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The Review of the Ontario Civil Justice System

The Reconstruction of the Canadian Constitution and The Case for Muslim Personal/Family Law
A Submission to The Ontario Civil Justice Review Task Force

Presented by The Canadian Society of Muslims

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Executive Summary

Following the Oral Presentation in June 1994, The Canadian Society of Muslims has had the pleasure of submitting its 'Brief' (a written presentation) to the Ontario Civil Justice Review Task Force in the month of July 1994.

This 'Brief' has now been officially released for the benefit of the Canadian public generally and for the particular benefit of the Muslim community residing in Canada or other countries of the world.

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 marginalised, 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 A.D.R. 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 A.D.R. system, when dealing with divorces where both parties are Muslim, an independent, private arbitration system managed by local Muslims 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.

THE BRIEF

Part I

Introduction

In submitting our presentation to the Ontario Justice Review, we have tried to always bear in mind, particularly in our Conclusions and Recommendations, the 'Principles to Guide the Review' as enumerated by the Task Force—namely, affordability, accessibility, timeliness, efficiency, streamlining the process, and fairness. We also felt recalling certain similar principles as delineated by the 1987 Zuber Inquiry would be very useful. Hence, our decision to include an introduction recapitulating some salient points.

By an Order-in-Council passed on May 22nd, 1986, the government of Ontario established an Ontario Courts Inquiry under the guidance and direction of the Honourable Thomas George Zuber to inquire into and report on, among other matters, "any other matter affecting the accessibility of and the *service to the public* provided by the Courts of Ontario. One of the preambles stated:

Whereas it has become apparent that increasing demands are being placed on the Courts of Ontario as a result of *constitutional*, legislative changes and *changes in Society*.

The Report of the said (Ontario Court) Inquiry was released in 1987. It stresses the point that certain general principles are fundamental to the structure and management of the justice system, and that they must always be kept in mind in order to ensure that the system fulfils its ultimate purpose, that of *serving the public*.

Courts Are a Necessary Part of Society (5.2)

> The courts continue to exist because, despite their problems, the people have confidence in the integrity and wisdom of the courts, and they continue, in times of stress, to turn to the courts for the vindication of their rights.
>
> The courts protect the rights, liberties and freedoms of citizens. *The Courts do not function in a vacuum*; they are an essential part of the government of our society. Society cannot exist without laws, and where there are laws there must also be a method of fairly administering these laws. The justice system is an integral part of the process of governing. It is, as Peter Russell states, the third branch of government.

Emmett Hall, in his 1974 Report of the Survey of the Court Structure in Saskatchewan, described the function of the courts as follows:

> The courts of law occupy the pivotal point in the scales of justice. They apply the concept of the "rule of law" rather than the "rule of men" to the controversies which men and women cannot otherwise settle peacefully. They represent the substitution of the authoritative power of reason, knowledge, wisdom and experience to the settlement of conflicts between citizens and between the state and its citizens."
>
> In an earlier era, much of the law administered by the Courts was customary law—common law and equity. In modern times, however, statute law has become a much greater source of the law administered by the courts. The Canadian Charter of Rights and Freedoms, **the new family law regime**, The Young Offenders Act, are all examples of legislation which have **added greatly to the work of the courts**.

Courts Are a Social Service (5.3)

> **Courts exist to serve the public**. Lawyers, judges, court registrars and court clerks all serve the justice system, which in turn serve the public.....It is the opinion of this Inquiry that the **principle that court exist for the benefit of the litigants and the public is one which must be kept in mind whenever reform or restructuring of the Courts is under consideration**.

The Inquiry further stated, in order to stress the point emphatically that "not only counsel should be cast in a social service role, but that the entire court system has a purpose only to the extent that it serves the community."

> If the general public are the people for whom the court are designed, then the principles governing the structure of the courts should

> take their needs into account. The general public are not concerned with the prestige of any given court, they merely want to understand the system, to have access to the system, and to have their problems dealt with properly, efficiently and quickly.

Economic Accessibility (5.7)

Economic accessibility is possibly the most important type of access to the courts. In recent years, economic access to the courts has in large part become the preserve of the very poor, who can apply for legal aid, and the rich, who can pay their own way. The middle class are sometimes required to absorb losses that they could have recovered in Court, except for the fact that the cost was prohibitive.

It was therefore recommended that

> . . .the court system should be made economically accessible to people of all income levels. In order to provide such a service, an affordable court will have to be a court with simple procedures so that people can represent themselves, and have sufficient jurisdiction so that most cases can be dealt with there.

Timeliness (5.8)

In civil cases, the pace of litigation is largely controlled by the parties themselves. However, the system must provide procedures and mechanisms whereby the cases can be processed (within reason) as fast as the parties wish.

Courts Must Attract the Best People (5.9)

> *Courts operate best when they are staffed by experienced people. People become experienced, however, when they have worked in the system for a number of years.*

A careful study and analysis of what has been said above leads us to seriously take note of several important points. The general conclusion, being the most important one, is that all matters of justice, in some form or other, relating to the 'service to the public', fall within the purview and general jurisdictions of the Courts of law. Included among such matters, and of particular significance, are those matters that relate to various aspects of adjudication arising out of the constitutional and legislative changes as well as 'changes in society', for the ultimate purpose of the justice system which includes courts, is to operate not only as an important third branch of government, but also to provide a 'social service' to the community at large. Being a necessary 'part of society', **the courts cannot function 'in a vacuum' without regard** to the changes—particularly structural and compositional changes—in an evolving society such as Canada. Consequently, multiculturalism and the diverse needs of the new citizens (e.g., **the religious needs of Muslims who must be governed by the Muslim family law in their internal, personal and communal inter-relationships and interactions**) cannot be taken lightly or marginalized by Ontario courts. If the rights, liberties and freedoms of all citizens are to be protected by the courts, the courts cannot disregard the necessity of interpreting The Charter of Rights and Freedoms as it relates to rights, liberties and freedoms of the new citizens in the context of their religious and cultural backgrounds. Obviously, it is not just the Canadian Constitution but it is all laws of the land which have to be interpreted and construed in a manner that is consistent with the true spirit of justice and fairness inherent in the guarantees of The Charter of Rights and Freedoms. And since this cannot be done in a vacuum, out of sheer necessity the **courts must take into account** and be influenced and affected by so **many considerations and elements that are extra-legal in character**. As our paper *Oh! Canada! Whose Land, Whose Dream?*[1] points out, among other things, the systems of interpretation, the philosophical assumptions, the theories of law, and the styles of logical mapping which judges employ in reaching legal decisions are part of the practices and conventions which surround statutes, legal rules and the constitution. However, they are not themselves either statutory in character (a legal rule which has been clearly articulated as such and which is legally incumbent upon judges to follow), or constitutional in character.

Judges of the Court are, of course, empowered to make judgements on legal issues and are permitted judicial discretion in reaching such decisions. Although **judicial discretion** is integral to the process of generating legal decisions, this discretionary exercise is **functionally dependent**, as stated earlier, **on a whole set of considerations that are extra legal in character**. When this discretionary power is exercised in conjunction with the courts' normal function of interpreting the law, the judges are in effect performing a legislative type of function in making new laws. This is why it is said that **what the judges SAY is the law, is what the law is!** Even mandatory provisions of the Constitution empower and require the courts to exercise a very broad measure of discretion in interpreting the law. Take Section 2 of *The Charter of Rights and Freedoms,* for instance. It provides that:

> The Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Such an extensive use of discretion made available to the courts enables them, in effect, to make 'new' laws.

Taking into account the very inevitable nature of the influence and impact of these extra-legal considerations on the thinking and *modus operandi* of the courts, it also becomes quite obvious at the very outset, when one sits down to calmly contemplate on what a Civil Justice Review could and would entail, that many of the issues and topics which such a broad re-examination of the civil justice system encompasses are quite complex and far reaching in scope. Then, additionally, one also becomes conscious of the fact that there are many different perspectives one could choose as a means of engaging and examining such issues and such a variety of topics.

In view of such considerations, it became quite obvious that Muslims, as a religious minority sector of the Canadian citizenry must make efforts to bring it to the attention of all branches of the government that some of their difficulties, as a cultural group, must be examined and understood and taken note of and understood by others as well, in the context of not only the Constitution, *The Charter of Rights and Freedoms* and all other relevant laws of the land, but also in the context of the so-called 'extra-legal' and philosophical basic constitutional concepts of: rights, freedom, equality, justice, democracy, sovereignty (both in the traditional sense and in the sense of limited 'autonomy' accorded to individuals, groups, minorities and other collective organs), and secularism with all the ramifications of its abused form, e.g., oversecularism and biased interpretations, distribution of power as well as access to power and acceptance in the halls of power, be they legislative, executive or judicial halls or power houses.

Having become cognizant of such complexities and such a diverse set of considerations, philosophical and extra legal as well as constitutional and legal, the Canadian Society of Muslims was prompted to begin thinking seriously in terms of *exploring ways and means to seek solutions to the Muslim Community's major problems in the context of its 'minority-living' in Canada*. Consequently, the Canadian Society of Muslims have been busily engaged in setting in motion a variety of activities including the issuance of a discussion paper under the title of *Oh! Canada! Whose Land, Whose Dream?* The *basic approach* of this Discussion Paper, in general, and its exploration of the principles underlying democracy and the treatment of 'minorities,' including religious minorities, and the notion of multiculturalism, in particular, is mainly of a *philosophical-cum-legal* nature. The rationale behind adopting this type of approach, as stated in the 'Conclusion' of that paper, is to be found in our belief that, in the words of M. Hamidullah:

> The vitality of a society, a people or a civilization depends in a large measure on the philosophy of life *conceived* and *practised*.[2]

A good deal of the contents of this Submission, particularly Part II and Part III, consists of an almost verbatim reproduction of the material excerpted or culled mainly from two of our publications: the *Oh! Canada! Whose Land, Whose Dream?* paper and *Treatment of Minorities—The Islamic Model*.[3] This is done mainly with a view to not only retaining the original flavour of those passages, but also to avoid re-inventing the wheel, so to speak. In order to avoid cluttering up the visual landscape of such reading material, all these verbatim excerpts will not follow the conventional practice of using quotation marks, as most of it, as stated earlier, is taken from the Society's own published literature. Excerpts from other sources will be duly and appropriately acknowledged, as and when required. Such other sources which are originally acknowledged in the Society's publications will not again be acknowledged or referenced separately in this presentation.

Part II

General Discussion of Certain Fundamental Principles and Basic Issues Underlying the Plea for Recognition and Implementation of Muslim Personal/Family Law

Introduction

The object of this submission is to focus on a brief discussion of how certain constitutional, philosophical and extra-legal sets of issues came to be defined and became constructed as a religious problem under conditions of liberal democracy and its attendant offshoot environment of secularism. The importance and relevance of such discussion becomes clearly established when one takes into account the realities of the evolving process of a society and then one sees in that context how a system of law and justice, including the Ontario Civil Justice System, cannot effectively fulfill its mandate of providing its own brand of public social service (i.e., legal service) without responding to the changing needs of the society in a timely manner.

Oh! Canada! Whose Land, Whose Dream?

Such arguments and points of discussion were originally intended to be, and they were as such, published as a paper which delineated a way of looking at various aspects of the constitutional problems besetting the country at that time and which are, in fact, persisting to annoy and frustrate many

a Canadian even now. It offers a critical analysis of a number of problems which we believe have played a fundamental role in creating and shaping the crisis facing Canadians—a crisis that envelopes all facets of the Canadian system of Confederation. It is affecting not only the courts, the justice system and the Constitutional arrangements, but also the political, cultural and religious aspects of our lives. After all, all societies, particularly the Confederation type, evolve through recurring crises of this kind. Ontario's Civil Justice System is no exception to this general rule. Such crises are not necessarily disasters-in-waiting or harbingers of crippling sociological diseases—not all the time, anyway. Fervent activities involving crisis of change are also indicative of strength, good health, robust attitudes and willingness to tackle the new challenges.

Our reasons or rationale for inclusion of such a discussion into this presentation of ours to the Civil Justice Review Task Force are twofold:

1. Our desire and earnest hope to invite and engage the Task Force, and by extension the governments of Ontario and Canada, as well as the Canadians at large, in seriously taking into consideration the vital pro and con aspects of these discussions. These discussions, as can be readily seen, are as valid, as relevant and as important today in relation to the Civil Justice Review as they were then (i.e., when our paper was first produced) in relation to the constitutional review.

2. These discussions are intended to engage us into taking cognizance of those aspects of extra-legal-cum-philosophical general issues and considerations which play a very important role in the interpretational and decision-making function of the court system. As indicated earlier in the Introduction (Part I), all kinds of important philosophical assumptions, the theories of law, and the styles of logical mapping have their own influence and persuasive impact not only on the decision-making process, but also on the *modus operandi* of the court system. And the courts cannot operate in a vacuum with a nonchalant disregard for such powerful background influences. Moreover, as the Zuber Inquiry's Report clearly points out, public service being the aim and purpose or the ideal, courts cannot fulfill their obligation to the society by not taking seriously the changes, particularly the rapid changes, and new developments in the philosophical and cultural landscape of the Canadian society. Multiculturalism with its attendant impact on the changing needs of both the new immigrants and the adherents to a variety of old conventional and new radical religious philosophies and traditions are only one glaring example of the rapidly changing ethnic, racial and religious landscape of Canada.

As interested observers and participants in the social/political fabric of Canadian life, we, to borrow the vernacular of sports, have tried to call things as we see them. We realize some of these judgement calls may well upset some segments of Canadian society.

The intention underlying such judgement calls is neither to insult nor to vilify any group. In fact, to continue with the analogy of sports, by citing apparent infractions concerning the spirit and substance of democratic principles, we, somewhat like referees, are not making any moral judgements about the integrity of the people or groups to whom some of the remarks are addressed. Our remarks are directed at drawing attention to the inappropriateness of the behaviour involved, according to our understanding and interpretation of the rules and character of the democratic game.

As Canadians, we subscribe to the general idea of democracy. At the same time, we believe many of the political practices, institutions and processes which exist in Canada fall far short of the promise and potential that democratic theory has for meeting the social and political needs of a truly multicultural society. Radical reconstruction of the Canadian Constitution is necessary, but such reconstruction must be built upon a thoroughly democratic foundation.

Multiculturalism cannot survive in an environment that pays only lip service to the underlying principles and values of that philosophy. The principles and values of multiculturalism must be put into everyday practice.

As to our discussion of democracy, a word of caution should be mentioned in relation to the idea of ‘sovereignty'. This cautionary note may prevent much misunderstanding during the discussion which follows.

In any democratic setup, sovereignty is a structurally complex idea. Many people have different ideas about its character and scope. *However, as used in the current document, it must always be understood to be a relative and not an absolute term*.

The shape which sovereignty assumes in any given socio-political context must always be a function of the dialectic between the rights and duties of care of the participants in that context. Consequently, the sovereignty of one individual must be balanced against the sovereignty of other individuals. Moreover, the sovereignty of one level of government must be harmonized with the sovereignty of other levels of government. The same holds true with respect to the sovereignty association of communities and various levels of government.

However, nothing in the ensuing discussion of sovereignty or related ideas should be construed as advocating either some form of anarchy or the break-up of Canada. Canada must remain whole and united, and it can accomplish this, we suggest, through the combination of constraints and degrees of freedom permitted by the principles and proposals put forth in this paper.

Sovereignty: A First Encounter

To begin with, let us examine the area involving the issue of personal autonomy as a basic expression of participatory democracy. Recently, the British Columbia Supreme Court handed down a decision which denied the land claims of a group of Native people. The essence of the court's decision is that the Native land claims had no merit since such claims had all been extinguished during colonial times. This act of extinguishing was accomplished by those who were acting on behalf of the authority of the sovereign power of the King or Queen of England.

The apparent ethnocentric prejudices that are ingrained in certain aspects of Canadian society and which are reflected, unfortunately, in the judgement of the learned justices of the B.C. Supreme Court run so deeply that many people do not seem to have properly appreciated just how revealing the court's judgement is about the assumption underlying the world view of many Canadians concerning Native peoples. Moreover, the court's judgement is not an isolated phenomenon. Other judges and governmental officials in other localities and times have made statements or rendered judgements which are similar to that of the British Columbia Supreme Court.

The sovereignty of a people is not a function of law. It is an a priori given that has been recognized, appealed to, alluded to and invoked across thousands of years and in virtually every society about which there exists recorded knowledge. In fact, the roots of this a priori principle are so fundamental and so pervasive to the human condition that no one has been able to mount a plausible, let alone convincing, argument that would justify the denial of such sovereignty in a way that would be acknowledged as a tenable philosophical position by most people. The central importance of this issue of sovereignty also is reflected in every kind of human rights document that has issued forth from the United Nations and its predecessor, the League of Nations.

Law is predicated on, and presupposes the existence of, such sovereignty. Law is derivative from sovereignty. Indeed, although one can conceive of sovereignty without law, one cannot conceive of law without presupposing the existence of a source of sovereignty to generate such law. Law does not generate itself.

Legitimate constraints and limits can be placed on the exercise of sovereignty only through mutual agreement. This sort of reciprocity is exhibited in the case of a social contract between an individual and the larger community in which both parties agree to restraining themselves in certain ways in order to preserve the autonomy and integrity of the other party to the agreement. Each party has rights in such an agreement. Each party has duties of care with respect to the other party under the reciprocal character of the agreement.

However, the willingness of a person or people to accept constraints upon one's sovereignty should not be confused with the idea of extinguishing a people's sovereignty. The latter idea is a figment of the fevered imagination of those who would shamelessly, and with an inflated sense of self-importance, try to rationalize their attempts to deny, if not usurp, the sovereignty of another people.

Neither the Supreme Court of British Columbia, nor the court system of any province, nor the Supreme Court of Canada has any jurisdiction in the matter of the sovereignty of Native peoples. In and of itself, the sovereignty of the Native people is entirely extra-legal in character. However, as indicated earlier, the trappings of legitimate legality arise in conjunction with the sovereignty of Native peoples only to the extent that, of their own free will and volition, Native peoples agree to enter into a social contract with the peoples of Canada. This contract gives expression to the sort of constraints on sovereignty which are deemed necessary in order to protect and, where possible, enhance the integrity, autonomy and access to real power of the respective parties.

Unfortunately, historically, the non-native peoples of Canada tend to have misconstrued and misunderstood the nature of their relationship with Native peoples. The former have been inclined to consider themselves the superior, ‘civilized', divinely favoured party which has the right to impose their values, policies, programmes and will on the Native peoples. In short, most non-Native peoples of Canada believed they alone had sovereignty. For the most part, there has been a dearth of any semblance of mutuality and reciprocity which has characterized the intentions and attitudes of non-Native peoples in their dealings and interactions with Native peoples on the issue of sovereignty.

The resolution of the sovereignty problem of Native peoples is complicated immeasurably by the fact that money, natural resources and land have become inextricably caught up with the issue of sovereignty. In fact, for Native peoples, the land plays a central role in their spiritual traditions, since it is a sacred responsibility that has been entrusted to them. They are the trustees of the land over which they have authority and on which they live their lives. If they are denied the capacity to nurture their relationship with the land and to fulfill their spiritual responsibilities as trustees, then they are

being denied the opportunity to pursue a fundamental aspect of their religious tradition.

Presumably, Native peoples will be prepared, as they always have been, to enter into a form of social contract with the non-Native peoples of Canada in which reciprocity, mutuality and co-operation become the central shaping forces of that contractual process. This means that the Native peoples will have to assume certain kinds of restraints upon their sovereignty and, therefore, they will not get everything they would like or to which they, morally, may be quite entitled. However, there must be a reciprocity to this constraining process. This means that all non-Native Canadians are going to have constraints placed on their sovereignty as well with respect to the Native peoples, if we are to resolve the problem in as equitable a fashion as possible under a very complicated and messy set of circumstances. This is likely not going to be a pain-free process on either side. For further discussion, please refer to the section of the chapter under the heading 'A Possible Solution' in our paper *Oh! Canada! Whose Land, Whose Dream?*

Canadian Identity

This principle of sovereignty, and its attendant problems, actually goes to the heart of who we are as Canadians. Being a Canadian is not about the CBC, Via Rail, the National Film Board, the RCMP, the Maple Leaf Flag or any other symbol one cares to choose as that which helps bind us to one another and helps define our collective identity as Canadians rather than as something else.

