The Ontario Sharia Debate: Helping or Hindering Muslim Women?

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In 2003 the Ontario-based Islamic Institute of Civil Justice (IICJ) announced that it would be providing faith-based commercial and family law arbitration services to the Muslim community in Ontario using the principles of Islamic jurisprudence, known as Sharia. Although Christian and Jewish religious groups had been using faith-based arbitration for years, this announcement by the IICJ sparked an intense and emotional debate that played out in both academic and public spheres. As a response to the debate, the Ontario government tasked former Attorney General Marion Boyd with assessing faith-based arbitration and giving her recommendations on the feasibility of the province continuing to allow faith-based arbitration. Boyd came to the conclusion that "within a reformed arbitral system, religious law (Sharia or otherwise) could be used in a way that both allows for accommodation of cultural autonomy, and does not violate the liberty interests of Canadian citizens under the *Charter of Rights and Freedoms*" (Emon, 2008), but this report did little to dispel the raging debate. Despite Boyd's recommendations at the time, Premier Dalton McGuinty made the decision that "There will be no Sharia law in Ontario and further, that there will be no religious arbitration in Ontario" (Farrow, 2006). Although there were many facets to the debate, this paper will focus on the dominant argument that allowing faith-based arbitration would serve to oppress and further marginalize Muslim women. From this examination it will become clear that a revised arbitration system, subject to government oversight, would better protect vulnerable Muslim women than a complete ban on faith-based arbitration.

In order to better situate the argument that Sharia-based arbitration would discriminate against Muslim women it is important to understand the public perception of Sharia and Islam at the time of the debate. Thornback (2005) notes the definition of Sharia as "the path or road leading to the water" and argued that the debate centered on Sharia as a set of unchanging laws,

rather than a theology that provides its faithful with guidelines within which to conduct themselves in family and society as most Muslims understood it. Many opponents to Sharia-based arbitration understood Sharia to be an "inflexible and immutable code of religious rules, based on the Qur'an and traditions of the prophet Muhammad" (Emon, 2008, p.395). However, Emon (2008) notes that "Sharia has a history whose normative foundations and development stretch from the seventh century to the present" (p.395) and that "it is highly misleading to suggest that Islamic law is constituted by the Qur'an and the prophet without further recourse to techniques of juristic analysis that allowed the law to remain socially responsive but at the same time prevented the erosion of the legal traditions authority" (Emon, 2008, p. 396). This narrow and oversimplified perception of Sharia as a set of immutable laws, rather than responsibilities to a way of living, prevailed throughout the debate, spurred on by sensationalist media reports. In a Globe and Mail piece, Worthington (2004) makes the bold statement that Sharia "…has no place in Canadian culture, and certainly not in law. In short, it's an abomination…" (para. 6). Bakht (2006) notes that the announcement by the IICJ sparked a "moral panic" in the public sphere that was fuelled by sensationalized images of fundamental Islamic ideologies such as the controversy over the headscarf, female genital mutilation, and honour killings. This perception helped to perpetuate the notion that "…Islamic law (was) riddled with injustice and (gendered) oppression" (Korteweg, 2008, p.442) and that Sharia-based arbitration could be equated with "the worst examples of justice enacted under the guise of Islam" (Korteweg, 2008, p.442). Emon (2008) contends that the debate was predicated on an erroneous understanding of Sharia as "an all-or-nothing system of de-contextualized rules, which for some were amenable to *Charter* values but for others directly contravened human rights norms" (p. 418). Emon (2008) also believes that this dominant view of Sharia and the vociferous backlash by opponents contributed

greatly to the government's decision to ban faith-based arbitration. It is clear that public perception of Sharia and Islam was cursory at best and Islam stood as a monolithic entity founded on patriarchal fundamental ideologies in the minds of many. In order to enter the debate from an informed perspective one must be "capable of seeing Sharia as it really is – a complex combination of religion, politics, and history" (Thornback, 2005, p.10) and it is clear this was not the case in the Ontario debate.

It is also important to also examine the perception of Muslim women at the time to locate their role in the debate. Bakht (2009) quotes Sharmeen Khan as saying "the stereotype of Muslim women – hidden behind the veil, barred from public participation unless given permission by their husbands – has captivated the imagination of some feminists in Canada and fuelled a commitment to 'save' the women behind the burqua" (p. 3). This trope of the Muslim woman as marginalized and oppressed by her patriarchal, oppressive religion was one that was well supported in the media, but was also strengthened by women's groups, feminists and anti-sharia advocates both within and without the Muslim community. There are problems that arise from this need to "rescue imperiled Muslim women from dangerous Muslim men" (Bakht, 2006, p.2) though, with perhaps the most important being the infantilizing effect this has on Muslim women's capacity to act as agents of their own lives. Zine (2009) also notes that these "paternalistic narratives not only serve to constitute the subjectivity of Canadian Muslim women as universally oppressed victims of cultural misogyny, they in turn reconfigure the construction of the state as the benevolent patron and vanguard of these women" (p.153). In turn these narratives also serve to solidify Muslim women as the "other" who require saving from their enlightened sisters in the West. It is difficult to argue that the intentions of Canadian feminists and women's groups were neither legitimate nor noble, but their work was predicated on

