Provocative as it may sound, my exposition will argue that the Muslim Marriage Bill can potentially defeat the very objectives it was designed to achieve and ultimately become an instrument through which secular values could be grafted onto religious law. This article will attempt to demonstrate

the likelihood of this unintended scenario and to emphasize the imprudence of relying on the "guarantees" and "safeguards" drafted into the Bill.

The majority of those who have been vocal and active on the Muslim Personal Law scene could be placed into three distinct groups. Although all three groups share the desire for formal recognition of Muslim marriages, they have very different views on how best to achieve this vital recognition.

Each group entertains a different and sometimes mutually exclusive set of expectations, while seeking different legislative guarantees and protective measures.

The first group I refer to as "secular" Muslims. My use of the term "secular" may not be entirely technically correct, hence I will clarify it in some small detail. My use of the term "secular" is not used in any pejorative sense, merely as a descriptive term. This group will comprise of all those who firmly believe that the Constitution of South Africa is the supreme law and together with the Bill of Rights, must dictate and shape the ethos of all legislation. Any human right enshrined in the Constitution cannot be compromised in order to accommodate any religious dictate. Essentially, this group comprises of feminists and women's rights organizations seeking to ensure that the gender equality guaranteed by the Constitution, is incorporated in all legislation, including the Muslim Marriage Bill.

The second major group comprises of all those who are firmly opposed to the adoption and implementation of the Bill. Although the group of "secular" Muslims and this conservative group, both oppose the adoption of the proposed Bill, but for completely opposite reasons. Spearheading this group's opposition to the Bill, is the Majlisul Ulama of South Africa.

Since the ultra conservatives have concluded that the South African secular courts are not allowed to adjudicate matters pertaining to the *Shariah* they are firmly opposed to any attempt to have the proposed Bill approved. To them the matter is straight forward, i.e. the secular courts do not have the necessary expertise nor the investiture (*wilayah*) to adjudicate and rule on matters of the *Shariah*.

The third major group comprises of all those who in principal support the proposed Bill albeit with some reservations on some

aspects of the content of the Bill. Essentially, they favour its adoption and do not find any aspect sufficiently objectionable to abandon it. This group of protagonists is spearheaded by the United Ulama Council of South Africa (UUCSA)

The "Secular" Muslims

In seeking legislative redress for the enforcement of maintenance, termination of marriage, propriety and custody rights, the "secularists" have emphasized the supremacy of constitutional law over all other laws, be it religious or customary. They are unwilling to consider any exemptions. This point is clearly spelt out by the late gender activist, Shamima Shaik:

> Muslim personal law cannot be exempted from the Bill of Rights and be allowed to perpetuate inequalities. To even consider exempting any sector of society from being covered by the Bill of Rights is an injustice and makes a mockery of the Bill"

Where there exists a tension between women's equality rights and religious law, the former must be given preference. Constitutional supremacy is further illustrated:

> South Africa's courts have stressed that this history of discrimination and the push to remedy the real-world impact of such wrongs must inform any interpretation of the Constitution, especially the provisions on equality.

The "secularists" have argued that in adopting legislation to recognize Muslim marriages, balancing the rights of women and the rights of religious groups is at the heart of staying true to the Constitution and overcoming the history of discrimination. As indicated earlier, where fundamental rights collide, the equality of women must take precedence.

The "secularists" position is abundantly clear, and when it is applied to the proposed Muslim Marriage Bill, they tend to believe that aspects of its content would invariably clash with Constitutional rights.

> The violation of constitutional supremacy, violation of fundamental rights; affirmation of popular and customary views and beliefs on Islam such as 'polygamy is a man's right; and challenges to the authority of the secular courts due to the existence of a parallel judicial system based on Islamic Law.

Other areas of concern raised by the "secularists" include the stipulation of Muslim Judges and Muslim experts as assessors.

> It is argued that by creating special roles for Muslim judges and attorneys as judicial officers, the Bill "may convey existing distributional problems into the courtroom."

Since the Bill seeks to codify sections of Muslim Personal Law via legislation and via the jurisprudence of Muslim judges and assessors, the whole codification approach is questioned.

> Many problems arise from this [codification] approach. At one level the concerns raised over the codification of religious laws reflect a broader concern that practices of many religious laws, including Muslim Personal Laws, are biased against women.

For the "secularists", an even more serious problem is that it is believed that by formally codifying aspects of religious laws, the proposed Bill would confer state sanction on any underlying bias.

> Thus, the codification approach is problematic because it opens the door for the application of Muslim personal Laws in a manner that potentially violates many constitutional provisions.

