Media's Mediation and Other Matters:
Faith-Based Dispute Resolution in Canada

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On November 25, 2003, a story appeared in the *Canadian Law Times*[1] about a proposal by the Islamic Institute of Civil Justice (IICJ) for resolution of civil law disputes under the Ontario *Arbitration Act*,[2] using Islamic religious law, or *Shari'a*.[3] Three days later, the first line of an American news story proclaimed that "Canadian judges soon will be enforcing Islamic law, or *Shari'a*, in disputes between Muslims, possibly paving the way to one day administering criminal sentences, such as stoning women caught in adultery."[4] This story was picked up by news media around the world from the United States to Turkey.

I came upon these stories in May 2004, when I was updating some research on family arbitration in BC.[5] This and similar stories were part of a hailstorm of opinion pieces for and against the enforcement of *Shari'a* arbitration in Canada.[6] I particularly noted a May 2004 editorial by

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[1] The media coverage seems to have started with a story by Judy Van Rhijn."First Steps Taken Towards Sharia Law in Canada." *Law Times*, Tuesday November 25, 2003, reproduced by Vancouver Indymedia. Available http://vancouver.indymedia.org/news/2003/11/87502.php.

[2] Arbitration Act S.O. 1991, Chapter 17, available: http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/91a17_e.htm.

[3] See the website of the Islamic Institute of Civil Justice at http://muslim-canada.org/DARLQADAform2andhalf.html. See "Frequently Asked Questions and Answers" at http://muslim-canada.org/pflfaqs.html and its perspective on the media debate at http://muslim-canada.org/mediacritique.html.

[4] "Canada prepares to enforce Islamic law: Judges will give legal sanction to disputes between Muslims." *WorldNetDaily*. November 28, 2003. Available http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=35850. It should go without saying that it is nonsense to imagine that Canada's Charter of Rights or any Canadian court would ever enforce or condone criminal penalties for adultery, let alone stoning!

[5] This research is reported in Catherine Morris. "Arbitration of Family Law Disputes in British Columbia." Paper prepared for the Ministry of Attorney General of British Columbia, July 7, 2004. Available http://www.bcjusticereview.org/working_groups family_justice/paper_07_07_04.pdf.

[6] In addition to the Mallick and Worthington articles cited below, see contrasting opinions in the articles by Alia Hogben "The laws of the land must protect all of us, irrespective of gender or religion" *Toronto Star*, June 1, http://www.ccmw.com/In%20The%20Press/ShariainCanada/The%20laws%20of%20the%20land%20must%20protect%20all%20of%20us.htm; Haroon Siddiqui "Battling Phantoms on Sharia Law" *Toronto Star*. http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&c=Article&cid=1086

Heather Mallick in the Toronto *Globe and Mail* which said that mediation of divorces "under sharia or Islamic law is about the best idea since female foot-binding." This story further stated that "sharia law is already written. By a deity. And if you're a Muslim woman who makes the choice of going to Canadian courts rather than signing away her rights under sharia, you're offending one of the bigger gods, as I understand Islam."[7]

"This is interesting," said Ms. Mallick, "not just because it's vile, but because it's part of a worldwide move toward privatizing everything, including the legal system. Ooooh, now we can go law-shopping," she quipped.

I found this interesting, too! Ms. Mallick's story raises several important themes that I want to address in this paper. I have been intrigued as well as troubled by portrayals of Muslims and other cultural and religious minorities in many of the news stories about this issue. I have been more than a little troubled about the human rights concerns raised by women's groups such as the Canadian Council of Muslim Women (CCMW) and the National Association of Women and the Law (NAWL).[8] I have been struck by the media portrayals of arbitration and mediation. I have been interested in the fact that the controversy has largely bypassed British Columbia. And I have been surprised that the dispute resolution community in Canada has paid relatively little attention to this issue.

Media representations of Islam as "other"

The ferocity of Ms. Mallick's comments took me aback, especially since it appeared in the Toronto *Globe and Mail* which is often considered to be one of Canada's better newspapers. Before I go on, it is important to state that Ms. Mallick's commentary misrepresents Islam and *Shari'a* in ways that I find offensive. Islam has no "gods" or "deities." Islam recognize only one true God, and is firmly monotheistic.

