

# MUSLIM LAWYERS ASSOCIATION

IN RE:

**MUSLIM MARRIAGES BILL**

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## SUBMISSION PAPER

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### INTRODUCTION

1. Islam ordains a common code of Muslim personal law for all Muslims, irrespective of their race, nationality or domicile. A Muslim is thus not governed, by *lex domicilii*, that is, the law of the country of which he or she is a permanent resident or citizen. With regards to Muslim Personal Law, a Muslim is governed by the provisions of Islamic Law. The Prophet Muhammed (peace be upon him) is reported to have said, "Islam prevails and is not prevailed upon."
2. These submissions are made to the Minister of Justice and Constitutional Development in response to the Muslim Marriages Bill (the Bill)
3. It is not desirable to engage in a section by section analysis of the Bill in this paper. In order to sustain our arguments we have provided certain illustrative examples which are not exhaustive .We accordingly reserve our rights to supplement the grounds for our objection if this becomes necessary.
4. The Muslim Lawyers Association is fundamentally opposed to the Bill which in form appears to give effect to Islamic Law but in substance in fact alters it through impermissible State regulation.

5. We note that the latest draft of the Bill has been substantially altered from the previous draft (which was also unacceptable to us) in a manner which would be objectionable to many Muslims, even those that may have previously been willing to accept some form of statutory intervention. The alterations include *inter alia*:-
  - 5.1. removal of the requirement for Arbitration;
  - 5.2. the removal of the requirement that the judge presiding at the court of first instance be a Muslim judge (assisted by assessors);
  - 5.3. the removal of the requirement that the Appeal Court have regard to the opinion of senior Muslim scholars before making a decision on appeal;
  - 5.4. The reversal of the option to either opt in or out. I.e. the Bill now holds that EXISTING Muslim marriages are automatically subject to the Act unless both husband and wife have agreed to opt out.
  
6. We have fundamental conceptual difficulties with allowing Muslim Personal Law to be interpreted and applied by secular courts:
  - 6.1. **Firstly** we have a deep-seated difficulty with subjecting the Quraan to Constitutional analysis on the basis that the Constitution is, as we will demonstrate below, regarded by secular courts as superior to religious texts. This is an impossible compromise that Muslims would be making.
  - 6.2. **Secondly**, bearing in mind the existing hierarchy of the Judiciary, we have an elementary difficulty with allowing such analysis, which results in binding precedent, to take place by those that do not believe in it.
  - 6.3. **Thirdly** we know of no other religion that would be willing to subject its sacred texts to interpretation by those that do not believe in it.
  - 6.4. **Fourthly** we submit that any regulation of Muslim personal law in the present secular model of democracy using the banner of Islam is a misnomer. State regulation of the substantive Islamic law will

and must inevitably result in the transmogrification of the religion and the contamination of sacred principles. We caution against the creation of this ill as a direct consequence of seeking legislative intervention to cure other ills.

6.5. **Fifthly** we submit that the Bill is unconstitutional at its core. A secular - constitutional system should not be convoluted with a legislative framework of "so called" religious bills such as the MMB or for that matter with any other bill purporting to regulate any other religious domination, since such exercise serves to emasculate the ideal of a secular - constitutional state with a fundamental respect for religious rights and freedoms.

6.6. **Sixthly** we submit further that State regulation of *Fiqh* (Islamic Jurisprudence) may cause divisions and conflicts within the community and worse still, between Muslims and the State.

6.7. **Finally** we also submit that the present Bill breeds selective morality.

7. Legislation regulating religious matters is therefore wholly undesirable.

8. However, we recognise one exception which we submit does require legislative intervention: Legislative intervention that allows mediation and arbitration on religious issues is a complete solution to all the difficulties which we have identified by substantively regulating Muslim marriages and the consequences arising therefrom.

9. We commence our analysis by delineating the specific objectionable provisions. We then articulate in detail the seven broad grounds for our objection and why it is that the MLA opposes the Bill. We then go on to consider the counter arguments and our responses thereto. In the final section we motivate our case for arbitration.

## WHEN DOES THE ACT APPLY AND TO WHOM – APPLICATION DIFFICULTIES

10. The present Bill already contaminates and changes Islamic principles and exposes the misnomer of labelling the Bill, “Muslim Marriage Bill”.
11. The Bill, on our interpretation, would apply by compulsion in certain circumstances. These are:
  - 11.1. The Bill applies to all existing Muslim Marriages concluded before the commencement of the Act unless the parties jointly agree otherwise (section 2 (2)). It follows axiomatically that if one party does not consent to the non application of the Act, the Act will apply. Hence the provisions as to the registration of a Talaq and polygamy and Faskh will apply by compulsion in these circumstances even if one party believes that the provisions offend their religious principles. It is made a criminal offence if one party intentionally prevents another party from exercising any right under the Act and what may follow is imprisonment not exceeding a year (section 8 (12)). We find this objectionable for the following reasons:
    - 11.1.1. It denies the freedom of choice;
    - 11.1.2. It changes existing rights of the parties;
    - 11.1.3. It encourages conflict in the marriage.