In terms of Islamic Law the husband has greater freedom to terminate the marriage. Codifying the different types of divorce and their consequences is further proof of violation of gender equality.

> The Bill, in codifying different forms of divorce and post-divorce practices, openly spells out and formalizes inequality in the law by giving the husband greater freedom to end the marriage. This is a violation of both domestic and international laws. One example is a provision on divorce which prohibits remarriage, for a mandatory waiting of 130 days for a woman who is not pregnant and until the time of delivery for a woman who is pregnant (i.e. the *iddah* period).

The "secularists" are not satisfied that the proposed Bill will guarantee gender quality. They see the proposed Bill if adopted, as official sanction for gender inequality, based on religious doctrine.

The Protagonists of the Bill.

The main protagonist of the Bill have been the *ulama* bodies. It would be fairly accurate to say that the drafters of the Bill were in full and constant consultation with the *ulama* bodies.

Since a Muslim marriage is essentially regarded as an extension of a Muslim's religious life, traditionally its adjudication was solely left to the *ulama* who organized themselves into judicial bodies and tribunals. Without the support of the *ulama* bodies, the proposed Bill

will stand very little chance of gaining wide acceptance among the Muslim public. Let us proceed to analyse the major arguments forwarded by the "protagonists" of the Bill.

Non Enforceability of Rulings.

Among the most essential functions of the Muslim judicial bodies, is the task to adjudicate matters arising out of Muslim marriages. There are however, limitations on the effectiveness of such adjudication, for the implementation of its rulings and findings were not enforceable, owing to the fact that these organizations lack official state recognition and are devoid of legal power. Their rulings, under the current dispensation, cannot be legally enforced. Non enforceability has always been an intrinsic weakness in this form of adjudication. Hence, some *ulama* have been clamouring for official state recognition of the rulings of Muslim judicial bodies. This would enhance the entire adjudication process and could be extended to all areas like, child custody, maintenance, and all other propriety consequences of a divorce. Currently, these organizations and tribunals limit their adjudication to matters of divorce and *faskh* (judicial annulment of a marriage). All propriety disputes and child custody matters, are left to the secular courts, who have the necessary legal authority to rule and implement their verdicts. To garner support from the *ulama* bodies for a bill that would both recognize Muslim marriages and provide for the legal implementation of aspects of Muslim Personal Law was therefore not difficult. Through the implementation of the proposed Bill, most of the *ulama* bodies envisaged enforceable rulings based on Islamic Law. However, the *ulama* wanted firstly, to be actively involved in drafting the content of the Bill, for they regarded themselves as the only experts capable of interpreting Islamic Law as well as custodians of the Muslim community. One of the senior members of UUCSA, Mowlana Yusuf Patel writes:

> The United Ulama Council of South Africa (UUCSA) had after wide consultation with leading Ulama - both local and abroad - made substantive inputs regarding the proposed MMA. UUCSA at present holds the view that the MMA as a regulated system will best serve the interests of the Muslim community of South Africa.

The absence of legal authority to implement and enforce Islamic rulings, especially related to propriety settlements arising out of a Muslim divorce, has created the need for seeking secular legal intervention through the secular courts. Although the Muslim judicial bodies recognize the need for enforceable rulings on propriety maters, they are firmly opposed to the practice of seeking secular intervention. The adoption of the Bill would, accordingly, satisfy this need for enforceable rulings based on Islamic Law.

Arguing in favour of the Bill, *ulama* are united in their criticism of the current undesirable practice of referring marital disputes to secular courts, which results in unIslamic judicial precedents being handed down. This in turn could impact on all Muslims in similar situations, not only the litigants to the original dispute.

> A good example for the need of the MMA is Khan's Case where the court ruled that the second spouse in a polygamous marriage is entitled to maintenance in accordance with common law. This means that the courts have ruled for maintenance of the divorced wife to extend beyond the period of iddah which is clearly unislamic. In the case of Daniels the court ruled that she has the right to bring a claim of maintenance against the estate of her deceased husband under the Maintenance Act... which is again unislamic.

The fear that, in the absence of a regulated system of Muslim Personal Law, the secular courts would rule on religious maters guided purely by secular legal principles with disastrous consequences for the Muslim community.

> A distorted set of laws will eventually emerge governing our marriages. Our choice is to either have a regulated system which will be governed by the Muslim Marriages Act setting out the relevant Islamic Law or to have an unregulated system which allow courts to develop law pertaining to Muslim marriages on a haphazard basis with far reaching consequences for the whole community.

