Storm over Shari`a Courts in Canada: Responses to Shari`a Arbitration Law in Ontario

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The most pressing and widespread attention to Islamic activities in Canada since 9/11 has arisen over the proposal by the Islamic Institute of Civil Justice in Ontario to establish a Shari`a family dispute tribunal. Based on Ontario's Arbitration Act of 1999, the idea is to set up a Muslim institution that will allow Muslim families to bypass the courts and adjudicate family disputes using Islamic law. The announcement has generated a great deal of media attention, and provoked such heated debated that the Ontario government has now appointed Ms. Marion Boyd, of the Solicitor Genera's office, to review the Act to determine if there are issues that require modification. My section of this paper will attempt to provide background information on developments in Canada that have led up to this contentious scenario, and to indicate some of the principal issues involved from the point of view of Shari`a. Humera Ibrahim will then shift to our discussion to the application of Shari`a to women in particular, and the ramification of the appointment of an Islamic tribunal to oversee Muslim family and civil law cases under the Act.

First let us note that the last several decades have spawned a number of perspectives and concomitant institutions that are alternatives to the confrontation implied in the standard court proceedings. It is now the case that almost all commercial, business and governmental jurisdictions use Arbitration law as a means to settle disputes.

Legislation governing Arbitration Law has a long history in British law, in its current form dating back at least 150 years (Colman, 2003), but likely originating in early Anglo-Saxon arbitration proceedings (Roebuck, 2002). It is a mechanism that has increasingly been used to bypass expensive litigation by companies in dispute. In the year 2000 in the United States, the American Arbitration Association received almost 200,000 cases, an increase of 300% since 1995. Arbitration in the US is founded upon the US Federal Arbitration Act (FAA) which provides the framework for arbitration throughout the States. Internationally, arbitration is likewise expanding at exponential rates , with key

provisions from the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the ‘New York Convention’) providing the enforcement of international arbitration agreements. (Bennett, 2002; Lew, 2003)

Often used by commercial interests, over the last two decades in Canada government has found arbitration to be a helpful tool for producing settlements in labour, education and inter-governmental spheres. (Jackson & Horton, 1993) In arbitration, positions are finalized by the contenders and an independent arbirator weighs the two and grants a binding decision as to which should be accepted. No challenges to the decision are allowed unless the arbitrator has erred in evaluating the positions.

The second area of growth in Canada and around the world has been in alternative dispute resolution (ADR). In recent years this mechanism has spawned a wide variety of organizations and movements. Allan Stitt in particular has argued for a wider role for ADR among organizations and commercial groups (Stitt, 2003, 2004). Notably it is an increasingly favourite mode of conflict resolution on the international scene, where cultural differences play a role in increasing tension. ADR has even been rapidly expanding in the EU among both commercial and corporate interests, especially where language and legal cultures differ markedly. Courts normally approve a stay of proceedings while the claimants' cases undergo mediation on substantive issues; when successfully completed, the court enters the terms of the agreement without further analysis of the case.

In Canada, Aboriginal groups have favoured the use of some versions of this, especially in the form of restorative justice tribunals. The sentencing circle has been set up and operated successfully in Calgary for about 7 years as a means to deal with much of the litigation arising out of aboriginal criminal and civil cases. The benefits of the sentencing circle is that evidence patterns can be used that would not be admissible in standard court proceedings, and the goal of the circle is to restore the individual and the person or persons harmed to a common community. Emotional, religious and psychological implications are given greater place. It is important to note that this form of justice

operates under the wing of the court system, and judgement is reserved on the case by referral to the sentencing circle. If the circle is unsuccessful in coming to a consensus about the case, it is again sent back to the court. If successful, the court removes the case from the docket and registers the terms of the settlement.