Whether we are talking about regions, provinces, municipalities, ministries, institutions or the federal government, we are talking about family, and we interact with the members of that family in a way that we don't interact with governments and people beyond our borders. The affection, pride or exasperation we feel toward one another has a political/cultural chemistry of its own that is not the same as the sort of chemistry that is generated by the affection, pride or exasperation one may feel toward other peoples. The straw that stirs the political/cultural chemistry of Canada and Canadians is the problem of sovereignty.

The history of French Canada or the Maritimes; the West or the Northern Territories; the provinces or the federal government; Native peoples or immigrants—all revolve around the search for asserting or claiming or fighting for their sovereignty. The story of Canada is a story of the attempts, failures and successes of a variety of peoples as they sought to enter into a social contract with other peoples. Such a social contract emphasized a reciprocity or mutuality of understanding and, therefore, a concomitant willingness to place constraints on their respective sovereignties in order to work out a system of rights, duties, freedoms and responsibilities which would enhance the quality of sovereignty of the parties involved in that social context.

The sense of betrayal that all peoples in Canada have experienced, at one time or another, can be traced directly to the perception, whether accurate or not, that there is an inequity in the relationship of reciprocity and mutuality that defines the social contract which links the sovereignty of one people with other people. Essentially, this means that when a people feel betrayed, they feel they have placed constraints on their own sovereignty as a people which either: (a) are not being reciprocated by others; or, (b) are not leading to a sufficient level of enhancement in the quality of that aspect of their sovereignty which is not under constraint.

Sovereignty and Democracy

The issue of sovereignty involves the desire to have substantial control over, or play a fundamental role in, shaping one's destiny. Sovereignty involves the desire to have access to, and the opportunity to exercise, real power. Such power enables one to structure, orient and colour the character one's living will assume. Having access to real power in an unmediated fashion goes to the heart of the difference between representational and participatory democracy.

Representational democracy is about people giving up power to other people, i.e., the elected officials and those whom these elected officials appoint or hire. Representational democracy is mediated by, and filtered through, the understanding, likes and dislikes, weaknesses and strengths, ambitions and visions (if not delusions) of the people who are seeking power through elected office. Representational democracy does for the few—namely, the elected officials and their appointed helpers—what participatory democracy intends for the many: namely, to provide access to the power which is necessary to work toward controlling one's own sovereignty. Representational democracy is indirect, unresponsive, and focuses on channelling power through the few. Participatory democracy is direct, responsive and focuses on sharing power with the many through a variety of channels that are specifically designed with such sharing in mind.

When the members of the Supreme Court make judgements, or when Parliamentary committees cast votes, or when governmental boards and commissions arrive at decisions, although the rule of the majority holds within the restricted confines of the court, committee, board or commission, there is no guarantee that the respective judgements, votes and decisions reflect the wishes of the majority of the population. Consequently, all of these narrowly construed powers of majority rules constitute potential sources of encroachment

upon the sovereignty of the people of a nation, province, region or municipality.

The individual often has little or no power to shape, constrain, modify or resist the aforementioned sorts of judgements, votes and decisions. Moreover, unless provisions are established that permit individuals, within certain limits, to have direct, unmediated access to the kind of power that will give them the opportunity to shape, constrain, modify or resist the process of realpolitik, then democracy becomes a vacuous exercise for the majority of people.

The operative principle in a democracy is not that the majority rule. Instead, what actually rules is a set of principles to which the overwhelming majority of the people agree or to which they are committed as a means of defining, establishing and regulating the social contract that underwrites a democracy. This set of principles both determines boundaries of constraints as well as provides for a spectrum of degrees of freedom within which, or through which, individuals and the collective pursue their respective sovereignties.

Presently, the Canadian public, on both an individual and a collective basis, is indicating that it has lost confidence in the capacity of the current approach to democracy in Canada to be able to resolve the problems which presently exist with respect to various aspects of the social contract—a contract that is supposed to bind us together within a common democratic framework.

In order to provide a balanced perspective for a better understanding of democracy and its principles, in the following two chapters under the headings of ‘Rights and Duties of Care' and ‘Diversity of Equality: A Principle', we are adding another aspect of our discussion taken from our publication *Oh! Canada! Whose Land, Whose Dream?* relating to rights, duties, equality and majority rule.

Rights and Duties of Care

Another one of the buzz words of the mythology of democracy is that of the idea of rights. Everyone likes to talk about and assert their rights. Rights are expressions of our sovereignty as individuals and, therefore, we are jealous about any intrusion onto that sovereignty by the denial or undermining of our rights. On the other hand, an unrestrained and mindless assertion of rights on the part of everyone is tantamount to chaos and anarchy.

The reality of our situation is that not everyone's ‘rights' can be honoured simultaneously. The claimed rights of one person often clash with the claimed rights of another person.

At a more fundamental level, democracy is not primarily about rights, per se. Democracy is about the search for a balanced, principled way of, on the one hand, protecting rights whenever possible and, on the other hand, of providing various means of resolving competing or conflicting claims of rights.

Unfortunately, people often conflate and confuse rights with their interests, desires and likes. Many people seem to assume that if they are interested in something, or desire it or like it, then, somehow, there must be a right that entitles them to pursue that interest, desire or like in an unhindered manner. Rights, however, are not a function of just any sort of interests, desires or likes.

Rights are about the constraints and degrees of freedom that are to structure our interactions with one another within the framework of the social contract to which we agree as a means of making government and society possible. Rights are about the sovereignty of the individual, but rights also are about the sovereignty of the collective. Rights are about the search for win-win situations such that the quality of sovereignty of both individual and the collective can be advanced and enhanced simultaneously.

The idea of rights, in and of itself, will not point the way to how to go about resolving disputes concerning conflicting and competing rights. Another concept is necessary. This additional concept might be referred to as having a 'duty of care'. In order for the sovereignty of both individuals as well as the collective to be protected and enhanced, there must be a balance established between rights and duties of care.

The social contract is not just about demanding rights. It is also about reciprocity. Reciprocity requires one to undertake the responsibilities of various duties of care toward other individuals and society in general.

Duties of care are not restricted to active respect for, and implementation of, the rights of other individuals or the rights of the collective. *Duties of care are rooted in an understanding that acknowledges the need for sacrificing, within certain parameters, one's own interests*. Duties of care involve a willingness, under various conditions, to place constraints on one's sovereignty in order to both enhance the quality of the collective sovereignty as well as to increase the likelihood that the quality of one's own long-term sovereignty will be enhanced. A duty of care is the finger in the social dike which keeps out the relentless ocean of competing and clashing claims of rights. Duties of care reflect a sensitivity and responsiveness to the kinds of

economic, social, cultural, physical, political, moral and intellectual destruction that can be wreaked on others by a self-centred insistence on one's rights irrespective of the costs. Duties of care are an index of the preparedness of both the individual as well as the collective to take on the responsibilities inherent in not just making the social contract work, but in helping it to flourish.

Diversity of Equality: A Principle

Along with 'majority rules' and 'rights', 'equality' is a further entry in the lexicon of democracy. Usually, people understand equality to mean that everybody must be treated in exactly the same way. Another way of giving expression to the idea of equality is that *no one should be given an unfair advantage or opportunity that permits him/her to enhance his/her position or circumstances at the expense of other people*. Alternatively, equality also refers to protecting people against being unfairly disadvantaged with respect to opportunity, status, treatment, and so on.

A key feature of the idea of equality is a function of what is meant by, say, *being given an unfair advantage or being unfairly disadvantaged*. Moreover, implied in this judgement of unfairness is the idea that standards or criteria of fairness exist by means of which one can distinguish between, on the one hand, fair and unfair advantages, or, on the other hand, fair and unfair disadvantages.

In fact, real equality may only be possible in some, perhaps many, cases if one offers people *an opportunity to choose, from among a set of alternatives, the one that best suits their circumstances or abilities*.

It permits people to choose, from among a set of alternatives, those possibilities which are most conducive to, and congruent with, their needs, interests, capabilities and resources. Furthermore, the set of alternatives is not imposed on people, but can be developed in conjunction with the individual's participation in the structuring of those alternatives.

The principle of diversity of equality is a means of *providing people with alternative routes to equality of treatment*. No one is unfairly advantaged or unfairly disadvantaged. Everyone is permitted to pursue their alternative of choice in a way that does not unfairly advantage them with respect to enhancing the quality of their sovereignty, nor does it unfairly disadvantage others in relation to the protection and/or enhancement of the sovereignty of the latter people. This is so because the alternatives from which people are permitted to choose, and which, ideally, they could have had a hand in developing, are to be pursued within the framework or boundaries established by the dynamic tension between rights and duties of care with respect to both individuals and the larger collective.

For example, by permitting Native peoples to have autonomy in the manner in which they conduct their affairs among themselves and with the rest of Canada, one is providing them with an alternative means of seeking an equality of treatment with respect to the protection, development and enhancement of their sovereignty as a people that is congruent with their needs, interests and inclinations as a people. Similarly, by permitting the people of Quebec to have autonomy in the manner in which they conduct their affairs among themselves and with the rest of Canada, one is providing them with an alternative means of seeking an equality of treatment with respect to the maintaining and realization of their sovereignty as a people that is conducive to who they are as a people. In this sense, Quebec is a special and distinct society. At the same time, the societies of the Native peoples are also distinctive and unique in character.

Indeed, the *very idea of multiculturalism is inextricably caught up with the acknowledgement that there are a multiplicity of special and distinct societies within Canada*. Our task as a multicultural nation is to construct a set of alternatives from amongst which the different peoples of Canada can choose those which are most conducive to, and congruent with, the needs, interests and characteristics of different peoples and which will permit all of them the opportunity to preserve and enhance the quality of their respective sovereignties as a distinct and special people.

Under the title of 'Social Contract: A Few Brief Studies', the Canadian Society of Muslims' paper, *Oh! Canada! Whose Land, Whose Dream?* discusses four issues: (1) Diversity, Equality, and the Social Contract, (2) Quebec and Sovereignty Association, (3) Religious Freedom, and (4) Family and Personal Law. Three of these discussions are presented here in this Part II.

Diversity, Equality and the Social Contract

The willingness to tolerate a certain degree of diversity in the constitutional process is not a new practice or concept. In point of fact, Canadians have displayed such a willingness with respect to the manner in which they have tolerated, over the years, various courts giving differential rulings on similar, or the same, constitutional issues, as the compositional character of the philosophies of law characterizing the members of these courts have shifted.

Moreover, not all criminal courts are carbon copies of one another, as far as, what might be termed, their 'styles of conduct' are concerned. The same is also true of civil courts.

More specifically, that different judges run their courts differently is a fact of life. Each judge has his or her own set of expectations about how lawyers will comport themselves in the judge's court. Each judge has his or her own set of do's and don't's within the court. Each judge has his or her own set of criteria for determining what they will and will not permit in his or her court.

Some judges run on a short fuse; others are more forbearing. Some judges are willing to provide more leniency and flexibility in the kinds of motions they are willing to entertain and under what circumstances; other judges are less flexible. Some judges are more biased than are other judges. Some judges are more stringent in the sentences they give for particular crimes; other judges are less stringent in this regard for the same sorts of crimes.

These differences lead to self-similar, rather than self-same, activity from court to court. In other words, these differences reflect the exercise of discretion which is extended to the judges. As long as the exercise of such discretion does not transgress beyond certain procedural lines, the diversity of conduct is tolerated.

Lawyers also introduce an element of diversity into legal proceedings. Gathering pre-trial evidence, processes of discovery, introduction of evidence, questioning of witnesses, cross-examination, presentation of their client's cases, making objections, seeking motions, and summation are all skills that a lawyer needs. Not all lawyers have these skills, or, at least, do not have them to equal degrees. However, as long as lawyers do not exceed certain minimum boundaries of conduct, practice and skill that mark the realm of malpractice, then such diversity of capacity and ability are tolerated by the legal community.

When one combines the diversity of judges with the diversity of lawyers, together with a soupçon of diversity in juries, one gets a diversity of treatment for those who are brought before the courts in civil and criminal matters.

As envisioned from the constitutional perspective advocated in the present document, *diversity of judgement need not be a liability* as long as certain conditions are satisfied. First of all, people must have a real opportunity to participate in the judgement process. This means that *the process must be: accessible, inclined to participatory modes of interchange, inexpensive,* and *responsive to the needs and concerns of individuals*.

Secondly, there must be considerable flexibility in the way the judgement process unfolds. For rules of diversity to be an asset, the individual must be provided with a spectrum of alternatives from which to choose the one(s) that are most resonant to the individual's circumstances. *Fairness does not necessarily mean that everything is done the same way*, but it does mean that everything which is done will satisfy criteria that help bring rights into line with duties of care. Circumstances vary from place to place, and the balance necessary in one place may not be the sort of balance necessary in some other locality.

Thirdly, the very fact of the existence of diversity in the judgement process must be brought to front and centre stage as a focal issue, rather than as a background issue from which we try to hide or which we try to deny altogether. By being aware of diversity as an issue, we stand a better chance of finding ways to countervail its potentially adverse affects.

Fourthly, there is *nothing necessarily intrinsically wrong with the idea of competing systems of justice*, as long as people are happy with the sorts of choices and consequences that those competing systems may offer. One of the truly ironic and intriguing aspects of Canadian history is that a Parliamentary and judicial system which has been as concerned, over the years, about promoting and protecting the principle of open and fair economic competition should be so resistant to the idea of competitive fairness in the realm of justice.

The traditional defense for the aforementioned resistance is that our approach to issues of justice and law must be monolithic in character or else we will not be able to provide equality of treatment in different cases, and, surely, so the argument goes, equality of treatment is one of the cornerstones of dispensing true justice. Whether or not equality of treatment is a necessary condition for justice, the fact is, as indicated previously, that if one means by the idea of ‘equality of treatment', sameness of treatment, then such equality does not exist in Canada, nor has it existed in the past. Indeed, given human variability, one well might question whether equality of treatment— when construed as sameness of treatment—is either feasible or even possible.

On the other hand, if people are provided with a number of competing perspectives concerning the idea of justice, and if they are aware of the constraints and degrees of freedom associated with each of these alternatives, and if they are aware of the upsides and downsides of these alternatives, as well as the strengths and weaknesses of such alternatives, then let the people make their own choices. The important considerations are: (a) that each of the alternatives is a fair process; (b) that a person is prepared to accept the judgement of such a process, irrespective of whether the judgement will turn out in their favour or against it; and, (c) *that a person feels their judicial system of choice is reflective of, or congruent, with his or her sense of what justice involves*.

Just as is the case with 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. However, even if there were no process of cross-fertilization, the quality of sovereignty of both individuals and the collective would be enhanced through the diversity of judicial styles which permit selecting the one that was nearest to one's sense of justice.

Thus, if Native peoples have a totally different sense of justice than do, say, English or French Canada, how could anyone feel that one would be justified in imposing on the Native peoples a system of justice that is alien to, and in conflict with, values, beliefs and practices in which the understanding of Native peoples' understanding of justice are rooted? Only the worst, most virulent sort of ethnocentrism could be sufficiently deluded to suppose that such gross intrusions into, and abuses of, another people's sovereignty could be acceptable.

Similarly, if the people of a given province believe that, under certain circumstances, the death penalty is warranted—that the death penalty gives expression to one of the facets of justice, then what arguments are to be invoked which can be shown, to the satisfaction of one and all, that such a conception of justice is mistaken? One of the truly remarkable aspects of the House of Commons' free vote of conscience on the death penalty is that the result was in opposition to virtually every Canadian poll that had been taken leading up to that vote. The vast majority of people in Canada wanted the death penalty, but the people's conception of justice conflicted with the sense of justice of those members of the House of Commons who voted against retaining the death penalty.

The deciding factor was not necessarily who was right or who had the better concept of justice. *The deciding factor was who had power*, and, in the case of the death penalty vote, the people were powerless. A small group of people were able to impose their sense of justice on millions of people who had a different conception of justice.

The concept of a social contract does not necessarily mean that each individual signs the same standard contract with some mythical, abstract entity called society. The social contract encompasses the entire realm of dialectical, dynamic negotiations between, and among, individuals. These constitutional negotiations establish the spectrum of constraints and degrees of freedom that are to regulate our handling of the issue of sovereignty. There is nothing in the dialectic which demands everyone's contract be the same. *As long as the structural character of the social contract is such that it permits alternatives and that people have a right to select from among these alternatives, then the social contract is fully capable of handling, among other things, diverse approaches to the manner in which justice is implemented.*

Religious Freedom: Some Problems

Previously, various aspects of the constitutional crisis concerning the Native peoples and the people of Quebec have been addressed. These sorts of issues are well known to Canadians. Indeed, much of the talk which is devoted to the current crisis usually focuses on these two peoples. However, there are others in Canada whose needs and problems must be taken into consideration if a revamped Constitution is to serve all Canadians.

For example, although many different ethnic groups and races are represented within Islam, as Muslims—as those who follow the Islamic religious tradition—all these various ethnic groups and races are one people. As a people, Muslims feel there are a number of ways in which their reality as a people is marginalized, if not denied, by the present constitutional arrangement.

To begin with, there is the question of religious freedom. While Canada prides itself as a nation in which, theoretically, individuals are free to commit themselves, if they wish, to a religion of their choice without any interference from the government, in practice this is not always the case.

Religion is not just a matter of having places of worship or having particular beliefs or values. Religion is also a matter of putting into practice what one believes, as well as acting in accordance with the values one holds in esteem. Moreover, these beliefs and values are not meant to be activated only when one enters a place of worship and switched off when one leaves that place of worship. Religious beliefs and values are meant to be put into practice in day-to-day life.

Secularism and Oversecularization

In Canada, there is said to be a separation between church and state, or temple and state, or mosque and state. This separation is intended to curtail the possibility that people in power may try to impose a certain kind of religious perspective—namely, their own—onto the citizens of the country, irrespective of the wishes of those citizens.

What, in fact, happens, however, is that government officials either: (a) use a variety of strategies, diversionary tactics and Machiavellian manipulations to camouflage their religious prejudices; or, (b) wield a set of non-religious biases in order to place obstacles in the way of, as well as impose constraints upon, the way one can pursue one's religion of choice. Although, in the latter case, the people in power

claim that they are being neutral with respect to religious beliefs and practices, in reality there is a huge difference between being neutral and being oriented in an anti-religious manner.

Being neutral in matters of a religious nature means, to be sure, that one does not favour one religion over another. On the other hand, being neutral also means that one does not favour a non-religious perspective over a religious perspective, or vice versa.

Neutral governmental decisions should establish constraints and degrees of freedom within the community that are based on a consistent principle (or set of principles). Such a principle should be geared toward helping people in general—irrespective of whether these people have a religious or non-religious orientation—to work toward enhancing the quality of their respective sovereignties while balancing considerations of rights and duties of care for individuals as well as the community as a whole.

Supremacy of God

Unfortunately, what happens in practice is that many governmental authorities, elected officials and justices often tend to interpret the idea of separation of state and religion to mean that a non-religious, rather than a neutral, perspective should be adopted in interpreting law, policies, programmes, directives and the Constitution. This is the case, despite the fact that the Constitution Act of 1982 clearly states Canada is founded "upon principles that recognize the supremacy of God". In reality, if any governmental official or jurist actually made a decision based on an articulated principle which recognized the supremacy of God, that individual would wreak upon himself or herself the collective wrath of the gods and idols of secularism who would be exceedingly jealous of such supremacy.

No jurist or government has ventured forth with sufficient courage to delineate, in a legal opinion or in government policy, just precisely what is meant or entailed or encompassed by the notion that Canada is founded "upon principles that recognize the supremacy of God". They have not said what such principles are; nor have they said what it means for such principles to *'recognize'* the supremacy of God; nor have they said what the ramifications of such recognition and supremacy are; nor have they said what they mean by God. In fact, almost every decision the courts and governments have made virtually ignore such questions, problems and issues.

In effect, the opening words of the Canadian Constitution, the single most important document in Canadian society, are devoid of official meaning and have no explicit, official role or function in determining government policy or judicial decisions. To the extent that such constitutional words have any role at all, they do so in the dark recesses of unstated assumptions, biases and predilections that shape, colour and orient the decisions made by officials—decisions that frequently have prejudicial consequences for the members of minority religions or for the members of majority religions with whom the officials disagree or for whom such officials hold antipathy.

Education

The realm of education gives expression to just one facet of the aforementioned biases. Education should not be just a means to a job. Furthermore, education should not be a tool of assimilation as long as the meaning of 'assimilation' requires individuals to submit themselves to someone else's imposed conception of sovereignty, identity, commitment and truth.