Generally, the *ulama* are united in their fear that, as custodians of the *Shariah*, their sole right to interpret Islamic Law is seriously compromised by the increasing practise of Muslims referring disputes arising out of their marriages to secular courts, whose rulings have significant legal ramifications for the Muslims at large. This has resulted in considerable disquiet among religious scholars.

Choosing the Lesser of the Two Harms

> The critical issue is whether an enforceable regulated statutory system will ensure that the bulk of the disputes in family matters will be resolved privately in a Shariah compliant manner, is better than the existing status quo, whereby Muslim disputes are resolved by courts, contrary to the Shariah. The Shariah principle, in the absence of an enforceable system of qada, that needs to be applied is the principle of the lesser of two harms, and whether the benefits of an enforceable statutory arrangement outweighs the harm.

A major argument forwarded by the protagonists of the proposed Bill is that in the absence of a *better* alternative, the legal principle of choosing the lesser of the two harms (evils) should be applied. The practice of Muslims seeking legal redress through the secular courts is condemned and regarded as unislamic. The adoption of the Bill will, accordingly obviate the need for such litigation, for the proposed Bill is viewed as "an enforceable regulated statutory system". The subtext of this argument is that, although the adoption of the Bill might not be ideal but, it certainly is less harmful than the alternative of seeking redress through the secular courts. Hence, the protagonists claim that currently there exists no better alternative to adopting the Bill in order to secure "Shariah compliant"redress for injustices suffered under the *status quo*. This assumption is based upon the notion that spouses, usually the wife is compelled to engage in lengthy and costly litigation to secure her rights which are unenforceable under the *status quo*.

Generally, there are three distinct areas of dispute that usually arise out of a Muslim divorce. Firstly, matters that are associated with the technicalities of the *talaq* and *faskh*. For expediency I refer to all such matters, e.g. wording of the *talaq*, its validity, the number of *talaqs, iddah*, grounds of a *faskh, nikah, mahr, nafaqah*, etc. as "religious matters".

The second area of dispute is related to the propriety consequences of a divorce. I refer to this as "material matters".

The last area of possible dispute is associated with child custody and access.

Under the *status quo*, "religious matters" are being handled by the respective religious judicial bodies. Although some judicial bodies have been accused of undue delaying the granting of *faskhs*, it must be

borne in mind that all judicial processes are usually very time consuming. These bodies have also been accused of being gender biased in favour of the husband. A petition for a *faskh* is by its very nature the result of the wife being unable to get a *talaq* from the husband, hence, it is usually a contested divorce which often complicates matters.

However, where the matter is not contested, like in the case of a missing husband, or a disinterested husband, the matter is finalised much quicker. Having said this, I am of the opinion that there is room for much needed improvement in this area. Judicial bodies need to employ more experts to relieve the huge backlog currently experienced by most judicial bodies. There is no pressing need to apply to any other official forum or secular court to resolve those "religious matters". Since they are strictly governed by the Shariah, the need to apply to the High Court for redress on "religious matters" has never been a practice of the Muslims. They are fairly satisfied to leave the adjudication of "religious matters" to the ulama who they regard as having the necessary qualifications, authority and competency to rule on the specifics of "religious matters" Neither has there been a need to "enforce" such ruling for they appeal to the moral conscience of Muslims and are widely accepted as authentic and are hardly ever challenged. On this score, the Bill will not enhance the adjudication process but will merely formalize it. It is fair to conclude that, the Muslim judicial bodies do not need a Bill or "an enforceable regulated statutory system" to authenticate or enforce their rulings on "religious matters".

The second area of dispute i.e. "material matters" (propriety consequences) of the divorce, is the root cause of virtually all litigation. Where there exists a propriety dispute between the divorced couple, the secular courts are inevitably asked to rule on the matter. The judicial bodies do not have the necessary legal authority to enforce their rulings on "material matters", hence, their rulings are ineffective. They argue that in the absence of a Bill, the secular courts have been fairly active on settling propriety claims according to secular legal tenets. A number of landmark rulings have emerged in the last few years. The question remains: under the Bill would the Supreme Court have reached a different verdict? Are the statutes in the

Bill sufficiently clear and above all, binding to the extent that deviation from them is not likely? Bearing in mind the latitude inherent in deciding propriety matters, it is unlikely that any set of religious values are binding on a secular court as will be clearly demonstrated in the many landmark rulings.

Essentially then, it is envisaged by the protagonists that the proposed Bill will "regulate" propriety and child custody disputes arising from a divorce. This begs the question: to what extent would the "Shariah compliant" regulations in the Bill escape secular scrutiny given the fact that there exists a marked difference in the propriety consequences of a Muslim marriage vis a vis a civil marriage?

