

Religious Arbitration

Discourses in Ontario and the Application of the Indian Model

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Demand for tolerance and acceptance of religiously-based laws in Canada's secular society is a heated topic, especially in the province of Ontario, where the recent ban of the Arbitration Act is currently a matter of much contention between numerous religious factions, the public, and the Ontario government. Similar concerns have been dealt with in India, where personal status statutes protect the rights of many religious minorities; the institution of these laws should be seen as a premier model of pluralism and multiculturalism, one that Canada would do well to emulate. Presently, Ontario's ban of the Arbitration Act is a violation of religious freedom within the context of Canada's family law, an injustice that affects Jewish, Christian, and especially Muslim-Canadians. India, like Canada, is a liberal democracy that includes a constitution protecting the sacred traditions of religion; in particular, the Indian Constitu-

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tion's Article 25 "guarantees freedom of conscience and the right to profess, practice, and propagate religion."¹ However, the article is subject to the state's regulation in terms of social welfare and reform and ensures that religious rights would be restricted if an individual's human rights were violated. Thus, the courts of India have adopted a rule of restriction that "classifies religious practices into essential and non-essential practices."² Such regulations are necessary in order to keep pace with society's constant evolution of beliefs and customs. For instance, in the Islamic faith polygamy has become subject to restrictions and even prohibition under Indian law (a reform made based on the interests of social welfare). In addition, Indian courts have been able to refute the Muslim tradition of polygamy by utilizing the Qur'an. According to the Qur'an, polygamy is allowed with the condition that "a husband should be able to deal justly with his wives"³; however, this "right to polygamy" was struck down by the courts by quoting a passage in the Qur'an that says "[y]ou are never able to be fair and just between women even if it is your ardent desire."⁴ The interpretation of such quotations within a modern context illustrates proper research and analysis conducted by legislators in deciding the essentials and non-essentials of Islamic law, and that such reforms are fair because they are indeed based upon the Qur'an itself, and thus do not erode or threaten the culture of Islam.

A key factor to India's success in managing religious law is the state's ability to unify secular law with Islamic law in a manner that allows both Hindus and Muslims to preserve their customs, and permits the state to appropriately intervene in personal matters. As stated by Mohammad Ghouse, "Muslim law is made enforceable by the constitution, along with other pre-constitution laws."⁵ Ghouse's comments illustrate that even though the rights of religious groups are protected under the constitution, it is the state that has the final say. Although it might be argued that the Indian state favours its Hindu majority and tends to be biased in its dealings with Islamic law, this has been arguably proven false, as the state had also discouraged polygamy in the Hindu tradition.

In the case of Hinduism, it is common for followers to practice polygamy. Indian government has thus squashed accusations of discrimination towards the Muslim minority when they disallowed Hindus from performing polygamy, as "[t]he public policy of India favours monogamy because 'bigamous marriages tend to destroy the purity of matrimonial relation, [and] disturb the peace of families....'"⁶ This shift towards monogamy is representative of India's amending constitution, which caters to the changing definitions of personal rights, freedoms and

equality. As noted by legal scholar Flavia Agnes, “[R]eforms are meant to mould the classical Islamic law according to the changing social needs.”⁷ Obviously, this means that legal changes that occur in Indian society as those in Canadian society may be accompanied by developing statutes that govern them.

These reforms of personal status matters in Islamic law have been implemented not only in India, but also in other parts of the world. For example, provisions of the Turkish family codes have been incorporated into nations such as Lebanon and Israel. The unification of traditional Muslim law and divergent legal principles in so many different nations is an illustration of modernity in terms of the relationship between religion and politics. These novel forms of mixing two legal traditions should be models for all democratic states choosing the idea of multiculturalism.

