

In the Name Of Allah, Almighty God, the Beneficent, the Merciful

31 May 2011

PRESIDENT JACOB ZUMA
Office of the Presidency

Private Bag X1000
Pretoria 0001

E-mail : president@po.gov.za

AND

The MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

Private Bag X 81
Pretoria 0001

Attention : Mr T N Matibe

Per Fax : 086 648 7766

E-mail : tmatibe@justice.gov.za

Dear Sirs

RE : THE PROPOSED MUSLIM MARRIAGES BILL (MMB)

1. This letter is signed on behalf of the undermentioned, who are amongst some of the senior Muftis, Islamic Scholars and academics teaching at various Darul Ulooms (Islamic institutions of higher learning similar to universities) and other similar Institutions.

Apart from the senior muftis at the Darul Ulooms, this letter is also signed on behalf of some of the other senior independent muftis involved in the giving of Islamic rulings on a daily basis to members of the Muslim community in and even from outside the country.

We are engaged in the academic study, research and teaching of the sources of Islamic Law ie., the Quran, the teachings of the Noble Prophet (peace be upon him) and the rulings of the schools of Islamic Jurisprudence as well as the Arabic language and Islamic history.

We are responsible for the training of Ulama (Muslim Scholars, Imams, Muftis and Academics) and the issuing of Islamic rulings for which the community seeks our guidance.

This letter represents the considered views of a substantial body of the leading and senior traditional Islamic academic opinion in the country. Due to time constraints we have not

canvassed the opinions of an even wider list of academics.

2. We would like to express our gratitude to our government for its sympathetic approach to accommodating the Muslim community in its family laws.

3. However we respectfully inform our Government that we strongly oppose the proposed Bill

The proposed Bill has been considered in its many draft forms including its latest one, and we are very strongly opposed to not only the said Bill, provisions of which we regard as being in conflict with the Shariah (Islamic Religious Law), but with the very concept of a Muslim Marriages Bill **which operates under a dominant Secular System.**

4. Alteration Of the Shariah to make it Consistent with our Constitution

4.1 We regard the principles of Islamic Law as sacrosanct and immutable as they have been given by Allah, God Almighty.

We know however that when a conflict arises between the Secular and the Islamic Laws, the law as envisaged in the proposed Muslim Marriages Act will be interpreted, changed and developed by the Constitutional Court, as indeed by all the lower courts, to conform to our country's Constitutional Imperatives.

Our Courts' approach to African Customary Law make it unambiguously clear how it will deal with any proposed Muslim Marriages Bill.

In the Gumede Case, Judge Moseneke had opined :

“ Courts are required not **only to apply customary law** but **also to develop it**. Section 39(2) of the Constitution makes it 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 “

“ The **adaptation of customary law**would **ensure** that customary lawis **brought into harmony with our supreme law and its values.....the adaptation would salvage and free customary law from its stunted and deprived past.** “

[The Annexure attached gives further examples of the approach of our courts]

Alteration, indeed contamination of the Shariah by our courts in developing what ostensibly would be made out to be Islamic Law (the proposed MMB and its development), would simply be unacceptable to the Muslim community.

4.2 This contamination and **altering of the Shariah** are **inevitable, not merely a possibility.**

4.3 Even if therefore every individual clause of the proposed MMB were to be compliant with Islamic Law (which most of them are not and which would be a contradiction in terms for the reasons given in this letter), we have a **fundamental objection** to the very idea of **any Muslim Personal Law Bill** which operates **under a dominant Secular System.**

4.4 In any case the draft **MMB** is already unacceptable merely for the reason that it **has already taken great liberties with Islamic Law** precisely and partly because the drafters of the Bill appear to have been anticipating future conflicts with our country's Constitution.

So even before the courts adapting and developing " Islamic Law " via a proposed MMB, the drafters of the MMB have already been tampering with and attempting to alter the sacred (to us Muslims) fourteen century corpus of Islamic Jurisprudence.

5. Islamic Law would deem as valid rulings in the name of the Shariah ***only if the judge of the court is a Muslim and an expert of the Shariah and has complete judicial autonomy to decide on a matter based only on Islam. And his rulings may not be the subject of an appeal to a higher Secular Court***

5.1 Muslims are required by the Shariah to obey the laws of of the country they live in and to accept the rulings of its courts.