*Scenario:*

*The parties are married prior to promulgation of the Act*

- *The Wife does not want the Act to apply to the marriage*
- *The Husband wants the Act to apply*
- *The Act in its current form therefore applies.*
- *This conflict has the potential to lead to the breakdown of marital harmony.*

- *Ironically, and to reflect the absurdity of the Act in its current form, should the Husband elect to divorce his wife arising out of this impasse his Talaq has to comply with the Act.*

11.2. For marriages that are concluded after the commencement of the Act, the parties have the right in terms of Section 2(1) to opt in. Assume that the parties in the first marriage have opted out. What happens if the Husband decides to take a second wife and she elects with her Husband to opt in? What is the status of the first wife? Is she, for the purposes of the Act, to be regarded as the first or second wife or a wife at all?

Furthermore, in the case where the parties in the first marriage have opted out, the parties in the second marriage would not be entitled to approach a marriage officer to conclude their marriage because in terms of Section 8(10) it is provided that *“No marriage officer may register a second or subsequent Muslim marriage, unless the husband provides the marriage officer with the order of the court granting the required approval in terms of sub-section 7.”* The husband will thus not be able to enter into a second marriage, as the law regulating his first marriage; will be regulated by common law. It is most unlikely that in the face of an Act of parliament providing for detailed regulation of polygamous marriages that a court of law would be prepared to develop the common law to recognise the second polygamous marriage which is contracted outside the ambit of a regulating statute. It would appear therefore that where a Muslim man opts out of the Act (which he can only do jointly with his wife) he is effectively barred from concluding a second marriage.

12. In Islam, women who are “people of the book” and who are married to Muslim men are bound by the Shariah. These women, in terms of the Act are not regulated as they are not Muslim as defined. How is the Legislature going to deal with this anomaly? In Muslim countries women who are, “people of the book” and who are married to Muslim men are bound by the Shariah.

## DEFINITIONAL PROBLEMS

13. There are a host of definitional problems. We point out two illustrative examples. There are a number of difficulties that arise from the definition of Muslim and Islamic law in the Bill, and consequently, its ambit over particular persons:

The Bill defines “ Muslim” as *“a person who believes in the oneness of Allah and who believes in the Holy Messenger Muhammad as the final prophet and who has faith in all the essentials of Islam (Daruriyyat Al-Din); ”*

- 13.1.1. Who is empowered to decide who is or is not a Muslim for the purposes of the Act?
- 13.1.2. Does the Act apply to someone who is merely Muslim in name, but is for example, not practising?
- 13.1.3. What does it mean to have “faith in the essentials of Islam”?
- 13.1.4. Will there be subjective inquiries on Islam by a Non-Muslim judge in this regard?
- 13.1.5. What of the different sects: will a Shia for instance have to register a “mutah’ as a second marriage?
- 13.1.6. Will sects such as the Qadiani’s be recognised as Muslim? See MOHAMED AND ANOTHER v JASSIEM 1996 (1) SA 673 (A)



- 13.1.7. Allah forbid, but if one gets married through Nikah and thereafter leaves Islam, since he or she is no longer “Muslim”, yet his or her marriage is recognised in terms of this “Act”, would he or she then be forced to comply with it?
  - 13.1.8. What about the general difference of opinion among the classical jurists in relation to Nikah. How will a court decide in matter where a Hanafi is married to a Shafee etc.?
  - 13.1.9. Will the courts thus be empowered to essentially practice Takfir where they deem it appropriate and/or necessary?
14. It appears that to avoid the application of the Act one would have to deny being Muslim
15. The Bill defines Islamic law as *“the law as derived from the Holy Quraan, the Sunnah (Prophetic Model), the consensus from Muslim jurist (IJMA) and analogical deductions based on the primary sources (QIYAS).”* This would mean that Non-Muslim judges would be entitled to make analogical deductions on Islamic Law and define what is the Sunnah? We object to this as this gives a blanket licence to secular Judges to make IJTihad.
16. Where there are differences of opinion between the four Sunni schools of thought, which one will override? A secular judge would be entitled to overrule one of the Imams. Moreover the secular judge can define what the Sunnah means and what the Quraan means. How are secular Judges going to interpret the Quraan without in depth knowledge of Arabic or Islamic Jurisprudence?

## UN-ISLAMIC PROVISIONS

17. Specifically we submit that the following provisions of the Bill are Un-Islamic:
  - 17.1. There is no Shariah basis and/or justification to obtain a cabinet minister's approval to contract a marriage where the spouses are under the age of 18. In Islam a person may be married once he or she reaches puberty. How can the State then call the bill a "Muslim Marriages bill"?
  - 17.2. There is no Shariah basis and/or justification for making the Bill applicable as a matter of law to the parties in existing Muslim marriages unless both agree otherwise.
  - 17.3. There is no Shariah basis and/or justification for a Non-Muslim to make binding rulings on a Muslim about the meaning of Quraan. Section 8 (7) (a) requires a court to determine if a husband is able to maintain justice between the spouses "*as is prescribed by the Holy Quraan,*" be "*satisfied that the husband is able to maintain his spouses equally as is prescribed by the Holy Quraan.*"
  - 17.4. Similarly a Non-Muslim Judge may issue a Faskh. This is fundamentally objectionable.
  - 17.5. On the face of it the Bill purports to stipulate that an irrevocable Talaq which has not been registered is none the less effective from the time of pronouncement. The efficacy however is substantially diluted or even contradicted by the provision entitling one party to confirm the Talaq in action proceedings after registration thereof. Pending the outcome of the action the court may provide for maintenance beyond the Iddah period (see section 9(3) (g)). Action proceedings may take years to finalize way beyond the Iddah period. The court is given the power in section 9 (8) to confirm a decree of Talaq. It may refuse to do so. The effective date of the Talaq is therefore unclear and the Bill is inherently contradictory.

