RELIGION, PLURALISM AND FAITH-BASED ARBITRATION

Consequences for Canadian Muslim Women

ABSTRACT

Ontario is currently the hotbed of a debate on the application of religious laws in family matters, using legally binding arbitration, as a clause in the *Arbitration Act* opened the possibility of using other laws in arbitration settlements. This article sheds a new light on one of the most controversial social debates in the province and on the consequences of Islamic Sharia for Canadian Muslim women.

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In Ontario, starting October 2003, a debate emerged on the application of religious laws in family matters, using legally binding arbitration. This issue arose because of a clause in the *Arbitration Act* which states that other laws may be applied in arbitration settlements. Although the Attorney General's staff stated that this clause was specifically added to resolve a dispute between Ontario and one of the American states,[2] this same clause can also be used for family matters. The issue is that instead of restricting resolution of commercial disputes, the door was opened for any laws from any country or any religion and for any purposes. There was a surprising lack of foresight on the part of the government of the day which is now resulting in significant issues for Ontarians.

This issue has stirred the activism and consciousness of Canadian and international faith-based organizations, feminists groups, community groups, researchers and the media. Due to public outcry, the Premier of Ontario, Dalton McGuinty, appointed Ms. Marion Boyd (former Ontario Attorney General under the provincial NDP government) to review the *Arbitration Act* and the impact arbitration has on people who may be vulnerable, including women, persons with disabilities and the elderly. The Review was to include a review of the use of religious-based arbitration.

Ms. Boyd met with a number of groups including, those who were proponents and opponents of this issue.

One of the proponents for the use of Sharia/Muslim Family law, the Islamic Institute for Civil Justice (IICJ) reviewed the *Arbitration Act* to find that the *Act* legally permits the use of any religious laws and so they proposed the use of Sharia/Muslim family law in Ontario. The Act's permission for private, legally binding arbitration would settle issues that affect the personal status of people such as wills, inheritance, marriage, remarriage, marriage contracts, divorce, maintenance, custody and maintenance of children and guardianship.

The IICJ and other organizations have put forward that Sharia/Muslim Family law gives Muslim women better rights than those provided under the laws of Canada, Ontario and the West. They argue that the Canadian Charter enshrines the right to practice one's religion and that this move is a form of accommodating the needs of religious minorities within a multicultural society. They accept the argument that the use of private arbitration relieves the backlog at courts and engaging in private arbitration is a matter of choice. They also claim that as informal mediation is taking place, with decisions being made by religious leaders and lawyers, it would be better to have these recognized by the *Arbitration Act* and given legitimacy; and that the confidentiality of arbitration is emphasized, especially for women who do not want their problems made public and thus be victim to exploitation or defamation.[3]

Organizations and individuals opposing the use of religious laws in private legally binding arbitration under the *Arbitration Act*, do not accept these arguments. They point to the progress of the last 30 years to separate Judeo-Christian values from the Family Law regime and to base these laws on human rights principles, and now question the return of religiously-based laws for Canadian religious women. The use of private arbitration will privatize family law by creating a parallel system of law that allows the religious, cultural and political elites to decide on the applicable law, with the option of circumventing Canadian family law.[4] The current *Family Law Act* has values stated in the Preamble, while the *Arbitration Act* has no underlying principles about the family.

The Canadian Council of Muslim Women, (CCMW) along with several other women's organizations, state that family issues should be a matter of public law. Any implementation of religious laws in family matters will be harmful for many women and children, especially considering the

prevalent conservative interpretations of Muslim Family Law as applied to women.[5] Religious laws are based on a patriarchal model of the family and not on equal partnership of the family.

Canadian Muslim Women – Combatting Old Stereotypes and Defining New Roles

The 2001 Census reports that the Muslim population has grown 128% over the past decade to approximately 580,000, [2% of the Canadian population] of which 276,075 were women (Hamdani, 2004). Based on 2001 Census, recent research of Dr. Daood Hamdani released by CCMW, shows that Muslim women are among the poorest women in Canada, are underemployed despite high levels of education and tend to work part-time in low-paying jobs. Muslim women have a higher rate of unemployment and a lower rate of labour force participation compared to other women. Compared to other women, twice as many Muslim women remain separated; fewer of them are divorced and marital breakdown among Muslim women aged 18-24 is higher than their peers (Hamdani, 2004).

