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A Destruction of Muslim Identity: Ontario's Decision to Stop Shari'a-based Arbitration

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A Destruction of Muslim Identity: Ontario's Decision to Stop Shari'a-based Arbitration

Cover Page Footnote

International Law; Commercial Law; Law

A Destruction of Muslim Identity: Ontario's Decision to Stop *Shari'a*-based Arbitration[†]

*"And if you fear a breach between the two,
appoint an arbiter from his people and an arbiter
from her people. If they both desire agreement, Allah
will effect harmony between them.
Surely Allah is ever Knowing, Aware."*

—The Holy *Qur'an*, 4:35

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I. Introduction

September 11th continues to be a significant day in Muslim-American relations. On September 11, 2005, Canadian Premier

[†] The author would like to thank North Carolina Court of Appeals Judge Sanford Steelman for the opportunity to present this paper to the North Carolina Dispute Resolution Commission on August 25, 2006 at the Elon University School of Law in Greensboro, North Carolina. The views expressed in this paper are the author's alone.

Dalton McGuinty announced the rejection of all religious arbitration within Ontario's legal system.¹ Formal legislation was passed in Ontario to support the declaration on February 14, 2006.² Notably, Premier McGuinty's decision ran counter to a lengthy report commissioned by the government of Ontario by former Attorney General Marion Boyd. That report, released in late 2004, recommended the allowance of religious arbitration, including *Shari'a*-based³ arbitration, to settle certain types of private disputes, such as property divisions in divorce.⁴

In siding with Boyd, this paper takes her report as its foundation and borrows from it in significant ways. Specifically, Boyd's general introduction to Ontario's arbitration system is relied on heavily because it is an authoritative and straightforward presentation of that system with specific attention to areas relevant to the debate. Additionally, her report draws a balanced survey of the positions of many groups who were involved in the debate over religious arbitration in Ontario. The collection of views presented in Boyd's paper have not been collected in any other academic source and make this paper possible. Yet, to only understand the debate over religious arbitration as limited to Ontario would be to miss the insight it gives to the larger question of how the law should deal with multiculturalism. Thus, this paper's ultimate goal is to elaborate on and reinvigorate Boyd's unheeded report, making the issue of religious arbitration she discussed in Ontario relevant to a broader audience.

The debate over a limited incorporation of *Shari'a*⁵ law in

¹ *Ontario Premier Rejects Use of Shariah Law*, CBC NEWS, Sept. 11, 2005, <http://www.cbc.ca/canada/story/2005/09/09/sharia-protests-20050909.html>.

² Kerry Gillespie, 'One Law for All Ontarians' in *Divorce, Child Custody*, TORONTO STAR, Feb. 15, 2006, at A5.

³ *Shari'a* is one of several accepted transliterations of the Arabic: شريعة. Note also that Arabic is read right to left. Transliterations of other Arabic words which are not commonly integrated into English will appear in italics throughout this paper.

⁴ See generally MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION (2004), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>.

⁵ *Shari'a* is the comprehensive Islamic code for all human activities. TANYA GULEVICH, UNDERSTANDING ISLAM AND MUSLIM TRADITIONS: AN INTRODUCTION TO THE RELIGIOUS PRACTICES, CELEBRATIONS, FESTIVALS, OBSERVANCES, BELIEFS, FOLKLORE, CUSTOMS, AND CALENDAR SYSTEM OF THE WORLD'S MUSLIM COMMUNITIES, INCLUDING AN OVERVIEW OF ISLAMIC HISTORY AND GEOGRAPHY 193, 437 (2004). The topic is

Canada mirrors recent controversies in other Western democracies, particularly in Europe, where Muslim immigration has presented acute challenges to national identity. The murder of Theo Van Gogh in Amsterdam⁶ and the passage of certain laws in France which effectively banned the *hijab*⁷ in public schools⁸ severely tested the role of tolerance as a central aspect of the Dutch and French identities.⁹ This tension between tolerance and national identity reflects some of the fundamental problems for minority cultures within the majoritarian structure of democracy and also exposes major weaknesses in the philosophies of multiculturalism and human rights.

Canada presents a unique ground for a discussion of minority rights and multiculturalism because it is a leader in accommodating minority nationalisms, indigenous people, and immigrants.¹⁰ For example, the Catholic and French-speaking singularities of Quebec led to certain historical exceptions, like the constitutional veto, that some see as evidence of an asymmetrical federalism in Canada.¹¹ The country has also been confronted with the aspirations of indigenous peoples for self-government and

addressed at length in Section III of this paper.

⁶ Craig S. Smith, *In Mourning Slain Filmmaker, Dutch Confront Limitations of Their Tolerance*, N.Y. TIMES, Nov. 10, 2004, at A1. Theo Van Gogh was a filmmaker in The Netherlands who made a controversial film about Islamic culture in that country. *Id.* He was killed by Ayaan Hirsi Ali, a first-generation Dutch Muslim, who disagreed with Van Gogh's views. *Id.*

⁷ *Hijab* means "screen, separation, cover, or partition in Arabic." GULEVICH, *supra* note 5, at 193, 429 (internal quotation marks omitted). The most common example of the *hijab* is the veil or headscarf. *Id.*

⁸ Elaine Sciolino, *Debate Begins In France On Religion In the Schools*, N.Y. TIMES, Feb. 4, 2004, at A1.

⁹ In resisting a demand from French Muslims to reconsider the ban on the *hijab*, French President Jacques Chirac said in a speech, "France is a land of tolerance. France ensures the equality, the respect, the protection of the free exercise of all religions in the framework of our communal law. This tradition, anchored in our history, is the glue of our national unity." Elaine Sciolino, *France Won't Meet Demand To Stop Ban on Head Scarves*, N.Y. TIMES, Aug. 30, 2004, at A5 (internal quotation marks omitted).

¹⁰ WILL KYMLICKA, *FINDING OUR WAY: RETHINKING ETHNOCULTURAL RELATIONS IN CANADA* 2-3 (1998).