assumptions about what they viewed as right and the diminishing of Muslim women's agency. As Kandiyoti notes, "women should not be seen as passive victims as they are fully fledged social actors, bearing the full set of contradictions implied by their class, racial and ethnic locations as well as gender" (Shaheed, 1994, p. 998).

Marion Boyd stated in her report that she found no evidence of discrimination against women and recommended the continuation of faith-based arbitration with added safeguards to ensure women were treated equally in arbitration. However, various interest groups mired in the debate feared that "Muslim arbitration boards could undo the many years of hard work which have entrenched equality rights in Canada…to the detriment of women, children and other vulnerable people" (Korteweg, 2008, p.436). Feminists were concerned that sharia-based arbitration would oppress and marginalize Muslim women and that sharia law was inherently unfair to women, particularly in the areas of divorce, child custody and inheritance. While sharia laws do tend to favour men, feminist scholars have argued that tradition can be modified and that it "contains a plurality of meanings and can be subject to various interpretations…and that Islam…can and indeed does support women's rights" (Bakht, 2006, p.12). Feminists continued to argue that the only way to protect Muslim women was by state oversight and as Razack (2007) notes "the absolute separation of religion and law" (p.9), but this argument largely ignores the desires of devout Muslim women who choose to live a faith based life. By ignoring the voices of devout Muslim women and restricting their right to choose, feminists do exactly what they are arguing against as this quote from Azizah Al-Hibri suggests "If Western feminists are now vying for control of the lives of immigrant women by justifying coercive state action, then, these women have not learned the lessons of history, be it colonialism, imperialism or even fascism" (Razack, 2007, p. 26).

One central theme among the arguments of feminists and women's groups against faith-based arbitration, is that Muslim women would be coerced into choosing arbitration by their husbands, families and communities and that they would receive more equitable treatment in the secular justice system. Kutty (2010) argues that while this is a valid concern, this is not a concern solely for Muslim women. He notes that "pressures exist even in the non-alternative legal setting, where the vast majority of cases are settled out of court and where, in many instances, parties compromise for less than their legal entitlements (p.565). Opponents to sharia-based arbitration argued that the arbitration system as it was provided "very few substantive protections for equality and did not protect vulnerable individuals, women in particular" (Bakht, 2006, p.6), however they failed to consider any solutions that might involve strengthening a women's position in faith-based arbitration (Razack, 2007, p. 10). By focusing only on secular law as a solution, opponents to sharia-based arbitration effectively marginalized religious Muslim women themselves. These contentious arguments may have succeeded in swaying the government to abolish faith-based arbitration, but some like Farrow (2006) argue that the point was moot as the "government is not typically in the business of regulating and policing the private religious affairs of Ontario residents" (p. 80). Farrow quotes Mubin Sheikh who commented "is the government going to stand outside every mosque and ask people if they are going in to do faith-based arbitration? No, a ban will change nothing" (Farrow, 2006, p. 80). Others involved in the debate also agreed that the government's decision to ban faith-based arbitration did little to change anything. Riad Saloojee of the Council on American-Islamic Relations Canada stated "the reality is that on the ground, faith based arbitration is already going on in an informal way" (Jimenez, 2004, para. 4), which is supported by others such as Bakht (2006) who noted that Muslim women will still choose religious arbitration and that "feminist

concern regarding women's vulnerability to the conscious or unconscious patriarchal practices of arbitrators remain" (p.18). It is clear that the ban on faith-based arbitration did not serve to abolish the practice. Muslim women will still choose to participate in sharia-based arbitration, regardless of whether through choice or coercion and now "we have lost the opportunity to prevent back-alley arbitrations through a regime of government regulation that could have ensured a measure of transparency" (Bakht, 2006, p. 18).

