Faith-based arbitration in Ontario:
promoting the option to exit and building fraternity

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Abstract

This thesis examines in detail the legislative amendments made to the Ontario *Arbitration Act, 1991* following the "sharia debate" of 2004. The thesis takes the position that the legislative changes dealing with the regulation and enforcement of faith-based arbitration struck an appropriate balance in safeguarding against the coerced consent of vulnerable members within religious communities. A comprehensive overview of family arbitration in Ontario and the historical background of the "sharia debate" is presented. The thesis develops the argument that consent in family law-related arbitration must necessarily be scrutinized in a more probing and searching manner than the consent given in arbitration for other subject matters. The main arguments being advanced and explored are that the state has a duty not to erect obstacles in the path of individuals wishing to exit their religious communities. I highlight this argument first through a comparative analysis of the regime of personal laws in India and the controversial *Shah Bano* case. In the latter half of my thesis, I then justify the Ontario government's decision to discontinue the legal enforceability of faith-based arbitration in family law-related disputes based on the importance of maintaining judicial neutrality regarding religious precepts and dogma, and as the best means of building fraternity in a diverse and pluralistic society.

Resumé

Cette thèse examine en détail les amendements effectués à la *Loi de 1991 sur l'arbitrage* de l'Ontario, suite au « débat sur la charia » survenu en 2004. Cette thèse adopte le point de vue selon lequel les changements législatifs concernant la réglementation et l'application de l'arbitrage religieux sont parvenus à atteindre un juste équilibre dans la lutte contre le consentement forcé de membres vulnérables au sein de communautés religieuses. Une revue complète de l'arbitrage familial en Ontario et du contexte historique du « débat sur la charia » est présentée. L'argument déployé dans cette thèse établit que le consentement dans l'arbitrage en droit de la famille doit nécessairement être examiné de façon plus approfondie que le consentement accordé lors d'autres questions d'arbitrage. Les raisons principales explorées avancent que l'état a le devoir de ne pas poser des obstacles aux individus qui désirent quitter leur communauté religieuse. Ce constat est mis en évidence grâce à une analyse comparative du régime du droit religieux en Inde et à l'affaire Shah Bano. Dans la deuxième moitié de ma thèse, je justifie la décision du gouvernement de l'Ontario de retirer à l'arbitrage religieux de litiges en droit de la famille son caractère exécutoire parce que la neutralité judiciaire concernant les préceptes religieux et dogmatique est essentielle. Par ailleurs, il s'agit du meilleur moyen de construire la fraternité dans une société pluraliste.

Table of Contents

1 INTRODUCTION

This thesis provides justification for the government of Ontario's decision to prohibit the legal enforceability of arbitral awards in family law related-disputes that are governed exclusively by faith-based principles.

Parts 1 and 2 of this thesis present an overview of arbitration and family law legislation in Ontario, including a detailed summary of the legislative changes that were brought to Ontario's *Arbitration Act, 1991*[1] [*Arbitration Act*] after the "sharia debate"[2] in 2004. The overview on arbitration legislation in Canada and especially in Ontario draws from the research conducted and presented by Marion Boyd in the report commissioned by the Ontario government in the aftermath of the sharia debate, called "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion" [the *Boyd Report*].[3]

Part 3 of this thesis studies how prevailing gender imbalance makes the ascertainment of women's genuine consent problematic not just in faith-based arbitration but also in family law in general. An argument is advanced that consent in family law arbitration needs necessarily to be scrutinized in a different and more probing manner than consent in arbitration for other subject matters. A comparative analysis of the legal regime regarding family law in India is undertaken, and the dangers and inadequacies of permitting a parallel governing system of personal laws are highlighted through an examination of the Supreme Court of India's decision in *Mohammed Ahmed Khan v Shah Bano Begum* [*Shah Bano*].[4]

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[1] *Arbitration Act*, SO 1991, c 17.

[2] 'Sharia debate' is a term I use to refer to the public debate that happened in Ontario after the media promoted plans by the Institute of Islamic Civil Justice to create self-labeled "sharia tribunals" in the province of Ontario. The goals and motivations of the Institute of Islamic Civil Justice will be presented in more detail under Part 2.2 of this thesis.

[3] Marion Boyd (30 September 2004) *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Ministry of the Attorney General, 2004).

[4] *Mohammed Ahmed Khan v Shah Bano Begum,* 1985 AIR 945, 1985 SCC (2) 556.

Part 4 of this thesis justifies the prohibition on legal enforceability of faith-based arbitral awards by means of two arguments: First, the importance of maintaining neutrality in courtrooms so that the judiciary are not engaged in adjudicating on religious dogma and precepts; and second, that the consistency and uniformity of one family law for all fosters fraternity in the diverse and pluralistic Canadian society.

1.1 Introduction to alternative dispute resolution and arbitration

Increasingly, legal disputes are resolved through alternative dispute resolution processes because of their advantages over the use of traditional court-based adjudication. Generally, these advantages include:

- a shortened time frame;
- a significant reduction in expenses;
- specialized expertise;
- a heightened degree of privacy;
- the possibility of creative and flexible solutions; and
- a sense of personal agency and ownership over the disputes.

To reap these benefits and to efficiently deal with a backlog of court cases, various jurisdictions in Canada have adopted legislation to encourage parties to resolve their commercial and personal disputes outside the traditional and adversarial courtroom setting.[5] The goal of alternative dispute resolution panels is understood as not superseding the existing judicial framework, but rather as supplementing the scope of justice by including the "cultural, economic and psychological features inherent in complex, multi-layered, and plural societies."[6]

[5] See Mauro Cappelletti, "Alternative Dispute Resolution Process within the Framework of the World-Wide-Access-to-Justice Movement" (1993) 56 Mod L Rev 283.
[6] *Ibid* at 283.

When it comes to family law related-disputes, the advantages of using alternative dispute resolution processes are even more obvious: time and cost savings can greatly reduce emotional stress during a period of time that is already fraught with tension and anxiety; additionally, the direct engagement and involvement of both parties in the *process* of dispute resolution as well as its *outcome* provides parties with a sense of control and ownership that is more often than not missing in the often unfamiliar and confusing realm of court-based adjudication.

Among the alternative dispute resolution methods used in the family law context, mediation and arbitration are the most common and popular alternatives to litigation. In mediation the parties work together with a neutral mediator to arrive at a mutually acceptable agreement. As such, mediation is generally a consensual process, and a party is free to withdraw at any time. This is preferable to going to court because a decision rendered by a judge is always unpredictable. Despite being an out-of-court process, the power of the courts can be invoked in mediation in terms of securing enforcement for mediated agreements. Thus, an agreement or settlement reached through mediation, such as a separation agreement, is capable of being filed with a court and enforced as an order.

When mediation itself fails to resolve certain issues, increasingly the parties turn to arbitration. In arbitration, the parties agree to have a third party adjudicate their dispute, but the distinguishing feature is that they agree at the outset to be held to the decision of said third party. In other words, once an arbitration agreement or clause has been agreed upon and signed (usually pre-dispute), parties do not typically have the option of withdrawing from arbitration or going to court. Generally speaking, parties are free to choose their arbitrator as well as the set of governing laws or principles to best resolve their conflicts. Like mediated settlements in some jurisdictions, arbitral awards can be filed with a court and enforced as court orders if necessary.

In summary, two defining strengths of arbitration are that: (i) it allows parties to choose the arbitrator and governing law, thus providing the parties with a customized solution to their dispute (flexibility and autonomy); and (ii) it carries the force of law since arbitral awards are enforceable (force of law). These two features make arbitration a particularly attractive option that efficiently maximizes cost and time, both for the state and for the individuals involved.

1.2 Overview of arbitration legislation in Canada

Arbitration legislation first developed in Canada and elsewhere in the commercial context. Benefits such as an expeditious outcome, inexpensive process and, perhaps most importantly, the specialized expertise of the arbitrators, made arbitration an especially compelling option for early business merchants. Originally, the common law provinces passed statutes on commercial arbitration based on English legislation dating from 1889.[7] The federal government, however, did not pass any legislation on arbitration until 1986.[8]

The process of federal adoption of arbitration legislation began in 1985 when the United Nations Commission on International Trade Law [UNCITRAL] created a *Model Law on International Commercial Arbitration* [*Model Law*]. The *Model Law* was to serve as a basis for the update, revision and promotion of uniformity of Canadian provincial legislation.[9] This update and revision occurred through the work of the Uniform Law Conference of Canada, a federal-provincial-

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[7] See Randy A Pepper, "Why Arbitrate?: Ontario's Recent Experience with Commercial Arbitration", online: (1998) 36:4 Osgoode Hall LJ <http://www.ohlj.ca/archive/articles/36_4_pepper.pdf>.

[8] *Ibid.*

[9] See Uniform Law Conference of Canada, *Proceedings of the Seventy-First Annual Meeting* (Law Reform Commission of Canada, 1989), online: <http://www.bcli.org/ulcc/proceeedings/1989.pdf>. See also Uniform Law Conference of Canada *Uniform Arbitration Act* (Law Reform Commission of Canada, 1990), online: <http://www.ulcc.ca/en/us/arbitrat.pdf>.

territorial law reform and harmonization body, which in 1990 created the *Uniform Arbitration Act*, and recommended its adoption by Canada's provinces and territories.[10] While the *Uniform Arbitration Act* was based on the UNCITRAL *Model Law*, which itself addressed international arbitrations, its principles were modified only slightly to apply to domestic arbitrations.[11]

The guiding principles of the *Uniform Arbitration Act* were listed in the section titled Commentaries as follows:

> (1) people who enter into valid arbitration agreements should be held to those agreements;
> (2) the parties should have broad freedom to design the arbitral process as they see fit;
> (3) that process should nevertheless be fair to both parties; and
> (4) the award resulting from the arbitration should be readily enforceable, subject only to review for a specific list of fatal flaws of form or procedure.

These four guiding principles embody the importance of the concepts of (i) finality once an arbitration agreement is entered into; (ii) freedom with respect to the arbitral process; (iii) fairness; and (iv) enforceability. The importance and function of the courts are also set out in the same section as follows:

> [T]he Act attempts to minimize the opportunities to delay the arbitration, either by [the parties'] refusing to participate or seeking the intervention of the courts. The courts do have their place in arbitration under the Uniform Act, however. They can keep proceedings moving in the face of resistance, they can protect the position of parties during proceedings, they can help ensure that the arbitral award applies with the law, and they can lend their weight to the enforcement of the award.

Notwithstanding the commentary on the role of the courts, the *Uniform Arbitration Act* was inspired by an evolution in the attitudes to arbitration. The changes reflected an increased perception of the legitimacy of arbitration as a

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[10] *Ibid*.

[11] J Brian Casey, *International and Domestic Commercial Arbitration: An Introduction*, loose-leaf (consulted on 16 February, 2013), (Toronto: Carswell), ch 3 at 1.

method of dispute resolution, and greater trust in the ability of arbitrators to make a range of decisions. The new legislation thus reduced the discretion of the court in supervising (or, as some people saw it, interfering with) arbitrations. Court discretion was reduced with respect to both stopping litigation when parties had agreed to arbitrate, as well as enforcing awards once rendered.[12]

Ontario was among the first provinces to adopt the *Uniform Arbitration Act* for international and domestic commercial arbitrations that occurred within its jurisdiction. Today, seven provinces in all have adopted the *Uniform Arbitration Act*: Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Prince Edward Island and Nova Scotia. While British Columbia adopted a statute on commercial arbitration in 1986, it stands out from the other provinces in that the statute provides the courts with greater discretion to refuse to enforce an arbitration agreement or award as compared to the *Uniform Arbitration Act*.

In the introduction to his book, *International and Domestic Commercial Arbitration*, Brian Casey notes that while the UNCITRAL *Model Law* was designed for international arbitration, most provinces have also used it as the basis for domestic arbitration with only slight modifications, using the *Uniform Arbitration Act* as a model.[13]

Importantly, the *Uniform Arbitration Act* as implemented in the various provinces, including Ontario, is not limited solely to commercial arbitration. Unless the parties to an agreement exclude the application of the relevant provincial arbitration statute, such statute applies to all arbitrations that take place within the province. The statutes also apply to arbitration of family law and inheritance disputes, but without doubt, the arbitration acts work in conjunction with, and within the limits imposed by, various other acts governing

[12] See *Boyd Report, supra* note 3 at 11.
[13] *Supra* note 11.

family law. Acts governing family law often, though not always, stipulate which act is to take precedence in the event of a conflict.

1.3 Overview of arbitration legislation for family law-related disputes in Ontario

In 1992, Ontario adopted the *Arbitration Act* for domestic arbitrations.[14]

The central tenet of party autonomy has been adopted and incorporated into the *Arbitration Act*, though at the same time, attempts have been made to provide for certain safeguards that are necessary to account for the special sensitivities of family law-related disputes.

While the law does not permit arbitration in the family law realm to occur *carte blanche*, arbitration's key features, flexibility and enforceability, are still upheld in a manner that results in a very precarious balance between freedom of choice and protection against abuse. Limits and safeguards on the family law-related arbitrations are provided either through the direct legislation on arbitration or through legislation governing family law.

These limitations, which will be studied below, either (i) prevent a dispute from being arbitrated in the first place; (ii) constrain the arbitration process in procedural and substantive ways; and/or (iii) expand or constrict the powers of the court to review the enforceability of an arbitral award.

The adequacy of these limitations will be discussed in further detail in Part 3 of this paper. By way of introduction, I will provide here the legislative landscape within which family arbitration operates in Ontario to properly understand the role that arbitration legislation plays in the resolution of family law-related

[14] *Supra* note 7 at 808.

dispute. In order to understand what can be arbitrated in the first place, I set out the jurisdictional division of responsibility for family law between the federal and provincial governments.

1.3.1 The federal / provincial division of responsibility over family law

In Canada, jurisdiction to legislate on family law is shared between the federal and provincial governments. This division of responsibility stems from the division of powers contained in sections 91 and 92 of Canada's *Constitution Act, 1867*.[15] Section 91 sets out the areas over which the federal Parliament has exclusive jurisdiction, including marriage and divorce. Section 92 sets out the areas over which the provincial legislators have exclusive jurisdiction, including the solemnization of marriage, and property and civil rights in the province.

Enacted under Parliament's power over marriage and divorce, the federal *Divorce Act* only applies to married people who have initiated divorce proceedings, and also to the custody, access, child and spousal support claims they make as part of those proceedings.[16] The federal *Divorce Act* explicitly permits, and one can safely conclude also promotes, mediation: counsel acting on behalf of the divorcing spouse has a duty to inform that spouse of mediation facilities to assist in negotiating matters which may be subject to a support or custody order.[17] In contrast, arbitration is not mentioned anywhere in the *Divorce Act*.

Where spouses are unmarried, or are married but not divorcing, their rights and obligations are determined by the family laws of their provinces or territories. Therefore, outside of what is covered by the *Divorce Act*, provincial law applies

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[15] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92, reprinted in RSC 1985, App II, No 5.
[16] *Divorce Act*, RS 1985, c 3, (2nd Supp).
[17] *Divorce Act, ibid*, s 9(2).

to most family law matters.[18] The provinces have jurisdiction over, for example, the separation (distinct from divorce) of married or unmarried couples, custody, access, support, division and possession of property, restraining orders, and related issues of child protection and enforcement of orders. Note that since property is a matter of provincial and territorial competence within the Canadian federal structure, the division of family property is not addressed under the *Divorce Act* but is dealt with through the applicable provincial or territorial law.

When adults separate, their marital status thus determines the family law regime that may apply to them and their children. Married people have the option of using the *Divorce Act* to apply for a divorce and can use this same statute to establish their custody, access and support rights. On the other hand, common law couples and married couples who choose not to divorce must turn to provincial legislation to determine the custody and access for children, and child and spousal support.

In summary, the division of powers in Canadian law means that only certain civil matters outside the scope of the federal *Divorce Act* and thus subject to provincial jurisdiction, such as separation, property division or support of dependent children and spouses, are amenable to arbitration under provincial legislation.

1.3.2 The *Family Law Act* and *Children's Law Reform Act*

In Ontario, common law couples and married couples who choose not to divorce and use the federal *Divorce Act* must then turn to two provincial statutes to determine their rights and obligations: the *Family Law Act*[19] for child and

[18] There exist other, albeit arguably less important, federal family law-related statutes: *Civil Marriage Act*, *Assisted Human Reproduction Act*, and federal child support tables.
[19] *Family Law Act*, RSO 1990, c F3.

spousal support, and the *Children's Law Reform Act*[20] to determine custody and access.

Property division after the breakdown of a relationship is determined in different ways throughout the provinces. Not all provinces require the sharing of all property, and most do not even provide for property sharing between unmarried partners. Furthermore, each province takes a different approach to the variation of the presumptive "50/50" sharing of property to achieve a "fair" result.[21]

Ontario's *Family Law Act* is intended to achieve a fair and balanced regime for the division of assets upon marital breakdown, thanks in part to years of lobbying work and awareness raising by women's rights groups. In its preamble, the *Family Law Act* contains strong language supporting gender equality:

> Whereas it is desirable to encourage and strengthen the role of the family; and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership; and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of spouses upon the breakdown of their partnership, and to provide for other mutual obligations in family relationships, including equitable sharing by parents of responsibility for their children.

The above preamble represents an aspiration of equality that aims to acknowledge and respect the equal importance of roles people play within their familial relationships.

While family arbitrations are governed both by the *Arbitration Act* and the *Family Law Act*, where there are conflicts between them, the *Family Law Act* is

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[20] *Children's Law Reform Act*, RSO 1990, c C12.

[21] Polly Dondy-Kaplan and Natasha Bakht, "The application of religious law in family law arbitration across Canada" *Women's Legal Action and Action Fund* (April 2006), online: Women's Legal Action and Action Fund <http://leaf.ca>.

to prevail.[22] Moreover, domestic contracts made and agreed to by the parties take precedence over the provisions of the *Family Law Act*, subject only to the exceptions provided for in the *Family Law Act*.[23] This reflects a policy decision to place greater value on the agreements to which people mutually consent, rather than on statutory provisions.

The *Family Law Act* is responsible for setting out the guidelines for the resolution of family disputes through contractual agreements. Separation agreements are made under the authority of Part IV of the *Family Law Act*. The main formal requirements for an enforceable agreement under the *Family Law Act* are that the agreement be in writing; that it be signed by the parties; that the signature be witnessed; that the best interests of the child be respected; and that the agreement be in accordance with child support guidelines.[24]

The *Family Law Act* permits spouses to contract out of sharing any, or all, of their property by excluding property from the calculation of "net family property".[25] While contracting out of protections relating to the possession, sale or mortgage of the matrimonial home through a marriage contract is prohibited under the *Family Law Act*,[26] contracting out of sharing the value of the home is not prohibited. Spouses are also allowed to contract out of spousal support. However, the *Family Law Act* allows the court to set aside a support agreement or a waiver of support in a domestic contract under certain circumstances. These include: where it results in unconscionable circumstances; if the person entitled to support is in receipt of social assistance; or if the support provision is in

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[22] *Arbitration Act, supra* note 1 at s 2.1(2), and *Family Law Act*, supra note 13 at s 59.1(2).
[23] *Family Law Act, supra* note 19 at s 2(10).
[24] *Family Law Act, supra* note 19 at ss 55(1), 56(1)-(1.1).
[25] *Family Law Act, supra* note 19 at s 4 (the Act defines one category of excluded property as "property that the spouses have agreed by domestic contract is not to be included in the spouse's net family property").
[26] *Family Law Act, supra* note 19 at s 52(2).

default.[27] The shortcoming of these remedies is that the circumstance must be demonstrated in order to bring the claim forward.

