A CHALLENGE TO THE PROMOTERS OF THE BAATIL MMB CONCOCTION

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A CHALLENGE TO THE LATE 2013 ATTEMPT AT REVIVING MPL

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 محمداً 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.

I was forwarded an invitation to a seminar entitled “The recognition and enforcement of Muslim Personal Law in South African: An attempt at consensus”. Attached to the invitation was a Paper prepared by Mr MS Omar. The seminar and the Paper are attempts at resuscitating the debate on whether it is feasible to implement aspects of the Islamic Law of Marriages within the South African legal framework.

Mr Omar terminates his Paper with a quotation from Sayyiduna Umar ﵁ which states “It is not beneficial to speak of rights which have no legal enforceability”. This then begs the question: Can Muslim Personal Law be enforced from within the constitutional framework without distortion or interference? Just as there can be no benefit in rights without enforceability, there can be no such enforceability that undermines those rights, for such a situation will be oxymoronic, self-negatory and a contradiction in terms.

The debate on whether it is workable to implement certain aspects of the Shari’ah from within the legal framework has been raging for about two decades. It must be accepted that the Muslim community

in South Africa are split on this issue. One sector, taking their cue from mainly conservative 'Ulama, is opposed to the promulgation of the Muslim Marriage's Bill (MMB). The other faction, in whose ranks the modernists are predominant, continues to vigorously campaign for the implementation of the MMB.

Sadly, what has been dearly missing from the debate is a serious and focussed academic deliberation of whether the constitutional framework *can* accommodate the implementation of a religious set of laws such as MPL. Whilst the discussions over the past decade may be characterised in many respects as an emotional exchange based on sentimental fears and apprehensions, very little by way of sound academic argument has come to the fore. In fact legal arguments for the MMB are so conspicuously wanting, that in order to extract and bring forth these legal points, which are at the very nub of the issue, one is constrained to put forth a challenge so that one may draw out to the surface the very core issues upon which this entire debate turns.

Challenge as a Method of Argument

Muslims take guidance in all matters from the Quran Majeed and the noble Sunnah of our Nabi ﷺ. Even in considering the method employed in arguing a disputed issue, we find precedence in the Qur'aan and Sunnah. One prominent method of adjudicating a disputed issue is that of throwing down a challenge.

The mushrikeen of the Arabian Peninsula were recognised for their excellence in Arabic rhetoric and poetry. When the Qur'aan Majeed was revealed to Nabi ﷺ, the debate at the time was whether the Qur'aan Majeed was the word of Allah ﷻ or,nauthubillah, the word of a human being. Allah ﷻ then used the technique of a challenge to settle this debate. Allah ﷻ mentions in Surah Baqarah:

“And if you are in doubt in respect of that (Quraan) which we have revealed upon our slave then bring forth a chapter like it (the Quraan), and call upon your witnesses (helpers) from besides Allah (Subhaanahu Wa Ta’ala) if you are true”

This establishes that putting a challenge is also one means of settling a debate. A discernable feature of falsehood is that when a valid and well-founded challenge is put forth, those on falsehood do everything but take up the challenge. The mushrikeen of Makkah Mukarramah went to great lengths to combat and wage an all-out waragainst Islam. They were even prepared to put their lives on the line in order to destroy this new ideology and way of life. The contemporaneous issue could have easily been settled by simply bringing forth three short verses of poetry that could match the Qur’aan Majeed. Those on falsehood deliberately steered away from that which was, relatively speaking, easy and were prepared to undergo severe hardships in order to challenge Islam. Allamah Taftazani brought two major proofs (amongst the many others that are available) for the veracity of the Nubuwwah (Prophethood) of Rasulullah ﷺ. The first proof he mentions is as follows:

> *As far as Rasulullah ﷺ displaying miracles (from amongst the many the following two are prominent):*
> *The first of these two: that he ﷺ presented the word of Allah Subhaanahu Wa Ta’ala (the Qur’aan) and then challenged those who were eloquent in the Arabic language. Despite their eloquence they were rendered helpless in presenting even the shortest surah notwithstanding their intense desire to do so. This inability was to the extent that they were prepared to put their lives in danger (in the form of going to war against the Muslims) and they turned away from the challenge of words to the challenge of swords, as is the general position of those who do not have sound arguments. It has never been recorded from any of these persons who were famous for their eloquence that they ever took up the challenge. (They never even attempted at taking*

up the challenge, let alone matching it.) This sufficiently proves that this Book (The Qur'aan) is from Allah Ta'ala.

History therefore bears testimony to the fact that the consistent and unwavering feature of falsehood is that it evades and sidesteps valid, legitimate and pertinent challenges on key issues.

When Nabi Ibrahim عليه السلام wished to draw his nation's attention to the falsehood of their idol-worship, he broke the idols and spared that largest one. He then challenged[1] them to question the large idol in respect of what happened to the others. Whilst this challenged lead to them acknowledging the truth secretly amongst themselves, their pride did not allow them to submit to the truth.

Similarly, when Nabi Ibrahim عليه السلام was confronted by the king Namrood[2] who claimed to have the ability to give life and death, the reply came in the form of a challenge made to Namrood to cause the sun to rise from the west. The challenge rendered him helpless and defeated. Examples of such challenges are many.

<u>The Challenge</u>

Having been involved in the MPL for over a decade, I was always in search for serious academic discussions on the topic. Sadly, I did not come any scholarly defence of the MMB. Despite my invitation to Mr. Omar and others to respond to the many arguments I had presented, the lack of response was truly disappointing to say the least. I therefore feel somewhat constrained to adopt a method, espoused by the Qur'aan itself, which is designed to extract or expose the truth.

I therefore would like to challenge any promoter of the MMB to provide cogent academic arguments, in the format suggested below, that could satisfy the concerns I enumerate below. This invitation is

open to any person. My appeal to the respondent, to whom I shall be obliged and whose efforts will be appreciated, is to consider three basic rules of engagement:

(a) There should be no evasion, side-stepping, conflation of issues, subterfuges or misrepresentations in addressing the topic on hand;

(b) What are being sought are sound legal arguments which would be admissible in a South African Court to defend the various attacks (mentioned below) that could be made against the MMB. Religious arguments which will hold no weight in court are obviously excluded.

(c) I prefer open written communication (email would be the most convenient) so as to avoid misinterpretations of what was said and what not. The response will be in the public domain.

Mock Scenario

Assume the following:

A. The MMB is enacted as an Act.
B. There is an Application before court to have the Act declared unconstitutional, on all the grounds mentioned below.
C. Your task is to prepare Heads of Arguments on behalf of the Respondent.

The invitation, which I believe is fair, balanced and focussed, is to present the defence of the MMB in the format of Heads of Argument.

I sincerely look forward to anyone coming forth to present the pro-MMB case in an open and honest public written discussion. The Applicant's case is outlined below.

The Constitutional Framework

The starting point would be the Constitution, from which the various possible challenges to the MMB are most like to emanate.

The Preamble to the Constitution contains the following:

> We, the people of South Africa, Recognise the *injustices of our past*; … We therefore … adopt this Constitution as the supreme law of the Republic so *as to* - *Heal the divisions of the past* and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is *equally* protected by law; (emphasis added)

Included in the injustices of the past was gender inequality; as well as cultural and religious discrimination. The very purpose of the Constitution is to heal those divisions. Therefore the Constitution goes on to record:

> **FOUNDING PROVISIONS**
>
> 1. Republic of South Africa
>
> The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.

To achieve this, the Constitution entrenches a Bill of Rights, and states:

BILL OF RIGHTS

7. Rights

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

8. Application

(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

Whilst the Bill of Rights is the cornerstone of the Constitution, the Equality Clause could be said to be the heart of the Bill of Rights, and it reads:

9. Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

The Constitutional Court has therefore, in litany of cases, endorsed the centrality of the Equality Clause, as it stated:

> There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised.[3]

In *Bato Star*[4], Njcobo J (as he then was), said:

> The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one 'in which there is equality between men and women and people of all races'[5]

[3] *Fraser v Children's Court, Pretoria North, & others* 1997 (2) 261 (CC) at para 20; See also *Minister of Home Affairs v Fourie* 2005 (CC) at para 59; *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at paras 155 – 6; *Shabalala and Others v Attorney-General, Transvaal and Another* 1996 (1) SA 725 (CC) at para 26 and *Brink v Kitshoff* 1996 (4) SA 197 (CC) at para 33.