5.2 However where the state promulgates a Bill to regulate the personal family laws of the Muslims specifically, then rulings in terms of such a statute would, according to Islamic Jurisprudence, have to meet certain conditions, interalia, Judicial Autonomy.

According to the consensus of classical Islamic Jurists, the rulings of a judge, even of a Muslim expert on Islamic Law, on matters such as marriage, divorce etc., in a situation where Muslims are a minority community and the law of the land is secular, are without any validity in so far as the religious consequences of his rulings are concerned, unless he has complete judicial autonomy from the state to consider only Islamic Law in coming to his judgements, independent of the constitution and secular laws of the country. *The decrees of such a Shariah court may not be the subject of appeal.*

5.3 In South Africa, a Muslim judge, when applying the proposed Muslim Marriages Act (assuming for a moment it does not have any provisions contrary to Islamic Law, which it does), will nevertheless, by law, have to take into account the Constitution of our country. Where his ruling, based on Islamic Law, is in conflict with the Constitution, he has to alter his " Islamic " ruling and give preference to and make it conform to the Constitution, which latter is supreme in South African Law.

5.4 As there clearly cannot be judicial autonomy, as defined above, in South Africa, the rulings of a judge in terms of the proposed MMB will have no Islamic Law consequences.

In other words in, for example, a ruling of divorce, while a divorce in terms of South African law with all its legal consequences would take place, the couple would still be regarded as married in terms of Islamic Law. Should a wife remarry another person merely on the basis of such a court divorce, this would be a major sin equal to adultery. The judge's decree of divorce, even when ruling in terms of the proposed MMB, would not be valid in terms of Islamic Law.

5.5 The proposed Bill therefore, on these grounds alone, is **an exercise in futility.**

6. The Prospect of a Secular Court holding forth and issuing " Fatwas " on matters of Islamic Law

6.1 We regard the very concept of a Muslim Personal Law Bill to be fundamentally flawed in that it is **anathema to us that a secular court**, schooled in secular legal traditions and duty bound to ultimately give effect to the Constitution of the country, should **give judgements on issues of Islamic Law.**

With respect, the prospect of a secular judge, opening the Noble Quran or one of the Classical Islamic Texts of Jurisprudence like " Hedaya " or " Sharhul Muhazzab " (texts of the Hanafi and Shafei schools of thought) and giving his interpretations and developing case law, guided as he has to be by our Constitution, all in the name of Islamic law, fills us with alarm and is simply unacceptable to the Muslim community.

The problem becomes even worse if and when, as is likely to happen, a matter goes on appeal to higher courts.

6.2 Technical Islamic Terms

Moreover the proposed MMB is liberally littered with technical terms and such as faskh ; talaq ; iddah etc. with a fourteen hundred year history of Islamic Jurisprudence by our great jurists of the different schools of interpretation behind these concepts.

With respect, how on earth is a secular judge, be he Muslim, no matter how intelligent and competent he is in our South African Law, but only superficially familiar with Islamic Legal Traditions, going to negotiate what will be for him / her a legal minefield. The idea is risible and absurd.

And **the resulting corpus of case law** given through " the prism of our Constitution' , while having some kind of " Islamic " name, will be **a veritable hybrid new 5th school of**

jurisprudence based on the “ ijtihad “ (new deduction) of our courts – competing with the four classical Islamic Schools of Interpretation.

6.3 **Judicial Entanglement**

This would also be **judicial entanglement** - in our religious law by the state - which most jurisdictions have been careful to avoid

(see " Constitutional Law, Analysis and Cases " by Prof. Z Motala and Mr C Ramaphosa, Oxford University Press 2002, chap. 12, sub-section on Freedom of Religion).

