

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

وَأَعْتَصِمُوا بِحَبْلِ اللَّهِ جَمِيعًا وَلَا تَفَرَّقُوا وَاذْكُرُوا نِعْمَةَ اللَّهِ عَلَيْكُمْ إِذْ كُنْتُمْ أَعْدَاءً فَأَلَّفَ بَيْنَ قُلُوبِكُمْ فَأَصْبَحْتُمْ بِنِعْمَتِهِ إِخْوَانًا وَكُنْتُمْ عَلَىٰ شَفَا حُفْرَةٍ مِّنَ النَّارِ فَأَنْقَذَكُم مِّنْهَا كَذَلِكَ يُبَيِّنُ اللَّهُ لَكُمْ آيَاتِهِ لَعَلَّكُمْ تَهْتَدُونَ

Assalamu ‘Alaykum wa Rahmatullah wa Barakatuhu,

Many Muslims have noted a lack of internal dialogue within the Muslim community, for which CCMW as well as the various other Muslim groups have been criticized, particularly with regards to faith-based arbitration in Canada. If we have indeed been remiss, then I would like to present this letter as a step towards rectifying this matter. In this letter, I wish to explain my objections to faith-based arbitration, on the basis of the Qur’an, which forms the very core of our Islamic belief. What I wish to achieve is mutual respect and a calm and objective discourse as opposed to the polarization and heated statements that are so distressing to us all. I do not expect everyone to share my views, and welcome responses, including criticism. In a previous dialogue on the issue of women’s leadership of congregational prayers, I have had the good fortune to witness firsthand the skills and capacity of various Muslims to discuss reasonably, intelligently and with civility. Knowing something of the history of Muslim discourse, this comes as no surprise, but is no less a pleasure to observe and experience.

Anyone wishing to participate in the discourse is welcome to do so. Historically, Muslims and non-Muslims have a history of intellectual interchange that has been enriching to all participants. In particular during the ‘Abbasid caliphate, Muslims, Karaites, Rabbinic Jews, Christians, Nestorians, Manichaeans, Zoroastrians and Brahmins participated in theological and philosophical discussions in a civilized and respectful manner. Canada, with its history of multiculturalism and respect for human dignity provides a unique environment for similar discourses.

The core of CCMW’s objection has to do with force of law in connection with faith-based arbitration. Although there is some degree of choice at the beginning of the arbitration process, there is no choice in the middle or at the end of the procedure. This means that once a person has agreed to undergo arbitration and has signed the agreement, then that person is forced to go through with it till the end. If the person is not satisfied with the arbitrator or does not think the arbitrator represents the person’s own understanding of religion, the person cannot withdraw either before or after the arbitrator has issued a ruling. The person is **bound** to comply by force of law. This is what is known as **binding** arbitration.

I would like to point out six reasons why I think that faith-based arbitration should not be binding and enforced by law:

- 1- The Qur'an teaches that there should be no compulsion in religion. Force of Law is a form of compulsion. If a couple is satisfied with an arbitrator's ruling, there is nothing to prevent them from going to a qualified lawyer afterwards and having it legalized. There is no reason why a couple should be deprived of the choice of whether to comply or not at the end of the process. Force of law is entirely unnecessary and it infringes upon the Qur'anic principle of "Let there be no compulsion in religion." (See Qur'an 2:256)

- 2- The arbitration act is not a suitable vehicle to resolve family disputes. It is not entirely clear whether countries outside of Canada would recognize the rulings of a Canadian arbitration tribunal. Women who cannot afford a lawyer do not receive legal aid. There is no requirement to keep records of the proceedings, which is why we know so little about them. There are no requirements for training of arbitrators, no professional standards and no license requirements. Anybody can act as an arbitrator and claim to be issuing judgments in the name of Islam. This leaves a lot of room for misrepresentation and negative publicity.

- 3- Moreover, the Qur'an teaches a distinctive monotheism, which does not recognize any human being coming in between God and the individual. We do not have priests or Rabbis. Arbitrators do not have the authority to represent God, speak for God or judge for God in any way. They are entirely human. They should not be claiming divine status for their human decisions. It infringes upon the Islamic principle of monotheism.
(See Qur'an 3: 64; 9:31 and elsewhere, where the term *Arbab* the plural of *Rabb* occurs, which is the Arabic cognate of the Hebrew *Rabb*.)

- 4- The fourth reason is the confusion that occurs between man-made law and divine law. The term Shari'a is used very ambiguously to confuse between two different laws. All of us agree that Qur'anic law is divine law. However, what arbitrators are implementing under the name Shari'a is not Qur'anic law, but Classical Muslim law. Classical Muslim law, or *fiqh* as it is known, is man-made law produced by at least five different groups of men largely in medieval times. The names of these individuals are known, as are the names of the schools to which they belonged: the Hanafi, Maliki, Shafi'i, Hanabali and Ja'fari schools of Jurisprudence.