Many stories have been more informative and balanced than Ms. Mallick's editorial, however, the portrayal of Islam and Muslims by the Canadian media has been quite consistently quite

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819009712&call_pageid=968256290204&col=968350116795; Faisal Kutty, "Canada's Islamic Dispute Resolution Initiative Faces Strong Opposition" *Washington Report on Middle East Affairs* (May) 70, <http://www.wrmea.com/archives/May_2004/0405070.html>; Lynda Hurst. "Shariah Tribunals." *The Toronto Star*, May 22, 2004 which story has been placed on the IICJ website at http://muslim-canada.org/torontostaromiicj.html.

[7] Heather Mallick. "Boutique law: It's the latest thing." *The Globe and Mail*, May 15, 2004, Page F3. This story cis now found in an appendix to Julia Bass. Report to Convocation, Government Relations Committee, Law Society of Upper Canada, June 24, 2004. Available http://www.lsuc.on.ca/news/pdf/convjune04_gov_relations.pdf.

[8] See Natasha Bakht. Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women. Written for National Association of Women and the Law, The Canadian Council of Muslim Women, and the National Organization of Immigrant & Visible Minority Women of Canada, n.d. Available http://www.nawl.ca/brief-sharia.html. Ms. Bakht's paper is published as "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women." *Muslim World Journal of Human Rights* 1(1) (2004) Article 7. Available: http://www.bepress.com/mwjhr/vol1/iss1/

negative and ill informed.[9] A typical example was written by Peter Worthington in the *Toronto Sun* in May 2004. Mr. Worthington advised Ontario Premier Dalton McGuinty to "wake up" to the idea that "Sharia is totally unfair and discriminates against women and has no place in Canadian culture, and certainly not in law. In short, it's an abomination that mitigates against women in favour of men."[10] Not only that, but, according to Worthington, "*Muslim* women are vulnerable to intimation, coercion, being bullied into accepting Sharia intervention."[11]

Mr. Worthington's totalizing portrayal of *Shari'a* obfuscates the reality of the diversity of Islamic law and the diversity of Muslim people. He implies that all *Shari'a* is all basically the same, all basically alien, and all fundamentally bad. While neither he nor Ms. Mallick imply that "*Muslim* women" are all basically bad, they do imply that *Muslim* women are all basically the same and all basically vulnerable to becoming helpless victims of intimidation, coercion and bullying. Ms. Mallick's analogy to "female foot-binding" provides some credence to the idea that dominant groups in Canadian society are as prone as ever to what Edward Said termed "orientalism"[12] in which the so called "East" is essentially defined as "The Other" and by "its sensuality, its tendency to despotism, its aberrant mentality, its habits of inaccuracy, its backwardness,"[13] and in which the which the so-called "West" is implicitly contrasted as "rational, liberal, right-thinking, honest, and progressive."[14]

Has Canada's cultural diversity taught us nothing at all? Do Canadians really imagine that so called so-called "others" are really all the same, alien and bad[15] as these media portrayals seem to suggest? It also seems fair to say that some of the proponents of Shari'a seem to have gone defensively to the opposite pole, portraying *Shari'a* as good, benign and misunderstood.[16] As the CCMW and others have tried to pointed out, it is just as much of a problem to totalize *Shari'a* and Islam as uniformly "good" any more than all versions of Christianity (or secularism, for that matter) could be claimed to be "good."

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[9] It is beyond the scope of this short paper to comment on the post-September 11, 2001, environment that has contributed to stereotyped portrayals and discriminatory public attitudes towards Islam and Muslim people.

[10] Peter Worthington. "Wake up, McGuinty" *Toronto Sun*, August 26, 2004. Available: http://www.canoe.ca/NewsStand/Columnists/Toronto/Peter_Worthington/2004/08/26/pf-602197.html.

[11] Worthington. "Wake up, McGuinty, emphasis added.

[12] Edward Said. *Orientalism*. New York: Vintage Press, 1978

[13] *Ibid*., at 205, as quoted by James Thornback. "The Portrayal of Sharia in Ontario. *Appeal: Review of Current Law and Law Reform* (2005) 10 *Appeal* 1-12.

[14] James Thornback. "The Portrayal of Sharia in Ontario. *Appeal: Review of Current Law and Law Reform* (2005) 10 *Appeal* 1-12.

