

# **WOMEN'S RIGHTS IN A SECULAR DEMOCRACY:**

**YWCA TORONTO'S RESPONSE TO THE REPORT ON THE  
ARBITRATION ACT BY MARION BOYD.**

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**WRITTEN FOR THE BOARD OF DIRECTORS BY  
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**YWCA**  
TORONTO

A TURNING POINT  
FOR WOMEN



United Way



## **BACKGROUND**

Much controversy surrounds the Ontario Government's December 20<sup>th</sup> 2004 announcement that Sharia Law would be permitted to govern the resolution of family disputes in the Muslim community through an extension of the Arbitration Act.

In response to speculation on the part of media, members of various communities and local constituents, that Ontario was about to sanction Sharia Law, in June 2004 Premier Dalton McGuinty announced the appointment of Marion Boyd (former NDP Attorney General) to review the Act and the issues and to submit a report to him. Since June, Ms. Boyd has met with many community organizations, religious groups, professional organizations and individuals in an attempt to reach some conclusions about this issue. She was scheduled to complete her review and submit the report to the Premier by the end of September. Now that the review is complete, it is useful to clarify some issues and continue the public debate on this matter.

The Arbitration Act governs the formal resolution of many kinds of disputes, including areas of corporate law. It was introduced under the Rae government and already exists as law in Ontario. Right now, the Arbitration Act is being relied upon by a number of corporations, businesses, some of which in some cases are applying religious laws.

It is proposed that under Ontario's Arbitration Act, arbitrators such as Imams, Muslim elders or lawyers, using Sharia, or Muslim Family Law as their guidelines, would be allowed to make final decisions in various matters, such as marriage breakdown, custody, support and property division.

### **Why is YWCA Toronto Commenting?**

YWCA Toronto is part of an international movement based in Geneva that improves the lives of women and girls around the world. In Ontario, YWCAs are an integral part of 14 different communities. YWCA Toronto is the largest and only women's multi-service organization in the Toronto area. We are active in services that shelter, house and prepare women for employment, assist them in overcoming violence and support them into roles of leadership. For more than 130 years, YWCA Toronto has represented the concerns of the women and girls who come to us for support. We do so through policy submissions, deputations, position papers and public debate. As an integral part of the province's most multi-cultural centre, we serve just under 50,000 people from a huge variety of cultures, faiths, creeds and ethnicities and, as public sponsors of the fight to include equality rights in the Canadian Charter of Rights and Freedoms, we bring to bear an important and unique perspective to the debate surrounding the introduction of Muslim Family Law into the Arbitration Act of Ontario.

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### Who is proposing Sharia?

Mr. Mumtaz Ali leads the movement for private Sharia-based courts that would be allowed under the extension of the Act. The Islamic Institute of Civil Justice, of which Mr. Ali is head, has gained the right to hold tribunals, *darul qada*, in which marriage, family, and business disputes can be settled according to the 1,300-year-old body of laws and rules for living drawn from the Koran and the Sunnah of the Prophet.

Mr. Ali has been variously quoted in statements that contradict each other as to the intent and limitation of this extension of the Act vis-à-vis secular law. The following is a selection of his own words on the case for the extension of the Arbitration Act and his position on access to universal rights for Muslims in Ontario (all quotes can be found on: <http://muslim-canada.org/DARLQADAFORM2andhalf.html>)

“Muslim minorities living in non-Muslim countries like Canada are like wandering Bedouins for whom the *Shariat* applies irregardless of where or when or they live. Although they are free to live according to the Divine Law to practice their faith unhindered in their homes and *masjids* [mosques], they have practically no say in the making of the laws of the land, and governmental institutions do not cater to their needs”.

"Islam does not believe in the principle of separation of the spiritual and the temporal, the sacred and the profane nor the church and the state."

“The decisions of *Darul Qada* (once rendered) will be binding on the parties, the relevant *Rules of Civil Procedure* would also be applicable and the decisions will be enforceable through the normal enforcement agencies of the government in the same way as any order of a Canadian court.”

“...then the court will hand them over to an arbitration board for a final decision, a binding ruling. That ruling would be final and would not be subject to the approval by secular court...”

“...a Muslim who would choose to opt out at this stage, for reasons of convenience would be guilty of a far greater crime than a mere breach of contract - this could be tantamount to blasphemy-apostasy.”

Ali is challenged by a broad coalition of human rights groups and women activists who vehemently denounce his proposals and believe that Sharia has no place within the legal framework of Ontario.

### What are the critics saying?

Critics say that Sharia contradicts the Charter of Rights and Freedoms, which guarantees the equality of men and women. Under Canadian family law, for instance, men and women have equal rights to inheritance and property acquired during a marriage.

