

Interview: A review of the Muslim Personal/Family Law Campaign

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The following is an interview conducted with Syed Mumtaz Ali, President of the Canadian Society of Muslims. Insha'Allah the reader will gain a better understanding of the Personal/Family Law Campaign itself and the issues surrounding it.

Introduction

1. *What is meant by Muslim Personal/Family Law?*

For Muslims, Personal/Family Law (PFL) is a key ingredient which helps the individual and the community struggle toward harmonious equilibrium. Muslim PFL governs fundamental aspects of individual and community affairs. It encompasses issues affecting the personal status of people and it deals with wills, inheritance, marriage, remarriage, marriage contracts, divorce, maintenance, custody and maintenance of children, guardianship, etc., hence the term Personal Law. However, in the Canadian context, to simplify matters, it may also be referred to as Family Law.

Muslim PFL is rooted in and derived from the two most basic sources of Islamic law--namely, the holy Qur'an and the Sunnah of the Prophet (pbuh). Repeatedly, the Qur'an enjoins and instructs Muslims to follow the Qur'an and the example of the holy Prophet Muhammad (pbuh). Again and again, Muslims are informed in the Qur'an that one cannot consider oneself a Muslim (one who submits to the command of Allah) unless one follows the guidelines, counsel, and principles related to us through the Qur'an and the Prophet Muhammad (pbuh).

2. *Who are you trying to reach with your Personal/Family Law (PFL) campaign? Is it directed toward both Muslims and non-Muslims?*

Quite simply, we are trying to reach Muslims, non-Muslims, and Canadian governmental authorities at all administrative levels.

3. *Why do you call this the Muslim Personal/Family Law campaign (PFL) and what is its history? When did this campaign begin?*

In accordance with the holy Qur'an and Sunnah of the Prophet Muhammad (pbuh), we have mounted a campaign which would meet the needs of all Canadian Muslims, because right now we cannot meet these needs through Canadian secular law as it presently stands. We call it the 'Personal/Family Law Campaign' because that is what it is--an effort to upgrade and achieve Muslim Personal Law in the familial context both within the Muslim community and in the Canadian judicial system. As to the inception and history of our campaign, I refer you to my opening comments in *A Word from the President* [see website]

4. *Why are you confining your PFL campaign to family issues rather than other aspects of the Shariah?*

Our campaign for PFL addresses only a very small part of the Shariah--namely, the Muslim personal law dealing with family relationships. We live in a non-Muslim country which subjects us to laws which, for the most part, do not allow us to live our faith to the best of our ability. Confining our campaign to those areas where the Canadian judicial system could accommodate Muslim minority concerns is far more feasible, realistic, and practical than other areas of the Shariah. Family relationships is just such an area, in that while it does not make it necessary for Canadians to sacrifice the fundamental principles upon which the country was founded, it does enable the Canadian Muslims to have recourse to legal problem-solving based upon the Shariah.

5. *Why is the PFL so important for Muslims? Why do Muslims need it?*

As Canadian Muslims, you have a clear choice. Do you want to govern yourself by the personal law of your own religion, or do you prefer governance by secular Canadian family law? If you choose the latter, then you cannot claim that you believe in Islam as a religion and a complete code of life actualized by a Prophet who you believe to be a mercy to all. If you choose the former (i.e., to be governed by your religion), then you must accept the necessary consequence that you must follow

a course of action that will enable you to achieve that end. You cannot shirk from your religious and moral duty to try for what can be achieved lawfully within the parameters of the Canadian democratic system and constitutional legal rights.

If Canada were some sort of archaic despotic regime, then your responsibilities would be different. But this is not the case in Canada. We believe that among the many beautiful aspects of democracy are its capacities for change, flexibility, fairness, and accommodation of a spectrum of possibilities and perspectives.

Democracy has not produced, so far, a perfect society. Instead, democracy is a process which is dedicated to a continuous attempt to improve the quality of life for both individuals and the collective. Part of the progressive search for discovering better, more equitable ways of doing things is to provide people with a variety of choices which are more suited to their individual and collective needs.

In the Canadian context, you cannot shirk from your civil responsibility to pitch in to bring your Canadian system a step closer to achieving that ideal of a perfect democracy. You must use democratic methods to seek democratic solutions to your problems, as suggested by the Canadian Society of Muslims. This is why the PFL is so important for you as Canadian Muslims -- it is an opportunity to live your Islam to the best extent possible in the Canadian democratic context.

6. Why is Muslim PFL important to all Canadians, be they Muslim or non-Muslim? Why should Canada adopt it?

Firstly, it would be a more efficient, less costly and less burdened system for dealing with the relatively diversified approach of Canadians to their own family law.

