THE MPL ISSUE

REFUTATION OF THE BASELESS VIEW OF THE FIQH ACADEMY OF INDIA

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“In fact, We strike baatil (falsehood) with the Haqq, and it (the Haqq) then crushes out its (baatil’s) brains. Then suddenly it vanishes.
And for you (O people of falsehood!) there is Wail (the Fire of Hell) on account of what you concoct.”
(Qur’aan)

A NEW SUBTLE, CUNNING ATTEMPT TO RESURRECT THE HARAAM MPL ISSUE

THE PURVEYORS OF the haraam so-called Muslim Personal law (MPL) which is a satanic attempt to subvert the Shariah of Allah Ta'ala, despite having miserably failed over the past two decades in several abortive attempts to have MPL imposed on the Muslim community, are once again making another abortive haraam attempt to resurrect the Kufr Bill which one Muslim professor of law has described as the *"The B. BILL"*. We, confess that we are unaware what exactly this designation, i.e. *"B. Bill"*, signifies. However, someone informs us that it is utilized in a pejorative sense. He says that when a legal bill is palpably silly in terms of the legal profession, then the bill is mockingly dubbed with a crude pejorative title to connote its ludicrousness and legal untenability.

Be that as it may. While the MPL measure is a "B. Bill" according to legal experts, it is worse in terms of the Shariah. It is nothing short of a K. Bill, i.e. KUFR BILL since its entire fabric is kufr – in violent conflict with the Shariah of Allah Ta'ala.

One ardent votary of the B. Bill — K. Bill or MPL bill, Mr. M.S. Omar who is hell-bent on promoting this un-Islamic and anti-Islamic measure, despite having failed several times in the past, and very recently in the Constitutional Court, to force the K. Bill down the throats of the Muslim community, has now once again adopted a very cunning plot in his nefarious attempt to get the MPL-K. Bill process resurrected.

In this regard, Mr. M.S. Omar has prepared an article which he has forwarded to an academy of liberal molvies in India for the extravagation of a 'fatwa' to prepare the grounds for the resurrection of

the corpse of the K. Bill or B. Bill or the MPL bill as it is commonly and popularly known. His puerile article prepared in Arabic, according to the academy molvies of India, will be put up for discussion next year February.

The article of Mr. Omar pivots on an extremely repugnant postulate of KUFR. In his article, the wayward Mr. Omar makes a shaitaani attempt to gain a 'fatwa' from some liberal molvies – a fatwa to upset and abrogate a divine injunction of Islam – an injunction on which there exists Consensus (Ijma') of the Ummah – Ijma' of all Four Math-habs of Islam. It is a Divine Injunction structured on what is termed *Nusoos-e-Qatiyyah* or Qur'aanic and Hadith proofs of Absolute Certitude.

This Divine Injunction which Mr. Omar seeks to have negated, is:

A kaafir judge/court has no wilaayat (legal jurisdiction) over a Muslim. In terms of this divine principle of the Shariah, verdicts of a secular court pertaining to Muslim marital and other affairs have no Shar'i validity. Mr. M. S. Omar is making a dastardly kufr attempt to have this fourteen century divine injunction of the Shariah abrogated as the first move in the conspiracy to resurrect the K. Bill../B. Bill/MPL Bill. In his article he cunningly attempts to pull wool over the eyes of the liberal molvies of the India academy with the false and baseless notion that Muslims in South Africa have absolutely no option other than to take the secular court route to solve their marital disputes and affairs. On the basis of his conjectural falsity, Mr. M. S. Omar seeks from the academy molvies a silly 'decree' to cancel Islam's Injunction and to legalize the haraam kufr postulate of the satanically conjectured 'validity' of a kaafir's wilaayat over Muslims. In other words, if a secular court rules that a Shar'i Talaaq is not valid, then this kufr ruling will be valid. In short, whatever ruling the kaafir court issues will be the final word.

While the K. Bill culprit does not say so in these terms, the objective of his vile quest to tamper with and overrule the Shariah is palpably clear. The Mujlisul Ulama of South Africa's has prepared a detailed response to Mr. M.S. Omar's plot. Those interested, may write for a copy. The conflict between Haqq and baatil is perennial, and shall continue until the end of earthly time. It is the Waajib duty of all Muslims to oppose all attempts made by the deviate modernists and liberal molvies whose objective underlying the K. Bill/B. Bill/MPL Bill is the resurrection of the kufr MPL bill which was beaten down several times over the past two decades. Insha'Allah, the deviates will not succeed in shoving the B/Bill down the throats of Muslims.

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THE QUESTION OF CONFERRING WILAAYAT TO A KAAFIR COURT OVER MUSLIMS

An article on the abovementioned issue, authored by a lawyer, Mr. M. S. Omar, has come to our attention. The objective of Mr. Omar is the bestowal of *Wilaayat* to a kaafir judge over Muslims living in non-Muslim countries.

The solitary ground tendered by Mr.Omar for his view is *Dhuroorah*, viz., that there exists an imperative need for investing kuffaar judges in non-Muslim lands with *Wilaayat* over Muslims to ensure that the verdicts of the kuffaar courts in Shar'i matters will be clothed with the same authority and validity as the verdicts of a Muslim Qaadhi of a Shar'i court in an Islamic land.

Although Mr.Omar confines the *Wilaayat* to only such court decrees which will conform with the Shariah, his entire argument pertains to an unreal situation because the kuffaar courts in South Africa do not have the power to issue decrees in terms of the Shariah nor do they apply the Shariah's standards for *Shahaadat.* The courts are obliged to issue decrees only in terms of the laws and constitution of the land. Should we degenerate into the dregs of stupidity to assume that in terms of South Africa’s constitution the courts are allowed to supersede the country’s laws to accommodate the Shariah, then too, the Kaafir court’s 100% “Shariah Compliant” decree will have no validity over a Muslim for the simple reason that according to the Shariah a secular court has no *wilaayat* (jurisdiction) over a Muslim.

The issues for scrutiny in this regard are:

(a) Does there really exist such a *Dhuroorah* necessitating abrogation of a fourteen century *Ijmaa-ee* Shar'i injunction on which there exists the Consensus of all Four Math-habs, viz. *a kaafir has no wilaayat over Muslims.*

(b) If such a *Dhuroorah* does exist, how will a fatwa confirming the validity of a kaafir court's *Wilaayat over Muslims* be practically implemented by the kuffaar courts in South Africa?

(c) If there is a real problem pertaining to resolution of Muslim disputes in marital and other spheres of Muslim life, is there no way for resolving such disputes other than resorting to a kaafir court and conferring it with *wilaayat* over Muslims?

(d) Hitherto how did Muslims living in South Africa for centuries resolve their marital and other disputes?

According to Mr. Omar there exists such a *Dhuroorah.* In the introduction to his article the lawyer, M.S. Omar makes a grossly misleading claim. The impression which he seeks to convey is that Muslims living in South Africa are compelled to submit their marital affairs for adjudication to non-Muslim courts, hence he avers:

> *"The Islamic legal system is not found there to resolve disputes and terminate khilaaf (discord, argument, dissension)….."*

Firstly, the law of the country does not compel Muslims to proceed to the secular court for resolving their disputes regardless of the nature of such disputes.

Secondly, since time immemorial, there have always existed Ulama organizations throughout the country for rendering services to the Muslim community in Shar'i issues.

Thirdly, Muslims have generally referred and still do refer their disputes to the Ulama for terminating disputes and for the obtaining Shar'i resolutions.

However, there are many Muslim who are not contented with the rulings of the Shariah, hence they proceed to the secular kuffaar courts of their own free will, not as a consequence of any pressure or law of the government. Invariably, women dissatisfied with the Shariah's dispensation proceed to the secular courts to extract haraam money from their ex-husbands or their estates.

Fourthly, the Ulama in South Africa are adequately equipped in the knowledge of the Shariah to decide disputes in accordance with the Shariah.

Fifthly, it should not be forgotten for a single moment that the verdicts of the secular court are in terms of kuffaar law which has no relationship with the Shariah. The court has no discretion to issue

decrees and verdicts in accordance with the Shariah. The courts are fettered by the atheist and immoral constitution of the country. Should a verdict of the kaafir court conform with a Shariah injunction, it should not be seen as being consequential of a Shar'i approach adopted by the kaafir judge. It will be a pure coincidence. The verdict of the court is dictated by the constitution and law of the country, NEVER by any consideration for the Shariah.

In a recent ruling of the Constitutional Court of South Africa, the judge emphasized that the ruling of the Court is not based on any Shariah injunction/principle. Despite the particular law favouring the Shar'i position, it was the product of the laws and constitution of South Africa.

Sixthly, the Constitution and legal statutes afford Muslims ample latitude to resolve Muslim disputes within the framework of the Shariah, if they opt for the Shar'i route. Thus, if a Muslim does not challenge the Shariah's verdict in the kaafir court, the law will not interfere with the adoption of the Shariah by the Muslim disputing parties.

The aforementioned thus shows the deception and futility of the *'Tamheed' or introduction* presented by M.S. Omar in his endeavour to have Shar'i status conferred to the verdicts of the kuffaar courts.

REFUTATION OF THE LAWYER'S CLAIM IN HIS ITEM NO. 13

He argues the issue of bestowal of *wilaayat* to a kaafir judge in the light of the principle of *Dhuroorah.* For indulgence in this argument we shall temporarily assume that *wilaayat* can be conferred to a kaafir judge if the *Dhuroorah* exists. The lawyer avers that *Muslims in a non-Muslim country (South Africa with regard to us) have no option but to turn to the secular non-Muslim courts for the acquisition of their rights.*

This averment is extremely dubious and ambiguous. To which right does he refer? Of topical importance currently are marital issues. He has to explain in detail which rights and which scenarios he has in

mind. In almost all cases of disputes which culminate in the secular courts, as has been observed, it is invariably the party who is dissatisfied with the Shariah's ruling who takes the legal route. It is indeed rare that the converse is the case.

If the parties are contented with the Shariah, they can acquire the law of Allah Ta'ala from the Ulama without expending any money whereas they are required to squander huge amounts, even millions, to secure a kaafir verdict from a kaafir judge. It is palpably false and misleading to aver that Muslims are constrained by circumstances of *Dhuroorah* to seek the aid of the kuffaar courts.

It is invariably the miscreant party who is dissatisfied with the Shariah who enlists the aid of the kaafir court to usurp money from the opposite party. There is no such *Dhuroorah* in our country to legitimize the legalization of prohibitions via the kaafir court. It is necessary for the lawyer to present precise examples for his generalizations to enable us to subject his views and baseless 'fatwas' to scrutiny and negation.

In our country it has generally been the case of Muslim lawyers supporting the party, usually an errant wife, in the endeavour to eke out haraam money from her former husband, in conflict with the Shariah.

While we concede that in a non-Muslim country the need does develop to enlist the aid of the police services and the kuffaar courts to sometimes acquire one's rights, this need does not require bestowal of *Wilaayat* to a kaafir judge. The Ulama will issue the verdict, then the coercive power of the state could be enlisted for enforceability. But, *wilaayat* cannever be conferred to the kaafir judge regardless of *'dhuroorah.'* According to the law of the country, there is no scope for the application of *Shar'i Wilaayat* to a kaafir judge who is not allowed by the law to issue decrees in the light of the Shariah.

It should be emphasized that the *dhuroorah* stated by the lawyer is nothing but whimsical imagination. There exists no such imperative need in this domain for bestowing *wilaayat* to a kaafir judge. Enforceability and Wilaayat are two separate issues which should not be confused. He must explain how Muslims are prejudiced and in which way are they unable to acquire their Shar'i rights.

Enlisting the aid of the kaafir court is like seeking assistance from the police in the kaafir land. The need for such assistance does not require *Wilaayat* over Muslims to be conferred to a kaafir court. If two Muslims have a dispute and they refer to the Ulama, they will obtain the Shar'i ruling. Now if the recalcitrant party refuses to submit to the Shariah and refuses to restore the rights of the other party, the latter may enlist the aid of the kaafir court to claim his right. This is not a scenario of bestowing *Wilaayat* to a kaafir judge. The oppressed Muslim simply utilizes the coercive power of the authorities to gain his Shar'i right on which the Ulama have ruled in the same way as a Muslim would seek assistance from the police to protect him and to regain his property which had been stolen. For such issues there is no need for bestowing *Wilaayat* to the kaafir judge.

Muslims have inhabited South Africa for centuries. There always were Ulama structures to address disputes of such Muslims who desired resolution in terms of the Shariah. And, it has always been seen that the culprit who detests the ruling of the Shariah, is the evil one who rushes to the secular court for claiming 'rights' which according to the Shariah are *baatil* and *zulm*

We see no merit in the attempt of the lawyer to get *wilaayat* bestowed to the kaafir court. Should the Ulama ever become entrapped in this baatil reasoning and issue fatwas to confer wilaayat to a kaafir judge, an extremely wide avenue of Fitnah will be opened up.

While the lawyer has attempted to mislead with his contention of witnesses conforming to the standards of the Shariah, testifying in a kaafir court, it should be remembered that no kaafir court will determine the *adaalat and the fisq* of witnesses in terms of the Shariah. The kaafir judge himself, besides being a kaafir, is a faasiq in terms of Shar'i standards.

The lawyer is well aware that in marital cases in this country the law of gender equality reigns supreme. The courts always rule in terms of this concept which is enshrined in the vile constitution of the country. The question of a kaafir court's verdict conforming with the Shariah in South Africa belongs to the realm of dreams. The Shariah's dispensation pertaining to maintenance of divorcees, custody of minors, etc., etc., are extremely 'repugnant' to the law. The court cannever issue a verdict to conform with the so-called 'discriminatory'

laws of the Shariah –'discriminatory' against women in their kufr concept – in this country. It is therefore extremely deceptive and misleading to create the impression that the kaafir court in this country will decree according to the Shariah..

Of great importance is to understand that it will always be the party who is discontented with the Shariah who will take the route of the secular court to resolve a dispute. Consider the following examples which occur frequently in our Muslim society in South Africa:

(i) A man issues Talaaq to his wife. There is a dispute between them regarding ownership of assets and maintenance *(nafqah).* They proceed to the Ulama for resolving their dispute. The wife demands half of the property and of all the assets of her husband because the law of the land allows her to make this demand. The husband refuses to satisfy her demand and is prepared to pay *Nafqah f*or only the *iddat* period. The wife is dissatisfied with this Shar'i decision, hence she goes to court.

The kaafir court will decree in her favour and order the man to pay her half the value of his entire estate, and also maintenance for as long as the court determines is 'equitable' and 'just' in terms of the law/constitution of the country. Now if the Ulama had clothed the kaafir court with *Wilaayat* over Muslims, then in the eyes of the ignorant Muslim masses, this haraam and unjust ruling of the court will have Shar'i validity. This will open the door for all women to take this route without suffering any pangs of conscience for they will labour under the misconception that the kaafir judge's decree is tantamount to a Shar'i *hukm*.

(ii) Husband and wife separate, the husband having divorced his wife. There are three minor children – a girl of 2 years and two boys of 8 and 9 years. The mother is a *faahishah* while the father is a Deeni conscious person. It was her evil and infidelity which led to the divorce. For custody of the children, they go to the Ulama who issue the following ruling: The mother can retain custody of the 2 year old girl until she reaches 10 years of age. The father has the right of custody of the two boys even if the mother is not an evil woman.

The woman is displeased with this Shar'i ruling, hence she goes to the kaafir court to cancel the verdict of the Ulama. The kaafir judge will incumbently decree in terms of the constitution and laws of the country. His ruling will be that the mother will have custody of the children until they reach the age of 21 years. Meanwhile the father has to pay maintenance for the children until they reach 21 years. Furthermore, such maintenance will be exorbitant because the father has to pay for many haraam items of expenditure which are considered to be in the interests of the children in terms of kuffaar laws. In addition he has to pay exorbitant maintenance for the woman for many years.

Now if the Ulama had conferred *Wilaayat* to the kaafir court, then the impression will be conveyed to all Muslims that this haraam decree is a Shar'i ruling.