- 17.6. There is no Shariah basis and/or justification for criminalising the failure to register a Talaq. (Section 9 (4)). This is simply unacceptable and un-Islamic.
- 17.7. There is no Shariah basis and/or justification to divide assets on dissolution in the absence of an agreement, as the proprietary consequence of a marriage in Islamic law is inherently Out of Community of Property. (See section 9 (8)).
- 17.8. There is no Shariah basis and/or justification for altering the proprietary consequences of a first marriage or for giving the court the power to terminate a matrimonial property system where a man takes a second wife (see section 8 (7) (b) which grants the court this power regardless of the contractual arrangement between the parties.
- 17.9. There is no Shariah basis and/or justification for making it a criminal offence not to get the permission of a court to enter into a polygamous marriage (section 8 (11)). This makes unlawful what the Quran makes lawful. It is simply unacceptable.

## **THE QURANIC PROHIBITION CONCERNING ALTERING THE LAW OF ALLAH**

18. The Bill discourages that which Allah has made lawful.
19. Thus the Prophet (peace is upon him) was commanded in Surah 66 verse 1:  
*“O Prophet! Why holdst thou to be forbidden that which Allah has made lawful to thee? Thou seekest to please thy consorts. But Allah is Oft Forgiving Most Merciful.”*
20. We refer to the following verses which sum up our difficulties far better than we can express:

*“2:2 (Y. Ali) This is the Book; in it is guidance sure, without doubt, to those who fear Allah.”*

*“2:176 (Y. Ali) (Their doom is) because Allah sent down the Book in truth but those who seek causes of dispute in the Book are in a schism Far (from the purpose).”*

*“6:34 (Y. Ali) Rejected were the apostles before thee: with patience and constancy they bore their rejection and their wrongs, until our aid did reach them: there is none that can alter the words (and decrees) of Allah. Already hast thou received some account of those apostles?”*

*“6:115 (Y. Ali) The word of thy Lord doth find its fulfilment in truth and in justice: None can change His words: for He is the one who heareth and knoweth all.”*

*“10:64 (Y. Ali) For them are glad tidings, in the life of the present and in the Hereafter; no change can there be in the words of Allah. This is indeed the supreme felicity.”*

*“17:77 (Y. Ali) (This was Our) way with the apostles We sent before thee: thou wilt find no change in Our ways.”*

*“18:27 (Y. Ali) And recite (and teach) what has been revealed to thee of the Book of thy Lord: none can change His Words, and none wilt thou find as a refuge other than Him.”*

*“33:62 (Y. Ali) (Such was) the practice (approved) of Allah among those who lived aforetime: No change wilt thou find in the practice (approved) of Allah.”*

## **Illustration**

Compare the wording of the Quraan on polygamy with the wording of the new bill. There are many differences.

It is impossible to ignore the text which embodies what is just already (and then follow the best meaning in it) and it is impossible to ignore the Quranic notion of consistent justice through time.

The wording of the Quraan does not support a requirement that court permission be obtained nor does it criminalise a polygamous marriage entered into without the permission of the court.

Justice is not judged prospectively as the Bill requires. The concept of justice is not looked at from the perspective of a materialistic secular outlook.

## **THE QURAAN:**

*4:3 And if have reason to fear that you might not act equitably towards orphans, then marry from among [other] women such as are lawful to you - [even] two, or three, or four: but if you have reason to fear that you might not be able to treat them with equal fairness, then [only] one - or [from among] those whom you rightfully possess. This will make it more likely that you will not deviate from the right course.*

*4:24 (Asad) And [forbidden to you are] all married women other than those whom you rightfully possess [through wedlock]: this is God's ordinance, binding upon you. But lawful to you are all [women] beyond these, for you to seek out, offering them of your possessions, taking them in honest wedlock, and not in fornication. And unto those with whom you desire to enjoy marriage, you shall give the dowers due to them; but you will incur no sin if, after [having agreed upon] this lawful due, you freely agree with one another upon anything [else]: behold, God is indeed all-knowing, wise.*

*4:129 (Asad) And it will not be within your power to treat your wives with equal fairness, however much you may desire it; and so, do not allow yourselves to incline towards one to the exclusion of the other, leaving her in a state, as it were, of having and not having a husband. But if you put things to rights and are conscious of Him - behold, God is indeed much-forgiving, a dispenser of grace.*

21. The ethos relating to proprietary consequences of a marriage as presented in the Bill is not compatible with Islamic values concerning rizq or sustenance. For example see the following *hadith* (prophetic teachings)

Sahih Bukhari- the book on Nikah-

*"Narrated Sahl bin Sad As-Sa'idi: A woman came to Allah's Apostle and said, "O Allah's Apostle! I have come to give you myself in marriage (without Mahr)." Allah's Apostle looked at her. He looked at her carefully and fixed his glance on her and then lowered his head. When the lady saw that he did not say anything, she sat down. A man from his companions got up and said, "O*