Secondly, it is important for non-Muslim Canadians to carry out and act upon their fundamental principles and ideology which is put forward in the Canadian Charter of Rights and Freedoms. To not do so would be flagrant hypocrisy and a denial of rights to its citizens. It would put Canada in an awkward position on the world stage. Canada would be like a rudderless ship, unable to steer to its proclaimed destination of treating minorities fairly and equitably, not only according to their own Constitution, but also according to the requirements of the United Nations Organisation. In failing to fulfil this responsibility, Canadians would become victims of their own rhetoric and so any progress would be lost. Therefore, I think Canadians would want to

accommodate Muslim PFL in some appropriate fashion and thus live up to their own aspirations and strivings toward democracy.

Thirdly, Canadians as individual members of the society would not be losing control but instead would broaden their mandate of sovereignty. They would enhance the quality of that sovereignty, in as much as the term 'sovereignty' in relation to individuals and communities of minorities is used in a relative rather than an abstract sense.

Lastly, by adopting Muslim PFL into the current system of law, Canadians would gain international recognition, particularly by the United Nations, for its exemplary fairness and practical facility toward minority rights.

7. But how can a separate system of law like Muslim PFL coexist with current Canadian Law?

As the English author, William Blake, succinctly stated in the late 1700s, "One law for the lion and ox is oppression." With this notion in mind, it is somewhat promising to note that several systems already exist now -- for example, Canadian common law, Quebec Civil law, Municipal by-laws, laws governing Aboriginal self-government on reservations, etc. Still, to cope with the changing structure of our society, we need improvement and fine tuning to include and address more of our minority concerns.

We would like to see a more equitable situation which includes mechanisms for conflict resolution in order to meet the needs of all Muslims living in Canada. It would not be a separate system of law, per se, but rather an adjunct to current Canadian Law which incorporates and includes Muslim concerns in a fair and just way.

The Prophet Muhammad (pbuh) in his lifetime resolved beautifully the concerns and conflicts of non-Muslim minorities by applying Christian Law to Christians, Jewish Law to Jews, Parsi Law to Parsis, etc. This was done through their own respective separate judicial tribunals appointed by themselves as separate minority groups. Thus, what the Prophet (pbuh) did in this respect was in effect nothing but a judicial translation of an ideological co-existence that goes hand in hand with full integrity for all minority religious groups living within the Islamic state.

8. What changes are necessary to Canadian law to adapt to this?

We have put forward detailed recommendations in our submission to the Ontario Civil Justice Review Task Force [*The Review of the Ontario Civil Justice System 1994*]. For those requiring a more detailed picture, I would recommend reading it. Chief among these recommendations was the establishment of Islamic arbitration boards to deal with PFL problems. We also recommended:

- (a) that Marriage officers be given authority to act as Divorce officers;
- (b) that disputes arising from a Muslim who fails to leave a Will be resolved through Muslim arbitration boards;
- (c) that the Unified Family Court systems be extended to the whole province;
- (d) that, with uncontested divorce, the husband and wife be permitted to waive the one-year separation requirement and that legislation be amended accordingly; and
- (e) alternatively, that provisions relating to marriage, divorce and intestate succession be incorporated into Ontario Law as a part only applicable to Muslims.

We also offered a blueprint of how Muslim PFL is incorporated in Trinidad and Tobago. In that country, they administer Muslim PFL under the *Muslim Marriage and Divorce Act*.

9. *Will this be very cost-effective? How will it benefit both the Muslim community and the Canadian system?*

Yes, it could be very cost-effective. Court proceedings are very expensive to individual users and the provincial taxpayer. If we could settle Muslim disputes without these lengthy proceedings, then it would be more utilitarian for both Muslims and non-Muslims. Both from a streamline and cost point of view, what we are proposing would be less burdensome to the judicial system.

The Islamic Imperative

10. *As an Islamic alternative to Canadian adoption, can a Muslim living in Canada become a guardian of a child according to Muslim Law?*

No. Please refer to my article '*Establishing Guardianship...*' [on the website and in PDF format]

11. *Can a Muslim living in Canada get a divorce according to Muslim Law?*

No.

12. *If a Muslim living in Canada should pass away without leaving a Will, would his or her matters of inheritance be dealt with according to Muslim Law?*

No.

13. *If a Muslim living in Ontario should, through disease, accident or old age, become mentally incapable of looking after his or her affairs, would the Ontario government give his or her family that responsibility and conduct the affairs of the incapacitated person in accordance with Muslim PFL?*

No. Unless they have arranged for power of attorney, the Ontario government, through a government-appointed representative, could take control of that person's financial and personal affairs.