Judge Albie Sachs of the Constitutional Court has said in a Constitutional Court case [Minister of Home Affairs v Fourie] that “...judges would be placed in an intolerable situation if they are called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies. “

The late President of the Appeal Court, Justice Ismail Mohamed, acting as Senior Counsel on behalf of the Muslim community in a case in the Cape High Court many years ago, on a dispute as to who was a Muslim, had argued along the same lines - that **a secular court had simply no competence or jurisdiction in such a matter of Faith.**

6.4 In effect the proposed Bill means that the **State will be prescribing its understanding of Religion (Islam) on the Muslims.**

7. **The Idea of Muslim Judges and / or Assessors does not resolve the fundamental problems with the proposed Muslim Marriages Bill**

Even if the proposed Bill were to require Muslim judges to deal with matters related to the Bill (which the present version does not), it would not resolve at all the fundamental objections, detailed in this letter, which we have to any Muslim Marriages Bill.

a. **Any Muslim judge**, even if he is the most pious and Islamically learned Muslim in South Africa, would, if he is true to his oath of office, have to subsume Islamic Law and alter it to bring it in line with the Constitution where a conflict arises, as it most certainly will, between these two different systems.

b. And with respect, most South African Muslim judges have, as far as we are aware, a relatively cursory understanding of Islamic Law.

c. The idea of knowledgeable Muslim assessors as advisers also does not solve the problem. The judge has to make his own decision and will have to be guided by the Constitution.

d. And in any case this impractical proposal (in the South African context) of Muslims judges hearing MMB matters will definitely not apply when a matter goes on appeal to a higher court, such as the Supreme Court of Appeals and the Constitutional Court.

Then we would really be faced with the **absurd** prospect of secular judges with a relatively passing knowledge of Islam, let alone its Law, engaging in novel interpretations of Islamic Law or what is known as Ijtihad.

8. **The Misleading Impression that the Proposed Bill is Shariah**

The primary reasons for our opposition to the MMB - the conflicts with and likely alteration of the Shariah ; the giving of judgements and therefore developing a corpus of “ Islamic Law “ by a Secular Court etc. - are detailed in this letter.

The **Muslim nomenclature and Islamic terminology** employed in the Bill are and will therefore be highly misleading. The uneducated Muslim masses will incorrectly be made to believe that the provisions of the MMB and its development by our Courts, are and will be all Islamic and in conformity with the Shariah.

9. **The Proposed Bill will Impose a Plethora of Restrictions Not Applicable to other Citizens and Specifically Set Aside the Muslim Community for Discriminatory Treatment.**

The proposed Bill, with its plethora of regulations specific to the Muslim community, will be an imposition of entirely unnecessary **bureaucratic hardship and legal restrictions on Muslim marriages which Muslims have never had until now.**

And which regulations are not applicable to the other citizens of our country.

It is absurd that taking on a fleeting relationship, with a mistress or a homosexual partner would be easier than a traditionally solemnised Muslim marriage!

10. In view of all the above, we therefore, with respect, feel that **the imposition of any version of an MMB** will also be inconsistent with and in violation of the right to freedom of religion which the Constitution enshrines.

11. **Recognition by our Courts and the Registration of Marriages already satisfies the Objective of the Legal Recognition of Muslim Marriages.**

11.1 There is nothing to prevent Muslims from resorting to the secular law of our country

to gain recognition, neither Islamically nor legally.

- a. As for the ostensible objective of and need for the recognition of marriages solemnised according to Islam, our courts have in recent years already begun giving such recognition anyway.
- b. And in any case those Muslims who desire legal recognition for their " nikah " (a marriage solemnised according to Islamic rites usually in a mosque) are free to acquire this by simply registering their marriages, as all the citizens in the country can do.
- c. And by adopting the antenuptual contract with the exclusion of the accrual system, Muslims are able to obtain secular effect to and recognition for the propriety consequences of their " nikah " in line with Islamic law.
- d. And registration can easily be acquired by simply having the " nikah " performed by a licensed Muslim marriage officer.

11.2 Moreover Muslims are free to make wills to ensure their estates are wound up according to the Islamic Laws of Succession (which matter - of inheritance - the proposed Bill does not make provision for at all).

11.3 The **Bill is therefore unnecessary** to achieve the ostensible objective of and need for the **recognition of Muslim marriages**.

12. **A Simple Uncontroversial Proposal to Achieve Legal Recognition**

There is a misunderstanding that our opposition to the proposed Bill implies we are for some reason opposed to the recognition of Muslim marriages (Nikahs). This is absurd and nothing could be further from the truth.