(iii) Two Muslims are in a partnership business. They are equal partners. After some years the partnership is dissolved. They go to the Ulama for a Shar'i directive regarding division of the assets of the partnership business. The total value of the assets is R2 million. The Ulama decree that each partner is entitled to R1 million. The one partner refuses to accept this Shar'i ruling. He claims that if the business is sold as a going concern, it can be sold for R4 million. He therefore wants his partner to pay him R2 million. On the other hand, the partner has dissolved the partnership, closed the business which operates in his property, and demands that his partner uplifts his R1 million assets.

Since the kaafir court will favour the partner who is claiming R2 million, he goes to court and obtains a verdict which negates the Shar'i ruling. Now if the kaafir judge has been clothed with *Wilaayat*, it will be understood by the Muslim masses that this haraam verdict is in fact the Shariah's position.

These few examples illustrate that the aggrieved party who goes to court is generally the one who is dissatisfied with the Shariah's ruling.

In his second example on page 8 of his article, Mr.Omar presents the postulate of the kaafir court's decree conforming to the Shariah. Then he poses the question: "Will this decree be valid and enforceable?"

Firstly, the question of 'enforceability' of the kaafir court's ruling is superfluous. In a kaafir land, all rulings of the courts are enforceable. Secondly, even if the kaafir judge's decree conforms to the Shariah, it will be a mere coincidence. Such decree will not be issued by the court on the basis of the Shariah. It will be a decree in terms of the kaafir constitution and laws of the country. Thirdly, should the kaafir judge's decree conform with the Shariah, the *nifaaz* (enforceability) of the decree is not depended on *Wilaayat*. To enforce the decree which by coincidence conforms to the Shariah, it is not necessary to invest the kaafir judge with *Wilaayat.* The Muslim may simply utilize the services of the authorities to acquire his Shar'i right. *Wilaayat* is not a requisite for acquisition of one's Shar'i right in a non-Muslim country. The argument of Mr.Omar is therefore extremely deceptive and misleading. It is designed to obtain a fatwa on the basis of false premises – a fatwa to bestow to the kaafir court *Wilaayat* over Muslims.

Should there be a need for a Muslim to utilize the facilities of the authorities, whether the courts, the police or any other state agency, for the acquisition of his rights, there is no objection to this. Firstly, he must satisfy himself that he is on the Haqq. He has to obtain a decree from the Ulama stating that his demand is Haqq. If the disputing party refuses to hand over his *huqooq,* he may and can proceed to the kaafir court only if such *huqooq* are consistent with the law and the spirit of the kaafir constitution. If the Shar'i decree conflicts with the law, obviously he cannot have recourse to the kaafir court. If consistent with the law, he can enlist the aid of the court. But, for this there is no need to confer *Wilaayat* to the kaafir judge. In fact, the Muslim whose rights have been usurped has the right to repossess his *huqooq* without recourse to the kaafir court. He requires the court's assistance only if he lacks the means of acquiring his rights from the usurper.

To the best of our knowledge, there has not been a single case in the history of South Africa when a Muslim, especially in a marital dispute, has proceeded to a kaafir court to claim his/her Shar'i rights. All Muslim cases which were adjudicated by kuffaar courts were invariably the acts of *zaalimeen* – of such Muslims who rejected the Shariah's decree, and this is almost always the case of a divorced woman dissatisfied with the Shariah.

It is essential to understand that the route which M.S. Omar desires to be adopted has as its objective the neutralization of the Ulama. M.S.Omar's track record testifies that he is striving to render the Ulama ineffective and to have the kuffaar courts usurp their functions. Since he is a secular lawyer, it should not be difficult to see through the smokescreen which he has created to conceal his agenda, viz., rendering the Shariah and its institutions ineffective by conferring *Wilaayat* to the kuffaar court which will effectively negate the Shariah under guise of the Shariah. This guise will be the effect of the bestowal of *Wilaayat* to the kuffaar court which must incumbently issue decrees in accordance with the country's laws and constitution.

CIVIL MARRIAGE

The law in South Africa does not oblige Muslims to contract civil/legal 'marriages'. Islamic marriages are recognized by the law. Some Muslims contract civil marriages either out of ignorance, without understanding the legal consequences which are in conflict with the Shariah, or because they have some mundane motive.

With regard to civil marriages, the law has made provision for the accommodation of the consequences of the Islamic Nikah. Certain civil marriage options allow for the distribution of the Muslim's estate in accordance with the Shariah's Law of Inheritance. As Muslims are being educated by the Ulama, they are becoming aware of the right civil marriage option to adopt in the event they desire civil registration of their Nikah. We are therefore experiencing that Muslims are now increasingly preparing Islamic Wills to ensure that after their death their estates will be distributed in accordance with the Shariah.

In a nutshell, Muslims are not compelled to adopt any form of civil marriage regime. Their Islamic marriages are valid and there are no adverse consequences of Shar'i marriages. Any adverse consequences are the product of the evil of people who are averse to the Shariah because they see greater monetary benefit for themselves in certain measures of the secular law.

THE SEPARATION OF EXECUTIVE AND JUDICIAL POWERS OF THE STATE

M.S. Omar has introduced this futile dimension merely to darken the page. In reality this system has no bearing on the resolution of Muslim marital disputes. This secular system does not infringe on the domain of the Ulama who enjoy freedom to decide issues in terms of the Shariah. There is absolutely no merit for introducing this dimension in the subject being discussed.

FREEDOM OF RELIGION AND NEUTRALITY

Governments do not accept all aspects of the Shariah despite their proclamation of freedom of religion. The western concept of freedom of religion precludes any Shar'i injunction which conflicts with kufr law. Thus Muslims living in a non-Muslim country are aware of the extremely limited sphere of the concept of 'freedom of religion'. Despite the limitations of this concept, there is generally ample latitude in the law to allow Muslims to manouvre, circumvent and manipulate the laws to ensure that their affairs are conducted in conformity with the Shariah. But this concern is obviously displayed by only those Muslims who believe that the Shariah is Allah's Law. As for those who desire their lives to be conducted in accordance with the secular law, the only option is Ta'leem and Dua for their hidaayat. But, it must be understood that the secular law does not compel Muslims to resolve their disputes in conflict with the Shariah.

The lack of 'neutrality' by the government does not prejudice the Shar'i rights of such Muslims who are desirous of submitting their disputes for Shar'i adjudication. It does not prevent Muslims from going the route of the Shariah.

WILAAYAT

As far as we Muqallideen are concerned, the basis for the verdict that a kaafir court has no *Wilaayat* over a Muslim, is the unanimous ruling of the Aimmah-e-Mujtahideen.

The injunction on which there exists consensus of the Ummah is that a kaafir court has no *Wilaayat* over Muslims, hence the kaafir

court's adjudication in the marital and other affairs of Muslims is simply not valid.

There never develops an imperative need *(Dhuroorah)* for interfering and cancelling this *Ijmaa-ee* injunction of the Shariah even if it is assumed as Mr.Omar alleges that in non-Muslim countries, Muslims have no *ikhtiyaar* other than to turn towards the kuffaar courts for the acquisition of their *huqooq*. In some instances when Muslims feel the need to resort to the courts, they may do so and avail of the assistance of the courts without the need for the Ulama to invest the kaafir judge with *Wilaayat over Muslims.* Such investiture besides being superfluous and laughable is dangerous for Muslims.

It is superfluous and laughable because in a non-Muslim country such as South Africa the courts have no right to decree in accordance with the Shariah even if a Shar'i issue conforms with the law of the land. The decree must necessarily be in terms of the law and the kaafir constitution. The conformity is merely a fortuitous coincidence. The kaafir court will decree *only* in terms of the country's laws.

Mr.Omar has withheld vital information which is essential for the formulation of a correct fatwa. His presentation of the situation is a patchwork from which important issues have been deleted or withheld. For example, he does not mention that in South Africa it is impossible for the courts to even think of issuing decrees in terms of the Shariah. Any dispute between Muslims, which is brought for adjudication will necessarily be decided in strict accordance with the laws and constitution of the land.

He also does not mention that in particular in South Africa, the law and the courts are obsessed with the concept of gender equality, and all Shar'i injunctions which are perceived to be discriminatory against women such as maintenance *(nafqah),* Talaaq, inheritance *(miraath),* custody of minors, etc., will be thrown out of court if any Muslim presents a case for a decree to be issued in terms of the Shariah.

Also, while Mr.Omar mentions the scenario of *Shahaadat in terms of the Shariah'* being presented in the kaafir court it is extremely deceptive. It is a total impossibility to apply Shar'i standards for *Shahaadat* in a kaafir court. It is the constitutional right of even a drunkard, gambler, robber, and the most immoral man or woman to testify in the kaafir court. The testimony of a woman is the equivalent

of a man's testimony. The suggestion of *Shahaadat* conforming to the Shariah in a kaafir court is absolutely baseless and extremely deceptive.

Thus, Mr. Omar's example number one on page 6 is a gross deception and extremely misleading. It is an unreal scenario. His example consists of the following incongruencies:

- Annulment of a Shar'i Nikah by a kaafir judge. The kaafir court will not entertain such a case. The court will and can annul only a marriage which has been contracted in terms of the law of the land. The court will not and cannot issue a decree of annulment of a Shar'i Nikah for the simple reason that there is no law which allows the kaafir court to annul a religious marriage. It is impossible for Faatimah to go to court and ask the kaafir judge to annul her Shar'i Nikah. There is no provision in South African law for legal annulment of religious marriages.
- Faatimah substantiating her application with Shar'i *Shahaadat* is a total impossibility. Firstly, the court will not listen to her application. Secondly, Shar'i Shahaadat is in conflict with the law and constitution of the country.
- *Faskh-e-Nikah* according to both the Shariah and the secular law of the land is the domain of the Ulama, not the function of the kaafir court which is averse to entanglement in doctrinal or religious issues. Now if the Ulama had annulled Faatimah's Nikah, what need is there for the kaafir court to confirm such *Faskh?* Regardless of Zaid's rejection of the *Faskh* decree of the Ulama, Faatimah in South Africa has been released from the Nikah of Zaid and is free to marry anyone else on the strength of the Faskh decree issued by the Ulama. This is in fact the position in South Africa – the real position.
- By presenting this example, Mr. Omar has endeavoured to mislead and deceive by creating the notion that Faatimah with her Ulama-decreed *Faskh* is helpless and that Zaid's refusal to accept the *Faskh* decree is preventing her from carrying on with her life, namely, that she is unable to get married because her ex-husband refuses to accept the *Faskh* decree of the

> Ulama, hence there is an imperative need for a kaafir judge to confirm the annulment.

The whole scenario portrayed by Mr.Omar in his first example is unreal and baseless. The *Faskh* decree of the Ulama relative to the Shar'i Nikah is valid in South Africa and the woman is finally and totally released from the marriage bond.

The injunction that a kaafir has no *wilaayat* over a Muslim is not a secondary rule or a derivative from a principle. It is the product of *Nass-e-Qat'i.* This injunction is the actual law as stated in the *Nass.* The condition of Islam is an absolute requisite for the validity of *Wilaayat*. While Mr.Omar has presented the claim of *Dhuroorah,* in reality there is absolutely no imperative need in South Africa for tampering with this *Ijmaa-ee* injunction.

The lawyer's second example

Mr. Omar's second example is sillier than the first example. The woman claims that her husband had divorced her. The husband confirms the correctness of her claim. The termination of the Nikah does not require any further measure for confirmation. The termination of the marriage is not the consequence of the kaafir court's ruling. It is the pure product of the husband's declaration that he has divorced his wife, which claim she even confirms. There is no need for *Bayyinah* in this case. How can this lawyer ask if the marital bond still subsists when the husband declares openly for the whole world to hear that he has divorced his wife, and even his wife confirms the correctness of his claim?

The lawyer's third example

The simple and straightforward answer is that the kaafir's ruling will not be valid because of lack of *Wilaayat.* Secondly, the woman has no need in South Africa to proceed to the kaafir court to obtain a ruling in her favour. She can present her evidence to the Ulama who will issue the Shar'i ruling. The Ulama's ruling will enable her to give expression to the *Tafweedh* with which her husband has invested her.

This lawyer argues in a dream world or in an imaginary realm. He seeks a ruling for practical issues while ignoring the reality of the situation as it exists in relation to the Muslim community in South Africa. He should therefore present realities. He argues with deception to confuse those who read his article. A Muslim wife in South Africa is not constrained to proceed to a kaafir court to prove the validity of her right to the *Tafweedh* issue. There are Ulama structures in the country to deal with issues of this nature. When there does not even exist a *dhuroorah,* why is the lawyer hell-bent on bypassing the Ulama to confer *Wilaayat* to the kaafir judges?

There is no difference in the invalidity of a kaafir judge's *wilaayat over Muslims* in all Shar'i issues whether these relate to marital or economic or contractual affairs of any department of the Shariah. The kaafir court has no *wilaayat* and the Ulama may not bestow Shar'i *Wilaayat* to a kaafir court. Should it be assumed that *Dhuroorah* permits bestowal of *Wilaayat* to a kaafir judge, the simple response is that there exists absolutely no such *Dhuroorah* in South Africa. Muslims who wish for a Shar'i resolution are free to submit their disputes to the Ulama.

The example which Mr.Omar tenders pertaining to a monetary transaction is grossly misleading. If Zaid is genuine in his claim that Amr owes him a thousand rupees, but Amr refuses to pay, he (Zaid) is entitled to enlist the support of the kuffaar authorities of the land to acquire his Haqq from Amr. To enable Zaid to acquire his right there is no need to bestow the kaafir court with the mantle of *Wilaayat*.

Furthermore, Mr.Omar's averment of Zaid proving his case in a kaafir court with such witnesses whose *Shahaadat* is according to Shar'i standards is also misleading. The kaafir court has no legal right to deny the testimony if it does not conform to the Shariah.

THE UNIQUE STRUCTURES OF THE ULAMA IN SOUTH AFRICA

Despite the kufr constitution and laws of South Africa, the Ulama are free to adjudicate the disputes of Muslims if the latter desire to be governed by the Shariah. And, even if the decree of the Ulama is in conflict with the law and the constitution, the authorities will not

interfere if the disputing parties accept the decree. Thus, if the Ulama decree for example, that a divorcee is not entitled to a share of her ex-husband's assets, and the woman accepts this decree, there is nothing to prevent its (the decree's) operation.

Despite the Ulama being bereft of the power of *Nifaaz*, the operation of their decrees is not prevented by law, and as long as the parties submit to the Shariah, there is no problem. However, if one party rejects the Shariah's decree, and proceeds to court, then obviously the ruling of the kaafir court will be *zulm*, as it will be in conflict with the Shariah. Yet, the haraam decree will be enforced.

The question of the kaafir court enforcing a Shar'i decree issued by the Ulama is extremely remote, in particular in marital affairs because the Shar'i masaa-il in marital issues are extremely 'repugnant' and in violation of the kuffaar gender equality concept. Hence, there is absolutely no possibility of a kaafir court issuing a decree which will fortuitously in accordance with the Shariah, and should it be, it will be a rare fluke and a consequence of the secular laws and the Constitution.

The presence of Ulama structures in South Africa to deal with all types of disputes, and the total impossibility of the kuffaar courts issuing decrees in terms of the Shariah refute the *Dhuroorah* imagined by Mr.Omar, and which he presented as his fundamental basis for his attempt to obtain a fatwa from the Ulama. Furthermore, if it is accepted that there does exist such a *Dhuroorah* as contemplated or imagined by Mr. Omar, the courts in South Africa have no power and no jurisdiction in terms of the land's laws and constitution to issue decrees in terms of the Shariah.

CONCLUSION

(1) In South Africa there exists no *Dhuroorah* for bestowing the mantle of *Wilaayat over Muslims* to a kaafir court.
(2) Assuming that there does exist the imagined *Dhuroorah*, there is no way in which the kaafir court could be clothed with the mantle of Shar'i *Wilaayat* in view of the fact that it is only the kufr constitution which governs.

(3) The presence of Ulama structures is adequate to resolve all Muslim disputes in terms of the Shariah.
(4) Hitherto, all Muslim disputes were handled by the Ulama who issue decrees in accordance with the Shariah.