14. *What about the situation where a legally incapacitated Muslim living in Ontario does not leave a Living Will? Would the needed decisions be made in accordance with Muslim Law?*

No. Unless his Muslim next of kin are in a position to make such decisions on his behalf, in regard to his personal care (e.g., whether to continue or not to continue life support systems in a critical life/ death situation).

15. *What significance does this have for the Muslim community?*

Due to these obstacles, we are not able to follow Muslim PFL in Canada to our utmost capacity. If we prefer to disregard our religious duty to strive for inclusion of our rights within the Canadian system, then Canadian secular law will take precedence over the Law of Allah and His Messenger.

16. *What can be done about this situation? What practical steps can be taken by individuals and Muslims as a group toward achieving this goal?*

You can do many things. First and foremost, you can educate yourself. Learn what your duties are in the Shariah. Learn how to best incorporate Muslim PFL within the Canadian framework. Then you can inform those around you about Muslim minority concerns. You can inform other Muslim groups about the necessity to lend their support to the Canadian Society of Muslims. For example, different Muslim organizations may have different aims and objectives, but they could all come

together to form a unified (and strong) voice for this one struggle and common cause--one single issue.

The Canadian Society of Muslims has undertaken to lobby politicians and the judicial as well as the executive arms of government and also to inform the media regularly. Furthermore, the need for Muslim PFL for the younger generation is of great consequence. You can write to the Canadian Society of Muslims with comments and suggestions. You can help the Canadian Society of Muslims with letters of support. We are seeking methods to finance such projects and to establish resources to carry out research. Also, if you have done any study or work in this area, within Canada or in other countries, we could greatly benefit from your experience and helpful hints.

The one thing you must NOT do is nothing!

Implementation

17. *What is the difference between mediation and arbitration? Which best suits a Muslim's needs?*

With mediation, a third party intervenes between parties in a dispute to bring about an agreement or reconciliation. The mediator does this by encouraging both parties to discuss their conflicts openly. The presiding mediator mainly stands on the sidelines, so to speak, in that he tries not to interfere too much in the presentation and discussion of their case.

With arbitration, the third party (arbitrator) makes an informed decision in order to settle a dispute. The arbitrator acts like a judge, and can and does interrupt and direct the proceedings as the need occurs. The arbitrator does not stand on the sidelines as a mediator does. An arbitrator would take the initiative to make rulings and make a final decision after the case has been presented, whereas in the case of mediation, the parties are encouraged by the mediator to bring about a compromise solution by themselves. The mediator only formalizes that compromised settlement of the dispute and then submits it to the court for final approval.

From the point of view of the Canadian Society of Muslims and our campaign goals, mediation is a toothless form of conflict resolution because it still does not address our needs for legislation to enact Muslim PFL within the Canadian domain.

Arbitration has more bite and is more effectual. Please see my opening comments to this Newsletter for my reasons for arbitration as the preferred method for Muslim PFL conflict resolution. It should be pointed out, however, that even under the Muslim PFL scenario,

mediation is a preferred vehicle for the purposes of bringing about a reconciliation between the two parties in order to avoid the undesirable steps of taking up divorce proceedings. For this limited purpose, mediation is appropriate.

18. *Would it be obligatory for all Canadian Muslims to accede to PFL requirements if the Muslim PFL were accommodated by way of adaptation or inclusion in some form or the other into the Canadian judicial system?*

Those Muslims who would prefer to be governed by secular Canadian family law may do so. It would be more preferable, however, for Muslims to choose governance by Muslim PFL for reasons of conscience.

19. *What if both parties cannot agree to be governed by PFL-- say, in a divorce between a Muslim male and a Christian female?*

Both parties would have to agree to Muslim arbitration or the case would be put before the regular Canadian courts. Due to the all-inclusive nature of religion, there is a potential for conflict when one set of practices faces opposition to another set of practices. This is why we insist that implementation of Muslim PFL (in cooperation with the existing judicial system) be on a voluntary basis. No one will be affected by such a system except those Muslims who wish this to be the case.

20. *What criteria, then, would one have to meet to qualify for governance by PFL?*

One would have to be a Canadian Muslim and would have to give prior consent, or put him or herself on a register of people consenting (beforehand) to be governed by Muslim PFL. In the hypothetical case given above, the Christian female could choose to waive her rights to secular Canadian law only if she chooses to and only if she were made aware and understood the consequences of such action. The court-appointed arbitrator could make this clear to her before she agrees to Muslim PFL. This is only a what-if scenario. It remains to be seen to what extent the Canadian judicial system will address our concerns.

