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Canadian Council of Muslim Women
Conseil canadien des femmes musulmanes

SYMPOSIUM:

MUSLIM WOMEN'S EQUALITY RIGHTS IN THE JUSTICE SYSTEM: GENDER, RELIGION AND PLURALISM

APRIL 9, 2005

CROWNE PLAZA TORONTO
DON VALLEY
1250 Eglinton Avenue East
Toronto, Ontario

Appreciation

Canadian Council of Muslim Women gratefully acknowledges the support of the Women's Program, Status of Women Canada, Rights and Democracy, Canadian Women's Foundation, AND Change Canada Foundation

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CANADIAN COUNCIL OF MUSLIM WOMEN

GUIDING PRINCIPLES

- We are guided by the Quranic message of God's mercy and justice, and of the equality of all persons, and that each person is directly answerable to God.
- We value a pluralistic society and foster the goal of strength and diversity within a unifying vision and values of Canada. Our identity of being Muslim women and of diverse ethnicity and race is integral to being Canadian.
- As Canadians we abide by the Charter of Rights and Freedoms and the law of Canada.
- We believe in the universality of human rights, which means equality and social justice, with no restrictions or discrimination based on gender or race.
- We are vigilant in safeguarding, enhancing our identity, and our rights to make informed choices amongst a variety of options.
- We acknowledge that CCMW is one voice amongst many who speak on behalf of Muslim women and that there are others who may represent differing perspectives.
- We aim to be actively inclusive and accepting of diversity among ourselves, as Muslim women.

OBJECTIVES

- To attain and maintain equality, equity, and empowerment for all Canadian Muslim women.
- To promote Muslim women's identity in the Canadian context.
- To assist Muslim women to gain an understanding of their rights, responsibilities, and roles in Canadian society.
- To promote and encourage rapprochement and interfaith dialogue between Muslims and other faith communities.
- To contribute to Canadian society the knowledge, life experiences and ideas of Muslim women for the benefit of all.
- To strengthen the bonds of sisterhood among the Muslim communities and among Muslim individuals.
- To stimulate Islamic thinking and action among Muslim women in the Canadian setting.
- To acknowledge and respect the cultural differences among Canadian Muslim women and to recognize and develop our common cultural heritage.
- To promote a better understanding of Islam and the Islamic way of life in the North American setting.
- To represent Canadian Muslim women at national and international forums.
- To encourage the organization and coordination of Muslim women's organizations across Canada.

EXECUTIVE SUMMARY

As part of its initiatives, the Canadian Council of Muslim Women (CCMW) has been focusing it efforts on responding to the imminent implementation of Muslim family law under Ontario's *Arbitration Act*. The CCMW has been mobilizing resources and increasing awareness about the impact of the Ontario government's proposal and ultimately ensuring that family matters be removed from the Ontario *Arbitration Act*.

Since the release of Marion Boyd's recommendations on the implementation of Muslim family law tribunals, CCMW has taken a leadership role in working with other organizations to increase awareness of impacts and try to affect a change in the Ontario government's position so as to not allow the use of private arbitration using religious laws in family matters. Since December, CCMW has engaged in the following activities in support of their initiative:

- Issued a response to Marion Boyd's report
- Met with Ms. Boyd to discuss CCMW's concerns regarding her recommendations
- Collaborated with various organizations such as National Association of Women and the Law (NAWL), National Organization of Immigrant and Visible Minority Women of Canada (NOIVMWC), Rights and Democracy, Muslim Canadian Congress (MCC), Women's Legal Education and Action Fund (LEAF).
- Contacted politicians both at the provincial and federal levels including letters to Ontario Premier Dalton McGuinty and Attorney General Michael Bryant.
- News releases have been issued and Alia Hogben, CCMW's Executive Director and Nuzhat Jafri, a member of CCMW's Board, have participated in several speaking forums around Ontario and made several media appearances. CCMW representatives have been contacted by Media from around the globe.
- Other communications have been issued via e-mail and website

Since the Symposium, further collaboration and follow-up actions have been taken to continue to develop strategies to raise awareness and communicate the implications of family law arbitration as a concern for all Canadian women and vulnerable individuals' equality rights. Recently the above-mentioned and many other organizations have developed a joint declaration in opposing settlement of family matters under the *Arbitration Act* in Ontario. CCMW will continue to communicate its message through a variety of sources including media, politicians and scholars.

CCMW is working with partners to finalize a plain language Primer which compares the application of Sharia/Muslim family law and Canadian family law. A draft was presented at the Symposium for input from participants. When the Primer is completed, it will be printed in six languages.

Since the family law arbitration issue can have potential impact at a national level, CCMW's National Board will continue to work closely with its Chapters to assist in promoting women's equality rights and providing tools to support Chapters' initiatives.

SYMPOSIUM ANALYSIS

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INTRODUCTION

The ***Muslim Women's Equality Rights in the Justice System: Gender, Religion and Pluralism*** Symposium was organized as an urgent undertaking by the Canadian Council of Muslim Women (CCMW), to heighten awareness and engage others in understanding the impacts of settling family matters under the *Ontario Arbitration Act*, as recommended in Marion Boyd's report *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion.* The recommendations in Ms. Boyd's report would allow family matters to be settled under Muslim law, in Ontario. The discussions in the Symposium revolved around the dynamics of gender, religion and pluralism within the Canadian context generally and specifically around faith-based arbitration of family matters using Muslim family law. In the *Public Policy and the Application of Religious Law in Family Matters* workshop, positions, in response to Marion Boyd's report, were presented detailing specific concerns with Ms. Boyd's recommendation. A summary report on this workshop can be found in the next section.

The Symposium provided a wide range of perspectives with speakers and panellists from the fields of Sociology, Anthropology, Philosophy, Law, Religion, Human Rights and Women's Rights. Many common themes emerged throughout the sessions and included neutral, proponent and opponent positions on this debate. International perspectives were also shared. This analysis highlights how the debate was defined, the major themes that were discussed and the strategies that were suggested in ensuring that open discussion and analysis is completed in evaluating the merits of implementing Muslim family law arbitration or faith-based family law arbitration.

FRAMING THE DEBATE

Most observers have described this issue as the most significant issue related to women's equality rights in Canada, in the past decade or even since the lobbying for amendments to the *Canadian Charter of Rights and Freedoms.* Dr Ziba Mir-Hosseini described the status of women under Sharia law as the hottest debate among Muslims, for a century or more. Although there is much debate on Muslim womens' equality rights, Ms. Aisha Geissinger noted that there is limited literature available on the subject from non-conservatives. She also mentioned that the literature that is available, is not relevant in the Canadian context.

CCMW made an effort to have differing views presented at the Symposium's panel *Is There Room for Women's Equality Rights in Religious Arbitration*. Proponents feel that faith-based arbitration has been available as a method of settling family matters for other religious groups in Ontario and therefore Muslims should also have the choice of settling family matters, using Muslim family law. They also believe that other alternatives would still be available for the choosing. Opponents of faith-based family law arbitration believe that Muslim women may be coerced into selecting religious arbitration due to the pressures of their community and therefore there would be no real choice. Another concern is that although there may be appeals available in religious family law

arbitration, as some proponents believe, it is unlikely that a Muslim woman will appeal the decision of an Imam.

According to the proponents, the objection to Muslim family law arbitration is attracting anti-Muslim sentiment. Many believing Muslims, however, feel that faith-based family law arbitration is problematic, not just for Muslim women but for all women and vulnerable individuals and is therefore an issue for all communities.

MULTICULTURALISM AND ITS RELEVANCE IN THIS DEBATE

The issues in the debate have been positioned at times to confuse it with Canada's Multiculturalism policy. As we will see later, Dr. Kymlicka calls to separate arbitration and multiculturalism policy as two very distinct debates.

Dr. An-Na'im described the debate in terms of "the struggle between the collective right to cultural self-determination by Canadian Muslims on one hand, and the individual rights of women on the other."

Canada's Multiculturalism policy has been cited to support both proponent and opponent positions on the establishment of faith-based family law arbitration. In order to explain the connection between faith-based arbitration and multiculturalism, Dr. Kymlicka reviewed the history of Canada's multiculturalism policy and stressed its ever-changing nature. Dr. Kymlicka explained how Canada's multiculturalism policy was based on liberal ideas of individual freedom and "would allow each individual to choose whether, and to what extent, they wish to maintain an ethnic or religious identity, and to what extent they wish to challenge or reject the practices associated with their inherited group membership." Changes in the multicultural policy were required for the non-European immigrants to help in their settlement and integration. These included language and anti-racism programs.

The composition of more recent Canadian immigrants has changed such that many Canadians are questioning whether the newer immigrants will "uphold liberal-democratic values that the multiculturalism policy was based on and not misuse their rights under the multiculturalism policy." Although Muslim immigrants only make up a small fraction of the immigrant population in Canada, they have been at the centre of the multiculturalism policy debate, since 9/11.

According to Dr. Kymlicka, the "introduction of Sharia tribunals has become a test case on Islam and whether the rules of liberal multiculturalism can be respected." Proponents of the debate say that a double-standard is being applied to Muslims since the *1991 Arbitration Act* has allowed other religions to establish faith-based arbitration without any public debate. They see the objection to Muslim tribunals as mistrusting Muslim immigrants and not other immigrants. Opponents fear that Sharia tribunals will lead to "to institutionalizing a conservative form of Islam with the Canadian judicial system, and pushing towards the more traditionalist interpretation of multiculturalism." Dr. Kymlicka, however, believes that the introduction of faith-based arbitration under Ontario's *Arbitration Act* has nothing to do with multiculturalism. He believes faith-based tribunals would never have been allowed if they were introduced through the *Multiculturalism Act*.

WOMEN'S EQUALITY RIGHTS & "MINORITIES WITHIN MINORITIES"

Women's equality rights in Canada are central to this debate and the movement to "actualize" these rights was identified as a significant objective of the Symposium by Ms. Marilou McPhedran.

The tension between the broader (Muslim) community and the individual rights of women or vulnerable individuals, within the same community, was mentioned throughout the day. Dr. Sirma Bilge discussed the concept of "minorities within minorities" where equality rights for women are in competition for rights of other minority groups. Minority women are faced with inequality from the majority population and within their own minority community.

Both Dr. Bilge and Dr. Ayelet Shachar have cautioned how well-intentioned pluralistic accommodations are resulting in negative outcomes. Dr. Bilge's research is indicating how cultural information is being used to exonerate or mitigate criminal responsibility.

A proponent of the use of Muslim family law, Dr. Bullock said "interference in the family to protect women's equality is secular authoritarianism." For Dr. Bullock the issue of women's equality rights versus religious values is about "the ability of us to follow the dictates of our conscience to follow the way we think our religion tells us to live."

Speaking in favour of Muslim family law arbitration, Dr. Bullock explained that "Sharia values and enables women's equality through a different concept of equality." She also believes that while the mainstream feminist liberal definition of equality suggests that women and men be treated exactly alike, the conservative religious perspective recognizes that according to the Quran, men and women are not the same and not equal in all ways and justice requires that sometimes women are treated the same way while other times they are treated differently. Dr. Bullock suggested that "equity" may be the more appropriate term to use.

Ms Aisha Geissinger discussed how there are claims made that "Islam teaches gender equity" but pointed out that, "gender equity cannot stand in the way of gender hierarchy, since gender equity is believed to be laid down in authoritative sources such as the Quran and the Sunnah". Ms. Geissinger also added that "this tension between the aspiration to claim the vocabulary of human rights while at the same time affirming some form of gender hierarchy is clearly a question which believers rather than the Ontario government must resolve for themselves. However, it is evident that in such conservative formulations, "equality" and "equity" are not being used in the same way that the Ontario Human Rights law does. So therefore, for the Ontario government to in any way be directly or indirectly supporting such formulations does imply a contradiction to the very least--it seems to imply that it does not take its own human rights laws seriously, that it does not believe that all persons should be equally protected under the law as long as one waves around the magic word of "equity."

ROLE OF RELIGION AND STATE

Speakers also considered the debate in terms of the role of religion and State and how policies such as arbitration in the private arena, could have the effect of dividing communities from the broader, community. Mr. Julius Grey explained how religion depends on the full consent of the person who is observing it and not on the community. Mr. Grey believes religion plays a role of "conscience" and becomes less effective when it encroaches on "State and secular matters." Dr. An-Na'im also emphasized how the observation of Sharia is not dependent on what the State does or doesn't do and that Muslims cannot abdicate their responsibilities for being a Muslim, to the State or religious leaders. They have to accept responsibility for their own actions. He also stressed the importance of neutrality of the state due to power being used for political objectives rather than considering the value of other positions. Political behaviour could be influenced by religious beliefs.

Concern was also expressed about the State sharing power with minority groups and the power struggles which would ensue in determining "who will speak on whose behalf and who will define whom." Other critics have warned that the State should be concerned about protecting individual rights, rather than protecting groups which are formed on the basis of religion or other basis and also protecting the rights of individuals to disassociate themselves from religious or other groups.

Mr. Grey noted that one of the main purposes of the State, is to create a wholeness of the community by providing common institutions in areas such as education, health and courts. He cautioned that the use of Sharia law or any other religion's law, would separate adjudication and put a barrier around the religious community. Dr. Bullock believes Sharia does not "put a barrier around Muslims as a community, nor does it ghettoize us." She believes the community is better able to preserve itself. If everyone is to fit into one mould then the white majority discriminates against the minorities. Dr. Bullock explained minorities sometimes need access to things from their own tradition which develops self-esteem and confidence.

Ms. Andrée Côté also discussed separation of religion and State. Speaking on behalf of the National Association of Women and the Law (NAWL), Ms. Cote, said "the decisions of religious authority should only be advisory and if your conscience and your faith dictates to you that you want to follow this opinion, that is a question of individual freedom, but it should not be a question of law." She added "that faith based arbitration actually threatens the tenets of freedom of religion. The Supreme Court has said many times that freedom of religion is a subjective question, an individual choice and when a religious authority dictates upon you his interpretation of the law and your situation, and that becomes a legally binding decision, we think that that actually violates freedom of religion and also obviously violates the separation between "church" and state."

RELEVANCE OF SHARIA OR MUSLIM LAW APPLICATION

Speakers on both sides of the debate commented on the application of Sharia or Muslim family law.

Dr. Bullock believes that "Sharia is reasonable in its provisions and it is a profound system which is neither better nor worse than its secular counterpart but from a believing Muslim perspective it is divine in its origin and hence deserves reverence." According to Dr. Bullock, Sharia balances relationships between duties and rights.

Dr. An-Na'im mentioned that to his knowledge, "there is no basis in the Qur`an that Shari`a is divine. In fact the term "Shari`a" is not even mentioned in the Quran at all in the sense that Muslims use it today."

He believes that Sharia cannot be enforced or enacted by the state because the authority of Sharia is religious, while that of the state, is political. He also voiced concerns, as others have, that the diversity of opinion among Muslim scholars and schools would result in "legislation being selective among competing views on matters of law and public policy." Dr. An-Na'im noted there is no need to distinguish between Sharia and *fiqh* in this debate because it's human judgement that determines which text is applicable to a situation and in what context.

In Dr Ziba Mir-Hosseini's research on the practice of Islamic family law, she described it as "jurisprudential or *fiqh* rulings that have been selectively reformed, codified and grafted onto a modern legal system." As an example of application to marriage, Dr. Mir-Hosseini feels there is a gap between how marriage has been defined and how it is actually lived and experienced. She explained how, in *fiqh,* marriage has been defined as a contract of exhange between a man and a woman like a contract of sale. Under the marriage contract "the woman comes under the husband's *isma* (authority, dominion and protection), under a set of rights and obligations of each party." Dr. Mir-Hosseini pointed out that in practice however, "marriage goes beyond its legal/*fiqh* construction. As a social and cultural institution, some of its features are rooted in the ideals of Sharia (based on mutual respect, cooperation and harmony) but these ethical ideals are not translated into legal terms and not reflected in *fiqh* rulings." According to Dr. Mir Hosseini, when marriages break down, women find out that they are at the mercy of their husbands i.e. this is when men can take advantage of their privileges under their contract. Because judges are bound by legal code, Dr. Mir-Hosseini believes that the "sacred" in Sharia is irrelevant.

Dr. Mir-Hosseini quoted Hojjat ol-Islam Mohsen Kadivar, an Iranian reformist jurist who feels that a law can only be Islamic if it meets the following three criteria:

- "its rational basis: it must satisfy the rational demands of the time"
- "it must be just, in line with justice of its time"
- "it must be more advanced and progressive than existing laws in other society"

In assessing what is referred to as Sharia family law today, Dr. Mir-Hosseini believes it does not meet these three criteria.

Speakers also warned that because religious laws are conservative, tradition-based and in the case of Sharia law, out-of-step with the current demographics of Muslim women, they could be counter-productive. As Dr. An-Naim explained, they cannot assure the protection of women's rights in family matters because they were developed "under a very different context of a few Islamic societies 1000 years ago."

Dr. Mir-Hosseini mentioned that there are two understandings of the status of women in Islam. The first is "Absolutist Islam" and the second is "Pluralist Islam" and therefore two different interpretations. The first is based on the notion of duty and doesn't recognize the present-day realities and aspirations of Muslims. The pluralist view is based on the notion of "right" and does recognize the today's realities and values such as democracy, human rights and gender equality. Ms. Mir-Hosseini also pointed out that the debate in Sharia countries tends to be reformist while that of non-Sharia countries is conservative.

THE CASE FOR MUSLIM/SHARIA OR FAITH-BASED FAMILY LAW ARBITRATION

Dr. Kathy Bullock does not believe there should be access to only one set of laws for dispute resolution since she feels this is not the best way to achieve justice in a multicultural society. She feels a more mature society allows access to different laws based on heritage and tradition.

Although Mr Faisal Kutty said he was not speaking as either a proponent or opponent of arbitration of family law matters, he is advocating for the implementation of Marion Boyd's recommendations since unregulated arbitration is taking place currently under Ontario's *Arbitration Act*. In his view, Marion Boyd's recommended checks and balances are not present in the informal proceedings being conducted today. Both Mr. Kutty and Ms. Bullock pointed out that Muslims should be allowed to use family law arbitration because it is voluntary, it conforms to Canadian laws, it can be appealed and it is a matter of choice. Other religious groups have been allowed to use it so why can't Muslims?

ARBITRATION NOT DESIGNED FOR APPLICATION TO FAMILY MATTERS

Many speakers highlighted how "with its original intention to settle commercial disputes between independent business people, the *Arbitration Act* was not designed with the interests of immigrants (or other vulnerable groups) in mind." Ms. Shachar explained how Ontario's proposal "tries to use an existing legal framework, the Arbitration Act, which is typically used for resolving business and commercial disputes, to endorse a very different kind of institution: one that is designed primarily to settle family law disputes.

Most of the speakers expressed their concerns regarding the lack of a proper understanding of the implications of allowing arbitration of family matters on women and other vulnerable individuals. Dr. Bilge pointed out how "no systematic inquiry is taking place to understand the implications of Islamic arbitration tribunals on women's citizenship rights." Dr. Will Kymlicka also explained how there were no proper consultations among and between communities. Proponents question why consultations have to be conducted for Muslim tribunals but no consultations have been required for other religious groups who are already using arbitration.

Mr. Grey does not view arbitration as a panacea and he believes it does not guarantee a just result. Mr. Kutty also agrees that arbitration cannot be viewed as a panacea that will resolve all of the problems for the Muslim community.

INTERNATIONAL IMPLICATIONS

Many speakers talked about the significance of this debate in Ontario and its implications on national and international fronts and outcomes in Ontario and Canada are being watched closely around the world. Examples of how Sharia is being applied in the Muslim world, were discussed. Turkey, although a Muslim society but a secular state, has made a full commitment to the UN's Convention on Elimination of All Forms of Discrimination Against Women. It was suggested that Canada make a similar commitment.

SUGGESTED STRATEGIES FOR POSITIVE OUTCOMES

Speakers suggested various ways of ensuring the debate on the proposal to implement Muslim family law arbitration or family law arbitration is carried out in a thorough and constructive manner resulting in a decision that will be beneficial for the community as a whole. Suggestions are highlighted below along with examples of successes in Canadian history:

Active Participation

- Dr. An-Na'im stressed the importance of being a part of the process in developing and implementing social change initiatives and affecting public policy by working as part of the broader Canadian community

Form Alliances

- It was also suggested that as Muslims, if we build alliances with others who share our values, we can be more successful in protecting common interests

Apply Previous Activist Experience

- Ms. McPhedran and others cited many examples of the efforts that have been made throughout Canadian history to ensure protection of rights and specifically, women's rights such as the grassroots lobbying which resulted in the "notwithstanding clause" in the *Canadian Charter of Rights and Freedoms* and the reforms which resulted from the formation of the National Action Committee for the Status of Women. Both Dr. Bilge and Ms. McPhedran discussed examples of efforts on the part of Aboriginal Women to secure protections.
- Through experiences of political activism, women have built their expertise. Ms. McPhedran emphasized how the issue of faith-based arbitration of family matters
- was not just a Muslim women's issue but an issue for all women and also an issue of values for both women and men. Many organizations (including non-Muslim women's organizations) have been working together on this issue and Ms. McPhedran encouraged their collective expertise to alert the Ontario Attorney General, the Premier and the Minister Responsible for the Status of Women, of the ramifications of faith-based arbitration of family matters.

Conduct Analysis/Address Gender Bias

- Dr. Mir-Hosseini discussed how there have been many legal strides made for Muslim women between 1900 and 1970's but she feels that gender biases need to be debated and that the quest for justice for Muslim women must continue
- Dr. Bilge pointed to the development of tools such as "intersectional analysis" being used to provide new perspectives on social inequalities. Intersectional analysis looks at inequalities of different groups in relation to one another through an integrated approach. These tools can be used to improve the position of "minorities within minorities."

Be Informed about the Issues

- Ms. Geissinger mentioned that although there is limited literature on women's equality rights, there is some information available on the internet and she also mentioned Jamal Badawi's book, *Gender Equity in Islam: Basic Principles*
- Mr. Faisal Kutty also urged attendees to read Marion Boyd's report and position papers prepared by opponents of family law arbitration and make an informed determination of the merits of the proposal

INDIVIDUAL EVALUATIONS:

The recommendations from individual participants were about:

Outreach and Increasing of awareness amongst Muslims and non-Muslims.

Publish CCMW perspectives via media and the website.
On going.
Publish symposium speeches on the website.
To be done by August.
Increase awareness of both systems of law-Canadian and Muslim.
A Primer of Comparison of the systems of law is being developed. It will be published by Fall 05.
Publish materials in other languages.
The Primer and some of the documents of the Coalition will be translated into other languages.
Hold similar events across the country.

CCMW will be holding regional meetings this Fall in Calgary, Vancouver, Halifax, Montreal and Toronto.
Explore possibility of a web page discussion of issue.
This will be considered.
Emphasize the positive aspects of family relationships taught in Islam.
This is done in all CCMW public events and will be noted strongly in the Primer.
Outreach to mosques and Islamic centres.
This has been done in the past and sadly we are not welcomed, but it requires continuing efforts.
Work with CCMW chapters.
On going.

Create partnerships with similar organizations so as to mobilize and campaign together.
To link with other women's equality seeking organizations so as to mobilize actions.
Lobby via letter writing campaign.
A coalition of over 50 organizations has been formed, NO RELIGIOUS ARBITRATION, with a Steering Committee which is to organize various mobilizing strategies. A Joint Declaration has been completed.
A meeting of the Coalition is set for Sept 17/05.
Get involved in Law reform activities.
Some of our partners include NAWL, LEAF and METRAC. We will become involved if there is any possibility of reforming the Ontario Family Law Act.
Explore possibility of a legal challenge.
We have consulted with constitutional lawyers and will continue to explore the possibilities.
In campaigning ensure that people understand that the discussion regarding Multiculturalism/Religious freedom and women's equality rights affect all Canadians.
This continues to be part of the campaign, public speaking events and media outreach.

OTHER ACTIONS TO DATE

The Symposium was part of the overall strategy of increasing awareness, education, and mobilization in the campaign to have one law apply to all of us, regardless of religion, culture, ethnicity and race and to eliminate the use of any religious laws in family matters.

The objectives for holding the symposium were met and recommendations have resulted for further actions and for the two levels of governments.

CCMW, along with others, has kept the issue in the public eye via media, outreach, meetings with politicians and getting individual Canadians to become involved.
As examples, the federal Liberal Women's Caucus has written a formal letter of support of our position; the Quebec legislature passed a motion against religious laws in that province; British Columbia has publicly stated its opposition to any application of religious laws. The Ontario New Democratic Party which was responsible for the revised

Arbitration Act of 1991, has made a public statement that on consideration they oppose the use of religious laws via the Arbitration Act.

We still await hearing from the liberal government of Ontario.

RECOMMENDATIONS TO THE FEDERAL AND PROVINCIAL GOVERNMENTS:

Due to the current political world environment there is much attention on all things Muslim, so that this issue has gained high visibility and attention internationally. The issues of Sharia and Muslim women are being discussed in many Muslim and non Muslim countries, creating tensions for all concerned. There is discussion regarding multiculturalism, pluralism and the place of religion in a western democracy, and so all eyes are on Canada, and in particular, Ontario, as it prepares to implement faith-based family law arbitration using Muslim family law. This Symposium surfaced the issues revolving around this debate from both proponent and opponent perspectives and highlighted the importance of understanding the implications of implementing faith-based family law arbitration on women and other vulnerable individuals throughout our multicultural community – not only on Muslims.

It is critical for the Ontario government to review its proposal in light of its human rights legislation, Canada's *Charter of Rights and Freedoms*, UN's Convention on Elimination of All Forms of Discrimination Against Women and deliberately determine the course it wants to chart for Ontario and Canada in the future and how it will maintain Canada's reputation as a shining example of a successful multicultural society that is fair and equitable.

The federal government reasoning that the issue of family law is a provincial matter does not hold up. It is Canada which has signed international conventions and agreements and is held accountable for any contraventions. The preliminary discussion with the U.N Special Rapporteurs on Family Violence and Women's equality confirms the responsibility of the government of Canada.

The discussion regarding the Canadian Charter of Rights and Freedoms has been confusing, and again it is up to the governments to ensure that there is clarity regarding the equality of women versus the erosion of this fundamental right in the cause of religious freedom. It is unfair that women may have to initiate a legal challenge when this is unnecessary.

CCMW, in collaboration with a coalition of organizations, will continue to work with concerned individuals and groups to ensure the that both levels of governments understands the far reaching impact of the proposal to allow the use of religious laws in family matters in one province.

SYMPOSIUM SESSIONS HIGHIGHTS

Below are summary highlights of the various sessions in the Symposium.

Prospects and Limitations of Legal Protection of Rights: Need for Internal Transformation

Keynote Speaker: Dr. Abdullahi An-Na'im, Professor of Law, Emory School of Law

- "Be part of the process of legal protection both as a participant in its development and implementation as well as beneficiary of its application."
- "When I say that the debate must be fully inclusive, I mean of everybody, including and especially with whom we disagree strongly. In particular, the Canadian Council of Muslim Women should not only listen to its opponents, but also insist on the right of those opponents to have their views taken seriously and considered in the process of framing public policy or protection of rights."
- "To be part of the majority on some important ways, Muslims must learn how to build alliances, to define their issues in ways that attract the empathy and support of others, instead of alienating them or making them indifferent."
- "What Muslims now call Shari`a family law have been trapped in a social, economic, political, psychological, sociological capsule of many centuries ago, and as such totally out of step with the present demographics, educational, empowerment, economic influence, autonomy and independence of Muslim women throughout the world, especially those who live in countries like Canada.
- "Enforcement of Shari`a in the family law field is the colonial phenomenon, done for colonial reasons, and not as a matter of respect for the Islamic tradition. Therefore, this is not a matter Muslims of Canada should be concerned about today, and will in fact find counter-productive and deeply problematic if it is attempted in Canada for the following reason."

Testing the Bounds of Liberal Multiculturalism

Keynote Speaker: Dr. Will Kymlicka, Chair, Political Philosophy, Queen's University

- "Since 9/11, the spotlight has been put on Muslims in Canada, and they are now (involuntarily) the focus of public debates, even though they remain a small fraction of our immigrant population. As a result, I believe that the Canadian commitment to liberal multiculturalism is being tested in a way it has never been before. Now, for the first time, we will find out whether liberal multiculturalism will endure in Canada under the sorts of conditions and challenges that have eroded it in much of Europe."
- "There are really two separate questions. On the one hand, will native-born Canadians 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? On the other hand, will Muslim leaders and organizations 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?'

- "On the one hand, some commentators argue that the public debate is evidence that native-born Canadians are applying a double-standard to Muslims. After all, ever since the 1991 Arbitration Act, other religious groups have set up faith-based arbitration tribunals without any public debate. It was only when a Muslim organization publicly declared its intention to set up an Islamic faith-based tribunal, as permitted by law, that the public furor arose. This can be seen as a case of Canadians refusing to extend Muslims the same trust they have shown to other groups, and abandoning the liberal expectancy that underpins the use of multiculturalism as a tool for integration. On the other hand, one can also argue that some of the Muslim leaders who have proposed sharia tribunals see this as part of a broader campaign to institutionalize a conservative form of Islam within the Canadian judicial system. They appear to be using it as a first step towards securing broader exemptions from the normal constraints of liberal multiculturalism, and pushing towards a more traditionalist conception of multiculturalism, in which group members would face increasing pressure to follow (conservative) group norms."
- "The reality is that the opportunity made available for faith-based arbitration under Ontario's Arbitration Act has almost nothing to do with multiculturalism. The adoption of this Act in 1991 was not in response to the demands of immigrant groups, nor was it justified in terms of the requirements of the multiculturalism policy. On the contrary, the Act was demanded by, and designed for, members of the mainstream society, who wanted a cheaper, quicker and less adversarial form of dispute resolution."
- "The (*Arbitration) Act* desperately needs revision in order to protect the legitimate interests of vulnerable parties and of the larger society, but none of these revisions require any amendment to the multiculturalism policy."

Panel: Impact of Religious Pluralism on Women

Panellists: Dr. Abdullahi An-Na'im, Dr. Will Kymlicka, Ms. Marilou McPhedran, Dr. Sirma Bilge and Dr. Ayelet Shachar

- Panellists discussed initiatives throughout Canadian history for women's and minority equality rights. A variety of perspectives were provided. Dr. Sirma Bilge spoke from a sociological perspective. She talked about political activism on part of minority women which has been using tools such as intersectional analysis to gain perspectives on social inequalities. Dr. Bilge explained how competing forces are at play within ethno-cultural and religious groups vying to legitimize their views.
- Ms Marilou McPhedran discussed how women's activism in Canadian history has built expertise in understanding and actualizing women's equality rights. She emphasized the importance of using this collective expertise to educate the Ontario Premier, the Attorney General and provincial and federal governments, on the implications of family law arbitration on women and vulnerable individuals. Ms. McPhedran monitors what is happening on the international front and cited Turkey's commitment to the International Convention on Women's Rights and believes we should be mobilizing Canada to do the same.

- In her presentation, Dr. Ayelet Shachar drew upon her research which appeared in *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press, 2001) to explain the tension between accommodating religious diversity and protecting women's rights. She argued that we must pay special attention to the vulnerability of women in family law disputes. She then analyzed the proposal to permit the use of religious-law principles in private-dispute resolution processes in Ontario, such as arbitration, within a broader comparative context, explaining how other jurisdictions have struggled to find a balance that simultaneously respects women as members of minority groups and as full citizens of the larger political community.
  Dr. Shachar cautioned that the current legal framework governing private dispute resolution in Ontario fails to provide adequate safeguards to protect the hard-won rights of minority women. She urged the development of more inclusive and just procedures to resolve family law disputes.

Panel: Is There Room for Women's Equality Rights in Religious Arbitration?

Panellists: Dr. Kathy Bullock, Ms Aisha Geissinger, Mr Julius Grey and Mr Faisal Kutty.

Dr. Kathy Bullock:

- "I believe that the short answer to this question is yes, and the long answer to this question is yes and it depends on how you define equality."
- "I don't believe that having only one law for all of us is actually the best way to reach justice in a multicultural society. And I believe actually that it's a more mature society which does allow for the different communities to have access to different laws based on their heritage and tradition. It's a more mature multicultural society than one which does not. That's my operating assumption."
- "Sharia values and enables women's equality. I believe that it values and honours women as dignified individuals. Now I believe that it does this through a different concept of what equality is. The secular liberal feminist understanding of equality which is basically the mainstream understanding here in this society, and not like the radical feminist or any of the other kind of feminists but basically the mainstream liberal feminist understanding is what we say equality as identicality."
- "Sharia is reasonable in its provisions and it is a profound system which is neither better nor worse than its secular counterpart but from a believing Muslim perspective it is divine in its origin and hence deserves reverence."
- "We focus only on rights. But one of the things that I really admire about the Sharia is the systemic set up of balancing of relationship between duties and rights."
- "I do not agree that the law should be rescinded for everyone, so in that case, if others access it, Muslims should be allowed to access it."
- "I think about the issue of women's equality rights versus religious values and really it's about the ability of us to follow the dictates of our conscience to follow the way we think our religion tells us to live."

Ms Aisha Geissinger:

- "I read very little and see very little which is actually addressing the experience, the lived day-to-day experience of women in Canada as opposed to ideals of how it should be."
- "First of all, much of it addresses gender issues in very general terms. It is often apologetic--it is intended as a defence of Islam against opponents, or else it is admonitory--telling believers how they should live their lives at any time, how a Muslim woman should conduct herself, and so on."
- "Such material is most often authored by conservative males of varying degrees of conservativeness, or sometimes by conservative western female converts. There's remarkably little out there that is written by immigrant Muslim women, or for that matter, by second generation or third generation immigrant Muslim women."
- "Terms like "equality" and "equity" are bandied about a lot but they are seldom--in the Muslim context--specifically and clearly defined."
- "While the wish to claim the word "equity" is evident in this quote, so is the desire to distance the Muslim discourse on gender from what is presented as the "competitive" ideal of equality. We have the rhetoric here of family harmony--and after all who doesn't want a harmonious family life?--which obscures the question of who it is who gets to define what is "co-operation" and what is "complementary" in the family."
- "I would say that the evidence that is out there is that regardless of the use of words like "equality" and "equity," what is being advanced in reality by the Muslim advocates of faith-based arbitration is not in accordance with the Canadian Charter of Rights and Freedoms."

Mr Julius Grey:

- "I want to point out what's in our *Charter*. That our *Charter* guarantees not only freedom of religion, that it makes it very clear that it's an individual thing by saying "and conscience" and indeed religion at all times in order to be effective requires the right of the individual to say no, I don't care where I come from, I don't believe, or I believe something else."
- "I think in a sense it takes away from the role of the religion to plunge it into everyday dispute resolution."
- "I think the State - I do believe in freedom and liberty and all of those things - but I think the State has two fundamental functions. One of the fundamental functions is to re-distribute goods and services, to create social justice, to make certain that those who are underprivileged, those who are not educated, those who are not healthy, those who are not as well placed as others, do get a fair shake and that is one of the fundamental purposes of the State and the State cannot abandon that."
- "I think it is the function of the State to have certain common institutions. Institutions for everybody, institutions that bind Canadians, I would say the same thing for other countries."
- "..one of the purposes for Sharia law separate adjudication is perhaps to put a barrier around a community. I think in a country like Canada, belonging to a community is just like belonging to a religion, it is entirely and totally consensual at all times and putting a barrier, and see I am not a friend of separate schools

either or of separate hospitals or anything else. I think it is important that citizens meet together in the institutions. So it is not only the result of the arbitration that I worry about, but I also worry about the separation, about the fact that people will live inside their own group and not see that the rest of the society is not that different from them, that they live in the same way, that they have the same values."