Our view is that a specific Muslim Marriages Bill is neither necessary nor advisable for this.

All that is required - and we request the same of our government - is a single line amendment to our current secular marriage legislation recognising all Muslim marriages (Nikahs) solemnised in terms of Islamic Law, either on the basis of the antenuptual contract with the exclusion of the accrual system or with the parties being free to adopt a propriety regime of their choice.

Any case law which develops from such an amendment, while affecting Muslims, will nevertheless be part of the normal development of the corpus of our secular South African Law based on our country's Constitution. It will not be infringing on Islamic Law nor giving the misleading impression to any intelligent person that it is Islamic Law.

This is confirmed by the comment of Judge Nkabinde in the Hassam case in the

Constitutional Court : “ It should also be emphasised that this judgement does not purport to incorporate any aspect of Shariah law into South African law “

13. **The Protection of Women in Muslim Marriages.**

- a. The proponents of the Bill argue that it will serve to protect women. We believe that our secular laws already protect all women of the country. Whatever further protection that is required, is required by all women of the country ; and we are sure our Courts through the case law and our Legislature will provide the same.
- b. A specific MMB, incorporating substantive provisions of Divine Law, is misguided, and is neither needed nor advisable for this.
- c. Indeed, as we have pointed out, **our Courts have and are coming to the aid of women by recognising marriages**, including polygamous ones, **solemnised only under Islamic rites**.

14. **Religious Rulings by Traditional Committees of Scholars and other Responsible Persons**

14.1 As far as we are concerned **Muslims have two constitutionally given options.**

Those who wish their marital affairs, especially disputes, to be regulated by the Shariah, have the Shariah and can approach the traditional, non-judicial (having no force of law) committees of the Muslims. Muslims have for centuries turned to traditional Islamic community based committees to resolve marital disputes. And the law allows Muslims this freedom.

On the other hand, those who want to approach our secular courts are free to opt for the same. No one can deny them this constitutional right.

In view of these existing options, there is absolutely no need for a special MMB which will set the Muslim community aside for discriminatory treatment.

14.2 Individuals who are disinclined to accept the ruling of a traditional committee of the Muslims based on Islam would logically also not be inclined towards a ruling, ostensibly based on Islam (ie. the proposed MMB), in our secular courts !

14.3 **Non-Enforceable Rulings by these Traditional Committees**

- a. It is argued by proponents of the proposed Bill that **rulings by our traditional, Islamic committees** do not have the force of the law and **are not enforceable**. A recalcitrant spouse, usually the husband, can therefore simply ignore a ruling especially as

regards duties of maintenance etc.

This is however not a problem as at first it appears to be, as **such a recalcitrant spouse** faces the risk and **prospect of the matter going to our country's secular courts and having a similar enforceable ruling on his duty of maintenance imposed on him, or even a more onerous one ; and in addition incurring court costs.**

Such a prospect would serve to concentrate the mind of a recalcitrant spouse that abiding by the ruling of our traditional, Islamic committees would be the wiser choice.

b. In any case, while a ruling based on the proposed MMB would be enforceable, it would be based, not on true Islamic Law, but a hybrid, adulterated and tampered version of it – defeating the ostensible purpose of settling the marital disputes of Muslims on the basis of Islam !

c. **The mere non-enforceability of the rulings of our traditional Islamic committees** is therefore **not a good enough reason** for the passing of the proposed Bill, especially given the major, fundamental problems with it which we have set out in this letter.

15. The So-called Opt-out Provisions of the Proposed Bill

15.1 We respectfully point out that **we are opposed to this proposed Bill irrespective of the fact that it may have an opt-out provision** for Muslims who do not want to be governed by it. We regard the Bill as being in conflict with the Shariah and, being amongst those responsible to safeguard the Shariah, we therefore have a duty to oppose the Bill.

15.2 In any case any so - called opt-out option from the proposed Bill will, in practice, mean that the **majority of Muslims will forcibly be subject to the Bill by default**, unless they actively make the choice, within a prescribed period, to be excluded from it.

This is no choice at all and is in itself a violation of our right to freedom of religion. It discriminates against Muslims solely on the basis of religion.