21. *Who will form this arbitration board, a panel or an individual, and what sort of qualifications and experience will they hold?*

Ideally, a panel of specialists would be necessary. Such a roster would represent the cream of the crop of competence and expertise. They would consist of persons selected from (a) the bar (i.e., lawyers or retired judges) with required qualifications and experience at the bar or the bench; (b) religious scholars from the Muslim community with proper qualifications and accreditation; and (c) private arbitrators accredited by the governing licensing organization--or even one sole arbitrator if he or she has the qualifications of all three categories.

22. *It is very easy to see how an arbitrator would be very useful in cases of divorce. What about cases of (a) adoption, (b) marriage, (c) inheritance and wills, and (d) substitute decisions (i.e., powers of attorney), etc.?*

(a) If a Muslim would choose to be a guardian of a child, the arbitration board could provide a ruling on how they could achieve that in the Canadian legal context and within the parameters of Muslim PFL.

(b) For marriage contracts, Islamic arbitration boards would, by their authority through their precedence-setting decisions, provide the stamp of legitimacy to such contracts.

(c) If a person should die without leaving a will, Muslim arbitration could provide a binding legal ruling which is according to Muslim Law.

(d) If a Muslim were to become incapable of conducting his affairs, either financially or physically, then substitute decisions could be provided by arbitration boards in accordance with the provisions of the Muslim Law.

23. *How will arbitration be enforced? Will there be checks and balances? For example, what if a person decides to opt out of arbitration after initially agreeing to it because of his feeling that he would get a more profitable decision through Canadian courts--say, in a divorce case?*

There would be built-in safeguards to ensure that there would be no conflict with secular law. For example, disputes would first go to secular court. If both parties agree, before filing a Statement of Defence, to being governed by Muslim PFL, then the court would 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 in the same manner as would be the case in mediation proceedings.

Once the parties have agreed to be governed by

Muslim PFL, then they will be committed to it by their prior consent. As a consequence, on religious grounds, 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--and this could be tantamount to blasphemy-apostasy. The Qur'an (7:2) is quite explicit in regard to the revealed law being the root-source of all activities:

Follow that which is sent down unto you [i.e., the law] from your Lord, and follow no protecting friends beside Him.

24. *How much authority will they have? Will their recommendations be binding?*

The arbitration award (decision/ruling), once rendered, would be filed with the court in which the matter commenced. This will enable it to be deemed to be a judgement of that court, and as such it would also be appealable as a judgement of that court. In other words, yes, their decisions would be binding. Their authority would be similar to, if not the same as, secular court authority.

25. *Who will pay for this?*

The parties to the dispute would pay the fees for arbitration.

26. *There are different schools of Muslim Law. How would your proposed Muslim arbitration board reconcile them?*

The arbitrators would arrive at their decisions based upon applying whatever school of Law the individual happens to follow. There are four schools of Sunni thought, for example. If the parties involved belong to one of those schools, then the law of that particular school would be applied. Similarly, if the parties involved belong to the Shia sect, then the Shia Law would be applied. It is just as simple as that!

Issues

27. *Do you think your campaign is realistic?*

It is supra realistic because it is inclusive and not exclusive. When people are marginalized by their faith in a country which only pays lip service to the rhetoric of democracy and freedom, then this undermines and upsets the balance of the whole country in so far as the

equilibrium of amicable coexistence is concerned. One might argue that, in many ways, Islamic PFL is more flexible, accessible, simple and progressive than are its Canadian counterparts. Canada would not fall apart or into an abyss of chaos or legalized anarchy if the Canadian government permitted Muslims to control their own affairs in the realm of Muslim PFL. Claims of tolerance and coexistence do amount to something meaningful only if they are put into practice. Proof of the pudding is in the eating, as the expression goes. To continue our culinary metaphor, nothing short of a judicial translation of this ideological coexistence can successfully lay the claim to be the sufficient proof of eating the pudding of minority equanimity!

28. Polygamy is a divisive issue between non-Muslims and Muslims. Where do you stand on this issue?

I stand on the Shariah which states that a Muslim living in a non-Muslim country must obey Muslim Law to every extent possible, and that we must also adhere to the laws of the host country. Therefore, we accede to the Canadian Law on this point without accepting its superiority or supremacy over Muslim Law.

29. What sort of resistance are you encountering from non-Muslims and Muslims?

To meet the needs of all Muslims living in Canada we've conducted a comprehensive campaign which includes, among other things, an open dialogue. We invite both Muslims and non-Muslims to communicate their concerns to us. This will ensure that we express and exchange our views through such a dialogue on matters which affect them most. Progress by its very nature is slow but sure. Resistance occurs when communication lines become closed or clogged up and stereotyping prevails. Once all parties concerned realize that we as Muslims are not a threat, but instead desire peaceful coexistence in harmony with all, then Insha'Allah doors will begin to open.

30. Will that be soon?

Insha'Allah.