

SHARI'A IN ONTARIO - Why Premier McGuinty is Right

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Welcome Decision

Human rights activists worldwide who, like me, were supporting, and participating in, *The International Campaign Against Shari'a Court in Canada* welcomed the 11 September [2005] decision by Ontario's Premier Dalton McGuinty to end all religious arbitration in his province. "There must be one law for all citizens, and religious arbitrations threaten our common ground", said the Premier in a surprise reversal of policy, setting to rest over two years of acrimonious debate in the province.

The controversy arose in 2003, when the Toronto-based Canadian Society of Muslims proposed creating an Islamic Institute of Civil Justice. As per the proposal, Muslim arbitrators would be appointed to deal with disputes in Muslim families, and would handle matters involving family and personal laws governing marriage, divorce, custody of children and inheritance. The decisions made by the arbitrators would be guided by the Shari'a and would be legally-binding.

The 1991 Arbitration Act

The proposal by the Canadian Society of Muslims was based on Ontario's Arbitration Act of 1991 which allows faith-based arbitration for all religious groups in the province. At the time of its introduction the Act was widely seen by its proponents as reinforcing Canada's Charter of Freedoms viz. Section 2 a) which provides for "freedom of conscience and religion," and Section 27 which assures "preservation and enhancement of the multicultural heritage of Canadians." Aboriginals, ethnic and private citizens have traditionally used their own arbitration tribunals, and this Act sought to formalize the situation.

The Arbitration Act allows for mediation, where parties involved agree to a settlement. It also allows for arbitration, in which both parties agree upon a process and then an arbitrator decides on a settlement, based on a set of legal ground rules. These arbitration rulings are strictly voluntary, and subject to Canadian law. Further, if either party disagrees with the ruling, they can abandon the process and take their appeal to court within 30 days. Business disputes as well as family matters can be resolved under its provisions using religious principles.

Both the Jewish and the Catholic communities have made use of the Act's provisions since 1991. Catholics have been able to get their personal issues decided upon as per Canon Law and Orthodox Jews used the system to obtain a 'get,' i.e. a divorce under Orthodox laws that only a Jewish court can issue. Records show that only a small proportion of family law cases have ever reached the rabbinical courts – so researchers suggest that most couples must be resorting to either civil courts, or private arbitration that is not faith-based.

Arrangements that were now being considered by the government for the Muslim community would enable Muslims to benefit from faith-based arbitration – it was

simply extending to the Muslims what had already been available to Jews and Catholics in the province for over ten years. They would be able to obtain divorces, and obtain decisions in inheritance and custody matters that would also be recognized by Muslim countries, as well as by-passing the acrimony and expense that accompany litigation.

Hue and Cry

Why, then, was there such a hue and cry about extending faith-based arbitration rights to the Muslim population of Ontario?

Part of the answer can be found in the original proposal by the Canadian Society of Muslims. Syed Mumtaz Ali, the author of the proposal for Shari'a Arbitration Courts, argued that it was a religious *duty* for Muslims to settle disputes in Muslim courts. This meant that Arbitration was not voluntary; it was an obligation. Secondly, Mr. Ali said that his long-term aim was that both secular and Islamic laws should run in parallel in Ontario. This meant that he aimed to set up a parallel system of justice, rather than an alternative dispute resolution mechanism.

In addition, the Canadian Bar Association registered its objections in principle to the arbitration system drawing attention to its systemic shortfalls: the secrecy of procedure, the absence of compulsory written records of the proceedings, and the near-absolute power of discretion to the arbitrator. Former Attorney General Boyd's report recommending that faith-based arbitration be extended to the Islamic community, failed to assuage serious concerns by his opponents about the potentially adverse impact on Muslim women in Ontario. After all, over 60% of Canada's 650,000 Muslims live in Ontario, and many of them are immigrants. Would an immigrant woman living within a patriarchal family structure reinforced by religion in practice be able to withdraw consent to the arbitration process, which is supposed only to be open to parties between whom there is no power imbalance? Indeed, given language barriers and poor access to information, would the woman even know she could withdraw?

Shari'a

There was also alarm that Shari'a would be the basis of arbitration. Shari'a law is based on four canonical books written in the 10th and 11th centuries and several conflicting interpretations of Shari'a law exist today, each claiming to be 'the right path'. Whichever the interpretation, Shari'a law conflicts with modern values, and in many areas falls far short of the universal standards of Human Rights.

Shari'a law in Muslim countries affects the judicial system, the rules of evidence, the role of women in society, and all other Human Rights. Under Islamic jurisprudence, a woman's worth is half that of a man; women are required to be under a man's supervision (usually that of a father, a brother or a husband) and in inheritance women routinely receive only a half of a man's inheritance. More often than not, in a divorce, men are more likely to be granted custody of children, particularly of boys. Across the Muslim nations, Shari'a negatively impacts religious freedom and freedom of conscience, disadvantages the status of women, and denies equality before the law. How could this system – or parts of it tailored to address civil matters - created by a 10th century mindset be considered appropriate for the 21st century?

Deeply Flawed

Since it would be subject to Canadian Law, and because Islam in Canada is of a liberal kind, it has been argued that a Canadian version of the Shari'a would be a benign one and not what obtains in Pakistan or Nigeria or Saudi Arabia. Even if this were the case in Ontario, the larger question is whether it would be right to allow religious arbitration in a country? Was it right, in the first place, to give an official sanction to faith-based arbitration for Jews or Christians?

