

MCHA-77-2-1

MUSLIM

4 November 1993

TO:

THE SECRETARY
THE NEGOTIATION COMMISSION ANC

MEMORANDUM
TO BE SUBMITTED TO THE CONSTITUTIONAL
COMMITTEE OF THE ANC

FROM:

THE MUSLIM JUDICIAL COUNCIL (CAPE)

4 November 1993

INTRODUCTION

South Africa is on the brink of major constitutional and political change. It is inevitable that apartheid will finally be abolished, legally, politically, socially and culturally and a constitutional democracy will be established. Many South Africans of different ideological positions, racial and ethnic origin or religious persuasion have struggled, sacrificed and contributed in a multiple of ways for this impending change. The new South Africa will in a way be the fulfilment of the vision and aspirations of the majority of people who have been denied basic, God-given, human rights by successive Nationalist Party Governments.

The position of the MJC regarding human rights derives from general principles explicitly stated in the Holy Quran which are immutable. It is a command of the Holy Quran that justice, in the exercise of authority, should be absolute. Discrimination is condemned, be it on the ground of religion, race, colour or social status. Similar features can exist in a secular state like South Africa, where a constitution declares general unchangeable principles of fundamental rights. This we hope will be the case in the new South African constitution.

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From the point of view of Islam, the religious laws pertaining to basic human rights are not merely moral recommendations but should be a legal order. It must be supported by all the necessary legislation that is needed to ensure their implementation. This is the concern and care Islam devotes to basic human rights - political, economic, social and cultural.

One of the blessings of South Africa amongst many others is that it is an intensely religious country. It is home to people of many religions and Muslims have been part of this mosaic of faiths since the first European colonial settlement in the Cape. As a religious community Muslims have particular concerns and aspirations pertaining to the religious life of the community.

It is with this in mind that the MJC is submitting a memorandum dealing with this issue. As Muslim religious leaders we are duty bound to speak on behalf of the community in order to realise its aspirations particularly with regard to Muslim Personal Law which has always been a matter of great concern since the arrival of Muslims and Islam in South Africa.

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THE MUSLIM COMMUNITY

Muslims and Islam were introduced in South Africa via the Cape concurrently with European colonial settlement. They were in fact slaves imported from the Malayan Archipelago. Despite enormous setbacks due to their condition of slavery and forced labour the early Muslims held on to their faith and culture. Today they are approximately 750,000 in South Africa, the majority classified as "coloured" by the apartheid regime. They are grouped in a large number of autonomous organisations, mosques and educational institutions and judicial structures with the Muslim Judicial Council being the major one in the Cape. These Councils consisting of Ulema (theologians) execute the tasks of formal religious practices, interpretation of the Shariah (Islamic Law), conduct marriages and divorce and their decisions are widely respected in the community. The ulema are in fact practising Muslim Personal Law at a community level within local community structures. The humiliating defect of this set up is that judgements are not justiciable nor enforceable.

Though the Muslim community displays a variety of political and ideological positions they participated in the liberation struggle for equality and justice. The involvement of Muslims as part of the South African nation has always displayed a yearning for the assertion of their Muslim identity.

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This is epitomized in their demand for the inclusion of Muslim Personal Law into a new South African Constitution. The non-recognition of this by successive Nationalist Party governments has always been a source of grievance and a stigma on Muslims as South African citizens.

THE MUSLIM JUDICIAL COUNCIL AND THE LIBERATION MOVEMENT

The Muslim Judicial Council was formed in 1945 at a conference of Muslim religious leaders of the Western Cape where it adopted amongst others the following resolution:-

"To demand that the Government recognise Muslim marriages as legal when performed in conformity with the Holy Quran". Successive National Party governments have not given this any consideration. Muslim marriages remained illegal and the offspring from such unions was legally illegitimate which resulted in tremendous suffering with respect to succession custody of children and maintenance. Whilst the community was suffering under this disadvantage the MJC never abandoned the deep yearning to have Muslim Personal Law as part of the legal system of a Democratic South Africa.