The vital fact to remember is that it is usually only the recalcitrant party – the one who refuses to accept the Shariah's decree – who takes the legal route to seek the decree of the kaafir judge. That means, the desire is only to overrule the Shariah when it serves the monetary or other whims and motives of a recalcitrant party.

The arguments of Mr. Omar have no Shar'i merit and are in total conflict with the teachings and the principles of the Shariah.

"And among the people is he who disputes (argues with his drivel) in (regard to the Shariah of) Allah without any knowledge, and He follows (in this pursuit) every rebellious shaitaan."
(Qur'aan)

OUR RESPONSE TO THE FIQH ACADEMY OF INDIA

A SYNOPSIS

1) A Durban lawyer, Shuaib Omar, sent a questionnaire to the India Fiqh Academy with a view of obtaining a fatwa of conferring *wilaayat* (jurisdiction) to a non-Muslim judge over Muslims. Such *wilaayat* is *baatil*. According to the Shariah a non-Muslim judge/court has absolutely no *wilaayat* over Muslims.

2) The Mujlisul Ulama of S.A. in an article criticized this baatil view. Our criticism was forwarded to the Fiqh Academy.

3) An MPL molvi clique led by the lawyer travelled to India to attend the recent seminar of the Fiqh Academy. The lawyer misinformed the academy on the legal position regarding Muslim marriages in South Africa.

4) To appease the lawyer and the MPL clique, the Fiqh Academy committed a terrible blunder by issuing a fatwa in diametric contradiction to the fourteen century *Ijma'* (Consensus) of the Ummah. Furthermore, for its baseless opinion, the academy did not tender a single *Shar'i daleel.*

5) The Mujlisul Ulama criticized the corrupt fatwa which was structured on the basis of misinformation and which was devoid of Shar'i substance. The basis on which the Fiqh Academy raised their fatwa is that *the law of the land compels Muslim husbands to apply to the secular courts for annulment of their Islamic Nikah.* But this is a blatant falsehood. We demanded that the academy furnishes its Shar'i evidence for its corrupt fatwa.

6) The academy responded with an eight page letter stating their arguments.

7) The Mujlisul Ulama of S.A. responded with a detailed refutation of the academy's baseless arguments. The fatwa is corrupt and the arguments are baseless, entirely unbefitting an academy of Ulama. Our Refutation is presented here for the benefit of the Muslim community, and to dispel confusion and stupidities which the MPL clique is circulating.

WILAAYAT OF A KAAFIR JUDGE OVER A MUSLIM

OUR RESPONSE TO THE FIQH ACADEMY'S BESTOWAL OF WILAAYAT TO THE KAAFIR JUDGE

The Fiqh Academy of India recently in a resolution equated the divorce decree pronounced by a non-Muslim court to a Talaaq Baa-in. The Mujlisul Ulama rejected this resolution and pointed out it was untenable according to both the Shariah and the secular law. It is in conflict with the fourteen century *Ijma'* of the Ummah. We requested the Academy to present its Shar'i basis and evidence for its resolution. The Academy has complied. This is our response to the response of the Academy.

In its Response, the Academy states:

"Generally the Academy does not keep in view the conditions of any particular country when it reflects (on a mas'alah). On the contrary, the conditions of different countries are kept in view. With regard to the topic of divorce decrees pronounced by courts in non-Muslim countries, the discussion (of the academy) did not keep in view only South Africa because this pertains to many countries where Muslims are in a minority. Furthermore, it was also not a case of conforming to the desires of any particular personality……."

The academy has in its response outlined its in depth research and investigation methodology. It has emphasized the composition of the academy which consists of about 400 or more Ulama from several countries. It has outlined its way of discussion and adoption of resolutions to give it a hue of unanimity.

While the academy is commended for its methodology, we must clarify that in our criticism of the academy's resolution we did not

make its methodology of operation the target of our critique. Furthermore, while the academy according to the response of Khalid Saifullah Rahmaani has based its drastic and baseless resolution on assumptions, we are concerned with real issues in conflict with the Shariah prevailing in our country. And, leading the anti-Shariah measures is the MPL group of molvis with the lawyer Shuaib Omar as their leader. The academy has in fact not taken South Africa at all into consideration despite the fact that an MPL group of molvis had attended its 'seminar', and that the deviate lawyer, Shuaib Omar had forwarded to them a questionnaire on this topic several months prior to the convening of the academy seminar.

Furthermore, the academy's committee of ten Ulama did not even consider the situation on the ground as it prevails in other countries as well, not only South Africa, where Muslims are in the minority. The academy's assumptions and imaginary exigencies are therefore devoid of reality and must be assigned to the realm of futility.

The academy should have made it its duty to attend firstly to real issues. Imaginary and non-existent exigencies should not be given priority.

The academy should also explain which aspects of its resolution which we have criticized, are assumptions. In the criticized resolution, the fundamental basis for the academy's view is *'qaanuni majboori'* (legal constraint which compels the husband to apply to the court for annulment of his Shar'i Nikah). The academy should explain in relation to South African Muslims, precisely which *'qaanuni majboori'* constrained the academy's committee to forge the resolution which gives validity to the kaafir court's 'divorce' decree?

If there is no such *'qaanuni majboori',* will the resolution be applicable to the Muslims of South Africa? The academy owes a debt to the Muslim community of South Africa. The MPL Molvi group, especially Mr.Shuaib, the lawyer, will go to great lengths to eke support from this corrupt resolution for their kufr MPL bill. Since there exists absolutely no *'qaanuni majboori'* in South Africa to compel a Muslim husband to apply to the court for a decree of divorce for his Islamic Nikah, and since the courts do not entertain applications for annulment of Islamic Nikahs which have no legal recognition in this country, we implore the academy to amend its

resolution or to draft a new resolution tailored for the South African Muslim community.

Furthermore, even if in some other countries there do exists some form of *'qaanuni majboori'* which constrains Muslim husbands to apply to the kaafir court for annulment of their Islamic Nikah, then too, the resolution is erroneous. By no stretch of valid *ta'weel* will the kaafir court's decree ever be a Talaaq Baa-in. The *taukeel* interpretation is an example of *Ta'weel-e-Baatil* which we shall explain further on.

In countries where kufr law requires Muslims to apply to the courts for annulment of their Islamic Nikah, the simplest thing to do, which will not interfere with any Shar'i command nor necessitate the employment of corrupt interpretation, is for the husband himself to pronounce Talaaq. Thereafter he may go the legal route to satisfy the law. But to confer Shar'i status and priority to the kaafir court's decree over and above the Shar'i right of the husband, as the academy has done, is totally unacceptable, and must be rejected as *baatil.*

Months prior to the academy adopting its erroneous resolution, this Shuaib Omar did furnish you, the academy, with a questionnaire, the objective of which palpably was to extravasate a fatwa for conferring *wilaayat (jurisdiction)* to a non-Muslim judge notwithstanding his averment that such a judge has no *wilaayat* over a Muslim. Despite conceding this unanimous Shar'i *mas'alah*, he proceeded to consult with you. The objective was as clear as daylight, namely, to obtain a ruling of permissibility of *wilaayat* of a kaafir over a Muslim. Such a 'fatwa' is imperative for activating the kufr MPL proposal which the MPL molvis are presently again kindling.

His questionnaire is inextricably interwoven with the plot to get a haraam MPL bill enacted as law in South Africa. We have been opposing the anti-Shariah MPL bill since the past almost 20 years. Alhamdulillah, each time they failed to hoist the haraam MPL measure on the Muslim community. Last year the Constitutional Court which is the highest court in the country, dismissed the application for this measure brought by a kaafir women's organization which was fully supported by Shuaib Omar and the MPL clique of molvis, and opposed by the Ulama-e-Haqq and other non-Ulama Muslim organizations.

It is essential to view our concern and the nature of our response in the light of the evil plot to subvert the Shariah in South Africa. This plot is being spearheaded by Shuaib Omar and the MPL clique of molvis. Perhaps you are unaware of the haraam and baatil contents of the MPL bill. We have written abundantly in its refutation. Almost every proposal in the bill is in violation of the Shariah.

Shuaib Omar had forwarded his questionnaire to you with the specific intention of gaining ammunition for supporting the MPL bill which will soon be discussed by the parliament in our country. It is precisely for this reason that only the MPL clique of molvis attended the Fiqh academy's seminar to garner support for their MPL bill conspiracy. But, Insha'Allah, they will not succeed in their despicable plot to dismantle the Shariah. However, they have succeeded in misleading the academy and extracting from it the erroneous resolution which confers *wilaayat* to the kaafir court under guise of *taukeel'.* With this resolution the academy has rendered Islam and the Muslim community of South Africa a great disservice. You have strengthened the hand of *baatil* by your resolution which you have issued without taking into account the situation on the ground in our country despite the fact that a group of molvis from our country approached you, and despite the fact that you had several months advance notice to investigate the matter. Your resolution assists in digging the foundations of the glorious Shariah formulated, systematized and codified by the illustrious Aimmah-e-Mujtahideen and the noble Fuqaha of *Khairul Quroon.*

It is difficult to accept that you are entirely unaware of the MPL conflict raging in our country. Some members of your academy had even visited South Africa and are well aware of the issues pertaining to it. Hence, your argument that your resolution had not been fabricated specifically for South African consumption is refuted. We just don't buy it. Prior to issuing your resolution, members of the South African MPL clique were in private consultation with you. Thus, the thrust of your resolution is directed to South Africa.

Shuaib Omar's questionnaire should have served the purpose of alerting you. But you chose to remain oblivious. A Mufti/Faqeeh should be farsighted, and not issue resolutions and fatwas on the basis

of assumptions which have no relationship with reality, especially in a situation of *fitnah* as is prevailing in our country.

There prevails intense controversy in South Africa on the MPL issue. You should have taken the reality of our situation more into account than remote assumptions on which you ostensibly based your corrupt resolution, thereby falling into Shuaib Omar's and the MPL molvi clique's trap. While you are at liberty to conjecture on assumptions, realities have priority. You have entirely ignored the reality of the South African scenario to give expression to your resolution whose fundamental basis for your view is the imagined *'qaanuni majboori',* which has no relevance to us here in South Africa.

We must also clarify that when we examine a fatwa/resolution we are not impressed by the number of Ulama nor their seniority nor their methodology especially when such methodology is at variance with the *mubaarak tareeqah* of the Salf-e-Saaliheen and modelled along western patterns. Thus, we see that despite you being a purely Islamic Ulama body and Urdu speaking, you call yourself 'academy' and you dub your meetings with the term 'seminar'. Is there then such a dearth in the beautiful and rich Urdu language of our Akaabireen that you had to stoop and grovel to unnecessarily seek and adopt western terminology to describe your movement? We examine the fatwa on the basis of the Dalaa-il of the Shariah. If the fatwa is in conflict with the Shariah, the majority view holds no substance. Minority and majority are not Shar'i *dalaa-il* or principles. We therefore trust that you will adhere to *Shar'i dalaa-il* and not endeavour to impress us with the number of Ulama who may have aligned themselves with your resolution. Our common basis of argument should be the *Dalaa-il* of the Shariah. We follow the Hanafi Math-hab and we believe that you too are Hanafis. We thus have a common platform on which our arguments must be structured.

Anyhow, now that you have proffered the grounds for your view of conferring *wilaayat* to the kaafir court although you interpret it as '*taukeel'*, we are in a better position to eliminate your proofs academically. Let us now proceed to examine your resolutions and their respective basis.

Your Tajweez No.1

Your first resolution reads: *"If the judge of a court in a non-Muslim country is a Muslim and at the time of issuing a decree he keeps in mind the principles of the Shariah, then accepting him to be in the stead of a Muslim judge, his decree in the matter of annulment of Nikah will be valid."*

Firstly, it is necessary for us to highlight that the issue of conflict is *the bestowal of wilaayat to a kaafir over a Muslim.* Our subject of discussion is not *bestowal of wilaayat to a Muslim by a kaafir over a Muslim.* At no stage did we deny the validity of this particular *mas'alah*. At the time of writing our critique we were not even aware of your resolution No.1.

Since you have apprized us of this resolution which in reality is old hat and a known *mas'alah* which the *kutub* of the Fuqaha state with clarity, we deem it necessary to comment in view of the erroneous signal this resolution also sends to the Muslim community.

The determining factor for the Shar'i validity of the decree of a Muslim judge in a non-Muslim court/land is that it (the decree) must be fully in compliance with the Shariah and be issued by a proper *Shar'i Waali.* This is precisely what the purport is in the statements of the Fuqaha which you have cited in this regard.

In a land where Muslims do not have political power, if the non-Muslim authorities appoint a Muslim as a *Waali* (ruler/judge/governor) to oversee the religious affairs of the Muslim community, this *Waali* will dispense the law in accordance with the Shariah. He will not issue decrees in the light of the non-Muslim constitution and in compliance with laws of the land. The law which the *Waali* who is conferred with the mantle of *wilaayat (jurisdiction)* over Muslims, will be the Shariah in every respect. Thus, a judge in a secular court in a non-Muslim country is not a *Waali* in the meaning and concept propounded by the Fuqaha.

While the law to which the judge, be he a Muslim, in a non-Muslim country or a Muslim secular country is subjugated to, is kufr law, the law which the *Waali* appointed by the non-Muslim government, is the Shariah. The difference is thus as clear as daylight. It is glaringly erroneous to describe a Muslim judge in today's secular courts to be

the *Waali* of the Muslim community in the region where he happens to be a judge. Nowhere in the world is a Muslim judge of a secular court invested with the power to govern the Muslim community in strict accord with the Shariah. A Muslim judge who ignores the law of the land and attempts to issue decrees according to the Shariah will be unceremoniously kicked out of office and possibly arraigned for treason.

We fail to comprehend the intelligence which equated a Muslim secular court judge to a *Waali* appointed by the non-Muslim authorities of the land. There is absolutely not even a semblance of the Shariah in the decrees of a Muslim judge whose body, soul and brain are all subservient to the kufr law of the land which he must at all times interpret in the light of the kufr constitution of the country. Far, very far from being a *Shar'i Waali,* the Muslim judge in a kaafir court comes fully within the purview of the Qur'aanic stricture:

> *"And those who do not decree according to that (Shariah) revealed by Allah, verily, they are the kaafiroon."*

The Muslim judge adjudicating in a kaafir court is under obligation to suspend his Deen. Thus, the *ibaaraat* of our *kutub* which you have cited in substantiation of your *Tajweez No. 1* have no bearing to the Muslim judge whom you have abortively endeavoured to elevate to the pedestal of a *Shar'i Waali.* You have not furnished a single Shar'i reference for a basis on which to structure your resolution. While the *ibaarat* quoted by you applies to a proper *Shar'i Waali,* your resolution is something entirely different.

This resolution of the academy is extremely misleading in that it does not at all take into account the reality of the judicature, the judiciary and its kufr ethos and its binding nature on judges in non-Muslim countries and in all the Muslim countries ruled by secular (kuffaar) governments. A judge in a secular court cannot and may not issue decrees in compliance with the Shariah. He is bound by law to issue decrees in terms of the constitution and law of the country. If by chance any particular law of the land conforms to the Shariah, it will be a rare fluke – a decree which did not take into account Shar'i principles and particulars. It is a decree in the light of the law of the land. The Shariah has absolutely no relevancy to the decrees of a non-

Muslim or a Muslim judge in a non-Muslim country. In a recent judgment the Constitutional Court had specifically confirmed this fact.

What the academy states in its resolution will be valid only if the government in a non-Muslim country clothes a Muslim with judicial and coercive power to decree in strict accord with the Shariah without reference to the country's constitution and law, and his decrees will not be subject to appeal. But this is pure fiction. There is no parallel judicial systems (secular and Shar'i) in non-Muslim countries. Yes, there are hybrid systems known as MPL which have been incorporated into the law by making the Shariah subservient to kufr concepts. This subservience is achieved after mutilation of the *Ahkaam* of the Deen. Thus, all MPL measures are kufr presented in the name of Islam. Where there are such hybrid systems the court is bound then to operate strictly within the parameters of the haraam MPL measure which has been enacted as law, and which is portrayed as the Shariah to the masses. The Muslim judge in a non-Muslim country, has no right to ignore such a law – a kufr law in the name of the Shariah - and he issues decrees strictly according to the whatever hybrid, so-called Muslim Personal Law the government has promulgated. In fact, the Court can and will go much further. It has the power to strike out any MPL provision which conflicts with the constitution even after its (MPL's) enactment as law.