- "I think we have a common institution called the court, which along with the hospitals and the schools should be used by all Canadians regardless of their religion and used for the better."
- "Imagine how much more coercion there will be afterwards for somebody not to issue a court proceeding in which they say the Imam acted contrary to natural justice and completely unfairly and he gave a decision that was manifestly unreasonable and therefore this court should not follow it because its incompatible with Canadian standards."
- "Contract is important, when possible, people's free will is important in our society but the just result is as well and I think arbitration in other fields has its limits, it's not always for everybody's benefit."

Mr Faisal Kutty:

- "I'd like to think of myself as somebody who comes down in the middle where I believe that, unlike the proponents who think it is a panacea and will solve the problems of the Muslim community - I don't agree with that, I don't believe that. Neither do I side with the opponents who say that using religious arbitration within family context is not possible because we don't have checks and balances. I don't agree with that."
- "..for me it's an issue of choice. In our legal system we have a private system. The State provides dispute resolution mechanisms and options and for parties to select which option they want to use to resolve their disputes."
- "People settle their disputes by reaching out to their families, clergy and they have their disputes settled like that. They do it themselves by going to Business Depot, getting the divorce forms, they complete it themselves, they settle property issues, custody issues, they settle those things. The only way it gets in front of a judge is when one party challenges it."
- "a case of Hercules vs. Hercules establishes fairness and equality must be the subject of arbitration. The court also exercises the jurisdiction onus *parens patrie.* So in other words, parties have a marriage contract, separation agreement or arbitration decision where they say the child goes to the father. Well the court can step in, they have ultimate jurisdiction…. You can see, it's a much more nuance and comprehensive system that we are talking about."
- "The Law Society, the Canadian Bar, have all said you can't force people to go for independent legal advice. You give them the option, you can go for independent legal advice but they can waive that option and say I don't want to. "
- "Alternative dispute resolution already exists within the community as I said and people are being bound by their decision. My position is let's take it out of these back alleys and mosques where no rules and procedures are being followed. Let's put it into a system where parties can have some rules and procedures. This at the end of the day is the best way to ensure that religious rights do not trump women's rights."

Workshop: Primer: Consultation on Comparative Study: Muslim Family Law and Canadian Family Law

Panellists: Dr. Lynda Clark and Ms Pam Cross

- This was an interactive session to obtain input on a draft comparative study on Muslim family law and Canadian family law. The plain language Primer will be piloted at CCMW's regional meetings before it is finalized and will be available in six different languages (Urdu, Farsi, Arabic, French, English, Somali). The Primer is due to be completed by Fall 2005.

Workshop: Public Policy and the Application of Religious Laws in Family Matters

Panellists: Dr. Anu Bose, Ms Ariane Brunet, Ms Andrée Côté, Mr Tarek Fatah, Ms Rizwana Jafri and Ms Cindy Wilkey.

- Five organizations presented their positions in response to Marion Boyd's report entitled *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion.* A set of suggested actions were developed to continue to ensure Ms. Boyd's recommendations are not implemented and prevent the Ontario government from allowing faith-based arbitration of family matters. The full report on this workshop can be found on **page 15**. Follow-up meetings have been held and further strategies developed for the participating organizations to work together on this issue.

Address: Observations on Women's Experience of the Shariah as an Ideology

Speaker: Dr. Ziba Mir-Hosseini

- "Given the patriarchal bias of the law, which gives men certain privileges compared to women, I was particularly interested to find out how women cope with their inferior position in law and reconcile it with their belief in the justice of Islam. Of course, when we say "Shariah family law", we are talking about jurisprudential or *fiqh* rulings, as defined by classical jurists (*fuqaha*), which have been selectively reformed, codified and grafted onto a modern legal system."
- "..huge gap that exists between marriage as it is conceptualized and defined in *fiqh* texts, and marriage as it is lived and experienced."
- "In line with the logic of contract, a man can enter more than one marriage (up to four) at a time, and can terminate each contract at will. Repudiation (*talaq*) is the husband's exclusive right: he can unilaterally terminate the contract: he needs neither grounds, nor his wife's consent. A wife can obtain release from the marriage contract by offering the husband inducements, usually by returning her *mahr*, to consent to a divorce by mutual agreement (*khul'*). If she fails to obtain his consent, then her only recourse is to the intervention of the court, where she needs to establish a valid ground."
- "…why has Shariah become such a sensitive issue for Muslims? Why do demands for its application or reform stir up such emotion? One apparent answer is that the provisions of the Koran were most abundant and explicit in the area of

personal relations, thus the boundaries between the sacred and legal remain blurred and open to manipulation in Shariah family law. It is also the most developed field of classical Islamic jurisprudence, which in modern times has been claimed as the foundation of the ideal Islamic society – of course by the Islamists."

- "Marriage in practice as a social and cultural institution among Muslims goes far beyond its legal/*fiqh* construction. Some of its features are rooted in the ideals of the Shariah – in which marriage is based on mutual respect, cooperation and harmony – but none of these ideals are translated into legal terms. They are simply not reflected in *fiqh* rulings. They do not sit comfortably with the definition of marriage as a contract of exchange patterned after the contract of sale."
- "What my research in the courts suggests is that, for men and women who come to court to get out of a marital impasse, the sacred in the Shariah is irrelevant. The same is true for the judge, who is bound by a legal code that is in many ways a translation of the *fiqh* concept of marriage. All this, in a nutshell again, places Shariah family law in practice on the same level as other systems of law, and challenges the claim of its sanctity."

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Canadian Council of Muslim Women
Conseil canadien des femmes musulmanes

SYMPOSIUM:

MUSLIM WOMEN'S EQUALITY RIGHTS IN THE JUSTICE SYSTEM: GENDER, RELIGION AND PLURALISM

APRIL 9, 2005

CROWNE PLAZA TORONTO DON VALLEY
1250 Eglinton Avenue East
Toronto, Ontario

Appreciation

Canadian Council of Muslim Women gratefully acknowledges the support of the Women's Program, Status of Women Canada, Rights and Democracy, Canadian Women's Foundation, AND Change Canada Foundation

P R O G R A M

8:00 - 9:00 a.m.	**Registration**	
9:00 - 9:05 a.m.	**Recitation of Al-Quran** **Translation** **National Anthem**	**Nevin Reda and** **Andreea Muscurel**
9:05 - 9:10 a.m.	**Host Chapter's Welcome**	**Barbara Siddiqui** President, Toronto Chapter **Huma Ahmad** President, Peel Chapter
9:10 - 9:15 a.m.	**National President's Remarks** **Introduction of Speaker**	**Razia Jaffer** President, National Board
9:15 - 10:00 a.m.	**Prospects and Limitations of Legal** Protection of Rights: Need for Internal Transformation	**Abdullahi An-Na'im, PhD,** Professor of Law, Emory School of Law
10:00 - 10:05 a.m.	**Introduction of Speaker**	**Erum Afsar** Calgary Chapter
10:05 – 10:45 a.m.	**Testing the Bounds of Liberal** **Multiculturalism**	**Will Kymlicka, PhD** Chair, Political Philosophy Queen's University
10:45 – 11:00 a.m.	**HEALTH BREAK**	

11:00 – 12:30 p.m.	**Panel: Impact of Religious Pluralism On Women**	**Sirma Bilge** **Will Kymlicka** **Marilou McPhedran** **Abdullahi An'Naim,** **Ayelet Shachar**
	Facilitator	**Alia Hogben**
12:30 - 2:00 p.m.	**PRAYERS/LUNCH**	
2:00 – 3:30 p.m.	**Panel: Is There Room for Women's Equality Rights in Religious Arbitration**	**Kathy Bullock,** **Aisha Geissinger** **Julius Grey** **Faisal Kutty**
	Facilitator	**Selma Zecevic**
3:30 – 3:45 p.m.	**HEALTH BREAK**	
3:45 – 5:00 p.m.	**CONCURRENT WORKSHOPS**	
	1. Primer: Consultation on Comparative Study: Muslim Family Law and Canadian Family Law	**Lynda Clark** **Pam Cross**
	Facilitator **Recorder**	**Huma Ahmad** **Razia Jaffer**
	2. Public Policy and the Application of Religious Laws in Family Matters	**Andrée Côté,** NAWL **Cindy Wilkey,** LEAF **Rizwana Jafri,** MCC **Tarek Fatah,** MCC **Ariane Brunet,** Rights and Democracy **Anu Bose,** NOIVMWC

	Facilitator	**Nuzhat Jafri**
	Recorder	**Ismat Jafri**
5:00 – 6:00 p.m.	**Observations on Women's Experience of the Shariah as an Ideology**	**Ziba Mir-Hosseini** Hauser Global Law Visiting Professor New York University
	Wrap-up **Question and Answer**	
	Facilitator: Alia Hogben	
7:30 p.m.	**DINNER**	
	Dinner/ Live Music/ Auction	

SPEECHES

WELCOME ADDRESS BY PRESIDENTS OF THE HOST CHAPTER

Barbara Siddiqui
Homa Ahmed

My name is Barbara Siddiqui and I am the Toronto Chapter President.
Asalaam Alaikum.

I am Homa and I am representing the Peel Chapter. Salaam Alaikum.

We have worked really well together, the Peel Chapter and the Toronto Chapter to help get ready for this. We'd like to thank you all very, very much for coming. We'd like to thank all of our special guests who are here and all of our volunteers who have worked really, really hard and will continue to work really hard.

So we hope you will participate fully and have a great conference day.

We'd also like to express our thanks to the National Board who have worked tirelessly all year and always do, and very rarely do people remember to say thank you. So would you please give them a round of applause.

Although we have a very short time, we'd like to ask you, in honour of the man who worked tirelessly for justice, peace and love for all mankind that we take a moment of silence in honour of Pope John Paul.

Thank you very much everyone. Have a wonderful conference and thanks again for coming.

Have a nice day.

NATIONAL PRESIDENT'S REMARKS

Razia Jaffer

Asalaam Alaikum and Good Morning

The National Board members, Nuzhat Jafri, Najet Hassan, Humera Ibrahim, Iman Zebian, Nina Karachi-Khaled, Solmaz Sahin, Alia Hogben our Executive Director, Andreea Muscurel our Administrative Assistant and I welcome you to this gathering of the Canadian Council of Muslim Women. We thank each and everyone of you for taking the time from your busy schedules to be with us to discuss an issue that has occupied us for most of the past year and a half. The issue before us is the intersection of multiculturalism, religious pluralism and women's equality rights. It is of significant importance to Muslim women as well as all Canadians. We are fortunate today to have with us scholars and activists who are well versed in these issues and who will help us unpack and understand them better.

CCMW is an organization that believes that we cannot take a backseat and let things happen to us. We have always led discussions and debated the issues that affect Muslim women in Canada. We are Canadians and our reality is here, so every issue that affects Canadian women affects us. Before we start the proceedings we would like to remind all of us of the Guiding Principles of CCMW. Copies of these are in your folders. We are committed to these principles and we ensure that all our work is based on them. We are Canadian, Muslim, Women and all that this implies.

We are believing Muslim women and proud of our faith. We are also part of this open and welcoming society of Canada. Within ourselves we value diversity of thought, diversity of our backgrounds and of our particular life experiences. The issues we will discuss today are issues that have divided the communities but we firmly believe that these issues need to be discussed. At our gatherings we want to create a space for open and stimulating dialogue within a respectful environment. We understand and appreciate that not everyone will agree on all points under discussion yet we want the discussion to happen in a respectful and safe environment.

We would like to thank the host Chapters of Toronto and Peel for hosting this conference. Members and volunteers from these Chapters, especially Peel, have worked very hard to make this day a success. We thank you all.

We would like to publicly thank our funders and supporters, Barbara Riley and Huguette LeClerc of the Status of Women, Canada, Donna James of Department of Canadian Heritage, Multiculturalism Program; Ariane Brunet of Rights and Democracy and Bev Wybrow of the Canadian Women's Foundation. We would also like to thank Marilou McPhedran for her tireless support, encouragement and advice and bringing our issue to the attention of many like-minded people. We are most grateful to our speakers who have taken time from their busy lives to be with us.

Last, but by no means least, we acknowledge our husbands and families. They support us, take pride in what we do, they cheer us on and show great patience when we get

carried away with the work of CCMW in the middle of the night. They even bring us cups of tea when we are working away. Most importantly they treat us as equals.

Before I end, I would once again like to urge everyone to be respectful of others' view points and of each other.

Thank you.

KEYNOTE

PROSPECTS AND LIMITATIONS OF LEGAL PROTECTION OF RIGHTS: NEED FOR INTERNAL TRANSFORMATION

Dr. Abdullahi An-Na'im
Professor of Law, Emory School of Law

Proactive Citizenship and the Legal Protection of Rights

Dr. Abdullahi An-Na`im

Bismi Allahi al-Rahman al-Rahim

As-salamu aliakum wa Rahmatu Allahi wa Barakatu

It is a tremendous honour and privilege to support the Canadian Council of Muslim Women but I wish to do so from a broader perspective of a call for proactive and truly inclusive citizenship for all Muslim citizens of Canada, regardless of their positions on such issues of public policy. All the Muslims of Canada have the right to be fully accepted as citizens of this country, but they continue to earn that right by also proactively engaging the values and institutions of the liberal secular state they have chosen to identify with. As citizens, they have the right to their identity, to address issues of public policy from their own perspective, but that self-perception and perspective must also remain open to change and transformation. In my view, the liberal secular state of Canada can secure the right of all Muslim citizens to self-determination provided they accept this premise and contribute to the development and well-being of the whole country, rather than entrench into a marginal ghetto of minority politics.

This call is premised on accepting the diversity and dynamism of Canadian Muslim communities (in the plural), which should be celebrated and engaged in international debate among Muslims, rather than suppressed as insignificant or undesirable. I also recall the *Hadith* of the Prophet that can be translated as saying "support your brother/sister, whether oppressed or oppressor". When asked, we understand how to support those who are oppressed, but how do we support those who are oppressors, the Prophet replied: "by turning them back form being oppressive." I am not suggesting that the Council is oppressive, but only wish my role to be one of challenging all sides to every issue. It is very uncomfortable to listen to me, but I believe that it is important to mediate tensions by challenging and flushing out issues - as the President of CCMW already emphasized, we should open up issues rather than to seek to close them.

I think that my remarks this morning here are more broadly addressing questions of legal protection of rights in general and questions of multiculturalism and pluralism which I hope we'll have a chance to debate or discuss further on in the panels today.

I am from Sudan, now an "African American" living in Atlanta, Georgia, and I am trying to follow very much what is happening regarding the issues we are discussing here. But very much I would like to say that I am trying to identify issues about the debate as well as issues in the debate. One can see already that there can be different ways of identifying what the debate is about. At some levels it is about arbitration and enforcement of arbitration awards by Canadian court, at another level it is about the possibility of having voices heard and having experiences reflected and accepted. It could be seen as a sort of a tension or debate between collective right to cultural self-

determination by Canadian Muslims on one hand and the individual rights of women on another hand. It could be seen as rights to a family and rights within the family.

My point to start with is to simply acknowledge that the multiplicity and ways in which the issues and the debate itself can be characterized, identified or described. And as I already stated, my purpose is not to endorse one position or another as such. Although I hope that ultimately I will be able to endorse whatever right there is on every side of the issue. I am not even sure how to classify or to identify for certain what the debate is about, rather my hope is to clarify the terms of the debate and to endorse the value of debate and so on.

To come to issues of legal protection of rights, I am a lawyer by training so I tend to think in legal terms and I like to think that I am lawyer enough not to be lawyerly and to see how limiting law is in fact. My caution is not to invest primarily in legal protection without also investing in the foundations of that legal protection. My sense is that legal protection of rights should not be taken for granted or assumed to be neutral as it claims to be. The idea of legal protection of rights already presupposes a lot in terms of cultural normative consensus about certain values, certain procedures and institutions. It also requires a deliberate building up of those institutions and articulation of those normative values before they come to take the hard edge of legal enforcement. So for me therefore the question is how to be aware and sensitive to the fact that legal protection is an outcome as well as a tool of social change. One must therefore be part of the process of legal protection both as a participant in its development and implementation as well as beneficiary of its application.

I am familiar with the Canadian legal system to some extent because I trained in Britain and I also taught at the University of Saskatchewan in the late ’80s for three years, but we don’t need to get into the technical aspects of it, although we can do that, if you like, later on. The point for me is to understand the nature of the system and its possibilities and limitations. Like any other legal system, the Canadian model for the protection of rights is the product of its own history, and aspects of that history were not always consistent with the values that the system has come to reflect and promote in its recent development. I am sure that we know how recent it is that certain values and institutions that are now taken for granted were not part of Canadian policy and legal system, like the global reach of immigration to Canada and the policy of multiculturalism. The Canadian Charter of Rights and its effective application is the product of struggles by various segments of the population, and some pockets of resistance to the scope and efficacy of legal protection of rights continue within the system itself.

This is all to be expected, even welcomed because it is the nature of social change and development. The dynamics of this process should also be seen in terms of regression being part of progression: that we cannot assume a continuous consistent development forward progression, whatever the forward may be in our respect. Sometimes we need to re- enact discourses, repeat certain scenarios and experiences because earlier cycles were not inclusive of all segments of the population, or not persuasive enough. It is not that I am pessimistic about the progress Canada achieved in the protection of rights, which is truly impressive. Rather, it is just simply to acknowledge that it has taken struggles and efforts and deliberate strategies to get where we are and that we can slide back into some of the darker moments of our collective experiences and so forth.

Therefore, for me the critical question is how to be part of this dynamic process of better and broader legal protection of the rights of all Canadians, of taking issues further and clarifying them, of exposing the darker corners of ambiguity and prejudice and racism and so on. The idea of human rights is about the rights of all human beings, even those who oppress others must have their human rights protected, without allowing them to oppress, have the right to be heard in the debate, and to have their point of view taken seriously. When I say that the debate must be fully inclusive, I mean of everybody, including and especially with whom we disagree strongly. In particular, the Canadian Council of Muslim Women should not only listen to its opponents, but also insist on the right of those opponents to have their views taken seriously and considered in the process of framing public policy or protection of rights.

From this perspective, and with all due respect, I wish to challenge the remarks that were made by the Quebec Minister of International Relations who is quoted to have said that she exalts all political parties at all levels in Canada to voice their opposition to Shari`a. She is also reported to have said that Quebec should turn down the immigration applications of anyone who abides by Islamic law. That's the way she was quoted on the internet, but I must recognize that she may have made her remarks in more nuance manner than what I have quoted. My purpose here is to strongly object to this sort of remarks, rather than criticize this particular leader though it would be particularly distressing if this is the attitude of a Minister of International Relations. Such views are arrogant, chauvinistic and simplistic because it assumes that there is an 'ideal model' or 'natural' Canadian who defines what Canada is and should remain to be for everybody else, telling them to fit this model or else go home, wherever that may be. On the contrary, every person who made a choice to become Canadian, and qualifies for that by Canadian law, is equally entitled to participate in determining what it means to be Canadian, to participate in setting and implementing public policies and legislation on any issue of national or provincial concern, as applicable. The Minister, or any other Canadian citizen, is of course entitled to have and express her views, whether in opposition or support of the application of Shari`a principles through arbitration. My point is that such remarks on all sides of the issue should be made in constructive and respectful manner.

One of the most profound insights I find in the field of human rights is by Albie Sacks, the Justice of the South African Constitutional Court, who defines human rights as the right to be the same and the right to be different. That is, human rights are about the rights all human beings to be fully accepted and respected as who they are, and not as others wish them to be. I am entitled to be treated equally though I am in fact different. I think that is a very valuable insight because we tend to assume that human rights are the rights of people who are like us and therefore they are entitled to these rights as we are in the way we are, and so on, instead of listening and appreciating the right of others to be different and to be accepted as such.

Another point I wish to make regarding the determination and implementation of public policy and legislation on matters of family law for Muslims, for instance, is about the self-perception of Muslims and their role in Canadian politics and society. I was recently travelling in South East Asia and talking to Muslims in Singapore and an idea came to me that, I am sure that someone else has thought of it and articulated more clearly, but my sense is, we remain a minority as long as we define ourselves as such. But if we choose

to define ourselves in broader terms, we will find that we are not in fact minorities. The idea of minorities assumes that there is homogenous and monolithic majority, and vice versa, while this is actually not true of either side. Each and every segment of any population is divided and united along various lines that coincide with the lines of division and unity among other segments. Thus, members of different religious, racial or ethnic communities may be united among themselves on that ground, that cannot be always assumed, but they can also be united with members of other communities in economic or political terms. Muslims can be members of trade unions or political parties that represent Christian, Hindu and Jewish members. The so-called model of white, male, middle-class, Christian Canadian who may see himself or be seen as representative of the homogenous majority is in fact part of a minority in some ways, and of a majority in other ways that include those who are neither white, male, middle-class nor Christian.

This is therefore an invitation to de-construct and re-construct the idea of majority/minority in terms of themes, issues, struggles, solidarities and values, and not as rigid persona characteristic as race, sex, religion or national origin. The question I am raising here is: how can Muslims remain open to identifying with other religious communities, to engage in the same struggles with them to advance shared values, or protect common interests? To be part of the majority on some important ways Muslims must learn how to build alliances, to define their issues in ways that attract the empathy and support of others, instead of alienating them or making them indifferent. We can re-invent our self every morning to be part of a majority in another sense by trying to conceive and re-define our positions, life situations and experiences in that dynamic and creative sense. I don't know if this idea is coming across clearly enough in these hurried remarks, but we can discuss it further later if you wish. For Canadian women or Muslims more generally to think of themselves as a minority is a choice, not a foregone conclusion. It is very empowering and liberating to discover that you can break away from the limitations and inhibitions of being a minority.

The two main points I have been making so far - the need for fully inclusive and free debate and the proactive view of citizenship - can be illustrated by recalling an early precedent of debates among liberal rationalists and conservative literalists Muslim scholars that took place more than a thousand years ago in Baghdad, the same Baghdad that the United States and Britain are colonizing now. By the end of the 8th Century, beginning of the 9th Century, there was a very lively and vigorous debate between proponents of two philosophical and theological perspectives among Muslim scholars. On the one hand, the *al-Mu`tazila* were the rationalists liberals who subscribed to a view of the Qur'an as created in history, and as such is open to human interpretation in the historical context of Islamic societies. *Al-Asha`ira*, on the other hand, took the Qur'an to be the eternal word of God, therefore not to be understood human within history. Ironically, however, the liberal *al-Mu`tazila* were tempted to co-opt the state to impose their view on others, which the Abbasy Caliph did for his own political ends. By so doing they legitimized the idea of state intervention to impose one view over others, instead of using persuasion to propagate it. As to be expected, the next Caliph shifted to favour *al-Asha`ira's* view and suppress that of *al-Mu`tazila*.

The cautionary to be drawn from that historical episode is also about the need for the religious neutrality of the state. Once allowed to dominate religious or philosophical discourse, then it will probably use that power for its own political objectives, rather than

the genuine merits of one position or the other. Yet, while one should be sceptical and suspicious of the motivations and objectives of the state, it is not possible to keep it out of such controversies altogether. Indeed, the state has a role in mediating and adjudicating issues of public concern. I am currently working on a project about secularism in Islamic societies. My contention is that Islamic societies are secular and that the state has always been secular, that there was never a time in Muslim history when the state was an Islamic state. My claim is that the state cannot be Islamic and that Shari`a cannot be enacted and enforced by the state because the authority of Shari`a is religious while that of law is political. In other words, if a principle of Shari`a is enforced as law, that would be as a matter of the political will of the state, and not the religious law of Islam. Otherwise, why would Shari`a principles need official enactment by the state to be enforceable as law? Another problem with the enactment of Shari`a principles is that there is so much diversity of opinion among Muslim scholars and schools that state legislation will have to be highly selective among competing, yet equally valid, views on any specific matter of law or policy. Of course you will have to wait for the book when it is ready in about a year from now to see how I support these claims.

The point I wish to emphasize here is that secularism should be seen as a process of mediation of tensions between two poles: the imperative need for the religious neutrality of the state, on the one hand, and connectedness of religion and politics, on the other. It is extremely dangerous and conceptually incoherent for the state to claim to be religious. Whenever we speak about the religion of the state what we are really talking about is the religion of those who control and manipulate the state. Once we see that, you will clearly see how dangerous it is to allow them to claim the sanctity of religion for their own political choices and priorities. That is why it is critical to insist on the religious neutrality of the state. At the same time we cannot really move away from the reality of the impact of religion on politics or the connectedness between religion and politics because believers will act politically in accordance with their beliefs, as all human beings tend to do. That is, while it is clear to me that there should be institutional separation between Islam and the state, but I also know, a Muslim myself, that Islam and politics cannot be separated because my political behaviour is influenced by my religious beliefs. Of course I and other Muslims do not think and behave only as Muslims and nothing but Muslims, but Islam is critically important for those who identify as Muslims.

I suggest to you that principles of constitutionalism, human rights and citizenship provide an essential framework for the mediation of such tensions. Proactive participation in building the culture and institutions of legal protection of rights I emphasized earlier is also part of that framework. But in the final analysis, the whole process is about the dynamic of cultural transformation within and among Muslim communities for our purposes of promoting these values and proactive citizenship regarding whatever issues of public policy are being debated. The principles and institutions indicated above can only come to life, and achieve their desired objectives, through the active agency of human beings. It is from this perspective that I now turn to current debate in Canada which is the subject of this workshop. The question therefore is what of our values as Canadian Muslims do we want to see as part of the evolving dynamic Canadian, legal, constitutional and other institutions that are so critical to our lives.

All those of us who identify as Muslims realize and accept that we are bound by Shari`a, as the normative system of our religion, wherever we are and whatever the state does or

fails to do. This may sound obvious, but I wish to state it clearly so that there is no reason for confusion in this regard. Our obligation of Muslims to honour and observe Shari`a is in our lives is not dependent on what the state does or fails to do, and regardless of what else is happening around us. I think it is really very instructive for Muslims to appreciate and reflect on the fact that we can never abdicate our responsibility for being Muslims. That we are constantly responsible and accountable, we cannot delegate this obligation to the state or those whom we accept as our religious leaders. From this perspective, it is ironic that some of us seek to avoid responsibility by looking for *fatwa* and arbitration decisions, though they still remain responsible as Muslims for what they do or refrain from doing. We should all of course seek knowledge and understanding of the precepts of Islam, but must always make up our own minds and accept responsibility for our actions. Since a Muslim is responsible and accountable for our actions, including how we resolve our family disputes, why seek to abdicate or delegate that responsibility to someone else when we know that it does not work that way at all.

Another point to make here is that our individual and inescapable obligation to uphold Shari`a does not tell us what the right view of Shari`a is on the specific issue at hand. We must all strive to find and understand relevant sources of Shari`a in our own specific context and individual situation. Some of us try to avoid responsibility for this by claiming a distinction between Shari`a and Fiqh principles, to say that Shari`a is binding while Fiqh principles are not, because we find it psychologically difficult to refuse to comply with what is presented to us as being part of Shari`a. I don't believe that the distinction between Sharia and Fiqah is useful here because we can only know either of the two through human understanding. Any possibility of understanding of Qur'an and Sunna of the Prophet is inherently implicated in human reason, reflection and experience, it cannot be otherwise. In other words, the religious and the secular as entangled, for religion to be relevant to life it has to be implicated in the secular. The dichotomy of the secular and the religious is not a very helpful dichotomy. The dichotomy of Shari`a and Fiqh is not helpful because whether Shar`ia or Fiqh principle, it's always the product of human understanding in historical context. Since the Qur'an does not speak out itself, it is human judgment and reason in specific context that determines which texts are relevant, how to understand and apply them to the facts on the ground.

Another relevant consideration is the point I made earlier that Shari`a principles cannot be enacted and enforced by the state. They cease to be Shari`a by the very act of enacting them because they become dependent on the political will of the state and not the religious authority of Islam in the minds and hearts of Muslims. Since enactment also requires selectivity among competing equally valid views, those who make the choice for state enforcement are necessarily imposing their understanding of Shari`a. The fact that ruling elite claim to establish an Islamic state or to enforce Shari`a does not make it true.

Regarding so-called family law aspects of Shari`a, it should first be noted that this category itself is a colonial idea that follows European models of administration of justice. This colonial 'exception' of Shari`a family law was made for the wrong reasons, in that colonial administrations did not care about family relations among Muslims so long such issues of property, commerce, criminal and constitutional matters were governed by European codes to facilitate the economic exploitation of colonized societies. The point for me is that the enforcement of Shari`a in the family law field is

the colonial phenomenon, done for colonial reasons, and not as a matter of respect for the Islamic tradition. Therefore, this is not a matter Muslims of Canada should be concerned about today, and will in fact find counter-productive and deeply problematic if it is attempted in Canada for the following reason.

The continued application of these principles in isolation, while the rest of Shari`a was displaced by European codes and legal systems is very dangerous because family law Shari`a remained trapped in medieval social and economic context. All the so-called 'reforms' in this field in Islamic countries during the last few decades are limited by the fact they all depend on pre-existing principles of Shari`a, and the methodology of *Usul al-Fiqah*. The selectivity of these reforms from among existing Fiqh cannot protect the rights of women to equality and justice in family relations because they are all dependent on principles that were developed under drastically different context of a few Islamic societies a thousand years ago. So what Muslims now call Shari`a family law have been trapped in a social, economic, political, psychological, sociological capsule of many centuries ago, and as such totally out of step with the present demographics, educational, empowerment, economic influence, autonomy and independence of Muslim women throughout the world, especially those who live in countries like Canada. I am therefore proposing that family disputes should be not be settled according to those traditional understandings of Shari`a anywhere in the world today, and not only in Canada.

In conclusion, as I have explained in the introduction to "Islamic Family Law in the Globalizing World (2002)" all state legislation and enforcement is necessarily secular, and should be clearly seen as such. In my view, the proponents of the application of those principles in the family law field through the enforcement of arbitration are not really clear on the full implications of what they are proposing. But Since Shari`a principles will continue to be extremely influential among Muslims even when not enforced by the state as such, internal debates must continue about the necessary degree and methodology of Islamic reform. We must still open up the shell of Shari`a family law even at the personal private level, we challenge the assumptions, the methodology and jurisprudence that continues to colonize the hearts and minds of Muslims regardless of what the state does or does not do. In challenging the proposed enforcement of Shari`a through arbitration awards in Canada we must also continue to struggle for all the concerns and priorities of immigrant communities, as mentioned earlier, challenge the sort of chauvinism and racial prejudice that is reflected in the remarks attributed to the Quebec Minister, as well as sexism and patriarchy among Muslims. I am being very blunt here with all due respect, but the issues are too serious to be polite.

Various factions of Canadian Muslims may simply seek to co-opt the state to promote their agenda, whatever they may be, without appreciating the risks of deep rooted chauvinism and bias that persists among political leaders and state officials. But we must all appreciate that co-optation is a two-way street, if we seek to co-opt then we also risk being co-opted by the state, which is more able and willing to co-opt than being co-opted. The state and its institutions can never be neutral, and that is why we must all affirm the rule of law and protection of human rights, instead of pretending that we can use it for our short term objectives and thereby legitimize its further exploitation by all factions and interest groups. The better alternative is to promote our objections among popular constituencies and build political alliances, operate within the constitutional and human rights framework.

Therefore my plea is to resist this proposal, but to resist it in a way that takes the complexity, depth and risks seriously. I am sure that all the kinds of questions I am raising here have been raised in the debate here in Canada, but we now have an opportunity to discuss these questions in detail and with sufficient specific information about the Shari`a family law experiences of different societies around the world.

Thank you very much.

KEYNOTE

TESTING THE BOUNDS OF LIBERAL MULTICULTURALISM

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Testing the Bounds of Liberal Multiculturalism?

Dr. Will Kymlicka

The idea of "multiculturalism" has played a central role in recent public debates regarding Muslim family law tribunals. Proponents of these tribunals have often appealed to the idea of multiculturalism, and argued that anyone who endorses Canada's multiculturalism policy should accept the legitimacy of sharia-based family law arbitration.[1] Other commentators draw the opposite conclusion: the fact that multiculturalism can be invoked to justify sharia courts shows that the very idea of multiculturalism is dangerous, and should be abandoned. According to Tarek Fatah of the Muslim Canadian Congress, for example, sharia arbitration is an example of "multiculturalism run amok".[2] Yet others argue that while multiculturalism is "a great Canadian value", it is being "abused" by defenders of these tribunals.[3]

Does the idea of multiculturalism support proposals for faith-based family law arbitration? This is an important question, I believe, since multiculturalism has played a central role in Canadian political life for the past thirty years. It has not only had an enormous symbolic effect, reshaping our very ideas of what it is to be Canadian, but has also had important substantive effects on the way that public institutions operate. Whether in the schools, media, police, social services, or in the legal and political system, multiculturalism policies and programs have helped make public institutions in Canada more open to the participation of immigrants and ethnic minorities.[4] I believe that these effects have generally been positive, and indeed Canada's multiculturalism policy is often seen around the world as a success story.

It is important, therefore, to figure out how exactly the issue of faith-based family law arbitration is connected to that of multiculturalism. To answer this question, we need to step back and look at the history of the multiculturalism policy. The policy is neither simple nor static: its main goals have changed significantly over time, and may be going through yet another transformation.

1. The Liberal Foundations of Canadian Multiculturalism

The multiculturalism policy was originally introduced by Prime Minister Pierre Elliot Trudeau in September 1971. The crucial point about this original policy, for our purposes, is that it was a very liberal conception of multiculturalism, grounded in liberal ideas of individual freedom. As Trudeau put it when introducing the policy to the House of Commons, "a policy of multiculturalism within a bilingual framework is basically the conscious support of individual freedom of choice. We are free to be ourselves" (Trudeau

[1] See, for example, Part 4 ("Multiculturalism") in Syed Mumtaz Ali's submission to the Ontario Civil Justice Review Task Force (http://muslim-canada.org/submission).
[2] See also the statement of the Women Living Under Muslim Laws (April 7, 2005) which says that conservatives within Ontario's Muslim community have "sought to take advantage of state policies of multiculturalism".
[3] "Submission to Ms. Marion Boyd", Canadian Council of Muslim Women, July 2004 (www.ccmw.com).
[4] For evidence, see Kymlicka 1998; and Bloemraad 2005.

1971: 8546). Each individual should be free to decide whether, or to what extent, they wish to maintain an inherited ethnic or religious identity, and to what extent they wish to challenge or reject the practices associated with their inherited group membership. People who wish to maintain and express their ethnic or religious identity should be free to do so without fear of discrimination or stigmatization within the larger society – they should not have to hide or abandon their ethnic identity in order to participate in society. But nor should anyone be forced to maintain an ethnic identity, or to preserve its traditional practices, if they no longer wish to do so – they should not be forced by other group members or group leaders to follow customs they no longer value.