*Allah's Apostle! If you are not in need of her, then marry her to me." The Prophet said, "Have you got anything to offer?" The man said, "No, by Allah, O Allah's Apostle!" The Prophet said (to him), "Go to your family and see if you have something." The man went and returned, saying, "No, by Allah, I have not found anything." Allah's Apostle said, "(Go again) and look for something, even if it is an iron ring." He went again and returned, saying, "No, by Allah, O Allah's Apostle! I could not find even an iron ring, but this is my Izar (waist sheet)." He had no rida. He added, "I give half of it to her." Allah's Apostle said, "What will she do with your Izar? If you wear it, she will be naked, and if she wears it, you will be naked." So that man sat down for a long while and then got up (to depart). When Allah's Apostle saw him going, he ordered that he be called back. When he came, the Prophet said, "How much of the Quran do you know?" He said, "I know such Surah and such Surah," counting them. The Prophet said, "Do you know them by heart?" He replied, "Yes." The Prophet said, "Go, I marry her to you for that much of the Quran which you have."*

22. Abuses may be combated by enforcing justice as and when it is required and not by judging it prospectively as the Bill posits.

## **THE CASE AGAINST LEGISLATIVE INTERVENTION**

23. This discussion will take place within the context of the model for recognition proposed currently in the Bill.

### **Transmogrification and contamination generally**

24. The most profound argument against legislative intervention into Muslim personal law in a secular democracy is that it will inexorably lead to a

transmogrification of the Shari'ah and to a contamination of its sacred sources.

25. Transmogrification and contamination takes place in a number of fundamental ways, *inter alia*:

25.1. Firstly, there is a fundamental difference in the procedural law, including the law of evidence, between the secular and Islamic legal systems. The present model purports to apply Muslim personal law within a secular rather than an Islamic procedural system. It is axiomatic that if the law relating to the admissibility of evidence is different, as it clearly is, the result of its application would inevitably be different:

*“The British Government, after it seized power from Mughals, established its own courts, which also heard cases pertaining to Muslim marriage, divorce, inheritance etc. In most of these courts there were either British or non-Muslim judges who did not know Shari’ah law or if even Muslim judges heard these cases, most of them were trained in British laws.*

*What these judges did was to consult Hidayah, written by Mirghayani, a Hanafi scholar, and translated into English by Mr. Hamilton. Often they also consulted some Maulavi before delivering the judgment. Since the cases were heard in these British courts, the procedural law followed was English law and substantive law was based on Hidayah, it came to be known as Anglo-Mohammedan law.*



*The judgments in these cases delivered by higher courts became precedents for subsequent cases and thus whole corpus of law came into existence based on these judgments which came to be known as Anglo-Mohammedan law and renamed as Muslim personal law as calling it Anglo-Mohammedan law was now rather embarrassing. Thus to call it Shari'ah law would be a misnomer."*

*Why Codification of Muslim personal Law?*

*By Asghar Ali Engineer 02 May, 2009*

*Secular Perspective*

- 25.2. Secondly, as pointed out in the above quotation the idea that Non Muslim judges could interpret Quraan and Sunnah when they do not believe in it, which is foreign and impermissible in Islamic law and will inevitably lead to contamination of sacred principles. These judges with respect, do not know Arabic, do not understand the text of Quran and the sciences of *Hadith* (prophetic teachings) and are simply not qualified in the principles of USOOLUL FIQH (principles of Islamic Jurisprudence) to enable them to do what the Bill requires. A Qhadi's judgment is only acceptable if the Qadi is a Muslim, who is knowledgeable in Quran and *Hadith*. There are no secular Judges in South Africa that we are aware of, who have any Islamic law training and even those Muslim judges, to our knowledge, that serve in the Judiciary, face this fundamental problem. This idea will not find favour with most Muslims.

- 25.3. While it is recognised that some in the Muslim community favour the Bill it must be pointed out that the State does not intervene in this manner in other religions and should not so intervene in the Muslim faith. The results will not be accepted by the Muslim community and the potential for future conflict is inevitable and foreseeable. Hence for example what will happen if the court, in a case where a Non-Muslim judge, issues a Faskh and the husband believes that the marriage is still binding under Islamic law? Or what happens if the court overrules the issuing of a Talaq? Or what will happen if under Islamic law the Talaq is valid but under section 9(3) the court obliges the man to maintain the woman beyond the iddah period where the Talaq is disputed?
- 25.4. State Regulation in the name of Islam which leads to un-Islamic consequences is insincere and un-Islamic.
- 25.5. Muslims are not allowed to make unlawful what is lawful.

### **Transmogrification through Constitutional Attacks**

26. The Bill of Rights is the supreme law of the land. All laws must be interpreted in accordance with the values in the Bill of rights. It is inevitable that changes to the substantive *Fiqh* must occur either within the context of the initial legislation or through subsequent attacks concerning its Constitutionality or through subsequent secular judicial interpretation.
27. The resulting jurisprudence is not Islamic but secular.

28. The change to Islamic law ironically will be done under the banner of an Act of Parliament that purports to recognise Muslim Personal Law when in truth it seeks to change it.
29. There is an inherent risk that the Shari'ah will be altered to bring it in line with the Constitution but under the name of Islam. This is precisely what has happened to African customary law already. It has been contaminated with secular principles.

See:

- *BHE and others v the Magistrate Khayelitsha and others 2005 (1) BCLR 1 (CC)*.