[15] *Ibid*.

[16] *Ibid*.

Multiculturalism and faith-based dispute resolution

In Canada, the ideals of multiculturalism conceal a trap that in trying to accommodate all cultural and religious groups we fail to adequately recognize the considerable diversity within all religious and cultural groups. People with minority opinions within particular groups are vulnerable to persecution within the broader group if they do not represent the official voice of the group within the Canadian multicultural "mosaic."[17] This is as much true within my own Christian tradition as it is within any other religion. There is always considerable debate and dialogue within any religious tradition. It is also worth noting here that religiously based mediation and arbitration have been conducted in Canada by diverse Jewish, Christian and Islamic communities for many years. Some of these efforts have been criticized,[18] and some are highly respected, such as the Ismaili Conciliation and Arbitration Boards (CABS).

The current confrontations of multiculturalism seen in the "*shari'a* debates" have led the Ontario and Quebec government's decisions to opt for Canadian law, which (in theory at least) is subject to debate in elected legislatures that (in theory) represent the diversity of the Canadian public. This is the policy choice that has been made by the Quebec government in its exclusion of family arbitration altogether.[19] The Ontario government has made a policy choice to exclude family arbitration that is *not based on Canadian law*. While the proposed amendment[20] would mean that family arbitration which does not use Canadian law would no longer fall under the Ontario *Arbitration Act*, it is important to be aware that the amendment does not exclude family arbitration conducted by a person from a particular religious persuasion (or no religious persuasion). How could it? It remains to be seen whether proponents of various religiously-based dispute resolution methods will decide to raise any legal arguments based on Constitutional and international human rights, or whether they would be successful.

Faith-Based Dispute Resolution in BC

What about faith-based dispute resolution British Columbia? Could religiously based family

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[17] See the interesting paper by Ayelet Shachar. "Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies." *McGill Law Journal* 50 (2005): 49-88.

[18] See Elliot Scheinberg. "Arbitration in Custody and Visitation Issues" (2003) 229 *New York Law Journal* 2. Probably similar arguments could be made about arbitration tribunals set up by various cultural or religious groups including Christian groups.

[19] Article 2639 *Civil Code of Quebec*.

[20] Ontario Legislature, Bill 27, Family Statute Law Amendment Act, 2005, available: http://www.ontla.on.ca/library/bills/382/27382.htm. See the explanatory notes about the amendments to the Arbitration act at http://www.ontla.on.ca/library/bills/382/27382.htm#Explanatory%20Note. This Bill received second reading on December 7, 2005. According to the Ontario legislature website on January 24, 2006, is currently in committee.

arbitration take place under British Columbia law? The answer is a clear "yes."[21] The courts have applied the BC *Commercial Arbitration Act*[22] to family arbitration. The *Act* further provides that anyone may be appointed as an arbitrator with the consent of the parties. This would, of course, include persons from any or no religious persuasion. There are no qualification requirements. Also, like many other arbitration statues, including the Ontario *Arbitration Act*, the BC *Commercial Arbitration Act* provides for choice of law. Further, Section 23 of the *Act* provides that a dispute "may be decided on equitable grounds, grounds of conscience or some other basis" with the express consent of the parties at the time of arbitration.[23] This would include religiously-based codes. The *Act* contains no specific safeguards to specify how consent is determined, other than the general requirements of natural justice.

Is the *BC Commercial Arbitration Act* adequate to supervise arbitration in family law cases? I am of the view that it is not. The BC *Commercial Arbitration Act* was designed to take a "hands off" approach to arbitration. This policy choice was intended to make BC more hospitable to commercial arbitration by creating more finality of awards. The *Act* was not designed for family law matters, and may not provide for sufficient supervision of family law arbitrations to ensure the protection of vulnerable persons, including children and women who have been subjected to abuse or coercion.[24]

In September 2004 the BC Attorney General, then Geoff Plant, announced that he had "no plans

