

Arbitration and Family Laws

Muslim Women Campaign to Eliminate the Use of Religious Laws in Legally-Binding Arbitration

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Cet article décrit le combat que le Conseil canadien des femmes musulmanes a mené pendant deux ans contre l'application de la "charia," cette loi musulmane du droit de la famille qui serait applicable pour tous dans la juridiction actuelle, sans égard de la religion, de l'ethnie, de la culture. Elles ont gagné que l'arbitrage religieux de la loi de la famille en Ontario soit abrogé.

For the past two years, the Canadian Council of Muslim Women (CCMW)—a national non-profit organization of believing women committed to the equality, equity, and empowerment of Muslim women—has actively organized against the use of “Sharia” or Muslim family laws in private legally-binding arbitration to settle family disputes. CCMW understood that faith, communities, and families are powerful forces in our lives, and it would be very difficult for some Muslim women to go against these forces if legally-binding arbitration using religious laws is offered as the preferred alternative. The CCMW, together with other community groups, mobilized to advocate that no religiously laws, of any faith, should be applied in the arbitration process, and thus the focus was to change the *Arbitration Act*. CCMW and its coalition partners fought on the grounds that women’s equality

rights would be jeopardized and believing women would be discriminated against on the basis of their religion.

The Issue

The *Arbitration Act* in Ontario and similar legislation in other provincial jurisdictions, with the exception of Quebec, allowed for religious laws to be applied in settling family disputes. Under the *Arbitration Act*, a faith-based, privately-arbitrated decision was legally binding. While the right of appeal existed, it was almost impossible to exercise it without incurring tremendous personal and financial hardship. The Canadian Council of Muslim Women advocated for one set of laws to be applied to all, regardless of faith, ethnicity, race or culture, under the existing family law legislation. CCMW believes that the use of religious laws through private arbitration to settle family matters, under the *Arbitration Act*, violates the hard won equality rights guaranteed under the Canadian Charter of Rights and Freedoms, and creates a two-tiered, fractured justice system.

In December 2003, the issue came to the forefront when some Muslims discovered that “Sharia” or Muslim family laws could be applied legally, under the *Arbitration Act* in family matters. The argument

was made that as the Hasidic Jewish community, in the rabbinical court called the Beis Din, had used the Ontario *Arbitration Act*, and that, therefore, this must be allowed for other religious groups. Although, it was found that the Beis Din had used the Ontario law on only two instances in one year, CCMW agreed that if one group was allowed to use faith-based religious arbitration, then others would also have the same right to do so. However, the position of the CCMW was not to legitimize any other system of law, particularly those that might infringe on women’s equality rights, and thus advocated for *no religious arbitration in family matters*.

The CCMW identified a number of problems with the *Arbitration Act*, especially if used in combination with other laws, such as Muslim family laws.

1. Once the process of arbitration starts, the person cannot withdraw from the process.
2. The arbitrator can be anyone, and does not require any training, legal or otherwise.
3. The arbitration agreement (award) is legally binding and can only be overturned via a court challenge.
4. Past experiences have demonstrated that the courts tend to defer to the arbitrator’s decision and rarely have any cases been overturned.

5. The financial, time, and emotional costs of a court challenge are enormous and few can proceed to this step.

6. The problematic section that stated other laws could be applied was specifically related to a commercial dispute between Ontario and an American State.

7. The NDP, which revised the *Act* in 1991, recently made a public statement that the current *Arbitration Act*, should not be used in family matters. The Conservatives agreed with the then Premier's decision of "no religious arbitration" in family matters.

8. The main objection is that the nature of the private agreement, outside the civil court system, does not lend itself to having the government intrude in such agreements. This is even more so when religious or other laws are used.

9. Another concern is that a parallel system of law is introduced in family matters that deflects from the civil court system which has public scrutiny.

10. Although the welfare of women is considered in some Muslim family laws, these laws do not have the equality of women as a foundational principle. This means that divorce can be a male right only, the custody of children tends to be given to the father, there is very limited financial support after divorce, and there is no concept of shared financial assets.

The public outcry against religious arbitration in family matters eventually led the provincial Liberal government to appoint Marion Boyd to review the *Arbitration Act* in the summer of 2004. However, it was never clear whether Boyd had been instructed to only make recommendations for revisions to the *Act*, or to explore the use of religious laws, or to have a more open discussion about the merits of the *Act* itself for family matters. Her report was made public in December of 2004.

