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Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women

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Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women*

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Abstract

In Canada, much media attention has recently been focused on the formation of arbitration tribunals that would use Islamic law or Sharia to settle civil matters in Ontario. In fact, the idea of private parties voluntarily agreeing to arbitration using religious principles or a foreign legal system is not new. Ontario's Arbitration Act has allowed parties to resolve disputes outside the traditional court system for some time. This issue has been complicated by the fact that Canada has a commitment to upholding both a policy of multiculturalism and an international obligation towards women's rights. Although these values need not necessarily conflict, in this context, they have carried a tension that must be reconciled. This paper will examine the legal implications of faith-based arbitration tribunals in family law, with a particular emphasis on the impact that Sharia could have on Muslim women in Ontario.

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Introduction

In many parts of the world, religious groups have been organizing to implement policies that will influence the manner in which civil society is run. It has been argued that this use of religion for political gain threatens to undermine hard won entitlements to equality and basic human rights.¹ In Canada, a Western democratic country with a significant Muslim population, much media attention has recently focused on the issue of the formation of arbitration tribunals that would use Islamic law or Sharia² to settle civil matters in Ontario.³ This issue has been complicated by the fact that Canada has a commitment to upholding both a policy of multiculturalism and an international obligation towards women's rights. In particular, the *Canadian Charter of Rights and Freedoms*,⁴ an entrenched part of Canada's constitution, protects both the freedom of religion and equality rights of all residents from infringements by the state. Although these values need not necessarily conflict, in this context, they have carried a tension that must be reconciled.

Certain members of the Muslim community in Toronto belonging to the Islamic Institute of Civil Justice have proposed arbitration tribunals using Sharia law. In fact, the idea of private parties voluntarily agreeing to have their disputes resolved by an arbitrator using a foreign legal system is not new. Ontario's *Arbitration Act*⁵ has allowed parties to resolve disputes outside the traditional court system for some time. Other religious groups including several Jewish communities have created Jewish arbitration tribunals or *Beis Din* in order to resolve civil matters between individuals using the *Arbitration Act*. Some of these tribunals have been sitting in parts of Canada since 1982,⁶ setting a precedent for Muslim communities to do the same.⁷

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

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

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

⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].

⁵ *Arbitration Act*, S.O. 1991, c. 17 ("the Act").

⁶ Lynne Cohen, "Inside the Beis Din" *Canadian Lawyer* (May 2000) 27 at 27.

⁷ According to Imam Hamid Slimi, the Islamic Council of Imams-Canada have been involved in mediation and arbitration for more than ten years. They have dealt with a number of issues including Islamic divorce. Hamid Slimi, Letter to the Editor, *The Toronto Star* (1 June 2004) online: The Star <<http://www.thestar.com>>. Published by The Berkeley Electronic Press, 2004

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

Though the scope of arbitration tribunals can include a wide range of legal areas, the principal area of inquiry of this paper will be family law with a particular emphasis on the impact that Sharia could have on Muslim women⁸ in Ontario. The paper will consider the complex issue of what version of Sharia will be applied, whether women are at risk of coercion in agreeing to the arbitration process, and what if any judicial safeguards exist to protect them. The paper will also consider the broad issue of the increasing privatization of family law in Ontario. Though the interplay of multiculturalism and religious freedom are important aspects of this topic, the scope of this paper does not allow more than a brief examination of such issues.

Ontario's Arbitration Act

Arbitration is a form of alternative dispute resolution by which people are given a voluntary alternative to the increasingly lengthy and expensive cost of litigation under the traditional court system.⁹ Under arbitration, parties agree to have their dispute settled by an adjudicator agreed upon by both parties. Ontario's *Arbitration Act*, amended in 1991, sets out the rules to be used in resolving civil disputes. The parties are given much freedom to design their own processes because arbitration is considered a private system that is entered into by agreement.

In the Canadian family law context, mediation and arbitration are perhaps the most common alternatives to litigation. In mediation the parties design an agreement themselves with the assistance of a neutral mediator. This is considered advantageous because lawyers often cannot predict what a judge will do if disputed issues go to trial. A settlement, such as a separation agreement, gives the parties control over their own financial and property rights, can be filed with a court and then enforced as an order. It can also ensure that values different from those propagated by the state can serve to guide the interests of the parties. Mediation ensures privacy and may promote more constructive parenting relationships after divorce in cases where there has been no abuse

⁸ The author acknowledges the limitations of using the phrase "Muslim women" which tends to connote a singular group of women with similar interests and goals. Muslim women are in fact, made up of women from a vast diversity of races, countries of origin and beliefs. "Diversities are so pronounced that one has to ask whether the term 'the Muslim world' is at all meaningful if it refers to such an amorphous, divergent, shifting composition of individuals and societies who are not infrequently in conflict with one another." Fareeda Shaheed, "Asian Women in Muslim Societies: Perspectives & Struggle" (Keynote Address to the Asia-Pacific NGO Forum on B+10, July 2001, Bangkok) online: Women Living Under Muslim Law <<http://www.wluml.org/english/newsfulltxt.shtml?cmd%5B157%5D=x-157-59336%20&cmd%5B189%5D=x-189-59336>>.

⁹ Berend Hovius, *Family Law: Cases, Notes and Materials*, 5th ed, (Toronto: Carswell, 2000) at 37. 2

or oppression. Notably however, there has been much feminist critique of the perils of mediation generally and within the context of domestic violence.¹⁰ Mediation is regarded as a consensual process, from which a party is free to withdraw at any time.

Arbitration is different from mediation in that the parties agree to have a third person adjudicate their dispute for them in a similar manner that a judge would. Some perceived advantages to arbitration are that the process is considered private, is often less expensive than litigation, and an arbitral award can be filed with a court and enforced as a court order. Once an arbitration agreement is signed, the parties do not have the option of withdrawing from arbitration. Arbitration awards are final and binding in the province of Ontario unless set aside or appealed according to the Act. This can be particularly problematic where the parties sign an agreement to arbitrate at the date of marriage, but the actual arbitration does not take place until years later. In the meantime one of the parties may have changed her/his mind about wanting to submit a dispute to arbitration. In the context of arbitration using religious principles, this may pose problems for an individual whose religious beliefs change over the course of time.

The *Arbitration Act* allows parties to arbitrate most civil matters without express limits. Arbitrators however, may only impose such decisions on parties that the parties could bind themselves to directly. In other words, matters of a criminal nature that involve the state, or disputes involving third parties who have not agreed to arbitrate are not matters that can be arbitrated upon. Typical disputes that are resolved via arbitration are commercial, construction and rental disputes. Certain family law matters can also be submitted to arbitration, for example, spousal support or a division of matrimonial property upon the dissolution of a marriage or common law relationship.

The Role of Arbitrators

Ontario's *Arbitration Act* allows consenting parties to have their disputes settled by any mutually agreed upon person. The Act does not require arbitrators to have any special training and the parties are free to choose whomever they believe will be the most appropriate person to resolve their dispute.¹¹ Generally, the parties appoint arbitrators and they pay the arbitrator's fees.¹²

¹⁰ Goundry S. A. et al., *Family Mediation in Canada: Implications for Women's Equality* (Ottawa: Status of Women Canada, 1998) and R. Mandhane, *The Trend Towards Mandatory Mediation in Ontario: A Critical Feminist Legal Perspective* (Ottawa: Ontario Women's Justice Network, 1999). See also Georgina Taylor, Jan Barnsley & Penny Goldsmith, *Women and Children Last: Custody Disputes and the Family 'Justice' System*, (Vancouver: VCASAA, 1996) where it states at 29: "No amount of training on the part of a mediator can make up for the control an abuser has over a battered woman. It is not hard to understand that a woman who has been physically assaulted, demeaned and derided, threatened and isolated would find it impossible to be assertive sitting across the table from her abuser. If the process of mediation set up continued contact [between a woman and her abuser], which is almost inevitable when dealing with custody and access issues, the autonomy and safety that she sought in leaving the relationship is seriously jeopardized."

¹¹ An association of chartered arbitrators utilizing a code of ethics exists in Ontario, but there is no legal requirement to avail oneself of these services. See online: ADR Institute of Ontario

<www.adrontario.ca/carb.html>

¹² Published by The Berkeley Electronic Press, 2004

Hovius, *supra* note 10 at 37.

