

Executive Summary

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Part I -- Introduction

In order to support and reinforce 'The Principles to Guide the Review' enumerated by the Task Force, we have included in our review some of the general principles laid down by the Zuber Report of 1987. These principles were described as fundamental to the structure and management of the Justice System: (a) courts are a necessary part of society; (b) they are a social service; (c) they must have economic accessibility; (d) they must be timely; and (e) they must attract the best people with experience.

Courts cannot function in a vacuum without regard to the needs arising as a consequence of structural and compositional changes in society, e.g., the religious needs of Muslims who must govern themselves by the Muslim family law in their interrelationships of both a personal and communal nature. Out of sheer necessity, the courts must also take into account and be influenced by so many considerations and elements that are extra-legal in character. For instance, among other things, the system of interpretation, philosophical assumptions, the theories of law and the styles of logical mapping which judges employ in reaching legal decisions are all part of the practices and conventions which surround statutes, legal rules and the Constitution.

It is a fact that fundamental principles and issues arising out of the concepts of democracy, equality, rights and duties, justice, autonomy, sovereignty, secularism, guaranteed freedoms, access to power, etc., become necessary for discussion in order for the Muslims, as a religious minority group, to air their difficulties and seek help from all three areas of government--namely, the judiciary, the legislative and the executive.

Part II -- Discussion

Object: To focus on discussion as to how certain constitutional and other philosophical, extra-legal kinds of important issues come to be defined and become constructed as a religious problem under conditions of liberal democracy and its attendant secularism.

As the term 'sovereignty' is used in a relative rather than an abstract sense, the sovereignty of one individual, one community, or one level of government must be balanced against the sovereignty of other individuals, other communities--whether religious communities or other kinds--or other levels of government.

This is borne out by the history of French Canada or the Maritimes, the West or the Northern Territories, the provinces or the federal government, Native people or immigrants; all revolve around the search for asserting or claiming or fighting for their respective sovereignty. As a matter of historical fact, the sense of betrayal that all people in Canada have experienced, at one time or another, can be traced directly to the perception, whether correct or not, that there is an inequality in the relationship of reciprocity and mutuality that defines the social contract that links the sovereignty of one people

with other people.

Actually, it would serve us all well to remember that the straw that stirs the political/cultural chemistry of Canada and Canadians and their Canadian identity is the rankling problem of sovereignty. Since the issue of sovereignty also involves the desire to have substantial control over, or play a fundamental role in, shaping one's destiny, the concept of participatory democracy also becomes relevant and deserving of discussion.

Part III -- Treatment of Minorities

For a well-rounded discussion, in this part of our submission we examine the relevant issues from three perspectives: (1) Islamic, (2) International, and (3) Canadian. **Islamic Perspective**

It is a fundamental principle of Islamic law that "in matters of this world, Muslims and non-Muslims are equal and alike." Accordingly, Islamic law permits minorities to establish their own private facilities (e.g., own tribunals, own judges and own laws) for adjudication in order that they may lead their lives in accordance with their own sense of justice in civil, penal, religious and cultural matters.

Like any kind of arbitration system, such a system of judicial autonomy obviously has an element of privatization of justice in that sense. But, in this context, we might add, there is much to be said in favour of such an improvisation for, just as is the case in other areas of competition, competition in the area of the judicial system could lead to a heuristically valuable process of cross-fertilization that generates improvements in the respective systems of justice.

Law exists in human society from time immemorial. Every race, every region, and every group of men has made some contribution in this sphere. The contribution made by Muslims is as rich as it is worthy and valuable.

Muslim personal law is an integral part of the religious structure of Islam and the Muslims are bound to observe and obey Islamic law wherever they might be.

International Perspective

Treatment of minorities and the standard of equality or non-discrimination as established by the U.N.O. are discussed with reference to the findings of the U.N.'s Commission on Human Rights, sub-commission on Prevention of Discrimination and Protection of Minorities. On 'Definition and Classification of Minorities,' "multinational states" are defined as the states "formed by two or more nations, existing as *different communities*, each of which is aware of--and desires to retain--its own *distinguishing characteristics*." These states are then divided into two principal categories, one of which is those states in which the *state reflects* the culture of the *predominant nation* whilst the others are considered

minorities. In this context, therefore, the majority group is the cultural, religious, ethnic or racial group with the *greatest power*, not necessarily the group with the largest number of members, in numerical terms, in Canada.