Contracting about the custody and access of children before the relationship has broken down is not permitted by the *Family Law Act*.[28] The court may disregard any provision that a couple makes about their children's upbringing where the court believes it is in a child's best interest to do so.[29] The *Family Law Act* also permits a court to disregard a provision relating to child support where the provision is unreasonable with regard to the child support guidelines.[30]

In Ontario, aside from the provisions of the *Family Law Act* mentioned above, most of the laws relating to children are contained in two statutes: the *Children's Law Reform Act* and the *Child and Family Services Act.*[31]

The concept of illegitimacy was abolished in Ontario in 1978, as manifested by the fact that the definition of child under both acts now includes all children, whether born inside or outside marriage.[32] As such, support claims may be made on behalf of all children—parents must support their children whether they are born from a marriage, a common law relationship, or a casual encounter. Contractual arrangements that provide otherwise will always be subject to the court's inherent jurisdiction, which allows it to intervene in the 'best interests of the child.' In the case of support, persons (most married and common law) who have entered into *in loco parentis* relationships with children (i.e., manifested an intention to treat that child as part of their family) must be responsible for that child's support.[33]

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[27] *Family Law Act*, *supra* note 19 at s 33(4).
[28] *Family Law Act*, *supra* note 19 at ss 52(2)(c), 53(1)(c).
[29] *Family Law Act*, *supra* note 19 at s 56(1).
[30] *Family Law Act*, *supra* note 19 at s 56(1.1).
[31] *Child and Family Services Act*, RSO 1990, c C-11.
[32] *Children's Law Reform Act*, *supra* note 20 at s 1(1). See *Child and Family Services Act*, *supra* note 31 at s 3(1) where the definition of child is "a person under the age of eighteen years."
[33] *Chartier v Chartier* [1999] 1 SCR 242 [*Chartier*]

The *Child and Family Services Act* is the provincial law that enables a Children's Aid Society to become involved if a child is being abused or neglected. Under the act, any person, whatever the source of their knowledge, has a mandatory duty to report to a Children's Aid Society if they suspect that a child is being neglected, abused, sexually exploited, or otherwise not cared for in a manner that meets minimum parenting standards.[34] This is a legal obligation that applies to everyone. In addition, if a person works with children, then it is an offence not to report suspicions about child abuse and neglect. Persons in this category include health care professionals, teachers, family counselors, social workers, priests, rabbis and lawyers.[35] While these sections do not explicitly mention mediators or arbitrators, it is likely that most people who practice alternative dispute resolution would fall within one of these explicitly established professions and be bound by the same duty to report.

1.3.3 General limits to arbitration

Beyond the scarce legislative curtailments on the resolution of family law-related disputes mentioned above, there are some internal limitations within the *Arbitration Act* itself that aim to provide more safeguards for the parties. These restrictions on freedom of contract are provided for the greater good, and they include legal, procedural and substantive limits to the use of the *Arbitration Act.*[36]

Through legislation, the state has two strategies for protecting parties from the unfettered broadness and flexibility of arbitration, namely to remove an issue

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[34] *Child and Family Services Act, supra* note 31 at s 72.
[35] *Child and Family Services Act, supra* note 31 at s 72(5)(b).
[36] This section of the paper draws heavily from the thorough discussion of limits imposed on arbitration provided in the Boyd Report at 13-17. However while Marion Boyd drew the conclusion that there are adequate limits on the arbitration regime, I present the opposing argument that these limits do not in fact adequately provide sufficient protection for the parties.

from the scope of subject matter that can be subjected to arbitration, and/or to impose a heavy judicial review regarding certain matters in the award (what is termed a post-facto review). A post-facto review could occur in the form of an appeal or an application to set aside an arbitral award. Under arbitration law, an appeal can be made on a question of law, question of fact, or mixed fact and law.[37] An application to set aside an award occurs only when a specific ground has been met and generally deals with flaws of form or procedure in the arbitration *process*.[38] The provisions with respect to both forms of judicial review are provided for within the *Arbitration Act* and parties are not permitted to vary or exclude those provisions.[39]

(i) Legal limits

The main legal limitation is that of voluntary consent. As a fundamental principle, private dispute resolution only occurs because the parties have agreed to it. The exercise of personal choice over the decision to enter into the legislated arbitral process is the critical gateway into valid arbitration. Part 3 of this paper will examine in detail the questions of free choice and consent that are critical issues for whether an arbitration process is valid and legitimate in the context of resolving family disputes.

A further legal limit is that an arbitrator cannot order the parties to partake in any illegal activity under Canadian law (since parties cannot lawfully agree to break the law). However, this assumes that the parties and the arbitrator are sufficiently knowledgeable of what is considered legal in Canadian law at any given point in time. In this regard, matters that involve a public recognition of civil status (for example, status of a marriage, or recognition of parenthood) are

[37] *Arbitration Act, supra* note 1 at s 45.
[38] *Arbitration Act, supra* note 1 at s 46.
[39] *Arbitration Act, supra* note 1 at s 3.

not arbitrable.[40] This point again assumes that the arbitrator and parties are aware of and apply such distinctions.

Finally, since the arbitration agreement is a contract between the parties, it is enforceable or voidable just like any other contract. As such, a court could refuse to stay litigation or could set aside an award where compliance with the ordinary rules of contract law has not been met, such as legal incapacity due to age, duress or mental incompetence.[41] However, the threshold for court intervention due to duress or coercion is fairly high, as will be demonstrated later through discussion of Canadian cases in Part 3.2.1 of this thesis.

(ii) Procedural limits

Parties cannot contract out of the provision in arbitration legislation that parties must be treated equally and the process conducted fairly.[42] This requirement includes being given a fair opportunity to present one's case, and receiving proper notice of significant steps in the arbitration process.

The courts may also set aside an award that was obtained by fraud or if the arbitrator is or reasonably appears to be biased.[43] However, where the party has the opportunity to challenge the arbitrator on these grounds but does not do so, the court shall not set aside the award on the basis of a deemed waiver.[44]

(iii) Substantive limits

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[40] Only a public body, a court, can make an order affecting these public statuses. See Boyd Report, *supra* note 3 at 14.
[41] *Arbitration Act*, *supra* note 1 at s 5(5) which reads "An arbitration agreement may be revoked only in accordance with the ordinary rules of contract law."
[42] *Arbitration Act*, *supra* note 1 at s 3.
[43] *Arbitration Act*, *supra* note 1 at s 46(1).
[44] *Arbitration Act*, supra note 1 at ss 46(4),(5).

Ontario courts may also refuse to enforce an arbitral award dealing with the custody of children through the court's general jurisdiction (which is termed "*parens patriae*" jurisdiction) to oversee the treatment of children and to ensure that their best interests are protected.[45] However, barring a motion for an appeal, the *Arbitration Act* does not expressly give courts any right to review the merits of an award on any other basis. There is no power to refuse enforcement on grounds that the award violates a "public policy" or the "greater good", however that may be defined.

It is also worth noting that some of the protections mentioned above are lost unless they are exercised promptly.[46] Complaints about irregularities must be made within a reasonable time, or the affected party is deemed to have accepted the irregularity. Likewise, if a party participates in the arbitration despite being aware of a defect of jurisdiction or bias, then that party may lose the right to complain on that ground later. In addition, an application to set an award aside must be brought within 30 days of the award,[47] and an application to enforce an award must be brought within two years of the date of the award.[48]

In summary, these provincial acts showcase a confidence in the process of arbitration as an appropriate mechanism to resolve family law-related disputes. This confidence is manifested by providing for the public enforcement of arbitral awards, subject only to a limited number of legal, procedural and substantive protections. Notwithstanding these safeguards, however, in light of arbitration's origins as a mechanism to deal with commercial disputes and its relatively recent emergence in family law, there have been important and relevant feminist critiques of the use of arbitration in the realm of family law. In family law-

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[45] See: http://www.attorneygeneral.jus.gov.on.ca/english/family/arbitration/domestic_violence.asp (parens patriae is an inherent jurisdiction the Court can apply to rescue a child in danger. This power allows the court to step into a dispute involving children if necessary).

[46] *Arbitration Act, supra* note 1 at s 4.

[47] *Arbitration Act, supra* note 1 at s 47.

[48] *Arbitration Act, supra* note 1 at s 52(3).

related disputes involving abuse, oppression and domestic violence, certain defining features of arbitration have proven problematic. These drawbacks will be discussed in further detail in Part 1.4 of this paper.

1.3.4 Inheritance law in Ontario

In Ontario, inheritance can be divided into three areas: inheritance according to a will (testate succession), inheritance without a will (intestate succession), and situations where a will only covers part of the inheritance (partial intestacy).

All successions, whether testate, intestate, or partially intestate, are subject to a claim under the *Family Law Act* by the surviving spouse, where the net family property of the deceased spouse is greater than that of the surviving spouse.[49]

There is no law in Ontario to prohibit or constrain a person from making a will that includes or excludes anyone they wish, subject only to a spouse's claim under the *Family Law Act*. In addition, claims may be made by dependents for support from the estate. It is clear then, that under Ontario law, testate successions can be organized in any manner and to the exclusion of anyone. Spouses and dependents may bring claims against the estate if they have not been adequately provided for.

On the other hand, intestate successions are distributed according to statutory provisions; however, as with all civil disputes, alleged violations must be brought to the court's attention by someone bringing forward a complaint. Where a person dies without a will, the *Succession Law Reform Act*[50] operates as the code for an equitable distribution of the inheritance. The first person to be considered next of kin is the legally married spouse of the deceased.[51] If the only next of kin is the spouse, then the spouse inherits everything. If there are

[49] *Family Law Act, supra* note 19 at s 5(2).
[50] *Succession Law Reform Act,* RSO 1990, c S26.
[51] *Succession Law Reform Act, ibid,* s 44.

other next of kin, the spouse is entitled to the "preferential share", which is the first $200,000 of the value of the estate. The act then provides for a distribution process for the remainder of the inheritance.

Though the *Succession Law Reform Act* does not mention arbitration, there is nothing prohibiting beneficiaries who chose to avoid the courts from arbitrating an intestacy dispute.

1.4 Suitability of arbitration for family law-related disputes

Legislated rules for arbitration dealing with family law-related disputes are a relatively recent addition to the Canadian legal landscape. Historically the disputes resolved via arbitration legislation have been commercial disputes.

Disputes among family members have long been considered matters of personal sensitivity and the disputants have traditionally been given a wide latitude to resolve them privately. Subject to a few limitations mentioned above, there is generally no legislation to prevent people from making their own private arrangements to resolve their disputes in any manner they wish. Parties are free to be led by their personal and/or religious convictions when resolving their disputes. Traditionally, this freedom was not widely questioned; parties were mostly left alone to resolve their private matters without much mainstream contemplation or consideration about the adverse effects of the lack of state scrutiny.

While the legislation surrounding arbitration of family-related disputes is relatively recent, the *practice* of arbitration in this context is as old as the practice of private negotiation and mediation. From an Islamic perspective, the use of mediation and arbitration in marital disputes has been a longstanding

custom practiced for many years.[52] The Quran itself advises that "[i]f a couple fears separation, appoint an arbitrator from his family and an arbitrator from her family; [and] if they decide to reconcile, God will help them remain together."[53] Scholars have pointed out that because Islamic societies are communal in nature and have a "culture of relatedness", it is natural for family members to help settle disputes rather than for the couple to seek external and/or neutral intervention.[54]

Feminist critiques have recently questioned the advantages of such customs, which involve important arrangements being made behind "closed doors" and in the absence of neutral arbitrators, noting that the privacy that shrouds such practices and the stigma of opting out of this system leaves women particularly vulnerable and dependent.[55] Such feminist scholars point out that the gender inequities present in society in general, and in how religions are practiced in particular, makes the use of arbitration especially unsuitable and problematic for women.

As a result of these Islamic customs, women are put in the position of relying on family members to advocate on their behalf, which may or may not be a practical option for many women in Canada, especially immigrants. Their advocates may themselves have been conditioned from birth to believe in a reduced agency, minimized rights and entitlements for women, and in turn perpetuate cycles of oppression and disempowerment that they have experienced. What is especially problematic is that in these already delicate circumstances of faith-based arbitration the state has the potential for

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[52] Amr Abdalla, "Principles of Islamic Interpersonal Conflict Intervention: a Search within Islam and Western Literature" (2000-2001) 15 JL & Religion at 174.
[53] Quran, 4:35.
[54] Abdalla, *supra* note 52 at 175.
[55] See generally 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, and Ayelet Shachar, "Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation" (1998) 6 Journal of Political Philosophy 296.

exacerbating the situation by permitting awards from such processes to become legally enforceable through the courts.

This precise situation existed in Ontario until 2004 whereby parties were permitted to appoint any arbitrator that they saw fit, as well as use any principles of law they wished for the resolution of family law-related disputes. As will be discussed in Part 2 of this paper, when awareness of the dangers of this unrestrained freedom and the potential for resultant abuses from such an unfettered form of arbitration were made clear to the public at large, a very active and open debate about the appropriateness of the use of arbitration in general, and of faith-based arbitration in particular, for family law-related disputes ensued.

While parties cannot be restrained from ordering their family affairs as they wish (nor would one desire or find appropriate an intrusion or prohibition which cuts away at freedom and liberty to such a degree), Ontario's former role in blindly stamping arbitral awards from faith-based arbitrations and allowing them to be legally enforceable rightly troubled many women's groups and those working in tandem with them. These observers expressed a reasonable and valid fear that judicial enforcement of privately ordered agreements was at best permitting social inequities, and at worst encouraging them.

Critics included, for example, the Muslim Canadian Congress [MCC], a national organization that "provides a voice to progressive Muslims who are not represented by existing organizations", who challenged the use of the *Arbitration Act* for family law-related disputes during the 2005 debate on faith-based arbitration in Ontario.[56] They were joined by the National Association of Women and the Law [NAWL], the Canadian Council of Muslim Women [CCMW] and the National Organization of Immigrant and Visible Minority

[56] See Letter from the Muslim Canadian Congress to Marion Boyd (26 August 2004), online: <http://www.muslimcanadiancongress.or/20040826-2.pdf>.

Women of Canada. These groups viewed the "privatization" of family law matters as a negative trend in Ontario, and pointed out the dangers of taking family matters out of the public sphere where they are subject to public policy imperatives and scrutiny.[57]

During this same time, Action ontarienne contre la violence faite aux femmes, which works for francophone women in Ontario, also cautioned against the lack of control and transparency within private processes like arbitration, stating that:

> Contrairement aux lois en vigueur qui pourraient faire l'objet de réformes ou modifications grâce à la jurisprudence, on ne pourrait avoir d'emprise sur les vicissitudes des décisions prises en arbitrage, puisque celles-ci font partie d'un processus privé. Les lois canadiennes n'étant pas toujours sans failles dans leur élaboration ou leur application, le public dispose au moins d'un recours puisqu'il s'agit d'un processus public. L'utilisation des processus alternatifs dans les cas de garde légale ou de séparation des biens matrimoniaux constituent une privsatisation du droit de la famille qui remet en question les principes mêmes de justice.[58]

Along the same lines, 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 [emphasis in original]. [59]

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[57] See Letter from NAWL to Premier Dalton McGuinty, Attorney General Michael Bryant, Minister Sandra Pupatello (24 February 2005), online: <http://nawl.ca/en/>. See also excerpts of the written submission from CCMW to Marion Boyd (30 July 2004), online: <http://www.ccmw.com>.

[58] Letter from Gaëtanne Pharand to Marion Boyd (30 September 2004) in *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Ministry of the Attorney General, 2004) at 33.

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

As our society strives to move towards addressing centuries of gender inequality and providing for greater justice for all, the suitability of both older and newer methods of dispute resolution have to be reviewed and reanalyzed from many different lenses. The problems with arbitration, as pointed out by the above scholars, are real and pertinent; that social inequities suffered by female members within religious communities and society in general may continue to be reflected in the process and outcome of arbitration has pressing repercussions for society at large.

These concerns were noticed by Madam Justice L'Heureux-Dubé in the groundbreaking Supreme Court decision of *Moge v. Moge* [*Moge*].[60] The decision gave considerable attention to the economic disadvantages faced by women in Canada, and the phenomenon referred to as the "feminization of poverty". In *Moge*, Madam Justice L'Heureux-Dubé noted that although there are many causes of women's poverty, "there is no doubt that divorce and its economic effects are playing a role."[61] Citing a number of studies, she held that the "general economic impact of divorce upon women is a phenomenon the existence of which cannot reasonably be questioned and should be amenable to judicial notice."[62]

The fact that the state may be actively permitting such inequities by enforcing outcomes of such arbitral processes (where women effectively had no choice but to enter) backed by the full strength of the judicial system certainly means that the state is compelled to re-examine the consequences of its actions. Indeed, the state must consider how better to assist the vulnerable, including by closing loopholes and seeking out better solutions for all.

This paper does not advocate a complete ban on the use of arbitration in family law-related disputes; instead it is in agreement with the decision by the

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[60] *Moge v Moge*, [1992] 3 SCR 813, 99 DLR (4th) 456.
[61] *Ibid* at 854.
[62] *Ibid* at 873.

government of Ontario to deny the legal enforceability of arbitral awards that are reached through the use of faith-based principles. This approach strikes a proper balance between allowing freedom of choice for individuals to resolve their conflicts efficiently and discreetly, while at the same time ensuring that a basic minimum standard of law is applied and followed that provides checks and safeguards to vulnerable parties. The paper further argues that it is better policy not to maintain a parallel legal regime that allows for the resolution of family law-related disputes through religious principles, as the pressures to enter into such parallel regimes and the onus placed on vulnerable women to opt out of the system are too high.

Gender equality is more readily achieved when arbitral processes are governed by principles of Canadian laws; laws which are more easily amenable to change and reform than religious laws. The use of Canadian laws in family law arbitration achieves a fair balance in allowing parties their freedom and choice to settle disputes as they wish, while at the same time ensuring that the state fulfills its duty to assist the vulnerable, or simply dissatisfied, members of a community who could be further disadvantaged by legally-enforceable faith-based systems of dispute resolution.

2 HISTORY OF FAITH-BASED ARBITRATION IN ONTARIO

The *Arbitration Act* came into force in Ontario in 1992. Prior to 1992 private arbitration was already legal in Ontario under the previous *Arbitrations Act*, and family law-related disputes had been arbitrated based on various principles and laws for many years, including religious principles in the Jewish, Christian, Shia Imami Ismaili Muslims (Ismailis), and B'nai Birth communities.[63] In addition, aboriginal communities also utilized the same provisions of the *Arbitration Act* to pursue dispute resolution governed by the arbitrators and the spiritual principles which they felt best suited themselves and their conflicts.[64]

The three relevant features of the *Arbitration Act* that together created the problematic structure whereby the judicial enforcement of faith-based arbitration was permitted were the following:

(a) The choice of arbitrator was up to the parties and no qualifications or prior experience were necessary.[65] The parties could choose anyone that they felt was suitable to handle the dispute.