In the Canadian constitution, an individual’s religious rights fall under section 2, which treats freedom of religion. Section 15 grants equality before and under the law and provides for having equal protection and equal benefit of the law without discrimination, and section 27 provides the right to a multicultural heritage.⁸ These guaranteed rights were infringed upon when Ontario Premier Dalton McGuinty announced in September 2005 that the Arbitration Act, which allowed “religious-based settlements in matters such as child custody disputes [and] inheritances,”⁹ would be abolished. Although the media’s primary focus has been on Shariah law and its applications to Canadian legal principles, many religious groups such as Jews and Christians are also significantly affected. Since 1991, the Ontario Arbitration Act has permitted practices of religious law. For more than a decade, the Jewish community has utilized the Arbitration Act by implementing *beit dins* (rabbinical court) to settle personal legal disputes. Hypothetically, if a Jewish couple were to file for a divorce, the wife would have to obtain a *get*, which in the Jewish faith is the only way to break the union of two married people. McGuinty’s intent to terminate the Arbitration Act has provoked fear within the Jewish community. According to Ron Csillag, “[A] complete end to *beit dins* would mean Jewish women would no longer be able to obtain a *get*, the Jewish divorce decree.”¹⁰ This is significant because the Jewish community only recognizes a women’s file for divorce in the form of a *get*. Jewish women who file for divorce through a secular court would not be legally separated in the eyes of the Jewish society. Thus, by removing this law, the Jewish community fears it will in fact promote discontent and increased instances of distress.

The move towards removing religious arbitration has come about as a result of tremendous pressure from the public and accusations of such arbitration being discriminatory against women. The motion to remove religious arbitration is meant to ensure that all Ontarians fall under one universal secular law, thus ensuring equality for all. However, the removal of religious arbitration rights from the Jewish community would actually contravene section 2 of the Canadian constitution, which provides "freedom of conscience and religion."¹¹ As viewed by Csillag, "McGuinty's steps are completely unconstitutional, against the Charter of Rights and will be struck down by the Supreme Court of Canada at the first opportunity."¹² What makes the abolishment of the Arbitration Act even more contradictory is that in regards to family disputes, the *beit din* follows Ontario's legal outlines; its custody decisions "and financial issues are consistent with the principles of Ontario's *Family Law Act*."¹³ Thus, since the *beit din* is arguably compatible with secular Canadian law, it is unfortunate that the laws and traditions of Judaism have to suffer because of the Ontario government's unwillingness to integrate Islamic (Shariah) law with the Arbitration Act. As Csillag notes, in this matter "all faith groups have been tarred with the same brush."¹⁴

However, in a sense, the banning of the use of all religious-based laws would simplify the problem of religion, with the dilemmas facing Ontario being analogous to the situation of India: both India and Canada are societies with individuals from many cultural backgrounds, who each have certain needs and demands that have to be facilitated. To a certain extent, India has satisfied these demands to the point where stability and order can be maintained. One of India's fears had been, previously, that religious strife would have arisen and possibly resulted in civil war and anarchy if the issue of Islamic and Hindu law had not been rectified. As pointed out by Larson, "[E]nity between Hindus and Muslims - arguably could have posed a threat to national security."¹⁵ In order to prevent this potential conflict, the concept of secularism became part of the Indian Constitution. Larson points out that "[i]n 1976, the word 'secular' was added to the preamble of the Indian Constitution to emphasize that no particular religion in the state will have any preferential treatment or will be discriminated against simply on the ground that he or she professes a particular form of religion."¹⁶ The truth of the matter is that "India is a land of religions."¹⁷ Personal law privileges and a secular constitution provide citizens of India with religious protection and a comfortable distance from religion for the Indian government. Because India has a larger population of religious minorities than Canada

yet is still able to resolve the dilemma, it is possible for Canada to do the same. The banning of religious arbitration has produced feelings of bitterness and tension from various religious communities being directed toward the Ontario government.

