RELIGIOUS ARBITRATION IN FAMILY LAW

A challenge to women's equality in contemporary Canadian society

ABSTRACT

During the recent debate over the continued use of religious arbitration in family law in the Province of Ontario, the National Association of Women and the Law (NAWL) opposed religious arbitration and any use of the Ontario Arbitration Act to settle family matters. NAWL argues that while arbitration may be suitable in the commercial law setting, it is entirely inappropriate in family law since state policy must always take into account systemic patterns of sexual inequality. NAWL acknowledges that people are free to participate in religious processes that may involve family matters. However, the decisions of religious authorities ought not to have any civil effect and they should never be legally binding.

In December 2003, the creation and promotion of religious tribunals by the Islamic Institute for Civil Justice sparked significant media and other public discussions in Canada and around the world as to the implications of the proposed "Sharia Courts". The National Association of Women (NAWL), a pan-Canada feminist law reform organization with a track record of upholding women's human rights through law, in collaboration with the National Council of Muslim Women (CCMW) and the National Organization of Immigrant and Visible Minority Women of Canada (NOIVMC) played a key role in researching the impacts of religious tribunals on the equality rights of women.

Eventually NAWL joined with over 50 groups in a CCMW-led No Religious Arbitration Coalition to educate the public about the findings of the NAWL research and to convince Ontario politicians that religious arbitration threatens women's equality rights. On September 11, 2005, Premier Dalton McGuinty announced that his government will put an end to all family law arbitration based on religious principles. The fact that Ontario was seriously considering supplanting public law in favour of tribunals based on religious principles and that serious public debate ensued with mainstream media supporting the tribunals only underscores what NAWL already knew. Women's rights in Canada must be protected in contemporary Canadian society, a liberal democracy hosting many religious groups within an increasingly fundamentalist world. While NAWL's research was sparked by the prospect of the Islamic Tribunals, NAWL knew that fundamental forces within all religions pose equally serious threats to women's equality rights.

From the outset is was clear that the discrete issue of Islamic religious tribunals under the Ontario Arbitration Act would increase the privatization of family law, a trend in Canada that NAWL's current and past work has flagged as a problem for women . While NAWL's research did initially focus on the Islamic tribunals in Ontario the research journey quickly widened the debate to the consideration of all religions. However, despite repeated efforts to publicly oppose religious arbitration generally, the media and other public discourse continually cast the debate in terms of Sharia Law. This was a problem for two reasons – first, it at once sensationalized and narrowed the argument focusing only on Islam and often employing dramatic stereotypes of Muslim practices around the world. Second, as the Canadian Council of Muslim Women consistently pointed out, it confused the terms "Sharia Law" and " Muslim Personal Laws". The No Religious Arbitration never did oppose "Sharia Law" but rather opposed all religious arbitration including that based on Muslim Personal Laws. Refusal by the mainstream media to understand the language caused confusion and hurt. Sharia law in fact refers to the comprehensive terms by which all Muslims practice their religion. Muslim Personal Laws on the other hand refer to a complex system of jurisprudence that is not woman positive. Practicing Muslims, such as the Canadian Council of Muslim Women would not oppose Sharia since it is their very lifeline to their religion. The members of the Muslim Community who worked within the Coalition found it very difficult to constantly have Sharia under attack – it was in fact a personal attack against them. This inability to widen the debate was problematic. It at once has potential to both stigmatize Muslims and to cast people who oppose the introduction of religious principles into Canadian law as Islamophobes.

NAWL's position went considerably farther than resisting religious arbitration and went much farther than current practice. NAWL recommended that Ontario follow Quebec's example and

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explicitly exempt family law matters from arbitration. NAWL believes that while arbitration may be suitable in the commercial law setting, it is entirely inappropriate in family law where gender dynamics, unequal power relations between men and women and systemic discrimination are always at play. As currently practiced, arbitration allows people to pick and choose the law that will apply to them. Arbitration in family law is a convenient method of circumventing democratic law reform that not coincidentally displeases many historically privileged groups, including men. Arguably, arbitration is a form of "backlash" to feminist reform in different areas of the law, aimed at re-establishing impunity and power historically exercised by men. By promoting a "choice of law", the government is facilitating the disappearance of hard-won progressive developments in the law. When justice is privatized, public policy ceases to rule. Arbitration in family law effectively introduces a "two-tier" system of justice and women, particularly marginalized women, are the losers.