In this sense, the adoption of multiculturalism in 1971 was part of a more general liberal revolution in Canada, starting with the (statutory) Bill of Rights in 1960 and capped by the adoption of the (constitutional) Charter of Rights in 1982 (which is very liberal by international standards). In this 20 to 25-year period, many traditional hierarchies and forms of social control in Canadian society were contested in the name of individual freedom and equality, including restrictions on birth control and abortion, the criminalization of homosexuality, as well as various forms of discrimination against women, blacks, Aboriginals and religious minorities.

The multiculturalism policy was seen as a natural extension of this liberal logic of individual rights, freedom of choice, and non-discrimination. It is thus not surprising that government documents explaining the origins of the multiculturalism policy often start with the Universal Declaration of Human Rights in 1948, and the Canadian Bill of Rights in 1960. The fundamental moral impulses behind the policy were the liberal values of individual freedom and equal citizenship on a non-discriminatory basis.

This liberal conception of multiculturalism is not unique to Canada. According to James Jupp - who played a pivotal role in defining Australia's multiculturalism policy - multiculturalism in Australia "is essentially a liberal ideology which operates within liberal institutions with the universal approval of liberal attitudes. In accepts that all humans should be treated as equals and that different cultures can co-exist if they accept liberal values" (Jupp 1996: 40).

We can distinguish this liberal ideal of multiculturalism from a different model, which we might call “traditionalist” or “communitarian”. On this alternate model, the goal of multiculturalism is to enable a group to maintain its inherited practices even if they violate the rights of individuals (eg., coerced arranged marriages; female genital mutilation; denying education to girls, honour killings, the “cultural defense” in criminal law, etc.). Traditionalist multiculturalism seeks to enhance the ability of a group to enforce the group’s practices on its members: group leaders should have the power to police the behaviour of group members, to pressure members to follow the inherited practices of the community, and to sanction those who deviate from them, even if this requires that the community be exempted from constitutional guarantees of individual rights.[5]

This is obviously a very different conception of multiculturalism. The liberal model of multiculturalism is based on the principle that all individuals should be free to make their

[5] A historical example of such a traditionalist conception of multiculturalism is the millet system of the Ottoman Empire.

own choices about whether or how to express and ethnic and religious identity, and that all groups should respect basic liberal values of human rights and democracy. The traditionalist model of multiculturalism is based on the principle of cultural relativism: each group should be able to practice its own customs (including its customary forms of enforcement and punishment), whether or not they respect principles of individual freedom, human rights and democracy.

In both the popular and academic debates, it is often assumed that multiculturalism must take this traditionalist form. It is assumed that proponents of multiculturalism are committed to cultural relativism, and reject the values of Enlightenment liberalism, including its ideal of universal human rights. For example, the international organization Women Living Under Muslim Laws has associated the spread of multiculturalism policies in the West with the spread of cultural relativism (WLUML 2005). Several academics have made the same claim (eg., Barry 2001). Other analysts, who acknowledge that there are both liberal and traditionalist conceptions of multiculturalism, assert there has been a long-standing struggle between the two over how to interpret the ideal of multiculturalism (Tamir 1996).

Yet if we examine the origins of the multiculturalism policy in Canada, what is striking is that no one defended, or even discussed, the traditionalist model. It is not surprising that Trudeau himself was in favour of the liberal model of multiculturalism – his passionate commitment to liberal values is well-known. What is more surprising, perhaps, is that no one else who participated in the original Canadian debates expressed any interest in the traditionalist model. In fact, so far as I can tell, the first time that commentators started to associate multiculturalism with cultural relativism in the Canadian public debate was in 1990. This debate was spurred in part by Reginald Bibby's book Mosaic Madness, which asked whether the logic of multiculturalism entailed allowing immigrant groups to maintain whatever practices they brought with them, no matter how illiberal or undemocratic. A similar charge was made by Neil Bissoondath and Richard Gwyn in influential books in the early 1990s (Bissoondath 1993; Gwyn 1995), and was picked up by countless newspaper columnists.

But this debate only arose twenty years after the policy had been adopted. By 1990, the multiculturalism policy had not only been in operation for twenty years, but it had been constitutionally entrenched in the 1982 Charter of Rights and Freedoms, and given a statutory basis in the 1988 Multiculturalism Act. Multiculturalism policies had also diffused beyond the federal government to the provincial and municipal levels. Throughout this key twenty-year period from 1970 to 1990 when multiculturalism was being defined and diffused, it was simply taken for granted that multiculturalism was grounded in (and constrained by) liberal values of individual freedom and equality.

Why wasn't there more of a debate about the possibility that multiculturalism could be used (or abused) to maintain illiberal practices? The answer, I think, lies with the nature of the groups that initially demanded multiculturalism. The groups who initially mobilized for multiculturalism in Canada, and for whom the policy was initially designed, were long-settled European-origin ethnic groups - above all the Ukrainians, and to a lesser extent the Italians, Poles, Czechs and Slovaks, Germans, Dutch,

Scandinavians.[6] It was these "white ethnics" who pushed for multiculturalism in the 1960s, leading to its adoption in 1971.

It is important to remember that Canada had a racially discriminatory immigration policy until the 1960s that kept most Asians, blacks and Arabs out of the country. It was only in the mid-1960s that these non-white "visible minorities" started to emigrate in significant numbers to Canada. And it was only several years later, long after the multiculturalism policy was already established, that they started to gain a significant voice in the debate.

In the 1960s, therefore, the ethnic groups that dominated the public debate over multiculturalism were white European groups. Most of these groups had been present in Canada for two or three generations, and were typically very well-integrated, not only economically but also politically. When they first arrived in Canada, some native-born Canadians expressed scepticism about their capacity to integrate into society and to adjust to liberal-democratic values (Palmer 1994). However, by the mid-1960s these groups had proven their loyalty to Canada in World War II, were often fiercely anti-Communist during the Cold War, and were seen as proud and patriotic Canadians, as well as fully committed to the basic liberal-democratic principles of the Canadian state. They had proven their willingness and ability to work within the rules of a liberal-democratic order. The idea that such groups might use multiculturalism to maintain illiberal practices did not even arise.

So multiculturalism was initially designed for well-integrated European ethnic groups whose liberal-democratic credentials were not in dispute: it was a way of recognizing and rewarding their successful integration. However, soon after it was adopted, the focus of the multiculturalism policy started to change. Increasing numbers of non-European immigrants were arriving, and new public policies were needed to assist in their settlement and integration. Although it was not originally intended as a tool for integrating newcomers, the idea of "multiculturalism" provided a convenient and already-established discourse and institutional infrastructure to negotiate these challenges. As a result, both the government and immigrant organizations started to adapt the language and programs of multiculturalism to focus on the needs of newer non-European immigrants.

This led to important changes in the multiculturalism policy. For example, questions about language training and naturalization became more important, as did anti-racism programs – an issue that had not arisen for the `white ethnics'. Indeed, by the late 1980s, anti-racism programs became the largest recipient of multiculturalism funding. In short, a policy that initially arose as an acknowledgement of the successful integration of long-settled white ethnic groups became redefined as a tool for assisting in the integration of newer non-European immigrants.

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[6] It's hardly an overstatement to say that we owe the multiculturalism policy to the relentless efforts of a handful of Ukrainian-Canadians who fought persistently in the 1960s for the policy – see Jaworsky 1979; Lupul 2005. The immediate trigger for this mobilization was the Royal Commission on Bilingualism and Biculturalism, and its mandate to enhance the (French-English) "duality" of Canada as a way of accommodating and defusing Quebecois nationalism. The white ethnics believed that the B&B Commission would essentially carve up public resources and offices between the English and French, leaving the white ethnics out in the cold. See Kymlicka 2004.

In retrospect, this is a striking example of policy reinvention. However, it was not uncontroversial. For one thing, some of the European ethnic groups started to complain that the policy had been "hijacked" by newer immigrants: the groups who had fought hard to establish the policy were now being ignored by it. More importantly, however, this shift was seen as raising new risks. Granting multicultural rights or benefits to European ethnic groups was seen as a fairly safe policy: there was no fear that such groups would use their rights or resources in ways that threatened liberal-democratic values. But with newcomers, particularly from countries that were not liberal-democracies, there was a risk that such groups would attempt to use their multiculturalism privileges in ways that violated liberal-democratic values.[7] A certain degree of trust is therefore implicit in extending multiculturalism to newcomers.

Some Canadians did not want to take this risk: they would have preferred to wait until there was firm proof that the newcomers really had internalized liberal-democratic values, and had successfully integrated into Canada's constitutional order, before granting them access to multiculturalism's benefits. We can see similar fears in European debates on multiculturalism. Indeed, in the European context, it appears that the majority of governments (and their citizens) have decided that the risk is not worth taking. Most European countries have not adopted multiculturalism policies, and the few that have are backtracking on them.[8]

In Canada, by contrast, despite these concerns, the policy has remained in place. While public support for multiculturalism has gone up and down over the years, most Canadians appear willing to take the risk of granting multiculturalism benefits to newcomers even before they have fully integrated. Most Canadians appear to endorse what social scientists call the "liberal expectancy" – ie., the view that if a liberal-democratic state reaches out to newcomers, and offers them fair terms of integration into a liberal order, they will over time accept these terms, and become loyal and law-abiding liberal citizens. Based on this liberal expectancy, Canadians have been willing to trust immigrants not to misuse the benefits accorded them under multiculturalism.

Access to multiculturalism, on this view, is not a reward for successfully integrating, but is part of the integration process, a way of encouraging and assisting immigrants to find their place within the larger Canadian order. Using multiculturalism in this way is risky, since there is no guarantee that newcomers will not attempt to use multiculturalism in ways that violate liberal-democratic values. But in Canada, unlike in Europe, a decision

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[7] A clear expression of this fear comes from Gwyn's book, where he states:

> "To put the problem at its starkest, if female genital mutilation is a genuinely distinctive cultural practice, as it is among Somalis and others, then since official multiculturalism's purpose is to `preserve' and `enhance' the values and habits of all multicultural groups, why should this practice be disallowed in Canada any more than singing `O Sole Mio' or Highland dancing?" (Gwyn 1995: 189).

In this quote, multiculturalism for European groups like the Italians and Scots is described as a matter of benign differences in music, whereas multiculturalism for non-European groups like the Somalis is seen as raising the potential for conflicts over fundamental moral and political values.

[8] On the retreat from multiculturalism in Europe, see Joppke 2004; Entzinger 2003; Brubaker 2001; Back et al 2002.

has been made that the potential benefits in terms of successful integration outweigh the risks.

Why has Canada come to a different conclusion than European countries? Many people would like to think that this reflects a distinctly Canadian virtue of tolerance, and lack of xenophobia. I suspect that the answer lies elsewhere. Part of the answer, I think, is simply timing. As I noted earlier, a "safe" form of multiculturalism had been in operation for almost twenty years before people started to ask whether non-European immigrants would use it as a justification to maintain illiberal practices. Over these twenty years, not only had multiculturalism become a central part of the Canadian identity, but non-European groups had already, slowly and imperceptibly, taken their place within the larger framework of Canadian multiculturalism. Since the 1970s, visible minority ethnic organizations had begun to take a seat at the table, and a public record was available of what sorts of demands they had made in the name of multiculturalism. And the reality is that no major immigrant organization had demanded the right to maintain illiberal practices. The Somalis had not demanded exemption from laws against FGM;[9] Pakistanis had not demanded exemption from laws against coerced marriages; and so on. If non-European immigrant groups were going to contest the basic principles of liberal-democracy in the name of multiculturalism, one might have expected it to have occurred already by 1990, but it hadn't. These groups had already developed a track record of working within the framework of a liberal (human rights-based) multiculturalism, and this record helped to assuage public fears about the risks of extending multiculturalism to newcomers.[10] In Europe, by contrast, there was no pre-existing multiculturalism policy into which non-European immigrant groups could fit.

2. The Debate about Islam and Liberal Multiculturalism

But there is another factor that distinguishes Canada from Europe - namely, the role of Islam. So far, I have been discussing "non-European immigrants" as a single category, all of whom are seen as potential bearers of values and traditions at odds with the values of

[9] The Canadian government in 1995 gathered together representatives of the various ethnic groups from countries where FGM is traditionally practised, in order to discuss how this issue should be dealt with (Government of Canada 1995). There was unanimous agreement that the practice should not be allowed in Canada, and the discussion quickly moved to questions of how best to inform people within these groups about the law and the reasoning behind it (cf. Levine 1999; OHRC 1996). Of course, the fact that ethnic organizations disavow these illiberal practices does not mean that individual members of the group do not attempt in private to maintain them, or to avoid punishment for them. But there is nothing in Canada like the debates in the UK re forced arranged marriages (Phillips 2003) or in France about FGM (Dembour 2002) or even in the US about the cultural defense (Renteln 2004).

[10] On the broad consensus across racial/religious lines on a human rights-based liberal multiculturalism in Canada, see Howard-Hassman 2003. For example, no one has attempted to invoke the multiculturalism clause (Section 27) of the Constitution to defend the practice of FGM, and any such attempt would certainly be rejected by the courts. Indeed, Canada was one of the first countries in the world to accept that a girl could be granted refugee status if she faces a risk of being subject to FGM if returned to her country of origin (Levine 1999: 40). Since Canada views FGM as persecution for the purposes of refugee determination, it can hardly permit it to be practiced within Canada.

Western liberal-democracy. But as we all know, some non-European groups are seen as more of a threat to these values than others. In particular, throughout the West today, it is Muslims who are seen as most likely to be culturally and religiously committed to illiberal practices, and/or as supporters of undemocratic political movements. This is particularly the case after 9/11, but has been true for several years now. (There is of course a long history of Islamophobia in Europe, dating back to the Crusades, but I think its modern resurgence dates to the Islamic revolution in Iran, with its virulent anti-Western rhetoric).

As a result, the perception within host countries that multiculturalism is a high-risk policy depends in part on whether Muslims the largest immigrant group, or whether they are a relatively small proportion of the immigrant population. And this points to a fundamental difference between Europe and Canada. In most of Western Europe, the largest group of non-European immigrants is Muslims – up to 80% or 90% in countries like France, Spain, Italy, Denmark, etc. Indeed, the term "immigrant" and "Muslim" are seen as virtually interchangeable in these countries. And many of these Muslim immigrants are from parts of Africa or South Asia where traditions of FGM or arranged marriages persist, or where Islamic fundamentalism is strong.[11] Racism and Islamophobia combine to generate a perception of recent non-European immigrants as illiberal and untrustworthy, and hence, of multiculturalism as a high-risk policy.

In Canada, by contrast, Muslims are a small portion of the overall population (less than 2%), and form only a small fraction of recent non-European immigration. Ninety percent of Canada's recent immigrants are not Muslim. The largest and most politically active groups of non-European immigrants have been Caribbean blacks and East Asians. It is these groups that have dominated Canadian debates about multiculturalism, and they are not perceived as raising the same risks to liberal-democratic values.

Of course all non-European groups in Canada have faced discrimination and prejudice. But the nature of the prejudice differs in ways that have a profound influence on the issue of multiculturalism. Consider the Caribbean blacks, such as the Jamaicans, who were the first large group of non-white immigrants arriving in the late 1960s and early 1970s. There are certainly many prejudices and stereotypes about Caribbean blacks, including perceptions of criminality, laziness, irresponsibility, lack of intelligence, and so on - in short, old-fashioned racism (Henry 1994). But the idea that these groups have a religious or cultural commitment to offensive practices or illiberal political movements is not particularly salient – after all, they are overwhelmingly Protestants, and hence assumed to share a basic Christian ethos. Multicultural recognition of their ethnocultural identity – reflected in such things as Black History Month, the Caribana festival, and anti-racism programs – is not seen as endorsing illiberal practices or undemocratic political movements. The same holds for Latin American immigrants, such as (predominantly Catholic) refugees from Chile or Guatamela. They face racism in Canada, but are not seen as carriers of illiberal values or supporters of undemocratic political movements, and accommodating them through multiculturalism is not seen as posing a threat to liberal-democratic values.

[11] The popular view in the West that FGM is a "Muslim" practice is doubly incorrect: FGM is practiced by Christians, Jews and animists as well as Muslims in parts of sub-Saharan Africa, and is strongly disavowed by many Muslim leaders. Yet this popular perception is very strong.

The next large wave of non-white immigrants came from East Asia – particularly the Chinese, Koreans, Vietnamese and Filipinos. Indeed East Asians remain by far the largest source of new immigration to Canada. Here again, there are a range of prejudices and stereotypes against East Asians, but these immigrants are not widely perceived as being prone to religious fundamentalism or as having a strong cultural or religious commitment to illiberal practices. East Asian religions, such as Buddhism and Confucianism, are viewed in Canada as essentially benign and pacific.[12] Moreover, many of these immigrants are Christian (particularly from Korea and the Philippines).

In short, despite their racial prejudices, most Canadians have come to trust that Caribbeans and East Asians will integrate into the liberal-democratic mainstream, and that offering multicultural privileges to such groups is not a threat to the liberal-democratic order. And since these are the groups that have dominated public debates in Canada about multiculturalism, the policy has retained broad public support. The debate in Canada might have been very different if, as in Europe, ninety percent of our immigrants were Muslim.

It is a complicated question why Muslims have been singled out as uniquely or distinctly prone to illiberalism. After all, illiberal practices can be found in all cultures, not least European cultures. Indeed, if we look at court cases where immigrants to North America have invoked "culture" or "tradition" as an explanation or justification for the mistreatment of women or children, we are as likely to find East Asian and Caribbean immigrants as Muslims.[13] So why single out Muslims?

Part of the answer is, of course, the tendency to treat Muslims as a single homogeneous community, ignoring the vast differences between different strands of Islam in different regions of the world. But it also a result of two further factors. First, while most immigrant groups bring with them patriarchal practices, it is widely assumed that Muslims are more likely than other groups to defend these practices in the name of religion. Hmong and Haitian immigrants charged with wife-abuse have sometimes said that this is part of their "culture", but they have not claimed that they have a religious right or religious obligation to engage in such practices. Where people believe they have a religious obligation or religious sanction to engage in certain practices, they are more likely to fight to defend such practices, and to invoke multiculturalism in that fight.

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[12] This is partly due to the extraordinary influence of the Dalai Lama in shaping Western perceptions of Buddhism. The reality on the ground in East Asia is rather more complex. Buddhist monks in Sri Lanka, for example, have been amongst the most rabid opponents of sharing power with the (Hindu) Tamil minority.

[13] See the cases discussed in Okin 1999 and Renteln 2004 where (non-Muslim) Asian immigrants in the United States invoked "culture" as a justification for mistreating women. A similar case arose recently in Canada when a Haitian man in Montreal invoked "cultural tradition" as a mitigating factor when charged with domestic and sexual violence, and the presiding judge accepted this as a reason for a reduced sentence. There was an immediate outcry from Haitian immigrant organizations themselves, who vehemently disputed that Haitian culture predisposed people to violence, or that Haitian people were somehow less capable of respecting rights. The defendant's invoking of the cultural defense was seen as a betrayal of his community, by perpetuating stereotypes about the group's culture, habits, and moral values.

This point takes on added significance given the larger international context. There is a worldwide movement towards the politicization of Islam, often in a conservative form, and immigrants who wish to maintain a conservative form of Islam are likely to receive moral support and perhaps even financial support from external sources. And of course the radical tip of this international Islamist movement is seen as linked to international terrorism.

In all of these respects, Muslims are seen as raising different kinds of challenges than other non-European immigrant groups. Caribbean, Latin American and East Asian groups often bring with them illiberal practices, but since these are typically seen simply as "customs" or "traditions", it is widely hoped and expected that the attractions of liberal multiculturalism will persuade groups to transform their practices in a liberal direction. This "liberal expectancy" is more difficult to sustain, however, when illiberal practices are defined as matters of faith, and where there is an international movement encouraging immigrants to defend an uncompromising and conservative interpretation of their faith. Multiculturalism is much riskier in the latter context. And, rightly or wrongly, it is predominantly (if not exclusively) Muslims who are seen as falling into this latter camp.[14]

So where Muslims are seen as the main proponents and beneficiaries of multiculturalism it is more difficult to generate or sustain public support. This is the situation today in much of Europe. Two countries in Europe that have adopted multiculturalism policies – namely, Britain and the Netherlands - are exceptions that prove the rule. In both cases, the initial demand for multiculturalism came from non-Muslim groups, and a backlash arose when Muslims became the main focus of the debate. In Britain, the initial push for multiculturalism was spearheaded by (Christian) Caribbean Blacks, but political mobilization and public debate is now dominated by South Asian Muslims, and the result has been a decided cooling of public support for multiculturalism. A recent article in The Spectator was titled "How Islam Has Killed Multiculturalism" (Liddle 2004). The title and article are decidedly biased,[15] but it seems true that public support for multiculturalism has declined as Muslims have come to be seen as the main proponents or beneficiaries of the policy.

A similar story applies to the Netherlands. The original beneficiaries of multiculturalism in the Netherlands were two former colonial groups - the (Christian) Moluccans from Indonesia and the (predominantly Hindu) Surinamese. However, over the past fifteen years, public debate on multiculturalism has become dominated by two more recent immigrant groups – the Turks and Moroccans, both Muslim. And here again, this shift in focus was accompanied by a strong backlash against (and retreat from) multiculturalism. So even those European societies that were able to extend a degree of trust and openness to non-European immigrants have balked when Islam became the issue. There are indeed

[14] In the 1980s, Sikhs were also seen in Canada as falling into this category. There was a conservative religious revival within the Sikh community, connected to a radicalized (and violent) international political movement, and many Canadians feared that multiculturalism was being used as a tool by illiberal forces. This fear has largely dissipated, in part due to concerted efforts within the Sikh community to marginalize the radicals, particularly after the Air India bombing. This provides a hopeful precedent that groups can overcome public fears.

[15] Note that Liddle says it is Islam, not Islamophobia, that has killed multiculturalism.

very few (if any) cases in the Western democracies where multiculturalism policies have endured when they are primarily demanded by, and designed for, Muslims.

In Canada, however, public debates about multiculturalism have never focused on Muslims. Debates were driven at first by the Ukrainians and Italians in the 1960s and 1970s, then by the Jamaicans in the 1980s, and more recently by the Chinese. This raises the question of whether multiculturalism would endure in Canada if Muslims moved to the centre of Canadian debates. And indeed, in a sense, that is the situation we are currently in. Since 9/11, the spotlight has been put on Muslims in Canada, and they are now (involuntarily) the focus of public debates, even though they remain a small fraction of our immigrant population. As a result, I believe that the Canadian commitment to liberal multiculturalism is being tested in a way it has never been before. Now, for the first time, we will find out whether liberal multiculturalism will endure in Canada under the sorts of conditions and challenges that have eroded it in much of Europe.

There are really two separate questions. On the one hand, will native-born Canadians 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? On the other hand, will Muslim leaders and organizations 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?

3. Sharia Tribunals as a (Misleading) Test Case

This is the larger context within which the sharia court issue has arisen. Indeed, I believe that the sharia tribunal issue has become a lightning rod precisely because it is a symbol of these larger unresolved questions about Islam and liberal multiculturalism. The issue of how to adjudicate family law disputes is a very important one on its own terms. But it has also become a symbolic issue. Ever since 9/11, the general public, and the press, have been waiting for an issue to arise that could be used as a test-case for whether everyone respects the rules of liberal multiculturalism. And, for better or worse, many commentators have decided that the sharia tribunals will be that test case.[16]

[16] It took awhile for such a test case to emerge because in the immediate aftermath of 9/11, the reaction of many Muslim organizations was to lie low and try to avoid the public spotlight. Insofar as they did participate in public debates, it was not so much to advance new multiculturalism claims, but rather to defend much more basic civil rights in the face of anti-Muslim hate crimes, discrimination, racial profiling by the police, and the use of draconian "security certificates". Indeed, post-9/11, Muslim organizations have become some of the most vocal defenders of traditional civil rights in Canada. However, what the press wanted was an issue where Muslims were demanding some "special" rights or treatment in the name of multiculturalism. And the sharia court proposal seemed to fill the bill, although as I explain below I think this is in fact misleading. Had this issue not arisen, the press would have almost certainly continued to look for some other issue that could be invoked as a test for Islam and liberal multiculturalism, such as religious schooling, or a free speech case (a la Rushdie, or the Van Gogh documentary).

One reason why it is being invoked as a test case is that can be interpreted as a challenge to liberal multiculturalism from both directions. On the one hand, some commentators argue that the public debate is evidence that native-born Canadians are applying a double-standard to Muslims. After all, ever since the 1991 Arbitration Act, other religious groups have set up faith-based arbitration tribunals without any public debate. It was only when a Muslim organization publicly declared its intention to set up an Islamic faith-based tribunal, as permitted by law, that the public furor arose. This can be seen as a case of Canadians refusing to extend Muslims the same trust they have shown to other groups, and abandoning the liberal expectancy that underpins the use of multiculturalism as a tool for integration.

On the other hand, one can also argue that some of the Muslim leaders who have proposed sharia tribunals see this as part of a broader campaign to institutionalize a conservative form of Islam within the Canadian judicial system. They appear to be using it as a first step towards securing broader exemptions from the normal constraints of liberal multiculturalism, and pushing towards a more traditionalist conception of multiculturalism, in which group members would face increasing pressure to follow (conservative) group norms. Some Muslim leaders have even speculated that sharia norms can and should be used more widely in the justice system, including in criminal punishments.

In short, depending on one's perspective, one can view this issue as an example of how either mainstream Canadians, or Muslims leaders, or both, are stepping away from the norms of liberal multiculturalism. As a result, it was predictable, and perhaps inevitable, that this issue would become a symbol of larger debates about Islam and liberal multiculturalism.

Unfortunately, I believe that it is in fact a very poor test case for these larger debates. The reality is that the opportunity made available for faith-based arbitration under Ontario's Arbitration Act has almost nothing to do with multiculturalism. The adoption of this Act in 1991 was not in response to the demands of immigrant groups, nor was it justified in terms of the requirements of the multiculturalism policy. On the contrary, the Act was demanded by, and designed for, members of the mainstream society, who wanted a cheaper, quicker and less adversarial form of dispute resolution. The trend towards creating such alternative forms of dispute resolution is very widespread across the Western democracies, regardless of whether they have multiculturalism policies, and has been supported by both the left and the right of the political spectrum. For the right, it is a way of reducing government expenditures, by relieving pressure on the courts. For the left, it is a way of making dispute resolution more accessible to people who cannot afford the expense of normal litigation. (Indeed, the 1991 Act was introduced by the left-wing NDP government in Ontario).[17] This trend has nothing in particular to do with the presence or absence of multiculturalism policies.

It is important to emphasize that (contrary to many press reports) the Act does not accord any special rights or privileges to the Muslim community, or to religious groups in

[17] One of the few critics of these forms of alternative dispute resolution have been women's groups, since the evidence to date suggests that women (whatever their race or religion) fare less well in them.

general. It simply establishes a legal framework within which anyone, religious or secular, can agree to use private arbitration to resolve their disputes. No group is given any "special exemptions" – Muslims have no more (or less) freedom to use private arbitration than atheists, environmentalists, or members of the Rotary Club.

It is also important to emphasize that the adoption of this Act was not recommended or funded by the Multiculturalism program of the federal government. (The program funds many pilot projects relating to the accommodation of ethnic and religious diversity, but this was not one of them, in part because it was not originally intended as a project to accommodate diversity). Nor was there any suggestion that this Act was somehow required to comply with the Multiculturalism Act, or with the Multiculturalism clause of the Constitution. Nor was it developed through the sort of community-based deliberative procedure that the multiculturalism policy encourages, in which multicultural reforms are adopted after extensive processes of consultation within and between ethnic communities. The creation of a legal opening for faith-based family law tribunals was not the intended result of a process of multicultural reform; it was the accidental result of a legal reform to the system of private arbitration that was not mandated, inspired or guided by the multiculturalism policy.

Indeed, one could argue that the adoption of the Arbitration Act was actually in violation of the spirit of the Multiculturalism Act. A central principle of the Multiculturalism Act is that all government bodies have an obligation to consider how their actions will impact on ethnocultural minorities.[18] Yet it seems clear that this sort of assessment was not undertaken. If it had been, it surely would have been clear that some safeguards are required to protect the interests of immigrant women and other vulnerable groups. The 1991 Arbitration Act may work well for resolving commercial disputes between independent businesspeople – which was its main original goal – but it clearly was not designed with the interests of immigrants (or other vulnerable groups) in mind.

In this sense, I would argue that the Arbitration Act is not a case of "multiculturalism run amok", but rather of "private arbitration run amok". The Act desperately needs revision in order to protect the legitimate interests of vulnerable parties and of the larger society, but none of these revisions require any amendment to the multiculturalism policy. The problems with the Arbitration Act can be fixed without changing one word in the Multiculturalism Act, or in its associated programs.

Let me put the point another way. Let's imagine that the Arbitration Act had not been adopted in 1991, so there was no legal provision for private arbitration of family law disputes. Could Muslim leaders like Mumtaz Ali have gone to court and argued that the Multiculturalism Act, or the Multiculturalism section of the Charter, required that they be granted the right to set up their own faith-based arbitration? Could faith-based arbitration be demanded as a "right" that is somehow implicit in Canadian multiculturalism? Would any court in Canada have said that provincial governments have a legal obligation to allow such tribunals?

[18] Of course, the federal Multiculturalism Act only applies to the federal government, not to the decisions of the Ontario government, although Ontario has its own provincial policy of multiculturalism.

I think the answer is clearly no. There is nothing in the Multiculturalism Act, or the Multiculturalism clause of the Constitution, that requires giving members of religious groups the right to ignore provisions of the Family Law Act that differ from their traditional practices, just as there is nothing in multiculturalism that requires granting an exemption from mandatory education laws, or anti-discrimination laws, or laws against FGM, coerced arranged marriages or honour killings. The courts in Canada have never interpreted the Multiculturalism Act or Multiculturalism section as permitting infringement of the basic rights of individuals. To repeat a point I made earlier, the model of multiculturalism that is enshrined in the Multiculturalism Act, and in the Charter, is a liberal one, predicated on a commitment to individual freedom.

It is one of the many paradoxes of the debate that conservative Muslims were able to achieve something under the Arbitration Act that they almost certainly could not have achieved if the issue had been decided or litigated under the Multiculturalism Act.[19]

In short, multiculturalism was not the cause of this problem, and amending or abolishing multiculturalism will do nothing to solve the problem. Indeed, if the Multiculturalism Act were repealed tomorrow, and all funding for multiculturalism policies stopped, this would have no effect whatsoever on the legal standing of sharia tribunals in Ontario. There is simply no financial, statutory, or constitutional connection between the Arbitration Act and Canadian multiculturalism.

4. Conclusion

In sum, I believe that there are two conversations being run together in the current public debate about sharia tribunals. One conversation concerns the role of private arbitration as a tool for providing citizens with more affordable and accessible (and less adversarial) forms of dispute resolution. There is a strong trend throughout the West towards new forms of alternative dispute resolution, but they all carry risks, particularly for less powerful groups in society, since they typically contain fewer procedural requirements (eg., regarding legal representation or appeal rights) and fewer substantive guarantees (eg., regarding the fairness of outcomes). For example, we know that women, whatever their race or religion, typically fare less well within private arbitration than they do in the

[19] Some critics have argued that, despite their alleged liberal foundations, multiculturalism policies have in fact operated in Canada to reinforce the power of conservative male leaders within ethnic and religious groups. While this is undoubtedly a risk, my own sense is that the sorts of programs funded by the multiculturalism program have usually been quite sensitive to gender issues, and have encouraged women's representation. Indeed, Bloemraad's recent work has shown that multiculturalism policies have helped to create more gender parity in ethnic leadership than would otherwise have existed. In the absence of multiculturalism policies, the leadership of ethnic communities has typically been drawn from three sources of power - business success, religious authority, and previous leadership roles in homeland politics. In the context of most immigrant groups, all three of these routes to leadership have historically been male-dominated. Multiculturalism policies, however, provide resources and opportunities to the providers of immigrant and settlement services, who are often women, thereby creating a new route to leadership, and a more gender-balanced set of representatives (Bloemraad 2005).

common family law courts. Yet many women, whatever their background, would prefer to resolve their disputes quickly and peaceably, rather than drag the conflict out in the courts, causing pain to everyone involved, including the children. Can we find forms of alternative dispute resolution that are affordable, accessible and non-adversarial, yet still provide adequate safeguards for equality rights?[20]

The second conversation concerns the link between Islam and liberal multiculturalism, and whether we can sustain a consensus on liberal multiculturalism in a context where Muslim communities are growing and increasingly politicized. Will Canadians extend to Muslims the same trust they have shown to other minorities in providing multicultural accommodations, and if so, will Muslim leaders and organizations acknowledge the liberal foundations (and limits) of these accommodations?

It is my firm hope and belief that liberal multiculturalism can indeed provide a stable and enduring basis for social relations in Canada. However, in order to serve this function, we need to keep these two conversations distinct.

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[20] I will not try in this paper to provide a detailed account of what sorts of safeguards would be appropriate, except to say that the current Arbitration Act seems woefully inadequate, and that while the Boyd Report identifies many of the defects of the Act, its recommendations fail to adequately address them. If we approached this issue from the perspective of liberal multiculturalism, the first task would be to develop a process of internal discussion and dialogue within the various communities, to see what sorts of proposals in fact have the broad support of group members, and then to engage in a broader societal debate about whether or how these proposals can be accommodated. This is the sort of process that the multiculturalism policy has encouraged in other cases of proposals for multicultural reforms. In this case, I suspect that the sharia tribunal proposal does not in fact have broad support within the Muslim community in Canada, and that this would have become clear if the government had encouraged a broad consultative process with various Muslim groups and organizations about their concerns with the family law system. Unfortunately, because the sharia proposal emerged out of the Arbitration Act, rather than from the multiculturalism policy, this process of intra- and inter-community debate was short-circuited.

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PANEL

IMPACT OF RELIGIOUS PLURALISM ON WOMEN

Dr. Sirma Bilge
Dr. Will Kymlicka
Ms. Marilou McPhedran
Dr. Abdullahi An-Na'im
Dr. Ayelet Shachar

Between a Rock and a Hard Place:
Minority Women's Citizenship in Canada, its Intersecting Inequalities, and What an Intersectional Theorizing Can Offer?

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Panel presentation
Canadian Council of Muslim Women
April 9, 2005, Toronto

I would like to thank to the Canadian Council of Muslim Women for inviting me to this symposium and giving me the privilege and the honour of sharing with you some of my questionings on whether the aim of achieving ethnocultural and religious equality is actually pursued in Canada at the expense of minority women's full citizenship.

This questioning brings to the fore a central problem faced by policies of pluralism in liberal democracies, a problem that Ayelet Shachar pertinently named the "paradox of multicultural vulnerability" (Shachar, 2000: p. 3).