- *Bannatyne v Bannatyne and Another 2003 (2) BCLR 111 (CC)*

- *Shilubana and others v Nwamitwa and others 2008 (9) BCLR 914 (CC)*

30. Transmogrification and contamination of Islamic law using the Constitution is unavoidable.

- 30.1. To take one example, under the present model the husband has a right to exercise Talaq on broader grounds than the wife has to obtain a Faskh. This violates the right to equality and indeed international conventions such as the Convention on the Elimination of All Forms of Discrimination against Women, which for example, allows the spouses freely to dissolve the marriage on the same grounds. In order to read the legislation and interpret it in accordance with the Constitution a court may well be obliged to broaden the grounds for a *Faskh* beyond levels acceptable to certain Muslims who hold divergent but sincerely held views.

- 30.2. To take a more extreme example to illustrate the point - The right of a man to take a second wife exists under the Bill but is restricted. However, women have no such rights at all. Again, the Bill is

subject to attack on the grounds of the equality clause of the Constitution. To bring about equality polygamy will have to be abolished or both sexes would have to be given the same rights.

30.3. Then again, women do not have the right to automatically issue a Talaq but men do. This too, violates the equality clause and it is impossible to remedy this without giving women the exact same procedural rights to divorce.

30.4. It is not unforeseeable that a Gay couple claiming that they satisfy the definition of a Muslim, may approach a court to declare the Act unconstitutional for not recognizing their marriage. It is not unforeseeable for such a couple to produce so-called expert witnesses to justify their position.

### **THE BILL IS IN FACT UNCONSTITUTIONAL AT ITS CORE**

31. Within the secular – Constitutional system, all persons and citizens should be allowed to practice their religious rights freely without hindrance, fear or favour. It is submitted that the Bill serves to hinder a person's Constitutional religious rights.

32. It has been argued that recognition gives effect to the provisions of section 15(3) (a) of the Constitution which provides that

*“This section does not prevent legislation recognising –*

*(i) marriages concluded under any tradition, or a system of religious, personal or family law:”*

33. There are three fundamental difficulties with invoking section 15(3) in the context of the present model.

33.1. Firstly, the present model does more than recognise Shariah. It transmogrifies it and contaminates it. The model goes beyond what is mandated, namely “recognition”.

33.2. Secondly, section 15(3) is qualified by sub-section (b) which provides that:

*“Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.”*

Hence, the Bill is not protected from any Constitutional provision which it is likely to threaten.

33.3 Thirdly from a Constitutional point of view, the legislature will be forced to choose one personal law system even though there are differences of opinion between the four schools of *Fiqh* on a variety of matters governing Muslim personal law.

34. Inevitably, the model that is chosen will be subject to the criticism that it does not represent the religious law accurately. It is simply undesirable for the State to decide what is part of a religion and what is not, and it is also undesirable that the State should take the side of one party over another. It is submitted that by doing so, the State infringes upon the religious rights of those that do not accept the legislative model.

35. We concur with the views of Professor Z Motala in his paper entitled *“Discussion Paper: Proposal for Muslim Personal Law, June 2005”*. As is pointed out *“The power and duty to allow communities to practice their religion should not be understood as the power to prescribe religion. In other words, the State (be it the Legislature, the Executive or the Courts) should not enter the religious thicket by making pronouncements on what constitutes proper religious doctrine.”*

36. In a further paper prepared by Professor Motala headed "*Religion and the state, the case against the Muslim personal law Bill*", Professor Motala correctly points out that if the Bill becomes law "*the judges are unlikely to be the more revered of deities. Religious doctrines brim with complexities, uncertainties and very different disciplining rules and procedures which their interpretive communities follow judges usually do not have insight into religions.....developing religious law against the ethos and values of the constitution is unlikely to resonate well among the religious group affected and is bound to inflame sectarian differences as exemplified from the experiences in India.*"
37. Hence courts have expressed reluctance to get involved in general doctrinal differences within religions. For the same reasons legislation is problematic.

*Worcester Muslim Jamaa v Valley and Others, 2002 (6) BCLR 591 (C)*

38. The present Bill is discriminatory, and will be, in whatever form it is imposed, because of the Hobson's choice involved. The legislature either imposes its provisions unless the parties contract out or does not impose it unless the parties agree. In either case it is open to Constitutional attack as we shall demonstrate with reference to the existing model which inexplicably tries to do both.
39. The existing model is discriminatory and subject to Constitutional attack because:
- 39.1. Its provisions apply by compulsion to existing Muslim marriages unless both parties jointly contract out. (see section 2 (2)).

39.2. By contrast the Bill does not apply as a matter of law to marriages concluded after its commencement unless the parties agree to opt in. It is discriminatory on an arbitrary ground.

40. This is the Hobson's choice:

40.1. As stated above in the first scenario it is conceivable that it may be argued by one spouse that the Bill offends his or her freedom of choice and freedom of religion and is therefore unconstitutional. As pointed out earlier, this forces the party into a regime which he or she may believe is Un-Islamic as it selects one model or viewpoint of Islamic law. This violates freedom of choice and freedom of religion.

40.2. In the second scenario, it is conceivable that it may be argued by a wife in a Muslim marriage concluded after the commencement of the Act, that she had no bargaining power in a patriarchal society to force her husband to agree to the provisions of the Act and that the legislature should have made the provisions of the Act compulsory to all Muslim marriages after the commencement of the Act unless agreed otherwise in order to protect her in the same way as a wife who was party to an existing Islamic marriage prior to the commencement of the Act. She may point out that the one who is automatically protected enjoyed the right to obtain a Faskh by a court or to object to a second wife (if the Bill's provisions are not read as already applying to both) or the right to obtain maintenance *pendente lite* after the iddah period, where the Talaq is in dispute.