The Matrimonial Property Act regulates the proprietary consequences of all civil marriages in South Africa. Matrimonial property regimes in South Africa are governed primarily by the Matrimonial Property Act, which recognises two forms of matrimonial property regimes: in community of property and out of community of property.

Unless the parties explicitly state otherwise by entering into an ante-nuptial agreement, all marriages are automatically in community of property.

Marriages in community of property are governed by sections 14-20 of The Matrimonial Property Act. In these marriages, the estates of the parties entering into the marriage are fused together and the spouses become co-owners of all their assets, those that were owned prior to the marriage as well as those they acquire afterwards. There are exceptions to this general rule and some property may continue to be owned by only one party (e.g. an inheritance received by one party).

There are three different types of out of community of property marriages:

• ***Out of community of property without the accrual system*** – under this regime, the parties remain in the same position as they were before the marriage. Each party keeps the property they owned prior to the marriage. Upon dissolution of marriage by divorce, the parties retain ownership of their separate estates.

• ***Out of community with accrual*** – this system is relatively new and was introduced by the Act, specifically to address gender disparity within marriage. Although during the subsistence of the marriage, the

parties retain separate ownership of their assets, when the marriage is dissolved by divorce, the spouses share in the growth of their estates.

• ***Out of community of property with the retention of community of profit or loss*** – under such a regime, the parties retain separate ownership of the assets they owned prior to the marriage. However, any assets that are acquired during the marriage are jointly owned by the parties.

In the case of the secular dispensation (civil marriages), when a partnership is ended, the act sets out the proprietary consequences:

• The court may order a partner to pay maintenance to the other partner and the act includes a list of factors that the court may take into account when determining whether to award maintenance - these include the contributions that each partner made to the partnership, the existing and prospective means of each partner, their ages, the duration of the partnership, and the standard of living prior to the end of the partnership;

• A surviving partner is entitled to claim maintenance from the deceased estate of a partner and is also entitled to inherit a spouse' share, if the deceased partner died without a will;

• The court can order a division of joint or separate property, if the parties cannot agree on division themselves. When making such an order, the court must order a division that is "just and equitable".

Under the proposed Bill Section 8 (1), all Muslim marriages will be out of community of property excluding the accrual system.

In terms of the Bill it will be the task of the courts to settle all propriety consequences and propriety disputes arising out of a divorce. Here the pertinent question arises: would the settlement in the case of a propriety dispute under the provisions of the Bill be any different to a settlement made under the provisions of a civil marriage concluded out of community of property, excluding the accrual system? Bearing in mind that the Matrimonial Property Act regulates the proprietary consequences of both marital regimes. In both cases, the burden rests on the claimant to persuade the divorce court that it is just and equitable for it to be awarded part of the disputed matrimonial property. The legal reasoning that underpins judicial discretion in settling propriety claims arising out of the termination of all officially recognized marriages must be rooted in secular standards of fairness

and cannot be "regulated" by religious dictates which are in some instances considered to be gender biased.

The secular courts are in no way bound to deliver verdicts that reflect religious doctrine. If a secular ruling happens to reflect religious sentiment, it was certainly not guided by it, hence, justification for it must be based on sound secular legal principles rather than religious doctrine. In the case of the Minister of Home Affairs v. Fourie and Another, the court declared:

> It is one thing for the court to acknowledge the important role that religion plays in our public life. It is another to use religious doctrine as a source for interpreting the Constitution.

The notion that by adopting of the proposed Bill, secular courts would be spared the need to engage in judicial activism, as disputes would be referred to Muslim judges and Muslim assessors, whose verdicts are governed by the Bill will be scrutinised in the light of the landmark ruling in the Gumede case.

The Gumede Case

It might be helpful to briefly analyse the justificatory force of Justice Moseneke's ruling in this landmark case. The ruling not only sheds light on the legal reasoning of the Constitutional Court but I believe, sets the legal tone for future cases involving the constitutional validity of certain customary and religious practices. It is argued that customary law is not that dissimilar to religious law and both will be subject to the legal ethos of the Constitutional Court. This is aptly summed up by Justice Moseneke:

> This case concerns a claim of unfair discrimination on the grounds of gender and race in relation to women who are married under customary law as codified in the province of KwaZulu-Natal. At one level, the case underlines the stubborn persistence of patriarchy and conversely, the vulnerability of many women during and upon termination of a customary marriage. At another level, the case poses intricate questions about the relative space occupied by pluralist legal systems under the umbrella of one supreme law, which lays down a common normative platform.