Canadians voluntarily waive their legal rights all the time through contractual agreements, but it is the obligation of the courts to ensure that they have independent legal advice before doing so. Critics of Sharia say Muslim women would be deprived of their rights

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because, as with any new immigrant women, they frequently live in isolation from the broader society and have little access to information and resources. Mr. Ali's own words testify that as with women from many faith groups, Muslim women may also be shamed into complying with the most conservative interpretations of their rights at risk of losing their community's support.

Critics emphasize that Mr. Ali's stated intention that Muslims be able to live according to their beliefs is not contradicted by the guarantee to universal rights.

In the words of the Canadian Council of Muslim Women (CCMW)<sup>1</sup>,

"[We hold] that human rights as declared in the United Nations Universal Declaration are consistent with the ideals of Islam, and as believing Muslim women we can adhere to the Quran and to the U.N. Declaration. We see no contradiction between the rights and responsibilities as expressed in the divine message and those articulated by the nations of the world. As Canadian Muslim women we uphold the Charter of Rights and Freedoms and expect it to apply to us as fully as to any other Canadian."

While the current proposal by Ms. Boyd arguably opens the door substantially to the interpretation of the Arbitration Act from a variety of religious perspectives, the current initiative is focused exclusively on Muslim Family Law. The Women's Legal Education Fund (LEAF) notes in a position paper that taking the resolution of family law disputes out of the systems that women struggled to reform from a patriarchal view of family relations "undermines women's equality rights and is a step backward for all women in Ontario"<sup>2</sup>.

### THE CONTEXT

The consideration of this issue forces us to weigh the difficult balance of living in a diverse society with a liberal democratic framework of law. It tests the meaning and extent of multicultural policy and requires careful consideration of the premise of given equality verses the claim of equity seeking groups that equality is not yet a given<sup>3</sup>.

In addition, in the current international context of the "War on Terror", it is undeniable and well-documented that people of the Muslim faith are experiencing an unprecedented amount of negative attention to their ethnicity and beliefs. This includes Canadian Muslims no less than for those of any other nationalities. We believe that intervention in this debate must be motivated from clear principles that include the strong support of religious freedom and the right to live free from discrimination. Naïveté about the discriminatory and intolerant social context is tantamount to endorsement of it. We have fully debated our recognition of this as part of our struggle with this issue.

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<sup>1</sup> All references to statements by the CCMW can be found on their web site at [http://www.ccmw.com/Position%20Papers/Position\\_Sharia\\_Law.htm](http://www.ccmw.com/Position%20Papers/Position_Sharia_Law.htm)

<sup>2</sup> LEAF, Submission to Marion Boyd in Relation to Her Review of the Arbitration Act, September 17, 2004, p.2.

<sup>3</sup> An example of this would be the claim that if women are given access to the choice of having their family disputes resolved through Sharia or Ontario Law, then their choice amounts to an exercise of rights. This position assumes that women have already achieved equality and need only be given "choice". The argument that equality is not yet a given would counter that women's current inequality means that this choice is not truly a free one, and is subject to coercion by men who hold dominance over them.

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All in all, it is a time for measured responses, clarity of message and mutual understanding.

### **WHAT WE'VE ALREADY STATED**

Prompted by the leadership of women within the Canadian Muslim community, YWCA Toronto went public with a position opposing the implementation of the proposed expansion of the Arbitration Act in a letter to the Editor of The Toronto Star published in June 2004. To see this on line, go to:

[http://ywcatoronto.org/assets/pdf/get\\_involved/media\\_archive/2004/040601\\_tstar\\_editorial.pdf](http://ywcatoronto.org/assets/pdf/get_involved/media_archive/2004/040601_tstar_editorial.pdf) (or click onto the "in the news" button on the right side of the YWCA website home page).

We did so on the basis that it explicitly erodes universal access to the rights guaranteed all women in Canada by the Canadian Charter of Rights and Freedoms. Our letter was prompted by a plea from the Canadian Council of Muslim women (CCMW) for Canadians to pay attention to this issue and to assist Muslim women to fight this direct attack on their rights. Our brief argument located the debate within the current context in which a rise in fundamentalist interpretations of most major religions – Christianity, Judaism and Islam - expressly erodes the rights of women. Our argument made a clear distinction between religious belief per se, and patriarchal institutional practices carried over into public life. These latter have the net effect of normalizing the exclusion of women from positions of power and self-determination.

### **WHY SAY MORE?**

This is a significant enough event in the history of women's rights in Canada that we wish to be part of the debate. This is a part of being an advocate for women and girls. We have taken our lead from the Muslim women who have asked for our support in this debate, namely the Canadian Council of Muslim Women. Their self-determination in this matter is crucial to our acceptance of their lead. In recognition of the convolutions that colonial policies brought to bear on the role of women and the meaning of colonized women taking up their rights later in history, we wish to make it clear that our stance is not motivated from some modern version of colonial 'benevolence'.