Marion Boyd, who conducted research for the McGuinty government, argued that it is inappropriate to require a universal application of the laws adopted to protect women in the "private" sphere and that women should be free to "live as they choose"[1]. This neoliberal vision of "choice" disregards not only the painful dynamics of divorce and separation, but most importantly, the overall social and economic context of the lives of many women: susceptibility to homelessness upon the breakdown of a marriage, the precariousness of immigration status, abject poverty and persistent racism. Given the inability of most women to afford legal counsel and the fact that ideological and religious groups may offer free mediation and arbitration services, women's free choice remains dubious. The discourse in favour of choice is reminiscent of arguments of the freedom of individual workers to bargain fairly the terms of a contract with an employer, now discredited through the well-established mechanism of unions and minimum wage legislation. The notion of free choice in the context of family arbitration is gender-insensitive as it does not take into consideration the real power dynamics at play and the collective rights at stake for women.

Women's rights in Canada must be protected in contemporary Canadian society, a liberal democracy hosting many religious groups within an increasingly fundamentalist world.

Feminists have often said that "the personal is political". What is meant by this statement is that in the intimate, "private" and "personal" space of the family women are all too often subjected to discrimination, exploitation and abuse by men. These gendered, systemic patterns of sexual inequality need to be acknowledged and taken into account in state policy. While the Canadian government and even the international legal order has come to recognize their obligation to correct violations against women in the "private" sphere, arbitration threatens to put women back to the realm of "family government" principles or rules of religious elites who have not demonstrated a commitment to the egalitarian principles established through the years.

In a society where sexual inequality of women is still systemic, women need to be ensured of "equal protection" and "equal benefit" of the law. All women need to be secure in the knowledge that they will be protected by state legislation and official courts that are accountable and that act according to the rule of law and democratically-adopted legal frameworks.

NAWL recognizes that the recommendation to prohibit arbitration in family law marks a significant departure from what is currently practiced. However, the organization firmly believes that arbitration is inappropriate in family law.

Specifically regarding religious arbitration, given that religious freedom, both domestically and internationally, may include the right to create religious tribunals, NAWL acknowledges that people are free to participate in religious processes that may involve family matters. Parties must be free to adhere to the recommendations of religious authorities according to their faith. However, the decisions of religious authorities ought not to have any civil effect and they should never be legally binding. Any family law decision coming from a religious tribunal would thus be advisory only.

Religious arbitration in family law offends the tenet of separation of "church" and state. A religious authority invested with the power of rendering an enforceable order, typically without the possibility of appeal, is transformed into a legal authority. This blurring of the distinction between religion and law erodes the authority of the state in the elaboration of legal rules that should have universal application to all persons living within its jurisdiction. As the former Quebec Minister of Justice, Paul Bégin has noted,

> …the conduct of men and women in our society must under no pretext be placed under the rule or laws of religion…[A]ll persons have the inalienable and non-negotiable right to invoke the law, above and beyond any religious rule…they have the right to the protection of the law at all times and in all circumstances…The creation of [religious tribunals] under discussion in Ontario represents a major and dramatic setback for women and children's civil rights, to which we cannot consent under the guise of freedom of religion or reasonable accommodation.[2]

Indeed enforceable faith-based arbitration may be incompatible with freedom of religion itself, which as the Supreme Court has noted recognizes individual liberty and subjective choice in the interpretation of religious norms.[3] The interpretation of a religious obligation by an arbitrator may be in conflict with an individual's

understanding of the religious precept. Thus, when a religious order is given legal effect it could force an individual to act contrary to her belief.

