

**National Association of
Women and the Law**



**Association nationale
Femmes et droit**

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**Arbitration, Religion and Family Law:
Private Justice on the Backs of Women**

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Arbitration, Religion and Family Law: Private Justice on the Backs of Women

In Canada and other parts of the world, many religious groups have been organizing to implement policies that would influence the manner in which civil society is run. It has been argued that this use of religion for political gain threatens to undermine hard won entitlements to equality and basic human rights.¹ Much media attention has recently focused on the issue of the formation of arbitration tribunals that would use Islamic or sharia² law to settle civil matters in Ontario.³ Certain members of the Muslim community in Toronto belonging to the Islamic Institute of Civil Justice have proposed such tribunals. In fact, the idea of private parties voluntarily agreeing to have their disputes resolved by an arbitrator using a foreign legal system is not new. Ontario's *Arbitration Act*⁴ has allowed parties to resolve disputes outside the traditional court system for some time. Other religious groups including several Jewish communities have created Jewish arbitration tribunals or *Beis Din* in order to resolve civil matters between individuals using the *Arbitration Act*. Some of these tribunals have been sitting in parts of Canada since 1982,⁵ setting a precedent for Muslim communities to do the same.⁶

The primary purpose of this paper is to examine the legal implications of arbitration tribunals that will utilize sharia⁷ law in Ontario. Part one of the paper will investigate the role of arbitrators, the mechanisms for appealing arbitral awards to the courts, judicial interpretation of arbitral agreements and awards, the importance of legal representation and the gender-based impact on women with an accompanying analysis of the section 15 right implicated under the *Canadian Charter of Rights and Freedoms*.⁸ Key sections of the *Arbitration Act* will be examined and contrasted with the reality of how such clauses are likely to be interpreted to the disadvantage of women. The general process

¹ Kathleen McNeil, "Muslim Fundamentalisms and Legal Systems" (December 2003) online: Web Resource for Women's Human Rights <<http://www.whrnet.org/fundamentalisms/docs/issue-muslim-fundamentalisms-0401.html>>. This author's use of the term "fundamentalist" connotes groups and ideologies that appropriate religious authority to pursue extreme right-wing political agendas.

² Alia Hogben has noted that sharia is an all encompassing, value-laden term that literally means the beaten path to the water. Metaphorically, it describes the way Muslims are to live. See Alia Hogben, Editorial, *The Toronto Star* (1 June 2004) "The Laws of the Land Must Protect All of Us, Irrespective of Gender or Religion" online: The Star <www.thestar.com>. Syed B. Soharwardy has stated that the Arabic word sharia means "laws, rules, regulations, way." That is, the "code of conduct for Muslims." See Syed Soharwardy, "Shari'a – A Blessing OR a Burden" online: Islamic Supreme Council of Canada <<http://www.islamicsupremecouncil.com/sharia.htm>>.

³ Some journalists have succumbed to an anti-Muslim sentiment in reporting this issue. The colonialist stereotype of Muslims as barbaric and in need of "civilizing" has been perpetuated in certain media reports. This sensationalized essentialism does nothing to forward the cause of women's equality and this paper in no way supports these points of view.

⁴ *Arbitration Act*, S.O. 1991, c. 17 ("the Act").

⁵ Lynne Cohen, "Inside the Beis Din" *Canadian Lawyer* (May 2000) 27 at 27.

⁶ According to Imam Hamid Slimi, the Islamic Council of Imams-Canada have been involved in mediation and arbitration for more than ten years. They have dealt with a number of issues including Islamic divorce. Hamid Slimi, Letter to the Editor, *The Toronto Star* (1 June 2004) online: The Star <<http://www.thestar.com>>.

⁷ Though some organizations have noted their objection to the use of the term "sharia" in the context of arbitration in Ontario, this paper uses the terms "sharia", "sharia law", "Islamic law", and "Muslim family law" interchangeably. See for example, Council on American-Islamic Relations Canada, Review of Ontario's Arbitration Process and *Arbitration Act*: Written Submissions to Marion Boyd online: CAIR-CAN <<http://www.caircan.ca/downloads/sst-10082004.pdf>>.

⁸ *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 [Charter].

of arbitration in Ontario will also be outlined. Though the scope of arbitration tribunals can include a wide range of legal areas, the principal area of inquiry of this paper will be family law with a particular emphasis on the impact that sharia law could have on Muslim women⁹ in Ontario. The paper will also consider the broad issue of the increasing privatization of family law.

Part two of the paper will examine the human rights framework with an emphasis on the role of multiculturalism and the protection of religious freedom both domestically and internationally. In particular, the unique position of women within minority groups will be examined. Part three of the paper will consider the doctrine of the separation of “church” and state with a view to understanding Canada’s relationship with religion and religious communities. Finally, part four of the paper will summarize and assess various law reform proposals put forth by key actors in the debate around religious family arbitration in Ontario including the preliminary recommendations put forth by the National Association of Women and the Law. The paper ends with reflections on the need to have ongoing discussions and consultations on this topic and the many areas that it implicates.

Part One: Family Arbitration Using Sharia Law

I. Arbitration and Family Law in Ontario

Although the bulk of this paper addresses the distinct circumstances of family arbitration in Ontario, most other provinces of Canada have also enacted arbitration legislation. The debate in Ontario surrounding the use of religious principles to resolve family law matters will have implications for many of the provinces of Canada. It is hoped that the issues raised in this paper, specifically the suggestions for law reform will influence Ontario, other provincial governments and the federal government to reexamine the situation of family law and arbitration, in particular, its implications for women.

A. Ontario’s Arbitration Act

Arbitration is a form of alternative dispute resolution by which people are given a voluntary alternative to the increasingly lengthy and expensive cost of litigation under the traditional court system.¹⁰ Under arbitration, parties agree to have their dispute settled by an adjudicator agreed upon by both parties. Ontario’s *Arbitration Act*, amended in 1991, sets out the rules to be used in resolving civil disputes. For example, the Act sets out how the arbitrator is appointed and how he or she conducts the resolution of disputes. The parties are given much freedom to design their own processes because arbitration is considered a private system that is entered into by agreement.

⁹ The author acknowledges the limitations of using the phrase “Muslim women” which tends to connote a singular group of women with similar interests and goals. Muslim women are in fact, made up of women from a vast diversity of races, countries of origin and beliefs. “Diversities are so pronounced that one has to ask whether the term ‘the Muslim world’ is at all meaningful if it refers to such an amorphous, divergent, shifting composition of individuals and societies who are not infrequently in conflict with one another.” Fareeda Shaheed, “Asian Women in Muslim Societies: Perspectives & Struggle”(Keynote Address to the Asia-Pacific NGO Forum on B+10, July 2001, Bangkok) online: Women Living Under Muslim Law <<http://www.wluml.org/english/newsfulltxt.shtml?cmd%5B157%5D=x-157-59336%20&cmd%5B189%5D=x-189-59336>>.

¹⁰ Berend Hovius, *Family Law: Cases, Notes and Materials*, 5th ed, (Toronto: Carswell, 2000) at 37.

In the family law context, mediation and arbitration are perhaps the most common alternatives to litigation. In mediation the parties design an agreement themselves with the assistance of a neutral mediator. This is considered advantageous because lawyers often cannot predict what a judge will do if disputed issues go to trial. A settlement, such as a separation agreement, gives the parties control over their own financial and property rights and can be filed with a court and then enforced as an order. It can also ensure that values different from those propagated by the state can serve to guide individuals' interests. Mediation ensures privacy and can promote more constructive parenting relationships after divorce in cases where there is no abuse or oppression. Notably however, there has been much feminist critique of the perils of mediation generally and within the context of domestic violence.¹¹ Mediation is regarded as a consensual process, from which a party is free to withdraw at any time.

The use of arbitration is a relatively new development in family law. The *Arbitration Act* was amended in 1991 with a view to resolving civil disputes in a more cost effective manner. The original intent of the act was likely to increase efficiency in primarily commercial and not family law matters.¹² Arbitration is different from mediation in that the parties agree to have a third person adjudicate their dispute for them in a similar manner that a judge would. Some perceived advantages to arbitration are that the process is considered private, is often less expensive than litigation and an arbitral award can be filed with a court and then enforced as a court order. Filing an arbitration order with a court is neither mandatory nor does it represent court oversight of an arbitral award. It merely means that a party to the arbitration agreement has recourse to enforcement should another party fail to abide by the arbitrator's decision. Once an arbitration agreement is signed, the parties do not have the option of withdrawing from arbitration. This can be particularly problematic where an agreement to arbitrate is signed at the date of marriage, but the actual arbitration does not take place until years later, during which time a person may have changed her/his mind about wanting to submit a dispute to arbitration. In the context of arbitration using religious principles, this may pose problems for the individual whose religious beliefs change over the course of time.

The *Arbitration Act* allows parties to arbitrate most civil matters without express limits. Arbitrators however, may only impose such decisions on parties that the parties could bind themselves to directly. In other words, matters of a criminal nature that involve the state, or disputes involving individuals or institutions who have not agreed to arbitrate

¹¹ Goundry S. A. et al., *Family Mediation in Canada: Implications for Women's Equality* (Ottawa: Status of Women Canada, 1998) and R. Mandhane, *The Trend Towards Mandatory Mediation in Ontario: A Critical Feminist Legal Perspective* (Ottawa: Ontario Women's Justice Network, 1999). See also Georgina Taylor, Jan Barnsley & Penny Goldsmith, *Women and Children Last: Custody Disputes and the Family 'Justice' System*, (Vancouver: VCASAA, 1996) where it states at 29: "No amount of training on the part of a mediator can make up for the control an abuser has over a battered woman. It is not hard to understand that a woman who has been physically assaulted, demeaned and derided, threatened and isolated would find it impossible to be assertive sitting across the table from her abuser. If the process of mediation set up continued contact, which is almost inevitable when dealing with custody and access issues, the autonomy and safety that she sought in leaving the relationship is seriously jeopardized."

¹² An inspection of the provincial parliamentary debates prior to the enactment of the *Arbitration Act* suggests that the primary concern was to ensure a more cost effective means of resolving civil disputes and to salvage scarce judicial resources. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, (5 November 1991) at 3384 (Mr. Hampton). See also Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, (19 June 1990) at 1845 (Mr. Scott).

are not matters that can be arbitrated upon. Similarly, disputes involving public status such as marriage and divorce cannot be resolved by arbitration. Divorce is additionally, a federal matter and thus, is also outside the provincial jurisdiction of arbitration. Typical disputes that are resolved via arbitration are commercial disputes, construction disputes, rental disputes and intellectual property issues. Certain family law matters particularly upon the dissolution of a marriage or common law relationship can also be submitted to arbitration, for example spousal support or a division of matrimonial property.

1. The Role of Arbitrators

Ontario's *Arbitration Act* allows consenting parties to have their disputes settled by any mutually agreed upon person. Arbitrators are required by ss. 11(1) of the Act to be independent and neutral as between the parties, unless the parties decide otherwise.¹³

The Act does not require arbitrators to have any special training since the parties are free to choose whomever they believe will be the most appropriate person to resolve their dispute.¹⁴ Pursuant to ss. 10(1) of the Act, anyone who can get her/himself chosen by disputants or by a court can be an arbitrator. Arbitrators are required by ss. 11(2) and (3) of the Act to disclose to all parties any circumstances of which she/he is aware that may give rise to a reasonable apprehension of bias.

Arbitrators are lawyers or private citizens who may or may not make a living through adjudication. Generally, private parties appoint arbitrators and they pay the arbitrator's fees.¹⁵ If however, the parties to arbitration cannot agree on who should arbitrate a matter, a court can be asked to appoint someone under ss. 10(1) of the Act. The court will normally appoint someone based on suggestions made by one of the parties. Arguments are made by both parties to persuade the court as to who to appoint.

Though several media sources have noted that the *Canadian Charter of Rights and Freedoms* is the supreme law of the land that will preclude discriminatory provisions in arbitral agreements, it must be recalled that arbitration impacts only civil disputes. The *Charter* is legislation that applies to state action and not disputes between private individuals. Thus, the *Charter* does not bind arbitrators *per se*. Where however, an arbitral award is filed with a court and enforced as an order governmental action may well be implicated. Though the *Charter* became part of the Constitution of Canada in 1982 and by virtue of s. 52(1) of the *Constitution Act, 1982* any law that is inconsistent with the *Charter* "is to the extent of the inconsistency of no force or effect",¹⁶ it is difficult to predict what impact this will have on legislation that allows two parties with informed consent to agree to arbitration using any "rules of law."¹⁷

Traditionally perceived as facets of private life protected from state intrusion, certain family law matters have been acknowledged as subjects of public scrutiny and influence. For example, in the matter of spousal support where government action is not implicated, the courts have utilized a process of interpretation by which *Charter* values

¹³ In some contexts a three-arbitrator panel is appointed, with each disputant choosing one member. The two non-independent arbitrators then pick a neutral third arbitrator to act as chair.

¹⁴ An association of chartered arbitrators utilizing a code of ethics exists in Ontario, but there is no legal requirement to avail oneself of these services. See online: ADR Institute of Ontario <www.adrontario.ca/carb.html>.

¹⁵ Hovius, *supra* note 10 at 37.

¹⁶ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52(1) [*Constitution*].

¹⁷ *Arbitration Act*, *supra* note 4 at s. 32(1).

have been imported into disputes between private individuals in order to recognize and redress historic disadvantages endured by women.¹⁸ An argument can be made that arbitration involving family law, no matter what legal framework is used to resolve the dispute, should by analogy and in order to maintain coherence in the law also import *Charter* values. Alison Harvison Young makes the major claim that substantially because of the *Charter* family law can no longer be characterized as falling within the domain of private law. The *Charter* has “articulated values such as equality that form a framework or backdrop of principle, in turn creating an overall degree of integrity or coherence” and it has legitimated a methodology of adjudication that openly articulates policy considerations.¹⁹

However, should reliance be placed on *Charter* values, there is no reason why only equality and not other *Charter* rights such as freedom of religion would be selectively included in determining the content of private agreements. It has been suggested that the progressive changes evident in family law over the years are not simply the result of *Charter* values, but the robust values of equality indigenous to family law.²⁰

B. The Arbitration Process

Parties to arbitration and sometimes their chosen adjudicator sign a contract called an arbitration agreement that stipulates the time frame, the scope of the issues to be adjudicated upon and other relevant matters which the parties wish to submit to arbitration. Some arbitration agreements are very complex and comprehensive including the specific processes by which arbitration will be conducted, while other agreements are very simple. The *Arbitration Act* stipulates in ss. 5(3) that an arbitration agreement need not be in writing. A domestic contract covering matters governed by the *Family Law Act* or the *Children’s Law Reform Act* such as custody and access to children or support obligations must however, be in writing, signed by the parties and witnessed otherwise it is unenforceable.²¹ It is uncertain whether arbitration agreements resolving family law matters, but made outside the context of a domestic contract under Part IV of the FLA need to be in writing.

It is useful to emphasize the distinction between an arbitration agreement and an arbitral award. The arbitration agreement is signed by the parties to authorize the arbitrator to act, whereas the arbitral award is the decision or reasons of the arbitrator. Subsection 32(1) of the *Arbitration Act* provides that parties to arbitration can choose the legal framework by which their disputes will be settled. Parties are free to adopt any “rules of

¹⁸ See generally *Moge v. Moge* [1992] 3 S.C.R. 813 [*Moge*]. Alison Harvison Young notes that the *Charter* has provided a principled framework of values which has guided and influenced the Supreme Court of Canada in issues involving the interpretation or extension of the common law, the interpretation of statutes and the exercise of judicial discretion. Alison Harvison Young, “The Changing Family, Rights Discourse and The Supreme Court of Canada”(2004) 80 Can. Bar R. 749 at 787.

¹⁹ Alison Harvison Young, *supra* note 18 at 792.

²⁰ Robert Leckey argues that “the contemporary orientation of family law are substantially consistent with the values animating legislative developments in recent decades: civil emancipation of women in Quebec; the introduction of no-fault divorce; the enactment of matrimonial property legislation; the introduction of support obligations between unmarried cohabitants and inclusion of them in social legislation; the abolition of illegitimacy; the extension of child support obligations to de facto children.” Leckey suggests that while the *Charter* has served as an instrument that has led to significant family reform, this should not be the basis upon which to downplay the strong values of equality and fairness internal to family law. Robert Leckey, “Family Law’s Relational Subject” (October 2004) [unpublished, on file with author].

²¹ *Family Law Act*, R.S.O. 1990, c. F.3, s. 55(1) [FLA], See *Duguay v. Thompson-Duguay* [2000] O.J. No. 1541 [QL] at para. 32.

law” to govern their arbitrations, so long as the results are not prohibited by law or purport to bind people or institutions that have not agreed to the process. In other words, the Act has opened the door to utilizing any code including religious principles for resolving civil matters in Ontario.

According to ss. 5(5), an arbitration agreement may be revoked only in accordance with the ordinary rules of contract law. Section 6 of the Act authorizes a court not to enforce an arbitral award if the parties did not have real consent to arbitrate. Thus, if brought to the attention of a court, an arbitral agreement could be challenged on the basis that it was signed under duress, coercion, undue influence, misrepresentation or based on unconscionability. The success of a party’s attack or resistance to an arbitral award on the ground of non-consent to an arbitration agreement will depend on the facts in each case and the interpretation of consent, coercion, undue influence and/or duress given by the courts in past cases (see below “Judicial Interpretation of Private Agreements”).

Subsection 50(3) of the Act provides that the court shall enforce an arbitral award. Thus, arbitration awards are final and binding in the province of Ontario unless set aside or appealed according to the Act.

C. The Content of Arbitral Awards in the Family Law Context

There are some limits on the substance of arbitration agreements. Theoretically, discriminatory provisions or clauses that incorporate for example a gender bias cannot be included as part of an arbitral agreement as this would likely be considered unconscionable under the principles of contract law. As a practical matter, given the private nature of arbitration a court will not be aware of unfair provisions unless a review mechanism is utilized.

It is certainly not illegal to contract out of certain statutory rights. Indeed the alternative dispute resolution process encourages parties to design their own bargains that are suited to their individual needs. There are however, certain base requirements. In the family law context, agreements on property division and spousal support require full disclosure of finances from each party and a clear understanding of the consequences of the agreement. A clear understanding of the nature and consequences of the agreement typically includes the ability to read and access to independent legal advice. If these criteria are not present, a court can set the agreement aside if one party applies. Where as a result of a marriage breakdown one party would require social assistance, the government would rather have that party’s former spouse pay spousal support as required than burden the state with this matter.²² Thus, this may be another instance when a court could set an agreement aside. Moreover, the law does not enforce certain kinds of agreements, as contrary to public policy, such as that women remain chaste as a condition of separation.²³ In addition, some rights, at least theoretically, cannot be waived in advance, such as the right to occupy the matrimonial home because this could impact on the rights of any children of the marriage.²⁴

²² Brenda Cossman has argued that increased private obligations dovetail nicely with a shrinking social safety net. Cossman in Harvison Young, *supra* note 18 at 765. See also Mary Jane Mossman, “Conversations about Families in Canadian Courts and Legislatures: Are There ‘Lessons’ for the United States?” (2003) 32 Hofstra L. R. 171 at 183-190.

²³ FLA, *supra* note 21 at s. 56(2).

²⁴ Section 52(2) of the FLA, *ibid.* provides that “A provision in a marriage contract purporting to limit a spouse’s rights under Part II (Matrimonial Home) is unenforceable.”

1. Division of Property

A married couple in Ontario has the right under the *Family Law Act* to an equal division of property upon the dissolution of the marriage.²⁵ A married couple can agree to vary their statutory rights to the “net family property”²⁶ by virtue of a domestic contract. A domestic contract may include a clause wherein the parties agree to arbitration in order to resolve their dispute. Where an alternative means of dividing the parties’ property is resolved via arbitration, a court’s primary concern on appeal will be to examine whether the arbitration order failed to consider undisclosed significant assets, whether a party understood the nature or consequences of the arbitration agreement and any other matter in accordance with the law of contract.²⁷ The safeguards of the law of contract would include considering such factors as whether the parties received independent legal advice and whether an agreement may be rendered invalid by reason of duress, unconscionability, misrepresentation or inequality in bargaining power.

2. Spousal Support

A court will consider similar factors in determining whether to set aside an arbitration order that dealt with spousal support between married or common law spouses or same-sex partners.²⁸ If an agreement produces unconscionable results or will force family dependants to seek public assistance or if the terms of the arbitration agreement were being breached, a court may grant an order respecting spousal support that overrides the terms of the arbitral award.

3. Custody, Access, Child Support and Other Matters Involving Children

Because the *Arbitration Act* provides no express limits to the content of arbitrations, parties can have matters such as custody, access, child support and other matters including the moral and religious education of their children arbitrated upon. In fact, private agreements regarding custody and access are far more common than court mandated orders. The Islamic Institute of Civil Justice has made statements to the effect that custody, access or child support matters will not be arbitrable.²⁹ In fact, there is no legal impediment to doing so.

As child support falls under the joint jurisdiction of the provinces and the federal government, an arbitrator will be unwise to stray far from the Child Support Guidelines.³⁰ Section 56(1.1) of the FLA additionally provides that a court may disregard any provision of a domestic contract where the child support provision is unreasonable having regard to the child support guidelines. The Ontario Superior Court of Justice has noted that though the *Arbitration Act* governs all types of civil disputes, its clauses are not framed particularly for family law and “still less are they drawn for custody and access

²⁵ FLA, *ibid.* at s. 5(1).

²⁶ See s. 4(1) of FLA, *ibid.* for the definition of the “net family property.”

²⁷ *Ibid.* at s. 56(4).

²⁸ *Ibid.* at s. 33.

²⁹ Mr. Syed Mumtaz Ali has been quoted as saying that Islamic family law would definitely not apply in child-custody cases: “We cannot use that aspect because Canadian law is very sensitive to the interests of the child and the courts must decide custody.” See Marina Jiminez “Islamic Law in Civil Disputes Raises Questions” (11 December 2003) online: Workopolis.com <<http://www.workopolis.com/servlet/Content/qprinter/20031211/SHARIA11>>.

³⁰ See s. 15.1(3) of the *Divorce Act*, R.S., 1985, c. 3 and s. 33(11) and s. 56 (1.1) of FLA, *supra* note 21.

matters.”³¹ Significantly, in *Duguay v. Thompson-Duguay* and *Hercus v. Hercus*, the Court explicitly held that it retains its inherent *parens patriae* jurisdiction to intervene in arbitral awards where necessary in the “best interests of the children.”³² The courts’ *parens patriae* jurisdiction refers traditionally to the role of the state as sovereign and guardian of persons under legal disability such as minors or the mentally unwell.³³ However, because arbitration is a private order any award affecting children would only be alterable if brought to the attention of courts.

D. Court Intervention in Arbitral Agreements and Awards

There is no guarantee that arbitration will eliminate time-consuming and expensive litigation as the *Arbitration Act* provides a procedure by which a party can appeal and/or judicially review an arbitral award under certain circumstances.

Arbitration does not necessarily lead to court intervention. Parties may be satisfied with their arbitral awards or unable for a variety of reasons to bring the matter to court. Arbitrations and the awards that result from them are by their nature private. Unless the awards are challenged in court or need to be enforced, the process remains outside the public realm. Particular arbitral tribunals may, but are not required to develop their own rules with respect to the keeping of records and/or transcripts. For some participants this privacy is considered one of the attractions of the arbitration process, but for others it could result in isolation and the privatization of oppression. As the Ministry of the Attorney General points out in a letter to the Canadian Council of Muslim Women:

Even plainly illegal activities may occur unless state authorities find out about them in some way. Similarly, people may suffer from unjust arbitral awards, unless they bring them to the attention of the courts.³⁴

The following sections will delineate the distinction between appeals and judicial review and outline the circumstances when such procedures may be available.