(b) The parties were permitted to choose which "rules of law" would apply to their dispute; if they did not make such a choice, the arbitrator could choose the appropriate law.[66]

(c) Courts were required to enforce arbitral awards, subject only to appeals; applications to set aside awards; time left to appeal; overturned awards;[67] as well as reasonable apprehension of bias on the part of the arbitrator.[68] However, as noted above if a party possessed prior knowledge of an arbitrator's bias and did not challenge the arbitrator on such ground, they

[63] See the Boyd Report, *supra* note 3 at 4.
[64] See the Boyd Report, *supra* note 3 at 117.
[65] *Arbitration Act*, *supra* note 1 at s 11(1).
[66] *Arbitration Act*, *supra* note 1 at s 32(1).
[67] *Arbitration Act*, *supra* note 1 at s 50.
[68] *Arbitration Act*, *supra* note 1 at s 46(1).

would then be considered to have acquiesced to the bias and no relief would be possible.[69]

Other shortcomings of the regime included the following:

(a) The *Arbitration Act* did not require that any independent legal advice be sought prior to the signing of an arbitration agreement. Many parties entered into arbitration being unaware and uninformed of their entitlements and rights under Canadian law.

(b) While awards had to be in writing and state the reasons for the award, there was no further record-keeping requirement on the part of the arbitrator.

(c) Arbitration agreements could be made well before the disputes ever arose. As such, many parties agreed to the process of arbitration, as well as onerous clauses within that process, without fully appreciating the potential impacts.

Since these deficiencies were not widely recognized at the time, faith-based arbitration was popular and commonly used in certain communities. For example, the use of faith-based arbitration was most familiar in Ontario in the context of the Jewish faith, where under the Beit Din tribunals binding arbitration had occurred for many years.[70] As well, the Ismailis had developed and used a model of conciliation and arbitration, the Ismaili Conciliation and Arbitration Boards, which were well-organized and well-received within their own communities.[71]

[69] *Arbitration Act*, supra note 1 at ss 46(4),(5).
[70] See the Boyd Report, *supra* note 3 at 41.
[71] For a fuller discussion of the successful arbitrations conducted under the Ismaili Conciliation and Arbitration Boards, see the Boyd Report, *supra* note 3 at 55-60.

2.2 The "sharia debate" of 2004

Despite its significant shortcomings, the *Arbitration Act* remained untouched for a number of years. In fact, no government had brought any changes to the *Arbitration Act* since its passing into law in 1992. In addition, there was little mainstream or academic interest in this act and its limitations.

These circumstances were all to change in late 2003, when a new organization, the Islamic Institute of Civil Justice [IICJ] proclaimed, noisily and boisterously, that it wanted to set up its own faith-based arbitration panels under the *Arbitration Act* based on Islamic law. Founded by Syed Mumtaz Ali, a retired Ontario lawyer, the IICJ was established to conduct arbitrations in the fields of family and inheritance law according to Islamic personal law.

In initial statements to the media, the IICJ itself proclaimed that it wanted to set up a "sharia court in Canada" authorized by the *Arbitration Act*, and that once such a court was available to Muslims, they would be required as part of their faith to settle disputes only in that forum.[72] The IICJ further noted that as "good Muslims", practicing Muslims would be bound to the rulings of the sharia court and agree to abandon any recourse to the Ontario courts. The statement also emphasized, however, that the "sharia court" would be bound by the laws of Canada and Ontario, as it is a requirement for Muslims living in non-Islamic countries to obey the laws of their country of residence.[73]

This proposal ignited a firestorm of attention in the mainstream Canadian and international press, and provoked a great deal of consternation and debate. A wide range of issues was raised, from civic secularism to women's rights to accommodation of religions in the public sphere. Opposition came from many corners, including, as mentioned above in Part 1.4, several women's groups

[72] Judy Van Rhijn, "First steps taken for Islamic arbitration board," *The Toronto Star* (25 November 2004), online: <www.thestar.com>.
[73] *Ibid*.

who questioned the suitability of arbitration for family law-related disputes. Even from within the Islamic community, the moderate MCC feared that "sharia" law as practiced does not view women as equal to men and feared that it could cause grave injustice to women.[74] For the purposes of this thesis, the public response to the IICJ proposal is termed the "sharia debate" of 2004.

To deal with the public outcry, Marion Boyd, former Attorney General, was given a mandate by the then-current Attorney General and the Minister Responsible for Women's Issues to explore the suitability of private arbitration to resolve family and inheritance disputes, and the impact that using arbitration may have on vulnerable parties. Boyd was asked to examine the prevalence of the use of arbitration in family and inheritance disputes, the extent to which parties resorted to the courts to enforce arbitral awards, as well as the differential impact arbitration had on women, elderly persons, persons with disabilities, and other vulnerable groups.[75]

After much research and wide-ranging consultations, the Boyd Report was issued in December 2004. It recommended the implementation of forty-six changes to the regime for arbitration of family law-related disputes.[76] Some of these recommendations called for changes to the governing legislation, some for new changes to regulation, some for general government oversight of the activities studied by the Boyd Report, and some for fostering public support for the interests of vulnerable people in society. Lastly and significantly, subject to the implementation of its recommendations, the Boyd Report concluded that the government of Ontario should continue to allow arbitration in general, as well as faith-based arbitration in particular, for family and inheritance law disputes.

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[74] "Sharia Law: FAQs", *CBC* (26 May 2005) online: Canadian Broadcasting Corporation <http://www.cbc.ca/news/background/islam/shariah-law.html>.
[75] See Boyd Report, *supra* note 3.
[76] *Ibid* at 133-142.

2.3 The government of Ontario's response to the "sharia debate"

The government of Ontario took about nine months to review the Boyd Report. In the days leading up to the public announcement of its decision on the continued use of arbitration in family law-related disputes, the then-current Attorney General Michael Bryant issued a public statement stressing the government's position on the importance of protecting gender equality and signaling which direction the government was likely to take. On September 8, 2005, Bryant stated that:

> We have heard loud and clear from those who are seeking greater protections for women. We must constantly move forward to eradicate discrimination, protect the vulnerable, and promote equality. As the Premier reiterated this week, we will ensure that women's rights are fully protected. We are guided by the values and the rights enshrined in our Charter of Rights and Freedoms. We will ensure that the law of the land in Ontario is not compromised, that there will be no binding family arbitration in Ontario that uses a set of rules or laws that discriminate against women.[77]

Premier Dalton McGunity then held a press conference on September 11, 2005, and eschewing the recommendation of the Boyd Report to permit faith-based arbitration in Ontario declared, "There will be no Shariah law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians."[78]

Even though the *Arbitration Act* was amended to include essentially all the proposed safeguards suggested in the Boyd Report, it excluded the possibility of legal enforceability for arbitral awards made using any principles or laws other than Canadian laws. Many people incorrectly concluded that faith-based

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[77] Ministry of the Attorney General of Ontario, Public Statement, "Statement by Attorney General on the Arbitration Act, 1991" (8 September 2005) online: <http://www.attorneygeneral.jus.gov.on.ca>.

[78] Colin Freeze and Karen Howlett, "McGuinty government rules out use of sharia law", *The Globe and Mail* (12 September 2005).

arbitration had been banned in Ontario, which was not the case. Rather, amendments were passed so that arbitrations that were conducted in conformity with faith-based laws were deemed as solely advisory. These changes were implemented through the *Family Statute Law Amendment Act*,[79] which was enacted in February 2006 and codified McGuinty's decision by mandating that only Canadian law could be applied to binding family law arbitrations in Ontario.[80]

These amendments addressed the concerns of feminist groups who had decried that the state was "washing its hands" of the abuses inflicted on the private lives of women through the privatizing of family law disputes. The government's solution was aptly put by a scholar as follows: "family law arbitration in Ontario privatizes the process of disputes resolution, but the substance of the law applied by the arbitrator remains public."[81]

Some of the other legislative changes made to the family law arbitration regime through amendments to the *Arbitration Act* and the *Family Law Act* included the following:

- the requirement that parties receive independent legal advice before entering into an arbitration agreement; [82]
- the requirement that arbitration agreements be in writing;[83]

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[79] *Family Statute Law Amendment Act*, 2006, SO 2006, c 1, amending the *Arbitration Act*, the *Child and Family Services Act*, the *Family Law Act* in connection with family arbitration and related matters, and amending the *Children's Law Reform Act* in connection with the matters to be considered by the court in dealing with applications for custody and access.

[80] *Arbitration Act, supra* note 1 at s 2.2. See also *Family Law Act*, *supra* note 19 at s 3(5): "in a family arbitration, the arbitral tribunal shall apply the substantive law of Ontario, unless the parties expressly designate the substantive law of another Canadian jurisdiction, in which case that substantive law shall be applied."

[81] Audrey Macklin, "Multiculturalism Meets Privatization: The Case of Faith-Based Arbitration" in Anna C. Korteweg & Jennifer A. Selby, eds, *Debating Sharia: Islam, Gender Politics, and Family Law Arbitration* (Toronto: University of Toronto Press, 2012) 91 at 99.

[82] *Family Law Act*, *supra* note 19 at s 59.6(1)(b).

- the prohibition of advance agreements, such that arbitration agreements entered into prior to a dispute are not legally enforceable;[84]
- the requirement that all family law arbitrators receive state-approved training, including training in screening parties for power imbalances and domestic violence;[85]
- the requirement that all family law arbitrators ensure that parties are separately screened for power imbalances and domestic violence by someone other than the arbitrator, and consider the results of such screening before and during the arbitration;[86]
- the granting of authority to the government to make further regulations under the *Arbitration Act* to govern the conduct, training, and record-keeping of arbitrators in greater detail;[87]
- the granting of priority to the provisions of the *Family Law Act* in case of conflict between the *Arbitration Act* and *Family Law Act*;[88]
- an amendment under the *Children's Law Reform Act* mandating that violence and abuse be taken into account in determining the best interests of a child with respect to custody and access;[89]
- the granting of authority to a court to disregard any provision of a domestic contract where the child support provision is unreasonable having regard to the Federal Child Support Guidelines.[90]

Despite the former Premier's dramatic sound bite that there would only be "one law for all Ontarians," in the end, the decision by the Ontario government to deny the legal enforceability of faith-based arbitration does not prevent parties from engaging mediators or negotiators to guide them towards an agreement using faith-based principles. Parties remain free to resolve their issues by

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[83] *Family Law Act*, *supra* note 19 at s 59.6(1)(a).
[84] *Family Law Act*, *supra* note 19 at s 59.4.
[85] *Arbitration Act*, *supra* note 1 at s 58(d).
[86] *Arbitration Act*, *supra* note 1 at s 58(e).
[87] *Arbitration Act, supra* note 1 at s 58.
[88] *Arbitration Act, supra* note 1 at s 2.1(2).
[89] *Children's Law Reform Act*, *supra* note 20 at s 24(4).
[90] *Family Law Act*, *supra* note 19 at s 56(1.1).

negotiating an agreement on their own (with or without the involvement of lawyers) or with the assistance of a neutral mediator, and the resultant agreements are labeled "domestic contracts" under the *Family Law Act*.[91] In Ontario, judges can intervene and vary domestic contracts only if the terms are "unconscionable", which as will be seen in Part 3.2.1 is a high threshold. What has changed is that arbitral processes using faith-based principles are no longer legally binding on the parties. As a corollary note, binding faith-based arbitration is permissible so long as the matters in question are not related to family law.

2.4 Remarks on Islamophobia

It would be amiss if some mention of Islam were not made in a discussion of the "sharia debate" of 2004. Certainly the timing and content of Premier McGuinty's announcement on the prohibition of enforcing faith-based arbitration was provocative to many members of the Muslim community who felt signaled out. The public announcement may well have played into and further stoked the public's fears and misconceptions of Islam.

While the term "Islamophobia" has been used since the late 1980s or early 1990s, the Runneymede Trust, an independent British social policy agency that tracks issues related to cultural diversity, offered the most clear and succinct definition for the term in 1997. In a study that was put together by a 20-person panel including academics and representatives of various British Muslim organizations, the Runneymede Trust defined Islamophobia as an "unfounded hostility towards Islam."[92]

The group further elaborated that there exist two general perspectives when relating to Islam, labelled as "open" or "closed". An "open" perspective holds

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[91] *Family Law Act*, supra note 19 at Part IV.
[92] Runnymede Trust, "Islamophobia: a Challenge for us All" (November 1997), online: Runnymede Trust <http://www.runnymedetrust.org>.

that Islam is diverse, open to change, interactive with other world traditions, and regarded as a genuine religion, "practiced sincerely by its adherents."[93] An Islamophobic or "closed" understanding, on the other hand, believes that Islam is monolithic, static, and impervious to change. This perspective also holds that the tradition is incapable of coping with modernity and regularly resorts to violence as a means of preventing change. According to the Runneymede Trust, Islamophobia produces a hostility that serves to exclude Muslims from the mainstream, creating an atmosphere where negative views towards Islam are regarded as acceptable and normal.[94]

Since the events of September 11, 2001, it cannot be denied that public perception of Islam has been coloured by news accounts of violent events undertaken by people in the name in Islam, whether genuinely believed or politically manipulated.

Practices such as suicide bombings, stoning, and honor killings, which have been long-standing problems in parts of the Muslim world, are now at the forefront of Western media interest and criticism. Horrific acts have been perpetuated by Muslims abroad, as well as by Canadian Muslims here at home. Such events have, to some extent understandably, clouded mainstream society's judgment and understanding of the religion of Islam and its adherents. As a result, public perception is now compromised and many fail to recognize that ordinary law-abiding Muslims choose to practice their religion along a very broad spectrum of beliefs and accompanying practices, exactly like other major religions. There exists a public misunderstanding and misapprehension of Islam that has birthed and promoted fears that Islamic law is especially unfair and discriminatory against women, more so than other religious laws.

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[93] *Ibid.*
[94] *Ibid.*

While it is a valid point that the authority of canonical works in Islam (the Quran and secondarily the *hadiths*[95]) has not been critically examined by feminist scholars to a sufficient extent, there has been some encouraging movement towards change since the eighteenth century.[96] Some believe that Islamic law is a form of law that is incapable of change owing to its divine origins. However, as mentioned above, this is a narrow and inaccurate understanding of Islam, and such ignorance ends up stalling attempts at reform within the religion.

Therefore, while this paper recognizes that Islam as a religion is not static and that it is in an evolving state of flux like other major religions, this paper also recognizes that one cannot turn a blind eye towards the manner in which the religion is currently and commonly practiced. The reality is that the elite who exercise leadership within Muslim communities today are overwhelmingly conservative males. There is considerable and worthy debate that such leadership is in direct conflict with the proper principles of the religion, and the very real negative repercussions and systemic disadvantages that women suffer because of such leadership has to be acknowledged and corrected.

The patriarchal orientation of how religion has come to be practiced in general, and in Islam in particular, is worrisome. At best, there is a failure to recognize the particular obstacles faced by women in attaining their rights and entitlements, and at worst, actively engages in erecting obstacles preventing women from gaining their independence and agency.

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[95] *Hadith* is a saying or an act ascribed either validly or invalidly to the Muslim prophet, Muhammed. Clerics and jurists of all denominations within Islam classify individual *hadith* as authentic, good or weak. However, different traditions within each denomination and different scholars within each tradition may differ as to which *hadith* should be included in which category. The overwhelming majority of Muslims consider *hadith* to be essential supplements to and clarifications of the Quran and to issues pertaining to Islamic jurisprudence.

[96] V A Behiery & A M Guenther, *Islam: Its Roots and Wings* (Mississauga: Canadian Council of Muslim Women, 2000) at 11-13.

This troubling reality is why the question of the inadequacy of women's consent in faith-based arbitration needs to be taken seriously. The government of Ontario's involvement in legally enforcing decisions produced through arbitral processes in which choice may have been compromised was problematic and needed to be corrected through legislative reform. In Part 3.2.3 of this paper, I advance the argument that the government of Ontario has a duty to provide women living in religious communities with the "option to exit" the communities and religions they or their parents were born into.

3 CONSENT, CHOICE, AND COMPULSION IN FAITH-BASED ARBITRATION

"There is no compulsion in religion." (Quran, 2:256)

Genuine consent lies at the cornerstone of all arbitration processes, and the sharpest criticism of using faith-based arbitration to resolve family law-related disputes has centred on the extent to which participating parties' consent is free and informed.

The state's primary concern against permitting binding faith-based arbitration in family law-related disputes is the argument that the consent given by female members of a religious community may not be freely given, nor occur with sufficient awareness of their rights and entitlements. The argument put forth is two-fold: consent may not be freely given as there may be no "practical" opportunity to say "no" because the financial and/or community censure may realistically preclude the opportunity to decline the use of faith-based arbitration. Furthermore, and as an addendum to the above argument, the consent given may not be "informed" or meaningful consent because it may be given without sufficient awareness or knowledge of one's rights and entitlements (i.e., the consenting party may not have adequate knowledge of the legal advantages of other mechanisms for resolving the dispute).

In order to address the inadequacy of consent, the government of Ontario's response has been to henceforth remove the legal enforceability of faith-based arbitration. This allows the state to distance its own involvement in the compulsion of women to enter faith-based arbitral processes.

Even though the Boyd Report recommended the adoption of several safeguards and advised the continued use of faith-based arbitration, the government of Ontario, while incorporating virtually all of the safeguards, listened to the

concerns of many women's groups and removed its own complicity in legally enforcing faith-based arbitration.

In dealing with the concerns regarding the inadequacies of consent by vulnerable women within religious communities, the Ontario government made critical changes:

(a) restricting the parties' choice of arbitrator;
(b) restricting the parties' choice of the applicable governing law to only permit Canadian law;
(c) requiring that parties receive independent legal advice before entering into an arbitration agreement; and
(d) prohibiting arbitration agreements in advance of the dispute.

These restrictions have achieved the intended effect of prohibiting legally enforceable faith-based arbitration in Ontario. While such measures do not completely curtail the use of faith-based arbitration, nor would it be feasible or desirable to do so, the government has taken a strong stand on protecting against gender imbalance.

However, the government's approach has effectively set up a theoretical paradox for many scholars: should the possibility that consent *may* not be freely given be "corrected" by a regime that assumes consent *cannot* be freely given? If so, why is this necessary and desirable?

At the heart of the debate regarding the adequacy and actuality of consent by vulnerable members of a faith is an unresolved theoretical conundrum: do we empower the vulnerable classes by providing them with the freedom of choice and the resultant accountability for such choice, or do we protect the vulnerable classes by taking away the harmful consequences of such choice. We must also question whether empowerment and protection are mutually exclusive.

In my analysis of why the consent to being legally bound in faith-based arbitration dealing with family law-related disputes has to be deemed inadequate, I focus on two areas: (i) a party's choice regarding the governing law; and (ii) a party's choice regarding the level of judicial review (i.e., the decision to be bound by the outcome of the arbitration).

Before analyzing the adequacies (or lack thereof) of consent in faith-based family law-related arbitration, I will begin by examining the general state of consent and the restrictions imposed upon it under the *Arbitration Act* for non-family law-related arbitration.

3.1 Consent in commercial arbitration

Modern-day arbitration under legislative authority is used to resolve a wide range of disputes that may be partially or wholly non-commercial in nature. At its conception, however, Ontario's *Arbitration Act* was designed for the swift and cost-effective adjudication of commercial disputes between private parties. And in commercial arbitration, genuine consent is determined exclusively on a contractual basis. As such, contracts may be vitiated for the standard contractual exceptions, such as legal capacity, duress, undue influence, coercion, unconscionability, and fraud. The threshold for proving these exceptions is generally high in the commercial law realm (the same holds true in the family law realm as will be demonstrated in Part 3.2.1).