Though several media sources have noted that the *Canadian Charter of Rights and Freedoms* will protect against discriminatory provisions in arbitral agreements, it must be recalled that arbitration impacts only civil disputes. The *Charter* became part of the Constitution of Canada in 1982. It is legislation that protects citizens from the potentially discriminatory actions of the state by arming them with certain rights such as the right to equality and the right to freedom of religion. It does not apply to disputes between private individuals. Thus, the *Charter* does not bind arbitrators *per se*. Though s. 52(1) of the *Constitution Act, 1982* states that any law that is inconsistent with the *Charter* “is to the extent of the inconsistency of no force or effect”,¹³ it is difficult to predict what impact this will have on legislation that allows two parties with informed consent to agree to arbitration using any “rules of law.”¹⁴

Traditionally perceived as facets of private life protected from state intrusion, certain family law matters have recently been acknowledged as subjects of public scrutiny and influence. For example, in the matter of spousal support where government action is not implicated, the courts have utilized a process of interpretation by which *Charter* values have been imported into disputes between private individuals in order to recognize and redress historic disadvantages endured by women. An argument can be made that arbitration involving family law, no matter what legal framework is used to resolve the dispute, should import *Charter* values such as, equality in order to maintain coherence in the law.

The Arbitration Process

Parties to arbitration and sometimes their chosen arbitrator sign a contract called an arbitration agreement that stipulates the time frame, the scope of the issues to be adjudicated and other relevant matters that the parties wish to submit to arbitration. Some arbitration agreements are complex and comprehensive while others are simple. Subsection 32(1) of the *Arbitration Act* provides that parties to arbitration can choose the legal framework by which their disputes will be settled. Parties are free to adopt any principles to govern their arbitrations, so long as the results are not prohibited by law or purport to bind people or institutions that have not agreed to the process. In other words, the Act has opened the door to utilizing any code including religious principles for resolving civil matters in Ontario.

An arbitral agreement can be challenged on the basis that it was signed under duress, coercion, undue influence, misrepresentation or based on unconscionability. The success of a party’s attack or resistance to an arbitral award on the ground of non-consent will depend on previous judicial interpretation of consent, coercion, undue influence and/or duress and the specific facts of each case.

The Content of Arbitral Awards in the Family Law Context

There are some limits on the substance of arbitration agreements. Theoretically, discriminatory provisions or clauses that incorporate a gender bias cannot be included as part of an arbitral agreement as this would likely be considered unconscionable under the

¹³ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52(1).

¹⁴ <http://www.bepress.com/mw/jhr/vol1/iss1/art7>
Arbitration Act, *supra* note 6 at s. 32(1).

principles of contract law. As a practical matter, given the private nature of arbitration, a court will not be aware of unfair provisions unless a review mechanism is utilized.

It is certainly not illegal to contract out of certain statutory rights. Indeed the alternative dispute resolution process encourages parties to design their own bargains that are suited to their individual needs. There are however, certain base requirements. In the family law context, an agreement on property division and spousal support requires full disclosure of finances from each party and a clear understanding of the consequences of the agreement. A clear understanding of the nature and consequences of the agreement typically includes the ability of a party to read and access to independent legal advice. If these criteria are not present, a court can set the agreement aside. Moreover, the law does not enforce certain kinds of agreements, as contrary to public policy, such as that women remain chaste as a condition of separation.¹⁵

Because the *Arbitration Act* provides no express limits to the content of arbitrations, parties can have matters such as custody, access, child support and other matters including the moral and religious education of their children arbitrated upon. In fact, private agreements regarding custody and access are far more common than court mandated orders. Although the Islamic Institute of Civil Justice has made statements to the effect that custody/access or child support matters will not be arbitrable,¹⁶ there is in fact no legal impediment to doing so.

As child support falls under the joint jurisdiction of the provinces and the federal government, an arbitrator will be unwise to stray far from the Child Support Guidelines.¹⁷ The Ontario Superior Court of Justice has noted that though the *Arbitration Act* governs all types of civil disputes, its clauses are not framed particularly for family law and “still less are they drawn for custody and access matters.”¹⁸ Significantly, in *Duguay v. Thompson-Duguay* and *Hercus v. Hercus*, the Court explicitly held that it retains its inherent *parens patriae*¹⁹ jurisdiction to intervene in arbitral awards where necessary in the “best interests of the children.”²⁰

Court Intervention in Arbitral Agreements and Awards

There is no guarantee that arbitration will eliminate time-consuming and expensive litigation as the *Arbitration Act* provides a procedure by which a party can appeal and/or

¹⁵ *Family Law Act*, R.S.O. 1990, c. F.3, s. 56(2) [FLA].

¹⁶ Mr. Syed Mumtaz Ali has been quoted as saying that Islamic family law would definitely not apply in child custody cases: “We cannot use that aspect because Canadian law is very sensitive to the interests of the child and the courts must decide custody.” See Marina Jiminez “Islamic Law in Civil Disputes Raises Questions” (11 December 2003) online: Workopolis.com <<http://www.workopolis.com/servlet/Content/qprinter/20031211/SHARIA11>>.

¹⁷ See s. 15.1(3) of the *Divorce Act*, R.S., 1985, c. 3 and s. 33(11) and s. 56 (1.1) of FLA, *supra* note 17.

¹⁸ *Duguay v. Thompson-Duguay* [2000] O.J. No. 1541 Q.L. at para. 31. See also *Hercus v. Hercus*, [2001] O.J. No 534 Q.L. [*Hercus*] at para. 76.

¹⁹ The courts’ *parens patriae* jurisdiction refers traditionally to the role of the state as sovereign and guardian of persons under legal disability such as minors or the mentally unwell. *Black’s Law Dictionary*, 6th ed., s.v. “*parens patriae*”.

²⁰ *Ibid.* See also *Children’s Law Reform Act*, R.S.O. 1990, c. C.12 at s. 69 and FLA, *supra* note 17, at s. 56(1). Published by The Berkeley Electronic Press, 2004

judicially review an arbitral award under certain circumstances. Arbitrations and the awards that result from them are, by their nature, private. Particular arbitral tribunals may, but are not required to, develop their own rules with respect to record keeping and/or transcripts. For some participants this privacy is considered one of the attractive features of the arbitration process, but for others such as women, the emotional or financial resources required to pursue a matter in court could result in isolation and the privatization of oppression. As the Ministry of the Attorney General points out in a letter to the Canadian Council of Muslim Women:

Even plainly illegal activities may occur unless state authorities find out about them in some way. Similarly, people may suffer from unjust arbitral awards, unless they bring them to the attention of the courts.²¹

As noted above, there are two mechanisms of judicial oversight of arbitration agreements and awards; appeal and judicial review. For parties concerned about unjust arbitral awards, the appeal mechanism is the strongest safeguard against awards that are contrary to Canadian law. If a party to arbitration under the Islamic Institute of Civil Justice appeals a pure question of law to a court, it is most likely that a court would evaluate the arbitral award based on Canadian law and not, any version of the Sharia opted into by the parties. The underlying rationale for this is the principle of universality which requires appellate courts to ensure that the same legal rules are applied in similar situations.²² Given that the purpose of arbitration is typically to avoid the traditional court system, it is likely that parties will contract out of their appeal rights in arbitration agreements, resulting in very limited judicial oversight through the mechanism of judicial review.

Judicial review, unlike the appeal process, tends to be rooted in matters of a procedural nature.²³ The standard of review used by the courts in judicial review of an arbitral award is a complex test that incorporates a variety of different factors.²⁴ Where a matter is judicially reviewed, courts will usually respect and enforce the terms of an award unless the decision of the arbitrator is unreasonable or patently unreasonable. As noted in *Duguay* and *Hercus*, “[t]he legislature has given the courts clear instructions to exercise the highest deference to arbitration awards and arbitration disputes generally.”²⁵ In other words, the courts as a general rule will be unlikely to second guess the decisions of arbitrators.

It should be noted that under principles of administrative law, one important factor that courts must consider in determining the level of deference owed to an arbitrator’s

²¹ Letter from Ministry of Attorney General, Policy Branch (April 26, 2004) to Ms. Alia Hogben, Executive Director, Canadian Council of Muslim Women at 5.

²² *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 9 and generally at paras. 8-37.

²³ There is some case law to suggest that courts will interpret certain sections of the Act to include certain guarantees as to the substance of the arbitral award. In *Hercus*, Templeton J. held that there was nothing in the Arbitration Act that limits the concept of “fairness” in s. 19(1) to mere procedural fairness. Rather, she felt that s. 19(2) of the Act more specifically addresses the concept of procedural fairness, *Hercus*, *supra* note 20 at paras. 96-97. This is an encouraging finding that suggests courts may be more willing in the family law context to interpret arbitral awards substantively based on fairness.