[4] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC)

[5] Id at para 73-74

While the Bill of Rights guarantees "freedom of conscience, religion, thought, belief and opinion"[6], any recognition of personal law has to be "consistent with this and other provisions of the Constitution"[7]. Religion and Culture "may not be exercised in a manner inconsistent with any provision of the Bill of Rights"[8]. Thus, the system of personal law to be recognised has to conform to the Equality Clause.

It is therefore understandable that the Promotion of Equality and Prevention of Unfair Discrimination Act[9] outlaws gender discrimination, including "traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men"[10].

Should a conflict arise between religion or culture on the one hand, and the Equality Clause on the other side, the latter will prevail. This was clearly demonstrated in *Bhe and Others v the Magistrate, Khayelitsha and Others*[11], where the African customary rule of male primogeniture was declared inconsistent with the Constitution. The exact same stance was adopted in *Shilubana and Others v Nwamitwa*[12].

The Equality Test

In South African jurisprudence under the new dispensation, the *Harksen v Lane*[13] analysis enjoys the elevated position of the being the definitive test of the Equality Clause. There is no reason why,

[6] S 15 of the Constitution
[7] S 15(3)b of the Constitution
[8] S 31(2) of the Constitution
[9] Act 4 of 2000
[10] S 8 of Act 4 of 2000
[11] *Bhe and Others v. Magistrate of Khayelitsha and others* 2005 (1) BCLR 1 (CC)
[12] *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC)
[13] *Harksen v. Lane NO* 1997 (11) BCLR 1489 (CC)

when dealing with religion, any other test should be employed. The test involves a three tier enquiry, set out as follows[14]:

> (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1)[15]. Even if it does bear a rational connection, it might nevertheless amount to discrimination.
> (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
> (b)(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
> (b)(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.
> If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

[14] Id para 50
[15] The case made reference to the interim constitution. Under the final Constitution, the Equality Clause is S 9 instead of S 8, and the Limitation Clause is S 36 instead of S 33.

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution).

Significant for our purposes is that discrimination on the basis of gender, sex, pregnancy, marital status, sexual orientation, religion, conscience, belief, culture or any combination thereof is automatically unfair as these are listed grounds.

Application to Muslim Personal Law

The introduction of legislation incorporating areas of Muslim Personal Law (MPL) challenges the Equality Clause on both a Macro as well as a Micro level. The former pertains to a broader treatment of Muslims differently vis-à-vis non-Muslim, or even between segments within the Muslim community; whilst the latter concept refers to substantive provisions found within such legislation. Whilst our present discussion shall concentrate on the Micro level, in passing, a few concerns around the Macro level will be noted.

An example of the Macro level of discrimination is that only Muslims suffer from the encumbrances imposed upon them by the Muslim Marriages Bill (MMB), whilst members of other faiths do not suffer the same. The other way around, members of other faiths could rightfully complain that they are deprived of certain privileges afforded to Muslims in the MMB. For example, their religious laws are not recognised in the manner that Muslim Personal Law is. In order to establish equality, the government will have to provide a similar dispensation to all other faiths, as numerous and divergent as they may be. Amien concludes: "Implicit in the notion of equality is the requirement that all religions be allowed to manifest and instruct regarding their beliefs."[16]

[16] Waheeda Amien *Overcoming the Conflict between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages* 28 Hum. Rts. Q. 729 2006

This broader based discrimination could be extended to discrimination within the Muslim community itself. The Muslim society is heterogeneous, with its members holding a host of divergent views and approaches, extending from the fundamentals on the one end to the miniscule details of the law on the other end. It is not unexpected that one encounters a debate as to such a fundamental question as: Who is a Muslim, and who is not? By the State adopting one position within these religious debates over the other, the State is discriminating against those whose views do not have the imprimatur sanction of the legislature. Equality demands that all these diverse views be afforded equal accommodation and treatment.

Presently, we shall concentrate on instances of discrimination in the form of substantive provisions of the MMB[17]. Amien aptly sums up the challenge, where she states:

> Many of its provisions, if enacted, will stand to be constitutionally challenged on the ground of sex/gender inequality. The Constitutional Court, as the highest court of constitutional appeal, will be tasked with having to decide how to deal with the conflict between the right to freedom of religion and women's rights to equality, as indeed one will arise. It is therefore necessary to examine the extent to which the norms of sex/gender equality and religious freedom have been entrenched in the Constitution and the manner in which the Constitutional Court has developed its jurisprudence in respect of both. This will give some indication regarding the position the Court may take when faced with a conflict between the two rights in the context of Muslim marriages.[18]

Some examples are listed below.

[17] There are many versions of the Bill. Section numbers here refer to the version published by the SALC in 2003, unless the contrary is stated.
[18] Waheeda Amien *ibid*

(a) A husband is obliged in the Shari'ah (Islamic Law) to pay his wife a dower (*mahr*), whilst no such obligation lies on the wife. S 1(vi).

(b) Contrary to what is stated in the Bill, only a wife need apply for a *Faskh* (judicial process of dissolution). It is absurd to suggest that a husband ever requires applying for *Faskh*. Such an application, if ever made, would be superfluous. The various grounds on which *Faskh* may be founded all relate to the husband, for it is only the wife that relies on these grounds. Legally, the husband requires no grounds for dissolving the *Nikah* (marriage). It is a separate matter that, morally speaking, he should premise his action on some valid moral ground. In brief, if a husband gives his wife *talaaq* in the absence of any morally sound reason, the *talaaq* is legally valid. *Faskh* is designed to be only available to the wife as the husband does not require judicial intervention. S 1(x).

(c) Upon dissolution of the *Nikah*, only the wife is obliged to observe the *Iddah* -- a mandatory waiting period. The husband has no such obligation. S 1(xi).

(d) Only the husband has the right of *Talaaq*. This problematic area shall be expanded on in more detail below. Contrary to the wording adopted by the 2003 version of the Bill, the wife has no such right. This differentiation is so glaring that the drafters were compelled to resort to linguistic gymnastics in an attempt to conceal this discrimination. *Talaaq* is perhaps the strongest example of gender discrimination in the MMB. S 1(xxiv).

Westenbergcomments thus:

> From a sheer equality perspective, one may argue that the *talaq* is itself a violation. It permits the husband to unilaterally end the marriage whereas *khul'a and faksh* [sic], open to the wife, require mutual agreement or court

intervention respectively. In evaluating the constitutionality of this disparity, one looks to the three-tiered *Harksen* analysis.[19]

Amien adds:

> This is reinforcement of the traditional approach to Muslim divorces that regards *talaq as* the exclusive preserve of the husband, which does not require the wife's consent. On the contrary, a wife needs the *'ulama's* permission to obtain a *faskh* to release her from the marriage. However, it appears that few women apply for *faskh* because the process can be time consuming, difficult, expensive, and sometimes humiliating.[20]

(e) Witnesses that are required are determined by Islamic Law. Under such law the minimum requirements are:

i. Two male witnesses, or

ii. One male and two female witnesses.

In other words, the witnessing of two females is unacceptable, whilst that of two males is. S 5(1)(c).

(f) Marriage is a bilateral act. If the taking of a further wife by a Muslim husband without the court's permission is a criminal act, that act is carried out by both parties to the subsequent marriage. Only the husband is saddled with a fine, whilst the subsequent wife, who is an equal partner in such crime, is not guilty of an offence. S 8(11).

(g) Only the husband is obliged to register a *Talaaq*, whilst the wife is not. S 9(3)(a) to (d).

[19] Erica Westenberg *CONSTITUTIONAL ANALVSIS OF THE PROPOSED MUSLIM MARRIAGES ACT*Commission on Gender Equality - Recognition of Religious Marriages Workshop 25 October 2005

[20] Waheeda Amien *ibid*

(h) According to Islamic Law, only the husband is obliged to maintain the wife, and not the reverse. Ss 12(2)(a) and 12(2)(c).

(i) Only the father is obliged to maintain the children, whilst the mother is not. S 12(2)(b).

(j) The marriage officer mentioned in the Bill must be a Muslim. In other words a non-Muslim may not carry out this administrative task. S 1(v).