For commercial disputes under the *Arbitration Act*, the curtailments on the exercise of choice and consent are few in number and are intended to provide for a basic minimum standard of legality and fairness. Parties cannot contract out of, nor deviate from, certain basic obligations. These basic obligations are listed under section 3 of the *Arbitration Act* and are primarily procedural in nature:

> The parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except the following:
>
> 1. In the case of an arbitration agreement other than a family arbitration agreement,
>
> i) subsection 5(4) ("Scott v. Avery" clauses),
> ii) section 19 (equality and fairness),
> iii) section 39 (extension of time limits),
> iv) section 46 (setting aside award),
> v) section 48 (declaration of invalidity of arbitration),
> vi) section 50 (enforcement of award).

A "Scott v. Avery" clause in a contract provides that any differences or disputes have to be referred to arbitration. Parties agree to the term that no right of action shall accrue in the courts regarding their disputes until such disputes have been adjudicated by an arbitrator.[97] As such, a "Scott v. Avery" clause makes arbitration a condition precedent to court action. Under the *Arbitration Act*, such a clause cannot be varied or excluded.

The "equality and fairness" provision is mainly understood as a procedural provision relating to the giving of proper notice and appropriate time for response.

The "extension of time limits" authorizes a court to extend the time within which the arbitral tribunal is required to make an award, even if the time has expired.

Under "declaration of invalidity of arbitration," the court may, at any time during or after an arbitration, declare the arbitration invalid under an application by a third party for the following reasons: i) the legal incapacity of one of the parties; ii) an invalid or expired arbitration agreement; iii) the subject-matter is not arbitrable under Ontario law; or iv) the dispute was outside the scope of the arbitration agreement.

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[97] David St John Sutton & Judith Gill, eds, *Russell on Arbitration*, 23rd ed (London, UK: Sweet & Maxwell, 2007).

"Setting aside an award" may occur on application by a party even where both parties agreed to waive the right to an appeal from an arbitral award. The parties are still able to apply for an order to set aside an award for certain enumerated grounds which include: i) legal incapacity; ii) an invalid or expired arbitration agreement; iii) a dispute falling outside the scope of the arbitration agreement; iv) irregular composition of the arbitral tribunal; v) inarbitrable subject-matter under Ontario law; vi) unequal or unfair treatment of one of the parties; or vii) corruption, fraudulent act or reasonable apprehension of bias. Again this section deals with fatal flaws of form or procedure and merely codifies that a bare minimum level of conduct and procedure must be adhered to in order to enforce an award.

Finally the "enforcement of an award" essentially mandates a court to enforce an arbitral award barring any fatal flaws of form or procedure in the award. This section contains two exceptions:

i. where the award grants a remedy that the court would not have the jurisdiction to grant or would not grant under similar circumstances, the court may either grant a different remedy requested by the applicant or remit the award to the tribunal with the court's opinion on the appropriate remedy;[98] and
ii. that family arbitration awards are only enforceable under the *Family Law Act*.[99]

One can safely conclude then that *Arbitration Act* curtails the ability of parties to design the process of their arbitration to a very minor degree. For the most part, the curtailment is to a level recognized as a basic standard minimum in administrative law.

[98] *Arbitration Act, supra* note 1 at s 50(7).
[99] *Family Law Act, supra* note 19 at s 1(10).

In summary, the *Arbitration Act* accords the parties a great deal of freedom and flexibility in the procedural shaping of their commercial dispute resolution processes. The minimal curtailment of the parties' choices with respect to commercial arbitration solely requires parties to engage in a basic minimum standard of "good faith" conduct and bars parties from agreeing to engage in choices that would result in manifest unfairness.

When it comes to substantive matters in commercial arbitration, the freedom of choice is similarly extensive. Unlike the situation in family law arbitration, Ontario's *Arbitration Act* permits parties to commercial disputes to enter the proceedings with a broad choice as to their preferred governing law, with no bar to choosing religious law.[100] Furthermore, if the agreement is silent on the governing law, then the arbitral tribunal makes the decision as to the rules of law to govern the dispute.[101]

The legislation is similarly enabling and permissive when it comes to the parties' decision to choose whether they want the right to appeal their arbitral award.[102] Different from the setting aside procedure which cannot be waived, parties have the freedom to waive appeals.[103]

In commercial arbitration, the broad deference given to the parties' exercise of choice regarding the governing law and the level of judicial review is rooted in the principle of party autonomy, which is paramount in commercial law. Party autonomy is described in *Redfern and Hunter* in the following terms:

> Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and

[100] *Arbitration Act*, *supra* note 1 at ss 31, 32.
[101] *Arbitration Act*, *supra* note 1 at s 32(1).
[102] *Arbitration Act*, *supra* note 1 at s 45.
[103] *Ibid.*

> organizations. The legislative history of the Model Law shows that the principle was adopted without opposition.[104]

Redfern and Hunter further cite article 19(1) of the UNCITRAL Model Law (Model Law), which provides that:

> Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

Party autonomy is a guiding principle in the realm of commercial arbitration, and provides the *raison d'être* for the broad deference accorded to parties to structure the process of their dispute resolution as they find most suitable and agreeable as between themselves.

In summary, it can be concluded that the legislation in Ontario regarding the use of arbitration to resolve a commercial dispute presents the parties with very broad flexibility and choice. Parties are free to use the law of their choice, including religiously-based laws and principles to shape and guide their arbitration process. Furthermore, and notwithstanding certain basic exceptions that cannot be deviated from (for which the courts can set aside awards or declare the process invalid), participating parties are free to restrict the appeals of arbitral awards to a level that they find suitable and agreeable.

The broad flexibility permitted under the *Arbitration Act* is intended to encourage the exercise of personal autonomy and allow parties the opportunity to realize economic gains through choice and risk.

The principle of party autonomy is justified in situations where the parties have equal bargaining power, but where this is not the case, such unfettered freedoms can disadvantage the weaker party to a significant degree. The arbitration of national and international commercial disputes rests on the principle of party

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[104] Alan Redfern et al, *Law and Practice of International Commercial Arbitration*, 4th ed (London, UK: Sweet & Maxwell, 2004) at 315.

autonomy, and a presumption of equal bargaining power. However, there are two areas in arbitration where apparent party inequality and financial domination by one party is accepted and practiced. In both consumer arbitration and sports arbitration, there has been a *laissez-faire* acknowledgement and acceptance of unequal bargaining power.

3.1.1 Illusory consent in sports and consumer arbitration

Both sports and consumer arbitration agreements are rife with instances of illusory consent. For all intents and purposes, the social and economic disadvantages suffered by one party realistically negate genuine consent. Standard-form contracts common in both the sports and consumer spheres regularly require athletes and consumers to consent to onerous clauses, such as submitting their claims to arbitration while leaving the other party free to institute litigation, forbidding class actions, requiring expensive three-person arbitral panels, shortening limitation periods, and banning the use of certain defences.[105] Yet, despite such manifestly favourable terms to the financially stronger position of one party, such dominance and the consequent illusory consent have long been simply accepted as an immutable facet of business reality.

The deference given to arbitration in the commercial context is largely based on the freedom of contract and the value of personal autonomy in the business world. The question is how can such principles still be upheld in cases where autonomy is only effectively exercised by one of the parties? Why is it acceptable that the status quo of unequal bargaining power remains unchallenged in these spheres?

[105] Jonnette Watson Hamilton, "Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?" (2006) 51 McGill LJ 693 at 733.

In recent years, however, there has been movement towards reform of onerous clauses that disadvantage vulnerable parties. For example, Ontario's *Consumer Protection Act*[106] provides consumers with a number of protections. As one example, the Act prevents a consumer from agreeing to arbitrate certain kinds of disputes until the dispute has arisen.[107] The consumer, like anyone else, may waive or compromise his or her rights, but the Act requires that he or she be aware of the dispute before any such waiver so as to be in a better position to evaluate how his or her rights might be affected before making such a decision.

The prohibition of pre-dispute waivers is now recognized as an important feature in ensuring an adequate level of consent. This change is a big step forward in shifting the power imbalance in consumer arbitration, and it has occurred through public awareness and mobilization against the oppressiveness of big corporations. Therefore, even in the professedly conservative regime of commercial arbitration, the status quo is being challenged. As will be discussed below, it appears that calls for reform are becoming louder and clearer, and steps to level the playing field are being taken.

Many of the changes and much of the reform that integrates concerns regarding fairness and equality into arbitration legislation came about in the early 1980s following the recommendations in the British Columbia's Report on Arbitration produced in 1982.[108]

Thus, some of the very flexibilities that commercial arbitration is known and used for, and provide arbitration with its defining characteristics, are being modified and tweaked in the interests of public policy and fairness.

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[106] *Consumer Protection Act*, SO 2002 c 30, s 7.
[107] *Ibid*, s 7(2).
[108] British Columbia, Law Reform Commission, *Report No. 55 on Arbitration* (May 1982), online: British Columbia Law Institute < http://www.bcli.org>.

As another example, in the area of sports arbitration, which is tightly regulated by sports governing bodies, there has also been impressive critical movement towards reform to account for the particular vulnerability of individual athletes. While there may be little to no choice for the athlete to do anything other than submit his or her dispute to mandatory arbitration, there are strong procedural safeguards in place to ensure that the process itself is at least fair.

Consider the example of the Court of Arbitration for Sport ("CAS"), which was formed in 1984 to provide a forum for the world's athletes and sports federations to resolve legal disputes quickly and inexpensively through arbitration or mediation "by means of procedural rules adapted to the specific needs of the sports world."[109] Most but not all of the legal disputes CAS manages centre on doping regulations and allegations. Though CAS is a relatively recent body, it has put considerable effort into carefully balancing the promotion of the integrity of athletics as a whole with protecting the individual rights of the accused athlete through a fair legal process. For example, in 1994, CAS revised its Statute and Regulations to make them more efficient, and modified the structure of its institution to respond to perceptions that it was not independent enough from the International Olympic Committee.[110]

The evolving interaction between CAS and the World Anti-Doping Agency ("WADA") also reflects increased protection for vulnerable parties. The World Anti-Doping Code (the "Code") and International Standards were officially implemented on January 1, 2004, and in the adjudication of doping cases, the Code implements WADA's right to appeal to the CAS.[111] Several revisions

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[109] CAS, *20 Questions About the CAS: What is the Court of Arbitration for Sport?* online: Court of Arbitration for Sport <http://www.tas-cas.org/20question>.
[110] See Meredith Lambert, "The Competing Justices of Clean Sport: Strengthening the Integrity of International Athletics While Affording a Fair Process for the Individual Athlete Under the World Anti-Doping Program" (2009) 23 Temp Int'l & Comp LJ 409.
[111] WADA, *The Code*, online: World Anti-Doping Agency <http://www.wada-ama.org>.

were made to the Code in January 2009.[112] These ongoing revisions to the governing body as well as the Code manifest WADA's commitment and intention to have the Code to operate as a living document, evolving to meet new demands for enhanced fairness for all the parties involved.[113]

Meredith Lambert has documented the positive effect of WADA's efforts. While Lambert lists some of the procedural inefficiencies under the Code, she concludes with recent developments in anti-doping jurisprudence brought about by the revised Code that have produced procedural efficiency and uniformity of rules:

> By enumerating with increased precision the mechanisms for a reduction or elimination of sanctions based on exceptional circumstances, the revised Code aims to minimize undue hardship on the individual athlete to the fullest extent possible without sacrificing the vigilance and efficacy of its anti-doping regime.
>
> […]
>
> WADA has sought to alleviate some of the burden on athletes through its revisions to the Code, providing greater clarity of the rules, consistency of enforcement, and predictability of adjudication.[114]

In summary, even in the allegedly conservative environment of sports and consumer arbitration, which have long been governed by the financial domination of the stronger party, changes have been, and continue to be, implemented in order to address the concerns of according adequate fairness and equality to individual athletes and consumers.

In the following section of this thesis, I turn my attention to the use of arbitration in family law, where concerns about equality between both parties are intensified by the very personal nature of what is at stake. The protection of

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[112] WADA, *Q&A: Code Revisions* 1 (Feb. 20, 2008), online: <http://www.wada-ama.org/>.
[113] *Ibid*.
[114] *Supra* note 109 at 441.

children is of paramount concern where the breakdown and re-organization of the family unit is concerned; as well, accounting for gender imbalance in the redistribution of family wealth has serious consequences for all parties, including the state, because of the greater risk of impoverishment for women. With these concerns in mind, illusory consent is impossible to accept, tolerate, or justify in family law-related disputes.

3.2 Consent in Family Law Arbitration

The importance that today's society accords to achieving gender equality means that the state has a duty to curtail the flexibility and freedom historically accorded to faith-based arbitration. Therefore, quite different from the broader freedom accorded to parties in commercial arbitral proceedings, Ontario's *Arbitration Act* has implemented a number of unique procedural safeguards for parties participating in family law-related arbitral proceedings. As mentioned above in Part 1.3.2, family arbitrations are governed by both the *Arbitration Act* and the *Family Law Act*, with the latter to prevail in cases of conflict between the two acts.[115]

The term "family arbitration" is defined identically in both acts. For citation purposes, I reproduce the definition provided in the *Arbitration Act* which states unequivocally that "family arbitration" is limited to that arbitration which is governed exclusively by the law of a Canadian jurisdiction:

> In this Act,
> "family arbitration" means an arbitration that,
> (a) deals with matters that could be dealt with in a marriage contract, separation agreement, cohabitation agreement or paternity agreement under Part IV of the Family Law Act, and
> (b) is conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction; ("arbitrage familial")

[115] *Supra* note 19.

For further clarification and direction, section 32(4) of the *Arbitration Act* expressly mandates that in a family arbitration, the tribunal *must* apply the substantive law of Ontario or another Canadian jurisdiction. Section 32(4) reads:

> In a family arbitration, the arbitral tribunal shall apply the substantive law of Ontario, unless the parties expressly designate the substantive law of another Canadian jurisdiction, in which case that substantive law shall be applied.

Furthermore, both Acts make it clear that Canadian law needs to be applied *exclusively*. Section 59.2(1) of the *Family Law Act* and section 2.2(1) of the *Arbitration Act* state that any process whereby parties agree to have a third party make a family law-related decision which is not conducted exclusively using the law of Ontario or another Canadian jurisdiction will not be considered a family arbitration and the decision will have no legal effect.

Some have erroneously understood these amendments to mean that the parties are prohibited from consenting to the use of religious laws or principles in relation to family disputes. The *Arbitration Act* itself makes clear that a person's right to obtain religious advice is certainly not restricted; rather, it is the state's ability to legally enforce the decisions rendered by arbitrators using religious principles that has been discontinued.[116] As such, the state has now merely returned the practice of religious arbitration to its former freedom: parties are only compelled to enter into and follow a religious arbitral decision if they choose to do so, and they may decide to exit the system at any time without any legal ramifications. This point will be further explored in Section 3.2.2 of the thesis.

While it may be possible to ascertain consent for legally-binding religious arbitration through a comprehensive case-by-case analysis, or implement a

[116] See *Arbitration Act, supra* note 1 at s 2.2(2) which reads "Nothing in this section restricts a person's right to obtain advice from another person."

presumption of lack of consent as suggested by another author,[117] this paper argues that it is not ideal nor desirable to mandate that parties remain bound to faith-based arbitral decisions through state enforcement.

The sometimes coercive and confining nature of religion and community necessitates precluding the state from judicially enforcing family law arbitral decisions reached through the use of religious principles. However, before considering this argument in detail, I consider why the state nevertheless holds parties to the other choices they make in family law-related disputes and renders them otherwise accountable for those choices.

3.2.1 Choice and accountability in family law

This section considers what it is about faith-based arbitration that sets it apart from other arbitration so as to require scrutiny and curtailment of a party's choice to consent to the process with judicially enforceable finality. Why are choice and consent to adhere to faith-based resolution of family law-related disputes accounted for in a substantially different manner?

To begin with, family law-related disputes are themselves dealt with in a substantially different manner than other disputes. This difference exists because of the importance of the role of family in the individual's sense of identity and purpose. In the Canadian legal system, the family is recognized as the fundamental unit of society, which warrants specific legislative protections. At the same time, however, this centrality of the family unit has also traditionally prompted the state to maintain a certain respectful distance from the

[117] See Jehan Aslam, "Judicial oversight of Islamic family law arbitration in Ontario: ensuring meaningful consent and promoting multicultural citizenship" (2006) 38 NYUJ Int'l L & Pol 841. Aslam sought in her article to develop a theory of judicial review that the Canadian courts could have applied to appeals arising out of Islamic family law tribunals and argued that the courts should have peremptorily employed a rebuttable presumption that the party challenging the results of the arbitration did not consent to the process.

familial realm and the private ordering of people's lives. As such, the family unit has traditionally been regarded as a private sphere where the state should not interfere.

This seemingly neutral attitude of non-interference has had a significant adverse impact on the advancement of gender relations and equality. For many years, the traditional justice system played a significant role in the impoverishment and marginalization of women. In her book, *Multicultural Jurisdictions,* Ayelet Shachar points out that the courtroom has had a negative impact on women:

> The family law realm … vividly illustrates the troubling paradox of multicultural vulnerability, by demonstrating how well-meaning attempts to respect differences often translate into a license for subordination of a particular category of group members – in this instance, primarily women.[118]

It is only recently, in the last thirty years or so, that Canadian society has witnessed some gains in family law jurisprudence with respect to equality and fairness for both sexes. Recent Canadian law decisions such as *Moge* and *Chartier* showcase that there is a legal affirmation and recognition of the distinctive roles and needs of each member of a family unit. These Canadian judgments manifest that the best interests of the child are of paramount concern in the legal regime, and that family and spousal obligations are not just contractual obligations, nor "compensatory" in an individualistic sense.

For example, in the case of *Moge*, the Canadian legal landscape saw a turning point in conservative attitudes. In *Moge* the Canadian Supreme Court heavily restricted a court's ability to terminate alimony payments where a wife's domestic role during the marriage resulted in her having difficulty finding work after the separation. Justice L'Heureux-Dubé, speaking for the Court recognized that:

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[118] Ayelet Shachar, *Multicultural Jurisdictions* (Cambridge: Cambridge University Press, 2001) at 62.

> women have tended to suffer economic disadvantages and hardships from marriage or its breakdown because of the traditional division of labour within that institution. Historically, or at least in recent history, the contributions made by women to the marital partnership were non-monetary and came in the form of work at home, such as taking care of the household, raising children, and so on. Today, though more and more women are working outside the home, such employment continues to play a secondary role and sacrifices continue to be made for the sake of domestic considerations. These sacrifices often impair the ability of the partner who makes them (usually the wife) to maximize her earning potential because she may tend to forego educational and career advancement opportunities. These same sacrifices may also enhance the earning potential of the other spouse (usually the husband) who, because his wife is tending to such matters, is free to pursue economic goals. This eventually may result in inequities.[119]

This traditional division of labour and the sacrifices made by wives and mothers within the institution of marriage has been more or less a universal phenomenon, regardless of whether the woman belonged to a religious community or which particular religious community she belonged to.

Moge was ground-breaking in that it manifested the Supreme Court's recognition of the multiplicity of economic barriers that women have faced and continue to face in society (due to their traditional position as the stay-at-home caregiver for both husband and children). Moreover, the case highlighted women's consequent social dislocation and loss of networks and social services for emotional support, and also indicated an appreciation for and desire to correct the pre-existing disadvantage, vulnerability, stereotyping, and prejudice experienced by women.

In *Chartier* the Supreme Court unanimously held that a person cannot "unilaterally withdraw" from a relationship with a child where that person has a parental relationship with that child (i.e., a step-parent who is found to be in *loco*

[119] *Moge, supra* note 60 at 861.

parentis), thus enforcing the notion that the best interests of a child are paramount in the Canadian legal landscape.[120]

The direction taken in the cases of *Moge* and *Chartier*, where the protection of children is paramount and the reality of societal gender imbalance is understood, needs to be continued, not just in judgments but also in the legislative landscape.