It is thus clear that this *Tajweez* of the academy has no practical relevance, at least not in South Africa., and that the basis, namely, *'qaanuni majboori'* you have provided for substantiation is fallacious. While the mas'alah of the Fuqaha in this regard does not create any confusion nor is it misleading, the academy has created confusion by offering its resolution in a scenario to which the Fuqaha did not apply it. The biggest flaw in this *Tajweez* is that the Muslim judge in a secular court in a non-Muslim country is not the *Waali* envisaged by the Fuqaha.

We reiterate that this resolution is unrelated to our contention and to our initial criticism which is directed at the academy's utterly baseless bestowal of *wilaayat* to a non-Muslim judge over a Muslim. It should be noted that in the criticized resolution, the judge is not even a Muslim who decrees in compliance with the Shariah. He is a kaafir who decides strictly in accordance with the country's laws and any

ambiguity in the law is eliminated by judicial interpretation in the light of the immoral and kufr constitution of the land. There is no room for the operation of the Shariah in this kufr system whose officers your academy is elevating to the status of Muslim Qaadhis.

Thus, the *mas'alah* of a Muslim *Waali* clothed with political power in a non-Muslim country can never be presented as an analogy for a Muslim judge fitted with the straight-jacket of kufr law in a kaafir court, and to a greater degree will the analogy be fallacious and absurd if the judge in the kaafir court is a kaafir.

Your Tajweez No. 2

Your second *Tajweez* reads: *"In those non-Muslim lands where the government has not established for Muslims a judiciary system in accordance with the principles of the Shariah, there (i.e. in such countries) it is incumbent on Muslims with the consultation of the Muslim leadership to establish a (Shar'i) judiciary, panchaayat (tribunal, committee, etc.) or similar institutions. The community should then refer their disputes to only these institutions."*

There is no dispute in this. In fact, this is the ideal solution for Muslims living in non-Muslim countries. Alhamdulillah, we have such institutions in South Africa which are able to handle and finalize all Muslim disputes in accordance with the Shariah. The only problem is that Muslims themselves prefer the kuffaar courts because of dissatisfaction with the laws of Allah Azza Wa Jal, and the prime culprits in the perpetration of such kufr are invariably women who openly reject the dispensation of the Shariah.

Mufti Zubair Bhayat, one of the MPL molvis who had attended the academy's session had in fact stated in his address to the academy that in South Africa there exist such Shar'i institutions which admirably perform the function of deciding the disputes of Muslims. Despite this acknowledgement, he and the other MPL molvis for some hidden motives are bent on achieving the objective of an MPL measure. This *Tajweez* too is unrelated to the conflict we have with the academy. There is therefore no need to dwell on this resolution with which we have no problem.

Your Tajweez No. 4

Your fourth *Tajweez* reads: *"In a non-Muslim country the husband constrained by the law (of the land – 'qaanuni majboori') applies to the court to annul his marriage. The judge issues a decree of separation (annulment/divorce). The judge's decree of separation will be accepted as being a Talaaq-e-Baa-in. However, it is better that after the decree of the court that the husband proclaims Talaaq with his own tongue."*

This is the resolution which we have rejected and denounced as *baatil* and in conflict with the fourteen century *Ijma'* of the Ummah. In this resolution the academy has bestowed the mantle of *wilaayat* to a kaafir over a Muslim by the devious interpretation of *taukeel.* The academy is at pains to justify its stand by interpreting the secular judiciary system to being the equivalent of *Taukeel (Agency)* in respect of the husband's application, but not so if the applicant is the wife. However, this interpretation is highly erroneous. It is untenable in the Shariah, in logic and even in terms of the kuffaar law. This corrupt interpretation negates the judicature according to both the Shariah and kuffaar concepts.

In its attempt to justify this baseless and haraam opinion, the academy states:

"The question is this: If a Muslim applies to a non-Muslim judge to decree divorce to his wife or to decree a separation between him and his wife, then what will be the status of it (i.e. of such a decree)? In this regard, the academy received 20 articles from Ulama prior to its seminar. Among these, the opinion of some (Ulama) was that this is Tahkeem (Arbitration), and it is not permissible to appoint a non-Muslim to be a hakam (arbitrator). The stance of the majority was that this is Taukeel (Agency). Finally, after debate and discussion the seminar unanimously decided that this form comes within the purview of Taukeel because when the husband says to someone to issue divorce to his wife, then this is taukeel. ……Being appointed a judge by the government is not negatory of him being the wakeel (agent) of another person."

Should we understand from the contention *'unanimously decided'* that those Ulama who had advanced the *Tahkeem* opinion have

retracted and accepted the *Taukeel* position or is the majority opinion interpreted by the academy to be in the category of 'unanimous'? A clarification will be appreciated.

What is the academy's basis for its contention that *"being appointed a judge by the government is not negatory of him being the wakeel of another person"?* Does this mean that the presiding judge while adjudicating between two parties can be the agent of one of these two parties? Clarification on this contention will also be appreciated.

The academy has not furnished a single Shar'i reference or proof of the Shariah for this stupendously weird and ludicrous conclusion. The conclusion that a sitting judge, a presiding judge acting in his judicial capacity as a judge is the agent of one of the parties whose case he has to listen and decide boggles the mind, nor has the academy shown that there exists somewhere on earth a judiciary system which allows a presiding judge to act as the agent of one of the parties whose dispute he is adjudicating. There is no judicial system, Muslim or kaafir, which condones this weird idea that the presiding judge listening to the case of two opposing parties is the agent of one party.

The academy performed the trick of arbitrarily concluding, without any Shar'i or even logical basis, that the application of the husband is the appointment of a *wakeel*, the judge being the *'wakeel'* in this case. For any claim, especially of this grave nature which abrogates the 14 century *Ijma'* and which is absurd, it is imperative to furnish solid Shar'i *dalaa-il.*

After arbitrarily asserting that the husband's application for divorce (which in reality is an imaginary one which has no practical import as will be shown further on) is *Taukeel,* the academy proceeds to furnish *ibaaraat* which deals with the *mas'alah* of *Taukeel*. This is a redundant exercise. We did not challenge the validity of *Taukeel* in the Shariah. The academy is supposed to furnish such *ibaaraat* from the kutub of the Fuqaha, which explicitly confirm that the presiding Qaadhi can be a wakeel for one of the parties in the dispute he is adjudicating.

It devolves upon the academy to provide *dalaa-il* for its arbitrary contention that *qadha is taukeel* or that the husband's application to the secular court is an act of *taukeel.* Instead of furnishing proof for

this contention, the academy provides proof for *taukeel.* You have to first prove that what is obviously and unanimously *qadha'* can also simultaneously be *taukeel.* Once you have 'proved' this contention, then only will it be appropriate to present *dalaa-il* for the validity of appointing a kaafir as one's *wakeel*, and that too, if we deny the validity of *taukeel* of a kaafir.

Your entire two and half pages of argument pertaining to *Taukeel* are superfluous. Whatever you have mentioned regarding *taukeel* is accepted. There is no dispute in this sphere. The dispute is: Is the judge while presiding to decide a dispute, the agent of one party? You merely claim: 'Yes', without giving your Shar'i proofs. Your contention is thus without *daleel* and is dismissed as baseless and weird and in conflict will reality, with the Shariah, with kufr law and with logic and common sense. It is not expected of Scholars of the Deen to insult their intelligence with such weird drivel.

Since you have structured your *wilkaalat* view on unsubstantiated opinion, your resolution is absolutely *baatil.* Even if we momentarily accept the imaginary claim of a Muslim husband proceeding to court to obtain a Talaaq, the resultant judicial process is never agency *(taukeel)*. The judge is never the husband's agent. The concept of a judicial system, does not accept the baseless and arbitrary contention that the judge is the agent of the plaintiff/applicant, and that he (the judge) is obliged to give fulfillment to the requests of the husband who has been assumed to be the *Muakkil* (the principal) in this weird and ludicrous interpretation.

Surely the academy committee is aware that once a person accepts to be the *wakeel*, then he is obliged to act in accordance with the instructions of his *muakkil (the principal).* If you appoint a *wakeel* to purchase for you a car, he may not purchase a donkey and impose it on you. If you appoint a person to contract your marriage to a woman, he has no right to issue divorce to your existing wife. Now when a man makes an application to the court for annulment of his marriage, the judge is not obliged by the law to grant the application. It is his right to issue a decree in favour of the other party. It is a right which no *wakeel* enjoys. If it is a *taukeel* contract, the *wakeel* has to incumbently execute only the instruction of his *muakkil.* This fact too refutes the

academy's *taukeel* contention. Your interpretation has no truck with reality and intelligence.

In another attempt to bolster its *taukeel* view, the academy states: *"For taukeel the explicit mention of wikaalat is not necessary. Expression of the meaning (mafhoom) is sufficient."*

While this is correct, the condition for the validity of *taukeel* is acceptance by the appointed person whether the acceptance is express or tacit. But in the case of a presiding judge who decides the dispute there is neither express nor tacit acceptance by the judge. On the contrary, the very concept of a judicature refutes the contention of *taukeel.* Let anyone ask a sitting judge whether he is the agent of one party or whether one party has appointed him to be his/her agent, and whether he has accepted such an appointment. Every stupid Tom, Dick and Harry will have the answer. If the lawyer, Mr. Shuayb Omar should ask a judge while the court is in session to state whose wakeel he is, we are certain that the judge will order Mr. Shuayb to visit a psychiatrist to check the operation of his intelligence.

In addition, ask the husband whom the academy imagines to be the *muakkil*, whether he has appointed the judge to be his agent. This husband we are sure will be dumbfounded and maintain silence for his failure to comprehend the mystery. From all angles, the contention of *taukeel* is absolutely basis.

In a *taukeel* appointment, the wakeel is obliged to act in accordance with the instructions of his principal *(the muakkil).* He has no right to act in conflict with his principal's instructions. But, in the case of the husband's application to the court, the judge is not obliged to submit to the wishes of the husband as stated in his application. If the court thinks that there is a reasonable prospect for the marriage to work, the judge has the absolute right to order the spouses to consult a marriage counsellor and to make an attempt to reconcile with a view to sustain the marriage.

Despite the husband's application which the academy interprets as the appointment of a *'wakeel',* the judge can refrain from granting the application and decree divorce if he feels that the marriage has not totally disintegrated. The onus is upon the husband to prove that the marriage has irretrievably broken down. But if someone is appointed a *wakeel* to issue Talaaq, the *muakkil* (the husband) is not obliged to

prove to his 'wakeel' that his marriage has completely disintegrated, leaving no prospect for reconciliation. There are a variety of factors which the court will or is supposed to take into consideration before granting a divorce application.

When the husband applies to the court, he does not instruct the judge to deliver his Talaaq to his wife nor is there even the slightest implication to this effect. He only informs the court that since his marriage has broken down irretrievably, the judge should grant a divorce decree. The judge will then decide on the basis of the facts and proofs whether to grant the decree or whether to reject the application or to postpone the decree or to order an opportunity for the couple to reconcile, etc.

Thus, even on the basis of accepting the fictitious and imaginary contention that the husband is actually applying for the dissolution of his Shar'i Nikah, the judge's decree is never a Talaaq because he is never the husband's wakeel.

Furthermore, even if we should momentarily accept the *baatil* assumption for pursuing this weird argument of *taukeel*, the question is: If the husband is intent on issuing Talaaq to his wife, and if there exists some law in the non-Muslim country which compels him to apply to the court for divorce, then why should or would the husband simply not issue Talaaq to his wife, and thereafter make the mock application to the court for annulment/divorce?

The advice of the academy is that the husband should pronounce Talaaq *after* the kaafir judge has issued a decree of 'divorce'. On what basis and in terms of which *Ihtiyaat* (precautionary measure) does the academy accord the husband's Talaaq a secondary role, and the kaafir judge's decree the primary role? The best course would be for the husband to issue Talaaq if he is determined to end the Nikah. Thereafter, as a mere legal formality to satisfy the kufr law, he could submit his application to the court.

In giving this rigmarole advice, the academy has acted like a man who wants to hold his nose. Instead of simply placing his hand on to his nose, he takes it (his hand) around his neck/head trying to grasp the nose from the other side, and then too fails. Instead of this stupid rigmarole the husband should be told to simply issue Talaaq, then if the law compels you, apply to court to satisfy the legal demand.

Despite the real danger that the kaafir court's decree is not Talaaq according to the view of those Ulama who say that the judge is not the *wakeel* of the husband – and this is not only a danger. It is a fact of reality – the academy assigns the husband's pronouncement of Talaaq to the *Ihtiyaat* category. In other words, it is not compulsory for the husband to pronounce Talaaq. The kaafir judge's decree suffices. After accepting that there are Ulama—innumerable Ulama who refute the weird *taukeel* interpretation of the academy's committee, it will also have to be logically accepted that the consequence of this opposite view is that the Nikah remains valid. Hence without the husband's pronouncement, the woman will remain in his Nikah, but on the basis of the academy's view the Nikah has been annulled. She will therefore feel at liberty to marry another man even if the husband does not pronounce Talaaq. This 'marriage' will be *baatil* in terms of the other view. Thus the woman will be living in the state of zina.

Therefore, for those who subscribe to the weird *taukeel* view, the *Ihtiyaat* measure is for the husband to *compulsorily* pronounce Talaaq. It should not be optional as the academy committee portrays. If the husband's pronouncement of Talaaq precedes the imaginary court application, it will obviate the enactment of rigmarole because his Talaaq effectively terminates the Nikah. What then is the purpose for making the court application? It serves only to secure cancellation of the haraam kufr registration, and nothing more.

In its attempt to justify its weird and baseless resolution the academy basis its view on what it termed *'qaanuni majboori'* (legal compulsion or a law which compels the husband to apply to court for divorce). In its response, the academy states:

"The topic of separation (divorce/annulment) by way of non-Muslim courts was included in this list of the academy for a long time. Important personalities of India and foreign countries have expressed the wish to make this a topic of discussion. ……"

It will therefore be reasonable to assume that the academy has done extensive homework and research of the law systems prevalent in the 'foreign countries', and that the 'important personalities' of those countries must have apprized the academy of the mode of operation of the courts in these many foreign lands. In fact, you, Brother Khaalid, had been in South Africa, and you did move around with the MPL

clique who had apprized you of the situation in South Africa. The academy should therefore apprize us of any country which has a law to compel Muslim husbands to apply to the secular court for a divorce decree to terminate their *Shar'i Nikah*. In South Africa there exists no such law. Since the resolutions of the academy germane to divorce and annulment decrees issued by non-Muslim courts pertain to real situations about which you are fully aware, it is highly inappropriate for the academy to present resolutions based on baseless assumptions totally unrelated to the realties prevailing in the foreign lands. In this kind of approach, instead of assisting and providing guidance, you are adding to the confusion with your baseless assumptions which have no relationship with the realities on the ground.

Which country requires Muslim husbands to apply to the secular courts for annulment of their Islamic marriages which are not even recognized as legal in South Africa? If there are any countries with this type of law, it will be the effect of some hybrid, baatil MPL provision enacted as law. In South Africa, a court will not entertain an application for dissolution of an Islamic Nikah because such Nikah is not recognized. Such an application will be for the dissolution of something which does not exist in law. There is no law in our country which requires a Muslim husband to apply to a court for dissolution of his Nikah. Your resolution is simply absurd, misleading and opens a door for *fitnah* by providing aid to miscreants whose mission on earth is to dismantle the Shariah with their MPL haraam rubbish..

If in any other country there exists such a law, then too, there is absolutely no need to make the Shariah subservient to the kufr law and abrogate the 14 century *Ijma'* by giving the kaafir court *wilaayat* disguised with the cloak of *taukeel* over a Muslim by some absurd, crooked and *baatil ta'weel.* What is the need for the absurd *taukeel* interpretation which defies reality and logic when the husband may simply pronounce Talaaq to his wife, then proceed to the court for annulment if the law so requires?