In order to discuss the matter of secularism a little further, we would like to quote Syed Athar Husain from his Muslim Personal Law:

Some tried to distort the meaning of secularism quite forgetting that secularism does not mean negation of religion but means only toleration of all the religions and creeds prevalent in the country, that the State as such has no religion of its own and that every community is free to observe and practice its religion and its rites without causing harm or annoyance to the followers of other religions or creeds and that a secular society does not mean anti-religious society. [The author is complaining about some of his compatriots, fellow-countrymen in India.]

If secularization could only mean that in heterogenous society comprising peoples of different faiths and creeds, the state, as such, has no religion and people of every religion are free to follow their religion and religious practices and could advocate toleration between them it would have been a happy state of affairs. But *over-secularization* has come to mean a clear division between the spiritual and the mundane, depleting things of their spiritual significance and a *negative freedom verging* on anarchy. Islam does not believe in the dichotomy between the spiritual and the mundane, the other worldly and the temporal. According to it, every activity of man has a spiritual significance whether positive or negative. Islam presents a view of life that is sacred and grants freedom under submission to the Divine will. Today man is in need of a social order that enables humanism to justify its existence as ordained by its great Creator and to activise the powers of the mind, science and experimentation for establishment of a system appropriate to the real needs of mankind.

The pertinence of Islam to the modern world is that issuing from the All Knowing and the absolutely Real and serving as the message of the Heaven, it takes care of everything and provides for a balanced life and an equilibrium between spiritual and material needs.[4]

Becoming a loyal subject of Canada has nothing to do with being assimilated into some sort of pre-fabricated, monolithic, standard set of assumptions, values, beliefs, commitments and practices which public education is, among other things, intended to promote. Supposedly, such a monolithic process constitutes an allegedly unifying social and political medium. Yet, one can be taught values such as freedom, rights, democracy, social responsibility, justice and multiculturalism without going to public school and without presupposing that everyone must engage these topics in precisely the same way.

On the other hand, public education cannot teach, say, a Muslim child about how to be a good Muslim. In addition, public education cannot actively assist a Muslim child to establish an Islamic identity or to adopt an Islamic way of life. Public schools cannot do this because they have virtually no expertise in, or understanding of, what Islam involves. They do not teach Arabic or the Quran or the *Sunnah* (practices) of the Prophet Muhammad (peace be upon him); nor do they teach *Shari'ah* (Islamic Law); nor do public schools have the capacity to help the individual learn how to put all of this into practice on a day-to-day basis.

Muslims are told, however, that such educational topics are not the responsibility of the public education system. Such issues are the responsibility of parents and must be done at night or on weekends or during the summer. Consequently, a supposedly neutral state has made it a matter of law, practice and convention that the public education system, despite being funded by Muslim tax money, cannot accommodate an Islamic education.

Muslims are free, of course, to begin their own educational system, but they are not permitted to have access to the taxes which they contribute to the government in order to be able to use that money for the purposes of religious education. Thus, Muslims— and this is also true of Jewish, Hindu, Buddhist, Sikh, Native Peoples and Protestant Christians—must bear a special burden of paying twice if they want an education that reflects the values and practices of their religious tradition. The Catholic community, on the other hand, is permitted, more so in some places than in other places, to have access to public money to promote an educational process that does reflect that community's religious values and practices.

That Catholics should be entitled to educate their children according to the values and religious beliefs of their tradition is not in dispute. What does need to be critically examined is the decision process which singles them out as being, when compared with all other religious traditions in Canada, the only ones entitled to such public support.

Apparently, to paraphrase an insight made by George Orwell in another context nearly 50 years ago, in the barnyard of Canadian democracy, all animals are equal, but some are more equal than others. *Those that are more equal than others enjoy the opportunity to pursue their religion of choice and*

learn about their religion of choice in ways that those who are 'sort of equal' do not enjoy the opportunity to do.

Such inconsistency is indefensible: morally, philosophically and logically. It is not neutral. It is discriminatory. It does not reflect the spirit of multiculturalism.

The aforementioned sort of inconsistency clearly points out that the religious freedom of a great many people in Canada, Muslims included, has been seriously circumscribed and inhibited. This is the case since the powers that be have taken something of fundamental importance to the pursuit and practice of religion—namely, education—and placed obstacle after obstacle in the path of certain peoples and communities of Canada with respect to their ability to pursue their religion of choice freely. These obstacles prevent many, if not most, religious minorities in Canada from having access to anything but a curriculum of subjugation to a preconceived master plan of assimilation. As a result, these people and communities are required either to: (a) submit to the values and practices of public education which are often antithetical to religious values and practices; or, (b) pay twice for the kind of education they want.

Diversity of Educational Alternatives

Education is an area that is very amenable to the implementation of the previously discussed principle of diversity of equality. Catholics, Protestants, Jews, Muslims, Sikhs, Buddhists, Native peoples, atheists, agnostics, humanists, and so on, all have their own ideas about what constitutes an appropriate educational process. The equitable way to handle this multiplicity of beliefs, values, interests, practices, and goals is not to impose a monolithic educational system on everyone and, thereby, treat everyone the same way by marginalizing, ignoring and denying, to an equal degree, the reality of everyone's perspective. *The equitable solution is to provide people with educational alternatives from which they can select the one which is best suited to their needs, circumstances, and values*.

In short, equality is best served by means of offering a diversity of alternatives. Educational programmes do not have to be the same to be equal. The conditions of quality are satisfied when different educational systems meet the needs and reflect the values of the communities being served, respectively, by these different educational systems.

One may never be able to achieve a perfect fit between the diversity of educational alternatives which are offered and the diversity of values which exist in the community. Nevertheless, one needs to struggle in the direction of providing more flexibility and alternatives than presently exist.

Family and Personal Law

Another example of how Muslims are prevented from being able to realize the promise of religious freedom concerns the area of Muslim family and personal law. *This area covers issues such as marriage, divorce, separation, maintenance, child support and inheritance*.

In Islam, Muslims are required to follow a set of constraints and degrees of freedom that have been established in Divine Law. Following Divine Law is at the heart of what being Muslim means. *Muslims are not free, according to their likes and dislikes, to pick and choose what they will and will not do with respect to Divine Law*. Divine Law is inherent in, and presupposed by, the practices of the Islamic religious tradition. Muslim personal/family law is an integral part of such Islamic practices.

Muslims in Canada have no wish to impose their perspective, or way of doing things, on other Canadians. In other words, Muslims are not requesting that the non-Muslim people of Canada adhere to our practices, beliefs and values concerning Muslim personal/family law. Such an imposition would be an intrusion on the sovereignty of the non-Muslim people of Canada.

As indicated many times in the foregoing pages, however, sovereignty is a function of reciprocity in which there is a dynamic balance between rights and duties of care. This balance should shape our interactions with respect to one another. When such balance is missing, then steps must be taken to re-establish reciprocity. In this regard, Muslims feel that such an imbalance does exist in Canada in a variety of areas, one of which deals with the issues surrounding the implementation of Muslim personal/ family law.

Many things in Canada are permitted as long as the people are consenting adults. Presumably, therefore, Muslim personal/family law, which also involves the actions of consenting adults, is not at all inconsistent with some of the basic philosophical principles at work in Canadian society. Nonetheless, the likelihood of consenting Muslim adults being permitted to arrange things in accordance with the Islamic principles underlying Muslim personal/family law is beset by a variety of problems.

Chief among the difficulties which attempts to establish Muslim personal/family law may encounter in Canada is the resistance of the legal and political community. After all, the argument might go, there already are programmes, laws, procedures and policies in place for handling matters of

marriage, divorce, separation, maintenance, child support and inheritance. These programmes, laws, and so on have evolved over a period of time and represent the way things are done in this society. Muslims who live in this society, therefore, are obligated to accommodate themselves to the existing way of handling these issues.

The problem with this sort of argument is that it totally ignores the issue of religious freedom to which Muslims are entitled. As previously indicated, for Muslims, religion is not just an abstract set of ideas that are to be taken out on special occasions and dusted off as Muslims indulge themselves in some sort of nostalgic ritual in homage to the past. Religion must be lived; it must be put into practice; it must be followed and adhered to with one's actions.

Muslim personal/family law is not an arbitrary afterthought that has been tacked onto Islamic religious beliefs and practices. Such law is rooted in, and derived from, the two most basic sources of Islamic law: namely, (a) the Quran (the Holy Book of God's Revelation); and, (b) the practices and teachings of the Prophet Muhammed (peace be upon him) who is accepted by all Muslims as the one who was most intimate with, and had the most profound understanding of, and commitment to, God's plan for the Muslim community.

Repeatedly, the Quran enjoins, encourages and instructs Muslims to follow the Quran and the example of the Prophet Muhammed (p.b.u.h.). Again and again, Muslims are informed in the Quran that one cannot consider oneself a Muslim—one who submits to the command of God—unless one adheres to the guidelines, counsel, principles, beliefs and practices that are related to human beings through the Quran and the Prophet Muhammed (p.b.u.h.).

Part of the guidelines, counsel, and principles to which Muslims must adhere are the spectrum of constraints and degrees of freedom which give expression to Muslim personal/family law. Consequently, *if Muslims are prevented from implementing such law, they are prevented from freely pursuing and committing themselves to the Islamic religious tradition*, since adhering to the various aspects of Islamic family and personal law are all acts of worship.

If one cannot worship God as one is required to do by the tenets of one's tradition, then severe, oppressive constraints have been placed upon one's capacity to exercise religious freedom. Such constraints on, and impediments to, the exercise of religious freedom are especially oppressive in the case of those religious practices that do not require sacrifices from, or place any hardships on, people outside or within the given religious tradition.

In point of fact, *the implementation of Muslim personal/family law would not entail sacrifices or hardships for anyone*. This would be the case irrespective of whether one were considering Muslims or non-Muslims.

There may be people within the Muslim community who are enamoured with the Canadian way of dealing with and arranging issues of family/personal law. Those people should be left free to choose whatever they believe to be in their best interests.

There are many other people in the Muslim community, on the other hand, who feel that their sovereignty as human beings, in general, and as Muslims, in particular, has been intruded upon, undermined and marginalized through being prevented from following the requirements of their own religious tradition.

The irony of this situation is that the principles, methods, values and safeguards inherent in Islamic family/personal law are every bit as sophisticated as anything in the Canadian legal system. In fact, many aspects of Canadian law dealing with issues of personal/family law have begun, only recently, to put into practice what has long been an integral part of Islamic law. For example, the easing of restrictions with respect to divorce, which have been introduced into Canadian law just a few years ago, have been a part of Islamic law for more than 1400 years.

One also might maintain that, in many ways, Islamic personal/family law is more flexible, accessible, simple and progressive than are its Canadian counterparts. For instance, human beings have both strengths and weaknesses, and, in addition, human circumstances are quite variable and diversified. Rather than impose one system of law on everyone, Islam provides people with a variety of alternatives from which to choose the one which best meets the individual's needs and inclinations. Generally, this is not the case in the Canadian legal system, although Quebec does practise a different brand of civil law based on principles drawn from a French/Roman code of law.

Finally, many of the things for which people in the feminist movement have been fighting for many years now have been regular features of Islamic personal/family law for more than eleven hundred years. Thus, the sovereignty of women is a principle which is firmly established in Islam, and such sovereignty encompasses a great many entitlements that have surfaced only recently in North America.

For example, the right of women to be able to specify, by way of contract, precisely what arrangements are to be observed by the man during a marriage has been available to Muslim women since the early part of the ninth century. Only people's ignorance of Islam—including, unfortunately, far too many Muslims themselves—has made this truth appear otherwise.

Issues of sovereignty and religious freedom aside, there are a number of advantages that could accrue to Canada in general if official recognition concerning the right of Muslims to implement their own personal/family law were granted. To begin with, this recognition could save Canadian/provincial taxpayers money since Muslims would be underwriting the financial costs of administering and running such a system themselves. For example, tribunals for handling dispute resolution issues in areas covered by Muslim personal/family law would be set up, staffed and monitored by people from the Muslim community. All of this would be financed by user fees and contributions from the Muslim community.

Furthermore, by assuming such responsibilities, Muslims would be taking a certain burden from the shoulders of an already overwrought judicial system. This could result in a more efficient and responsive judicial process for other, non-Muslim Canadians.

The Bottom Line: A Win-Win Situation

The *bottom line* on all of this is as follows. If Muslims were permitted to govern their own affairs in the realm of personal/family law, then a win-win situation would have been generated for Muslims and non-Muslims alike. *Muslims would have the opportunity to realize more of their religious freedom than previously had been the case, and non-Muslims would have a more efficient, less costly, and less burdened system for dealing with their own approach to family/personal law.*

In addition, by permitting alternative methods of dispute resolution in matters of family/personal law, one would be providing Muslims with *a way of doing things that reflects fundamental aspects of their own sense of justice*. As a result, Muslims would be shown that the promise of multiculturalism, when properly implemented, is capable of creating conditions conducive to the generation of the peace of mind and happiness that come with true autonomy. Rather than feeling alienated within Canada, Muslims would become integrated, active participants in the Canadian mosaic.

Some people may have reservations about the foregoing possibilities, feeling that if such recognition were given, then one is inviting anarchy and chaos into our society. This would be the case, or so the argument might claim, because legal authorities and governments would no longer have control over what Muslims do in the areas covered by personal/family law. Moreover, what if problems arose during the administering of such a system? How would they be handled?

Although Muslims are as prone to folly, mistakes and ill-considered actions as are non-Muslims, Muslims are not children. Among them one will find intelligent, knowledgeable, insightful, wise, committed, just, compassionate, honest, sincere, hard-working, creative people. While problems undoubtedly will arise, it is a rather paternalistic ethnocentrism which supposes that Muslims are not capable of resolving, within the limits of human capacity to achieve such things, their own problems in ways that utilize values, beliefs, principles and practices that exhibit integrity, responsibility, fairness and wisdom.

All kinds of organizations, institutions, administrative tribunals, universities and colleges are permitted to run their own internal affairs with little or no interference from the courts and the government. Canadian society has not disintegrated as a result of this.

Canada also will not fall apart or into an abyss of chaos if Muslims are permitted to control their own affairs in the realm of Muslim personal/family law. Canadians should look at this matter, not as if they are losing control, but as if they were broadening the mandate of sovereignty, and thereby enhancing the quality of that sovereignty. In any event, establishing such a system of law is not something which is either impossible or impractical.

Part III

Treatment of Minorities: Equality and Tolerance versus Discrimination

A Model for Minorities

It is a well-established historical fact as well as a sincere belief of the Muslims that the Islamic Law provides a system of life which accords the non-Muslim minorities (known as *dhimmis* = protected people) living in a Muslim state a most compassionate and a very fair treatment. In fact one might be so bold as to propose that because the Islamic model for treatment of minorities serves Muslims so well, it also may be capable of serving other nations and countries as well by providing a universal code of conduct and general model for the treatment of minorities.

Muslim minorities can expect this kind of fair treatment from non-Muslim states only if the latter are prepared to offer a system of treatment similar to what is the case in Islam with respect to minority treatment. History shows that, in the absence of such a system, good or bad treatment of Muslim

minorities depended more on the unpredictable whims of the rulers of non-Muslim governments.

However, in order to get a proper perspective, it would be appropriate to briefly examine the general approach of the Muslim judicial system when it comes to dealing with the question of minorities living in a Muslim state. We can then relate this with our own Canadian situation and the treatment the minorities, particularly the Muslim minority, receive under the secular judicial system of Canada.

Reproduced here are excerpts of the Canadian Society of Muslims' publication *Treatment of Minorities: The Islamic Model* which is based on material derived from The Muslim Conduct of State by Dr. M. Hamidullah.[5]

(A) Islamic Perspective

The principle of law that is at the heart of international relations and, as such, found repeated in every compendium of Muslim law, maintains that: "IN SUFFERINGS (i.e., AFFAIRS) OF THIS WORLD, MUSLIMS AND NON-MUSLIMS ARE EQUAL AND ALIKE." Even the most orthodox Muslim authors of international law are all unanimous on this basic principle.

This approach to international law serves the function of a pivot. It is a point which balances all the detailed rules regulating the protection of the spectrum of legitimate interests of the minorities. They constitute the 'protected' community of non-Muslims.

(i) Minority Autonomy: Judicial, Social, Cultural

One of the most characteristic features of Islam is the award of judicial, social and cultural autonomy to these communities. As a result, they are routinely referred to as the *dhimmis*, in the technical terminology of the law. The word *dhimma* means a compact which a believer agrees to respect and the violation of which makes him liable to *dham* (blame). The other meaning of the word is guarantee of safety (*aman*). Legally, the term refers to certain rights which must be protected by the state. The people whose rights are protected are known as *dhimmis* or protected subjects.

Let us take a quick look at the nature of judicial autonomy under Islamic law. Far from imposing Quranic laws on everybody, Islam permits and even encourages every group—Jewish, Christian, Magian or other—to establish its *own tribunals* presided over by its *own judges*. Each group should seek to apply *its laws* to all branches of human affairs. Thus, judicial autonomy is intended to encompass not only individual, private matters (involving personal status) but also for all the affairs of life: civil, penal, religious and others.

As far as issues of social and cultural autonomy are concerned, the safeguard of the rights of non-Muslims in Islamic territory goes even to the extent of giving them liberty of practising customs entirely opposed to those of Islam. For instance, manufacture, importation, sale and consumption of alcoholic drinks is permitted to non-Muslims. The same is true of games of chance, marriage with close relatives, contracts entailing interest, etc.

(ii) Liberty of Conscience

To establish liberty of conscience in the world was one of the aims and objectives of the Prophet Mohammed (p.b.u.h.). Therefore, the concept of 'holy war' in Islam cannot be employed for the purpose of imposing Islam on non-Muslims or compelling anyone to become Muslim. The spirit of Jihad is one of sacrifice to ensure that the word of God and the practices entailed by that word are not extinguished and, therefore, are available for those who wish to follow the Divine Word and concomitant practices. Waging war for any other reason is illegal. There is absolutely no question of waging war in order to compel people to embrace Islam. This would be an unholy war.

Islamic law expressly recognizes the right of non-Muslims to preserve their beliefs. However, while it categorically forbids all recourse to compulsion in converting others to Islam, Islamic law maintains a rigorous discipline among its own adherents.

For instance, a Christian or Jewish wife of a Muslim is given her liberty to conserve, practise and act in accordance with what her religion permits. Consequently, she may go to church or synagogue, drink wine, gamble, etc.

On the other hand, some of these liberties are not extended to Muslims. They are not permitted alcohol, nor can they gamble. Nonetheless, one should not forget the great practical importance attached to the fact that Muslims obey their system of law as something of Divine origin, and not merely the will of the majority of the leaders of the country. Due to its Divine origin, there is greater stability in the Muslim law than any other secular legislation of the world.

The foregoing discussion presents the main features of a general picture of Muslim law dealing with non-Muslims. The discussion draws heavily from two main sources: *Introduction to Islam* and *The Muslim Conduct of State*, both by Dr. M. Hamidullah. For a better understanding and a more comprehensive coverage of the subject, these two books are highly recommended. They are widely recognized as authoritative works of long standing. Much of the following discussion also is based on material from these two works.

In *The Muslim Conduct of State* Dr. Hamidullah points out, with respect to the Islamic model for treating minorities, that: "I have tried to explain the reasons of these rules. I am not writing on what, according to modern average Muslims, ought to be the Muslim law, but what has always been considered to be the Muslim law." It is always useful to remind ourselves to make a distinction between the Muslim Law and the laws of the Muslims. Before we proceed to the next section of our discussion, let us cite a passage from another author, Professor Sheik Showkat Hussain, who in his own way reflects the position outlined by Dr. Hamidullah in the previous discussion. Dr. Hussain states:

> The *dhimmis* or the protected subjects enjoy protection of life, liberty, property, and honour. Full freedom of conscience is given to them. They are exempted from compulsory military service and payment of *zakat*. However, their able bodied males have to pay *jizyah* in lieu of military services. Islamic state deals with the *dhimmis* of all denominations as members of a community, not as individuals. *Shari'ah* governs the relations of the *dhimmis* with both individual Muslims and the Islamic state on the basis of religious distinction. All the internal relations of the *dhimmis* are left to be regulated by the laws of the religion to which they adhere. Hence it (the *Shari'ah* or Islam) regards the adherents of each religion as a community controlled by guardians of its sacred traditions. The individual *dhimmis* are to be obliged by the Islamic state to follow its tradition relating to internal relationship of the individuals and the community. They are exempted from application of Islamic penal laws to the extent these are not in conformity with their religious perceptions. Due to this unique position which the *dhimmis* enjoy in Islamic law, their legal status has been subject of a great controversy.[6]

Dr. Hussain has given expression to the kind of most compassionate and fair treatment non-Muslim minorities should receive at the hands of the Muslim majority, according to Muslim law.