Preliminary results from the 2003 Ethnic Diversity Survey (EDS) on the role religion plays in the lives of Canadians illustrates the importance of religion for Muslim Canadians. The data shows that 76% of Canadian Muslims ranked religion as being important to them, 32% of Canadian Muslim participated in religious activities at least once a week and 65% of Muslim respondents participated in individual religious worship (including prayer, meditation and other forms of worship taking place at home or in any other location) (Ibrahim and Janhevich, 2004).

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These recent findings emphasize the central role that Islam and the Muslim community play in the daily lives of Canadian Muslim men and women.

For Muslim women, like other women, the struggle related to gender-related issues has been a long one and is on-going. Many of the obstacles women face stem from the gender-related stereotypes assigned to them in Canadian society and within the Muslim community itself.

Furthermore, culturally-based traditions and practices blur the lines between religiously-mandated codes of behaviour and culturally-based gender expectations. Research also shows that Canadian Muslim women do not want to add to the anti-Muslim sentiments or Islamaphobia. These women are committed to tackling a myriad of difficult issues, including the proposed Islamic tribunals, through dialogue, research, partnerships and awareness raising.

Elucidating Muslim Family Law/Sharia

It is important to understand the parameters of Sharia, Muslim Family Law and Muslim jurisprudence. Sharia is a comprehensive religious term to define how Muslims should live, while *fiqh* (jurisprudence) is limited to the laws promulgated by Muslim scholars, based on their understanding of the *Qur'an* and the practices of the Prophet (Ramadan, 2004). It is argued that using the term 'Sharia' immediately causes believing Muslims to hesitate in expressing any opposition, as no Muslim wants to be against the Sharia. However, the correct use of the term Muslim Law opens up the discussion and one can then explore the issues within.

Of additional importance is that Muslim Family Law/Sharia is not a homogeneous civil code, but complex system of jurisprudence based on five schools of thought interpreted by culturally and ethnically diverse individuals. As the research by the network, *Women Living Under Muslim Laws* has concluded, the laws vary and what is considered Muslim in one country is unknown in another. They found there are variations in applications of Muslim Family Law/Sharia and that women's rights were rarely based on equality.

Muslim Family Law is based on a patriarchal model of the family which places the man as head of the family and though the wife has certain rights she is expected to obey her husband because he provides for her (Esack, 2002). Many proponents of Muslim family law accept that men have the right to marry up to four wives; women must be obedient; following divorce a wife does not receive any maintenance except for a period of 3 months to one year and most agree that the children should go to the father, usually at ages 7 for boys and 9 for girls (Mernissi, 1991). If the wife wants a divorce she must go to court, while the husband has the right to repudiate the union without recourse to courts. Inheritance favours males, [because it is argued that they are responsible for the costs of the family] to the extent that the wife gets only a portion at the death of the husband and a daughter will only receive one third inheritance, whereas a son receives two-thirds.

In this patriarchal model, women do have rights. The woman keeps her wealth, if she has any; she is provided with a gift at the time of marriage (*maher* which could be an iron ring or property or gold or money) she inherits in her own right; in theory she does not have to share in the provision of the household needs, and she keeps her own name. In return she accepts the patriarchal model and the prescribed roles for herself and her male relatives, including her husband.

Deconstructing the Boyd Report

Ms Boyd's report entitled *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* is a puzzling title, as her findings and recommendations promote exclusion and isolation of religious women.

It is perplexing that in her Report, Ms Boyd rightly admits that there is virtually no information on the impact of religious arbitration on women, however, she then states in her first recommendation that she found no adverse

impact on women, and therefore recommends private legally binding arbitration using religious laws. Under the Oversight and Evaluation section, the Report also states, "the government lacks information about the extent to which arbitration is used in family law and inheritance and how this mechanism has impacted on vulnerable people" (Boyd, 2004).

The Boyd report's statements that other religious groups use religious based arbitration for family matters is misleading. The *Arbitration Act* is not used for the Jewish divorce or "Get," but we understand that the Beis Din's have used the *Arbitration Act* to settle commercial disputes.[6] Neither the Catholics nor the Anglicans use the *Arbitration Act* and Ismaili Muslims have established their own Community Arbitration Board that follows Canadian laws.

She admits that the *Arbitration Act* was problematic for family matters and so instead of considering any other alternative, proceeds to making forty-six recommendations to ameliorate an inappropriate legislation. The report has little consideration of women's equality or welfare and appears to emphasize the use of religious laws as part of religious freedom, thereby creating the false juxtaposition of religious freedom and equality rights.