¹¹ Cameron D. Bodnar, *Practice and Principle: Asymmetrical Federalism in Canada* 6 (2003), <http://www.cpsa-acsp.ca/paper-2003/bodnar.pdf> (prepared for the 2003 Annual Meeting of the Canadian Political Science Association, Dalhousie Univ.).

granted them partial autonomy.¹² The desire for a limited application of *Shari'a* by the Canadian Muslim community, now the dominant religious minority in Canada,¹³ is arguably part of the same story.¹⁴

Canada's confrontation with the *Shari'a* question is a particularly compelling case study in multiculturalism for legal observers in the United States. The Canadian experience confirms that the debate surrounding Muslim communities in Western democracies, of which the *Shari'a* movement is a part, is not confined to the more homogeneous societies of Europe. Indeed, the debate has arrived in North America. Further, the arbitration system which catalyzed this particular debate in Canada exists in essentially the same form within the United States.¹⁵

To document the debate over *Shari'a*-based arbitration that occurred in Ontario, this paper opens in Section II with an introduction to the underlying laws in Ontario that offered a limited space for the practice of *Shari'a*-based arbitration. The highlights are drawn from Marion Boyd's presentation of arbitration in Ontario. Section III explains the topics of Islam relevant to the debate and the Muslim community's need for *Shari'a*-based arbitration. Section IV outlines the competing philosophies in the debate, giving attention to particular voices from Boyd's report. The final section offers the conclusion that religious arbitration should continue in Ontario.

II. Alternative Dispute Resolution in Canada

The Islamic Institute of Civil Justice (IICJ) was formed in

¹² SAMUAL V. LASELVA, *THE MORAL FOUNDATIONS OF CANADIAN FEDERALISM* 137 (1996).

¹³ STATISTICS CANADA, *POPULATION BY RELIGION, BY PROVINCES AND TERRITORIES* (2001 Census), available at <http://www40.statcan.ca/L01/cst01/demo30b.htm>.

¹⁴ S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 4-5 (2004).

¹⁵ The Council of Masajid met in 1988 and agreed to establish *Shari'a* arbitration councils in Manhattan, Brooklyn, Queens, the Bronx, Buffalo, Paterson, New Brunswick, Trenton, Detroit, Lansing, Toledo, Columbus, Boston, Hartford, Indianapolis, Gary, Chicago, Elgin, Champaign, Urbana, Miami, Houston, Dallas, Seattle, Los Angeles, San Francisco, San Diego, Baltimore, Washington D.C., Philadelphia, and Pittsburgh. Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origins and Elements*, 7 J. ISLAMIC L. & CULTURE 27, 79 (2002).

2003.¹⁶ The formation of the IICJ sparked the beginning of debate over *Shari'a* law in Ontario.¹⁷ When the debate erupted, however, much of the dialogue centered around the flawed premise that the Canadian government had only recently begun to allow “faith-based” arbitration.¹⁸ Actually, in a report prepared for the Canadian Attorney General, Marion Boyd wrote, “family matters [in Canada have] been arbitrated based on religious teachings for many years in Jewish, Muslim, and Christian settings.”¹⁹ Nothing in the Arbitration Act of 1991, the collection of statutes which regulate arbitration in Ontario, restricts religious arbitration or refers to “faith-based” decisions at all.²⁰ The IICJ, therefore, only attempted to take advantage of what already existed—the general right of arbitration to settle private disputes.²¹

In public disputes where the State has a specific grievance with an individual, such as crimes, the individual is required to submit to the laws and courts of the State.²² For most private disputes, on the other hand, whether a dispute even exists is a matter completely left to the parties.²³ Consequently, there are no requirements in the substantive law that must be followed to resolve the disagreement. Individuals could even choose to have their dispute decided by a coin flip.²⁴ If the parties come to agree on a resolution themselves, this is called “alternative dispute

¹⁶ BOYD, *supra* note 4, at 3.

¹⁷ *Id.*

¹⁸ *Id.* at 4. See, e.g., *Shariah Law: FAQs*, CBC NEWS ONLINE, May 26, 2005, <http://www.cbc.ca/news/background/islam/shariah-law.html> (“In 1991, Ontario was looking for ways to ease the burdens of a backlogged court system. So the province changed its Arbitration Act to allow ‘faith based arbitration’”).

¹⁹ BOYD, *supra* note 4, at 4.

²⁰ The Arbitration Act, R.S.O., ch. 17 (1991) (Can.). This paper references Ontario’s Arbitration Act of 1991 as it existed before the changes approved on Feb. 14, 2006.

²¹ BOYD, *supra* note 4, at 4. It is worth noting that this practice has flourished in the United States as well for many years. The Beth Din, a Jewish rabbinical court operating out of New York, has settled issues of family and property law through arbitration since 1960. Beth Din of America, <http://bethdin.org> (last visited Mar. 6, 2007).

²² BOYD, *supra* note 4, at 9.

²³ *Id.*

²⁴ *Id.*

resolution" (ADR).²⁵

ADR is mutually beneficial to the government and the individual.²⁶ It benefits the government because it keeps more disputes out of the formal court system.²⁷ This necessarily helps reduce the possibility of backlogs, thereby accelerating resolution of the cases that are in the formal court system.²⁸ It also acts to reserve the judges of the formal system, who are highly trained, for the most complicated disputes.²⁹ The individual also benefits because, by empowering individuals to choose the process and rules, the resolution is more likely to approximate the one desired.³⁰ In addition, private resolutions may save private parties money and allow for greater confidentiality.³¹

In recognition of these mutual benefits, Canada has made efforts to encourage private dispute resolution.³² In Ontario, for example, parties are required to go through mediation in most cases before reaching the court system.³³ For family law cases, however, mediation is merely optional.³⁴ The Arbitration Act of 1991 was developed across Canada as a more formally structured mechanism of ADR.³⁵

A. *The Arbitration Act of 1991*

With the goal of providing a uniform set of arbitration rules across Canada, the Uniform Law Conference of Canada proposed the Uniform Arbitration Act in 1990.³⁶ Ontario was the first province to adopt the new rules in 1991, and these became

²⁵ *Id.* at 9.

²⁶ *Id.* at 10.