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[21] Some BC lawyers have been under the impression that the BC *Commercial Arbitration Act* does not apply to family law disputes at all. This belief arises from section 2 (2) which says: "A provision of an arbitration agreement that removes the jurisdiction of a court under the *Divorce Act* (Canada) or the Family Relations Act has no effect." However, BC courts have applied the BC *Commercial Arbitration Act* to family law arbitrations. I have found no case that suggests family law cases are not arbitrable under the BC *Commercial Arbitration Act*. Since this section must mean something, it is most likely to be taken to mean that the *Commercial Arbitration Act* does cover family law arbitration, but that the Supreme Court can supervise family law arbitrations. The 1987 case of *Merrell* v. *Merrell* appears to support this approach, saying in *obiter dicta* that Section 2 of BC *Commercial Arbitration Act* "preserves the jurisdiction of the Court" in family law cases. For more detail on how Canadian courts have considered family arbitration, including consideration of cases from Jewish religious tribunals, see Catherine Morris, "Arbitration of Family Law Disputes in British Columbia," *supra* note 5.

[22] *Commercial Arbitration Act* [RSBC 1996] Chapter 55, online: http://www.qp.gov.bc.ca/statreg/stat/C/96055_01.htm

[23] Under Section 23 of the *Commercial Arbitration Act*, an arbitrator "must adjudicate the matter... by reference to law . . . " However, the *Act* does not specify the laws of BC or Canada. Section 23 contemplates that *after the arbitration has commenced* the parties may agree "that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis." It is important to note that this may only happen after the arbitration has commenced (Section 35). This feature of the BC *Act* provides flexibility and choice of law as well as a procedural safeguard to ensure that the default law for arbitration is the relevant law of BC and Canada, and that other laws are only used with informed consent *at the time of a dispute* (as opposed to the time of the drafting of an arbitration agreement, which in family or inheritance cases could be a pre-nuptial agreement).

[24] It is beyond the scope of this talk to give details of the inadequacies of the BC *Commercial Arbitration Act* for family law matters.

to take any action to change the laws of British Columbia to give any special recognition to any set of religious laws."[25] This statement was greeted with applause by Razia Jaffer, president of the CCMW who is quoted as saying: "We are very happy that the attorney-general of BC has rejected the idea of shariah because we believe it would undermine women's rights in Canada."[26] The BC debate about this issue appears to have ended there. Yet, ironically, the BC *Act* has even fewer safeguards than exist in the Ontario's 1991 *Arbitration Act*. At this point in time, the BC government appears to have no plans to open up the *BC Commercial Arbitration Act*, not even to provide additional safeguards in the case of family arbitration.

Concerns relevant to mediation

The current controversy concerns arbitration. However, this does not mean that the debate is irrelevant to mediators. There are two concerns: one relates to the level of journalist knowledge about the field of dispute resolution and the other to some important public policy concerns about dispute resolution processes outside the courts.

It is not clear from Heather Mallick's *Globe and Mail* article (and many others on this subject) whether journalists understand the differences between mediation, which is consensual, and arbitration, which is adjudicative. This seems discouraging after more than two decades of focussed work in Canada by the dispute resolution movement.

Mallick's comment about "law shopping" raises interesting and important concerns about ADR which are not new at all. Before we continue to discuss possible unfair practices of religious minorities in Canada, I want to refresh our memories as ADR practitioners about similar concerns expressed by women's groups in Canada and elsewhere about family mediation (particularly mandatory family mediation) for the past two decades.[27] *Similar concerns* about

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[25] "No religious-based law for B.C., says AG." CBC, September 8, 2004. Available http://vancouver.cbc.ca/regional/servlet/View?filename=bc_shariah20040908

0.Jim Beatty. "Islamic law not needed in BC" *Vancouver Sun*, September 9, 2004. Available: http://www.ccmw.com/MuslimFamilyLaw/Islamic%20law%20not%20needed%20in%20BC.htm l