40.3. Free choice arguments will inevitably be problematic in the face of arguments that women have no bargaining power in a male dominated society where patriarchal values are practised.

- *Masiya v Director of Public Prosecutions (Pretoria) and Others 2007 (8) BCLR 827 (CC)*,

- *Kooverjee v Kooverjee* [2006] JOL 17320 (C):

*“11.2.10 Substantive equality was also discussed by Langa DCJ (as he then was) in BHE & others v Magistrate, Khayelitsha, & others (Commission for Gender Equality as amicus curiae); Shibi v Sithole & others; SA Human Rights Commission & another v President of RSA & another:*

*"Not only is the achievement of equality one of the founding values of the constitution, section 9 of the Constitution also guarantees the achievement of substantive equality to ensure that the opportunity to enjoy the benefits of an egalitarian and non-sexist society is available to all, including those who have been subjected to unfair discrimination in the past."*

*11.2.11 When this Court therefore considers the earning capacity of the two parties, the "emancipation of women" is a very important factor.*

## **POTENTIAL TENSIONS**

41. The introduction of the Bill will inevitably cause divisions within the Muslim Ummah. It has already.
42. The proposed Bill has already set the stage for tension and division within the Muslim community.
43. The State implicates itself in such divisions when it chooses one view of the *Fiqh* over another.
44. Tensions may escalate between the State and Muslims in future. Three examples suffice:



- 44.1. Firstly, earlier drafts attempted, insufficiently and impossibly we submit, to accommodate the concern that non-Muslims may not issue Islamic rulings under Shariah. These insufficient attempts to accommodate these concerns have altogether been removed and the present Bill simply makes no accommodation for these concerns. What happens if the rulings of judges' conflict with the opinion of leading Muslim scholars in the community whose opinions are accepted?
- 44.2. Secondly, the Bill for example allows for litigation over the issue of polygamy. Assume that the husband is denied permission because his first wife opposes the court case. Litigation is inherently conflict driven. Will the first wife who so wished to keep her husband to herself still be married after the husband has heard the submissions of her advocate? Litigation forces one to lay open in court matters of a personal and private nature. In this example too, as in every other case where the permission is denied, the law has in effect denied polygamy. In fact the process of seeking permission may have this very consequence.
- 44.3. The Bill stipulates that (Section 9 (3) (e)): *"A spouse must, within 14 days, as from the date of the registration of the irrevocable Talaq, institute an action in a competent court for a decree confirming the dissolution of the marriage by way of Talaq..."* What happens if the court refuses to confirm the Talaq and the religious convictions of one of the parties and/or their family regards the marriage as having ended? This is a foreseeable problem especially in the case of three Talaqs in one sitting, a highly contentious issue in the Muslim world where there are different viewpoints.
- 44.4. In terms of the provisions of clause 8 (4) *"In the case of a husband who is a spouse in more than one Muslim marriage, all persons having a sufficient interest in the matter, and in particular the husband's existing spouse must be joined in the proceedings."*

These are clearly hidden mechanisms to prohibit polygamy. Who are the people to be joined? Does it include the children, creditors and in-laws?

## **SELECTIVE MORALITY AND JUSTICE**

45. If a man, for example, takes a second wife without the permission of the court he may be tried as a criminal and fined, but if he takes a mistress and commits adultery the law safeguards him.
46. This brings us to another fundamental problem inherent in substantive regulation.
47. We are forced to be selective about what and how to regulate. Hence polygamy is regulated but adultery and fornication is not. Maintenance, divorce, custody, access and so on are regulated but not the law of succession. Succession disputes are rife within the Muslim community and have caused rifts within families. This leads to selective justice.
48. We point out specifically that the amendment to the Intestate Succession Act proposed in the Bill, which recognizes the right of both spouses to inherit in the intestate estate in equal shares perpetuates the fundamental difficulty that we have. The Intestate Succession Act of 1987 is un-Islamic because the shares fixed therein contradict the Quran. The suggested amendment to the Intestate Succession Act by the Bill gives effect to an intestate regime which is fundamentally Un-Islamic.
49. For example, the Bill regulates polygamy in order to ensure that no injustice is done to the first spouse, but the husband is free to leave all his property to

either wife or even to his mistress and there is no relief because the Muslim Personal Law of succession is simply not regulated in the Bill.

50. As mentioned, it is noted that the State has not sought to require the President of this country to obtain permission before taking more spouses. Why should Muslims be treated differently?
51. The State has not sought to give secular judges the power to interpret the sacred texts of other religions. Why should Islam be any different?
52. State Regulation creates a vacuum between those that buy in and those that do not. The recalcitrant are treated as criminals and robbed of their dignity despite their religious convictions. The following examples illustrate the point:
  - 52.1. A couple gets married when they are 17 years of age without the consent of their parent/guardian. Both are *Baligh* (reached the age of puberty). The parents, the Minister or an authorized body as envisaged by the Bill refuse to consent to such marriage. The marriage is not valid. What protections are there for the wife?
  - 52.2. Those that wilfully fail to register a Talaq - which is not a Shari'ah requirement - are treated as criminals and fined as are those who are in a polygamous marriage without court permission.