Although in theory, the Qur'an is a source for the derivation of classical Muslim law, in practice the consensus of a male scholarly elite often plays a bigger role. There are cases where the Qur'an and the consensus differ, and the consensus overrides the Qur'an and the Qur'an is dropped. These are issues that need to be discussed openly and calmly within our community. We need to ascertain that what is being applied does not contradict the Qur'an before we go ahead and give it the epithets of "Divine" or "Islamic." This is our responsibility as Muslims.

For example, based on consensus, medieval scholars authorized a tradition thereby prohibiting women from acting as judges or jurists. The tradition in question is that of Abu Bakrah to the effect that a people who give the government of their affairs to a woman will never prosper. Accepting either the content of the tradition or testimony of the transmitter goes against the Qur'an, since the transmitter is known to have slandered a man and woman of adultery and to have never repented. Even though the tradition goes against the Qur'an, consensus overruled the Qur'an and women were prevented from acting as jurists and judges. In that respect, Canadian law is more in keeping with Qur'anic law than classical Muslim law, because Canadian law allows women to act as judges. (For content compare al-Naml 23-44, al-Nahl 16:58-59 and for transmitter compare Al-Nur 24:4. For the tradition see Ibn Hajar al-'Asqalani, *Fath al-Bari bi Sharh Sahih al-Bukhari* (al-Qahira: Dar al-Rayyan, 1988) vol.13 , *Kitab al-Fitan* 92:7099, p.58; For the transmitter see 'Izz al-Din Ibn al-Athir, *Usd al-Ghāba fī Ma'rifat al-Ṣaḥāba*, (al-Qahira: al-Maktabah al-Ta'awuniya, 1964) p.39 and Taqi al-Din Ibn Taymiyya, *Tafsīr Sūrat al-Nūr* (Bayrut: Dar al-Kutub al-'Ilmiya, 1983) p.73).

Another example: the Qur'an stipulates that polygamy be conditional upon a fear of committing injustice against *yatāma* (al-Nisa' 4:3). However, medieval male scholars rescinded this particular condition. They all agreed that the Qur'an contains this stipulation, but decided to drop it based on their consensus. The term used was *sāqit bi-al-ijmā'*, which means "dropped by consensus." Today in Canada, the fear for widows and orphans is not there. We are not in a situation of war, where men die leaving behind them women and children without provision. In the ancient world, they would have ended up in slavery. This is no longer the case. Since the stipulation for polygamy is not there, then polygamy should not be allowed. In that respect, Canadian law is more in keeping with Qur'anic law than Classical Muslim law. (For *sāqit bi-al-ijmā'* see Abū Bakr Ibn al-'Arabi, *Aḥkām al-Qur'ān*, (Bayrūt: Dār al-Ma'rifa, 198-?) 1: 310 ff. Compare also Qur'an 4:13-14 and elsewhere where the limits/boundaries imposed by God are mentioned)

Although the Qur'an is extraordinarily fair and protects the rights of women, we need to recognize that medieval Muslim men did not always accede women their Qur'anic rights.

So by confusing both Qur'an and medieval Muslim law under the term Shari'a, we are disguising man-made law as the Qur'an, which is not fair to the Qur'an and to our Islamic faith.

- 5- The fact that human beings produced the five systems of medieval Muslim law does not make them bad. They accomplished a great deal for women in medieval times. For example, women were entitled to own and dispose of their financial assets in any way they liked with or without the husband's consent.

However, there are also some negative modern applications of classical Muslim law. For example, during the civil war in Afghanistan, women were not allowed to go out of their homes unaccompanied or receive an education. Many became extremely depressed to the point of committing suicide. Although some Muslims may consider confining women to their homes to be the Islamic thing to do, others do not.

We need to recognize that classical Muslim law is very diverse. It was produced over a period of several centuries and in many geographical regions such as medieval Spain, North Africa, Arabia, Persia and Afghanistan. Because of its diversity, it is not uncommon to find disagreement and contradictions. Some Muslim countries, such as Egypt, developed the classical law into a codified system with good results. So it is possible to develop the law into something suitable for today. However, what was proposed and used here in Canada was not a codified, developed system of law, but the classical medieval version. Afghanistan had the excuse of war and a failed state for implementing medieval law. We do not have that excuse. And with classical Muslim law, there is no guarantee that we will only have positive applications. So whereas some arbitrators may do an excellent job in decisions, others may not. There are just too many loopholes and ways to abuse justice for women.