1. Appeal Process

Section 45 of the *Arbitration Act* outlines the details of the technical right of appeal available to a party. Where an arbitration agreement makes no mention of appeals on questions of law, a party may appeal an award with the permission of the court. Permission will only be granted where the court is satisfied that the matter is of sufficient importance to the parties and the determination of the question of law will significantly affect the rights of the parties.³⁵ Arbitration agreements that specifically provide for rights of appeal on questions of law, questions of fact and questions of mixed fact and law³⁶ will be examined by the court and the court may require an arbitral tribunal to

³¹ *Duguay*, *supra* note 21 at para. 31. See also *Hercus v. Hercus*, [2001] O.J. No 534 [QL] [*Hercus*] at para. 76.

³² *Ibid.* See also *Children’s Law Reform Act*, R.S.O. 1990, c. C.12 at s. 69 and FLA, *supra* note 21 at s. 56(1).

³³ *Black’s Law Dictionary*, 6th ed., s.v. “*parens patriae*”.

³⁴ Letter from Ministry of Attorney General, Policy Branch (April 26, 2004) to Ms. Alia Hogben, Executive Director, Canadian Council of Muslim Women at 5 [on file with author].

³⁵ *Arbitration Act*, *supra* note 4 at s. 45(1).

³⁶ A question of law includes a question touching the scope, effect or application of a rule or principle that the courts apply in determine the rights of parties. *R. v. Alberta Giftwares Ltd.* [1974] S.C.R. 584, *per* Ritchie J. A question of fact is a factual finding or inference requiring a conclusion of fact based on a set of facts. Questions of mixed fact and law involve the application of a legal standard to a set of facts. See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 26.

explain any matter.³⁷ The remedies available to a court are to confirm, vary or set aside an arbitral award or remit the matter to the arbitral tribunal with the court's opinion and/or directions.

In an appeal, a court is entitled to afford a certain deference or regard to the arbitrator's decision. The appropriate degree of deference is called the standard of review. In *Robinson v. Robinson*, a family law decision of the Ontario Superior Court of Justice, the court noted "that a court should not interfere with the arbitrator's award unless it is satisfied that the arbitrator acted on the basis of a wrong principle, disregarded material evidence or misapprehended the evidence."³⁸

Generally, courts will be strict in their review of pure questions of law and will replace the opinion of the arbitrator with their own. That is, an arbitrator's decision will have to be "correct" if it is not to be overturned. If a party to arbitration under the Islamic Institute of Civil Justice appealed a pure question of law to a court, it is most likely that the applicable law wherein a tribunal must be correct would be Canadian law and not, any version of the sharia opted into by the parties. The underlying rationale for this standard is the principle of universality which requires appellate courts to ensure that the same legal rules are applied in similar situations.³⁹ An alternative possibility is that the court will decide an appeal based on sharia according to the rules of inter-state arbitration. Thus, if the parties agree to the substantive law of another jurisdiction, at the arbitration itself arguments will be made on both sides as to what the law of that jurisdiction actually is. An appellate court would use this record to make its decision as to whether an error has been made in the law of that jurisdiction. Where there is incomplete information in the record or where parties have not argued the law of the foreign jurisdiction, the court will assume that the foreign law is the same as Ontario's law. Importantly, under this situation parties to arbitration or their lawyers/other representatives will be required to argue the relevant "rules of law".

This could provide the strongest protection for vulnerable parties particularly where there is a concern that an award may permit something that would be contrary to Ontario's family law regime as by default the assumption of the court will provide a type of statutory minimum standard. However, an inevitable consequence of this rule will likely result in a battle between the more conservative and modernist Islamic scholars who will be used as experts at the arbitration to determine the nuances of sharia law.

For parties concerned about unjust arbitral awards, the mechanism of appeal is the strongest safeguard against awards that are contrary to Canadian law.

The findings of fact made by an arbitrator are owed the highest degree of deference. They cannot be reversed unless the arbitrator has made a "palpable and overriding error." This standard recognizes that the trier of fact is better situated to make factual findings owing to her/his extensive exposure to the evidence, the advantage of hearing oral testimony including assessing the credibility of witnesses, and the familiarity with the case as a whole.⁴⁰ It is very unlikely for a court to overturn an arbitrator on a finding of fact.

³⁷ *Arbitration Act*, *supra* note 4 at s. 45(2), (3) and (4).

³⁸ *Robinson v. Robinson*, [2000] O.J. No. 3299 at para. 5 [QL]. The court made these comments by relying on the Supreme Court of Canada's decision in *Moge*, *supra* note 18 paras. 18-19.

³⁹ *Housen v. Nikolaisen*, *supra* note 36 at para. 9 and generally at paras. 8-37.

⁴⁰ *Ibid.* at para. 18.

Similarly, questions of mixed fact and law will only be overturned where the arbitrator has made a palpable and overriding error. If however, the arbitrator has made some extricable error in principle with respect to the characterization of the law or its application, the error may amount to an error of law and is therefore subject to the highest standard of correctness.⁴¹

Importantly, parties to arbitration can agree to waive their rights of appeal in the arbitration agreement.⁴² It is most likely that parties will contract out of their appeal rights particularly where the intent and purpose of seeking arbitration is to be subjected to an alternative legal framework to that provided by Canadian courts. This severely limits the oversight of arbitral awards that courts can provide, however it does not constrain the courts entirely.

2. Process of Judicial Review

There are situations through judicial review when a court can set an arbitral award aside because the *Arbitration Act* provides that parties cannot agree either expressly or by implication to vary or exclude section 46 (setting aside an award).⁴³ Judicial review, unlike the appeals process, tends to be rooted in matters of a procedural nature (See below “Setting Aside Arbitral Agreements and Awards”).

The standard of review used by the courts in judicial review of an arbitral award is a complex test that incorporates a variety of different factors used to determine how much deference should be given to an arbitrator’s decision.⁴⁴ Where a matter is judicially reviewed courts will usually respect and enforce the terms of an award unless the decision is unreasonable or patently unreasonable. As noted in *Duguay and Hercus*, “[t]he legislature has given the courts clear instructions to exercise the highest deference to arbitration awards and arbitration disputes generally.”⁴⁵ In other words, the courts’ general tendency will be to respect the decisions of arbitrators.

Under principles of administrative law, one factor that courts must consider in determining the level of deference owed to an arbitrator’s decision is the specialized expertise that a tribunal may have as compared to the court. Where an arbitrator can claim highly specialized expertise, for example in a situation where two parties have agreed to have their dispute settled according to certain religious principles, theoretically, courts will militate in favour of a high degree of deference,⁴⁶ that is, favour upholding the arbitrator’s decision.⁴⁷ It is likely that the expertise of a tribunal will be the determinative factor. There are however, three other components to the functional and pragmatic approach to judicial review which may vary the degree of deference.⁴⁸

⁴¹ *Ibid.* at paras. 26-37.

⁴² See *Arbitration Act*, *supra* note 4 at s. 3.

⁴³ *Ibid.* at s. 3.4.

⁴⁴ See *Pushpanathan v. Canada* [1998] 1 S.C.R. 982 [*Pushpanathan*].

⁴⁵ *Hercus*, *supra* note 31 at para. 76 and *Duguay*, *supra* note 21 at para. 31.

⁴⁶ A high degree of deference will have a propensity toward a standard of review at the patent unreasonableness end of the spectrum. See generally *Pushpanathan*, *supra* note 44 at paras. 32-35.

⁴⁷ *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at para. 66.

⁴⁸ The other factors to be considered by a court in judicial review are (1) the existence of any privative clauses; (2) the nature of the problem, that is, whether it is a question of law, fact or mixed law and fact; and (3) the purpose of the act as a whole and the provision in particular. See *Pushpanathan*, *supra* note 44 at paras. 29-38. See also *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92* [2004]

3. Setting Aside Arbitral Agreements and Awards

Most safeguards in the *Arbitration Act* refer to procedural guarantees. However, there is some case law to suggest that courts will interpret certain sections of the Act to include certain guarantees as to the substance of the arbitral award. Subsection 19(1) of the Act guarantees that parties shall be treated equally and fairly. Subsection 19(2) ensures that each party is given an opportunity to present a case and respond to the other parties' cases. In *Hercus*, Templeton J. held that there was nothing in the *Arbitration Act* that limits the concept of "fairness" in s. 19(1) to mere procedural fairness. Rather, she felt that s. 19(2) of the Act more specifically addresses the concept of procedural fairness.⁴⁹ This is an encouraging finding that suggests courts may be more willing in the family law context to interpret arbitral awards substantively based on fairness.

Generally, s. 6 of the Act permits a court to intervene in arbitral matters: (1) to assist in the conduct of arbitrations; (2) to ensure that arbitrations are conducted in accordance with arbitration agreements; (3) to prevent unequal or unfair treatment of parties to arbitration agreements; and (4) to enforce awards.

Subsection 20(1) of the Act states that the arbitral tribunal may determine the procedure to be followed in the arbitration subject to some guidelines provided by the Act.

According to ss. 46(1) of the Act, a court may set aside an arbitral award on a party's application in certain circumstances. The following section outlines the specific clauses of ss. 46(1) and provides an example to illustrate their meaning. An award will be set aside where:

1. A party entered into the arbitration agreement while under a legal incapacity.

The court would not enforce for example, an agreement entered into while a person was impaired or where a minor entered into an agreement.

2. The arbitration agreement is invalid or has ceased to exist.

An arbitral agreement may be invalid if the time frame set out in the agreement has expired or if a particular procedural guarantee has not been met. This section may also be used to set aside awards that are contrary to public policy, for example requiring unreasonable conditions such as chastity or where the contract is unconscionable.

3. The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement.

For example, if the subject matter of an arbitration agreement purports to deal only with the division of property upon the breakdown of a marriage, an award that refers to spousal support would be considered outside the

S.C.J. No. 2 [QL] and *Alberta Union of Provincial Employees v. Lethbridge Community College* [2004] S.C.J. No. 24 [QL].

⁴⁹ *Hercus*, *supra* note 31 at paras. 96-97.

scope of the agreement. Subsection 46(3) of the Act, however, provides a restriction wherein a court shall not set aside an award where a party has agreed to the inclusion of the matter, waived the right to object to its inclusion or agreed the tribunal has power to decide what disputes are referred to it. Thus, a clause in an agreement giving the tribunal power to decide what matters are under its jurisdiction or a waiver of rights clause could prove extremely disadvantageous in later attempting to have a court set an award aside.

4. The composition of the tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with that matter, was not in accordance with the Act.

This is a procedural guarantee that ensures that the manner in which the arbitration is conducted is consistent with the intent of the parties or the Act.

5. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.

A court would set aside an agreement that for example, purports to bind a third party or a falls outside the jurisdiction of civil law.

The following clauses provide circumstances that permit a court to intervene when arbitration is not carried out in a just manner:

6. The applicant was not treated equally or fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of the arbitrator.

7. The procedures followed in the arbitration did not comply with this Act.

8. An arbitrator has committed a corrupt or fraudulent act or there is reasonable apprehension of bias.

9. The award was obtained by fraud.

4. Declaration of Invalidity by a Non-Party

Interestingly, ss. 48(1) of the Act, provides that at any stage of an arbitration a party who has not participated in the arbitration can apply to the court for a declaration that the arbitration is invalid because:

- (a) a party entered into the arbitration agreement while under a legal incapacity;
- (b) the arbitration agreement is invalid or has ceased to exist;
- (c) the subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law; or

(d) the arbitration agreement does not apply to the dispute.

This section may provide an important protection for vulnerable parties who do not have the emotional or financial resources to pursue a matter in court. Presumably, a sympathetic family member or an organization that knows the details of the party's situation could apply to the court for a declaration of invalidity where for example, they suspect that a party has entered an agreement without true consent. By contrast, such a provision could also be used to undermine the legitimate position of party who has voluntarily agreed to arbitration.

5. Unusual Remedies

Subsection 50(7) of the Act provides that if the arbitral award grants a remedy that the court does not have jurisdiction to grant the court may grant a different remedy or remit the matter to the arbitral tribunal with the court's opinion to award a different remedy. Thus, where a matter reaches a court some protection exists as to the type of remedy that will be awarded.

E. Judicial Interpretation of Private Agreements

Critical to understanding the impact arbitration will have on parties is an awareness of the approach courts are taking to the increasing privatization of certain areas of the law. The Supreme Court of Canada has emphasized in several family law cases, its interest in upholding parties' private bargains:

...[I]n a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess the arrangements on which they reasonably expected to rely. Individuals may choose to structure their affairs in a number of different ways, and it is their prerogative to do so.⁵⁰

In *Miglin v. Miglin*, a case involving the interpretation of a separation agreement, the Supreme Court of Canada held that trial judges must balance Parliament's objective of equitable sharing of the consequences of marriage and its breakdown under the *Divorce Act*⁵¹ with the parties' freedom to arrange their affairs as they see fit.

Accordingly, a court should be loath to interfere with a pre-existing agreement unless it is convinced that the agreement does not comply substantially with the overall objectives of the *Divorce Act*.⁵²

This decision suggests that there is some notion of a core public order that private parties are obliged to respect in family law. Indeed the progression of family law cases in Canada since *Murdoch v. Murdoch*⁵³ indicates that family law matters have become a matter of public law and policy.⁵⁴

⁵⁰ *Hartshorne v. Hartshorne* 2004 S.C.C. 22 at para. 36 [QL] [*Hartshorne*].

⁵¹ Section 15.2(6) of the *Divorce Act*, *supra* note 30 outlines the objectives of spousal support orders.

⁵² *Miglin v. Miglin* [2003] 1 S.C.R. 303 at para. 46 [*Miglin*].

⁵³ *Murdoch v. Murdoch* [1975] 1 S.C.R. 423 This notorious case in family law jurisprudence illustrates the early unwillingness of the courts to use equitable principles to achieve justice between spouses upon marriage breakdown.

⁵⁴ See generally *Moge*, *supra* note 18. Alison Harvison Young notes that "the discourse and methodology of the *Charter* has had a profound impact on the nature and style of judicial decision-making which, not surprisingly, have affected all areas of the law whether it is directly applicable or not." Harvison Young, *supra* note 18 at 760.

While the Supreme Court's interpretation in *Miglin* provides some protection against grossly unfair agreements, it has noted recently in *Hartshorne v. Hartshorne* that deference will be given to agreements that deviate from the statutory matrimonial property regime particularly where negotiated with independent legal advice regardless of whether this advice was heeded.⁵⁵ In this case, a couple, both of whom were lawyers, entered into a marriage agreement on the day of their wedding. Both parties had independent legal advice. The wife's lawyer wrote an opinion letter to her indicating that the draft marriage agreement was "grossly unfair" and that she would be entitled to much more under the statutory regime.⁵⁶ For a variety of reasons, she signed the agreement anyway. Though the minority in this decision notes that "simply 'signing' the agreement...does not cure its substantive unfairness",⁵⁷ the majority states, "[i]f the respondent truly believed that the Agreement was unacceptable at that time, she should not have signed it."⁵⁸

Hartshorne, a case originating in British Columbia, is particularly worrisome because the majority of the Supreme Court did not take advantage of the relatively low threshold for judicial intervention in the variation of domestic contracts that is available to judges. Under the B.C. *Family Relations Act*, a court may reapportion assets upon a finding that to divide the property as provided for in a domestic contract would be "unfair".⁵⁹ By contrast in Ontario, the threshold for judicial oversight of domestic contracts is much higher. Judges are only permitted to set aside a contract in specified circumstances such as, where a party fails to disclose significant assets or liabilities, where a party does not understand the nature or consequences of the contract, or otherwise, in accordance with the law of contract.⁶⁰ The fairly conservative judicial interpretation of "fairness" in the B.C. context suggests that judges will likely interpret a *Hartshorne*-type situation in Ontario similarly if not with less interventionism.

1. The Interpretation of Voluntariness and Free Will

Also of note in *Hartshorne* are certain facts surrounding the voluntariness of entering into a domestic contract. As noted earlier, the husband and wife entered into a marriage agreement on the day of their wedding and with independent legal advice. Although the testimony of the husband and wife varies, at the time of the signing of the agreement, it was agreed that the wife was upset and reluctant to sign the agreement.⁶¹ The trial judge noted that in the defendant's mind:

[S]he felt she had no choice but to sign an agreement. The wedding date was set, she had a 20 month old child, she was planning another child (and in fact was pregnant but did not know she was pregnant at the time), and she had committed to a life with the plaintiff. It was her evidence that the plaintiff was dominating and controlling, and that she knew that if she did not sign the proposed agreement, it would be a complete bar to a good relationship...Sometime after the wedding, but before the parties and their guests went out for dinner, she recalls that she was in the

⁵⁵ *Hartshorne*, *supra* note 50 at para. 67.

⁵⁶ *Ibid.* at para. 60.

⁵⁷ *Ibid.* at para. 89 *per* Deschamps J.

⁵⁸ *Ibid.* at para. 65 *per* Bastarache J.

⁵⁹ *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 65.

⁶⁰ Section 56 of the FLA, *supra* note 21 delineates when a judge may set aside a domestic contract in Ontario.

⁶¹ *Hartshorne v. Hartshorne* [1999] B.C. J. No. 2861 at para. 40 [QL] [*Hartshorne*, B.C.S.C.].

kitchen with one of her friends, Leslie Walton. The plaintiff was after her to sign the marriage agreement before they went out for dinner, and she ended up signing the agreement while Leslie Walton was present. On her evidence, she was crying and very upset...Ms. Walton, in her evidence...recalls the plaintiff and the defendant coming in, and that they were discussing something. The defendant was clearly upset and was crying. The plaintiff gave her a pen, and the defendant looked up at Ms. Walton and said words to the effect that "You're my witness, I am signing this under duress". Ms. Walton never saw the document, but was simply aware that the defendant was signing something.⁶²

The trial judge held that "notwithstanding the defendant's emotional upset at the time" the evidence fell short of establishing a basis for finding that the agreement was unconscionable, or that it was entered into under duress, coercion or undue influence.⁶³ The Court of Appeal and the Supreme Court of Canada upheld the trial judge's finding on this matter.

As is obvious from the above decision, the courts have set a high threshold for the test of duress or coercion. Though the common law recognizes a defence of duress, its scope has remained narrowly defined with relief chiefly limited to cases of physical threat.⁶⁴ There is a general protection afforded in the law where undue advantage is taken by virtue of inequality of bargaining power. Inequality in bargaining power may result from any of various aspects of the parties' circumstances such as "abuse or intimidation or...learning or other disability...anxiety or stress or a nervous breakdown or indulgence in drugs or alcohol."⁶⁵ Other factors held to indicate the necessary inequality include old age, emotional distress, alcoholism and lack of business experience.⁶⁶ It appears that any situation that results in a weaker party's being "overmatched and overreached" will qualify for relief if the stronger party secures immoderate gain.⁶⁷

There is a well established line of cases providing relief from agreements on the basis of undue influence, which describes an advantage accruing from "a longstanding relationship of control and dominance."⁶⁸ Certain relationships such as solicitor-client and doctor-patient, give rise to a presumption of undue influence. The relationship of husband-wife is not included in that class of special relationships. However, where an inequality of bargaining power can be established, for example if the husband has subjected the wife to abuse, a court will set aside an agreement based on undue influence and unconscionability.⁶⁹

Syed Mumtaz Ali, current head of the Islamic Institute of Civil Justice, explained the law of minorities as sharia law sets it down. Muslims in non-Muslim countries are expected

⁶² *Ibid.* at paras. 43-45.

⁶³ *Ibid.* at para. 46.

⁶⁴ S.M. Waddams, *The Law of Contracts*, 3rd ed., (Toronto: Canada Law Books, 1993) at para. 502.

⁶⁵ *Rosen v. Rosen* (1994), 18 O.R. (3d) 641 at 645-646 (C.A.), application for leave to appeal dismissed (16 February 1995), S.C.C. Bulletin, 1995, p. 340.

⁶⁶ Waddams, *supra* note 64 at para. 511.

⁶⁷ *Ibid.* See also *Dyck v. Manitoba Snowmobile Association* (1985), 18 D.L.R. (4th) 635 at 637 (S.C.C.).

⁶⁸ See J. McLeod, Annotation to *Sartor v. Sartor* (1993), 45 R.F.L. (3d) 250 at 251.

⁶⁹ See for example, *S.M.B. v. K.R.B.* [1997] O.J. No. 3199 [QL]. The court noted at para. 44 that the wife would not have been able to benefit from independent legal counsel at the time given the extent to which she was a victim of marital abuse.

to follow the sharia to the extent that it is practical.⁷⁰ According to Ali, until recent changes to the *Arbitration Act*, Canadian Muslims have been excused from applying the sharia in their legal disputes. Now that arbitration agreements are considered final and binding, “the concession given by Shariah is no longer available to us because the impracticality has been removed. In settling civil disputes, there is no choice indeed but to have an arbitration board [emphasis added].”⁷¹ It is certainly not implausible to imagine a situation where a devout Muslim woman would be susceptible to pressure to consent to arbitration by sharia law because of a pronouncement such as Syed Mumtaz Ali’s.

Indeed very similarly, Rabbi Reuven Tradburks, secretary to the *Beis Din*⁷² of Toronto’s *Va’ad HaRabbonim* notes: “In this city, we actually push people a little to come [to arbitration by Jewish law] because using the *Beis Din* is a *mitzvah*, a commandment from God, an obligation.”⁷³ According to Homa Arjomand, head of the new ‘International Campaign Against Shari’a Court in Canada’, most at risk are young immigrants from the Middle East, North Africa or certain South Asian countries, where sharia law is practised “and has been used to subjugate them their entire lives. They know nothing different.”⁷⁴ Whether religious or moral coercion of this type by an Imam, spouse or others will be deemed to affect the equality of bargaining power of the parties will depend on the facts of each case.

F. Judicial Interpretation of Islamic Agreements

It is possible that judicial interpretation of arbitral awards that invoke Islamic law principles may stray from the family law precedents set wherein parties’ bargains are given much weight. Indeed, the precise reading that courts will assume when reviewing awards based on religious principles remains uncertain because of conflicting case law.

In *Kaddoura v. Hammoud*,⁷⁵ a decision of the Ontario Court of Justice, the court refused to require payment of the mahr,⁷⁶ a Muslim marriage custom, because the contract had a religious purpose and accordingly, was not an obligation that should be adjudicated in

⁷⁰ Interestingly, Imam Feisal Abdul Rauf of New York’s Masjid al-Farah mosque, argues that the Declaration of Independence and the American Constitution “are quite compliant with Islamic law, compliant with Sharia.” He states: “I can argue from very firm grounds that what we have here in the United States scores very high in the Islamic scheme of things, which is why Muslims are comfortable living in the West. In fact, they prefer to live under Western systems of governance because what they have in the Muslim world is not really Islamic.” Melvin McLeod “What’s Right With Islam: A Conversation with Imam Feisal Abdul Rauf” *Shambhala Sun* (July 2004) 55 at 57.

⁷¹ Judy Van Rhijn “First Steps Taken Toward Sharia Law in Canada” *Law Times*, (25 November 2003) online: Vancouver Independent Media Center <<http://vancouver.indymedia.org/print.php?id=87502>>. Syed Mumtaz Ali was also quoted as saying “‘to be a good Muslim’ all Muslims must use these *sharia* courts.” Margaret Wente “Life Under Sharia, in Canada?” *The Toronto Star* (29 May 2004), online: The Globe and Mail <www.theglobeandmail.com>.

⁷² The *Beis Din* are religious tribunals that resolve civil disputes using Jewish law pursuant to provincial arbitration acts. There are *Beis Din* operating in Toronto, Montreal and Vancouver. Arbitrators at the *Beis Din* are typically Orthodox rabbis who are recognized experts in Jewish law. See Cohen, *supra* note 5 at 30.