As will be shown in the following section, in the high-stakes sphere of family law where choices are not made in the abstract but in lived conditions of gender inequality, including relationships of power and powerlessness, courtrooms may well produce unfair results if parties are held to their "choices" too strictly. Such decisions pay respect to an illusory exercise of choice and may make parties accountable at times to their own detriment.

The Boyd Report mentioned three cases to highlight the justice system's recognition of individual accountability, which I examine in this thesis.[121] Additionally, I also examine the recent Supreme Court decision in the case of *Quebec (Attorney General) v A* [*Quebec v A*].[122] These four decisions are rooted in the Court's recognition and promotion of individual accountability, yet potentially ignore the reality of gendered relationships that can at times seriously limit or constrain women's choices with respect to the structure of their relationships.

To begin with, the cases of *Miglin v Miglin* [*Miglin*][123] and *Hartshorne v Hartshorne* [*Hartshorne*],[124] decided in 2003 and 2004 respectively, can be seen as showcasing the Supreme Court's commitment to relying on contractual notions of autonomy and choice in the enforcement of family contracts.

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120 *Chartier*, *supra* 33 at para 32.
121 See Boyd Report, *supra* note 3 at 23.
122 *Quebec (Attorney General) v A*, 2013 SCC 5 [*Quebec v A*].
123 *Miglin v Miglin* (2003) 1 SCR 303 [*Miglin*].
124 *Hartshorne v Hartshorne* (2004) 1 SCR 550 [*Hartshorne*].

In the case of *Miglin*, a woman who signed a waiver of spousal support in exchange for a time-limited position as a consultant in the family business was held to her agreement. Speaking for the majority, the Honorable Justices Bastarche and Arbour held that "parties must take responsibility for the contract they execute as well as for their own lives."[125] In its analysis, the Court first considered the circumstances under which the agreement was made: whether the agreement was negotiated fairly was critical, as well as whether the agreement conformed with the objectives of the *Divorce Act*.[126] Second, the court considered the current circumstances: whether there had been any significant change in circumstances that were reasonably unforeseeable at the time of formation.[127] With these precautions in place, it is easy to understand that where the negotiation process itself has been fair and no significant detriment has been caused (through an unforeseeable future circumstance), a party is held accountable to its agreement.

In *Hartshorne* a woman who signed a pre-nuptial agreement on the day of her wedding, after being advised by a legal colleague that the agreement would not be upheld because it was "grossly unfair", was in fact held to that agreement by the Court. Though she argued that the pre-nuptial agreement was unfair, the Court echoed the emphasis on personal choice from its decision in *Miglin* and held that "in 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 their initiative and arrangement."[128]

Though the female claimant in *Miglin* was a lawyer with a presumed deeper understanding of the law and its consequences, here Mrs. Hartshorne left the

[125] *Miglin, supra* note 123 at para 91.
[126] *Miglin, supra* note 123 at para 83.
[127] *Miglin, supra* note 123 at para 88.
[128] *Hartshorne, supra* note 124 at para 67.

practice of law to look after her two children, one of whom was born a few months after her wedding. The couple had been married for nine years and lived together for twelve years. The Court reasoned that the pre-nuptial agreement reflected the intent of both parties, and unfairness could not be presumed just because the property division reflected a different arrangement than that set out in the family legislation. The Court also held that any economic disadvantage could be compensated for through spousal support. The Court found it significant that both parties had sought legal advice, and Mrs. Hartshorne's background as a lawyer appears to have influenced the Court in reasoning that she understood and accepted the legal risks.

In the 2002 case of *NS (AG) v Walsh* [*Walsh*],[129] a case that arrived at the Supreme Court of Canada from Nova Scotia, a woman who "chose" not to marry was not allowed to make a claim for property division. The parties had been cohabitating together for over ten years. The claimant attempted to get spousal and child support under the *Matrimonial Property Act*[130] [*MPA*] by applying to have her and her partner's cohabitation recognized as a "spousal" relationship.

The claimant argued that the choice to marry (or enter into a domestic contract to register her partnership under the *Law Reform (2002) Act*[131]) was not applicable to her, as it did not account for her particular situation since her unmarried partner had refused to marry her or register their domestic partnership. She argued that the decision to marry was not entirely in her control and claimed that the legislative discrimination unduly disadvantaged her and her two children, as well as all other non title-holding partners who have historically been women.[132]

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[129] *NS (AG) v Walsh* (2002) 4 SCR 325.
[130] *Matrimonial Property Act*, RSNS 1989, c 275 [*MPA*].
[131] *Law Reform (2000) Act*, SNS 2000, c 29.
[132] *Walsh*, *supra* note 129 at para 56.

The Court rejected the claimant's arguments and held that the discrimination of cohabitants under the *MPA* needed to be viewed in light of the values of the *Charter:*

> One of [the Charter's] essential values is liberty, basically defined as the absence of coercion and the ability to make fundamental choices with regard to one's life. … Limitations imposed by this Court that serve to restrict this freedom of choice among persons in conjugal relationships would be contrary to our notions of liberty.[133]

The *Walsh* decision was predicated on the assumption that common-law couples together make a conscious choice to avoid the trappings and obligations of marriage. The Court stated:

> [C]hoice must be paramount. The decision to marry or not is intensely personal and engages a complex interplay of social, political, religious, and financial considerations by the individual. While it remains true that unmarried spouses have suffered from historical disadvantage and stereotyping, it simultaneously cannot be ignored that many persons in circumstances similar to those of the parties … have chosen to avoid the institution of marriage and the legal consequences that flow from it.[134]

In the 2013 case of *Quebec v A*, the Supreme Court had an opportunity to reflect upon the reasoning in the *Walsh* decision. In this case, the parties were "common law" living in Quebec who had been together for seven years and had three children together (for ease of reference, I have labeled the parties, A and B). They met when A was seventeen years old, and B was already a wealthy businessman of thirty-two. Though she had wanted to marry, he had refused, stating that he did not believe in the institution of marriage. She did not work outside of the home and accompanied him on his social engagements and travels. Upon the breakdown of their relationship, she wanted to claim the same protections afforded to couples in a civil union.

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[133] *Supra* note 129 at para 63.
[134] *Walsh*, supra note 129 at para 43.

Under the *Civil Code of Quebec*'s (CCQ) Book on the Family, however, women in common law relationships are not entitled to family law protections provided for married spouses (specifically spousal support and property division). Hence A argued that the exclusion of common law spouses from the articles of the CCQ violated section 15 equality rights under the *Charter.*[135] She argued that her exclusion from the CCQ provisions discriminated against her on the basis of marital status, about which she did not have a choice.

In a very close (and complicated) decision, the Supreme Court ruled that the lack of recognition of common law unions under Quebec's provincial law does not violate the *Charter* and is therefore constitutional.

A majority of the justices found a breach of section 15. Under section 1 of the *Charter*, however, laws are permitted to be upheld even if they breach guaranteed equality rights because of "reasonable limits" to those guarantees within a free and democratic society. Of the justices who considered section 1, only one found that it "saved" the laws she found to be discriminatory. However, since a minority of the court had not found that section 15 was breached, they did not consider section 1. Thus as a result, (through a narrow majority of the Court: five out of four justices) the challenged provisions were upheld as constitutional.

While the decision was disappointing for women's rights groups in that it failed to account for the reality of power imbalances in heterosexual relationships, there were some promising comments made by Justice Abella, who wrote for the majority that found a breach of section 15. She stated, "fairness requires that we look at the content of the relationship's social package, not at how it is wrapped."[136] She noted that "the right to support – and the obligation to pay it –

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[135] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[136] *Quebec v A*, *supra* note 122 at para 285.

did not rest on the legal status of either husband or wife, but on the reality of the dependence or vulnerability that the spousal relationship had created."[137]

One cannot deny that the highly unusual facts of this case played a significant part in the Court's decision: B had a vast fortune and A sought a monthly payment of $56,000 for herself, a share of the family estate and a lump-sum payment of $50 million. B had provided A the $2.5 million family home and provided child support of $460,000 a year. While A was deprived from the largesse of B's fortune, she was left in relatively comfortable finances. It is likely that had the claimant been in vulnerable socio-economic circumstances, the Court's judgment would have gone in the other direction.

Justice Abella's dissent points to a direction that the Court may take in future cases whereby spousal obligations are be considered in the particular circumstances of each case regardless of the official status of the union, rather than based solely on the formal classification of the relationship. The comments by Justice Abella highlight that while the Court remains committed to respecting personal choice and autonomy in the resolution of family law-related disputes, there is growing awareness that many of the "choices" women make are under conditions of inequality, and blindly bolstering the concept of personal autonomy should not justify creating, perpetuating, or reinforcing systemic inequalities.

In summary, all four of these cases manifest a type of reasoning that regresses from the reasoning employed in *Moge*. More importantly, it is not easy to reconcile these cases that showcase the Supreme Court's commitment to respecting personal choice and autonomy in the resolution of family law-related disputes, even at the financial detriment of the weaker party, when there is intensified surveillance of faith-based arbitration for resolution of the same subject matters.

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[137] *Quebec v A, supra* note 122 at para 296.

3.2.2 Option to Exit in Faith-Based Arbitration

Jean-Francois Gaudreault-DesBiens' article, "The Limits of Private Justice? The Problems of the State Recognition of Arbitral Awards in Family and Personal Status Disputes in Ontario," posits two main reasons for analyzing consent more deeply and in a qualitatively different manner in faith-based arbitration for family law-related disputes.[138] Firstly, he states that constitutional values, such as, dignity and equality, are more likely to be offended. Secondly, the risk of significant derogations to the state's basic norms and values by unrestrained arbitration is much greater.

Furthermore, Gaudreault-DesBiens argues that the state has a duty not to erect obstacles in the path of an individual who may wish to exercise the right to exit. He observes that two core values of democracy are at play in faith-based arbitration: liberty and equality. He then proposes another overarching principle, "freedom of identity," which arises from the interplay of liberty and equality. He argues that "freedom of identity" needs protection from state intervention:

> [a]ny person should, to the extent possible, always be able to choose willfully and freely his or her own destiny, including the freedom to associate or not with a group. … This view echoes Sartre's definition of liberty as the capacity to tear oneself away from "givens." The State has a duty in a democratic society not to erect obstacles in the path of an individual who may exercise the right to exit.[139]

In this regard, we can define the right to exit as an ability to remove oneself from the rights and obligations of membership or identification with a group.[140] Of

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[138] Jean-François Gaudreault-DesBiens, "The Limits of Private Justice? The Problems of the State Recognition of Arbitral Awards in Family and Personal Status Disputes in Ontario" (2005) 16 Perspectives 18.
[139] *Ibid* at 21.
[140] See Dwight G. Newman, "Exit, Voice and 'Exile': Rights to Exit and Rights to Eject" (2007) 57:1 UTLJ 43 at 48. In this article, Newman critiques whether exit

distinguishable concern in faith-based arbitration for family law-related disputes are the issues of community censure and coercion, which do not generally exist to the same degree in other settings. It is easy to see that where arbitration proceedings are to be presided over by a religious figure and with the use of religious principles, the possibility and probability for coercion is intensified, and the determination of what might constitute meaningful consent becomes very problematic and difficult. The option to "exit" is effectively denied in certain cases. Were the state to continue to permit binding faith-based arbitration, parties would become effectively trapped within their religious identities.

These sentiments were echoed in the various submissions made in the process that led to the Boyd Report, which shared a similar concern about the ability of women to reject faith-based arbitration:

> the concept of women "voluntarily" agreeing to faith-based arbitration will never be an option for many women, especially immigrants and First Nation women with lower levels of literacy and education and reduced self esteem and control over their own lives.[141]

The conundrum we must deal with here is whether recognizing the particular vulnerability of women in religious communities casts a critical and patriarchal eye upon the situation, which is ultimately unhelpful. In her report, Marion Boyd succinctly explains this dilemma:

> A number of assumptions underlie this [dilemma]: first is the idea that there are some categories of people who, while being legally capable, are nevertheless automatically vulnerable and therefore unable to understand how to make choices for themselves, and,

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rights are always necessary and/or sufficient, and advocates that in some circumstances the development of effective 'voice' (defined as the ability to influence those determining the group's course of action by expressing one's preferences) may be more productive. While Newman's article provides a succinct definition of exit that I use for my paper, Newman's analysis on the necessity and sufficiency of exit and voice are not explored further in this paper.

[141] Letter from Karen Graham to Marion Boyd (September 22, 2004) in the Boyd Report, *supra* note 3 at 51.

> especially, how to make the right choices for themselves. In this view, there is a defined correct choice. Second is the notion that there is no way someone who is fully informed of her rights and obligations would make certain choices, such as arbitration according to religious principles.[142]

Those arguing in favor of disallowing binding faith-based arbitration must reflect whether the concern for the welfare of Muslim women edges towards a condescending frame of mind that presumes that "we" know best for "them". How and where do we draw the line between paternalism and empowerment?

Gila Stopler's article, "Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate against Women," cuts to the heart of the matter and questions the role that the "rhetoric of choice" has played in the discrimination and subjugation of women.[143] Stopler uses the phrase, "rhetoric of choice" in relation to the exploitation of liberal ideas by religious groups:

> One of the strongest myths [obstructing] feminist struggles is the myth that many of the infringements of rights women suffer are the result of their own choices. Respecting choices made by free autonomous individuals is a fundamental tenet of liberal theory, which is based on individual autonomy. Cultural and religious groups that do not place any value on the free choices of their members have exploited this aspect of liberalism to counter feminist attacks on violations of women's rights that are committed by the group.[144]

She then posits that the real issue is not whether women should be empowered with the choice to assent or withhold their consent; rather, the debate should focus on the notion of "disadvantage":

> [W]hen examining cases in which the conflict between women's rights and religious and cultural practices arises, we should not concentrate on the question of choice, but on the question of disadvantage, and ask ourselves whether the practice in question

[142] Boyd Report, *supra* note 3 at 75.
[143] Stopler, *supra* note 55.
[144] *Ibid* at 158.

> disadvantages women. If the answer to this question is affirmative, than the disadvantageous practice should not be allowed unless overwhelming evidence proves that the practice is consented to by all the women involved, out of their own, genuine free choice.[145]

Stopler's focus on "disadvantage" parallels the focus on "harm" that was recently highlighted in a judgment on the constitutionality of the criminalization of polygamy.[146] In this case, the British Columbia Supreme Court ruled that the prohibition on polygamy infringes the protection of religious freedom in the *Charter*; however, the criminalization of polygamy is justified under section 1 on the grounds of a reasoned apprehension of harm. Speaking for the court, Chief Justice Bauman stated:

> I have concluded that this case is essentially about harm; more specifically, Parliament's reasoned apprehension of harm arising out of the practice of polygamy. This includes harm to women, to children, to society and to the institution of monogamous marriage.[147]

While the words of Justice Bauman can be distinguished on the basis of having application only in regard to criminal law, Stopler's imperative to consider the implications of subjecting women to disadvantageous practices compels a deeper introspection as to how choices are made and how they should be evaluated.

The "harm" or disadvantage I refer to in this section relates to the disadvantage of using faith-based principles in family law arbitration as compared to Canadian laws, which by and large have made great strides in promoting gender equality. In Islam certain consequences upon the breakdown of a marriage, such as weakened guardianship rights for mothers of young children after re-marriage, testimony from female witnesses being given half the weight of testimony from male witnesses, and reduced spousal support for the wife (because of a presumption of monetary assistance that she will receive from the male members

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[145] *Ibid* at 218-9.
[146] *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588.
[147] *Ibid* at para 5.

of her own family) all contribute to a "risk of harm" and "disadvantage" that many women from religious communities may not be fully aware of. Moreover, they may not be fully cognizant of the alternatives under Canadian laws.

This type of risk and harm was something about which Gaudreault-Desbiens had grave misgivings:

> Whenever 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 reinforce their power over such a vulnerable party. Thus, in case of doubt, the State should elaborate its policies to favor the protection of individuals rather than the cohesion of groups, religious or otherwise. It should always ensure that its policies protect the right to dissociate from groups, which may imply a refusal to grant legal enforceability to the group's norms or dogmas.[148]

While fair outcomes can and do occur in faith-based arbitration for women who are knowledgeable and adept at advocating feminist interpretations of religious principles, do such gains not occur on the backs of those women who are not effectively capable of the same, nor effectively capable of exercising meaningful choice? Is it justifiable that reform and change within religion be sought by sacrificing the wellbeing of those who are in the weakest and most vulnerable positions?

Some of the very organizations that work for the interests of vulnerable women have attempted to address and answer these questions. During the time the future of faith-based arbitration in Ontario was in debate, the National Association of Women and the Law (NAWL), in conjunction with the Canadian Council of Muslim Women (CCMW) and the National Organization of Immigrant and Visible Minority Women of Canada (IVMWC), advocated in various submissions made toward the Boyd Report that the *Arbitration Act*

[148] *Supra* note 138 at 22.

should not deal with family matters at all.[149] They argued that the *Arbitration Act* was inherently discriminatory against women by permitting the use of other forms of law as opposed to Canadian law:

> Specifically the Act permits the use of family arbitration. Women are negatively impacted because of the possibility that any framework may be used to decide family law issues, even frameworks that hold no recognized principles of equality or statutory criteria under the Family Law Act or the Divorce Act.[150]

To ensure basic norms and ideals for all, NAWL, CCMW and IVMWC argued for common rules for all citizens of Canada. They cited research conducted in 2003 by the network, Women Living Under Muslim Law (WLUML), reported in "Knowing our Rights: Women, family, laws, and customs in the Muslim World."[151] This study compared and contrasted the application of sharia law and its impact on women in fifteen countries, finding great variance from country to country. For example, in Tunisia, the state interprets sharia law as limiting marriage to monogamy, while in Pakistan polygamy is permissible as long as the first wife consents. Such variance among countries demonstrates the diversity and unpredictability that could result from faith-based arbitration.

In another report, "Shah Bano and the Muslim Women Act: A Decade On," the CCMW provides a cautionary example of India's experience with personal laws.[152] This will be discussed in further detail in the following section.

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[149] See Boyd Report, *supra* note 3 at 29-34.
[150] Submission of the National Association of Women and the Law, Canadian Council of Muslim Women, and the National Organization of Immigrant and Visible Minority Women of Canada, Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its impact on women' (September 13, 2004) to Boyd Report, *supra* note 3 at 31.
[151] Women Living Under Muslim Laws, *Knowing Our Rights: Women, family, laws and customs in the Muslim World*, 2nd ed (Nottingham, UK: The Russell Press, 2003).
[152] Lucy Carroll, ed, *Shah Bano and the Muslim Women Act a Decade On: The Right of a Divorced Muslim Woman to Mataa* (Grabels Cédex: Women Living Under Muslim Laws, 1998).

3.2.3 Personal Laws in India and the *Shah Bano* tragedy

India's Constitution was drafted at a momentous time in the history of the nation when the ideals and aspirations of unity and nationalism were compelling to the newly liberated state. The document recognized the role of law and the significance of rights in remedying the sharp inequities of colonial India—with its divisions of class, caste, gender, and religion. In this regard, the Constitution guarantees equality and freedom from discrimination,[153] as well as religious freedom. [154]

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[153] *Constitution of India, 1950*, arts 14 - 16(2).
Article 14. – Equality before law. –
The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
Article 15. – Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. –
(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to
(a) access to shops, public restaurants, hotels and places or public entertainment; or
(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
(3) Nothing in this article shall prevent the State from making any special provision for women and children.
(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially or educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.
(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.
Article 16. – Equality of opportunity in matters of public employment. –
(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
[154] *Ibid*, arts 25, 29.
Article 25. – Freedom of conscience and free profession, practice and propagation of

In present-day India, the balancing act between guaranteeing equality based on gender and promoting religious freedoms is tilted heavily in favour of religious freedoms through the existence and use of personal laws. India has four personal laws, namely Hindu, Muslim, Christian and Parsi, which apply to a person depending on his or her religious identity. These laws travel with the person wherever he or she goes within the country. The personal laws deal with marriage, divorce, parentage, guardianship, religious and charitable endowments, wills, and inheritance succession of those legally defined as Hindus, Muslims, Christians and Parsis.

