

CCMW board and Executive Director, with our friends Marilou McPhedran and Amina Sherazee, met with Ms Marion Boyd on July 30/04.

Here are excerpts of the written submission made to Ms Boyd.

**SUBMISSION TO Ms MARION BOYD:**

**REVIEW OF THE ONTARIO ARBITRATION ACT AND ARBITRATION PROCESSES, SPECIFICALLY IN MATTERS OF FAMILY LAW.**

**“Family law is critical to citizenship laws and practices. Family law is anchored in religious law in most Arab countries, making it a critical site in the struggles between feminists, nationalists and state builders. Family law, which regulates marriage, divorce, child custody and inheritance, may rightfully be said to be the most critical site of power of religious communities over the shape of citizenship in Arab states.”**

“Women are Citizens too: The laws of the State, the lives of women.”

By: United Nations Development Program, p 26.

**“ 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 it as its duty to interfere in the family to ensure equality for women.”**

Countenancing the Oppression of Women: How liberals tolerate religious and cultural practices that discriminate against women. By Gila Stopler.

In Columbia Journal of Gender and Law, 2003. p 27.

**APPRECIATION:**

The Canadian Council of Muslim Women is very grateful for the support it has been given, by ordinary Canadians and groups, in its difficult struggle to advocate for the rights of women in the resolution of family disputes under Ontario law.

It is the efforts of our fellow Canadians which has resulted in the Premier's decision to review the Ontario Arbitration Act and the processes used for family matters.

We applaud the Premier and his ministers in their choice of Ms Marion Boyd, as we know of her considerable stature and of her knowledge of the issues to be addressed.

The Terms of Reference for her review states that

“she will provide advice and recommendations to the Attorney General and the Minister Responsible for Women's Issues about the use of private arbitration to resolve family and inheritance cases and the impact the use of arbitration may have on vulnerable people, including women, persons with disabilities and elderly people. The review will include the consideration of religious based arbitrations.”

p1.

**POSITION OF THE CANADIAN COUNCIL OF MUSLIM WOMEN:**

Our concern is two-fold: the permission of the government, via the Arbitration Act, for private agreements with binding arbitration for family matters; and the permission to use a system of law which is vast, controversial, complex and according to some Muslims, immutably divinely ordained.

We believe that Islam's principles are for equality of women in every aspect, from religious, spiritual duties to practical daily rights and responsibilities of citizens.

For us, Islam is a religion of peace, compassion, social justice and equality, and we know that many of the interpretations and practices of Muslim law do not always reflect these principles. Further, we think that these fundamentals are embodied in the Canadian Charter of Rights and Freedoms.

And we advocate that as we are not compelled by our faith to live under Muslim family law, we as Canadian Muslim women want the same laws to apply to us as to all other Canadians. and not to have our equality rights jeopardized by the application of another system of jurisprudence.

CCMW submits that there are ways for Ontario to follow the Quebec example of reasoning and invalidate any use of the Arbitration Act for families. There are clauses within the Act which could be used to limit "the subject matter which is not capable of being the subject of arbitration under Ontario law." [2] 3. We advocate that matters pertaining to the family are acknowledged as of public interest and not as appropriate for the private sphere.

CCMW has held focus groups with Muslim women in Vancouver, Calgary, Toronto, Ottawa, Halifax and another planned for Montreal, to discuss the issue of Sharia.

What we have learnt from this consultation is that Muslim women want to make a clear distinction between Sharia and Muslim family law; be clear that we are believing women and believe that Islam is a pro-woman faith of equality and justice; we do not want to add

to the hostile perception about Islam or Muslims; we are pleased to be Canadians and to have Canadian laws for our issues.

We are working collaborating with other organizations, such as NAWL, NOIVMWC and

the Campaign Against the Sharia in Canada.

## **ISSUES:**

### **Arbitration Act for Family Matters and the Application of Religious based laws.**

#### **Arbitration Act.**

The provincial Arbitration Act can be used for family matters, and allows for the use of any laws agreed to by the involved parties.

" In deciding a dispute, an arbitral tribunal shall apply the rules of law designated by the parties or, if none are designated, the rules of law it considers appropriate in the circumstances" 32.[1]

The process of arbitration is outside the court system and is in the private as distinct from public domain. This legal permission has led to some religious groups using their specific religious laws for binding arbitration, in private agreements.

We recognize the need for settlements arranged privately and outside the court system, and there are many examples of appropriate disputes for arbitration, outside the public domain, such as commercial contracts, construction, rental and intellectual property issues.