(k) The judicial officer in the High Court has to be a Muslim. This discriminates against non-Muslims. S 15(1)(a).

(l) Assessors in the High Court have to be Muslims. This discriminates against non-Muslims. S 15(1)(b).

(m) A distinction is drawn between a husband married in a monogamous marriage, and one in a polygynous marriage. Ss 4(2)(a), 8(4) to 8(8) and 8(11), 9(7)(c),

(n) The *Iddah* of a menstruating woman is distinguished from the *Iddah* of a non-menstruating woman. S 1(xi)(b).

(o) The *Iddah* of a pregnant woman is distinguished from one who is not. S 1(xi)(c).

(p) The *Iddah* of a divorced woman is distinguished from that of a widowed woman. S 1(xi).

(q) Various distinctions have been drawn between marriages concluded before the commencement of the Act and those after commencement. The ensuing inequality is arbitrary and irrational, and cannot be linked to any sound rational basis. Therefore

Sinclair refers to this distinction as a curious configuration[21]. Ss 2(1), 2(2), 2(4)(b), 5(1), 6(1), 8(1), and 8(6).

The first nine examples *supra* relate to gender inequality, and these are the most significant.

Nos. (j) to (l) *supra* involve discrimination on the basis of religion. Together with this (k) and (l) involve interference in the judiciary.

Section 165 of the Constitution states:

> Judicial authority
>
> (1) The judicial authority of the Republic is vested in the courts.
>
> (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
>
> (3) No person or organ of state may interfere with the functioning of the courts.
>
> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

To impose on the court that the presiding officer be a Muslim interferes with the unfettered functioning of the courts. It is also offensive to the other judges. Whilst judges administer all other legislation, why then should they be proscribed from presiding over matters dealt with in the MMB? What does the private conviction of the person have to do with interpretation and implementation of a statute? Assuming that there is some nexus between the two, what

[21] June Sinclair and Else Bonthuys *LAW OF PERSONS AND FAMILY LAW* Journal of Annual Survey of South African Law 2003

guarantee exists that the presiding officer actually has that conviction? These and other questions lead to the conclusion that the said provision is indignant to non-Muslim members of the bench who are disqualified from trying cases involving Muslims.

To illustrate, imagine an Act that states that in every case where the litigants are white Afrikaners, the presiding officer has to be a white Afrikaner. The discrimination is glaring. It is precisely for this reason that the 2011 version of the Bill has done away with these provisions[22].
Sinclair asks:

> For a secular legal system this provision is a fundamental step. Were this legislation to be enacted, would Jewish South Africans be entitled to ask that in disputes concerning, for example, the entitlement of a woman to a get, and thus a civil divorce (see s 5A of the Divorce Act 70 of 1979), the bench be made up of (practising) Jewish judges/legal practitioners? If not, why not?[23]

No. (m) involves discrimination based upon the ground of marital status.

The term 'sex' is a biological term, whereas 'gender' is a social term.[24] Menstruation being a biological feature, the ground of discrimination in (n) would then be sex – a listed ground.

No. (o) falls under the listed ground of pregnancy.

The distinction between being divorced and widowed in (p) would fall within an analogous ground.

The differentiation in (q) has no legitimate and rational government purpose.

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[22] It is however important to discuss the section despite its removal from the latest version since there are calls for its reinstatement.
[23] June Sinclair and Else Bonthuys *LAW OF PERSONS AND FAMILY LAW* Journal of Annual Survey of South African Law 2003
[24] *The Bill of Rights Handbook*, Currie and De Waal, p 250, 2005, Juta and Co.

Application of the Analysis

In the examples, do the relevant sections differentiate between people or categories of people? The answer in each case is in the affirmative.

Nos. (a) to (o) are on listed grounds. The outcome is that they are automatically classified as discrimination, as well as there being a presumption that the discrimination is unfair. There is no reason to suggest otherwise, and no argument can be advanced to counter the presumption.

In the case of (p), the differentiation is based on an unlisted ground. The question that then arises is "whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner."[25] *Prima facie* it appears to be so.

The arbitrary nature of the discrimination in (q) has been dealt with above. These instances are thus in violation of S 9(1) of the Constitution.

Summing up, Amien concludes:

> Thus, the draft legislation reinforces a patriarchal framework and unequal relationship between men and women. For example, it recognizes the requirement in certain communities that a woman must be married by proxy; it allows only the husband to take multiple spouses; it incorporates the exclusive right of men to unilaterally repudiate the marriage *(talaq);* it recognizes the unilateral obligations of the husband to provide *mahr* and to maintain his wife and children, which is the basis upon which obedience and sex on demand from women are justified; it places a unilateral obligation on the wife to observe

[25] *Harksen v. Lane NO* 1997 (11) BCLR 1489 (CC) at para 50(b)(i).

iddah; and it requires that upon divorce, guardianship, custody, and access of children should be determined on the basis of the best interests of the child and "with due regard to Islamic Law." A conservative interpretation of the latter could award these rights to the father only.[26]

The Limitation Clause

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The first question that arises is whether the MMB is 'law of general application'? Commenting on the underlying reason for this requirement, Woolman says:

[26] Waheeda Amien *ibid*

> By requiring that laws which seek the benefits of the limitation clause be general in application this threshold test ensures that law-making bodies themselves do not craft laws which infringe the fundamental rights of named or easily ascertainable individuals.[27]

In all likelihood, the MMB (upon enactment) will not qualify as 'law of general application' as it targets a specific segment of society, namely a defined section of the Muslim community.

This is followed by the fundamental enquiry whether "the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". It would be absurd to suggest that a society based on equality will reasonably and justifiably permit such forms of inequality. The limitation, if allowed, would be a classical example of a contradiction in terms.

What the limitation clause requires is a balancing act between the infringement of the fundamental right and the benefits the law is designed to achieve[28]. A proportionality test is applied, which is explained in *Bhulwana* as:

> In sum, therefore, the court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.[29]

In the above examples, the infringement is drastic, hence justification needs to be of extra-ordinary strength to counter the high degree of invasion.

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[27] *Constitutional Law of South Africa*, Woolman (ed), 2nd Edition, 1998, 12-29

[28] *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 at para 104

[29] *S v Bhulwana, S v Gwadiso* (CCT12/95, CCT11/95) [1995] ZACC 11; 1996 (1) SA 388; 1995 (12) BCLR 1579 at para 18

(a) the nature of the right

As explained above, the right to equality is being infringed, which lies at the heart of the Constitution.

(b) the importance of the purpose of the limitation

What is required is to demonstrate that the limitation serves some purpose, and further that such purpose is important. Do the inequalities mentioned above have some state purpose: No. It is not one of the purposes of the State to interpret and implement religious texts. Furthermore, in the process of legal analysis, the court may not rely on religious texts, no matter how sincere the adherents of those texts may be[30]. When the judiciary cannot even rely on religious texts as an interpretive tool, it would be far-fetched to conceive the implementation of religious texts as a state objective.

Will the Muslim community be able to demonstrate to the Constitutional Court that the above mentioned forms of discrimination serve a rational purpose? If so, can this be logically demonstrated to the satisfaction of the Court? If not, then the limitation clause will be of no assistance.

(c) the nature and extent of the limitation

The limitation is serious and complete. There is no partial or relatively minor infringement of equality. Inequality is established in totality.

(d) the relation between the limitation and its purpose

There should exist a causal connection between the limitation and it purpose. When there is no justifiable purpose in the above mentioned examples, the rational link between the limitation and its purpose does not arise.

[30] *Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs* (CCT 10/05) [2005] ZACC 20; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) at para 93

(e) less restrictive means to achieve the purpose

Again, when the purpose does not exist, this question does not even arise.

Religion cannot be used as a ground for limiting fundamental rights. Sach J summed it up as follows:

> It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others. ... Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies[31].

<u>In Brief</u>

It has been sufficiently demonstrated that the MMB contains many examples of discrimination. Having applied the standard equality test, it has been proven that these forms of discrimination constitute unfair discrimination. The limitation clause is of no avail as the legal enforcement of religion is not a State objective. Therefore it is inevitable that the MMB is open to various constitutional challenges.

<u>The International Law Perspective</u>

The Bill of Rights angle aside, the International Law perspective is of particular interest, and it is precisely because of this dimension that the Bill will not pass constitutional muster.