The Muslim Judicial Council developed over the years and today it is the most representative organisation of Muslims in the Cape. Approximately 90% of the mosques are affiliated to the Muslim Judicial Council in that the Imams are members of the organisation.

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The Muslim Judicial Council also monitors the halaal operation in the Cape and is accepted by local authorities to be the religious authority in the region.

Amongst other functions the organisation adjudicates on marriage and divorce according to Islamic law but its judgement remains unjusticiable and unenforcible. Imams affiliated to the Muslim Judicial Council normally conducts marriages in Mosques and have married people across the colour and racial divide in defiance of apartheid because since criteria of race and colour were contrary to the tenets of the Holy Quran and the Sunnah (tradition) of the Holy Prophet Muhammad (SAW).

The anti-apartheid stance of the MJC was intensified with the introduction of the Group Areas Act. It was the Group Areas Act which caused the greatest suffering to Muslims by forcibly removing Muslim communities from their mosques. This drew the Muslim Judicial Council into the national liberation struggle in South Africa.

This forced removal from the surrounding of the mosque disrupted Muslim society and resettlement in township exposed this traditional religious community to the evils of gangsterism, drug addiction and alcoholism.

This experience resulted in the Muslim Judicial Council playing a significant role in the struggle for liberation in South Africa and actively participating in the anti-apartheid campaigns of the UDF and MDM.

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In 1987 the South African Law Commission, a statutory body solicited the opinion of Muslim organisations and individuals on the question of the

recognition of Muslim personal law. Progressive organisations in the community rejected this as part of a strategy of ethnic co-option by an illegitimate government. This was shelved when the process of negotiation started in 1992.

THE INTRODUCTION OF MUSLIM PERSONAL LAW IN THE NEW SOUTH AFRICAN CONSTITUTION

The Muslim demand for the recognition, introduction and practice of Muslim Personal Law in a new South Africa must be seen from the basic Muslim concern for the preservation of their religion and the practice of the Law as found in the Holy Quran and the Sunnah (tradition) of the Holy Prophet. In order to appreciate this demand it is very important to understand precisely what Muslims perceive to be their religion.

The Muslim conception of religion is comprehensive and all encompassing. It includes relationship of the believer with the Creator and transcendent forces as well as the relationship amongst human beings in day to day mundane social intercourse. Consequently Muslims deem it necessary to derive their legislation on all matters from the Holy Quran and the

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Sunnah of the Holy Prophet. These are the major sources of their religious activities. Therefore if a Bill of Rights guarantees the right to practice the beliefs of all religious groups in South Africa, Muslims will interpret this to mean the right to practice what is prescribed in the Holy Quran and the Sunnah of the Holy Prophet.

This position of Muslims should not be interpreted as exclusivist or sectarian. Universality is an important aspect of Islamic Law which is based on the common good of humankind.

BASIC DEMANDS OF MUSLIMS (MUSLIM JUDICIAL COUNCIL)

Muslim South Africans have been discriminated against racially and religiously. They were discriminated against racially because they were classified as non-white and consequently suffered every humiliation of the apartheid laws. They do not form part of the majority religion in South Africa and as such their Muslim Personal Law was ignored, by not being recognised.

We therefore demand that:

- Islam be accepted as a true revealed religion and that South Africa be recognised as a multi-religious country.

