An Unjust Doctrine of Civil Arbitration: Sharia Courts in Canada and England

By Arsani William

Ecclesiastical law has long been accepted as a form of civil arbitration in Western Democracies. The result of ecclesiastical trials is legally binding and enforceable. Nevertheless, the dangers associated with legal ecclesiastical rulings became manifest when Islamic groups pushed for the recognition of Sharia as a doctrine of arbitration. After a trial in Canada, fears with regard to the safeguarding of human rights under Sharia surfaced among Ontarians. Premier Dalton responded with a ban on all ecclesiastical arbitration in the province of Ontario. In England, fears of gender-biased discrimination and female coercion ignited a similar controversy concerning Sharia’s legitimacy. Here, we examine the root causes of such concerns in England, argue that Sharia is a dangerous doctrine of civil arbitration, and advocate for its rejection from binding arbitration.
BACKGROUND - THE CANADA STORY

On June 25, 2004, Honorable Michael Bryant, the Attorney General and Minister Responsible for Women's Issues in Ontario took initiative. He asked former Attorney General Marion Boyd to examine the public concern about the use of Muslim Sharia law in private arbitration. This review was a result of the growing concern shared by local Muslim women and the Canadian public alike concerning Sharia courts. Months earlier, the Islamic Institute of Civil Justice publicly announced its use of Sharia in family arbitration and inheritance cases. It justified these uses under the protective veil of the Canadian Arbitration Act. Canada’s Orthodox Jewish population used private arbitration under the Arbitration Act for a century in what are called Beth Din courts. The courts decided both contractual and private cases under ecclesiastical law. The rulings became enforceable by the Canadian justice system. Verdicts could be registered if both parties consented to these terms preceding the trial. Similarly, private courts used Catholic canon law in private courts to settle familial and private jurisdiction cases.

The Initial Request for Religious Arbitration

The Islamic Institute of Civil Justice (IICJ) sought Sharia law in private arbitration, but encountered resistance from Muslim women and the New Democratic Party (NDP). The IICJ recognized Canada’s overarching support for multiculturalism. They saw the Arbitration Act as an opportunity, to push for Sharia arbitration in matters of family law, but not commercial and contractual law. Suddenly, counter groups of Muslim women stood up to fight these actions. They claimed that Sharia would treat women in the Islamic community in ways contrary to the Canadian Charter of Rights. The liberal Democratic NDP party examined the issue and hired a social worker, Marion Boyd, to file a report on the issue. Boyd, though not a lawyer, was keen to institute a zero tolerance policy of domestic abuse. Her government peers acknowledged her as a strong feminist. Boyd questioned leaders of the Islamic community and non-leaders who stood in opposition. Her conclusion was shocking among public officials and the public alike.

Though Boyd concluded that Sharia law should apply to private arbitration, she blatantly overlooked that accommodation of any legal framework capable of producing gender-bias convictions would not stand judicial scrutiny. Boyd recommended that with safeguards from The Charter of Rights (1982) in place, Sharia law should apply to private arbitration. Section 1 of the Canadian Charter states that the rights mentioned in the Charter are “supreme.” However, these rights are subject to reasonable limits given overriding ‘demonstrably justified’ considerations. Boyd concluded that Sharia does not violate these rights when used in private arbitration. She recommended 46 changes in the Arbitration Act and the Family Marriage Act to mediate any conflict from future Sharia verdicts. Boyd believed that her recommendation provided a balanced assessment that addressed the view of proponents and opponents, and coincided with Ontario’s policies on equality in family law and multiculturalism.

Nevertheless, Boyd overlooked that the verdicts of an entire community of Islamic Sheiks could neither be answerable nor accountable to anyone. During Boyd’s ground research, the NDP was ousted by a more conservative government that ignored the issue for years. It was the current premier of Ontario, Dalton McGuinty, who recognized the growing controversy. McGuinty acknowledged the overriding political circumstances of recognizing Sharia in Canada. In a smart political decision, Premier Dalton refused recognition of Muslim arbitration. He affirmed that one law would apply to all. In denying Sharia, Dalton needed to reject recognition of the ecclesiastical law of other denominations. Among these were Jews, Catholics, and Jehovah's Witnesses. The decisions
of private religious courts would no longer gain the blessings of state enforcement. These groups could however still pursue private arbitration in quiet. Dalton’s decision would not allow the registration of any decision under the Arbitration Act. Hence, it became a matter of conscious decision of whether individuals choosing to arbitrate under ecclesiastical law adhered to the verdict. If the losing party does not wish to recognize the decision, the state could not enforce the verdict. Up until McGuinty’s decision, only the Jewish and Catholic communities were actively pursuing private arbitration. The Islamic community merely had a request.