[31] *Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs* ibid at para 92

International Law plays a profound role within our Constitutional dispensation. Section 39(1) of the Constitution states that a court, tribunal or forum *must* consider international law when interpreting the Bill of Rights.

South Africa has signed (but not ratified) the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1994. It has ratified the following treaties:

- International Covenant on Civil and Political Rights (ICCPR)
- Convention on the Elimination of All forms of Discrimination Against Women (CEDAW)
- African Charter on Human and People's Rights
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (The Maputo Protocol)

All these documents impose on the Republic a duty to promote the equality norms in a democratic society. The ICCPR especially demands commitment to the right to equality (Articles 18 and 26). CEDAW is more specific where Article 16 commands State Parties to:

"… ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage;

(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or

similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration."

The preamble of the African Charter on Human and Peoples' Rights demands genuine equality and dignity for all people and dismantling of all forms of discrimination. Article 2 entitles every individual to the enjoyment of the rights and freedoms in the Charter, without distinction of any kind such as race, ethnic group, color, sex, religion etc. Article 3 states that every individual shall be equal before the law and be entitled to equal protection of the law. Article 18(3) requires states to eliminate "every discrimination against women".

Article 2 of the Maputo Protocol states that "… harmful cultural and traditional practices…" are those which "… are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men." Article 6 more explicitly requires states parties to "… ensure that women and men enjoy equal rights and are regarded as equal partners in marriage." Article 6(c) states that "… monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationship, are promoted and protected." Even more clearer is Article 7 which necessitates that all marriages must be annulled or divorced by judicial order, and further demanding that "States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage."

These international documents and treaties are bound, in one way or another, to be in conflict with the Shari'ah.

As far back as 1948 the Kingdom of Saudi Arabia abstained from signing the Universal Declaration of Human Rights (UDHR) on the grounds that human rights (as understood and implemented by these instruments), in particular the freedom of religion clauses, was in conflict with the Shari'ah.[32]

Therefore, when CEDAW[33] was signed, a number of countries[34] recorded reservations[35] on the basis of Islamic Shari'ah[36]. This in-turn elicited objections from a host of other nations[37]. Denson says: "It is clear that the Convention must be taken into consideration when a dispute concerns discrimination against women. The provisions of the Convention could have a definite effect on the interpretation and application of any law relating to gender equality in South Africa."[38]

Egypt sought to explain[39] its reservation in the following words:

> Reservation to the text of article 16[40] concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic *Sharia's* provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern

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[32] Ali, Shaheen Sardar, *Gender and human rights in Islam and international law : equal before Allah, unequal before man?* p. 27

[33] Convention on the Elimination of All forms of Discrimination Against Women

[34] Bahrain, Bangladesh, Brunei Darussalam, Egypt, Iraq, Kuwait, Libya, Malaysia, Maldives, Mauritania, Morocco, Oman, Pakistan, Saudi Arabia, Syria, and United Arab Emirates

[35] According to The Vienna Convention on the Law of Treaties, 1969, Article 2 (1)(d) the term "reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty whereby it purports to exclude or modify the legal effects of certain provisions of the treaty in their application to that State.

[36] See http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm Accessed 2/01/11

[37] Austria, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Spain, Sweden and United Kingdom

[38] Razaana Denson 2009 *Non-Recognition of Muslim Marriages: Discrimination and Social Injustice*, Obiter 30(2) p. 281

[39] See http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm Accessed 2/01/11

[40] See Article 16 above. Interestingly, Israel recorded its reservation in relation to Article 16 "to the extent that the laws on personal status which are binding on the various religious communities in Israel do not conform with the provisions of that article." Further, in entered its "reservation with regard to article 7 (b) of the Convention concerning the appointment of women to serve as judges of religious courts where this is prohibited by the laws of any of the religious communities in Israel". No State ever objected to Israel's reservations.

> marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementary which guarantees true equality between the spouses. The provisions of the *Sharia* lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The *Sharia* therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband.

What is abundantly clear is that some aspects of the Shari'ah relating to Family Law are definitely and irrefutably in variance with CEDAW and other International Human Rights instruments. This is precisely the reason certain Muslim states, despite the fact that they incorporate very limited aspects of the Shari'ah into their respective legislation, were compelled to record reservations to the Convention.

However, Article 28, paragraph 2, of CEDAW adopts the impermissibility principle contained in the Vienna Convention on the Law of Treaties. It states that a reservation incompatible with the object and purpose of the present Convention shall not be permitted. This puts the legitimacy of the reservations entered into by the mentioned states into question[41].

Nonetheless, it is clear that on the international plane the very same debate, as is presently unfolding in relation to the Muslim Marriages Bill in South Africa, continues unabated. Samuel P. Huntington in his much publicised and controversial article "The Clash of Civilisations"[42] links the international debate over whether human rights are western, and thus unsuitable for non-western cultures, to a clash of

[41]Banda, Fareda, *Meaningless Gestures? African Nations and the Convention on the Elimination of All Forms of Discrimination Against Women*, in Eekelaar and Nhlapo (eds) 'The Changing Family. Family Forms and Family Law'. Oxford: Hart Publishing 1998. p. 535.

[42] S. P. Huttington, "The Clash of Civilisations" (1993) 72(3) *Foreign Affairs,* pp. 22-49

civilisations: western and Islamic. He argues that differences in culture and religion create differences over policy issues such as human rights so that the promotion of human rights by the west merely provokes civilisational clashes[43].

The question to consider is whether the relatively small Muslim community of South Africa is prepared to open a can of worms and enter into the foray of the "Clash of Civilisations"? Are they better off dealing with aspects of Shari'ah via conscience based consultations with the Ulama (Islamic religious scholars), or are they sufficiently equipped to enter the battlefield of the "Clash of Civilisations" in order to achieve some limited degree of legal enforceability of the Shari'ah?

Further, even if the government of the day is sympathetic and politicians won over, does the Republic have the legal scope and freedom to legislate such innovative and far-reaching rules of religious accommodation? The State is bound by the various the International instruments referred to above[44], and it is "thus an obligation that the South African government cannot ignore in its quest to recognise religious marriages."[45] The politicians' hands are tied, and it is only so much they can bend. Any further will cause the State to be in violation of its international obligations.

Hence the International dimension is indeed significant if not decisive, and it is precisely for this reason that the Muslim Marriages Bill is not workable. This is besides the aspect of violating the Bill of Rights within its own Constitution.

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[43] Ibid at p. 29. See Rashida Manjoo, 'Making rights real: facing the challenges of recognising Muslim marriages in South Africa' in Julia Sloth-Nielsen (ed.) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law*. Collected Contributions from the International Miller du Toit Cloete Inc/UWC Conferences on Child and Family Law (2001-2008)

[44] For further details see also: Johan D van der Vyver and M Christian Green 2008 *Law, religion and human rights in Africa: Introduction*, African Human Rights Law Journal, 8(2), 337-56; and Michele Brandt & Jeffrey A. Kaplan, (1995-1996) *The Tension Between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia*, 12 Journal of Law and Religion 105, 111-13.

[45] Rashida Manjoo, ibidp. 121

Talaaq Elaborated

Whilst the issue of Talaaq was touched upon above, this issue deserves particular attention, and hence is discussed below in more detail.

The Problematic Definition

The 2003 version defined talaaq as

> (xxiv) "*Talāq*" means the dissolution of a *Muslim marriage*, forthwith or at a later stage, by a husband, or his wife or agent, duly authorised by him or her to do so, using the word *Talāq* or a synonym or derivative thereof in any language, and includes the pronouncement of a *Talāq* pursuant to a *Tafwīd al-Talāq*; and

The right to give talaaq was broadened to include the wife. We are here referring to the original authority and not the delegated right.

The question arises as to why the drafters did so. In reality it was a *faux pas*. In an attempt to disguise the gender inequality that is inherent in the institution of talaaq, the drafters tried to create an illusion of equality. Their actual intention was to weave in the delegated right of the wife into the definition in order to build up this façade of equality. In the process they shot themselves in the foot and gave the wife the original authority, not the delegated one. This is just one of many examples of downright poor drafting. A number of academics have commented on the deplorable state of the drafting.