- 6- Last, but not least is the Qur'anic principle of *Shūra*, or public consultation. The Qur'an teaches that government should be a process of consultation (Shura 42:38). The development and implementation of the justice system is part of the responsibilities of government. The formation of classical Muslim law took place largely in medieval times, and we here in Canada have not had the opportunity to participate in the consultation process. Thus, the Qur'anic principle of *Shūra* is absent in the application of classical Muslim law today. However, it is not absent in Canadian law. Here in Canada, we have this process of public involvement in the law-making procedure in the form of parliaments and MPs. We have a unique law, which developed out of a unique history and a system of public involvement and participation. The development of this law is in keeping with the principle of *Shūra* that we see in the Qur'an. The content of Canadian law is in keeping with our Islamic principles, even more so than some of the systems of countries that have a history of applying Classical Muslim law. This is the system that we should work with as opposed to ghettoizing ourselves.

There is a role for Imams and other would-be arbitrators in resolving family disputes. Islam literally means peace-making and I see their role as making peace between families and helping them resolve their disputes, whether they decide to stay together or to separate. This can bring peace to the couples involved, as well as to their children and families. We need to recognize the importance of this role and not underestimate it. The involvement of force undermines this role. So the work of Imams and other community leaders is to make peace between couples. Making and enforcing law is the job of the state and the community at large of which we all are a part.

For Imams who want to have their legal decisions enforced by law, they still have the opportunity to do so by means of a mediation process, since in some instances mediation can also be binding. They would need to fulfill the necessary requirements to act as a mediator, which can involve studying Canadian law and passing exams. The main difference between mediation and arbitration is that to act as a mediator, an individual needs to have the necessary training and license to practice. I find this to be in the best interests of the Muslim community at large. Mediators also have the opportunity to enrich their education by taking courses in Islamic law. CCMW is in favour of individuals seeking mediation as opposed to arbitration. Now that the University of Toronto, Faculty of Law has appointed two new Professors in Islamic Law, it may be possible for students to have a double major in both Canadian and Islamic Law or even a major and a minor. It may be that we will have mediators with a background in both Canadian and Islamic law.

In conclusion, I would like to present some thoughts on the benefits of Islamic monotheism as they have played out in history. Monotheism is a continuous process, which involves the constant placing of God above human beings, including religious scholars. It is a process of enlivenment whereby individuals learn to use their own powers of perception: seeing, hearing and thinking, as opposed to shutting their eyes and ears and depending on others to do their thinking for them. Faith is the very heart of the individual and when the heart comes alive it reflects on every aspect of human life: whether it is in the economy, arts, sciences or human relations. When Islam first appeared on the historical scene, the ensuing enlivenment led to the development of a tremendous civilization with accomplishments in every known field of human endeavor.

Interestingly, the impact of the Qur'an and Islamic monotheism was not limited to the Islamic world. The German Martin Luther (d.1546) was exposed to Qur'anic ideas and was enriched by them. He proceeded to revitalize his own faith, Christianity, paralleling Islamic monotheistic ideas, a resemblance that did not go unnoticed by his Catholic opponents. Luther criticized the tradition of the Church fathers and advocated a return to the Bible. He thereby initiated the Protestant movement, which was instrumental in getting Europe out of the Middle Ages and the domination of the Church. The act of going back to the original Biblical text, reflecting on it and giving it authority over and above that of the Catholic priests, parallels Islamic monotheism as it is described in the Qur'an. When an individual becomes conditioned to think as opposed to shutting out his or her own thinking processes, it reflects on every aspect of human life. Perhaps this was the single most important reason for the development of Western civilization. Luther's movement also reflected on the Catholic Church, which then underwent a counter reformation. Judaism was similarly enriched through contact with the Qur'an and Islamic monotheistic ideas. This can be noted in the medieval Karaite movement and in the work of the influential, nineteenth century Rabbi, Abraham Geiger, who pioneered the new historically oriented study of the Jewish religion and people.

In light of the above, we Muslims need to encourage intellectual activity and dialogue among ourselves and with the outside world. Harsh and judgmental accusations effectively put a stop to any civilized discourse and are a primary reason for the dearth of such interchange. We need to be able to talk about our legal traditions calmly and objectively and compare them to the Qur'an. We need to be able to exercise our own judgment as opposed to being required to set up for ourselves a rabbinic-like scholarly elite to tell us what is right and wrong. We need to stay away from scholar veneration and ancestor veneration by giving the Qur'an authority over and above past and present scholars and inherited customs and traditions. We need to hold on to the teachings of the Qur'an and to our own distinctive monotheism, for in it is our future and our hope.