But before going any further, let me situate very briefly the parameters of the basis of my knowledge, the point from which I speak, an endeavour that seems to me quite important. I will be speaking from a sociological perspective, precisely from a sub-field known as sociology of ethnic and racial relations, a sub-field that I try to articulate in my research and my teaching with other axis of social differentiation and stratification such as gender, class, age, sexual orientation, handicap, etc. This effort to analyze social processes and mechanisms producing and reproducing distinct social inequalities based on gender, race, ethnicity, class, culture, religion, age, sexual orientation, handicap, etc., in relation to one another is known as intersectional analysis. Developed by Black feminists in the United States, who were marginalized both within the feminist and the antiracist (civil rights) movements and their respective political agenda, intersectional theorizing calls for an integrated approach to the study of discrimination and inequalities, and for the abandonment of an "either/or perspective" (Crenshaw, 1986). Feminist intersectional theorizing is mostly, but not exclusively[21], produced by racialized minority women in the academia; and this production is closely linked to their political activism and claims. Denouncing the compounded effects of gender, race and class domination in their lives and how their problematic social location was rendered invisible both in feminist and antiracist/multiculturalist discourses, these feminists from minority groups produced new

[21] Indeed, there are a number of anti-racist white feminists using intersectional/transversal approaches. See Anthias and Yuval-Davis (1983, 1992), Stasiulis (1999). It is worth noting the importance of the theoretical contribution of F. Anthias and N. Yuval-Davis - from UK-, whose precursory work is among those which have paved the path. The concept of intersectionality has been first used by an African-American jurist, Kimberlé Crenshaw (1989). Her work, widely known, constitutes the primary reference in intersectional scholarship. See also Essed (1991).

conceptual tools to reframe the feminist and antiracist debate on equality and citizenship rights.

I am using this analytical perspective to examine for instance the dynamics of intersecting power relations in the lives of immigrant women, victims of spousal abuse and the social determinants of their access to social services. My most recent research - still in progress- examines the use of cultural information in criminal courts dealing with cases of violence against racialized women (aboriginal and immigrant women from visible minorities) in order to capture the ways in which the cultural otherness is constructed and used by the judiciary as a background factor to be taken into account to determine the criminal intent of the defendant[22] or the appropriate sentence to be imposed, and how this use of culture out of the sensitivities for ethnocultural diversity serves to exonerate or mitigate one's criminal responsibility and creates double victimization for women.

So, in this research, I deal with the issue of culture in the context of law, precisely with the use and the abuse of cultural evidence in criminal courts while processing cases involving violence against minority (racialized) women (domestic violence, sexual assault, etc.). By questioning the ways in which some seemingly well-intentioned and culturally sensitive practices in court processing may lead to double victimization of minority women already victim of violence, I take a critical position towards dominant discourses on Canadian diversity and plead not for the abandonment of multicultural considerations while doing justice, but for a readjustment of the culture lens. It is my contention that the way culture is used in criminal courts dealing with cases of violence against racialized women is very often detrimental to women's rights and well-being. Moreover, this use and abuse of culture further reinforce and disseminate ill-informed and reified assumptions about 'other cultures', seen as ahistoricial and monolithically fixed entities, implicitly viewed as less developed than the dominant /Western culture.

Today, instead of discussing how the use of cultural evidence in criminal courts can be detrimental for minority women victim of violence, I will try, to consider some conceptual openings between feminist intersectional theorizing and current writings from political theorists on the issue of a complex phenomenon that is quite simplistically called "minorities within minorities".

To sum up the position from which I speak, I will say that my central interest is to understand the ways in which social hierarchies and domination based on gender, class, race, ethnicity, religion, etc. can intersect and interact, as well as the ways claims for gender equality can interact, compete or complement claims for ethnic/cultural/racial/religious equality.

I will try to contribute, from a sociological perspective focusing on groups with citizenship claims, to the ongoing debate on the well-known liberal dilemma between the recognition of cultural rights to minority groups and the guarantee of individual freedoms within their boundaries.

[22] Criminal intent (*mens rea*) constitutes with the criminal act (*actus reus*) the two bases required to find someone guilty.

There is a general agreement in the academia, at least among political theorists, that policies of multiculturalism are confronted with a serious dilemma that can be resumed as follows: how to accommodate ethnic and religious minorities and secure at the same time the respect of fundamental rights and freedoms within their boundaries? How to assure to ethnic and religious minorities a certain degree of institutional autonomy from the State and guarantee at the same time to their members a right for individual autonomy from their respective community? This dilemma is particularly acute in regards to vulnerable segments within minorities, such as minors, women and homosexuals. First identified, if I am not wrong, by Leslie Green more than a decade ago, in his article "Internal Minorities and Their Rights" (Green, in Baker ed., 1994), the problematic location of these social categories currently called "minorities within minorities" has been since object to an increasing number of writings from legal and political theorists. Before that, the central concern about the impacts of group-differentiated rights seems to be the issue of social cohesion, whether their recognition would compromise it or not.

The fact that well-meaning pluralistic accommodations may aggravate, and do indeed aggravate in some cases, the in-group subordination of vulnerable segments within minorities has been brilliantly explored and demonstrated by Ayelet Shachar, in her important book *, Multicultural Jurisdictions: Cultural Differences and Women's Rights*, a phenomenon she calls "the paradox of multicultural vulnerability" (2001: p. 3).

Recent debates over and political orientations taken regarding to the formation of arbitration tribunals that would use Islamic law to settle civil matters in Ontario clearly demonstrate that this "paradox of multicultural vulnerability" is yet to be understood in its nuances and complexities. Instead, debates have been largely dominated, I would add especially in Quebec, by a sharp polarization between the proponents of gender equality and the proponents of cultural, religious equality. This opposition is not new; and claims of irreconcilability between the political goals of feminism and multiculturalism have been made some liberal feminists, like late Susan Okin, who asked in her influential and controversial essay if multiculturalism was not bad for women. I agree with Susan Okin when she maintains that generally liberal defenders of group rights tend not to take gender inequality as seriously as other forms of morally arbitrary inequalities such as race, caste, etc. (Okin, 2002: p. 206). But I disagree with her conception of the relationship between culture (including religion) and gender, and her prior affirmation that women who belong to a "more patriarchal minority culture" might be better off if their cultures were to become "extinct" or to be "integrated" into the majority culture (1999: pp. 22-23). This opposition suggests an impossible choice: either your rights or your culture. And it crucially neglects the fact that culture (and religion) is a contested terrain. It is not monolithical, it is open to interpretation, to negotiation. And there are competing forces within each ethnocultural or religious group to legitimize their own version, trying to silence other versions, claiming authority over the monopole of legitimate, authentic collective identity. So, it is really not surprising that we have recently heard some Muslim voices ruling that those opposing to the formation of Islamic courts were not good Muslims. Therefore, whenever State decides to share power and jurisdiction with any minority group, there should be concerns about the possible external and internal effects of this power-sharing (Shachar, 2000: 73). Who will speak in the

name of whom? Who will define whom?[23] If this State-sanctioned new community power is to be used to silence dissenting voices or to excommunicate them, it means that accommodating diversity by increasing group autonomy clearly contributes to the oppression of those who attempt to bring about social change to their community (Bilge, 2004). And all theoretical discussions that are not empirically sound on exit rights mean not much for them, since their aspiration is to be able to live within their group while claiming their agency, their right to contest and to change their culture.

So it seems to me very perilous to brand the claims of some associations in favour of Islamic courts as Muslim claims and to label opposing voices as feminist, or else, but definitely 'not Muslim'. This binary representation contributes to cast out the progressist voices (contesting patriarchy), putting only conservative ones as the legitimate holder of the true cultural/religious identity. Affiliating these forces to the Western civilization is also a neo-colonialist/Orientalist -in the sense described by Said- representation of Muslim cultures, seen as incapable of producing internal forces of contestation and reform (Bilge, 2005a).

Moreover, declaring gender equality and cultural equality as antithetical, conflicting claims, as it is actually done by dominant political, media and even academic discourses, comes to delegitimize minority women's rightful claims to live within their cultural group without enduring the double jeopardy of out-group racial/ethnic/religious discrimination and in-group gender subordination. Moreover, opposing in-group gender equality to inter-group cultural equality, precisely between the majority and the minorities, overlooks the extent of political activism of minority women movements and how their activism and claims required new analytical tools, such as the intersectional analysis, producing new perspectives in theories of social inequalities and stratification.

The importance of minority women's activism to defend their interests as a group, both women and member of a minority group, and to define their version of suitable autonomy from State is very well illustrated by the activism of Aboriginal women in Canadian politics during the period of constitutional negotiations in 1992 leading to the failed referendum on Charlottetown Accord. During that process, Aboriginal women supported the goal of self-government for their nations, at the same time they insisted that the formal protection from gender discrimination guaranteed by the Canadian Charters of Rights and Freedoms be maintained. In that, Aboriginal women have opposed to the male leadership of their communities who claimed full independence from the legal and political institutions of Canadian state (Deveaux, 2000: 522). It is very important to note that, during that process Aboriginal women did not only stand up against their in-group subordination based on gender, but also denounced the sexism of Canadian authorities by bringing before the Supreme Court of Canada the fact that the federal government's financial support for public consultations excluded their association and gave exclusivity to Aboriginal (male) associations, and they have gained their cause.

[23] Power relations underpin the definitions of social problems and societal solutions. This is a Faucaldien perspective that I explored in depth elsewhere (Bilge, 2005b) in regards to the construction of cultural information relating to 'others'/minorities to be taken into account while dealing cases of violence against women.

It is my contention that Muslim women's resistance to the formation of Islamic courts is one of the most important political activism for citizenship rights carried out by Canadian minority women during the last decade. By claiming this, I do not intend to minimize other activisms such as the lobbying to obtain the abolition of the Live-in Caregiver Program, etc. My intent is to draw the attention of social analysts -especially of sociologists and anthropologists- on this important and complex process which is actually happening without any systematic empirical inquiry, unlike the legal implications of arbitration tribunals that will use Islamic precepts and their possible negative impacts on women's citizenship rights, which are hopefully comprehensively scrutinized by legal theorists. It seems to me that the sociological aspects of this process are unfortunately hijacked by dominant simplistic views that fail to see how culture and gender intersect, since they represent gender equality and cultural equality as competing and opposing equality claims.

To sum up, I will insist on the fact that policies of multiculturalism are confronted with a serious dilemma between the increasing institutional autonomy of minority groups (at least their claims) and the necessity to secure the protection of fundamental rights and freedoms of individuals within these communities, especially of those belonging to vulnerable social categories such as women, children and homosexuals (minorities within minorities). On the one hand, philosophers and political theorists have written a great deal on this issue during the last decade; on the other hand, critical analysts, whether in sociology, criminology, ethnic and racial studies, cultural studies or women studies, have developed interesting analytical tools (such as feminist intersectional theorizing) to assess the situations of multiple discrimination, how interlocking systems of social inequalities operate, how sexism, racism and classism interact. My final point would be: I think it may be most beneficial if these two academic corpuses can be bridged. I think efforts to bridge them may well lead to a viable way of ending the structural dilemma faced by pluralistic policies in the matter of ensuring group autonomy from the State and individual autonomy from the group (Bader, 2005: 336), and ameliorating the position of minorities within minorities without proposing the exit rights (i.e. freedom to abandon one's community) as the unique solution.

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Marilou McPhedran

The lawyers in the audience will understand the compulsion to stand up when speaking. I have appropriated for myself a role of a kind of story teller. I want to try to convey to you both how unique this gathering is and how connected it is to many other gatherings that have gone before us and many more that are going to come and I want to begin by reflecting with you on the very first lines of the Canadian Anthem that we sang this morning. It's always interesting to me to stand and sing this. I often am very deeply moved by the experiences that I have had personally as a Canadian or western Canadian who's ended up being transplanted to the East, but I can't say "true patriot love in all thy sons command" and I have two of them, I love them dearly. So you may or may not know that there are women parliamentarians that have actually put forth legislation to change these words and they've been thrown out of the process, they're going to come back in, primarily Senator Vivian Poy is the leader but if you find that difficult to do, not because we don't love our sons and the men in our lives, but because it excludes us in the very first lines and that I think is part of the theme that we are exploring from many different angles today.

I am also giving myself permission to change the title of the presentation a little bit because we've been asked to speak about the Impact of Religious Pluralism on Women but I want to talk about the Impact of Women on Religious Pluralism. I want to talk about the impact of women's equality and what that means about how we define and how we actualize our lived rights. A lot of them are on paper and every little step that we take, and today is a big step, towards actualizing and living our rights.

I want to ask you to just take a moment and visualize with me, we're about 200 people in the room, just close your eyes for a moment and think what it would feel like to be in a room with 8 times the number of us. The change in the energy, longer line-ups at the bathroom, all the various things that bringing a crowd together can bring to us both good and bad and I use that number of 8 times because almost 25 years ago, February 14, 1981 on Parliament Hill an unprecedented grassroots political women's movement in this country crossed party lines, crossed age lines, came from all over the country, many different cultural and racial groups represented and by and large every one of those women found her way to Ottawa, to the centre of government on her own speed, at her own cost because the government of the day had cancelled the Women's Constitutional Conference at a crucial moment when the equality sections of the Constitution were actually in the process of being amended.

This is not unlike that day and this is the beginning of many more meetings, moments of lobbying, personal interactions, mobilizations, at the group level and the individual level and the community level. I want to use my time today and I certainly don't have to ask Alia to be a time keeper, I've watched her in action, I know we are dealing with someone who is going to be very helpful in stopping me from going on for too long. But I do want to tell you a few of the stories about what we are all part of here today. My comments about the anthem stay as they are but let me also acknowledge how absolutely critical it is to all of us to have the men who are here in this room with us today and the many who are not in the room with us but are here in spirit, this is not a men versus women battle, this is a battle of values. This is about the Canada and the world that we want to live in and unless we shape it and unless we use our time as we are today, to make sure that our

expertise - I use that word, our expertise, there is expertise in every single person in this room today and it is the collective expertise that the Government of Ontario is lacking and we must find ways to help the Premier, the Attorney General, the Minister Responsible for Status of Women and all of the provincial parliamentarians to understand that they are operating on inadequate and in many cases, legally inaccurate advice. They need our expertise.

This is by no means the first time that this has been faced. There are some very long standing dedicated activists in this room representing organizations that, while I helped to found many of these organizations I am not actively involved any more, and I really want to acknowledge the critical role that's been played by National Association of Women and the Law, by Rights and Democracy, by METRAC, by many other organizations. They're listed in the program that you can read. I make the point because we can't do this alone. Muslim women can't do this alone and women who are not Muslim cannot do this alone and we are hugely inter-connected and we share far more than we differ on. So it's the inter-connections and it's the thanks, it's the appreciation of our differences and understanding that that is part of what makes us strong. I've had some tremendous opportunities over the last couple of years, initially through my association with the Afghan Women's Organization, and I'm delighted to see my friend Adeena Niazi here today. I've learnt so much working with AWO and Adeena and then that has led to the association of working with the Canadian Council of Muslim Women and activists like Homa Arjomand also part of this struggle and I want to thank each and every one of you for your gracious, generous willingness to be open about where the differences are and to be open to learning on both sides, partly because this is an excellent way of modelling and living what is, even for those of us who might be allergic to the adjective feminist process, pro-women process, pro-equality process and anything, I assure you, that is pro-women, is going to be pro-children. So we're talking about the generations that are coming and we are talking about our sons and our daughters.

So I want to frame my comments within the context of where we all are. Canada is a constitutional democracy and I am going to take a moment and just read two of the key sections that inform not only what we're doing but how we're doing it and why we're doing it. In the Canadian Charter of Rights and Freedoms which was enacted in 1982 except for the following section, section 15, which I will now read to you which many people will not remember had a moratorium placed on it by governments across this country because they weren't ready to deal with equality. So here's what they suspended for three years while everything else in the Constitution was activated:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

The subsection I just read to you does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or economic origin, colour, religion, sex, age or mental or physical disability. And I'll point out at this stage that the judicial interpretation of the wording I just read to you has resulted in terms on conditions of discrimination, not specifically described in what I read to you also

becoming protected constitutionally, for example, discrimination is unconstitutional when it is based on discrimination against those with different sexual orientation.

Then I want to read section 28. It has been called the equal rights amendment, at the time that this was being negotiated and this unprecedented grassroots political lobby was occurring across party lines in many parts of our country, the issue became what if section 15 is not enough? What if the Courts, once the Constitution is closed, decide to follow what was being seen in the United States and what had happened in Canada under the Canadian Bill of Rights because the wording in the proposed Charter was virtually identical to what was already in law in the Canadian Bill of Rights and women, Aboriginal women in particular, had lost every single case that they brought under the previous Bill of Rights. We already knew it was useless. In fact it was worse, it was dangerous for generations of women. So out of that grassroots political lobby, came another amendment to the Charter, which reads and the first word is very important:

> Notwithstanding anything in this Charter the rights and freedoms referred to in it are guaranteed equally to male and female persons

And I can tell you, because I was involved in the drafting of this wording, that we changed it to male and female persons because we wanted to make sure that girls and boys would also be able to claim protection. In addition to this, there is an Equal Rights Amendment for Aboriginal women. It's not within the Charter, it is not worded the same and Aboriginal women have documented many ways in which it has not proven to be anything close to what they felt they needed.

So in reference to the inter-connections that are with us today, I want to just quickly run through some of the similar meetings, some of the ways in which you are on a continuum of this shaping and actualizing of rights.

1967 Lester Pearson was Prime Minister. Women came together from across Canada and said "we need a Royal Commission on the status of women" and he laughed. He laughed right up until the point when three of them went to see him and said "it's about the 3,000 women that we now know we can marshal to come down to Ottawa just as you are going to begin the Centennial celebration of this country" and a Royal Commission was named. Several of those women were placed on that Commission. It laid the foundation for much of what we do have today to work from.

1970s after the Royal Commission has reported and the first federation, country-wide lobby group, the National Action Committee on the Status of Women has been formed and the Courts are dealing with family law cases, the Federal court, the Supreme Court, and still women are losing. They are losing under the Bill of Rights, they're losing under other legislation. I am a law student at the time, I get a phone call late at night. My mother from Manitoba is on the end of the line and she says "What is this decision? What has happened to this woman, Iris Murdoch, she's worked her entire life as a farm wife, she's done the work of her husband, he was away for months at a time, just like your father used to be away for months at a time and she didn't get her fair share and she was told she didn't get her fair share because it was just what a typical farm wife did. Well, I'm your mother, that's going to happen to me, what are you going to do about that? That's why you are in law school." Bit of a tall order. During that time period

National Association of Women and the Law was formed and there were family law reforms across this country. They went like dominos once they started, driven by women's activism, against the prevailing notion of what was "traditional", what was to be expected and what women deserved. Law after law after law changed and women at the provincial level across the country understood what it meant to be politically engaged and not to let legislators off the hook, not to let them even if they can't conceive of themselves, and let me tell you, Michael Bryant, our Attorney General, can't conceive of himself as discriminating against women, he is going to have to have the benefit of our expertise to understand how badly he is being advised on this issue and that's a great part of what happening here today and what will go forward from today.

And then the 1980s I made reference to the Constitution and the Charter and I am going to just wrap up by mentioning one other section of the Charter and then one little bit about women's activism in the international context.

Mention has been made and some really excellent comments today on multiculturalism policy and in particular section 27 of the Charter. Will, you mentioned that on the public record probably the first documented wide public debate looking at this question of multiculturalism and where that extends vis-à-vis rights was in the early 1990s. But once again, because I was there, I can tell you that section 28 that starts "Notwithstanding anything" was negotiated and that the then Attorney General for Canada, Jean Chrétien was persuaded that that needed to be done because women were inside the offices on Parliament Hill lobbying, as many of you are going to be invited to do in the days to come, in order to bring our expertise to Queen's Park and that lobbying to caucuses and to individual members resulted in an understanding that if section 27 was left by itself, that the way in which it had been worded, because the word "shall" is used in section 27, could very well create a situation where indeed FGM and other practices that are clearly very, very damaging and harmful to women could be argued and perhaps effectively argued in courts and I will never forget the moment, you know you talk about the click or the snap when somebody goes, 'okay I get it', and we had a moment like that with Jean Chrétien and that was part of what led to that amendment in the Constitution.

Lastly let me speak just quickly about the Convention on the Elimination of All Forms of Discrimination Against Women, that major UN Human Rights Treaty that is called the Women's Convention. The only one of what I consider to be the six major treaties that focuses on women. In January, a part of the work that I do, is in monitoring at times what happens at the UN, related to women and I was there for the presentation of Turkey reporting on what is happening in Turkey under this convention. I want to just leave you with a very important distinction that was made and that is that Turkey is definitely a Muslim society, but it is a secular state, it has made full commitment to the international conventions related to women's rights and it accepted that governments have a positive obligation to address discrimination, to re-dress discrimination and that's where we are headed today. That's what the government of Ontario has to understand, it has an international and a national and a provincial obligation, a positive obligation to support women's equality and women's right to religious freedom.

Thank you.

Summary of Presentation by Ayelet Shachar

In her presentation, Ayelet Shachar drew upon her research which appeared in *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press, 2001) to explain the tension between accommodating religious diversity and protecting women's rights. She argued that we must pay special attention to the vulnerability of women in family law disputes. She then analyzed the proposal to permit the use of religious-law principles in private-dispute resolution processes in Ontario, such as arbitration, within a broader comparative context, explaining how other jurisdictions have struggled to find a balance that simultaneously respects women as members of minority groups and as full citizens of the larger political community. She argued that the particular difficulty raised by the proposal in Ontario is that it tries to use an existing legal framework, the Arbitration Act, which is typically used for resolving business and commercial disputes, to endorse a very different kind of institution: one that is designed primarily to settle family law disputes. Shachar cautioned that the current legal framework governing private dispute resolution in Ontario fails to provide adequate safeguards to protect the hard-won rights of minority women. She urged the development of more inclusive and just procedures to resolve family law disputes.

QUESTION/ANSWER

Question

Thank you for the talks. My question was really to Professor An-Na'im. When you mention that why should Shari`a apply only to family law rather than to commercial or business law. Well, you know what, the Muslim community as it's being growing in North America, there are now a lot of institutions offering home financing, business financing, RRSPs in Canada that invest in businesses that are socially responsible. So my question to you is that why not Shari`a in family law and I just have to point out, I am not a proponent of Shari`a, or for or against, but I want to tell you why should Sharia not be applied for the sake of debate, the reason being (question asked, let it be answered) but do we know Shari`a, do any of us in this room know what is Sharia?

Dr. An-Na`im

To answer your question, do we know Shari`a? Everybody does, and should, but nobody knows it well enough in the sense that nobody's knowledge of Shari`a relieves me from the obligation to know it for myself. The notion of sanctified scholars or Ulema is a heresy in the sense that it is not original to the tradition, and not really consistent with the individual and inescapable responsibility of every Muslim. Who is to sanctify or certify anybody as 'qualified' to issue rulings on Shari`a questions that should be binding on others? Why should the fact that the person is a graduate of Al-Azhar university in Egypt or Um al-Qura in Saudi Arabia makes him knowing Shari`a enough to decide for me what I should do or not do as a Muslim? Religious authority should also be based on genuine piety and good character, not just theoretical knowledge which can be mastered by an atheist scholar of Islam, an 'orientalist' who does not believe in Islam at all. Yet, it is extremely difficult under present demographic and social conditions to know who is pious or of good character, and who is not. So therefore, we must all pursue knowledge of Shari`a, to the best of our ability, and keep on doing that all our lives. But we should also realize that this is always a human understanding of Shari`a, subject to all the biases and faults of human knowledge and action. Nobody's knowledge of Shari`a should be accepted as sacred or immutable, binding on any other Muslim simply because this scholar or that *mufti* said so.

There is also the question of why insist on enforcement of Shari`a by the state in this so-called family law field, and not in all other fields? My point here is that by confining Shari`a and co-opting the state or using the state institutions to enforce that, we have isolated this field from the dynamics of Muslim societies throughout their lives. In other words, that our understanding of Muslim family law has remained retarded by the fact that it has been isolated as a field and if we had kept this field as part of the total experience of being Muslim, then it would have been influenced by our experience as Muslims, economic, political, social, educational and otherwise. So when I raise the question, I accept that Shari`a principle, as each Muslim believe and understand them, are binding on that person as a matter of religious obligation. I am bound by the prohibition on paying or receiving interest on loans (riba) as I understand that principle, and should

observe it in my dealings with others. My objection is to have the state enforce the view of some Muslims on others in the name of Shari`a.

Question

My question would be very quick and brief to Dr. An-Na'im. When you also heard on reformation of Sharia and propagating your ustad, Mohamed Taha's theory of reverse nasq and when you say in your excellent book, that Sharia today is not compatible to the accepted concept of human rights, then why do you seem to have missed the real spirit of Sharia which is not a benign law book, Sharia not in the Quranic word but taken as fiqh, that's the reality today? Sharia is the malignant driving force of the political brand of Islam which wants to uproot all other governments.

Dr. An-Na`im

I hope I did not miss the real spirit of Shari`a. The term Shari`a is problematic because whenever we use it, we have a sense of what it means in our minds and that may not necessarily be what it means to others. The point is that for me an understanding of Shari`a as the normative system of Islam is binding on every Muslim, but that should not be done through enforcement by the state. If that is attempted by a state, then it is no longer the fulfilment of my religious obligation, but rather the enforcement of the political will of the state in the name of Shari`a. Take the example of *khul`*, whereby a wife would forfeit her financial entitlement or make a payment in order to obtain a termination of marriage by a court of law. This principle was known and accepted in Fiqh, Islamic jurisprudence for many centuries, but not available to Egyptian women until the legislature of the state of Egypt enacted a law making khul` part of Egyptian family law in 2000. This principle is now enforced by Egyptian courts because the state said so, and not because it is simply part of Shari`a.

Question

My question is gender-focussed and any of the panellists can respond to it. As women, if we come from the principle of inclusion and accommodating because as we heard the theme today of listening to different views and being respectful to different views, there are from what I have noticed from my experience as a Muslim woman, there are women who are saying that they don't necessarily believe in certain rights that are given to them, when they say, this is what we want and for example I was struck by your international example of Turkey because, Morocco, I come from North Africa. When a society tries to make amendments to meet international standards of granting equal rights to men and women and you have a huge group of women who go out in the streets and oppose it, and they say this is what we want, my question is, as women how can we work together as Muslim women to accommodate the different views of others.

Marilou McPhedran

I'll speak briefly but I think the other panellists probably have, in some cases, some different answers. The analogy I am going to use in responding to your question is actually more in the field of health and that is where in order to have informed consent, to have something done that you need to have done to your body, you cannot contract to a

degree of harm to your body or a degree of risk to your body. You can have informed consent of what is the procedure that is to strengthen your health. In the whole area of sexual assault for example, there's a huge debate that has been going on for decades around what does it actually mean when a woman consents and where is the line between consenting and when it turns into rape or assault and we keep looking at the reality of the situation, allowing a degree of choice but not having the most permissive situations to occur if it's not in the public interest. In other word, the standard is not the narrowest situation applied to everybody. The standard is to try to keep a focus on health and a focus on equality and a focus on opportunity and still keep an element of choice but not the choice to self-harm. The analogy that I want to take that into answering your question by saying that what we're striving for, and what I believe the constitutional democracy allows for, are laws, State norms like Abdu has referred to that in the larges public interest with the values, the absolute bottom line values being the constitutional values and the linking of equality and religious freedom and to allow as we do, women/men to contract out of many of their stated rights in law, is part of being a constitutional democracy but what we don't want to see - and this is where I would say the respectful debate can become a real challenge - is to say your desire to limit your choices and your opportunities and your personal freedoms is not something that can be allowed to dictate and limiting my choices or our daughters' or granddaughters' choices and opportunities and we may well, and I think we may be at that point currently in Ontario, where certain women and men will make the argument that that's the model we need to be using. And I would reject that.

Question

Thank you all very much for your presentations. I have a question for Professor An-Na'im. My research focuses on women's human rights and peace building in Afghanistan and two points that you made are so critical to the struggles that I have. So I am wondering if you can comment a little bit more on them. One was your comment about legal protection being meaningless without the foundations for legal protection which I think is a fantastic comment so if you could reflect on that a bit more and the second comment you made regarding the tension between the two poles of secularism and religiosity and how you feel this is playing out in societies which are on the verge of, like we have a new constitution in Afghanistan providing equality rights to women but within the context of Sharia and so how can we mediate these tensions in a way that's culturally and religiously appropriate but at the same time provide women with the rights that they would like to have guaranteed?

Dr. An-Na`im

I think the first point is really to say that legal protection of rights, the idea of rights, the institution, enforcement mechanisms, and so on, are benefits or outcomes of a long process of development and institutionalization of this infra-structure or system in order to make the protection of rights possible and sustainable. But if we just focus on these benefits or outcomes without investing in the process, we are going to be excluded from the continuing development and evolution of that process. So I say use rights as you have been doing, use legal protection as you have it in practice, but equally invest in the future of this process and not just simply benefit from it and sit back and wait until the next crisis. That was the point I am making. Just simply that legal protection has its

limitations, that if we focus on it without understanding the cultural, institutional and political dimensions of it, the process will be unsustainable and our own role in it will be lost.

On secularism as the religious neutrality of the state, while recognizing and regulating the political role of religion, I would again emphasize the importance of investing in the process of legal protection of constitutionalism and human rights because they are the safeguards for what that mediation of the two poles might yield. No conclusion is ever final. If today's Afghan society decides that women should have this set of rights and not that or this other right, that should not be accepted as the end of the story. So long as they have the process safeguarded and further developed, Afghan women and men can continue to struggle for the inclusion of more rights, and the more effective protection of rights already accepted. The main point here is to maintain and even encourage the ability of people to contest, challenge, make alliances and develop strategies for the protection of human rights. I sometimes make this point in a controversial way by saying that heresy is critical to religiosity. You cannot believe if you don't have the right and ability to disbelieve. Belief assumes the ability to disbelieve, otherwise it's meaningless. So the ability to challenge any understanding of religion is critical for being religious at all. That's why I am committed to human rights and constitutional rights because it safeguards the possibility of being Muslim. I have an article called Interdependence of Religious Secularism and Human Rights, for me the three are interdependent. I need religion to protect human rights and I need secularism to protect the other two and so on. And all of them together are what I need to be a Muslim.

Question

My question is addressed to the legal experts. The proponents of Sharia often maintain that wherever there's a conflict between Sharia law and Canadian law, Canadian law automatically supersedes. I basically just want to understand the mechanics behind that provision and why it would not be effective in safeguarding Muslim women's rights.

Marilou McPhedran

Why don't we pass it to the panel because it focuses on that. The panel in the afternoon is going to be very specifically on that, will that be alright? That's fine.

PANEL

IS THERE ROOM FOR WOMEN'S EQUALITY RIGHTS IN RELIGIOUS ARBITRATION?

Dr. Kathy Bullock
Aisha Geissinger
Julius Grey
Faisal Kutty

Faisal Kutty

First of all I would like to thank the organizers for inviting me. I know we've had differences of opinion on this issue and I'd like to extend my thanks for inviting me to share our thoughts in forums like this and to dialogue so that we can really come out with the issues for the greater good of our community. I am interested or involved in this issue as a lawyer practicing for the past nine years in the Muslim community. I have handled hundreds of divorces and family disputes have been referred, many of the very tough cases from various mosques in Toronto and southern Ontario as well as Islamic Social Services. So I know the situation of Muslim women, I know the situation of immigrant women, and an unenviable situation that many find themselves in. I am also a student in Alternative Dispute Resolution at Osgood. So I am involved in the system and I understand where the issues of concern are and I have studied the issue and I have looked at it and I know that the issue has polarized the community - there are the proponents and the opponents. I'd like to think myself as somebody who comes down in the middle where I believe that, unlike the proponents who think it is a panacea and will solve the problems of the Muslim community, I don't agree with that, I don't believe that; neither do I side with the opponents who say that using religious arbitration within family context is not possible because we don't have checks and balances. I don't agree with that.

It's very difficult in 15 minutes to go through a substantive look at the laws and where I think the protections are. What I would urge each one of you to do as educated people is to go and read two things, one is the report prepared for the CCMW and the National Association of Women and the Law by Professor Natasha Bakht. If you read through that study, *Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women*, read the sections which talk about the protections and the sections which talk about arbitration itself and how it interacts with other laws. I would urge you to read that and I would also urge you to read Marion Boyd's recommendations, a hundred and fifty page report which sets out what the protections are and what further recommendations she makes. After reading that, you can come to an educated decision, rather than letting emotions get in the way.

Throughout my presentation here I will be quoting from Professor Natasha Bakht's report to show you where the protections are and you can go yourself and read it later on. Marion Boyd, for those who don't know, she was appointed by the Attorney General to review the Arbitration Act to see if religious principles can be used in the family law context. She was the former Attorney General, as you know, and so please go and read these two things.

Getting back to our topic - for me it's an issue of choice. In our legal system we have a private system. The State provides dispute resolution mechanisms and options and for parties to select which option they want to use to resolve their disputes. I will quickly run through the options. You can go to court. Even when you go to court, most matters do not end up in front of a judge. Matters are settled by lawyers who compromise, who settle for their clients and many times parties will take less than their legal entitlements under the Family Law Act or the Divorce Act, various other legislative provisions. The second option is an uncontested divorce, where they will go to the same lawyer or the same paralegal and the same lawyer or paralegal settles the issues. Again they may

compromise for less, again a judge doesn't see it, there is no court oversight. Third, people go to paralegals, many immigrant women particularly go to paralegals because they can't afford lawyers. So they have their matters resolved by paralegals and I deal with cases which have gone to paralegals and they need to be corrected because of course one person makes these decisions, they have made these settlements, they have made these resolutions, so again there is no court oversight.

People settle their disputes by reaching out to their families, clergy and they have their disputes settled like that. They do it themselves by going to Business Depot, getting the divorce forms, they complete it themselves, they settle property issues, custody issues, they settle those things. The only way it gets in front of a judge is when one party challenges it. ADR is another option which I will get into further detail which is arbitration, mediation, conciliation, etc. Another one is no resolution at all. I had a woman come to my office on Thursday where she has a child. She has not been given child support, nor spousal support. The man has a lot of properties, she hasn't been given any property. She has gone to Imams - both Imams have chastised the husband and said give child support, give spousal support, you need to reconcile, you know, settle the property issues. He wants nothing to do with it. She came to me, I said "well you must go to court. We'll prepare court documents and we'll fight," she says no, she doesn't want to do it. I can't twist her arm. The State can't twist her arm. She thinks what she is doing is right. She says "I don't want to get into the hassle, I don't want to get into the problem. " We cannot force that. So we have to realize that that's another option, people just walk away.

There are various limits on arbitration and I'll quickly go over that. The arbitrator gets power from the parties and from the Arbitration Act. The arbitrator has now power to order anything that the parties themselves could not agree. If you want, you can read the Act itself, or you can go to the CCMW's report and you can read all this. They cannot bind third parties. Children can't be bound, and you and I can't be bound by their decisions. Two individuals are making a decision that must be conducted in fairness as per section 19 of the Act, appeal and judicial review rights. Again I'll get into those. Substantive limits, a case of Hercules vs. Hercules establishes fairness and equality must be the subject of arbitration. The court also exercises the jurisdiction onus *parens patrie.* So in other words, parties have a marriage contract, separation agreement or arbitration decision where they say the child goes to the father. Well the court can step in, they have ultimate jurisdiction. It's called the *parens patrie* jurisdiction to enter and open up these things because it's not in the best interest of the children. You can see, it's a much more nuance and comprehensive system that we are talking about.