The drafting team was well alive to the reality that the institution of talaaq is gender biased, which then lends itself open to a constitutional challenge. The drafters were naïve enough to believe that they would be able to conceal this reality and fool the judiciary who would be interpreting the Act. What is of concern is the *animus decipiendi* (intention to deceive). It brings into question the *modus*

operandi of the project committee. So much for the integrity of the drafters, which included a judge of the Supreme Court of Appeal, an erstwhile Dean of the Faculty of Law at one of the major universities, a Maulana and a so called Shari'ah Expert.

This gaffe was a real embarrassment. In response to this solecism, the United Ulama Council of South Africa (UUCSA), in their subsequent draft of the Bill, suggested the following definition.

(xxiv) **"*Talāq*"** means the dissolution of a *Muslim marriage*, forthwith or at a later stage, by a husband, or his agent, duly authorised by him to do so, using the word *Talāq* or a synonym or derivative thereof in any language, and includes the pronouncement of a *Talāq* pursuant to a *Tafwīd al-Talāq*; and further includes the pronouncement of a *Talaq* known as *Kinayah-Talaq*, through the use of broad expressions which are specifically construed as constituting *Talaq* by reference to the husband's intention or relevant surrounding circumstances.

However, despite their attempts to influence the Department of Justice and Constitutional Development otherwise, the gaucherie was persisted with in a draft the Department prepared in 2009. The definition presented therein was as follows:

"*Talāq*" means the dissolution of a Muslim marriage, ~~forthwith~~ immediately or at a later stage, by a husband, or his agent, or his wife (through a *Tafwid al-Talāq*) duly authorised by him or her to do so, by using the word *Talāq* or a synonym or derivative thereof in any language, and includes the pronouncement of a *Talāq* known as *Kinayah-Talāq* pursuant to a *Tafwīd al-Talāq*; and

The definition seemed to be oscillating from one error to the other. In the convoluted mess, the words "duly authorised by him or her to do

so" could not refer to the wife, as the wife cannot duly authorise herself. Hence these words could only have been referring to the agent, leaving the wife in the position of not being authorised by the husband. In other words, we are back to square one, where the wife has an original authority, and not a delegated one.

Further, Kinayah-Talaaq is not issued pursuant to a Tafwid al-talaaq. In other words, delegation is not a requirement for a talaaq by inference.

Finally some sanity prevailed, and the 2011 version has it as:

> **"*Talāq*"** means the dissolution of a Muslim marriage, immediately or at a later stage, by a husband or his agent by using the word *Talāq* or a synonym or derivative thereof in any language; and

Talaaq by inference has been removed, which leaves the definition incomplete and open to erroneous interpretation. Such ambiguity, anyway, is the nature of the Bill as a whole.

Nonetheless, having improved the wording, this is where the real difficulties only begin. Two conundrums arise, none of which have any solution in sight.

<u>Unfair Discrimination</u>

The first problem is, as indicated above, gender inequality.

It is trite law in the Shari'ah the only the husband may issue a talaaq. The wife has no such original authority.

If it is argued that the husband may delegate such authority to the wife, this will not avail to counter the inequality. The husband may also decide not to or refuse to delegate this authority. This enforces the exclusive authority of the husband in this respect. Further, the husband is entitled to delegate to any other individual having legal

capacity. The wife is thus in a position equal to any other person in the world, but yet not equal to her husband.

The issue of Faskh is also of no avail as the grounds for Faskh are limited. Faskh only comes into being through the intervention of the court, whereas talaaq does not. Legally speaking, talaaq does not require any ground for its validity. If the husband issues a talaaq for no apparent reason, it is nonetheless valid. Therefore the two institutions of Talaaq and Faskh are not on par, and the one cannot be advanced as a true counterbalance of the other.

Similarly, Khula' does not match up to talaaq as khula' only comes into play upon the agreement of the husband, and the wife offers payment of some property. In talaaq there is no payment, and the co-operation of the wife is not a requirement.

Sardar Ali explains:

> It is an established fact that traditional Islamic law accords the Muslim male a unilateral right to dissolve the marriage tie *(talaq)* without assigning any cause and without the interference of the court. … Although some leading judgements from the superior courts of Pakistan have tried to equate the right to pronounce *talaq* by the husband with the right of *khula* available to the woman, yet it is submitted that there are major differences between these two modes of dissolution of marriage. No matter what obstacles one places in the husband's right to give *talaq,* at the end of the day by its very definition, *talaq* may be pronounced with or without the intervention of a court of law. On the other hand, if a woman fails to convince the judge of the genuineness of her case for *khula,* she cannot unilaterally terminate the marriage contract. It is with these drawbacks in mind that the right of *khula* is being placed in the

protective/corrective category of women's human rights rather than in the nondiscriminatory one.[46]

Manjoo highlights the inequality in the following passage:

> The SALRC bill provisions on *divorce* reveal a lack of clarity, disparate levels of power granted to male spouses (i.e. the entrenchment of legal inequality), and also a failure to pursue the *substantive* equality of women. For example, section 9(2) of the SALRC Bill provides that a court may terminate a Muslim marriage on any ground permitted by Islamic law. Yet, the bill fails to identify any of these grounds and thus opens the door to gender-biased interpretations of religious grounds. ... Also, the SALRC Bill, in codifying different forms of divorce and post-divorce practices, openly spells out and formalizes inequality in the law by giving the husband greater freedom to end the marriage. This is a violation of both domestic and international laws.[47]

Westenbergcomments thus:

> From a sheer equality perspective, one may argue that the *talaq* is itself a violation. It permits the husband to unilaterally end the marriage whereas *khul'a and faksh* [sic], open to the wife, require mutual agreement or court intervention respectively. In evaluating the constitutionality of this disparity, one looks to the three-tiered *Harksen* analysis.[48]

Amien adds:

> This is reinforcement of the traditional approach to Muslim divorces that regards *talaq as* the exclusive preserve of the

[46] Shaheen Sardar Ali; *Gender and human rights in Islam and international law: equal before Allah, unequal before man?* 2000 Kluwer Law International, The Hague. p61

[47] Rashida Manjoo; *The Recognition of Muslim Personal Laws in South Africa: Implications for Women's Human Rights*; Human Rights Program at Harvard Law School Working Paper July 2007

[48] Erica Westenberg *CONSTITUTIONAL ANALVSIS OF THE PROPOSED MUSLIM MARRIAGES ACT*Commission on Gender Equality - Recognition of Religious Marriages Workshop 25 October 2005

husband, which does not require the wife's consent. On the contrary, a wife needs the *'ulama's* permission to obtain a *faskh* to release her from the marriage. However, it appears that few women apply for *faskh* because the process can be time consuming, difficult, expensive, and sometimes humiliating.[49]

If one has to apply the *Harksen v Lane*[50] test of equality, the obvious conclusion would be that the institution of talaaq constitutes unfair discrimination, and has to be reformed. The court may either remove the entire institution, which is more likely from the discussion coming ahead, or it may extend this preserve to the wife. In the case of the former, the MMB will simply be unworkable, since the institution of the talaaq is a thread that runs throughout the application of the MMB. In the case of the second possibility, it would be reformation of the Shari'ah to a position that is in total violation of the Shari'ah.

Against Natural Law

The second problem is that the very concept of talaaq is incompatible with western law. To understand this, one needs to grasp the concept.

Talaaq is the exclusive prerogative of the husband to, at will, repudiate the Nikah (marriage bond).
On a moral level, the husband should only issue a talaaq when there is a compelling ground. If he abuses this authority, he is sinful. This is what is being referred to in the Hadith when it is said:

Rasulullah صلىاللهعليهوسلم has said:

The most detestable of permissible acts in the sight of Allah Ta'ala is Talaaq

[49] Waheeda Amien *Overcoming the Conflict between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages* 28 Hum. Rts. Q. 729 2006
[50] *Harksen v. Lane NO* 1997 (11) BCLR 1489 (CC)

However, on a legal level (Shari'ah), the talaaq remains valid even if there are no grounds for the talaaq. Most people confuse the moral level (diyaanaat) with the legal level (qadhaa). They assume that Islamic judiciary deals with morals. That is not the case. The law concerns itself with valid and invalid, permissible and impermissible, and so forth. It does not police the morals of society. So a valid act undertaken with an ulterior motive remains valid. An invalid act carried out with the most sincere intention remains invalid. Yes, the very positive rules are themselves infused with morality.