²⁷ *Id.*

²⁸ BOYD, *supra* note 4, at 10.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* Mediation refers generally to the inclusion of a third party in a private dispute who helps the parties come to an agreement. BLACK'S LAW DICTIONARY 1003 (8th ed. 2004).

³⁴ BOYD, *supra* note 4, at 10.

³⁵ *Id.*

³⁶ *Id.*

effective in 1992.³⁷ This Act is referred to as the Arbitration Act of 1991 (Arbitration Act).³⁸ The primary function of the Arbitration Act is to offer procedural rules for an arbitration process.³⁹ The Arbitration Act facilitates the use of that process by allowing the courts to appoint an arbitrator when the parties cannot agree and by legally sanctioning the results of properly conducted arbitrations.⁴⁰

Ontario allowed arbitration even before the adoption of the Arbitration Act, with the earliest occurring in the nineteenth century.⁴¹ The new rules adopted in 1991 were simply reflective of a broader public acceptance of arbitration, and they effectively reduced the supervisory capacity of the courts.⁴² Most importantly for framing the *Shari'a* debate, however, is that under both the old and new arbitration systems, private parties in Ontario were allowed to settle family law and property disputes.⁴³

Flexibility is the centerpiece of the Arbitration Act. The law allows both parties to choose any arbitrator.⁴⁴ No qualifications or certifications, such as a law degree, legal experience, or even Canadian citizenship, are required. The sole requirement is that the arbitrator must be neutral as to the parties concerned.⁴⁵ This requirement is supported by section 46.1 of the Arbitration Act, which allows for an arbitration award to be set aside where "there is a reasonable apprehension of bias" on the part of the arbitrator.⁴⁶ But section 46.4 specifically allows parties to waive even this restriction.⁴⁷

³⁷ *Id.* at 10-11. At the time of Boyd's report seven provinces had adopted the Uniform Arbitration Act: Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Prince Edward Island, and Nova Scotia. *Id.* at 12 n.9.

³⁸ *Id.* at 11.

³⁹ *Id.*

⁴⁰ BOYD, *supra* note 4, at 12.

⁴¹ *Id.* at 11.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 12.

⁴⁵ The Arbitration Act, R.S.O., ch. 17, §§ 11.1, 46.1 (1991) (Can.).

⁴⁶ § 46.1.

⁴⁷ § 46.4 (providing that courts are restricted from setting aside an arbitration decision where the disadvantaged party fails to use section 13 to bring a challenge or

The parties also decide which law will govern the arbitration.⁴⁸ Usually, parties rely on the law of their own province.⁴⁹ But the parties can designate any specific set of laws to apply, or the arbitrator can choose for them.⁵⁰ Arbitrators commonly make the choice of applicable laws in diversity cases.⁵¹ The Arbitration Act does not require that the laws used in the arbitration come from a specific place or governmental body like Ontario. Any set of laws, such as the rules governing a private organization, rules invented by the parties, or even rules based on religious teachings, can be chosen.⁵² At the end of the arbitration, the arbitrator, or arbitration council, will deliver a decision called the arbitral award.⁵³ Whether the result is an order directing one party to perform an act for another party, or simply a monetary award, the courts will enforce the arbitral award against a losing party.⁵⁴

It is hard to estimate the exact number of private arbitrations that have occurred under the Arbitration Act because the process is private by nature.⁵⁵ The highest number of arbitrations seem to occur in Toronto because the formal court system is so backlogged.⁵⁶ Of groups offering mediation and arbitration that submitted statistics for Marion Boyd's report, the average number of arbitrations conducted by each group per year was between thirty and thirty-five.⁵⁷ Very few of those arbitrations ever ended up in the formal court system.⁵⁸ This last point seems to confirm that parties have a high satisfaction rate with the process.

fails to be successful on such a challenge).

⁴⁸ § 31.

⁴⁹ BOYD, *supra* note 4, at 12.

⁵⁰ The Arbitration Act, R.S.O., ch. 17, § 32.1 (1991) (Can.).

⁵¹ § 32.1.

⁵² BOYD, *supra* note 4, at 12.

⁵³ *Id.* at 13.

⁵⁴ *Id.* The enforcement is delayed if there is an appeal pending under section 5 or if the period for appeal (30 days under section 5) is not exhausted. *Id.*

⁵⁵ *Id.* at 34-35.

⁵⁶ *Id.* at 35.

⁵⁷ *Id.*

⁵⁸ BOYD, *supra* note 4, at 35.

B. Limits of Arbitration

Notwithstanding the extreme flexibility provided by the Arbitration Act, there are some limits to arbitration. The first set of limits is legal and overlaps with the general limits of freedom of contract. The arbitrator's jurisdiction arises from the submission of both parties; therefore, it is critical that the parties voluntarily enter into the arbitration.⁵⁹ The corollary is that the arbitrator can only decide issues that the parties have submitted to arbitration.⁶⁰ As with contracts, the result of the arbitration cannot force either party to perform an illegal act.⁶¹ The legal rules of capacity also apply—no party can be under the legal age, subject to duress when they enter arbitration, or mentally incompetent.⁶² Finally, while most civil issues can be arbitrated, no criminal or personal status cases can be subject to enforceable arbitration.⁶³ As a result of the exclusion of personal status cases, two key aspects of family law are expressly excluded from arbitration: the recognition of parenthood and the grant of divorce.⁶⁴

The Arbitration Act also contains certain procedural limits to arbitration which are designed to ensure the fairness of whatever form the arbitration takes. Section 19 requires that the parties be treated “equally and fairly,”⁶⁵ and section 6 allows the courts to intervene in an arbitration to ensure such equitable treatment.⁶⁶ The equitable requirement cannot be waived by the parties.⁶⁷

The appeals procedures also help ensure equitable treatment. A party can request a court to hear an appeal by convincing the court that an important question of law is raised affecting the

⁵⁹ *Id.* at 13.

⁶⁰ *Id.* at 14.

⁶¹ *Id.* at 13.

⁶² *Id.* at 13-14.

⁶³ *Id.* at 14. Courts will set aside any arbitration decision that violates the subject matter jurisdiction limits of The Arbitration Act. The Arbitration Act, R.S.O., ch. 17, § 46.1.5 (1991) (Can.).