## **THE CASE FOR LEGISLATIVE RECOGNITION**

53. Firstly, recognition of Muslim marriages through legislation, it is argued by proponents of the Bill, enhances and gives effect to the dignity of Muslims and will represent a break from the past. Under apartheid, Muslim marriages were regarded as being against public policy. This was no doubt morally reprehensible and discriminatory. There were, in addition, drastic consequences that flowed from non-recognition for husband, wife and their

children. Children born of a Muslim marriage were regarded by the law as illegitimate. Women had no rights, for example, to enforce maintenance obligations and the duties of a husband. Polygamy was regarded as a criminal offence which could result in imprisonment. Men who were divorced had no right to access and custody of their children and it was not unknown for a woman to allow her father or new husband to adopt the child thus severing all links between the father and the child. It is unsurprising therefore that the call for legal reforms arose out of the injustices of apartheid.

54. These historical arguments in favour of regulation issues are no longer of any consequence, or have been significantly ameliorated by the developments under the common law hence regulation is not required to remedy them. Subsequent case law under the new Constitution has not followed the apartheid approach:

- In *Rylands v Edros 1997 (1) BCLR 77 (C)* a woman married only by Islamic law was allowed to sue her husband for her rights under the Islamic contract. The court heard expert evidence about the parties' contentions and the *Fiqh*.
- In *Amod v Multilateral Motor Vehicle Accident Fund 1999 (4) SA 1319(SCA)* the court allowed a woman to sue the Multilateral Motor Vehicle Accident Fund for loss of support even though she was married only under Islamic law. The court rejected the argument that a Muslim monogamous marriage because of it being potentially polygamous is against public policy.
- In *Daniels v Campbell NO and others 2004 (7) BCLR 735 (CC)* the court held that persons married under Islamic law were spouses for the purposes of the Intestate Succession Act.

55. Sufficient protection exists for abused women under South African law. All citizens continue to have access to courts if they perceive an injustice.

56. Secondly, proponents for regulation point out the need to regulate actual or perceived injustice and discrimination against women in proprietary matters (maintenance during and after the marriage), matters related to polygamy (the taking of a second wife without permission or disclosure), Talaq (they cite for example the issuing of three Talaqs in one sitting or the refusal to issue Talaq to hold the women to ransom) , Faskh (the availability of remedy for women to exit a marriage on recognised grounds) and so on.
57. Injustices should never be ignored however the law as it stands provides adequate remedies for victims of injustice. Moreover as will be shown below, secular values about justice are vastly different from religious ones. There are justifiable concerns that first wives, for example, are sometimes abandoned when a man takes a second wife. The argument for regulation thus proceeds from the premise that if the conclusion of the second and subsequent marriage remains unregulated, the suffering of women will continue unabated. On the face of it, such an argument has much appeal. However, we submit that it is somewhat misplaced ,for the following reasons:
- 57.1. The failure by a man to fulfil his Islamic obligations of maintenance and care during the subsistence of the marriage is to be dealt with at the level of enforcement (such as maintenance orders) and not at the level of regulation of the subsequent marriage. It is not the conclusion of the second marriage that causes the ill, it is the recalcitrance of the man that does. Hence, the solution is to recognise the marriage and grant all parties the power to enforce justice when there is a need and a case.
- 57.2. Secondly, one must ask (ignoring for the moment whether this is a decision that ought to be taken by or for the man) what the factors are that are to be taken into account in determining whether a man is able to maintain justice and equality .Is it a question of inclination

of the man (in which case the *ipsi dixit* of the man cannot be challenged) or does it include capacity to provide, if the latter, is the present standard of living to which the first wife is accustomed the benchmark? What are the values that inform this determination?

58. Thirdly, they argue that recognition would give effect to the constitutional guarantee of equality and the prohibition of gender discrimination suffered by Muslim women - they argue that South Africa is obliged, for example, to give effect to international protocols such as the Convention on the Elimination of all Forms of Discrimination Against Women which for instance allows the spouses freely to dissolve the marriage on the same grounds. This secular argument for favouring legislation applies to both sides. For example, the taking of one viewpoint over others on matters of polygamy, Talaq etc. is arguably a curb and restriction of religious freedoms as well by giving preferential status to one school of thought over others. As we have demonstrated, the Bill, some may argue, does not go far enough and actually perpetuates injustice in consequence.
59. Fourthly, they argue that the present *ad hoc* development of the jurisprudence is inherently problematic. Binding case law is made with reference to limited parties to the litigation and often without the input of different viewpoints. This is undemocratic in the sense that law which is made by a few binds the rest. There is inevitably uncertainty in the judicial process. The outcome is dependent upon the exercise of the discretion of one or more judges and the development of the law is often slow and tedious. This argument is persuasive but it is outweighed by the inherent problems involved in legislating under the banner of Islam, something that is perhaps nearer to Islam than we have but is still un-Islamic. The community is not forced to legitimise what the religion disallows. When courts intervene *ad hoc* they would be doing so by enforcing secular values and not religious ones.