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- the recognition of Muslim personal law be regarded as part of the elimination of discrimination.
- the historic claim of the Muslim community to practice their religion be considered within the context of the emerging democratic order with constitutional support.
- within the equal liberties and citizenship for all South Africans Muslims be granted the right to be different in the practice of the Law of Islam which can be applied in a post-apartheid legal system.
- it be accepted that Islam does not differentiate law and religion, public and private and that the accomodation of Muslim personal law in a future non-racial legal order notes this inclusiveness of law, religion, culture and identity.
- based on the recognition of a plurality of cultures that monogamous marriages are not the only "civilized" forms of union between persons.
- Muslim marriage be accepted, as according to the Shariah as a civil contract and not of the nature of a sacrament only and therefore the marriage itself creates reciprocal rights and obligations between the contracting parties.
- these rights be made constitutionally justiciable and enforceable.
- the Personal Law of Islam be accepted as laid down in the Holy Quran and the sunnah of the Holy Prophet Muhammad (SAW).
- the interpretation for the law be the domain of suitably qualified ulema (Muslim Jurists).

We thank you for your letter of ***** and place on record our appreciation of your valuable contribution over the years to the establishment of freedom, democracy and equality in our land.

We further wish to thank you for the open, direct and friendly manner in which you have raised various issues with us.

We have not been able to convene the whole of the Constitutional Committee to consider the important matters to which you refer, but feel that in view of the urgency of the matter we should give you our immediate response, which will guide us at the Multi-Party talks.

Proposed Draft

Constitutional Committee

Reply to the Muslim Judicial Council.

1. Many of the aspects which you raise are already catered for

- the secure guarantees of religious rights and freedoms
- the equality of all religions (non-hegemony)
- the right of people to conduct their affairs in terms of their beliefs, provided this does not impinge on the rights of others [Muslims, Catholics, Jews etc could continue to obey the religious law and not involve the state]
- the right to maintain Muslim schools

It is also our firm policy to oppose any discrimination against Muslim families and support treating Muslim marriages as enjoying equal status with all other recognised marriages.

There are a number of other questions that will require thoughtful and sensitive handling, giving the fullest respect to your principles in the light of the Constitution as a whole:

- (i) Reconciling the 'right to be different' with the broad principles of non-racism, non-sexism, equality and national unity for which we have all fought so hard;
- (ii) Determining rules of choice of law, and what criteria should be used;
- (iii) Working out the relationship between the Muslim and the State judicial authorities in relation both to the making and the enforcement of decisions.
- (iv) Possible implications for property and commercial law, the law of inheritance and tax law.
- (v) Working out principles and procedures that govern the relationship between all forms of law : constitutional, statutory, common law, customary law and religious law.

These are just some of the complicated questions that will have to be dealt with in a comprehensive and balanced way. It will be vital to involve all affected persons in the process, and we trust that we can call upon the Muslim Judicial Council to give leadership in this as you have done in other matters.

What needs to be done at this stage is to ensure that there is secure constitutional space, both in the interim and in the final constitution for future legislation that deals with the recognition and status of Muslim personal law.

A lasting and effective end result can then be worked out with proper consultation and the involvement of all concerned. We attach our draft proposals for the Negotiating Council.

We look forward to continuing collaboration with yourselves and feel confident that a satisfactory solution can be worked out.