It is unfortunate that the Arbitration Act of Ontario was terminated, because it is an injustice to the Jewish society and its implementation of *beit din*. John Syrtash of the Canadian Jewish News said, "Jewish courts of law, or [*beit*] *din*, have been successfully operating in family law for hundreds of years and 'serve as a model of success,' especially in Ontario."¹⁸ It was understandable that since McGuinty was under such enormous pressure to respond to the Shariah law inequality issue, that any other option would not have been palatable. If the model of the Jewish court system was utilized and if extensive research of Shariah law had been conducted (like that done in India), a better verdict could possibly have been reached by McGuinty and his government.

This action against the Arbitration Act affects not only the Jewish community, but also other groups such as Christians. The Christian community, specifically the Christian Legal Fellowship, has expressed its disapproval of the call for the dissolution of the Arbitration Act. Their claim is that religious arbitration is essential to Canada's secular society because:

[m]any of these communities may feel that their core values, including the sanctity of the nuclear family are threatened by having their disputes resolved outside of their community by persons having no familiarity with their belief system. In order to protect against further erosion of these values, many wish to resolve disputes in accordance with the teachings of their holy books and laws with the assistance of a mediator or arbitrator from within their faith community. Not only may this be the preference of the parties, it is often a requirement of their faith teachings.¹⁹

The need for an alternative is essential in a society such as Canada's. If values of multiculturalism and pluralism are to be maintained, the fundamental Charter Rights for religious Canadians should be honoured. Canadians should have secular rights provided in addition to religious rights, so that they have a choice of whether or not to use the option of secular freedoms.

The relevance of a person's obligations to his or her faith is an issue for Muslims, their Shariah law and its use in Ontario. Recently, a primary concern that has arisen during the debate of Shariah law in Ontario is the potential oppression of women's rights connected with the Islamic tradition. One of the prevailing issues at stake was polygamy. The finding of the Indian courts in regard to polygamy and Islamic law indicates that polygamy can be restricted and even prohibited without violating the Qur'an. These discoveries of Shariah law are most useful for the Ontario government if they are willing to revisit the issue of religious arbitration.

There is a common concern that although the continuation of Shariah law in Ontario would maintain certain religious freedoms for Ontarians, the pressure for Islamic women to fulfill the religious obligations upheld by Shariah law (in which women are heavily disadvantaged in terms of family inheritance and equality rights), would continue to occur. However, this problem could be prevented with proper intervention and collaboration between Shariah and Canadian law. This is an achievable goal because of Shariah's countless interpretations. For instance, "in Tunisia, Shariah law has been interpreted as limiting marriage to monogamy,"²⁰ thus allowing for a religiously-sanctioned ban of polygamy. Such interpretations were also upheld within Indian courts. Further, Amy MacLachlan provides evidence of Shariah law's flexibility by stating that "Shariah law varies depending on where it is exercised."²¹ The flexibility of Shariah law should be utilized by the Ontario government, as it is an opportunity to make appropriate adjustments within it. Formulating statutes that are consistent and workable in both secular and religious contexts means that such measures could be effective in salvaging the secular rights of Muslim women along with their religious liberty.

Shariah customs have a reputation among Western societies for frequent human rights violations and serious cases of violence against women; there is a hesitation among legislators in mixing its traditions with Canadian legal principles. For example, "some Shariah interpretations find raped women guilty of 'tempting' men, and have resulted in the stoning of women for 'offences' such as flirting."²² Even though such cases may be true within certain interpretations of Shariah law, these types of incidents are not specific to Islamic culture. Just because some communities have used Shariah law in discriminatory ways, does not mean the Shariah code cannot be interpreted according to a fair and just, non-discriminatory manner, as proven by India and Tunisia. The Islamic

faith should not be judged because of the controversial ways of some of its followers.