Boyd came to the conclusion that as she was not able to find any

cases of complaints with regard to faith-based arbitration, then the arbitration process must not be in fact problematic and thus the practice can continue. Her report added to the confusion and did not settle the issues. Some people read into her recommendations (incorrectly) what was simply not there. Although Ms Boyd's report is full of concerns about the use of pri-

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vately-arbitrated agreements, and she noted that there were no records of the proceedings or the award (and therefore she could not assess the impact on vulnerable people), she still concluded that there was nothing negative about the arbitration process or decisions made as a result. While Boyd made 46 recommendations—not requirements—none of these protect or safeguard any rights. For example, she only recommended, but did not require, training for arbitrators; she accepted that legal aid cannot be provided for arbitration; she allowed for a woman to give up her right to legal advice; and she did not require oversight by the courts, the government, nor any professional bodies, only recommended it.

On August 2, 2005, the Ontario Institute of Dispute Resolution, the Ontario Association for Family Mediation and Family Mediation

Canada, wrote to the Premier that Boyd's recommendations would not protect vulnerable people.

Advocacy for Change

Early in 2004, CCMW gained the active support of the National Association of Women and the Law (NAWL), and the National Organization of Immigrant and Visible Minority Women of Canada (NOIVMWC). By March 2005, CCMW with the help of many others groups, built a coalition to campaign for the elimination of faith-based arbitration. Though there were many differences amongst us, all the groups pulled together for the same principles, which were that women's equality rights must be paramount. Nearly 100 women's groups, labour organizations, other faith groups and women's equality-seeking organizations came together under the banner of the No Religious Arbitration Coalition. The focus of the struggle was that some women—believing women—would be discriminated against; that the same values and principles of equality, social justice, and compassion would not be applied to some, and that religion would be used as a “coercive” force instead of an enhancement to the lives of women. The common goal of the coalition was, therefore, to focus not on Islam, or Muslims, but on the equality of women.

The coalition was very powerful in mobilizing the various communities and in influencing the politicians. The CCMW developed an Information Kit that was distributed widely to all media and MPPs, as well as internationally. One of the member organizations, the Canadian Federation of University Women, visited each MPPs constituency office to discuss the issue. Prominent Canadians agreed to a joint letter calling for no religious arbitration to settle family disputes, which was published in *The Globe and Mail* on September 10, 2006. This letter, we

understand, had an impact on Premier Dalton McGuinty.

There were many politicians, especially the Liberal Women's Caucus at both the federal and provincial level who became allies. We also received huge support from international partners such as Women Living Under Muslims Laws and are most grateful to Rights and Democracy, a Canadian international organization, for bringing lawyers, scholars and activists to Canada. The active advocacy and communication strategies of these organizations helped bring international attention to the issue.

Unfortunately, the struggle lasted over two years. The delay in the Premier's response caused the discussion in the public and the media became heated and somewhat anti-Muslim. Even though CCMW and its partners were clear that the struggle was not against Muslims, the media and some of the public continued to focus on Muslims and what they insisted on calling "sharia" laws. It was difficult to steer the discussion to the heart of democratic principles and away from prejudice and anti-religious sentiment.

Within the Muslim communities, the discussion created confusion, dissension, and unease as the focus in the media and in the public too often remained on Muslims. For example, much was said about "choice" for Muslim women. We know from experience that as Muslim women, most of us are influenced by our faith, our family and by our communities, and we have a strong desire to be identified by all three. It is difficult to go against such powerful forces. For example, there were verbal attacks on those who were open about their position on one law for all, which demonstrated to us the unlikelihood of "choice" in these matters. What is free choice, when even in discussions, some "religious leaders" have made condemnatory statements that people who oppose the use of religious laws are not Muslims, that they should be

declared *kaffir* (unbelievers), made into outcasts, and that funeral services will not be provided? Imagine then the pressure women would face if religious arbitration became legally binding. No one wants to be isolated from their community.