The criticisms, I will quickly go through the criticisms and again point you to the CCMW's own report to see the answers to those criticisms. 'Women will give up their rights'. Settlement of any legal disputes involves compromise. People give up their rights - that's how you settle a dispute. Not all disputes go in front of a judge for a judge to say the *Family Law* says this, you get this. Very few matters end up in front of a judge. The 50/50 is one example, for the family property. Spousal support, people compromise for less. When this is done through an arbitration, according to the CCMW report of Natasha Bakht, the courts can examine where the arbitration order failed to consider undisclosed significant assets and the courts can open the decision up. They can open the decision for lack of independent legal advice. They can open up the decision for

duress, misrepresentation, inequality in bargaining power - all the contractual rights are there. And I am not making this up this is from the CCMW's own report. S*uccession Law Reform Act* allows parties to will away their assets as they wish. So whether it's arbitration, mediation or just somebody writing a will, you can do that. In Ontario you can do that. The second thing is 'women will be forced to arbitrate'. Coercion exists in all communities, at all levels. Not just the Muslim community. Unfortunately in this debate we have heard that coercion is a problem with Muslims. That's racist. Coercion exists in every community. As a lawyer I see it daily, coercion is there. When I settle a legal dispute in the courts people are settling because of family pressure, social pressure, what will people think. We can't control that, because somebody may be coerced, we can't deny people the right to use an option which they want. The CCMW report again says "according to section 5 an arbitration agreement may only be in accordance with the ordinary rules of contract law. Section 6 of the Act authorizes a court not to enforce an arbitral award if the parties did not have real consent to arbitrate". So they can step in and challenge it. CCMW report again states "it appears that any situation that results in a weaker party being over-matched will qualify for relief from the courts." Again, so if there's issue of consent the courts can step in.

A paternalistic attitude towards the Muslims will not solve the issue or coercion or social pressure. As Marion Boyd said in fact doing that thing, you know Muslims can't be trusted because they'll be coerced is going to force arbitration to be driven underground and as we speak today, there's arbitration/mediation taking place. What we're saying is take it out, make it formal, so there are more protections available.

"Decisions will be biased". The report of Natasha Bakht says "discriminatory provisions or clauses that incorporate for example, gender bias cannot be included as part of an arbitral agreement and this would likely be considered unconscionable under the principles of contract law". Again, you can see there's avenues of challenge.

"Children will go to fathers." Courts have confirmed that you can agree or arbitrate all you want but they have the ultimate jurisdiction when it comes to the best interest of children.

The criticism that there's no independent legal advice. As it stands today nobody can be forced to go to independent legal advice. If independent legal advice was forced on people, it's great for me as a lawyer, unfortunately it won't work for people. The Law Society, the Canadian Bar, have all said you can't force people to go for independent legal advice. You give them the option, you can go for independent legal advice but they can waive that option and say I don't want to. Am I going to say, "no, no you have to go?" We can't do that, that's too much State intrusion into private matters. We can't do that. And why should we have a different standard for Muslims? Because Muslim women are abused, we need independent legal advice for Muslim women. That's dangerous because you are singling out a community for special treatment and paternalism and we need to stand up against that. But Marion Boyd didn't do anything, all she did is she said the law as it applies should apply in this context. Arbitrators have to advise that people have the right to independent legal advice. If they don't get it, guess what happens? The party who doesn't get independent legal advice, the decision of the arbitration tribunal can be challenged. The CCMW report says ironically "a failure to get independent legal advice may be the best protection a vulnerable party may have in

getting a court to review an arbitration decision". Great, a person doesn't get ILA, the court can step in and overturn it.

So what is the fear? Decisions are binding, that's the other fear. Well decisions are being treated as binding because they are decisions from God. Today people are making decisions in mosques and they say it's from God and it's binding, it has more authority than your court. But now under the *Arbitration Act,* section 45 talks about appeal rights. Again read the report, I don't have too much time. Section 46 the judicial review right, Natasha Bakht talks about all the options the courts have to do judicial review of the arbitration decision.

Now this even I didn't know until I read the CCMW report. Professor Bakht says "section 48 of the Act says a party who has not participated in the arbitration can step in and ask for a court to overturn the decision". Can you believe that? So a third party, the parent, or CCMW or the National Association of Women and the Law can bring an application in front of the courts, I am not saying this - this is Professor Bakht from the University of Ottawa, who did this report for the CCMW.

After reading all this, I fail to understand what all of the objection is. For me, unfortunately, it has been driven by a lot of people who don't understand how the legal system works, how it interacts with the other existing laws and also driven by Islamaphobia. The fear that Muslims all of a sudden are going to be oppressing their women and I think we need to really deal with that. Alternative dispute resolution already exists within the community as I said and people are being bound by their decision. My position is let's take it out of these back alleys and mosques where no rules and procedures are being followed. Let's put it into a system where parties can have some rules and procedures. This at the end of the day is the best way to ensure that religious rights do not trump women's rights. Thank you very much.

Julius Grey

I am really flattered and honoured to be here. I agree with Faisal on only one thing, you can't make anybody go to court and you can't prevent anybody from going to an Imam or Rabbi or a priest and I wouldn't want to do that because I agree there are limits to how far we can coerce. But I don't agree with the rest. I don't agree for the following reasons, I will divide what I am going to say into four or five points.

The first one is the role of religion. I want to point out what's in our *Charter*. That our *Charter* guarantees not only freedom of religion, that it makes it very clear that it's an individual thing by saying "and conscience" and indeed religion at all times in order to be effective requires the right of the individual to say no, I don't care where I come from, I don't believe, or I believe something else. Freedom of religion, freedom of conscience mean that all times religion depends on the full consent of the person who participates in it and not on any notion of community or anything else and it seems to me that religion - I will quite frankly say I don't have one, but for those who do, and those who consider themselves religious - I think the role that it plays in our society is that of a conscience, that of a system that brings out certain moral truths and I think religion becomes less effective in its fundamental role of bringing out the moral questions and the justice when it mixes itself into the administration of the state and secular matters.

I'll just point out on a very topical matter which I think the late Pope John Paul II was much more effective when he dealt with issues of theoretical dignity of people, than when he got himself into issues of abortion and birth control and things of that nature. In other words, I think in a sense it takes away from the role of the religion to plunge it into everyday dispute resolution. For those people who need religion, it is a matter of conscience, individual conscience, they will follow their religion according to their individual conscience but it is not necessary, it is in fact not good for it to be involved in the State. Then I'll come back to the role of the State.

I found Faisal to be a little bit too individualistic about the role of the State. I think the State - I do believe in freedom and liberty and all of those things - but I think the State has two fundamental functions. One of the fundamental functions is to re-distribute goods and services, to create social justice, to make certain that those who are underprivileged, those who are not educated, those who are not healthy, those who are not as well placed as others, do get a fair shake and that is one of the fundamental purposes of the State and the State cannot abandon that.

The second purpose of the State, I think is to create a sense of wholeness, a sense of community, but I don't mean communities, I mean community. And I think it is the function of the State to have certain common institutions. Institutions for everybody, institutions that bind Canadians, I would say the same thing for other countries. I think without those institutions we become what Joe Clark said a community of communities. I think we are also a community of citizens. And what are those common institutions? Those common institutions are in my view, in Canada today, the education system, the health system and the court system. Those are the fundamental institutions that must be shared in common and that the State must provide.

I agree with what Faisal says that to a large extent the results may be the same, especially if you have a lot of judicial review and so on, many cases will not differ. But I think one of the purposes, and that has not been brought out, one of the purposes for Sharia law separate adjudication is perhaps to put a barrier around a community. I think in a country like Canada, belonging to a community is just like belonging to a religion, it is entirely and totally consensual at all times and putting a barrier, and see I am not a friend of separate schools either or of separate hospitals or anything else. I think it is important that citizens meet together in the institutions. So it is not only the result of the arbitration that I worry about, but I also worry about the separation, about the fact that people will live inside their own group and not see that the rest of the society is not that different from them, that they live in the same way, that they have the same values. It's very easy to isolate and I would not want any portion and I do agree we must not be paternalistic, this applies to everybody and not just to Muslims. I would react in the same way to the Christian court, or to a Jewish court or to a Hindu court. It's nothing to do with Islam, it has everything to do with the separation of people inside society.

The next problem, and even more complicated one I think, is that I do not believe that the results will be the same. I think religious tribunals, and again all religious tribunals, tend in the long run to be conservative, and to be tradition bound. And the reason why they are is because it's their business to attempt to pass it on. They don't want somebody to say well I'm just a Canadian and I am going to marry whomever I want and I'm going to do whatever I want in this society. It's contrary to their interest and it's all tribunals that are the same. If you said this before a very Catholic tribunal or a very Jewish tribunal, you'd have exactly the same problem. There is an inherent conservatism to religious structures. There is not an inherent conservatism to religious abuse, it is perfectly possible to have very progressive views based on our faith and so on. You see that with South American clerics and so on, but when it comes to religious structures, they do tend to be conservative and tradition bound.

The second problem is, somebody will tell me there are appeals, there is judicial review. But remember we have already agreed, I think we all agree that there will be a certain amount of coercion and that it can't be helped, there is always a certain degree of coercion. Imagine how much more coercion there will be afterwards for somebody not to issue a court proceeding in which they say the Imam acted contrary to natural justice and completely unfairly and he gave a decision that was manifestly unreasonable and therefore this court should not follow it because its incompatible with Canadian standards. If somebody can be pressured into going there, imagine how much more easily she can be pressured into not challenging the decision especially given the narrow scope for a judicial review which will mean that you will have to say the man was manifestly unreasonable, he was completely off his rocker. How many people who have already been pressured into going there are going to dare sign an affidavit saying he was off the wall, that decision cannot stand up in a Canadian reality.

The other problem of course with arbitration and contract is that I think, and that is something of a more philosophical nature, that I will not have time to develop, that I think because I believe in the more re-distributive type of society, I'm not a free enterpriser in any sense of the word, let me give too much credit to contracts. Contract is important, when possible, people's free will is important in our society but the just result is as well and I think arbitration in other fields has its limits, it's not always for

everybody's benefit. When insurance companies force arbitrations on the insured, there's something to be questioned there. When employers ask executives to sign that their dismissal will be governed by the law of some American state, there is certainly something that one would want to question in taking away the basic protections of the Canadian social justice from those people. So I don't think we should look, even though in some places, and as I agree between big companies, both of whom are well advised and have the means, there is something to be said for a certain degree of arbitration. I think viewing arbitration as a panacea and viewing contract as a panacea is not a good idea. I think the result in terms of justice is more important than contract and contract is only one of many principles. We should not get into a contract worship situation.

So I conclude that the reality of it is that there will be no equality in that system. Not because it's Muslim, because it'll be the same for any other similar system, not because Islam is wrong, of course it's not. I wouldn't be here if I thought that and I think in fact it'll strengthen Islam. It will strengthen the spiritual message if it does not meddle in everyday court affairs. I think we have a common institution called the court, which along with the hospitals and the schools should be used by all Canadians regardless of their religion and used for the better. Thank you.

Dr. Kathy Bullock

Greetings. I wish I had had a chance to see the previous speaker's speech before I wrote mine, because then I would have been able to write mine as a refutation for just about everything he said and he started out refuting Faisal, so we've got a nice little debate going on here.

I was asked to address the question "Is there Room for Women's Equality Rights in Religious Arbitration?" And I believe that the short answer to this question is yes, and the long answer to this question is yes and it depends on how you define equality.

The big questions that arise in this kind of issue, I think are many. For example, what is the balance between women's equality and freedom of religion in a multicultural society, what is the balance between secular and religious law? Should we have one law for all or should we have the ability to have access to other laws? We've just heard a very eloquent and strong and persuasive speech that there should be only one law for all. I come from a different perspective and I argue with something else. Other questions that often come up - should conservative religious values trump women's equality and why or why not?

Now we have been given only 10 minutes and obviously each of those questions could be a book. So I have tried to limit my remarks to certain focus. And the operating assumption here that I have without explaining, without developing is that it's a good idea to allow different communities to have access to faith-based laws in arbitration. And this is the part of my talk that I decided not to develop, but now that I have heard the previous speaker's argument against why it's a good idea to have that, I almost wish that I had decided to develop that argument instead. However, I am not, because I wanted to focus on other aspects. Therefore, this is my unargued assumption, which if we wanted to get into during question time later, we can. I don't believe that having only one law for all of us is actually the best way to reach justice in a multicultural society. And I believe actually that it's a more mature society which does allow for the different communities to have access to different laws based on their heritage and tradition. It's a more mature multicultural society than one which does not. That's my operating assumption.

So what's the focus here? Basically to try to tease out women's equality and religious values. What I have to say is rather superficial, you will probably find, given the time constraint, and I have three parts to my talk.

The first part is to talk briefly about Sharia and women's equality. The second part is the case for arbitration which I may not need to dwell on too much because I think Faisal already did a good job of trying to show what the criticisms are and what the responses to those criticisms are. And the third part where I wanted to look at what I really think is at stake in this debate because to be honest I find it a bit of storm in a teacup.

My main message is that I think that Ontario should continue to allow, as it has allowed since 1991, faith-based arbitration for all groups.

So part 1 – Sharia and women's equality in a very sort of superficial and general way. The question which often comes up, should conservative Muslim religious values trump women's equality? Now from my perspective, speaking as I do within the conservative Muslim tradition, this is in fact a wrong question. It's a misguided question because from my perspective, the Sharia values and enables women's equality. I believe that it values and honours women as dignified individuals. Now I believe that it does this through a different concept of what equality is. The secular liberal feminist understanding of equality which is basically the mainstream understanding here in this society, and not like the radical feminist or any of the other kind of feminists but basically the mainstream liberal feminist understanding is what we say equality as identicality. Which means, that men and women must be treated exactly in the same way for justice to be achieved. But from the conservative religious perspective, the Quran states that the male is not like the female and therefore it affirms equality sometimes as being the same and affirms equality as sometimes being different. Therefore that justice requires sometimes we get treated in the same way and sometimes we get treated in different ways. That the preferred phrase is "equity". Sharia is a word whose name has been dragged through the mud but I really find it a remarkable document of living law. I find it to be very reasonable in its provisions and I don't believe it's been drawn up by evil men with a view to suppressing women. I believe that it's been drawn up by intelligent men and women and is to discern the will of the creator. I believe it's a very profound system, perhaps neither better nor worse than its secular counterpart. With the crucial difference that from a believing Muslim perspective the Sharia is divine in its origin and hence it deserves reverence. The Sharia has a balance of duties and rights. Now in the west it's not very popular to talk about duties. We focus only on rights. But one of the things that I really admire about the Sharia is the systemic set up of balancing of relationship between duties and rights. My right is always somebody else's duty and therefore if I have rights, that is somebody else's duty, their right is also therefore part of my duty and I think that there is a sort of a wonderful balance, a yin and yang if you like, aspect to that.

Islamic legal rulings always have to be consistent with comprehensive justice, equity and mercy. Now justice is not a thing to be achieved by generalized blanket laws applying equally to everyone, no matter their age or stage in life. Taken out of context or perhaps moved from one country or era to another, they may be laws that do discriminate or appear to discriminate depending on your philosophic or perspective but is part of a holistic system and I am convinced that they achieve equality as equity and one example of that is the inheritance laws that are often given as examples in the media as how women are discriminated against. The argument that I am making today is not a new argument, not even to CCMW members because on the website when the CCMW document submission to Marion Boyd makes reference to the argument that I am making today about equality of equity, they call it a traditional understanding of women's rights. I don't agree with everything the way that has been described on the website, but nevertheless, I am aware that the argument I am making is not new, even to the members of CCMW. I understand that my reverence to the law doesn't make me blind that there needs to be improvement. But I think the issue here really is not reform but whether or not Muslims in Ontario should be allowed to access Muslim Family Law in arbitration

and given that since 1991 other communities do, and in fact Muslims already do anyway, the answer is yes. Muslims should continue to be allowed to access this law.

Part 2 – Why? Well I think Faisal has argued this well so I won't dwell here but first of all it's voluntary, even though the question of voluntariness is hotly disputed but I still believe in the voluntariness of it. Second of all, it's in conformity with Canadian law, third, all decisions can be appealed and fourth of all, and most importantly, I think it really gets down to choice. If the law exists and it does exist, then Jewish groups access it, Catholics access it, Ismailis access it so why can't Muslims? Are we going to be the only group denied access? Unless the government rescinds the law for everyone, then you cannot rescind it for Muslims. I do not agree that the law should be rescinded for everyone, so in that case, if others access it, Muslims should be allowed to access it.

I know that not everyone agrees with my understanding of women's equality in Islam, but that's fine. What I think is that I should be allowed the right to believe and follow my own interpretation. No one should be able to prevent me from living the way I wish and the previous speaker talked about religion as conscience, religion as conscience guides everything I do. I can't separate some sort of abstract theological position from the moral questions of society which he had recommended the Pope should have stuck to, because that makes a mockery really of what religion is. Religion guides everything I do. So if people want to persuade me that Islam does not give women equality the way I believe it does, what they have to do is present to me the research, the evidence and the reasoned argument. And if I remain unconvinced by that particular perspective, if I remain more convinced in a more conservative understanding, then I ought to have the right to follow my convictions. They ought not to be allowed to be able to prevent me from following what they consider to be an oppressive interpretation of Islam. That goes against one of the core secular liberal values that they uphold which is the freedom to follow the conscience of my dictates. I also ought to respect their choices and interpretation. They need not go to Islamic arbitration if they choose not to.

I am not trying to say that there are not challenges with this question, of course there are, but I do believe in the virtue of having things regulated and out in the open and away from the backstreet alleys where things are happening. This whole debate is going on as if we are not already having arbitration going on in the mosques. We are. If we want to have things done better, I think that's where the virtues of Marion Boyd's recommendations, especially that we have trained arbitrators, access to a log of previous decisions where we can monitor and track what's going on, and so on.

So this brings me to part 3. What is really at stake? Obviously an understanding of what a multicultural society is. I do not believe that Sharia puts a barrier around Muslims as a community and I don't believe it ghettoizes us. I believe that what happens is that a community is able to sustain and preserve itself in a way that it feels that it values and it creates confident beings who have high self-esteem, who can enter the public space and interact with the other communities from a position of confidence. We know that racism exists and if you force everybody into the one mould what happens is that the dominant white middle class society tramples on and discriminates against the minorities. That's why sometimes minorities need access to things from their own tradition. It's a way of helping create self-esteem and self-confidence. The public space is not neutral. The public space is biased and therefore I think this whole debate really has become about

choice and it's become about the place of Muslims in a multicultural society even though the previous speaker said, no it's the same Jewish, Catholic, whatever – it's not. We wouldn't be having this conference if it hadn't been for the Institute of Civil Justice or whatever they are called, having this grand announcement about Sharia courts. Since 1991 Jews and Catholics and Ismailis have had faith-based arbitration. Where was the conference about should Jewish people have that right? It didn't happen, it happened because Muslims made some kind of public fuss about it, which they didn't need to do because they had the right under the law anyway to start arbitrating.

So here's an example of the most kind of upfront racism and Islamaphobia which has come out actually in Quebec from the International Relations Minister Monique Gagnon Tremblay who told a conference that immigrants who want to come to Quebec and "who do not respect women's rights or who do not respect whatever rights may be in our civil code should stay in their country and not come to Quebec because that is unacceptable. On the other hand, if people want to accept our way of doing things and our rights, they will be welcome and we will help them to integrate." I don't have time to go through everything here, but there are negative assumptions here in her statement. Who said Muslims don't respect women's rights, in addition the assumption is that conservative Catholics or Jews who may also practice a way of life that would be criticized by a liberal feminist, that their way of life is okay. They are allowed to immigrate - but they don't have to immigrate because they have already been here for hundreds of years but Muslims who might have some kind of similar practices, are not because they are the new kid on the block, because they have not been here for hundreds of years. For example, in the Catholic tradition divorce is not allowed, contraception is not allowed and abortion is not allowed. That goes against many of the rights that women would have in a secular court. So a Catholic woman in Quebec is welcome to stay but a Muslim woman who might agree with contraception because Islam allows it, who might agree with abortion because Islam allows it, is not welcome in Quebec.

So in the balance of religious values and women's equality rights it ought not be the case that the liberal feminist definition of equality and vision should reign over all of us. I worry about the following quotation which I found on the CCMW website much to my surprise. It comes from a book called "Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women" written by Gila Stopler and she writes "I would argue that all claims rejecting state intervention in religious and cultural practices that concern the family and discriminate against women should be rejected and that the state should see as its duty to interfere in the family to ensure equality for women". The previous speaker talked about the State and religion and their roles but the State is not neutral and it's not benign. A lot of feminists find the State in the west to be patriarchal. It's very strange to find suddenly the women's groups relying on the State to protect women's equality when if you do a flip side and do a study of feminist critique of the State, the State is often found to be biased against women. So this is a strange double standard. So here's a woman arguing that the State should interfere in the family to protect women's equality. Interfere in the family, this is a kind of authoritarianism, secular authoritarianism and if the woman who is committed to a conservative understanding of family, I know she wouldn't agree with a lot of the things that I believe in, so now she is going to encourage the State to interfere in my family - in the name of my equality. So this worries me.

I think about the issue of women's equality rights versus religious values and really it's about the ability of us to follow the dictates of our conscience to follow the way we think our religion tells us to live. So, I note that you weren't as happy with my speech as you were with the previous speaker, but I do appreciate your quietness while I spoke. Thank you very much.

Aisha Geissinger

This is the final conclusion to our panel. So many interesting points have been made. I've got three top acts to follow but I'll do my best. What I had decided when I was given this topic, Women's Equality Rights in Religious Arbitration, was to focus on the question really of is there room for women's equality rights in religious arbitration.

The first observation that came to my mind when I heard this topic is, what an unusual topic, because in my experience--I came to Toronto in 1983, have lived here in the Muslim community, except for three years, when I was in Malaysia—this topic to my knowledge has never been openly, honestly and candidly addressed in Muslim circles that I have heard of. It's not that Ontario Muslims don't discuss the issue of the "status of woman" in Islam. Quite the contrary, all one has to do is to go to any Islamic book store, on any Muslim website, any Muslim conference, and you will see lots and lots of evidence that the issue of the status of women is discussed quite a lot. It's a very popular topic and it's evident that this is an issue of concern. Surveying this great mass of material on women in Islam which is available to Ontario Muslims through mainly conservative religious channels, such as mainstream organizations' websites and conferences. I want to make several observations.

First of all, much of it addresses gender issues in very general terms. It is often apologetic--it is intended as a defence of Islam against opponents, or else it is admonitory--telling believers how they should live their lives at any time, how a Muslim woman should conduct herself, and so on. For someone going to this type of literature looking for specific information on what are my rights in the case of divorce, for example, there is not that much information. Most of it is very general about how Islam has elevated women, Islam has given women this and that, but for somebody who wants to know what are my rights in this particular situation, the information is rather scarce.

Second, in this literature and these sources in general, there is surprisingly little Canadian content. This sounds like a very CBC thing to say, but I am serious. Much of this material comes from overseas, or from the United States--which is not really overseas, but the demographic of the Muslim community in the States is significantly different from here, and many of the legal and social problems that they deal with are not our problems to the same extent. Even when the authors of this type of material are Canadian, the sources that they refer to and their frames of reference are usually imported from elsewhere. I read very little and see very little which is actually addressing the experience, the lived day-to-day experience of women in Canada as opposed to ideals of how it should be.

Third, such material is most often authored by conservative males of varying degrees of conservativeness, or sometimes by conservative western female converts. There's remarkably little out there that is written by immigrant Muslim women, or for that matter, by second generation or third generation immigrant Muslim women. And a significant amount of books in particular were originally published 10, 20, 30, sometimes even longer years ago. Material by North American Muslims which takes a more critical approach to gender issues generally speaking does not make it into the mainstream conservative bookstores, conference book tables, and so on. One exception I know of is the well known book by Amina Wadud "Quran and Woman" which you can buy at the

ICNA bookstore, should you want. That's an exception to the rule, however--of all the books that have come out in the last 10 years or so, many of them very well written, very informative, written by Muslim women from various parts of the world, including North America, which take a critical approach to gender issues or for that matter, books by people such as Khaled Abu Fadel which take a critical approach to Islamic law, you don't usually find them at places like the ISNA conference. You can of course get them on the internet, but we are trying to talk about what is the "mainstream" discourse on women in Islam and the answer is this type of material isn't really there.

So what does all this mean? Well, first of all when we are talking about the choices Muslim women make, on what basis are these choices being made? When we talk about conscience, conscience does not come out of nowhere-- what forms the consciences of Muslim women, and their ideas of what is Islamically permitted and what is not? What information is available to people when they make these choices and why are things happening in backstreet alleys; why is it that so many Muslims in Canada feel that they cannot go to the secular courts, that there is something unIslamic or ungodly about the family code of law?

Now, Canadian law guarantees freedom of religion, which of course can include verbally defending one's religion, or defining one's self understanding as a believer in terms imported from overseas, or being socially conservative. Nobody is questioning that. But how does such a discourse on Muslim women and the law intersect with Ontario Human Rights legislation? In candidly discussing this question, we are immediately faced with a number of problems of definition. What exactly are these Islamic principles? What are one's equality rights and what is religious arbitration? To ask even a more basic question, what is it about Ontario Family Law that is unacceptable to the proponents of Muslim religious arbitration? First of all, when one talks about religious principles or Islamic principles, it becomes difficult first of all to ask critical questions about what this means--doesn't every religion have noble principles? When religious principles come to mind, don't we think of things like compassion, justice, generosity? So, when the discussion has been framed in this way, for a Muslim to stand up and say, "What are Islamic principles; I am not sure that I agree with your Islamic principles," is to suggest that the person in question believes maybe that Islam doesn't have any moral standards worthy of the name. But it's not clear who is it who has the right to decide what these Islamic principles are and what frame of reference are they using. Is gender equality to be considered an Islamic principle, and why or why not? Terms like "equality" and "equity" are bandied about a lot but they are seldom--in the Muslim context--specifically and clearly defined. For a mainstream definition, one could turn to the well known book by Jamal Badawi--this is Canadian content, he is from Halifax--*Gender Equity in Islam: Basic Principles*. So, he explains

> "The term "equity" is used instead of the more common expression "equality," which is sometimes misunderstood to mean absolute equality in each and every detailed item of comparison rather than overall equality. *Equity* is used here to mean justice and overall equality in the totality of rights and responsibilities of both genders and allows for the possibility of variations in specific items within the **overall balance and equality**… It should be added that from an Islamic

> perspective, the roles of men and women are **complementary and co-operative** rather than competitive."[24]

Badawi indicates in this book that while men and women "share the same spiritual nature" and have "inherent dignity and the same religious and moral duties and responsibilities," they have significantly different legal rights and obligations within a family. The husband/father, according to him, is to be the head of the family, while a married woman must have her husband's consent in order to work unless her marriage contract stipulates otherwise.

There are divergent, even competing concerns in this vision of equity. The issue of women's oppression has been and continues to be used as a stick to beat the Muslims, as some previous speakers pointed out. Therefore, there is the wish to assert that, contrary to the sometimes very inflammatory claims made by some, Islam does teach gender equity. At the same time, though, the talk of equity is not to be allowed to stand in the way of preserving to what amounts to a gender hierarchy. Because this gender hierarchy is believed to be laid down in the authoritative sources--the Quran and the Sunnah, or the practice of the Prophet-- and for some Muslims as well, traditional medieval jurisprudence, it becomes very difficult to ask (for example) how placing a woman's right to work at the discretion of her husband could be described as equitable.

Such rhetorical manoeuvres are certainly not unique to Muslims. They will be familiar to anyone who has ever followed the Roman Catholic Church's discussion of whether or not women should be ordained, or discussions by some conservative Christian Evangelicals about why men should be the heads of the family. This tension between the aspiration to claim the vocabulary of human rights while at the same time affirming some form of gender hierarchy is clearly a question which believers rather than the Ontario government must resolve for themselves. However, it is evident that in such conservative formulations, "equality" and "equity" are not being used in the same way that the Ontario Human Rights law does. So therefore, for the Ontario government to in any way be directly or indirectly supporting such formulations does imply a contradiction to the very least--it seems to imply that it does not take its own human rights laws seriously, that it does not believe that all persons should be equally protected under the law as long as one waves around the magic word of "equity."

While the wish to claim the word "equity" is evident in this quote, so is the desire to distance the Muslim discourse on gender from what is presented as the "competitive" ideal of equality. We have the rhetoric here of family harmony--and after all who doesn't want a harmonious family life?--which obscures the question of who it is who gets to define what is "co-operation" and what is "complementary" in the family.

Now, to take one brief example: a fatwa from Islam.ca, a mainstream website in Toronto. A man writes:

> "My religious wife and I have been married 3 years. We both have good jobs. My wife refused to stop birth control until I threatened to leave 4 months ago.

[24] Jamal Badawi, *Gender Equity in Islam: Basic Principles* (Indiana: American Trust Publications, 1999), 55, n. 1. Emphasis is in the original.

> However, she still just arrogantly dismisses my desire for children and gets angry when I raise the subject. Before marriage, we agreed to have children within 2 years. She denies this. I really resent her--I cannot tolerate sleeping in the same bed with her. I am frustrated. What are a Muslim woman's duties to bear children? Would it be fair to divorce her? Would I have to pay her dowry?"

The answer:

> "Marriage is a contract which entails mutual duties and responsibilities. Procreation or seeking offspring is one of the stated objectives of marriage in Islam, and it is a legitimate right for each of the spouses in Islam. Just as it is her legitimate right, it is your legitimate right to desire to have children. If she refuses to cooperate with you in this matter, she is guilty of denying one of your basic rights and she is being unfair to you. Therefore, she is best advised to agree to accommodate your desire and help fulfill it.
>
> If, prior to marriage, she had agreed to have children within 2 years, then it was a condition she had contracted the marriage with. By reneging on that, she is guilty of a breach of the marriage contract.
>
> If in spite of your persistent attempts to convince her to agree to your request, she is stubborn in her refusal to have children, then it is up [to you] to think of divorce as a final recourse. It constitutes a legitimate ground for divorce. But you should not rush to do that, rather, you should try to exhaust all means to convince and persuade your wife and remove her fears. Sometimes she may be suffering from some kind of phobias concerning conception and childbirth. If that is the case, proper counselling may be the best route to follow before rushing to divorce her."[25]

There are many things we can say about this. The issue is not so much birth control, although this is obviously an important issue for any woman of childbearing age. The question is the assumptions that are being made here; the way in which women are being constructed. There is an apparent attempt here to present the right to have children as equally belonging to the husband and wife. There is also the reference to mutuality, co-operation and fairness, but obviously pregnancy has different psychological, physical, financial and social implications for women than for men, especially for women who work at "good" jobs. Apparent equality of rights in this case is not leading to an equitable result.

So what is the source of this ruling? We're never told, so the average lay person who is a Muslim will look at this and say well, where did this come from? I can say that the Quran says nothing explicit about birth control, and the Hadith only talks about withdrawal, which is obviously not a female-initiated form of birth control. So, the issue which is being discussed here is a modern problem.

It could also be pointed out that Muslim literature in general greatly emphasizes the esteem and the rights of the mother. There is a very well known Hadith about the man

[25] http://www.islam.ca/answers.php?id=295 Accessed on 07/04/2005.

who came to the Prophet Muhammad and said, “Who among the people is most worthy of my good companionship?” The Prophet said, “Your mother” three times, only then did say, "Your father." This is a well known saying that most, if not all Muslims, know.

Jamal Badawi points out that this gives mothers an unequal and elevated status in human relationships. But what is being presented here in this decision is compulsory motherhood; it is motherhood that can be forced on a woman. This is the obverse of the idea of idealizing motherhood as a wonderful thing that should be looked up to. It is a way in which women can be controlled.

So what gives this ruling authority, if not explicit texts, or values of mutuality, fairness and co-operation as generally understood in Ontario in 2005? Well, basically it’s the assumption that Islamic laws are a complete code of life to which Muslims are subject to, and that basically this is something that they have to accept. This is presented as an historical given, and even though this wife is, according to her husband, religious, her own conscience, her own views of how religion should govern her life, are given no recognition.

So to conclude, I would say that the evidence that is out there is that regardless of the use of words like “equality” and “equity,” what is being advanced in reality by the Muslim advocates of faith-based arbitration is not in accordance with the *Canadian Charter of Rights and Freedoms*.

[26] http://muslim-canada.org/pfl.htm#1. Accessed 08/04/2005.

IS THERE ROOM FOR WOMEN'S EQUALITY RIGHTS IN RELIGIOUS ARBITRATION?

Question and Answer

Question

To correct what Mr. Kutty was summarizing, I think quite selectively some of the issues in the report of Natasha Bakht that was done for NAWL, NOIVMW and the Canadian Council of Muslim Women. It's true that while there are appeal rights, you know it's a standard provision when people contract out of their appeal rights in an arbitration agreement, it's true that there is judicial revision, but the courts are extremely stringent and the test is very high for judicial review and it's true that we can appeal, but the Supreme Court gives a huge weight to private contracts and the fact is that arbitration allows for the use of any legal rule and the conclusion of Madam Bakht's analysis was in fact that the current practice is a violation of women's equality rights. So I thought it was important just to complete the picture.

Answer

If you remember at the beginning I said for you to read it yourself. Read all the points yourself and make an educated decision. I said these are the sections, I am citing some sections, go read it for yourself and read Marion Boyd's report and then make your educated decision.

Question

I have two questions for Kathy. Kathy throughout your talk you kept on referring to Ismailis and Muslims. Do you consider Ismailis not to be Muslims? My second question is what percentage of Muslim women can stand up for their own protection and what percentage of women are vulnerable that can be manipulated and abused by the authoritative arbitrating bodies and if there is such a group existing, what support could possibly be provided to these vulnerable women?

Answer

Thank you for the question. Why do people assume that a vulnerable woman is going to be oppressed when she goes to arbitration but not oppressed when she goes to the secular court? I just don't understand that. If there is a power imbalance, if there is abuse she is going to be facing that no matter where she goes. What I think is, if there are vulnerable women who need protection, we can set up hotlines or women's groups or support networks, take the opportunity that Marion Boyd has given us to increase education about women's rights in the community, we can have a buddy system, there are so many ways to help support vulnerable women but the secular court is not a panacea.

Question

I am going to pick and choose my questions. I think it was all agreed by all the panelists and everyone here that the back alley use of Sharia has been a reason to legitimize the institution of legal arbitration in Ontario but just to answer your question Mr. Kutty about what the fear is. I think myself and many people in the audience have seen the effects of that back alley application of Sharia and have had to pick up the pieces, so we don't want to see that abuse. You may respond by saying, as you addressed earlier, having a judicial review, but I don't think the issue is a judicial review of the arbitrators themselves but of what they are going to apply and everyone has spoken about Sharia as if it's a uniform ideology, but to my knowledge it's not and what exactly is going to be applied and I have never seen an answer from the person who instituted this arbitration idea except to say that there would be representation from each school of thought, let's say Hanafi, Shafi or whatever. But that then introduces another problem - is it going to be kind of a drive-through service, if this lady got that deal, can I then get that deal because it was more just? It's a broader problem about what exactly is going to be applied and once that question can be answered, may be it can be reconciled with what is in place already.

