

## **The Islamic Institute of Civil Justice**

The Muslim Court of Arbitration (Darul Qada)

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*The case for Judicial autonomy through the establishment and operation of*

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**Re: The issue of Muslim Personal/Family Law in the Judiciary**

By: Syed Mumtaz Ali. President.

Presented at Upper Canada College, Toronto, Ontario, Canada  
to the Ontario Model Parliament on April 8<sup>th</sup>, 2006.

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The *Canadian Constitution Act of 1982* has changed this country's *Parliamentary Democracy* into a *Constitutional Democracy*. It has also changed the *bi-cultural* or the *tri-cultural* society of the past into a *multi-cultural* society. We all know that democracy is a process that is dedicated to a continuous attempt to improve the quality of life for both individuals and the collective whole.

Part of this progressive search for discovering better and 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. **ADR is one such choice** – the Alternate Dispute Resolution is an alternate legal service that is added to the court system, It is an integral part of our judiciary, in that “judiciary” is defined as “the apparatus of law and its’ administration”

For this reason it seems logical to begin with a brief discussion of the preamble and four fundamental principles, rights and obligations enshrined in the **Charter of Rights and Freedoms** (part 1 of the Canadian Constitution Act, 1982). The fifth principle of judicial autonomy is complementary to and is derived from the said four principles of:

- (1) **Religious freedom (s.2)**
- (2) **Equality before and under the law (s.15)**
- (3) **Multiculturalism (s.27) and**
- (4) **Protection from cruel and unusual treatment and punishment (s.12)**

Let us then start with the preamble in the constitution. Preamble is defined as an introduction part of a statute stating the reasons and purpose of the text that follows. It stipulates: “Canada is founded upon principles that recognize the supremacy of God and the rule of law”. As the significance of God and His supremacy is mentioned in the preamble, it becomes quite apparent in the context of religion that, an inclusive term, “the rule of law” means not only obedience to the laws of the country but also simultaneous obedience to the Religious laws of Canadians. We shall briefly discuss the freedom of religion, as the starting point, in the light of this observation:

Section (2) of the **Charter** says: “*Everyone has the following fundamental freedoms: a) freedom of conscience and religion; b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication, c) freedom of peaceful assembly, and d) freedom of association.*”

The British Columbia Court of Appeal in its decision (1985 1 S.C.R. 295 at 336-337) deals with it in this way: “*Freedom in a broad sense embraces both the right to manifest beliefs and practice and the absence of coercion and constraint. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.*” The court further goes on to state: “*One of the major purposes of the Charter is to protect within reason, from compulsion or restraint.*”

Now, “*the right to manifest religious beliefs by worship and practice*” requires special explanation and elaboration in that these two terms “*worship*” and “*practice*” connote a completely different meaning when used in the context of Islam/Muslim religion; mainly because there is no separation of state and church, the temporal and the spiritual, unlike the western system of secularism. For a Muslim “*practice*” of his/her religion “*Islam*” is a full time, 24 hour occupation; it is not practiced only when a Muslim offers his “*service of worship*”/salat or other mandatory ritual practices but “*worship*” encompasses even very mundane acts done purely for the sake of and out of one’s love for God.

In other words, religion must be lived and it must be put into practice. It must be adhered to with one's own action, The Quran is very explicit with regards to the revealed law being the root source of all activities. (See chapter 7, verse 3). Muslim personal family law is an integral part of the Muslim religion and its jurisprudence, commonly known as FIQH or Muslim Law. It is not an arbitrary afterthought that has been tacked onto Islamic religious beliefs and practices. Consequently, if Muslims are prevented from implementing such laws, they are then prevented from freely pursuing and committing themselves to the Islamic religious traditions. Former British colonies, e.g. India, therefore had Muslim Personal Law integrated into the British legal system. Canada was also a British colony but since there were no significant numbers of Muslims living in this country at that time, Muslim Personal Law was not incorporated into the Canadian legal system. For this reason secular Canadian Courts do not have the authority or jurisdiction to accommodate the immigrants in settling their disputes in accordance with Muslim Personal law

Now that Muslims constitute the largest religious minority, It has become extremely frustrating not to be able to govern their personal life in accordance with the Muslim Personal/Family law injunctions. In short, not being able to live by Muslim Law means one cannot exercise freedom of religion guaranteed under the **Charter**. This is so because in effect Canadian courts are **forcing** Muslims to act in a way contrary to their beliefs or their conscious. Under the guaranteed equality rights of the **Charter** (section 15) Muslims are fully entitled to be given equal treatment "before and under the law and have the right to equal protection and equal benefit of the law without discrimination and in particular without discrimination based on race, national and ethnic origin, color, **RELIGION**, sex, age, or mental or physical disability." Providing alternate methods of cultural dispute resolutions through a Muslim Court of Justice for instance, Muslims would be shown that the promise of multiculturalism, when properly implemented, is capable of creating conditions that are conducive to the generation of peace of mind and happiness that can come with a true religious and cultural autonomy and equality. Furthermore, such peace of mind and spiritual satisfaction can come only from the realization that the religious injunctions (only those that are not in conflict with secular Canadian laws), are being obeyed. The Canadian courts cannot possibly provide such a delightful spiritual satisfaction. Rather than feeling alienated within Canada, Muslims would become integrated and active participants in the Canadian mosaic.

By successfully avoiding the kind of coercion and restraint which is tantamount to the denial of freedom of religion, as explained above and as explained in the B.C. Appellate Court decision referred to above, Muslims will be able to secure protection from the kind of "cruel and unusual treatment and punishment" which is envisaged by Section (12) of the **Charter**. Every Canadian has the right not to be subjected to the kind of "cruel and unusual treatment that is intrinsically dished out to Muslims in this way.

