RELIGIOUSLY-BASED ALTERNATE DISPUTE RESOLUTION: A CHALLENGE TO MULTICULTURALISM

ABSTRACT

Ontario has always allowed consenting parties to resort to private arbitration based on any form of law freely chosen by both to resolve family law disputes. This article outlines how a Muslim group's proposal to arbitrate family law matters based on Muslim personal law has led to widespread questioning of Canada's multicultural policies and suggests that there is a balanced approach which can reconcile the concerns.

In October 2003, a group calling itself the Islamic Institute of Civil Justice (I.I.C.J.) announced in rather grandiose terms its intention to incorporate a business which would offer arbitration of family law matters, based on Islamic principles. Its major proponent, Syed Mumtaz Ali, claimed the I.I.C.J. was "the beginning of a Sharia Court in Canada." Well known as an advocate for Islamic political identity, Ali had written articles proposing that Muslims should be treated similarly to Aboriginal nations with respect to the development of their own legal system and had defended the right of Quebecers to separate from Canada on the basis of cultural self-determination.[1] Ali claimed that, once Islamic-based arbitration was available, all "good Muslims" would be expected, as part of their faith, to have family matters resolved only in this forum as opposed to the secular courts of Canada.[2] His implication was that the law in Ontario had recently changed and that his Institute would henceforth offer a parallel legal system based on Sharia law.

These pronouncements precipitated immediate and vocal opposition both within the Muslim community and across Canada. Under the mistaken impression that the Ontario government had taken or planned to take specific action to allow Canadian laws to be superceded by Sharia law, opponents worked with the media to perpetuate this myth. Recognizing the volatility of the issue, the Ontario government asked me to conduct a review of the use of arbitration in family law in general and specifically to consider the impact on vulnerable individuals of alternate dispute resolution using religious laws. The Review received almost fifty written submissions from a wide variety of groups and individuals, conducted consultations with two hundred and fifty people, and considered the policy implications of various options. The full report of the Review was released on December 20, 2004; it includes an overview of the applicable laws, a summary of the positions of proponents and opponents, including their suggestions for remedy, an analysis of the policy issues, and recommendations to government for legislative, regulatory and program measures to address the issues raised during the Review.[3] It is not possible to outline all the findings of the Review in this space but a brief summary of the positions may help frame an appreciation of the challenge to multiculturalism posed by this controversy.

Along with most jurisdictions, Ontario encourages a wide range of dispute resolution methods that provide alternatives to the adversarial win/lose forum of the courts. Large numbers of family law disputes are resolved through separation agreements, voluntarily agreed to by both parties, often with the assistance of independent legal advice and/or mediation; these agreements may or may not come to the attention of the courts, depending upon the specific remedies being sought. Ontario law has always allowed parties to choose arbitration as one alternative means of resolving family law and inheritance matters as long as both parties agree freely and without coercion to do so. Under the law, the parties can agree on an arbitrator or arbitrators they feel will hear their matter fairly and both parties can agree on the form of law, including religious law, that will be used by the arbitrator in making a decision. The enabling legislation, the Arbitration Act, originated in the nineteenth century and was updated in 1991; Ontario is one of seven provinces to adopt a uniform arbitration act developed by the Uniform Law Conference of Canada, a group dedicated to modernizing and harmonizing laws across Canada.

The Arbitration Act applies only to civil matters that are subject to provincial jurisdiction (such as separation, property division, and support of dependent spouses and children) and provincial matters that are not specifically excluded by the Act (such as labour law.) Matters under federal jurisdiction, such as criminal law or civil divorce, cannot be arbitrated. Arbitrators can only order the

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parties to do things they could have agreed on their own to do and cannot order any remedy that is illegal under Canadian law, since parties cannot lawfully agree to break the law. The courts retain the right of judicial review with respect to the fairness and equity of the process and the parties cannot waive their right to such review. The courts can also overturn decisions which are found to be egregious or which are not in the best interests of children. The Review received submissions from religiously-based arbitration organizations in the Jewish, Muslim and Evangelical Christian faiths that have operated in Ontario over many years, apparently without significant judicial intervention.

Increasingly over the past twenty years, jurisdictions have implemented alternative dispute resolution methods following research and reviews. The rationale includes the swifter time frame for resolution of disputes, the lower costs, both to the state and the individual, the reduction of emotional stress, the specialized expertise needed to deal with the sensitive issues of family law, and the sense of personal agency experienced by disputants. Many mediators and arbitrators point out that parties who are engaged actively in the resolution process are often more likely to respect the outcome, even if that result is not what they had hoped to achieve. Those advocating for religiously-based alternate dispute resolution argue that diverse parties must have the right to choose to have their matters heard by those who understand their religious priorities, who respect their traditions and who speak their language (both literally and figuratively;) the results have both legal and religious authority, thus encouraging compliance on both secular and religious grounds.