I had a second question about coercion. You spoke about coercion from society, but I think the previous person mentioned coercion of the system. When the legal system will be coercive, that's another fear people will have, what are they going to apply and how are they going apply and how binding will it be?

Answer

Three things. One is first of all I disagree with it being Sharia arbitration. It's faith-based arbitration, number one. Number two, the question of back alley arbitration - that is exactly why I am saying no body can stop that. If tomorrow the Attorney General announces that family arbitration will not be allowed under the *Arbitration Act*, do you think people going to the mosques to do arbitrations and mediation are going to stop? No, they won't they will continue, that's going to continue, that's my argument. Take it out of that forum, formalize it, put rules and regulations in place, so that you catch some of the problems that are happening. I see it in my office, people coming with decisions and I say, what are you talking about? They respect those decisions because they think it's from God. They have as much right to think that that's the way they should be living their life, as you do to say no, that's not the way. But the thing is we're saying make it formal so that now we have more checks and balances and the other thing about coercion - what I am saying is even when I do a divorce, when a spouse comes to me and I do a divorce, I have many instances where the woman is accepting something, I say, are you sure you want to accept this? She says yes, yes, because of family pressure. There is nothing I can do, I can't twist her arm. I am talking about non-Muslims, I'm talking about Muslims, I will tell her, you are entitled to 50%, she'll say, well, you know I don't want to fight for 50%, I'll settle for 25%. How can anybody step in and say you can't? The parties can resolve their disputes privately and that's all we're saying, parties should be able to do that, we need checks and balances in place to deal with that. You can't stop people from settling their disputes. If the two parties agree to appoint this person as arbitrator, they respect that person, they'll abide by their decision and as I said because there no ILA, coercion issues, all of these issues you can open it up, you can challenge it and in your own report, the CCMW report said that even a third party can challenge the decision. That's what I am saying, I think the fear is exaggerated and it's not going to stop it from happening in the mosques, because those people will just continue.

Just a quick answer to that in more specifics. I believe that any of the school of law can be followed. I don't think that the government is going to say well only Hanafi in Ontario. So it's going to be up to the couple, the couple between them will decide to go to so and so person, who is known to follow Meleki, so and so who is known to follow Hanafi, or so and so who is known to follow the Sunnah, etc. All of them, the way I understand are going to be accessible.

Question

Salaam Alaikum. Aisha, I don't think Amina Wadud's book is going to be on sale at ISNA or ICNA very much longer. I wanted to thank you for your presentation and for bringing out issues, and my question actually directly springs from that. It's actually addressed to Kathy and to Faisal but I would really like a response or critique of their response by at least Aisha, if not also by Julius. My question is this: What is so deficient in the existing Canadian system with respect to access and equity that we need another layer and another system which is so ill-defined at this point in time, and how has that remedied the deficiencies in the existing system, how is that remedied by a set of laws whose organic development stopped centuries ago with the closing of *itjihad*?

Answer

Perfect question. I was waiting for that question. I want to ask that question back to the audience here. What is wrong with our family law that we allow parties to make marriage contracts, to opt out of the *Family Law Act* provisions? What is wrong with our *Family Law Act* if we allow people to do separation agreements? Is there anything wrong with our system? No, there's nothing wrong with it, but people may want to have a different settlement to their issues. That's all it is. There's nothing wrong with the system, we are working within the legal system with the constraint, under the *Charter*, with all the laws. You know support/custody issues always come up. Well custody will always go to the father, and I said, custody issues cannot be settled. It's in the best interest of the child. Even Marion Boyd's report says that. I can't believe the level of fear that even rational analysis, I mean, ask the questions yourself, when you want to do a marriage contract, is that allowed? Yes, it is. When you want to do a will, is that allowed? I can write my will and say who I want to distribute my assets to, the *Succession Law Reform Act* says one thing but I can opt out of that. Now do you want the government to say no, you know what, liberal Muslims, yes you can do what you want, you can exercise your conscience. Mr. Grey said about exercising my conscience, as a conservative Muslim. I am not conservative by the way, but if I am a conservative Muslim, should I have the right, because I know I am going to get stoned if I admit that I am a conservative Muslim, I am not by the way. If I am a conservative Muslim should I have the right to exercise my conscience? Yes, I should be able to just like the liberals can exercise their conscience, they can opt out of this choice. No body is saying they are going to put guns to everybody's head. I probably won't even go to this, but I defend the right of others to go.

Aisha Geissinger

When it comes to the whole issue of coercion and conscience and so on, I have a short quote from the Muslim Civil Justice System in Canada, these people who started the whole move to arbitration. Syed Mumtaz Ali is asked why is this so important for Muslims, why do the Muslims need it? His response is "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, 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". [1]

That is arm-twisting. That's basically saying you follow our understanding of what divine law is, or you are not a Muslim. And I should point out that as a woman, if a woman is ever in that situation of being accused - and say, in a divorce where she refuses to follow what is given to her as the Sharia, she is open to being accused of being an apostate. Apostate women do not receive custody of their children according to Islamic law. So this is not just a question of name calling, it has legal ramifications.

Julius Grey

Let me answer one part of the question. What is wrong with Ontario law or Quebec law or any other. I am not an Ontario lawyer, so I can't give you the details on that but certainly in Quebec law, yes people can opt out of certain things, but then challenging that is not particularly difficult because nobody claims any divine origin. If somebody has opted out and then the lawyer explains to the person that the opting out was not fair, then it's simply another secular law that you can challenge in the secular court. The difficulty with the religious court, whatever religion, is that challenging means in fact challenging the legitimacy of the religion and human nature being what it is, you don't want to put people before that dilemma.

Question

Very briefly, I have a number of objections to what Kathy Bullock had to say and I'll try to stay to one very basic point. Unfortunately, when people start questioning or asking questions about what is said in Quran, they get called many, many names and I am sure I'll be considered one of them. I can give you many things in the Quran that actually do discriminate against women and I would ask you to explain some of these. For example, the inheritance law in itself is, there's no question about it, it is very, very discriminatory towards women, there is mention in the Quran of beating your wife, which I don't know how anybody can deny it, and I am sure people will say, oh my God it doesn't say that in the Quran. Child custody is another one. The laws of evidence, there is no question about the fact that they are discriminatory. A woman is raped and yet she has to go find a male witness to prove that she has been raped. I don't know how you can say that. To me, I can still believe that I am a good Muslim because I believe in the concept of equality that the Quran wanted to see and that Islam wanted to see in its implementation and I believe that I can still be a good Muslim without sticking to those, you can either say that these things are in the Quran or say that it is okay for us to move away from some of the regressive and repressive things that are in all religions. And we can't just sit back and say "oh well, it is perfect the way it is, therefore we must follow them, otherwise we're apostate".

[1] http://muslim-canada.org/pfl.htm#1. Accessed 08/04/2005.

Answer

Just to clarify, I enjoyed Aisha's presentation, but divorce is not covered under the Arbitration Tribunals, okay. And secondly, I am not a representative or defendant of this Institute of Civil Justice. I don't agree with that comment that Mumtaz Ali is quoted in the press, you know don't box me. Okay. I don't agree with everything that's going around. But the previous question, maybe we should speak privately because none of her questions are relevant to what's under the theme today about arbitration. I disagree with her interpretation of the Quran. That's all.

Faisal Kutty

In the Institute for Civil Justice, I don't agree with them, I don't agree with their interpretation, I don't agree with their ideas. I am here to defend the concept that faith-based arbitration should be permitted just like my liberal understanding of Islam is valid for me, its my conscience, its acceptable for me, a conservative's, as long as there are checks and balances to make sure that Canadian laws are complied with, divorce is not a subject of arbitration. Custody of children cannot be subject of arbitration. You have to look at these issues, what can be arbitrated? Go look at the Act and I would look at your own report, those sections, read Marion Boyd's report, please if you do one thing after leaving, go read Marion Boyd's report and the CCMW Natasha Bakht's report.

Question

I have a question that I probably could address to everyone of you. But before that Mr. Faisal you did ask all of us a question and in all the questions we are asking, you said fear, why the fear from faith-based arbitration? Well, I am very fearful, and I will tell you why, because I am Algerian and because in Algeria in the name of Islam, I have seen women being beheaded because they didn't wear the scarf and there are 100% of us Muslims in Algeria. I have seen men, young men being beheaded, I have seen hands being chopped off because they had varnish. I do not want to get into that, please do not answer now. My question is not on these, this was just my answer to your question and I want to give you just a little bit of background. The question I address to both of you and maybe the others could comment on it. Do you know that in all other Muslim countries, where the law is somehow based on the Sharia, like the Algerian jurisprudence has been changed and the personal code, there is no Sharia. Well did you know that in Islam we are told that wherever we are, if there is, we have the choice between the law courts, civil law, and the arbitration which is Islamic, the Islamic one prevails? So we have no choice and everyone of you keep on saying it's voluntarily, you say it's on a voluntary basis, women have the choice. So me as a Muslim, or I should say, a Muslim is always a person in process of being a Muslim, if I want to obey all these Islamic rules, and I will have to go to an arbitration court because I do not have this choice and lawyers and Muslim scholars could tell you that, we do not have that choice because an arbitration Islamic court would prevail on the civil court. So this was just the one question, did you know this? If you knew then why are you saying it is voluntary?

Facilitator

We are running out of time, we will take all the questions and then we will respond to them and please, I just want to tell you that we have one minute per question.

Question

Thank you. What you have read is from page 9. On page 16 there is something more scary which I ask Dr. An Na'im and probably he will address. It is always a bunch of advice and hidden cruel laws. In no conference I have seen any speaker quoting the real Sharia laws from the real Sharia books. If you want we have the most, I repeat, the most authentic Islamic Sharia books, I can send you, each and every major Sharia law is anti-women and it violates the Quranic verses again and again in their context. That is all provable and this happens because Sharia is a product of patriarchy. Thank you.

Question

My question relates to Dr. Tariq Ramadan's request for a worldwide moratorium on application of Sharia punishments of stoning for adultery and other kinds of violations. Ma'shallah, Dr. Ramadan is a very esteemed scholar and Muslim, so if he is saying that Sharia is being applied unjustly to women and to men who are not politically favoured by the ruling administration, my concern in Canada is that the same kinds of concerns prevail. Of course we are not going to have hoodud punishments or anything like that but why would it be any different for other types of application of Sharia for oppression of women and oppression of unfavourable men and weaker members of society?

Question

My question is for Julius Grey who comes from Montreal where I come from and which has been deemed in a study to be the capital of single mothers in Canada. In secular courts I know a lot of divorced women in Quebec who have gone through the civil system and are still waiting up to five years later still waiting for child support payments to come and materialize, not a single cent has been seen of it. What recourse do these women have and I don't know whether the arbitration laws would enforce such laws or if they would be more beneficial for such women but believe me they are not beneficial to these divorced mothers. Secular courts as they are right now in Quebec, these women receive nothing.

Question

My question is to all Muslims. When we migrated to Canada, we knew we were migrating to a non-Muslim secular country, now suddenly we want to live under Muslim law. Please answer that.

Question

My question is very simple, as a semi-practicing Muslim woman, do you think Muslim women will have the choice to re-interpret the family law practice in the arbitration courts?

Question

My question is for Kathy Bullock. Do you know how long Muslims have been in Canada?

A: Since 1800 and something.

So I would have to say that we are not new kids on the block and we probably formed and helped create all the laws that are guiding us now and the Charter of Rights and Freedoms, so I think it would be undoing to accept anything else.

Question

My question is to Sister Kathy Bullock. You said in your speech that Sharia is divine. I would like you to support this from a verse of the divine book, the Quran, and I do not need an answer from the Hadith. Thank you.

ANSWERS

Faisal Kutty

Question was asked about what you are afraid of and criminal laws and the laws that are applied in Muslim countries. We are missing the issue here. Number one, it's not about Sharia. Number two, the areas that you are talking about, they can't be arbitrated. I have been sitting on panels and people are talking about a tribunal is going to say it's okay to beat your wife because it says in the Quran. It's against the criminal code, the person will be arrested and so will the arbitrator for encouraging. You have to realize there are certain issues that cannot be arbitrated. We are not saying we want to live under separate Muslim laws. All it is, we want to use the existing Ontario law, which is the Arbitration Act, to try to make use of one of the options which is ADR. Do you think all matters in a legal dispute end up in front of a court? They don't, as I gave you the example, they go through so many different options that are there. Those choices are there. All I am saying is don't remove that choice because in each of those other options abuses are taking place, problems are happening, that doesn't mean you shut down those options. Have we said let's stop paralegals from doing, that's may be a step we should take. Let's stop paralegals from doing divorces because there is so much abuse there. Paralegals don't understand the law and they are advising people and they are settling disputes for both parties and filing the documents. This is being driven by fear of Islam because Islam came into the picture. That's why I am such a vocal opponent of it because we need to stand up and say no, Muslims can't be treated any different than any other community and as long as the checks and balances are there we should be able to use ADR as another option.

Dr. Kathy Bullock

There are so many questions here and obviously we can't deal with them all properly but I really want to encourage people not to keep making these relationships between what we are talking

about with Catholics and Jews and Ismailis use faith-based arbitration, why not Muslims. We are not talking about Islamists in Algeria be-heading people because they didn't wear the veil. I really think that that's a very, very dangerous jump to keep making. I don't support people being be-headed because they don't wear the veil. Just because I am here at a panel trying to argue that like others in Ontario, Muslims should have the right to access faith-based arbitration, that's all I am asking in this panel that Muslims have the right for faith-based arbitration like other groups in Ontario do. I am not here to defend all the ills and wrongs of Islamists. So please, don't box and try to keep these different issues separate.

Julius Grey

There was a specific question about the fact that in Quebec we don't collect child support payments. That's true, we have a mechanism for collecting them but it doesn't always work. However, in my experience, other systems are no better. In other words, it may be theoretically possible that some individual may be more frightened of somebody in his mosque and would pay, but that would be one in hundred. But on the whole we have not seen for instance, in observing the results of other groups, the Hasidics for instance, that the problem of failing to collect is solved. I have seen that happen in many communities and I think that the notion that going is purely voluntary and therefore there is nothing to fear is as dangerous as the whole elevation of contract to the level of a sacred principle.

Faisal Kutty

I want to just deal with that coercion issue. Now think about this. Many people go to the mosque for prayer, should we now ban mosques because people who don't go to the mosque will feel pressured, they will be considered as not as Muslim if they don't go to the mosque? That's a dangerous line of thinking we are going under. Should we ban hijab because if we allow some Muslim women to wear hijab, because they believe in it, you know what, it's gonna pressure other people to think we're not a practicing Muslim, we don't wear hijab, so let's ban the hijab? That's what France did. That's why I am at the forefront of this debate because that's the line of argument that's being advanced and you have to be very careful as a community when arguments like that are being advanced that pressure is coming for people to go to the tribunals, so let's not allow it. Well, let's not allow hijab, let's not allow mosques, because that's also putting pressure on people. So think about that.

Aisha Geissinger

First of all when you construct this as an issue of Muslim immigrants coming to a non-Muslim country, then one does tend to fall into this sort of, you know, "if you're gonna come here, play by our rules" type of zenophobic, racist, approach which ignores the fact that, certainly in Quebec until the 1960s, the Church basically ran women's lives. It is not as though there is this egalitarian Canadian culture on one hand and this you know, backward-looking terrible Muslim culture on the other. But I think there is a complicated dynamic. On one hand Canadian women, such as for example in Quebec who do remember what life was like before equal rights, don't

want to be put back. They are worried that with an increasing demand for this type of faith-based arbitration that the clock will eventually be turned back and it does look as though the government doesn't truly believe in their equal rights legislation as being applicable to everyone. On the other hand one often sees Muslim immigrants who come from countries which have relatively--at least on the books--progressive legislation, who come here and become more conservative. So it's not a question of people coming and bringing their customs here, it's a question of a particular approach to Islam. The Islamist movements basically which have been operating in the last 20 years and are very powerful in a number of countries have a certain ability to basically coerce people into following their particular approaches to Islam because they say, okay, we have the Quran, we have the practice of the prophet, this is what we want to implement; if you don't agree with the way that we are implementing this, then basically your Islam is questionable. That's a very powerful way to coerce people, but this is a particular political movement that has emerged in the last 20 years. It was mentioned that Muslims have been in Canada since at least the 1890s, but when did they start calling for Sharia? Are the Muslims who have been in Canada until now all bad Muslims and we only have good Muslims in the last 20 years who decided we need the Sharia? When the first Muslims came to Canada, as soon as they could, they built mosques, it was not that they were not practicing Muslims, but they did not call for Muslim family laws to be implemented. This is not a question of authentic cultural values; it's not a question of Islam; its a question of a particular politically driven approach to Islam.

Alia Hogben

I hope you will agree that that was a very good discussion and thank you to everyone and I am hoping that the panelists will hang around and people can have another discussion.

There is one thing we wanted to make very, very clear here, and we hope that that is never asked again. The Canadian Council of Muslim Women is exactly that. Anybody who calls herself a Muslim can be part of the CCMW. We do not differentiate, we never ask a Muslim woman if she believes in one particular school of thought or belongs to any particular sect. That is just not part of our vocabulary. So to differentiate, sorry Kathy, not being critical of you, but people do this ever so often to differentiate between Ismailis and Muslims is totally, totally wrong. They are Muslims, they call themselves Muslims and as far as we are concerned there is no difference. Another correction is the Ismailis very rarely use the Arbitration Act. We looked into that and they do not use faith-based or Sharia, they use Canadian law. The Catholics do not use it and I would like your patience for a few minutes and I have asked Abdullahi An-Na'im, since some of the people here didn't hear him this morning, if he just wants to bring this into a closure, in five minutes, so please bear with us.

Dr. Abdullahi An-Na'im

I feel that I have taken too much of your time this morning already, but please allow me this brief comment. I am from Sudan and I have traveled throughout the Muslim world from Central Asia to Southeast Asia to South Asia to Africa and it is most amazing and distressing to see how much apologetics continue to dominate our discourse. I find that we are not willing to be straightforward about issues. With all due respect to Faisal, when you speak about this proposal

of enforcement of Sharia family law as “faith-based arbitration”, what does that mean? If this proposal is about the right of Muslims to live according to their religious beliefs, why are Canadian Muslims accepting the exclusion of divorce and custody of children issues? Why insist on some issues are faith-based, and accept that other issues which are also supposed to be governed by Sharia are not included? One question that was put to the panel was about the basis in the Quran for the belief that Sharia is divine. To my knowledge, there is no basis in the Qur`an that Sharia is divine. In fact the term “Sharia” is not even mentioned in the Quran at all in the sense that Muslims use it today. This term and its meaning emerged very gradually and slowly since the second century of Islam, which means that the first four generations of Muslims lived without even conceiving of this notion, or defining it as we do today. Yet, we all acknowledge that those early generations were model Muslims. I am sad and frustrated by this confusion and apologetic discourse. The issues are too fundamental to keep dancing around them. That’s all I have to say, and thank you all very much.

PRIMER

CONSULTATION ON COMPARATIVE STUDY: MUSLIM FAMILY LAW AND CANADIAN FAMILY LAW

Dr. Lynda Clark and
Pam Cross

Pam Cross
Thanks very much for coming after a really interesting and intense session. I am sure all of you agree. What I would like to do is just walk you very quickly through the Table of Contents for this Primer as we have been calling it and then Lynda and I are both going to explain briefly how we've gathered the information that we have. Of course no such publication could ever be absolutely comprehensive and that's why we are looking to you today to let us know if we've missed key areas that you think of often when you are thinking about legal matters or if we've focused on areas that you think are really not that relevant. So to let you know where we are starting from, if you just look through this draft that you have, you will see that the book will have a Preface, an Introduction that details women's rights, the role of interpretation and how to use this booklet. And again you'll see that each section will look at both Canadian secular law and Islamic law and will then look at the Law of Marriage, Divorce, Property and Spousal Support, Custody and Child Support and then I made a typing error when I did this, following that, there will be a chapter on Inheritance Law. I am sorry that's not there, but if you can just make a note to yourself that we are going to look at Inheritance Law. We'll then look at Domestic Contract. The final three sections of the book or publication will look at Canadian law only because there isn't a relevant comparator in Islamic law and that is what are the Canadian laws with respect to safety matters, access to justice and mediation and arbitration. That's the very basic outline, obviously the content will go into considerable detail.

In terms of how I developed the material for the Canadian law part of the book, in some respect my initial task was much easier than Lynda's because of course Canadian law is codified at both the federal and provincial levels. So throughout this material, I've referred in large measure to the *Divorce Act* which is a federal law and then at the provincial level to the *Marriage Act,* the *Family Law Act,* the *Children's Law Reform Act* and then with respect to inheritance law, the *Succession Law Reform Act*. There are brief references to other Acts as well, but I do want to stress at this point that in no way, is it quite as simple as that, that the laws set out certain principles, but in this respect Canadian secular law is not entirely unlike Islamic law; all of that's open to interpretation and so in the materials I have tried to reflect - well here's what the *Divorce Act* says but here is how it is often interpreted and women do not always have their rights absolutely respected when they use the Canadian secular law system. So it's not a case of saying here is a system that always works, here's a system that always respects and reflects the equality rights of women, because it doesn't. What we have tried to do is set out here's what the law permits and here's what the law does not permit.

Dr. Lynda Clark

I know what you are all thinking and that is, what could a summary of Islamic law and Mrs. Hogben told me also it should be a brief summary, it's a bit of an impossibility, but nevertheless we undertook it by limiting our parameters, not only to certain subjects, but in my case to a certain approach which I will explain now, and all of these disclaimers will be in the Preface, so no one, we hope, will open the book, which we hope will be in simple language, accessible and translated into other languages and for common use in the community, such as Arabic, no one, we hope will open it and think that this is comprehensive and everything and everything that could happen. What I have done in each case, for each issue is, I've spoken a little bit about the principles and the origins of

this part of the law, whether inheritance, or divorce and so forth and that helps people like judges and lawyers to get a grasp of the underlying principles. In light of the comments on inheritance made by one young lady in the other room, I think it might also help some Muslim women to realize that realistically, not apologetically, this was in its time and even in some jurisdictions, even recently, quite a progressive system. Then I go on to the classical law and of course I cannot cover all schools and opinions and minority opinions. I cannot even start to do that, so I just give a kind of a general map with some examples. Why do I spend time on the classical law that's dusty and crusty? Because that is what Muslims in the Diaspora tend to refer back to. In Muslim countries, Muslims find themselves under the shelter and control of state laws, of sets of reforms, and state control of divorce and other things but here it's an open field, you might even say a vacuum. So these prior practices and concerns tend to come back in, or at least the classical law again become a subject of discussion. So that does become relevant and I spent a good deal of time on that. Also that classical law underlies to varying degrees the state laws of modern Muslim countries to which Muslims here also refer and which sometimes they are affected by those laws if they live between the two countries and so I talk about some typical state reforms giving some examples and then I also talk about the ethic of the law and different views and interpretations. I tried fairly to represent more "conservative" and more "liberal" points of view and in all of this my very academic aim is not to advocate one thing or another, but I am envisaging my audience, for instance a judge or lawyer, a community worker who will come and be able in a short time that people usually have available, and read that section, come away and have a map in their head, a fair map, might knock down some of their prejudices and also inform them about the general tenor of the law and they will be able to take that knowledge to whatever task they have at hand. Now the Primer is, or booklet, we haven't decided what we are going to call it, is also designed for a Muslim woman to read and in that case it has to be, as I am calling it, real "worldized." We should also address the common concerns and situations that Muslim women have in Canada.

Now, there is limited material on this as Aisha Geissinger told us, and most of it actually relates to America, and so what I want from you in relation to each issue is to hear what kind of concerns you have, what kind of typical situations you have coming up. For instance, actual practice where Islamic custom is invoked in child custody is pretty much a blank to me now. All I have is this thing from classical law and as for visiting rights and joint custody, I am not really able to make much progress even on state law, so I need your feedback on that, for instance, but many other things. What we agreed is that since you are the session, we put you in control of the session, and you can look at the table of contents and really pick which issue, which area concerns you the most, or you would like to hear about, or you would like to tell us about the most. So it's in your hands at this point.

REMARKS

Question

In regards to Mahr, my experience, I am a divorced woman, I have been told that even though the Mahr amount is on the actual contract, that it is not enforceable by law and the analogy, to put it as what I was told, it's like saying, well if you make a contract to sell your baby and you say you are going to give $5,000.00 to whoever buys your baby or

someone would give you $5,000 to buy your baby, you can't enforce it by law, that the contract is an agreement but in Islamic law, a Mahr is not a selling of a person, it's just merely a gift that is bound by a contract of marriage.

Q: Can I ask you, who told you, that you ….
A: Lawyers in Canada. I've had three different lawyers tell me that.
Q: Muslim lawyers or non-Muslim lawyers.
A: Non-Muslim lawyers.
Q: They have told you, could you summarize again, that you have essentially given away your rights to any other compensation by agreeing to Mahr.
A: No, in a marriage contract, the Mahr is decided and it's stated and both parties sign on that agreement. When I took that document over to family lawyers that are non-Muslim that are practicing here in Toronto, they said, "you cannot enforce it. It's not enforceable by law."

Dr. Lynda Clark

I think that Pam has some information about how Mahr has been treated in courts in America and in Canada.

Pam Cross

I am really cautious of how to proceed here because it would be extremely ill advised for me to say anything that could be construed as legal advice, and I hope you can appreciate that. What we were hoping to do in this session was to hear what are the areas of law that you think need to be elaborated on, clearly that's one and I am not trying to avoid your question but its very problematic for me as a practicing lawyer to comment on an actual situation without really knowing the details of it. Its obvious though from your question and some nods around the room that the issue of how essentially private contracts are dealt with in the civil law of Canada, is something we should spend some time on and in a general way, what I can tell you is that in a domestic contracts under Canadian law section of this book, we talk about marriage contracts, co-habitation agreements, separation agreements, what can be contained in those and when the *Family Law Act* of Ontario can intervene if something unfair is contained in one of those contracts, so that information will be provided in the book. It is an area where the law in Canada is still trying to settle itself down because there is, as one of the speakers earlier said, that Canadian law does grant a fairly high right of individual autonomy; that if I am a fully competent adult and I have had access to independent legal advice, the law does say I have a right to sign away my rights but there are limits on that, and the limits are contained in the *Family Law Act* of Ontario, which specifies particular things, like where I haven't had that access to independent legal advice, I am not bound by a contract that I have signed, and so on and so forth.

Dr. Lynda Clark

As per the record of admitting Mahr as some kind of legal consideration in courts, in Canada or in America and other contracts and norms attached to Muslim marriages and divorces, the record from what I can see and you can't see much, because there's not a lot

that has gone through courts and less has come into the literature, it seems to me it's kind of arbitrary, you can't really tell what's going to happen because the judges don't have a lot of idea of Islamic law, how can they? And then they ask for testimony from people who might be entirely traditional, they might be an Imam who would honestly say that a woman is entitled to Mahr and nothing after that, no alimony, no maintenance, and then you might get a modernist, as has happened, who will say, yes, there is something in Islam that is somewhat equivalent to maintenance, or alimony, is a possible interpretation but not a very usual one, and then the judge seems to go for one or the other depending on whatever flies with him or her. It's difficult to tell, especially since we don't have a lot of records. The caution that I am giving in this booklet is that whatever agreements you make might or might not be entertained in a Canadian court of law and you don't know how they will be entertained. So we can talk about Mahr classically also, more if you like, if Mahr is a particular concern, but maybe somebody else has another concern. We were going to go by areas of law, but it seems that we are going by issues. Is that okay with you? You are in control.

Question

It's really not a question, I believe, I somehow know that when you are seeking a divorce in Canada, that the Canadian law at least prevailed, until now - that whatever marriage contract you have made in your so called, old country, outside, or under the Islamic law even here - the courts do not care for that, whether you want a Mahr or whatever you have decided you will get if you separate or divorce, you will get "x" number of dollars, or whatever. The marriage here goes by the Canadian law, then when we apply to the courts it's followed by the Canadian law. So I do not know if our young lady wants to go through the Canadian law for divorce and then also expect Mahr, because as far as my knowledge goes, the Canadian law will not care Mahr or any contract she has made under the Islamic law or traditional laws in her home country.

Answer

Sometimes considerations are admitted. There is a case that has been written up where some considerations arising from a Mutta marriage, that is a marriage for a fixed term, accepted in the Shiite school was considered in the court. So I am saying that the records from my point of view seems to be uneven, it's not something you'd depend on if you are going to go to a court, maybe it's part of your strategy to present something like that, I don't know, but it doesn't seem to me to be a sure thing and it can be a double-edged sword for instance if Mahr is admissible, then a man can say, I owe her only this according to my tradition, and she agreed to that and there is no community property in the Islamic conception of marriage, therefore, I don't owe her this much. I don't owe the 50/50. It could be a double-edged sword.

Question

Thanks for your comments, I just have comments about my own personal experience with Mahr and I was given different legal advice. My lawyer from a Bay Street firm said it is perfectly enforceable because it's a verbal contract and there have been some test cases I think in the Ontario court. We didn't have to go to court, but I was paid my Mahr and in the second marriage that I am currently in, I learnt more about Islam, I learnt that I

was entitled to Mahr paid up front, and I received it in instalment payments and I recommended that to siblings in my family to do it the same way, if it's a large amount of Mahr and you can't pay it all at once. My understanding is that that does not preclude my right to a 50/50 division of assets, and I think in your book you might recommend that women decide what is going to happen. I mean that it doesn't always happen, but one thing what we would say, we take what we come into marriage with and then what we do communally, we go 50/50 and we do all the Islamic things as well. So my understanding is, yes, it doesn't preclude enforcement of either laws and my other comment is relating to the comments in the big Symposium that it doesn't apply to marriage, it doesn't apply to divorce. I am a bit confused, like if it doesn't apply to a whole bunch of things, what does it apply to? So, if you could clarify that, and if you could also include that in your book.

Answer

It really is erratic at this point and a lot of that is because as Lynda has said, the experience of many lawyers and most judges with Islamic law is very small and if they can fall back on something like the *Family Law Act*; let's say that you come into a court and you say, we agreed on this car, now he won't pay it, and you ask the judge to enforce it. If the judge is sympathetic to you for whatever reasons and thinks there's a gross unfairness happening, the judge can fall back on something to support the decision that he or she is going to make. On the other hand, the judge thinks, well I don't understand what this is and I don't want to mess around with it because I don't understand what it is, the judge could argue that the court has no domain over that. The *Family Law Act* is really clear that for a contract to be enforceable by the court, certain conditions have to be met and one of them is that the two parties have to have had the opportunity of independent legal advice and you either have to have a lawyer sign a certificate that he or she gave you that independent legal advice or a lawyer to sign that you were offered the opportunity and you declined it and you declined it without having been coerced or intimidated into that. Now that's only a partial protection because not all lawyers do their job as thoroughly as they should do it, but that is often what will be the governing factor for a judge in deciding whether or not the court will see a private contract as being enforceable.

As for economic possibilities for people who want to resort to or even add to the Canadian law the Islamic law, I do spend some time on that. I am thinking maybe that you might have been fortunate, you know, if your partner or former partner was not amenable to such a solution and he took it to litigation then maybe it might not have stuck. That is some of the things that I am saying in this small document. For instance, you have the right to Mahr, try to secure it legally. Many women because they don't like to feel as if they are the object of a sale, settle for a smaller symbolic Mahr, don't do that. To do as a dear friend of mine did, and take for instance the title to the house as your Mahr and don't take Mu'ahkhar take it Mu'ahjdhar – take it up front especially since the marital home according to Islamic law is not yours and as you point out the economic basis of Islamic marriage is that people take into the marriage what they take in and they take out the same, yet the reality is that women stay at home and they work and things tend to go in the man's name or he tends to work more, therefore, unromantically, I say during the marriage, if you wish to go by the Islamic model, get things put in your name and that would also be a hedge against the possible only 1/8 that you would get in

inheritance, if there were children. I do give that kind of advice as much as I can, knowing that, may be it won't even stick in the courts.

Question - Inaudible

Pam Cross

I also just want to comment on the second part of your question and if I understand it correctly, what people were talking about earlier today was that divorce is not governable by the *Arbitration Act* because divorce is a civil matter by definition. So someone who is actually married and wants a civil divorce has to apply through the Canadian legal system to obtain that particular divorce. Whether there are other matters to be resolved that could be through arbitration or whether there is the requirement of a particular religious divorce, that's a different matter and that can be done privately, but to get a Canadian government divorce certificate, it is necessary to proceed using Canadian law. It's not necessarily complicated if all of the issues like child custody, support, division of property and so on have been resolved, either by negotiation through the means of mediation or any other kind of strategy, then it really is a matter of filling out some forms and paying a fee to the government and then the divorce is produced. But there are some people who also seek the religious approval, is the word I would use for it, of that divorce and then that would be a separate matter.

Lynda, I was just wondering in your Primer could you deal with the issue of citizenship. I think with a lot of so called "ethnic minority" women, they maybe are not allowed to have dual citizenship because of the country that they are from. I know a woman who is from Greece and they are not allowed to have dual citizenship, she'd have to give up her Greek citizenship in order to be a Canadian citizen. In any case, the point I am trying to make is that a lot of these women feel that they would be then forced or coerced to going the Sharia law way because they do not feel that they have Canadian status.

Dr. Lynda Clark

That hadn't occurred to me, I'll look into it and I'll work with it with Pam. Thank you.

Question

To the best of my knowledge, a woman is entitled to Mahr at the beginning of her marriage and then she gets that on the day of the marriage contract. That's my experience coming from Egypt. And then she is entitled to the Mu'akhar when either the husband dies or when she gets a divorce and then she is entitled to maintenance, Nafaqa and then she is entitled to Taawid al-muta, depending on how many years she was in the marriage.

Answer (Dr. Lynda Clark?)

As for Nafaqa that goes for only a very short time. Nafaqa means maintenance, really it's maintenance within marriage, not without marriage, it's not alimony or spousal support. I am going into classical law, this is a good example, because you can see the contrast that is in classical and reformed law. In the classical law the Nafaqa goes for a short

period until the divorce becomes irrevocable or to a certain time specified in the Quran after the man's death or it can also extend till the end of a pregnancy and so forth, but it's for a limited time period. Now when you are talking about, the assumption of the classical law, just assumption, is that a divorced woman goes back to and is taken care of by her natal family. That's probably why Muslim women or Arab women don't take their husband's name, they still belong to that family. That assumption is no longer just in this society or in Egypt either, those extra awards that you are speaking about are the result of state reforms. They aren't the result of the classical law and so what I often find is that Muslim women, because they know about state reforms, for instance, the common state reform that bans triple divorce and widens women's grounds for a divorce and because maybe partially they are lulled by the phenomenon that Dr. Geissinger was talking about, the kind of rights talk. They think that they have everything, that they are entitled to everything and then, this happens in divorce in any culture, in any system, when it comes to the time to divorce, and it's all over except the shouting, then comes the nasty surprises that no, we're not in Egypt, we are here, I am going to adhere says the male to classical law and that means that you don't have a right to anything, to any alimony or any alimony-like thing after the marriage, even though this reform may have been introduced or people try to introduce it in either jurisdiction, including actually Iran. Or, I have heard some of my students, my good meaning young Muslim female students say you know women have the right to divorce in Islam. That's a hard won right that people have fought for very much in Egypt, you know and they have used parts of Maliki law to facilitate that and so forth. But if you put this in North America, a Muslim man may, because divorce is a nasty thing, not because Islam is nasty or Muslim men are nasty, but they may say, "no, I am not going to give that to you because its my right not to give you a divorce." Well you know according to classical law, he's probably right, you know all these nasty surprises come up, as in any system, so I try to alert people to this and that. So you are secure in Egyptian law but don't think you are so secure here, is what I am trying to say. It's here that there might be regression, there has been regression, I feel.