⁶⁴ BOYD, *supra* note 4, at 14. Civil divorce can only be performed under the Divorce Act of Canada. *Id.* No laws prohibit the ability of parties to seek a religious divorce. Those decrees, however, are not legally enforceable. *Id.*

⁶⁵ The Arbitration Act, R.S.O., ch. 17, § 19 (1991) (Can.).

⁶⁶ § 6.

⁶⁷ § 3.

rights of the party.⁶⁸ Unlike the equitable requirements, however, the right to appeal may be waived.⁶⁹ Where a court is presented with an appeal, the matter can become even more difficult if Ontario law is not the basis of the arbitration because the judges may lack experience or familiarity with the law that was used.⁷⁰

The procedural limits that show concern for equitable treatment of the parties also have substantive counterparts. Some courts, for example, have set aside arbitral awards that resulted from an equitable process but were nonetheless inequitable in their results.⁷¹ The restriction of section 50.7, which provides that a court cannot enforce an order that it “would not have jurisdiction to make itself,” can also be read broadly to defeat awards that a court might find unfair.⁷² The Arbitration Act does not, however, expressly allow courts to set aside an award on “public policy” grounds.⁷³

While the statute includes many limits to ensure fairness and flexibility in arbitration, certain protections of the Arbitration Act are subject to expiration.⁷⁴ For example, appeals against an actual award must be made within thirty days.⁷⁵ The underlying purpose of this limitation is to encourage parties to raise problems as they appear, rather than holding on to an objection as insurance against an adverse award.⁷⁶

⁶⁸ § 45.

⁶⁹ BOYD, *supra* note 4, at 15 (citing The Arbitration Act, R.S.O., ch. 17, §3 (1991) (Can.), which does not list § 45 as a non-waivable provision).

⁷⁰ *Id.* This weakness of the appeals process is significant for the discussion of the *Shari'a* debate. An example of this problem would be where, on review of an arbitral award, a judge did not recognize the *mahr* or imposed support obligations on a wife for the children. These aspects of women's rights under *Shari'a* are explored later. BOYD, *supra* note 4, at 53.

⁷¹ BOYD, *supra* note 4, at 16 (citing *Hercus v. Hercus*, [2001] O.J. No. 1541, 7 R.F.L. (5th) 301 (Sp. Ct.), para. 41).

⁷² *Id.* The court simply defines its jurisdiction as inherently limited to granting fair and equitable awards. *Id.*

⁷³ *Id.*

⁷⁴ The Arbitration Act, R.S.O., ch. 17, §4 (1991) (Can.).

⁷⁵ §47.

⁷⁶ BOYD, *supra* note 4, at 17.

C. Family Law in Ontario

The federal and provincial governments of Canada share jurisdiction over family law.⁷⁷ The federal Divorce Act concerns married couples who want a divorce and various issues related to divorce, such as child and spousal support claims, custody, and access to children.⁷⁸ Provincial laws govern all other family law matters such as “separation [as 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.”⁷⁹ In Ontario, the relevant law is called the Family Law Act (FLA).⁸⁰ Neither the federal Divorce Act nor the FLA mention arbitration, although they expressly encourage mediation.⁸¹

The division of property in the event of divorce depends heavily on applicable provincial law governing the couple.⁸² In Ontario, the property division laws used by the formal courts generally strive for a fifty-fifty split between the shared assets of the divorcing spouses.⁸³ To calculate the actual split, each spouse’s net family property is defined.⁸⁴ Net family property is determined by considering all the property a spouse owns, accounting for certain deductions and exceptions.⁸⁵ The spouse who holds less net family property is entitled to one half of the difference between the two net family properties.⁸⁶ The courts are able to increase or decrease either spouse’s share to correct for equitable concerns, such as intentional depletion, or to honor a written agreement between the spouses that is not a domestic contract.⁸⁷

⁷⁷ *Id.* at 19.

⁷⁸ The Divorce Act, R.S.C., ch. 3 (1985) (Can.).

⁷⁹ BOYD, *supra* note 4, at 18.

⁸⁰ *Id.*

⁸¹ *Id.* For more on mediation, see *supra* note 33.

⁸² *Id.*

⁸³ Family Law Act, R.S.O., ch. F.3, § 5.1 (1990) (Can.).

⁸⁴ § 4.1.

⁸⁵ § 5.1.

⁸⁶ § 4.5.

⁸⁷ Family Law Act, R.S.O., ch. F.3, § 5.6 (1990) (Can.).

Ontario's statutes are notable for making some of the strongest statements in Canada encouraging gender equality in the divorce process.⁸⁸ The Preamble to the FLA states that the purpose of the statute is to "recognize the equal position of the spouses as individuals within marriage and to recognize marriage as a form of partnership" and, therefore, to insure "an equitable settlement" when the relationship dissolves.⁸⁹ Gender equality is written into the laws but may prove less enforceable when divorce settlements occur outside the formal court system.

And in fact, despite all of the formal court provisions and equality protections regarding property settlements in divorce, many couples still decide to make use of informal processes.⁹⁰ As part of these informal processes, parties are completely free to consult any advisor they wish in order to arrive at a decision.⁹¹ As in any life decision, attorneys, friends, and clergy are all commonly consulted.⁹² The result of these more informal, private processes is often a domestic contract, dividing property in a specific way by agreement of the parties.⁹³

A domestic contract supersedes the distribution rules of the FLA unless the contract violates one of the public policy parameters of the Act.⁹⁴ Domestic contracts can effectively remove all property from the calculation of net family property, resulting in no sharing between the spouses.⁹⁵ Child support agreements can also be subject to a domestic contract, which may provide for less support by one spouse than the FLA would provide.⁹⁶ Spousal support may be completely avoided by contract.⁹⁷ Spouses can also contract as to the education and moral

⁸⁸ § 5.6.

⁸⁹ Family Law Act, R.S.O., ch. F.3, pmbl. (1990) (Can.).

⁹⁰ BOYD, *supra* note 4, at 19.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 20.

⁹⁴ Family Law Act, R.S.O., ch. F.3, § 2(10) (1990) (Can.).

⁹⁵ § 5.6.