Muslims are not the only ones who support the allowance of Shariah law. Former Ontario Attorney General Marion Boyd also agrees with this policy. After much analysis and review, Boyd stated that she was in favour of religious arbitration, but with the application of safeguards. She said, "[A]lternative dispute resolution may provide a venue for continued abuse after the breakdown of a relationship, and therefore, safeguards must be in place."²³ Boyd's recommendations illustrate another form of government intervention that is vital in order to maintain a balance between secularist legal principles and non-secular religious practices.

Boyd's extensive report included the views and suggestions of several Muslim organizations. One of these groups was the Canadian Society of Muslims (CSM), which advocates for changes to Ontario law. Boyd's report included details from the CSM's 1994 meeting with the Ontario Civil Justice Review Task Force, which concerned the amendments to Ontario statutes. The highlights of the meeting included a stipulation that in "cases of uncontested joint petition for divorce, Marriage Officers appointed under the Ontario Marriage Act [should] be empowered to solemnize and register Muslim divorces following procedures similar to the procedures of the Marriage Act."²⁴ The Government, "[a]s a further alternative, fully incorporate Muslim personal/family law into the regular Ontario civil justice/family law system, thereby taking control of the whole administration and enforcement of Muslim family law provisions."²⁵ These suggestions indicate that the Muslim community is willing to co-operate with the Ontario government, making appropriate compromises in the hopes of satisfying all parties.

However, although many Muslims support the idea of mixing legal principles, there are others who believe the contrary. FatherCraft Canada, an organization that lobbies for equal parenting, disagrees with the notion of collaboration between Canadian and Muslim law; instead, it believes that faith-based arbitration is actually superior to the Canadian court system because "[m]ediators can appeal to common values, beliefs and principles, while judges generally cannot."²⁶ FatherCraft Canada explains that its preference of mediators over judges is because the "beliefs of the arbitrator are clear and motives generally altruistic, while judges may be motivated by political, careerist, or stereotyping motives."²⁷ In addition to these points, FatherCraft Canada argued that:

[r]ules of fairness, openness and explaining decisions underlie arbitration, whereas in family court, mothers and fathers complain of money, process, false accusations and opaque procedures being used to manipulate the court into incomprehensible or incomplete decisions.²⁸

FatherCraft's points emphasize the perception of Canadian judges being inexperienced and incompetent with respect to religious-based legal traditions. If the Ontario government has any intention of intervening with the personal status matters of Muslims, Jews, Christians, or any other religious group, it must ensure that judges are properly educated and trained to handle these kinds of cases. Such misunderstandings are not uncommon in Canada, as the provincial and federal governments of Canada have had similar conflicts and issues with the First Nations community in terms of indigenous law.

The conflict over whether one legal code is more appropriate to another is just one of the issues in debate. Ali Syed Mumtaz believes that the issue of Shariah law and arbitration is irrelevant due to its lack of productivity and distractive nature. What Syed Mumtaz does believe in is the Canadianization of the Shariah because it "provides the satisfaction and real peace of mind and tranquility [*sakeena*] that one is obeying both the Shariah and the Canadian law and avoiding any conflict between the two."²⁹ Syed Mumtaz justifies this argument by saying that "Shariah lays down the injunction that Muslims living in non-Muslim countries *must* obey both the Shariah and the law of the non-Muslim country of origin simultaneously."³⁰ These rules of Shariah are informative, as they convey the compatibility of mixed legal traditions between Ontario and Islam. Dr. Syed Mumtaz is a prime example of how those of the Muslim community of Ontario are sincere in their willingness to work together with the Ontario government to find a solution where all parties can emerge as winners.

Accommodating the demands in such a diverse society as Canada is incredibly challenging and complex, but in order to uphold Canadian values, such as pluralism and multiculturalism, accommodations must be considered. In the view of Winterdyk and Okita, "[I]n a culture [like Canada] that has championed human rights, it becomes pragmatically incongruous to incorporate a religion-based legal tradition."³¹ This incorporation is imperative because "as Canada becomes increasingly diversified in its ethnic and cultural makeup, we need to find a way to

ensure and maintain social order that can command the respect of all citizens.”³² One possible solution could be to include the utilization of international statutes set by international organizations such as those set out by the United Nations – as the world becomes more and more globalized, these international laws become more influential and relevant to the world’s societies. If the Ontario government fails to find a remedy, it is probable that many religious groups and individuals will begin to plead their cases in front of the Supreme Court of Canada and, if needed, take their grievances all the way to the international courts.

