

EXAMINING THE MUSLIM MARRIAGES BILL - ITS UNCONSTITUTIONALITY -

Written by Administrator

Saturday, 22 January 2011 06:27 - Last Updated Monday, 28 March 2011 08:15

NO. 2

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DEFINITION OF MUSLIM AND THE OPT-OUT PROVISION

Providing some 'background' information in the introduction of the published Muslim Marriages Bill, the Department of Justice and Constitutional Development states:

“The Bill is applicable to persons who adhere to the Muslim faith who elect

to be bound by its provisions. In other words, it contains an opting out

provision for persons who do not wish to be bound by it.”

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There are two serious flaws in this averment relating to:

- (1) The concept of the Muslim faith

- (2) The opting out provision.

THE MUSLIM AND THE MUSLIM FAITH

What is the meaning of the 'Muslim Faith' to which the MMB applies? Defining 'Muslim' who is an adherent of the 'Muslim faith', Section 1 of the MMB under the heading of Definitions, says:

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

To determine whether a person is a 'Muslim' on the basis of the aforementioned ambiguous concept / definition, will prove a daunting or a well nigh impossible task for a secular court of law. Any person who denies being a 'Muslim' in the meaning of the MMB, cannot be compelled

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by the secular courts to be a 'Muslim' in the meaning of MMB. Any such attempt by a secular court will be a direct infringement of the freedom of religion, thought and opinion enshrined in the Bill of Rights.

There are numerous sects whose adherents claim to be 'Muslim'; who proclaim the Oneness of Allah, and who claim to have faith in all the essentials of Islam. But what constitutes 'essentials of Islam' to one sect, are not necessarily 'essentials of Islam' to another sect. The chasm of difference among the sects could be extremely wide and unbridgeable on essential doctrinal issues among the various sects.

The Justice Ministry and the courts will haemorrhage with headaches in the labyrinth of ecclesiastical and doctrinal issues to determine whether a person is a 'Muslim' or not in the meaning of MMB. Should the Minister of Justice decide that the provisions of the ACT are applicable to someone whom he believes to be a 'Muslim', despite the latter's denial of being a 'Muslim' in the meaning of the MMB, his decision will most certainly be challenged in the Constitutional Court in view of it being in breach of the Bill of Rights which enshrines the principle of freedom of religion, opinion and thought. Neither the Minister of Justice nor any secular court has the constitutional right to describe a person to be a 'Muslim' in the ambiguous meaning of the MMB's definition. Any such determination by a secular entity will be discrimination against the person on the basis of one or more factors of unfair discrimination mentioned in Section 9 (3) of the Bill of Rights.

The MMB definition of '*Muslim*' is grossly defective and inadequate. What are the 'essentials of Islam'? Since there is no uniformity and consensus in this doctrinal element, no secular court will be able to decree that a denying person is a 'Muslim' in the meaning of Act. Thus, a person who is a Muslim, but denies being a 'Muslim' in the meaning of the MMB will automatically be excluded from the provisions of MMB without the legal compulsion of the opting out provision.

Despite being a Muslim, his/her constitutional right will entitle him/her to argue that as a citizen of the country he/she is on par with Jack and Jill respectively, who are non-Muslims and who are not bound by the provisions of MMB. Similarity of descriptive titles does not necessarily confirm similarity of faith and doctrine. Catholics, Anglicans, Methodists and the myriad of other sects all claim to be Christian notwithstanding their wide differences of belief and doctrinal tenets. Just as the state has no right to compel an Anglican to accept and believe in the doctrines of Catholics, so too the state has no constitutional/legal right to determine who is a 'Muslim' in the meaning of MMB.

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Shiahs and Qadianis declare belief in the Oneness of Allah, and in the finality of the Prophethood of Muhammad (sallallahu alayhi wasallam) along with affirmation of what they believe to be 'essentials of Islam', but which differ violently from the Sunni concept of 'essentials of Islam'. While they profess to be 'Muslim', the Ahl-e-Sunnah brand them as '*kaafir*' (non-Muslim). On the other hand, the Bareilwi sect which is a member of UUCSA (the so-called 'United Ulama Council of South Africa), brand the Deobandi Muslims '*kaafir*'.

Furthermore, according to some 'Muslims', the element of '*essentials of Islam*' is superfluous, and is not an integral constituent of *Imaan (Islamic Belief)*.

According to them, a 'Muslim' is a person who believes in the Oneness of Allah and in the Finality of the Prophethood of Muhammad (sallallahu alayhi wasallam). They do not subscribe to the element of '*essentials of Islam*'.