But we do not understand the Ontario government's position to allow family matters to be arbitrated under an Act which has weak safeguards and protection for vulnerable individuals.

Is it possible that this Act enacted in 1991 was primarily to deal with commercial disputes, with no foreknowledge that it could be used for other disputes such as the family? We are not lawyers, but a lay person's reading of the Act clearly shows the lack of protection and the pitfalls for binding arbitration for family disputes. As an example, there are

no express limits to the content of arbitrations, parties can have matters such as custody, access, child support and other matters arbitrated upon. There are no legal impediments to do so. Parties can even agree to waive their rights of appeal in the arbitration agreement and so the touted monitoring by the courts is removed.

Of interest is the fact that within Canada, the province of Quebec has recognized the inappropriateness of arbitration for families:

“Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration.”

Chapter XVIII 2639: Arbitration Agreements.

CCMW, NAWL and NOIVMWC are researching the Act and its use for family matters, as well as a review of any use of Muslim family law in Europe and the States.

The research will be made public in the fall, 2004.

### **Sharia/Muslim Family Law.**

CCMW states that as believing women, we can not be against the Sharia, as correctly defined.

It is important to understand the terms “Sharia” and “Muslim” law. Accurately, Sharia is a comprehensive religious term used to define how Muslims should live, while fiqh or jurisprudence is limited to the laws promulgated by Muslim scholars, based on their understanding of the Quran and the practices of the Prophet.

Some Muslims, by using the term Sharia immediately cause believing Muslims to hesitate in expressing any opposition, as no Muslim wants to be against the Sharia.

However, the correct use of the term “Muslim” law opens up the discussion and one can then explore the issues within.

There is much controversy regarding Muslim laws within the communities. Some insist that the whole system of jurisprudence is God ordained and therefore immutable and not subject to change. There are some who see the laws as time limited to the beginning of Islam, while others think that there are immutable principles in the Quran but that the interpretations of these has led to the formation of the jurisprudence.

Besides this theological discussion, the fact is that the laws were interpreted by male jurists at least 100 years after the death of the Prophet Mohammad, and developed in different parts of the world. These interpretations vary and are even now applied very differentially in Muslim countries.

As the research by the network Women Living Under Muslim Law has concluded, the laws vary and what is considered Muslim in one country is unknown in another. They found there are variations in application and women's rights were rarely based on equality.

The jurisprudence or fiqh does have some common understandings. Much of it is based on a patriarchal model of a community and of the family. It is accepted by many that men are head of the state, the mosque and the family. The responsibilities outlined for males is that they will provide for their families and because they spend of their wealth, they have the leadership to direct and guide the members of their families, including the women. In return, men are given rights of leadership, decision making and of final say in matters of state, community and family.

Most proponents of Muslim law accept that men have the right to marry up to four wives; that they can divorce unilaterally; that children belong to the patriarchal family; that

women must be obedient and seek the male's permission for many things; that if the wife is “disobedient” the husband can “discipline” the wife; that daughters require their father's permission to marry and she can be married at any time after puberty. A wife does not receive any maintenance except for a period of 3 months to one year and

most agree that the children should go to the father usually at ages 7 for boys and 9 for girls. If the wife wants a divorce she goes to court, while the husband has the right to repudiate the union without recourse to courts. Inheritance favours males, [because it is argued that they are responsible for the costs of the family] to the extent that the wife gets only a portion at the death of the husband.

In this patriarchal model, women do have rights. The woman keeps her wealth, if she has any; she is provided with a "gift" at the time of marriage [mahar which could be an iron ring or property or gold or money] she inherits in her own right; in theory she does not have to share in the provision of the household needs, and she keeps her own

name. In return she accepts the patriarchal model and the prescribed roles for herself and her male relatives, including her husband.

The language used by those who espouse these traditional interpretations make a distinction between equity, complementariness and equality. A woman is not equal to a man, she has a role which complements that of a man, and a woman is to be treated with "equity" which means with kindness and gentleness.

On the other hand there are scholars who agree with the position of CCMW that Muslim law needs to be reviewed and examined with the principles of Islam and in light of democracy and the rights of citizenship. These scholars do not agree to the application of the jurisprudence in Canada or the States as there is much work to be done by Muslims, prior to any implementation by individuals who view themselves as capable of practicing Muslim law.