⁹⁶ § 33.15b. The ultimate amount of child support is subject to broad policy limits. A child support agreement can always be set aside by the court if it is determined that the amount is not in the best interest of the child. § 56.1.

⁹⁷ § 33.4. The same section also lists the occasions where the court can override

training a child will receive.⁹⁸

Certain parameters related to conscionability and informed consent exist for domestic contracts. For example, the contracts can be set aside by the court if the agreement is deemed not in the best interest of a child who is involved.⁹⁹ Any domestic contract can be set aside in whole or in part if the court finds that the party did not understand the nature and consequences of the contract.¹⁰⁰ Typically courts conclude that the party must have consulted with an attorney familiar with Ontario's FLA before agreeing to a domestic contract.¹⁰¹

In terms of religion, a domestic contract can be overturned if one spouse has not taken the necessary steps to release the other spouse from religious barriers to remarriage.¹⁰² This provision seeks to avoid the ability of one spouse to use a religious barrier for leverage in the contract negotiations.¹⁰³ Courts have the widest possible scope for intervention on this ground because it applies to the settlement of any family matter in any form including "written or oral arrangement[s]."¹⁰⁴ This section also applies to an arbitral award because such awards qualify as "written or oral arrangement[s]."¹⁰⁵ This broad intervention power evinces a recognition that family negotiations involving religious principles risk a particular type of leveraging not possible in nonreligious negotiation.¹⁰⁶

In the end, the FLA may merely create an entitlement to a claim—the privileges or benefits one might receive under the FLA—which a spouse can disclaim.¹⁰⁷ The tone of the FLA is predominantly voluntary in order to empower individuals who, for

such a spousal support agreement.

⁹⁸ § 56.1.

⁹⁹ § 56.1.

¹⁰⁰ § 56.4. Other typical capacity restrictions associated with contracts, such as lack of consent or duress also apply. *Id.*

¹⁰¹ BOYD, *supra* note 4, at 21.

¹⁰² Family Law Act, R.S.O., ch. F.3, § 2.4 (1990) (Can.).

¹⁰³ BOYD, *supra* note 4, at 22.

¹⁰⁴ *Id.*; see also Family Law Act, R.S.O. 1990, ch. F.3, § 56.6.

¹⁰⁵ BOYD, *supra* note 4, at 22.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

a variety of reasons, such as the need for confidentiality or efficiency, want to avoid the courts.¹⁰⁸ The risk, though, is that a party will be subjected to unequal bargaining power that falls short of coercion, thus leaving the party bound by the agreement. For example, in the case of *Miglin v. Miglin*, the wife signed a spousal support waiver in exchange for a position in the family business.¹⁰⁹ When she later decided this was not a favorable settlement, she attempted to renege, but the court held her to the agreement.¹¹⁰

Canada's stance on polygamy, the practice of having more than one spouse,¹¹¹ demands specific consideration within a discussion of *Shari'a* and family law. Polygamy is a criminal offense in Canada that is punishable by up to five years in prison.¹¹² The criminal penalty applies to both those who are party to a polygamous union and those who perform a rite or ceremony attempting to create such a union.¹¹³ However, the law prohibiting polygamy is rarely enforced.¹¹⁴ Marion Boyd's report found that polygamous marriages were, in fact, being conducted in Ontario.¹¹⁵

For polygamous marriages performed in a jurisdiction that properly recognizes such unions, such as a Muslim country, the FLA acknowledges the parties as "spouses," notwithstanding the Criminal Code.¹¹⁶ Such polygamous "spouses," therefore, are entitled to the property distribution afforded to any spouse under the FLA.¹¹⁷ Thus, polygamy does have the effect of reducing the share of previous spouses in a property distribution, but no spouse

¹⁰⁸ *Id.*

¹⁰⁹ *Miglin v. Miglin*, [2003] S.C.R. 550.

¹¹⁰ *Id.*

¹¹¹ WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY 1500 (New Deluxe ed. 2001).

¹¹² Criminal Code of Canada, ch. C-46, § 293 (1985).

¹¹³ §§ 293 (a) & (b).

¹¹⁴ BOYD, *supra* note 4, at 23.

¹¹⁵ *Id.*

¹¹⁶ In the FLA definition of "spouse," a reference to marriage includes a marriage that is actually or potentially polygamous, if it was celebrated in a jurisdiction whose system of law recognizes it as valid. Family Law Act, R.S.O., ch. F.3, § 1.2 (1990) (Can.).

¹¹⁷ BOYD, *supra* note 4, at 23.

loses the right to claim spousal status under the FLA.¹¹⁸

The term "spouse" is given a broad definition in the FLA. A person can become a spouse in three ways: by getting married, by residing with another person for three years, or by having a relationship of some permanence if two people are the parents of a child.¹¹⁹ In Ontario, both men and women may marry multiple times, whereas only men may have multiple spouses under Islamic law.¹²⁰ The difference may be explained by the fact that under Islamic law, only the husband is required to provide support (*mata'a*)¹²¹ to the wife and not vice-versa.¹²²

III. Muslims and *Shari'a* in Canada

The presentation of Ontario's arbitration system and family law explains how religious laws were able to gain a foothold in the province. Outside observers likely would not be surprised to learn that Catholic and Jewish arbitration operated in Ontario under this legal structure because most people are familiar with the presence of members of those religions in North America. But many may wonder how Muslim arbitration came to be so strongly asserted there and what exactly Muslim arbitration might look like. This section of the paper introduces the Muslim population of Canada, the principles of *Shari'a*, how *Shari'a*-based arbitration was actually practiced in Ontario, and the role of Muslim women in the Canadian Muslim community.

¹¹⁸ *Id.*

¹¹⁹ Family Law Act, R.S.O., ch. F.3, §§ 2, 29 (1990) (Can.).

¹²⁰ M.A. QURESHI, MUSLIM LAW OF MARRIAGE, DIVORCE, AND MAINTENANCE 65 (1995) ("It is generally said that a Muslim husband can marry four times, whereas the wife can marry only one husband."). The relevant verse of the *Qur'an* is *Qur'an* 4:3: "And if ye fear that ye will not deal fairly by the orphans, marry of the women who seem good to you, two or three or four and if ye fear that ye cannot be justice (to so marry) than one (only) or (the captives) that your right hands possess. Thus it is more likely that ye will not do injustice." See *id.* (quoting THE HOLY QUR'AN 4:3).

