

**MMB
(THE 'MUSLIM'
MARRIAGES BILL)**

***THE ULAMA OF
SOUTH AFRICA
REJECT THE
“ILL-ADVISED AND
MISGUIDED BILL”***

Published by
**UNITED ULAMA COUNCIL OF SOUTH AFRICA
(UUCSA)**

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

31 May 2011

PRESIDENT JACOB ZUMA Office of the Presidency

Private Bag X1000
Pretoria 0001

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AND

The MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT

Private Bag X 81
Pretoria 0001

Attention : Mr T N Matibe

Per Fax : 086 648 7766

E-mail : tmatibe@justice.gov.za

Dear Sirs

RE : THE PROPOSED MUSLIM MARRIAGES BILL (MMB)

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

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

We are engaged in the academic study, research and teaching of

the sources of Islamic Law ie., the Quran, the teachings of the Noble Prophet (peace be upon him) and the rulings of the schools of Islamic Jurisprudence as well as the Arabic language and Islamic history.

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

This letter represents the considered views of a substantial body of the leading and senior traditional Islamic academic opinion in the country. Due to time constraints we have not canvassed the opinions of an even wider list of academics.

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

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

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

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

4.1 We regard the principles of Islamic Law as sacrosanct and immutable as they have been given by Allah, God Almighty. We know however that when a conflict arises between the Secular and the Islamic Laws, the law as envisaged in the proposed Muslim Marriages Act will be interpreted, changed and developed by the Constitutional Court, as indeed by all the lower courts, to conform to our country's Constitutional Imperatives.

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

In the Gumedde Case, Judge Moseneke had opined :

“ Courts are required not **only to apply customary law** but **also to develop it**. Section

39(2) of the Constitution makes it plain that when a court embarks on the ***adaptation of customary law it must promote*** the spirit, purport and objects of the Bill of Rights “

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

[The Annexure attached gives further examples of the approach of our courts] Alteration, indeed contamination of the Shariah by our courts in developing what ostensibly would be made out to be Islamic Law (the proposed MMB and its development), would simply be unacceptable to the Muslim community.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6.2 Technical Islamic Terms

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

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

And **the resulting corpus of case law** given through " the prism of our Constitution' , while having some kind of " Islamic " name, will be **a veritable hybrid new 5th school of jurisprudence** based on the " ijtihaad " (new deduction) of our courts – competing with the four classical Islamic Schools of Interpretation.

6.3 **Judicial Entanglement**

This would also be **judicial entanglement** - in our religious law by the state - which most jurisdictions have been careful to avoid (see " Constitutional Law, Analysis and Cases " by Prof. Z Motala and Mr C Ramaphosa, Oxford University Press 2002, chap. 12, sub-section on Freedom of Religion).

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

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

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

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

Marriages Bill

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

- a. **Any Muslim judge**, even if he is the most pious and Islamically learned Muslim in South Africa, would, if he is true to his oath of office, have to subsume Islamic Law and alter it to bring it in line with the Constitution where a conflict arises, as it most certainly will, between these two different systems.
- b. And with respect, most South African Muslim judges have, as far as we are aware, a relatively cursory understanding of Islamic Law.
- c. The idea of knowledgeable Muslim assessors as advisers also does not solve the problem. The judge has to make his own decision and will have to be guided by the Constitution.
- d. And in any case this impractical proposal (in the South African context) of Muslims judges hearing MMB matters will definitely not apply when a matter goes on appeal to a higher court, such as the Supreme Court of Appeals and the Constitutional Court.

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

8. The Misleading Impression that the Proposed Bill is Shariah

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

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

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

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

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

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

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

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

11.1 There is nothing to prevent Muslims from resorting to the secular law of our country to gain recognition, neither Islamically nor legally.

a. As for the ostensible objective of and need for the recognition of marriages solemnised according to Islam, our courts have in recent years already begun giving such recognition anyway.

b. And in any case those Muslims who desire legal recognition for their " nikah " (a marriage solemnised according to Islamic

rites usually in a mosque) are free to acquire this by simply registering their marriages, as all the citizens in the country can do.

c. And by adopting the antenuptual contract with the exclusion of the accrual system, Muslims are able to obtain secular effect to and recognition for the propriety consequences of their " nikah " in line with Islamic law.

d. And registration can easily be acquired by simply having the " nikah " performed by a licensed Muslim marriage officer.