²⁴ See *Pushpanathan v. Canada* [1998] 1 S.C.R. 982.

²⁵ *Hercus*, *supra* note 20 at para. 96 and *Duguay*, *supra* note 20 at para. 31.

decision is the specialized expertise that a tribunal may have, as compared to the court.²⁶ Where an arbitrator can claim highly specialized expertise for example in a situation where two parties have agreed to have their dispute settled according to certain religious principles, courts will militate in favor of a high degree of deference,²⁷ that is, they will favor upholding the arbitrator's decision.²⁸

Judicial Interpretation of Private Agreements

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

...[I]n a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess the arrangements on which they reasonably expected to rely. Individuals may choose to structure their affairs in a number of different ways, and it is their prerogative to do so.²⁹

In *Miglin v. Miglin*, a case involving the interpretation of a separation agreement, the Supreme Court of Canada held that trial judges must balance Parliament's objective of equitable sharing of the consequences of marriage and its breakdown under the *Divorce Act*³⁰ with the parties' freedom to arrange their affairs as they see fit.

Accordingly, a court should be loath to interfere with a pre-existing agreement unless it is convinced that the agreement does not comply substantially with the overall objectives of the *Divorce Act*.³¹

This decision suggests that there is some notion of a core public order that private parties are obliged to respect in family law. Indeed the progression of family law cases in Canada since *Murdoch v. Murdoch*³² indicates that family law matters have become a matter of public law and policy.³³

²⁶ There are however, three other components to the functional and pragmatic approach to judicial review which may vary the degree of deference. The other factors to be considered by a court in judicial review are (1) the existence of any privative clauses; (2) the nature of the problem, that is, whether it is a question of law, fact or mixed law and fact; and (3) the purpose of the act as a whole and the provision in particular. See *Pushpanathan*, *supra* note 26 at paras. 29-38. See also *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92* [2004] S.C.J. No. 2 [Q.L.] and *Alberta Union of Provincial Employees v. Lethbridge Community College* [2004] S.C.J. No. 24 [Q.L.].

²⁷ A high degree of deference will have a propensity toward a standard of review at the patent unreasonableness end of the spectrum. See generally *Pushpanathan*, *supra* note 26 at paras. 32-35.

²⁸ *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at para. 66.

²⁹ *Hartshorne v. Hartshorne* 2004 S.C.C. 22 at para. 36 [Q.L.] [*Hartshorne*].

³⁰ Section 15.2(6) of the *Divorce Act*, *supra* note 19 outlines the objectives of spousal support orders.

³¹ *Miglin v. Miglin* [2003] 1 S.C.R. 303 at para. 46 [*Miglin*].

³² *Murdoch v. Murdoch* [1975] 1 S.C.R. 423. This notorious case in family law jurisprudence illustrates the early unwillingness of the courts to use equitable principles to achieve justice between spouses upon marriage breakdown.

³³ See generally *Moge v. Moge*, *supra* note 16. Alison Harvison Young notes that "the discourse and methodology of the *Charter* has had a profound impact on the nature and style of judicial decision-making

While the Supreme Court's interpretation in *Miglin* provides some protection against grossly unfair agreements, it has noted recently in *Hartshorne v. Hartshorne* that deference will be given to agreements that deviate from the statutory matrimonial property regime particularly where negotiated with independent legal advice regardless of whether this advice was heeded.³⁴ In this case, a couple, both of whom were lawyers, entered into a marriage agreement on the day of their wedding. Both parties had independent legal advice. The wife's lawyer wrote an opinion letter to her indicating that the draft marriage agreement was "grossly unfair" and that she would be entitled to much more under the statutory regime.³⁵ For a variety of reasons, she signed the agreement anyway. Though the minority in this decision notes that "simply 'signing' the agreement...does not cure its substantive unfairness",³⁶ the majority states, "[i]f the respondent truly believed that the Agreement was unacceptable at that time, she should not have signed it."³⁷

Hartshorne, a case originating in British Columbia, is particularly worrisome because the majority of the Supreme Court did not take advantage of the relatively low threshold for judicial intervention in the variation of domestic contracts that is available to judges. Under the B.C. *Family Relations Act*, a court may reapportion assets upon a finding that to divide the property as provided for in a domestic contract would be "unfair".³⁸ By contrast in Ontario, the threshold for judicial oversight of domestic contracts is much higher. Judges are only permitted to set aside a contract in specified circumstances such as, where a party fails to disclose significant assets or liabilities, where a party does not understand the nature or consequences of the contract, or otherwise, in accordance with the law of contract.³⁹ The fairly conservative judicial interpretation of "fairness" in the B.C. context suggests that judges will likely interpret a *Hartshorne*-type situation in Ontario similarly if not with less interventionism.

The Interpretation of Voluntariness and Free Will

Also of note in *Hartshorne* are certain facts surrounding the voluntariness of entering into a domestic contract. As noted earlier, the husband and wife entered into a marriage agreement on the day of their wedding and with independent legal advice. Although the testimony of the husband and wife varies, at the time of the signing of the agreement, it was agreed that the wife was upset and reluctant to sign the agreement.⁴⁰ The trial judge noted that in the defendant's mind:

which, not surprisingly, have affected all areas of the law whether it is directly applicable or not." Young, *supra* note 16 at 760.

³⁴ *Hartshorne*, *supra* note 31 at para. 67.

³⁵ *Ibid.* at para. 60.

³⁶ *Ibid.* at para. 89 *per* Deschamps J.

³⁷ *Ibid.* at para. 65 *per* Bastarache J.

³⁸ *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 65.

³⁹ Section 56 of the FLA, *supra* note 17 delineates when a judge may set aside a domestic contract in Ontario.

⁴⁰ <http://www.bepress.com/mw/jhr/vol1/iss1/art7>
Hartshorne v. Hartshorne [1999] B.C. J. No. 2861 at para. 40 [Q.L.] [*Hartshorne*, B.C.S.C.].

[S]he felt she had no choice but to sign an agreement. The wedding date was set, she had a 20 month old child, she was planning another child (and in fact was pregnant but did not know she was pregnant at the time), and she had committed to a life with the plaintiff. It was her evidence that the plaintiff was dominating and controlling, and that she knew that if she did not sign the proposed agreement, it would be a complete bar to a good relationship...Sometime after the wedding, but before the parties and their guests went out for dinner, she recalls that she was in the kitchen with one of her friends, Leslie Walton. The plaintiff was after her to sign the marriage agreement before they went out for dinner, and she ended up signing the agreement while Leslie Walton was present. On her evidence, she was crying and very upset...Ms. Walton, in her evidence...recalls the plaintiff and the defendant coming in, and that they were discussing something. The defendant was clearly upset and was crying. The plaintiff gave her a pen, and the defendant looked up at Ms. Walton and said words to the effect that “You’re my witness, I am signing this under duress”. Ms. Walton never saw the document, but was simply aware that the defendant was signing something.⁴¹

The trial judge held that “notwithstanding the defendant’s emotional upset at the time” the evidence fell short of establishing a basis for finding that the agreement was unconscionable, or that it was entered into under duress, coercion or undue influence.⁴² The Court of Appeal and the Supreme Court of Canada upheld the trial judge’s finding on this matter.

As is obvious from the above decision, Canadian courts have set a high threshold for the test of duress or coercion. Though the common law recognizes a defence of duress, its scope has remained narrowly defined with relief chiefly limited to cases of physical threat.⁴³ There is a general protection afforded in the law where undue advantage is taken by virtue of inequality of bargaining power. Inequality in bargaining power may result from any of various aspects of the parties’ circumstances such as “abuse or intimidation or...learning or other disability...anxiety or stress or a nervous breakdown or indulgence in drugs or alcohol.”⁴⁴ Other factors held to indicate the necessary inequality include old age, emotional distress, alcoholism and lack of business experience.⁴⁵ It appears that any situation that results in a weaker party’s being “overmatched and overreached” will qualify for relief if the stronger party secures immoderate gain.⁴⁶

There is a well established line of cases providing relief from agreements on the basis of undue influence, which describes an advantage accruing from “a longstanding

⁴¹ *Ibid.* at paras. 43-45.

⁴² *Ibid.* at para. 46.

⁴³ S.M. Waddams, *The Law of Contracts*, 3rd ed., (Toronto: Canada Law Books, 1993) at para. 502.

⁴⁴ *Rosen v. Rosen* (1994), 18 O.R. (3d) 641 at 645-646 (C.A.), application for leave to appeal dismissed (16 February 1995), S.C.C. Bulletin, 1995, p. 340.

