

THE PORTRAYAL OF SHARIA IN ONTARIO

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Introduction

There has been much attention given by the media to the potential use of Sharia-based arbitration to resolve family disputes in Ontario. Although this possibility has been given both positive and negative attention, a common theme pervades the discourse: Islam as “the Other.”

In this paper, I provide sufficient background information for the reader to understand how Sharia-based arbitration might be used in Ontario. Then, I review several representative newspaper articles with three questions in mind. First, do the articles accurately represent Sharia? Second, do the articles accurately represent the state of the law in Ontario as it applies to arbitration in the family context? Third, what do the articles recommend as a solution to the perceived problem? By doing so, I show that the idea of Islam as a monolithic entity distinct from the West still underlies the approach of many journalists. This idea allows, or forces, these journalists to attack or defend Sharia rather than focusing on problems in domestic law. Only those writers who avoid conceiving of Islam as the Other manage to present well-reasoned criticism of the law of Ontario.

The Other

In his seminal work, *Orientalism*,¹ Edward Said discussed the Western conception of the Orient² as the Other. Islam, in particular, is seen as a uniform ideology that conflates politics, religion, culture, and history into a single entity. The West identifies itself, at least in part, in contrast to this idea of Islam or the Orient. The essential qualities of the Orient, “its sensuality, its tendency to despotism, its aberrant mentality, its habits of inaccuracy, its backwardness,”³ help to define the West as rational, liberal, right-thinking, honest, and progressive.

Although much of Said’s analysis is based on representations of the Orient made by late nineteenth- and early twentieth-century artists and academics, his thesis is still relevant today. In *Covering Islam*,⁴ Said examined representations of Islam made in the Western media following the Iranian revolution and hostage crisis. He found that, as the “United States took over the imperial role played by France and Britain,” America’s representations of Islam became more like nineteenth-century European representations of Islam.⁵ Since September 11th, interest in the Islamic world has been renewed yet again. Unfortunately, many journalists do not appear to have learned from the mistakes of their predecessors.

Critics of Said have portrayed him as an apologist of Islam: one who wants to replace a representation of Islam as Bad with a representation of Islam as Good. Said replied to his critics:

Whereas what I was trying to show was that any talk about Islam was radically flawed, not only because an unwarranted assumption was being made that a large ideologically freighted generalization could cover all the rich and diverse particularity of Islamic *life* (a very different thing) but also because it would simply be repeating

¹ *Orientalism* (New York: Vintage Books, 1978) [*Orientalism*].

² The choice of *Orient* to refer to the East and *West* to refer to the Occident is an interesting one: Orient and Occident sound more exotic to the English ear than the relatively plain, and older, East and West. See e.g. *The Oxford Modern English Dictionary*, or D. Harper, *Online Etymology Dictionary*, online: <<http://www.etymonline.com>> for etymologies.

³ *Orientalism*, *supra* note 1 at 205.

⁴ E. W. Said, *Covering Islam: How the Media and the Experts Determine How We See the Rest of the World* (New York: Pantheon Books, 1981).

⁵ *Ibid.* at 26.

the errors of Orientalism to claim that the correct view of Islam was X or Y or Z.⁶

Those who portray Islam as Good are making the same error as those who portray Islam as Bad. Both portrayals are premised on Islam being an easily identifiable ideology that is common to all followers of the religion.

Sharia

Sharia means “the path or the road leading to the water,”⁷ or, more simply, “the way.”⁸ The word appears in only one⁹ verse of the *Quran*: “Then we put thee on the [right] Way of Religion: so follow thou that [Way], and follow not the desires of those who know not.”¹⁰ Thus, its original connotation was very broad and applied to both behaviour and belief. However, Sharia has, in many circles, come to refer to law rather than theology or faith.¹¹

The foundation of Sharia is the *Quran*, which contains guiding principles as well as specific rules relating to inheritance and certain crimes.¹² Although rejected by some Muslims,¹³ further guidance and

⁶ E. W. Said, “Islam Through Western Eyes” *The Nation* (26 April 1980), online: *The Nation* <<http://www.thenation.com/doc.mhtml?i=19800426&s=19800426said>>.

⁷ F. Rahman, *Islam* (London: Weidenfeld and Nicolson, 1966) at 100 [Rahman].

⁸ M. S. Al-‘Ashmawi, “Shari’a: The Codification of Islamic Law” in C. Kurzman, ed., *Liberal Islam* (New York: Oxford University Press, 1998) 49 at 50.

⁹ *Ibid.* at 50.