(iii) Personal Law

> Finally, Muslim Personal Law is a part of the religious structure of Islam and no non-Muslim government has the right to interfere with it. Muslims living under non-Muslim systems are, as such, required to make every possible effort for the recognition of this principle by their governments.[7]

The Prophet ordered the non-Muslim residents to observe Muslim law wherever they might be. We may refer in this connection to the oft-quoted instruction of the Prophet in which he commanded:

> Ask them to embrace Islam. If they comply, molest them no more but ask them to migrate to the territory of migration. If they do that, they will have the same rights as the Migrants (i.e., Muslims) and same obligations as they. If they refuse to migrate, inform them that they will be considered like the wandering or non-resident Muslims. They will have, however, to observe the Divine laws even as all the believers.

Hence the dictum of Abu Yusuf (a very highly regarded Muslim jurist): "A Muslim is bound to regulate his conduct according to laws of Islam wherever he may be."

It goes without saying that this depends upon the liberty enjoyed in foreign countries. According to the Quran (12:75), in Egypt at the time of Joseph, the Patriarch administered justice to foreigners, even in criminal cases, according to their own personal laws. In spite of the insistence of Muslim jurists on Muslims being bound by their own laws wherever they may find themselves, it cannot be denied that Muslims in foreign territories live there on sufferance and they are subject to twofold restrictions. Firstly, Muslim law itself reduces their legal capacity. For instance, such a Muslim cannot give quarter (i.e., protection, asylum) during his stay abroad to a non-Muslim so as to bind the Muslim state, although he could do this had he done so in Muslim territory. Secondly, such Muslims have to accommodate themselves to the laws of the country where they are living.

With respect to the Muslim international law, there are many points on which Muslim law is at variance with the modern, Western international practice. Consequently, it is up to Muslim States to see if their heritage could not be proposed to others with convincing arguments for universal application.

In conclusion, we would like to stress the following point. From the previous discussion, it is quite clear that not only historically but also from a sheer practical, common-sense point of view, Muslim minorities living under non-Muslim governments are the authors of their own fortunes. By making efforts, by struggling along as Muslims throughout history have done, Muslim minorities share the opportunity and the responsibility to seek the best standard and the best possible quality of life they can acquire by all lawful means available to them. Evidently, to each according to his merit.

As the Quran exhorts us, "Man can have nothing but what he strives for" (53:39). In addition, the Quran reminds us that "Verily never will God change the condition of a people until they change it themselves (with their own souls)" (Quran, 13:11). Depending on how they negotiate with governments of their adopted non-Muslim homelands, Muslims either can live the best kind of lives, or reduce themselves to the worst possible levels of existence.

(iv) Pluralistic World—Challenge of the Times

Obviously, therefore, Muslims must operate within the framework of the Canadian laws and the laws of the Western countries they happen to be living in. With intellectual and moral evolution, there is a tendency in human society to facilitate the assimilation of the foreigner. Modern, liberal-minded Western countries, particularly those with democratic forms of governments, are becoming increasingly convinced of the need for adopting a humanitarian notion of social unity as a basic tie of society. One by one, these countries are rejecting the conceptions of 'national unity' based on accidents of nature, the notions which belong more to the animal instincts rather than to the rationality of man. Blood relationship, colour of skin, language, place of birth, are all accidents and hazards of birth. These primitive bases of assimilation are being replaced more and more by the basis of identity of ideas. Such a notion of unity and assimilation depends on the choice of man and is therefore closer to reason and more practical. It is common knowledge that Islam has always followed this method of assimilation, showing how to live one's life in peace and tranquillity.

Islam also enjoins on its followers a constant struggle for the well-being of the entire humanity, as the Quran makes it clear that "mankind was but one nation, but it differed later" (25:53).

As stated in Part I of this presentation (Introduction), the Canadian Society of Muslims has, since September 1990, been busily engaged in setting in motion a variety of activities relating to its campaign for recognition of Muslim personal law. Included among such activities have been talks, speeches, public meetings, conferences and seminars, publications of newsletters and other literature. The contents of the preceding section of this Part III is excerpted from our publication *Treatment of Minorities: The Islamic Model*, and what follows are excerpts from a speech made by the president of the Society, on the occasion of the Prophet Mohammed's (p.b.u.h.) birthday celebration under the title of 'Complementary Equanimity: A Balancing Principle of Gender Equality.'[8] The first relevant excerpt reproduced here deals with 'Three Main Questions'.

(v) Three Main Questions

This brings me to the point where I would like to answer some questions asked, respond to some concerns expressed and clarify some incorrect impressions entertained by the media as well as some Muslim and non-Muslim individuals and organizations who were able to oblige us by bringing their questions, concerns and reservations to our attention. We are indeed grateful, because the whole purpose of the second phase of our Muslim Personal/Family Law Issue Campaign was and still is to receive, as it was stated in our Newsletter, as much valuable information about the anxieties, fears, concerns, questions, feelings and thoughts of people from both within, as well as without, the Muslim community.

1. One of the questions asked, primarily by the media people, is whether the Society's intention is to push for recognition of the whole code of Shari'ah or the Muslim law. The answer of course is no. We are talking about a very small section of Shari'ah, namely, the Muslim personal law dealing with family relationships—mainly marriage, divorce and intestate succession, i.e., inheritance in a situation where a Muslim dies without leaving a will. For, without official government recognition of Muslim family law provisions in this regard, a Muslim is forced to go through the expensive, traumatic court procedures in the case of divorce; and, in the case of intestate succession, heirs, survivors of the deceased Muslim person will inherit according to the secular Canadian law, rather than the Quranic, Islamic law.

2. The second question both by the media and some Muslim people is: Does the Society wish the Muslim personal/family law to apply to all Muslims? The answer is again no. We thought we made it clear that those Muslims who prefer to be governed by secular Canadian family law may continue that way. Neither are we responsible for them, nor are they for us in respect of the correctness or incorrectness of the dictates of our respective conscience. We all will have to answer for our own acts on the Final Day of Judgement. However, it is only those Muslims who prefer (by prior registration) their own personal/religious family laws to govern their affairs who will be served by whatever facilities may become available for this purpose. Even

for these people, it will not be possible to meaningfully practise what they believe unless they are provided with some government-backed mechanism to enforce and implement the decisions of Muslim arbitration boards or such other tribunals who, we suggest, could take jurisdiction of their cases by mutual consent of the parties to the disputes.

(vi) Zero Majority, Zero Minority

Insha' Allah, I will now respond to the *second* of the two major concerns referred to in the very beginning of my speech. That concern is generally put to us in the form of a question, and that question, simply put, is: Why is recognition of Muslim personal/family law so important (a) to Muslims, and (b) to Canada? The third question is dealt with in Section C(i), 'The Canadian Perspective', under the subheading of 'Why the Muslim Personal/Family Law is Important for Muslims'. Incidental to this is the question: Why is it so difficult for non-Muslims to understand the crucial significance that Muslim family law has for Muslims? The exact wording of the question is also used as a heading for Section C(iii) of the chapter 'Canadian Perspective'.

Today, in answering those questions, the intention is to deal with another aspect of Muslim personal law as it assumes a special significance for us in the context of Muslims living as a minority group because it affects our interrelationship with other religious or secular communities.

Historically, it is important to note that in a very short period of the last ten years of the life of the Holy Prophet p.b.u.h., all the people of the Arabian Peninsula and the southern regions of Iraq and Palestine had voluntarily embraced Islam. Some Christian, Jewish and Parsi groups remained attached to their creeds, and they were granted liberty of conscience as well as judicial and juridical autonomy. The Prophet left a new system of law, which dispensed impartial justice in which religious tolerance was so great that non-Muslim inhabitants of Muslim countries equally enjoyed not only complete *juridical, judicial* but also *cultural* autonomy. Since such laws were established by the Prophet p.b.u.h. himself, in the name of God, his successors in political and judicial affairs could not abrogate them even to this day. Thus, what the Prophet p.b.u.h. 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 religious groups living within the Islamic state. It is for this reason that in his work Islamic Law, Dr. Said Ramadhan, quite correctly, arrives at the conclusion that: "Thus, *religious differentiation in personal laws* can by no means be characterised as discrimination because of religion."

(B) International Perspective

It is easy to see from what has so far been said that Muslim law began as the law of a State and of a ruling community and *served the purposes of the community* when the Muslim rule grew in dimension and extended from the Atlantic to the Pacific. It had an inherent capacity to develop and to adapt itself to the exigencies of time and clime. It has not lost its dynamism today.

In fact, it is obtaining more and more recognition as an agency for good and for the sound judicial principles and juridical adoption both by the former Muslim colonial subjects of the suppressive Western political powers and by the non-Muslim countries alike.

(i) Muslim Personal Law Autonomy in Yugoslavia, Greece and Albania

However, it was not until the 10th September and the 27th November, 1919 and 2nd October, 1921, that a part of this judicial autonomy was granted to Muslim minorities in Yugoslavia, Greece and Albania and promises were made, under international pressure, treaties and declarations, that "suitable provision will be made in the case of Muslims for regulating family law and personal status in accordance with Muslim usage."[9] With the fall of the Russian Empire and the disintegration of Yugoslavia and the sorry state of the Balkan States, nobody knows what the situation is like these days. Quite a number of countries in Asia and Africa in the past were able to achieve from the British, French and other

colonial powers a great deal of autonomy in the matters of personal/family law.

(ii) Muslim Jurisdiction

To complete the picture, I shall now reproduce paragraph 293 from *Introduction to Islam,* as promised earlier:

> The question of jurisdiction has also certain peculiarities. Foreigners residing in the Islamic territory are subjected to Muslim jurisdiction, but not to Muslim law, because Islam tolerates on its territory a multiplicity of laws, with autonomous judiciary for each community. A stranger would belong therefore to the jurisdiction of his own confessional tribunal. If he is a Christian, Jew, or anything else, and if the other party to the litigation is also of the same confession—no matter whether this other party is a subject of the Muslim State or a stranger —the case is decided by the confessional court according to its own laws. Generally no distinction is made between civil and criminal cases with respect to this jurisdiction. As for cases where the litigants belong to different communities, the question has already been discussed above. However, it is always permissible under Muslim law (cf. Quran 5/42-50) for a non-Muslim to renounce this privilege and go before the Islamic tribunal, provided both parties to the suit agree. In such an eventuality, the Islamic law is applied. It is permissible for the Muslim judge to apply even foreign law, personal law of the parties to the case, as is evidenced from the practice of the Prophet: Two Jews, guilty of adultery, were brought by their coreligionists, and the Prophet caused to bring the Bible (Book of Levites) and administered Jewish law to them, as is reported by Bukhari. It may be mentioned by the way that the concern for legality has forced the Muslim jurists to admit that if a crime is committed, even against a Muslim, who is the subject of the Muslim State, by a foreigner in a foreign country, and this foreigner later comes peacefully to the Muslim territory, he will not be tried by the Islamic tribunals, which are not competent to hear a case that had taken place outside the territory of their jurisdiction. Muslim jurists are unanimous on the point.
>
> This gives us a clear picture of how Islam incorporates its fundamental principle of tolerance and equality into its legal system and thus achieves a judicial translation of an ideological co-existence of all religious groups and practical manifestation of its cherished determination to protect the interests of *all its subjects*. One does, however, concede that the theory and practice of later generations have not always been identical in Muslim society. But while it should always be borne in mind, however, that a Muslim—like any other human being—may fail to live up to those human principles and moral principles, he never has the right to attribute his deviation to any Islamic principle, nor has he the right to justify that deviation on any political or economic pretext. In other words, the *de facto* status of non-Muslim subjects might be one of unfair discrimination—as occasionally happened in the course of history—but their *de jure* status is always there in both the Quran and the Sunnah: a status meeting the highest standards of equity and equality. This *de jure* status is as stable as any Quranic or prophetic text could be, and every struggle for re-establishing it in practice in an Islamic State is thereby rendered a constitutional one. "One should not forget," says Dr. Hamidullah, "the great practical importance attached to the fact that Muslims obey their system of law as something of Divine origin, and not merely the will of the majority of the leaders of the country."

Up to this point we have discussed the Islamic Law, its concept of equality and its treatment and protection of all its subjects in accordance with its legal philosophy of permitting, encouraging and enforcing, by legal sanctions, its adherence to the principle and the concept of ideological co-existence of all religious groups. We have also examined the *de facto* possibilities.

(iii) United Nations Organization (UNO) Criteria and Standards of Equality or Non-Discrimination

But let us deal with another aspect now. Does all this measure up to the modern standards of international criteria of equality as they prevail in our present day society, particularly the modern Western society?

For the sake of brevity and convenience, I will reproduce the relevant portion from Dr. Said Ramadhan's Islamic Law dealing with this matter:[10]

> In a report prepared by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, we find a comprehensive definition of the principles of equality, or non-discrimination, which we shall utilize here to probe the legal impact of religious distinction on the non-Muslim subjects of an Islamic State.
>
> Says the report: "The principle of equality or non-discrimination implies the following two consequences. In the first place the members of the minority have the *right to the nationality* of the State which exercises sovereignty over the territory where they reside. In a modern State, the possession of nationality implies equal rights for all those possessing it. Secondly *discrimination de facto or de jure* against minority elements is forbidden."
>
> In a memorandum on the Definition and Classification of Minorities submitted by the Secretary-General to the Sub-Commission, he admits 'the difficulties of giving a clear-cut definition of the term "minority" from a scientific point of view.' Thus, 'it is safe to say that, at least in the field of political science, that term is most frequently used to apply to communities with certain characteristics (ethnic, linguistic, cultural or religious groups, etc.), and almost always to communities of a national type.' Of all these characteristics, only that of religion is relevant to Islamic Law. Furthermore, *all distinctions made by Islamic Law on the basis of religion are far from the conception of 'minority' as interpreted and enacted in international documents* and undertakings.

We shall now try to apply the internationally agreed-upon criteria of equality (e.g., *the right to nationality* and *equality before law* both *de facto* and *de jure*), so as to probe the legal impact of religion on the scope of Islamic Law. Still in line with our international criteria, let us go back to the memorandum of the Secretary-General of the United Nations on "Definition and Classification of Minorities." Speaking on *'multi-national' states*, he defined them 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*." He then divided them into two principal categories: "a) those in which the *State reflects the culture of the predominant nation*, whilst the other nations are considered as minorities; and b) those which do not reflect the culture of a predominant nation, but are *neutral* in so far as the various nations submitted to their jurisdiction are concerned. In the case of *States in the latter category*, it is *impossible* to speak of either a *national majority* or a *national minority except from the purely numerical standpoint*: one may only speak of different national groups.

The question now is: where, under such a division, should we place the *Islamic State*? On the one hand, it is a state that reflects a *predominant culture* and thereby may belong to the first category. But it is *also*, by virtue of its culture, a state that accords full *social and judicial autonomy to every community* living within its territory, thus practising a *kind of neutrality* in so far as other religious communities are concerned. Because of this, it definitely belongs to the second category. This well illustrates the Secretary-General's statement that the categories, as above divided, "are not rigid, but in many cases are relatively fluid." **Thus, we may say that a state of the type prescribed by Islam can be characterized as a state which, while reflecting a predominant culture, accords full autonomy to the co-existing cultures within its dominance. It follows that "neither a national majority, nor a national minority" can conceivably exist in such a state, "except from the purely numerical standpoint".**

From the point of view of the group (a), 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. The focus is on the institutional framework within which groups become defined as cultural, religious, racial or ethnic, and how social interactions are organized accordingly. For example, it was not really the differences in skin colour that produced slavery in America. Rather, it was the structure of slavery and the relationship between slave owners and slaves that produced the social importance of racial groups known as "black" and "white".[11]

Similar also was the situation prevailing until very recently in the Gaza Strip and the Golan Heights where the numerical Muslim Palestinian majority is in reality a subjugated, subordinated, numerical minority of the dominant Jewish/Israeli people.

(iv) Summary of Minority Protection

To be more explicit, we may quote Oppenheim's summarization of the protection of minorities as afforded by relevant clauses in international treaties, as follows:

> 1) For the inhabitants, protection of life and liberty and free exercise of religion without distinction of birth, nationality, language, race, or religion.
>
> 2) In general, for *certain inhabitants*, automatic acquisition, or just facilities for the acquisition of the nationality of the contracting state.
>
> 3) For the nationals, equality before the law and as to all civil and political rights, and as to the use of any language.
>
> 4) Freedom of organization for religious and education purposes.
>
> 5) State provision for the elementary instruction of their children through the medium of their own language in districts where a particular minority forms a considerable proportion of the population.
>
> But Oppenheim had to admit (in spite of the twofold method of ensuring the observance of the minority clauses: 1) the contracting state's adoption of them in its fundamental laws, and 2) the guarantee of the League of Nations to such obligations of international concern) that the implementation of the system of protection of minorities was affected by the progressive weakening of the political structure of the League. He further opined that "so long as the general protection of fundamental human rights, through indisputably binding obligations under the aegis of the United Nations and otherwise, has not become part of law, there seems to be a need for the protection of minorities, through special treaties."

In contrast with the above, Islam—as we have seen—preceded all international treaties with legislation for the full protection, social autonomy, liberty and integrity of all subjects of the Islamic State, Muslims and non-Muslims alike. By virtue of its basic principles, *Islam* not only *discarded the very concepts of 'majority' and 'minority' as contrary to the principle of the equality of all men before Divine justice,* but it further *administered this justice in terms of positive law* which is *applicable to all citizens, except* in cases where the probity of *conscience* demands a *specific differentiation* based upon reciprocal rights and duties.

Furthermore, "the general protection of fundamental human rights" which Oppenheim and others hope to have enacted as part of municipal laws conceivably "through indisputably binding obligations under the aegis of the United Nations" (after the generally admitted ineffectiveness of the League of Nations) were—more than thirteen centuries ago—both introduced and sanctioned as part of the fundamental laws of Islam.

(C) The Canadian Perspective: The Other Side of the Coin

Our discussion of the subject so far related to the situation of non-Muslim communities living in a Muslim country. This is one side of the coin. Let us now turn the coin and deal with the other side, namely, what is the situation relating to Muslim communities (minorities) living in non-Muslim/ secular countries?

Generally speaking, it is an undeniable fact that the quality of life the minorities lead in a country governed by a majority rule depends not only on the philosophy of life conceived (i.e., theory), but also how it is practised (i.e., implementation of the theory). Almost every society, civilization or people of a country in the world do provide some form of guarantees for the theoretical legal equality of all its people or citizens, be it in the form of The Charter of Rights and Freedoms, or Bill of Rights, or documents of constitutional or religious declarations that contain very high-sounding platitudes, but the proof of the pudding is always in the eating, as the expression goes. The litmus test of all philosophy is in its implementation, and of course the level of success in implementation depends on the quality, sincerity and commitment of the people (i.e., the majority of the legislative representative of the governing political party, in a non-Islamic context) to effectively implement the policy of equality for all citizens without discrimination or preference. For this reason, some countries fare well in this respect and some not so well, and some even fail miserably.

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

The international criteria of equality which we have applied to the treatment of non-Muslim communities in a Muslim state, obviously apply to Canada as well. With this yard stick of measurement, Canada as a country committed to multi-cultural and multi-racial philosophy fares well in the scale of things which reflect the *de jure* position of the modern Canadian society. *However, when it comes to implementation of its multi-cultural commitment, there is much to be desired and done on the Canadian scene* in order to claim equality before the law for all citizens, particularly minority groups of all colours and stripes. The most obvious case is the situation where certain groups of minorities such as Francophones or Aboriginal Indians do enjoy autonomy of their legal systems, whereas certain other communities, such as Muslim, Hindu, Sikh, Jewish and Parsi, are deprived of this privilege of equal treatment when it comes to recognition of their personal/family laws.