For a talaaq to be valid the following are NOT required:-

1. A morally sound reason
2. Witnesses present when the husband pronounces the talaaq
3. The wife being present
4. The wife being aware or having knowledge thereof.
5. Registration of the talaaq
6. A court order or decree

It follows that talaaq is at the absolute discretion of the husband.

For purposes of legal certainty, some states have introduced the process of registration of talaaq. The MMB has emulated this approached. However, what cannot be introduced is a rule that says that if the talaaq is not registered, the talaaq is invalid. This will place the legislation at variance with the true Shari'ah position. Such variance will open up a host of untold difficulties.

Thus the MMB records:

9(4)(b) Where an irrevocable *Talāq* has not been registered in accordance with subsection (3), it is nonetheless effective as from the time of its pronouncement.

Therefore non-registration does not affect the validity of the talaaq, despite there being criminal sanctions for non-registration. It is the husband's pronouncement that brings the Nikah to an end, and not the decree of the court. This is evidence by the fact that the talaaq takes effect from the time of husband's pronouncement. The husband's action is constitutive. In an Islamic context, if any of the spouses ever approaches a court in relation to talaaq, it is for a declaratory order. The Qaadhi's (Islamic judge's) decree is not constitutive, but rather the husband's action is.

While this is the correct Shari'ah position, the question that arises is whether this concept of talaaq is compatible with western legal systems.

It is well established in our law that only the Superior Courts can pronounce on matters of status. Talaaq, being the dissolution of a marriage, affects status. In all western legal systems, a marriage may only be dissolved through judicial intervention. The very institution of talaaq gives the husband the authority to, at will, bring about a change in the status of the spouses. There is no place for extra-curial or extra-judicial dissolution of a marriage in western systems of law.

The foreign courts have had on occasion the opportunity to consider the effect of talaaq. Judge Gleeson explains:

> The recognition of Islamic *talaq*divorces is an issue which usually arises in the immigration context when considering whether the parties are married and a claimant can enter the UK as a spouse. Under Islamic Shari'a law, a husband is permitted to divorce a wife without recourse to court proceedings simply by declaring unequivocally his intention to repudiate the marriage in the presence of witnesses. This is a bare *talaq* and involves no proceedings at all.[51]

[51] United Kingdom Asylum and Immigration Tribunal; NC (bare talaq - Indian Muslims – recognition) Pakistan [2009] UKAIT 00016; http://www.bailii.org/uk/cases/UKIAT/2009/00016.html

Elsewhere, the Tribunal added:

> "It is pronounced. Pronouncement of *talaq* three times finally terminates the marriage in Kashmir, Dubai, and probably in other unsophisticated peasant, desert or jungle communities which respect classical Muslim religious tradition. Certainly by that tradition the pronouncement is a solemn religious act. It might doubtfully be described as a ceremony, though the absence of any formality of any kind renders the ceremony singularly unceremonious. It can fairly be described as a 'procedure' laid down by divine authority in the inspired text of the Koran. But neither respect for the divine origin of the procedure nor respect for the long enduring tradition which over the centuries had rendered the bare *talaq* effective as terminating a marriage by the law of Muslim countries necessarily or sensibly should convert the procedure into a proceeding within the intent of [the Act]. …
>
> … The essentials of the bare *talaq* are, as I understand it, merely the private recital of a verbal formula in front of witnesses who may or may not have been specially assembled by the husband for the purpose and whose only qualification is that, presumably, they can see and hear. It may be, as it was in this case, pronounced in the temple. It may be, as it was here, reinforced by a written document containing such information, accurate or inaccurate, as the husband cares to insert in it. But what brings about the divorce is the pronouncement before witnesses and that alone. Thus in its essential elements it lacks any formality other than ritual performance; it lacks any necessary element of publicity; it lacks the invocation of the assistance or involvement of any organ of, or recognised by, the state in any capacity at all, even if merely that of registering or recording what has been done. Thus, though the public consequences are very different, the essential procedure differs very little from any other private act such as the execution of a will and is akin to the purely

consensual type of divorce recognised in some states of the Far East.

In my judgement, … such an act cannot properly be described as a 'proceeding' in any ordinary sense of the word, still less a 'proceeding' in what must, for the reasons given above, be the restrictive sense of the word as used in the Act. …

But the *talaq* is still an entirely personal act. It lacks any formality other than the ritual performance. It lacks the invocation or assistance of any organ of the state. It does not even require an organ of the state to act as a registrar or recorder of what has happened.[52]

The Australian High Court commented similarly:

A Muslim husband of sound mind may divorce his wife whenever he so desires without assigning any reason. The presence of the wife is not even necessary for pronouncing a divorce nor any notice need be given for that purpose.[53]

In a Canadian decision, Justice Fichaud stated:

Rules of Natural Justice

[17] I would dismiss the appeal for a second and independent reason. *Castel*, p. 17-8 states:

Grounds for Refusing to Recognize Foreign divorces

Although the foreign court that granted the decree may be jurisdictionally competent in the eyes of Canadian law, recognition will be refused if the respondent did not receive notice of the proceeding, especially if fraud was present. The jurisdiction of the

[52] United Kingdom Asylum and Immigration Tribunal; [2002] UKIAT 04229; http://www.bailii.org/uk/cases/UKIAT/2002/04229.html

[53] HAQUE v. HAQUE [1962] HCA 39; (1962) 108 CLR 230

> foreign court must not be established "through any flimsy residential means" and the petitioner must not have resorted to the foreign court for any fraudulent and improper reasons such as solely "for the purpose of obtaining a divorce". The foreign decree must not be contrary to Canadian public policy. Denial of natural justice may also be a reason for refusing recognition.

Payne, p. 112 states:

> A foreign divorce may also be denied recognition where principles of natural justice have been contravened.

To the same effect: *Indyka* at pp. 706, 715 and 731.

> [18] Mr. El Qaoud knew where Ms. Orabi resided. Yet Mr. El Qaoud did not serve Ms. Orabi with notice of the divorce proceeding . This was not a case where the respondent was difficult to locate, avoiding service, or subject to an order for substituted service. The Jordanian tribunal granted the divorce apparently without requiring any proof that Ms. Orabi had been served with notice. In December, 2002, Ms. Orabi received her couriered divorce decree, issued by a tribunal before which there was no role for her participation, in a country to which she had no connection, after a proceeding of which she received no notice. This divorce decree would affect her status and corollary relief. This violates the principles of natural justice. I would deny recognition of the Revocable Divorce Document on that ground[54]." [Underlining added]

The most significant conclusion arrived at in these foreign judgements is that the very institution of talaaq is one that goes against the principles of natural justice, from a western perspective. This was arrived at despite the misunderstanding that talaaq requires

[54] *Orabi v. Qaoud*, 2005 NSCA 28 (CanLII)

witnesses. If the true position, i.e. witnesses not being a requirement, was known to the respective judges, their conclusions would have been, *a fortiori*, more strongly applicable.

These foreign judgements will have strong persuasive value in our courts. That aside, our common law principles themselves lead to the conclusion that there is no scope for extra-judicial dissolution of marriages. From a western law perspective, any process that repudiates a marriage will require, at the very least, that the other party be given prior notice and the opportunity to defend such 'proceedings'. On that score, the reasoning behind these judgements cannot be criticised.

The interpretation clause of the Constitution reads:

> **39. Interpretation of Bill of Rights**
>
> (1) When interpreting the Bill of Rights, a court, tribunal or forum -
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law.
>
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Our courts will thus consider these foreign judgements, and are most likely to be persuaded thereby.

Contrary to International Law

Not only is the recognition and implementation of the institution of talaaq contrary to the common law and foreign judgements, it is also in violation of International Law.

South Africa is a signatory to the 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in African', also known as the 'Maputo Protocol'. Article 7 thereof reads:

Article 7

Separation, Divorce and Annulment of Marriage

States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that:

- separation, divorce or annulment of a marriage shall be effected by judicial order;
- women and men shall have the same rights to seek separation, divorce or annulment of a marriage;
- in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance;
- in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage [Underlining added]

It is inconceivable how the institution of talaaq could be married in with the South African legal system. I invite those supporting the MMB to convince me how this will be done.