¹⁰ *The Meaning of The Holy Quran*, trans. A. Y. Ali (Beirut: Ala’alami Library, 2001) at Sura 45, Verse 18.

¹¹ See Rahman, *supra* note 7 at 101-109 for a brief history of the meaning of Sharia. Compare Al-‘Ashmawi, *supra* note 8 at 50-51 for a discussion of how the word “Sharia” should be understood and how it is understood in Egypt. I recognize that some believe that Sharia should not be used in the narrow sense of Islamic Law. However, I have chosen to do so as it is the term used by many parties involved in the debate.

¹² Rahman, *supra* note 7 at 69.

¹³ *Ibid.* at 43.

rules are given in the Hadith, a body of work that “represents the sayings and deeds of the Prophet.”¹⁴

Varying methods of interpretation led to the development of a number of schools of law. Today, four consistently recognized legal schools of Sunni Islam¹⁵ remain: Hanafi, Maliki, Shafi'i, and Hanbali.¹⁶ Although the differences between the schools have largely disappeared,¹⁷ some significant differences remain. For example, under Hanafi law, a wife may only apply for divorce when the husband is incapable of consummating the marriage. Under the other Sunni schools, a wife may pay a sum to be released from marriage.¹⁸ There are also a number of practices common to the four schools that many Canadians would consider to be discriminatory. For instance, all four schools agree that a husband may divorce his wife at will, but give no such right to a wife.¹⁹

The major Shia school of law is the Ithna Ashari. Theoretically, this school leaves more room for “individual creative thinking and interpretation of the dogma and the law”²⁰ than do the Sunni schools. In practice, the major difference is that the Ithna Ashari school allows for temporary marriage while the Sunni schools do not.²¹

In some countries, new interpretations of Sharia are being made. For example, polygyny has been prohibited in Tunisia. Sura 4, Verse 3 of the *Quran* allows a man to marry up to four women only if he believes he can treat them justly. However, Sura 4, Verse 129 states that a

¹⁴ *Ibid.*

¹⁵ There are two major branches of Islam: Sunni Islam and Shia Islam. The fundamental differences between the two sects relate to historical disputes over the possession of political leadership within the Islamic community and the religious dimension of that leadership.

¹⁶ D. S. El Alami & D. Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World* (London: Kluwer Law International, 1996) at 3 [El Alami].

¹⁷ Rahman, *supra* note 7 at 83.

¹⁸ El Alami, *supra* note 16 at 27-28.

¹⁹ *Ibid.* at 22-28. Intervention by arbitrators or judges may allow for divorce under some schools of law without the husband's consent.

²⁰ Rahman, *supra* note 7 at 174.

²¹ *Ibid.* at 174-175. See El Alami, *supra* note 16 at 9 for an exposition of temporary marriage, or *mut'a*.

man will never be able to deal fairly and justly between women. As a result, some argue that this prohibition is justified under Sharia.²²

Sharia is not a single monolithic legal system. Rather, it is a term which is used in different ways by different believers. Even when it is used to refer only to law, it must be remembered that there are different schools of Sharia and different ways to interpret the materials on which Sharia is based. As with any system, there are those within each school who advocate for more liberal interpretations and those who prefer a conservative approach.

Ontario

The controversy over the use of Sharia under the law of Ontario arose most recently²³ in 2003 when the Canadian Society of Muslims proposed the establishment of a *Darul Qada*, or Muslim arbitration board.²⁴ The Islamic Institute of Civil Justice (“IICJ”), as it is known in English, provides mediation and arbitration services in a number of areas, including family law. The *Family Law Act*²⁵ allows couples to enter into domestic contracts, which include marriage contracts, cohabitation agreements, and separation agreements. Domestic contracts specify spouses’ respective rights relating to property, support, children, and “any other matter in the settlement of their affairs.”²⁶ It is open for couples to agree to submit to arbitration in a domestic contract. Any such arbitration agreement is subject to the

²² See J. J. Nasir, *The Status of Women Under Islamic Law and Under Modern Legislation*, 2d ed. (London: Graham & Trotman, 1994) at 26.

²³ Media attention was given to The Canadian Society of Muslims’ proposal to establish arbitration boards as early as 1991. However, no such board was established before 2003. See The Canadian Society of Muslims, News Release, “The Review of the Ontario Civil Justice System” (1994), at 45-46, online: <<http://muslim-canada.org/submission.pdf>>.

²⁴ The Canadian Society of Muslims, News Release, “Darul-Qada Beginnings of Muslim Civil Justice System in Canada” (April 2003), online: <<http://muslim-canada.org/news03.html>>.