When the objective of the husband can be achieved by strictly following the Shariah and by abstaining from interfering with the Shariah's laws with far-fetched and ludicrous interpretations, then why unnecessarily embark on such a dangerous exercise? Why not simply

advise the husband to issue Talaaq, then apply to the court for annulment of his registered marriage if the law so demands?

It is clear to us that the academy committee of Ulama did not diligently apply their minds to reality and to simple ways of overcoming problems without tampering with the Shariah. This indifference of the academy borders on recklessness and displays scant respect for the Shariah and the needs of the Ummah.

Besides the fact that the academy did not provide a single Shar'i *daleel* for its weird *taukeel* interpretation to summarily negate the reality of *qadha* and the 14 Century *Ijma' of the Ummah,* its resolution is laughable to all those who understand the reality of the concept of a judicial system which can never be equated to agency (*taukeel*). In addition, there is no *dhuroorat* and no *qaanooni majboori* whatsoever which constrain interpreting away the reality *(Haqeeqat)* of *qadha* and for conferring *wilaayat* to a kaafir judge over a Muslim. If there is, then spell it out?

The extremely simple solution in a country where the law requires a man to apply to the secular court for divorce is for that husband to issue Talaaq whenever he wishes, and not to hinge his Talaaq on the decree of a kaafir judge. The legal requirement could be fulfilled without the need for the extremely far-fetched, in fact *baatil ta'weel* to which the academy has resorted.

In another weird and baseless assumption the academy avers:
"This talaaq has been proclaimed a talaaq baa-in because generally the words used in an application for separation, are in the terminology of the Fuqaha within the scope of Kinaayah. Also, the intention of the husband is to attain freedom from the woman, and this is possible only by means of talaaq baa-in. Furthermore, he is aware that the court will decree a total separation….Thus, with regard to both the word and intent, the angle of talaaq baa-in appears to be preferable."

The puerility of this averment is not hidden from those who have an understanding of legal issues in a non-Muslim country. Firstly, this entire averment is baseless since we have shown that the decree of the non-Muslim judge is not by way of *taukeel,* but is the effect of *qadha',* hence it has no validity. The question of Talaaq therefore does not apply.

For argument's sake if we accept momentarily the *baatil taukeel* supposition, the question is: What exactly is the husband applying for? What is he asking the kaafir judge to do? Either the law constrains him to apply to the court for dissolution of his marriage or it does not. If the law does require the husband to apply to court, it follows that the husband applies for dissolution of the legal registration, not for a Shar'i Talaaq because he possesses sufficient brains to understand that he has the power to dissolve his marriage at home with a single statement, and without indulgence in the expensive and disgraceful nonsense of the kuffaar legal system. He takes the court route only because of compulsion – the imagined fiction of *qaanuni majboori.*

Whether there is such a legal constraint or not, the husband knows that his one utterance of Talaaq will irrevocably and finally terminate his Nikah, hence there is no logical reason for him to become embroiled in very expensive ludicrous kufr legal proceedings for the acquisition of a *Shar'i Talaaq.* He will apply to court only for cancellation of the registration, and for nothing else.

Now when the husband applies to the court due to legal constraint, he does so for ONLY one reason, and that is to acquire cancellation of the legal registration, and this he does for one of two reasons: either he has already issued Shar'i Talaaq to her or he has not divorced her and he has no intention of issuing Talaaq, but circumstances constrain him to apply for dissolution of the legal registration.

Such circumstances may be the realization that as long as his marriage is registered in terms of kufr law, he will not be able to leave an Islamic Will. To ensure that a deceased's estate is distributed in accordance with the Shariah, it is imperative to obtain dissolution of the legal 'marriage'. Thus, his application is motivated by a reason other than Talaaq. On the contrary, he has no intention of Talaaq. Therefore, even if we have to assume or accept that the wording in his application is of the *Talaaq-e-Kinaayah* category, then the determining factor for Talaaq to come into effect is the *Niyyat* of the husband. But the husband has no *niyyat* of Talaaq, hence the consequence of the imagined *Kinaayaat* in the papers submitted to the court is not Talaaq.

If the intention is genuinely Talaaq, then the following questions develop: What prevents the Talaaq coming into immediate effect when

the husband made the *Kinaayah* statements with the intention of Talaaq? Why does the Talaaq in this case come into effect only when the kaafir judge issues a decree of dissolution of the registered marriage? Talaaq comes into effect immediately it is uttered or written, be it *Raj'i or Kinaayah.* With *niyyat* of Talaaq, the written or spoken statements are in fact spontaneously Talaaq not reliant on anyone's decree for validity. What Shar'i argument is there to substantiate the suspension of Talaaq Kinaayah on the decree of the kaafir judge?

The statement: *"It is the intention of the husband to obtain total separation from the woman.",* is truly laughable. Although we regret to say it, it may be salubrious for the academy that we say that you are making a laughing stock of yourselves by blurting out such absurdities which even laymen understand to be absurd. It does not behove an academy of Ulama to descend to such a puerile level. The husband knows well that he is able to obtain total separation from the woman by uttering just one Talaaq Baa-in. He is able to achieve this objective without the decree of the kaafir court.

Yes, he requires the decree only to free himself from the haraam encumbrance of the kufr registration which prevents him from leaving an Islamic Will to regulate the distribution of his assets in terms of the Shariah after his death.

What is the position if after making an application to the court, the husband issues three Talaaqs to his wife before the decree of the court? If the matter is one of *Taukeel,* the 'wakeel's' decree will be futile *(laghw).* Despite the futility, the application continues and will necessarily be heard and the court will issue its decree, and the husband will not withdraw his application for the simple reason that the objective of the whole exercise was to secure dissolution of the haraam kufr court registration, hence the case will proceed, and the very same decree which the kaafir judge would have issued prior to the three talaaqs will be issued after the three talaaqs. Subsequent to the three talaaqs the husband is not dismissing his 'judge-wakeel'. On the contrary he continues with the case for the objective which had motivated the application.

The husband's continuation with the court case even after the woman is no longer his wife according to the Shariah, is clear

evidence for our contention that the application is made for the dissolution of the haraam kufr legal registration, not for the Islamic Nikah. Ask any man who has made such an application to a court for his reason.

According to the academy the application submitted by the husband is in fact *taukeel* – i.e. the husband appointing the judge to be his *wakeel* to issue talaaq baa-in to his wife. But before this fictitious *'wakeel'* could execute the instruction of his *'muakkil',* the latter himself issued three talaaqs. Now what is the category of this *'wakeel'* who continues to pursue the original instruction of his *'muakkil'*? In the academy's view is he a judge or an agent of the husband?

If he is the agent, then what function will he be performing when the husband has already administered three Talaaqs? It is thus clear that he will not be the *wakeel* of the husband. But, if the academy intransigently contends that he remains the *'wakeel',* then the question develops: What is the function of this *'wakeel'*? Three Talaaqs have already been given by the husband. It can therefore be said only by a contumacious ignoramus that the *taukeel* remains valid., and that now this *'wakeel'* will execute on behalf of his *'muakkil'* the function of cancelling the court registration. But this is impossible because in this scenario the imagined *'muakkil'* (the husband) lacks the right and power to execute the task himself, hence he cannot appoint someone else to execute it. Cancellation of court registered marriages is the function of only the judge.

If after giving three Talaaqs prior to the court's decree, it is contended that the judge reverts to being a judge, then the academy must elaborate this logic which transformed the *'wakeel'* into a judge, especially in the context of the judge continuing with the very first and original duty which the imagined *'muakkil'* had entrusted him with.

It will therefore be abundantly clear and simple to understand the drivel of the academy's *'taukeel'* supposition. Thus, the academy's contention that the kaafir court's pronouncement is Talaaq Baa-in is devoid of Shar'i substance. It is a claim without *daleel.*

The academy then asks the crucial question – a question which is of vital importance:

"A question is: Instead of proceeding to the court why is the husband not ordered to issue talaaq? What is the need to proceed to the court?

In this regard we say that if his marriage is registered in the court, then the court will regard divorce to be valid only if it is decreed by the court otherwise the court can compel the man to establish marital relations with the woman."

The academy here acknowledges that the court has legal coercive power to compel the husband to establish marital relations with the woman as long as he does not obtain a decree of dissolution from the court, and this will be the case even after the husband has administered three talaaqs to his wife. The application will be purely for the dissolution of the registration, not to gain a Shar'i Talaaq.

Now after having given his wife three talaaqs, the husband makes an application to the court for 'divorce'. It is clearer than daylight that the objective of the application is not to gain a Shar'i Talaaq, but is for the dissolution of the haraam kufr registration. This was precisely the objective of the husband prior to giving the three Talaaqs. The *maqsad* is clearly cancellation of the registration, not dissolution of the Islamic Nikah. And this fact is conceded by the academy in its resolution. It is therefore, ludicrous to arbitrarily without any Shar'i *daleel* equate *qadha* with *taukeel*. Besides the invalidity of this contention, there is absolutely no need for it. The exercise is stupidly redundant. The husband's own utterance is the Shar'i Talaaq, and the court's decree is the termination of the registration.

The academy has squandered many years, considerable sums of money and brains pursuing a simple issue which does not need all these futile paraphernalia for a solution. The matter is as simple as follows:

If a husband decides to apply to court for 'divorce', he should be asked: 'Why are you proceeding to the kaafir court?' He will invariably answer: 'To obtain dissolution of the registration of the court marriage.' If he is asked: 'Do you want to issue Talaaq to your wife?' He replies: 'No, never! We are living happily.' Now what is the need for all the nonsensical *ta'weelaat* which the academy has advanced to bestow *wilaayat* to the kaafir court under subterfuge of *'taukeel'?*

If the husband says that he wants to dissolve his Islamic Nikah, and if he is so stupid that he is not aware of his right to administer Talaaq, it will be said to him: 'You yourself give your wife one Talaaq Baa-in.

There is no need to make an application to the court.' But then he will argue that his marriage is registered in the kaafir court. Obviously now he has no alternative but to proceed to the court. The purpose for proceeding to the kaafir court is nothing but the cancellation of the registration, not the dissolution of the Islamic Nikah. Such dissolution is available to the husband with his own tongue in a second without all the rubbish legal nonsense.

In every example mentioned by the academy, the *maqsad* of the husband's court application is nothing other than dissolution of the legal registration, not dissolution of his Islamic Nikah since the very foundational basis for the academy's view is *'qaanuni majboori'.* There is therefore no need whatsoever to pretend and contend that a court of law is the agent of the husband and its decree is Talaaq Baa-in.

Another baseless contention of the academy reads:

"...In terms of this law if the Nikah is not registered, there being only a Shar'i Nikah, then too if the husband wants to be liberated from his wife, he has to necessarily initiate legal proceedings for divorce. Therefore, sometimes the husband is constrained to apply to the court."

The confusion of the academy is manifest in this incongruous averment. In a country such as South Africa, an Islamic Nikah has no legal recognition. It is therefore highly erroneous to contend that the husband has to apply to the court for dissolution of his Islamic Nikah. The court will kick out the lawyer who comes with such a frivolous and stupid application. When there is no legal marriage, what is there for the court to dissolve? The dissolution is only by way of Shar'i Talaaq which the husband himself has to issue.

The court has no power to compel a Muslim husband to remain in wedlock with his ex-wife – with the woman whom he has divorced in terms of the Shariah. The academy is confused by certain court rulings which apply to the consequences of unions of two persons, be they two vile males or two vile women living as spouses without having registered their 'marriages'. When they separate, they don't and they can't apply to the court for a decree of dissolution of their partnership/ Islamic Nikah.

However, the courts have taken the position that although there is no marriage, living together for a period of time as spouses has legal consequences. None of these consequences is divorce. The consequences pertain to maintenance, custody of minors, etc. The court will order payment of maintenance which a 'spouse' must pay to the other 'spouse' whether the union was an adulterous one or a homosexual one or a lesbian one or an Islamic Nikah. The issue of divorce does not feature in such court decrees.

Your Tajweeza No. 5

Tajweez No.5 reads: *"If in a non-Muslim country a woman applies for termination of the marital relationship, and the non-Muslim judge with the permission of the husband issues a decree of separation, then it will be valid otherwise this separation will not be valid according to the Shariah. In such a case the woman should acquire khula' from the husband or obtain annulment from a Shar'i Panchaayat (committee/tribulal)."*

The incongruity of this resolution stems from the confusion of the academy. This resolution is another example of not having applied their minds, hence its insipidness and puerility. Why in the first instance should the wife not be advised to apply to the Shar'i Panchaayat for annulment of the Nikah? Only when the rigmarole of the court proceedings fail, is she advised to refer to the Shar'i Committee for *faskh* of her Nikah. This bias in favour of the kuffaar courts displayed by the academy betrays something sinister. It appears that like the MPL clique this academy too is more enamoured with kuffaar courts, hence the inordinate craving to surreptitiously confer *wilaayat* to the kaafir judge.

In this resolution, the applicant is the woman. It is palpably silly to aver that the judge gives his ruling with the permission of the husband. The husband will either defend the action or not. If he defends the action and the judge dismisses his defence, the court will issue its decree of kufr divorce for which the permission of the husband is not required, nor will the judge seek his consent. Also, the decree relates to the legal registered 'marriage', not to the Islamic Nikah. The wife does not apply to the court for termination of her Islamic Nikah.

If the husband does not defend the action, the judge will simply issue his decree of kufr divorce. Thus, in both instances, the question of the husband's permission is ludicrous. The academy committee's understanding of the functioning of a judiciary is hopelessly defective, hence it (the academy) has audaciously ventured corrupt untenable interpretations whereby the presiding judge is believed to be subservient to the husband since the *baatil ta'weel* would like us to believe that the judge is the agent of the husband. But this is palpable nonsense.

In explaining this *tajweez* the academy says: *"This tajweez has two parts. The first is this: If the wife had applied for talaaq and the husband accepts it such as the husband stating in writing: 'I accept the wife's demand for talaaq.', then obviously this is a talaaq which he gives. Similarly, if he said to the court: 'Accept her application.' Or he says: 'The court should decree a separation between us.' All these are forms of taukeel (agency)."*

This entire explanation is bunkum and laughable. It appears that the academy committee is totally ignorant of the way in which courts of law operate, hence this silly explanation has been tendered. If the wife applies to a court for divorce, in the first place she does not apply for a Shar'i Talaaq. The secular court does not listen to applications for Shar'i Talaaq nor do women apply for such Talaaq. The most ignorant and most irreligious woman in South Africa too is not so stupid as to make such a nonsensical application to court. In the entire history of the Muslim community of South Africa, no woman has ever applied to the court for a Shar'i Talaaq. The application is for annulment of the registration and/or for money – haraam money which these irreligious women usurp from their husbands with the aid of the kuffaar courts.

Now when the woman applies for annulment/divorce of her kufr court 'marriage', and if the husband refuses to issue Talaaq, then her brains begin to open up and the reality sinks in. Then she has no alternative but to appeal to the Ulama and others to endeavour to obtain Talaaq from her husband. Without a Shar'i Talaaq, she knows that she cannot marry any other man.

When the woman applies to court for annulment of the kufr registration, her husband either defends the action or he does not. In the first instance, that is, if he defends the action, he does not write in

any paper that the court should accept her demands nor does he ask the court to decree a separation as the academy ludicrously avers. If he wants the registration to be cancelled, he simply refrains from defending the matter. He does not appear in court, and the judge then issues a decree to cancel the registration.

By what stretch of Shar'i logic could any of these two forms be Talaaq? This resolution is an absurd figment of the imagination of those who drafted it.

Explaining the second part, the academy committee states: *"The husband does not consent to this demand (of the wife). In this case the separation decreed by the court is not valid. ……In this case the decision will be a decree of the judge and since a non-Muslim does not have wilaayat (jurisdiction) over Muslims, he cannot be a qaadhi."*

At least the academy has conducted itself responsibly with regard to this resolution. While the *taukeel* view is drivel and illogic both Islamically and in terms of the law of the land, the academy has at least acquitted itself correctly in a situation where the woman makes the application. This resolution is a great setback for the MPL clique. According to the immoral constitution of our country this resolution discriminates against women, hence it will vastly weaken the stand of the MPL clique whose members are engaged in dismantling the Shariah.