60. Finally, the case for recognition is supported by a religious argument. It is submitted that regulation allows us the opportunity of infusing Islamic principles in the law even though Muslims may not be obtaining a perfect system, but then we must be honest and not call the end product Islamic.
61. Some religious arguments go much further. They seek to reform traditional ways of understanding *Fiqh*. They submit that “Muslim” countries such as Tunisia, Malaysia, Pakistan and Egypt have accepted the development of Shari'ah to bring it in line with human rights and equality and that the two systems are capable of harmonisation.
62. They argue that family laws are not divine but have been constructed by humans, mainly men with a gender bias and or within a particular social context. They submit that women are treated like second class citizens by past religious scholars who interpreted the Quranic Text with a patriarchal outlook which has led to injustice and the inability of women to exercise free choice. They argue that reforms are permissible under Quranic principles of justice and equity considerations. They submit that both a human rights system and the Shari'ah are founded upon notions of justice, equity and equality and may be married. In short, they posit that we can rid ourselves of the patriarchal context within which the religion was born but still give effect to the Shari'ah and the egalitarian spirit of Islam.
63. The fallacy with this argument is exposed in two ways.
- 63.1. Firstly, secular values of justice and Islamic values of justice are not the same. Hence in blatant disregard to religious texts, homosexuality and sodomy is allowed, gambling is allowed, same-sex marriages are allowed, the death penalty has been abolished, and abortion is justified in the name of equality and justice.

See:

- *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC)
- *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC)

63.2. In *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (3) BCLR 355 (CC), Sachs J said:

*“It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others. Between and within religions there are vastly different and at times highly disputed views on how to respond to the fact that members of their congregations and clergy are themselves homosexual. Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies..... One respects the sincerity with which Mr Smyth cited passages in the Old and New Testaments in support of his argument that what he referred to as a change in the definition of marriage would discriminate against persons who believed that marriage was a heterosexual institution ordained of God, and who regarded their marriage vows as sacred. Yet for the purpose of legal analysis, such appreciation would not imply accepting that those sources may appropriately be relied upon by a court.*



*Whether or not the Biblical texts support his beliefs would certainly not be a question which this Court could entertain. From a constitutional point of view, what matters is for the Court to ensure that he be protected in his right to regard his marriage as sacramental, to belong to a religious community*

*That celebrates its marriages according to its own doctrinal tenets, and to be free to express his views in an appropriate manner both in public and in Court.”*

63.3. Secondly the models used by the parties from so called “Islamic countries” ignore the fact that none of these countries in fact rule according to Islamic law. Their rule of law is secular hence to call these countries Islamic is a misnomer. These countries have simply transmogrified Islam in an impermissible manner.

63.4. Thirdly, the Quraan explicitly regulates many aspects of Muslim personal law such as polygamy, Talaq, maintenance and so on. Hence what are in issue are not manmade laws but the interpretation of the primary source of law in Islam namely the Quraan. Even value orientated analysis or theological interpretations must adhere to the Quranic Text.

## **MEDIATION AND ARBITRATION AS THE ONLY SOLUTION**

64. It is our considered submission that regulation of substantive Muslim personal law in the name of Islam is inherently problematic and will lead to transmogrification and contamination of the religion.

65. However, we are in favour of limited legislative intervention that would allow mediation and private arbitrations.
66. In terms of the current law, the Arbitration Act, 42 of 1965 in section 2(a), prohibits arbitration over any matrimonial cause or any matter incidental to such cause. The Arbitration Act should remove this provision. Professor Motale in his discussion paper, Proposal for Muslim Personal Law, June 2005, provides clear examples where secular societies have allowed arbitration or personal law issues in religious faiths in order to give effect to the right to religious freedom. We concur with this scholarly analysis.
67. The Constitutional Court in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & Another CC SALR 2009(4) 529* has held that the award of private arbitrators cannot be reviewed on the grounds of reasonableness or rationality, but can only be reviewed if there is a procedural defect or corruption or excess of power. Consequently, by allowing private arbitrations, the problem inherent in Courts choosing between different religious opinions, is completely avoided.
68. Allowing Muslims the right to mediate and then arbitrate Muslim Personal law disputes privately between them with a limited right of review to the court fundamentally presents a great gain for religious freedom. The alternative to this would be to require the State to grant Muslims the right to have a Shariah Court. This expectation is probably the ideal but it may also be unrealistic given that the State would then attract various legislative, financial and other burdens that go with the establishment and maintenance of such courts i.e. Court premises, interpreters, registrars, Judges, Appeal judges and so on. This would necessitate an amendment to the Constitution in order to exclude the present appeal court's jurisdiction to hear appeals in relation to Muslim Personal law.

69. In isolation and without regulating substantive law, allowing Muslims the right to arbitrate on issues regarding Muslim personal law, *inter alia* allows for:
- 69.1. Private regulation of disputes with no additional burden upon the State,
  - 69.2. opportunities for self-regulation;
  - 69.3. accommodation of different schools of thought;
  - 69.4. Reduces the risk of selective morality;
  - 69.5. Reduces the possibility of diminishing the risk of dividing the Muslim community; and
  - 69.6. Diminishing the potential for serious tensions between Muslims and the State.
70. There may be an additional benefit to mediation and private arbitration i.e. the involvement and the role of the Muslim scholars. Arbitrations conducted by them will allow them, finally, to make decisions, to take responsibility for such decisions and to be accountable for the views which they express. It is necessary for the Muslim scholars to be active in the life of the Muslim Community. Authority will give them the opportunity to implement the Shariah, rather than simply comment on it. There is no greater way to impart knowledge than to act upon it.
71. The MLA encourages dialogue with proponents of the Bill to allay fears and support the call for practical solutions to cater for the legitimate concerns of the abused and neglected in our communities.

## MUSLIM LAWYERS ASSOCIATION