²⁵ *Family Law Act*, R.S.O. 1990, c. F.3 ss. 52-54 [*Family Law Act*].

²⁶ *Ibid.* ss. 52(1)(d), 53(1)(d), 54(e).

Arbitration Act,²⁷ which allows the parties to specify the law that the arbitrator will apply.²⁸

The controversy centres around the fact that spouses can choose to have their disputes arbitrated under Sharia and have the resulting decision enforced by an Ontario court. An arbitration award is binding unless it is varied on appeal or set aside by the court.²⁹ As Perkins J. stated in *Duguay v. Thompson-Duguay*, “[t]he legislature has given the courts clear instructions to exercise the highest deference to arbitration awards and arbitration clauses generally.”³⁰ However, Perkins J. indicated that a lower level of deference may be given to family law arbitrations. Even so, the grounds on which an arbitration award may be set aside are few. In disputes involving children, courts will be able to exercise their *parens patriae* jurisdiction to alter arbitration awards.³¹ As for other subjects of dispute, the *Arbitration Act* specified that a decision may be set aside if the parties were not “treated equally and fairly.”³² In *Hercus v. Hercus*, Templeton J. found that this requirement of fairness may be interpreted more broadly than mere procedural fairness.³³ However, there is no case law to support the suggestion that a court would go so far as to consider whether the law that the parties had agreed to was inherently unfair.

Although some have suggested that arbitration awards would be subject to *Charter*³⁴ scrutiny, this is not very likely. Domestic contracts, being private agreements, are not directly subject to the *Charter* because there is no government action. Natasha Bakht has produced a paper which explained how a *Charter* challenge might

²⁷ *Arbitration Act, 1991*, S.O. 1991, c. 17 at s. 2 [*Arbitration Act*].

²⁸ *Ibid.* ss. 3 and 31.

²⁹ *Ibid.* s. 37.

³⁰ *Duguay v. Thompson-Duguay* (2000), 7 R.F.L. (5th) 301 at para. 31, [2000] O.T.C. 299, [2000] O.J. No. 1541 [*Duguay* cited to R.F.L.].

³¹ *Ibid.* at para. 41.

³² *Arbitration Act, supra* note 26 at s. 46(1).

³³ (2001), 103 A.C.W.S. (3d) 340 at paras. 96-99, [2001] O.J. No. 534.

³⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

proceed.³⁵ The challenge would need to be directed at the legislation which allows arbitration, rather than at an arbitration award itself.

Thus, the *Family Law Act* and the *Arbitration Act* combine to allow spouses to contract out of most of the usual family law provisions with a minimal amount of judicial oversight. Indeed, it is not surprising that the *Arbitration Act* does not provide the protections that one would expect in a family context because it was based on the Uniform Law Conference of Canada's *Uniform Arbitration Act*,³⁶ which was based on an international commercial arbitration model.³⁷

Marion Boyd, former Attorney General of Ontario, has been appointed to review the current state of the law in Ontario.³⁸ Although her report was expected to be delivered in September 2004, it had not been released to the public at the time of the writing of this article. As a result, public debate has mostly been informed by the presentation of the issue in the media.

Islam the Bad

Many people assert that Islam is inherently unfair to women, and that Sharia should thus not be integrated into Ontario's family law context. Peter Worthington's column in the *Toronto Sun*, "Wake Up, McGuinty,"³⁹ is a typical example of this position. He claimed that

³⁵ N. Bakht, "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and Its Impact on Women," online: <<http://www.ccmw.com/ShariaInCanada/NAWL-CCMW%20Sharia%20Paper.doc>>.

³⁶ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 35th Leg., No. L080 (5 November 1991) at 1550 (Hon Mr. Hampton).

³⁷ Uniform Law Conference of Canada, *Uniform Arbitration Act* (1990) at 3, online: Uniform Law Conference of Canada <<http://www.ulcc.ca/en/us/arbitrat.pdf>>.

³⁸ Ministry of the Attorney General, News Release, "Former Attorney General and Women's Issues Minister to Review Arbitrations Processes" (June 25, 2004), online: <<http://www.attorneygeneral.jus.gov.on.ca/english/news/2004/20040625-arbitrationreview-nr.asp>>.

³⁹ (August 26, 2004), online: Canoe <http://www.canoe.ca/NewsStand/Columnists/Toronto/Peter_Worthington/2004/08/26/pf-602197.html>. Dalton McGuinty is the current Premier of Ontario.