In the area of Family Law in Canada, provinces demonstrate considerable variation in operation. For example, Alberta is in the process of setting up Family Courts that will deal with a whole range of family matters: abuse, divorce and estate etc. because it finds the system too cumbersome and ill-organized for the issues with which it must deal. The impetus for this activity arises not only because the normal litigation process scarcely fits the family situation, but also because the current process seems to exacerbate conflicts. To make matters worse, people are confused as to which court of law they need to apply….Provincial Court of Alberta or Court of Queen's Bench. Here jurisdictional issues come to the fore, because in Canada, provincial and federal interests are not always in harmony. Divorce, to name but one, is a federal matter, while guardianship, custody and access must be handled in the provincial court. People not conversant with the court system are often confused, especially when they have little funds to procure expensive lawyers to lead them through the entire process. Furthermore in Calgary, these two courts are not in the same building. At least some judges believe the system to be overextended and out of date; neither legal institution is designed to accommodate people who have little money to spend on contemporary civil and family litigation, and sometimes try to represent themselves without knowledge of the complexity of the law. Some form of mediation would appear to be a better model. It is hard not to conclude that the current system is a poor one for attaining justice for families (Christopher, 2004). Almost all governmental jurisdictions in Canada agree with the jaundiced view that Alberta has of the Family Law system, and welcome ideas that promote mediation.

It is also important to note that some religious groups have utilized a species of this form of resolution for several years. Jewish Orthodox tribunals have been in operation in Canada for over 20 years. Called Beit Din, these tribunals have operated under the general oversight of family courts, and have applied rabbinic law to cases involving

believer families. Isma`ilis, followers of the Aga Khan, have for many years provided mediation through their local jurisdictional council for members who are undergoing distress, including divorce. Both these councils attempt to mediate disputes in the light of community values as well as Canadian legal standards of equity, although admittedly there have been some problems of conflict between the systems. At least in the later case, no traditional school of Islamic law is applied. Rather the point of the exercise is to provide a familiar set of individuals who are versed in community history and affairs to provide some judicious mediation. One of its goals is to find a way of retaining both persons within the community after divorce or litigation. As in the Aboriginal case, the emphasis is on restorative justice for both parties. It is important to note that Isma`ilis are unlikely to utilize the Islamic tribunals set up by other groups of Muslims…their traditions are just too different to find this of value. Moreover, they apply Canadian legal norms in adjudicating these disputes.

Furthermore, where Sunni groups have established congregations, some form of religious dispute mechanism already operates. It is anecdotal history that Islamic talaq divorce (three simultaneous declarations of divorce in front of worthy witnesses) has been operating unofficially in Canada through Muslim imams, who witness the statements for their members. These members may then marry again according to Islamic law.[1] The imam is involved in counseling the individuals during the proceedings, where presumably some mediation takes place.

Legally these cases must go before the courts. However, they are usually handled by Muslim lawyers, who concern themselves primarily with presenting a case that will meet the court’s requirements. To my knowledge no one has investigated these divorces to see whether Canada's equality provisions are being upheld in actuality as well as prescriptively. Clearly one of the difficulties in judging the import of the current proposal is the paucity of independent review about the success of these religious mediational mechanisms.

Of course there are other organizations involved in dispute resolution, albeit with no direct legal impact. In a general sense, Catholic Social Services also provides counseling to divorcing couples, despite theological presuppositions about marriage that run counter to divorce, as do a number of social institutions of a more secular type from divorce investment advisors to psychologists. Churches of all stripe also provide marriage/divorce counseling through pastors and priests. All these activities fall under what we might call dispute resolution, or even family mediation although they may not have any direct connection to the court system. Several writers, such as Goudy (1998) and Mandhane, (1999) have noted the difficulties these mediation activities pose in general for women. One thing is clear: these activities do not play the same legal role as arbitration, which is defined by legislation to have legally binding decisions, although they may have delegated responsibilities of a legal sort.

To sum up: Canadian legal systems have been evolving over the last two decades in ways designed to reduce the burden on the courts. Arbitration, ADR and mediation all have secured important places as alternatives to standard litigation. That the area is in flux is a given; that certain curbs may be placed on its use for Muslim or other religious families might be the outcome of the current controversy, but the basic processes are obviously so much part of Canadian legal culture that they will likely only expand in the next decades. The best strategy might be to examine Shari`a to see what potential it might have to assist Canadians in the area of Dispute Resolution.