Bakht analysis of the Boyd Report

Bakht states that it fails to find a balance between the rights of religious minorities and women. It unquestionably and inappropriately gives preferentiality to religious freedom demonstrating a clear refusal to assume responsibilities for the protection of vulnerable persons within minority groups, women in particular (Bakht, 2005).

Ms. Boyd proposes the application of the "statement of principles of faith-based arbitration."

What does this mean when there is no one codified, agreed upon single Muslim law on which this state of principles could be based? In addition, Ms. Boyd does not provide any details on what would constitute a statement of principles and who would formulate the parameters.

True and free choice is not a reality for many Canadian Muslim women, especially immigrant women that may live in religious or cultural enclaves, lack resources and support systems, are not proficient in English or French, are not aware of their rights in Canada, and may be increasingly vulnerable to coercion (Ahmed, 2005).

Arbitration is said to be voluntary and consent of both parties is required, but the probability that the woman may be pressured to agree to arbitration still exists. It is not that Muslim women are incapable of making appropriate choices and decisions for themselves, but the strong influence of family, religion and community cannot be underestimated.

In her report, Ms. Boyd states: "Religious law serves to determine who is considered a full member of the religious community…Those who do not conform to religious law may find themselves ostracized, disentitled to practice their religion within the community or entirely disowned by the community." (Boyd, 2004)

It is difficult to understand how she thinks that those who do not conform will really feel like they have a choice.

As well, proponents of Sharia Tribunal Councils publicly claim that "Sharia/Muslim Family Law is the law for all Muslims. If women reject decisions based on these laws these women will be seen as bad Muslims who reject Islam" and very few Muslims would challenge such statements for fear of being labeled blasphemous and losing the support of their community. (Armstrong, 2004)[7]

There are no recommendations for mandatory training of arbitrators, neither is the issue of education of arbitrators in Muslim or other religious jurisprudence addressed. Recommendations on oversight and evaluation of arbitrators address record keeping and reporting requirements, but who will provide the human and financial resources to ensure full compliance with these requirements? More public education regarding family law and arbitration is welcomed, particularly the provision of linguistically and culturally appropriate legal information; however, there is no mention about the resources required to achieve these.

The 2001 Census reports that the Muslim population has grown 128% over the past decade to approximately 580,000, [2% of the Canadian population] of which 276,075 were women.

Multiculturalism: Help or Hindrance

Throughout this debate, multiculturalism has been evoked. Does multiculturalism sanction or prevent Islamic tribunals for Muslims? Some claim the creation of the Islamic tribunals is the dark side of multiculturalism which will ghettoize Muslims and will lead to a two-tiered legal system – one for Muslims and one for everyone else (Ahmed, 2005). All those involved are strong believers in Canada's Multiculturalism Policy, which is based on the principle that "all individuals should be free to make their own choices about whether or how to express their ethnic and religious identity, and that all groups should respect basic liberal values of human fights and democracy." (Kymlicka, 2005)

However, Kymlicka raises two serious questions that will require further research. He asks if "native-born Canadians will continue to support Multiculturalism, and extend the same trust to Muslims that has been shown to other non-European groups, or will they follow the European path of retreating from multiculturalism when confronted with politicized Muslim minorities?" He also probes whether "Muslim leaders and organizations will accept the liberal foundations and constraints of Canadian multiculturalism, or will they attempt to use multiculturalism to perpetuate illiberal practices for which they claim a religious sanction?"

The recognition and celebration of differences should not lead to fragmentation of ethnic, religious, or racial communities, nor should it mean that each group is not part of the whole, nor that minority women should be discriminated against and have their equality rights taken away from them. CCMW recognizes that the *Multiculturalism Act* works within a larger legal and legislative framework which includes the *Canadian Charter of Rights and Freedoms*, the *Citizenship Act* and the *Human Rights Act*. Canada is signatory to a number of international treaties, including

the *Convention for the Elimination of Racial Discrimination*, the *Convention on Civil and Political Rights* and the *Convention for the Elimination of Violence Against Women* and the approval of Islamic Tribunals would seriously violate these international treaties.

A study by Pascale Fournier examining the application of Sharia/Muslim Family Law in western liberal states reported that the British proposal to establish a separate system of Muslim Family Law was rejected in order to uphold universally accepted human rights values, especially in relation to women. Ms. Fournier also stated the following: "What is apparent is that Canadian Muslim women risk being ghettoized and their equality rights seriously violated in a country that is known in the world for its commitment to human rights." (Fournier, 2004).