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

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

12. A Simple Uncontroversial Proposal to Achieve Legal Recognition

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

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

All that is required - and we request the same of our government - is a single line amendment to our current secular marriage legislation recognising all Muslim marriages (Nikahs) solemnised in terms of Islamic Law, either on the basis of the antenuptual contract with the exclusion of the accrual system or with the parties being free to adopt a propriety regime of their choice. Any case law which develops from such an amendment, while affecting Muslims, will nevertheless be part of the normal development of the corpus of our secular South African Law

based on our country's Constitution. It will not be infringing on Islamic Law nor giving the misleading impression to any intelligent person that it is Islamic Law.

This is confirmed by the comment of Judge Nkabinde in the Hassam case in the Constitutional Court : “ It should also be emphasised that this judgement does not purport to incorporate any aspect of Shariah law into South African law “

13. The Protection of Women in Muslim Marriages.

a. The proponents of the Bill argue that it will serve to protect women. We believe that our secular laws already protect all women of the country. Whatever further protection that is required, is required by all women of the country ; and we are sure our Courts through the case law and our Legislature will provide the same.

b. A specific MMB, incorporating substantive provisions of Divine Law, is misguided, and is neither needed nor advisable for this.

c. Indeed, as we have pointed out, **our Courts have and are coming to the aid of women by recognising marriages**, including polygamous ones, **solemnised only under Islamic rites**.

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

14.1 As far as we are concerned **Muslims have two constitutionally given options**. Those who wish their marital affairs, especially disputes, to be regulated by the Shariah, have the Shariah and can approach the traditional, non-judicial (having no force of law) committees of the Muslims. Muslims have for centuries turned to traditional Islamic community based committees to resolve marital disputes. And the law allows Muslims this freedom.

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

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

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

14.3 Non-Enforceable Rulings by these Traditional Committees

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

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

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

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

c. The mere non-enforceability of the rulings of our

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

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

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

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

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

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

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

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

And Prof. Z Motala (co-author with Cyril Ramaphosa of " Constitution

Law "), is of the opinion that the proposed Bill is " **an unwise, improvident and questionable constitutional exercise** "

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

17. Negative Feelings and Constitutional Challenges

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

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

And Allah, Almighty God, knows best.

Kindly Acknowledge

Yours sincerely

Signed

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

1) Darul Uloom Azaadville (Gauteng)

Moulana Abdul Hamid - Principal and Senior Prof. of Hadith
Mufti M. Saeed Motara - Chief Mufti and Senior Lecturer of Hadith

Mufti Masood Qaasim – Senior Mufti and Teacher of Hadith

2) Darul Uloom Newcastle

(the first and oldest Darul Ulooms from which hundreds of Ulama have graduated) Moulana Ismail Akoo – Senior Aalim and Principal

3) Moulana Ebrahim Adam (Western Cape)

Very Senior Aalim (Scholar) and Amir (Head) of Jamiat al Falaah Madaaris

Cape Town

4) Darul Uloom Taalimuddin Isipingo Beach Durban

Mufti Ebrahim Salejee - Principal and Chief Mufti

Moulana Haroun Abasoomar - Senior Prof. of Hadith

5) Waterval Islamic Institute (Gauteng)

Moulana Ebrahim Mia, Head of one of the oldest academic institutions in SA and one of the most senior ulama in SA

6) Moulana Ahmad Sadiq Desai (Port Elizabeth)

Senior Aalim and leading Mufti ; Editor The Majlis : Author and Translator of Numerous Books on Islam

7) Jaamia Mahmoodia Springs (Gauteng)

Mufti Ismail Moosa – Senior Alim and Mufti and Principal of the Darul Uloom

8) Darul Uloom Inaamiya, Camperdown, KwaZulu Natal

Moulana M Madani - Principal

9) Mufti Abdul Jalil -

Senior Mufti and Senior Prof. of Hadith; Madressa Fatima Zahrah, Chatsworth KZN

10) Moulana Ali Adam al Nadwi
Senior Alim and educationist; Graduate of the famous Nadwatul Ulama, India; Head of the Islamiyyah College, Cape Town

11) Moulana Fakih Abdullah Khatib - (Eastern Cape)
Senior Aalim and teacher of Hadith, Darul Uloom Abu Bakr

12) Mufti Bashir Amod - (KZN) Senior Independent Mufti and Principal of Madressah Al-Banat Stanger