(i) Why the Muslim Personal/Family Law is Important for Muslims

For the Muslim community, the issue of personal law carries an extraordinary and a very critical significance which may or may not be the case with other minority groups. We have tried to stress this point by way of an example or a case study relating to obstacles in the way of the Freedom of Religion (see Part II, chapter under the heading of 'Religious Freedom: Some Problems') guaranteed by the Canadian Constitution's Charter of Rights and Freedoms. In a report entitled *Oh! Canada! Whose Land, Whose Dream?*, which was a discussion paper containing many suggestions for constitutional reforms, The Canadian Society of Muslims put it this way:

> Religion is not just a matter of having places of worship or having particular beliefs or values. Religion is also a matter of putting into practice what one believes, as well as acting in accordance with the values one holds in esteem. Moreover, these beliefs and values are not meant to be activated only when one enters a place of worship and switched off when one leaves that place of worship. *Religious beliefs and values are meant to be put into practice in day-to-day life.*

Muslim personal law is important to the Muslim minority living in Canada, yet Muslims in Canada have no wish to impose their perspective or way of doing things on other Canadians. *There may be people even within the Muslim community who are enamoured with the Canadian way/the secular way of dealing with and arranging issues of family/personal law. Those people should be left free to choose whatever they believe to be in their best interest*.

> I shall not get into a presentation of arguments of a legal, constitutional, philosophical, ideological, social, sociological, moral, ethical or psychological nature. We shall deal with that at some other time. I have decided to confine myself only to one very fundamental religious consideration of utmost critical importance—call it an argument based on a single religious ground, if you will.
>
> With this purpose in mind, I would, Insha Allah, do two things: (a) give you the gist of why or how Muslim personal law is so important to us, and (b) to explain simultaneously why it is so difficult for the Western society to understand the crucial nature of the concern of Muslims living in non-Muslim countries like Canada, for instance.

(ii) A Critical Situation: The Grave Nature of *Shirk* (Polytheism)

> Rather than doing this in my own clumsy fashion, I have chosen to accomplish my purpose by giving you an excerpt from the introduction to the book Islamic Law by Said Ramadan. This introduction was written by no less a representative of Muslims than a man known as A.K. Brohi, Advocate, Supreme

Court of Pakistan and former Minister of Law, and a scholar of Islamic law. A quotation from his Introduction would very well serve the purpose of answering our third question, namely:

(iii) Why is It so Difficult for Non-Muslims to Understand the Crucial Significance Muslim Personal/Family Law Has for Muslims?

The trouble is that it is impossible even for the most enlightened Europeans who are begotten and bred in a secularistic culture (which, in its turn, is the offspring of the alleged saying of Christ, 'Render unto Caesar what is Caesar's and to God what is God's') to meaningfully understand that a Muslim totally surrenders himself at the altar of the Divine Will as it is expressed by the Divine Law—and he is called upon to refer every act of his being to a comprehensive Divine setting: his declaration of faith enjoins upon him to say: 'Indeed my prayers, my very sacrifice, my life and my death is for the Lord of the worlds Who hath no compeer—this I am commanded to do, and I am the first of Muslims' (Chap. 6, V:163-4). Such is the decree that to the extent that I do anything for God and in His Holy name—I am in the camp of Islam.

"The critics of Islam," complained Dr. Muhammad Iqbal as far back as 1930 in his famous lectures on 'Reconstruction of Religious Thought in Islam,' "have lost sight of this important consideration. The ultimate reality, according to the *Quran*, is spiritual and its life consists in its temporal activity. The spirit finds its opportunities in the natural, the material, the secular. *All that is secular is therefore sacred in the roots of its being.* There is no such thing as the profane world. All this immensity of matter constitutes a scope for the self-realization of spirit. All is holy ground. As the Prophet so beautifully puts it: "The whole of this Earth is a mosque." The state, according to Islam, is only an effort to realize the spiritual in human organization.

It is difficult for a Western scholar to become fully conscious of this claim of Islam—namely, that the *authority of 'the King, Lord and Master of this Universe' is not to be partitioned between the conflicting claims of 'Caesar' and 'God'*. You cannot bring partners to share God's authority with him. **That is, for a Muslim, the most unforgivable of all the derelictions of religious duties.** Such is the grave and critical nature of *shirk* in Islam. So all law has to be sanctioned by the Divine Will—including the law—stemming from the human activity, provided it is within the limits prescribed by the Divine. But this is not the same thing as saying that the entirety of the law of Islam is immutable, static and unprogressive. If one were at all pressed to define for oneself those features that distinguish the approach of Islam from that of Christianity to the problems of organising a socio-political order under the *aegis* of law, the following observations of Dr. Iqbal, which follow immediately after those cited above from his lecture on 'The Principle of Movement in the Structure of Islam', might be of considerable assistance. 'Primitive Christianity,' says he, 'was founded not as a political or civil unit but as a monastic order in a profane world, having nothing to do with civil affairs, and obeying the Roman authority practically in all matters. The result of this was that when the state became Christian, state and church confronted one another as distinct powers and interminable boundary disputes arose between them. Such a thing would never happen in Islam for *Islam was from the beginning a civil society having received from the Quran a set of simple principles which like the twelve tables of the Romans, carried, as experience subsequently proved, great potentialities of expansion and development by interpretation*' (emphasis supplied by the writer).

The Quran is very clear on this point: "They have no protector other than He; nor does He share His Command with any person whatsoever" (Quran, 18:26).

God is the real law-giver, and authority of absolute legislation rests in Him. No person, clan or group, not even the entire population of the state as a whole, can lay claim to sovereignty. The believers cannot resort to totally independent legislation, nor can they

modify any law which God has laid down (from *Fundamental Teachings of Quran and Hadith* by Nisar Ahmed, who took help from *Islamic Law and Constitution* by Abul Ala Maududi).

7:2— "Follow that which is sent down unto you (i.e., the law) from your Lord, and follow no protecting friends besides Him."

So, my brothers and sisters, this is the position of Muslim family law vis-à-vis non-Muslim majority governments like Canada.

(iv) The Choice is Yours Alone

As to the crucial importance of Muslim personal law vis-à-vis the Muslim minority community of Canada, the case is clear and straightforward. It is your choice. Do you want to govern yourself by the personal law of your own religion, or do you prefer to be governed by the secular Canadian family law?

Maulana Muhammad Taqi Amini puts it this way in his Urdu book entitled Ahkam-e-Shari'ah Mein Halat Wa Zamane Ki Riayat. Here is a paraphrase of the gist of what he says, rather than a literal translation of the passage:

There is no denying the fact that one has to have the courage of sincere conviction to choose only one of the two possibilities of conviction:

1) That, like other religions, Islam to you means nothing more than certain prescribed rituals of worship and sacred devotional practices, and that it has nothing to do with the conditions, circumstances and day-to-day affairs of human life, or

2) That what Islam means to you is a complete code of life capable of providing a guidance for all time and clime, for all circumstances and for every condition of human life at all times.

If you exercise your option or choice in favour of the first conviction, then there is nothing much to be said about it except that you are perfectly within your God-given right to make this choice (since there is no compulsion in Islam). But one who subscribes to this way of life and holds this conviction cannot really have a moral right to claim that he believes in Islam being a religion or code of life brought about or promulgated by a Prophet who you believe to be a mercy or blessing to all humanity (i.e., all generations of the past, present and future) and all the universe.

If your choice is in favour of the second option, then you must accept the necessary logical consequence that, in following Islamic principles and precepts, one must obey the law (or follow a course of action for this purpose) with due regard to the latitude and flexibility for adaptation to the changing times and circumstances. And for the survival and establishment of an Islamic way of life, one must, out of sheer necessity, seek ways and means as to how one may be able to cope with new and changing situations.

To this excerpt, I will add only this personal assertion or plea: that, because of the secular, democratic, broad-minded, and humanitarian considerations which permeate the multicultural way of Canadian life, Muslims living in this country cannot simply shirk from their religious and moral duty to try for what can be achieved lawfully within the parameters of the Canadian democratic system and legal rights. Most countries of Europe or America are not antagonistic to religion now, but Canada stands head and shoulders above all of them when it comes to leading the pack in liberal-mindedness and co-existence of all and sundry.

If we were living in a country where religion and a religious way of life were condemned, suppressed or merely ignored for all intents and purposes, or where Muslims were persecuted, then I would say, our responsibility for at least making an effort to persuade the governmental authorities to see the fairness of our expectations and hopes would be diminished in proportion to the prevailing degree of persecution or suppression and other unbearable consequences.

With that final remark, I appeal to you to seriously consider your position in relation to the Muslim Personal/Family Law Campaign in Canada, search your soul and consult your heart, in addition to seeking help from your rational faculties, and then decide whether you would like to support the Canadian Society of Muslims' efforts in that direction.

I might add, in conclusion, that it will be only fair and reasonable that members of each of the two groups who are free in the exercise of their option to prefer the first choice over the second, or vice versa, owe to the others the same courtesy of tolerance and understanding as they expect from the others. As decent, civilized and cultured human beings, each group must refrain from resorting to questionable tactics, all in the name of religion, to put obstacles and roadblocks in the path of the other group's legitimate, democratic pursuits.

Misguided and Misconceived Notions of 'Unity'

Furthermore, it is high time for all to realize the sad fact that a great number of Muslim people suffer from certain misguided and misconceived notions about 'unity' of Muslims and 'unity' of Canadians. A healthy, legitimate and permissible difference of opinion and exercise of freedom of expression, discussion and debate serve to strengthen the unity of Muslims as Canadians—they are not the forces to undermine it.

To our way of thinking, it is adherence to the core principles of a society that constitutes unity; differences in adherence to the details of a secondary nature emanating from those core principles do not disintegrate or destroy that unity. Quite contrary is the case: diversity of details augments and serves to support the unity of principles. In the Islamic context, adherence to any of the four diverse schools of thought in Fiqh does not disintegrate the unity of Sunnis, nor does it destroy the unity of Muslims. Similarly, on the Canadian scene, diversity of Francophone and Aboriginal native people has not destroyed the unity of Canadians, and an extension of this principle of ideological co-existence to many a new cultural or religious community of immigrants is not going to disintegrate Canadian unity, nor would it create legal chaos. The history of human civilization and the history of Canada have convincingly proved that! To recognize and establish autonomy of personal laws of those communities or groups ('minorities') who desire to retain their own distinguishing characteristics (e.g., religious/cultural) is an international obligation imposed by the *United Nations Organization's Sub-Commission on Prevention of Prejudice and Protection of Minorities*. For Muslims, as a minority group living in Canada, it is our natural, religious right, granted both under the authority of the national Canadian Charter of Rights and Freedoms and under the international authority of the United Nations Organization.

We do have this right on paper. We must acquire the right to exercise it in practical life. Law-makers only bestow rights—it is not for them to force you to exercise those rights or fight for acquiring the ability to exercise them from the Executive Branch of the Government.[12]

Part IV

Multiculturalism

The Rhetoric versus the Practice

As stated earlier in the Introduction of our submission—and it bears repetition—we maintain that all civilized societies aim

for liberty of conscience, freedom of choice, tolerance and equality for their citizens. This is the conceptual side of philosophy. The litmus test, however, of all philosophy concerns its implementation. Only when one comes to the point of putting theory into practice, and one tries to concretely realize the principles of an ideology or set of beliefs, can philosophies be shown to succeed in certain ways, while failing in other ways.

This is the case with respect to the theory and practice of democracy in Canada. This is also the case with respect to the theory and practice of multiculturalism in Canada. In fact, the theory and practice of both democracy and multiculturalism are inextricably interwoven in Canada.

Two Major Causes of the Current Multicultural and Constitutional Crisis

Acceptance of the principle of multiculturalism as a publicly approved and officially sanctioned policy of the government has been an important advancement in the history of Canada. One becomes more conscious of this 'step' being 'in the right direction' when one takes into account the following point, aptly put by Erna Paris in a *Globe and Mail* article:

> . . .until recently the French believed that, as the custodian of 'culture', they had a civilizing mission to the rest of the world; and the British laboured under a similar burden—'the White man's burden' of improving 'primitive' peoples.

We might add that the British attempted to expand their sense of Divine mission by chasing both the French and the Aboriginal people into a melting pot of assimilation. Paris continues on by saying:

> Before 1945, Canada was overtly, perhaps proudly, racial . . . Our Canadian ethos emerged with the waves of immigration that changed the face of the country. What this meant in blunt terms was that a post-war generation that did not derive from 'British stock', as the phrase went, grew up as comfortable Canadians while many of our parents did not.

According to the interim report of the Citizens Forum Commission on Canada's Future, headed by Keith Spicer, Canadians speak of our "willingness to compromise, our tolerance of ethnic and cultural diversity, [and] our equality for all." However, to borrow again from Erna Paris' article:

> Surely, people who were 'willing to compromise' and be 'tolerant of diversity' would gladly recognize the enormous difficulty of maintaining a separate language and culture in the anglophone sea of North America. They would be far more generous in acknowledging and accommodating the obvious distinctness of Quebec and its special needs. Instead, *we act as though granting the necessary extra to Quebec somehow diminishes the rest of us.*

Thus, we come to the first cause of the current crisis in the multicultural spheres of Canadian life. This concerns the anxiety or fear which many Canadians have that resolving Canada's constitutional problems which revolve around the issues of sovereignty and its offshoot, multiculturalism, requires a diminishment of their basic rights, freedoms, integrity and entitlements as human beings.

The second major cause of our constitutional crisis is captured quite well, although somewhat narrowly, by Keith Spicer when he says:

> What we express from east to west is nothing less than *terminal meanness; matched by terminal bitterness* in Quebec. We need psychiatrists, not politicians.

The 'terminal meanness' of Canadians of all stripes and colours is a function of the way we all have a tendency to define 'culture' in a very narrow, self-centred, simple-minded manner.

For example, interpretation of 'multiculturalism' often is confined to a superficial approach. This is expressed in terms of a sensitization to things ethnic, such as: folk dances, music festivals and culinary extravaganzas, along with a few quaint, visually appealing tribal activities and/or clusteral gatherings. On the other hand, even the more sophisticated attempts to raise people's consciousness about various literary, artistic and scientific achievements of minority groups does not do justice to the real spirit of the concept of multiculturalism. Interestingly enough, even the literal meaning given by Webster's Dictionary is much broader than such a narrow interpretation. It defines culture as " *the social and religious structures* and intellectual and artistic manifestations, etc. that characterize a society." The true spirit of multiculturalism extends to much deeper and more essential aspects of human life than can be encompassed by cultural artifacts, irrespective of whether these artifacts are simple or complex.

As such, there is a fundamental blindness about multiculturalism on the part of many Canadians from a

diverse set of racial, ethnic and religious backgrounds. This blindness prevents people from understanding that if the Constitution is going to work, it must reflect, in substantial ways, the diversity that is Canada.

The Solution

In view of these two aforementioned root causes of Canada's multicultural and constitutional crisis, there is an urgent need to realize and appreciate the existence of certain core dimensions of human reality. These ennobling dimensions are constructed from the fabric of human brotherhood and sisterhood. This fabric transcends the narrowly defined regional, ethnic, linguistic, tribal and racial interests through which all too many people view, and interact with, the world.

The idea of capital H Humanity which encompasses a collective human purpose or destiny is, these days, a politically tainted idea. In the words of Carole Giangrande, a Toronto writer, "some see it [i.e., capital H Humanity] as a crude form of Western dominance, or euphemism for a world view imposed by white, male humanity".

As an exploration into constitutional arrangements, and a general re-examination of the Civic Justice System's problems, the present document deals with certain principles underlying basic themes such as: social contracts, sovereignty, democracy, equality, rights and duties, religious freedom, family and personal law, etc. In the course of such explorations, one major principle stands out for special attention. This principle underlies our attempt to propose a just, reasonable and practical solution to the current crises facing Canada.

The principle is expressed by the motto-like phrase '*Diversity of Equality/Equality of Opportunity*'. The essence of this phrase has been stated earlier in our Submission in the following manner:

No one should be given an unfair advantage or opportunity that permits him/her to enhance his/her position or circumstances at the expense of other people. Alternatively, equality also refers to protecting people against being unfairly disadvantaged with respect to opportunity, status, treatment, and so on. . . . Equality is not necessarily about subjecting people to a monolithic process. In fact, real equality may only be possible in some, perhaps many, cases if one offers people *an opportunity to choose from among a set of alternatives the one that best suits their circumstances or abilities*.

Elsewhere, the Submission states the same idea slightly differently:

> Indeed, the very idea of multiculturalism is inextricably caught up with the acknowledgement that there are a multiplicity of special and distinctive societies within Canada. *Our task as a multicultural nation is to construct a set of alternatives from amongst which the different peoples of Canada can choose those which are most conducive to, and congruent with, the needs, interests and characteristics of different peoples, and which will permit all of them the opportunity to preserve and enhance the quality of their respective 'sovereignties' as a distinct and special people.* . . . Moreover, realization of the principle of diversity of equality is what underwrites our respective quests for sovereignty.

It goes without saying that the courts, being the guardians of the society and its legal rights and obligations, are obliged to fully implement this concept. Indeed, the Canadian Constitution itself imposes a heavy duty on the courts to interpret The Charters of Rights and Freedoms in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians (Section 2).

If the principle of 'diversity of equality/equality of opportunity', as conceived in this Submission, is applied not only to those who, at present, reside in Canada, but also to future immigrants, the multicultural mosaic of Canadian society will be transformed considerably. In fact, if the above principle is permitted full extension in practice, and not just in theory, a multiplicity of distinct and special societies will emerge *within* Canada. Stated in yet another way, the *principle of multiculturalism need not be confined in its implementation to only three special charter groups—namely, the Aboriginals, the British and the French*.

During the course of the ongoing discussion/debate among Canadians exploring various proposed solutions to the Constitutional problems, in an article appearing in *The Globe and Mail*, Mr. Willard Z. Estey, a former Supreme Court of Canada justice, and Mr. Peter Nicholson, Executive Assistant to the Chairman of the Bank of Nova Scotia, appear to deem the issues of immigrant minority groups unworthy of even a passing reference when they presented their case to the Beaudoin-Edwards Committee which was, at that time, entertaining various proposals for amending the Constitution. According to the article, the distinguished witnesses before the Committee did state clearly that, in the amending process:

> . . . there must be enough breadth and flexibility to confront the full range of major

> issues facing Canada, including the position of native people, Senate reform, federal and provincial powers, the distinctiveness of Quebec and the Charter of Rights and its 'notwithstanding clause'. Meech Lake demonstrated the futility of a narrow agenda.

If the foregoing quote is an accurate and complete list of the sorts of issues Mr. Estey and Mr. Nicholson believe to be of importance, then multiculturalism, except in a very limited form, does not appear to be a major or relevant issue when such people are discussing the process for amending the Constitution.

Canadian multiculturalism was officially recognized only in October 1971. Just ten years later, in 1981, the distribution of ethnic populations were recorded as being: British 40.1%; French 26.7%; and all other ethnic minorities 33.2%. Yet, despite pointing out, quite correctly, that: "There are extraordinary times in a nation's history when the enormity of the challenge calls for an extraordinary response. This is such a time," apparently, the challenge of full-fledged multiculturalismis not of sufficient enormity to persuade Mr. Estey and Mr. Nicholson to urge that the requisite extraordinary response be extended to those who are not British, French or Aboriginal.

A Muslim Perspective

To quote, once again, Carole Giangrande, writer-in-residence at the North York Public Library:

> Without forgetting that 'cultural appropriation' is a painful and sensitive issue for many, we are also in real danger of denying what is most human in us by cluttering our psychic landscape with 'no trespassing' signs. Glutted as we are with politics, we keep forgetting that there are other, equally profound dimensions of human understanding and reality.

In the context of Canadian society considered as a whole, Muslims are just one small group of people. Nevertheless, we are Canadian citizens. Moreover, we are citizens who happen to have a somewhat different understanding of ‘culture' than do some of the other citizens of Canada. We consider culture to be one of "the profound dimensions of human understanding and reality" to which Ms. Giangrande alluded toward the end of her previous quote.

More specifically, ‘culture' involves cultivation. This aspect of cultivation especially applies to the human mind, heart and spirit. On the other hand, to quote Marmaduke Pickthal, the aim of culture

> . . . is NOT the cultivation of the individual or a group of individuals, but of the entire human race. It [culture] aims at nothing less than universal human brotherhood. . . . Literary, artistic and scientific achievements are regarded as the incidental phenomena of culture [and serve to] act as either aids to the end, or refreshment for the wayfarer.