The fact that most religions can be interpreted as endorsing male domination and female inferiority, sanctioning religious decision-making as part of the legal order would very often condone the commission or the perpetuation of potential discriminations. The Canadian Council of Muslim Women has stated:

> We are believing women who are committed to our faith and our members are very concerned that the use of Muslim family law will erode the equality rights of Muslim women that are guaranteed under the Canadian Charter of Rights and Freedoms…Sanctioning the use of religious laws under the Arbitration Act will provide legitimacy to practices that are abhorred by fair-minded Canadians, including Muslim women.[4]

Professor Jean-Francois Gaudreault-Desbiens is of the opinion that this situation creates a responsibility on governments to ensure that women's inequality is not exacerbated:

> [W]henever there is a risk that the situation of a vulnerable party could be worsened as a result of the application (or misapplication) of religious norms, the state should at the very minimum ensure that it does not facilitate the application of such norms or that it potentially reinforces their power over such a vulnerable party.[5]

Thus, NAWL opposes the use of religious principles as a legal framework for arbitration in family law, as it has existed in Ontario's Arbitration Act. No one should be forced by a state sanctioned legal mechanism to respect a religious injunction. All men and women, whatever their culture or religion, have a right to equality and justice and to the enjoyment of all of their universally recognized and constitutionally entrenched human rights.

NAWL recognizes the continued deficiencies within the traditional court system and the need to address them. But these deficiencies should not justify the development of a parallel legal order, controlled by minority communities or religious groups. On the contrary, the government must renew its commitment to accessible justice, in a climate that does not tolerate racism and that accommodates cultural diversity.

Ontario and Canada are bound by human rights obligations included in the Canadian Charter of Rights and Freedoms, and international human rights instruments, such as the Universal Declaration of Human Rights, the Convention on the Elimination of all Forms of Discrimination against Women, the Convention on the Elimination of Racial Discrimination, the International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights. Each of the obligations under the above covenants requires that the state protect disadvantaged individuals and groups. A government must not, either by positive action or by omission, maintain legislation and policies that have a discriminatory impact on women particularly when they have a disparate impact on women of colour and/or women from different religious minorities. Such legislation and/or policies cannot be justified in a free and democratic society. A system of justice that privatizes family law abrogates the state's responsibility toward its people. The government of Ontario has taken the first step to rectify the current situation of injustice and create a system whereby each individual's human worth and dignity are protected. Those of us who have worked towards eliminating religious arbitration in family law welcome Premier McGuinty's rejection of religious tribunals. In this decision the McGuinty government has chosen in favour of social cohesion and the upholding of human rights for those who hold the least institutional power within the community, namely women and children. The job now remains to improve the public court system so that all women can have fair and equal access to their rights.

Notes

This article is extracted from a research publication conducted by the National Association of Women and the Law (NAWL) entitled Arbitration Religion and Family Law: Private Justice on the Backs of Women authored by Natasha Bakht. The complete publication is available at NAWL Religious Arbitration)

1 Boyd states: "It is not clear to me that we should aspire to the level of state intrusion in our lives that is implied by the application of the Charter to privately ordered relationships. Of course, in any given area, the government can decide it wants to regulate for the purpose of achieving conformity of conduct in accordance with a given set of principles. However, this in no way diminishes the fact that we accept that there are private spheres in which people should be free to live as they choose without being forced to subscribe to the values of the state." Boyd Report, *supra* note 248 at 76.

2 "L'étant Québecois doit se prononcer. Et clairement contre" *Le Devoir*, (12 January 2005) A7 [translated by Andrée Côté]. A few days after this opinion, the current Minister of Justice Monsieur Jacques Dupuis re-affirmed the position of his government that no faith based arbitration or mediation would be allowed under Quebec law. Jacques Depuis "Pas question de modifier le Code civil du Québec" *Le Devoir* (15 January 2005) B5 [translated by Andrée Côté].

3 Amselem, *supra* note 143.

4 Letter to Dalton McGuinty, Premier and Michael Bryant, Attorney General of Ontario from Alia Hogben, Executive Director of Canadian Council of Muslim Women (14 January 2005) online: CCMW <http://www.ccmw.com/ShariainCanada/Letter%20to%20Ontario%20Premier%20Attorney%20General.htm>.

5 Gaudreault-Desbiens, *supra* note 209 at 30.