⁴⁵ Waddams, *supra* note 45 at para. 511.

⁴⁶ *Ibid.* See also *Dyck v. Manitoba Snowmobile Association* (1985), 18 D.L.R. (4th) 635 at 637 (S.C.C.).

relationship of control and dominance.”⁴⁷ Certain relationships such as solicitor-client and doctor-patient, give rise to a presumption of undue influence. The relationship of husband-wife is not included in that class of special relationships. However, where an inequality of bargaining power can be established, for example if the husband has subjected the wife to abuse, a court will set aside an agreement based on undue influence and unconscionability.⁴⁸

Syed Mumtaz Ali, current head of the Islamic Institute of Civil Justice, explained the law of minorities as Sharia sets it down. Muslims in non-Muslim countries are expected to follow the Sharia to the extent that it is practical.⁴⁹ According to Ali, until recent changes to the *Arbitration Act*, Canadian Muslims have been excused from applying the Sharia in their legal disputes. Now that arbitration agreements are considered final and binding, “the concession given by Shariah is no longer available to us because the impracticality has been removed. In settling civil disputes, there is no choice indeed but to have an arbitration board [emphasis added].”⁵⁰ It is certainly not implausible to imagine a situation where a devout Muslim woman would be susceptible to pressure to consent to arbitration by Sharia because of a pronouncement such as Syed Mumtaz Ali’s.

Indeed very similarly, Rabbi Reuven Tradburks, secretary to the *Beis Din*⁵¹ of Toronto’s *Va’ad HaRabbonim* notes: “In this city, we actually push people a little to come [to arbitration by Jewish law] because using the *Beis Din* is a *mitzvah*, a commandment from God, an obligation.”⁵² According to Homa Arjomand, head of the new ‘International Campaign Against Shari’a Court in Canada’, most at risk are young immigrants from the Middle East, North Africa or certain South Asian countries, where Sharia law is practised “and has been used to subjugate them their entire lives. They know nothing different.”⁵³ Whether religious or moral coercion of this type by an Imam, spouse or others will be

⁴⁷ See J. McLeod, Annotation to *Sartor v. Sartor* (1993), 45 R.F.L. (3d) 250 at 251.

⁴⁸ See for example, *S.M.B. v. K.R.B.* [1997] O.J. No. 3199 [Q.L.]. The court noted at para. 44 that the wife would not have been able to benefit from independent legal counsel at the time given the extent to which she was a victim of marital abuse.

⁴⁹ Interestingly, Imam Feisal Abdul Rauf of New York’s Masjid al-Farah mosque, argues that the Declaration of Independence and the American Constitution “are quite compliant with Islamic law, compliant with Sharia.” He states: “I can argue from very firm grounds that what we have here in the United States scores very high in the Islamic scheme of things, which is why Muslims are comfortable living in the West. In fact, they prefer to live under Western systems of governance because what they have in the Muslim world is not really Islamic.” Melvin McLeod “What’s Right With Islam: A Conversation with Imam Feisal Abudul Rauf” *Shambhala Sun* (July 2004) 55 at 57.

⁵⁰ Judy Van Rhijn “First Steps Taken Toward Sharia Law in Canada” *Law Times*, (25 November 2003) online: Vancouver Independent Media Center <<http://vancouver.indymedia.org/print.php?id=87502>>. Syed Mumtaz Ali was also quoted as saying “to be a good Muslim’ all Muslims must use these *sharia* courts.” Margaret Wente “Life Under Sharia, in Canada?” *The Toronto Star* (29 May 2004), online: The Globe and Mail <www.theglobeandmail.com>.

⁵¹ The *Beis Din* are religious tribunals that resolve civil disputes using Jewish law pursuant to provincial arbitration acts. There are *Beis Din* operating in Toronto, Montreal and Vancouver. Arbitrators at the *Beis Din* are typically Orthodox rabbis who are recognized experts in Jewish law. See Cohen, *supra* note 7 at 30.

⁵² *Ibid.* at 30.

⁵³ Lynda Hurst, “Ontario Sharia Tribunals Assailed: Women Fighting Use of Islamic Law, but Backers say Rights Protected” *The Toronto Star* (1 June 2004) online: The Star <www.thestar.com>.

deemed to affect the equality of bargaining power of the parties will depend on the facts of each case.

Judicial Interpretation of Islamic Agreements

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

In *Kaddoura v. Hammoud*,⁵⁴ a decision of the Ontario Court of Justice, the court refused to require payment of the Mahr,⁵⁵ a Muslim marriage custom, because the contract had a religious purpose and accordingly, was not an obligation that should be adjudicated in the civil courts. In this case, an amount of \$30,000 was due to the wife under an Islamic marriage contract. The contract conformed to s. 52(1) of Ontario's *Family Law Act* in that the provision was not vague nor was the agreement signed under circumstances suggestive of inequality or duress. Despite the obligatory nature of the Mahr under Islamic principles however, the court held that the agreement was unenforceable by Canadian courts.

Pascale Fournier has argued that judges frequently perceive Muslim cultural differences as too drastic to fit within existing legal categories.⁵⁶ In *Kaddoura*, the judge's reasons reveal that it was the religious dimension of the Mahr that rendered the agreement unenforceable. The judge notes:

While not, perhaps, an ideal comparison, I cannot help but think that the obligation of the Mahr is as unsuitable for adjudication in the civil courts as is an obligation in a Christian religious marriage, such as to love, honour and cherish, or to remain faithful, or to maintain the marriage in sickness or other adversity so long as both parties live, or to raise children according to specified religious doctrine. Many such promises go well beyond the basic legal commitment to marriage required by our civil law, and are essentially matters of chosen religion and morality. They are derived from and are dependent upon doctrine and faith. They bind the conscience as a matter of religious principle but not necessarily as a matter of enforceable civil law.⁵⁷

As Fournier notes, in erroneously importing a Christian, majoritarian comparison with the Islamic institution of the Mahr, the judge overlooks that whereas Christian vows constitute moral obligations that are indefinite insofar as they can only bind the

⁵⁴ [1998] O.J. No. 5054 [Q.L.] [*Kaddoura*].

⁵⁵ The Mahr is a gift from a husband to the wife. It is not a price paid for an Islamic marriage, but rather depending on the school of Muslim law in question, an effect of the contract or a condition upon which the validity of the marriage depends. See generally, Pascale Fournier "The Erasure of Islamic Difference in Canadian and American Family Law Adjudication" (2001) 10 J. Law & Policy 51 at 59-60. See also *Kaddoura*, *supra* note 56 at para. 13.

⁵⁶ *Ibid.* at 53.

⁵⁷ Published by The Berkeley Electronic Press, 2004
Kaddoura, *supra* note 56 at para. 25.

conscience, the Mahr is a clear financial obligation.⁵⁸ “The court’s message is that a valid agreement between two Muslim parties is unenforceable, not for vagueness like the Christian examples deemed analogous, but because of the agreement’s religious purpose.”⁵⁹

The “apparent cultural anxiety”⁶⁰ in Ontario associated with entering the “religious thicket”, a place that the courts cannot safely and should not go⁶¹ is contrasted with cases of near identical facts in British Columbia where the courts’ interpretation of the enforceability of the Mahr has been very different. In *N.M.M. v. N.S.M.*,⁶² a decision of the British Columbia Supreme Court, it was held that the Mahr was enforceable as a valid marriage agreement per s. 48 of the *Family Relations Act*.⁶³ The court’s reasons were a reiteration of two previous cases in B.C., *Nathoo v. Nathoo*⁶⁴ and *Amlani v. Hirani*,⁶⁵ wherein the enforceability of the Mahr was also recognized. Dorgan J. in his concluding comments in *Nathoo* held:

Our law continues to evolve in a manner which acknowledges cultural diversity. Attempts are made to be respectful of traditions which define various groups who live in a multi-cultural community. Nothing in the evidence before me satisfies me that it would be unfair to uphold provisions of an agreement entered into by these parties in contemplation of their marriage, which agreement specifically provides that it does not oust the provisions of the applicable law.⁶⁶

Kaddoura suggests that Ontario’s judges will be reluctant to intervene in internal matters involving religious principles⁶⁷ whereas *N.M.M.*, *Amlani* and *Nathoo* indicate that B.C.’s judges may give more deference to religious principles where an agreement is voluntarily entered into by consenting parties. An appellate court’s interpretation of such matters is required to clarify the legal position in Canada.