Sharia is alien to everything that Canada stands for. He pointed out that “Muslim women are vulnerable to intimidation [sic], coercion, being bullied into accepting Sharia intervention.” He attributed a number of practices to Sharia, including arranged marriage, male and female circumcision, the stoning of women, and the beating of disobedient wives. Worthington summarized, “[t]he essence of Islam is that it is immutable and rigid. It atrophied 1,400 years ago and cannot evolve or be re-interpreted like other religions.” He concluded that Ontario should “reject Sharia law being applied to domestic disputes.”

Worthington clearly sees Islam as the Other. Sharia is held to be alien to everything Canada stands for. Islam is portrayed as a fossil that cannot adapt to different political and economic circumstances. In support of his conclusion that all of Sharia is bad and unworkable in Canada, Worthington dwelled on several distasteful practices that have occurred in Islamic countries. The corollary to his conclusion is that family law in Canada is good, and that none of the problems associated with Sharia exist here.

Worthington’s portrayal, of course, is a misrepresentation not only of Sharia, but also of Canadian law. Worthington’s article implied that only Muslim women are subject to intimidation and bullying. However, similar concerns exist in other religious communities that use arbitration. Additionally, spousal abuse, usually targeted at women, may arise in as many as half of all divorces in Canada.⁴⁰ It is difficult to believe that abused women would be less subject to intimidation and coercion than religious women would be. The problem, then, is not limited to the Muslim community – as Worthington would have us believe – but exists within all Canadian communities. The question that should be asked is, “What can we do to mitigate the intimidation that women often face in divorce?” rather than “How can we stop Muslims from using Sharia law?” Seeing Islam as the Other blinds Worthington to broader problems that exist in Canadian family law.

⁴⁰N. Bala, “Spousal Abuse and Children of Divorce: A Differentiated Approach” (1996) 13 Can. J. Fam. L. 215 at 215.

Islam the Good

Often, those who object to the portrayal of Islam as Bad respond with a portrayal of Islam as Good. This approach was taken by Ouahida Bendjedou in “Who’s afraid of Sharia?”⁴¹ Bendjedou presented Sharia as “a fair and equitable code that treats women and men equally and reflects important values within Muslim life.” She stated that “the outcry results from a fear of the unknown, both in terms of the content of Sharia and the manner in which it is interpreted.” Bendjedou believes that Muslim women can freely choose whether or not to submit to Sharia-based arbitration. Fears of unfairness can be addressed by drafting arbitration agreements that would allow appeals on the basis of conflict with public policy. She concluded that Ontario should allow Sharia tribunals to exist so that a better understanding of Sharia can be promoted.

Although Bendjedou is a Muslim woman who believes that Sharia is an equitable system, it is clear that she cannot speak for all Muslims. In her portrayal of Islam as Good, she glosses over issues that have been raised by other Muslim women. For example, the Canadian Council of Muslim Women (“CCMW”) feels that Sharia has often been developed under patriarchal systems, and a conservative application of Sharia will have a negative impact on women.⁴² It appears that Bendjedou is unwilling to criticize Sharia, for fear that this criticism would empower those who present Islam as Bad. In response to the view of Sharia as a monolithic and evil system, Bendjedou presented a monolithic and good system.

Although Bendjedou presented the law of Ontario accurately, her proposed safeguards cannot realistically address the fears raised by the CCMW. It is certainly possible that arbitration agreements could be drafted so that decisions could be appealed to an Ontario court on the basis of conflict with public policy. Yet how many men or women would know that a clause such as this could, or should, be included in a domestic contract? As there is no requirement for

⁴¹O. Bendjedou, “Who’s Afraid of Sharia?” *The Globe & Mail* (19 August 2004) A17.

⁴²Canadian Council of Muslim Women, News Release, “Tribunals Will Marginalize Canadian Muslim Women and Increase Privatization of Family Law” (24 October 2004), online:
<<http://www.ccmw.com/ShariainCanada/Tribunals%20Will%20Marginalize%20Canadian%20Muslim%20Women.htm>>.

independent legal advice before an arbitration agreement is made, there is no guarantee that such clauses will be included. As a result, those who are least familiar with the Ontario legal system will be most likely to enter into contracts where arbitration is not subject to review. Responding to Islam as the Other causes Bendjedou to oversimplify the issue.

Islam in the West

Those who are capable of seeing Sharia as it really is – a complex combination of religion, politics, and history – are able to present realistic solutions to the problems that result from arbitration. In “How Sharia Law Could Work in Ontario,”⁴³ Riad Saloojee demonstrated an understanding of how Islam and Sharia operate in Canada, rather than trying to present an idealization of Islam. Although Saloojee initially answered those who present Islam as Bad in similar fashion to Bendjedou, he admitted that there are problems with allowing arbitration in the family context without stronger court oversight. Specifically, he recognized that there is no guarantee of voluntariness, and no assurance of an arbitrator’s qualifications.

