Religion-Based Alternative Dispute Resolution: A Challenge to Multiculturalism

THE BASIC TENSION INHERENT IN MULTICULTURALISM IS HOW TO BALANCE THE RIGHTS of minority groups within a multicultural society and yet protect the rights of individuals who are members of these groups. Family law is often a litmus test for how a jurisdiction interprets multiculturalism, as it serves to determine who belongs in a community and who does not according to the community's own norms. Family law also has a distributive function, as it allocates rights and obligations, including financial security, to members of the community. Delegating complete power over family law to a minority group would not only empower that group to determine the boundaries of its own inclusion and exclusion, but it would also allow those in power to determine the level of enfranchisement of individual group members.

This is extremely problematic when a community is seen by some to have little regard for the rights of certain members, such as women. Similarly problematic, however, is the prospect of cultural and religious minorities being suddenly deprived of the right to deal with family law matters before religious tribunals — a right they have enjoyed for decades and one that they firmly believe is guaranteed by the Charter of Rights and Freedoms. In this context, the controversy that emerged in 2003 over religion-based alternative dispute resolution in family law in Ontario led to widespread questioning of Canada's multicultural policies and how they affect vulnerable individuals with respect to family law.

The Issue

In October 2003, a group called the Islamic Institute of Civil Justice (IICJ) announced in rather grandiose terms its intention to incorporate a business that would offer arbitration of family law matters based on Islamic principles. Its major proponent, Syed Mumtaz Ali, claimed the IICJ was "the beginning of a *sharia* court in Canada." Well known as an advocate for Islamic political identity, Ali had written articles proposing that Muslims have the same right as Aboriginal nations to develop their own legal system, and he had also defended the right of Quebecers to separate from Canada on the basis of cultural self-determination (Ali and Whitehouse 1991). He claimed that once Islamic-based arbitration was available, all "good Muslims" would be expected to have family matters resolved only in this forum as opposed to the secular courts of Canada (Ali 2003). His implication was that the law in Ontario had recently changed and that his institute would henceforth offer a parallel legal system based on Sharia law.

These pronouncements precipitated immediate and vocal opposition within the Muslim community and Canadian society as a whole. Under the mistaken impression that the Ontario government had taken, or planned to take, specific action to allow Canadian laws to be superseded by Sharia law, opponents worked with the media to perpetuate this myth. Recognizing the volatility of the issue, the Ontario government asked me to conduct a review of the use of arbitration in family law in general, and specifically to consider the impact on vulnerable individuals of alternative dispute resolution using religious laws. The review received almost 50 written submissions from a wide variety of groups and individuals. Among the submissions were presentations by religion-based arbitration organizations in the Jewish, Muslim and evangelical Christian faiths, which have operated in Ontario for many years — albeit dealing with quite small numbers of clients — without significant judicial intervention. Also presenting submissions were groups strongly opposed to any role for religion in the design or application of the laws of Canada. The review conducted consultations with 250 people and considered the policy implications of various options. The full report of the review was released on December 20, 2004. It included an overview of the applicable laws; a summary of the positions of proponents and opponents, including their suggested remedies; an analysis of the policy issues; and recommendations to government for legislative, regulatory and program measures to address the issues raised during the review (Boyd 2004).

The History of Arbitration in Ontario

As do most jurisdictions, Ontario has a system of family law that encourages a wide range of dispute resolution methods to provide alternatives to the adversarial win-lose forum of the courts. Large numbers of family law disputes are resolved through separation agreements, voluntarily agreed to by both parties, often with the assistance of independent legal advice and/or mediation. These agreements may or may not come to the attention of the courts, depending upon the specific remedies sought. Ontario law has always allowed parties to choose arbitration as a means of resolving family law and inheritance matters, as long as both parties agree to it freely, without coercion. Under the law, the parties can agree on an arbitrator (or arbitrators) they feel will hear the matter fairly, and both parties can agree on the form of law — including religious law — that the arbitrator will use in making a decision. The enabling legislation, the *Arbitration Act*, originated in the nineteenth century, and it was updated in 1991. Ontario is one of seven provinces to adopt a uniform arbitration act developed by the Uniform Law Conference of Canada, a group dedicated to modernizing and harmonizing laws across Canada. British Columbia and Quebec amended their legislation prior to the conference's report, and they have different provisions.

The *Arbitration Act* applies only to civil matters that are subject to provincial jurisdiction (such as separation, property division and support of dependent spouses and children) and provincial matters that the Act does not specifically exclude (such as labour law). Matters under federal jurisdiction, such as criminal law or civil divorce, cannot be arbitrated. Arbitrators can order the parties to do only things they could have agreed to do independently; they cannot order a remedy that is illegal under Canadian law, since parties cannot lawfully agree to break the law. The courts retain the right of judicial review with respect to the fairness and equity of the process, and the parties cannot waive their right to such review. The courts can also overturn decisions that are found to be egregious or not in the best interests of children.