[27] The feminist critical literature on ADR is voluminous. For a review of the North American critical literature up to approximately 1993, see Barbara Landau, "Qualifications of Family Mediators: Listening to the Feminist Critique," in *Qualifications for Dispute Resolution: Perspectives on the Debate*, edited by Catherine Morris and Andrew Pirie, 27-49. Victoria, BC: UVic Institute for Dispute Resolution, 1994. Also see the report of the Multiculturalism and Dispute Resolution Project of the University of Victoria Institute for Dispute Resolution which reports findings from immigrant groups that where "traditional conflict resolution methods have been identified, the parties may not wish to use them, nor to participate in processes into which they have been incorporated, because the methods are often not compatible with Canadian practices and values. Examples include the traditional male, elder-driven processes used in some cultures... there is a need to find processes which will respect the values of disputants without importing features of processes they cannot now accept." Brishkai Lund, Catherine Morris and Michelle LeBaron Duryea. *Conflict and Culture: Report of the Multiculturalism and Dispute Resolution Project*. Victoria: UVic Institute for Dispute Resolution, 1994, 33. See also Scott Brown, Christine Cervenak, and David Fairman. *Alternative Dispute Resolution Practitioners Guide*. Cambridge, MA: Conflict Management Group, 1998, available:

"boutique law" have been raised in critiques of ADR about privatization of family dispute resolution, particularly mandatory family mediation. *Similar concerns* have been raised about coercion of women in mandatory mediation schemes if there are extreme power imbalances, including coercion through threats of family violence, economic power imbalances, or ideas about gender that tend to foster inequalities. *Similar concerns* about real choice and truly informed consent have been raised about family mediation in general. *Similar concerns* have led to creation of qualification standards for mediators which are increasingly insisting that mediators increase their competency to address issues of power and coercion within mediation. And *similar concerns* have been raised about "second class justice" within ADR schemes, particularly mandatory mediation schemes.[28] So far, governments in Canada have responded to these broader concerns with caution about introducing mandatory family mediation. I think the debates about religiously-based family arbitration point out the wisdom of continued caution.

However, I have noticed no alarmist or inflammatory media coverage of family mediation in the past twenty years or so. Feminist critiques of ADR have rarely made it into the news at all until the recent alarm was raised about the dispute resolution practices of "the other"! Let me emphasize again that concerns about ADR are not confined to the practices of particular conservative religious groups.

Conclusion

A good deal of public policy consideration and debate is needed to ensure equality, adequate religious freedom, and adequate state protection of the rights and well-being of vulnerable persons. Public deliberation has not been assisted by the polarized, inaccurate and inflammatory portrayals of faith-based dispute resolution in many media reports. I welcome the fact that the CBA is encouraging respectful dialogue through forums like this one which attempt to provide balanced information in ways that do not shrink from addressing the hard issues. While it is arguably late in the debates for the Canadian Bar Association to be convening focussed attention to these important questions, the issue of faith-based arbitration in Ontario is not yet settled; the

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http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacp335.pdf. See the "Bangladesh Case Study" in this work. See also Sarah Leah Whitson. "'Neither Fish, nor Flesh, nor Good Red Herring' Lok Adalats: an Experiment in Informal Dispute Resolution in India." *Hastings International and Comparative Law Review* 15 (1991-1992):391-445.

[28] The qualifications standards of Family Mediation Canada and the BC Mediator Roster Society both require at least three days of training specifically in family dynamics in divorce and separation and family violence. The Family Mediation Canada Code of Professional conduct requires mediators to ensure that parties have the capacity to negotiate fairly, and provides a duty for mediators to "ensure balanced negotiations," and not to "permit manipulative or intimidating negotiating tactics." See http://www.fmc.ca/main.asp?p=Common/code.htm. The Code of Conduct of the BC Mediator Roster Society requires mediators to "make every reasonable effort to identify threats to the safety of any participant, and either make the mediation process safe or end it." Family mediators are also required to "assess or be satisfied that the participants have been assessed for the appropriateness for mediation by screening and individual interviews," and be satisfied either that there has never been any abuse or that if there has been abuse, "a fair and safe mediation is still possible" and that "any vulnerable participant can be protected in the mediation process and all of the necessary safety measures to do this are put in place for the mediation." See http://www.mediator-roster.bc.ca/Standards_Conduct.pdf

proposed amendments to the *Arbitration Act* are currently in Committee stage after First and Second Readings in the Ontario legislature.[29] The issues are proving to be far from settled. Therefore, it is timely that the CBA has formed a committee representing ADR, Family, and Constitutional and Human Rights National Sections, which along with the CBA's Standing Committee on Equity is mandated to develop an issues paper and possible recommendations on the issue of faith based arbitration for consideration by the CBA National Council in August, 2006.

Notes

[29] See note 20.