⁷³ *Ibid.* at 30.

⁷⁴ Lynda Hurst, “Ontario Sharia Tribunals Assailed: Women Fighting Use of Islamic Law, but Backers say Rights Protected” *The Toronto Star* (1 June 2004) online: The Star <www.thestar.com>.

⁷⁵ [1998] O.J. No. 5054 [QL] [*Kaddoura*].

⁷⁶ The mahr is a gift from a husband to the wife. It is not a price paid for an Islamic marriage, but rather depending on the school of Muslim law in question, an effect of the contract or a condition upon which the validity of the marriage depends. See generally, Pascale Fournier “The Erasure of Islamic Difference in Canadian and American Family Law Adjudication” (2001) 10 *J. Law & Policy* 51 at 59-60. See also *Kaddoura supra* note 75 at para. 13.

the civil courts. In this case, an amount of \$30,000 was due to the wife under an Islamic marriage contract. The contract conformed to s. 52(1) of Ontario's *Family Law Act* in that the provision was not vague nor was the agreement signed under circumstances suggestive of inequality or duress. Despite the obligatory nature of the mahr under Islamic principles however, the court held that the agreement was unenforceable by Canadian courts.

Pascale Fournier has argued that judges frequently perceive Muslim cultural differences as too drastic to fit within existing legal categories.⁷⁷ In *Kaddoura*, the judge's reasons reveal that it was the religious dimension of the mahr that rendered the agreement unenforceable. The judge notes:

While not, perhaps, an ideal comparison, I cannot help but think that the obligation of the Mahr is as unsuitable for adjudication in the civil courts as is an obligation in a Christian religious marriage, such as to love, honour and cherish, or to remain faithful, or to maintain the marriage in sickness or other adversity so long as both parties live, or to raise children according to specified religious doctrine. Many such promises go well beyond the basic legal commitment to marriage required by our civil law, and are essentially matters of chosen religion and morality. They are derived from and are dependent upon doctrine and faith. They bind the conscience as a matter of religious principle but not necessarily as a matter of enforceable civil law.⁷⁸

As Fournier notes, in erroneously importing a Christian, majoritarian comparison with the Islamic institution of the mahr, the judge overlooks that whereas Christian vows constitute moral obligations that are indefinite insofar as they can only bind the conscience, the mahr is a clear financial obligation.⁷⁹ "The court's message is that a valid agreement between two Muslim parties is unenforceable, not for vagueness like the Christian examples deemed analogous, but because of the agreement's religious purpose."⁸⁰

The "apparent cultural anxiety"⁸¹ in Ontario associated with entering the "religious thicket", a place that the courts cannot safely and should not go⁸² is contrasted with cases of near identical facts in British Columbia where the courts' interpretation of the enforceability of the mahr has been very different. In *N.M.M. v. N.S.M.*,⁸³ a decision of the British Columbia Supreme Court, it was held that the mahr was enforceable as a valid marriage agreement per s. 48 of the *Family Relations Act*.⁸⁴ The court's reasons were a reiteration of two previous cases in B.C., *Nathoo v. Nathoo*⁸⁵ and *Amlani v. Hirani*,⁸⁶ wherein the enforceability of the mahr was also recognized. Dorgan J. in his concluding comments in *Nathoo* held:

⁷⁷ Pascale Fournier *supra* note 76 at 53.

⁷⁸ *Kaddoura supra* note 75 at para. 25.

⁷⁹ Pascale Fournier *supra* note 76 at 61.

⁸⁰ *Ibid.*

⁸¹ *Ibid.* at 61.

⁸² *Kaddoura supra* note 75 at para. 28.

⁸³ [2004] B.C.J. No. 642 (S.C.) [QL] [*N.M.M.*].

⁸⁴ *Family Relations Act, supra* note 55 at s. 48.

⁸⁵ [1996] B.C.J. No. 2720 (S.C.) [QL] at para. 23 [*Nathoo*].

⁸⁶ [2000] B.C.J. No. 2357 (S.C.) [QL] [*Amlani*].

Our law continues to evolve in a manner which acknowledges cultural diversity. Attempts are made to be respectful of traditions which define various groups who live in a multi-cultural community. Nothing in the evidence before me satisfies me that it would be unfair to uphold provisions of an agreement entered into by these parties in contemplation of their marriage, which agreement specifically provides that it does not oust the provisions of the applicable law.⁸⁷

Kaddoura suggests that Ontario's judges will be reluctant to intervene in internal matters involving religious principles⁸⁸ whereas *N.M.M., Amlani* and *Nathoo* indicate that B.C.'s judges may give more deference to religious principles where an agreement is voluntarily entered into by consenting parties. An appellate court's interpretation of such matters is required to clarify the legal position in Canada.

A notable distinction between the mahr cases and arbitral awards that use sharia law is that the former may be deemed an unrecognizable category of Canadian family law while the latter is not necessarily. The mahr can be relegated to a place of pure religion that need not be decided by "our judicial system." That is, the court may decide the mahr is a dispute involving Islamic law in which they have no expertise and thus will not intervene. Alternatively, the court may find, as in B.C., that the mahr issue ought to be considered a matter of family or contract law, an area in which the courts have comparable expertise to that of any arbitrator and is therefore justiciable. Matters that may be considered in arbitration such as division of family property, spousal support and child support which are recognizable under a Western legal framework are not as easily relegated to the un-justiciable even where the resolution of such issues may be less recognizable, that is, via sharia law.

However, in *Brewer v. Incorporated Synod of the Diocese of Ottawa of the Anglican Church of Canada*,⁸⁹ the plaintiff Anglican rector whose relationship with the Anglican Church was governed by the canons and rules of the Church, began a recognizable action for damages for wrongful dismissal. It was held that in adjudicating Church disputes, the court would look not to the merits of the decision, but rather at adherence to the rules, procedural fairness, the absence of *mala fides* (bad faith) and natural justice.⁹⁰

Given the conflicting case law in Canada on the mahr and the lack of specific case law on arbitrations dealing with Islamic religious principles, it is difficult to predict with

⁸⁷ *Nathoo*, *supra* note 85 at para. 25.

⁸⁸ See also *Levitts Kosher Foods Inc. v. Levin*, (1999), 45 O.R. (3d) 147 (Sup. Ct. J.) [*Levitts Kosher Foods*]. The case involved a plaintiff company, a Montreal seller of kosher meats, which was denied, for some of its products, the kosher certification symbol COR by Toronto's *Va'ad Hakashruth*. Justice Mary Lou Benotto held that the case should properly go before a *Beis Din* because the plaintiff had chosen to operate its business in a religious context. The judge's decision confirmed the position in *Kaddoura*, *supra* note 71 that it is not appropriate for civil courts to decide questions of religious doctrine.

⁸⁹ *Brewer v. Incorporated Synod of Diocese of Ottawa of the Anglican Church of Canada*, [1996] O.J. No. 634 (Ont. Gen. Div.)[QL].

⁹⁰ The Supreme Court of Canada held in *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 at para. 6 that the court will hesitate to exercise jurisdiction over religious groups, but will do so where a property or civil right turns on the question of membership. The Hutterite colony in question failed to adhere to principles of natural justice in expelling the defendants, thus the court dismissed the colony's action to seek an order requiring the defendants to vacate the colony's land permanently.

certainty how much deference, if any, courts will give to religious arbitral awards that parties voluntarily agree to and whether courts will tend to prefer outcomes that reflect the statutory and judicial standards of family law developed in Canada.⁹¹

1. Legal Representation

The Supreme Court of Canada has noted that independent legal advice at the time of negotiation is an important means of ensuring an informed decision to enter an agreement.⁹² Obtaining legal advice will be essential for parties to understand what they are entitled to under Canadian law versus the legal framework they choose under the *Arbitration Act*.

At certain *Beis Din*, lawyers have the indispensable role of reviewing any contracts before their clients sign them, unless the client waives that right.⁹³ Typically, lawyers are not welcome at the *Beis Din*, but in the event that they are present their role is not as advocate for their clients.⁹⁴ Rather, they are to assist rabbis in marshalling the facts in order to give them an understanding of secular law, and to assist them in seeing how secular law can affect any decisions of the *Beis Din*.⁹⁵

Canadian courts have stressed the importance of independent legal advice in order for parties to be of equivalent bargaining power.⁹⁶ Ironically, it may be that a failure to get independent legal advice may be the best protection a vulnerable party will have in getting a court to review and overturn an unfair arbitration agreement. Where, however, parties sign an agreement to abide by a ruling and consent is found to be voluntary, the courts will likely impute knowledge of the system of laws one is submitting to. It is unlikely an argument that one didn't realize or understand the impact of a particular set of rules would be successful particularly, where an attempt to contest the ruling is based on a dislike of the outcome.

Arbitrations can be informal processes where disputants may feel comfortable representing themselves or having a non-legal advocate or a para-legal represent them. Arbitrations, however, can also duplicate the formality and adversarial atmosphere of a court wherein legal representation may be more appropriate.⁹⁷ Parties who choose the arbitration route are not eligible to receive any legal representation though Legal Aid Ontario.⁹⁸ Moreover, it is unlikely that a lawyer would agree to represent a client at a tribunal that employs religious law because currently, the standard liability insurance provided by the Lawyers' Professional Indemnity Company, the insurance carrier for the Law Society of Upper Canada (members of the Ontario bar), does not cover lawyers

⁹¹ In *Weidberg v. Weidberg*, the Ontario Court of Justice upheld a judgment obtained by a divorcing couple who had taken their dispute to a Jewish rabbinical court for resolution. The court noted that there was "no evidence before [it] that the judgment of the Rabbinical Court was improvident." *Weidberg v. Weidberg* [1991] O.J. No. 3446 [QL] at para. 12.

⁹² *Hartshorne*, *supra* note 50 at para. 60. Recall however, in *S.M.B. v. K.R.B.*, *supra* note 65 where the judge held that the battered wife would not have been able to benefit from independent legal advice.

⁹³ Cohen, *supra* note 5 at 32.

⁹⁴ *Ibid.* at 32.

⁹⁵ *Ibid.*

⁹⁶ See generally, *Hartshorne*, *supra* note 50, *Bertolo v. Bank of Montreal* 57 O.R. (2d) 577 (C.A.) [QL] and *Barclays Bank v. O'Brien* [1994] 1 A.C. 180 (H.L.).

⁹⁷ Hovius, *supra* note 10 at 37.

⁹⁸ Interview of Natahlie Champagne, Area Director for Legal Aid Ontario by Patricia Harewood (12 August 2004). See also <http://www.legalaid.on.ca>.

acting in any area except Ontario/Canadian law.⁹⁹ When discussing arbitration before the *Beis Din*, a Toronto lawyer notes:

When it comes to Jewish law, Canadian lawyers really don't know anything. But even those who do know some *halacha*...[it] would be negligent to go before the *Beis Din* and argue Jewish law, since they are not covered for it in their insurance policy. If they made a mistake with financial repercussions, they could be personally liable.¹⁰⁰

Thus, despite its recognized utility, in practice, independent legal advice may be of little use to clients who submit to arbitration using an alternative legal framework; this is so because most Ontario-trained lawyers are likely to be unaware of the repercussions and consequences of a system of law that they are not familiar with. Lawyers may only be of assistance to clients to the extent of explaining their rights in the Canadian legal context.

G. Multiple Interpretations of Sharia Law

The scope of this paper does not allow an in depth examination into the intricacies or various schools of thought of sharia law.¹⁰¹ Indeed it is impossible to know what version of sharia will be used for civil matters in Ontario since the *Arbitration Act* allows parties to agree to any legal framework they desire. Parties may agree to very specific interpretations of the sharia or they may agree to submit to the sharia generally, putting faith in the arbitrator's expertise.

What is known about sharia is that it is a complex legal framework that is meant to be a complete system for regulating every aspect of human life:

The rules, obligations, injunctions and prohibitions laid down by or derived from the Qur'an and the Sunnah produce a complete picture of the Muslim community, from which no part can be removed without the rest being damaged.¹⁰²

Sharia law does not translate appropriately or fairly when utilized in a patchwork fashion. Indeed Syed Soharwardy, a founding member of the Islamic Institute of Civil Justice, has written: "Sharia cannot be customized for specific countries. These universal, divine laws are for all people of all countries for all times."¹⁰³ Yet, by virtue of living in Canada, sharia law can only be applied in a limited way to certain civil matters. Syed Mumtaz Ali's contradictory claim to both his own comments and Soharwardy's that a "Canadianized sharia" will be utilized should be received with concern. Ali notes: "It will be a watered-down sharia, not 100 per cent sharia. Only those provisions that agree with Canadian laws will be used."¹⁰⁴ If this is the case, some Canadian Muslims may

⁹⁹ Conversation with corporate counsel at the Lawyers' Professional Indemnity Company (LPIC), June 16, 2004, 1-800-410-1013.

¹⁰⁰ John Syrtash in Cohen, *supra* note 5 at 32.

¹⁰¹ The author, not being a religious expert, has made a deliberate choice not to review specific principles of sharia law.

¹⁰² Syed Mumtaz Ali, online: The Canadian Society of Muslims <<http://muslim-canada.org>>. See also Elka Enola, "Shari'a: A Threat to Canadian Society" online: National Union <www.nupage.ca>.

¹⁰³ Hurst, *supra* note 74.

¹⁰⁴ *Ibid.* The Canadian Council on American-Islamic Relations (CAIR-CAN) states that because sharia refers to a religious code covering all aspects of a Muslim's life, "it is inappropriate and misleading to use the word 'shariah' to describe an arbitration tribunal that will use Islamic legal principles to resolve a very specific and limited set of civil disputes...under Ontario's *Arbitration Act*." CAIR-CAN instead proposes that the tribunal will be engaging in a form of Muslim dispute resolution. "Review of Ontario's Arbitration Process and

feel insecure subjecting themselves to distortions of Islamic principles where such principles are understood as immutable. On the other hand, the fact that sharia is subject to interpretation may be an asset in addressing women's concerns.

1. Reservations to CEDAW: Example of the Diverse Application of Sharia Internationally¹⁰⁵

The application of sharia law internationally reveals that Islamic countries are not homogenous and have a great deal of diversity in culture and even faith. Exploring the tenets and historical foundations of "cultural Islam"¹⁰⁶ leads one to the understanding that much discretion lies in the interpretation of Islamic law and its correlation to international human rights standards. Perhaps the most telling example of this are the reservations made by Muslim countries in the name of Islam to the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW). The Convention is an international legal instrument or treaty that requires respect for and observance of the human rights of women. It was adopted in 1979 by the United Nations General Assembly and came into force in September of 1981. Countries that ratify CEDAW have the option of invoking reservations to certain provisions of the treaty. Reservations serve to exclude or modify the legal effect of the reserved provision(s) in their application to that country.¹⁰⁷ For example, a country's reservation might read: The Government of the Republic of X will comply with the provisions of the Convention, except those which the Government may consider contradictory to the principles of the Islamic Sharia, upon which the laws and traditions of X are founded.

Several Muslim countries have invoked reservations to CEDAW specifically citing sharia law as the motivating force behind these reservations.

The most reserved articles relate to rights of women in the area of family law, which has always been jealously guarded by Muslim countries as being regulated by Islamic law, whereas other fields of life including the running of governments and financial institutions are not so guarded against 'infiltration' of 'secular' laws.¹⁰⁸

Notably however, perceptions of what constitute Islamic norms and what falls outside their ambit vary extensively, particularly with respect to women's rights. Wide ranges of factors including political, socio-economic as well as religious considerations motivate reservations entered by Muslim countries. However, not every Muslim country has entered a reservation in the name of Islam.¹⁰⁹ In fact, a group of Central Asian

Arbitration Act: Written Submissions to Marion Boyd online: CAIR-CAN <www.caircan.ca/downloads/sst-10082004.pdf> at 3-4.

¹⁰⁵ This section of this paper is borrowed from another paper written by Natasha Bakht. N. Bakht, "Reconciling International Human Rights Standards with the Shari'a: Reservations as a Mechanism for Incrementally Fulfilling International Obligations" (2001) [unpublished].

¹⁰⁶ S. S. Ali, *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?*, (London: Kluwer Law International, 1999) at 248. Faisal Kutty has stated, "The status quo in Islamic law, characterized far too often with abuse of women and minorities, is the product of rigid interpretations shaped by tribal and cultural norms. The pure Islamic teachings of equality, justice and freedom must be brought to the fore again by using interpretations which are consistent with the spirit of Islam." Faisal Kutty, "Canada's Islamic Dispute Resolution Initiative Faces Strong Opposition" online: <http://www.wrea.com/archives/May_2004/045070.html>.

¹⁰⁷ *Vienna Convention on the Law of Treaties*. (1969) 1155 U.N.T.S. 331, in force 1980, at article 2(d).

¹⁰⁸ R. J. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women" (1990) 30 Va. J. Int'l L. 643 at 252.

¹⁰⁹ *Ibid.* at 249.

Republics and some other Muslim countries have ratified the CEDAW without any reservations whatsoever, providing further evidence for the disparate “Islamic” positions adopted by varying jurisdictions.¹¹⁰ “The situation is further complicated where no uniform position vis-à-vis Islamic law is adopted by Muslim States since each jurisdiction presents its own specific blend of an ‘operative’ and ‘cultural’ Islam, distinct from other jurisdictions.”¹¹¹

The reason for the lack of consistency in invoking sharia is due to the absence of a unified interpretation of religious law.¹¹² Increasingly, Muslim feminists and Islamic reformers are asserting that the Qur’an and the example of the Prophet provide much support for the idea of expanded rights for women.¹¹³ A growing movement is contesting the model of gender rights and duties found in traditional Islamic jurisprudence and discourse and promoting instead interpretations and understandings of Islamic law and justice rooted in notions of gender equality.¹¹⁴ Contemporary Muslims such as Abdullahi An-Na’im and Fatima Mernissi have reexamined the sources and concluded that Islam calls for equal rights for men and women. In contrast, opponents of feminism turn to the juristic tradition and the associated cultural norms, which reflect the values of patriarchal societies. The differences in approaches to understanding Islam have been compounded by the absence of any generally recognized central authority for resolving disputed points of sharia doctrine.

Faisal Kutty, a Toronto-based lawyer, states the fact that there is virtually no formal certification process to designate someone as being qualified to interpret Islamic law compounds the problem:

As it stands today, anyone can get away with making rulings so long as he has the appearance of piety and a group of followers. There are numerous institutions across the country [Canada] churning out graduates as alims (scholars), faqihs (jurists) or muftis (juris-consults) without fully imparting the subtleties of Islamic jurisprudence. Many, unfortunately, are more influenced by cultural world views and clearly take a male-centered approach.¹¹⁵

The lack of uniformity in interpreting sharia law poses a difficulty in assessing the impact on women of sharia arbitration tribunals in Ontario. The fact that arbitration is a private matter wherein records are typically not kept further complicates this problem. The lack of specified training required of religious leaders/arbitrators both in Islam and under the *Arbitration Act* suggests that women’s rights may well be in jeopardy. The fact that the Islamic Institute of Civil Justice has not released any by-laws, rules or guidelines

¹¹⁰ *Ibid.* at 264.

¹¹¹ *Ibid.* at 264.

¹¹² “The differences that divide orthodox Muslims from modernists and fundamentalists is over the *shari’a*. Orthodoxy holds that it [sharia] is perfect as it is. Modernists argue that, being the work of man, it must constantly be reinterpreted to adapt to the requirements of changing times. Fundamentalists maintain that, Islam being indifferent to changing times, it must be reexamined only for intrusions upon its original purity.” Milton Viorst, *The Struggle for the Soul of Islam: In the Shadow of the Prophet* (Colorado: Westview Press, 2001) at 144.

¹¹³ The historical roots of Islam reveal a progressive trend towards women’s rights that Western scholarship rarely acknowledges. See Bakht, *supra* note 105.

¹¹⁴ See Ziba Mir-Hosseini, “The Construction of Gender in Islamic Legal Thought and Strategies for Reform” (2003) online: Koninklijke Brill <www.brill.nl>.

¹¹⁵ Faisal Kutty, *supra* note 106.

indicating how the various schools of Muslim law will interact with family law matters in relation to women is also problematic.¹¹⁶

II. The Potential Impact of the Arbitration Regime on Women

While it is possible that a feminist interpretation of sharia law or an interpretation of Islam that incorporates international human rights standards may result in arbitral awards that deal fairly with women, it is also feasible that under the current *Arbitration Act* a regressive interpretation of sharia will be used to seriously undermine the rights of women. John Syrtash acknowledges that “disadvantaged spouses”—that is women—may be adversely affected by a family law system that defers to religious or cultural traditions.¹¹⁷ As the Act currently stands, any conservative, fundamentalist or extreme right wing standard can be used to resolve family law matters in Ontario. Indeed a pre-*Rathwell*-ian¹¹⁸ legal standard that resorts to stereotypes about women’s prescribed familial roles would be a legitimate standard by which to make family law decisions under the *Arbitration Act*, resulting in the exacerbation of women’s disadvantage through unfair division of property, spousal support, child support, custody and access awards.

Gender bias that operates to the detriment of women in family law is not a new or uncommon phenomenon in Canadian law.¹¹⁹ Though judicial and statutory measures have been taken to ameliorate the economic disadvantage or unfair treatment that women experience, overall, women’s economic well-being and role/work recognition continues to suffer.¹²⁰ Nonetheless, a review of family law jurisprudence over the past 20 years reveals some beneficial developments to women. The *Arbitration Act* threatens to hinder these developments by providing no safeguards whatsoever to ensure women’s equality. Arbitral awards may bear no relationship to what the parties would be entitled to if they went to court. Much of the feminist critique surrounding mediation is relevant and applicable to arbitration. The following is an example:

There is currently no mechanism in place to ensure that those legal rights and entitlements are reflected in...[arbitration] agreements, or are even fully considered by the parties. Moreover, the private nature of... [arbitration] means that the process is not open. This means that women may cede hard-won legal rights behind closed doors. Further...there is no means to review and track what is happening to women in... [arbitration].¹²¹

¹¹⁶ The Islamic Institute of Civil Justice has noted that it will provide services to clients in any of the four schools of Muslim law (Hanafi, Shafii, Hanbali and Maliki). See online: The Muslim Marriage Mediation and Arbitration Service <<http://muslim-canada.org/brochure.htm>>.

¹¹⁷ Shauna Van Praagh “Bringing the Charter Home” Book Review of Religion and Culture in Canadian Family Law” Book Review (1993) 38 McGill L.J. 233.

¹¹⁸ *Rathwell v. Rathwell* [1978] 2 S.C.R. 436 [*Rathwell*] This decision of the Supreme Court of Canada awarded Mrs. Rathwell an interest in one-half of all real and personal property own by Mr. Rathwell through the doctrine of constructive trust. The court’s use of this remedial tool significantly benefited women and improved the remedies they received in family law disputes.

¹¹⁹ See Marie L. Gordon “What, Me Biased? Women and Gender Bias in Family Law” (2001) 19 Fam. L. Quarterly 53 at 54.

¹²⁰ *Ibid.* at 54.

¹²¹ See Goundry, *supra* note 11 at 36.

Studies have found that private bargaining in family law tends to yield inferior results for many women.¹²² In his study of factors that impact on negotiated spousal support outcomes Craig Martin found that “the support claimant is the party who will have the least resources and so will be least able to bear the transaction costs” associated with private bargaining. He also notes that “psychologically and culturally, support is still viewed as a *favour* given to dependent women, rather than a form of *entitlement*.”¹²³ Indeed arbitrators will bring their own set of biases, which are seldom acknowledged, to their decision-making.