Many opponents of arbitration came to Canada from other lands to escape the oppressive yoke of states like Iran, Afghanistan or Pakistan, where Islamic law governs every aspect of life; they expressed fear that the use of Muslim family law principles in family law arbitration is just "the thin edge of the wedge," believing that allowing such practices opens the door to the gradual implementation of full Sharia law, applicable to all Canadian Muslims. Feminist organizations claimed that religious principles are inherently conservative and prejudicial to women and that arbitration on the basis of Muslim family law in particular will erode the individual equality rights women have striven to have enshrined in Canadian law over decades of political action. Some of these groups suggested that Muslim women would not have the knowledge or the strength to assert their own rights when these conflict with the communal rights of Islamic society. Secular humanists, believing in the complete separation of church and state, deplored what they depicted as a further intrusion of religion into the realm of the state; they demanded that the government take immediate steps to remove the right of any religious group to arbitrate family law matters using religious laws. All these groups raised questions about the status of women in Muslim states and the vulnerability of women and children to violence within that culture. Those opposed to Canada's multicultural policies seized upon this issue as an example of why Canada should limit the expression of cultural diversity and insist that everyone, however heterogeneous our population, should be required to adhere to exactly the same laws and processes.[4]

The basic tension inherent in multiculturalism is how to balance the rights of minority groups within a multicultural society and yet protect the rights of individuals who are members of those minority groups. The responses to the Review revealed a wide range of views on how multiculturalism can be viewed in Canada. There was a minority who advocated for full jurisdiction for religious/cultural minorities over the family law and inheritance matters, with minimal intervention from the state; for this group, the minority group should be able to apply religious laws even where these are in serious conflict with the laws or policy imperatives of the state and the state should have little power to act on behalf of an individual member of the group, even if that individual's rights have been contravened by the process. This view has been called a policy of "non-interventional accommodation."[5] At the other end of the scale, another minority response advocated vigorously for a complete separation of church and state, with religious and cultural minorities having no authority whatsoever over matters that are subject to state laws.[6]

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Family law is often a litmus test for how a jurisdiction interprets multiculturalism. Family law serves to delineate who belongs in the community and who does not, according to the community's own norms. Family law also has a distributive function, allocating rights and obligations, including financial security, to the members of the community. Complete delegation of power over family law to a minority group empowers the group not only to determine its boundaries of inclusion and exclusion, but allows those in power in a community to determine the level of enfranchisement of individuals within the group. This is extremely problematic where a community is seen by some to have little regard for the rights of certain members, such as women. The non-interventionist approach, "renders invisible those violations of members' basic individual rights which occur under the shield of an identity group."[7] By placing primacy on the right of the minority group to protect itself from external influences, those individuals in the minority group whose rights may be violated must bear the burden of the protection of the culture within the dominant society. As a result, individual autonomy is sacrificed for the sake of group survival. Where, as in Ontario, the existing family law regime is available to all residents but is not mandatory, there are limited state

guaranteed protections, aside from the right to avail oneself of a particular set of laws. It is simply not tolerable that any individual might lose legal rights and protections because of the exercise of power by a minority group. It is therefore essential that these laws continue to be available to all, regardless of the community to which they belong, and that no community is given the right to stop people from having access to those laws.

Similarly problematic, however, is the notion that cultural and religious minorities could suddenly be deprived of rights they have enjoyed for decades and which they firmly believe are guaranteed by the Charter of Rights and Freedoms. The secular absolutist approach is based on an assumption that secular laws treat everyone equally. The primary shortcoming of this position is that it fails to acknowledge that some people live their lives in a manner more closely aligned to their faiths than others, so that secularism is experienced as a constraint. Ontario laws are framed by the combined influence of the Judeo-Christian tradition and the enlightenment focus on the individual as opposed to the community, both grounded in English common law. As a result, the laws of the province and their application are more easily digestible by some cultures than others, making their impact disproportionate on those who do not belong to the dominant culture. This disproportionate impact may serve to alienate from the mainstream those who do not see themselves reflected in our laws. Many opponents of arbitration in family law urged the government to make resolution of family disputes possible only through the secular court process. Those who identify primarily with their religion, as opposed to our laws, and whose religious rules require them to seek mediation and arbitration of disputes, rather than litigation in the secular courts, would experience such a requirement as oppressive and discriminatory. Undoubtedly the practice of religious arbitration would simply go underground, leaving vulnerable women and children with no recourse under Ontario law.