Saloojee recommended that four changes be made to the arbitration framework. First, both parties to an arbitration must receive independent legal advice. Second, immigrants and minority women should be educated about their rights. Third, the provincial government should cooperate with minority communities to develop a scheme for the selection and training of arbitrators. Fourth, the government should make available a registry of “sanitized” copies of arbitrators’ decisions.

Saloojee’s analysis was possible because he recognized that Sharia is not a monolithic system; it is neither entirely good nor entirely bad. Instead, Sharia is seen as a system that has changed in the past, and that will continue to change if necessary. Because he sees Sharia and Ontario law as systems that must interact rather than seeing the systems as Others, Saloojee is also prepared to criticize Ontario’s arbitration system as a whole.

Although Saloojee’s recommendations will probably not make for a completely satisfactory solution, they are a good starting point for

⁴³R. Saloojee, “How Sharia Law Could Work in Ontario” *Calgary Herald* (6 September 2004) A11.

debate. It is unquestionable that parties should be required to seek independent legal advice before entering an arbitration agreement. It would also be beneficial to publish decisions that have been stripped of any information that could identify the parties. Those considering arbitration could see what results could be expected, and those unfamiliar with Sharia could see how it works in practice in Canada.

However, Saloojee's second and third recommendations may be more problematic in that they would be expensive to implement. From the province's point of view, one of the advantages of arbitration is that it reduces taxpayer expense by moving disputes out of the court. If this expense is reintroduced in programs to educate immigrants and to train arbitrators, there may very well be a backlash from those who see Islam as Bad: "Why should *we* pay for *them* to apply their bad law?" Ontario will need to balance these concerns with the advantages of greater protection for those considering arbitration.

An alternative solution would be to subject arbitration awards to the same degree of scrutiny to which domestic contracts are subject. For example, the *Family Law Act* allows a provision for support in a domestic contract to be set aside if the provision results in unconscionable circumstances.⁴⁴ Likewise, a court should be able to set aside a provision of an arbitration award that was arrived at fairly but results in unconscionable circumstances. The effectiveness of this judicial protection is uncertain in light of *Hartshorne v. Hartshorne*,⁴⁵ in which a domestic agreement was upheld in spite of the wife's indication, at the time of signing, that she was signing the agreement unwillingly. However, there is no reason to give less protection to parties who resolve a dispute via arbitration than to parties who simply sign a contract that outlines their respective rights. The Legislature should take this opportunity to question whether adequate protection is given to all those involved in family disputes, not just those who choose to use religious-based arbitration.

Conclusion

The IICJ's proposal to provide Sharia-based arbitration has provoked significant media debate over the appropriateness of Sharia in Canada. Unfortunately, much of the debate has been uninformed and

⁴⁴ *Family Law Act*, *supra* note 24 s. 33(4)(a).

⁴⁵ [2004] 1 S.C.R. 550, 2004 SCC 22.

unhelpful due to the portrayal of Islam as the Other. Only those who recognize that Sharia is not a monolithic system and is capable of change have made important contributions to the discourse.

The question that Canadians should be asking is not whether Sharia is Good or Bad. Rather, we need to examine family law in Ontario and the rest of the country to decide whose interests we want to protect and whose interests are being protected. Does family arbitration exist simply to save the government money, or are there genuine benefits to those who use it? Should the government respect the choice of individuals and allow them to resolve their disputes in the manner they choose, or should the government step in and impose solutions? How do we ensure that domestic contracts, whether they are arbitration agreements or not, are based on the true and informed consent of both parties?

There are, undoubtedly, advantages to those who participate in arbitration. It is often cheaper, less intimidating, and more private than going to court, and the arbitrator may be more sensitive to cultural and religious issues than a judge trained in the common law tradition would be. However, we should not remove family problems from the oversight of the courts simply because the parties arrive at a solution via arbitration rather than by some other method.

These issues have largely been ignored in the public debate due to the way the problem has been framed by the media. Perhaps the situation will change for the better once Marion Boyd's recommendations are released. Unfortunately, it is difficult to hold out much hope for this result.

***Addendum:** Marion Boyd's report was released in late December 2004. Since then, in the author's opinion, most newspaper articles have been more accurate in their portrayal of the situation. However, there still appears to be a greater focus on what is wrong with Sharia, rather than a focus on what is wrong with the laws of Ontario.*