A Wrong Decision Made Right

The debate stirred high emotions among the Ontarians. Citizens of Ontario are known to care deeply about the Canadian Charter of Rights and Freedoms. They “do not see multiculturalism to be an unlimited concept, but rather one that must be balanced against individual freedoms.”\(^8\) The United Nations Declaration on the Elimination of Violence Against Women makes a valid observation: Domestic violence is inevitable if the attitudes or beliefs of a culture condone such violence as passive.\(^9\) The outcry against Sharia began here, and rightly so. In her Review, Marion Boyd acknowledged the beliefs of Ontarians, that the Muslim community must first counter traditional “attitudes that may condone violence against women” before recognizing Sharia as an alternative dispute resolution.\(^10\) Her belief that these attitudes could be resolved speedily to meet Western standards of equality was not only hasty, but impractical.

In her forty-six recommendations, Boyd ignored the claims of opponents who saw Muslim law as unfit with Western values. She failed to address the danger of “Muslim women [being] forced to cave in to social pressure and accept unfair decisions.”\(^11\) These women would be held to better settlements under legal entitlements in the Canadian court system. In courts of Sharia law, they would be refused proper jurisdiction and legal claims. McGuinty announced his decision in the face of little backlash among the actively arbitrating religious communities. Jews and Catholics did not want Muslims introducing Sharia into Canada, especially when religious rights groups took the offensive in publicly making manifest the fears of Sharia implementation. They realized that if they were granted the right to arbitrate, then Sharia would be recognized. They applauded McGuinty’s decision. They felt they had to pay a price for it, as legally the law would apply to all.\(^12\) They acknowledged that politically, he could not deny Sharia to Muslims and let the Jews and Catholics continue its practice. In May 2005, the Quebec National Assembly “unanimously supported a motion to block the use of Sharia law in Quebec courts.” In September of 2005, Premier Dalton McGuinty banned all religious arbitration in Ontario, including both Jewish and Christian tribunals.\(^13\)

As seen in 2004, Canada faced growing pleas from Islamic followers to recognize religious Sharia courts in the realm of civil law. The Canadian request was the first documented case study of Sharia law pushing for recognition as an official arbitrating framework in a Western state. Sharia proponents argued that in Ontario, Beth Din courts had been given jurisdiction over Jewish civil matters for nearly 100 years. Equality would mandate the same claim to religious arbitration for Muslims. Social scientists have advanced the idea of integrating Sharia law in private arbitration. The question that was explored in this essay was what issues would be raised if Sharia was implemented in England? How drastic are the social and legal ramifications on Muslim women who choose or are coerced to arbitrate in these courts? Canadian history advises politicians to approach the topic cautiously; however, the English experiment stands unique, because ongoing arbitration via Sharia has not received the endorsement of the state.

SHARIA IN ENGLAND

The Current State of Affairs

To Western society, the word ‘Sharia’ elicits a repugnant image of floggings, executions, beheadings, crimes against women, and other strict punishments. To many, Sharia is seen as incompatible with Western standards of justice. Contrarily, Islamic followers see Sharia as the law of God, revealed through divine revelation. They view Sharia as the embodiment of social justice--the only body of law under which civil and personal matters should be adjudicated.

There is growing controversy over the use of Sharia courts for civil arbitration in England. Since August 2007, English Sharia courts issued hundreds of rulings concerning civil arbitration: marriage and divorce, finances, and domestic abuse criminal proceedings. While these cases were never heard in
common English courts, their rulings hold a vague definition of 'legal status.' Yet, the establishment of Sharia tribunals is a recent phenomenon.\(^{14}\)