One of the consequences of the “privatization of justice” is that social inequities may be reproduced in privately ordered agreements, and yet remain hidden from the public eye.¹²⁴ As a result, the status quo is maintained and women’s inequality in relation to this “private sphere of the family is no longer a public concern.”¹²⁵ As has been noted by one author “[p]rivate justice’ renders the personal apolitical.”¹²⁶

With no legal aid or mandatory legal representation, there are serious concerns as to whether women will be truly free in their choice to arbitrate. Gila Stopler has argued that unlike racially-, ethnically-, and religious-oppressed communities which strive to instill in their members the recognition of their own oppression, the oppression of women is compounded by societies that strive to deprive them of the recognition of gender based oppression and prevent them from creating the space and the cooperation required to form resistance.¹²⁷ Women may be susceptible to subtle but powerful compulsion by family members or may be the targets of coercion and pressure from religious leaders for whom there may be a financial interest in people seeking arbitration.¹²⁸ In the context of battered women and mediation, it has been noted that

[t]he reality is that a battered woman is not free to choose. She is not free to elect or reject mediation if the batterer prefers it, nor free to identify and advocate for components essential to her autonomy and safety and that of her children...¹²⁹

This comment is equally relevant to battered women agreeing to arbitration. It is highly unlikely that a battered woman will be capable of negotiating the terms of an arbitration agreement in a way that is fair to her interests. New immigrant women from countries where sharia law is practiced are particularly vulnerable because they may be unaware of their rights in Canada. These women may be complacent with the decision of a sharia tribunal because arbitral awards may seem equal to or better than what might be available in their country of origin.¹³⁰ An immigrant woman who is sponsored by her

¹²² Gordon, *supra* note 119 at 55.

¹²³ Martin in Gordon, *ibid.* at 81.

¹²⁴ Goundry, *supra* note 11 at 34.

¹²⁵ *Ibid.* at 34.

¹²⁶ *Ibid.* at 35.

¹²⁷ Gila Stopler “Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women” (2003) 12 Colum. J. Gender & L. 154 at 197.

¹²⁸ Religious leaders who become arbitrators will have a financial interest in people seeking arbitration since the parties pay for their services.

¹²⁹ B. Hart, “Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation” (1990) 7 Mediation Quarterly 317 at 321.

¹³⁰ Homa Arjomand in Hurst, *supra* note 74.

husband is in an unequal relationship of power with her sponsor.¹³¹ It may be impossible for a woman in this situation to refuse a request or order from a husband, making consent to arbitration illusory. Linguistic barriers will also disadvantage women who may be at the mercy of family or community members that may perpetuate deep-rooted patriarchal points of view. If a woman manages to access the court via judicial review or appeal, she may well be told that she “chose” the disadvantageous situation that she finds herself in, further entrenching her feelings of helplessness and inferiority.

The consequences of family arbitration with few limits will seriously and detrimentally impact the lives of women. This gender-based impact will likely be felt widely and will have intersecting class, (dis)ability, race and cultural implications. In the following section an attempt will be made to outline the issues and arguments that may be raised by a section 15 equality analysis under the *Charter*.

A. Section 15 Charter Analysis

Section 15 of the *Charter* is meant to catch government action that has a discriminatory purpose or effect on the basis of an enumerated or analogous ground and impairs a person’s dignity. Section 15(1) provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.¹³²

At the heart of s. 15(1) is the promotion of a society in which all are secure in the knowledge that they are recognized at law as equal human beings, equally capable and equally deserving.¹³³

The test for determining a s. 15 infringement is three-pronged.¹³⁴ Firstly, does the impugned law (a) draw a formal distinction between the rights claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant’s already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Secondly, was the claimant subject to differential treatment on the basis of enumerated or analogous grounds? And finally, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) in remedying such ills as prejudice, stereotyping and historical disadvantage?

In challenging the use of sharia law in civil disputes in Ontario as discriminatory against women it is necessary to move a step back and challenge the enabling legislation, the *Arbitration Act*, under which the use of sharia law is permitted. This is necessary

¹³¹ A. Côté, M. Kérisit & M. Côté *The Impact of Sponsorship on the Equality Rights of Immigrant Women* (Ottawa: Status of Women Canada, Canadian Heritage and Centre of Excellence for Research in Immigration and Integration, 1999) at 14.

¹³² *Charter*, *supra* note 8 at s. 15(1).

¹³³ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General in Right of Canada)* 2004 S.C.C. 4 at para. 219 *per* Deschamps J [*Canadian Foundation*].

¹³⁴ See *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 39.

because in order to invoke a *Charter* right, one must demonstrate some form of governmental action.¹³⁵

1. Standing: Who Can Invoke a *Charter* Right?

Typically, an individual who is of the view that her/his equality rights have been infringed would bring an action to a court challenging the constitutionality of the *Arbitration Act* on the basis of s. 15 of the *Charter*. This scenario requires a set of facts where for example, a woman who has submitted her family dispute to a sharia law arbitrator, upon receiving the arbitral award, then challenges the use of family law in arbitration generally, arguing that her equality right is threatened by the *Arbitration Act*.¹³⁶

A private citizen or organization is generally not entitled to direct a reference¹³⁷ to the court, but may in certain specific situations bring a declaratory action in which no relief is sought other than an order of a court that a statute is contrary to the constitution.¹³⁸ In order to gain standing, an organization would have to demonstrate that (1) the case raises a serious legal issue; (2) it has some genuine interest in bringing the proceeding; and (3) there is no other reasonable or effective way to bring the issue before the court.¹³⁹ In seeking to gain standing, criteria (1) and (2) are unlikely to pose much difficulty for a legitimate organization with an interest in securing women's rights. The decisive factor will be criteria (3). Because an alternative method of bringing this matter to a court exists, that is, via a claimant whose rights have been directly infringed, it is unlikely the courts will grant standing.¹⁴⁰

Assuming that this hurdle is overcome, we proceed with the *Charter* analysis.

¹³⁵ It is important in a *Charter* challenge to frame this issue broadly and not simply in relation to sharia law in order to prevent the conclusion that Muslims as a group should not be permitted to use arbitration. Thus, the broad argument being made is that family law matters are not appropriate for arbitration because they involve public interests that require court supervision. The downside of making such an argument is that it fails to take into consideration the current and possibly progressive uses of family arbitration by groups and individuals including women. The Ismaili community, a division of Muslims, has set up a system of mediation and arbitration in every province in Canada. This system of alternative dispute resolution provides a safe space to settle primarily business matters but also some family law issues amongst Ismaili Canadians using the relevant Canadian law. Arbitrations are conducted at no cost and arbitrators are sensitive to the culturally specific context of for example the role of the extended family. Additionally, all arbitration agreements are reviewed by lawyers in the community *pro bono*. Interview of Fatima Jaffer by Natasha Bakht (5 August 2004). Fatima Jaffer, an Ismaili Canadian, is a member of the Coalition of South Asian Women Against Violence, VCASAA (Vancouver Custody and Access Support and Advocacy Association) and founder of the South Asian Women's Centre in Vancouver. See also Kellie Johnston, Gus Camelino & Roger Rizzo "A Return to 'Traditional' Dispute Resolution: An Examination of Religious Dispute Resolution Systems" online: Canadian Forum on Civil Justice <<http://www.cfcj-fcjc.org/full-text/traditional.htm>> at 15-26.

¹³⁶ There have been suggestions that family law cases present difficulties for equality analysis because they are "highly fact-based and involve the exercise of judicial discretion." K. Busby, L. Fainstein & H. Penner, in Mary Jane Mossman "Running Hard to Stand Still: The Paradox of Family Law Reform" (2000) Dal. L.J. 5 at 25. Interestingly however, "one third of the inquiries received by LEAF's national office concern cases raising family law issues." *Ibid*.

¹³⁷ A reference is a question which a government presents to a court for an opinion concerning the constitutionality of an enactment although there is no real dispute. Robert J. Sharpe ed., *Charter Litigation* (Toronto: Butterworths, 1987) at 337.

¹³⁸ See generally R. Sharpe & K. Swinton *The Charter of Rights and Freedoms* (Toronto: Irwin Law, 1998) at 66-67, 73-74.

¹³⁹ *Thorson v. Canada (A.G.)*, [1975] 1 S.C.R. 138; *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575.

¹⁴⁰ See *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236.

2. Distinction in Purpose or Differential Treatment in Effect

The *Arbitration Act* does not make any direct distinction between individuals. It is a statute that is open to any adult person to use. The argument at this stage of the s. 15 test is that the Act, in not setting any express limits as to the type of civil law under its jurisdiction, disparately impacts women. Specifically, the Act permits the use of family arbitration. Women are negatively impacted because of the possibility that any legal framework may be used to decide family law issues, even frameworks that hold no regard for recognized principles of equality or statutory criteria under the *Family Law Act* or the *Divorce Act*.

3. Based on an Enumerated Ground

Because private ordering tends to replicate social inequities, of particular concern is that the oppression women experience in society generally will be duplicated in arbitrated agreements and awards. This distinction for the purpose of a s. 15 analysis, is based on sex, which is clearly, an enumerated ground. It may well be that more than one ground of distinction for example, race, ethnic origin or colour will be implicated. Depending on the facts of a case, arguments relating to multiple grounds of distinction can be made.¹⁴¹

4. Whether the Distinction or Differential Treatment is Discrimination

In this portion of the s. 15 analysis four main contextual factors will be considered: Firstly, the nature of the interests at stake will be examined. Women's right to ensured equality in family law matters is a significant interest. The judiciary has recognized the importance of fairness to women in family law issues in past cases, albeit not directly in the context of the *Charter*.¹⁴² However, *Charter* rights are not absolute and will have to be balanced such that other *Charter* rights that are also in issue can coexist together. Proponents of sharia arbitration will argue that s. 2(a) of the *Charter*, which protects freedom of religion, is implicated. Moreover, the argument will surely be made that an important feature of Canada's constitutional democracy is respect for minorities, including religious minorities.¹⁴³ While multicultural privileges can be protected using s. 27, which mandates interpretation of the *Charter* in a way consistent with the enhancement of the multicultural heritage of Canadians, s. 28 of the *Charter* reads:

¹⁴¹ Incidentally, the Supreme Court has never recognized the intersectionality of equality claims. Beverley Baines has noted that "[o]nly two provincial appellate courts, Nova Scotia in 1993 and Ontario in 2002...[have] ever tried to reconcile the categorical imperatives expressed in section 15 with litigants' real life experiences of intersectional discrimination." See *Re Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 224 (NSSCAD); and *Falkiner v. Ontario*, [2002] O.J. No. 1771 (O.C.A.) [O.J.]. Baines has suggested that recognizing intersectional claims may be possible through combining a section 15 ground other than sex with section 28's promise of sex equality. Beverley Baines, "Section 28 of the Canadian Charter of Rights and Freedoms: A purposive interpretation" (2005) C.J.W.L. [forthcoming in 2005].

¹⁴² See generally *Moge*, *supra* note 18.

¹⁴³ This argument was successfully made most recently in the Supreme Court of Canada decision *Syndicat Northcrest v. Amselem*, 2004 SCC 47 [*Amselem*]. Part Two of this paper will examine the issues of freedom of religion and multiculturalism in more depth. However, should a strategy of litigation be pursued, much thought should be put into countering these arguments that will most certainly be made by several intervening religious organizations. Syed Mumtaz Ali, head of the Islamic Institute of Justice has already framed all of his arguments for sharia tribunals around religious freedom and multiculturalism. Syed Mumtaz Ali, "The Review of the Ontario Civil Justice System: The Reconstruction of the Canadian Constitution and the Case of Muslim Personal/Family Law" (1994) online: Canadian Society of Muslims <<http://muslim-canada.org/submission.pdf>>.

“Notwithstanding anything in this Charter, all the rights and freedoms referred to in it are guaranteed equally to male and female persons.”¹⁴⁴

Secondly, the Court will consider whether there has been any pre-existing disadvantage, vulnerability, stereotyping or prejudice experienced by the individual or group. The Supreme Court of Canada has clearly stated that women suffer disadvantage in familial relationships. In *M. v. H.*, Justice Gonthier wrote of a “dynamic of dependence” that disadvantages women in heterosexual relationships.¹⁴⁵ In *Moge*, the Court recognized “that women have tended to suffer economic disadvantages and hardships from marriage or its breakdown because of the traditional division of labour within that institution.”¹⁴⁶ The Court’s recognition of the multiplicity of economic barriers that women face in society and the consequent social dislocation and a loss of familiar networks for emotional support and social services, clearly indicates recognition of the pre-existing disadvantage, vulnerability, stereotyping or prejudice experienced by women.

The third contextual factor refers to proposed ameliorative purposes or effects. This factor is aimed mainly at recognizing the importance and value of affirmative government measures to ameliorate the position of already disadvantaged groups. The government may try and argue that religious minorities are affirmatively benefiting from the Act as it currently stands, however, this argument may be difficult to sustain upon an examination of the intention behind the Act.¹⁴⁷ The more likely conclusion is that this factor does not apply and has only a neutral impact on the analysis.

Finally, the correspondence to the actual needs, capacities or circumstances of the claimant will be considered. It is not entirely clear to the author whether this contextual factor will be relevant to making a s. 15 claim for women. In recent Supreme Court of Canada decisions, this portion of the test has been inappropriately used to import s. 1 issues into s. 15.¹⁴⁸ In other words, factors that reduce the likelihood of finding a *Charter* infringement are considered at this stage, rather than at the s. 1 stage where the government bears the burden of establishing a justification for the infringement of a *Charter* right. It is possible that the government will argue that the Act does correspond to the needs, capacities and circumstances of women by giving them a choice as to whether to submit to arbitration. Indeed it may be argued that this is particularly true for Muslim women who for religious reasons may have reason to want their family law disputes resolved by arbitration. While it is important to make arguments regarding the compulsion and pressure to arbitrate that many women will endure, it may not be strategic to put forth the generalized argument that all women will always be unable to make free choices.¹⁴⁹

¹⁴⁴ *Charter*, *supra* note 8 at s. 28.

¹⁴⁵ *M. v. H.*, [1999] 2 S.C.R. 3 at para. 181.

¹⁴⁶ *Moge*, *supra* note 18 at para 70.

¹⁴⁷ The *Arbitration Act* does not have a preamble from which to garner a legislative intention. However, an inspection of the provincial parliamentary debates that occurred prior to the enactment of the Act suggests that the primary concern was to ensure a more cost effective means of resolving civil disputes and to salvage scarce judicial resources. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, (5 November 1991) at 3384 (Mr. Hampton). See also Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, (19 June 1990) at 1845 (Mr. Scott).

¹⁴⁸ *Canadian Foundation*, *supra* note 133 at para. 74 *per* Binnie. J. See also *Gosselin v. Quebec (Attorney General)* [2002] 4 S.C.R. 429 at para. 55.

¹⁴⁹ There will be Muslim women who will want to submit to arbitration using sharia law. It cannot be assumed that these women are necessarily being duped or oppressed as this would be engaging in the very

In order to demonstrate the negative impact that family arbitration has on women, one will have to consider whether as a strategy it is appropriate to delve into the likelihood that the sharia will be implemented fairly. Where a concrete set of facts exists, this may be easier to do by simply examining the arbitral award without making gross generalizations about the ability of the sharia to be progressive for women.¹⁵⁰ Importantly, the courts have stated their unwillingness to make judgments on religious principles.¹⁵¹

It is possible to make a general argument about the impact that the privatization of family law is having on women. Indeed many scholars have written about the dangers of the state washing its hands of responsibility in matters that are “private.”

The ideology of the public/private dichotomy allows government to clean its hands of any *responsibility* for the state of the ‘private’ world and *depoliticizes* the disadvantages which inevitably spill over the alleged divide by affecting the position of the ‘privately’ disadvantaged in the ‘public’ world.¹⁵²

The practical consequence of non-regulation by the government “is the consolidation of the status quo: the de facto support of pre-existing power relations and distributions of goods within the ‘private’ sphere.”¹⁵³ The difficulty lies in supporting this argument. The burden of proving all elements of the breach of a *Charter* right rests on the person asserting the breach.¹⁵⁴ Because arbitration is a private process and records are typically not kept, the fulfillment of this obligation is seriously hampered. Though in several cases, the Supreme Court of Canada has been prepared to make findings of fact without or with very little evidence, relying on the “obvious” or “self-evident” character of the findings, this has typically been done at the s. 1 justificatory stage of the *Charter* analysis, which benefits the government and not the rights-claimant.¹⁵⁵

infantilizing of Muslim women that one accuses patriarchal culture of. In fact, making an overly generalized argument regarding women’s capacities or experiences homogenizes women and potentially eliminates important differences based on intersecting grounds of oppression. Fareeda Shaheed of the network ‘Women Living Under Muslim Law’ (WLUML) has stated “WLUML recognizes that living in different circumstances and situations, women will have different strategies and priorities. We believe that each woman knowing her own situation is best placed to decide what is the right strategy and choice for her.” Shaheed, *supra* note 9.

¹⁵⁰ There are multiple explanations for why people choose to publicly support or denounce manifestations of their religion. According to Irshad Manji, “many Muslims favour reform [of for example, “deep-seated prejudices against women and religious minorities”] but will not speak about it publicly.” See Irshad Manji, *The Trouble With Islam: A Wake-up Call for Honesty and Change* (Toronto: Random House, 2003) at 169. Muslim women may feel particularly vulnerable in speaking out against Sharia law as they may fear being singled out as traitors in their community. As with other minority communities, the struggles of Muslim women to change patriarchal community practices are often seen as a betrayal of the community’s culture and traditions and as a threat to its stability in the hostile world of the larger society. See G. Stopler, *supra* note 127 at 197.

¹⁵¹ *Levitts Kosher Foods*, *supra* note 88 at para. 13.

¹⁵² Lacey in Susan Boyd ed. *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997) at 3.

¹⁵³ *Ibid.* at 3.

¹⁵⁴ Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2001) at 733. The standard of proof is the civil standard namely, proof by a preponderance of probability.

¹⁵⁵ *Ibid.* at 734. Peter Hogg has suggested that *Charter* review become less dependent on evidence because of the exorbitant cost associated with expert evidence for both the challenger and the government.

Trinity Western University v. British Columbia College of Teachers, a s. 15 case, involved a decision of the British Columbia College of Teachers (BCCT) not to accredit a free-standing Evangelical teacher-training program at Trinity Western University (TWU) because students from that program were required to sign a community standards document in which they agreed to refrain from “sexual sins including...homosexual behaviour”.¹⁵⁶ The BCCT was concerned that the TWU community standards, applicable to all students, faculty and staff, embodied discrimination against homosexuals. The BCCT argued that graduates from the TWU teacher-training program would not treat homosexuals in the BC public school system fairly and respectfully. The Supreme Court of Canada relied on the lack of a factual foundation in dismissing the appeal: “The evidence to date is that graduates from the joint TWU-SFU teacher education program have become competent public school teachers, and there is no evidence before this Court of discriminatory conduct.” The Court noted that the BCCT’s evidence was “speculative”¹⁵⁷ and involved inferences “without any concrete evidence” that the views of TWU graduates would have a detrimental effect on the learning environment in public schools.¹⁵⁸ This case strongly suggests that a rights-claimant must have more than approximate or tentative evidence of discrimination, which will be difficult to obtain given the lack of records and/or statistics.

However, as previously noted, there has been much feminist critique of the privatization of justice. The use of academic articles and expert testimony is certainly one method by which a claim of discrimination can be made out. Another possibility may be the use of judicial notice, a technique wherein judges acknowledge the obvious nature of a phenomenon without requiring tangible evidence to justify it. Judicial notice has been used to recognize the operation of systemic racism against certain communities in the criminal law.¹⁵⁹ There is no reason why it is not possible to persuade a judge to take judicial notice of systemic sexism.

Based on the above analysis, it is likely that a court will find that the use of arbitration in family law with no limits disparately impacts women. Strong arguments can certainly be made that this disparate impact is discriminatory and affects the dignity of women.

5. Section 1 of the *Charter*

Upon finding a s. 15 infringement of the *Charter* the onus of proof shifts to the government to establish that the infringement is justifiable in a free and democratic society pursuant to s. 1. The s. 1 test is two-pronged calling for the government to firstly, delineate a legislative objective of the *Arbitration Act* that is pressing and substantial and secondly, to demonstrate proportionality between the rights violation and the means chosen to achieve the legislative objective.¹⁶⁰ It is at this stage of the analysis that the government will attempt to demonstrate that it has balanced the equality rights of women with the competing *Charter* claimants’ right to freedom of religion. In this phase of the analysis, the government will likely address arguments about the cost efficiency of arbitration, the inability of courts to handle all civil disputes because of the scarcity of judicial resources and the necessity of catering to the multicultural ethos of Ontario.

¹⁵⁶ *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 at para. 4.

¹⁵⁷ *Ibid.* at para. 19.

¹⁵⁸ *Ibid.* at para. 32.

¹⁵⁹ *R. v. S.(R.D.)* (1997), 10 C.R. (5th) 1 (S.C.C.).

¹⁶⁰ *R v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*].

6. Conclusion

The implementation of sharia arbitration tribunals in Ontario raises a complex range of issues. When the resolution of family law matters is relegated to the private domain of arbitration with no limits, there are serious threats to the equality rights of certain vulnerable groups such as women. Because the *Arbitration Act* provides no safeguards for the equality rights of women, this critique is not limited to merely sharia arbitration tribunals, but to all religious arbitration and any system of law that does not acknowledge the dignity and worth of women. Though the traditional justice system is by no means perfect, the last 20 years of jurisprudence in family law demonstrates that certain gains have been made. These hard-won rights are seriously threatened by the underlying principles of the current *Arbitration Act*.

In considering strategies for law reform it is critical that certain questions be explored such as: Is it possible to include safeguards to the arbitration process that will adequately protect women? Can one avoid the predictable limits of such safeguards? Is it possible to reinvent dispute resolution such that feminist concerns are met?¹⁶¹ Should family law matters be excluded from the *Arbitration Act* altogether? Given the government's huge investment of resources in alternative dispute resolution, how likely is a prohibition of all family law matters from the Act? The Canadian Council of Muslim Women has concluded that Ontario ought to have the courage to acknowledge that the *Arbitration Act* should not be used for family law purposes. Indeed there is some precedent for this position from the province of Quebec, which has declared that family arbitration is not permissible.¹⁶²

The Attorney General of Ontario and the Minister for Women's Issues appointed Ms Marion Boyd to review the province's arbitration process and any current problems with the *Arbitration Act*, with specific reference to faith-based arbitration. In her lengthy report entitled "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion," Boyd weighed the competing interests of the over 100 individuals and groups with whom she consulted and examined the relevant constitutional issues. The report concludes with 46 recommendations which endorse family arbitration generally and religious arbitration for family and inheritance matters for all faiths. Boyd's report states that the engagement of religious minorities with provincial legislation will create an institutional dialogue and help minorities engage with the larger society. She concludes that the use of religious arbitration will promote a shared sense of social identity and social integration. Accordingly, she details a system where the practice of religious arbitration may be normalized and entrenched.

Several organizations including the National Association of Women and the Law have been critical of Boyd's report and have made alternate proposals. The final outcome of this matter remains to be seen. The government of Ontario has yet to announce how it will resolve this controversial issue or its intentions with respect to Boyd's recommendations.

¹⁶¹ "The formal ADR initiative provides an opportunity to shed the cultural baggage [of Islam] and revisit some of the patriarchally misinterpreted rulings by refocusing on the Qur'an's emphasis on gender equality." Faisal Kutty, *supra* note 106.

¹⁶² Article 2639 of the *Civil Code of Québec*, S. Q., 1991, c. 64, s. 2639 provides: "Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration."

Part Two: Human Rights Framework

I. Culture and multiculturalism

Cultural autonomy and gender equality are not always easily reconciled. The clash between these areas is a pervasive issue in the law. States with a multitude of communities within their borders are likely to face this issue in different guises and perhaps with increasing frequency. Canada has for years grappled with the question of how to incorporate a plurality of cultures and traditions while simultaneously defining a nation in the absence of a single collective identity. This issue has been complicated by the fact that Canada has a commitment to upholding both a policy of multiculturalism and an obligation towards women's rights. The *Canadian Charter of Rights and Freedoms* protects both the freedom of religion and the equality rights of all people from infringements by the state. Although these values need not necessarily conflict, in the context of religious arbitration tribunals, they have created a tension that must be resolved.