¹²¹ ASGHAR ALI ENGINEER, THE RIGHTS OF WOMEN IN ISLAM 155-56 (2004) (indicating that there is some dispute about the exact translation of *mata'a*).

¹²² BOYD, *supra* note 4, at 24. But see ENGINEER, *supra* note 121, at 157 (explaining that there is some debate about the requirement of a husband to pay *mata'a*; Imam Muhammad, for example, says there is no such requirement).

A. *An Identity Portrait*

Roughly a third of all Muslims live in countries where they are in the minority.¹²³ Today, Muslims and various Islamic organizations are prevalent in the largest Canadian cities.¹²⁴ The majority of Canada's Muslims are recent immigrants.¹²⁵ In contrast, the Muslim community in America dates to the time when the first African slaves were brought over by the European colonists.¹²⁶ Thirteen Muslims were reported to live in Canada in 1871.¹²⁷ By 1981, the number had grown to 98,165.¹²⁸ Today, there are about 579,640 Muslims in Canada, accounting for nearly 2% of the entire Canadian population and representing the largest religious minority in Canada.¹²⁹ Ontario has the largest share of the Canadian Muslim population at 352,530.¹³⁰ In contrast, the Canadian population overall is relatively homogenous: 85% of the Canadian population is white and 95% of the population is Christian.¹³¹

There is significant diversity within the Canadian Muslim community. Muslim immigrants have come to Canada from across the Middle East, Africa, Europe, South America, and the Caribbean.¹³² This wide diversity of national origin leads to significant variation of languages, ethnic backgrounds, races, and even versions of Islam.¹³³ Emigration from Muslim countries has largely been driven by political and economic unrest.¹³⁴ Canada has served as an attractive destination for Muslim emigrants

¹²³ AHMAD F. YOUSIF, *MUSLIMS IN CANADA: A QUESTION OF IDENTITY* 12 (1993).

¹²⁴ *Id.* at 13.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* (citing *THE MUSLIM COMMUNITY IN NORTH AMERICA* 76 (Earle Waugh, Baha Abu-Laban, and Regula Qureshi eds., 1983)).

¹²⁸ *Id.* (citing A. RASHID, *THE MUSLIM CANADIAN: A PROFILE A PROFILE ON OTTAWA* 15-19 (1985)).

¹²⁹ STATISTICS CANADA, *POPULATION BY RELIGION, BY PROVINCES AND TERRITORIES* (2001 Census), <http://www40.statcan.ca/L01/cst01/demo30b.htm>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² YOUSIF, *supra* note 123, at 14.

¹³³ *Id.*

¹³⁴ *Id.* at 14.

because of its relative economic advantages, educational opportunities, and the guarantees of freedom of faith and expression.¹³⁵ However, these guaranteed freedoms create a ideological rift in the Muslim immigrant community of Canada. Some Muslim immigrants have come hoping to be free to practice the customs and religion of their former homes, while others have come to escape the restrictions that custom and religion may have imposed on them.¹³⁶

The religious aspects of Muslim identity have affected the immigrants so significantly because Islam covers all areas of life, both social and spiritual.¹³⁷ Most Muslim countries, however, have not been formally governed by Islamic laws since the time of Western colonization.¹³⁸ But the values and traditions of Islamic faith continue to pervade Muslim societies as part of the social structure, encouraging its practice.¹³⁹ For example, any Westerner who has spent a single night in a Muslim country knows well the calls of the *muezzin* that echo across Muslim cities at sunrise, calling the faithful to prayer.¹⁴⁰ This Islamic-based social structure is not in place in Canada, leaving many Muslim immigrants disoriented when they arrive in a country whose policies and structures have developed around Christian traditions.¹⁴¹ Even the simple rite of praying five times each day can present complications to a Muslim in a Christian country. At work or school, it may be difficult to find a private place to pray. Answering the call to prayer on Friday (the Muslim Sabbath) at the local mosque may mean choosing between Islam and a job.¹⁴²

Muslims in Canada are confronted with a paradox. On the one hand, they experience more religious freedom than in the Muslim countries they left behind; but on the other hand, that religious

¹³⁵ *Id.* at 17.

¹³⁶ BOYD, *supra* note 4, at 46.

¹³⁷ *Id.* at 14.

¹³⁸ Abdal-Haqq, *supra* note 15, at 68.

¹³⁹ YOUSIF, *supra* note 123, at 15.

¹⁴⁰ The *muezzin* is the "man who performs the *adhan*, or call to prayer." Gulevich, *supra* note 5, at 434.

¹⁴¹ *Id.* at 22

¹⁴² BOYD, *supra* note 4, at 46; see also SHAHID ATHAR, REFLECTIONS OF AN AMERICAN MUSLIM 3-4 (1994).

freedom flows from a larger guarantee of freedom to all Canadians, which entails activities beyond the limits of Islam. Some of the disorientation for Muslims, therefore, owes to the very freedom that attracted Muslim immigrants to Canada in the first place. Muslims in Canada may frequently experience a pressure to pass beyond the limits of the Islamic faith in a society that proudly protects the right of the individual to drink alcohol, eat pork, charge bank interest, gamble, or have premarital sex.¹⁴³

While Islam is made up of certain rules and restrictions which apply to any follower, the religion is fundamentally defined by five main principles or pillars: 1) *Shahadah*: the belief that Allah is the only god and Muhammad (pbuh)¹⁴⁴ was his final Prophet; 2) *Salat*: the observance of prayer five times per day; 3) *Sawm*: observing the fast of Ramadan; 4) *Zakat*: giving to charity; 5) The *Hajj*: making the pilgrimage to Mecca at least once in a person's lifetime.¹⁴⁵

In 1993, Ahmad F. Yousif conducted a study of 152 Muslims living in the Canadian National Capital Region (CNCR), which is to say in or near Ottawa, Ontario.¹⁴⁶ Part of the study included a survey asking whether the individuals continued to observe *Salat*, *Sawm*, and *Zakat* after moving to Canada and which activity was most valuable to their Muslim identity.¹⁴⁷ This survey was done to observe the stability of these three "active" pillars of Muslim life, how they are incorporated into Canadian life, and to better understand the state of Muslim identity in Canada and what it depends on most.