Sincerely,

Annexure

Schedule 7

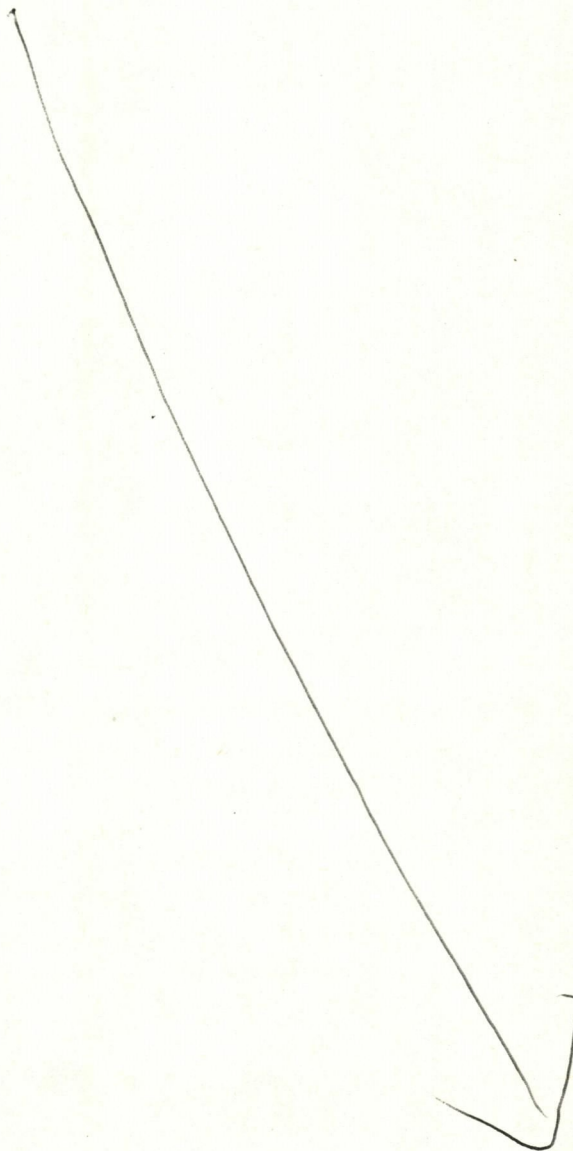
Either append to IX or make it a new principle IX : Members of religious associations shall be free to regulate their affairs on a voluntary basis in terms of principles and laws of their faith, provided that they do not violate the rights of others. Personal family law may be recognised within the framework of the general principles set out in this Schedule. The equal status of all marriages performed by recognised religious officers shall be acknowledged.

We thank you for your letter of ***** and place on record our appreciation of your valuable contribution over the years to the establishment of freedom, democracy and equality in our land.

We further wish to thank you for the open, direct and friendly manner in which you have raised various issues with us.

We have not been able to convene the whole of the Constitutional Committee to consider the important matters to which you refer, but feel that in view of the urgency of the matter we should give you our immediate response, which will guide us at the Multi-Party talks.

We fully take into account what you have written.



Proposed Draft

Constitutional Committee

Reply to the Muslim Judicial Council.

Our detailed observations
are as follows:

1. Many of the aspects which you raise are already catered for

- the secure guarantees of religious rights and freedoms
- the equality of all religions (non-hegemony)
- the right of people to conduct their affairs in terms of their beliefs, provided this does not impinge on the rights of others [Muslims, Catholics, Jews etc could continue to obey the religious law and not involve the state]
- the right to maintain Muslim schools

to It is also our firm policy to oppose any discrimination against Muslim families and support treating Muslim marriages as enjoying equal status with all other recognised marriages. This will have important implications for accord appropriate dignity to such marriages, and

There are a number of other questions that will require thoughtful and sensitive handling, giving the fullest respect to your principles in the light of the Constitution as a whole: also have

- (i) Reconciling the 'right to be different' with the broad principles of non-racism, non-sexism, equality and national unity for which we have all fought so hard; important consequences in terms of housing, pension, welfare and other rights
- (ii) Determining rules of choice of law, and what criteria should be used;
- (iii) Working out the relationship between the Muslim and the State judicial authorities in relation both to the making and the enforcement of decisions.
- (iv) Possible implications for property and commercial law, the law of inheritance and tax law.
- (v) Working out principles and procedures that govern the relationship between all forms of law : constitutional, statutory, common law, customary law and religious law.

These are just some of the complicated questions that will have to be dealt with in a comprehensive and balanced way. It will be vital to involve all affected persons in the process, and we trust that we can call upon the Muslim Judicial Council to give leadership in this as you have done in other matters.

What needs to be done at this stage is to ensure that there is secure constitutional space, both in the interim and in the final constitution for future legislation that deals with the recognition and status of Muslim personal law.

A lasting and effective end result can then be worked out with proper consultation and the involvement of all concerned. We attach our draft proposals for the Negotiating Council.

We look forward to continuing collaboration with yourselves and feel confident that a satisfactory solution can be worked out.