The rules and impact of divorce, property division, and child custody are dictated by the personal laws under which the marriage was solemnized. In India, despite the availability of the *Special Marriage Act of 1954*,[155] Indians overwhelmingly choose to marry under their respective personal laws. For women from religious communities to "opt into" a secular law over their religious personal laws requires knowledge of the benefits of opting-in, as well as the fortitude to go against the grain. In order particularly for Muslim women to opt in, they have to convince their own family and their prospective spouse's family that such a choice is beneficial for both sides, and that it is religiously effective.

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religion. –
(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.
Article 29. – Protection of interests of minorities. –
(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.
(2) No citizen shall be denied admission into any educational institution maintained by the State receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

[155] *Special Marriage Act of 1954.*

Muslim marriages fall into three categories: void, irregular or valid.[156] If a marriage is found to be void, then any offspring produced from that marriage are considered illegitimate. This can disadvantage women because, under Islam, the father has no obligation to illegitimate children. Void marriages also mean that the spouses have no obligations towards one another.

Faced with these potential consequences and other pressures, Muslim women are usually unable or unwilling to jeopardize their religious and familial affiliations by opting to solemnize their marriage under a secular law. This reluctance is particularly true in a society where most women need their communities for protection and support. An assumption of free choice in a traditional society is naïve and problematic; it also fails to account for the disparities in class, education, and agency among Muslim women. In making the decision to opt into a secular regime of laws to govern their marriage, women put their identities, relationships and sometimes their very lives at risk.

India's regime where secular family laws are optional, places the onus on Muslim women to make the choice to opt out of religious laws, and burdens them with the difficult task of securing their own rights with respect to their religious community. Such a regime's lack of success can be witnessed through the fact that despite offering stronger rights and better protections, the secular *Special Marriages Act of 1954* has not, in fact, replaced the dominance of Muslim personal laws.[157]

Such an unappealing situation is created by a "rhetoric of choice" which Stopler argues one should examine and deconstruct so that the discrimination and subjugation of women is not countenanced by blindly exalting the strength of

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156 See generally Nathan B Oman, "How to Judge Shari'a Contracts: A Guide to Islamic Marriage Agreements in American Courts" (2011) 1 Utah Law Review 287.
157 See generally Nandini Chatterjee, "Religious Change, social conflict and legal competition: the emergence of Christian personal law in colonial India" (2010) 44:6 Modern Asian Studies 1147.

individual autonomy over and above the reality of gender inequality.[158] By providing women from different religious communities the "choice" to follow their own personal laws based on religious principles that blend inseparably with long-standing conservative customs and traditions, India, at best unwittingly, and at worst overtly, invites injustice upon women.

On the other hand, the government of Ontario's decision to prohibit the legal enforceability of religious arbitral awards frees women from having to take onerous steps to opt out of religious laws and community expectations.

Indeed many have argued that injustice could be significantly reduced in India if it were to establish a uniform civil code, as originally envisioned by India's constitution-makers. Under a section called, "Directive Principles", the Constitution pronounces:

> The state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.

However, the Indian government has yet to take any concrete steps towards a uniform code because India's legislative policy so far has been to avoid altering the rights and privileges of religious communities unless there is an overwhelming demand for change from the affected community itself. This stance exists because male-dominated conservative groups argue vociferously that modifying the practice of permitting personal laws significantly interferes with one's right to religious freedom.[159] Until an overwhelming majority of members from the affected community (Muslim women), as well as external supporters, are able to compete with historical and institutional discrimination and subjugation to revolutionize the social landscape, little to no progress is likely.

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[158] *Supra* note 55.

[159] Robert D. Baird, "Gender Implications for a Uniform Civil Code" in Gerald James Larson, eds, *Religion and Personal Law in Secular India* (Bloomington: Indiana University Press) 145 at 152.

This wait-for-the-demand approach ignores that the communities that request and clamour for legal reform are predominantly comprised of society's weakest and most vulnerable members (Muslim women), and that the most vocal and politically-organized community bodies have had historical and institutional advantages to build their wide support and amass sufficient funding to influence politicians. In the result, the Indian state has not created an environment whereby citizens are able to effectively or successfully exercise the option to exit.

In the Ontario debate on the use of binding faith-based arbitration, CCMW had noted the tragic case of Shah Bano as a cautionary example about the lack of an option to exit.

Shah Bano, now deceased, was an Indian Muslim woman who married a lawyer in 1932. They had five children together, and Shah Bano spent her life taking care of the children and maintaining the household as a housewife. At some later point in their marriage, her husband remarried and had other children with his second wife. Shah Bano continued to live with her husband and his second wife until 1975 when she was driven out of the marital home by her husband at the age of sixty-two.

Left destitute by her ex-husband, Shah Bano filed a claim for maintenance under section 125 of the secular *Code of Criminal Procedure*[160] [*Code*] in 1978. Pursuant to this provision, husbands with sufficient means are required to pay maintenance to their wives or ex-wives who are unable to support themselves. Upon filing for maintenance and notice being sent to her husband, he officially

[160] *Code of Criminal Procedure, 1973* (this Act was relatively recent at the time of Shah Bano's claim as it had been enacted in 1973 and came into force on 1 April, 1974).

divorced Shah Bano, repaid her dower,[161] and paid maintenance for three months as per Muslim personal law (called *iddat*).

Shah Bano's ex-husband argued that he had followed the provisions of Muslim personal law by repaying her dower and maintaining her for the necessary time period under that law, and that therefore he should be released from any further financial obligations towards her under the *Code*.

At trial, the High Court of Madhya Pradesh decided in favor of Shah Bano under Section 125 of the *Code*. Her ex-husband appealed to the Supreme Court of India, arguing in essence that the fulfillment of his obligations under Muslim personal law acted as a shield to the secular application of the *Code*.

To begin with the Supreme Court of India disagreed with the husband's submissions and found that the appeal did not involve a question of constitutional importance. It held that the question of whether section 125 of the *Code* applies to Muslims had already been settled by two previous decisions of the Court.[162] However, for further clarity, the court reiterated that by reason of the intent and purpose behind section 125, the provision "unmistakably ... overrides the personal law, if there is any conflict between the two."[163]

That said, the judges also noted that the entire debate as to whether the rights conferred by section 125 to all women prevailed over the personal law of the parties had proceeded on the assumption that there was a conflict between the provisions of the *Code* and those of Muslim personal law.[164] After reviewing commentary and interpretation from respected mainstream Islamic jurists and scholars, the judges held that a Muslim husband is obliged to maintain his wife

[161] Dower is the amount to be given by the husband to the wife at the time of marriage. Technically without the giving of this payment the solemnization of marriage cannot take place.
[162] *Shah Bano, supra* note 4 at para 4.
[163] *Ibid* at para 10.
[164] *Ibid* at para 11.

beyond the period of three months pursuant to personal law, holding that the "contrary argument does less than justice to the teachings of the Quran."[165]

In addition, and as *obiter dicta*, the judges provided strong suggestions to the government and Parliament of India concerning the enactment of a uniform civil code. Their sharp criticisms of the current personal laws in India are relevant and instructive in our present discussion of faith-based arbitration:

> It is also a matter of regret that Article 44 of our Constitution has remained a dead letter.
>
> […]
>
> A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies.
>
> […]
>
> No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common civil code. *Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.*[166] [emphasis added].

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[165] *Ibid* at para 22.
[166] *Ibid* at para 32 [emphasis added].

The dual combination of the judges' active engagement in the interpretation of the Quran and their strong exhortation to Parliament to address the lack of a uniform civil code led to a very impassioned outburst from certain members of the Muslim community who saw this position as interference with their religious freedoms. Additionally many Muslim groups vehemently opposed the supersession of the *Code* over personal laws.

Affronted Muslim groups felt that the validity of Muslim personal laws was brought into question by the judges' *dicta*, and viewed the judgment as an attack on the validity of Islam itself. Reformist and secular Muslims who supported the judgment were not helped by the fact that right-wing Hindu nationalists took up the cause of a uniform civil code. The ensuing outcry was so great and sentiments so inflamed that the Rajiv Gandhi government felt compelled to dilute the court's decision by implementing legislation. The government passed the *Muslim Women (Protection of Rights on Divorce) Act*,[167] which is an ironic moniker because it reinforces Muslim law's denial of ongoing maintenance to divorced women and exempts Muslims from section 125 of the *Code*.

The *Muslim Women (Protection of Rights on Divorce) Act* was passed despite the fact that many secular Muslims were in favour of the *Shah Bano* decision. In a Memorandum provided to the Prime Minister by the Committee for Protection of Rights of Muslim Women comprising of the leading Muslim women voices of the day, the signatories expressed their wishes that:

> Regardless of the rights and privileges that Islam may have conferred on Muslim women, they should not be denied the rights guaranteed by the Indian Constitution based on the recognition of equality, justice and fraternity of all citizens. It is imperative in a secular polity like ours to go beyond the rights conferred by various religions in order to evolve laws which would provide

[167] *Muslim Women (Protection of Rights on Divorce) Act, 1986.*

> justice and succor to all women, irrespective of their religious beliefs.[168]

While the infamy of Shah Bano's treatment under the law did result in some positive changes (i.e., the maximum monthly payment under *iddat* was removed and cases of women receiving lump sum payments that would essentially provide for lifetime maintenance became common), the uncertainty of whether justice will be meted out in all cases has remained a cause for concern as Muslim women who are now held dependent upon the sensitivities of the judiciary for justice.[169] As we know, political winds are apt to change the sensibilities of the presiding judiciary at any given moment.

We must reflect deeply then that India's lack of a uniform civil code and the *Shah Bano* decision were provided as cautionary examples in the Canadian debate on the use of binding faith-based arbitration in Ontario by a leading Muslim women's group. In a position statement to Marion Boyd, the CCMW concluded:

> [There is] no compelling reason to live under any other form of law in Canada and we want the same laws to apply to us as to other Canadian women. We prefer to live under Canadian laws, governed by the Charter of Rights and Freedoms, which safeguard and protect our equality rights. … We are also concerned that, in deference to their religious beliefs, some Canadian Muslim women may be persuaded to use the Shariah option, rather than seeking protection under the law of the land.[170]

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[168] Memorandum from Committee for Protection of Rights and Women to the Prime Minister of India (24 February 1986) in Lucy Carroll, ed, *Shah Bano and the Muslim Women Act a Decade On: The Right of a Divorced Muslim Woman to Mataa* (Grabels Cédex: Women Living Under Muslim Laws, 1998) 97.

[169] See Seema Mustafa, "How did we get here? Where do we go from here?" in Lucy Carroll, ed, *Shah Bano and the Muslim Women Act a Decade On: The Right of a Divorced Muslim Woman to Mataa* (Grabels Cédex: Women Living Under Muslim Laws, 1998) 215.

[170] Position Statement from Canadian Council of Muslim Women, "Position Statement on the Proposed Implementation of Sections of Muslim Law (Sharia) in Canada" (25 May 2004), online: Canadian Council of Muslim Women <http://www.ccmw.com>.

It is an unfortunate situation in India that the catalyst for positive change is left to occur on the backs of sacrificial women. In essence, in India, society expects that the burden of receiving a fair outcome should rest on the very shoulders of the women most in need of assistance.

Gaudreault-Desbiens warned against transferring the financial, psychological, and social costs of law reform to individuals, particularly vulnerable ones, stating that it would be preferable instead to leave faith-based arbitration as self-enforcing arbitration: "believers could still submit their disputes to faith-based arbitration, but the award would not be legally binding. Therefore, parties would retain their right to exit from the process or disavow its result, or could instead voluntarily comply with the award." [171]

It appears that until a more egregious set of facts presents itself to the courts and the public, the vulnerable Shah Banos of India will continue to be sacrificed for the religious freedoms of the powerful.

What is instructive in this case is that a parallel system of religious laws is unlikely to serve the interests of Canadian women, and the government of Ontario's decision to rescind the judicial enforceability of religious arbitration better allows Canadian Muslim women to easily opt out of religiously-governed processes of dispute resolution.

3.2.4 Is state intervention necessary? Desirable? The *Bruker* decision.

In contrast to *Shah Bano*, the Supreme Court of Canada's decision in *Bruker v. Marcowitz*[172] [*Bruker*] is instructive because it demonstrates what happens when women want to remain in their religious communities and yet religious principles do not permit them to do so. In the *Bruker* case, the state stepped in

[171] *Supra* note 138 at 23.
[172] *Bruker v Marcovitz*, 2007 SCC 54, [2007] 3 SCR 607.

and came to the assistance of these women, which I submit is a questionable role for the state to play. As will be examined in detail below, the strong dissent in *Bruker* suggests that reform within religion is usually a matter best left to the religious community. *Bruker* is also interesting in that it showcases the direction that Canadian courts have taken in restraining religious freedoms to make way for modern public interests and evolving fundamental values (such as, the importance of remarriage and eradicating gender discrimination), through both legislative changes and judicial response.

In the 2007 case of *Bruker*, the Canadian Supreme Court was tasked with deciding whether the courts could compel a Jewish husband to uphold his promise to provide a *get* (or religious divorce)[173] for his Jewish wife. Ms. Bruker brought an action in damages against her husband for breach of contract. Under an agreement voluntarily negotiated and signed the couple, both of whom were represented by counsel, agreed to a number of commitments in order to settle their matrimonial disputes. One of the commitments was that Marcovitz would present himself to the rabbinical court to grant a *get*. However, Mr. Marcovitz refused to do so for fifteen years and challenged the validity of the agreement, claiming that under Jewish law he was free to refuse to grant a *get* to his ex-wife.

In short, Mr. Marcovitz argued that his right to religious freedom shielded him from the consequences of refusing to comply with the contract. In other words, similar to the *Shah Bano* case, he argued that his divinely ordained "choices" or "rights" under religious laws allowed him to evade the secular legal obligations he owed to his ex-wife.

At trial, the court found that the dispute was a justiciable matter and that Mr. Marcovitz had breached his contractual obligation. On appeal, however, the

[173] A *ghet* is the Jewish form of divorce which is supervised by a Beth Din (a rabbinical court). A wife cannot obtain a *ghet* unless her husband agrees to give it. Historically the refusal to obtain a *get* left observant Jewish women with the legal right to remarry, but the practical inability to remarry in accordance with her religion.

court found that the obligation was religious in nature and overturned the lower court judgment, claiming that in order for the clause to be enforceable, "[it] must be directly related to one of the subject matters on which courts issue or vary orders of corollary relief, and otherwise be justiciable."[174] In so deciding, the Quebec Court of Appeal relied in part on the Supreme Court of Canada's leading judgment on religious freedoms, *Syndicat Northcrest v Amselem* [*Amselem*][175] wherein it was held that:

> [T]he state is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual....[176]

The Supreme Court of Canada disagreed with the Court of Appeal's decision and identified two issues to be resolved: first, whether the agreement to give a *get* was a valid and binding contractual obligation under Quebec law (they concluded it was); and second, whether the husband could rely on his freedom of religion to avoid the legal consequences of failing to comply with an otherwise lawful agreement.

In regards to the second issue, the majority of the Supreme Court of Canada held that the ex-husband was not entitled to immunity from damages for his contractual breach by invoking his freedom of religion. They held that a claim to religious freedom must at all times be balanced and reconciled with countervailing rights, values, and harm, and that each claim has to be assessed on its own particular merits ("respectful of the complexity, sensitivity, and individuality inherent in each matter") to determine when it may have to yield to a more pressing public interest.[177]

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[174] *Bruker v Marcovitz*, 2005 QCCA 835, 259 SLE (4th) 55 at para 85.
[175] *Syndicat Northcrest v Amselem*, 2004 2 S.C.R. 551, 2004 SCC 47.
[176] *Ibid* at para 50.
[177] See *Bruker*, *supra* note 172 at para 20.

Furthermore, the Court distinguished that Ms. Bruker sought a remedy in the form of damages to compensate for her husband's extended non-compliance and did not seek an order directing him to appear before the rabbis.[178]

Additionally, to rectify the direction taken by the appellate court, the majority clarified that while the civil courts do not intervene in strictly doctrinal or spiritual matters, they do and must intervene when civil or property rights are engaged.[179] In this regard, they reiterated that religious freedoms were subject to limitations when they disproportionately collided with other significant public rights and interests, and cited the leading Supreme Court decision of *R v Big M Drug Mart Ltd*[180] for a full elaboration on the broadness and boundaries of religious freedom:

> Freedom means that, *subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others,* no one is to be forced to act in a way contrary to his beliefs or his conscience.[181]
>
> […]
>
> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, *provided inter alia only that such manifestations do not inure his or her neighbors or their parallel rights to hold and manifest beliefs and opinions of their own* [emphasis added].[182]

In *Bruker* the majority also reiterated the mutability over time of what constitutes "public order" or "public interest".[183] In our common understanding

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[178] See *Bruker, supra* note 172 at para 12.
[179] See *Bruker, supra* note 172 at para 45.
[180] *R v Big M Drug Mart Ltd* [1985] 1 S.C.R. 295.
[181] *Ibid* at para 95 [emphasis added].
[182] *Ibid* at para 123 [emphasis added].
[183] *Bruker, supra* note 172 at para 61 ("what constitutes public order, as Beaudouin and Jobin explain, is variable: [translation] [the content of public order] changes over time, since this concept basically represents certain values at a given point in the evolution of society").

of what constitutes justice, society must continually adjust and readjust to what constitutes justice.

There was, however, a strong dissent in *Bruker* from Justices Deschamps and Charron. According to their analysis, the unfairness of a recalcitrant husband to grant a *get* was "a matter for Hebrew law," and the "courts were limited to cases that originate in positive law."[184] However, this reasoning has the potential to send society back to the situation in India where the responsibility for reform and gender equality is something that is relegated back to those who are least able to *fight* for, and *achieve*, such rights.[185] While state intervention may not at all times be desirable, it is perhaps necessary where the facts require such intervention in the interests of justice.

I note however that while I am in agreement with parts of the reasoning provided in Justice Deschamps' dissent, in the instant case, the majority was able to reach the correct decision because they bolstered their reasoning by relying on the aims and goals provided in the federal *Divorce Act*. In particular, the majority relied heavily on a provision in federal divorce legislation that was enacted in 1985 to provide greater protection for women by removing religious barriers to marriage. Section 21.1 of the *Divorce Act* states that, should a spouse withhold consent to religious re-marriage, the Court has the discretion to dismiss any application that said spouse has filed with the Court or to strike out any pleadings or affidavits filed by that spouse in relation to their Court action.

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[184] See *Bruker, supra* note 172 at para 183.

[185] But see *Bruker, supra* note 172 at 141 where it appears that Justice Deschamps does not intend to close off all civil avenues for redress or compensation for the ex-wife in this case. She appeared to indicate that that the English or common law approach from an earlier Supreme Court judgment, *Leskun v Leskun* (2006 SCC 25 (CanLII), [2006] 1 SCR 920) might be more appropriate for Mrs. Bruker's claim. In *Leskun* the court held that if one spouse became dependent because of the other spouse's conduct (presumably not being able to re-marry within her religious community would leave Mrs. Bruker dependent to some extent), the court could have regard to all the circumstances, including the state of dependence and award support based on the parties' resources and needs.