¹⁴³ *Id.* at 16. Of course, this may also be the case in the former Muslim country which they left.

¹⁴⁴ The parenthetical "(pbuh)" is an acronym for "peace be upon him," a translation of the phrase which is commonly invoked as a sign of respect any time the Prophet's name is written or spoken. See Abdal-Haqq, *supra* note 15, at 40 n.58.

¹⁴⁵ Abdal-Haqq, *supra* note 15, at 41. While these five tenets are consistent between *Sunni* and *Shi'a* Muslims, there are numerous religious groups in North America that claim to follow Islam but may not identify with the five tenets. Examples of such groups operating outside the five pillars are The Ahmadiyyah Movement, The Moorish Science Temple of America, The Lost Found Nation of Islam (commonly known as Nation of Islam), and the Nubian Islamic Hebrews (commonly known as the Ansaru Allah Community). See *id.* at 43-44.

¹⁴⁶ YOUSIF, *supra* note 123, at 27.

¹⁴⁷ *Id.* at 31-54.

More than sixty percent of respondents reported that they continued to perform *Salat*, the prayers given facing Mecca, at least sometimes.¹⁴⁸ Of those that continued to pray, more than half performed all five prayers each day.¹⁴⁹ Nearly seventy percent of the respondents rated the paying of *Zakah*, as “very important” to their identity,¹⁵⁰ and a majority of those same respondents continued to make the contribution each year.¹⁵¹ Almost eighty percent of respondents continued to observe the demanding fast of Ramadan,¹⁵² which involves a prohibition from sunrise to sunset on eating, drinking, and smoking as well as on voluntary vomiting, self-pollution, sexual intercourse, and other practices.¹⁵³ Another ten percent stated that they continued to observe Ramadan only when outside of Canada.¹⁵⁴

Based on these findings, Yousif reached several conclusions. Most significant is the observation that Muslim identity in Ottawa closely tracks with the performance of the traditional pillars of Islam and that most Muslims in the CNCR continue to observe these rites.¹⁵⁵ In other words, Islam has not been reinvented simply because of a geographic movement. Also, even though practicing the “active” pillars certainly leads to a strong sense of Muslim identity, it does not guarantee that the Muslim identity achieved in Canada is secure.¹⁵⁶ Finally, Muslims may have a strong sense of identity in Canada but also experience racism or discrimination or feel that their Muslim identity is under attack by social pressures.¹⁵⁷

As an individual engages in activities that are expressly forbidden by one’s religion, or is prevented from maintaining practices that are critical to that religion, the individual

¹⁴⁸ *Id.* at 33 (figure 2).

¹⁴⁹ *Id.* at 35 (figure 3).

¹⁵⁰ *Id.* at 45 (figure 7).

¹⁵¹ *Id.* at 44.

¹⁵² YOUSIF, *supra* note 123, at 45 (figure 7).

¹⁵³ *Id.* at 45.

¹⁵⁴ *Id.* at 47.

¹⁵⁵ *Id.* at 54.

¹⁵⁶ *Id.* at 79.

¹⁵⁷ *Id.* at 55-82.

experiences a dissonance related to identity.¹⁵⁸ Stated simply, if to be Muslim is to follow *Shari'a*, it necessarily follows that one who does not follow *Shari'a* is not Muslim. In recognition of this fact, Irshad Abdal-Haqq writes: "[Islamic law] must command the attention of any Muslim community seeking to preserve and assert itself."¹⁵⁹

B. Shari'a: A Basic Introduction to the Principles

While the basic tenets of the Muslim faith are easy to define, Islamic law is a much more complex and contentious issue. In Ontario the public's misconception of the Arbitration Act was perhaps only equaled by its misconception of *Shari'a* law. For example, during the debate, many Canadians who argued against *Shari'a*-based arbitration believed they were dissenting to the formation of "*Shari'a* Tribunals."¹⁶⁰ The Council of American-Islamic Relations of Canada (CAIR-CAN) explains why this conception of *Shari'a*-based arbitration was a mistake:

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 which may be the subject of arbitration under Ontario's Arbitration Act. Moreover, such a tribunal is not a full-fledged Islamic court, as may be inferred by the use of the word "shariah", and its limited jurisdiction stems from the Act. The tribunal will, more appropriately, be a form of Muslim dispute resolution, consistent with Canadian law and the Charter within the flexibility of Islamic normative principles.¹⁶¹

To properly consider the debate that occupied Ontario, it is important to juxtapose the freedoms allowed by the Arbitration Act and the actual tenets of *Shari'a*. By observing the actual principles of *Shari'a*, a more complete appreciation of the stakes

¹⁵⁸ YOUSIF, *supra* note 123, at 59-60 (specifically addressing the issue of the effect of the legalized consumption of alcohol on adolescents).

¹⁵⁹ Abdal-Haqq, *supra* note 15, at 30.

¹⁶⁰ See, e.g., BOYD *supra* note 4, at 54 quoting Homa Arjomand ("We strongly believe that *Shari'a* tribunals will crush women's liberties.").

¹⁶¹ BOYD, *supra* note 4, at 45. The arbitration referred to here is "*Shari'a*-based arbitration" which comprehends the explanation of CAIR-CAN, but also accounts for the fact that non-Muslims could also choose to settle a family law dispute using *Shari'a*-based arbitration.

in the *Shari'a* debate emerges.