A Justification Based on Contract

An argument presented in favour of the Muslim Marriages Act is that the opponents are overstating the constitutional concern in an alarmist fashion. The fact that we have a Bill of Rights is being overdramatised as a scare tactic to create false panic. There is nothing to fear in the Bill of Rights.

Parties will be bound by the Act through their own choice. Even if certain aspects of the Act contain provisions that may be discriminatory, this would be defended by the fact that parties have voluntarily consented to such a regime.

A party to a commercial contract enters the contract by conscious will and consent. If the party thereafter finds that the provisions of the contract are unfair or discriminatory, the party cannot cry foul and invoke the Bill of Rights to have the contract cancelled or rectified. The Bill of Rights will not interfere in a private contract and will not impose the Constitution's equality clause on the contracting parties.

The Muslim Marriages Act, because it is based on choice, will not be open to a constitutional attack since the parties have voluntarily chosen an external system of law. If it then turns out that that system of law has certain traces of discrimination, the parties will still be bound by their commitment to that system of law, notwithstanding any discrimination. Just as a private commercial contract is protected from a Bill of Rights attack, so too will the Muslim Marriages Act be defended. There are examples where the courts have refused to come to the rescue of such opportunistic contracting parties claiming the contract is unfair, and have refused to intervene in the mutual agreement.

Therefore the opponents of the MMB are, due to lack of knowledge of the law, resorting to scaremonger tactics. There is no fear that the Shariah will be interfered with. This is just a fiction created to stir up the emotions of the public. So the argument goes.

Dissecting the Justification

The argument is however, with respect, flawed on a number of fronts. We shall analyse and counter the argument below.

The Law of Contract and the Bill of Rights

Private contracts are not wholly immune and insulated from an attack based on the Bill of Rights. This topic requires some detail.
Our law recognises the principle of autonomy. This principle postulates the ideal that individuals should be allowed the greatest possible measure of self-determination and self-realisation compatible with the interests of the other individuals. The principle of freedom of contract is an expression of the principle of individual autonomy and includes the freedom of a party to decide whether he wants to contract, with whom he wants to contract and on what terms. Another aspect of the ideal of autonomy is consensuality which means that contractual liability arises from the concurrence of the intentions of the parties to an agreement to create obligation(s) for themselves. The principle of the sanctity of contracts also flows from the principle of autonomy: an individual should take responsibility for the consequences of his decision.

Our law holds the principle of autonomy in high esteem; hence specific rules of law play a limited role as the individual should be given as much freedom as possible with only the minimum of interference. The function of the judge is to determine what the parties have agreed upon and not to make contracts for them.

The principle of good faith (*bona fides*) is the counterbalance of the principle of autonomy. This principle requires that good faith should be protected in human relationships. Society demands that individuals should act in a certain way when forming a new relationship or when acting in an existing relationship in order to protect the interests of the other party in the relationship.

Based on the above principles, our courts have in the past denied that they have a general equitable jurisdiction to refuse the enforcement of unfair contractual terms which are clear and not against public policy[55].

Then the Constitutional era ushered in. Under the interim Constitution, the Bill of Rights only had vertical application. However, under the 1996 Constitution, the Bill of Rights expanded to direct horizontal application, making it possible to apply the Bill of Rights to relations between private citizens and the traditional private law sphere. This effectively demanded a re-evaluation of the Law of Contract in order to create a balancing of values.

In line with the new approach that the Constitution demanded, a fresh balance had to be found. On the one hand the court does not interfere with the foolish and imprudent decision of a contracting party[56]; whilst on the other hand the court is required to intervene when public policy and the values of the Constitution demand so. In this respect the court held[57] that:

> All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle *pacta sunt servanda*[58]is, therefore, subject to constitutional control.

[55]*Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 (3) SA 580 (A) 605-606; *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A)
[56]*Knox D'Arcy Ltd v Shaw* 1996 2 SA 651 (W) 660
[57]*Barkhuizen v Napier* (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) para 15. See also *Bredenkamp v Standard Bank* (599/09) [2010] ZASCA 75
[58] The principle that "Agreements must be kept", also referred to as the sanctity of contract.

At para 87, Ngcobo J went on to say:

> *Pacta sunt servanda* is a profoundly moral principle, on which the coherence of any society relies. It is also a universally recognised legal principle. But, the general rule that agreements must be honoured cannot apply to immoral agreements which violate public policy. As indicated above, courts have recognised this and our Constitution re-enforces it.

In respect to a specific species of contract, namely arbitration agreements, the court stated[59]:

> However, as with other contracts, should the arbitration agreement contain a provision that is contrary to public policy in the light of the values of the Constitution, the arbitration agreement will be null and void to that extent (and whether any valid provisions remain will depend on the question of severability). In determining whether a provision is contra bonos mores, the spirit, purport and objects of the Bill of Rights will be of importance.

In other words a new threshold was set. At some stage, when public policy demands, the Bill of Rights does have application in private contracts, and the courts do step in to apply the Bill of Rights. The important lesson for our purposes is that the Law of Contract is not completely insulated and immune from the application of the Bill of Rights.

Woolman[60] goes further and argues, rather vehemently, that while a waiver of contractual rights may exist, Constitutional rights may never be waived. He concludes:

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[59] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* (CCT 97/07) [2009] ZACC 6; 2009 (4) SA 529 (CC) ; 2009 (6) BCLR 527 (CC) para 210

[60] *Category mistakes and the waiver of constitutional rights: A response to Deeksha Bhana on Barkhuizen* Stu Woolman (2008) 125 South African Law Journal 10

> Whether we are talking about life, dignity, torture, slavery, religion, expression or property, the question is always the same: does the right permit the kind of activity, relationship or status contemplated — at some point in time — by the parties before the court? If it does not, then, as we noted above, the right bars the law or conduct contemplated and no such thing as waiver can occur. If the right in question permits the kind of activity or agreement in question, then the parties may do as they wish and the question of waiver never arises.

The very premise on which the argument in the question is based has now fallen away. Consent, even in the Law of Contract sphere, is not a bar to the application of the Bill of Rights. The argument thus fails on its first leg.

Law of Contract Distinguished

The Muslim Marriages Bill does not fall under the field of the Law of Contract, rather under the sphere of Family Law. Therefore the analogy with the Law of Contract is grossly misplaced. The Law of Contract, in the main, deals with commercial or patrimonial rights and obligations. On the other hand, Family Law deals with interpersonal relationships that are so close to the heart that they go to the core of the concept of Human Dignity. To compare the Law of Contract with Family Law betrays sound legal reasoning. In the area of Family Law, the Bill of Rights applies from the very outset, and sets the foundational standard by which all rules are judged *ab initio*. By contrast, in the Law of Contract, minor incursions by means of the Bill of Rights violations may be sustained or overruled by the sanctity of contract principle. It is only when the invasion is significant will the testing powers of the Bill of Rights kick-in. Absolute equality is not a standard by which contracts are judged, nor is it practical. A modest degree of power imbalance is an inevitable feature of most commercial contracts, while such an imbalance is indefensible in the area of Family Law.

To what does the Bill of Rights apply

Section 8(1) of the Constitution is clear that the "The Bill of Rights applies to all law…". This gives rise to a simple question: Are the provisions of the Muslim Marriages Act (when enacted) law? An equally simple answer is that, as a piece of legislation, it definitely is law. The rather obvious conclusion is that the Act has to conform to the Bill of Rights. Any supposed "choice" to opt-in or opt-out will not make it any lesser law. Even if hypothetically not a single individual opts to be bound by the Act, it does remain law, which, at least in theory, has to conform to the Bill of Rights.

The Bill's Scope of Operation

If the obligations created by the Bill applied exclusively to those who volunteered to be bound by the Bill, the Contract theory advanced in the question could possibly have some validity. However, the duties imposed by the Bill are not simply *erga partes* (binding only on the parties), but some provisions are *erga omnes* (binding on everyone).

For example the Bill states: "Any person who facilitates the conclusion of a Muslim marriage … must inform the prospective spouses that they have a choice whether or not to be bound by the provisions of the Act", and "Any person who intentionally prevents another person from exercising any right conferred under this Act is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding one year" (Our emphasis).