Many people called the issue of family matters "limited and private." Surely, the family is of greatest importance, and it is neither private

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nor limited. There was a also deliberate use of blurred terminology and some people confused others by using terms such as "Islamic principles" rather than laws. Religious laws, such as Muslim *fiqh* / jurisprudence, are specific, developed over the centuries by humans, and do not have the equality of women as a fundamental value. Nevertheless, there is much that is good in these laws and CCMW is encouraged by the evolution that taking place in some Muslim countries regarding Muslim family law, but this is still a legal area needing more development and the concern CCMW had was how *Fiqh* would be practiced in Canada.

CCMW stated that as Islamic Principles of Equality, Social Justice, Compassion are shared in the values articulated in the Canadian Charter of Rights and Freedoms, then we should have no issues with

Canadian laws. As Canadian Muslims, we have acknowledged that the laws of the land are compatible with the principles of Islam, and we can live here fully as Muslims, with our religious and other freedoms protected.

The Result of Our Actions

On Sunday, September 11, 2005, the Premier of Ontario publicly announced that there would be no religious laws used in arbitration and that "one law will apply to all citizens and that is Ontario and Canadian law."

Since then, the government of Ontario introduced Bill 27, and after a second reading, there were public hearings on January 16 and 17, 2006. The bill passed a third reading on February 14, 2006. Royal assent was granted. There were consultations on the Regulations and as of November 2006, the Attorney General is to finalize the regulation shortly.

The introduction of the *Family Statute Law Amendment Act, 2005*, amends a number of other legislations and the changes include:

- Family arbitration agreements must be in writing.
- Each party must receive independent legal advice before entering an agreement.
- The right to appeal cannot be waived.
- No one can be committed in advance to arbitration.
- The agreement has to consider the best interests of the children.
- There is to be regulation for family law arbitrators and they must undergo training.
- Arbitrators must keep records and submit reports to the Attorney General.
- Funds are to be provided for public education and outreach.

In September 2006, the Attorney General's office has drafted a regula-

tion that delineates the requirements stated above. It has not yet been formalized nor publicly stated.

Arbitration Versus Mediation

There continues to be confusion regarding the differences between private, legally-binding arbitration and mediation. These two are very different, as one is recognized and enforced by the courts, while the other is informal, community-based counseling and is similar to “good advice,” which individuals may accept or reject.

No one is interfering with the choice of individuals to go to elders and religious institutions for advice and counseling. This can continue to happen, but it should not have the sanction of the state to make it legally binding. If a person wants to use this alternative, as religiously binding on her, that is still her choice.

It is false that other religious groups have used the *Arbitration Act* for settling family matters. No Christians use it. The Muslim Ismailis use Canadian law, and the Jewish Beis Din, do not use it for their religious divorces called “get.” Only a small segment of the Jewish community, the Hasidic and some Orthodox, use the Beis Din, and last year, there were only two cases in Ontario that used the *Arbitration Act*.

Because of this, the Premier’s decision is not discriminatory; it is fair and just, for no religious arbitration is allowed for any religious community. As Canadians, we are governed under one law in such an important area as that family. If the decision had been otherwise, it would be the start of a private, parallel system of law.

Conclusion

In conclusion, there was no choice for us as Muslims and as women; we could not remain silent. Many women’s and human rights organi-

zations became partners as the issue was seen as a significant threat to *all* women’s equality rights. The public discourse was framed very quickly by pitting religious freedom and multiculturalism versus women’s equality. It was an arduous process to maintain that women’s equality rights should be embedded in both religious freedom and multiculturalism and that neither should undermine this fundamental right of equality.

At its national conference on November 18, 2006, the Canadian Council of Muslim Women (CCMW), launched the first publication of its kind in Canada, *Muslim and Canadian Family Law: A Comparative Primer*, at its national conference this Saturday, November 18, in Ottawa. The Primer is designed to provide information comparing Muslim and Canadian family laws to a range of audiences, including Muslim women, lawyers,

social service providers, students, and the judiciary. The commitment to produce the publication came from the Council’s involvement in the campaign to eliminate religious arbitration in family law under Ontario’s *Arbitration Act*. CCMW has also produced easy to use booklets based on the information in the Primer for wide distribution across Canada. Booklets are available on the topics of marriage, divorce, domestic contracts, custody and child support, spousal support and division of property, and inheritance. For more information about the Primer, booklets and the conference, visit the CCMW website at www.ccmw.com.

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