And, according to some who profess to be 'Muslim', the doctrine of 'Finality of the Prophethood of Muhammad (sallallahu alayhi wasallam)' is not a requisite for being a 'Muslim'

It should be understood that the requisites of '*essential of Islam*' and '*Finality of Prophethood*' have different interpretations and meanings. Besides the difference of interpretation, they do not constitute integrals of the definition of 'Muslim' according to some.

Now that it is understood that the MMB definition of the term 'Muslim' does not apply to all persons who profess to be Muslim, the following averment of the Ministry of Justice is erroneous" "*The Bill is applicable to persons who adhere to the Muslim faith....*" There simply is no uniform, comprehensive definition for 'Muslim faith' nor for 'Muslim'. The nightmare which the courts will face will be bizarre.

THE OPTING OUT PROVISION

The Justice Ministry's statement: "*In other words, it contains an opting out provision for persons who do not wish to be bound by it.*" , is misleading. In fact, it is

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half a truth. Section 2 (2) of the MMB states the *Opting Out* provision as follows:

“The provisions of this Act apply to Muslim marriages concluded before the commencement of this Act, unless the parties, within a period of 36 months or such longer period as may be prescribed, as from date of the commencement of this Act, jointly elect, in the prescribed manner, not to be bound by the provisions of this Act, in which event the provisions of this Act do not apply to such a marriage.”

Firstly it is indeed surprising that that none of the legal experts advising the Minister of Justice could discern the glaring conflict of this provision with the Constitution. In our article No.1, we have already elaborated the unconstitutionality of this provision. We shall again briefly reiterate the explanation of the conflict.

This provision discriminates against those who profess to be Muslims. The discrimination is on religion, and this is unfair and unconstitutional in terms of Section 9 (3) of the Bill of Rights. It firstly slaps the deficient and ambiguous definition on all those who profess to be Muslim despite not being Muslim in the meaning of MMB.

Secondly, it differentiates between Zaid (a Muslim) and John (a Christian) in that it imposes on Zaid the encumbrance of having to apply for the opt out to be valid for him, while John does not have to make any such application.

Thirdly, on the basis of religion, the state imposes on Muslims the MMB provisions while members of all other religions are exempted, hence they are not subjected to make application for opting out.

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Fourthly, if a Muslim does not elect to opt out, perhaps due to being ignorant of the MMB provisions, or due to forgetfulness, etc., the provisions become automatically loaded on to him. He is consequently saddled with provisions which are anathema to him. Such imposition of belief by the state on a person is unfair discrimination based on religion.

For the provision to conform to the constitution, it should read:

“The provisions of this Act apply only to Muslims who elect in the prescribed manner to be bound by the provisions of this Act.”

This simple provision will eliminate the two flaws explained although this does not mean that the other provisions are acceptable and not in conflict with the Constitution.

Consider the following scenario:

Zaid is a professed Muslim who had by design not elected to be exempted from the Muslim Marriages Act since he is convinced that it is his constitutional right not to submit to such election by virtue of him being equal with all other citizens. Since the state regards Zaid to be a

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Muslim, it prosecutes him for being in violation of some provision of MMA (Muslim Marriages Act). Zaid defends the action and proceeds to the Constitutional Court to prove that he is being discriminated against on the basis of his religion.

He argues that he is not a 'Muslim' in the meaning of the Act. The state and the court will become mired in intractable doctrinal issues in order to establish whether Zaid is a Muslim in the meaning of the Act. The state will have to explain the '*essentials of Islam*' which is an integral constituent of the definition of 'Muslim' in the Act. It matters not who the state's expert 'Muslim' witnesses will be, Zaid with his expert witnesses will argue that according to his belief the '*essentials*' which the state tried to prove do not constitute part of his Islamic beliefs. In short, no one's conception of Islam can be forced on a person who has his own conception and doctrines. Neither the state nor the court can compel Zaid to accept the doctrines of another Muslim sect or of any other Muslim.

Provision 2 (2) is likewise unconstitutional in that it requires both spouses to jointly elect "*not to be bound by the provisions of the Act.*"

Here again, the beliefs of one spouse are imposed on the other spouse by the state, for the one spouse may be a 'Muslim' in the meaning of the Act while the other spouse is not. It is unconstitutional for a spouse to be at the mercy of the other spouse by denying him his constitutional right for his marital and any other affairs to be governed by the laws as they apply to all citizens of the country.