Question

I hear another word, "Mu'akhra"? what does that mean?

Answer

Well to the best of my knowledge, the "Mu'akhr" is called the "Mu'akhr sadaak" and it's a written sum that is specified in the marriage contract that a woman receives after the marriage, that means if she is either divorced or if the husband dies, she receives that "Mu'akhr" and that's different from the Mahr.

Dr. Lynda Clark

Sorry to interrupt but part of the Mahr, because traditionally in Hanafi, although not in all schools, I am talking about the classical law, there is the Muajdhar, it's what you get up front, often it's a small amount, and then there is the Mu'akhr that you get at the junctions that you spoke of. It could be postponed by common agreement till later, but usually it's upon death or divorce. Now you don't necessarily get it. If you are protected by the state as in Egypt or even the Islamic Republic of Iran, you may get it, or a great

deal of it. But if you are the one who wants the divorce, and your husband can make you want a divorce, even if you didn't originally want one, then you are thrown into the most common kind of Islamic divorce which is Khulla. That's the most common throughout the world, a negotiated divorce. Mahr then becomes the object of negotiation, you buy your way out of the marriage with it, you buy custody of your children and so forth. That's the most common occurrence. I see this as an abuse, even in light of the classical law, but that kind of negotiations have been in Egypt and Iran, in Iraq, I am not sure about some of the Gulf states, in Tunisia, by the state stepping in and saying, "look if the woman wants the divorce, then she has to give up some of her Mahr but she still has these rights." But in this vacuum, if you want to go by Islamic law, you could be forced, if you really want your divorce and other things to give up all of the Mahr or according to many opinions more than the amount of your Mahr. That's an old nasty opinion, that somebody can dig up, if they know well enough and since we are here between ourselves, I might say that it's just a good thing that some of these people who want to make these arrangements of Islamic law semi-obligatory or whatever, it's just a good thing that they don't read old law books because there's really a lot of stuff in there that would be quite detrimental if it could be dug up and there's a lot of good stuff too, but there's bad stuff too.

Question

I know that you are leaning towards the theory about putting a book together, but just in terms of access to advice and representation, say somebody is a foreigner and can't speak the language for example, are you legally obliged, or do you have the legal right to get a translator to work with you, how does that work? Or is it a proxy representation, because I know in some countries under some systems, if somebody wants to be represented and they can use a proxy to represent them? Is that part of Islamic law? Or not?

Answer

I am not sure whether you are talking about Islamic law or what would be available under Canadian law. Under Canadian law there are two different categories and what's available to you depends on where you are. If you are using the public court system, so you have sued your wife for divorce let's say, then you have access to certain rights, one of them is certainly a right to legal representation, if you can't afford to pay for that representation yourself, and if you are poor enough, it's very poor, you may qualify for legal aid, in which case the state will pay the fee of your lawyer. In a limited way you get a chance to choose your lawyer, but not all lawyers accept legal aid, so you are not assigned a lawyer, but let's say in a small town, there might only be one lawyer who accepts legal aid because the fee that's paid by legal aid is far lower than a lawyer can charge privately. But it's not as though legal aid says here you must go to this lawyer. At least that's the case in Ontario. In different provinces it's administered differently. You also have the right to translation, whether it's paid for by you or by the government, is a different matter and it depends on the circumstances. If, however, you are involved in a private dispute resolution like mediation or arbitration, you may or may not have the right to legal representation, you have no opportunity to have that paid for, through legal aid. Legal aid is only available if you are engaged in a court based legal matter.

Question

I just have a request, I work with a lot of women who are new immigrants in Canada, in Toronto who have language barriers and cultural barriers and they'll continue for the rest of their lives to have those barriers, and most likely their children do because they grow up in very narrow communities. What you are planning to do sounds really good, I wish it would be available and translated in languages and that they would know their rights through videos and through different community agencies and so on. They are not here at this conference, and they wouldn't be comfortable because of class and language barriers, they wouldn't be comfortable if they were, but there are thousands of them out there and they really have a big problem. I think you are quite aware of that.

Answer

This will be translated. I can also tell you that if you contact me at the e-mail address up there, METRAC, the organization where I work, has already produced a number of materials, nothing to do with Islamic law, but looking at legal rights for immigrant and refugee women in Canada. So you can get in touch with me there and those materials are available to you at no cost in eight different languages.

I should also mention that I have made an effort to culturally translate, not only for judges and lawyers, who may begin with a hostility towards Islam, but also for Muslim women, so they don't read and see that everything is terrible, because it isn't. It's really a story of pitfalls and opportunities. You know it's a map through a territory. I hope that it's certainly not hostile but there's stuff you should watch out for. So I am really hoping not to alienate that potential audience that you are speaking about at all. And before I forget, I have my business cards here because I'll definitely forget and anybody that has any story, no questions because I can't answer any question, I am only an academic, I have no authority, none whatever, but if you have anything you'd like to see included and now we have already got lots of material, or resource or story or your own or of someone else that you'd like to give anonymously that would help to illustrate things or whatever, then if you could e-mail me. Everybody that does that will be acknowledged anonymously and then out of the list where you give your e-mail and so forth, we'll just randomly, it's like a Lotto or drawing straws, select people to read this piece and give us more feedback. If you include on the list also some kind of identification like Jane Doe, homemaker, or something like that, age 40, that would also help us to get a variety and see how we can reach people.

Question

In this outline I'm not sure that I see the question of the wife's rights within an existing marriage, the issue of maintenance, the Nafaqa was mentioned, however, according to classical law as far as I know that is conditional on the wife's obedience.

Answer

I do cover the question of obedience extensively, yes. Because one can lose one's right to maintenance and in fact, everything, if one is not obedient and it still happens in some

Muslim jurisdictions that the man can bring a suit for his wife's obedience, that is to bring her back to the marital home because the option of divorce is his alone. This is disappearing, but it's still happening. So it's not only a kind of a moral or hierarchal or whatever, social norm but it actually had legal effect and that is so important and I do cover that, but with your cue I am going to enlarge on it.

Question

And another question, well this is related to obedience, the whole question of leaving the house. I know people who actually face this issue where, a friend of mine wanted to take a summer course last summer and her husband wouldn't give her permission to take the course. The question of working also which classically speaking one cannot do without the husband's permission.

Answer

I still believe even in the modern jurisdiction of Turkey. But, it still has affect in some modern jurisdictions, surely, and again I am thinking in the vacuum here, you know when there's dispute between a couple, its something that the man may invoke for sure. It is invoked then send me the story.

Question

Another question is the whole issue of, not just the child custody, but of the upbringing of children within the marriage. It's supposed to be the father's responsibility to name the children to direct them, to make their life decisions for them, to marry off his daughters and all that stuff is also sometimes invoked.

Answer

Yes, the man has, according to classical law, and this is affected even in very liberal modern jurisdictions, even though the woman may have Hadhana, maternal custody from anywhere from two years for boys in the Shiite school of law, though there are reforms in Islam, up to consummation of the marriage for the girl in Maliki law, even with that maternal custody, the legal custody is the man's, which means the that the child cannot be moved, the man makes kind of life decisions like education, profession, signing papers, deciding on travel, passport. And that's still effective in places that you think are pretty liberal.

Question

Just a question about which school would a person adhere to. Like I joke that I'd like the Shaafi because I don't have to do any housework or anything. So when there's a difference how do you decide whose school is going to be adhered to? I also heard the interpretation that God has provided all these schools so you can choose the easier way to make things easier for people. But the opposite is that if you are picking and choosing, then you are just trying to make it easy and you are only supposed to go to one Mazhab only. So that would be an important issue because I think people can manipulate that.

The other issue is relating to custody and access. I am a psychiatrist and I have done assessments in litigious situations and I have been told that I am going to go to hell because I have cases of the best interest of the child, because in some cases I have been asked, because I am Muslim, to help things and then in the end, you didn't really help, it was worse in a way. So I think some understanding of the role of assessment of competence to parent some of those issues, are later downstream from that. I was called by the parents and told I would go to hell because I said the child doesn't want to live with either parent and wants to be in a foster home and I assessed the foster parent. She seemed okay, I mean I am not God, I don't know what's really happening anywhere and I understand that for example in a particular case, the wife was under the influence of the husband and the daughter would have gone there but because she was in the husband's control, the daughter couldn't go to her own mother. I can go at length of different cases that I have been involved in, Muslim and non-Muslim, that brought interesting issues to light, but I think my point is about the role of assessors. When your child is brought to a psychiatrist, is brought to a psychologist, where does that fit into Islamic understanding of experts, Shura, all different kind of issues.

Answer

The image of the Islamic law of custody and the image that people act on traditionally is that the child automatically goes to the father. In the classical law, although the man has always legal custody, that is not exactly the case because the children at different age, according to different schools, and then even in classical law there is a test of competence for either the mother or the father, but if either of those is found to be incompetent, then the child goes to members of the extended family in fixed order until a competent one is found. Very interestingly, there is also provision for the choice of the child at a quite early age to live with one parent or the other, because you see the conception of the Muslims as an autonomous individual with rights, even a child, plays in here and a child is seen to have discretion at a fairly early age and even if the child has property, the guardian is supposed to keep on testing the child to see when they could take charge of their own property. So there is a possibility for choice. In other words, in the classical law there are possibilities for a more liberal interpretation. Now, why do I do all the dusty classical law? Because that's probably what will be pushed at you at one point and then modern states have taken those liberal provisions and done a fair amount with them, and child custody now throughout the Islamic world, is a big issue with all kinds of reforms but not as far as you are saying. As far as I know, unless it happened yesterday or the day before, or I didn't notice it, that the child could be placed with a stranger. That probably would be beyond the bounds of the usual morality.

Question – Inaudible

Answer

Okay, well, the reason may be why nobody takes them is because there is no adoption in Islam, instead there is "Tabanna" which is kind of like, you might call it open adoption and so forth.

TORONTO - April 9, 2005 - The Canadian Council of Muslim Women presents:

Muslim Women's Equality Rights in the Justice System:

Gender, Religion and Pluralism

CCMW

WORKSHOP REPORT:

PUBLIC POLICY AND THE APPLICATION OF RELIGIOUS LAWS IN FAMILY MATTERS

Prepared by: Ismat Jafri

May 16, 2005

www.ccmw.com

Introduction

On April 9, 2005, the Canadian Council of Muslim Women (CCMW) hosted a symposium entitled ***Muslim Women's Equality Rights in the Justice System: Gender, Religion and Pluralism***. This event was organized to raise awareness and engage in dialogue, as a priority, regarding the implications of Marion Boyd's report *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion.* Ms. Boyd's report is based on her review of the *1991 Arbitration Act*. The recommendations of her report would allow arbitration tribunals in Ontario to settle family matters under Sharia or Muslim family law. Speakers at the Symposium represented both sides of the debate and included scholars, activists and professionals in human rights, women's rights and the legal arena. There was also representation from an international perspective.

Representatives from five different organizations participated in a workshop entitled "Public Policy and the Application of Religious Laws in Family Matters." The discussions focused specifically on responses to Marion Boyd's report. The panellists also commented on their consultations with Ms. Boyd held prior to, or following the release of the report. The participating organizations included the National Association of Women and the Law **(NAWL)**, the Muslim Canadian Congress **(MCC),** the Women's Legal Education and Action Fund **(LEAF)**, the National Organization of Immigrant and Visible Minority Women of Canada **(NOIVMWC)** and **Rights and Democracy** (International Centre for Human Rights and Democratic Development).

Although CCMW's position was not presented at the workshop, it was reflected in the written materials provided at the Symposium. Since there has been much collaboration among the organizations on this issue, the organizations represented at this workshop were familiar with CCMW's position. This report provides a summary of the positions presented by each of the organizations, followed by a summary of the major themes and finally, suggestions for further action, based on the discussions in the workshop. For the purpose of this report, a summary of CCMW's position sets the stage for comparison of positions among the organizations represented in the discussion.

Positions

CANADIAN COUNCIL OF MUSLIM WOMEN (CCMW)

On January 14, 2005, in their response to Marion Boyd's report (released December 20, 2004), CCMW wrote to Premier Dalton McGuinty and Attorney General Michael Bryant expressing their serious concerns about the *Arbitration Act* on a number of fronts. Below is a summary of their communication.

Settlement of Family Matters under *Family Law Act*

CCMW recommended that family matters be exempt from the *Act,* "as they are a matter of public order, as is the case in Quebec." They have stressed their commitment to advocating for the removal of family matters from the *Act* to protect women's equality rights and ensuring that family matters continue to be settled under the *Family Law Act (FLA).*

Muslim Family Law and Impacts on Women's/Equality Rights

CCMW has serious concerns regarding the impacts of arbitration on women. In their response, CCMW questioned why Ms. Boyd recognizes the potential harmful impacts on women and children resulting from the implementation of Muslim family law but she does not address these concerns in her recommendations.

CCMW acknowledged that faith-based arbitration is used to settle some disputes, however, their understanding is, that it is limited. CCMW was also careful to point out that it is not a matter of capability or capacity of Muslim women to make decisions, but rather the influence of their family and community to pressure them to participate in arbitration, that is of great concern. These pressures cannot be underestimated. Ms. Boyd has also recognized this possibility in her report but not addressed its impact.

While CCMW believes that Ms. Boyd's recommendations to introduce amendments and safeguards to the *Arbitration Act* and its use in the *Family Law Act* are well intentioned, they feel these measures "do not address the potential harm to women if religious laws are applied."

CCMW also questioned why Ms. Boyd has recommended the use of religious laws to settle family and inheritance disputes when she points out in her report that there is a lack of information on the impact of religious arbitration on women.

CCMW believes that "use of Muslim family law will erode the equality rights of Muslim women that are guaranteed under the *Canadian Charter of Rights and Freedoms* and other Canadian laws. CCMW agrees with Ms. Boyd that many years of hard work in the area of equality rights in Canada could be undone to the disadvantage of women, children and other vulnerable people and again questioned why Ms. Boyd has recommended the arbitration tribunal despite this acknowledgement.

Consistent Application

CCMW also recognizes the difficulty in consistent application of Muslim family law. They have emphasized there is "no one codified, agreed upon single law upon which a statement of principles of faith-based arbitration, as suggested by Ms. Boyd, can be based," since Muslim family law is applied differently throughout the world. It will be difficult to achieve consensus on the statement and on the application of Muslim family law.

Education and Training of Arbitrators

Another area of concern is the education and training of Arbitrators. Since Ms. Boyd's recommendations do not call for mandatory training of Arbitrators in Alternate Dispute Resolution (ADR) and education of Arbitrators in Muslim jurisprudence is not addressed, CCMW questions "who the Arbitrators will be and what knowledge and expertise they will possess in Muslim jurisprudence?

Efficient Use of Resources

CCMW is concerned about full compliance with record keeping and reporting despite the recommendations on oversight and evaluation of Arbitrators since the mechanisms required to do this effectively, will need additional resources.

While CCMW welcomes the provision of more public education regarding family law and arbitration, there is concern over the resources required to do this well so that those in greatest need of the information, receive it.

CCMW believes the resources required to implement the proposed safeguards necessary for ADR for family matters should be "redirected to improve the existing justice system e.g. increased use of cultural interpreters, cultural/religious sensitivity training for judges and lawyers, etc."

CCMW strongly opposes the use of public funds to develop information materials about rights and obligations under religious laws and would prefer the use of these funds towards improving the justice system.

CCMW believes the recommended waivers of receiving legal advice about Canadian and Ontario family law and Ontario arbitration law, should not be permitted. Legal aid would not be available under private arbitration.

CCMW believes the use of religious laws under the *Arbitration Act* will legitimatize "practices that are abhorred by fair-minded Canadians, including Muslim women", and have urged the Premier and Mr. Bryant to reject the application of religious laws under the *Arbitration Act*.

NATIONAL ASSOCIATION OF WOMEN AND THE LAW (NAWL)

Andrée Côté, Director of Legislation and Law Reform at the National Association of Women and the Law (NAWL) presented their position. NAWL was deeply disappointed with the report and have called on the government not to implement the recommendations made in Marion Boyd's report. NAWL's position is formulated on four major points as follows:

- oppose arbitration in family law
- oppose faith-based arbitration in family law for all religions
- regulate mediation
- call on improvements in the justice system

Opposition to Arbitration in Family Law

NAWL feels that arbitration in family law is not appropriate since it was developed to respond to commercial deals and not with the family in mind. Its' application in family law is inappropriate where "gender dynamics, unequal power relations between men and women and the systemic discrimination are always at play." Like the CCMW, Ms. Côté also stressed that substantial reforms achieved in family law and hard battles which have been won for equality and human rights for families, would be threatened. Allowing individuals and families to choose arbitration which is based on religious, family or traditional values, side-steps the principles achieved to date.

According to NAWL, arbitration would introduce a two-tiered system of justice where a third party is named as a justice and will allow new judges, community and religious leaders to impose their decisions, rather than "mediation under which parties agree or not to a resolution." These Arbitrators will be unaccountable and the decision will be legally binding. This system will allow financially better off individuals to choose to pay for private justice and the law that applies, while more vulnerable individuals will not be able to access legal representation as the arbitration route will not be supported by legal aid. They may be forced to choose faith-based arbitration which may be free. NAWL also has serious concerns regarding the finality of Arbitrators' decisions.

NAWL challenges Ms. Boyd's notion of choice which doesn't recognize "the dynamics of separation, divorce nor the social and economic conditions of married, divorced, immigrant women and racism within the legal system and society in general." These factors will weigh heavily and restrict women's choices.

NAWL also takes issue with Marion Boyd's report in claiming that arbitration is not subject to the *Canadian Charter of Rights and Freedoms* because it is a private matter. This means "there is no equality rights framework to guard arbitration and that the government has no obligation to ensure that there is equality for women and other vulnerable individuals in the system." NAWL believes that Ontario and Canada are bound by human rights obligations under the "*Charter*" and international instruments such as the *Convention on the Elimination of all Forms of Discrimination against Women*. They agree with CCMW that "use of Muslim family law will erode the equality rights of Muslim women that are guaranteed under the *Canadian Charter of Rights and Freedoms* and other Canadian laws.

Like the CCMW, NAWL also believes that arbitration should not be available in the case of family law, as is the case in Quebec.

Opposition to Faith-based Arbitration

NAWL acknowledges that while freedom of religion gives the right to create religious tribunals, it does not give the right for religious tribunals to give decisions that are legally binding and should only be advisory in nature. Furthermore, Ms. Côté stressed that these legally binding decisions actually violate freedom of religion and the separation between church and state.

Regulate Mediation

NAWL believes that mediation be subject to legislative standards and family law standards and that we must not permit women to consent to discriminatory decisions.

Improve Justice System

Ms. Côté concluded by saying that NAWL also calls for the government to improve the justice system to make traditional family courts more efficient, instead of arbitration in family law. They would also like to see training and education for judges, lawyers, etc., regarding other cultures and religions.

MUSLIM CANADIAN CONGRESS (MCC)

Rizwana Jafri (President, MCC) and Tarek Fatah, spoke on behalf of the Muslim Canadian Congress (MCC). The MCC explained that many issues arose in their meeting with Ms. Boyd. They believe it was inappropriate for Ms. Boyd to have conducted this review of the *Arbitration Act,* since it was her party, under Bob Rae, who implemented the *Act*, and challenged her on this point. Since the justice system needed improvements, the MCC feels the government introduced arbitration as a cheaper way to resolve family or personal matters.

Lack of Understanding of Issues / Impacts on the Community

The MCC felt that Ms. Boyd lacked an understanding of the issues related to the introduction of arbitration of family matters and she did not understand the complexity of "the religion or the diversity of the Muslim community."

The MCC also believes it would "ghettoize the community" and further exclude Muslims from the mainstream. Ms. Boyd's belief is that the government is being less discriminatory by introducing arbitration in family law.

Maintain State Family Law

Like the other organizations, the MCC feels that arbitration does have a place in society but not in family matters and should remain within state family law and removed from arbitration. Mr. Fatah added that MCC's position was not primarily from the Muslim gender perspective, as is the case with the other groups, but that the *Arbitration Act* intrudes on the principle that "citizenship is not based on inherited ancestry or religions," and subject to legislative scrutiny. In democratic societies such as Canada, society plays a role in the welfare of children, rather than in Muslim societies where the parents and

primarily the father, own the child. Mr. Fatah explained that arbitration in family law or the desire for Muslim or Sharia courts, is a response to Muslim fundamentalists and would allow them to make decisions in their favour. He believes this reality is at the core of this issue.

The MCC believes that establishing a multi-tiered judicial process for family law is "racist and unconstitutional, since it breaches the *Canadian Charter of Rights and Freedoms* and other norms or rights enunciated by the Supreme Court of Canada." Mr. Fatah emphasized that this issue is not one to be debated in the Parliament since MPPs are being pressured by a small group of people favouring Muslim or Sharia laws.

In conclusion, the MCC recommends that this matter be referred to the Ontario Court of Appeal.

WOMEN'S LEGAL EDUCATION ACTION FUND (LEAF)

Cindy Wilkey, who is Co-Chair of the Women's Legal Education Action Fund (LEAF), National Legal Committee thanked CCMW for organizing the Symposium and said LEAF felt privileged to be a part of this important event. Ms. Wilkey started by saying that LEAF's response to Marion Boyd's report is similar to that of the other organizations participating in the workshop and found it to be "wholly unsatisfactory and disappointing." As noted later in this report, LEAF, however is willing to endorse arbitration if certain conditions are guaranteed.

Impact on Women's/Equality Rights

LEAF also believes Marion Boyd's report fails to incorporate a meaningful gender analysis and rather than promoting inclusion, allows the creation of "separate family law regimes within religiously defined communities" to the disadvantage of women of those communities, depriving them of the rights guaranteed to other Ontario women." It provides an imbalance of women's equality rights and religious freedoms and fails to provide meaningful protection for those whom arbitration is inappropriate.

Opposition to Family Law Arbitration

There is no reviewer scrutiny of the *Arbitration Act* and LEAF's position is consistent with that of the other organizations regarding this issue. Ms. Wilkey stressed that family laws should be public laws. LEAF recognizes that people are free to make voluntary decisions but there is concern when families cannot make decisions and that's when LEAF believes Ontario or Canadian family law must apply. LEAF also believes that the "safeguards" recommended in the report to not address the issue of "choice" for women who could be coerced or pressured into using religious arbitration. They do not support religious arbitration.

Like the other organizations, LEAF disagrees with the report's claim that the *Canadian Charter of Rights and Freedoms* does not apply to family matters, since it is the government that would be involved in providing the "regime and mechanisms under which such arbitration can be enforced."

Advantages of Arbitration Process

LEAF has a different approach related to "the mechanism of decision making." LEAF acknowledges that arbitration does offer some relief from the harshness of family law courts and that the parties have more control over arbitration than the courts relating to timing, who will be involved and where it will be carried out. In Ontario, there is not a specialized family court, so the judge hearing any one dispute may not have a deep understanding of family issues. In places where secular family law arbitration is well established, experienced family law lawyers are highly respected mediators. Arbitration is less adversarial and informal and more tailored to meet the needs of the relevant culture or community. Arbitration can provide the significant benefit of resolving issues more quickly than the courts and being less costly as a result.

LEAF believes arbitration can only be endorsed under the following conditions:

- Canadian and Ontario law controls decisions by arbitration
- Arbitrators should be lawyers (in Canadian and Ontario law), qualified to practice in Ontario
- legal aid funding should be extended to arbitration
- ensure voluntary and informed consent to choose arbitration
- address huge lack of knowledge of family law arbitrations and promotion of women's equality rights by requirement to file family law arbitration in a central location

Family Law Act Review

LEAF has continued to review its position and recently communicated with the Attorney General of Ontario and identified their criticisms of Marion Boyd's report, emphasizing that they have a serious concern regarding "entirely unregulated arbitration." They have recommended that the province take an interim step of either requiring that "only Canadian and Ontario law be the law permissible for family law arbitration under the *Arbitration Act* or that family law arbitration, simply be banned." In the longer term, LEAF has recommended that a review of the *Family Law Act* be undertaken to:

- determine how arbitration could be brought within the *Family Law Act*
- ensure that the law applied is both Ontario and Canadian law and;
- ensure the family law principles developed within the family law, especially principles promoting women's equality, guide family law arbitrations

NATIONAL ORGANIZATION OF IMMIGRANT AND VISIBLE MINORITY WOMEN OF CANADA (NOIVMWC)

Anu Bose, Executive Director of the National Organization of Immigrant and Visible Minority Women of Canada (NOIVMWC), spoke from a public policy perspective. She began her discussion by saying that NOIVMWC had worked closely with CCMW on this issue, noting in jest that NOIVMWC had played the "supporting actress role", with CCMW taking the lead on the efforts regarding faith-based arbitration and Marion Boyd's report.

Opposition to family law arbitration

NOIVMWC is opposed to the use of any religious principles within the *Arbitration Act*. They would like to see the removal of family matters from arbitration and reject the use of any kind of religious principles in matters regarding family, the dissolution of marriage, or inheritance.

Lack of Understanding of Women's/Minority Issues

NOIVMWC was extremely disappointed in Ms. Boyd's suggestion that NOIVMWC was "anti-family and anti-multiculturalism." As an organization representing immigrant and visible minority women, NOIVMWC sees a stable family life as an inherent right and sees the recommendations of the report as a lack of support for immigrant families in Canada. Ms. Bose was troubled by being labelled "anti-multiculturalism" when she had questioned the merits of using "traditional authority" in deciding the fates of vulnerable women and individuals.

Like most of the other organizations supporting CCMW, NOIVMWC is concerned that the arbitration process is outside the purview of legal aid. Secondly, Ms. Bose regretted the fact that Ms. Boyd did not conduct any gender-based analysis i.e. did not engage in assessing the differential impact that the *Arbitration Act* has and continues to have, on women and men. Therefore, Ms. Boyd did not understand the role of coercion or of potential immigrant status withdrawal, which women could face. NOIVMWC is committed to this issue and will continue to voice their opposition to religious arbitration, along side the other organizations.

Ms. Bose concluded by saying that organizations such as NOIVMWC and CCMW have to engage the rest of the community to raise awareness of this issue but do it in the various immigrant languages.

RIGHTS AND DEMOCRACY (INTERNATIONAL CENTRE FOR HUMAN RIGHTS AND DEMOCRATIC DEVELOPMENT)

Ariane Brunet spoke on behalf of Rights and Democracy and brought their international perspective to the issue. Ms. Brunet warned the introduction of arbitration in family law could violate international human rights obligations and sets a dangerous precedence for women's equality rights both in the

national and international arena. On the international front, Ms. Brunet cited recent incidence of using women's rights to justify foreign policy e.g. in Afghanistan, where women's rights were "instrumentalized". Rights and Democracy believes that with the introduction of arbitration in family law, women's rights are being "invisibilized".

Opposition to Family Law Arbitration

Rights and Democracy is also troubled by privatized family law arbitration that allows religious, cultural and political elites to make decisions. Like some of the other organizations Rights and Democracy is extremely concerned about who these leaders or decision makers are. Ms. Brunet also stressed that by privatizing family law decisions, there is an infringement in Ontario of the *Bill of Human Rights, the Convention of Discrimination* and other protections against discrimination against women and violence against women. This approach defeats the purpose of taking advantage of progressive forces and the government would forfeit its obligations under international rights of due diligence, if this course was taken.

Impact on Women's/Equality Rights/International Obligations

As per other organizations, Rights and Democracy fears the dangerous impact on women, since Ms. Boyd has not conducted an analysis on this impact. Although Rights and Democracy recognizes, "that the right to freedom of religion includes the right to participate in religious processes involving family matters**",** the report does not address women's rights. Ms. Brunet highlighted that United Nations *Special Rapporteurs on Violence Against Women and on Women's Rights* have stressed that "states must not invoke any customs, traditions or religious considerations to avoid their obligations with respect to elimination of violence and discrimination against women." Rights and Democracy also referenced the *Special Rapporteur on Violence against Women* in pointing out that in considering "cultural rights there is always a conflict with women's rights. Ms. Brunet explained that if we are to reconcile culture, diversity and the protection of women's rights, it is essential that there are three ingredients as follows: "the right to choose, voluntariness and maintaining the integrity of the woman making the decision. "

Ms. Brunet cautions about the current regressive forces in North America and Europe that are having effects around other parts of the world. She stressed the importance of staying connected with other organizations on a global scale. There are positive signs of solidarity from organizations such as the Network of Women Living under Muslim Law and women who have come to speak from Iran, Afghanistan and Uzbekistan. This dialogue and engagement is critical when initiatives such as the introduction of religious arbitration in family law could have a ripple effect.

SUMMARY OF MAJOR THEMES

- clear evidence that the participating organizations have consistent positions on a majority of the issues
- resounding consensus that family matters should not be subject to arbitration whether it is faith-based or not. Privatizing the settlement of family matters should simply not be an option
- clear recognition of a lack of understanding of the diversity of the Muslim community and of the impacts on women and other vulnerable groups, should Muslim family law arbitration be introduced
- most of the organizations also warned of the losses which would be incurred on the women's equality rights front
- likelihood of women being coerced into agreeing to arbitration was emphasized again and again
- serious concerns regarding the legally binding nature of the decisions and the unavailability of legal aid if arbitration is the selected route
- from legal perspective, there is evidence that arbitration of family matters encroaches upon the *Canadian Charter of Rights and Freedoms* and violates some international obligations while setting a dangerous precedence in Canada, North America and globally
- while other organizations do not accept arbitration at all, LEAF has recognized some benefits of arbitration but insists that it can only be applied under strict guidelines and therefore, must be regulated. They have also recommended the Ontario government conduct a thorough review of the *Family Law Act*, to determine if arbitration can be brought into the *Family Law Ac.*
- MCC has urged that this debate to be settled by the Ontario Court of Appeal

The table in the next section summarizes the various issues or positions which were highlighted along with relevant comments or actions.

POSITION SUMMARY

Position	Comments / Actions
Settlement of family matters by arbitration	• Most organizations oppose family law arbitration. • Provincial government must review the *Family Law Act* and maintain it
Settlement of family matters by faith-based arbitration	• All organizations oppose faith-based arbitration. • Provincial government must review the *Family Law Act* and maintain it
Value of arbitration under strict conditions	• LEAF recognizes culturally relevant, less adversarial and efficient nature of arbitration versus the courts, but also believes arbitration can only occur under strict conditions
Matter to be referred to Ontario Court of Appeal	• MCC has warned that Parliamentarians cannot debate this issue, due to pressures on MPPs from Muslim/Sharia law supporters
Lack of understanding of impacts on women/threatens equality rights for women	• General recognition that recommendations are regressive in that they would undo many years of hard work achieved to date for women's equality rights and family law reforms. • Provincial government must conduct in-depth analysis of the impact of arbitration on women, especially Muslim women, and on the diversity of the community both culturally and religiously
Role of Coercion in agreeing to arbitration	• This is a general fear. • Provincial government must ensure guarantees to voluntary and informed choice, especially for Muslim women
Inconsistent with *Canadian Charter of Rights and Freedoms*	• All organizations recommend the Provincial government conduct careful review of equality rights in "the *Charter"* for women, children and other vulnerable individuals which would be compromised under arbitration
Violation of international human rights/women's rights obligations/dangerous precedence setting	• Several of the organizations cited this as a dangerous direction and urge a thorough examination of international obligations/ ramifications

Position	Comments / Actions
Difficulty in consistent application of Muslim family law	• Some organizations warned that it is virtually impossible to reach consensus on what will guide arbitration and how the process would work within such a diverse community
Quality/education and training/background of Arbitrators	• General belief that Arbitrators must be lawyers in Ontario and Canadian law
Compliance/oversight resources versus improvements in the current justice system	• General consensus that the resources be redirected to current justice system by sensitizing the system to cultural, religious and women's issues and increase efficiencies
Legal advice waivers and availability of legal aid	• There is a general call for legal aid to be extended if arbitration is introduced and waivers of legal advice on Ontario and Canadian law must be removed.
Legally binding decisions	• Most groups believe finality of decisions is problematic, especially since they are not subject to scrutiny under Ontario and Canadian laws and violate freedom of religion rights
Unregulated mediation	• NAWL asks that mediation must be subject to legislative standards
Citizenship should not be based on inherited ancestry or religions	• MCC believes that arbitration of family matters intrudes on this principle

Based on common recognition of the issues related to the introduction of arbitration to settle family matters under Muslim/Sharia law, there are opportunities to take joint and individual action. Towards to the end of the workshop, all participants, including members of the audience, were requested to make suggestions to move the dialogue to action. Based on this feedback and the suggestions cited earlier in this report, the next section outlines the actions that may be taken, to affect positive change.

SUGGESTIONS FOR FUTURE ACTION

1) Attain a clear understanding of where the government is in terms of the status of Ms. Boyd's report, status of the *Arbitration Act* etc.

2) Establish a common voice, develop common goals and agree on milestones

3) Develop an engagement strategy that will:

    a) communicate the joint position, discussions and decisions to politicians, scholars, media, the Muslim community and the public at large
    b) educate and engage the grassroots level by formulating a clear, simple message to address the implications of arbitration

4) Mobilize Muslims who oppose Muslim/Sharia tribunals to join in efforts to take action

5) Develop a strategy on how to engage proponents of Muslim/Sharia tribunals

6) Continue dialogue with and learn from individuals and groups around the world, who are challenged by and dealing with similar issues

7) Prepare a joint position paper for release to the Premier and Attorney General

8) Prepare a joint press release

9) As a coalition, demand a meeting with the Premier and the Attorney General

In conclusion, there is an immediate need for the participating organizations to meet and begin moving these suggestions into concrete action and to formulate a joint position paper demanding the Ontario government to conduct a review of the *Family Law Act,* a detailed gender analysis and other actions listed in the issues summary table above.

ADDRESS

OBSERVATIONS ON WOMEN'S EXPERIENCE OF THE SHARIAH AS AN IDEOLOGY

Dr. Ziba Mir-Hosseini,
Hauser Global Law,
Visiting Professor,
New York University

CCMW Symposium
Muslim Women's Equality Rights in the Justice System:
Gender, Religion and Pluralism
Toronto, 9 April 2005

Women's Experience of the Shariah as Ideology

Ziba Mir-Hosseini

For a century or more, one of the 'hottest' areas of debate among the Muslims has been the status of women under Shariah law. The debate is embedded in the history of polemics between Islam and the West, and the anti-colonial and nationalist discourses of the first half of the 20th century. With the rise of political Islam in the second half of the century, and the Islamists' slogan of 'Return to Shariah', the debate took a new turn and acquired a new dimension. It became part of a larger intellectual and political struggle among the Muslims between two understandings of their religion and two ways of reading its sacred texts. One is a legalist and absolutist Islam, premised on the notion of 'duty' (*taklif*), which makes little concession to contemporary realities and the aspirations of Muslims. The other is a pluralist and tolerant Islam, premised on the notion of 'right' (*haqq*), which is making room for modern realities and values such democracy, human rights and gender equality.