In other words, from the Muslim perspective, culture, in the words of Mr. Pickthal: "aims NOT at beautifying and refining the accessories of human life: *it aims at beautifying and exalting human life itself.*" (For those interested in a full discussion of the subject, the author's book, The Cultural Side of Islam, would provide valuable and delicious food for thought.)

From such an understanding of the nature of cultural life, flows the notion of a society that places great value on the sovereignty of both the individual as well as communities. Inherent in such a conception of culture is an active principle of unity which is rooted in a shared framework concerning a progressive belief in the ideals of universal brotherhood and sisterhood—without distinction of race, religion, ethnic background, language or place of abode.

The practice of universal brotherhood and sisterhood requires tolerance of differences. Tolerance can be helped to become established and to flourish by ensuring that there are an array of social, judicial, political, educational, and constitutional means of protecting, preserving and enhancing the sovereignty of individuals and communities. This is especially true in relation to minorities who, because of their relative disadvantage of not belonging to the ethnic/racial/religious majority, need to be treated as a ‘protected community' within the larger community. Indeed, governments have a duty of care to protect the legitimate interests of these ‘strangers', rather than forcing on them a culture of assimilation which is not conducive to the preservation of the identity and integrity of such minority groups.

Froma Muslim religious perspective, in order for a society to serve its function, it must assist both the individual and the larger collectivity to work towards harmonious equilibrium. This harmony needs to be inculcated within the individual, as well as between the individual and the community, and also among communities.

For Muslims, personal/family law is an integral ingredient in helping the individual and the community to struggle toward harmonious equilibrium. Muslim personal/family law governs

fundamental aspects of individual and community affairs. It encompasses issues dealing with wills, inheritance, marriage, re-marriage, marriage contracts, divorce, maintenance, custody and maintenance of children. Official recognition by municipal, provincial and federal governments in Canada, and the determined efforts of the Civil Justice System to interpret and implement laws with a view to giving effect to the true spirit of multiculturalism as envisaged by the Constitution, with particular reference to Muslim personal/family law, would only enhance the cultural richness of Canada. It would not diminish Canadians in any way.

Official recognition and sanctioning of Muslim personal/family law is but one possibility inherent in the principle of 'diversity of equality/equality of opportunity'. We believe there is a treasure house of such possibilities inherent in the aforementioned principle which could enhance the sovereignty of all Canadians.

Overlapping of Discussions

Needless to say, Muslims are not the only religious/cultural group searching for solutions of their unique problems. Other minorities such as the Native Indians and the Francophone people of Quebec are two other cases of similar kind. These two cases have been dealt with under other chapters of this presentation. A certain amount of overlapping is unavoidable in the interest of avoiding the avoidable repetition of the same subject matter. The attention of the Task Force is therefore invited to Part II of our presentation 'Sovereignty: A First Encounter' which relates to the Native Indian minority problem.[13]

Moreover, airtight compartmentalization also poses practical problems. For instance, the arguments and discussions contained in Part III under the chapter 'Religious Freedom: Some Problems' apply with equal force and relevance to the 'Multiculturalism' chapter. The reader may therefore be well advised to bear this in mind, too. Discussion of principles and issues relating to democracy, equality, rights, freedoms, etc., among others, also are all relevant and applicable to almost all other chapters.

Part V

Conclusion

The very first page of the Zuber Report quotes Exodus 18:13-27. We have also decided to reproduce that passage, for the wisdom and advice contained therein seems to be not only good for all and for all times, but also most relevant to the realities of our times, generally, and the religious family law, e.g., Muslim personal/family law issues in particular.

Court Reform in Ancient Times

On the morrow Moses sat to judge the people, and the people stood about Moses from morning till evening. When Moses' father-in-law saw all that he was doing for the people, he said, "What is this that you are doing for the people? Why do you sit alone, and all the people stand about you from morning till evening?" And Moses said to his father-in-law, "Because the people come to me to inquire of God; when they have a dispute, they come to me and I decide between a man and his neighbours, and I make them know the statutes of God and his decisions." Moses' father-in-law said to him, "What you are doing is not good. You and the people with you will wear yourselves out, for the thing is too heavy for you; you are not able to perform it alone. Listen now to my voice; I will give you counsel, and God be with you! You shall represent the people before God, and bring their cases to God; and you shall teach them the statutes and the decisions, and make them know the way in which they must walk and what they must do.

"Moreover choose able men from all the people, such as fear God, men who are trustworthy and who hate a bribe; and place such men over the people as rulers of thousands, of hundreds, of fifties, and of tens. And let them judge the people at all times; every great matter they shall bring to you but **any small matter they shall decide themselves; so it will be easier for you, and they will bear the burden with you**. If you do this, and God so commands you, then you will be able to endure, and all this people also will go to their place in peace."

So Moses gave heed to the voice of his father-in-law and did all that he had said. Moses chose able men out of all Israel, and made them heads over the people, rulers of thousands, of hundreds, of fifties, and of tens. And they judged the people at all times; **hard cases they brought to Moses, but any small**

> **matter they decided themselves**. Then Moses let his father-in-law depart, and he went his way to his own country. *(Exodus 18:13-27*)

Judicial Autonomy

The principle of administration of justice and the judicial autonomy to people in 'small matters' is also found in Islamic law. The gist of how this Divine Command is implemented and enforced in the Islamic judicial system can easily be conveyed by stating that foreigners residing in the Islamic territory are subjected to Muslim jurisdiction, but not to Muslim law: Islam tolerates on its territory a multiplicity of laws (i.e., legal systems) with *autonomous judiciary* to *each community*.

Indeed, in Canada, we too recognize this principle, although its use or application at the present time is limited largely to two communities—namely, the Francophone community of Quebec and the Native Indian community.

It is our conclusion that the time has now come for us to wisely extend application of this principle to other communities as well, in order to keep pace with the changing needs of the Canadian Society.

A good start can be made by permitting the Muslim community or any other religious community to have access to officially recognized tribunals, operating under the general annexation or affiliation or some sort of connection with the Civil Justice System. Those communities (e.g., the Muslim community) may conduct the proceedings of such tribunals (e.g., arbitration) in accordance with their own set of religious laws and their own sense of justice. This kind of autonomy may be limited only to personal/family law matters and the tribunals may be made to operate under the general annexation or connection of some sort with the Civil Justice System of Ontario.

Alternative Systems of Adjudication: Perceptions of Justice

The justice system must provide a people with a variety of alternatives from which to choose the one which best meets the individual's needs and inclinations. Generally this is not the case with the Ontario Civil Justice System, although Quebec, within its own boundaries, does practice a different brand of civil law based on principles drawn from a French/Roman code of law. We will do well in Ontario to recognize:

a) the ever changing compositional structure of the multicultural mosaic and that human circumstances are quite variable and diversified, and that,

b) there is nothing necessarily intrinsically wrong, as we have stated earlier in another place, with the idea of competing systems of justice, as long as people are happy with the sorts of choices and consequences that those competing systems may offer. One of the truly ironic and intriguing aspects of Canadian history is that a parliamentary and judicial system which has been as concerned over the years, about promoting and protecting the principles of open and fair economic competition should be so resistant to the idea of competitive fairness in the realm of justice.

Just as is the case with 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.

If people are provided with a number of perspectives concerning the idea of justice, and if they are aware of the constraints and degrees of freedom associated with each of these alternatives, and, if they are aware of the upsides and downsides, as we put it earlier in this presentation, as well as the strengths and weaknesses of such alternatives, then let the people make their own choices. The important considerations, however, are that:

a) each of the alternatives is a fair process;

b) a person is prepared to accept the judgement of such a process, irrespective of whether the judgement will turn out in their favour or against it.

Thus, if the minority group of Native people, or the Muslims or the Jews for that matter, have a totally different sense of justice than do, say, English or French Canada, how could anyone feel that one would be justified in imposing on the Native people—or the Muslims or the Jews—a system of justice that is alien to, and in conflict with, values, beliefs and practices in which the understanding of Native people's understanding of justice are rooted? Only the worst, most virulent sort of ethnocentrism could be sufficiently deluded to suppose that such gross intrusions into, and abuses of, another peoples' 'sovereignty'(in the relative rather than absolute sense) could be acceptable.

The Islamic Imperative[14]

The most fundamental reason for the plea concerning the possible implementation of Muslim personal/family law in

Canada is a matter of responsibility. This is the obligation we have as Muslims, both individually and collectively, to seek to establish an environment which, as much as is feasible and practical in a non-Muslim country, is conducive to living in accordance with the way in which Allah would wish Muslims to live.

Through the principles, values and precepts which have been disclosed by means of the Quran as well as exemplified in the teachings and actions of the Prophet Muhammad (peace be upon him), many guidelines have been given with respect to the manner in which, among other things, matters of personal/family law should be conducted. These guidelines are not arbitrary, peripheral issues. They have been established with the structural character of human nature clearly in focus and are intended to assist us to find harmonious solutions to the problems which inevitably arise in personal and family matters.

However, solving problems, including personal/family law problems, is not, in and of itself, the only rule to be used in measuring the propriety of various modes of conflict resolution. 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, as an expression of worship and love of Him.

If the governmental authorities and judicial system of a non-Muslim country have in place methods of conflict resolution that are rooted in principles and values that are governed by motives other than the intention to please God or which do not serve the best interests of the Muslim community or which contain less wisdom than do the guidelines which have been given by Allah and His Prophet, then Muslims place their spiritual and social lives in dire peril when they submit to that which is other than what Allah has ordained for those who wish to submit themselves to Him.

This struggle for an Islamic identity by means of the founding of institutions, processes and a framework that facilitates a way of life which reflects Islamic values, principles and methods is not a matter of trying to impose a Muslim perspective on non-Muslims. Furthermore, the desire for the implementation of Muslim personal/family law is not a demand that Muslims should be treated differently from other people in Canada. Rather, we are simply asking that Canada live up to:

a) the preamble of the Canadian Constitution's Charter of Rights which stipulates that Canada is a country founded on principles which recognize the supremacy of God; and

b) the guarantee in The Charter of Rights concerning freedom of religion.

We do not believe that freedom of religion can be restricted to meaning only that one is free to think what one wants about religious issues or that one is free to perform acts of worship in one's home or place of community worship. The very nature of religion has everywhere and at all times been intended to extend into realms which fall beyond the boundaries of the home or the mosque, temple or church. Religion is a way of life, a set of values, a framework which is intended to penetrate into, shape, colour and orient all facets of an individual's life.

Naturally, due to the all-inclusive character of religion, there is a potential for conflicts when one set of religious practices comes into antagonistic opposition to some other set of religious practices. Nevertheless, one of the beautiful, appealing aspects of the desire for seeking to implement Muslim personal/family law in Canada on a *voluntary basis* and *in cooperation with the existing judicial structure in this country* is that no one will be affected by such a system except those who wish this to be the case. Moreover, the effort to implement Muslim personal law is designed in a *cost-effective*, responsible fashion, to increase the degrees of freedom in a democratic society without, simultaneously, usurping the rights or freedoms of anyone (Muslim or non-Muslim) under the existing constitution. Due to the opportunity presented to all Ontario citizens by inviting presentations to the newly appointed task force to review the Ontario Justice System, the present atmosphere of constitutional crisis, multicultural debates and an apparently genuine receptivity to, and preparedness for, change on the part of many Canadians, we believed that the time was right for communicating some of the concerns of Muslims to the people, the executive, the legislative and judicial areas of Canada. We believe that the legitimacy and tenability of our quest will carry over into the post-crisis era of Canadian history.

Aside from the foregoing considerations, there is an element of urgency which modulates everything that has been said up to this point. More specifically, there is an increasing number of problems arising in the Muslim community in Canada involving issues of marriage, divorce, maintenance, child support, custody and inheritance.

Neither the present secular, judicial system nor the uncoordinated and largely unorganised efforts of the Muslim community is proving to be adequate to the task of resolving these problems in a manner that really serves the needs of the Muslim community, as a community, rather than as a collectivity of groups and individuals who have been woven into something of an arbitrary, social patchwork quilt whose design reflects a whole variety of influences which are often in fundamental conflict with one another. The potential for human tragedy, in general, and the undermining of

spirituality, in particular, is very frightening under the present circumstances in Canada. Consequently, the implementation of Muslim personal/family law in Canada might go a long way towards helping to lend stability and constructive direction to the Muslim community here.

Islam: *Terra Incognita*

We have also come to the conclusion that perhaps the time is also right for communicating some of our concerns of another kind to the Ontario Civil Justice Review Task Force, and by extension to the different levels of the governments and the people of Canada. This concern of ours is based on our perceived apprehension that Islam and Muslims are not understood by the West (which includes the North and South American Continents) in as objective, impartial and secularly enlightened manner as they deserve to be. And a frightening thought crossed our minds to wonder as to what kind of treatment our presentation of 'Islamic Imperative' is likely to receive if the well-meaning and well-intentioned Task Force also decides to shunt us aside and discard our views because of their suffering with the same malady of apathy and lack of adequate knowledge about Islamic teachings, coupled with some pre-conceived notions about its adherents. Would it be prudent on our part to make an effort to make them aware of what the general conception of Islamic life is and what are the rudimentary philosophical cornerstones of its basic teachings, by providing a couple of simple excerpts from a book or two—and attach them as appendices rather than including them in the text of this conclusion?[15]

Or would it be advisable to be ready with the quick answer that one of my favourite Counsel, arguing an appeal in an Appellate Court, had for the honourable justices of that court. After giving a very patient hearing to a lengthy discourse of the Counsel on some elementary points of law, the justices could not resist the urge to request the counsel to give them (i.e., the judges) credit for knowing at least that much of the elementary law. The counsel's immediate response was somewhat like this: "With due respect to your Lordships, I made the mistake of doing that in the Court below. Had I not been that generous in my assumptions, My Lords, I would not be here today, appealing the lower court's decision."

On this occasion, when my mind was seriously occupied in finding a solution to this dilemma, I decided to relax a bit and start reading a newspaper. An article—or rather a speech—by the Agha Khan, reproduced verbatim in that paper, caught my eye. This was the speech of the same well-known Agha Kahn who is widely known to the West and also known not only to be sympathetic to the West, but also for his penchant to scrupulously avoid political controversy. Of all the places in the world, this was an address given by the Agha Kahn on May 27, 1994 at the Massachusetts Institute of Technology. I decided to give an excerpt from this speech and maybe another quote of his from some other occasion and let the chips fall where they may!

> The Islamic world is remarkably poorly understood by the West—almost *terra incognita*. Even now, one sees pervasive images in the West that caricature Muslims as either oil sheiks or unruly fundamentalists. The Islamic world is in fact a rich and changing tapestry, which the West would do well to understand.
>
> The economic power of the Islamic world is increasing, not so much because of Middle Eastern oil but because of the rapid growth of newly industrializing countries like Malaysia and Indonesia. *Its population* is increasing, and already represents *nearly one-quarter of the world's total*. It is remarkably diverse—ethnically, economically, politically and in its interpretations of its own faith. The Muslim world no longer can be thought of as a subset of the developing world. Islam is well represented in the United States, Canada, the United Kingdom and Western Europe—and that presence is growing.
>
> In the face of such lack of knowledge about one-quarter of the world's population, one may ask what the role of the *university* is in setting things straight. [We at the Canadian Society of Muslims, suggest substitution of the words: 'The Task Force' for 'university'.] . . . I would argue that the University's [Task Force's] potential is met not just in developing the intelligence of its students [for 'students,' read 'Ontario government'], but also in bringing them to understand the importance of engaging themselves in solving the problems of the world [or at least problems of its citizens, minorities and all others].

On another occasion, the Agha Khan had this to say in order to express his concern about the relationship between Islam and the West and to express his thoughts that he feels that the perception of Islam as a threat to order, as darkness, is never far from the Western mind:

> With Islam encompassing a large area of the world with significant populations, *Western society can no longer survive in its own interest by being ill informed or misinformed about the Islamic world*. They have to get

> away from the concept that every time that there is a bush fire, or worse than that, it is representative of the Islamic world. So long as they make it representative of the Islamic world, they damage both themselves and their relations with the Islamic world itself because they are sending erroneous messages back. There is what I call a 'knowledge vacuum.' It is hurting everyone.[16]

The following chart shows the details re distribution of an estimated one billion Muslims in the world.[17]

> Distribution of an estimated one billion Muslims in the world, one-third of this number living as minorities in non-Muslim states (there are about the same number of Christians):

South Asia (India, Pakistan, Bangladesh) - 250-300 million

Africa - 200 million

Arab Countries - 180 million

Southeast Asia - 170 million

Europe (out of this, six million in Western Europe and one million in the United Kingdom) - 65 million

Iran -50 million

Central Asia - 50 million

China -50 million

Afghanistan - 15 million

North America -6 million

South America -3 million

Australia - 1 million

To be able to understand the crucial significance of Muslim personal/family law for the Muslim community and the inherent Islamic Imperative, it seems obvious then that at least a rudimentary introduction to what Islam stands for and what it offers to a Muslim and all others of the modern world should be provided. For this purpose, we are inserting as Appendix A a very short excerpt from Muslim Personal Law by Athar Husain, for the benefit of those who would like to take a look at a two-page 'capsule presentation' of the basic idea of Islam.

Part VI

Recommendations

Arbitration: Part of Total Alternative Dispute Resolution Package

On the basis of the foregoing conclusions and the overall presentation of our case pleading official recognition and implementation of Muslim personal/family law, we offer the following recommendations, accompanied with remarks by way of explanatory or background information:

The Canadian Society of Muslims is in full and complete agreement with the observation appearing in the Report of the Zuber Inquiry as follows:

> . . . the justice system is a complicated machine. There is no quick fix or magic formula whereby it can be made to work better. . . A number of modifications can be made to a variety of procedures in the courts, even as re-organized, and a few innovations. Many of the changes will be modest in themselves but, in their cumulative effect, substantial improvement may be accomplished.

One of the *innovative recommendations* the Zuber Inquiry made was a *plea to encourage a Court Annexed Arbitration system*, but, alas, not much seems to have been done by any government organization—legislative, executive or judiciary—to take the initiative in this regard. The Canadian Society of Muslims, however, took the initiative by way of opening up for discussion the prospects and feasibility of establishing a Court Annexed Arbitration Board System for settlement of Muslim personal/ family law disputes. The Society's proposal was picked up and aired by the media people, the first one being Michael McAteer in the Toronto Star of 30th May, 1991, followed by others.

There was a good deal of lively discussion and fervent reaction in response to this proposal of the Society, not only in Canada but also in the U.S.A. and other overseas places and countries, and the coverage was by print media as well as audio and video media. A very small sample of print media response, together with response from government authorities, is herewith attached as Appendices B1 through B11.

The proposal for establishment of Islamic Arbitration Boards and the Canadian Society of Muslims' interview with the Toronto Star were based on the Zuber Report's recommendation for Court Annexed Arbitration as one way of encouraging alternate methods of dispute resolution. The

text of that recommendation is reproduced here, together with our explanatory comments/conclusions:

> 1. *After the commencement of a proceeding*, either party may propose that the matter be resolved by arbitration. If the other parties agree upon an arbitrator, the matter should proceed forthwith to arbitration.
>
> The arbitration should be a procedure of record and the procedure should accord with the principles of natural justice. But the strict rules respecting the admissibility of evidence need not be observed.
>
> 2. The arbitration award, when rendered, should be filed with the court in which the matter was commenced and *be deemed to be a judgement of that court* and be *appealable* as a judgement of that court.
>
> *The fees of the arbitrator* should be paid by the parties to the dispute.

The Zuber Inquiry Report also contains the following remark:

> It is recognized that arbitration may not be appropriate in many cases and that there is an element of privatization of the justice system in arbitration. However, these factors should not deter the provision of *arbitration as a part of the total package of alternative dispute resolution mechanism*.

It is our submission that, although it may not be appropriate in many cases, *arbitration is certainly appropriate in some cases*. Allowing arbitration process for adjudicating personal/family law problems of the Muslim community we suggest would be most appropriate and indeed most advisable. It may not be out of place to note that, by accepting the principle of adjudication by A.D.R. (e.g., the recently installed Court based A.D.R. permitting private A.D.R. services by way of mediation), the Ontario Civil Justice System has overcome the stigma attached to the element of the so-called 'privatization' of the justice system.

As to the second part of the Zuber Report remark, we would submit that the initiative respecting Alternative Dispute Resolution Pilot Project has been long overdue and as such it deserves to be welcomed most enthusiastically; yet it is lacking in courage to include arbitration as a part of the total package of alternative dispute resolution mechanism. Our main recommendation, being the principle object of our submission, is to strongly plead for an improvement to the Pilot Project in that direction. We encourage the Ontario Civil Justice System to overcome their excessively cautious approach to break new ground, which to us seems quite apparent in their decision to stop short of putting together the total package.