During the marriage, Mrs Gumede was not formally employed because her husband did not permit her to work. However, by whatever means she could garner, she maintained the family

household and was the primary caregiver to the children. She had no means to contribute towards the purchase of the common home. Her husband was working. Mrs Gumede states that over time the family acquired two homes. She approached the High Court with a view to procuring an order invalidating the statutory provisions that regulate the proprietary consequences of her marriage. The Recognition of Customary Marriages Act (Recognition Act) provides that the proprietary consequences of a customary marriage entered into before the commencement of the Recognition Act continue to be governed by customary law i.e. out of community of property. Basically she contested the constitutionality of provisions of:

a) Recognition of Customary Marriages Act

b) Section 20 of the KwaZulu Act on the Code of Zulu Law (KwaZulu Act). It provides that the family head is the owner of and has control over all family property in the family home.

c) Section 20 of the Natal Code of Zulu Law Natal Code. It provides that the family head is the owner of and has control over all family property in the family home.

d) Section 22 of the Natal Code. It provides that "inmates" of a kraal are in respect of all family matters under the control of and owe obedience to the family head.

Justice Moseneke agreed with the High Court's finding and ruled:

> The order of constitutional invalidity made by the High Court in relation to certain legislation (sections 7 (1) and (2) of the Recognition Act; section 20 of the KwaZulu Act; and sections 20 and 22 of the Natal Code) should be confirmed

What is of great importance here, is Justice Moseneke's outlining of the court's mandate to "adapt" customary law, not merely to interpret and apply it. Emphasizing this constitutional mandate, Justice Moseneke explains:

> Courts are required not only to apply customary law but also to develop it. Section 39(2) of the Constitution makes plain that when a court embarks on the adaptation of customary law it must promote the spirit, purport and objects of the Bill of Rights.

Again:

> The adaptation of customary law serves a number of important constitutional purposes. Firstly, this process would ensure that customary law, like statutory law or the common law, is brought into harmony with our supreme law and its values, and brought in line with international human rights standards. Secondly, the adaptation would salvage and free customary law from its stunted and deprived past. And lastly, it would fulfil and reaffirm the historically plural character of our legal system, which now sits under the umbrella of one controlling law – the Constitution.

Given the secular courts' constitutional mandate, it is not difficult to see why the Bill will not make any material difference. The deciding courts are obliged to deploy the same secular legal tenets to determine what constitutes a fair and just distribution of the disputed assets. "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

Once again I believe it is a combination of naivety and optimism to believe that the Bill will in any substantial way "regulate" the adjudication process sufficiently to comply with the dictates of the *Shariah*. Even in cases where the ruling of the court in the first instance was compatible with the *Shariah*, they could and I firmly believe they will inevitably be appealed, in which case they (rulings) will be subject to the scrutiny of a Bill of Rights espousing secular legal tenets. In the light of this, we are inclined to suggest the propriety consequences of a marriage concluded in terms of the Bill on the one hand, and a civil marriage in addition to the *nikah* on the other, will not be dissimilar.

It is our firm belief that the courts will deploy the same secular standards to both marital regimes. Seeking to "regulate" the propriety consequences of a Muslim Marriage concluded under the Bill purely by religious law (Shariah), will in our estimate, not get court approval or pass constitutional muster. Only if the regulations are Shariah and or Constitution compliant will they have any legal validity.

Voluntarism (Voluntary Consent)

The argument that since opting for the Bill is purely voluntary, it would stave off most constitutional challenges. This contention is

premised on the assumption that, since both parties have voluntarily opted to have the Bill apply to their union, they are legally and contractually bound by the terms of the Bill. This contention is not supported in Justice Moseneke's ruling. His ruling accepts that "Both consider themselves spouses in a customary marriage and bound by the codified customary law of KwaZulu-Natal". Despite the fact that both parties considered themselves "bound" by the codified law, it did not influence or weaken Mrs Gumede's case. The court was neither sympathetic nor persuaded by the fact that both parties considered themselves "bound" by customary law.

Reverting to the Status Quo

The protagonists have often deployed the "fallback" argument to strengthen their call for the adoption of the proposed Bill. This argument seeks justification in the belief that "if the Bill does not yield the desired result, Muslims can always fallback to the current status quo". This argument tends to overlook the danger of "irreversibility". Once the Bill is adopted and promulgated, it assumes a life of its own and regulates the marriages of all those who opted for it.

In the current legal dispensation, where rulings of a secular court were handed down in matters arising out of the propriety consequences of a Muslim marriage, those rulings are only legally binding on the litigants and not on the Muslims at large. A separate action must be brought each time an individual wants redress in terms of that ruling. On the contrary, if the Bill is promulgated and the Supreme Court of Appeal is asked to rule on a specific aspect of the Bill, its ruling will be automatically applicable to all those who opted for it.