The Position of Shari`a in the Contemporary World

The development in Ontario of the Islamic Institute of Civil Justice has raised a firestorm of opinion about and among Muslims in Canada. No presentation of a few minutes could do justice to the long and complex development of the Shari`a. Moreover, some groups, like the Council on American-Islamic Relations Canada, are opposed to the use of the term 'shari`a' to describe what will be used in the Islamic tribunal.[2] Like all legal systems, the Shari`a has been responding to Muslim community developments all over the world, and the place of Shari`a in defining Muslim identity is shifting as the community matures

and develops in Canada and around the world.[3] For example, the issue of whether charging interest, even moderate amounts, is un-Islamic has been hotly debated around the world. It is a measure of how some Muslim jurisdictions are becoming more 'conservative' or 'traditional' in their interpretation, that Pakistan's Supreme Court has ruled that "all prevailing forms of *riba* (interest), either in banking transactions or in private transactions" are contrary to the Injunctions of Islam and the Shari`a,[4] a position that would not likely to have been made during the early years of Pakistan's development when the judiciary was far more liberal.[5]

The point is the interpretations of the Shari`a are becoming more and more a yardstick of true Islam. This is despite the fact that the history of the shari`a reflects Islamic history as much as it does a timeless law. That is, Muslims point to the Qur'an and the hadith of the Prophet as the true source of Shari`a, and by implication suggest that it is rooted in God's timeless revelation. While that may be theologically sound, it is obvious that what became law and how it became conceived as law implies the system used more than divine revelation. Gibb made this point many years ago (Gibb, 1950).

Islamists (fundamentalists) often point out the problematic of taking anything after the Prophet's life time as authoritative, simply because ordinary humans were involved in the crafting of the Islamic empires, along with the growth of Islamic law as well. And Muslim feminists have decried the fact that the whole structure of Islamic law was skewed by the male scholarly community that simply ignored the equalities of the sexes built into the Qur'an from the beginning. Then there is the obvious fact that Shari`a in any form is hardly practiced in its 'original form' anywhere in the Muslim world; almost all incorporate some aspects of traditional Shari`a into Westernized codes. From this perspective, Shari`a is much more like ancient Roman Law that gradually was assimilated into civil codes in the West whence it passed into various common law traditions. The difference is that Roman law has ceased to exist as an identifiable element, while the Shari`a, of somewhat later, but still ancient provenance, continues to have a solid hold within religious and legal circles in Muslim countries. In some respects

the very fact that it has survived the crises of the community over that last 200 years validates it as the true law of God.

However, in the reality of the contemporary world, shari`a functions much more like a British common law tradition than a full-fledged operative system. However, let us acknowledge reality: Shari`a has both a symbolic and a legal meaning. As for the first, it provides the basis for adjudicating basic principles of an Islamic understanding of religiosity, society, and public and private life…among other things, this symbolic meaning reflects a belief in the superiority of the legal principles in the Qur'an and the unification of the ummah around the Law of God. In the second, various admixtures of traditional Shari`a exist within civil and criminal codes in Muslim countries, but in very few can it be said that the Shari`a is the infrastructure upon which contemporary law is built. Probably Saudi Arabia alone can be said to maintain a particular interpretation of Shari`a as the foundation of law, but even it has to add laws that have no direct relevance to the Qur'anic milieu (Airplane landing rights being a case in point!) and their relationship to the Shari`a may be tenuous at best. Thus those who argue that Shari`a ought not be applied in Ontario cite such varieties of intermix of Shari`a and Western codes as proof that there is neither one definition of Shari`a nor of its content that would be applied: just what version of Shari`a, and from what country of origin? These questions indicate significant progress must yet be made on the applications side before the tribunal can operate.

Even if some Islamic 'first principles' could be singled out to be applied in family or civil law cases (one suggestion is to limit what will be restricted to "Muslim personal law," a proposal that immediately will raise questions about which legal school's codification to take as normative), traditional Shari`a informs these areas of law and will inevitably require discussions about which 'first principles' to apply in any given case. Indeed, from a theoretical position, it might also mean that Islamic tribunals will require expertly trained individuals in order to determine which principle should apply. At the very least experts in contemporary interpretation of Maliki, Hanafi, Shafi`i and Hanbali law will be required.

Arbitration is very old in Islamic jurisprudence. The fact is that the Prophet himself disliked the arbitration that existed in pre-Islamic times because the arbitrators were associated with pagan cults or were priests of those cults. They used divination techniques to determine answers. Nevertheless the Prophet used it himself in his dispute with the Jewish tribe, the Banu Qurayza. However, as the various schools of Sunni jurisprudence developed, they restricted the use of arbitration to certain situations. The four schools mentioned above restrict arbitration to financial and property matters. In fact, it was contrary (in the opinion of these schools of law) for Shari`a to deal with issues such as family law through arbitration: As Majeeb points out "Issues dealing with criminal and penal sanctions, dissolution of marriage, divorce, determination of blood relationships and guardianship are excluded from the scope of arbitrability."(Majeeb, 105) According to Amin, the Shi`a schools of law are even more opposed to arbitration than the Sunni, apparently because of an antipathy to private arbitration (Amin, 25-20), although Ali himself subjected something as important as the conflict between himself and Mu`awiyah b. Abi Sufyan to arbitration, to very negative results. The use of arbitration, then, as the basis for applying Shari`a to family matters in Ontario seems to run counter to the very letter of the Shari`a itself, at least as traditionally interpreted by the major schools of law. However, it still could be applied to financial and civil cases.