Rather than writing a whole lengthy essay with all the procedural details and discussions relating to our recommendation on this point, perhaps the simplest way would be to delineate some suggested simple amendments to the Practice Directive of June 7/94 as follows. Accordingly, we make the following recommendations:

Recommendation 1

It is recommended that a mechanism be put in place through court-based A.D.R. Pilot Project, to enable determination of divorce matters in accordance with Islamic law where husband and wife are both Muslim, by entering into an arbitration agreement containing such a provision.

Paragraph (4) of the Practice Direction dated November 30/93 issued by the Chief Justice of the Ontario Courts reads:

> the parties may choose to utilize *Private A.D.R. services* instead of those provided by the court, in which case the parties will be responsible for fees charged by the private A.D.R. service providers. *A roster of private A.D.R. service providers* will be available at the A.D.R. Centre.

We recommend that a) "Private A.D.R. services" be re-defined to include "Private Arbitrators", and b) the roster of A.D.R. service providers be expanded to include those who specialize in Muslim family law.

Such a roster of specialists in family law may consist of persons appropriately selected from among a combination of members of a) the Ontario bar with required qualifications and experience at the bar; b) religious scholars from Muslims community with proper qualifications and accreditation; and c) private arbitrators accredited by the governing licensing organization—or only one sole arbitrator if he has the qualifications of all three categories.

Recommendation 2

In the Alternative Dispute Resolution Pilot Project Procedures, Section 2.1 reads:

> At any time after the delivery of a statement of defence, actions appearing on the Commercial List and the general Civil List may be referred to the A.D.R. Centre upon notice to Counsel for the parties, or where the parties are not represented, to the parties themselves.

We recommend that the words "Statement of Defence" be substituted by "Statement of Claim."

Also that, of course, it be made applicable not only to petitions for divorce, but also to other applications in the Unified Family Court and all other Family Courts.

Reasons for Amendments

Our reasons for the suggested amendment are as follows:

(a) For mediation process, statement of defence may be appropriate and even advisable in order for the parties to learn the other party's case but in arbitration cases, its usefulness is doubtful or even detrimental to maintenance of the desirable attitudes conducive to the needed cooperation and give and take compromise atmosphere. Arbitration is still a method of adjudication rather than a settlement process.

(b) In family law matters, particularly where Muslim law is to be followed, mere institution of court action itself would take its toll on the emotional, psychological mind-set of both parties, thus causing bitterness and acrimony. Filing of statement of defence, then, would cause further harm by creating a situation which makes the attitudes even more hardened and less likely to be amicably settled. The adversary method is a poor way to resolve any matrimonial dispute and is the worst way to resolve the issues of custody and access. The best way is, of course, not to make mediation or arbitration contingent upon commencement of court action. A practice based on voluntary agreement between parties which was developed and is still followed in the Unified Family Court and is also followed in many other jurisdictions whereby in matters of (1) custody, (2) access, (3) support, and (4) division of property, a mediation service is provided BEFORE the commencement of an application.

Sections 3, 4 and 5 need no comment because either no amendments are needed or because these sections do not apply if referrals are to binding arbitration process.

Section 6.0 may be amended by adding the following: "Similarly, an award of an arbitration shall also be filed with the court whereupon it shall be deemed a judgement of the Court and shall be appealable on appropriate grounds."

A chart showing, in juxtaposition, a comparison of the recommended A.D.R. by Arbitration procedures with the existing Pilot Project A.D.R. by Mediation Procedures is hereto attached, and set out on a separate sheet, for ease of reference.

Importing Muslim Family Law via Arbitration

As the chart indicates, our recommendation for Arbitration constitutes a necessary part of the total package of A.D.R. If the parties to the dispute are both Muslims, they may include a clause in the agreement setting out the terms and conditions of arbitration to the effect that they would like the issues in dispute to be determined in accordance with the principles of Islamic law. To dispel any doubts about the enforceability of such a clause, I would like to very briefly quote from an eleven-page article by P.A. Buttar. The author has this to say in his opening paragraph under the heading of "Islamic Law as an Authentic Source":

> On question of importing Islamic Law via arbitration, determining whether such law is an authentic source and reliance can be made on it, I wish to rely upon Texaco v. Libyan Arab Republic, an award in an international arbitration. [*Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, Prof. Dupny, sole arbitrator, preliminary award given on 27 Nov., 1957; Award on the Merits, 19 January, 1977. cf. B.P. Arbitration Case.]

The concluding paragraph states:

> It seems that the Texaco case will go down in history as the first to have recognised the importance of the reliance upon the local law particularly if it includes the Shari'ah. This is the starting point of a new era. In my opinion the following points may be deduced from this case:-

1. That Islamic law is a recognised branch of law which can be relied upon even in proceedings at the international level.
2. That therefore Islamic law can be imported into agreements referring the dispute to arbitration.
3. If there is no ambiguity as to the law of a particular Islamic country (or a school of thought) it can be invoked and relied upon by the arbitrator to decide the nature of the dispute on merits.[18]

A Comparative Chart
A.D.R. Pilot Project Procedures (Toronto Region)

Existing Procedures (Mediation)	Recommended Procedures (Arbitration)
Step 1	**Step 1**
Statement of Claim filed with Court	Statement of Claim filed with Court
Step 2	**Step 2**
Statement of Defence filed	OMITTED
Step 3	**Step 3**
(a) Referral to A.D.R. Centre (b) Choice of: (i) court-based A.D.R. (ii) private A.D.R. (by agreement) • placed on court file	(a) Referral to A.D.R. Centre (b) Choice of: (i) OMITTED (ii) Arbitration Agreement • Muslim parties agree to settle issues in accordance with principles of Islamic law • relaxed rules for evidence • placed on court file
Step 4	**Step 4**
(a) Parties meet, confer for settlement (b) failure to resolve, submit statement identifying issues and reasons of failure	(a) OMITTED (b) OMITTED
Step 5	**Step 5**
Attend A.D.R. Session • presided by judge, or • Dispute Resolution Officer (under court supervision)	Attend Arbitration Session(s) • presided by arbitrator selected from a roster maintained by Court
Step 6	**Step 6**
Record the outcome of Mediation (a) Settlement filed with Court • Court judgement given • appealable (b) If no settlement reached, proceed to trial	Record the outcome of Arbitration (a) Award filed with Court • deemed Court judgement • appealable (b) OMITTED (Award is final and binding on parties)

Recommendation 3

Where uncontested petitions for divorce are by mutual consent and signed by both the husband and the wife, Marriage Officers appointed under the Ontario Marriage Act be given further authority to act as Divorce Officers to solemnize divorces.

Procedures for solemnization and registration of divorces on lines similar to those now in effect for marriages may be prescribed by Regulations.

It is our submission that such a mechanism would go a long way in accomplishing most of the objectives, e.g., affordability, accessability, timeliness, efficiency, fairness and reduction of case load for the courts.

Muslim marriages, as well as civil marriages in Ontario, are contractual in nature. It is an irony of our times that, while entering into a contract is so easy, terminating it is not. To avoid court entanglements and the associated frustrations of cost, delay, acrimony, etc., people are, as a consequence, by and large trying to stay away from the 'officialdom' of the 'marriage trap' itself and thus avoid the hardships associated with official divorce decrees. The tendency among the religious community to be content with the religious solemn ization and completely ignore the requirement of obtaining a marriage licence for registration of marriages with the government offices is growing at an alarming speed. The popularity of common-law relationships is, of course, another consequence of reaction to difficulties of termination of marriages.

It is indeed a sorry state of affairs that governments of all colours and stripes never seem to stop harping upon the theme of the wonderful family unit and its social benefits of cohesion, co-operation, sharing, sense of communal responsibility, etc., etc. Yet not much is done to facilitate the termination of the marriage process except for luke-warm, half-hearted, piecemeal, bandaid efforts which always seem to come too late anyway.

It is a tragedy of our times that, while all kinds of new familial relationships are being created these days, no encouragement seems to be offered to the so-called 'conventional marriages' or 'conventional families'.

Is it any wonder, then, that the kind of respect the laws, the courts and the government institutions used to enjoy and take for granted is changing into absolute disregard and even contempt of the legal institutions of authority?

Simplifying the divorce mechanism would go a long way in restoring the values and traditions of the past years. We are not unaware of the insurmountable constitutional hurdles and the "No Trespassing" signs that decorate the length and breadth of the federal-provincial jurisdictional landscape!

Recommendation 4

Disputes and matters relating to Muslim intestate succession be determined through arbitration, following procedures suggested in our Recommendation 1.

Recommendation 5

Extend the Unified Family Court System to the whole province. We are not the only organization at a loss to understand how such a good idea has suffered the fate that it has for such a long time after proving itself to be the best thing that has ever happened to the family law regime.

Public interest seems to take the back seat every so often when things get bogged down into constitutional, federal-provincial overlapping of jurisdictions.

Recommendation 6

In cases where uncontested joint petition for divorce is filed by mutual consent of both the husband and the wife, the parties be permitted to waive the one-year separation requirement, and the relevant legislation be amended appropriately to give effect to this waiver procedure.

Recommendation 7

As an alternative, some independent adjudicative mechanism be set up (by legislation or otherwise) on the lines of the Trinidad and Tobago Marriage and Divorce Act.

A summary of the Act is provided herebelow, after Recommendation 8.

For full coverage, the printed copy of the Act herein enclosed as an appendix may be referred to.

Recommendation 8

As an alternative, provisions relating to marriage, divorce, intestate succession may (by legislation or otherwise) be incorporated into Ontario system of justice as a part applicable only to Muslims. The regular family courts may deal with all such matters. This is the method followed by

former British colonial countries (e.g., India, etc.). Incorporation of Muslim and Hindu personal law into the regular civil justice system of British India was initiated during the early British rule and even now continues to be used, basically in the same manner, in India, a country of an overwhelming 90 percent majority of non-Muslim population as against approximately 10 percent of Muslim population. Formerly, appeals in Muslim law matters used to go (for final determination) to the British Privy Council (Judicial Committee) in London, U.K. That pretty little treasure house of Anglo-Muhammadan case law developed from Indian appeals and also through precedents from other countries where similar population spread prevails is still available for all who want to benefit from it!

Muslim Personal/Family Law: A Global Perspective

Muslim personal/family law is practised by over one billion people throughout the world. This part of Shari'ah (i.e., the Muslim personal law) is recognized and implemented either as an integral part of the judicial system of several non-Muslim, or secular countries, e.g., India (non-Muslim population: almost half a billion) or implemented in some form or another for the benefit of their Muslim citizens. Muslim law, in fact, was widely practised in Eastern as well as Western Europe, even in times not all that distant from our modern age.

Trinidad and Tobago Muslim Marriage and Divorce Act

The American continent has not been a virgin territory either. Trinidad and Tobago of the South American continent have had in place the Muslim Marriage and Divorce Act since in 1961. A copy of that legislation is also provided herewith as Appendix C. A summary of the important points of the said Act is set out here below:

Summary/Important Points: The Muslim Marriage and Divorce Act (Trinidad and Tobago)

- DIVORCE COUNCILS are created as independent adjudicative organizations to perform the following, among other functions:
  - . holding hearings (*in camera*; within 60 days)
  - . determining *all* divorces when husband and wife, both, are Muslim
  - . issuing *decrees nisi* and making them absolute (within three to nine months)
  - . maintaining Muslim Divorce Certificate Book and entering therein the Certificates
  - . transmitting Certificates of Divorce to Registrar General of Muslim Marriages and Divorces (appointed by the government) for entering in the Muslim Divorce Register maintained by him
  - . other ancillary functions
  - . determination of applications are final and conclusive between parties

  Each Divorce Council consists of three Divorce Officers, one of whom a barrister or solicitor of three years' standing acts as Chairman.
- DIVORCE OFFICERS (no more than 15) are appointed by government at the *recommendation* of three 'Muslim bodies' named in the Act.
- EACH MUSLIM BODY (an independently and separately incorporated association/organization consisting of local Muslims who belong to such a body) recommends for appointment by government three to five persons as Divorce Officers.
  - . Petitions are filed with one of the three Muslim bodies to whom the petitioner belongs.
  - . Secretary of each Muslim body is responsible for:
    - issuing acknowledgement of petitions with date and time of filing endorsed thereon
    - serving certified copy of application on spouse of party filing application, and setting down time and place of hearing.
- PRINCIPLES OF ISLAMIC LAW applied:
  - . all applications are determined in accordance with Islamic law
  - . **Evidence**: Islamic standard of proof followed; if Islamic law silent on any point, civil law standard of proof applied.
- HIGH COURT retains jurisdiction in matters of (a) maintenance of wife and children and (b) custody of children.
- ADVANCE RULING may be given on *ex-parte* application by intending petitioner who is in doubt as to sufficiency of grounds for divorce; attendance not required.
- ON JOINT PETITIONS, no need for service of process on anybody; hearing set down right away; *decree nisi* pronounced only in presence of both spouses.

While the influx of Muslims of all colours and stripes has changed the religious and secular landscape of many a country of the American continent, Canada is no exception to this continuing trend. Earlier we have given some interesting statistics of distribution of Muslim population in the world, which speak for themselves. In Canada, estimates of Muslim population run anywhere from three hundred thousand to even five hundred thousand. No statistical precision is needed really to see and observe what Knowlton Nash has seen and observed after scaling 70,000 miles of

Canadian territory to talk to forty five different Canadians. He states:

> But while our national physique boldly flourishes its self-confidence, in dramatic contrast our national psyche is fraught with agonizing uncertainty as we face the clash of our old values and new realities. Canada is a profoundly different country from the one Sir John A. Macdonald brought forth. He was midwife to a nation dual in theory and predominantly British in fact. *Today, the children of Britain are a shrinking minority, duality is in question, and multiculturalism is astride our city streets*.

Saddened Pessimism to Cautious Optimism

We join Knowlton Nash in his conclusion that while, like him, we too began our search for a vision of Canada as saddened pessimists (in the year 1986 when the Zuber Inquiry Report was underway), we end it as cautious optimists. In our campaign and ensuing dialogue with fellow Canadians we also discovered that we have something unique and precious in this land in the northern half of north America. That something unique and precious we find in the profound grandeur, the noble integrity and the serene quality of adaptability enshrined in our legal, judicial heritage.

> The history of Ontario courts is a history of constant change and adaptation. Resistance to change is also a hallmark of the history of the Courts. Changes which were considered too radical ever to occur were adopted, almost without a murmur, a few years later. The Ontario Courts have survived because they have always adapted themselves to the needs of the people.

And, this is how or why we find ourselves ending as cautious optimists. Many things have changed between 1987, the year of the Zuber Report of the Ontario Courts Inquiry and 1994, the year of Ontario Civil Justice Review—changes for the better mostly.

It is our earnest hope, cautious optimist though we may be, that the Task Force will see the wisdom or practical expediency, or whatever one may call it, inherent in our recommendation to adapt the A.D.R. Pilot Project to accommodate the needs of the Muslim minority and other minorities who care to avail themselves of the court-based arbitration system operating with the special features that we have suggested. If we, i.e., both the Muslim community and the Task Force and by extension the government of Ontario, fail, then "a spark of hope, of humanity, will have sputtered out."

Appendix A

What Islam Stands For

Before discussing this subject in any detail it is necessary to understand what Islam stands for and what is modernity, that is, what are its gains and ills, how it is influencing the thinking of man, in what direction it is leading mankind, and whether it has ushered any happiness.

According to Islam, man is to be conscious of certain truths of life and to think and act in conformity with them. These verities are expressed in the form of a few doctrinal beliefs in the unity of God, revelations of God brought to mankind by a chain of prophets, the last in the line being the Prophet of Islam, the unity of mankind, accountability of one's deeds as this life is not an end in itself but is a gateway to an ever-lasting life of the Hereafter. It asserts that the universe is not an accidental phenomenon nor its objects and forces came into being by themselves just by passage of time, nor has the universe been created in vain but for a definite purpose and man, as viceregent of God, has to play a definite role in the scheme of things.

Man's most fundamental belief is belief in one God, not a vague, distant or amorphous being but an intensely real and approachable though transcendental Being, the Creator and Sustainer of the world, the most Compassionate and Merciful, and Powerful, Omnipresent and Omniscient besides whom there is no other God, the Sovereign and the Supreme, who is nearer to man than his jugular vein, who is All-Knowing and Ever-Watchful, who encompasseth everything but is Himself beyond all comprehension. Its monotheism is universal, absolute and unconditional and every other belief and every other doctrine flows from this concept.

Islam is not, however, only a spiritual attitude of mind or a code of sublime precepts but is a self-sufficing orbit of

culture and a social system of well-defined features. It not only undertakes to define the metaphysical relations between man and his Creator and prescribes beliefs but it also lays down rules of personal conduct and social behaviour. In fact, it is an all-embracing code of life establishing,, on a systematic and positive base, the fundamental principles of morality and precisely formulating the duties of man not only towards his Creator but also towards himself and his fellow beings.

Its concept of life does not exclude notions of happiness in the shape of material welfare in this world. It demands no renunciation of the world nor does it prescribe austerities for spiritual purification. Its concept is enunciated in the Quran. "Our Lord gives us the good in this world and the good in the Hereafter" (Quran 2:21). At the same time it does not subscribe to materialistic trends but rouses in man a consciousness of moral responsibility in everything he does. There is no sphere of activity of man which may be outside the pale of Islamic morality.

The two fundamental factors which constitute the essentials of Islam are belief in God and righteous living in consonance with it. Man has a dual responsibility to discharge. The first is the duty he owes to God and the second is the obligation to mankind. The former expresses itself in a process of self-development, physical, intellectual and moral, and the second lies in developing a social conscience and consideration for others. The two responsibilities are two facets of one and the same attitude towards life.[19]

Appendix B1

Muslims seek jurisdiction over family law

by Michael McAteer

Toronto Star, 30 May 1991

Canadian Muslims should have their own arbitration boards to allow them to govern themselves according to Islamic law on such issues as marriage and divorce, a national Muslim group says.

The Islamic arbitration boards would also deal with family problems such as separation, inheritance, child support and maintenance.

The 160-page report released yesterday by the Canadian Society of Muslims says official recognition by municipal, provincial and federal governments of Islamic arbitration boards would only enhance Canada's cultural richness.

The report also calls for changes in provincial laws so that Muslims can redirect their educational tax dollars to separate Islamic schools with their own curricula.

The report says Muslims are free to start their own private educational system but they are not permitted access to their public education taxes to set up their own religious schools.

Clearly, the report says, this points out that the religious freedom of a great many Canadians, Muslims included, has been "seriously circumscribed and inhibited."

Other religious groups such as the Associated Hebrew Schools and evangelical groups also seek authority to redirect publicly paid education tax dollars into religious schools. But Roman Catholics are the only religious group in Ontario that now do so.

Society president Syed Mumtaz Ali told The Star that Islamic arbitration boards would have jurisdiction only over those Muslims who register themselves as wanting to be governed by Muslim law.

He said there would be built-in safeguards to ensure there was no conflict with secular law.

Disputes would first go to a secular court that would turn them over to the Islamic arbitration boards for a ruling, and the ruling would then be subject to the approval of a secular court, he said.

Permitting alternative methods of resolving disputes in matters of family-personal law would provide Muslims with a "way of doing things that reflects fundamental aspects of their sense of justice," the report says.

The Muslim group says the report, called *Oh! Canada! Whose Land, Whose Dream?*, was written because the Society believes "many of the political practices, institutions and processes which exist in Canada fall short of the promise and potential that democratic theory has for meeting the social and political needs of a truly multicultural society."

Mere tinkering with the Canadian Constitution will not serve the best interest of Canada or Canadians, the report says. Radical reconstruction is necessary but "such reconstruction must be built upon a thoroughly democratic foundation."

The report, offered as a "constructive contribution to the debate concerning constitutional issues facing Canada," deals with such subjects as democracy, sovereignty and participation in a multicultural Canada.

Although Canada prides itself on being a nation in which individuals are free to commit themselves to a religion of their choice without interference from the government, in practice "this is not always the case."

The report notes that following divine law is at the heart of what being a Muslim means. That law allows a Muslim to have four wives.

But Ali of Cooksville, a retired lawyer, told The Star there is no push to amend Canadian law forbidding polygamy.