The province of Ontario is not being supported by some of the other provinces. For example, the British Columbia Attorney General made a clear statement against the use of faith-based arbitration in British Columbia. Recently the Québec legislature came out strongly in favour of the family law being applied to all and that religious laws can not be used for arbitration.[8] However, the comments of the former Québec immigration minister about refusing immigrants to Canada, who believe in Sharia, does not facilitate tolerance, feeds into negative sentiments and hurts a community that is feeling besieged.

Summary and Next Steps

CCMW is comprised of believing women who are committed to their faith and are extremely concerned that the use of Muslim Family Law will erode the equality rights of Canadian Muslim women.

CCMW has been fortunate that other organizations such as those for human rights, for Muslims and other women's groups, have understood that this is not a struggle for Muslim women only, but rather that it is of significance for all Canadians. For although the focus has been on the proposed application of Sharia/Muslim Family Law, all agree that the discussion is more fundamental than what is affecting the Muslim communities just now. Protecting the rights of women and minority communities is the responsibility of all Canadians as there are social, political and economic consequences for not ensuring the rights of the most vulnerable.

CCMW will continue to work with its membership, supporters and partners to lobby the Ontario government. To this end, CCMW will continue to dialogue with different representatives of the Muslim community, strengthen international networks so as to learn from groups that are challenged with similar issues, engage at the grassroots and continue public education activities. CCMW will collaborate with other groups to ensure that the province proceeds with a much needed review of the *Family Law Act*.

The intent is to ensure that family matters are removed from the *Ontario Arbitration Act* and that no other provincial government allows family matters to be settled under its *Arbitration Act*, in order to protect women's equality rights.

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Notes

1 Razia Jaffer is the President of the *Canadian Council of Muslim Women* (CCMW) which is a faith-based Muslim women's organization which works to assist Muslim women in gaining an understanding of their rights, responsibilities, and roles in Canadian society. See www.ccmw.com for more details.

2 CCMW was informed of this earlier decision during their July 2004 meeting with Marion Boyd.

3 For details on the IICJ position, visit their website at http://muslim-canada.org/pfl.htm#1.

4 Open Letter sent to the Hon. Michael Bryant (Attorney General of Ontario) regarding the Application of Religious *Family Law Matters using Ontario`s Arbitration Act*, submitted by Jean-Louis Roy (Rights and Democracy: International Centre for Human Rights and Democratic Development). http://www.ddrd.ca/frame2.iphtml?langue=0&menu=m01&urlpage=/english/commdoc/publications/women/sharialetter.html

5 See Open Letter sent by CCMW to Premier Dalton McGuinty and Hon. Michael Bryant dated January 15, 2005 in response to the release of the Boyd Report. http://ccmw.com/ShariainCanada/Letter%20to%20Ontario%20Premier%20Attorney%20General.htm

Organizations that have supported CCMW include, National Association of Women and the Law, the YWCA, Rights and Democracy, Women Living Under Muslim Laws, National Association of Immigrant and Visible Minority Women, the Ontario Council of the Canadian Federation of University Women, Ontario Association of Interval and Transitional Housing, the Muslim Canadian Congress, Metropolitan Action Committee on Violence Against Women and Children (METRAC), Legal Education Action Fund, the International Campaign Against Shari'a Court in Canada, Amnesty and the National Council of Women of Canada.

6 The Beis Din are religious tribunals that resolve civil disputes using Jewish laws. Arbitrators at the Beis Din are typically Orthodox rabbis who are recognized experts in Jewish law.

7 The IICJ Website also states that as Canadian Muslims, you have a clear choice. Do you want to govern yourself by the personal law of your own religion, or do you prefer governance by secular Canadian family law? If you choose the latter, then you cannot claim that you believe in Islam as a religion and a complete code of life actualized by a Prophet who you believe to be a mercy to all. If you choose the former (i.e., to be governed by your religion), then you must accept the necessary consequence that you must follow a course of action that will enable you to achieve that end. You cannot shirk from your religious and moral duty to try for what can be achieved lawfully within the parameters of the Canadian democratic system and constitutional legal rights.

8 Québec recognizes the inappropriateness of arbitration for families: "Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration" (Article 2639 of the Civil Code of Québec, S. Q., 1991).

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