15.3 Moreover those Muslims who do opt out from the Bill may suffer prejudice in cases where the recognition of their traditionally solemnised marriages is in question as the courts could ask why they had not opted for the application of the Bill if they wanted it to be recognised.

And the relief that in recent years our courts have already begun giving in recognising marriages solemnised according to Islam may also suffer negative consequences.

16. We understand that the previous State Law Advisor to our government, Mr Enver Daniels, was also of the view the proposed MMB was ill-advised, not least because of the strongly felt misgivings and substantial opposition from within the Muslim community.

And Prof. Z Motala (co-author with Cyril Ramaphosa of " Constitution Law "), is of the opinion that the proposed Bill is " **an unwise, improvident and questionable constitutional exercise** "

[see article by Prof. Z Motala " The Draft Bill on the Recognition of Muslim Marriages " in the " Comparative and International Law Journal of Southern Africa " Vol. 37 (2004) 331.]

17. **Negative Feelings and Constitutional Challenges**

We trust our government will not go ahead with this ill-advised, misguided Bill.

And avoid the unnecessary and inevitable constitutional challenges and negative feelings from the majority of our country's Muslim citizens - both should it do so and when the courts give such decisions as we feel tampers with Islam and which conflict with the Muslim Community's convictions and understanding of what our Faith is.

And Allah, Almighty God, knows best.

Kindly Acknowledge

Yours sincerely

Signed

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This letter is signed on behalf of and with the approval of the following senior and leading Ulama (Scholars) from Darul Ulooms and other Institutions, and some of the senior independent Muftis and Ulama of South Africa :

- 1) Darul Uloom Azaadville (Gauteng)
Moulana Abdul Hamid - Principal and Senior Prof. of Hadith
Mufti M. Saeed Motara - Chief Mufti and Senior Lecturer of Hadith
Mufti Masood Qaasim – Senior Mufti and Teacher of Hadith
- 2) Darul Uloom Newcastle (the first and oldest Darul Ulooms from which hundreds of Ulama have graduated)
Moulana Ismail Akoo – Senior Aalim and Principal
- 3) Moulana Ebrahim Adam (Western Cape)
Very Senior Aalim (Scholar) and Amir (Head) of Jamiat al Falaah Madaaris Cape Town
- 4) Darul Uloom Taalimuddin Isipingo Beach Durban
Mufti Ebrahim Salejee - Principal and Chief Mufti
Moulana Haroun Abasoomar - Senior Prof. of Hadith
- 5) Waterval Islamic Institute (Gauteng)
Moulana Ebrahim Mia, Head of one of the oldest academic institutions in SA and one of the most senior ulama in SA
- 6) Moulana Ahmad Sadiq Desai (Port Elizabeth)
Senior Aalim and leading Mufti ; Editor The Majlis : Author and Translator of Numerous Books on Islam
- 7) Jaamia Mahmoodia Springs (Gauteng)
Mufti Ismail Moosa – Senior Alim and Mufti and Principal of the Darul Uloom
- 8) Darul Uloom Inaamiya, Camperdown, KwaZulu Natal
Moulana M Madani - Principal
- 9) Mufti Abdul Jalil -
Senior Mufti and Senior Prof. of Hadith; Madressa Fatima Zahrah, Chatsworth KZN
- 10) Moulana Ali Adam al Nadwi
Senior Alim and educationist; Graduate of the famous Nadwatul Ulama, India; Head of the Islamiyyah College, Cape Town
- 11) Moulana Fakhir Abdullah Khatib - (Eastern Cape) Senior Aalim and teacher of Hadith, Darul Uloom Abu Bakr
- 12) Mufti Bashir Amod - (KZN) Senior Independent Mufti and Principal of Madressa