A notable distinction between the Mahr cases and arbitral awards that use Sharia is that the former may be deemed an unrecognizable category of Canadian family law while the latter is not necessarily. The Mahr can be relegated to a place of pure religion that need not be decided by “our judicial system.” That is, the court may decide the Mahr is a

⁵⁸ Pascale Fournier, *supra* note 57 at 61.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* at 61.

⁶¹ *Kaddoura*, *supra* note 56 at para. 28.

⁶² [2004] B.C.J. No. 642 (S.C.) [Q.L.] [*N.M.M.*].

⁶³ *Family Relations Act*, *supra* note 40 at s. 48.

⁶⁴ [1996] B.C.J. No. 2720 (S.C.) [Q.L.] at para. 23 [*Nathoo*].

⁶⁵ [2000] B.C.J. No. 2357 (S.C.) [Q.L.] [*Amlani*].

⁶⁶ *Nathoo*, *supra* note 66 at para. 25.

⁶⁷ See also *Levitts Kosher Foods Inc. v. Levin*, (1999), 45 O.R. (3d) 147 (Sup. Ct. J.) [*Levitts Kosher Foods*]. The case involved a plaintiff company, a Montreal seller of kosher meats, which was denied, for some of its products, the kosher certification symbol COR by Toronto’s *Va’ad Hakashruth*. Justice Mary Lou Benotto held that the case should properly go before a *Beis Din* because the plaintiff had chosen to operate its business in a religious context. The judge’s decision confirmed the position in *Kaddoura*, *supra* note 56 that it is not appropriate for civil courts to decide questions of religious doctrine.

dispute involving Islamic law in which they have no expertise and thus will not intervene. Alternatively, the court may find, as in B.C. that the Mahr issue ought to be considered a matter of family or contract law, an area in which the courts have comparable expertise to that of any arbitrator and is therefore justiciable. Matters that may be considered in arbitration such as division of family property, spousal support and child support which are recognizable under a Western legal framework are not as easily relegated to the unjusticiable even where the resolution of such issues may be less recognizable, that is, via Sharia law.

Given the conflicting case law in Canada on the Mahr and the lack of specific case law on arbitrations dealing with Islamic religious principles, it is difficult to predict with certainty how much deference, if any, courts will give to religious arbitral awards⁶⁸ that parties voluntarily agree to and whether courts will tend to prefer outcomes that reflect the statutory and judicial standards of family law developed in Canada.⁶⁹

Legal Representation

The Supreme Court of Canada has noted that independent legal advice at the time of negotiation is an important means of ensuring an informed decision to enter an agreement.⁷⁰ Obtaining legal advice will be essential for parties to understand what they are entitled to under Canadian law versus the legal framework they choose under the *Arbitration Act*.

At certain *Beis Din*, lawyers have the indispensable role of reviewing any contracts before their clients sign them, unless the client waives that right.⁷¹ Typically, lawyers are not welcome at the *Beis Din*, but in the event that they are present their role is not as advocate for their clients.⁷² Rather, they are to assist rabbis in marshalling the facts in order to give them an understanding of secular law, and to assist them in seeing how secular law can affect any decisions of the *Beis Din*.⁷³

⁶⁸ It was held in *Brewer v. Incorporated Synod of the Diocese of Ottawa of the Anglican Church of Canada* [1996] O.J. No. 634 (Ont. Gen. Div.) [Q.L.] that in adjudicating Church disputes, the court would look not to the merits of the decision, but rather at adherence to the rules, procedural fairness, the absence of *mala fides* and natural justice. The Supreme Court of Canada held in *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 at para. 6 that the court will hesitate to exercise jurisdiction over religious groups, but will do so where a property or civil right turns on the question of membership. The Hutterite colony in question failed to adhere to principles of natural justice in expelling the defendants, thus the court dismissed the colony's action to seek an order requiring the defendants to vacate the colony's land permanently.

⁶⁹ In *Weidberg v. Weidberg*, the Ontario Court of Justice upheld a judgment obtained by a divorcing couple who had taken their dispute to a Jewish rabbinical court for resolution. The court noted that there was "no evidence before [it] that the judgment of the Rabbinical Court was improvident." *Weidberg v. Weidberg* [1991] O.J. No. 3446 [Q.L.] at para. 12.

⁷⁰ *Hartshorne*, *supra* note 31 at para. 60. Recall however, in *S.M.B. v. K.R.B.*, *supra* note 65 where the judge held that the battered wife would not have been able to benefit from independent legal advice.

⁷¹ Cohen, *supra* note 7 at 32.

⁷² *Ibid.* at 32.

⁷³ *Ibid.* Published by The Berkeley Electronic Press, 2004

Canadian courts have stressed the importance of independent legal advice in order for parties to be of equivalent bargaining power.⁷⁴ Ironically, it may be that a failure to get independent legal advice may be the best protection a vulnerable party will have in getting a court to review and overturn an unfair arbitration agreement. Where, however, parties sign an agreement to abide by a ruling and consent is found to be voluntary, the courts will likely impute knowledge of the system of laws one is submitting to. It is unlikely an argument that one didn't realize or understand the impact of a particular set of rules would be successful particularly, where an attempt to contest the ruling is based on a dislike of the outcome.

Arbitrations can be informal processes where disputants may feel comfortable representing themselves or having a non-legal advocate or a para-legal represent them. Arbitrations, however, can also duplicate the formality and adversarial atmosphere of a court wherein legal representation may be more appropriate.⁷⁵ Parties who choose the arbitration route are not eligible to receive any legal representation through Legal Aid Ontario.⁷⁶ Moreover, it is unlikely that a lawyer would agree to represent a client at a tribunal that employs religious law because currently, the standard liability insurance provided by the Lawyers' Professional Indemnity Company, the insurance carrier for the Law Society of Upper Canada (members of the Ontario bar), does not cover lawyers acting in any area except Ontario/federal Canadian law.⁷⁷ When discussing arbitration before the *Beis Din*, a Toronto lawyer notes:

When it comes to Jewish law, Canadian lawyers really don't know anything. But even those who do know some *halacha*...[it] would be negligent to go before the *Beis Din* and argue Jewish law, since they are not covered for it in their insurance policy. If they made a mistake with financial repercussions, they could be personally liable.⁷⁸

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

Multiple Interpretations of Sharia Law

⁷⁴ See generally, *Hartshorne*, *supra* note 31, *Bertolo v. Bank of Montreal* 57 O.R. (2d) 577 (C.A.) [Q.L.] and *Barclays Bank v. O'Brien* [1994] 1 A.C. 180 (H.L.).

⁷⁵ Hovius, *supra* note 10 at 37.

⁷⁶ Interview of Natahlie Champagne, Area Director for Legal Aid Ontario by Patricia Harewood (12 August 2004). See also <http://www.legalaid.on.ca>.

⁷⁷ Conversation with corporate counsel at the Lawyers' Professional Indemnity Company (LPIC), June 16, 2004, 1-800-410-1013.

⁷⁸ <http://www.bepress.com/mwjhr/vol1/iss1/art7>
John Syrtash in Cohen, *supra* note 7 at 32.

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

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

The rules, obligations, injunctions and prohibitions laid down by or derived from the Qur'an and the Sunnah produce a complete picture of the Muslim community, from which no part can be removed without the rest being damaged.⁸⁰

Sharia law does not translate appropriately or fairly when utilized in a patchwork fashion. Indeed Syed Soharwardy, a founding member of the Islamic Institute of Civil Justice, has written: "Sharia cannot be customized for specific countries. These universal, divine laws are for all people of all countries for all times."⁸¹

Yet, by virtue of living in Canada, Sharia can only be applied in a limited way to certain civil matters. Syed Mumtaz Ali's contradictory claim to both his own comments and Soharwardy's that a "Canadianized sharia" will be utilized should be received with concern. Ali notes: "It will be a watered-down sharia, not 100 per cent sharia. Only those provisions that agree with Canadian laws will be used."⁸² If this is the case, some Canadian Muslims may feel insecure subjecting themselves to distortions of Islamic principles where such principles are understood as immutable. On the other hand, the fact that Sharia is subject to interpretation may be an asset in addressing women's concerns.

Reservations to CEDAW: Example of the Diverse Application of Sharia Internationally⁸³

The application of Sharia internationally reveals that Islamic countries are not homogenous and have a great deal of diversity in culture and even faith. Exploring the

⁷⁹ The author, not being a religious expert, has made a deliberate choice not to review specific principles of Sharia law.