Concluding Remarks

The various processes of law that are in flux in Canada, including Arbitration Law will doubtless be firmed up in the years ahead. The questions is, how would Shari`a fit within that process? My own reaction to this issue is that some kind of mediation procedure with Islamic content will be shaped in the years that are ahead. As a matter of policy, then, some basic provision will be necessary. The basic principle of equality of the sexes in the Qur'an would seem to imply that a series of first principles will have to be articulated for application in family law cases in any Islamic tribunal, and that these first principles would have to be agreed upon by the litigants ahead of time. In effect, women (and likely men) with little or no understanding of these principles will need to be protected from

decisions that are contrary to their best interests. At the very least, they should be counseled by someone who does know the law as it is interpreted in front of these tribunals, and they should be made aware of the alternatives available. For example, community pressure to accept less than what equality, whether Islamic or Canadian, implies must be eliminated by the terms of reference of the tribunal.

In this regard, Canadians need to be reminded that not a few Muslims believe the best kinds of law in Canada, and in the West, have a Shari`a-like character…that is, that true Shari`a will always be superior to other forms of law. Hence living in Canada under Canadian law is not living "outside Shari`a. " Those who argue this way regard the paralleling of the two legal traditions inevitable because some aspects of Canadian law are in tune with basic principles of Shari`a. Unfortunately, this view does not seem to be represented among the current advocates of the Islamic tribunal in their public statements.

Any Muslim tribunal, mindful of the history of arbitration in Islam, will need to insist on its sitting members' training to reflect the diversity of opinion among the various schools of Islamic law; furthermore, it will have to embrace the principle that an independent arbitrator must be well-versed in the culture of the two litigants for that is the foundation for the Muslim arbitration process. No arbitration ever took place in Islam without both parties being convinced that the arbitrator understood and sympathized with their cultural point of view. These two principles must surely be among the basic ingredients of the tribunal's code.

Finally, some decision will have to be made about whether matters should go to arbitration or to dispute resolution or family mediation. Manifestly, they are not all the same, nor do they have the same claim of law. What would seem better at this point in time might be to set up a procedural apparatus that moves from mediation to dispute resolution to arbitration. It is my view that many of these issues will sort out as the process itself matures.

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Endnotes

[1] Imam Hamid Slimi, Letter to the Editor, *The Toronto Star* (1 June 2004) online: The Star <http://www.thestar.com>.
[2] http://www.caircan.ca/downloads/sst-10082004.pdf, p.3.
[3] For a helpful examination of shari`a in the contemporary world, one could do no better than refer to Bettina Dennerlein, 1999. "Changing Conceptions of Marriage in Algerian Personal Status Law." In *Perspectives on Islamic Law, Justice, and Society*. R.S. Khane, ed. Landham, MD.: New York: Rowman and Littlefield,. 110-132, where she shows that, under French influence, shari`a law was manipulated by the colonial government and changes were introduced in areas such as age of marriage, child custody, dowry, etc.

After independence shari`a hardly fared better, for it because an arena of conflict between traditionalist ideas and pragmatic ideology. The result is that no traditionally-minded jurist considers the resulting codes any longer the universally binding source of divine law.

[4] All Pakistan Legal Decisions, PLD 2000 SC 225, 760,770.

[5] A case in point being the career of modernist thinker Fazlur Rahman, who was head of the Advisory Council of Islamic Ideology under Muhammad Ayyub Khan, where he was to develop policy and law. See Donald L. Berry, 1998. "Dr. Fazlur Rahman (1919-1988): A Life in Review." In *The Shaping of an American Islamic Discourse: A Memorial to Fazlur Rahman.* Earle H. Waugh and Fredrick M. Denny, eds. Atlanta, Georgia: Scholars Press, pp.39-40.