Sincerely,

S. G. of the ANC

Thameside

c.c. Constitutional Committee

Annexure

Schedule 7

Constitutional Principles binding on
the Constitution-making body
in doing so

Either append to IX or make it a new principle IX : Members of religious associations shall be free to regulate their affairs on a voluntary basis in terms of principles and laws of their faith, provided that they do not violate the rights of others. Personal family law may be recognised within the framework of the general principles set out in this Schedule. The equal status of all marriages performed by recognised religious officers shall be acknowledged.

faith

including the Bill of Rights,
and such principles as the
legislature might determine.

Legislation may provide for the
recognition of personal family law

We thank you for your letter
of and place on record
our appreciation of your valuable
~~contribution~~
~~work~~ over the years, ~~together with~~
~~South Africans of many faiths, in~~
to the establishment of ^{freedom} democracy
and ~~free~~ equality in our land.

We further wish to thank
you for ~~the open and direct and friendly~~
manner in which you have
raised ~~the~~ various issues with us.

~~But~~ We have not been able
to convene the whole of the
Constitution Committee to consider
the important matters to which
you refer, but feel that in view
of the urgency of the matter we

should give you ~~an~~ our immediate
response, which will guide us at
the Multi-Party talks.

Proposed draft

Const. Committee

Reply to Muslim Ind. Council.

~~Along fol. lines:~~

1). Many aspects ^{(which you raise have} already catered for

~~for~~ - the secure guarantees
of religious rights and freedoms

- the equality of all
religions (non-hegemony)

- the right of people to
conduct their affairs in terms
of their beliefs, provided this
does not infringe the rights
of others [Muslims, Catholics,

Hindus, Jews etc. could continue to
obey the religious law and not
invoke the State law] ~~if it~~;
~~different~~.

- the right to maintain Muslim schools.

It is also our firm policy to oppose any discrimination against Muslim families and to support treating Muslim marriages as enjoying equal status with all other ^{recognised} marriages.

There are a number of other questions that will require thoughtful and sensitive handling, ^{giving the fullest} ~~respecting~~ ^{to your} principles in the light of the Constitution as a whole.

(i) Reconciling the 'right to be different' with the broad principles of non-racism, non-sexism, ^{equality} and national unity for which we have all fought so hard.

(ii) Determining rules of choice of law, and what criteria should be used;

(iii) Working out the relationship of ~~the~~ between the ~~state~~ Muslim and the State judicial authorities in relation both to the making and

the enforcement of decisions.
(iii) Possible ~~the~~ implications for property and commercial law, ~~and~~ the law of inheritance and tax law.
(v) Working out principles and procedures that govern the relationship between all forms of law: constitutional, statutory, common law, customary law and religious law.

These are just some of the complicated questions that will have to be dealt with in a comprehensive and balanced way. It will be vital to involve all affected persons in the process, and we trust that we can call upon the Muslim Judicial Council to give leadership in this as ~~they~~ ^{you} have done in other matters.

What needs to be done at this stage is to ensure that there is <sup>(both in the interim and the final Const-
itution)</sup> secure constitutional space for future legislation that deals with the above matters in an appropriate recognition and status of Muslim personal law. The end ^{A lasting}
and effective end result can then be worked out with proper consultation ^{with} ~~the~~ involvement of all concerned. We attach our draft proposals for the negotiating Council.
We look forward to continuing collaboration ^{with yourselves} ~~between~~ and feel confident that a satisfactory solution can be worked out.

Sincerely,

Annexure.

Schedule 7.

~~Principle VII~~

Either append to
IX or make it a new
principle

IX Members of religious associations

shall be free to regulate their affairs

on a voluntary basis in terms of the

principles

~~laws~~ and laws of their faith, provided

that they do not violate ~~fundamental~~

the rights of others. Personal family

law may be recognised by ~~statute~~

legislation within the framework of

the general principles set out in

this Schedule. The equal status of

all marriages shall be ~~also~~ acknowledged

performed by recognised religious officers