We believe that any system of religious law, including Christianity, should not be part of the legal framework of a secular democracy and that codes of religious law have not often taken into account the universal equality rights of women. We intervened in the debate surrounding the inclusion of gender equality into the Constitution. We took a stand that was pro-choice. We understand the proposed reading of the Arbitration Act to be of similar significance and controversy in the rights of women.

We stand strongly behind religious freedom and we are in support of the Canadian Council of Muslim Women who are rooted in their faith at the same time as they struggle for women's equality rights. As Toronto's largest women's association, we are concerned with the universal principle of women's equality, and not a specific group's exemption from it.

## **WHAT IS THE WOMEN'S ISSUE AT STAKE?**

Notwithstanding our critical stance toward some aspects of the current approach to resolving family law, we wish to go on record as supporting the public resolution of these matters. Criticisms of currently sanctioned mediation in the resolution of family disputes raise similar concerns to those presented by the expansion of the Arbitration Act because it too undermines the equality rights of women. This is especially true for women in abusive relationships. Like Arbitration, mediation is a private process with no public record of what has taken place. It does not require that a woman's legal or equality rights be explained to her or respected. Often, abuse within a relationship is perpetuated through the mediation itself with the unwitting and unintentional complicity of the mediator. It has taken decades to make family law matters public rather than private. Increased reliance on mediation or an imposition of mandatory mediation moves family law back into the private sphere.

YWCA Toronto holds that the proposed use of the Act threatens the Charter rights of women in Canada and effects a "privatization" of public areas of law by making family law eligible for individual arrangements out of the scrutiny of the public record. In addition, there are concerns that the proposed Act blurs the line between "church" and state, the founding principle in the establishment of democratic government not based in the Divine Right of the monarchy.

As the Canadian Council of Muslim Women states: "instead of addressing the issues resulting from the inefficiencies or ineffectiveness of the federal / provincial court system, the government has allowed for the growth of privatization of the legal system and the lowering of some of the safeguards"<sup>4</sup>.

LEAF makes an important distinction in their paper between informal resolution of disputes that take place without assurance of equality guarantees, and arbitrations which are given the force of law under the Arbitration Act. "Where the state takes this step it is playing a role that engages its obligation, under the Charter, to protect and promote women's equality"<sup>5</sup>.

## **WHAT IS THE CANADIAN COUNCIL OF MUSLIM WOMEN SAYING?**

The Canadian Council of Muslim Women makes some important distinctions in its analysis of what is at stake in the proposed expansion of the Act.

First of all, they point out that there is a semantic confusion that has profound theological and strategic implications for the way this debate can be perceived and received. It centres on the use of the term Sharia Law as opposed to Muslim Family Law. The former, Sharia Law, in fact refers to the comprehensive term for how Muslims live. It is a term for a religious way of life and not for jurisprudence per se. The latter, they argue, is a "vast and complex system of jurisprudence" that is "not woman positive". This is an important distinction because to a Muslim public, stating unequivocal opposition to Sharia amounts to a condemnation of a religious way of life. This latter is not the contention or intention of the position adopted by YWCA Toronto.

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<sup>4</sup> CCMW, *op cit*.

<sup>5</sup> LEAF, *op cit*, p.2

**OTHER RELIGIOUS ACCOMMODATIONS CURRENTLY OBSERVED**

Within a context of general unfamiliarity with or ignorance of the variety of approaches to being Muslim (as opposed, for instance, to a better understanding of the variety of branches of Christianity, or secular Christian principles) it is important to note that other religions have brokered accommodations or have been actively pursuing exception status from universal law in other jurisdictions or areas of law. This illustrates the universality of the principles at stake in the debate.

As an example, a “Get” is an interpersonal release from obligation required between divorcing spouses within conservative branches of Judaism to allow for remarriage. It can become a bargaining chip that alienates women from their rights to property under Ontario law. In the Divorce Act the “Get” augments the Act. Under the current form of The Arbitration Act, Hassidic Jews have been running their own Beit Din arbitrations based on Jewish law for years, as have Catholics and Ismaili Muslims. Rulings are binding, but must be consistent with Canadian laws and the Charter of Rights.

In the United States at the moment, a creeping merger of the aims of a branch of Christianity with the social policy of the Federal Administration has a deleterious effect on the rights of women to access their legal rights. This has shown itself in the de-funding of programs that guarantee access to contraception, abortion, sex education, and so on.

In Ontario, Boyd is only looking at Sharia Law, but it does have implications for other religious groups and for the erosion of women's rights within the public realm. The foregoing example in Judaism and Christianity serve to remind us all that this debate is not about being Muslim; it is about the separation of religious codes from public legal ones.