13) Moulana Abdul Haq Makada - (KZN) Senior Aalim (Scholar) and Principal Madressa Moinuddin

14) Mufti Afzal Elias, (Gauteng) Senior Independent Mufti : author of over 200 books on Islam

15) Moulana Moosa Akoodie (Gauteng) Senior Aalim Benoni Muslim Jamaat, Benoni

16) Moulana Cassim O.V. Mohammed, Senior Aalim and Principal of Madrasatul Fuqara, Port Elizabeth

17) Moulana Goolam Sayed (Gauteng) Senior Aalim, Principal Miftah ul Uloom

18) Moulana M Salim Mangera – Senior Aalim and Principal Miftahuddin Islamic Institute Heidedal, Bloemfontein

19) Mufti Seraj Desai - Senior Mufti and Principal Darul Uloom Eastern Cape

20) Mufti E. Salejee (KZN) Senior Independent Mufti, author of Books on Islamic Law and Principal of Estcourt Islamic School

- 21) Mufti Hashim Muhammad Boda (Gauteng) Principal
Madressa Ashraful Uloom, De Deur
- 22) Moulana Abdul Rahman Khan - Senior Aalim and Head,
Chatsworth Ulama (Theologians) Council
- 23) Moulana Abdul Rahim Khan – Senior Alim and Academic,
Durban
- 24) Moulana Abdul Kader Osman – Senior Aalim
Pietermaritzberg
- 25) Moulana Saleem M Kareem Principal, Darul Quran
Ladysmith
- 26) Moulana Abdul Rahim Khan - Principal, Darul Uloom
Nomaania, Chatsworth.
- 27) Mufti Faiyazur Rahim – Senior Mufti and Principal Jamia
Faizul Uloom Durnacol (KZN)
- 28) Mufti Muhammad Bhana - (Gauteng) Principal,
Madrassa al Uloom al Shariah Benoni

ANNEXURE A

page 1 of 2

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

The fundamental concern is that the ***Shariah*** would be **altered and subsumed** as our **courts have an obligation to interpret any legislation “in a manner that promotes the spirit, purport**

and objects of the Bill of Rights.” The Constitutional Court has in a litany of cases stated that it must interpret legislation so as to give effect to the foundational values and “to the specific provisions of the Bill of Rights which encompass them. Legislation must now be seen through the prism of the Constitution”.

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

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

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

The learned Judge stated:

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

Page 752 of 2004 (7) BCLR 735 (CC)

“Courts are therefore under an obligation, where possible, to construe legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. The Bill of Rights is a cornerstone of our constitutional democracy. It “enshrines the rights of all people in our country” and affirms the foundational values of human dignity, equality and freedom. 52 Courts must give expression to these foundational values when construing any legislation. They must interpret legislation so as to give effect to encompass them. Legislation must now been seen through the prism of the page 2 of 2 Constitution. The Constitution provides the context within which all legislation must be understood and construed.”

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

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

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Indian lawyer suggests way out for Muslims

By SIRAJ WAHAB | ARAB NEWS

Published: Jun 21, 2010 23:00 Updated: Jun 21, 2010 23:00

<http://arabnews.com/saudiarabia/article70475.ece>

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

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

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

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

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

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

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

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

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

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

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

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THE 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.

13. The MMB curtails religious freedoms.

14. The Bill will cause division amongst Muslims and between Muslims and the State.

15. The Bill will promote a brand of Islam which is more palatable to Western secular values.

16. The Bill does not allow arbitration which the MLA believes is the only possible solution.

THE MLA'S DETAILED SUBMISSIONS ARE AVAILABLE ON ITS WEBSITE

www.mlajhb.com

The vast majority of the Ulama and the Muslim community is resolutely in opposition to the MMB. As such the idea of consensus is ludicrous. The Muslim community rejects the MMB which is a measure introduced to undermine the Shariah.

**THERE SHALL BE NO CONSENSUS
OF THE MUSLIM COMMUNITY ON
THE MMB. THE AUTHORITIES
SHOULD TAKE NOTE !!!**

UUCSA'S AFFILIATES

The term, 'mainstream' in this context is a misnomer. All Ulama bodies are mainstream provided they are Ulama of the Haqq. Even an Ulama body consisting of two Aalims, is a mainstream Ulama organization.

“Verily, Ibraaheem was an Ummah, obedient unto Allah and Haneef (aloof from all baatil with his focus on only Allah Ta’ala).” (An-Nahl, Aayat 120)