### **WHY SHARIA/MUSLIM FAMILY LAW IN ONTARIO AND CANADA?**

The proponents for the use of Sharia/Muslim Family law argue that:

1. It is the religious right of the Muslim community to have their own laws because the laws are God ordained and must be practiced if we are to be "good" Muslims. Muslims must advocate for their "comprehensive" way of life, no matter where we live.
2. The rights given to Muslim women under Sharia/Muslim Family law are better than those provided under the laws of Canada, Ontario and the West.
3. The Canadian Charter enshrines civil liberties and so the right to practice one's religion is safeguarded under the Charter for Muslims.
4. The government of Canada/Ontario recognizes communities' rights under Multiculturalism, to live as fully as possible according to their ethnic, cultural and or religious practices.
5. The government of Ontario has recognized this right and is encouraging it under the Arbitration Act, so that Muslims can live under their God given laws.
6. The use of private arbitration relieves the backlog at courts.
7. The Arbitration Act states that the route of private arbitration is voluntary and so it is not imposed on Muslim women.
8. Muslim women are capable of making their decisions and if they decide to use the Islamic tribunals, it is their choice to do so. They will want a choice between Cdn law and their religious laws as practiced under Sharia/Muslim family law. The proponents argue that if they are "good" Muslim women, they should choose the Sharia option as this is incumbent on them.
9. The Sharia applied in Canada/Ontario will be consistent with the Charter and with Canadian laws and this can be done by Muslims themselves.
10. Currently, there is informal mediation and all sorts of decisions being taken by religious leaders and lawyers, so it would be better to have these recognized by the Arbitration Act and given legitimacy.

11. To assist the Ontario government, Muslim leaders, such as the Council of Imams, would be pleased to act on behalf of the government and oversee the arbitration processes, settlements and awards so that these are congruent with Canadian and Sharia laws.

12. The Ontario government has already set a precedent by allowing orthodox/Hasidim Jews to use their own laws, so it reasonably follows that all other religious groups should be able to do the same. This should apply not only to Muslims but to Christians, Hindus, Buddhists or any other group who wants to, under the Arbitration Act.

## **IN RESPONSE: WHY CANADA/ONTARIO SHOULD HAVE ONE LAW FOR ALL ITS CITIZENS.**

### **1. God ordained laws.**

Islam has beliefs and practices and does espouse a “way of life” [Sharia] but it does not demand the practice of Muslim jurisprudence. In fact Islam insists that the laws of the land must be obeyed. Islam teaches social justice, compassion, community consciousness and equality of all peoples, and that these should be the values of any land. Canada has these values as articulated in the Charter of Rights and this is as Islamic as any document governing any country.

Islam does not have a clergy, it only recognizes the direct relationship between God and the individual. Muslims do respect religious learning and so accrue some respect to those who claim religious leadership, but this does not mean that there are intermediaries between God and the individual.

As the proponents claim that God wants them to live under Sharia/Muslim law, the question then arises as to why are they advocating for only on one aspect of Muslim jurisprudence. Why the focus only on family law and not on the whole, total system of laws including criminal? Or will this be the second stage of their demand of religious right?

We question why the demand for the application of family law and not all that is God ordained? Is it because women are most affected and that the use of family law allows for increased power and control over women by men and “religious leaders?” If the law of the land allows for the practice of Sharia/Muslim family law, which will be arbitrated by those who claim to be religious leaders [and almost all men] then the government will give even more power to these men over women’s lives.

We caution the government that by allowing religious based laws, they have started down the slippery slope and it will become very difficult to argue against the implementation of other laws believed by some to be God ordained.

### **2 Sharia laws better than Canadian ones:**

It is true that the rights given to Muslim women were way ahead of any other religions. The recognition of women as full human beings accountable to God with rights and responsibilities was not achieved in the West for many centuries. However, we are not in a contest of which rights are superior to the other. The issue at hand is that we are asking for the rights which accrue to all Canadian women by the fact of our citizenship.

### **3. Right of religious freedom:**

We agree that the Charter guarantees the right of religious freedom, but it also guarantees women equality. The issue then is which right should supersede when a woman may be treated unequally according to the practices espoused by a segment of religious practitioners.

For example, some Muslims believe, erroneously, that religion and culture accept female genital mutilation or honour killing as appropriate. So will the law of Canada and Ontario stand up for the religious and cultural rights or for the equality rights of women? If it is argued by some Muslims that God gave men the right to have polygamous marriages, will the law of Canada and Ontario bend the law of monogamy to accommodate polygamy, even if it is seen by Canadians to be undesirable?