The arguments made by the opposition highlighted many deficiencies in the arbitration act such as the lack of independent legal advice afforded to those participating in arbitration, insufficient training of arbitrators and the lack of requirements for written documentation of proceedings. These were valid concerns, but a weak argument as these deficiencies could be easily amended in a revised arbitration act as Marion Boyd suggested. It is the opinion of this writer that the solution to ensuring equality rights to Muslim women does not lie in the abolishment of faith-based arbitration. As McFarlane's 2012 research on Islamic divorce illustrated despite their lack of legal standing, the Islamic processes of marriage and divorce are very important for Muslims of different cultural, class and educational backgrounds and that many Muslims expressed the desire "to be able to continue to access their Islamic traditions in a private, informal system, and also to be able to use the legal process" (p.6). It is evident that faith-based arbitration will continue unsanctioned and "too many unqualified, ignorant imams" will continue to "make back-alley pronouncements on the lives of women, men and children" (Korteweg, 2008, p. 445). Muslim women would have been better served by a reformed arbitration system that provided safeguards such as access to independent legal advice both prior to agreeing to arbitration and signing an agreement, education about their options both within the religious arbitration system and the secular court system, a requirement that all proceedings are

documented and a means to recourse should the arbitration decision be deemed unequitable or to have been made under duress.

Although opponents to sharia-based arbitration offered many compelling arguments, they would have been better served by using a more "nuanced approach that showed consideration for the religious rights and the equality rights of women" (Bakht, 2006, p.10). The ban on faith-based arbitration in Ontario left little room for religious women who desired to live a faith-based life. Korteweg (2008) noted that the ban "constituted a failure to recognize the possibility that religious women might want to be able to enact certain religious practices, but they might need government assistance in securing a fair interpretation of Islamic jurisprudence" (p.450). The decision to ban faith-based arbitration failed Muslim women on many levels by not recognizing them as actors in their own lives and assuming that they will make choices about their lives that will undermine their rights in the attainment of warped cultural and religious ideals. The argument that Sharia-based arbitration is oppressive to women is what ultimately swayed the Ontario government to make the blanket ban on faith-based arbitration, but the reality is that Sharia-based arbitration is occurring regularly in the lives of Muslim women. The ban did not change anything for these women, rather it ensured that these back-alley arbitrations continue under the guidance of untrained, unregulated, patriarchal imams and that inequality and injustices to Muslim women remain hidden.

References

Bakht, N. (2006). Were muslim barbarians really knocking on the gates of Ontario?: The religious arbitration controversy – another perspective. *Ottawa Law Review, 40* (Summer), pp. 67-82. Available at SSRN: http://ssrn.com/abstract=1121790.

Emon, A. (2006). Islamic law and the Canadian mosaic: Politics, jurisprudence and multicultural accommodation. *U Toronto, Legal Studies Research Paper.* Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=947149

Farrow, T.C.W. (2006). Re-framing the sharia arbitration debate. *Constitutional Forum, 15,* (2), pp. 79-86. Retrieved from http://www.ejournals.library.ualberta.ca

Jimenez, M. (2004, September 11) Arbitration based on faith is working, Muslim group says. *The Globe and Mail,* pp.1-2. Retrieved from http://www.theglobeandmail.com

Korteweg, A. (2008). The sharia debate in Ontario gender, Islam and representations of Muslim women's agency. *Gender and Society, 22* (4), pp. 434-454, doi: 10.1177/0891243208319768

Kutty, F. (2010) The myth and reality of shari'a courts in Canada: A delayed opportunity for the indigenization of Islamic legal rulings. *University of St. Thomas Law Journal. 7* (3), pp. 559-602. Retrieved from http://ir.stthomas.edu/ustlj/vol7/iss3/7

McFarlane, J. (2012) Understanding trends in American Muslim divorce and marriage: A discussion guide for families and communities. *Institute for Social Policy and Understanding, January 2012 Report,* pp. 1-48. Available at www.ispu.org/pdfs/ISPU%20Report_Marriage%2011_McFarlane_WEB.pdf

References

Razack, S. (2007). The sharia law debate in Ontario: The modernity/premodernity distinction in legal efforts to protect women from culture. *Feminist Legal Studies. 15,* pp. 3-32, doi: 10.1007/s10691-006-9050-x

Shaheed, F. (1994). Controlled or autonomous identity and the experience of the network, women living under Muslim laws. *Feminism and the Law. 19* (4), pp. 997-1019. Retrieved from http://jstor.org/stable/3175010

Thornback, J. (2005). The portrayal of sharia in Ontario. *The Appeal. 10* (1), pp. 1-12. Retrieved from http://www.journals.uvic.ca/index/php/appeal/article/view/5679

Worthington, P. (2004, August 26). Wake up McGuinty. *The Globe and Mail,* np. Retrieved from www.theglobeandmail.com

Zine, J. (2014, Dec 16) Unsettling the nation: Gender, race and Muslim cultural politics in Canada. *Special Feature Article.* Retrieved from http://www.legacy.wlu.ca/documents/Unsettling_The_Nation_Gender_Article_Zine_Dec_16_2014.pdf