In England, the legal motions for Sharia arbitration were executed in silence, without any official endorsement by the state. Many critics cite Gordon Brown's political motives to gain the Muslim vote as the reason for a lack of political opposition. Others cite the large Islamic push for legal recognition. Under the English Arbitration Act of 1996, Muslims pushed for the adoption of Sharia courts as legally-binding arbitration tribunals. Five Sharia tribunals now actively operate in London, Birmingham, Bradford, Manchester, and Nuneaton. Two courts are being planned for Glasgow and Edinburgh.\(^{15}\) These Sharia courts have come to deal with numerous cases involving Muslim divorce, inheritance, domestic violence and small criminal cases. Both arbitrating parties must consent on an arbitrator and the enforceability of the decision. If mutual consent is given, the tribunal's final ruling is both legally binding and enforceable. Mediators are many times Muslim Sheiks and scholars of Islamic Sharia law. Before 2007, these courts dealt with family and dispute matters in private. No state recognition was tied to rulings. It was lawyer Sheikh Faiz-ul-Aqtab who began setting up the Muslim arbitration tribunal panels. He claims that legal jurisdiction was granted in the summer of 2007.\(^{16}\) The method by which these courts claim function is known as “alternative dispute resolution,” as specified in the 1996 English Arbitration Act. This method stems from England's recognition of multicultural rights within the realm of judicial and civil affairs. A poll conducted by the Centre for Social Cohesion found that 40 percent of Muslim students favor the introduction of Sharia law in Britain.\(^{17}\) Yet growing fears of coercion are shared by Britons and Muslim women alike. Robert Whelan of the Civitas Think Tank notes, “It is very easy to put pressure on young women in a male-dominated household. The English law stands to protect people from intimidation in such circumstances.”\(^{18}\)

**The Controversy Unveiled**

Controversy surrounding these courts continues to grow, as human rights groups and the British citizenry fear the violation of women's rights under Sharia arbitration. Archbishop of Canterbury Rowen Williams and Lord Chief Justice Philips have argued for the future of Sharia. Individually, both have noted that Sharia will soon *unavoidably* be used to settle civil disputes between consenting Muslims. The Archbishop sees this as an opportunity for promoting social cohesion. In a public announcement, he noted that “To recognize Sharia is to recognize a method of jurisprudence governed by revealed texts, rather than a single system.”\(^{19}\) The Archbishop's words sparked a national debate about the future of Sharia. Karen Edge, the director of the Centre for Islamic and Middle Eastern Law argues that “You can get married in your own religious community in the Church of England, but you can’t as a Muslim. So it seems rather discriminatory. But you wouldn’t necessarily want to recognize Islamic divorce. It may be that once you have admitted one religious right you would have to open it up to the whole spectrum.”\(^{20}\) The majority of British citizens feel that the ordination of Sharia courts will lead to this very slippery slope.

Sharia courts threaten the integrity of law in the British democracy, by promoting the unequal treatment of women in the British Islamic community. The pressing issue then becomes the potential curtailing of human rights under the auspice of Sharia-arbitration. Despite the overwhelming opposition, these Courts, remain in operation. Public politicians, judges, and private councilmen across England are loudly speaking out against the negative attributes associated with a parallel legal system. Simply, an “offshoot of English law cannot be enforced or sanctioned—especially Sharia law that sees women and men as unequal.”\(^{21}\) Nevertheless, Sharia Courts have and continue to make enforceable rulings under the Arbitration Act. Rulings of Sharia are enforceable through county and high courts in the five districts in which they operate. Many of these courts issued rulings in private familial
mediation since 2005. It was the Archbishop's words that brought this subject to the media spotlight. The Arbitration Act of England allows for alternative dispute resolution by means of party consent. That is, two individuals must agree to a trial by ecclesiastical law. They must also agree upon the enforcement of the decision prior to the trial. If these two conditions are met, then the State can enforce both familial and contractual arbitration verdicts based on religious law. Seeing such, the implementation aspects of Sharia may be unavoidable. Mohammad Shafik, Director of the Rahamadan Muslim Group Foundation argues that "Muslims are not asking British law to be changed, but Sharia law to be recognized as an alternative option."22