Any undesirable interpretations and adaptations, as a result of judicial activism emanating from the Higher courts are legally binding on all those who opted for it. To expect the masses to relinquish the Bill once it has been "contaminated" by secular judicial activism and "fallback to the *status quo*" is an exercise in futile optimism. At best it is wishful thinking and at worst a gross distortion of reality.

Restricting Judicial Discretion through Codification

As much as it is the firm intention of the architects of the proposed Bill to restrict judicial discretion through codification, the problem arises when the matter is taken on appeal. Combining Muslim Personal Law content with secular court procedures is bound to create some tension especially in the area of judicial review.

An obvious feature of the proposed Bill is the extent to which it relies upon existing acts and legislation for the implementation of numerous vital aspects of religious law. It is claimed that reliance of existing acts and statues is confined to matters of procedure, but this is not entirely correct. Here are some examples of how heavily reliant is the Bill on existing legislation.

Section 9 (1) The provisions of section 2 of the Divorce Act shall apply. Also section 9 (6) The mediation in Certain Divorce Matters Act, 1987, (Act 24 of 1987) and sections 6 (1) and (2) of the Divorce Act relating to safeguarding the welfare of any minor or dependent child ...

Section 9 (7) A court granting or confirming a decree for the dissolution of a Muslim marriage - (a) has the powers contemplated in section 7(1), 7(7) and 7(8) of the Divorce Act and section 24(1) of the Matrimonial Property Act, 1984 (Act 88 of 1984).

Under Maintenance, section 12(1) The provisions of the Maintenance Act, 1998 (Act 99 of 1998) shall apply. Also section 12(4) A maintenance order made in terms of this act [Bill] may at any time be rescinded or varied or suspended by a [secular] court if the court finds that there is sufficient reason therefor.

These are but some examples of how reliant the proposed Bill is on existing acts and legislation.

The consequences of reliance may not be immediately perceived as a threat because ignorance of the specifics of those acts may have warded off any serious objections. The proposed Bill attempts to direct the appeal process by stipulating that written comment must be sought from two accredited Muslim institutions and that “due regard” be given to such written comment.

Firstly, any attempt to fetter the discretionary power of the Supreme Court of Appeal will not be acceptable for their deliberations are

profoundly shaped by the secular principles of fairness, equity and justice enshrined in the Constitution. Judges may not abandon them to accommodate any cultural or religious practice. In deciding any matter placed before the Supreme Court of Appeal or the Constitutional Court, judges are obliged to take into account those secular legal principles and values which transcend religion, race, and gender. To expect these courts to jettison any of those fundamental principles in favour of any religious practice is naivety at its highest.

Conclusion

In this brief exposition I have avoided the task of scrutinizing the content of the proposed Bill and opted to focus firstly, on the competing aspirations of those who have been active and vocal on the Muslim Personal Law front. I then proceeded to demonstrate the latent danger inherent in adopting a Bill based on religious doctrine requiring Constitutional approval and operating under the aegis of a secular judicial system.

The genuine fear of secular judicial interference in the religious affairs of the Muslims has spurred the push for the adoption of the Bill. In the aftermath of some landmark rulings such as the Daniels case that hold dire consequences for Muslims, the protagonists felt an urgent need to expedite the adoption of the proposed Bill. This article asserts that the very fear that drives the need for the adoption of the Bill, i.e. stemming the tide of judicial activism, if adopted, will invariably result in the opening of floodgates of secular judicial interpretations on matters that were previously the sole preserve of the *ulama*. This legal quagmire and its dire ramifications for Muslim Personal Law have unfortunately been overlooked or seriously underestimated by the protagonists of the proposed Bill. As stated above, once the Bill is adopted, promulgated and come into effect, it assumes a life of its own. At that stage it's beyond the control and influence of any person or institution. Effectively, Muslims will lose control over how it will be interpreted by the Supreme Court of Appeal or the Constitutional Court. Moreover, whatever ruling is handed down by the High Courts become instantly applicable and binding upon all those who have opted for it. This is indeed a scary scenario, for no person can possibly

predict what the ultimate Bill would be like after being subjected to numerous constitutional challenges and Supreme Court decisions. The *ulama* who actively campaign for the adoption of the Bill can in no way guarantee that the Bill they now support in its current form will remain true to the values they infused into it. The current proposed Bill even if it is adopted and promulgated, is nothing more than "work in progress", a beginning, a start and not a tried and tested piece of legislation. It is fair to predict that the Bill will have to face the Constitutional gauntlet and how it emerges from such an encounter will, I believe, not be very agreeable to the conservative component of the protagonists of the Bill.