Every application which has hitherto been made to courts was the action of miscreant women whose eyes are only on the husband's money. Despite women being the culprits who initiate action in kuffaar courts, they are not in need of the academy's drivel resolution because they never apply for Shar'i Talaaq. They apply for money which the court always decrees for them.

A salient incongruity of the academy's bestowal of *wilaayat* to the kaafir court under guise of *'taukeel'*, is inconsistency and irrationality. When the man submits an application to the court, the judge becomes his *'wakeel'*. But when the woman submits her application, the judge remains a judge. And, if just prior to the court's decree, the husband himself administers three Talaaq to his wife, but pursues the court application since the *maqsad* is cancellation of the kufr legal registration, then this same *'wakeel'* is again transformed into a judge.

It is the baseless and corrupt *'taukeel'* interpretation which transforms the judge into a chameleon changing from one position to the other. No judicature whether Shar'i or otherwise subscribes to this nonsensical hybrid concept which the academy has fabricated for absolutely no pressing reason whatsoever. It must again be emphasized that the *'qaanuni majboori'* is the product of hallucination, for there is no law which compels the husband to apply to a secular court to terminate his Shar'i Nikah.

Summing up its argument, the academy states: *"The soul of all these resolutions consists of three factors:*
(1) Non-Muslims have no wilaayat over Muslims. Therefore without the consent of the husband the separation decreed by the court is not valid according to the Shariah.

(2) If the husband has applied for separation or he consents to the demands made in the wife's application, then this will be talaaq by taukeel or issuing talaaq directly.

(3) Muslims should establish their own judicial system either by petitioning the non-Muslim government to accept the demand for (a Muslim) judiciary, or they (Muslims) themselves should establish their own Daarul Qadha or a system of Shar'i Panchaayat."

With regard to No.1 above, the issue of the husband's consent is an incongruity. The court does not require the husband's consent, nor does the husband offer consent to the court nor does the court base its decree on the imagined consent of the husband. As mentioned earlier, the wife's application is to obtain cancellation of the kufr court registration, or haraam 'maintenance', or custody of the children, etc., and it is the prerogative of the judge to make a decision. He never refers to the husband for consent. Thus, the court's decree in all circumstances is NEVER Talaaq. The court will not have any *wilaayat* over a Muslim even in the hallucinated case of the husband's consent.

With regard to No.2, above, we have already discussed the absurdity of the *taukeel* supposition. No Talaaq takes place. In addition, the husband does not apply to the court for Talaaq. He applies for termination of the kufr court registration. The academy

dwells in total confusion in this regard. It is surprising that the academy committee has failed to differentiate between the Islamic Nikah and the court registration of a marriage. These are two separate issues which the academy has hitherto been unable to understand.

With regard to No.3, this is the only valid solution for Muslims living in non-Muslim and Muslim secular countries. The only way in which a woman could have her Nikah annulled is for her to apply to a Shar'i Committee.

Your defence of the miscreant lawyer Shuaib Omar is a futile exercise. We are in a better position than you to know and understand who this fellow is. We are not impressed by him being the student of Mufti Taqi Sahib. His relationship with Mufti Taqi Sahib does not grant him a licence to tamper with and dismantle the Shariah. This deviated lawyer has over the years plotted to corrupt the Shariah with his *baatil* ideas on different subjects. With the smattering of knowledge he possesses, he conducts himself as if he is a mujtahid. We do not need secular lawyers to dabble in Shar'i matters. We, therefore reiterate that our opinion regarding this deviate is correct. It is in the interests of the Muslim community and in defence of the Shariah that we are constrained to brand him a miscreant and a deviant.

Yes, we have taken your advice, searched our souls and reflected in the matter of this miscreant lawyer, and we are convinced that he comes within the scope of the undermentioned Qur'aanic aayat:

> *"And, from among people is he who disputes in (the Shariah) of Allah without knowledge, and he follows every rebellious shaitaan." (Aayat 3, Surah Hajj)*

You should advise him to concentrate on his secular profession and not dabble in the Shariah for which he is hopelessly unqualified.

It is our fervent dua that Allah Ta'ala keeps us all steadfast on the Haqq and saves us from the creeping cancer of liberalism which has destroyed the Ulama of this era.

THE FIQH ACADEMY ABSURDITY

A lawyer from England writes:

"I have spoken to Maulana Yaqub Qasimi in Dewsbury, England and he informs me that he met Maulana Khalid Saifullah (of India's Fiqh Academy) when he visited the country recently. He (Maulana Qasmi) privately asked him how a sitting judge could ever become a party's representative (wakeel).

Maulana Khalid explained that Talaaq ensues from a civil divorce because it is irrelevant whether the judge accepts or assumes the formal role of a representative. If a man makes a petition to a civil court then the judge, from a Shar'ee viewpoint, is now a Wakeel. It is not necessary for the sitting judge to formally acknowledge his role as anyone's representative. Indeed, Maulana Khalid Saifullah argues that the role of Wakalat is superimposed on the judge even though it is well-established generally in Islamic and English law that a judge can never become anyone's representative.

I said to Maulana Yaqub Qasmi that this was not the basis of the original decision from the Fiqh seminar and in correspondence with Mujlisul Ulama he had never argued in such form nor has he provided the Shar'ee basis for now arguing as he does privately.

I wish to share this information with you as Maulama Khalid Saifullah refuses to respond to any e-mails and it is interesting to note how there is no logical answer or arguments to the resolution adopted by the India Fiqh Academy."

COMMENT

The contention *"that the role of Wakalat is superimposed on the judge* ***even though it is well-established in Islamic and English law that a judge <u>can never</u> become anyone's representative"*** is bizarre irrationality and absurdity. Despite conceding that a sitting judge **can never** be any party's agent, Maulana Saifullah, irrationally clings to his ludicrous 'wakalat' contention.

Maulana Khalid Saifullah with his latest argument has degenerated further into his rut of absurdity. The averment that a person, be it a judge, becomes a wakeel without him accepting the appointment, (in fact he rejects it by virtue of his office and position), then too he is the wakeel of the petitioner, is an absolutely weird specimen of absurdity and irrationality.

His contention that the judge becomes the wakeel *"from the*

Shariah viewpoint" is totally baseless. He has to furnish Shar'i evidence to substantiate this preposterous and absurd claim. There are numerous rules which govern the Shar'i concept of Wakaalat which has *Arkaan and Shuroot (Fundamentals and Conditions)* for its validity. One of the fundamentals for the validity of Wakaalat is acceptance. The acceptance may be expressed verbally or by action. But Wakaalat is not valid if there is no acceptance and even more so if there is rejection as in the case of a sitting judge. It is glaringly in conflict with the Shariah and weird to argue that a man who refuses to be your wakeel is nevertheless your wakeel. The non-existence of Wakaalat in so far as the sitting judge is concerned is emphasized by his position which is a conspicuous denial of him being a wakeel of any party whose dispute he has to adjudicate. In fact we are labouring an issue to the degree of monotony. This matter is clearer than daylight. That a sitting judge is never the wakeel of one of the parties who dispute/case he has to adjudicate is an obvious and a simple fact which any layman in the street can also understand.

His claim that Wakaalat is superimposed on the judge is devoid of Shar'i, logical and rational substance. He should be asked to provide his Shar'i proof for the figment of his superimposition theory. There is no such superimposition concept in the Shariah. The Maulana has grievously erred in his presentation of this absurdity.

He will refuse to respond to your letters because he knows deep down in his heart that his theories are legless and cannot be substantiated with Shar'i daleel.

The whole MPL clique has become irrational in their arguments. They are like drowning men grasping desperately at passing straws to save them from the quagmire of the irrational debacle in which they are mired. Thus, you will find even the lawyer Mr. M.S. Omar who is supposed to acquit himself rationally and logically also conducting himself with absurdity. He too blurts out the stupidity of the sitting judge being the wakeel of the husband who has petitioned for cancellation of the civil contract. When even a secular lawyer who has practised almost two decades in the legal profession has failed to understand this very basic and rudimentary fact, then his practising as a lawyer boggles the mind.

“The majority of them do not know the Haqq, hence they diverge (from Siraatul Mustaqeem) into error and deviation.”
(Qur’aan)

In Replication to Maulana Khalid and M S Omar

(By Maulana I. E. Vawda
Darul Ifta, Madrasah In'amiyyah, Camperdown)

إن الحمد لله؛ نحمده ونستعينه ونستغفره، ونعوذ بالله تعالى من شرور أنفسنا وسيئات أعمالنا، من يهده الله فلا مضل له، ومن يضلل فلا هادي له، وأشهد أن لا إله إلا الله وحده لا شريك له، وأشهد أن محمدا عبده ورسوله، اللهم صل وسلم وزد وبارك عليه، وعلى آله وأصحابه وأحبابه وأتباعه وعلى كل من اهتدى بهديه، واستن بسنته، واقتفى أثره إلى يوم الدين.

1. I had the good fortune of receiving the letter of Maulana Khalid Saifullah Rahmani Saheb, of the Islamic Fiqh Academy India, dated 28 Rabi-ul-awwal 1431 (15 March 2010). Jazakallah to Maulana Shoayb Joosab for providing the same. The letter offers an explanation to some of the resolutions recently taken by the Academy. I am most grateful for the elucidation provided, and it has certainly helped in gaining better clarity on the subject under discussion.

2. I also received a copy of a letter, dated 5 March 2010, written by Mr. M S Omar, an attorney practicing in Durban. I have made attempts to elicit clarity on a number of issues raised by the attorney, but unfortunately to date no response has been forthcoming. The attorney has in his letter postulated a hypothesis, which shall be appraised below.

3. I have been commissioned to offer my opinion on these two viewpoints. I shall refer to Maulana Khalid Saifullah Rahmani Saheb simply as 'Maulana Khalid' for ease of reference. There is certainly no discourtesy intended, for Maulana deserves our dearest respect. The hypothesis proposed by Mr. Omar shall, again for ease of reference, be referred to as 'the Hypothesis'. Maulana Khalid's letter and the Hypothesis do share some common ground; hence I will offer comments of both of them jointly.

Outlining the Topic

4. Muslims living as minorities in non-Muslim states do not have the facility of a *Shar'ee Qadhi* to resolve their disputes, or to undertake those judicial functions that require the inherent powers found in the Head of State in an Islamic State. One such power is the authority to annul a Nikah. In the event of such a need, and in the absence of a *Shar'ee Qaadhi*, other solutions need to be sought to provide a remedy to such a predicament.

5. In terms of the *Shari'ah*, the husband has inherent power and authority to dissolve the *Nikah* at will, even without just cause. This he does by pronouncing a *Talaaq*.

6. A predicament only arises where the wife seeks annulment and husband is not co-operative. If the husband is co-operative, no special solution needs to be sought as the husband simply issues the *Talaaq*. On the other hand, if it is the husband who seeks to terminate the Nikah, no special procedures are required as here too the husband simply issues the *Talaaq*. Hence it is imperative not to lose focus of the specific and peculiar situation that is being addressed, namely the case where the wife seeks annulment and husband is recalcitrant.

7. It is common cause that a non-Muslim judge in the court of a non-Muslim state has no authority to pronounce on purely religious matters, such as the existence of a *Nikah* (Islamic marriage) or *Talaaq* (Islamic divorce). Any decree made by such a judge to this effect will only have a bearing in the secular sphere, and will not impact on the religious dimension. The judge lacks jurisdiction over religious affairs. More will be said on this point later.

8. Maulana Khalid's letter explores the possibility of a Muslim secular judge having an authority similar to that of a *Shar'ee Qaadhi* within the Islamic state, and thus overcoming the stated problem via this route. Furthermore, both Maulana Khalid and the Hypothesis probe the prospect of the husband authorising the secular judge to act on his behalf, or in his interest. Both these theories will be examined.

The Method must correspond with the Aim

9. In the field of Administrative Law, there is a concept termed "Exercising power using an unauthorised procedure". Without going into much detail, under this concept there is a rule that if a person in authority follows an incorrect procedure (one that does not correspond to the person's stated aim), more often than not it has been found that the person has an ulterior motive. There automatically arises a reasonable apprehension of an undercover cabal.

10. Maulana Khalid would be well aware of the procedure of the local tribunals, also called panchaayat, available to provide relief to women in the stated predicament. This has been discussed in detail in the monumental work 'Al Heelatun Naajizah'. At present, in the context of South Africa, these tribunals, which are run by the various Ulama bodies, do annul the Nikahs of deserving women. *When these tribunals are available, why would one then require the assistance of a secular court?* And, if despite the functioning of these tribunals on a regular basis, some quarters wish to vigorously advance the notion that the Nikah should be annulled via the secular courts, it is only reasonable to conclude that there is a strong likelihood of an ulterior motive behind such moves. No reasonable explanation has been offered as to why these tribunals need to be avoided in favour of secular courts.

11. In his introduction Maulana Khalid made it clear that the Academy did not direct its attention to any one particular country, but rather provided more general guidelines. This would imply that the Ulama of the various countries would have to study these broader guidelines, and then consider whether or not they apply to the particular circumstances found in their respective countries. In brief, the Academy's resolutions are theoretical, which then have to be applied to the factual situation. I am certain that the members of the Academy will agree that their work is only one phase in the entire process, and that the resolutions cannot be taken as the final word on the matter.

Resolution No. 1

12. Before discussing the findings, a word about terminology. When referring to a magistrate or judge as found in the judicial system of modern western democracies, I prefer using the term 'secular judge'. When referring to a *Qaadhi* as understood and applied in terms of the Shari'ah, I will use the term 'Shar'ee Qaadhi'. Both the coinages that I prefer are, I admit, somewhat tautologic, but this use has been necessitated by the erroneous assumption that both are one and the same.

13. I will break down the first resolution into its various elements, using the terminology outlined above. In essence it states:

i. In a non-Muslim state, should

ii. A secular judge

iii. Who happens to be a Muslim, and

iv. At the time of giving judgment

v. Kept the Shar'ee rules in mind

vi. Then it is accepted that he shall be a substitute of a Muslim Haakim (Head of State in terms of Shari'ah),

vii. And therefore his decree of annulment of a Nikah will be considered valid.

14. In support of this resolution, Maulana Khalid has presented a few texts from the works of our illustrious *Fuqahaa* (Islamic jurists). After a survey of these texts and others, it is clear that the scenario discussed by the *Fuqahaa* is something distinct and different from what is proposed in the resolution. It is certainly improper to focus solely on one or two common elements, whilst ignoring the others.

15. The *Fuqahaa* had in mind the case where a *Shar'ee Qaadhi* functions autonomously in a non-Muslim state. From history we learn that on occasion the non-Muslims did conquer Muslim lands. They however, at times, allowed the Muslim inhabitants varying degrees of autonomy. In some cases the autonomy was both in respect of administration as well as judicial function. The only interest the non-

Muslims had was to collect taxes from the Muslim citizens. All the administrative issues of state were in the hands of the Muslim community. They appointed their own governors, had their own courts, and managed their own state affairs. The central government, under the control of the non-Muslims, voluntarily abdicated many of its powers in favour of local or regional leaders. This is akin to the modern system of federalism. In other cases the non-Muslims facilitated for the Muslims to have their own system of courts, without autonomy in respect of other areas of governance.

16. The most important feature is that there was judicial autonomy. This has been borne out by the statements of the *Fuqahaa*. Whilst Maulana Khalid has quoted the text from *Addurul Mukthaar* the quotation is incomplete. Hereunder is the completer text.