Canadian Perspective

Thus, the British culture, as a power, predominates the cultural landscape of Canada. The Muslims as a minority group are thus marginalized, discriminated against and unequally treated according to the U.N. Standards.

(Oppenheim's summarization of the protection of minorities is also discussed.)

Canada as a country committed to multicultural and multiracial philosophy fares well in the scale of things which reflect the *de jure* position. However, when it comes to implementation of those commitments, there is much to be desired.

"In the barnyard of democratic multicultural Canada, some are more equal than others."

Francophones and Aboriginal people do enjoy autonomy of their legal systems, whereas certain others, such as Muslims and Jews, do not. They are deprived of equal treatment even in the spheres of personal/family laws.

Then we discuss why Muslim personal/family law is, therefore, so important--not only to Muslims, but also to Canada.

Part IV -- Multiculturalism

We conclude that, in Canada, implementation of the ideological rhetoric is lacking. Consequently, the theory and practice of democracy as well as multiculturalism are at variance.

The solution may be found in our willingness to apply and make full use of the principle of 'diversity of equality/equality of opportunity' and extend the principle of multiculturalism to all cultural groups, instead of confining it only to three charter groups: British, French and Aboriginal people.

The Muslim perspective and its understanding and application or use of the term 'culture' is much more extensive in its length and breadth and depth dimensions. It is applied to the whole human race, rather than to the limited endeavour of only a few individuals or groups of individuals. Islamic culture aims at nothing less than universal human brotherhood.

Muslim personal/family law is an essential ingredient in the total scheme of well-being of all humanity for a life of proper equilibrium and co-existence.

Part V -- Conclusion

In our conclusion, we refer to three legal authorities: The Old Testament, Exodus 18:13-27; the Quran, 5:45-51; and the Canadian Constitution. They all have one thing in common: all three of them recognize one important principle of administration of justice. They all permit some form of judicial autonomy and concurrent operation of multiplicity of legal systems, to a relatively larger or lesser extent.

Muslims of Ontario are also trying to persuade the government to extend some form of autonomy in respect to Muslim personal/family law which they need as an expression of worship and love of Allah

--the two elements inherent in its obedience. For Muslims, the *sine qua non* of action is that it be undertaken with the intention of submitting oneself to Allah's Will such that the action is done for the sake of Allah alone. When Muslims are forced to resolve their conflicts under a system that is governed by different motives, Muslims place their spiritual and social lives in dire peril because they are thus made to submit to that which is other than what Allah has ordained for those who wish to submit to Him.

We have dealt with this issue in more detail under the chapter of 'Religious Freedom: Some Problems'.

Attention is also drawn to the fact that, in the West, there is a serious lack of understanding of Muslim perspective in matters of this nature. A plea is therefore made that it is incumbent upon authoritative institutions such as the Civil Justice Review Task Force to help rectify this deficiency.

Part VI -- Recommendations

Briefly, in point form, our recommendations are as follows:

1. Appropriately amend the Practice Direction re court-based ADR Pilot Project to permit as an option private arbitration for determination of matrimonial matters. Where both parties are Muslim, they may be permitted to enter into an arbitration agreement to have matters determined in accordance with the principles of Islamic law. A precedent of an international arbitration case is cited in our submission in support of this proposition.
2. Matters of Muslim intestate succession be permitted to be settled in similar fashion. Changes to the law will have to be made, if needed.
3. In cases of uncontested joint petition for divorce, Marriage Officers appointed under the *Ontario Marriage Act* be empowered to solemnize and register Muslim divorces following procedures similar to the procedures of *The Marriage Act*.
4. In case of uncontested joint petition for divorce, both Muslim spouses be permitted to waive the mandatory one-year separation requirement and/or abridge the time for finalizing the divorce proceedings.
5. As an alternative to private arbitration under a court-based ADR system, when dealing with divorces where both parties are Muslim, an independent, private arbitration system managed by local Muslims could be put in place on lines similar to those followed by *Muslim Marriage and Divorce Act* of Trinidad and Tobago. A summary of the said Act is provided in our submission.
6. As a further alternative, fully incorporate Muslim personal/family law into the regular Ontario civil justice/family law system, thereby taking control of the whole administration and enforcement of Muslim family law provisions.
7. Extend the unified family court system to the whole of the province of Ontario.