### **4. The Politics of Multiculturalism:**

“ While ideally multiculturalism should be a means toward

the end of enabling the full development of minority groups and ensuring equality for their members, it has in effect been used as a political tool that serves mainly to oppress women, and even, in some circumstances, to oppress the same groups that it was intended to protect”

**Countenancing the Oppression of Women: How liberals tolerate religious and cultural practices that discriminate against women.**

By Gila Stopler in Columbia Journal of Gender and Law, 2003. p 22.

CCMW is a strong believer in Canada’s Multiculturalism policy, for it celebrates our differences and allows groups such as ours to be proud of our multiple identities.

However, the celebration of differences should not lead to fragmentation of ethnic/religious/racial communities, nor should it mean that each group is not part of the whole, nor that minority women should be discriminated against by its own government with differential treatment under the law.

We do not accept that multiculturalism is to be used to justify any attack on women’s equality rights. The Multiculturalism Act works within a larger framework which includes the Constitution and Human Rights legislation. The argument being put forward is an abuse of a great Canadian value.

#### **5. Permission via the Arbitration Act:**

It is true that knowingly or unknowingly, the Ontario government’s Arbitration Act has given legal permission for religious groups to use the Act , and some Muslim religious leaders and lawyers not only can act as arbitrators but can use whatever interpretation of Sharia/Muslim family they want to use.

The Act is flawed for family disputes. It states that no records need be maintained, that the whole process is private, the arbitrators require no specialized training nor accreditation and the matter can be settled by any laws. It is not enough to repeat that the Charter will be upheld, for who will uphold it, under what authority and how will decisions be challenged.

#### **6. Overburdened Courts:**

We know the rationale for the introduction of private arbitration. It relieves courts, it can be cost efficient, it can be effective and it can deal with a number of issues for individuals. But as family matters are substantively and qualitatively distinct from commercial matters we advocate that these disputes should be in the public arena and not in private spaces, where there are no safeguards for women and children.

#### **7. Voluntary Agreement to use arbitration:**

The continuous repetition by government spokespersons that binding arbitration is voluntary does not stand up to the realities of most Muslim women’s lives.

Our concern is not with those women who are “comfortable” and knowledgeable about rights in Canada, and who are unlikely to pursue the arbitration process using Sharia/Muslim family law. Our concern is for those of us who are newer immigrants, somewhat excluded due to language or customs, who turn to their traditional sources such as males, and the Islamic Centre or mosque and may not be exposed to mainstream media.

These women will be persuaded to try the Sharia route because that is what they know in their countries of origin and that is what is presented to them as part of the religion.

If the arbitration process is private and legally binding and this is explained to the women as approved by Ontario and Canadian law, why wouldn’t a woman be persuaded to go this route? How would any one ever hear of any abuse of women’s rights?

#### **8. Muslim women and choice:**

“...when examining cases in which the conflict between

women’s rights and religious and cultural practices arises,

we should not concentrate on the question of choice, but

on the question of **disadvantage**, {our emphasis} and ask ourselves whether the practice in question disadvantages women. If the answer to this question is affirmative, then the disadvantageous practice should not be allowed unless overwhelming evidence proves that the practice is consented to by all the women involved, out of their own, genuine free choice.”

ibid, p 28.

We can not generalize that all Muslim women lack knowledge or are unable to make informed choices and decisions about their lives. It may also be possible that some Muslim women will want to choose the Sharia option, if the province of Ontario provides a choice between the laws of Canada and the laws of Sharia. But why in Canada, should Ontario or any other province provide a choice of laws to some citizens and not to others?

The group we are concerned about will be those women who will be persuaded to use Sharia arbitration because it will be presented to them as their duty to follow as “good Muslims.” This is the group of women who should concern all of us, this is the most vulnerable group.

Surely there are limits to individuals’ and communities’ choices if these choices are such that they affect fundamental rights, such as equality? The state infringes on personal choice in matters of public policy and safety; e.g. there are limits to a person’s right to

freedom of expression or freedom of movement. No civilized state can function with absolute freedoms.

#### **9. Charter/Sharia consistency:**

It is difficult to conceive how the Sharia practiced in Canada by the known “religious leaders” will be any different from the versions practiced elsewhere. Having met with some of the proponents, it is incomprehensible how their traditional perspectives will be consistent with the Charter or the Ontario Family Law Act. One of the proponents has stated that the Sharia in Canada will be different, he calls it “Canadianized,” and this raises more questions than answers. Who will be the authority to change the Sharia laws, what happens to these laws being God ordained?