The two sections (the second in particular) extend the obligations established by the Bill to one and all, under the threat of criminal sanctions. A consensual contract is supposed to bind the parties to the contract and no one else. Under those circumstances consent could be seen as a form of waiver. However, when those who have not volunteered to be bound by the Bill are saddled with obligations, the implicit waiver theory falls flat. There is no consent from which an import of waiver may be extracted.

Criminal Sanctions

The last section quoted above, as well as other sections in the Bill, impose criminal sanctions of fines and imprisonment. This clearly brings the application of the Bill under the ambit of Criminal Law. The Criminal Law application of the Bill extends to each and every right constituted by the Bill and effectively covers every provision. The relevant section states: "Any person who intentionally prevents another person from exercising any right conferred under this Act is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding one year" (Our emphasis). It boggles the legal mind how the consensual contract theory (with its concomitant implicit waiver) could be reconciled with the overarching Criminal Law application of the Bill. There is no "choice" in Criminal Law, and one does not consent to be bound to the Criminal provisions of any legislation.

The Problematic Choice

Much has been made of the supposed party's choice of being bound by the Bill's provisions. The Bill's scheme of granting "choice" is however in itself in conflict with the Constitution.

The constitutional concept of 'Freedom of Religion' manifests itself in many forms, one of which is the rule that the State may not impose any religion, or any particular interpretation of a religion, upon any person. The State is not allowed to think for the individual what that person should or should not believe or practice. This prohibition is absolute and exacting to the extent that even a temporary election by the State would be constitutionally objectionable.

The Bill seeks to include all Muslim marriages that were concluded prior to the Bill's enactment within its provisions. Parties may however opt-out within a given period. In other words the Bill makes the "choice" of including them. The initial "choice" to be included is made by the State. Notwithstanding the option, this very choice by

the State is constitutionally obnoxious. The State is not allowed to think for the individual, to choose a particular interpretation of religion for the individual or to impose a State sanctioned set of religious laws on any individual. In the sphere of religion, the election to be or not to be bound by a religion has to be made by the individual completely voluntarily. This is one of the necessary attributes of the 'Freedom of Religion' concept. In fact this extends to all other freedoms as well.

The mere fact that individuals may opt-out does not justify the initial imposition. The State may not, even provisionally, make an election of such a personal nature on behalf of the citizen. Imposition is the very antithesis of freedom.

By way of illustration, hypothetically assume that the government enacts a law to the effect that all public servants are forthwith automatically members of the ANC, but have a window period of three years to cancel their membership. The Constitution guarantees the individual's freedom to choose affiliation with a political party. The State cannot make the choice on behalf of any citizen. The mere fact that the individual has been granted the choice to opt-out does not justify the State's decision on behalf of the individual.
When the individual has not made the conscious election to be bound by the provisions of the Bill, how then could it be argued that the individual has waived his/her constitutional rights? While there has been academic debate[61] on whether a constitutional right may be waived or not, however, what is settled is that if such a concept exists, it requires a conscious and informed decision. The court held in the Mohamed[62] case:

> To be enforceable, however, it would have to be a fully informed consent and one clearly showing that the applicant was aware of

[61] See Stu Woolman *Category mistakes and the waiver of constitutional rights: A response to Deeksha Bhana on Barkhuizen*(2008) 125 South African Law Journal 10; Kevin Hopkins *Constitutional rights and the question of waiver: How fundamental are fundamental rights?* (2001) 16 SA Public Law122 and Woolman et al *Constitutional Law of South Africa* 2nd Ed. 31-122

[62] *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa Intervening*) 2001 (3) SA 893 (CC) para 62

the exact nature and extent of the rights being waived in consequence of such consent.

All Muslim couples presently married in terms of Islamic Law only will be ambushed into being bound by the Bill, without being aware thereof, or without being fully aware of the comprehensive consequences of the Bill. How then could it be suggested that these individuals have waived their constitutional rights as enshrined in the Bill of Rights?

It has been argued that *Ignorantia juris non excusat*[63], hence when any Act is published in the Government Gazette; it is notionally assumed that every citizen is aware of that law. Therefore it will be notionally presumed that all affected couples have acquiesced to provisionally being bound. This argument is delusive.

Other fields of law are not dependent on consent. One does not consent to tax laws or criminal laws. Hence the presumption is made that all citizens are bound by such laws upon publication. However, religion falls under the ambit of freedoms, which imply free will. Freedoms demand non-interference from the State, a conscious decision by the individual and the discretion to change one's choice at will. The decision maker is the individual and not the State, whereas in legislation not dealing with freedoms the decision maker is the State which has a right to impose such decisions on its subjects.

It is difficult to fathom how comprehension of such basic concepts of the law has eluded the drafters of the Bill.

Therefore the theory that the constitutionally offensive provisions of the Bill, in particular the violations of the Bill of Rights (more specifically the Equality clause), would be able to withstand constitutional muster on the basis of a waiver implicit in the so called "choice" is untenable, irrational, legally unsound and deliberately deceptive.

[63] Ignorance of the law is no excuse

Undertaking

I look forward to and invite any person to provide convincing arguments of how MPL, if implemented in the form of the MMB and thereafter challenged as explained above, would be defensible in a South African Court.

As explained above, a common feature of falsehood is that it will do everything but address a well-founded, crucial and decisive challenge directly to the point.
I give an undertaking that if sound arguments are presented in defence, I am willing to lend support to the MMB. Until such time, the above mentioned apprehensions prevail, based on which I presently hold the view that the harms of the MMB far overweight any perceived benefit.

وآخر دعوانا أن الحمد لله رب العالمين

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THE MMB – THERE CAN BE NO CONSENSUS

Promoters of the so-called 'Muslim' Marriages Bill are at pains to achieve consensus of the Muslim community on a Bill which is divisive and in stark conflict with the Shariah. We reproduce here the Statement issued by the Muslim LAWYERS ASSOCIATION which was issued in rejection of the anti Shariah bill.

We, as the Muslim Lawyers Association are fundamentally opposed to the Bill for various reasons, some of which are inter alia:-

1. There are many provisions in the Bill which are simply un-Islamic and against the Quran and Sunnah. For example the regulation relating to maintenance, Talaq, polygamy and intestate succession to name a few.
2. The Bill makes impermissible what Allah has made permissible.
3. The outlook of the Bill is distinctly secular and materialistic and against the ethos of Islamic concepts such as RIZQ.
4. The Bill allows Non-Muslim judges who have no in-depth knowledge of Arabic and are not schooled in the Shariah to interpret Quraan and Sunnah and to make Ijtihad. The secular courts may amongst other things, pronounce on the validity of a Talaq, issue a Faskh, determine who is Muslim and interpret Islamic law. The secular

courts are able to make rulings which South African law will recognise as Shariah.
5. Muslims' Shariah rights may not be considered valid until reviewed and ratified by South African courts. This in itself is contrary to Shariah. e.g. Talaq and polygamy must be confirmed by a South African Court.
6. The MMB will subject Quraan and Sunnah to Constitutional review, which means that Allah's Law will be subject to Constitutional analysis. With the development of the law based on the proposed Bill along with Constitutional intervention, the result will contaminate Shariah and will consist of few elements of Deen combined with secular ideas of justice, all under the banner of Islam.
7. The constitution at present allows for all citizens to freely practice their religions. The MMB would curtail such religious freedom of expression for Muslims which in itself would be arguable to be unconstitutional.
8. Failure to abide by the provisions of the proposed Bill could result in a Muslim being found guilty of a criminal offence and/or being fined.
9. The Bill promotes a school of thought of a minority and does not cater for difference of opinion amongst scholars of the different schools of thought.
10. Existing Muslim marriages will automatically be bound by the Act, unless both husband and wife jointly opt out of it. Opting out does not stop the Courts from going ahead anyway with interpretation of Quraan and Sunnah on behalf of those who are bound by the Act, and modifying the Shariah as we know it to be more consistent with modern secular values.
11. There is selective Justice. The taking of a second wife without court permission is criminalised but adultery and fornication are not.
12. The Bill is in fact unconstitutional because it changes Muslim Personal Law instead of just recognising it. In light of the provisions not being consistent with Shariah, and being applicable only to Muslims, this will allow secular courts to systematically discriminate against Muslims, to the exclusion of all others, with sanctions which are foreign to the Shariah.