Increasingly, over the past 20 years, jurisdictions have implemented alternative dispute resolution methods in response to research and reviews. The rationale for doing so includes the swifter time frame for resolution of disputes; the lower cost, both to the state and the individual; the reduction of emotional stress; the fact that specialized expertise is needed to deal with the sensitive issues of

family law; and the sense of personal agency it gives disputants. Many mediators and arbitrators point out that parties who engage actively in the resolution process are more likely to respect the outcome, even if it is not the one they had hoped for. Those advocating religion-based alternative dispute resolution argue that diverse parties must be given the right to choose to have their matters heard by those who understand their religious priorities, who respect their traditions and who speak their language (both literally and figuratively). The results of such arbitration would have both legal and religious authority, thus encouraging compliance on both secular and religious grounds.

Discussion

Many opponents of arbitration came to Canada to escape the oppressive yoke of states like Iran, Afghanistan or Pakistan, where Islamic law governs every aspect of life. They expressed fear that the use of Muslim family law principles in family law arbitration would just be the thin edge of the wedge — that allowing such practices would open the door to the gradual implementation of full Sharia law, applicable to all Canadian Muslims. Feminist organizations claimed that religious principles are inherently conservative and prejudicial to women, and that arbitration based on Muslim family law, in particular, would erode the individual equality rights women have striven to have enshrined in Canadian law over decades of political action. Some of these groups suggested that Muslim women would not have the knowledge or the strength to assert their own rights when they conflicted with the communal rights of Islamic society. Secular humanists, believing in the complete separation of church and state, deplored what they depicted as a further intrusion of religion into the realm of the state. They demanded that the government take immediate steps to remove the right of any religious group to arbitrate family law matters using religious laws. All these groups raised questions about the status of women in Muslim states and the vulnerability of women and children to violence within Islamic culture. Those opposed to Canada's multicultural policies seized upon this issue as an example of why Canada should limit the expression of cultural diversity and insist that, however heterogeneous our population, everyone adhere to the same laws and processes (Boyd 2004, sec. 4).

The responses to the review revealed a wide range of opinion on multiculturalism in Canada. A minority advocated for full jurisdiction for religious/cultural minorities over family law and inheritance matters with minimal state intervention. These respondents believed that a minority group should be able to apply religious laws even when they seriously conflicted with the laws or policy imperatives of the state, and that the state should have little power to act on behalf of an individual member of the group, even if the process contravened that individual's rights. This has been described as a policy of "noninterventional accommodation" (Shachar 1998b, 83). At the other end of the scale, some respondents vigorously advocated for a complete separation of church and state, with religious and cultural minorities having no authority whatsoever over matters subject to state laws. This has been termed the "secular absolutist" position (Shachar 1998b, 81).

The noninterventionist approach "renders invisible those violations of members' basic individual rights which occur under the shield of an identity group" (Shachar 2001, 73). When the right of the minority group to protect itself from external influences is prioritized, individuals within the group whose rights are violated must bear a disproportionate share of the burden of protecting the culture within the dominant society. As a result, individual autonomy is sacrificed for the sake of group survival. Where, as in Ontario, the existing family law regime is available to all residents but is not mandatory, there are limited state-guaranteed protections, aside from the right to avail oneself of a particular set of laws. It is simply not tolerable that an individual could lose legal rights and protections because of the exercise of power by a minority group. It is therefore essential that these laws continue to be available to all, regardless of the community to which they belong, and that no community is given the right to prevent access to the laws.

However, the proposal that cultural and religious minorities lose the ability they have enjoyed to arbitrate family matters according to religious law is equally contentious, given the religious and multicultural rights enshrined in the Charter of Rights and Freedoms. The secular absolutist approach is based on the assumption that secular laws treat everyone equally. The primary shortcoming of this position is that it fails to acknowledge that some people live their lives in a manner more closely aligned to their faith than others and experience secularism as a constraint. Ontario laws are framed by the combined influence of the Judeo-Christian tradition and the Enlightenment focus on the individual as opposed to

the community and are grounded in English common law. As a result, the laws of the province and their application are more easily embraced by some cultures than others, making their impact disproportionate on those who do not belong to the dominant culture. This may serve to alienate from the mainstream those who do not see themselves reflected in our laws. Many opponents of arbitration in family law urged the government to make the resolution of family disputes possible only through the secular court process. Those who identify primarily with their religion, and whose religious rules require them to seek mediation and arbitration of disputes rather than litigation in the secular courts, would find such a requirement oppressive and discriminatory. Undoubtedly, this position would drive the practice of religious arbitration underground, leaving vulnerable women and children with no recourse under Ontario law.