- 13) Moulana Abdul Haq Makada - (KZN) Senior Aalim (Scholar) and Principal
Madressa Moinuddin
- 14) Mufti Afzal Elias, (Gauteng) Senior Independent Mufti : author of over 200 books
on Islam
- 15) Moulana Moosa Akoodie (Gauteng) Senior Aalim Benoni Muslim Jamaat, Benoni
- 16) Moulana Cassim O.V. Mohammed, Senior Aalim and Principal of Madrasatul
Fuqara, Port Elizabeth
- 17) Moulana Goolam Sayed (Gauteng) Senior Aalim, Principal Miftah ul Uloom
- 18) Moulana M Salim Mangera – Senior Aalim and Principal Miftahuddin Islamic
Institute Heidedal, Bloemfontein
- 19) Mufti Seraj Desai - Senior Mufti and Principal Darul Uloom Eastern Cape
- 20) Mufti E. Salejee (KZN) Senior Independent Mufti, author of Books on Islamic Law
and Principal of Estcourt Islamic School
- 21) Mufti Hashim Muhammad Boda (Gauteng) Principal Madressa Ashraful Uloom,
De Deur
- 22) Moulana Abdul Rahman Khan - Senior Aalim and Head, Chatsworth Ulama
(Theologians) Council
- 23) Moulana Abdul Rahim Khan – Senior Alim and Academic, Durban
- 24) Moulana Abdul Kader Osman – Senior Aalim Pietermaritzberg
- 25) Moulana Saleem M Kareem Principal, Darul Quran Ladysmith
- 26) Moulana Abdul Rahim Khan - Principal, Darul Uloom Nomaania, Chatsworth.
- 27) Mufti Faiyazur Rahim – Senior Mufti and Principal Jamia Faizul Uloom
Durrnacol (KZN)
- 28) Mufti Muhammad Bhana - (Gauteng) Principal, Madrassa al Uloom
al Shariah Benoni

OUR COURTS' APPROACH TO AFRICAN CUSTOMARY LAW CLEARLY INDICATES WHAT ITS APPROACH WILL BE TO ANY MUSLIM MARRIAGES BILL

The fundamental concern is that the *Shariah* would be **altered and subsumed** as our **courts have an obligation to interpret any legislation “in a manner that promotes the spirit, purport and objects of the Bill of Rights.”** The Constitutional Court has in a litany of cases stated that it must interpret legislation so as to give effect to the foundational values and “to the specific provisions of the Bill of Rights which encompass them. Legislation must now be seen through the prism of the Constitution”.

In the following few examples the Constitutional Court is making it unambiguously clear that all laws have to comply with Constitutional values “in a way that conforms to the foundational values of the constitution.”

In DANIELS vs CAMPBELL NO and OTHERS 2004 (7) BCLR 735 (CC)

– PER NGCOBO J (now Chief Justice) on the: “Proper approach to legislative interpretation”

The learned Judge stated:

“Section 39 (2) of the Constitutionrequires courts when interpreting any legislation to “promote the spirit, purport and objects of the Bill of Rights.” Consistent with this interpretive injunction, where possible, **legislation must be read in a manner that gives effect to the values of our constitutional democracy.**

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“Courts are therefore under an obligation, where possible, to construe legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. The Bill of Rights is a cornerstone of our constitutional democracy. It “enshrines the rights of all people in our country” and affirms the foundational values of human dignity, equality and freedom. 52 Courts must give expression to these foundational values when construing any legislation. They must interpret legislation so as to give effect to encompass them. Legislation must now be seen through the prism of the

Constitution. *The Constitution provides the context within which all legislation must be understood and construed.*”

Page 755 of 2004 (7) BCLR 735 (CC)

“Our Constitution contemplates that there will be a coherent system of law built on the foundations of the Bill of Rights, **in which common law and indigenous law should be developed and legislation should be interpreted so as to be consistent with the Bill of Rights.**”

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“Pending the legislative recognition of **Islamic Law of Succession in a way that conforms to foundational values of the Constitution**, the applicant is **entitled to appropriate relief** dictated by section 38 of the Constitution. An order reading in appropriate words to that effect, precise and faithful to the legislative scheme of the Acts, would best vindicate the **applicant’s equality claim.**”

In the Gumede Case Judge Moseneke has said :

“ **Courts are required not only to apply customary law** but also **to develop it**. Section 39(2) of the Constitution makes it 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 “

“ The adaptation of customary law ...would ensure that customary lawis brought into harmony with our supreme law and its values.....**the adaptation would salvage and free customary law from its stunted and deprived past.** “