

## THE QUESTION OF THE CONSTITUTIONALITY OF THE MUSLIM MARRIAGE BILL (MMB)

- (1) The constitution of the Republic of South Africa provides for the recognition of Muslim Personal and family law, which shall include the recognition of Muslim marriages and its consequences flowing therefrom.
- (2) Section 15 of the Constitution of the Republic of South Africa provides as follows, “everyone has the right to freedom of conscience, religion, thought, belief and opinion”.
- (3) Subsection 3 (a) makes provision for legislation recognizing;
  - (i) Marriages concluded under any tradition, or system of religious, personal family law,
  - (ii) System of Personal or family law under any tradition, or adhered to by persons professing any particular religion.
- (4) Section 31 of the Constitution of the Republic of South Africa, provides for the cultural, religious and linguistic communities to enjoy their culture, practice their religion and use their language and form their own cultural, religious and linguistic communities.
- (5) When interpreting the Bill of rights, a court must,
  - (i) promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (ii) must consider international law; and
  - (iii) May consider International law.

- (6) When interpreting any legislation, and when developing Common or Customary, every tribunal or forum must promote the spirit, purport and object of the Bill of rights.
- (7) The rights in the BOR may be limited in terms of law of general application to such an extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
- (8) It is understood that contents of the Bill prepared by the Project Committee 59 of the South African Law Reform Commission and handed to the Minister of Justice and Constitutional development, were compatible with Islamic law and the Constitution. The Project Committee, we understand, crafted certain novel and innovative safeguards, checks and balances to maintain the integrity of Islamic law and the Constitution
- (9) Before the MMb was approved by the Cabinet for purposes of public comment, certain important provisions contained in the Project Committee 59 Bill were axed from this Bill. The Bill that has been advertised for public comment has accordingly been amended in certain important respects compared to the Bill produced by Project Committee 59. The amendments may be summarized as follows;

- (i) The Arbitration clause was removed. The underlying rationale for its exclusion became evident, and emerged in earlier discussion papers released by the South African Law Reform Commission, e.g., discussion Paper 101. Furthermore the department of Justice was inclined to the view and rightly so, that the Bill, because it deals with matters pertaining to status law is excluded from the ambit of the Arbitration Act vide provision 52. The Constitution has also explicitly undertaken a firm commitment to protect the family to such an extent that we witnessed a plethora of legislation post 1994. The legislation was justiciable to its fullest extent and the state provided mechanisms for its practical enforcements.
- (ii) The clause that deal with Courts enforcing the Bill and compromising of Muslim judges and Muslim assessors and describing their respective functions and powers, were removed in its entirety.
- (10) It is premature at this stage to pre-empt any possible constitutional challenges for two reasons: firstly, the MMB has not been finally adopted and the Muslim community have been afforded a further opportunity to make submissions to enable substantial changes and improvements to be made. Secondly, court challenges are based on the law, the facts, and

circumstances of any matter before the court, and not abstract propositions.

(11) It would be premature and speculative to pre-empt any possible Constitutional challenges to the Bill without knowing the final form of such Bill as well as the facts and circumstances, which would give rise to such challenges.

(12) A number of Academics and professionals have criticized the Bill and called for its rejection. Most of the views, with a few exceptions are founded and premised upon euro centric values and norms. They underestimate the African concept of Ubuntu and have thus failed to infuse the values and notions of Ubuntu.

(13) Should the MMB become enacted in the form of a statute, there is great potential for the development of a forward looking corpus of jurisprudence through case law. This will inevitably expose our courts to be innovative.

(14) In the development of our jurisprudence it is also prudent according to the Constitution to consider and look for precedents elsewhere in countries of Africa, Middle East and Asia and more particularly countries such as India, Malaysia, Singapore and Tanzania, where Muslim Personal law applies.

- (15) Muslim as a minority in South Africa, are indeed fortunate to a very large extent to have their freedom to practice their faith entrenched, guaranteed and protected by the Constitution as a first generation right, justiciable to the fullest extent. The Constitution places an obligation on the state to enact legislation to recognize MPL and family law in South Africa. To have Islamic law crafted into our legal system is a major achievement for Muslims. Muslims must therefore build on the gains guaranteed instead of throwing out the “baby with the bathwater.
- (16) In terms of article 84 (2) of the Constitution, the President of the Republic of South Africa has the power to refer the Bill to the constitutional Court for a decision on the constitutionality of the Bill. This process will be made by representation of the Muslim community. After the Bill has been adopted by Parliament and before the President assents to such Bill, that the Bill be referred by him to the Constitutional Court for scrutiny and judgment on the constitutionality of the Bill.
- (17) In terms of jurisprudential language when one talks of equality it means substantial equality and not as some may understand absolute equality. The reason for this is obvious, as men and

women are not created physically the same and have different functions in terms of natural law.

In terms of Islamic law the concept used for substantial equality, is equity. Muslim Personal law has built in mechanisms to afford substantial equality (equity) to man and woman.

Quran 3:195 tells us:

"Their Lord responded to them: "I never fail to reward any worker among you for any work you do, be you male or female, you are equal to one another....."

See also the following verse; The Noble Quran, 33:35

"For Muslim men and women,- for believing men and women, for devout men and women, for true men and women, for men and women who are patient and constant, for men and women who humble themselves, for men and women who give in Charity, for men and women who fast (and deny themselves), for men and women who guard their chastity, and for men and women who engage much in God's praise,- for them has God prepared forgiveness and great reward. "

See also The Noble Quran, 49:13

"Righteousness determines the value of humans in Allah Almighty's sight. It is not their gender or race: "O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other. Verily the most honoured of you in the sight of Allah is the most righteous of you. And Allah has full knowledge and is well-acquainted."

(18) The mechanisms employed in the Bill to give substantial equality to men and women in regard to the question of talaaq are the following e.g.

(a) The parties could conclude a pre nuptial contract in terms of which she acquires by means of delegation the same rights the husband has in connection with talaaq. The husband can also delegate such powers during the subsistence of the marriage.

(b) She also has the right to institute the annulment of the marriage on certain grounds, e.g. irretrievable breakdown of the marriage.

(c) Women have a right to annul a marriage by agreement where she tenders the return of the dowry, or other consideration for dissolution of the marriage.

(19) The additional built in mechanisms is the fact that the parties have a choice whether or not they wish to be bound by the provisions of the Muslim Marriages Bill. Once they have exercised this choice, they are locked into the Bill with whatever advantages and disadvantages the Bill may contain

(20) As a matter of policy our courts have not pronounced on religious doctrine and has avoided getting entangled in such doctrine.