Islamic Marriage and Divorce

Sharia proceedings in marriage and divorce do provide for unequal, gender-biased outcomes in many cases. In the Islamic community, religious divorces are very important, but are extraordinarily biased in granting absolute authority to men. Author John Bowen argues the importance of these courts in the Muslim community. He notes many Muslims feel as if these courts are providing a just service to combat discrimination they face in English law.23 This discrimination includes requirements for established residency and proof of legal status before filing for divorce petitions. Other claims of discrimination stem from the differences in which English law views marriage as opposed to Sharia's outlook on marriage. In February of 2008, the London Sharia court heard seven cases from wives petitioning for divorces.24 These women's husbands had either abandoned them or could not be found. Islamic law would mandate that a religious divorce be pursued, only if the husbands could not be found. Bowen notes that in cases like these, the court's services could not be substituted by an English court of law. However, Bowen does not give an equal ear to the voice of women in abusive relationships, who may be pressured into mediation in Sharia tribunals. These women may prefer immediate civil action or divorce, but the pressure to submit to parental and cultural expectations may push them to settle in Sharia Courts instead. This objection is not unfounded. In Islam, marriages are seen as contracts.25 The dissolution of these contracts will provide for settlements that undermine the status of women, as women are not granted equal compensation or child-custody claims. Bowen argues that these Courts "offer women a religious good not otherwise obtainable." Yet, in the cases Bowen mentions, women approached the courts on their own terms. They were neither pressured nor coerced into these courts. This was because they were seeking divorce from husbands who had abandoned them. Many times victims of domestic abuse cannot share the same freedom. In these cases, women may be coerced into Sharia courts where the law is gender-biased. In this circumstance, Sharia courts may become active courts of Islamic enforcement. Nevertheless, one thing remains clear. England is moving "toward a balance of increasingly active Islamic tribunals, perhaps more of them equipped to undertake binding arbitration."26

Many Sharia Tribunals provide non-binding mediation as a form of arbitration. These tribunals are not registered under the Arbitration Act. The five active tribunals that are registered hold the power to make contractual binding decisions. Yet, they have only exercised their authority in personal and private familial arbitration. London's Islamic Sharia Council offers mediation as a form of divorce dispute.
and wives are encouraged to argue their case before an imam. The imam will render an opinion in the shadow of Sharia law. If neither the husband nor wife is satisfied, they can turn to the secular courts to overturn this opinion. However, “family pressure and religious convictions could keep both parties from using civil courts.” This approach to religious arbitration appears to facilitate the lives of Muslims by providing religious advice and guidance. It must be approached very cautiously.

Gender-Biased Discrimination

The debate over Sharia’s incompatibility is one solely unique to Sharia. Jewish Beth Din courts have been actively employed to settle civil and business contractual matters between Orthodox Jews for a century. But the case for Sharia does not pass fundamental scrutiny. Unlike contractual Jewish law, Sharia recognizes men as superior to women in matters of civil arbitration. Men can divorce their wives suddenly with a talaq. However, women must undergo multiple legal proceedings to be granted a religious divorce. Only in the extremest of cases are women granted divorce if husbands choose non-compliance. In disputes over child custody, Sharia recognizes the absoluteness of a father’s ownership if the child is over seven years old. Likewise, Sharia recognizes the superiority of men in inheritance disputes. Women can only be given a maximum of half of what the male receives.

This unbalanced, unequal view of civil arbitration denies the validity of Sharia rulings. Even if women consent to trial by Sharia, they are still being undercut justice in its rulings. In domestic violence cases, the most extreme English Sharia rulings have resulted in the abusive husband’s participation in anger management classes. Sentencing for domestic abuse cases in England depend on severity. Typically, prison sentences of one to three years, a petition for divorce, financial compensation, and restraining order protection are immediately validated. English Muslims who were victims of domestic abuse and who chose trial by Sharia faced different rulings. In every documented case, these abused women were told to halt police investigations and continue with the marriage peacefully! In two cases, the women requested a divorce but were denied, because their husbands would not comply. Furthermore, these Sharia tribunals appear to exert tremendous influence outside the realm of civil arbitration. In August of 2008, a teenage stabbing case in the Somali community in Woolwich was dealt by a Sharia trial. Financial compensation and family apologies were the only actions taken to remedy the conflict. The victim’s family withdrew charges from the aggressor instead choosing to settle the case in a Sharia court. In Courts of English law, charged of second degree murder and assault would have most undoubtedly culminated in a prison sentencing.

Many Muslims draw legitimacy for Sharia courts from the existence of Beth Din courts. They see themselves as disadvantaged in the absence of such courts. In Islamic countries, religiously condoned and recognized marriages are granted automatic legal status. However, these statuses cannot be claimed in countries like Canada and England, where marriage and divorce laws differ. Vice-versa, civil divorces in England are not accepted as religiously legitimate. Muslim divorces must be conducted according to proceedings of Sharia law. Hence, Muslims feel legally disadvantaged in the absence of Sharia courts. They justify Sharia tribunals as an active service to balance what they see as the discriminating civil law of Britain.