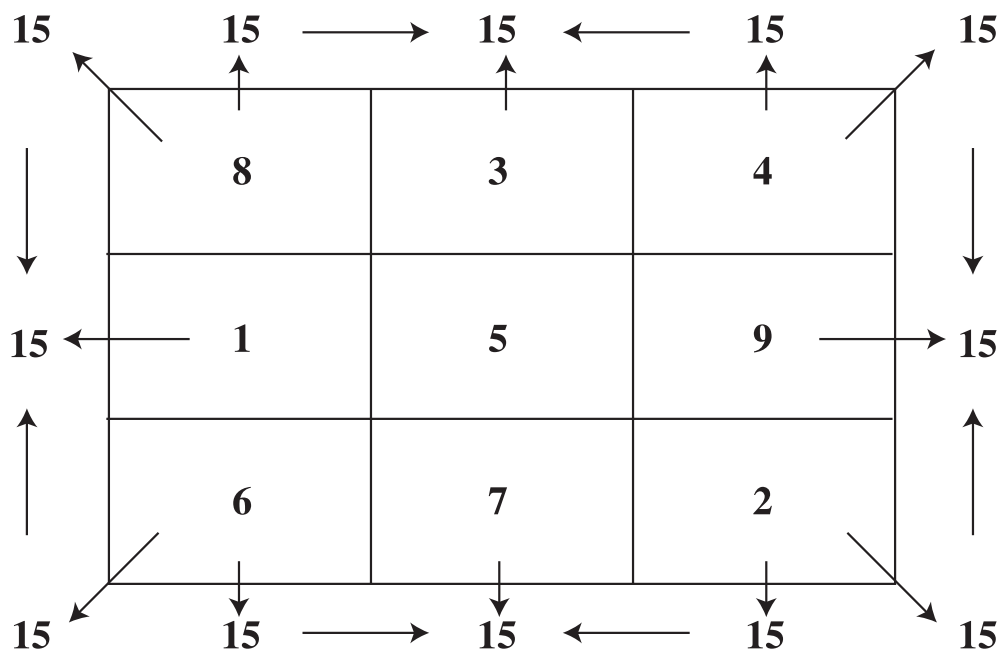
Finally, as to the fifth principle of judicial autonomy – it has already been stated earlier that this principle is really a complementary principle, which is derived from the above-noted four principles and it accords with the true spirit and the general philosophy of multiculturalism, co-existence and equality underlying the whole scheme of the **Charter**. As an Ontario political leader has recently reiterated, we have learnt from experience that recognizing the dignity of the people who think, speak and pray differently is at the heart of creating just and tolerant societies.

Our judiciary is given the task under Section 27, of interpreting all laws in a manner that will be conducive not only to maintaining but also enhancing the multicultural heritage of all Canadians. This complex task of making all the four fundamental rights work in tandem effectively and simultaneously can be undertaken only through establishing a system of judicial autonomy, namely A.D.R. If anyone of you has a better solution I would like to hear from you. I am sure the government would also be pleased to hear about it.

As to the Islamic context, suffice to say that in his lifetime, Prophet Muhammad (pbuh) resolved beautifully the concerns and conflicts of non-Muslim minorities by applying Christian laws to Christians, Jewish laws to Jews, Parsi laws to Parsi's, etc. This was done through their own respective judicial tribunals appointed by the minorities themselves as separate minority groups. Thus what the Prophet (pbuh) did in this

respect was in effect a judicial translation of an ideological co-existence, multiculturalism and universal brotherhood that goes hand in hand with full integrity for all minority religious groups living within the Islamic state. Indeed the judicial autonomy as preached and practiced by Prophet Mohammed (pbuh) proved to be an epitome of religious and cultural tolerance. In a multicultural society, like Canada, who can find a better solution than that, for as the English author, William Blake, succinctly stated in the late 17<sup>th</sup> century: “One law for the Lion and Ox is oppression”, not justice. Nor does it provide “equality” in the real sense. To be equal does not mean that one identical law has to be applied to every diverse community of people

Let me elaborate, “equality is sometimes misunderstood (as it has recently been by the Ontario government) as absolute equality in each and every detailed item of comparison rather than overall equality. For this reason I would suggest that “Equity” or “Equanimity” rather than “Equality” is the term and concept we ought to use to mean justice and overall equality (in the totality of rights and responsibilities enjoyed by diverse communities comprising of diverse religions or secular or atheist, agnostic or any other persuasions). This will allow for the possibilities of variations in specific items (rights, obligations) within the overall balance of equality. It is analogous to two persons possessing diverse currencies amounting, for each person, to the equivalent of \$1,000.00 U.S. while each of the two persons may possess more of one currency than the other, the total value still comes to \$1,000.00 U.S. in each case. Another example for elaboration of the overall equality point is the following -



It has nine squares--each square represents a combination or a bundle of rights and obligations so that in total the nine squares represent nine individual rights and obligations (numbers 1 to 9). The total of 15 is arrived at whether you count them horizontally or vertically or diagonally. In other words, an overall equality is maintained even though the rights are represented in several different combinations (of cultural/religious rights for each religious community), -- thus avoiding and absolute equality in each and every detailed item. This means that these individual rights (1 to 9) are not IDENTICAL, yet the OVERALL EQUALITY is achieved.

As to the recent government amendments to the Arbitration Act, which is not yet proclaimed as of this date, the Institute continues to accept Mediation/Arbitration cases both under the Arbitration Act (even if we are unable to enforce them through the Ontario Courts). We can also do Arbitration by consent of both parties – for which we do not need the Arbitration Act at all because every Canadian has the common law right to have their disputes settled on a consensual basis. This universal human right has existed throughout the world, including Canada, from time immemorial, and we cannot be deprived of this right by the Ontario government or any other government.

Thank you very much.