It is true that in the western world, several countries are struggling to balance the demands of multi-culturalism with a state's obligation to ensure human rights for all. Human beings are worthy of the highest respect, and it is the dignity and moral worth of all human beings that is the source of law, not a particular religion. In this context it is appropriate to note that the new Constitution for Iraq unfortunately proposes religion as the source of law, throwing open the job of interpretation to clerics, rather than to judges trained in modern law and well versed with modern conceptions of human rights. Allowing private courts where religious laws can be applied is a deeply flawed policy, whichever the religion and irrespective of whether it is in civil or in criminal matters.

Ontario's intentions were honorable – the province wanted to treat all the communities of Ontario equally and therefore extend the rights available to other communities also to Muslims. But to legitimise religious tribunals or Islamic Institutes of Civil Justice is to set up and support the principle of unequal rights, in the name of 'multiculturalism' and the 'right to be different'. This is a deeply flawed policy.

While Ontario was busy debating the issue, in May this year, Quebec's parliament unanimously rejected the use of Islamic tribunals in family matters. Now, with Premier McGuinty's decision the immediate danger of Shari'a making an appearance in the judicial system of Canada seems to have receded.

The Way Ahead

The desirable approach in such a situation – and one that those of us who supported the International Campaign Against Shari'a Court in Canada have repeatedly urged - would be to focus on citizens rather than on communities; on individuals rather than on groups. All men and women, irrespective of the religious or non-religious community they belong to, should be subject to the same laws and offered the same privileges and opportunities.

There are some other problems relating to equality of treatment in Ontario. For example, the provincial government finances Catholic parochial schools to help the French-speaking minority, but Protestant and Jewish schools do not get any state support. This unequal treatment of sections of society is undesirable. Parochial schools are not the best way of ensuring a well assimilated society. But if they have to continue, then these schools must do so without state support. After all, a philosophy or a worldview which needs the strength of the state to survive, and which cannot flourish on the strength of its own persuasive power, loses all its moral authority.

Having come out successfully in favour of the rule of law and of universal human rights, Canada today has the possibility to lead the Western nations out of the confused multi-culturalism which was at the heart of the present problem.

Shari'a Courts and Fatwas in India

Unlikely Litigant!

The Indian Express of 19 August 2005 reported the case of a Hindu approaching an unofficial Shari'a Court in Ahmedabad, Gujarat. Puranbhai Shah, a Hindu businessman found it difficult to recover money from Zariful Hasan, a customer to whom Puranbhai had supplied marble.

At the suggestion of a friend, Shah then approached the Shari'a court on 4 August 2005. On August 8, as settled at the Shari'a court, he got a cheque for Rs 30,000 from Zariful Hasan. This swift 'justice' is rarely possible through the traditional courts in the Indian sub-continent and was welcomed by the petitioner. An indication that a failing system encourages alternative means that may ultimately weaken the system further. The 'court' was set up nearly a year ago by the unofficial All India Personal Law Board and is headed by Mufti Abdul Qayyum Jaipuri. Of the 128 cases referred to it so far, it has settled only 46, suggesting that the claims that Shari'a provides quick justice may be exaggerated.

A Fatwa on Fatwas

On 16 August, 3 clerics from the Darul Uloom Deoband seminary in North India ruled that women should not contest elections, and that if they had to do it, they should do it under veil. This led to widespread protests from Human Rights activists and liberal circles in the country, including some Muslim clerics themselves. The seminary has now decided to impose a ban on issuing religious edicts or fatwas on political matters. "All muftis have been directed not to issue any fatwas and not to interact with the media," Vice-Chancellor of the Islamic seminary Maulana Marghoobur Rehman said.

'No Legal Sanctity'

In the light of these developments, India's Union Law Minister H.R. Bhardwaj clarified in a written reply in the Rajya Sabha - India's Upper House of Parliament - that fatwas issued by Islamic institutions are not valid in the eye of the law. He clarified that the procedure to be followed by courts in criminal cases are set out in the Code of Criminal Procedure, 1973 and that fatwas issued by Islamic institutions do not have legal sanctity.

In Bangladesh

In January 2001 the Bangladesh High Court gave a landmark ruling that fatwas were illegal. The court also opined that fatwas – religious edicts – should be made punishable by an act of parliament. Though fatwas are now illegal in the country, in the absence of political will to enforce the law, fundamentalists get away with their illegal activities.

In 2002, Governor Ahmed Sani of Nigeria's Zamfara state asserted that Shari'a supersedes the Nigerian constitution and said Islam requires Muslims to kill any apostate, including a Muslim seeking a trial in a civil, rather than in a Shari'a court.

Conclusion

It is undeniable that many Islamic texts and many fundamentalist Mullahs are unwavering in condemning women to a subordinate position in society. But, equally, it would be wrong to stereotype the over one billion Muslims in the world. For example, a recent poll in Indonesia shows 67 percent support for Shari'a (and to support it is a religious obligation for Muslims), but only 7 percent objecting to a

woman head of state. Similarly, another poll in Iraq indicated that while 80% of those surveyed supported Sharia, 80% also supported equality of men and women.

In many Islamic countries it has been argued by its proponents that introduction of Shari'a would restore honesty and purity in public life. But Saudi Arabia, Afghanistan, Iran and Pakistan where Shari'a is implemented strictly are also some of the most corrupt and undemocratic regimes of the world.