Moreover, I am of the opinion that there exists a distinct potential for the Bill to become the ideal instrument through which modern secular precepts of gender equality, human rights and individual freedoms may be channelled. On this score, I believe the general supporters as well as the arch protagonists of the Bill, UUCSA, have overestimated the potential of the Bill to withstand the tide of judicial activism and provide the desired safeguards the protagonists are hoping for.

The strength of the protagonists' argument of "choosing the lesser of the two harms" is considerably weakened by their failure to conclusively demonstrate how the proposed Bill is able to overcome or withstand the application of the same secular legal standards applicable to civil marriages. Surely, they cannot possibly expect the courts to employ two different sets of legal standards; one set applicable to the Bill, the other to civil marriages. Based on the study of the justificatory force of Justice Moseneke's findings in the Gumede case, we are not convinced that the Bill is able to overcome inevitable judicial activism. The Gumede judgement poignantly adumbrates what we should expect when provisions of the Bill face constitutional challenges. Under the circumstances, adopting the Bill may not prove to be the "lesser of the two harms" but rather the direct opposite.

Nor have we found convincing legal grounds to support the belief that the adoption of the Bill will obviate or indeed minimize the current practice of referring disputes about "material matters" to secular courts. We have argued that most, if not all litigation is rooted in "material matters" arising out of the propriety consequences of a

divorce. We have further questioned the effectiveness of the Bill in settling propriety consequences, given the fact that Divorce Courts are obliged to consider secular principles enshrined in the Bill of Rights, which may conflict with provisions of religious law embodied in the Bill.. Moreover, we have argued that the distinction between the propriety consequences of a marriage concluded under the Bill and a civil marriage (out of community of property excluding the accrual system) is at most, blurred.

While there is still time for the protagonists of the proposed Bill, I would suggest they consider the proposed Bill not as an accomplished piece of legislation reflecting Islamic values, incorporating satisfactory guarantees, but ponder into the possible future legal ramifications that may ensue as a direct result of its promulgation, for then the process would be irreversible.

We emphasize that we are in agreement with the protagonists of the Bill that Muslim Marriages need official state recognition but we have expressed misgivings as to the route they are advocating to achieve this universal goal. The adoption of the Bill, in our estimate may have the perverse effect of compromising values the Bill was originally designed to safeguard. The protagonist bear the burden of convincing us to the contrary.

Mohammed Allie Moosagie
Academy of Islamic Research
15 June 2010

THE LAW OF THE LAND WILL PREVAIL

By **SIRAJ WAHAB | ARAB NEWS**

ALKHOBAR: A visiting lawyer from the south Indian state of Andhra Pradesh has called on Muslims to set up their own arbitration councils to resolve family disputes.

Speaking to a select group of expatriates in the Kingdom on Sunday, Mohammed Osman Shaheed, the additional public prosecutor at Andhra Pradesh High Court, said high courts and Supreme Court were no longer delivering judgments in the light of Muslim Personal Law.

"This law has been confined only to legal books ... it is no longer in application. The majority of All-Indian Muslim Personal Law Board officials, too, have accepted this stark fact," he said.

Elaborating his point, Osman Shaheed said: "For example, if you take a case of divorce to the High Court or the Supreme Court, they will clearly tell you that where there is a conflict between the Muslim Personal Law and the law of the land, then the law of the land will prevail. And in almost all cases since independence, the judgments have been delivered in contravention of the Muslim Personal Law."

The Muslim Personal Law is a popular name for an act of law that was promulgated by the British occupation forces in 1937. It was then called as the Shariat Application Act. It was meant to solve cases involving Muslims according to their law.

Osman Shaheed said the Indian law provides a better solution to get out of this sorry state of legal affairs for Muslims. "You can set up arbitration councils in your localities. This is perfectly legal."

According to Indian Arbitration Act, if there is a conflict between two parties then they can nominate a third person of their choice to adjudicate between them. This third person is known in legal parlance as the arbitrator. Based on the evidence at hand and based on his wisdom, the arbitrator will give his ruling.

"As per Article 38 of Indian Arbitration Act, the ruling of the arbitrator can be taken to the chief judge of the local court and can be converted into a legally binding decision for a nominal fee of 100 Indian rupees. This decision then becomes executable. Is this not a perfect solution?" asked Osman Shaheed. "There is no need to take

Muslim family disputes or land disputes or inheritance disputes to the court. You can solve them through local arbitration."