Whether Ontario decides to emulate India and its system of personal status law, or to conduct extensive research on Shariah and cooperate with the Muslim community and its organizations, the formulating or amendment of private/family matter law should be on the agenda of the provincial government. The termination of the Arbitration Act has resulted in the undermining of Jewish and Christian rights, and thus should be deemed unjust. It may be argued that, compared to other faith-based traditions such as Judaism and Christianity, the complexity and numerous interpretations of Shariah law make the mixing of two legal principles extraordinarily difficult. This cannot be a legitimate reason for not applying or recognizing it. Shariah is a part of Canada’s greater cultural mosaic; Ontario, and the nation as a whole, have the civic responsibility to uphold Canadian values and, in particular, the Charter of Rights and Freedoms.

Notes

¹ Mohammad Ghose, *Secularism, Society and Law in India*. (New Delhi: Vikas, 1973), 120.

² *Ibid.*, 126.

³ *Ibid.*, 228.

⁴ *Ibid.*

⁵ *Ibid.*, 230.

⁶ *Ibid.*

⁷ Flavia Agnes, “Law and Gender Inequality,” in *Women and Law in India* (New Delhi: Oxford, 2004), 38.

⁸ Peter Hogg, *Constitutional Law of Canada*. (Toronto: Thomson Canada, 1996), 1025-1037.

⁹ Colin Freeze and Karen Howlett, “McGuinty Rules Out Use of Sharia Law,” *Globe and Mail*, September 15, 2005.

¹⁰ Ron Csillag, "Impact of Sharia Ruling Unclear," *Canadian Jewish News*, September 22, 2005, 57.

¹¹ Peter H. Russell, *Federalism and the Charter: Leading Constitutional Decisions* (Ottawa: Carleton University, 1989), 779.

¹² Csillag, "Impact of Sharia Ruling Unclear," 57.

¹³ Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*. (Toronto: Ministry of the Attorney General, 2004), 56.

¹⁴ Csillag, "Impact of Sharia Ruling Unclear," 57.

¹⁵ Gerald James Larson, *Religion and Personal Law in Secular India: A Call to Judgment* (Bloomington, IN: Indiana University, 2001), 19.

¹⁶ *Ibid.*, 24.

¹⁷ *Ibid.*

¹⁸ John Syrtash, "B'nai Supports Islamic Religious Courts," *Canadian Jewish News*, September 15, 2004, 5.

¹⁹ Boyd, *Dispute Resolution in Family Law*, 56.

²⁰ Rachel Thompson, "Muslim Women Say No to Sharia," *Horizons*, September 2004, 7.

²¹ Amy Maclachlan, "Muslims Debate Sharia in Ontario," *The Presbyterian Record*, October 2005, 12.

²² John Winterdyk and Kiara Okita, "Mixing Sharia Law With Canadian Legal Traditions," *Law Now*, December 2005 - January 2006, 17.

²³ Maclachlan, "Muslims Debate Sharia in Ontario," 12.

²⁴ Boyd, *Dispute Resolution in Family Law*, 62.

²⁵ *Ibid.*

²⁶ *Ibid.*, 65.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Ali Syed Mumtaz, "Are Muslim Women's Rights Adversely Affected by Shariah Tribunals?" *Canadian Society of Muslims*, <http://muslim-canada.org/darulqadawomen.html>.

³⁰ *Ibid.*

³¹ Winterdyk and Okita, "Mixing Shariah Law With Canadian Legal Traditions," 17.

³² *Ibid.*