I want to focus on two aspects of these developments. My remarks are based on research I have been doing since the early 1980s on the theory and practice of Islamic family law. In the 1980s, I conducted anthropological fieldwork in family courts in Tehran and Morocco, studying family disputes and the strategies of litigants, mostly women.[27] In the 1990s, I studied the ways in which notions of gender difference are debated, constructed, and deconstructed by the custodians of the Shariah in Iran – that is, the Shi'a clerics. I did this through the study of Islamic legal texts (*fiqh*) and discussions with a number of clerics in the Qom seminaries.[28]

My first focus is on the meaning and role of Shariah family law today; and the second is on the criticism of gender biases in Shariah family law that has been voiced by both Muslim feminists and new Muslim reformist thinkers. I conclude by arguing against the pervasive and pernicious polarization between secular and religious feminism, which has bedeviled contemporary Muslim women's struggles for gender justice.

Let me begin with what I learned when I began fieldwork in family courts in Tehran in the early 1980s. This was the heyday of Islamic ideology in Iran, shortly after the

[27]. Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family law, Iran and Morocco Compared* (London: IB Tauris, 1993 & 2000).
[28]. Ziba Mir-Hosseini, *Islam and Gender: The Religious Debate in Contemporary Iran* (Princeton University Press, 1999).

dismantling of the family law reforms that had been introduced by the Shah's regime. Among the principal questions that I wanted to explore were: What does it mean to be married and divorced under Shariah law? How do judges (mostly clerics, then) and litigants make sense of, and relate to, a piece of legislation for which divine legitimacy is claimed? In other words, how is the relationship between the sacred and the legal in Shariah law conceptualized, negotiated and operated? Given the patriarchal bias of the law, which gives men certain privileges compared to women, I was particularly interested to find out how women cope with their inferior position in law and reconcile it with their belief in the justice of Islam. Of course, when we say "Shariah family law", we are talking about jurisprudential or *fiqh* rulings, as defined by classical jurists (*fuqaha*), which have been selectively reformed, codified and grafted onto a modern legal system.

Among my findings, two are relevant and important to our discussion today. The first is the huge gap that exists between marriage as it is conceptualized and defined in *fiqh* texts, and marriage as it is lived and experienced. In *fiqh*, marriage is defined as a contract of exchange, whose prime purpose is to render sexual relations between a man and woman licit. It is patterned after the contract of sale; and its essential components are the offer (made by the woman or her guardian), the acceptance by the man, and the payment of dower or *mahr*, which is a sum of money or any valuable that the husband pays or pledges to pay the wife on the consummation of the marriage or later. The marriage contract establishes neither commonality in matrimonial resources, nor equality in rights and obligations between spouses. The husband is the sole provider and the owner of the matrimonial resources, and the wife remains the possessor of her *mahr* and her own wealth. The procreation of children is the only area the spouses share, and even here, a wife is not legally obliged to suckle her child unless it is impossible to feed it otherwise. With the contract, the woman comes under her husband's *'isma* (a mixture of authority, dominion, and protection), entailing a set of defined rights and obligations for each party; some have legal force, others depend on moral sanctions. The boundary between the legal and the moral is hazy and shifting. Those rights and obligations that have legal force revolve around the twin themes of sexual access and compensation, embodied in the concepts of *tamkin* (submission) and *nafaqa* (maintenance).

In line with the logic of contract, a man can enter more than one marriage (up to four) at a time, and can terminate each contract at will. Repudiation (*talaq*) is the husband's exclusive right: he can unilaterally terminate the contract: he needs neither grounds, nor his wife's consent. A wife can obtain release from the marriage contract by offering the husband inducements, usually by returning her *mahr*, to consent to a divorce by mutual agreement (*khul'*). If she fails to obtain his consent, then her only recourse is to the intervention of the court, where she needs to establish a valid ground.

This, in a nutshell, is the *fiqh* definition of marriage and the rights and duties that it entails. This is the default condition that a Muslim wife accepts when she signs her marriage contract, unless she succeeds in having terms and stipulations included. Most women come to learn about the *fiqh* conception of marriage only when the marriage is under strain or when they find themselves in court. It is then that they learn what they had got by signing the marriage contract. In fact, no marriage will survive if the couple lives by its terms, which are reduced to sexual submission (*tamkin*) by the wife, and feeding and maintenance by the husband (*nafaqa*). Legally speaking, a woman has no duty to care for the house or even to suckle her children; for these acts, she can demand wages;

while, legally speaking, a husband can ask for his wife's sexual services any time and anywhere he desires.

Marriage in practice as a social and cultural institution among Muslims goes far beyond its legal/*fiqh* construction. Some of its features are rooted in the ideals of the Shariah – in which marriage is based on mutual respect, cooperation and harmony – but none of these ideals are translated into legal terms. They are simply not reflected in *fiqh* rulings. They do not sit comfortably with the definition of marriage as a contract of exchange patterned after the contract of sale.

The early jurists had no qualms in speaking of marriage in these terms. It is common to come across phrases referring to *nikah* (marriage) as a kind of enslavement (Al-Ghazali), or as a contract through which a man acquires dominion over a woman's vagina (Muhaqqiq Hilli) or describing the dower as analogous to a sale price, that is, as entailing the same fundamental conditions as those attached to a sale.[29] Such a conception of marriage, and such a way of talking about marriage, are so repugnant to modern mentalities and values, so alien from the experience of marriage among contemporary Muslims, that no one writes or talks in these terms today. Yet it is there, alive, in the legal subconscious; and it comes up when marriage breaks down. It is then that women find, to their horror, that they are at the mercy of their husbands, and it is then that men can take advantage of the legal privileges that the contract has given them.

In other words, what my research in the courts suggests is that, for men and women who come to court to get out of a marital impasse, the sacred in the Shariah is irrelevant. The same is true for the judge, who is bound by a legal code that is in many ways a translation of the *fiqh* concept of marriage. All this, in a nutshell again, places Shariah family law in practice on the same level as other systems of law, and challenges the claim of its sanctity.

So if, as I suggest, Muslims in their adherence to Islamic legal precepts are motivated by the exigencies of social reality, rather than by religious ideals, then how can we explain the demand for Shariah law, and its central place in the contemporary Muslim scene? In other words, why has Shariah become such a sensitive issue for Muslims? Why do demands for its application or reform stir up such emotion?

One apparent answer is that the provisions of the Koran were most abundant and explicit in the area of personal relations, thus the boundaries between the sacred and legal remain blurred and open to manipulation in Shariah family law. It is also the most developed field of classical Islamic jurisprudence, which in modern times has been claimed as the foundation of the ideal Islamic society – of course by the Islamists.

To understand why this is the case, as I already said, we need to look at the place and role of Shariah and its relevance to the family in contemporary Muslim social life. This takes us into the domain of politics, and we can talk about it at macro and micro levels.

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[29] . For discussion of this, see Ziba Mir-Hosseini, "The Construction of Gender in Islamic Legal Thought: Strategies for Reform", in *Hawwa: Journal of Women in the Middle East and the Islamic World*, 2003, Vol 1, No 1, pp. 1-28; and Kecia Ali, "Progressive Muslims and Islamic Jurisprudence: The Necessity for Critical Engagement with Marriage and Divorce Law", in Omid Safi (ed), *Progressive Muslims on Justice, Gender, and Pluralism* (Oxford: Onewold, 2003).

At the macro level, a host of factors, both internal and external to Muslim societies and individuals, have resulted in a form of distorted change, which some have called 'neopatriarchy'.[30] In this peculiar duality, modern and patriarchal orders coexist, often in a contradictory union, and here the Shariah has come to acquire a special place. It symbolizes a golden past and compensates for a present that has been embittered by ties of dependency and feelings of marginalization; it acts as a buffer against rapid erosion of the traditional way of life and aggressive invasion by foreign values; it provides a refuge in a world permeated by uncertainty; it is an innate answer to the crisis of identity; and above all, it is an ideology which is used to justify unequal relations, of which gender relations are only one facet. An ideology that can claim divine roots is thereby more persuasive.

The same is true at the micro level of the family, where Shariah becomes an ideology whose present function is to perpetuate a certain type of relations within the family by restraining women's sphere of action. Its relevance to today's Muslims must be seen in this light. Its present function is to silence Muslim women's voices of dissent and to prevent them from making dignified choices in their private and social lives.

But we must not forget that every ideology carries the seeds and the means for its own mutation. This takes me to my second – briefer – point: the emergence of a critique from within. One paradoxical, and certainly unintended, consequence of the rise of political Islam and the slogan of "Return to the Shariah" has been the opening of a new phase in the politics of gender in Islam, enabling Muslim women to sustain a critique of the patriarchal notions of the Shariah in ways that were not possible before. The central question that they are asking is: to what extent does Shariah family law, found in *fiqh*, jurisprudential texts, reflect the values and ideals of marriage in Islam? In other words, are these laws sustainable and in line with the objectives of the Shariah (*maqasid al-shariah*) under the conditions prevailing in Muslim societies? Are they in line with the values and sense of justice of Muslims? In short, how *shar'i* or Islamic are these laws?

Hojjat ol-Islam Mohsen Kadivar, an Iranian reformist jurist, has recently argued that a law can qualify as 'Islamic' only when it meets three criteria.[31] The first is its rational basis: it must satisfy the rational demands of the time. Secondly, it must be just, in line with justice of its time. Thirdly, it must be more advanced and progressive than existing laws in other societies. The laws introduced by the Prophet met all these criteria. People accepted them, not because the Prophet had introduced them, but because they corresponded with their sense of justice and ideas of rationality as well as being more advanced and progressive than existing laws. Is the same true of what is now claimed to be Shariah family law? Based on my own empirical research over two decades, I can with confidence say it is not: what is claimed to be 'Shariah family law' often does not meet these three important criteria.

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[30] . Hisham Sharabi, *Neopatriarchy: A Theory of Distorted Change in Arab Society* (Oxford University Press, 1988).

[31] . Some of his writings are available in English at www.Kadivar.com. See, for example, http://www.kadivar.com/Htm/Farsi/Speeches/Speech820615.htm.

Let me conclude by saying that recent developments are breaking down the opposition between 'religious' and 'secular' feminism that has been in part a legacy of the politics of colonialism, in which Islam and a demand for gender equality were defined as implacably opposed. This opposition, as Abdullahi An-Na'im rightly reminds us, is arbitrary and at times false, but its implications are too grave and pernicious to be ignored.[32] The legal gains and losses of Muslim women in the 20th century suggest that there can be no sustainable gains unless this opposition is overcome and *fiqh* models of family and gender relations are debated and changed within an Islamic framework. Otherwise, Muslim women's quest for justice will remain hostage to the fortunes of various political tendencies and a battleground between forces of traditionalism and modernity, as has been the case in the 20th century in Muslim-majority countries, or between the forces of multiculturalism and religious freedom in countries like Canada where Muslims live as a minority.

[32] . For an excellent discussion, see Abdullahi An-Na'im, "The Dichotomy between Religious and Secular Discourse in Islamic Societies", in Mahnaz Afkhami (ed), *Faith and Freedom: Women's Human Rights in the Muslim World* (London: I B Tauris, 1995).

[33] http://muslim-canada.org/pfl.htm#1. Accessed 08/04/2005.

APPENDICES

Symposium Flyer

Speakers' Biographies

Evaluation Form

Symposium Evaluation

Bibliographies

The Canadian Council of Muslim Women presents a Groundbreaking Symposium

Muslim Women's Equality Rights in the Justice System:

Gender, Religion and Pluralism

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Faisal Kutty, Kathy Bullock, Julius Grey, Aisha Geissinger

WORKSHOPS

Primer: Consultation on Comparative Study – Muslim Family Law and Canadian Family Law
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SPEAKERS' BIOGRAPHIES

TORONTO - April 9, 2005 - The Canadian Council of Muslim Women presents:

Muslim Women's Equality Rights in the Justice System : Gender, Religion and Pluralism

BIOGRAPHIES OF SPEAKERS

KEYNOTE SPEAKERS:

Abdullahi An-Na'im

Abdullahi Ahmed An-Na'im is *Charles Howard Candler Professor of Law at Emory University* in Atlanta, Georgia, USA. He holds an LLB (Honours) University of Khartoum, Sudan; LLB (Honours) and Diploma in Criminology, University of Cambridge, England; and PhD in Law, University of Edinburgh, Scotland. He served as Executive Director of Human Rights Watch/Africa 1993-95, before joining the Faculty of Emory Law School in 1995. Professor An-Na'im is the author of *Toward an Islamic Reformation: Civil liberties, human rights and international law* (1990, translated into Arabic, Indonesian and Russian). He is the editor of *Human Rights and Religious Values: An uneasy relationship?*, with Jerald D. Gort, Henry Jansen & Hendrik M. Vroom (1995); *Human Rights in Africa: Cross-cultural perspectives*, with Francis M. Deng (1990); *The Cultural Dimensions of Human Rights in the Arab World* (in Arabic, 1994); *Universal Rights, Local Remedies: Legal protection of human rights under the constitutions of African countries (1999)*; *Proselytization and Communal Self-Determination in Africa (2000), Islamic Family Law in a Changing World: A Global Resource Book* s. (2002); and *Cultural Transformation and Human Rights in Africa (*2002).

Prof. An-Na'im has directed major research projects, one on women's access to, and control over, land in seven African countries (www.law.emory.edu/WAL), and the second a global study of the theory and practice of Islamic Family Law (www.law.emory.edu/IFL). He is currently the director of a Fellowship Program in Islam and Human Rights (www.law.emory.edu/IHR). Prof. An-Na'im's current project, **The Future of Shari'a**, examines how to ensure the institutional separation of Shari`a and the state, despite the organic connection between Islam and politics.

Will Kymlicka

Will Kymlicka received his B.A. in philosophy and politics from Queen's University in 1984, and his D.Phil. in philosophy from Oxford University in 1987. He is the author of five books published by Oxford University Press: *Liberalism, Community, and Culture* (1989), *Contemporary Political Philosophy* (1990; second edition 2002), *Multicultural Citizenship* (1995), which was awarded the Macpherson Prize by the Canadian Political Science Association, and the Bunche Award by the American Political Science Association, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (1998), and *Politics in the Vernacular: Nationalism, Multiculturalism, Citizenship* (2001). He is also the editor of *Justice in Political Philosophy* (Elgar 1992), and *The Rights of Minority Cultures* (OUP 1995), and co-editor of *Ethnicity and Group Rights* (NYU 1997), *Citizenship in Diverse Societies* (OUP 2000), *Alternative Conceptions of Civil Society* (PUP 2001), *Can Liberal Pluralism Be Exported?* (OUP 2001), *Language Rights and Political Theory* (OUP 2003), and *Ethnicity and Democracy in Africa* (James Currey, 2004). He is currently the Canada Research Chair in Political Philosophy at Queen's University, and a visiting professor in the Nationalism Studies program at the Central European University in Budapest. He is a Fellow of the Royal Society of Canada, and of the Canadian Institute for Advanced Research. From 2004-6, he is the President of the American Society for Political and Legal Philosophy. His works have been translated into 30 languages.

Ziba Mir-Hosseini

Ziba Mir-Hosseini is an anthropologist who has done extensive fieldwork in rural and urban Iran as well as in urban Morocco. She works as a freelance researcher and independent consultant on gender, family relations, Islam, law and development issues. She is a Research Associate at the London Middle Eastern Institute, SOAS, University of London; Hauser Global Law Visiting Professor at the School of Law, New York University (2002, 2004, 2006 ....), Fellow of Wissenschaftskolleg zu Berlin (2004-05). Her publications include Marriage on Trial (1993) and Islam and Gender (1999); she has co-directed two award-winning feature-length documentaries: Divorce Iranian Style (1998); and Runaway (2001).

OTHER INVITED SPEAKERS:

Sirma Bilge

Sirma Bilge holds a Ph.D. from the Université Paris III - Sorbonne nouvelle and a postdoctoral fellowship from the FQRSC and the CRI-VIFF (Centre de recherche interdisciplinaire de la violence familiale et de la violence faite aux femmes, Université de Montréal). For 2004-2005, Dr. Bilge is the recipient of the Bank of Montreal Visiting Scholar in Women's Studies at the University of Ottawa. Dr. Bilge will continue her work on majority/minority relations and intra-community relations. For her research program, titled "La violence faite aux femmes minoritaires: analyse du discours judiciaire canadien", she will adopt an "intersectional perspective taking into account the combined and mutually reinforcing effects of multiple systems of minoritization that take place on the basis of implicit or explicit hierarchies founded on 'race', gender, ethnicity, class, sexual orientation, and other factors.".

Kathy Bullock

Katherine Bullock completed her PhD in Political Science at the University of Toronto, in 1999. Currently, she is the Executive Director, Education, Media and Community Outreach, ISNA-Canada. She teaches a course on the "Politics of Islam" at the University of Toronto, and is also the Editor of the *American Journal of Islamic Social Sciences*. Her publications include *Rethinking Muslim Women and the Veil: Challenging Historical and Modern Stereotypes*. She is a community activist and lectures frequently, both to Muslim and non-Muslim groups. She is a founding member of the *Federation of Muslim Women*, and *Beacon*, a group dedicated to supporting new Muslims. Originally from Australia, she now lives in Mississauga with her husband and sons. She embraced Islam in 1994.

Lynda Clarke

Lynda Clarke received her PhD (1995) and Masters (1987) in Islamic Studies from McGill University. She is now an Assistant Professor of Religion and Islam in the Department of Religion at Concordia University. Previously, Lynda was a Research Fellow with the Middle East Centre and taught Persian language and literature and Asian and Middle East Studies at the University of Pennsylvania.

She has co-authored a book with M. Ayoub, entitled *Beacons of Light: Muhammad the Prophet and Fatimah the Radiant* (1986) and authored, *Shiite Heritage: Essays in Classical and Modern Traditions* (2001) and *The Mutaqad al-Imamiyah of Ibn Zuhrah al-Halabi: An Early Statement of Shiite Rational Theology* (Annotated translation and Persian text, 2004). Her forthcoming works include: *The Shiite Version of Traditionalism* (for Studia Islamica), *Women's Shiite Seminaries in Iran and Lebanon* (for periodical Teaching Theology and Religion),and *Fornication and Stoning* (critique of revival of stoning, based on classical books of law). Lynda has also published extensively in academic journals and is currently working on a Primer on Muslim Family Law for the Canadian Council of Muslim Women.

Pamela Cross

Pamela Cross is the Legal Director of the Ontario Women's Justice Network (OWJN) and the Metropolitan Action Committee on Violence Against Women and Children (METRAC). She is a feminist lawyer with an extensive background in family law and primarily represented battered women in a sole practice in Kingston, Ontario, for five years before joining OWJN/METRAC. Pamela has a lengthy history of community-based anti-violence work and is a recipient of the Linda Clippingdale Award from the Canadian Research Institute for the Advancement of Women for her "commitment to feminist change, by her spirit, energy and good judgment."

Aisha Geissinger

Aisha Geissinger is a PhD student at the Centre for the Study of Religion, University of Toronto. Her thesis is about exegetical hadiths which are attributed to early Muslim women and the relationship of these hadiths to the medieval tafsir tradition. Her present research interests are Quranic and tafsir studies, and gender.

Julius H. Grey

Julius Grey was educated in Montreal where he obtained a BA in 1970, a BCL in 1971, and an MA in 1973. He also studied at Oxford University where he received a BCL in 1973.
His professional experience includes Research Assistant for the Law Reform Commission (Sentencing) in 1972, Stagiaire at O'Brien Hall Saunders (1970-74), Lawyer at Lapointe Rosenstein (1974-76), Counsel at Lazare, Altschuler(1976-78). He has his own law offices since 1978 where he is Senior Partner.

He has taught at McGill University, since 1975, a variety of legal subjects including Civil Liberties, Administrative Law, Immigration Law, Family Law and Statute Law. He also taught at the University of Montreal and the Quebec Bar. Julius Grey is presently a member of the International Commission of Jurists, the Canadian Bar Association, the American Bar Association and the Canadian Human Rights Foundation, where he was Vice-President (1982-85) and President(1985-88) and was a member of Fondation des Gouverneurs du Barreau.

He is the author of Immigration in Canada, (1984), numerous legal articles, notes and comments and non-legal articles in newspapers and magazines. He has appeared before the Courts at all levels, Civil and Criminal divisions, Administrative, Municipal, Superior, Appeal(Quebec), Federal Court and the Supreme Court of Canada. In April 2004 he was awarded the Médaille du Barreau du Québec which is the highest distinction a member can achieve.

Faisal Kutty

Faisal Kutty is a Senior Partner of Baksh & Kutty. Faisal's practice areas include corporate/commercial law, non-profit/charity law, financial services, Islamic finance, commercial and residential real estate, wills & estates, human rights and alternative dispute resolution. He has advised and acted for a number of the leading Islamic finance companies in Ontario. Faisal has a BA (York University) and completed his LL.B. from the University of Ottawa. He is currently an LL.M. candidate in Civil Litigation and Dispute Resolution at Osgoode Hall Law School of York University. He is also currently completing his Diploma in Islamic Banking from the International Institute of Islamic Banking and Insurance (London, U.K.).

Faisal has published articles in the *Washington Report*, *Toronto Star*, *National Post*, *Montreal Gazette*, *Ottawa Citizen*, *Buffalo News*, *London Free Press*, *Law Times*, *Windsor Star*, *Hamilton Spectator*, *Al Ahram*, and numerous other publications around the world. Faisal is a member of the Canadian Bar Association, the Canadian Council on International Law, the International Bar Association, the Investigative Reporters and Editors Association, and the Canadian Association of Journalists. Faisal is on the Board of the Council on American Islamic Relations (Canadian Chapter), Islamic Social Services Association of North America, and he is also the General Counsel for the Canadian-Muslim Civil Liberties Association.

Marilou McPhedran

The youngest lawyer to be made a Member of the Order of Canada (in 1985) for her leadership in the unprecedented grass roots women's political engagement resulting in major equality amendments to Canada's Constitution, Marilou McPhedran is a graduate of Osgoode Hall Law School (LL.B. and LL.M.) She applies extensive experience and interdisciplinary skills in law, communications, organizational development, management, fundraising and social science methodology to strengthen and promote women's rights as a primary means of enhancing opportunities for women to participate in the economic, social and political dimensions of society.

As a co-founder of several of Canada's foremost social justice NGOs, (the National Association of Women and the Law in 1974, the Ad Hoc Committee of Canadian Women on the Constitution in 1981, the Charter of Rights Education Fund in 1982, METRAC - the Metropolitan Action Committee on Violence Against Women And Children in 1984, LEAF - the Women's Legal Education and Action Fund in 1985) and now, as the founder and current Co-Director of the International Women's Rights Project at the University of Victoria Centre for Global Studies, Marilou has provided support to women's rights and governance programs related to Afghanistan, Bangladesh, the Bahamas, Nepal, Pakistan, Swaziland and Ukraine. As a founder of the Canadian Coalition for Afghan Women (during the Taliban regime) she designed and managed a mentorship program with an intergenerational governance and leadership training component involving Afghan Canadian women, academics and parliamentarians. Marilou provides strategic counsel to a number of national organizations, including the Canadian Council of Muslim Women. Marilou McPhedran is a Women's Legal Rights, Democracy and Governance Specialist.

Ayelet Shachar

Ayelet Shachar holds an LL.B in Law and B.A. in Political Science (1993), from Tel Aviv University; LL.M. (1995) and J.S.D (1997), both from Yale Law School. Before arriving at Yale, she served as Law Clerk to Deputy Chief Justice (now Chief Justice) Aharon Barak of the Supreme Court of Israel. She joined the Faculty of Law University of Toronto in 1999. Her research addresses issues of citizenship theory, immigration law, multiculturalism, jurisdictional conflicts, transnational legal process, multi-level governance regimes, and the rights of women within minority cultures. She will hold the Connaught Research Fellowship in the Social Sciences in Spring 2005.

She is the author of *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge, 2001), Winner of the 2002 Best First Book Award by the American Political Science Association, Foundations of Political Theory Section. She is currently writing a new book, tentatively entitled Citizenship as Inherited Property: The New World of Bounded Communities (Harvard, forthcoming), which critically assesses the philosophical foundations and global distributive functions of birthright citizenship. Her most recent articles have been published in numerous academic journals, as well as in several edited volumes, including *Multicultural Questions* (Oxford, 1999), *Citizenship in Diverse Societies* (Oxford, 2000), *From Migrants to Citizens: Membership in a Changing World* (Brookings, 2000), *Breaking the Cycle of Hatred: Memory, Law, and Repair* (Princeton, 2002), *Constituting Women: The Gender of Constitutional Jurisprudence* (Cambridge, 2004); *Identities, Affiliations, and Allegiances* (Cambridge, forthcoming), and *Feminism, Multiculturalism, and Group Rights* (Oxford, forthcoming).

PARTNERING ORGANIZATIONS:

Association for Women's Rights in Development (AWID)

The Association for Women's Rights in Development (AWID) is an international membership organization connecting, informing and mobilizing people and organizations committed to achieving gender equality, sustainable development and women's human rights. Our goal is to cause policy, institutional and individual change that will improve the lives of women and girls everywhere. We do this by facilitating ongoing debates on fundamental and provocative issues as

well as by building the individual and organizational capacities of those working for women's empowerment and social justice.

A dynamic network of women and men around the world, AWID members are researchers, academics, students, educators, activists, business people, policy-makers, development practitioners, funders, and more. AWID recognizes that our members are our most valuable resource. We have a broad network of expert, committed members interested in sharing their ideas towards viable solutions for gender equality.

Rights & Democracy (International Centre for Human Rights and Democratic Development)

Rights & Democracy is a non-partisan organization with an international mandate. It was created by Canada's Parliament in 1988 to encourage and support the universal values of human rights and the promotion of democratic institutions and practices around the world.

Rights & Democracy works with individuals, organizations and governments in Canada and abroad to promote the human and democratic rights defined in the United Nations' International Bill of Human Rights. Although its mandate is wide-ranging, Rights & Democracy currently focuses on four themes: democratic development, women's human rights, globalization and human rights, and the rights of indigenous peoples. It also has two special operations: Urgent Action/Important Opportunities, to respond to human rights crises and seize important opportunities as they arise, and International Human Rights Advocacy, to enhance the work of human rights advocates, in Canada and internationally, in the effective use of regional and international human rights mechanisms of the United Nations and regional human rights systems.

Rights & Democracy enjoys partnerships with human rights, indigenous peoples' and women's rights groups, as well as democratic movements and governments around the world with whom it cooperates to promote human rights and democracy.
It is therefore uniquely placed to facilitate dialogue between government officials and non-governmental organizations in Canada and abroad. It is one of the very few organizations with the necessary credibility on both sides to play this bridge-building role. It initiates and supports projects that advocate the protection of human rights and the strengthening of democratic development and facilitates the capacity of its partners to do the same.

Legal Education Action Fund (LEAF)

LEAF is a national, non-profit organization committed to using the provisions of the Canadian Charter of Rights and Freedoms to promote equality for women. LEAF has a two-fold mandate: to ensure that the rights of women and girls in Canada, as guaranteed in the Charter are upheld in our courts, human rights commissions and government agencies and to provide public education on the issues of gender equality. LEAF undertakes legal action by intervening at the Canadian appellate courts on significant cases that will establish important principles of equality for women. LEAF's cases are selected by its National Legal Committee. Unfortunately, LEAF does not undertake individual cases at the trial division. LEAF has since its inception in 1985 intervened in over 140 cases and has helped establish landmark legal victories for women on a wide range of issues from violence against women, sexual harassment, pregnancy discrimination, sex bias in employment standards, spousal support and reproductive freedoms.

Muslim Canadian Congress (MCC)

The Muslim Canadian Congress is a grassroots organization that provides a voice to Muslims who are not represented by existing organizations; organizations that are either sectarian or ethnocentric, largely authoritarian, and influenced by a fear of modernity and an aversion to joy. Members of the Muslim Canadian Congress come from all parts of the world with diverse ethnic and racial backgrounds. We are proud of our Muslim heritage and the great contribution of Islam

to human civilization. As Muslim Canadians we believe in the Canadian Charter of Rights and Freedoms, and the Canadian constitution as our guiding principles. The Muslim Canadian Congress looks to the future, and not to the past for the best days of the Muslim community; a community that will fully integrate and participate with other Canadians to build a country that is a beacon of hope, peace, prosperity and joy for the rest of the world.

National Association of Women and the Law (NAWL)

The National Association of Women and the Law (NAWL) is a Canadian non-profit organization that has worked to improve the legal status of women in Canada through law reform since 1974. NAWL is governed by a regionally representative National Steering Committee elected by our membership. NAWL is a national non profit women's organization which promotes the equality rights of women through legal education, research and law reform advocacy. NAWL recognizes that each woman's experience of inequality is unique due to systemic discrimination related to race, class, sexual orientation, disability, age, language and other factors. In NAWL's view, a just and equal society is one which values diversity and is inclusive of it. NAWL is committed to working collectively, and in coalition with other groups to dismantle barriers to all women's equality.

National Council of Women of Canada (NCWC)

The National Council of Women of Canada (NCWC) was founded on October 27, 1893, at a public meeting in Toronto, chaired by Lady Aberdeen, wife of the Governor-General of Canada and attended by 1500 women. A Coat of Arms was granted to NCWC in 1993 as part of its Centennial celebrations. The National Council of Women of Canada was designated by the Government of Canada 2001-2002 as of historical significance for its role in Canadian women's history. Today there are Local Councils of Women and Study Groups in 20 Canadian cities and Provincial Councils of Women in 5 Canadian provinces, along with 27 National Organizations affiliated with NCWC.

NCWC works to empower all women to work together towards improving the quality of life for women, families, and society through a forum of member organizations and individuals. NCWC is a member of the International Council of Women, which represents the National Councils of Women in more than 70 countries, and of the Regional Council of the Americas, which represents National Councils of Women in the Western Hemisphere. NCWC has accreditation with the Economic and Social Council of the United Nations.

National Organization of Immigrant and Visible Minority Women of Canada (NOIVMWC)

The National Organization of Immigrant and Visible Minority Women of Canada (NOIVMWC) is a non-profit, non-partisan and non-sectarian organization The mission of NOIVMWC is to ensure equality for immigrant and visible minority women, within a bilingual Canada. Their objectives are to form a united national voice and liaise with other national women's groups to improve the status of immigrant and visible minority women; put in place strategies that will combat sexism racism, poverty, isolation and violence; act as an advocate on issues dealing with immigrant and visible minority women; heighten public awareness on the status of immigrant and visible minority women; work with all levels of government and public and private agencies to develop effective strategies.

NOIVMWC initiated and completed the very first national research project on violence against immigrant, refugee and visible minority women. It was a community development project with a focus on providing support, establishing networks and developing links with individual women and communities working towards the eradication of violence against women. NOIVMWC also works on issues impacting immigrant and visible minority women in the areas of: healthcare; youth barriers and needs; employment and labour market; criminal and restorative justice; and, immigration, refugee and domestic workers policy.

Canadian Council of Muslim Women
EVALUATION FORM

April 9/05

Objectives of the Symposium:

To increase understanding of the broader implications of allowing religious arbitration on women's equality rights.

To advocate for the removal of family matters from the Ontario Arbitration Act.

To further partnerships with other organizations and individuals for a concerted effort on this issue.

Were these objectives met? If no, please comment.

Did your understanding of the impact, on women, of religious laws in family matters, increase?

Not increased	Somewhat increased	More increased	Very increased.
1	2	3	4

What was your opinion before the symposium and what is it at the end of the day?

BEFORE

Pro religious laws	Concerns about religious laws	Preference for non religious laws
1	2	3

AFTER

Pro religious laws	Concerns about religious laws	Preference for non religious laws
1	2	3

Were the following satisfactory? Please provide comments.

	Very Good	**Satisfactory**	**Unsatisfactory**
Meeting rooms			
Length of sessions			
Time for discussions			
Met my expectations			
Held my interest			
Learnt something new			
Facilitators were organized			
Follow up Actions were identified			

Overall, rate the conference as

Poor *Fair* *Good* *Excellent*

Did the conference provide a respectful forum for open discussion and consultation?

Sessions:

Keynotes Speakers*:* *Professors Abdullahi an Naim & Will Kymlicka.*

Panel*:* *Impact of Religious Pluralism on Women*.

Panel: *Is there room for Women's Equality Rights in Religious Arbitration?*

Workshop: *Primer Consultation on Comparative Study of Muslim & Canadian Family Law.*

Workshop: *Response to government's position on the Arbitration Act for Family matters.*

Address*:* *Ziba Mir-Hosseini*

Which ones did you attend?

Did you learn from them?

What future actions would help create the change we want?

Other Comments?

Thank you!

Symposium Evaluations

There were 88 individual evaluations completed and most evaluations were very favourable and had positive comments about all aspects of the symposium.

The general negative comments were that more time was needed for discussion; question periods were too controlled by some facilitators; and there were some people sitting at one of the back tables who were disrespectful to one of the proponents of Sharia/Muslim Family law.

Of the 88 evaluations there were 4 negative evaluations. The individuals stated that they all found the symposium over all good, and 3 said their knowledge had increased. One person said there was no knowledge increase.

Their negative comments were:

Accept that the Quran is divine, so cannot question what it says.
The hotel was problematic, as it was too far from public transportation; the lunch line up were too long and too much time was taken; and there was an issue of physical accessibility.

The other criticism was that the registration fee was too high and the subsidies needed to be handled better and this restricted “financially poorer” women from attending. [this year, more women were subsidized than in previous years]

As to any change in thinking about the issues, there were 2 individuals who came to the symposium believing in religious laws for family matters and neither changed their mind by the end of the symposium.

There were 15 individuals whose opinions were changed to a preference for non religious laws.

71 individuals came stating a preference for non religious laws and remained of the same opinions.

Except for one person, 87 people said there knowledge of the issues increased.

Future Actions/Recommendations:
[not in any order of priority]

Reach out to other Muslims and non Muslims.

Link with other women's organizations and mobilize equality seeking groups.

Education of less informed, newer immigrant women of their rights.

Increase women's awareness of both systems of laws.

Lobby with politicians via a letter writing campaign.

Work with chapters across the country.

Publish CCMW perspectives in editorials and comments in the media.

Raise discussion that Multiculturalism and Religious freedoms affect women's equality rights and all this will affect the larger Canadian society.

Publish educational materials in other languages.

Hold similar events more often.

Consider legal challenges against the government.

Include more religious scholars in the discussion.

Put speeches of the symposium on the website.

Emphasize the positive aspects of family relationships in Islam.

Outreach to mosques and centres.

Do Law reform work with other organizations.

The board reviews the evaluations and considers them for future conferences. We thank everyone who attended and those who took time to complete the evaluations.

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CANADIAN COUNCIL OF MUSLIM WOMEN

March 2005.

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