In recognition of the increasing diversity of many societies, several authors have posited a theory of liberalism that includes the accommodation of the cultural rights of certain minority groups. Will Kymlicka for example, has argued that individuals born into minority groups may need protection from the majority society in order to enable their autonomy. A multicultural or differentiated citizenship¹⁶³ model relies on the protection of basic individual rights for a just social order. However, it also recognizes that justice may require the recognition of traditions and unique ways of life for members of non-dominant cultural minorities, through group-based protections. While liberal theory posits that individuals must decide how best to achieve the good life, the protection of minority rights acknowledges that culture is often the context which enables this choice. Kymlicka has convincingly argued that culture allows individuals to meaningfully comprehend society; it is the lens that permits one to see the array of available options "across the full range of human activities including religious, recreational, social, educational and economic...in public and private spheres."¹⁶⁴

A. Multiculturalism in Canada

Canada's commitment to cultural pluralism is evidenced by its official policy of bilingualism and multiculturalism. The multicultural framework in Canada "openly promotes the values of diversity as a necessary, beneficial, and inescapable feature of Canadian society."¹⁶⁵ This framework is thought to be a way in which minorities can retain cultural distinction without compromising their social equality. In its early days, Canada's policy of multiculturalism was criticized for among other things its emphasis on the mere "song and dance" aspect of cultural pluralism, its failure to improve the living

¹⁶³ Differentiated citizenship refers to group differences that can only be accommodated if their members have certain group-specific rights. See Iris Marion Young 1989 "Polity and Group Difference: A Critique of the Ideal Universal Citizenship" *Ethics* 99/2 at 258.

¹⁶⁴ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, (Oxford: Oxford University Press, 1995) at 46.

¹⁶⁵ Sarah V. Wayland, "Citizenship and Incorporation: How Nation-States Respond to the Challenges of Migration" (1996) 20-FALL *Fletcher F. World Aff.* 35 at 46.

conditions of many new immigrants and the promotion of fragmentation rather than a common vision of values for all Canadians.¹⁶⁶

In the late 1970s, the government's focus with multiculturalism funding was aimed at transforming public opinion toward the increasing cultural diversity in Canada combined with combating racism. In the context of large decreases to the multiculturalism budget generally in the 1990s, activities with a view to multicultural or multiethnic programmes were more likely to be funded than those of a monocultural or monoethnic nature.¹⁶⁷ More recently however, the "federal government has progressively moved to resolve the ongoing tension between multiculturalism and citizenship in favour of the latter."¹⁶⁸ In 1997, the multiculturalism programme was modified to focus on a three pronged approach: (1) Canadian identity (people of all backgrounds should feel a sense of belonging and attachment to Canada); (2) civic participation (everyone must be an active citizen, concerned with shaping the future of their communities and their country); and (3) social justice (everyone must be involved in building a society that ensures fair and equitable treatment and that respects the dignity of and accommodates people of all origins).¹⁶⁹ Direct funding to ethnocultural organizations is now seen as problematic because it is argued that such funding upholds the perception that multiculturalism is for special interest groups rather than for all Canadians.¹⁷⁰

Different to the Canadian government's policy of multiculturalism, the government of Quebec has adopted a policy of "interculturalism" that recognizes pluralism as a feature of modern Quebec, but seeks to integrate immigrants to a common civic culture using the French language. The promotion of French, the language of the majority, as the common public language of all Quebecers is seen as the instrument that allows the socialization of Quebecers from all origins and forces interaction between them.¹⁷¹

Despite some changes in policy content around multiculturalism that have put a greater emphasis on loyalty to Canada, the accommodation of cultural and religious groups¹⁷² has remained a commitment in order to combat racism, xenophobia, ethnocentrism, discrimination and religious intolerance. Thus, Canada has made special efforts to protect minority groups from the destabilizing impact of the political, economic, social and cultural hegemony of the majority. For example, the religious community of Sikhs has been exempted from motorcycle helmet laws in British Columbia¹⁷³ and from the

¹⁶⁶ Denise Helly, "Le financement des associations ethniques par le programme du Multiculturalisme canadien" (Paper presented to the Institut national de recherche scientifique, Centre Urbanisation, Culture et Société, March 2004) [unpublished].

¹⁶⁷ *Ibid.*

¹⁶⁸ Micheline Labelle, "The Politics of Managing Diversity: What is at Stake in Quebec?" (Paper presented to Conference *Quebec and Canada in the New Century: New Dynamics, New Opportunities*, Queen's University, Kingston, October 31-November 1 2003) at 4.

¹⁶⁹ Canadian Heritage in Micheline Labelle, *ibid.* at 4.

¹⁷⁰ *Ibid.* at 5.

¹⁷¹ Wikipedia, online: the Free Encyclopedia: <<http://en.wikipedia.org/wiki/Multiculturalism>>.

¹⁷² Religion and culture are often inextricably intertwined. Indeed religious freedom includes the customs and practices of a community or the sincere beliefs of an individual irrespective of formal religious tenets. See *Amselem*, *supra* note 143 and Part Two, II, A. of this paper. Clearly even people of a single faith will practice religion differently by virtue of their cultural differences. Thus, the discussion of culture in this paper necessarily includes religion as a subcategory of culture.

¹⁷³ *Dhillon v. British Columbia (Ministry of Transportation and Highways, Motor Vehicle Branch)*, [1999] B.C.H.R.T.D. No. 25 (QL).

official dress-code of the RCMP.¹⁷⁴ Similarly, some Mennonite communities, the Doukhobours and the Hutterites have been granted certain exemptions from mandatory education in recognition of the potentially substantial interference that a broad and secular education could have on the religious development of the children from these communities.¹⁷⁵

B. The Multiculturalism Paradox

While there is little doubt that the accommodation of minority groups is an indisputable virtue, multicultural accommodation policies have typically been concerned with the relationship among different cultures and between a given minority community and the state. Often overlooked, but equally important, is the dilemma concerning the potentially injurious effects of inter-group accommodation upon intra-group power relations.¹⁷⁶ Well-meaning accommodation policies by the state, aimed at leveling the playing field between minority communities and the majority society, may unwittingly allow systemic maltreatment of individuals within the accommodated minority group, “an impact in some cases so severe that it nullifies the individual rights of citizens.”¹⁷⁷

Will Kymlicka has referred to this phenomenon as the distinction between external protections, or group differentiated policies designed to “protect a particular ethnic or national group from the destabilizing impact of the decisions of the larger society” versus internal restrictions, or cultural group claims to “restrict the liberty of members in the name of group solidarity”.¹⁷⁸ While Kymlicka is in favour of external protections, he does not support the use of internal restrictions concluding that they are inconsistent with a system of minority rights that appeal to individual freedom or personal autonomy. He notes that a differentiated citizenship model must recognize the value and primacy of the individual while also recognizing the legitimacy of group-based accommodation. Kymlicka’s two concepts of external protections and internal protections can be viewed oppositionally as the two concepts are often two sides of the same coin. Thus, certain religious communities would view the withdrawal of their children from mandatory education as a necessary external protection in order to prevent undermining the religious development of the child. Kymlicka himself would argue that this group is imposing an internal restriction on its members by essentially making it difficult for their members to leave the group by severely limiting the extent to which these children would learn about the outside world.¹⁷⁹

¹⁷⁴ Kymlicka, *supra* note 164 at 31. Interestingly, Sikhs have not been exempted from the wearing of a hard hat at particular work sites where this obligation was a *bona fide* occupational requirement. *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561. “Subsequent rulings of the Supreme Court of Canada, in particular its ruling in *British Columbia (Public Service Employee Relations Comm.) v. B.C.G.E.U.* (1999), 35 C.H.R.R. D/257 (“Meiorin”), indicate that were Mr. Bhinder’s case to come before the Court today it would be decided differently. There would be an onus on CN Rail to show that it was impossible for it to accommodate Bhinder without incurring undue hardship. Susan Joanis, “Human Rights Law in B.C.: Religious Discrimination” (Paper prepared for the British Columbia Human Rights Commission, March 2001) online: <<http://www.cdn-hr-reporter.ca/religion.htm>>.

¹⁷⁵ Kymlicka, *supra* note 164 at 41-42.

¹⁷⁶ Ayelet Shachar, “The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority” (2000) 35 Harv. C.R.-C.L. Rev 385 at 385.

¹⁷⁷ *Ibid.*

¹⁷⁸ Kymlicka, *supra* note 164 at 153.

¹⁷⁹ Though Kymlicka would typically insist that liberal states enforce liberal principles on minority groups, he distinguishes the Mennonites from this result because they were granted historical exemptions, which though potentially regrettable, are not easily dismissed. See Kymlicka, *supra* note 164 at 170.

The multiculturalism paradox is represented by the reality in which sound attempts to empower traditionally marginalized minority communities ultimately may reinforce power hierarchies within the accommodated community. It appears then, that the task must be to find a way of accommodating cultural differences, while also protecting at-risk group members from sanctioned violations of their state-guaranteed rights. How can one protect women and other vulnerable individuals within the ambit of religious protection? "Indeed, one cannot comprehend (let alone redress) the plight of the individual in the multiculturalism paradox if one does not understand the complex and overlapping affiliations existing between the state, the group and the individual."¹⁸⁰

C. The Impact of Accommodation on Minority Women

As previously noted, the arena of family law has long remained controversial as it brings to the surface the ability of a group to demarcate the boundaries of its membership while also being a key site of oppression for women. Many minority communities operating within a larger political entity possess traditions pertaining specifically to the family that have historically served as important manifestations of distinct cultural identity, "making family law a central pillar in the cultural edifice for ensuring the group's continuity and coherence over time."¹⁸¹

The importance of substantively accommodating women within cultural communities is illustrated by the situation of Native women in Canada. In the pre-*Charter* case of *Canada (Attorney General) v. Lavell*,¹⁸² an Aboriginal woman lost her challenge to the *Indian Act* which provided that unlike Native men, Native women who married a non-Native lost their status as Indians, as did their children. Although the *Indian Act* was the legislation of a colonial regime, in this case, the interests of the state were in line with the patriarchal interests of Native men. In 1981, the Human Rights Committee found that the *Indian Act* unreasonably deprived Sandra Lovelace of her right to belong to the Indian minority and to live on and enjoy her culture under article 27 of the *International Covenant on Civil and Political Rights* (ICCPR).¹⁸³ Subsequent to this decision and the enactment of the *Charter*, the *Indian Act* was amended in 1985 and the statutory discrimination found in s. 12(1)(b) against women was eliminated.¹⁸⁴ In reality, the legislation has left

a continuing legacy of discrimination. A Bill C-31 reinstatedee cannot pass her own status on to her children: only children born with a status father will have status. This "second-generation cut-off" enacted in Bill C-31 and now effected by s. 6(2) of the *Indian Act* means that cousins of the first degree will have different status under the Act depending on whether they descend in the male or the female line. Brothers and sisters have different ability to pass on their status to their children. A Bill C-31 woman who has a child out of wedlock must name the father, and he must be status, before her child is eligible. Mothers who are restored to Indian status by Bill C-31 will be grandmothers of children who cannot claim status, as well as those who can, depending on the marital arrangements of their parents. The Bill effects finer and finer differentiations among the Aboriginal community, has divided families, and will result in the extinction

¹⁸⁰ Shachar, *supra* note 176 at 387-388.

¹⁸¹ *Ibid.* at 395.

¹⁸² *Canada (Attorney General) v. Lavell*, [1974] S.C.R. 1349.

¹⁸³ Communication No. 24/1977 (1)-(2), decided July 30, 1981, U.N. Doc. CCPR/C/OP/2 at 224 (1990).

¹⁸⁴ Frances Raday, "Culture, Religion and Gender" (2003) 1 *Int'l J. Const. L.* 663 at 683.

of some First Nations as the affects of the second generation cut-off are realized.¹⁸⁵

Contrary to the views of some Band Councils who have argued “that the right to discriminate against and exclude women is part of the traditional heritage of Aboriginal peoples”,¹⁸⁶ the Native Women’s Association of Canada recommends that there be a national Aboriginal Bill of Rights drafted from the grassroots that would be applicable to First Nations governments.¹⁸⁷

Gender discrimination in family law has systemic effects on women’s equality, given the substantive breadth of that law, as well as its impact on women’s ability to exercise specific rights. Family law defines property relations between spouses and determines the economic and parental consequences of divorce. For women, these stakes are especially high with separation and divorce typically resulting in the feminization of poverty.¹⁸⁸ The defence of “cultural practices” will have a much greater impact on the lives of women and girls than on the lives of men and boys, since far more of women’s time and energy goes into preserving and maintaining the private realm.

Women’s roles inside the home as caregivers and nurturers are central not only to religious thought, but also to contemporary western political thought. Familial ideology is also central to capitalism...The nurturing nature of the family, in contrast with the marketplace, generates the belief that the impersonal force of the state should be kept out of the familial realm. Finally, the family and women’s reproductive role, as well as their roles as care-givers and nurturers, are central to nationalism, which views women as reproducers of the nation, transmitters of its culture, and symbols of the nation.¹⁸⁹

In cases of separation or divorce, when women living within certain religious communities are told that they have limited or no legal rights to property, spousal support, or custody of their children, the accommodation of their group’s traditions means that women’s basic rights as individual citizens are violated. A growing body of research shows that accommodation in the family law arena imposes upon women a systemic and disproportionate burden, particularly in their traditional gender roles as wives and mothers.¹⁹⁰

Some countries with multiple religious groups, particularly the ex-colonies of France and Britain, have retained religious law in family and inheritance matters (despite the struggles of women in these countries)¹⁹¹ and secular law in commercial and criminal matters. This was originally a colonial strategy to ensure civil unrest.¹⁹² Thus,

¹⁸⁵ Mary Eberts, “Aboriginal Women’s Rights are Human Rights” online: Department of Justice Canada: <http://www.justice.gc.ca/chra/en/eberts.html>

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ See *Moge*, *supra* note 18.

¹⁸⁹ *Stopler*, *supra* note 127 at 172-173.

¹⁹⁰ *Shachar*, *supra* note 176 at 396.

¹⁹¹ For example, in India each religious community has its own personal laws that are governed by its own religious law. The result is highly discriminatory toward women, and women’s organizations have been advocating for the enactment of a Uniform Civil Code that will govern all marriages in India and will be based on equality between spouses. *Stopler*, *supra* note 127 at 197-198.

¹⁹² Colonial regimes generally did not attempt to abrogate personal status law nor to introduce reforms aimed at promoting gender equality, as their interests lay in maintaining economic and social stability.

individuals of certain religious affiliations have the internal rules of their respective religion apply to such matters as marriage, divorce, support, custody/access and inheritance while secular or civil law governs all other fields. In such multi-confessional states this body of law is known as “personal status law.”¹⁹³ Personal status law may regulate procedural as well as substantive rights and thus, condition women’s ability to obtain redress for violations of the latter, as illustrated by the example of evidentiary rules that assign lesser weight to women’s testimony or completely bar their testimony.¹⁹⁴

Importantly, under Canadian law there is no recognized concept of personal status law. Canadian law makes no distinction between secular and religious law. There is a single set of laws that apply to all people within Canada’s jurisdiction. Unlike France and Germany which may allow a “direct” application of family law from Muslim countries for non-citizen Muslims,¹⁹⁵ Canada has a single set of laws that apply to all people within its jurisdiction. In France,

as a result of stipulations of international private law and bilateral agreements, France must apply the laws of the foreigner’s country of... [nationality in most] matters of family law, more specifically in relation to disputes over “the status and capacity of persons”. This is true in so far as doing so does not contravene French public order or violate an international convention to which France is a party [such as the European Human Rights Convention]. These rules of international private law that incorporate...family law [from Muslim countries] at the domestic level to non-French citizens living within France are of crucial importance, as only one out of four million Muslims living in France have obtained French citizenship.¹⁹⁶

Canada by contrast, follows the law of domicile where regardless of citizenship all people are subject to the same law by virtue of their residence in Canada.

Susan Okin has asked, what happens when group rights are anti-feminist?¹⁹⁷ She states “[o]ppressed people have often internalized their oppression so well that they have no sense of what they are justly entitled to as human beings.”¹⁹⁸ That women from minority communities often feel the need to choose between their struggle against the sexism inside their communities and the racism/intolerance directed against them explains why oppression against women in minority communities often remains unchallenged by the women inside the community. The internalization process is certainly one of the most problematic legacies of long-term oppression. Okin ascribes to false consciousness potential disagreement arising from cultural defenses offered by women themselves. She explains that “[c]oming to terms with very little is no recipe for social justice....committed outsiders can often be better analysts and critics of social

Donna Sullivan, “Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution”, (1992) 24 N.Y.U. J. Int’l L. & Pol. 795 at 836.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.* at 838.

¹⁹⁵ Pascale Fournier “The Reception of Muslim Family Law in Western Liberal States” (Paper prepared for the Canadian Council of Muslim Women, September 2004) [unpublished] at 27.

¹⁹⁶ Fournier, *ibid.* at 8.

¹⁹⁷ See Susan Moller Okin, “Is Multiculturalism Bad for Women?” in J. Cohen, M. Howard, & M. Nussbaum, eds., *Is Multiculturalism Bad for Women*, (Princeton: Princeton University Press, 1999) 7.

¹⁹⁸ *Ibid.*

injustice than those who live within the relevant culture.”¹⁹⁹ This argument addresses the inadequacy of a gender-neutral policy of cultural accommodation yet it is unsatisfactory in explaining the situation of women who may still find value and meaning in their community’s cultural tradition and in continued group membership, particularly where the minority culture itself is subject to repressive pressures from the broader society.

While the liberatory and creative potential of allowing marginalized perspectives to redefine women’s condition is essential, states must not take advantage of the reluctance of women to speak out and interpret it to mean that minority women are content in their oppressive circumstances.²⁰⁰ The relationship between multiculturalism and feminism ought not to amount to a zero-sum game, in which any strengthening of a minority group’s rights implies an accompanying weakening in the rights for that minority group’s female group members.²⁰¹ The resolution to the multiculturalism paradox cannot be guided by “an either-your-rights-or-your-culture ultimatum” in which women may either enjoy the full spectrum of their state guaranteed rights or participate in their minority communities.²⁰² A new multicultural paradigm must break away from the either/or opposition as this forced stand off between two vital aspects of the experiences of women is unrealistic and undesirable.

II. Religious freedom

A. Freedom of Religion Under Domestic Law

In Canada, the right to religious freedom is a basic human right protected both domestically and ratified as an international obligation. Section 2(a) of the *Charter* guarantees to “everyone” the “fundamental freedom” of “conscience and religion.”²⁰³ Like other *Charter* rights, s. 2(a) is subject to the s. 1 clause which may limit freedom of religion or conscience if it comes within the phrase “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”²⁰⁴ Most recently, the Supreme Court of Canada stated in *Reference re Same-Sex Marriage*,²⁰⁵ “The protection of freedom of religion afforded by s. 2(a) of the Charter is broad and jealously guarded in our Charter jurisprudence.”²⁰⁶ In *Big M Drug Mart*, Justice Dickson offered the following definition of freedom of religion:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. The right to freedom of religion enshrined in s. 2(a) encompasses the right to believe and entertain the religious beliefs of one’s choice, the right to declare one’s religious beliefs openly and the

¹⁹⁹ Susan M. Okin, *Gender Inequality and Cultural Differences*, (1994) 22 *Pol. Theory* 5 (asking, “Doesn’t stressing differences, especially cultural differences, lead to a slide toward relativism?”) at 19.

²⁰⁰ Stopler, *supra* note 127 at 201.

²⁰¹ Shachar, *supra* note 176 at 400.

²⁰² *Ibid.* at 401.

²⁰³ Hogg, *supra* note 154 at 851.

²⁰⁴ *Ibid.* at 851.

²⁰⁵ *Reference re Same-Sex Marriage*, 2004 SCC 79 [*Same-Sex Marriage*].

²⁰⁶ *Ibid.* at para. 53.

right to manifest religious belief by worship, teaching, dissemination and religious practice.²⁰⁷

Section 2(a) emphasizes the protection afforded to both religious beliefs as well as religious practices. Peter Hogg has observed that Justice Dickson's comments borrow from the language of article 18 of the ICCPR.²⁰⁸ At least one author has suggested that the right to freedom of religion is conceptualized in Canada as a negative liberty, that is, "it does not impose any positive obligation upon the state...to recognize positive legal effects to religious norms."²⁰⁹

Custom, practice and individual belief within religious communities often diverge significantly from legal doctrine. However, each of these manifestations of religious belief are recognized and entitled to protection on an equal footing with religious law.²¹⁰

The extent to which a particular interpretation of religious law is considered to be authoritative or aberrant, or a particular practice is deemed to have a legitimate foundation in religious law, does not determine whether international guarantees of religious freedom are applicable. Those guarantees recognize all such interpretations (with the exception of spurious or fraudulent claims) as manifestations of religion.²¹¹

Importantly, the Supreme Court of Canada has stated that it will not enquire into the contents of religious belief:

[T]he basic principles underlying freedom of religion support the view that freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials...Consequently, both obligatory as well as voluntary expressions of faith should be protected under the Quebec (and the Canadian) Charter. It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection.²¹²

Thus in the Canadian context, an individual's sincere belief in a particular religious practice is given predominance over even the normative legal code of belief purported by religious authorities or the community. The Supreme Court's interpretation of religious freedom suggests that the imposition of an arbitrator's binding interpretation of a religious norm may violate an individual's subjective view of her/his religion.

²⁰⁷ *Big M Drug Mart*, [1985] 1 S.C.R. 295 at 336-37. See also *Same-Sex Marriage*, *supra* note 205 at para. 57.

²⁰⁸ Hogg, *supra* note 154 at 852.

²⁰⁹ Jean-Francois Gaudreault-Desbiens, "The Limits of Private Justice" University of Toronto Faculty of Law Nexus, Fall/Winter 2004 at 29.

²¹⁰ Sullivan, *supra* note 192 at 812-813.

²¹¹ *Ibid.* at 813.

²¹² *Amselem*, *supra* note 143 at paras. 46-47 [emphasis added].

While the inclusion of custom or sincerely held beliefs in the definition of religious law may entail the additional burden of engaging with offensive patriarchal practices never meant to be part of a religious code,²¹³ the use of custom may also be used for progressive purposes. Religious law is not static. Custom and practice can assist in modifying religious traditions over time, “even within religious communities that insist on the immutability of the law as defined in religious texts held to be divinely inspired.”²¹⁴ It has been noted that “Islam was not intended to freeze human history at the point in time at which God’s Word was revealed to the Prophet.”²¹⁵

B. Religious Freedom Under International Law

Under international law, the *Universal Declaration of Human Rights*, the ICCPR and the *Declaration on the Elimination of All Forms of Religious Intolerance and of Discrimination Based on Religion or Belief* (Declaration on Religious Intolerance) all guarantee the freedom, either individually or “in community with others” and “in public or private,” to manifest religion in worship, observance, practice or teaching.²¹⁶ Donna Sullivan has argued that the right to manifest one’s religion or belief encompasses the right to observe and apply religious law, including the right to establish and maintain religious tribunals. “The application of religious law, by formal tribunals or religious leaders, in communal or individual life, and in public or private life, constitutes the observance and practice of religion.”²¹⁷ In a number of belief systems including Islam, the observance of religious law is believed by some to be integral to religious practice. These interpretations of Islam emphasize the numerous prescriptive aspects of the religion on the daily life of Muslims. Importantly however, Islam also advocates that Muslims living in non-Muslim countries have a duty to obey the laws of that land.²¹⁸ Thus, while the right to practice one’s religion may include the use of religious tribunals, there is no necessary implication that the decisions of religious tribunals have civil effect.