"Like other Muslims, when I came to Canada as an immigrant and accepted citizenship I acknowledged that I would be willing to be governed by the fundamental principles of this country," he said. "The practice of monogamy is a fundamental concept of this society."

Appendix B2

Muslims propose their own set of laws

Bob Harvey, Religion Editor

Ottawa Citizen, 15 June 1991

The Canadian Muslims Society has put its finger on a sore point for believers of many faiths: that provincial and federal governments pretend to be religiously neutral while often actively discriminating against believers.

In a recent brief, the Society cites the Constitution's statement that Canada is founded "upon principles that recognize the supremacy of God" but says any official who tried to put those principles into effect "would wreak upon himself or herself the collective wrath of the gods and idols of secularism."

Personal and family law is perhaps the most interesting area cited by the Society as an example of how Muslims are prevented from being able to realize Canada's promise of religious freedom.

"Following divine law is at the heart of what being a Muslim means...adhering to the various aspects of Islamic and family personal law are all acts of worship," says the Society's 160-page brief on Canada's constitutional crisis.

Accordingly, the Muslim Society has proposed that Muslims who are interested be permitted to set up, administer and pay for their own system of family and personal law.

Anab Whitehouse, secretary-general of the Society, says Muslims prefer their own system, because, for example, they believe it's more fair to women in cases of divorce, permitting them to retain all property or other material wealth acquired during the marriage. Canadian laws require couples to split their assets.

Whitehouse said similar systems already exist for Muslims in India, Greece and Yugoslavia.

He says other communities in Canada— some groups of Jews, and native peoples—would also like control over certain aspects of law. But he says there's no reason to fear such freedoms for minorities would result in chaos.

"I don't think you're going to have millions of people running to do this, and it would in fact take a load off the court system and cost the governments less money."

Whitehouse says there's a division of opinion within the Muslim community as to whether it should seek permission for polygamous marriages. He said the Muslim Society also recognizes that "there will have to be some sorts of compromises."

Another example of discrimination against believers cited by the Muslim society is that of public funding of education.

"A supposedly neutral state has made it a matter of law, practice and convention that the public education system, despite being funded by Muslim tax money, cannot accommodate an Islamic education."

Canada must critically examine the process by which Roman Catholics have been singled out as the only religious community that "has access to public money to promote an educational process that does reflect the community's religious values and practices."

"In the barnyard of democracy, all animals are equal, but some are more equal than others," says the Society's brief.

Appendix B3

Multiculturalism would be defeated in a vote

(Appeared in Toronto Star, June 7, 1991)

Re: the article, *Muslims seek jurisdiction over family law* (May 30): So the Canadian Society of Muslims says Muslims should have their own boards to govern themselves according to Islamic law. Reconstruction of the Canadian Constitution must be built upon a democratic foundation, as Syed Mumtaz Ali says.

Let me inform Ali that he is a Canadian now, and multiculturalism was not democratically introduced. Like many objectives of the new politically correct movement, this idea would be defeated if put to a vote.

Criticism of any of these ideas is met with aggressive intimidation and a government willing to pander to these groups to stay in power. When you come to Canada, you assimilate the rules, routines and traditions of this country. If you wish to maintain your own culture, pay for it yourself.

STEPHAN RYAN
Scarborough

Appendix B4

Democracy embraces multiculturalism

(Appeared in Toronto Star, June 19, 1991)

Stephan Ryan's letter (June 7) contends that multiculturalism "would be defeated if put to a vote." He also maintains that "multiculturalism was not democratically introduced."

The demographics of Canada have changed substantially during the last 30 or 40 years. The people of Anglo-Saxon ancestry are now one of many minorities in Canada. Canada belongs to all of its citizens—a citizenry made up of many minorities that collectively form one Canadian people.

We also might point out that even if multiculturalism were merely a matter of "a government willing to pander to these groups to stay in power" (which we do not believe is the case), this constitutes a *prima facie* case for contradicting Ryan's contention that the idea of multiculturalism would be defeated if put to a vote. If these groups have enough power to keep governments in power, then they also have enough power to vote in favour of multicultural policies.

Second, democracy is not just about the idea of majority rule. Democracy is also about rights, freedoms, justice, equality, duties, responsibilities and a number of other principles or values which point to the fundamental importance of the integrity and worth of every human being in Canada. Moreover, this is a worth which is entirely independent of considerations of race, ethnic origins, religion, age, sex or socio-economic status.

Finally, Ryan states: "When you come to Canada, you assimilate the rules, routines and traditions of this country." In point of fact, as citizens of Canada, we have done precisely what Ryan suggests.

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 this 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. We don't see how Ryan could object to our using democratic methods to seek democratic solutions to our problems.

SYED MUMTAZ ALI
President
Canadian Society of Muslims
Toronto

Appendix B5

Minister of Multiculturalism and Citizenship
Ottawa, Canada K1A 0M5

July 26, 1991

Mr. Syed Mumtaz Ali, President
Canadian Society of Muslims
P.O. Box 143
Station "P"
Toronto, Ontario
M5S 2S7

Dear Mr. Ali:

I want you to know how very much I enjoyed your letter a few weeks back in the Toronto Star, in response to the letter from Stephen Ryan. Your comments and arguments were reasoned, clear, accurate and succinct. In short, it was a tremendous letter and I congratulate you on it.

You are absolutely right that our country and our society are changing. And they will continue to change as we welcome new citizens from around the world. But that does not mean Canada will lose or change the values and ideals we have traditionally associated with this country. On the contrary, it is precisely those values, what Canada stands for, that has attracted those newcomers to us.

If Canada's multicultural policies ever were designed to buy political support they are not today; and have not been for some while. Their purpose is not to divide Canadians but to bring them together, by eliminating the barriers to equality of opportunity and participation in our society. By so doing, multiculturalism helps make it possible for all our citizens to identify with those values we proudly call Canadian.

Again, let me say your letter was a real lift and I hope you will continue to write and speak out on behalf of multiculturalism.

Sincerely,
Gerry Weiner

Appendix B6

Hon. Frank McKenna
Premier
New Brunswick
P.O. Box 6000
Fredericton, New Brunswick
Canada E3B 5H1

Tel: (506) 453-2144
Fax: (506) 453-7407

June 13, 1991

Mr. Syed Mumtaz Ali
Canadian Society of Muslims
P.O. Box 143, Station P
Toronto, Ontario
M5S 2S7

Dear Mr. Syed:

This is to thank you for the copy of *Oh! Canada! Whose Land, Whose Dream?* which you recently forwarded to my office.

I have had a chance to peruse the document, which contained a great deal of interesting material. It is heartening to see that the Canadian Society of Muslims is taking an active interest in building a stronger, more united Canada for all its peoples and cultures.

I truly appreciate your taking the time to keep me informed.

Sincerely,

Frank McKenna

Appendix B7

Office of the Government Leader
Government of the Northwest Territories
P.O. Box 1320
Yellowknife, N.W.T.
Canada XIA 2L9

Facsimile (403) 873-0110

June 26, 1991

Mr. Syed Mumtaz Ali
President, Canadian Society of Muslims
Box 143, Station P
Toronto, Ontario M5S 2S7

Dear Mr. Ali:

The Government Leader, the Honourable Dennis Patterson has asked me to thank you for your letter of May 24, 1991

and for providing him with a copy of the report Oh Canada: Whose Land, Whose Dream?

Mr. Patterson's recent travelling schedule and the upcoming resumption of the Legislative Assembly has not permitted him to do a complete review of the document. He has however briefly reviewed the document and has directed that the report be sent to our Minister of Justice who is dealing with the constitutional matters for this government.

In addition, Mr. Patterson commends you for your efforts to share these with political leaders across Canada.

It is obvious that you are a concerned Canadian and if other Canadians display such a spirit we will all realize how fortunate we are to be part of such a wonderful country. There are many issues to be resolved, however Canada is worth every effort. Thoughts such as yours will enable us to develop a stronger Canada for all citizens.

Thank you for sharing your views with us and our very best wishes for continued health, happiness and success.

Sincerely,

Ernest L. Comerford
Executive Assistant

Appendix B8

Province of British Columbia
Office of the Premier
Parliament Buildings
Victoria, British Columbia V8V 4R3

July 5, 1991

Mr. Syed Mumtaz Ali
President
Canadian Society of Muslims
P.O. Box 143, Station P
Toronto, Ontario
M5S 2S7

Dear Mr. Ali:

Thank you for your letter of May 22, 1991 in which you enclose a copy of your Society's Report, Oh! Canada: Whose Land, Whose Dream! My colleagues and I will consider with interest the perspective and recommendations included in your Society's Report.

The British Columbia Government supports your view that a wide ranging public dialogue on the Canadian federation is necessary. As you may be aware, the Legislative Assembly of British Columbia has recently approved the Government's motion to establish a Select Standing Committee on Constitutional Matters and Intergovernmental Relations. This Committee will continue the process of consultation with British Columbians on these important issues thereby allowing residents to have meaningful input in the Constitutional reform process.

Again, thank you for writing and providing me with a copy of your report. I appreciate receiving your organization's thoughtful contribution to this important debate.

Sincerely yours,

Rita M. Johnston
PREMIER

Appendix B9

Manitoba Constitutional Task Force
Chairperson: Prof. Wally Fox-Decent
4th Floor, Woodsworth Building
405 Broadway
Winnipeg, Manitoba R3C 3L6

Telephone (204) 945-1658
Fax (204) 945-1662

June 26, 1991

Syed Mumtaz Ali
President
Canadian Society of Muslims
P.O. Box 143, Station P
Toronto, Ontario M5S 2S7

Dear Mr. Mumtaz Ali,

I am writing to acknowledge receipt of your letter and attached document dated June 5, 1991, forwarded to me by the Premier of Manitoba.

Thank you for sending your report, Oh! Canada! Whose Land, Whose Dream. It is an interesting analysis of all aspects of the Constitution.

I believe it is important that the communication lines between different organizations, such as ours, remain open to permit the free passage of ideas and concerns across provincial borders. Thus, I have ensured that the Canadian Society of Muslims has been placed on our mailing list for receipt of our final report.

Thank you once again for your interest and for sharing your views on Canada's Constitution with us here in Manitoba.

Yours sincerely,

Wally Fox-Decent

cc: Honourable Gary Filmon
Premier of Manitoba

Appendix B10

Muslims Propose Muslim Personal Law in Canada

by Siddiq Osman Noormuhammad

A feature article from IQRA, the Islamic Journal of Nairobi, Kenya, East Africa

The Canadian Society of Muslims has made a very important and monumental contribution to the ongoing process of constitutional reform in Canada. Recently, it presented a thoroughly researched, passionate and detailed 160-page report on how to enhance participatory democracy in Canada. The gist of the report is that Canada is a representative democracy but if Canadians made an effort, they can develop a model of participatory democracy that would be admired by the rest of the world. The report gives concrete, practical, in-depth, far reaching and many a times brilliant ideas on how such participatory democracy can be achieved.

It puts forward the principle of '"Diversity of Equality' which gives people real freedom of choice. Instead of governing people with a monolithic set of laws, "Diversity of Equality" "permits people to choose, from among a set of alternatives, those possibilities which are most conducive to, and congruent with, their needs, interests, capabilities and resources. Furthermore, the set of alternatives is not imposed on people, but can be developed in conjunction with the individual's participation in the structuring of those alternatives" (p. 52).

Hence, if Native peoples of Canada are to be given equality of treatment, they should be permitted autonomy in the manner in which they conduct their affairs among themselves and with the rest of Canada. Similarly, if Muslims are to be accorded equality of treatment, they should be permitted to be governed by Family Law and Personal Law, and their tax monies should be used to set up and run Muslim schools just as tax money of Catholics is used to set up and run Catholic schools.

In the words of the report, "... although many different ethnic groups and races are represented within Islam, as Muslims—as those who follow the Islamic religious tradition—all these various ethnic groups and races are one people. As a people, Muslims feel there are a number of ways in which their reality as a people is marginalized, if not denied, by the present constitutional arrangement ...
"Religion is not just a matter of having places of worship or having particular beliefs or values. Religion is also a matter of putting into practice what one believes ...

"... Public education cannot teach, say, a Muslim child to know how to be a good Muslim. In addition, public education cannot actively assist a Muslim child to establish an Islamic identity or to adopt an Islamic way of life. Public schools cannot do this because they have virtually no expertise in, or understanding of, what Islam involves. They do not teach Arabic or the Qur'an or the Sunnah (Practices) of the Prophet Muhammad (peace be upon him); nor do they teach Shari'ah (Islamic Law); nor do public schools have the capacity to help the individual learn how to put all of this into practice on a day-to-day basis.

"... Muslims are free, of course, to begin their own educational system, but they are not permitted to have access to the taxes which they contribute to the government in order to be able to use that money for the purposes of religious education. But Catholics are allowed this privilege. Hence, says the report, "in the barnyard of Canadian democracy, all animals are equal, but some are more equal than others" (p. 104).

On Family and Personal Law, the report has this to say:

"Another example of how Muslims are prevented from being able to realize the promise of religious freedom concerns the area of Muslim family and personal law. This area covers issues such as marriage, divorce, separation, maintenance, child support and inheritance ...

"Muslim personal/family law is not an arbitrary afterthought that has been tacked onto Islamic religious beliefs and practices. Such law is rooted in, and derived from, the two most basic sources of Islamic Law, namely: (a) the Qur'an (the Holy Book of God's Revelation), and (b) the practices and teachings of Prophet Muhammad (peace be upon him) ...

"In point of fact, the implementation of Muslim personal/family law would not entail sacrifices or hardships for anyone ...

"The irony of this situation is that the principles, methods, values and safeguards inherent in Islamic family/personal law are every bit as sophisticated as anything in the Canadian legal system. In fact, many aspects of Canadian law dealing with issues of personal/family law have begun, only recently, to put into practice what has long been an integral part of Islamic Law. For example, the easing of restrictions with respect to divorce, which have been introduced into Canadian law just a few years ago, have been a part of Islamic Law for more than 1400 years" (p. 109).

"Some people may have reservations about the foregoing possibilities, feeling that if such recognition were given, then one is inviting anarchy and chaos into our Society. This could be the case, or, so the argument might claim, because legal authorities and governments would no longer have control over what Muslims do in the areas covered by personal/family law. Moreover, what if problems arose during the administering of such a system? How would they be handled?

"... While problems undoubtedly will arise, it is rather paternalistic ethnocentrism, which supposes that Muslims are not capable of resolving, within the limits of human capacity to achieve such things, their own problems in ways that utilise values, beliefs, principles and practices that exhibit integrity, responsibilities, fairness and wisdom.

"All kinds of organizations, institutions, administrative tribunals, universities and colleges are permitted to run their own internal affairs with little or no interference from the courts and the government. Canadian society has not disintegrated as a result of this" (p. 111).

It is with such reasoned arguments that the Canadian Society of Muslims has proposed Islamic education and Muslim personal law in Canada.

The annex to the report puts forward numerous specific proposals on topics such as Rights and Duties of Care, the Senate, the House of Commons, Declaration of War, Election Reform, Recall Procedure, Referendum, the Use of Polls, Native and Aboriginal Peoples, Amending the Constitution and Legal Rights.

Those who are intellectually honest will give serious consideration to this report, whether they are Muslim or non-Muslim, as it is helpful to Canada in general and Muslims in particular.

The ideas contained in the report were first put forward on the occasion of Milad-al-Nabi in Toronto in 1990 by the President of the Canadian Society of Muslims, Syed Mumtaz Ali, himself a barrister and solicitor, who follows in the footsteps of his Murshid Al-Marhum Dr. Qadir Baig, may Allah Subhanahu, Wata-ala raise his darajat, Aameen. The Secretary-General of the Society, Dr. Anab Whitehouse, received his Shahadat, that is, converted to Islam, at the hands of Dr. Qadir Baig. Muslims of Toronto fondly remember Dr. Qadir Baig as a pious Sufi who formed the Canadian Society of Muslims and was the first Imam of the Jamia Mosque of Toronto. Among other functions, The Canadian Society of Muslims holds its Annual Urs of Sultanul Hind Maulana Moynuddin Chisti, may we all benefit from his barakah, Aameen. And may Allah give success to The Canadian Society of Muslims in all their endeavours, Aameen.

Appendix B11

Separate Muslim Law?

Toronto Star Editorial, 24 June 1991

A recent call for a Muslim personal and family law is questionable and may not even be needed by Muslims.

The recommendation is part of a constitutional proposal by the Canadian Society of Muslims of Toronto.

It is the first group in North America to ask for official recognition of the detailed Islamic code of daily conduct.

The code is *the* law in such states as Saudi Arabia, Iran and Pakistan. Other Muslim states, or states with big Muslim populations, have tried to marry western and Islamic juridical practices. They've found it a challenge:

- **Polygamy**. While Muslims are *theologically* split on whether men can have four wives, 99.9 per cent practice monogamy. Still, the rule runs afoul of secular laws.
- **Divorce**. Islam bestows many rights for women—the right to property, to dictate the terms of marriage, to initiate divorce. But a regressive interpretation of the code has often meant male chauvinism, not unlike in other cultures.
- **Inheritance**. This is less difficult, since those wishing to obey the Islamic law can do so through a will, so long as it is not contested later in a secular court.

Since the Society of Muslims says it accepts the federal law on monogamy, and indeed the supremacy of the secular law, where is the need for a separate Muslim law?

Neither the Society, a small group, not its views may be representative of Canada's 275,000 Muslims. Their main associations have not contemplated such a separate law.

A country is defined by its laws. A Canada governed by a different set of laws for every religious minority that wanted one could be a nation in judicial chaos.

Endnotes

1. Syed Mumtaz Ali and Anab Whitehouse, *Oh! Canada! Whose Land, Whose Dream?* (Toronto: The Canadian Society of Muslims, May 1991).

2. Dr. M. Hamidullah, "Chapter III: The Islamic Conception of Life," *Introduction to Islam* (iLahore, Pakistan: S.L. Muhammed Ashraf), para. 99.

3. Syed Mumtaz Ali, *Treatment of Minorities—The Islamic Model* (Toronto: The Canadian Society of Muslims, 1993), p. 14.

4. Syed Athar Husain, Muslim Personal Law (Lucknow, India: Nadwa Press, 1989).

5. Dr. M. Hamidullah, The Muslim Conduct of State (Lahore, Pakistan: Sheikh Muhammed Ashraf, 1977).

6. Sheik Showkat Husain, 'Status of Non-Muslims in Islamic State', an article in Hamdard Islamicus (Pakistan: Hamdard Foundation).

7. M. Manzoor Nomani, Islamic Faith and Practice (Lucknow, India: Islamic Research and Publications, 1973).

8. Syed Mumtaz Ali, 'Complementary Equanimity: A Balancing Principle of Gender Equality,' Newsletter 2:2 (Toronto: The Canadian Society of Muslims, September 1992).

9. United Nations, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Document prepared for the First Session (24 Nov. to 6 Dec., 1947), U.N. Doc. 1/CN4/Sub 2/6,7, Nov. 1947. See also Oppenheim, International Law, I, p. 713.

10. Dr. Said Ramadhan, Islamic Law: Its Scope and Equity (London, U.K.: MacMillan, 1961).

11. See Peter S. Li, 'Race and Ethnic Relations,' The Social World, ed. Tepperman & Richardson (Toronto, Montreal, New York: MacGraw-Hill Ryerson, 1991), p. 270.

12. Syed Mumtaz Ali, "Complementary Equanimity: A Balancing Principle," Newsletter 2:2 (Toronto: The Canadian Society of Muslims, September 1992).

13. As to the Quebec situation, we invite our readers to refer to an interesting discussion in our paper *Oh! Canada! Whose Land, Whose Dream?* under the chapter title of 'Quebec and Sovereignty Association.'

14. This section is taken from an article by Syed Mumtaz Ali and Anab Whitehouse in Journal Institute of Muslim Minority Affairs, Vol. 13:1 (London, U.K.: January 1992).

15. See Appendix A.

16. Akbar Ahmad, Postmodernism and Islam (London, New York: Routledge, 1992), p. 97.

17. Source: *Boston Sunday Globe*, reprint by *The Globe and Mail*, July 14, 1993.

18. P.A. Buttar, "Muslim Personal Law in Western Countries: The Case of Australia," published in Journal Institute of Muslim Minority Affairs (London, U.K.), pp. 271-282.

19. Syed Athar Husain, Muslim Personal Law (Lucknow, India: Nadwa Press, 1989).