⁸⁰ Syed Mumtaz Ali, online: The Canadian Society of Muslims <<http://muslim-canada.org>>. See also Elka Enola, "Shari'a: A Threat to Canadian Society" online: National Union <www.nupage.ca>.

⁸¹ Hurst, *supra* note 55.

⁸² Hurst, *ibid*. The Canadian Council on American-Islamic Relations (CAIR-CAN) states that because Sharia refers to a religious code covering all aspects of a Muslim's life, "it is inappropriate and misleading to use the word 'shariah' to describe an arbitration tribunal that will use Islamic legal principles to resolve a very specific and limited set of civil disputes...under Ontario's *Arbitration Act*." CAIR-CAN instead proposes that the tribunal will be engaging in a form of Muslim dispute resolution. "Review of Ontario's Arbitration Process and *Arbitration Act*: Written Submissions to Marion Boyd" online: CAIR-CAN <www.caircan.ca/downloads/sst-10082004.pdf> at 3-4.

⁸³ This section of this paper is borrowed from another paper written by Natasha Bakht. N. Bakht, "Reconciling International Human Rights Standards with the Shari'a: Reservations as a Mechanism for Incrementally Fulfilling International Obligations" (2001) [unpublished].

tenets and historical foundations of “cultural Islam”⁸⁴ leads one to the understanding that much discretion lies in the interpretation of Islamic law and its correlation to international human rights standards. Perhaps the most telling example of this can be found in the reservations made by Muslim countries in the name of Islam to the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW).⁸⁵ The Convention is an international legal instrument or treaty that requires respect for and observance of the human rights of women. It was adopted in 1979 by the United Nations General Assembly and came into force in September of 1981. Countries that ratify CEDAW have the option of invoking reservations to certain provisions of the treaty. Reservations serve to exclude or modify the legal effect of the reserved provision(s) in their application to that country.⁸⁶ For example, a country’s reservation might read:

The Government of the Republic of X will comply with the provisions of the Convention, except those which the Government may consider contradictory to the principles of the Islamic Sharia, upon which the laws and traditions of X are founded.

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

The most reserved articles relate to rights of women in the area of family law, which has always been jealously guarded by Muslim countries as being regulated by Islamic law, whereas other fields of life including the running of governments and financial institutions are not so guarded against ‘infiltration’ of ‘secular’ laws.⁸⁷

Notably however, perceptions of what constitute Islamic norms and what falls outside their ambit vary extensively, particularly with respect to women’s rights. Wide ranges of factors including political, socio-economic as well as religious considerations motivate reservations entered by Muslim countries. However, not every Muslim country has entered a reservation in the name of Islam.⁸⁸ In fact, a group of Central Asian Republics and some other Muslim countries have ratified the CEDAW without any reservations whatsoever, providing further evidence for the disparate “Islamic” positions adopted by varying jurisdictions.⁸⁹ “The situation is further complicated where no uniform position

⁸⁴ S. S. Ali, *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?*, (London: Kluwer Law International, 1999) at 248. Faisal Kutty has stated, “The status quo in Islamic law, characterized far too often with abuse of women and minorities, is the product of rigid interpretations shaped by tribal and cultural norms. The pure Islamic teachings of equality, justice and freedom must be brought to the fore again by using interpretations which are consistent with the spirit of Islam.” Faisal Kutty, “Canada’s Islamic Dispute Resolution Initiative Faces Strong Opposition” online: <http://www.wrea.com/archives/May_2004/045070.html>.

⁸⁵ *Convention for the Elimination of Discrimination against Women*, 3 September 1981, (1979), 1249 U.N.T.S. 13, 1982 Can. T. S., No. 31.

⁸⁶ *Vienna Convention on the Law of Treaties*. (1969) 1155 U.N.T.S. 331, in force 1980, at article 2(d).

⁸⁷ R. J. Cook, “Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women” (1990) 30 Va. J. Int’l L. 643 at 252.

⁸⁸ *Ibid.* at 249.

⁸⁹ *Ibid.* at 264. <http://www.bepress.com/mwjhr/vol1/iss1/art7>

vis-à-vis Islamic law is adopted by Muslim States since each jurisdiction presents its own specific blend of an ‘operative’ and ‘cultural’ Islam, distinct from other jurisdictions.”⁹⁰

The reason for the lack of consistency in invoking Sharia is due to the absence of a unified interpretation of religious law.⁹¹ Increasingly, Muslim feminists and Islamic reformers are asserting that the Qur’an and the example of the Prophet provide much support for the idea of expanded rights for women.⁹² A growing movement of Islamic feminists is contesting the model of gender rights and duties found in traditional Islamic jurisprudence and discourse and promoting instead interpretations and understandings of Islamic law and justice rooted in notions of gender equality.⁹³ Contemporary Muslims such as Abdullahi An-Na’im and Fatima Mernissi have reexamined the sources and concluded that Islam calls for equal rights for men and women. In contrast, opponents of feminism turn to the juristic tradition and the associated cultural norms, which reflect the values of patriarchal societies. The differences in approaches to understanding Islam have been compounded by the absence of any generally recognized central authority for resolving disputed points of Sharia doctrine.

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

As it stands today, anyone can get away with making rulings so long as he has the appearance of piety and a group of followers. There are numerous institutions across the country [Canada] churning out graduates as alims (scholars), faqihs (jurists) or muftis (juris-consults) without fully imparting the subtleties of Islamic jurisprudence. Many, unfortunately, are more influenced by cultural world views and clearly take a male-centered approach.⁹⁴

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

⁹⁰ *Ibid.* at 264.

⁹¹ “The differences that divide orthodox Muslims from modernists and fundamentalists is over the *shari’a*. Orthodoxy holds that it [Sharia] is perfect as it is. Modernists argue that, being the work of man, it must constantly be reinterpreted to adapt to the requirements of changing times. Fundamentalists maintain that, Islam being indifferent to changing times, it must be reexamined only for intrusions upon its original purity.” Milton Viorst, *The Struggle for the Soul of Islam: In the Shadow of the Prophet* (Colorado: Westview Press, 2001) at 144.

⁹² The historical roots of Islam reveal a progressive trend towards women’s rights that Western scholarship rarely acknowledges. See Bakht, *supra* note 85.

⁹³ See Ziba Mir-Hosseini, “The Construction of Gender in Islamic Legal Thought and Strategies for Reform” (2003) online: Koninklijke Brill <www.brill.nl>.

⁹⁴ Faisal Kutty, *supra* note 86.

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

The Potential Impact of the Arbitration Regime on Women

While it is possible that a feminist interpretation of Sharia or an interpretation of Islam that incorporates international human rights standards may result in arbitral awards that deal fairly with women, it is also feasible that under the current *Arbitration Act* a regressive interpretation of Sharia will be used to seriously undermine the rights of women. John Syrtash acknowledges that “disadvantaged spouses”—that is women—may be adversely affected by a family law system that defers to religious or cultural traditions.⁹⁶ As the Act currently stands, any conservative, fundamentalist or extreme right wing standard can be used to resolve family law matters in Ontario. Indeed a pre-*Rathwell*-ian⁹⁷ legal standard that resorts to stereotypes about women’s prescribed familial roles would be a legitimate standard by which to make family law decisions under the *Arbitration Act*, resulting in the exacerbation of women’s disadvantage through unfair division of property, spousal support, child support, custody and access awards.

Gender bias that operates to the detriment of women in family law is not a new or uncommon phenomenon in Canadian law.⁹⁸ Though judicial and statutory measures have been taken to ameliorate the economic disadvantage or unfair treatment that women experience, overall, women’s economic well-being and role/work recognition continues to suffer.⁹⁹ Nonetheless, a review of family law jurisprudence over the past 20 years reveals some beneficial developments to women. The *Arbitration Act* threatens to hinder these developments by providing no safeguards whatsoever to ensure women’s equality. Arbitral awards may bear no relationship to what the parties would be entitled to if they went to court. Much of the feminist critique surrounding mediation is relevant and applicable to arbitration. The following is an example:

There is currently no mechanism in place to ensure that those legal rights and entitlements are reflected in...[arbitration] agreements, or are even fully considered by the parties. Moreover, the private nature of... [arbitration] means that the process is not open. This means that women may cede hard-won legal rights behind closed doors. Further...there is no means to review and track what is happening to women in... [arbitration].¹⁰⁰

⁹⁵ The Islamic Institute of Civil Justice has noted that it will provide services to clients in any of the four schools of Muslim law (Hanafi, Shafii, Hanbali and Maliki). See online: The Muslim Marriage Mediation and Arbitration Service <<http://muslim-canada.org/brochure.htm>>.