As will be discussed in the following section, international and domestic norms guaranteeing the freedom of religion or belief are not absolute. Under international law countries are permitted to restrict manifestations of the freedom of religion in order to protect the rights of others.²¹⁹ In Canada, rights under the *Charter* can also be limited by virtue of s. 1 which states that the rights and freedoms set out in it are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”²²⁰

²¹³ For example, in certain countries the practice of female genital mutilation is often inaccurately described as originating in Islam. Any association of this tradition with Islam is only as a result of custom or practice.

²¹⁴ Sullivan, *supra* note 192 at 813.

²¹⁵ Leila P. Sayeh & Adriaen M. Morse, Jr., “Islam and the Treatment of Women: An Incomplete Understanding of Gradualism” (1995) 30 Tex. Int’l L.J. 311 at 330.

²¹⁶ Universal Declaration, G.A. Res. 217, U.N.Doc. A/810, art 18 [hereinafter Universal Declaration]; *International Covenant on Civil and Political Rights* (ICCPR), art. 18(1), 999 Supp. No. 51, at 171, U.N.Doc. A/36/51 (1981).

²¹⁷ Sullivan, *supra* note 192 at 805.

²¹⁸ Syed Mumtaz Ali in Jiminez, *supra* note 29. It has been suggested that this principle originates in Surah No. 4 (The Women), verse 59 of the Qu’ran:

O you who believe, obey God and the prophet

And those in authority among you;

And if you are at variance over something,

Refer it to God and the Messenger, if you believe in God and the Last Day.

This is good for you and the best of settlements [emphasis added]. *Al-Qur’an*, trans. by Ahmed Ali, (Karachi: Akrash Publishing, 1984).

²¹⁹ Sullivan, *supra* note 192 at 807.

²²⁰ *Charter*, *supra* note 8 at s. 1. See also *R. v. Oakes*, *supra* note 160.

III. The Legal Supremacy of Women’s Rights in the *Charter* and in CEDAW

A. International Legal Framework

The potential clash between culture and religion, on the one hand, and human rights or gender equality,²²¹ on the other, is expressly regulated in two international conventions—the CEDAW and the ICCPR, both of which have been ratified by Canada.

Article 5(a) of CEDAW reads:

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

Similarly, article 2(f) of CEDAW provides that:

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

Article 5(a) imposes a positive obligation on states parties to “modify...social and cultural” practices in the case of a conflict, and article 2(f) imposes an obligation to “modify or abolish...customs and practices” that discriminate against women. Clearly then, CEDAW gives superior force to the right to gender equality over cultural practices or custom, including religious norms,²²² thus creating a clear hierarchy of values.

The U.N. Committee on CEDAW has stated that Convention articles 2 and 3 “establish a comprehensive obligation to eliminate discrimination in all its forms in addition to the specific obligations under article 5-16”.²²³ The prohibition of gender discrimination set forth in the Convention explicitly extends beyond state action to non-governmental conduct.²²⁴

²²¹ It should be noted that the clash with which we are dealing is not one between religion on one side and the right to gender equality on the other, but between those norms of religion that inculcate patriarchal values and rely on a claim to religious freedom in order to perpetuate these patterns of behaviour to the disadvantage of women. See Raday, *supra* note 184 at 676.

²²² Culture in this respect is seen as a macroconcept definitive of human society. Thus, “cultural practices” subsume the religious norm of societies, Raday, *supra* note 184 at 677.

²²³ Adoption of the Report, General Recommendation No. 19: Violence Against Women, U.N. CEDAW, 11th Sess., Agenda Item 7 at 3, U.N. DOC. CEDAW/C/1992/L.1/Add.15 (1992). See also Sullivan, *supra* note 192 at 799.

²²⁴ Sullivan, *supra* note 192 at 799.

Article 18(3) of the ICCPR also expressly regulates any potential conflict between the right to manifest one's religion and the fundamental rights or freedoms of others. It states:

Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.²²⁵

Article 18(3) thus provides an exception to the "freedom to manifest one's religion", should a confrontation materialize with the fundamental rights and freedoms of others, including the right to gender equality also protected in the ICCPR pursuant to article 3.²²⁶ Through this exception, a hierarchy of rights is implicitly introduced, albeit in less categorical language than in CEDAW.²²⁷ Indeed the article, in providing an exception for such limitations as may be "necessary" to protect fundamental rights, may be read to imply that there will be an obligation on states parties to impose them. This appears to be the reading implicit in the Human Rights Committee's General Comment on the Equality of Rights between Men and Women, which although not expressly referring to article 18(3), holds that the right to religion does not allow any state, group or person to violate women's equality rights.²²⁸

B. Canada's Rights Regime

In Canadian law, as in international law, both the right to gender equality and the right to freedom of religion and multiculturalism are protected. The right to equality between women and men is protected under the general equality provision of s. 15 of the *Charter* and additionally under s. 28 of the *Charter* which provides that "[n]otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."²²⁹ The relationship between s. 15 and s. 28 of the *Charter* has been described in the following manner:

Section 28 has...to be viewed in the light of the 'limitations' clause in s. 1 of the Charter and the 'non obstante' clause in s. 33. Based upon past experience, there was fear either that the legislatures through s. 33 might, on the one hand, exempt a law discriminating against women from the ambit of the Charter, or, on the other hand, that the courts might, through the 'limitations' clause in s. 1, so construe a law which discriminates against women as to consider it such a reasonable limit 'as can be demonstrably justified in a free and democratic society'.²³⁰

While s. 15 of the *Charter* is subject to the s. 33 legislative override clause, s. 28 is not. Similarly, s. 15 is subject to the s. 1 limitations clause however, because of section 28, it

²²⁵ ICCPR, *supra* note 216 at art. 18(3) [emphasis added].

²²⁶ Article 3 of the ICCPR provides: The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant. ICCPR, *supra* note 216 at art. 3.

²²⁷ Raday, *supra* note 184 at 678.

²²⁸ *Ibid.*

²²⁹ *Charter*, *supra* note 8 at s. 28

²³⁰ Tarnopolsky and Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms: Commentary*, (Carswell, Toronto, 1982) at 436. See also Katherine J. de Jong, "Sexual Equality: Interpreting Section 28" in Anne F. Bayefsky & Mary Eberts, eds., *Equality and The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) at 527.

will almost never be “demonstrably justifiable” to deny sexual equality as provided by section 15(1).²³¹

Freedom of religion is protected by virtue of s. 2(a) of the *Charter* and religious minorities also have the right to be free from discrimination on the basis of s. 15’s general equality provision. The preservation of multiculturalism is recognized in Canada by virtue of s. 27 of the *Charter* which states that “[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”²³² Moreover, in *Reference re Secession of Quebec*,²³³ the Supreme Court of Canada emphasized respect for minorities as an underlying principle of the constitution. The Court noted that the constitution is more than a written text and that the underlying principles of the constitution inform the overall appreciation of constitutional rights and obligations.

Canada’s policy of multiculturalism²³⁴ has enabled the federal government to encourage and assist in the funding of certain activities of multi-ethnic groups with a view to increasing the dialogue and integration of minority groups in Canadian society. Multiculturalism in the courts on the other hand, has manifested itself through the concept of reasonable accommodation wherein for example, a duty is imposed on an employer to take reasonable steps short of undue hardship to accommodate the religious practices of the employee when the employee has suffered or will suffer discrimination from a working rule or condition.²³⁵ Though multiculturalism may not confer actual positive rights,²³⁶ the courts must give significance to the entrenched policy of pluralistic cultural preservation and enhancement in s. 27 of the *Charter*:

Therefore, my conclusion that a law infringes freedom of religion, if it makes it more difficult and more costly to practise one’s religion, is supported by the fact that such a law does not help to preserve and certainly does not serve to enhance or promote that part of one’s culture which is religiously based. Section 27 determines that ours will be an open and pluralistic society which must accommodate the small inconveniences that might occur where different religious practices are recognized as permissible exceptions to otherwise justifiable homogeneous requirements.²³⁷

²³¹ See also Jean-Francois Gaudreault-Desbiens, *supra* note 209 at 30. Recently however, the Supreme Court of Canada held that s. 9 of the *Public Sector Restraint Act*, which extinguished the promised pay equity arrears owed by the government of Newfoundland and Labrador to female employees violated women’s equality rights under s. 15(1) of the *Charter*, but was justifiable under s. 1. *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66 [NAPE]. It does not appear from the judgment that arguments using s. 28 of the *Charter* were submitted. It may be that the use of s. 28 would have changed the outcome in favour of women. Beverley Baines has noted the “untapped potential” of s. 28 and has encouraged feminist legal scholars and litigants to consider invoking it when framing women’s *Charter* claims. Baines, *supra* note 141.

²³² *Charter*, *supra* note 8 at s. 27.

²³³ *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

²³⁴ See *Canadian Multiculturalism Act*, R.S., 1985, c. 24 (4th Supp.).

²³⁵ *Ontario Human Rights Commission v. O’Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536. See also *Bhinder v. Canadian National Railway Co.*, *supra* note 174 at para. 46.

²³⁶ “Le but du multiculturalisme n’est donc pas de créer des droits subjectifs à la différence culturelle en soi mais plutôt d’éviter l’oppression d’une minorité, d’éviter que ces dernières ne soient discriminées. Il s’agit donc avant tout d’une dimension négative.” Anne Saris thesis, *supra* note 266.

²³⁷ *R. v. Videoflicks Ltd.* (1984), 15 C.C.C. (3d) 353 (Ont. C.A.) at para. 67; appeal dismissed sub nom. *Edwards Books and Art Limited et al. v. R.*, [1986] 2 S.C.R. 713.

It is not uncommon for rights in the *Charter* to conflict. The Supreme Court of Canada has held that “[t]he ultimate protection of any particular Charter right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.”²³⁸ Though the Court has required a balancing of competing rights claims with a view to the particular context, it has avoided explicitly finding a hierarchy of *Charter* rights. In *Dagenais v. Canadian Broadcasting Corporation*, the Court held:

A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict . . . Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.²³⁹

At issue in *R. v. O'Connor*²⁴⁰ was the right of sexual assault defendants to secure production of complainants’ therapeutic records held by third parties, as well as the process that might govern the production of such records. A large coalition of women’s groups intervened to oppose the extension of disclosure principles and practice to therapeutic records in order to stress the importance of women’s equality in sexual assault cases.²⁴¹ In balancing the right of an accused to a fair trial with the competing rights of a sexual assault complainant to privacy and to equality without discrimination, the Supreme Court was unanimous in holding that defendants have a right to request production of records held by third parties. The federal government responded to the *O'Connor* decision with Bill C-46, correcting the Supreme Court’s narrow focus on the right to a fair trial by promoting women’s privacy and equality considerations.²⁴² In 1999, the constitutionality of the new provision was at issue in *R. v. Mills*.²⁴³ Prior to this the Court’s interpretation of fair trial rights was singularly male-centric with a narrow focus on only the criminally accused. In *Mills*, the Court was willing to concede that the arena of sexual assault laws required a broader lens of interpretation and included the voices of women and children who are victimized and made vulnerable by sexual offences. Consideration of a woman’s right to privacy and equality was held to be necessary and the Court expanded the traditional understanding of the right to a fair trial.

The Supreme Court’s jurisprudence has approached the conflict between competing *Charter* rights with a generic balancing of rights. It has “not grant[ed] jurisdiction in an all-or-nothing fashion to institutional representatives of cultural communities”,²⁴⁴ however, neither has it explicitly mandated that women’s equality has primacy in situations of conflict with other rights. The Court has preferred to address the issue of how much accommodation should be granted to minority groups and women on a case-by-case basis. Nonetheless, the Court’s eventual willingness to expand the notion of the right to a fair trial to include women’s equality and privacy considerations suggests that an interpretation of freedom of religion could also be reconceptualized to incorporate women’s equality rights.

²³⁸ *Amselem*, *supra* note 143 at para. 62.

²³⁹ *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835 at 877.

²⁴⁰ *R. v. O'Connor*, [1995] 4 S.C.R. 411.

²⁴¹ Christopher P. Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women’s Legal Education and Action Fund* (UBC Press, 2004: Vancouver) at 130.

²⁴² *Ibid.* at 138.

²⁴³ *R. v. Mills*, [1999] 3 S.C.R. 668 [*Mills*].

²⁴⁴ Shachar, *supra* note 176 at 406.

Also of note is that the courts have refused to allow a “culture” defence to criminal defendants accused of killing their spouses. In *R. v. Ly*,²⁴⁵ a Vietnamese man who strangled a woman with whom he had been living argued that his spouse’s infidelity provoked him to kill her. The issue in the case was the appropriate test for the defence of provocation which if successfully made lowers a conviction of murder to manslaughter. Ly testified that his “wife’s infidelity had caused him to lose ‘face’ and ‘honour’, and this had a special importance to him because of his Vietnamese upbringing.”²⁴⁶ He argued that the jury should consider the characteristics peculiar to him, including his culture, when deciding what the ordinary person would have done in the circumstances. The court refused to take this into consideration finding instead that the appropriate test was an objective one that considered the reaction of the ordinary reasonable person.²⁴⁷ This case illustrates that Canadian courts are unwilling to allow an individual to gain from his wrong based on the indiscriminate use of “culture”.

C. Islam and the Conflict between Women’s Rights and Religious Practice

The potential for conflict between women’s rights and the right to practice religion or belief arises in all major religious traditions. Yet in the debate around religious arbitration in Ontario, Islam has received particular attention with respect to the fear of intolerant practices both from within and outside the Muslim community. In her review of arbitration and family law and inheritance matters, Marion Boyd reported that the Islamic Council of Imams, “recognizing that most of the concern with respect to arbitration was directed at Islamic personal law, expressed a willingness for oversight of Muslim arbitration decisions, even if other decisions were not being similarly monitored.”²⁴⁸

In Quebec, in the 1960s and 1970s the women’s movement fiercely opposed the domination of the Catholic Church, and its right to dictate how women would live their “private” lives. For example, women vehemently challenged the right of the Church to forbid contraception and to force women to perform their “conjugal duty” to be continually available for their husbands’ sexual needs. The Catholic Church mandated women’s submission to the men of their families for centuries and feminist resistance to this rule was expressed in many forms including public speeches, literature and theatre. Feminists continue to struggle against the Vatican’s remarkably well-funded efforts to thwart women’s rights on an international scale.

On a similar front, women are mobilizing against the rise of religious fundamentalism globally. The international solidarity network *Women Living Under Muslim Law* (WLUML) has suggested that the rise of fundamentalisms in the world today is part and parcel of the rise of extreme right movements and of the expansion of liberal pro-capitalist politics.²⁴⁹ In combating Muslim fundamentalism in particular, the specific context of their lived reality, WLUML have fought against “the imposition of dress codes

²⁴⁵ (1987) 33 C.C.C. (3d) 31 (B.C.C.A.) [Ly].

²⁴⁶ *Ibid.* at para. 8.

²⁴⁷ *Ibid.* at para. 24. See also *R. v. Nahar*, [2004], 181 C.C.C. (3d) 449 (B.C.C.A.).

²⁴⁸ Marion Boyd, “Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion” (December 2004) online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/news/20041220-boyd.asp>> at 126 [emphasis added] [Boyd Report]. See also *ibid.* at 68.

²⁴⁹ “WLUML statement to the World Social Forum - Appeal Against Fundamentalisms” (21 January 2005) online: Women Living Under Muslim Law <<http://wluml.org/english/newsfulltxt.shtml?cmd%5b157%5d=x-157-103376>>.

and forced veiling and the attacks on freedom of movement and on the rights to education and work under Taliban-like regimes.”²⁵⁰

As Catholic feminists have done in their religion, many Muslim feminists are arguing for a progressive interpretation of Islam.²⁵¹ Leila Sayeh and Adriaen Morse for example, have argued that “Islam mandates a status for women which is equal in dignity with that of men, and that all Muslims are compelled to complete God’s plan for such as revealed in his words and lessons.”²⁵² In their view, most commentators have focused erroneously on Islam itself as the source of Muslim women’s persecution rather than the misinterpretation of sharia law perpetuated by patriarchal societies and leaders. The unfortunate focus on Islam itself as the source of the persecution of women is misplaced and detracts from a true understanding of the nature of the plight of women in Muslim societies.²⁵³

Azizah al-Hibri has noted that for the majority of Muslim women who are attached to their religion, the only way to resolve conflicts is to build a solid Muslim feminist jurisprudential basis which clearly shows that Islam does not deprive them of their rights, but demands these rights for them. Al Hibri states that “they will not be liberated through the use of a secular approach imposed from the outside by international bodies or from above by...governments.”²⁵⁴ By contrast, WLUML have warned that the demand for separate laws based on religion for resolving family matters within the Muslim community will operate as deeply discriminatory and will be anti-women.²⁵⁵

D. Conclusion: Universality and indivisibility of human rights

The universality and indivisibility of human rights is a well-recognized and fundamental principle. The claim that human rights are universal is to assert that such rights as equal protection, physical security and freedom of religion are and must be the same everywhere. Every person is entitled to enjoy her or his human rights simply by virtue of being human. It is this universality of human rights that distinguishes them from other types of rights such as citizenship rights or contractual rights. Human rights are also indivisible. Enjoyment of one right is indivisibly inter-related to the enjoyment of other rights. For instance, enjoyment of the highest attainable standard of health requires enjoyment of the rights to information and education as well as the right to an adequate standard of living. Human beings have social, cultural and economic needs and aspirations that cannot be fragmented or compartmentalized, but are mutually dependent. State policies and programmes should not therefore be aimed at implementing one particular right alone, but in combination with all other rights.²⁵⁶

²⁵⁰ *Ibid.*

²⁵¹ Jewish women have also sought progressive, women-friendly interpretations of religious laws. See for example: Judith Plaskow, *Standing Again at Sinai - Judaism from a Feminist Perspective* (New York: HarperSanFrancisco, 1991); Blu Greenberg, *On Women and Judaism - A View From Tradition* (Philadelphia: The Jewish Publication Society of America, 1981) and Judith Hauptman, *Rereading the Rabbis: A Woman's Voice* (Boulder: Westview Press, 1998).

²⁵² Sayeh and Morse, *supra* note 215 at 319.

²⁵³ *Ibid.* at 312.

²⁵⁴ Azizah Al-Hibri “Islam, Law and Custom: Redefining Muslim Women’s Rights” (1997) 12 Am. U. J. Int’l L. & Pol’y 1 at 3.

²⁵⁵ WLUML, *supra* note 249.

²⁵⁶ “What are UNDP’s Human Rights Principles? Universality and Indivisibility of Human Rights” Online: United Nations Development Program <http://www.undp.org/fj/gold/human_rights_principles.htm>.

The ultimate goal of both international and Canadian human rights laws is to transform society so that it is more inclusive of women and others who experience disadvantage and marginalization. An institutional framework that cannot respond to overlapping forms of discrimination and multiple grounds of discrimination does a disservice to the transformative potential of human rights and equality. The evolution in human rights understanding over the past twenty-five years has led to a recognition that different forms of inequality do not exist in separate compartments.²⁵⁷ In fact, the Supreme Court of Canada recognizes that people experience discrimination in complex and multi-faceted ways.²⁵⁸

A modernized institutional framework is required to respond to the range of discriminatory practices that are enmeshed with family law matters. While cultural traditions affect the way in which a society organizes relationships within itself, they do not detract from the universalism of rights which are primarily concerned with the relationship of citizens with the state and the inherent dignity of persons and groups. "Not only has relativism fallen on hard times, it has become the subject of angry criticism, much of it from the Third World, which tends to conceive conservative attitudes toward change as promoting the subservience of the underdeveloped nations."²⁵⁹ Any resolution of the issue of arbitration tribunals using religious principles must not ignore these fundamental values of the human rights framework that are very much part of the progress we have made as a global community.

Part Three: The Separation of "Church" and State

I. Basic Concepts and Historical Context

The notion of the separation of "church" and state dictates that the structures of the state or national government ought to be kept separate from those of religious institutions. In the west, the medieval period saw monarchs who ruled by divine right and papal authorities who believed they were God's earthly authority. This unresolved contradiction in ultimate control of the state led to power struggles and crises of leadership that resulted in a number of important events in the development of the west. Though many western countries including Canada have legal traditions with Judeo-Christian origins there has been a tacit agreement on the necessity of slowly disentangling legal norms from the religious framework of medieval times.

It is nonetheless important to note that a strict model of separation does not necessarily maximize religious freedom nor is it necessarily neutral.²⁶⁰ Both religiously neutral and anti-religious states can be equally oppressive to religious freedom. Because most

²⁵⁷ Submission of the Canadian Human Rights Commission to the Pay Equity Task Force, March 2003 online: Canadian Human Rights Commission <http://www.chrc-ccdp.ca/legislation_policies/equitytaskforce-en.asp#Indivisible>.

²⁵⁸ *Egan v. Canada* (1995) 2 S.C.R. 513; *Law v. Canada (Minister of Employment and Immigration)*, (1999) 1 S.C.R. 497.

²⁵⁹ Elvin Hatch in Henry J. Steiner & Philip Alston, eds. *International Human Rights in Context: Law, Politics, Morals*, 2nd ed. (Oxford: Oxford University Press, 2000) at 371.

²⁶⁰ W. Cole Durham in Vicki C. Jackson & Mark Tushnet, eds., *Comparative Constitutional Law* (New York: Foundation Press, 1999) at 1159.

states regulate many parts of peoples' lives including criminal law, family law, education, property, employment and health care, the numerous clashes between religious beliefs and state doctrine are not surprising. "Secularist insistence...that religion be confined to the ever-diminishing 'private sphere'...[that is, where the state does not regulate people's lives] can marginalize religious life and reduce religious liberty."²⁶¹ Perhaps a minimalist state could defend religion as a private matter and retain a genuinely neutral stance with respect to religious practice, but this becomes a difficult task in societies that are heavily controlled by hundreds of laws and regulations.

For religions such as Islam which have a strong prescriptive element to religious observance, the relegation of religion to the private realm is not easily achievable. According to Urfan Khaliq, sharia does not recognize the separation of "church" and state that is largely advocated in the west, because it imposes on every aspect of a Muslim's life.²⁶²

II. Considerations in the Canadian Context

The relationship between religion and state is defined in Canada in the context of the freedom of religion clause in the *Charter*. Canada observes the British Monarch as its head of state, an office whose origins are undoubtedly religious in nature.²⁶³ Unlike the First Amendment of the United States' Constitution, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."²⁶⁴ Canada's Constitution makes no explicit reference to the non-establishment of religion. In fact, the Canadian constitution acknowledges that Canada is founded under "the supremacy of God and the rule of law."²⁶⁵ Importantly however, no court has yet invoked the "supremacy of God" clause and in cases of conflict between "moral" rules and the rule of law the latter has prevailed.²⁶⁶

Canada provides direct financial subsidies to religious education for Roman Catholics and the Supreme Court of Canada has characterized this state funding as "a narrow acknowledgement of an historical constitutional arrangement for particular religious communities and their children that can be upheld but not extended in the context of a multicultural, multireligious Canadian society."²⁶⁷ The Human Rights Committee found in *Waldman v. Canada* that the exclusive funding of Roman Catholic religious schools

²⁶¹ *Ibid* at 1162.

²⁶² Urfan Khaliq, "Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah" (1995) 2 *Buff. J. Int'l L.* 1 at 7. "In fact, a range of regimes is possible in Muslim theory, depending on the scope given to internal Muslim beliefs about toleration and also depending on the extent to which flexible interpretation of Shari'a law creates normative space for modernization." Durham in Jackson & Tushnet, *supra* note 260 at 1162.