Section 21.1 of the *Divorce Act* came about through the lobbying efforts of the Jewish community itself, which noted that there existed a religiously ordained inequality within Jewish religious laws that was preventing Jewish women from fully exercising their rights. Jewish women (and their future children through a religiously invalid marriage) were being forced to exit the religion, instead of choosing to exit.

The then-Minister of Justice, Doug Lewis, explained the motivation for these amendments at the proposed legislation's second reading:

> A spouse should not be able to refuse to participate in a Jewish religious divorce – called a Get – in order to obtain concessions in a civil divorce. The Get should not be used as a bargaining tool for child custody and access or monetary support.
>
> […]
>
> [T]he government is moving where it can and where it is brought to the government's attention to eliminate sexism and gender bias in the law.[186]

At the third reading of these amendments, Kim Campbell, who succeeded Mr. Lewis as Minister of Justice, confirmed the policy rationale for this legislative initiative, by elaborating that:

> Bill C-61 will enable Canada's Jewish community to preserve its traditions without destabilizing models of family life. *It also ensures that the principles of the Divorce Act with respect to alimony and custody are applied equally to all Canadians* [emphasis added].[187]

One can well imagine from the *Shah Bano* case that public reaction to this decision would likely have been very different if the Court's ruling had touched on a religious practice on which there was less consensus, such as for example the inclusion of women as clergy in certain religions, or guardianship rights for

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[186] *House of Commons Debates*, 34th Parl, 2nd Sess, No 6 (15 February 1990) at 8375-77.
[187] *House of Commons Debates,* 34th Parl, 2nd Sess, No 8 (4 May 1990) at 11033-34.

gay parents. The majority's decision in *Bruker* can be differentiated from the *Shah Bano* on the basis that the majority relied on a provision that had been lobbied into existence by the Jewish community itself, and to which there was very little resistance.

In summary, the *Bruker* majority placed a great deal of importance on the goals and public policy direction articulated by the legislature in Section 21.1, whereas the dissent by Justice Deschamps focused on the importance of courts maintaining their neutrality where religious precepts are concerned. Part 4.1.2 of this paper will expand on Justice Dechamps dissenting argument.

4 SAFEGUARDING NEUTRALITY & FOSTERING FRATERNITY

This section of the paper explores in detail a second argument in favor of restricting binding faith-based arbitration of family law-related disputes, namely the public interest and collective goal of building a unified state. Among many other factors, building a cohesive and unified state also means ensuring and strengthening these two elements: neutrality in the courtrooms, and fraternity among all members of society.

Restricting parties' choice of governing law to exclusively Canadian law and repealing the choice to be bound to arbitral awards rendered by using only faith-based laws is a better policy decision, as it does not put courts in the position of having to adjudicate on conflicting religious interpretations and obligations. Personal decisions on religious practices (such as the headscarf, appropriate activities for children, inheritance issues, etc.) can be fraught with complications within the Muslim community itself, as adherents themselves disagree on whether certain practices or their underlying philosophies are mandated by the religion or even desirable.

By implementing the above restrictions on faith-based arbitration, the state has signaled that it aims to promote a separation between "the church and the courtroom,"[188] and allow for legislation to provide a basic and uniform standard of rights and obligations in resolving family law disputes, thus fostering a sense of fraternity within the greater community.

[188] I use the term, 'separation of the church and courtroom' as a spin on the term, 'separation of church and state.' What I mean by a separation of the church and courtroom will be further explained in Part 4.1.2 where Justice Deschamps explains that the courtroom should not be used to adjudicate on issues relating to religious precepts and doctrines because to do so would undermine the neutrality and legitimacy of the legal system in the eyes of the public.

This section aims to demonstrate that, first, maintaining such a separation between the church and the courtroom best maintains the neutrality of the courts and provides them with legitimacy in the eyes of the public; and second, the separation between church and state results in everyone being subject to the same laws and norms, thus better building fraternity among all members of society and leading to successful integration of minority groups.

The section in 4.2 considers the concept of fraternity, as articulated by the late Justice Charles D. Gonthier, as well as the critical role it plays in the implementation of Canada's vision of a unified state. However, before beginning with an analysis and application of the role of fostering fraternity through restrictions on faith-based arbitration, I begin with the importance of aiming towards a secular neutrality in the courts.

4.1 Safeguarding neutrality

The amendments of 2005 to Ontario's *Arbitration Act* removed the enforcement mechanism and opportunity for judicial review that was previously available to the Ontario courts for family law-related disputes using faith-based arbitration. While it appeared that the majority of Ontarians and Canadians were in favour of these amendments, there was also strong and vocal discontent expressed by some who viewed these changes as a lost opportunity to engage in institutional dialogue with relatively guarded and insular religious groups. These latter groups argued that the opportunity for judicial scrutiny over arbitral awards in family law-related disputes would raise awareness of the discrimination exhibited in closed communities and thus do more to prevent harm of vulnerable members in the long-term.[189] This argument will be explored in the following section.

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[189] See "Muslim Arbitration: Don't Ban, Supervise", Editorial, *Globe and Mail* (9 September 2005) A16; see Anver Emon, "A Mistake to Ban Sharia", Letter to the Editor, *Globe and Mail* (13 September 2005) A21; and see Sheema Khan, "The Sharia Debate Deserves a Proper Hearing", Letter to the Editor, *Globe and Mail* (16 September 2005) A20. See Shachar, *supra* note 55.

4.1.1 Judicial scrutiny as catalyst for internal change?

Ayelet Shachar, a law professor at the University of Toronto, was among those who advocated for the continuation of faith-based arbitration, arguing that it created a multicultural jurisdictional body that better promoted Canada's ideals of pluralism and integration.[190] She explained that many individuals, especially recent immigrants and those who have strong ties to their socio-cultural roots, maintain "simultaneous belongings" to their particular identities as well as to the general culture within which they reside.[191] She reasoned that the demands made by Muslim groups to have religious arbitration in Canada for family law-related disputes would not lead down a path towards the formation of an enclosed and injurious regime; rather, it was an opportunity to have the mainstream legal community take the views and values of Muslims seriously and engage with those perspectives. She envisioned the formation of multicultural arbitration boards that addressed specific cultural and religious needs while maintaining the soundness and neutrality of Canadian procedural laws. In her view, faith-based arbitration would remain under the purview of Canadian courts, and women in conservative religious communities would be better served as a result.

It is important to note that Shachar's proposition for faith-based arbitration still came with significant limits. Although a joint governance model would permit Muslim communities to officiate marriages and arbitrate divorces, Shachar's proposal envisaged resolving matters regarding the redistribution of wealth and custodial rights of children in accordance with existing government legislation.[192] This exception was in recognition that within religious communities it was often the conservative voices of men who defined and/or interpreted the laws of personal status. She acknowledged that:

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[190] See *supra* note 55.
[191] *Ibid.*
[192] *Ibid* at 120-21.

> [i]ntra-group policing of women, if encoded in the group's essential traditions, is achieved partially via the implementation of personal status laws which clearly define how, when and with whom women can give birth to children so as to ensure that those children become legitimate members of the community.[193]

In Shachar's view, arbitration boards guided by procedural norms and laws along with constitutional guarantees would ensure that religious groups would not have *carte blanche* in subordinating the rights of women and other vulnerable members. The main advantage that Shachar envisioned in utilizing the joint governance model for dispute resolution was that rather than permit traditional practices to go unchallenged in matters relating to personal status, the existence of arbitration boards operating in a liberal environment and open always to judicial scrutiny would create "a catalyst for internal change" within the traditional cultural groups themselves.[194]

As well, Shachar argued that the main advantage in permitting binding faith-based arbitration for family law-related disputes was that it would break down the solitude between different cultural groups (i.e., the insular orthodox Muslim community and the mainstream legal community). Interaction and inter-communication between communities would ensure that society would be cognizant of and compassionate towards the cultural particularities and trends within each group, while at the same time informing cultural groups of the availability and importance of maintaining constitutional rights that provide the basis for a just and fair society. In her view, discounting Islamic law from the lives of individuals who wish to live in accordance with their religion was too paternalistic and stifling an approach given the importance that individual autonomy is accorded in Canadian democratic society. Furthermore, she argued that unregulated faith-based arbitration left Muslims with informal and unregulated arbitration processes. She suggested that the abuse and injustice

[193] *Supra* note 118 at 293.
[194] See *supra* note 55 at 118.

suffered by parties under the informal arbitration boards would be much harder to bring forward for judicial oversight and assistance.

Arguments advanced in favor of binding faith-based arbitration propose the following solution that: the courts be made responsible for inspiring and imparting mainstream ideals of justice within insular religious communities where gender inequality is rampant. Otherwise, the very harm that the state aims to alleviate by restricting the enforceability of faith-based arbitration is in actuality left to flourish. In sum, the question boils down to whether it is the community or the courts that should shoulder the responsibility of internal reform. Is bringing a community in line with mainstream ideals of justice something best left for the community to handle on its own, or should the courts play some part in inspiring change?

In order to answer this question, this paper assesses the consequences of the state's involvement in religious arbitration. I argue that allowing the courts to enforce and oversee faith-based arbitration would at worst encourage and at best tempt the courts to edge into adjudicating on doctrinal matters to rectify cases of grave abuse and injustice. Such precarious incursion by the courts into ruling on doctrinal matters would adversely impact the public's perception of the courts' neutrality and ultimately cause rifts in building unity and fraternity among all members of society. What is considered engagement and interaction on one face of the coin can also pivot into interference and meddling on the other. Therefore, this section argues that the motivation to move away from "engaging" and "interacting" with religious groups vis-à-vis judicial enforcement and oversight is one that is sound and based on the best long-term interests of the state.

4.1.2 Importance of neutrality regarding religious precepts in the family law

The analysis from the Supreme Court of Canada in the *Bruker* case reveals the benefits of not engaging in the kind of institutional dialogue proposed by Shachar. Commenting on the proper role of the courts and the appropriate boundaries for the legislature and the courts, it seems clear that the courts' role (as well as the public's perception of the courts' role) in resolving doctrinal matters is likely to ignite more flames than the fires it will put out.

Confidence in the laws and the justice system requires that individuals not feel that the courts unduly interfere with their religiously held beliefs and practices, especially where those beliefs and practices touch upon family affairs. Where courts are forced into a tough position to intervene in cases of grave abuse and injustice, allegations of undue trespass and heightened judicial surveillance of certain communities over others has the potential to erode the very fibers that bind the social fabric of the state. On the other hand, where there are cases of grave abuse and injustice and courts fail to intervene as a way to counteract claims of undue trespass, then the omission to provide justice to victims has the exact same potential to chip away at the trust that society places in the hands of the justice system.

In the *Bruker* case, the dissent led by Justice Deschamps made valid remarks on the importance of maintaining a division between church and state. Her comments are relevant to the present debate as to whether not only repealing the enforceability of faith-based arbitration but also restricting the choice of governing law in arbitration to exclusively Canadian law are preferable policy decisions as compared with a *post-facto* judicial review of faith-based arbitration.

Justice Deschamps stated that it is paramount that Canadian courts remain neutral where religious precepts are concerned. She expressed that the separation of church and state had been hard-fought for in Canada and that this division should not be recklessly disturbed:

> The role of the courts cannot be altered without calling into question the foundations of the relationship between the state and religion. The majority suggest proceeding on a case-by-case basis. In my opinion, that is a short-sighted approach. Canada opens its doors to all religions. All of them are entitled to receive the same protection, but not, I believe, to be provided with weapons.[195]

This neutrality lends legitimacy to the Canadian legal system and provides it with a stronger footing when deciding how to reconcile conflicting rights and claims.[196] Justice Deschamps elaborated that the restraint shown by Canadian civil courts with respect to religious questions enables them not only to limit their action to rules that they are explicitly responsible for applying, but also to maintain a kind of neutrality that is indispensable in a pluralistic and multicultural society.[197]

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[195] *Bruker*, *supra* note 172 at para 182.

[196] *Contra* Pascale Fournier, "The Erasure of Islamic Difference in Canadian and Amercian Family Law Adjudication" (2001-2002) 10 JL & Pol'y 51 at 90. In this article, Fournier examines two Canadian decisions which dealt with Islamic religious practices and contrasts them with American case law to highlight that in general the law does not operate in a neutral, universal and objective manner. He cautions against the prioritizing of neutrality ("the coercive power of law resides precisely in its ability to appear neutral when in reality it shapes society in the mold of dominant values" at 95). He advocates a 'functional' approach, whereby through "cultural repositioning" and "enlightened engagement" courts would take more notice of social context and cultural diversity. In contrast to Fournier's position, I argue that the courts' wading into conflicts over religious precepts would cause more problems than it would solve. As well, though I am in partial agreement with Fournier's comments on neutrality, this thesis approaches the issue of neutrality from a different direction and argues that the public's perception of a lack of judicial neutrality would ultimately have negative consequences.

[197] *Supra* note 172 at para 181.

Justice Deschamps reasoned that the courts' focus on conformity to the civil standard sets the proper boundaries for the judiciary and prohibits them from making decisions for and against various religiously motivated customs and practices. Where religious precepts are concerned, the courts must remain neutral, thus negating Shachar's argument that society would be better served by an interaction between courts and religious communities regarding doctrinal issues. Justice Deschamps also pointed out that this principle of non-intervention in religious practices was one of the critical grounds for adoption of the subjective standard of sincere belief in *Amselem.* On the other hand, implementing the type of multi-jurisdictional arbitral body as advocated by Shachar would reverse the long-standing trend in Canadian law to maintain a strict separation between church and state.

In *Bruker*, Justice Deschamps cited the Court of Appeal's position that the discriminatory effects of religion on women were not a matter to be resolved in courtrooms:

> Manifestly, it is not the role of secular courts to palliate the discriminatory effect of the absence of a ghet on a Jewish woman who wants to obtain one, any more than it would be appropriate for secular courts, in an extra-contractual context, to become involved in similar disputes involving other religions where unequal treatment is the fate of women in terms of their access to positions in the clergy, or as we have seen recently in other contexts, the fate reserved for same-sex couples being denied the right to marry in religious ceremonies of some religious faiths.[198]

While Justice Deschamps was correct in pointing out that the courts should not involve themselves in palliating these discriminatory effects, she dismissed the importance of section 21.1 of the *Divorce Act* on the basis that its constitutionality had initially been challenged, but abandoned later.[199] She did,

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[198] *Supra* note 174 at para 117.

[199] *Supra* note 172 at para 105 (It is worth quoting in length the rationale provided by Justice Deschamps: "[t]he constitutionality of s. 21.1 was challenged in this case. The challenge was abandoned….neither the trial judge nor the Court of Appeal had recourse to s. 21.1 to dispose of the issue of the justiciability of the *get.* Yet the

however, acknowledge that the majority had attached decisive importance to this section. In my opinion, the majority did so correctly, which brings us to another important point.

If the responsibility for mitigating the discriminatory effects of religion on women does not rest upon the judiciary, then are members of a religious community left to tackle these issues internally? Does the burden of reform rest upon them exclusively, and are they to remain bereft of external assistance? Furthermore, must appeasing allegations of undue trespass into religious fields necessarily take precedence over assisting those in need? Not at all.

In fact, the *Bruker* case again tells that it is the state who, through the proper democratic channels, is in the best position to address discriminatory effects on vulnerable members of any and all communities, by uniting to advance legislation to correct abuses. The role of the courts is to then pay respect to the objectives of the legislation, always cognizant of constitutional limits not to exceed the scope and mandate of the legislation.

In *Bruker*, the majority referred to the motivations behind implementing section 21.1 of the *Divorce Act* (which gives a court discretionary authority to rebuff in civil proceedings a spouse who obstructs religious re-marriage) as a clear indication of the public policy being advanced. The provision had been passed after wide consultation with Canada's Jewish community, and its purpose was to overcome the inability of rabbinical authorities to resolve the problem that Jewish religious divorce can only be given by men. Therefore, where legislation has been passed reflecting an ideal towards which society has committed to

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majority invoke this provision in support of their conclusion on this issue. The authorization granted by the Superior Court would become meaningless and the debate would be transformed if the higher courts based their decisions on an argument that has been withdrawn. It is unfortunate that the majority is using an argument to which it attaches so much importance").

evolve, then courts may certainly take their cue from the public interests being advanced in their case-by-case balancing of competing interests.

Neutrality of the courts is a critical precept in legitimating the role and use of the legal system. For example, the outrage felt by certain members of the Indian Muslim community in the *Shah Bano* case had much to do with the fact that it was perceived that the judiciary had overstepped its boundaries by analyzing Quranic verses for the "correct" interpretation of the appropriate *iddat.* This wading into the traditionally very insular and specially-regarded realm of Islamic law, which is usually reserved for special scholars of the religion, provoked distrust and anger among the affected population. Such a transgression was not favorably looked upon as it provoked a sense of undue respect to the religion and its orthodox followers. All the uproar and fears about religion being in danger prompted a former judge of India's Supreme Court, the well-respected and renowned Justice Krishna Iyer, to comment that a poisonous political theory had arisen among orthodox Muslims in the aftermath of the *Shah Bano* case, such that there was "a hard core negation of the secularity, integrity and authority of the State to adjudicate or legislate for Muslims."[200]

It is this fracturing in society that the new amendments to the *Arbitration Act* aim to avoid. By disallowing binding faith-based arbitration in family law-related disputes, the state is attempting to, first, mitigate the risk of personal harm that could be suffered by those in the most vulnerable of circumstances; and second, to encourage all members of society to be unified and well-integrated.

I address here a potential counter-argument: since faith-based arbitration for commercial disputes can be appealed,[201] then are the courts not invited to

[200] *Supra* note 152 at 9.
[201] See *Arbitration Act*, *supra* note 1 at ss 45(1),(2), where if parties agree to an appeal on questions of law, or if an arbitration agreement does not deal with appeals on questions of law, then the arbitral award may be appealed to the court.

adjudicate on the merits of religious laws after all? And does this not negate the argument in this section about the importance of the courts' maintaining neutrality regarding religious precepts?

While it is true that upon appeal of a commercial arbitral award where religious principles or laws have been used, courts may well have to adjudicate on the merits of those religious principles or laws, the distinguishing factor is that courts would be performing a judicial review over a commercial dispute between two parties with equal bargaining power, and where both would have explicitly agreed to a court's judicial scrutiny. In such cases, the oversight provided by the courts would not give rise to the same tensions nor influence the public's perception in the same ways as in family law-related cases.

4.2 Fostering Fraternity

The preceding section dealt with the importance of maintaining a separation between church and state, as such a separation best permits the courts to maintain neutrality. This section deals with how mandating that all members of Ontario society must resolve their family law disputes exclusively by Canadian laws to render arbitral awards legally-enforceable ultimately fosters fraternity in society. The concept of fraternity as articulated by the late Justice Charles D. Gonthier will be analyzed and explored in this section.