He said the Muslim Personal Board has also called for the setting up of Shariah courts in various cities. "However, when you say Shariah courts, it rings alarm bells among other sections of society and it unnecessarily creates an impression that Muslims do not believe in the law of the land and that they are trying to set up a parallel justice system. But when we set up arbitration councils, it is perfectly within the Indian legal parameters."

Osman Shaheed has set up an Andhra Pradesh State Muslim Forum to create awareness among the Indian Muslim community on this important legal aspect. "Interestingly, my suggestion is being vehemently opposed by my fellow lawyers. They think this will dry up their sources of livelihood. 'Where will we then get the cases from?' they ask."

Muslehuddin Ahmed, a Jeddah-based Indian expatriate, said he was highly impressed by Osman Shaheed's campaign. "He has focused on a very important issue and there needs to be sustained efforts to carry his message forward. There should be a healthy debate on this issue.

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THE MPL KUFR BILL, *REGISTER YOUR PROTEST!*

DEFEND ISLAM AGAINST THE ONSLAUGHT OF MPL KUFR! MPL – THE SUBTLE PLOT TO DISMANTLE THE SHARIAH! YOUR PROTEST IS A WAAJIB OBLIGATION!!!

Once again, the MPL CLIQUE – some modernist, misguided molvis and cardboard muftis – is plotting to resurrect the MPL Bill of kufr. It has been reported that soon the kufr bill will be submitted to the Cabinet for discussion.

The MPL Clique is labouring painfully to convey to the government the impression that they are representing the Muslims of South Africa and that the overwhelming majority of the community supports the MPL bill. It is imperative that this false notion be dispelled and the stand of the Muslim community be declared to the government.

It is the Waajib duty of the Ulama in particular, and of the Muslim masses in general to defend the immutable Shariah of Islam which was perfected and finalized more than fourteen centuries ago. This Divine Shariah has absolutely no scope for expansion, re-interpretation, interpolation and mutilation. The process of Shar'i evolution ended with the termination of Nubuwwat in the sacred Being of Rasulullah (sallallahu alayhi wasallam). But

this satanic clique steering the MPL bill of kufr is shamelessly and desperately labouring to overhaul the Shariah of Allah Azza Wa Jal to conform to western ideas of equality of the sexes, and to western concepts of marriage, divorce, etc.

WE CALL ON THE UMMAH TO REGISTER UNEQUIVOCAL OPPOSITION TO THE MPL KUFR BILL. IT IS THE INCUMBENT DUTY OF EVERY MUSLIM, MALE AND FEMALE, OF ALL PERSUASIONS, TO VOICE THEIR VEHEMENT DISSOCIATION FROM THE INIMICAL MPL BILL. MAKE IT KNOWN TO THE AUTHORITIES THAT MUSLIMS ARE NOT IN NEED OF ANY MPL MEASURE. ISLAM IS SUFFICIENT FOR US.

AS A MUSLIM CONCERNED WITH THE DEEN, YOU ARE REQUIRED TO DISCHARGE YOUR INCUMBENT OBLIGATION OF DEFENDING ISLAM BY WRITING A LETTER TO

THE MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT
Private Bag X276, Pretoria 0001
Fax: 021 467 1730
Tel : 021 357 8212 e-mail: minprivatesec@justice.gov.za

Your letter should embody the following facts:

(1) That you dissociate from the MPL bill
(2) The Muslim community is not in need of any MPL or any other similar bill/law
(3) That you are satisfied with the Divine Shariah
(4) That you fully support the Ulama who are against the MPL bill.

Besides these main points, add whatever else you deem appropriate to register your protest and dissociation from the bill.

Remember that you have a sacred duty to assist the action of defending the Deen. Be a participant in this sacred struggle and effort to defend Islam and to maintain the purity of its Shariah – that Shariah which was finalized and perfected by Rasulullah (sallallahu alayhi wasallam) and which has reached us intact in its form of pristine purity via the golden chain of the Sahaabah.

Understand well that the anti-MPL effort is a project in which every Muslim must join. You are required to devote only a few minutes to writing a very important letter for the sake of Allah's Deen. Forward your letter by post or by fax or by e-mail to the Minister of Justice. After despatching your letter, please send us a copy for our records.

It is important to send us a copy. We may require all letters of protest in the event legal action becomes necessary. We shall most certainly institute action in the Constitutional Court should there be an attempt to impose the MPL kufr bill on the Muslim community. The MPL bill is both constitutionally and religiously corrupt and untenable. It is open to attack from every angle, and almost all of its provisions are *rijs* and *kufr.*

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