Ayelet Shachar suggests that instead of choosing one of these two polarized approaches to multicultural accommodation, we seek to achieve "transformational accommodation" by balancing group religious and cultural freedoms with individual rights and freedoms (1998b, 83). This notion is based on the understanding that individuals stand at the intersection of various identities. Not only are they members of a collective, but they also have dimensions of gender, ability, age and so on. As Shachar writes:

> The intersectionist view of identity…would acknowledge the multidimensionality of insider's experiences and would capture the potential double or triple disadvantages that certain group members are exposed to given their *simultaneous belongings*. Moreover, an intersectionist view would recognize that group members are *always* caught at the intersection of multiple affiliations. They are group members (perhaps holding more than one affiliation) and, at the same time, citizens of the state. (1998a, 285)

Commitment to individual rights lies at the core of the legal and political organization of any liberal democracy. It underpins freedom of religion and expression and the right of minorities to enter into dialogue with the broader society. It is illogical and untenable to claim minority rights and then entrench religious or cultural orthodoxies that would undermine the individual rights of select others. Toleration and accommodation must be balanced against a firm commitment to individual agency and autonomy.

Incorporating cultural minority groups into mainstream political processes remains crucial for multicultural, liberal, democratic societies (Kymlicka 1995,

50). By utilizing provincial legislation that other religious groups were already using, the Muslim community was drawing on the dominant legal culture to express itself and engage in institutional dialogue. In using the existing law, the community was inviting the state into its affairs — since state intervention, in the form of judicial oversight, is specifically set out in that law — while at the same time creating a forum in which to meet its religious obligations. The Muslim proponents of religion-based arbitration consistently pointed out that, according to the Koran, Muslims living in a non-Islamic country are required to follow the laws of that country.

The recommendations flowing from the review attempted to strike a balance by allowing religion-based arbitration to continue, but only if the process and the decisions are consistent with the *Ontario Family Law Act*. Arbitration agreements and decisions would be included under part IV of the Act. Recommendations offered by proponents from both the Muslim and the mainstream communities include provisions for the regulation of arbitrators and mediators, requirements for record keeping, written decisions with reasons and monitoring of decisions in an anonymous form. The review also recommended that resources be allocated to ensure that individuals within all communities understand their rights and obligations under the law and that we commence a genuine public dialogue about how we can build a shared sense of identity in an atmosphere of peace and mutual respect. The review challenged the government to seize this opportunity to create transformational accommodation in family law arbitration and thus protect the choices of all individuals while promoting the inclusion of minority groups in our society.

The Outcome

THROUGHOUT THE SPRING AND SUMMER OF 2005, THE CONTROVERSY CONTINUED TO swirl, not only in Ontario but also across Canada, and even in Europe. The issue was a favourite of journalists, who often grounded their observations in blatant anti-Islamic or antimulticultural sentiment; they continued to repeat misinformation about the "dangers" of Sharia, even when their own editorial pages thoughtfully considered divergent views. The opponents of arbitration in family law waged an effective campaign to put pressure on the government; the

government assured citizens that it would act to ensure that family matters were resolved in accordance with Ontario and Canadian law. Without warning, on September 11, 2005, the premier of Ontario stated to a reporter that he had decided to ban all religious courts in the province. Immediately, the pressure on the government eased, and the story fell out of the spotlight. All sides waited to see what the legislation would actually entail.

On November 15, 2005, the government introduced the *Family Statute Law Amendment Act*, designed to ensure that all family law arbitrations are conducted only under Canadian law, which includes all provincial statutes. The legislation provides that family law resolutions based on any other laws or principles, including religious principles, will have no legal status and will amount to advice only. People will still have the right to seek advice from any source in matters of family law, including religious leaders. However, such advice will not be enforced by the courts. Virtually all the other legislative and regulatory provisions recommended by the review were incorporated into the Act. In addition, the government added a long-awaited amendment to the *Children's Law Reform Act* to ensure that violence and abuse are taken into account in determining the best interests of a child with respect to custody and access. Finally, it announced that it would develop new community outreach and education programs to better inform Ontarians about family law and arbitration. The *Family Statute Law Amendment Act* has been passed by the Ontario Legislature but not yet proclaimed, and regulations are still being drafted.

We can predict that some religious groups will challenge the legislation under section 2 (religious freedom) and possibly section 27 (enhancement of multiculturalism) of the Charter. Others are examining their options within the context of the law. The controversy has encouraged wide-ranging examination and debate within the Muslim community about its role and image in a multicultural Canada. It has also challenged all Canadians to pay more attention to how the concept of multiculturalism is actualized in their day-to-day lives. Only time will tell whether the law will alienate communities and isolate the vulnerable individuals within them, or whether it will contribute to the transformational accommodation of religious groups in Canada.

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