In the previous section, I looked at how prohibiting the legal enforceability of faith-based arbitration in family law-related disputes avoids putting courts in the precarious position of deciding between religious principles and practices. This neutrality of the courts in regards to religious conduct may at first glance appear harmful and discriminatory against women and other vulnerable parties. However, in the long-term it assists society because it empowers other channels of reform and redress. Reform is then left to be addressed by progressive adherents of the religion, as well as supporters of their cause, so as to encourage

genuine change from within. This approach in turn avoids unnecessary interference by the courts, which could jeopardize equality movements through claims of paternalistic over-stepping and intrusion. It is in this way that courts avoid regulating and stifling religious communities by external pressures to conform to certain standards and ideals of what it means to live "the good life." The contradiction inherent in the imposition of the majoritarian conception of the good life in a pluralistic society was something that Justice Gonthier was cognizant of, and that will be addressed later in this section also.

This section of my paper builds on Azim Hussain's essay, "Fraternity and the Debate regarding the Face-Veil," which utilizes Justice Gonthier's conception of fraternity to analyze the extent to which the Muslim face-veil for women should be accommodated in Canadian society.[202]

4.2.1 What is Fraternity?

The constitution of Canada is based on the liberal notion of individuality – rights to life, liberty and security of the person are guaranteed. However, Justice Charles D. Gonthier identified another critical concept, fraternity, as being integral to the functioning of a successful democracy.

In giving a historical overview of fraternity in his essay, "Liberty, Equality and Fraternity,"[203] Justice Gonthier noted that fraternity could be traced back to early Greek philosophy, particularly the writings of Plato and Aristotle.[204] For these early Greek philosophers, fraternity was an important component of political

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[202] Azim Hussain, "Fraternity and the Debate regarding the Face-Veil: France, Belgium, and Quebec in Comparative Perspectives" (2011) (Paper delivered at the Responsibility, Fraternity, and Sustainability in Law: A Legal Symposium in Honor of Justice Charles D. Gonthier" 1 April 2011), [unpublished].
[203] Charles D. Gonthier, "Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or Fraternity: The Unspoken Third Pillar of Democracy" (2000) 45 McGill LJ 567.
[204] *Ibid* at 570.

life. In turn, they viewed with suspicion the concept of liberty because they conceptualized it as a threat that could supplant fraternity.

Contrary to the Greek philosophers, philosophers during the Enlightenment thought of fraternity as a distant goal of political action rather than its *point de départ*. For them, liberty and equality represented a means of attaining the ideal of fraternity.

More recently, fraternity is encountered again during the French Revolution, where the famous slogan, "Liberté, Égalité, Fraternité," represented the rejection of the former French regime, as well as, for many at that time, the rejection of the dominant Christian culture.[205] Fraternity was and continues to be a core concept in French political philosophy. France's 1780 *Declaration des droits de l'Homme et du citoyen* notes in its first article that "[l]es distinctions sociales ne peuvent être fondées que sur l'utilité commune," while the 1958 Constitution states in its preamble that its principles are founded upon "l'idéal commun de liberté, d'égalité et de fraternité."[206]

Furthermore, the notion of fraternity is present in the first article of the 1948 *Universal Declaration of Human Rights*, where it is mentioned alongside liberty and equality:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. [In French, "espirit de fraternité.][207]

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[205] *Ibid* at 571.
[206] *Declaration des droits de l'Homme et du citoyen* (approved by the National Assembly of France, 26 August 1789), online: Ministère de la Justice, République Française <http://www.justice.gouv.fr/textfond/ddhc.htm>; *La Constitution du 4 octobre 1958*, art 1, online: République Française <http://www.legifrance.com/html/constitution/constitution2.htm>.
[207] *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN doc A/810, (1948) 71 at 72.

Though fraternity is not identified explicitly in the Canadian constitution, Justice Gonthier saw the concept of fraternity as implicit and omnipresent in the Canadian legal system, stating that:

> [Fraternity is the] forgotten element of democracy which, although rarely identified, is nevertheless present throughout our legal system. It is the glue that binds liberty and equality to a civil society. It is intuitive. It is the forging element of a community. It advances goals of fairness and equity, trust and security, and brings an element of compassion and dedication to the goals of liberty and equality. It bonds individuals who share similar values and goals not only to their current neighbors, but also provides a sense of continuity with the past and the future.[208]

Justice Gonthier's understanding of the concept of fraternity was double-edged: fraternity both promoted the exercise of liberty and equality, as well as set boundaries for those rights. Therefore, in essence, Justice Gonthier articulated that a society's sense of what is just necessitated that the concept of fraternity sometimes supersede and sometimes submit to the concept of liberty in different situations. He suggested that democracy could not properly function without fraternity as an underlying value in the law. In his view, balancing the sometimes-competing interests of fraternity, liberty and equality was essential for a healthy community: "Liberty and equality are, in a way antithetical to fraternity. Whereas liberty and equality emphasize the rights of the individual, fraternity emphasizes the rights of the community."[209]

At the same time, Justice Gonthier was clear that this balancing between fraternity on the one hand and liberty and equality on the other was not a black and white weighing between communitarian and liberal philosophies or traditions. Indeed, he was clear that the distinctions between communitarianism and liberalism were "somewhat artificial," and that both philosophical traditions

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[208] *Supra* note 203 at 569.
[209] *Ibid* at 570.

shared the ultimate goal of promoting the dignity of individuals within their community.[210]

For Justice Gonthier, the promotion of dignity entailed respect for a panoply of worldviews, perspectives, and choices. In a pluralistic and multi-ethnic society such as Canada, it is neither possible nor desirable to define fraternity narrowly and in such a way as to create divisions based on insular group identities. Moreover, it is not appropriate to define fraternity in such an overbroad manner based on one overarching community, so as to erase the distinctions and diversity of minority cultures and communities.

In essence, the pursuit of fraternity is the search for the best types of ties and values that a loving family can provide, which at times expands to welcome more members, but at others gathers in tighter circles. Thus, Justice Gonthier saw the pursuit of fraternity to include the incorporation of such underlying values as inclusion, empathy, trust, responsibility, fairness, and cooperation.[211]

Speaking specifically on the values of empathy and inclusion, which he considered essential in the successful functioning of a diverse polity, Justice Gonthier noted that they simultaneously underpin fraternity as well as provide it with its aims and boundaries:

> The first value of fraternity recognizes that there are certain people within this community who require special protection and to whom we have a commitment. […] In one respect, this imports to a liberal democracy a notion of *empathy*. In another respect, this aspect of fraternity informs our understanding of equality – the State may be discriminating against individuals by failing to accommodate their special needs. […] This aspect of fraternity – that of *inclusion* – is essential for the proper functioning of a polyethnic state such as Canada. As a result, the law is replete with examples of duties imposed on individuals to take positive

[210] See Charles Gonthier, "Law and Morality" (2003) 29 Queen's LJ 408 at 412.
[211] *Supra* note 203 at 572.

> steps to assist persons who are disadvantaged or in need of care or protection [emphasis in original].[212]

While at times the state may need to provide certain communities with special protection in the manner of special rights, at other times the need for special protection may dictate an omission to accommodate and/or the imposition of duties.

Drawing from the history of the use of fraternity as an important rallying force in the French Revolution, Justice Gonthier noted how the concept initially marked a step towards a larger community that broke free from the historical and traditional divisions of monarchy and class: "Le concept de fraternité marque une étape défensive [sic] dans l'évolution de l'idée d'humanité: il s'agit de faire front contre ceux qui menacent la cité des hommes qui vient de s'établir."[213]

Quoting from Josiane Boulad-Ayoub's text, *Contre nous de la tyrannie*,[214] Gonthier noted that "'[l]a fraternité connote l'amour de la patrie, la patrie politique immédiate' ainsi qu'une patrie symbolique qui englobe toutes les personnes qui partagent le même ethos."[215] Brotherhood and fraternity can encompass a large radiating circle where all who share the same ethos and goals are included. The result of this process, or the result to which it aspires, is a better community for all.

4.2.2 How the use of Canadian laws in family law arbitration fosters fraternity

It is the argument of this section that the decision by the government of Ontario to legislate that all members of its province must resolve their family law disputes exclusively by Canadian laws, for legally-enforceable arbitral awards ultimately fosters fraternity and a better community for all. Having "one law for

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[212] *Ibid* at 574 [emphasis in original].
[213] *Ibid* at 571.
[214] Josiane Boulad-Ayoub, *Contre nous de la tyrannie…des relations idéologiques entre Lumières et Revolution* (Montreal: Les Editions Hurtubise HMH Ltd, 1989).
[215] *Ibid*.

all" (exclusively Canadian laws) imposes a common set of goals and aspirations, and such commonality fosters fraternity and unity within a community. This is so because when a set of rules and rights are accessible to all people regardless of their religious beliefs or practices, common values are advanced and strengthened. Current Canadian laws dealing with family law disputes provide fair and balanced regimes for the division of assets upon marital breakdown and contain provisions supporting gender equality.[216] The regimes represent years of lobbying work by women's rights groups and advance the same goals and principles, which leads to more or less uniform results, predictability and stability.

Additionally, Canadian legislation aims to account for gender imbalances; whereas the same has been difficult to achieve with religious laws which have been mixed with cultural practices and traditions and created confusion and controversy. Meaningful reform has yet to take place on a mainstream scale in religious laws, and/or be translated into practices and outcomes in the majority of cases.[217] This concrete social problem causes uneven results, unpredictability and fragmentation in society. By making the enforceability of arbitral awards conditional on their conformity with Canadian laws, the scope for progressive possibilities in religious arbitration is enlarged and the claims of religious feminists who assert that traditions can be modified is valued and enhanced. Natasha Bakht, in particular argues that this solution from the Ontario government creates a "'third space' for Muslim women - between the patriarchy they may encounter within the minority group and the racism they may encounter outside of it."[218] In her article, "Religious Arbitration in Canada: Protecting Women by Protecting Them from Religion," Bakht argues that an outright ban on religious arbitration would have been unhelpful and would have promoted the view that religion is bound to patriarchal tradition and

[216] See *supra* note 21.
[217] *Supra* note 150.
[218] Natasha Bakht, "Religious Arbitration in Canada: Protecting Women by Protecting Them from Religion" (2007) 19 CJWL 119 at 143.

immutable.[219] By permitting religious arbitrations that conform to Canadian family law, Bakht concludes that the state has "realize[d] the only viable solution to an otherwise divisive issue….[and achieved] a balance between the concerns of gender quality and religious freedom.[220] It is in this way that the state's pronouncement of a "one law for all" regime works to foster fraternity and unity.

A germane question then is whether mandating that only Canadian laws can be used for binding arbitral awards in family law-related disputes imposes the majority's conception of the "good life" on the rest of the population. If so, how can this imposition be reconciled with the concept of fraternity, which at the same time values diversity and plurality?

4.2.3 The imposition of the "good life"

Justice Gonthier was quite clear in his belief that the "law cannot impose the majority's moral view of the 'good life' on the rest of the population."[221] This imposition would not only inadvertently benefit one group over another but also be unrealistic and undesirable in a pluralistic society that aims to accord dignity to all and accommodate individuals' diverse choices. The concept of the "good life" comes from ancient Greek philosophy and alludes to the life that one aspires to live.

In his essay, "Law and Morality," Justice Gonthier noted that whereas the law is an instrument to regulate an individual's conduct that impacts the individual, others, or society at large, the law cannot and should not regulate an individual's thoughts or morality.[222] However, Justice Gonthier was also very clear in accepting that there are moral elements, explicit and implicit, in many of our laws. He understood that without a moral basis, it would be immensely

[219] *Ibid* at 133.
[220] *Ibid* at 121.
[221] *Supra* note 210 at 414.
[222] *Ibid.*

problematic to build trust of and gain compliance with the law. Citing H.L.A. Hart's text, *The Concept of Law*, Justice Gonthier states:

> In the absence of this [moral] content men, as they are, would have no reason for obeying voluntarily any rules; and without a minimum of co-operation given voluntarily by those who find that it is in their interest to submit to and maintain the rules, coercion of others who would not voluntarily conform would be impossible.[223]

While laws need a moral basis to secure their legitimacy and compliance, constraining an individual's liberty on the basis of a perceived community good or the purported best interests of the individual is contradictory at worst, and problematic at best, in a society which aims to embrace liberty and choice. Constraining liberty on the ground that the majority's conception of "the good life" is nobler or superior to another's is fraught with obvious dangers. How then does one reconcile the position of the Ontario government to restrict the choice of governing law to that of Canadian law in binding arbitral awards for family law-related disputes? While it can be argued that such legislative restriction advances Justice Gonthier's concept of fraternity, the counter-argument is that such a restriction functions as an imposition of the majority's conception of the "good life", something that Justice Gonthier might have found problematic.

In his essay, "Fraternity and Public Reason,"[224] Fabien Gélinas neatly captures this theoretical conundrum, and drawing from Justice Gonthier's separate opinion in the case of *R v Butler*,[225] [*Butler*] provides insight as to how Justice Gonthier viewed its resolution:

> Given the limitations imposed by a "pluralistic society" in which people hold many "different conceptions of the good," [Gonthier]

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[223] *Ibid* at 414.
[224] Fabien Gélinas, "Fraternity and Public Reason," (June 1, 2012). Responsibility, Fraternity and Sustainability in Law. Markham, Ontario: Lexis Nexis Canada, 2012. Available at SSRN: http://ssrn.com/abstract=22112712.
[225] *R v Butler* [1992] SCJ No 15, [1992] 1 SCR 452.

> writes [that] the state can only impose "fundamental conceptions of morality." These can be distinguished from morality writ large by two criteria. First, the state's moral claims must be grounded: they must involve concrete problems "and not merely difference of opinion or of taste." Second, these claims must be supported by a social consensus going beyond the majority: "a wide consensus among holders of different conceptions of the good is necessary before the State can intervene in the name of morality."[226]

The case of *Butler* is a leading Supreme Court of Canada decision on the constitutional validity of the *Criminal Code* provision restricting trade in "obscene material."[227] *Butler* is instructive for the purposes of this paper because the Court had to balance the state's goal of censoring material considered harmful and indecent with an individual's freedom of expression.

In accordance with the test set out in the case of *R v Oakes*,[228] the Court had to adjudicate whether the restriction could be demonstrably justified in light of the objective of the legislation. The Court focused not on the protection of decency as an objective of the provision (as "decency" is a rather subjective criterion); rather, it held that the objective of the provision was the prevention of harm that could result from the attitudes promoted by the material (i.e., the degradation of women and resulting violence, both actual and threatened).

Although the Court found that the *Charter*[229] protected against restrictive legislation grounded purely on morality, it noted that morality can be completely cut out in neither the making nor the interpreting of laws. Justice Sopinka, with whom Justice Gonthier agreed, stated, "The notions of moral corruption and harm to society are not distinct, as the appellant suggests, but inextricably linked. It is moral corruption of a certain kind which leads to the detrimental effect on society."[230]

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[226] *Supra* note 223 at 839.
[227] *Criminal Code*, RSC 1985, c C-46 s 163.
[228] *R v Oakes* [1986] 1 SCR 103.
[229] *Supra* note 135.
[230] *Butler*, *supra* note 223 at 494.

In this sense, there is no imposition of the majority's moral views of the "good life"; rather, laws that restrict certain freedoms can be upheld on the basis of representing the community's *intolerance* of certain conduct.[231] Additionally, it is essential that harm to the community or its component members be demonstrated.[232] This idea of demonstrating harm corresponds to the risk of personal harm or disadvantage that was discussed earlier in Part 3.2.3 of this paper.

That there must be limits on certain forms of liberty in order to advance fundamental collective goals is an undeniable facet of life within a larger community. It is important to recall that the amendments to Ontario's *Arbitration Act* do not amount to a complete ban on faith-based arbitration; rather, they set down certain limits. This approach achieves an appropriate level of protection for women and children conducive to advancing their dignity in society. In this regard, I reiterate the reason that Justice Gonthier identified as the motivation behind assembling communities: a deep-seated desire to belong to a family.[233]

In conclusion, it is clear that communities are not simply a group of individuals pursuing rational self-interest, nor merely a means of providing collective resources. With respect to family arbitration, adhering to the collective goals of promoting integration and striving for a unified state necessitates that the state not be complicit in creating an environment whereby the coercion of parties to participate in faith-based arbitration is encouraged through legal enforceability. Such acquiescence by the state would lead to a fractured and fragmented society. I close with a quotation from one of Justice Gonthier essays where he stated,

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[231] See *supra* note 210 at 414.
[232] See *ibid* at 417.
[233] See *supra* note 203 at 573 ("Fraternity is an expression of brotherhood and sisterhood – of shared interests and beliefs").

"fraternity is many-splendoured….[it can be] a catalyst and source of inspiration for making our society more human."[234]

[234] *Supra* note 203 at 589.

5 CONCLUSION

Following the controversial "sharia debate" in Ontario in 2004, the government of Ontario implemented a number of legislative amendments to the *Arbitration Act* and *Family Law Act*. These legislative amendments set out certain limits on faith-based arbitration, but fell short of imposing a full ban on faith-based arbitration.

Even under the new regime, faith-based arbitration continues to be permitted in Ontario; however, courts can no longer be used to enforce the arbitral awards rendered in connection with such processes. In other words, parties are not compelled by legal enforcement to follow the decisions set down by arbitrators using exclusively religious principles. However, so long as the laws and principles used are exclusively Canadian, then there is no bar to the use of supplementary religious principles provided they do not conflict. The amendments also mandate that arbitrators receive state training to reflect a common knowledge base and provincial standard. Above all, the courts retain paramount jurisdiction to consider, in all cases, the "best interests of the child."

These legislative changes were promulgated to deal with two problematic issues associated with the use of faith-based arbitration in the family law domain: the risk of harm through the coercion of vulnerable parties into faith-based arbitration, and the lack of fraternity and social cohesion when individuals live under different laws depending on their religion of birth.

To address the first issue, one must take cognizance of society's evolving understanding of what constitutes "justice" at any given moment in history, and also bear in mind how conservative readings of monolithic religions have historically viewed and treated women. What such entrenched gender imbalance, allegedly stemming from a divine origin, has meant in child custody issues, support payments, and matters of inheritance is of serious and grave

concern. The critical issue of contention is that spouses and children may agree by coercion and compulsion to be governed by religious laws and principles that they themselves have not had the freedom and distance to adequately question. The state's tolerance of binding arbitration governed by *any* set of rules or principles that are not Canadian invites differential treatment and injustice.

While Ontario may have permitted binding faith-based arbitration for a number of years, the changing circumstances of society (i.e., higher divorce rates, higher immigration rates and globalization, and the growing awareness of the challenges faced by female members within certain communities as they begin to assert their rights) demand that society respond to militate against gender discrimination and inequality. Furthermore, the state should not become complicit in allowing obstacles to an individual's option to exit out their community, religion, or own previously-held beliefs.

With respect to the second issue, the increasing diversity of our nation state and the recent technological innovations permitting individuals to live in insular communities with much more ease than ever before (the internet allows individuals to keep connected to cultures and communities across the globe) pose a real challenge to the fostering of relationships and fraternity. As a consequence, individuals can remain aloof to the mainstream and lead lives that, more so than ever before, are focused exclusively within their own communities.

This thesis has demonstrated that fraternity is best promoted when individuals are subject to the same laws in the highly charged arena of family dispute resolution. In the long term, had the government of Ontario continued to allow judicial enforceability of family law arbitration, the legitimacy and neutrality of the Canadian judicial system would have been undermined in the eyes of the public.

Laws need constant re-evaluation and change so that individuals and communities can undergo their own continual re-evaluation and change. Individuals and communities should be unencumbered to seek out self-transformation and free to exit their former beliefs and identities at any time.

The Ontario government's prohibition on binding arbitration is not an aberrant form of paternalism, but instead a small step toward restoring faith-based arbitration to its roots: a process that is self-governed and invites change and evolution in the face of dissatisfaction and/or disagreement with an arbitral award.

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