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Shariah courts in Canada, Myth and Reality - IslamiCity

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At no other time have Ontario courts been as backlogged as today, wrote Ontario's auditor in his October 2003 report. The sentiment was echoed by Ontario's chief justices at the 2004 opening session of the provincial court.

Given the situation, one would expect that anything that may ease the backlog would be welcome. Ironically, recent efforts by the Islamic Institute of Civil Justice to formalize alternative dispute resolution (ADR) have met strong opposition from within and outside the community, at times verging on Islamophobia.

Right wing commentators and news outlets had a field day. "Canadian judges soon will be enforcing Islamic law...such as stoning women caught in adultery," screamed one headline. Another read "Canada Allowing Sharia Barbaric Laws?" Even the usually sober Globe and Mail got in on it with a front page story titled "Tribunal will apply Islamic Law in Ontario."

Within the community of more than 650,000, opinions range from embracing it wholeheartedly to opposition for fear that the decisions will be biased against women. In fact, the International Campaign for the Defense of Women's Rights in Iran held a panel discussion titled, "Sharia tribunals in Canada and women's rights," on March 7, 2004. The press release for the event endorsed by about half a dozen women's rights and humanist groups claim that "this attempt [to set up this tribunal] will make it possible for political Islam to gain legal credibility to attack women's rights."

Other communities have successfully implemented ADR procedures with much less fanfare and scrutiny. For instance, rabbinical courts or Beth Din's dealing with business and matrimonial issues have been functioning for some time in North America.

The existing Canadian legal framework allows parties to civil, family and religious disputes to opt for ADR and thereby resolve their differences using their own parameters be it religious or otherwise in a more feasible and culturally acceptable manner. This trend toward ADR will greatly benefit the general public by easing the burden on the judicial system and saving tax dollars.

Muslims would simply be reactivating their rich tradition of arbitration (tahkim); mediation (wasatah); and conciliation (sulh). The tradition, based on different assumptions from the Western model, has continued from the time of the prophet. In fact, R. Jennings in his *Kadi Courts and Legal Procedures in the 17th Century Ottoman Keysari*, wrote:

Muslihun (those who help negotiate compromise and reconciliation) were regular features of the court. Often, litigants reported to the court that Muslihun had negotiated sulh between them, indicating that a compromise had been accomplished away from the Court.

Indeed, the Quran specifically refers to arbitration in the context of matrimonial disputes:

If you fear a breach between them (man and wife), then appoint an arbitrator from his people and an arbitrator from her people. If they desire reconciliation, God will make them of one mind. God is all knowing, all aware. (Quran, C4, V35).

Of course, contrary to the impression left by some misinformed observers, any decision rendered by a tribunal or a panel of mediators would be subject to appeal to the courts and would have to be consistent with the supreme law of the land, the Canadian Charter of Rights and Freedoms.

Critics contend that unfair decisions will come to light very rarely given that women will cave in to social pressure. The concern is valid given the insular nature of the community, but should not undermine the whole initiative. In fact, Islamic dispute resolution already exists and people are abiding by decisions that are often times crude or unfair. Formalizing the process will allow for greater transparency and accountability. As long as there are proper procedures and rules of conduct in place there is nothing preventing the community from instituting a dynamic and less disruptive alternative to the adversarial court system.

The primary issue of what interpretation of Islamic law will be applied raises legitimate questions. The Shariah is a comprehensive legal, ethical and spiritual guide of conduct to achieve submission to the will of God. The discovery of these rules of conduct is attained through fiqh or jurisprudence. Fiqh is composed of the Usul al Fiqh and the Furu al fiqh. Usul al fiqh is the methodology of jurisprudence, including the philosophy of law, sources of rules, and the principles of legislation, interpretation and application of the Quran and traditions of the prophet Mohamed. Furu al fiqh are the derivatives or the legal rules, which are subject to interpretation and evolution. While agreeing on major points of Usul, Muslims have historically tolerated a wide variety of opinions with regards to Furu.

Compounding the problem is the fact that there is virtually no formal certification process to designate someone as being qualified to interpret Islamic law. As it stands today, anyone can get away with making rulings so long as they have the appearance of piety and a group of followers. There are numerous institutions across the country churning out graduates as alims (scholars), faqihs (jurists) or muftis (Juris-consults) without fully imparting the subtleties of Islamic jurisprudence. Many are unfortunately more influenced by cultural worldviews and clearly take a male centered approach.

The status quo in Islamic law characterized far too often with abuse of women and minorities is the product of rigid interpretations shaped by tribal and cultural norms. The pure Islamic teachings of equality, justice and freedom must be brought to the fore again by using interpretations which are consistent with the spirit of Islam.

Islamic dispute resolution if it is a simple exercise of grafting the western paradigm onto the existing Islamic rules will not be fair or just. This formal ADR initiative provides an opportunity to shed the cultural baggage and revisit some of the patriarchally misinterpreted rulings by refocusing on the Quran's emphasis on gender equality.

This is a daunting task. One where arbitrators, mediators and facilitators must be adequately qualified to issue Islamic rulings consistent with the spirit of the Shariah and within the parameters of the Canadian Charter.

Those expending their energy campaigning against this initiative outright would help their cause more by offering constructive input to help set parameters and develop a transparent and just process.

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