⁹⁶ Shauna Van Praagh “Bringing the Charter Home” Book Review of Religion and Culture in Canadian Family Law” Book Review (1993) 38 McGill L.J. 233.

⁹⁷ *Rathwell v. Rathwell* [1978] 2 S.C.R. 436 [*Rathwell*] This decision of the Supreme Court of Canada awarded Mrs. Rathwell an interest in one-half of all real and personal property own by Mr. Rathwell through the doctrine of constructive trust. The court’s use of this remedial tool significantly benefited women and improved the remedies they received in family law disputes.

⁹⁸ See Marie L. Gordon “What, Me Biased? Women and Gender Bias in Family Law” (2001) 19 Fam. L. Quarterly 53 at 54.

⁹⁹ *Ibid.*, at 54.

¹⁰⁰ <http://www.bepress.com/mwjhr/vol1/iss1/art7>
See Goundry, *supra* note 11 at 36.

Studies have found that private bargaining in family law tends to yield inferior results for many women.¹⁰¹ In his study of factors that impact on negotiated spousal support outcomes Craig Martin found that “the support claimant is the party who will have the least resources and so will be least able to bear the transaction costs” associated with private bargaining. He also notes that “psychologically and culturally, support is still viewed as a *favour* given to dependent women, rather than a form of *entitlement*.”¹⁰² Indeed arbitrators will bring their own set of biases, which are seldom acknowledged, to their decision-making.

One of the consequences of the “privatization of justice” is that social inequities may be reproduced in privately ordered agreements, and remain hidden from the public eye.¹⁰³ As a result, the status quo is maintained and women’s inequality in relation to this “private sphere of the family is no longer a public concern.”¹⁰⁴ As has been noted by one author “[p]rivate justice’ renders the personal apolitical.”¹⁰⁵

With no legal aid or mandatory legal representation, there are serious concerns as to whether women will be truly free in their choice to arbitrate. Gila Stopler has argued that unlike racially-, ethnically-, and religious-oppressed communities which strive to instill in their members the recognition of their own oppression, the oppression of women is compounded by societies that strive to deprive them of the recognition of gender based oppression and prevent them from creating the space and the cooperation required to form resistance.¹⁰⁶ Women may be susceptible to subtle but powerful compulsion by family members or may be the targets of coercion and pressure from religious leaders for whom there may be a financial interest in people seeking arbitration.¹⁰⁷ In the context of battered women and mediation, it has been noted that

[t]he reality is that a battered woman is not free to choose. She is not free to elect or reject mediation if the batterer prefers it, nor free to identify and advocate for components essential to her autonomy and safety and that of her children...¹⁰⁸

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

¹⁰¹ Gordon, *supra* note 100 at 55.

¹⁰² Martin in Gordon, *ibid.* at 81.

¹⁰³ Goundry, *supra* note 11 at 34.

¹⁰⁴ *Ibid.* at 34.

¹⁰⁵ *Ibid.* at 35.

¹⁰⁶ Gila Stopler “Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women” (2003) 12 Colum. J. Gender & L. 154 at 197.

¹⁰⁷ Religious leaders who become arbitrators will have a financial interest in people seeking arbitration since the parties pay for their services.

¹⁰⁸ B. Hart, “Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation” (1990) 7 Mediation Quarterly 317 at 321.

in their country of origin.¹⁰⁹ An immigrant woman who is sponsored by her husband is in an unequal relationship of power with her sponsor.¹¹⁰ It may be impossible for a woman in this situation to refuse a request or order from a husband, making consent to arbitration illusory. Linguistic barriers will also disadvantage women who may be at the mercy of family or community members that may perpetuate deep-rooted patriarchal points of view. If a woman manages to access the court via judicial review or appeal, she may well be told that she “chose” the disadvantageous situation that she finds herself in, further entrenching her feelings of helplessness and inferiority.

The consequences of family arbitration with few limits will seriously and detrimentally impact the lives of women. This gender-based impact will likely be felt widely and will have intersecting class, (dis)ability, race and cultural implications.

Legally Challenging the *Arbitration Act*

Women may wish to use the *Canadian Charter of Rights and Freedoms* to legally challenge the use of Sharia or another alternative legal framework in family law arbitration. As previously noted, Canada’s *Charter* constitutionally protects residents from government violations of their rights. Section 15 is the equality provision of the *Charter* that ensures that people are treated in a non-discriminatory manner. Section 15 is meant to check government action that has a discriminatory purpose or effect on the basis of a statutorily enumerated or analogous ground. Action that impairs a person’s dignity will infringe the *Charter*. Section 15(1) provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.¹¹¹

At the heart of s. 15(1) is the promotion of a society in which all are secure in the knowledge that they are recognized at law as equal human beings, equally capable and equally deserving.¹¹²

The broad legal argument in a *Charter* challenge would likely be that the lack of limits in the *Arbitration Act* permitting family law matters to be arbitrated upon using an alternative legal framework to Ontario’s family law regime is discriminatory because of its adverse impact on women. Women are negatively effected because of the possibility that any legal framework may be used to decide family law issues, even frameworks that have no regard for recognized principles of equality or statutory criteria under the *Family Law Act*, the *Divorce Act* or the *Children’s Law Reform Act*. Because private ordering tends to replicate social inequities, of particular concern is that the oppression women experience in society generally will be duplicated in arbitrated agreements and awards.

¹⁰⁹ Homa Arjomand in Hurst, *supra* note 55.

¹¹⁰ A. Côté, M. Kérisit & M. Côté *The Impact of Sponsorship on the Equality Rights of Immigrant Women* (Ottawa: Status of Women Canada, Canadian Heritage and Centre of Excellence for Research in Immigration and Integration, 1999) at 14.

¹¹¹ *Charter*, *supra* note 5 at s. 15(1).

¹¹² *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General in Right of Canada)* 2004 S.C.C. 4 at para. 219 *per* Deschamps J [*Canadian Foundation*].

So as to prevent the conclusion that Muslims as a group should not be permitted to use arbitration, it is important in a *Charter* challenge to frame the issue broadly and not simply in relation to Sharia law. Thus, the broad argument could be that family law matters are not appropriate for arbitration because they involve public interests that require court supervision.¹¹³ The downside of making such an argument is that it fails to take into consideration the actual and potentially progressive uses of family arbitration by groups and individuals including women. The Ismaili community, a division of Muslims, has set up a system of mediation and arbitration in every province in Canada. This system of alternative dispute resolution provides a safe space to settle primarily business matters but also some family law issues amongst Ismaili Canadians using the relevant Canadian law. Arbitrations are conducted at no cost and arbitrators are sensitive to the culturally specific context of for example the role of the extended family. Additionally, all arbitration agreements are reviewed, on a *pro bono* basis, by lawyers in the community.¹¹⁴

In evaluating women's equality claims under the *Charter*, a court will likely recognize the pre-existing disadvantage, vulnerability and stereotyping experienced by women in the context of familial relationships. In *M. v. H.*, Justice Gonthier wrote of a "dynamic of dependence" that disadvantages women in heterosexual relationships.¹¹⁵ Similarly, in *Moge*, the Court recognized "that women have tended to suffer economic disadvantages and hardships from marriage or its breakdown because of the traditional division of labour within that institution."¹¹⁶ Courts will also note however, that rights are not absolute and will have to be balanced such that other *Charter* rights in issue can coexist simultaneously. Proponents of Sharia arbitration will likely argue that s. 2(a) of the *Charter*, which protects freedom of religion, is implicated. Moreover, the argument will surely be made that an important feature of Canada's constitutional democracy is respect for minorities, including religious minorities.¹¹⁷ While multicultural privileges can be protected using s. 27 of the *Charter*, which mandates interpretation in a manner

¹¹³ Another possibility is arguing that family arbitration should only be permissible using Ontario family law. Other principles, such as religious precepts, may also be applied, but only to the extent that they do not conflict with Ontario's family law regime.

¹¹⁴ Interview of Fatima Jaffer by Natasha Bakht (5 August 2004). Fatima Jaffer, an Ismaili Canadian, is a member of the Coalition of South Asian Women Against Violence, VCASAA (Vancouver Custody and Access Support and Advocacy Association) and founder of the South Asian Women's Centre in Vancouver. See also Kellie Johnston, Gus Camelino & Roger Rizzo "A Return to 'Traditional' Dispute Resolution: An Examination of Religious Dispute Resolution Systems" online: Canadian Forum on Civil Justice <<http://www.cfcj-fcjc.org/full-text/traditional.htm>> at 15-26.