²⁶³ Wikipedia, online: The Free Encyclopedia

<http://en.wikipedia.org/wiki/Separation_of_church_and_state#History>.

²⁶⁴ U.S. Const. amend. I.

²⁶⁵ *Charter*, *supra* note 8 at preamble.

²⁶⁶ Anne Saris, *La compénétration des ordres normatifs religieux et étatiques en France et au Québec: quel pluralisme?* (J.S.D. Thesis, McGill University, Faculty of Law, 2005) [unpublished, on file with author]. Saris notes that the *British North America Act* of 1867 did not mention anything concerning the issue of "church" and state, nor did it include a reference to God. Canada's 1982 Constitution includes a preamble that refers to the "principles that recognize the supremacy of God and the rule of law". Despite Trudeau's commitment to pluralism, civil libertarianism and secularism, this reference to God was included after the lobbying efforts of several catholic and evangelical organizations. *Ibid*.

²⁶⁷ *Adler v. Ontario*, [1996] 140 D.L.R. 385. See also Shauna Van Praagh, "Changing the Lens: Locating Religious Communities Within U.S. and Canadian Families and Constitutions" 15 *Ariz. J. Int'l & Comp. L.* 125 at 134.

was a violation of article 26 of the ICCPR to equal and effective protection against discrimination.²⁶⁸ Canada has to date taken no action with respect to this decision.²⁶⁹

Despite the historical arrangement made for minority protection of Roman Catholics at the time of confederation, clearly Canada does not formally identify with a particular religion. However, “[t]he mere fact that a state does not have a formally established church does not necessarily mean that it has a separationist regime characterized by rigorous non-identification with religion.”²⁷⁰ Canada can be characterized as a “cooperationist” regime, wherein no official status is given to a religion, but the state cooperates with churches, but it is likely more accurately described as an accommodationist regime wherein a separation of church and state is claimed yet a posture of benevolent neutrality toward religion is maintained.²⁷¹ An accommodationist regime would have no qualms about recognizing the importance of religion as part of local culture, accommodating religious symbols in public settings, allowing tax, dietary, holiday, Sabbath, and other kinds of exemptions.²⁷² Indeed this is the case in Canada.

Anne Saris for her part writes that there is an “implicit principle of separation between religious institutions and the state” in Canada.²⁷³ Justice Muldoon of the Federal Court of Canada has reiterated this point:

The paramount imperative and value, found in the Canadian Charter of Rights and Freedoms, is that Canada is a secular State...It is so because of two constitutional ingredients which are inimical, if not fatal, to a theocratic State: everyone’s fundamental freedom of conscience and religion, as stated in s. 2(a) of the Charter, and everyone’s fundamental freedom of thought, belief, opinion and expression, as stated in s. 2(b) of the Charter.²⁷⁴

Justice Muldoon also notes:

So it is that while Canada may aptly be characterized as a secular State, yet, being declared by both Parliament and the Constitution to be founded upon principles which recognize “the supremacy of God”, it cannot be said that our public policy is entirely neutral in terms of “the advancement of religion”... The legal and constitutional recognition of God necessarily imports and involves a polity which leans in favour of belief, or faith - that is, the profession of religion among our people.²⁷⁵

Where an issue is intrinsically religious in nature Canadian courts have declined to intervene claiming that it is not appropriate for civil courts to decide questions of religious

²⁶⁸ *Waldman v. Canada*, (5 November 1999), Human Rights Committee, Sixty-seventh session CCPR/C/67/D/694/1996 online: United Nations CCPR <<http://www.unhchr.ch/tbs/doc.nsf/0/b3bfc541589cc30f802568690052e5d6?OpenDocument>>.

²⁶⁹ The observations and concluding recommendations of the Human Rights Committee, like other international human rights monitoring mechanisms, are not binding on nations. Their decisions have much international clout, but the only means of enforcement is to “shame” governments into action.

²⁷⁰ Durham in *Jackson & Tushnet*, *supra* note 260 at 1160.

²⁷¹ *Ibid.* at 1164.

²⁷² *Ibid.*

²⁷³ Anne Saris, thesis, *supra* note 266.

²⁷⁴ *Canadian Human Rights Commission v. Canada (Minister of Indian Affairs and Northern Development) and Prince*, [1994] F.C.J. No. 1998 Action No. T-671-93 Federal Court of Canada - Trial Division Vancouver, British Columbia per Muldoon J. at para. 6.

²⁷⁵ *McBurney v. Canada (Minister of National Revenue - M.N.R.)* [1984] F.C.J. No. 707 [QL].

doctrine²⁷⁶ because of the separation of church and state. Canadian judges will become involved in religion where necessary to prohibit practices that are harmful, that violate civil or property rights or that infringe a person's constitutional rights—otherwise they will “simply leave...conscience and religion quite alone.”²⁷⁷

Part Four: Law Reform Options

The following section outlines the positions of some key players in the debate surrounding religious arbitration in Ontario. An analysis of the strengths and weaknesses of each position is also included. The challenge for each organization lies in balancing the rights of religious minorities and women both of whom have legitimate claims under domestic and international law.

I. Islamic Institute of Civil Justice: Muslim Sovereignty

The Islamic Institute of Civil Justice, headed by Syed Mumtaz Ali, was established to conduct arbitrations in Ontario according to Islamic personal/family law. According to Syed Mumtaz Ali, Muslims who constitute a major religious minority in Canada must be able to practice freedom of religion as guaranteed by the *Charter*:

Religion is not just a matter of having places of worship or having particular beliefs or values. Religion is also a matter of putting into practice what one believes, as well as acting in accordance with the values one holds in esteem. Moreover, these beliefs and values are not meant to be activated only when one enters a place of worship and switched off when one leaves that place of worship. Religious beliefs and values are meant to be put into practice in day-to-day life.²⁷⁸

Because Mumtaz Ali is of the view that for Muslims “religion must be lived”²⁷⁹ he has advocated that Muslims have the opportunity to control family and inheritance law via the *Arbitration Act*. This viewpoint is not particularly unusual given that, as previously mentioned, other religious groups are also using the *Arbitration Act* to resolve family law disputes. Mumtaz Ali has framed his arguments for sharia tribunals under the right to religious freedom in the *Charter* and Canada's policy of multiculturalism.²⁸⁰

What is unique about Mumtaz Ali's characterization of this issue that is disturbing to many Canadians both Muslim and non-Muslim, is his vision that this process of family arbitration is but one step toward a separate system of justice for Muslims where they would be permitted to govern their own affairs in the realm of civil law.²⁸¹ He proposes

²⁷⁶ *Levitts Kosher Foods*, *supra* note 88.

²⁷⁷ *O'Sullivan v. Minister of National Revenue*, [1991] 45 F.T.R. 284 at para. 32.

²⁷⁸ Syed Mumtaz Ali and Anab Whitehouse, “Oh! Canada Whose Land, Whose Dream? Sovereignty Social Contracts and Participatory Democracy: An Exploration into Constitutional Arrangements” (1991) online: The Canadian Society of Muslims <<http://muslim-canada.org/ocanada.pdf>> at 39.

²⁷⁹ *Ibid.* at 42.

²⁸⁰ Syed Mumtaz Ali, “The Review of the Ontario Civil Justice System: The Reconstruction of the Canadian Constitution and the Case of Muslim Personal/Family Law” (1994) online: Canadian Society of Muslims <<http://muslim-canada.org/submission.pdf>>.

²⁸¹ Mumtaz Ali, *ibid.* at 3.

that “Canadians should look at this matter, not as if they are losing control, but as if they were broadening the mandate of sovereignty, and thereby enhancing the quality of that sovereignty.”²⁸² Mumtaz Ali compares Canada’s Muslim community to Canada’s First Nations communities in order to justify increased legal and political autonomy for Muslims. This comparison however, is unjustifiable because Canada’s Aboriginal peoples have a unique position in the country stemming from their historical relationship as “the original inhabitants of this land.”²⁸³ Moreover, Aboriginal rights are protected in Canada by virtue of a separate regime of rights entrenched in the Constitution under s. 35.²⁸⁴

Mumtaz Ali confuses the limited ability to provide services to resolve certain civil matters through the *Arbitration Act* with the right to set up a parallel institution of justice that resembles the redress sought by those seeking self-government. Will Kymlicka articulates that national minorities such as Quebec and Aboriginal peoples, that are an historical community, more or less institutionally complete, occupying a territory and sharing a culture or language, are entitled to make self-determination or self-representation claims. According to Kymlicka, immigrant groups ought not to have this same right because immigrants arrived voluntarily in Canada and thus can only legitimately make claims in order to preserve or engage in cultural practices or seek exemptions from norms of the state that have a differentiated impact on certain religious practices.²⁸⁵ Religious freedom and multiculturalism do not imply a right to sovereignty similar to Aboriginal peoples.²⁸⁶ Rather they offer minority communities modes of accommodation that assist in the integration of such communities with the larger society.

II. Canadian Council of Muslim Women: One law for All

The Canadian Council of Muslim Women (CCMW) is a national non-profit organization established to assist Muslim women in participating effectively in Canadian Society and to promote mutual understanding between Canadian Muslim women and women of other faiths.²⁸⁷ CCMW is not against sharia *per se*, but is against the application of Muslim family law in Canada because of the difficulty in understanding, interpreting or applying this complex legal system with any uniformity. CCMW echoes the concerns already made in this paper that religious interpretations using Muslim family law will have a detrimental impact on women. CCMW is cognizant that their stand on this issue places them in a difficult position particularly since they do not wish “to provide further

²⁸² Ali & Whitehouse, *supra* note 278.

²⁸³ Boyd Report, *supra* note 248 at 88.

²⁸⁴ *Constitution*, *supra* note 16 at s. 35.

²⁸⁵ Kymlicka, *supra* note 164 at 54. Kymlicka’s generalized conception that immigrant groups can claim only certain minority rights because they arrived voluntarily is highly problematic because it fails to reconcile the situation of Black communities that were forced to Canada due to slavery and the global distribution of resources that has created a large class of economic migrants and refugees. “In a world with huge economic disparities and very politically unstable geographical areas it is more and more difficult to generalize and describe migration movements as reflecting people’s free choice of cultural uprooting.” Bauböck in Ruth Rubio-Marín, “Exploring the Boundaries of Language Rights: Insiders, Newcomers, and Natives” in, Stephen Macedo & Allen Buchanan, eds., *NOMOS XLV: Secession and Self-Determination*, (New York: New York University Press, 2003) at 4. Ruth Rubio-Marín has argued that there is an inherent difficulty in assuming free consent to uprooting oneself culturally “especially for people who, before emigrating, have spent their entire lives within a secure cultural environment.” Rubio-Marín, *supra* at 5.

²⁸⁶ Kymlicka, *supra* note 164 at 49. See also Boyd Report, *supra* note 248 at 55 and 87.

²⁸⁷ Canadian Council of Muslim Women, online: CCMW <<http://www3.sympatico.ca/ccmw.london/>>.

ammunition to those who are keen to malign Islam".²⁸⁸ Though the organization has not issued a position on the separation of state and institutionalized religion, they have asserted that the policy of "[m]ulticulturalism was never meant to take away the equality rights of a group such as those of Muslim women."²⁸⁹

CCMW is of the view that the well meaning intentions to reflect the needs and interests of Canadian Muslims will not be met by the introduction of a tribunal that uses Muslim family law/sharia. On the contrary, such a solution may exacerbate problems for Muslim families and simply ghettoize vulnerable Muslim women, an already isolated group.²⁹⁰

CCMW is of the view that the gains made by Canadian women to improve family law in the last decade should benefit all women, including religious women. Human rights must be universally enjoyed such that all women benefit from the same laws, with no distinction made on the basis of religion. "As citizens of Canada, we believe that the laws of the land must protect us, treat us equally and be applied to all of us, irrespective of our ethnicity, race, gender or religion."²⁹¹ Thus, CCMW recommends that the use of religious laws be prohibited in legally binding family arbitration and that the *Family Law Act* be the basis for settling all family matters in Ontario.

III. Marion Boyd Recommendations

The Attorney General of Ontario and the Minister for Women's Issues appointed Ms Marion Boyd in 2004 to review the province's arbitration process and any current problems with the *Arbitration Act*, with specific reference to faith-based arbitration. Boyd released her 46 recommendations on December 20, 2004.

Generally, Marion Boyd's report supports family law arbitration including religious arbitration. Although she is critical of some of the misleading language used by members of the Islamic Institute of Civil Justice,²⁹² she emphasizes the rights of all religious minorities including Muslims to engage in alternative dispute resolution. Some of her recommendations attempt to standardize arbitration agreements through regulations and by requiring that they be written, signed and witnessed.²⁹³ Other recommendations fill in some gaps in the area of family arbitration by bringing into line arbitration agreements with family law statutes that do not mention arbitration.²⁹⁴ Some of these proposals could have the beneficial effect of ensuring more judicial intervention, in particular the ability for judges to set aside arbitration agreements that are not in

²⁸⁸ Canadian Council of Muslim Women, "Position Statement on the Proposed Implementation of Section of Muslim Law [Sharia] in Canada" (2004) online: CCMW <http://www.ccmw.com/Position%20Papers/Position_Sharia_Law.htm>.

²⁸⁹ *Ibid.*

²⁹⁰ Canadian Council of Muslim Women "Tribunals Will Marginalize Canadian Muslim Women and Increase Privatization of Family Law" (2004) online: CCMW <<http://www.ccmw.com/ShariainCanada/Tribunals%20Will%20Marginalize%20Canadian%20Muslim%20Women.htm>>.

²⁹¹ Alia Hogben, "The laws of the land must protect all of us, irrespective of gender or religion" *The Toronto Star* (1 June 2004) online: CCMW <<http://www.ccmw.com/ShariainCanada/The%20laws%20of%20the%20land%20must%20protect%20all%20of%20us.htm>>.

²⁹² Boyd Report, *supra* note 248 at 3, 55 and 88.

²⁹³ *Ibid.* at 134. See recommendations 3, 10 and 12.

²⁹⁴ *Ibid.* See recommendations 3, 4, 5, 6, 7, 8 and 9.

accordance with certain sections of the FLA.²⁹⁵ Boyd attempts to correct some deficiencies in the Act by recommending that agreements to arbitrate made in advance of the arbitration be re-confirmed in writing.²⁹⁶ She also recommends that arbitrators have a duty to report a child in need of protection according to the *Child and Family Services Act*.²⁹⁷ Boyd's recommendations for record keeping²⁹⁸ and the consequences for not keeping records for example, that an arbitral award may be set aside,²⁹⁹ are an improvement on the current system of arbitration. These recommendations will allow for research and evaluation of arbitral awards in the family law context and provide parties with accessibility to information that will give some degree of consumer protection.³⁰⁰

On the whole however, the report fails to find a balance between the rights of religious minorities and women. It unquestionably and inappropriately gives preferentiality to religious freedom demonstrating a clear refusal to assume responsibilities for the protection of vulnerable persons within minority groups, women in particular.

Most disappointingly, Boyd states that the "[r]eview did not find any evidence to suggest that women are being systematically discriminated against as a result of family law issues."³⁰¹ This observation is in contrast with her statement that the lack of records in arbitration hampers any investigation of family arbitration in the interests of public policy, a challenge that Boyd admits was certainly faced by her own review;³⁰² this suggests that (a) Boyd was unequipped to conclude that women are not being systemically discriminated against and (b) that despite the submissions of many groups regarding the potential misuse of the current Act to the detriment of women, Boyd seriously underestimated the challenges faced by vulnerable women in arbitration. Boyd's tendency to assume that women have not been systematically disadvantaged is revealed by her interpretation of the lack of appeals in family arbitration. Boyd accepts the reasoning of some consultants that the lack of appeals "likely results from the clients feeling as if they have some control over the process, some say in who will judge the case, and some 'buy in' to the results."³⁰³ An equally feasible interpretation of the lack of

²⁹⁵ By including arbitration agreements in the definition of domestic contracts under the FLA, Boyd has recommended that an arbitration agreement or a provision in it can be set aside by a court where (a) a party failed to disclose significant assets or significant debts or other liabilities when the domestic contract was entered into; (b) a party did not understand the nature or consequences of the domestic contract; or (c) otherwise in accordance with the law of contract. Section 56(4) of the FLA, *supra* note 21. Another result of this recommendation is that parties will not be able to contract out of their right to possess the matrimonial home *per s.* 52(2) of the FLA, *supra* note 21. Boyd also recommends that arbitration agreements involving the provision of support be capable of being set aside by a court where (a) the provision for support or waiver of the right is unconscionable; (b) the person owed support is in receipt of social assistance; or (c) the payment of support is in arrears, s. 33(4) FLA, *supra* note 21. Boyd recommends that the proposal for support not be capable of being opted out of. Through these recommendations Boyd has clarified the relationship between arbitration agreements and domestic contracts under the FLA, ensuring that certain challenges to arbitration agreements and unfair arbitral awards are possible through the mechanism of judicial review. See recommendations 3, 8 and 12, Boyd Report, *supra* note 248.

²⁹⁶ Boyd Report, *supra* note 248 at 134. See recommendations 5 and 6.

²⁹⁷ *Ibid.* at 135. See recommendation 11 and 34.

²⁹⁸ *Ibid.* at 140. See recommendations 38 and 39.

²⁹⁹ *Ibid.* at 140-141. See recommendation 39 and 42.

³⁰⁰ *Ibid.* at 140-141. See recommendation 40 and 41. The fact that Boyd only requires that summaries of decisions be filed with the Government of Ontario is an unsatisfactory proposal that may allow arbitrators to exclude, inadvertently perhaps, relevant evidence tendered by the parties and other significant information about the arbitration.

³⁰¹ *Ibid.* at 133.

³⁰² *Ibid.* at 136.

³⁰³ *Ibid.* at 35.

appeals in religious arbitration, but not one mentioned by Boyd, is that the parties have contracted out of their appeal rights when signing an arbitration agreement and are thus unable to have the decision of an arbitrator reviewed.³⁰⁴ Despite the fact that only one group urged that there be fewer grounds for appeal,³⁰⁵ Boyd made no recommendations on the current state of appeals under the Act.³⁰⁶ She retained the unsatisfactory status quo that allows parties to waive their right of appeal preventing important court review of significant family law matters.

Similarly, despite the urging of “all the lawyers consulted [in the review that]... independent legal advice be a requirement in order for family law matters to be arbitrated”,³⁰⁷ Boyd avoided making such a recommendation in order to prevent a “legalistic and time-consuming”³⁰⁸ process. Instead, Boyd recommended that parties be given the option to waive independent legal advice altogether.³⁰⁹ This recommendation is an unacceptable trade-off that puts in serious jeopardy the rights of vulnerable individuals who may be prone to coercion. It essentially ensures that these people will not have access to valuable information about the nature and consequences of an arbitration agreement and their rights under Ontario family law, further entrenching their oppression. Boyd’s recommendations only require that the arbitrator certify his/her review of the waiver of independent legal advice and be satisfied of the party’s knowledge and understanding of the waiver,³¹⁰ a formality that is unlikely to ensure that parties truly comprehend the consequences of such action.

While Boyd proposes that arbitrators be required to develop “a statement of principles of faith-based arbitration that explains the parties rights and obligations and available processes under the particular form of religious law”,³¹¹ presumably in order to aid parties in becoming familiar with the decision-makers and religious principles under which they are submitting their family law disputes, the lack of detail in this recommendation nullifies any beneficial objective. It is unclear whether the statement of principles must delineate merely procedural processes or whether it requires an outline of substantive law principles as well. While Boyd requires that lawyers reviewing the statement of principles of faith-based arbitration be satisfied that “the person has sufficient information to understand the nature and consequences of choosing religious law”³¹², those people who waive independent legal advice will be left to their own devices in making this determination. Clearly, a simple general overview would meet Boyd’s requirement yet provide a meager understanding of the religious principles in question to such individuals.

³⁰⁴ The lack of appeals may also be attributed to women not having the financial or emotional resources needed to pursue this course of action. Moreover, religious arbitration may result in fewer appeals because women are encouraged to believe that the arbitration was the “will of God”.

³⁰⁵ Boyd Report, *supra* note 248 at 108.

³⁰⁶ Even the Uniform Arbitration Act, upon which Ontario’s *Arbitration Act* is primarily based, does not allow parties to opt out of appeals on questions of law, with leave of the court. See Law Reform Commission of Canada *Uniform Arbitration Act* (Law Reform Commission of Canada, 1990), online:

<<http://www.ulcc.ca/en/us/arbitrat.pdf>>.

³⁰⁷ Boyd Report, *supra* note 248 at 37.

³⁰⁸ *Ibid.* at 137.

³⁰⁹ *Ibid.* at 134-135. See recommendations 9(b), 13 and 24.

³¹⁰ *Ibid.* at 136. See recommendation 19.

³¹¹ *Ibid.* at 136. See recommendations 12, 16, 17, 22, 23, 24.

³¹² *Ibid.* at 137. See recommendation 23.

Boyd's attempt to regulate the training and education of arbitrators is minimal.³¹³ She advocates the use of voluntary professional associations but, nothing in her recommendations prevents the continued ability for anyone to present themselves as an arbitrator, including those with little or no experience in family law. Boyd includes recommendations to standardize the screening of domestic violence and power imbalances in the context of family law and inheritance cases.³¹⁴ Her recommendations though well-intentioned, underestimate the difficulty in screening violence against women. Given the lack of appropriate screening methods for violence, the Vancouver Custody and Access Support and Advocacy Association (VCASAA) has suggested an approach for mediators in B.C. wherein the presumption ought to be that violence exists unless otherwise established by couples or more appropriately, men. This notion of screening couples into and not out of alternative dispute resolution takes the burden of proving violence off women and means that mediators and arbitrators need not determine what is violent but perhaps more easily what is not.³¹⁵

Confusingly, Boyd makes continual reference to "personal status law", a concept that she does not define, nor a concept known under Ontario's family law regime. In certain multi-confessional countries the domain of personal status law includes marriage and divorce, whereas in Ontario marriage and divorce are not arbitrable because they fall under the federal government's jurisdiction. Boyd's unqualified use of the term "personal status law" mistakenly broadens the potential area at issue in religious arbitration in Ontario.

Perhaps the reason Boyd fails to make concrete recommendations to address the concerns of vulnerable women in the context of arbitration is because she characterizes an arbitrator's decision as action that is private and not subject to *Charter* scrutiny.³¹⁶ According to Boyd, "while a court might find that a privately appointed arbitrator resolving a private dispute was enforcing a government action, such a finding has not yet been made."³¹⁷ Thus, Boyd incorrectly concludes that arbitrators do not derive their authority from the government but "the authority of the arbitrator flows directly from the parties' agreement to be bound."³¹⁸ This analysis fails to recognize that while people may indeed select the actual arbitrators, what gives the arbitral decisions the force of law is the authority of the *Arbitration Act*. Because the *Arbitration Act* is governmental action in the form of a statute, the *Charter* necessarily applies. When parties to arbitration appoint an arbitrator, but are then able to disregard the arbitral decision, an argument can be made that the *Charter* would not apply. However, courts must enforce arbitral awards and in fact, have no power to refuse enforcement except where the court "would not have had jurisdiction to make [the decision] itself."³¹⁹ Clearly, there is a distinction between informal arrangements made by private parties and arbitrations which are given the force of law. The latter engages the government's obligation to protect and promote women's equality under the *Charter*.

³¹³ *Ibid.* at 139 and 141. See recommendations 33, 34, 35 and 42.

³¹⁴ *Ibid.* at 136, 139. See recommendations 18, 31 and 33.

³¹⁵ Georgina Taylor, Jan Barnsley & Penny Goldsmith, *Women and Children Last: Custody Disputes and the Family "Justice" System* (Vancouver: VCASAA, 1996).

³¹⁶ Boyd Report, *supra* note 248 at 72.

³¹⁷ *Ibid.* at 71.