**MULTI-CULTURAL POLICY**

Mr. Mumtaz Ali makes the argument that the extension of the Arbitration Act is the only way to make Canada accountable to its stated policy of multiculturalism, and that to fail to do so amounts to an impingement on democracy and freedom:

“When people are marginalized by their faith in a country [Canada] which only pays lip service to the rhetoric of democracy and freedom...”

Multiculturalism is an official policy in Canada that purports a laudable goal of accommodation of a variety of cultural expressions based on a bi-cultural founding, but going beyond the two primary colonizing powers of France and Britain.

At its best, multi-culturalism values the diversity of the immigrant society by accepting difference as ‘not better, not worse but equal’.

At its worst, multiculturalism is accused of being a naïve, exclusively cultural approach, that ignores real structural (economic and legalistic) inequalities, such as employment barriers, and the privileging of dominant cultural values and institutions. This, it is argued, in effect, amounts to a celebration of festivals, restaurants and “ethnic costumes”. Many critics of official multi-culturalism have predicted that the surface niceness of

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Canada's position on this issue leaves open the possibility for overt racism on the one side and conservative isolationist intra-cultural domination of "minorities" (women, homosexuals, ethnic minorities) on the other.

Women's groups within the Muslim community have warned that under the guise of multi-cultural accommodation, women within a variety of communities wind up losing access to universal rights, the provision of which in no way legitimately threatens their personal religious beliefs, nor the more tolerant variations of their creed.

The Canadian Council of Muslim Women add, "The other cry is to state that this is "multiculturalism." This is another false argument, because in fact it is really a misuse of the policy. Multiculturalism was never meant to take away the equality rights of a group such as those of Muslim women."<sup>6</sup>

Polite tolerance based in a naïve multiculturalism that makes no analysis of differential power within communities based on ethnicity, creed, sexual orientation or gender, risks surrendering the rights of fellow citizens for statutes that construe those rights as being against "moral codes". We are joined in this analysis by many women's groups from a variety of cultural or national contexts; but most importantly in this case, by the women of the Canadian Council of Muslim Women.

As a woman's organization with roots in the dominant religion of Canada, still prominently proclaimed through the "C" in our name, and as the largest women's association in Canada's most multi-cultural city, YWCA Toronto is mindful of the complexity and importance of balancing competing claims to equality.

As the Canadian Council of Muslim Women has stated: "The issue of separation of state and institutionalized religion needs to be clarified in the context of religious freedom and multiculturalism policies."<sup>7</sup>

Their overriding concern is to achieve a freedom of cultural expression within the safeguard of access to universal rights. CCMW again states:

"[We are] advocating with law makers that there has to be a common civil code for all citizens of Canada and allowing the use of other legal systems discriminates against a group of Canadian women"<sup>8</sup>.

As LEAF sees it:

"...In a multicultural pluralistic society there is a great diversity of beliefs from a great variety of religions, cultures, faith traditions, etc. When such diverse beliefs are given the force of law in women's lives, such as through the Arbitration Act, the result is a great uncertainty and unpredictability, without any accountability or means of ensuring that women are protected. Moreover, faith traditions with a history of what we understand to be "jurisprudence" are effectively privileged, and traditions without such a history, are marginalized"<sup>9</sup>.

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<sup>6</sup> CCMW, *op cit.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> LEAF, *op cit.*, p.3.

**OUR RECOMMENDATION IS THAT:**

- The Arbitration Act must be amended to provide that in arbitrations concerning family law issues, Ontario Family Law must be applied. Disputes that are not decided in accordance with Ontario Family Law must not be enforceable.
- The government should not become a party to contracts by giving them the force of law through the Arbitration Act because the Ontario Family Law regime reflects that equality principles, unlike religious principles, are subject to Charter scrutiny.
- The legal provisions fought for by First Nations peoples, where these do not threaten the stated aims for equality of Aboriginal women's groups, remain protected.
- Religious belief or faith not be encoded in law and not where it contradicts the rights guaranteed by the Charter.

In recognition of the context of systemic discrimination and an imperfect multiculturalism, we concur with the Canadian Council of Muslim Women that:

“We are not naïve and know that there are issues with Canadian law [related to the true equality aims of women and minorities]. However these can be challenged by the concerted efforts of all Canadians, without reference to anyone's religious or cultural beliefs”<sup>10</sup>.

As the Canadian Council of Muslim Women has struggled with the meaning of faith and the rights of women within its own community, so YWCA Toronto has struggled in the past with the elements of the Christian faith that felt our support of a woman's right to choose in matters of reproduction was at odds with our roots. YWCA took the position then that we were a secular association with roots in the Christian faith and an overriding mission to further the equality rights of women and girls. As such we are acutely aware of the conservatism possible within any religious context that might threaten women's rights. We know that women's rights never have been simply granted, but that we have always had to fight for them. We join our women colleagues across Canada from all backgrounds in sounding the alarm bell that this is again one of those important battles.

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<sup>10</sup> CCMW, *op cit.*