(ويجوز تقلد القضاء من السلطان العادل والجائر) ولو كافرا ذكره مسكين وغيره إلا إذا كان يمنعه عن القضاء بالحق فيحرم[3]

ثم يجوز التقليد من السلطان العادل والجائر ولو كان كافرا كما في الدر عن مسكين وغيره، إلا إذا كان لا يمكنه من القضاء بالحق؛ لأن المقصود لا يحصل بالتقليد[4]

وما ذكرَ المُؤلّفُ من جَوَازِ التَّقليدِ من الجَائِرِ مُقَيَّدٌ بمَا إذا كان يُمَكِّنُهُ من القَضَاءِ بالحَقِّ أمَّا إذَا لم يُمَكِّنْهُ فلا كما في الهِدَايَةِ لِأَنَّ المَقصُودَ لا يَحصُلُ بِهِ[5]

One of the important conditions, which was overlooked, is non-interference. Should the non-Muslims have any control of the judicial process, thereby imposing their will over the *Shar'ee Qaadhi*, the appointment is invalid according to the *Fuqahaa*. If a person is bound by the ethos of the secular Constitution, his freedom to decide matters solely based on Shari'ah considerations is curtailed. He is prohibited from employing the truth of the Shari'ah.

17. The reverse scenario also existed in history where the central government was that of the Muslims, yet they allowed some degree of autonomy and self-governance in the hands of the non-Muslim subjects. These non-Muslims also had their own courts, and the central Muslim government would not interfere with their internal judgments. Allamah Shaami speaks of the Druze and Christians who were given such concessions in the Levant.

18. What all these texts refer to is a *Shar'ee Qaadhi* and not a secular judge. There is a world of difference between the two, and hence he has played around with interlingual rendition or improper reliance on a literal translation. Apart from the fact that both sets of adjudicators are schooled and trained in different systems of law, and that they are grounded in fundamentally opposed legal philosophies, the central issue is their allegiance. A secular judge has, by virtue of his judicial oath, sworn allegiance to uphold the secular Constitution. His fealty and loyalty are to the constitutional set of values, and he is required to keep his personal sense of morality or religious belief outside the courtroom.

19. One cannot conveniently isolate certain features, and base one's conclusion solely on those features. Elements such as "non-Muslim state", "appointment of a Muslim", and "consideration of the Shari'ah" are insufficient. The holistic approach creates a different picture. The secular judge being a Muslim does not elevate him/her to the status of a *Shar'ee Qaadhi*. The very judicial system requires of him/her to keep his/her Imaani belief system outside the courtroom or chambers. Should he/she import these values into his/her judicial functions or judgment in conflict with the constitutional values, he/she will be severely criticised when taken on review, and the judgment or function will be overturned.

20. The *Shar'ee Qaadhi's* allegiance is to the Shari'ah. One can only function as a *Shar'ee Qaadhi* if one is free to enforce the *Qur'aan* and *Sunnah*, as interpreted by the *Fuqahaa*, with judicial independence. The rules of judicial procedure are so strict that a *Shar'ee Qaadhi* is not even allowed to ordinarily depart from the preferred view of his *Math-hab*. To borrow the famous phrase, he should be able to act without 'fear, favour or prejudice'. Let alone a *Shar'ee Qaadhi*, an ordinary Muslim cannot have two masters – the Shari'ah and some other man-made system of law. As long as a person owes loyalty to the Constitution, such a person cannot assume the mantle of a *Shar'ee Qaadhi*. It would be incorrect to say, as Maulana Khalid intimates, that since both are adjudicators, the concept of *Shar'ee Qaadi* and secular judge are interchangeable provided the secular judge is a Muslim. This simply defies all reasoning.

21. Whilst there are many more criticisms that can be levelled at Resolution no. 1, brevity does not afford us the opportunity. Suffice to say that the *Fuqahaa* have envisaged a system where a *Shar'ee Qaadhi* (not a secular judge) may validly function with judicial independence within a non-Muslim state. Even though the Head of State be a non-Muslim.

22. Applying such a scenario would be impossible in the context of modern secular democracies; hence the academic theory covered by the *Fuqahaa* will find no practical application in the context of countries like South Africa, Canada, the USA, Britain, and the like. Yes, in countries like Nigeria or similar constitutional dispensations, where a strong degree of federalism exists, some federal states do conduct their internal affairs in accordance with Shari'ah. In such cases the rules established by the *Fuqahaa* may find expression.

23. In the context of South Africa, should there be any arrangement available whereby a *Shar'ee Qaadhi* is given the judicial authority to act independently in terms of Shari'ah, we would certainly want to grab onto such an opportunity with both hands wide open. However, such a structure is simply impossible. Hence the resolution has no relevance in our context.

Resolution no. 2

24. Once more, some clarity around a few concepts and terms before dealing with the issues. There are three distinct bonds that could exist between Muslim spouses. By bond is meant a relationship that is recognised in some or other system of law, giving rise to rights and duties under that system of law. To highlight these bonds, consider the following three scenarios:

> a) Should the couple, after concluding a Nikah, register their marriage in terms of the Marriage Act, a secular marriage is also established. From an Islamic perspective they are bonded to each another by the Nikah, and from a secular perspective they are bonded by the civil marriage. Although the two bonds may share some common features they are not one and the same. The rights and duties that flow from a Nikah are quite

distinct from the set of rights and duties that flow from the civil marriage. The two bonds exist independent of each another. One can have a Nikah without a civil marriage, and one can have civil marriage without a Nikah. It follows from this that one may have a termination of the Nikah without the termination of the civil marriage, and one may have a termination of the civil marriage without the termination of the Nikah.

b) Here the couple merely undertake the Nikah, but the secular law gives some degree of recognition to the Nikah. A bond does exist in the eyes of the secular law, but this bond is distinct and dissimilar from the type of bond that exists in (a) above, which is governed by the Marriage Act. This is currently the position of South African law in respect to most Nikahs. The precise parameters of this secular bond are still being worked out in our courts. The set of rights and duties that flow from this secular recognition are more limited than the set of rights and duties that flow from the Marriage Act.

c) Here the couple undertake the Nikah only, and the secular law does not give recognition to any bond. This was the position in South African law prior to 1996, when *Rylands v Edros* was decided. It may still be the position in many western democracies.

25. The second resolution deals with non-judicial tribunals. By non-judicial is meant that the decisions of such tribunals have no force of law in the eyes of the secular state. The resolution simply encourages the formation of such tribunals, to which we add our endorsement. In some areas these are referred to as Panchaayat, and in other areas as Darul Qada. Our local Jamiats called them 'Judicial Committees'.

26. It is indeed surprising that ardent followers of the Academy do not want to pursue this particular advice of the Academy of setting up such tribunals, and would prefer to pretend that such a resolution is *pro non scripto*.

27. The question that arises is that, when these tribunals do exist, what need is there to resort to a secular court? To this question Maulana Khalid has offered a few replies.

28. Maulana Khalid avers that at times the Nikah is registered with the authorities, and hence the court would have to terminate the Nikah. Therefore one may need to approach the court to terminate the Nikah.

Unfortunately, this contention is clearly incorrect. A Nikah is never registered, at least in the South African context. To the best of my knowledge, the same goes for other secular democracies. Courts do not deal with the Islamic bond, but only with the secular one.

29. The second reply proffered by Maulana Khalid is the example of where a couple, married under civil law, simultaneously accept Islam. In terms of the Shari'ah, a new Nikah is not required, and the Shari'ah automatically recognises the coming into being of a Nikah. Even in such a case, no need arises to approach a court since the court only deals with a secular bond, and not the Nikah.

30. The third reason provided by Maulana Khalid is where the couple undertake the civil marriage is such a manner that it also gives rise to a Nikah as well. He contends that they need to approach a court in order to terminate the Nikah. The same misconception repeats itself in this reply. The courts do not deal with Nikah. It is possible to terminate the civil marriage without affecting the Nikah, and it is also possible to terminate the Nikah without terminating the civil marriage.

31. The fourth reason offered by Maulana Khalid is the case of (b) above, where the courts give some form of recognition to the Nikah, but on their own terms and conditions. It has been explained above that such secular recognition of a bond is something separate and distinct from the Nikah bond. The courts may withdraw their recognition on a secular level without affecting the Nikah bond, as the courts do not deal with the Nikah. The two bonds are independent of each another. If the court refuses to recognise a bond in the case where a valid Nikah exists, are we then going to say that since the court did not give judicial recognition to any bond, the Nikah is invalid? Certainly not. Under no circumstances does the need arise for the

husband to approach a court in order to effect a termination of the Nikah bond.

32. Resolution no. 3 is not relevant for the present discussion.

Resolution no. 4.

33. The elements of this resolution are:

i. If in a non-Muslim State

ii. The Muslim husband

iii. Due to some legal compulsion

iv. Requests

v. A non-Muslim secular judge

vi. To terminate his Nikah bond, and

vii. The judge issues a decree of divorce,

viii. The decree of the judge shall constitute

ix. One *talaaq-ul-baa-in*.

34. The first point of contention is the misconception that the Muslim husband ever faces a legal compulsion to approach a secular court in respect of his Nikah. Necessity to approach a court in respect of the civil marriage – Yes. Necessity to approach a court in respect of the Nikah bond – Never. Maulana Khalid seems to be confused with the two bonds, hence the resultant confusion. Courts do not deal with the religious bond. It is outside of their jurisdiction. It falls in the purview of religious law, and the courts deal with secular law. The two systems of law are separate. Each operates in a deferent sphere.

35. In order to bring the Nikah within the jurisdiction of the Court, Maulana Khalid tenders the concept of *tawkeel*. '*Tawkeel'* means to appoint another as one's agent. He contends that the husband has appointed the secular judge as his agent to carry out the *talaaq* on his behalf.

36. He also poses the pertinent question as to why a husband would need to appoint the secular judge as his agent when he can carry out

the termination of the Nikah by himself. The Muslim husband simply issues the *talaaq*. After raising the opposite question, the issue is clearly avoided, and an explanation is given that it is valid to appoint a non-Muslim as one's agent. That however is not the issue.

37. On a general level it is accepted that if a Muslim husband, *de facto*, appointed a non-Muslim as his agent to carry out the *talaaq* on his behalf, the agency is valid. Can this rule be applied to the scenario contended by Maulana Khalid? For reasons provided later on, we say: No.

The Initial Problem

38. With all the finer detail issues, focus could be lost of the initial stated problem. Let us zoom out for the moment and reconsider the bigger picture. Where the wife requires the dissolution of the Nikah, and the husband is incalcitrant, there may arise a need to devise a method of coming to the rescue of the wife. But if the husband himself wishes to terminate the Nikah, there is absolutely no need for any special mechanism. The husband merely issues the *talaaq*. There is no need for any court process. And if the civil marriage needs dissolution, the process of court divorce is available without any fancy wakeel theory. What exactly is the problem that is being addressed, and how is it being addressed by this theory? I for one cannot see any link.

The Hypothesis

39. Mr. Omar's Hypothesis shall now be considered as it shares some common features with Maulana Khalid's theory. Thereafter both will be addressed jointly. A synopsis of his hypothesis is as follows:

> a. On occasion the scenario does arise where a Muslim husband applies for a decree of divorce in a secular court.
>
> b. During the procedure required to accomplish this, the husband is called into the witness box. There he is expected to aver that his secular marriage has irretrievably broken down, and that in his view there are no prospects for reconciliation.
>
> c. This statement of the husband must be interpreted to mean that the husband has appointed the judge to be his agent in

administering the *talaaq*. In the alternative, it must be presumed that the husband has delegated his discretion to the non-Muslim secular judge by means of *tafweedh-ut-talaaq.*

40. *Tafweedh-ut-talaaq* may be described as the husband's delegation of his full discretion of *talaaq* to the independent control of another competent person. The appointee is entrusted to apply his/her independent mind to the matter, and if he/she deems it appropriate, administer the *talaaq*. This is also a form of agency, but with an added feature of full discretion to consider the matter. In other words, the simple agent (as in *tawkeel*) is authorised to merely carry out the juristic act, whereas the appointee in the *tafweedh-uttalaaq* is entrusted to consider the appropriateness of the *talaaq*, and if necessary, administer it as well.

41. There is a fundamental difference between Maulana Khalid's contention, and the Hypothesis. Maulana Khalid deals with a *de facto* situation. He considers the case where the husband, in actual fact, makes a request to the secular judge to terminate the Nikah. The Hypothesis deals with the case where the husband does not make any such request. The husband simply avers that his marriage has irretrievably broken down, and that there are no prospects of reconciliation. The Hypothesis then postulates a truly absurd presumption that the husband has appointed the judge as his agent to give the *talaaq*. More about this fatuity later.

A Court Divorce

42. To put the scenario of the Hypothesis in proper context, it is apt to explain how court divorces work. For a secular court to grant a divorce, two important requirements must be met.

a. An irreconcilable breakdown of the marriage

b. No prospect of a reconciliation

43. Most often, one of the spouses sues for divorce, and the other spouse does not oppose the application. In the High Court or Divorce Court, the spouse that sues is present. He/she is called into the witness box, and the usual oath is administered. The Judge asks to see the original marriage certificate. The Court Orderly takes the certificate to

the Judge, who makes note of it. Then the Judge asks the spouse if the marriage has irretrievably broken down. The usual 'Yes' follows. The Judge then asks if there are any prospects of reconciliation. The standard negative answer comes forth. The above process works like a sausage factory, the same standard and monotonous procedure repeats itself time and again.

44. For our purposes, it is important to note why the spouse (any spouse and not just a Muslim husband) makes these statements. It is a simple requirement of court. There is nothing extraordinary or untoward about the statement made from the witness box. No reasonable person observing the scene would be overcome with a sudden desire to enquire as to another meaning behind the words.

Excursus

45. From a secular law perspective, it would be best if unopposed divorces be dealt with through the Department of Home Affairs, in a manner similar to which they register marriages. Despite the theoretical basis for claiming otherwise, from a practical perspective divorce is issued upon demand. The High Court's resources would be freed up for more important matters than mere mechanical-fashion procedures.

The "Agency"

46. Let us return to Maulana Khalid's presentation of a scene where a husband in reality requests the judge to terminate his Nikah. Has such a case every happened? Not to the best of my knowledge. It seems too farfetched to be true, and I won't hold my breath waiting to hear of such a factual event. Can it ever happen? For reasons coming ahead, No. The Academy exhausted its valuable energies over something that has never occurred, nor is it ever likely to occur.

47. The first step of any agency process is intention. The husband must have had the intention to appoint the judge as his agent. Minus such an intention, there can be no process of agency. The Hypothesis contends that one can presume the validity of the agency even if there was no intention. If the husband bears testimony under oath that he had no

intention to appoint the judge; then too, the Hypothesis argues, an agency arrangement shall be assumed to exist. On what rational basis this contention relies is beyond comprehension.

48. The second step in an agency process is that the principal must communicate to the prospective agent that he (the principal) intends appointing the prospective agent as his agent. In the absence of such a communication, no agency agreement can come into effect. The Hypothesis postulates that even in the absence of such a communication, it can be assumed that an agency agreement was formed. Again, this defies all logic.

49. The third step would be for the prospective agent to receive such a communication. It goes without saying that without being aware of such a request, the agent could not have agreed. Yet the Hypothesis, against all laws of logic, wishes to presume that in the absence of such awareness, the judge is nevertheless the agent of the husband.

50. The fourth step would be for the agent to accept such an appointment, or in other words to assume such a responsibility. The agent is not obliged to accept, and only if he voluntarily did so would it be possible to have a valid agency. Here the judge, not having been aware, is simply assumed to be aware and assumed to have accepted the responsibility of undertaking the task of being an agent of the husband. All this is supposed to exist even if the reality does not reflect so.

51. The fifth step would be for the agent to, when carrying out the function, have the intention of carrying it out on behalf of the principal. According to the strange reasoning of the Hypothesis, even if the judge proclaims that he had no such intention; we must nonetheless attribute to him such an intention, no matter how incompatible such an assumption may be.

52. The entire presumption of an agency is hinged on his statement to the effect that the marriage has broken down. Is there any possible rational link between the statement and the intention that is imputed to the statement? The husband simply made the statement as a formality of court. To postulate that he had some other intention, despite his denial thereof, would be incomprehensible.

Impossibility of Judge Acting as Husband's Agent

53. Maulana Khalid states:

> "The fact that a [secular] judge is appointed by the State does not preclude the [secular] judge from being an agent of any person"

This unfortunately is where Maulana Khalid has been clearly misinformed. This assumption lies at the essence of his erroneous theory, and it is due to this piece of misleading understanding of the law that the entire edifice of his theory collapses.