Since this initiative started we have heard directly from some of the “imams” that they consider “Islamic” law as superior to Canadian law and that what is permitted in Muslim law is what they want to practice. We have heard that some of the imams are approving

“Islamic” divorces for men and then marrying them to second wives. We have heard that there are polygamous marriages in Toronto and Ottawa. Violence against women is not different for Muslim women than for others, but at times, the violence is justified because women have not been doing their duties. One learned man has a website in which he decries violence against women but states that under certain circumstances the husband is permitted to “gently” hit the wife as a form of discipline.

Why are we allowing these things to happen to Canadian Muslim women when both France and Spain recently jailed and ousted imams who stated that women can be beaten under certain circumstances?

What gives the government confidence that these leaders will advocate for the rights of women as outlined in the Charter?

#### **10. Current situation at mosques and Islamic Centres:**

We have been told that there are a lot of mediation cases being undertaken by religious leaders and others. We have been told that these dealings are of concern to some of the lawyers who are proposing the establishment of Sharia tribunals, and that legitimizing arbitration via Sharia will allow for greater transparency and publicity.

We have been told, but no one is willing to confirm and make public, that Sharia/Muslim family law is being used for binding arbitration by some religious leaders and Muslim lawyers. They will not tell us what the settlements have been or how women have fared.

We don't see how all these dealings will improve because of the Arbitration Act, when in fact the Act will give these practices legitimacy.

If binding arbitration is private and outside the domain of public accountability under the Arbitration Act, we will learn little.

#### **11. Carving a role for the Council of Imams or some such body:**

One of the suggestions put forward by a couple of imams in public fora is that a group such as the Council of Imams could take over the role of overseeing the arbitration process for the government, as a self regulating body, within the Muslim communities.

The same question arises: what gives the government confidence that these religious leaders who will become arbitrators, will protect women's rights, and which brand of Sharia will be practiced.

#### **12. Precedent for Jewish groups:**

The government of Ontario should have considered more carefully that the Arbitration Act could be used for family disputes by religious groups under the guise of religious freedom. It is true that a precedent has been set with the Jewish Beis Deen courts, but one error can be corrected now, rather than opening the gates to any and all religious groups to separate themselves and become isolated islands unto themselves.

### **RECOMMENDATIONS**

There is a saying that a civil society should be judged by its treatment of its minorities and its vulnerable citizens. This applies well to this discussion of the application of any law which jeopardizes the rights of any woman, be she elderly, disabled or of a specific religious faith.

Without any reference to Islam or Muslims, Ontario should have the courage to acknowledge that the Arbitration Act should not be used for family matters, and follow the example of Quebec.

Ontario should not set a precedent for other countries by allowing the use of other laws which may adversely affect the rights of its citizens.

### **SOME QUESTIONS POSED FOR THE REVIEW**

#### **What are the strengths and weaknesses of the arbitration process?**

In theory, the strengths are that individuals can settle some of their disputes without recourse to the court system; it can be less cumbersome and less costly. There are some

disputes which would be appropriate to this method of settling them, e.g. labour, commercial and minor ones which do not transgress on fundamental human rights.

There are so many issues such as the lack of safeguards, so much "power" given to the arbitrators, and only slight overseeing by the courts. The fundamental weaknesses/dangers are the apparent abdication of the state in ensuring that vulnerable groups are not adversely impacted. As the Act allows the process to take place outside the public arena and away from public scrutiny, it is difficult to monitor the process or to do any comparisons.

We hold that family matters are of public interest and that it deals with vulnerable individuals and therefore requires greater care on the part of the state.

**What are the possible implications for people who may be vulnerable, including women, persons with disabilities and elderly persons?**

If vulnerability is recognized then so should the need for protection and safeguards.

It is unjust to assume goodwill in arbitration without ensuring that vulnerable individuals must be seen as the responsibility of the community which transfers its powers to the state. As this is true for children who are seen as children of the community, as well as those with developmental handicaps, so should it be true for other vulnerable groups.

As mentioned in our Recommendations, a civil society must be judged by its treatment of its minorities and of its vulnerable citizens. If their lives are allowed to be governed by others without state intervention, the chances of abuse and mistreatment are greater.

There are enough cases of adult children abusing their elderly parents, and like minorities, these elderly rarely accuse their grown children of the abuse. Many minority women will opt for their communities rather than open criticism, even if it involves their own mistreatment.

For the government to abdicate its trust from the community to protect the vulnerable is unacceptable.