³¹⁸ *Ibid.* at 72.

³¹⁹ *Ibid.* at 16. See *Arbitration Act*, *supra* note 4 at s. 50(7).

Boyd seems to approach the application of the *Charter* to arbitrations in an all or nothing fashion. Either the *Charter* allows arbitrations or it does not. She states, “I do not believe the Constitution prohibits the use of arbitration, faith-based or otherwise, for resolving disputes about family law and inheritance.”³²⁰ The more poignant question is whether the *Arbitration Act* as it currently stands (or after Boyd’s recommendations), includes enough safeguards to protect women’s equality as mandated by the *Charter*. Boyd argues that

[t]he *Charter* requires that the state give people equal benefit of the law, without discrimination on any prohibited ground, and that all its rights apply to women and men equally. At present, the law gives all parties to arbitrations, women and men alike, the same right to court enforcement of awards. There is no obvious *Charter* ground to invalidate that.³²¹

Boyd’s evaluation of the *Arbitration Act* relies on an approach to equality that has been quite thoroughly discredited in Canadian law.³²² She advocates a formal equality position wherein discrimination occurs only when similarly situated people are treated differently. Because the Act makes no distinction between men and women, there is no obvious *Charter* violation. This vision of equality is insufficient precisely because it does not account for the cumulative effects of past discrimination. The lack of limits in the *Arbitration Act* creates a legal framework wherein the effects on women are discriminatory. A substantive equality approach would consider the feminist literature on the oppression of women via the private realm and then determine the gender-based impact of arbitration on vulnerable individuals.³²³

IV. Reformist feminist proposals:

A. Dual Governance

Theorist Ayelet Shachar has argued that accommodating multiple affiliations means imagining structures of authority that require the state and cultural/religious groups to coordinate their exercise of powers.³²⁴ From the perspective of the historically subordinated group member, the state may seem a particularly untrustworthy partner. Women in particular have good reasons to be suspicious of state-drafted efforts to improve their status, which begs the question to whom should women turn to if they seek to improve their gender status without giving up their group identity?³²⁵ Instead of entrusting the state or minority group with full responsibility for improving the status of traditionally subordinated group members, one could adopt, according to Shachar, the principle regarding the separation of powers, that is, the more dispersed that power is structured and the more entry points that the legal system offers to those who are seeking recourse and remedy, the better.³²⁶ A dynamic system of checks and balances between the state and the minority group would recognize that both parties have a legitimate interest in shaping the policies under which their members operate, while

³²⁰ Boyd Report, *supra* note 248 at 77.

³²¹ *Ibid.* at 73.

³²² *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

³²³ See the gender-based analysis in Part II this paper entitled “The Potential Impact of the Arbitration Regime on Women”, *infra* at 38.

³²⁴ Shachar, *supra* note 176 at 425.

³²⁵ *Ibid.* at 407.

³²⁶ *Ibid.* at 410.

ensuring that power is never fully concentrated in the hands of either of these competing entities.³²⁷

Shachar offers a “joint governance” approach to the paradox of multiculturalism wherein the institutional design aspires to engender interaction, even competition, between state and cultural group sources of jurisdiction. Hence, neither the state nor the group would maintain exclusive jurisdiction within a given social context; instead, individual cultural group members would be offered the option of choosing to subject themselves to either the state or their cultural source of authority with respect to a given subject matter. This “partial exit” from group membership would enable vulnerable group members to retain cultural aspects of their identities while simultaneously avoiding subjugation in critical contexts. “Moreover the very existence of this form of institutional competition would provide cultural elites with an incentive to reinterpret their traditions and transform their group *nomos* in non-repressive directions.”³²⁸

Women’s rights activists in a number of national settings have stressed the need to transform religious law and practice, not only as a means of ending gender-based restrictions on specific human rights, but also as an essential step toward dismantling systemic gender inequality.³²⁹

A fundamental problem with Shachar’s competitive model is the premise of individual agency in the selection of jurisdictional authority. This is problematic in so far as there is reason to believe that the more vulnerable group members—that is, those most in need of a partial exit—will also be those least capable of exercising that agency.³³⁰ While the liberal conception of the person presumes the ability to revise constitutive attachments,³³¹ cultural allegiances are nonetheless quite difficult to abandon.³³² Indeed as Shachar herself notes, group members may feel expected and often obliged to unite around their cultural membership rather than to struggle to reform intra-group patterns of inequality.³³³ In the absence of fundamentally altered power relations evidenced by significantly enhanced educational and economic provisions for the most vulnerable members of minority groups, culturally-differentiated rights would still require careful monitoring to ensure that they do not facilitate intra-group repression.

B. Women’s Legal Education and Action Fund Proposal

Arguably, the system of arbitration currently set up in Ontario, could with ample modification meet Shachar’s expectations of adequate dual governance. The Women’s Legal Education and Action Fund (LEAF) also made recommendations on the issue of religious arbitration in Ontario. LEAF is a national, non-profit advocacy organization that engages in equality rights litigation, research, and public education to secure equal rights for Canadian women as guaranteed by the *Charter*.³³⁴

³²⁷ *Ibid.*

³²⁸ Eric J. Mitnick, “Three Models of Group-Differentiated Rights” (2004) 35 Colum. Hum. Rts. L. Rev. 215 at 256-257.

³²⁹ Sullivan, *supra* note 192 at 795.

³³⁰ Mitnick, *supra* note 328 at 257.

³³¹ See Kymlicka, *supra* note 164.

³³² Mitnick, *supra* note 328 at 257.

³³³ Shachar, *supra* note 176 at 398. For a concrete illustration of this scenario see Indian Supreme Court case *Mohd. Ahmed Khan v. Shah Bano Begum and others*, A.I.R. 1985 S.C. 945.

³³⁴ Women’s Legal Education and Action Fund (LEAF): Submission to Marion Boyd in Relation to her Review of the Arbitration Act (17 September 2004) online: LEAF <http://www.leafottawa.ca/news/archives/2004/11/media_release_leafs_submissions_to_marion_boyd_in_relation_to_her_review_of_the_arbitration_act/index.php>.

LEAF's submission to Marion Boyd did not advocate the removal of alternative means of resolving family law disputes, including religious arbitration, recognizing that "the courts are financially, linguistically or culturally inaccessible for many people, and because amicable proceedings may be more beneficial than the adversarial court system."³³⁵ Instead LEAF promoted the view that state-funded supports are required to protect vulnerable women "to ensure that all women have a full range of choices available to protect themselves and their children."³³⁶

The eight safeguards recommended by LEAF consist of: (1) the *Arbitration Act* must be amended to provide that family arbitrations apply to Ontario's family law regime (other principles, such as religious precepts, may also be applied, but only to the extent that they do not conflict with Ontario family law); (2) consent to arbitration must be made contemporaneously with the decision to arbitrate; (3) independent legal advice must be sought prior to the signing of an arbitration agreement; (4) legal aid or some other public funding must be available to all parties in order to obtain independent legal advice and to retain lawyers for arbitration (funding must also be provided to fund family law arbitrators, not religious arbitrators); (5) family arbitrations must only be conducted by persons who are lawyers and have training and experience with the Ontario family law regime and there must be a complaints mechanism through which the qualifications of arbitrators may be reviewed; (6) parties must not be able to contract out of their appeal rights; (7) arbitral awards must contain a statement of the issues in dispute, a concise description of the evidence tendered and a determination by the arbitrator, with reasons must be filed anonymously in a central registry; and (8) a legislative review must be mandated on a periodic basis examining the impact of religious arbitration on women, followed by a report on the extent and nature of family law disputes being arbitrated, on compliance with Ontario family law, and on possible concerns for vulnerable women.³³⁷

LEAF's submission, particularly its recommendation that Ontario family law be the statutory minimum from which religious arbitration is permitted, may offer more protection to women than Shachar's model by providing additional safeguards for vulnerable women who may wish to remain within the minority group's ambit. Although as LEAF readily admits, its recommendations may be objectionable to religious groups who may view some of the safeguards as too intrusive upon religious freedom,³³⁸ Ontario's family law regime is flexible enough to allow religious groups to still create imaginative family law resolutions within religious law boundaries while retaining significant judicial oversight.

V. National Association of Women and the Law³³⁹

A. NAWL Opposes Arbitration in Family Law

After more than a century of struggle, feminists have achieved substantial law reform in Canadian family law. From *Rathwell*³⁴⁰ to *Moge*,³⁴¹ women have fought hard battles to

³³⁵ *Ibid.*

³³⁶ *Ibid.*

³³⁷ *Ibid.*

³³⁸ LEAF submission to Boyd, *supra* note 334.

³³⁹ This section of the paper was written in collaboration with Andrée Côté, Director of Legislation and Law Reform at the National Association of Women and the Law.

gain equality and basic human rights in the family. By collectively identifying the political in the personal, women have challenged the rules that regulate the “private” sphere and greatly diminished its patriarchal bias. The National Association of Women and the Law (NAWL) has been part of the effort to improve the legal status of women in the family and in society through law reform since 1974.³⁴²

Despite the gains made in women’s equality, it should be noted that it has barely been twenty years since the *Criminal Code* was amended to make marital rape a crime.³⁴³ While sexual abuse remains a major crime, still substantially under-reported, physical violence goes largely unpunished and the vulnerable victims of murder continue to be accused of having provoked the crimes.³⁴⁴ The struggle for economic equality in the workplace and in the family continues.³⁴⁵ Women’s equality has yet to be achieved.

While arbitration may be suitable in the commercial law setting, it is entirely inappropriate in family law where gender dynamics, unequal power relations between men and women and systemic discrimination are always at play. As currently practiced, arbitration allows people to pick and chose the law that will apply to them. Arbitration in family law is a convenient method of circumventing democratic law reform that not coincidentally displeases many historically privileged groups, including men. Arguably, arbitration is a form of “backlash” to feminist reform in different areas of the law, aimed at re-establishing impunity and power historically exercised by men. By promoting a “choice of law”, the government is facilitating the disappearance of hard-won progressive developments in the law. When justice is privatized, public policy ceases to rule.

As a society family arbitration pulls us in the opposite direction of our post-*Charter* constitutional mandate of respecting and promoting equality. The Boyd report claims that arbitration is not subject to the *Charter* because it is a “private” affair. Boyd’s conclusion that the government has no obligation to ensure that women receive an egalitarian outcome from the arbitration process is an interpretation that is counterproductive to the goal of ensuring the “progressive realization” of women’s human rights. It is a step back to the supremacy of private contracts, a time under which women did not fare well in the past.

Arbitration in family law effectively introduces a “two-tier” system of justice. The very rich will be able to afford confidentiality, flexibility and speed by paying Toronto firms \$500 an hour to arbitrate.³⁴⁶ Some will receive “volunteer” arbitrators, committed to their religious or ideological code.³⁴⁷ And others will be condemned to delays and frustration in the court system, but will at least have recourse to judges who are accountable for their decisions.

³⁴⁰ Rathwell, *supra* note 118.

³⁴¹ Moge, *supra* note 18.

³⁴² National Association of Women and the Law, online: NAWL <<http://www.nawl.ca/about.htm#Mission>>.

³⁴³ In 1983, the *Criminal Code* was amended to bring the law in line with twentieth century thinking. Spousal immunity against charges of rape was eliminated. S.C. 1980-81-82-83, c. 125, s. 19.

³⁴⁴ Mills, *supra* note 243. Andrée Côté, Elizabeth Sheehy & Diana Majury “Stop Excusing Violence Against Women: NAWL’s Brief on Defence of Provocation” (2000) online: NAWL <<http://www.nawl.ca/provocation.htm>>.

³⁴⁵ NAPE, *supra* note 231.

³⁴⁶ Boyd Report, *supra* note 248 at 180.

³⁴⁷ Boyd Report, *supra* note 248 at 67.

Women may be locked into a commitment to proceed with arbitration as soon as a pre-nuptial agreement is put in place. The standard forfeiture of the right to appeal arbitration, and the weight given in law to the decision of the arbitrator ensures that arbitral awards will be very difficult to overturn. The prevailing law will in fact be the law of the religious, cultural and political elites that organize the arbitration procedures in their communities. These “freely chosen” arbitrators will be the new judges of women, imposing their own principles as the law of the land. By contrast, in Quebec “l’ordre publique” or public order continues to rule and arbitration in family law is explicitly prohibited by the Quebec Civil Code.³⁴⁸

Marion Boyd has argued that it is inappropriate to require a universal application of the laws adopted to protect women in the “private” sphere and that women should be free to “live as they choose”.³⁴⁹ This neoliberal vision of “choice” disregards not only the painful dynamics of divorce and separation, but most importantly, the overall social and economic context of the lives of many women: susceptibility to homelessness upon the breakdown of a marriage, the precariousness of immigration status, abject poverty and persistent racism. Given the inability of most women to afford legal counsel and the fact that ideological and religious groups may offer free mediation and arbitration services, women’s free choice remains dubious. The discourse in favour of choice is reminiscent of arguments of the freedom of individual workers to bargain fairly the terms of a contract with an employer, now discredited through the well-established mechanism of unions and minimum wage legislation. The notion of free choice in the context of family arbitration is gender-insensitive as it does not take into consideration the real power dynamics at play and the collective rights at stake for women.

Feminists have often said that “the personal is political”. What is meant by this statement is that in the intimate, “private” and “personal” space of the family women are all too often subjected to discrimination, exploitation and abuse by men. These gendered, systemic patterns of sexual inequality need to be acknowledged and taken into account in state policy. While the Canadian government and even the international legal order has come to recognize their obligation to correct violations against women in the “private” sphere, arbitration threatens to put women back to the realm of “family government” principles or rules of religious elites who have not demonstrated a commitment to the egalitarian principles established through the years.

In a society where sexual inequality of women is still systemic, women need to be ensured of “equal protection” and “equal benefit” of the law. All women need to be secure in the knowledge that they will be protected by state legislation and official courts that are accountable and that act according to the rule of law and democratically-adopted legal frameworks.

NAWL recognizes that the recommendation to prohibit arbitration in family law marks a significant departure from what is currently practiced. However, the organization firmly believes that arbitration is inappropriate in family law. Thus, NAWL agrees with the

³⁴⁸ *Civil Code of Québec*, *supra* note 162 at art. 2639.

³⁴⁹ Boyd states: “It is not clear to me that we should aspire to the level of state intrusion in our lives that is implied by the application of the Charter to privately ordered relationships. Of course, in any given area, the government can decide it wants to regulate for the purpose of achieving conformity of conduct in accordance with a given set of principles. However, this in no way diminishes the fact that we accept that there are private spheres in which people should be free to live as they choose without being forced to subscribe to the values of the state.” Boyd Report, *supra* note 248 at 76.

Quebec policy prohibiting arbitration in all family law proceedings. NAWL supports the Metropolitan Action Committee on Violence Against Women's (METRAC)³⁵⁰ position, expressed in their letter to the Attorney General of Ontario and the Minister Responsible for Women's Issues:

We oppose arbitration, particularly arbitration based on any system of religious laws, for family law disputes because we believe it does not ensure the equality rights of women and children...any use of arbitration, particularly arbitration based on religious law, must be approached with considerable caution. It is our opinion that, without equality for women, private dispute resolution of family disputes should not be encouraged or given legislative authority.³⁵¹

B. NAWL Opposes Faith-Based Arbitration in Family Law

Given that religious freedom, both domestically and internationally, may include the right to create religious tribunals, NAWL acknowledges that people are free to participate in religious processes that may involve family matters. Parties must be free to adhere to the recommendations of religious authorities according to their faith. However, the decisions of religious authorities ought not to have any civil effect and they should never be legally binding. Any family law decision coming from a religious tribunal would thus be advisory only.

Religious arbitration in family law offends the tenet of separation of "church" and state. A religious authority invested with the power of rendering an enforceable order, typically without the possibility of appeal, is transformed into a legal authority. This blurring of the distinction between religion and law erodes the authority of the state in the elaboration of legal rules that should have universal application to all persons living within its jurisdiction. As the former Quebec Minister of Justice, Paul Bégin has noted,

the conduct of men and women in our society must under no pretext be placed under the rule or laws of religion...[A]ll persons have the inalienable and non-negotiable right to invoke the law, above and beyond any religious rule...they have the right to the protection of the law at all times and in all circumstances...The creation of [religious tribunals] under discussion in Ontario represents a major and dramatic setback for women and children's civil rights, to which we cannot consent under the guise of freedom of religion or reasonable accommodation.³⁵²

Indeed enforceable faith-based arbitration may be incompatible with freedom of religion itself, which as the Supreme Court has noted recognizes individual liberty and subjective choice in the interpretation of religious norms.³⁵³ The interpretation of a religious obligation by an arbitrator may be in conflict with an individual's understanding of the

³⁵⁰ METRAC is a community organization that promotes the rights of women and children to live free from violence and the threats of violence: online: METRAC <<http://www.metrac.org/>>.

³⁵¹ Letter from Pamela C. Cross, Legal Director, Ontario Women's Justice Network to Michael Bryant, Attorney General and Sandra Pupatello, Minister Responsible for Women's Issues (27 January 2005) [on file with author].

³⁵² "L'étant Québécois doit se prononcer. Et clairement contre" *Le Devoir*, (12 January 2005) A7 [translated by Andrée Côté]. A few days after this opinion, the current Minister of Justice Monsieur Jacques Dupuis re-affirmed the position of his government that no faith based arbitration or mediation would be allowed under Quebec law. Jacques Dupuis "Pas question de modifier le Code civil du Québec" *Le Devoir* (15 January 2005) B5 [translated by Andrée Côté].

³⁵³ *Amselem*, *supra* note 143.

religious precept. Thus, when a religious order is given legal effect it could force an individual to act contrary to her belief.

The fact that most religions can be interpreted as endorsing male domination and female inferiority, sanctioning religious decision-making as part of the legal order would very often condone the commission or the perpetuation of potential discriminations. The Canadian Council of Muslim Women has stated:

We are believing women who are committed to our faith and our members are very concerned that the use of Muslim family law will erode the equality rights of Muslim women that are guaranteed under the *Canadian Charter of Rights and Freedoms*...Sanctioning the use of religious laws under the *Arbitration Act* will provide legitimacy to practices that are abhorred by fair-minded Canadians, including Muslim women.³⁵⁴

Professor Jean-Francois Gaudreault-Desbiens is of the opinion that this situation creates a responsibility on governments to ensure that women's inequality is not exacerbated:

[W]henever there is a risk that the situation of a vulnerable party could be worsened as a result of the application (or misapplication) of religious norms, the state should at the very minimum ensure that it does not facilitate the application of such norms or that it potentially reinforces their power over such a vulnerable party.³⁵⁵

Thus, NAWL opposes the use of religious principles as a legal framework for arbitration in family law, as it currently exists under Ontario's *Arbitration Act*. No one should be forced by a state sanctioned legal mechanism to respect a religious injunction. All men and women, whatever their culture or religion, have a right to equality and justice and to the enjoyment of all of their universally recognized and constitutionally entrenched human rights.

C. A Framework for Mediation

With respect to mediation, NAWL recommends that mediation be regulated and controlled by the legislative frameworks that exist both federally and provincially. Individual choice must be exerted within the bounds of legislatively recognized entitlements that were adopted with a view to removing sexual inequality in the family. Thus, decisions of religious authorities, or any other body that performs informal mediation or provides advice, can be the basis of a mediated settlement, agreed upon by both parties, but only if it conforms in substance to the rights that are recognized for women in Ontario's family legislation and case law.

In the context of pervasive oppression or discrimination, consent should never be allowed to validate discriminatory religious or cultural practices that exacerbate women's inequality. Thus even though parties agree with a religious authority's recommendations in the context of a separation or a divorce, consent cannot be legally binding if the

³⁵⁴ Letter to Dalton McGuinty, Premier and Michael Bryant, Attorney General of Ontario from Alia Hogben, Executive Director of Canadian Council of Muslim Women (14 January 2005) online: CCMW <<http://www.ccmw.com/ShariainCanada/Letter%20to%20Ontario%20Premier%20Attorney%20General.htm>>

³⁵⁵ Gaudreault-Desbiens, *supra* note 209 at 30.

settlement does not substantively conform with equality and the human rights framework.

D. Improving the Justice system

NAWL recognizes the continued deficiencies within the traditional court system and the need to address them. But these deficiencies should not justify the development of a parallel legal order, controlled by minority communities or religious groups. On the contrary, the government must renew its commitment to accessible justice, in a climate that does not tolerate racism and that accommodates cultural diversity.

In recognition of the fact that many people from racialized and religious communities do not find comfort in the traditional court system, NAWL recommends the continued accommodation of culture and religion in the courts by way of training and education for judges, lawyers, mediators, court clerks and others to increase their understanding and knowledge of non-Judeo-Christian cultural and religious beliefs and values with respect to family issues.

As METRAC has recommended, concerted efforts must be made to improve the traditional court system rather than creating a two-tier system of justice. Accordingly, the family courts must be made more efficient such that cases move through the system more quickly, effectively and fairly. Consultations must be held with religious and cultural communities to explore methods of sensitizing the family court system. The Government of Ontario must ensure that family court judges, lawyers, mediators and others properly take into account the issues of women's equality rights and violence against women to improve the quality of outcomes in family court. The Government of Ontario must work in collaboration with appropriate community groups (including women's equality-seeking groups as well as religious and cultural groups) to develop educational materials about women's rights and Canadian family laws, to be designed to meet the diverse needs of different communities. Finally, it is imperative that access to justice is ensured and that poverty not be bar to the enjoyment of human rights. As such, the dismal situation of funding for Legal Aid Ontario must be improved to ensure proper legal representation for all.³⁵⁶

E. Conclusion

Ontario and Canada are bound by human rights obligations included in the *Canadian Charter of Rights and Freedoms*, and international human rights instruments, such as the *Universal Declaration of Human Rights*, the *Convention on the Elimination of all Forms of Discrimination against Women*, the *Convention on the Elimination of Racial Discrimination*, the *International Convention on Civil and Political Rights* and the *International Convention on Economic, Social and Cultural Rights*. Each of the obligations under the above covenants requires that the state protect disadvantaged individuals and groups. A government must not, either by positive action or by omission, maintain legislation and policies that have a discriminatory impact on women particularly when they have a disparate impact on women of colour and/or women from different religious minorities. Such legislation and/or policies cannot be justified in a free and democratic society. A system of justice that privatizes family law abrogates the state's

³⁵⁶ Metropolitan Action Committee on Violence Against Women (METRAC), "Should different kinds of people living in the same province be governed by different kinds of laws?: An Analysis of Marion Boyd's Review 'Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion'" (27 January 2005) online: Ontario Women's Justice Network <<http://www.owjn.org/issues/mediatio/boyd.htm>>.

responsibility toward its people. The government of Ontario must rectify the current situation of injustice and create a system whereby each individual's human worth and dignity are protected. The people of Ontario, the rest of Canada and indeed the global community await a proper resolution of this matter. The current situation and the recommendations made by Marion Boyd contravene Canada's human rights obligations and are simply unacceptable.

The original intention of this paper was to consider the implications of sharia arbitration tribunals in Ontario. In the process of research and writing, it became clear that this discrete issue raises many other concerns of importance for women and has far reaching implications for a wide variety of individuals and groups. Several unresolved matters include how to assist minority women in participating in the interpretation of their culture, how to give power and legitimacy to women's definitions of their religion, whether the state has a role to play in assisting/protecting these "cultural dissenters", and how democracy can be exercised in the realm of the "private". In order to continue these discussions, several consultations have already been planned with different groups, both Muslim and non-Muslim. This paper has proven to be only the beginning of a process, and not an attempt to say it all. NAWL will continue collective engagement with a broad consultation of women and different organizations to identify and evaluate strategies for ensuring that women's constitutional equality rights are not infringed and to refine their recommendations to ensure fairness and equality for women who remain within the realm of religious decision-making.