54. The secular judge is bound by strict rules of court procedure. He is not free to engage on just any matter he wishes. He is mandated to deal with the secular law. To step out of his circle of authority, and engage in a matter outside of his sphere will vitiate the proceedings. Secular law recognises that religious law is outside of its sphere. For this very reason there is the precept in law called the 'non-entanglement doctrine'. This doctrine requires the courts to adopt strict neutrality towards theological issues. The Nikah, being a matter of religious law and not that of secular law, is outside the domain of the

courts. The secular judge will be acting *ultra vires* (beyond his mandate) during divorce proceedings if he engages in the issue of Nikah. Such engagement is unnecessary for him to dispense with the issue before him. A judge is required to strictly confine himself with the issue before him, and not digress outside of the material issues relevant to the application.

55. The secular judge must maintain a position of being a neutral umpire. He cannot be associated with any of the parties before him. He is not allowed to descend into the arena, and to be even perceived to take sides in the matter before him. The attorney and advocate are agents of the respective parties. The judge is no one's agent. Should the judge accept the appointment of being an agent, he now leaves his neutral position and descends into the arena. His neutrality is lost as he now represents the husband, who is one party to the proceedings. He then has an interest in the matter as an agent of one of the litigants before him. A new legal relationship is established between him and

the husband, that of Principal and Agent. With this new chain or bond existing between him and the husband, and no such chain or bond between him and the wife, he is inevitably linked with one party to the exclusion of the other. The judge cannot serve two masters, the law and the interests of the husband. It gives rise to a conflict of interests. The matter before him, i.e. the secular divorce, can be addressed without such a bond between him and the husband. Hence the agency, being superfluous from the court's perspective, would be a matter of interference in the proceedings of the court. Far from being necessary, it is not even desirable for the courts to engage in religious matters, that too in the form of the judge aligning himself with one party. When the husband himself can dissolve the Nikah without the assistance of the judge, there is not even the slightest need for the judge to compromise his neutral position. Let the husband issue the *talaaq* on his own.

56. Given the strict rule that the secular judge should at all times remain neutral, it is inconceivable for a secular judge to be an agent of the husband in divorce proceedings. This is a general concept of secular law, and would apply to all jurisdictions, not only in South African law, as it derives from the principle of natural justice.

Conclusions

57. A proper *Shar'ee Qaadhi* may carry out his duties even when appointed by a non-Muslim ruler, provided he has judicial autonomy. Since this is not possible in the vast majority of modern western democracies, this rule has no practical application. Hence, Maulana Khalid's first resolution does not find application.

58. Since the Nikah bond is distinct and separate from any marital bond recognised in secular law, the secular courts do not deal with the Nikah bond. Hence there is absolutely no need to have the Nikah annulled by a secular court. The husband may simply dissolve the Nikah, where necessary, by means of *talaaq*.

59. There is no logical link between the stated problem and the supposed solution of approaching a secular court to annul the Nikah.

60. The Hypothesis that a husband making an averment in court that his marriage has irretrievably broken down amounts to him appointing the judge to annul his Nikah is simply inexplicable

61. Since a secular judge, during divorce proceedings, cannot serve as the husband's agent, there is accordingly no need to weigh the possibility of the husband appointing the judge as his agent.

62. It is respectfully submitted that both Maulana Khalid and Mr. Omar have erred in their arguments.

63. I keep myself open to consider any counter arguments on the issue, and I hope this correspondence will offer us the opportunity to uphold academic honesty and integrity despite divergent views.

وآخر دعوانا أن الحمد لله رب العالمين

وصلى الله على سيدنا محمد وعلى آله وصحبه وسلم .

And Allah Ta'ala knows best

"Those who do not decree according to that (Shariah) which Allah revealed, verily, they are the kaafiroon."
(Qur'aan)

THE KUFR OF THE MPL BILL

BY
MUFTI E. M. H. SALEJEE, DARUL IFTA SIRATUL HAQ, ESTCOURT

Subject: RE: MPL

26 Jamaadith Thaani 1431 (10-06-2010)

RESPECTED BROTHER,

ASSALAAMU ALAIKUM…

Your e-mail pertaining to the position of one who despite knowing that the legislation of the MPL will result in the contamination of the Shariah still supports the MPL Bill and or endeavours for its promulgation refers.

(1) The Qur'aan Majeed states with clarity and emphasis: "Those who do not decree according to that (Shariah) which Allah has revealed, verily they are kaafiroon."

Tahleel-e-Haraam (making Halaal the Haraam) and Tahreem-e-Halaal (making Haraam the Halaal) is a well-known and established principle giving rise to the consequence of kufr. In Tirmizi appears the following Hadith narrated by Suhaib (radhiyallahu anhu):

"Rasulullah (sallallahu alayhi wasallam) said: 'He who makes halaal the prohibitions of Allah does not believe in the Qur'aan."

The MPL bill states:

"A husband who enters into a further Muslim marriage, whilst he is already married, without the permission of the court, in contravention of subsection (6) shall be guilty of an offence and liable on conviction to a fine not exceeding R20,000."

The Qur'aan and the Sunnah bestow to a man the right to marry a second, third and fourth wife. Polygamy has been the practice of the

Ambiya in general, of Rasulullah (sallallahu alayhi wasallam), of the Sahaabah and the Ummah since the very inception of Islam. The Shariah does not circumscribe Nikah, whether to one or more women, with any of the "MPL" conditions. In fact, this MPL provision makes polygamy a virtual impossibility because the current wife will be 'joined in the proceedings' when the man is compelled to apply to the kaafir court for permission.

Just imagine! A Muslim who has the Shar'i right of marrying a second wife is compelled to seek the permission of a kaafir court for entering into a Nikah. The objective of this imposition is to practically make the second Nikah impossible. And, even if we assume that the first wife will not object, the fact remains that the Qur'aan is being interpolated and the general law (Mutlaq hukm) of the Qur'aanic permissibility of the Nikah is fettered (made Muqayyad) with the permission of a kaafir court.

This MPL provision drafted by 'Muslims' in actual fact abrogates the Qur'aanic permissibility of marrying more than one wife.

(2) The UUCSA supporters of the MPL bill conceding this grave wrong stated in one of their pamphlets:

"Yes, the requirements set out for taking a second wife are difficult. We have objected to this provision several times but did not succeed to effect an acceptable amendment. The initial position of some members of the project committee was to outlaw polygamy totally. After intense debate that such a prohibition is absolutely un-Islamic, they eventually agreed to polygamous marriage subject to dictum 'adl' (having the ability to deal justly with more than one wife) as spelt out in the Bill."

The above clearly shows an inordinate and satanic desire and plot to 'outlaw polygamy' – to outlaw or prohibit and abrogate what the Qur'aan has made perfectly halaal and what was the practice of Rasulullah (sallallahu alayhi wasallam) and the Sahaabah. This is unadulterated kufr – in which there is not the slightest shred of doubt.

Regarding those who settle for (even though it be grudgingly) restricting and fettering the Mutlaq hukm with the encumbrance of the kaafir court's approval and other factors, they too are guilty of kufr for

making a compromise which is likewise kufr. Regarding those who scorn and prohibit polygamy, Hadhrat Maulana Rashid Ahmad Gangohi (rahmatullah alayh) had the following extremely severe castigation:

"The person who finds fault with any hukm of Allah Ta'ala or with any practice of the Sunnat of the Rasool (sallallahu alayhi wasallam) or views it with derision in any way whatsoever or he rebukes a person who practices it (the hukm of Allah Ta'ala), he is without any doubt mal-oon and kaafir. He is an opponent of Allah Ta'ala. He is a Jahannami and a murtadd……That shaqi (miserable and unfortunate) and mal-oon regards his customary kufr to be better than the hukm of Allah Ta'ala. To sever all relationship with such a person is Deen in reality. It is never permissible to maintain family ties with such a person. On the contrary one should sever relationship and regard him to be the most despicable (mabghoodh) in the creation of Allah Ta'ala, and become his enemy. Never perform his Janaazah Salaat because he is a kaafir. So does it appear in the kutub of Hadith, Fiqah and Aqaaid."

(Fataawa Rashidiyyah, Page 74)

Concurring with this Fatwa, Mufti Muhammad Jamaaluddin Dehlawi (rahmatullah alayh), said: "There is no doubt in the correctness of this (fatwa of Maulana Gangohi). In fact, whoever conceals this mas'alah or with silence refrains from publicizing it, he too according to the Hadith is a dumb shaitaan. Whoever, supports such a person even by means of signs (i.e. not explicitly) will be cast upside down into Jahannum as it is mentioned in the Hadith." (Fataawa Rashidiyyah, Page75)

Many senior Muftis concurred with this Fatwa and appended their substantiating comments and signatures.

(3) The severity of the comments of Hadhrat Maulana Gangohi and the other Muftis on this issue of outlawing polygamy is adequate to lay bare the status of the supporters of MPL. There is no doubt in their kufr and irtidaad (rengading from Islam).

Besides this one element of kufr, there are also other elements of kufr in the proposed MPL BILL.

The following epithets (found in ML. Gangohi's (A.R.) fatwa) are most significant and noteworthy: mal-oon, mabghood-tareen, kaafir, murtadd, dumb shaitaan, Jahannami, shaqi and Allah's enemy. These are the epithets with which Hadhrat Gangohi (rahmatullah alayh) and the other Akaabir Muftis condemn those who scorn polygamy, who want to outlaw polygamy, who even indirectly aid and abet the anti-polygamy lobby. The kutub of Aqaaid elaborately explain the Shar'i concept of kufr and its effects. In the sharah of Fiqhul Akbar of Imaam Abu Hanifah (rahmatullah alayh), among the examples of kufr is cited the episode of Imaam Abu Yusuf (rahmatullah alayh) who drew his sword and threatened to slay a man who had said that he does not love Dubbaa' (marrow) when he (Imaam Abu Yusuf) had recited the relevant Hadith asserting Rasulullah's love for Dubbaa'. The ruling of kufr is the consequence of expressing disdain/scorn/dislike for even a preference of Rasulullah (sallallahu alayhi wasallam) – such a preference which is not even in the Fiqhi classification of Istihbaab (i.e. being preferable) but belongs purely to the domain of Nabi-e-Kareem's Sunnat-e-Aadiyyah (a habit). What then should be concluded when a Shar'i hukm (law) structured on Nusoos-e-Qatiyyah (explicit text) of the highest degree is made the subject of prohibition, scorn, ridicule, disdain and fettered with the approval of a kaafir court before practical expression can be given to it?

The question which now remains is: Should we pronounce all those who support the MPL, whether actively or by silent approval, kaafir/murtadd? There are three types of MPL supporters:

(i) Those who are 100% aware of the kufr of the MPL bill.

(ii) The dumb ones who are simply lackeys and supporters of the first group. Most of these lackeys have not even read/studied the kufr bill.

In fact even those who have studied it, don't even understand the meanings of the provisions and their far reaching implications of kufr. They support the measure because they follow the directive of the first group. They are like the dumb masses. To them applies the Qur'aanic

aayat which castigates the masses of Bani Israaeel: “They take their ahbaar and their ruhbaan as gods besides Allah….”

(iii) The sincere, but silent scholars who are anti-MPL but are mortally scared of criticism or they fear to alienate some of their very wealthy donors who support the first group, or they are simply just frightened of controversy. This group comes within the purview of Rasulullah’s Hadith: “He who maintains silence about the Haqq is a dumb shaitaan.” Incidentally this Hadith is also cited in Fataawa Rashidiyyah to reprimand those who abstain from criticizing and publicizing the attack on polygamy and the proper Shar’i hukm.

While the kufr of the first and third group is the severest, the kufr of the second group is lighter. But zaahiran in terms of the Usool of Takfeer, all three groups are beyond the fold of Islam. What will happen on the Day of Qiyaamah is known to only Allah Azza Wa Jal. Our concern is with the application of the Zaahiri Shariah.

(4) Our attitude in this matter should be to proclaim in general without naming anyone, that those who support the anti-Qur’aan, anti-Sunnah and anti-Shariah MPL bill lose their Imaan. They are murtadd and kaafir. The reason why in this era we should refrain from applying the hukm of kufr to specific persons is that the consequence will be Takfeer of 99.9% of the Ummah. Muslims are perpetrating and believing in kufr in a wide range of issues, not only MPL. Precisely because 99.9% of the known Muslims are kaafir, did Rasulullah (sallallahu alayhi wasallam) say that of every 1000 of his Ummah, 999 will enter Jahannum. This Hadith is narrated in Bukhari and Muslim and other kutub as well.

Further corroborating this avalanche of kufr of the Ummah, Hadhrat Abdullah ibn Umar (radhiyallahu anhu) said: “An age will dawn over the people when they will gather in their Masaajid and perform Salaat while there will not be a single Mu’min among them.” May Allah Ta’ala save us from the calamity of kufr, and may He grant us a beautiful Maut with Imaan.

OBJECTION BY ADVOCATE S. I. BHABHA

Minister of Justice And Constitutional Development
Mr J T Radebe, Private Bag X 276, Pretoria, 0001

RE : OBJECTION TO THE MPL/ MMA BILL

Dear Sir
It is with great regret that I write this letter. It is a serious indictment on the South African Muslim Community that they are unable to obtain consensus on the proposed MPL / MMA bill, ("the bill").

As a South African Muslim female, and being a legal practioner, I vehemently object to, and oppose the bill from being promulgated into mainstream South African Law. The objection is based on the conspicuous fact that the bill is in direct conflict with, and is repugnant to the established doctrine of Islamic Sharia Law. Proponents of this bill seek to erode the basic tenets of Islamic Law which have been in existence for fourteen hundred years.

Muslim in South Africa subscribe to both South African and Sharia Law in the regulation of their dealings within the muslim community, this status quo, in my view has been functioning. It would however, be naïve to state that there aren't any challenges, such challenges may be addressed within so – called Sharia Courts, or even Arbitration forum, which is currently in place in the form of the Muslim Mediation and Arbitration forum, wherein hearings would be chaired by suitably qualified Ulema, Islamic jurists.

There is thus no justification by the proponents of this bill to include it in South African Law. The inclusion of this bill would lead to confusion and uncertainty within Islamic jurisprudence and would have a negative impact on the Muslim Community at large and may even undermine the South African Legal system.

Adv SI BHABHA
Minister of Justice And Constitutional Development
Mr J T Radebe, Private Bag X 276, Pretoria, 0001

31 May 2010

RE : OBJECTION TO THE MPL/ MMA BILL-ISSUE OF RECOGNITION

Dear Sir
In amplification of my letter which was forwarded to yourself on 28 May 2010. I hereby supplement as follows.

As stated in my previous letter Muslims in South Africa subscribe to both South African and Sharia Law in the regulation of their dealings within the Muslim community. In the main Muslim marriages are contracted within Islamic law. Those who desire to legitimize their marriages are not barred or precluded from contracting their marriages in terms of South African Law. This form of recognition, has in fact been the prevailing position, inherently it is the parties right, which right, is neither restricted in terms of Islamic Sharia nor South African Law. The parties are thus free to choose whichever property regime they wish to adopt when registering their marriages.

The same could be said about other issues ancillary to marriages, such as the legitimacy of children born out of Muslim marriages, custody, maintenance, inheritance etc. in the present dispensation there has been significant advancement under South African common law addressing material issues. The arguments in favour of regulation have consequently been ameliorated by the developments under the common law. Under the present Constitution cases such as Rylands v Edros 1997 (1) BCLR 77(C) , Amod v Multilateral Motor Vehicle Accident Fund 1999(4)SA 1319(SCA), and Daniels v Campbell NO and Others 2004 (7) BCLR 735(CC), have substantially changed jurisprudence pertaining to Muslim Marriages. The point is that the Law as it stands provides remedies for victims of injustice. There is thus no need for legislative intervention in the form of regulation.

The Recognition of a Muslim marriages does not stem from any man made Act. The recognition is by Almighty Allah, the veracity of which no Muslim male nor female can deny.

Adv SI BHABHA

"Then We established you on a Shariah with regard to (all your) affairs. Therefore follow it, and do not follow the vain desires of those who know not." (Qur'aan)