Muslim men argue that Sharia may indeed have benefits within the larger English community. Muslim communities would be given the option to pursue Sharia proceedings only if both parties freely consent to the superiority of ecclesiastical law. They wrongly claim that criminal adjudication would be solely reserved for common British courts. The aforementioned stabbing case, settled through Sharia proceedings, proves otherwise. They further claim that civil arbitration can unify the division that Muslims have between legal and religious marital proceedings. Cheaper and more efficient courts can decrease backlog in the English court system. They can also allow for more accessible rulings under terms accepted by both parties. Decreased costs, less intimidating and stressful court proceedings, accessibility and efficiency, and private trial hearings are all among the list of positive attributes Sharia courts share. The Website of the Muslim Arbitration Tribunal (MAT) notes that verdicts cannot be appealed. However, because they operate within the legal framework of England and Wales, decisions are enforceable by the High Court and can be appealed to secular county courts. While the case for multiculturalism is appealing, it is overly outweighed by the pressing concern concerning discrimination against women. Sharia law sees women as holding different roles than men.
Even if rejected legal adjudication, Sharia courts will continue to provide informal advice within Muslim communities. The legal recognition of these courts could in turn unify the many diverse conceptions of Sharia law. This will allow for more consistent rulings by Sharia panels. Recognizing such courts would also allow for a larger interplay between Islamic law and English common law. This would allow for the publicizing of unethical Sharia proceeding. This could lead to calls to vastly reform the system. Also, there exists no substitute in common law that can adjudicate between ritualistic and religious contracts. Many Muslims undergo contractual obligations, such as the mahr, which hold their foundations in the Quran. The English legal system cannot fully arbitrate between these religious contractual claims. Sharia court can delve within Quranic scripture to rule on such matters. In turn, Sharia law can provide a means for the accommodation of those who feel unprivileged. All the meanwhile, recognition of these courts, will only make unjust rulings more highly publicized and less likely to occur in the future.

Russel Bywaters, renowned English lawyer for his work in marital and inheritance settlements notes that “Sharia courts have no legal recognition in England. The parties might feel a sense of obligation to observe its decisions within their own community, but over and above the decisions of Sharia courts have no legal status in England.”  

Bywaters’ view is part of the shared common consensus among Britons. Many Briton’s feel that it is difficult to see how these courts can ever hold a place in English society. This is partly due to Sharia’s conflicts with many of the precepts of the Human Rights Act of 1998. Apart from this, secular law applied in civil jurisdiction emanates from statute and common law. It is a universal law, through which all are tried equally. Bywaters continues, “Those of us who are interested in these things and keep an eye on other jurisdictions look on in horror at Malaysia’s attempts to run the two systems- a civil code/Sharia in parallel in family law. The main legal activity seems to be unbridled forum shopping with consideration of the actual issues relegated very much down the “to do list.”

Josh Bowen puts it best when he says, "Whether you see Islamic tribunals as offering valuable services to members of a religious community, or as threatening to divide citizens and override common values, is largely a matter of how you weight competing political goods.”

In the modern multiculturalist debate, the minority struggle for accommodation must fight against the conservative values and ideals that dominate public life. But what happens when this minority struggle is a struggle for the coexistence of a separate legal system? The over two million Muslims living in the UK are at the heart of this debate. The institution of Sharia law into civil arbitration is a matter that must be approached extremely cautiously, and denied upon grounds of gender-biased rulings and discrimination. This essay has reviewed both the pro and oppositional arguments against courts of Sharia. Coercion and gender-based settlements in these courts were the fears that prompted its ousting from the Canadian system. Civil Sharia has been advanced in the British experiment. Whether its future effects are devastating remain to be seen—yet thus far its rulings have affirmed initial public fears. And the workings of its very nature are grounds for its disqualification from civil judicial arbitration. §

Endnotes

2 Ibid.
3 Ibid.
4 Ibid.
5 Ibid.
6 Ibid.
8 Ibid.
9 Ibid.
12 Boyd, Marion.
14 Bowen, John.
17 Carsen, Jessica. "Do Sharia Courts have a Role in British Life?" Time Magazine. 5 December 2006. <http://www.time.com/time/world/article/0,8599,1566038,00.html>
19 Murphy, Kim.
20 Doughty, Steve.
As the debate rages on in Britain, fears of Sharia Courts increase.