¹¹⁵ *M. v. H.*, [1999] 2 S.C.R. 3 at para. 181.

¹¹⁶ *Moge*, *supra* note 16 at para. 70.

¹¹⁷ This argument was successfully made most recently in the Supreme Court of Canada decision *League for Human Rights of B'Nai Brith Canada v. Syndicat Northcrest*, 2004 S.C.C. 47. The scope of this paper does not allow an in depth examination into the issues of freedom of religion and multiculturalism. However, should a strategy of litigation be pursued, much thought should be put into countering these arguments that will most certainly be made by several intervening religious organizations. Syed Mumtaz Ali, head of the Islamic Institute of Justice has already framed all of his arguments for Sharia tribunals around religious freedom and multiculturalism. Syed Mumtaz Ali, "The Review of the Ontario Civil Justice System: The Reconstruction of the Canadian Constitution and the Case of Muslim Personal/Family Law" (1994) online: Canadian Society of Muslims <<http://muslim-canada.org/submission.pdf>>.

consistent with the enhancement of the multicultural heritage of Canadians, s. 28 of the *Charter* reads: “Notwithstanding anything in this Charter, all the rights and freedoms referred to in it are guaranteed equally to male and female persons.”¹¹⁸

In defending the enactment of the *Arbitration Act*, the government may argue that the Act corresponds to the needs, capacities and circumstances of women by giving them a choice as to whether to submit to arbitration. Indeed it may be argued that this is particularly true for Muslim women who for religious reasons may have reason to want their family law disputes resolved by arbitration. While it is important to make arguments regarding the compulsion and pressure to arbitrate that many women will endure, it may not be strategic to put forth the generalized argument that all women will always be unable to make free choices.¹¹⁹

In order to demonstrate the negative impact that family arbitration has on women, one will have to consider whether as a strategy it is appropriate to delve into the likeliness that the Sharia will be implemented fairly. Where a concrete set of facts exists, this may be easier to do by simply examining the arbitral award in question. This avoids the necessity for a litigant to make sweeping generalizations about the ability of the Sharia to be progressive for women.¹²⁰ Importantly, the courts have stated their unwillingness to make judgments on religious principles.¹²¹

It is possible to make a generic argument about the impact that the privatization of family law is having on women. Indeed many Canadian 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.¹²²

¹¹⁸ *Charter*, *supra* note 5 at s. 28.

¹¹⁹ There will be Muslim women who will want to submit to arbitration using Sharia law. It cannot be assumed that these women are necessarily being duped or oppressed as this would be engaging in the very infantilizing of Muslim women that one accuses patriarchal culture of. In fact, making an overly generalized argument regarding women’s capacities or experiences homogenizes women and potentially eliminates important differences based on intersecting grounds of oppression. Fareeda Shaheed of the network ‘Women Living Under Muslim Law’ (WLUML) has stated “WLUML recognizes that living in different circumstances and situations, women will have different strategies and priorities. We believe that each woman knowing her own situation is best placed to decide what is the right strategy and choice for her.” Shaheed, *supra* note 9.

¹²⁰ There are multiple explanations for why people choose to publicly support or denounce manifestations of their religion. Muslim women may feel particularly vulnerable in speaking out against Sharia law as they may fear being singled out as traitors in their community. As with other minority communities, the struggles of Muslim women to change patriarchal community practices are often seen as a betrayal of the community’s culture and traditions and as a threat to its stability in the hostile world of the larger society. See G. Stopler, *supra* note 108 at 197.

¹²¹ *Levitts Kosher Foods*, *supra* note 69 at para. 13.

¹²² Lacey in Susan Boyd ed, *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997) at 3.

The practical consequence of non-regulation by the government “is the consolidation of the status quo: the de facto support of pre-existing power relations and distributions of goods within the ‘private’ sphere.”¹²³ The difficulty lies in proving this argument in a court of law. In Canadian law, the burden of proving all elements of the breach of a *Charter* right rests on the person asserting the breach.¹²⁴

*Trinity Western University v. British Columbia College of Teachers*¹²⁵ strongly suggests that a rights-claimant must have more than approximate or tentative evidence to make a claim of discrimination. Given the private nature of arbitration and the concomitant lack of records and/or statistics, the fulfillment of this obligation is seriously hampered. Though in several cases, the Supreme Court of Canada has been prepared to make findings of fact without or with very little evidence, relying on the “obvious” or “self-evident” character of the findings, this has typically been done at the s. 1 justificatory stage of the *Charter* analysis, which benefits the government and not the rights-claimant.¹²⁶

However, as previously noted, there has been much feminist critique of the privatization of justice. The use of academic articles and expert testimony is certainly one method by which a claim of discrimination can be made out. Another possibility may be the use of judicial notice, a technique wherein judges acknowledge the obvious nature of a phenomenon without requiring tangible evidence to justify it. Judicial notice has been used to recognize the operation of systemic racism against certain communities in the criminal law.¹²⁷ There is no reason why it is not possible to persuade a judge to take judicial notice of systemic sexism. Strong arguments can certainly be made that the use of arbitration in family law with no limits disparately impacts women and that the discriminatory effect impinges on the dignity of women.

Conclusion

¹²³ *Ibid.* at 3.

¹²⁴ Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2001) at 733. The standard of proof is the civil standard namely, proof by a preponderance of probability.

¹²⁵ *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 at para. 4 [*Trinity Western*]. This case involved a decision of the British Columbia College of Teachers (BCCT) not to accredit a free-standing Evangelical teacher-training program at Trinity Western University (TWU) because students from that program were required to sign a community standards document in which they agreed to refrain from “sexual sins including...homosexual behaviour”. The BCCT was concerned that the TWU community standards, applicable to all students, faculty and staff, embodied discrimination against homosexuals. The BCCT argued that graduates from the TWU teacher-training program would not treat homosexuals in the B.C. public school system fairly and respectfully. The Supreme Court of Canada relied on the lack of a factual foundation in dismissing the appeal: “The evidence to date is that graduates from the joint TWU-SFU teacher education program have become competent public school teachers, and there is no evidence before this Court of discriminatory conduct.” The Court noted that the BCCT’s evidence was “speculative” (at para. 19) and involved inferences “without any concrete evidence” that the views of TWU graduates would have a detrimental effect on the learning environment in public schools (at para. 32).

¹²⁶ *Ibid.* at 734. Peter Hogg has suggested that *Charter* review become less dependent on evidence because of the exorbitant cost associated with expert evidence for both the challenger and the government.

¹²⁷ *R. v. S.(K.D.)* (1997), 10 C.R. (5) 1 (S.C.C.)

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

This paper has not considered strategies for law reform as it is felt that a broad consultation of different groups, both Muslim and non-Muslim, is required to identify and evaluate strategies for ensuring that women's constitutional equality rights are not infringed in the process of arbitration. It is critical that certain questions be explored such as: Is it possible to include safeguards to the arbitration process that will adequately protect women? Can one avoid the predictable limits of such safeguards? Is it possible to reinvent dispute resolution such that feminist concerns are met?¹²⁸ Should family law matters be excluded from the *Arbitration Act* altogether? Given the government's huge investment of resources in alternative dispute resolution, how likely is a prohibition of all family law matters from the Act? The Canadian Council of Muslim Women has concluded that Ontario ought to have the courage to acknowledge that the *Arbitration Act* should not be used for family law purposes. Indeed there is some precedent for this position from the province of Quebec, which has declared that family arbitration is not permissible.¹²⁹ The final outcome of this matter remains to be seen. The Attorney General of Ontario and the Minister for Women's Issues appointed Ms Marion Boyd earlier this year to review the province's arbitration process and any current problems with the *Arbitration Act*, with specific reference to faith-based arbitration. Ms Boyd's recommendations are expected to be released by early October, 2004. Ontario is not the only Western jurisdiction to be dealing with these tensions, which is not surprising given the large population of Muslims throughout Canada and other Western countries. It will be interesting to see whether Canada manages to balance the competing rights at stake in this controversial issue and if so, in what way it is reconciled.

¹²⁸ "The formal ADR initiative provides an opportunity to shed the cultural baggage [of Islam] and revisit some of the patriarchally misinterpreted rulings by refocusing on the Qur'an's emphasis on gender equality." Faisal Kutty, *supra* note 86.

¹²⁹ Article 2639 of the *Civil Code of Québec*, S. Q., 1991, c. 64, s. 2639 provides: "Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration." <http://www.bepress.com/mw/jhr/vol1/iss1/art7>