Instead of choosing one of these two polar views of multicultural accommodation, Ayelet Shachar suggests we seek to achieve "transformational accommodation," whereby group religious and cultural freedoms are balanced with individual rights and freedoms.[8] This notion is based on the understanding of individuals as being at the intersection of various identities. Not only are indi-viduals members of the collective group to which they belong, but they also have additional dimensions of gender, ability, age, and so on.

The intersectionist view of identity…would acknowledge the multidimensionality of insider's experiences and would capture the potential double or triple disadvantages that certain group members are exposed to given their *simultaneous belongings*. Moreover, an intersectionist view would recognize that group members are *always* caught at the intersection of multiple affiliations. They are group members (perhaps holding more than one affiliation) and, at the same time, citizens of the state.[9]

Commitment to individual rights lives at the core of the legal and political organization of any liberal democracy and underpins freedom of religion and expression, and the rights of minorities to legitimately enter into dialogue with the broader society with any kind of legitimacy. It is illogical and untenable to claim minority rights in order then to entrench religious or cultural orthodoxies that seek to trample the individual rights of select others. Toleration and accommodation must be balanced against a firm commitment to individual agency and autonomy.

Increasingly over the past twenty years, jurisdictions have implemented alternative dispute resolution methods following research and reviews. The rationale includes the swifter time frame for resolution of disputes, the lower costs, both to the state and the individual, the reduction of emotional stress, the specialized expertise needed to deal with the sensitive issues of family law, and the sense of personal agency experienced by disputants.

Incorporating cultural minority groups into mainstream political processes remains crucial for multicultural, liberal, democratic societies.[10] By utilizing provincial legislation that is already used by other religious groups, the Muslim community is drawing on the dominant legal culture to express itself and engage in institutional dialogue. In using the existing law, the community is inviting the state into its affairs, since state intervention, in the form of judicial oversight, is specifically set out in that law, while at the same time creating a forum in which its religious obligations can be met. The Muslim proponents of religiously-based arbitration consistently pointed out that, according to the Quran, Muslims living in a non-Islamic country are required to follow the laws of that country. The recommendations flowing out of the Review attempt to strike a balance by allowing religiously-based arbitration to continue, but only if the process and the decisions are consistent with the Ontario Family Law Act. Arbitration agreements and decisions would be included under Part IV of the Act. As suggested by proponents from both the Muslim and the mainstream communities, the recommendations include provisions for the regulation of arbitrators and mediators, requirements for record keeping, written decisions with reasons and monitoring of decisions in an anonymous form. The Review also recommends that resources be allocated to ensure that affirmative steps are taken so that individuals within all communities understand their rights and obligations under the law and that a genuine

public dialogue commences about how we can fruitfully engage in building a shared sense of identity in an atmosphere of peace and mutual respect. It remains to be seen whether the government will seize this opportunity to create "transformational accommodation" in family law arbitration, thus protecting the choices of all individuals while promoting the inclusion of minority groups in our society.

Notes

[1] Ali, Syed Mumtaz. "Oh! Canada—Whose Land? Whose Dream?" The Canadian Society of Muslims, 1991, online <http://muslim-canada.org/ocanada.pdf>

[2] Ali, Syed Mumtaz. "Islamic Institute of Civil Justice and Muslim Court of Arbitration, Muslim Society of Canada," 2003.

[3] Boyd, Marion. "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion." December 20, 2004, online<http://www.attorneygeneral.jus.on.ca/english/about/pubs/boyd>

[4] Ibid. See Section 4, "Summary of Consultations."

[5] Shachar, Ayelet. "Reshaping the Multicultural Model: Group Accommodation and Individual Rights." (January 1998) 8 Windsor Review of Legal and Social Issues.

[6] Shachar, Ayelet. *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001, p. 73.

[7] Shachar, Ayelet. "Reshaping the Multicultural Model: Group Accommodation and Individual Rights" (January 1998) 8 Windsor Review of Legal and Social Issues, p. 83.

[8] Ibid.

[9] Schachar , Ayelet. "Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation." (1998) 6:3 The Journal of Political Philosophy, p. 285.

[10] Kymlicka, Will. *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995) p. 50.