Islamic law is understood in two forms, *Shari'a* and *fiqh*. *Shari'a* is the word relating to the primary sources of law.¹⁶² It literally means "path to the watering place"¹⁶³ which is meant to convey the idea that *Shari'a* is the source of life.¹⁶⁴ The word traces directly to a verse in the *Qur'an*:¹⁶⁵ "Then we put thee on the [right] Way of religion; so follow thou that [Way], and follow not the desires of those who know not."¹⁶⁶ *Shari'a* draws from both the *Qur'an*, Allah's revelation to mankind as recorded by Muhammad (pbuh),¹⁶⁷ and the Sunnah, which includes the sayings of Muhammad (pbuh) and things he did as well as those things he refrained from doing.¹⁶⁸

While *Shari'a* is meant to govern all human activity, specific issues naturally arise that are not covered. In that event, one is to use reason to deduce the principles *Shari'a* would apply.¹⁶⁹ This process is called *ijtihad*, which literally means "to exert oneself."¹⁷⁰ The concept is embodied in the following conversation between Muhammad and one of his appointed

¹⁶² *Id.*

¹⁶³ QURESHI, *supra* note 120. *Shari'a* actually has several accepted English translations such as "pathway," "path to be followed," "way to be cleared," and "path leading to the water." See Abdal-Haqq, *supra* note 15, at 33.

¹⁶⁴ Abdal-Haqq, *supra* note 15, at 33.

¹⁶⁵ *Qur'an* means "that which should be recited, read, or studied" and refers to the book embodying the revelation from Allah to Muhammad (pbuh). *Id.* at 45.

¹⁶⁶ *Id.* (citing THE HOLY QUR'AN 45:18, in A. YOUSEF ALI, THE HOLY QUR'AN, TEXT, TRANSLATION, AND COMMENTARY 1359 (1934)). Note that references to passages in the *Qur'an* include two numbers. The first number is the *sura*, or chapter, the second is the *ayat*, or verse. See C.T.R. HEWER, UNDERSTANDING ISLAM: AN INTRODUCTION 51-53 (2006).

¹⁶⁷ Muhammad ibn Abdullah (pbuh) is understood to be the final prophet of Allah in Islam. His teachings, which founded the faith, began around 610 C.E. in Arabia. Abdal-Haqq, *supra* note 15, at 33. For more on Muhammad (pbuh), see IBN ISHAQ, THE LIFE OF MUHAMMAD (A. Guillaume trans., Oxford University Press 2002).

¹⁶⁸ Abdal-Haqq, *supra* note 15, at 33. *Allah* is the supreme being in Islam, related to the idea of God in Judaism and Christianity. The defining verse in the *Qur'an* is 112:4: "Say: He is Allah, The One and Only; Allah, the Eternal, the Absolute; He begets not, nor is He begotten, And there is none like unto Him." THE HOLY QUR'AN 112:4.

¹⁶⁹ Abdal-Haqq, *supra* note 15, at 33 (citing SAID RAMADAN, ISLAMIC LAW, ITS SCOPE AND EQUITY 62 (1970)).

¹⁷⁰ *Id.* (emphasis added).

judges, which is recorded in the Sunnah:

According to what shalt thou judge? He replied: According to the Book of Allah. *And if thou findest nought therein?* According to the Sunnah of the Prophet of Allah. *And if thou findest nought therein?* Then I will exert myself to form my own judgment. Praise be to God Who has guided the messenger of His Prophet to that which pleases His Prophet.¹⁷¹

The second and more complicated aspect of Islamic law, called *fiqh*, means "intelligence."¹⁷² It is both the counterpart to *Shari'a* and the application of *ijtihad*.¹⁷³ In practical terms, *fiqh* represents the actual laws deduced to form *Shari'a*, which cover all legal issues concerning religion, politics, civil and criminal matters, constitutions, and procedural law.¹⁷⁴ These laws are subject to change depending on the circumstances, whereas the principles of *Shari'a* are considered monolithic.¹⁷⁵

Nineteen different schools of *fiqh*, called *fiqh madhabs*,¹⁷⁶ developed in the first four centuries of Islam, between the seventh and eleventh centuries.¹⁷⁷ The schools developed "as Islam spread to new lands and confronted new cultures that were not addressed directly in the *Qur'an* and Sunnah."¹⁷⁸ Today, only five schools exist: four *Sunni* and one *Shi'a*.¹⁷⁹ The average well-read Muslim is knowledgeable of these five schools and failure to belong to

¹⁷¹ *Id.* (citing SAID RAMADAN, *ISLAMIC LAW, ITS SCOPE AND EQUITY* 75 (1970)).

¹⁷² Abdal-Haqq, *supra* note 15, at 37.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* *Shari'a* is considered infallible because it is the law of God while *ijtihad* is merely a process of men attempting to understand God's intentions. *Fiqh*, therefore, is open to debate. *Id.* (citing A. BILAL PHILIPS, *THE EVOLUTION OF FIQH* 100 (3d ed. 1992)).

¹⁷⁶ *Madhab* literally means "way of going." *Id.* at 67.

¹⁷⁷ *Id.* (citing MUHAMMAD IQBAL, *RECONSTRUCTIONS OF RELIGIOUS THOUGHT IN ISLAM* 137 (2d ed. 1989)).

¹⁷⁸ Abdal-Haqq, *supra* note 15, at 67.

¹⁷⁹ *Id.* at 38-39. The four *Sunni* schools are: *Hanafi*, *Maliki*, *Shafii*, and *Hanbali*. *Jafari* is the predominant school of the *Shi'a*. GULEVICH, *supra* note 5, at 48. For an explanation of the historic origins of the *Sunni* and *Shi'a*, see ALKA SINGH, *WOMEN IN MUSLIM PERSONAL LAW* 22-24 (1992). For an editorial showing how lack of knowledge on this subject has injured American foreign policy, see Jeff Stein, *Can You Tell A Sunni From a Shiite?*, N.Y. TIMES, Oct. 17, 2006, at A21.

only one school was traditionally viewed as heresy.¹⁸⁰ The differences between the schools can be very significant on a given issue.¹⁸¹ Consequently, the claims of one Muslim in a particular case may be completely different from those of another Muslim presented with the same set of facts.¹⁸²

Fiqh can be understood as both the process of deducing and applying the principles of *Shari'a* as well as the collection of the deductions reached by specific jurists.¹⁸³ The process of *fiqh* is divided into two sections.¹⁸⁴ The first, known as the "roots," is called *usul al-fiqh*, which refers to the methodology and interpretation principles used in determining the law.¹⁸⁵ The second, known as the "branches," is called *faru al-fiqh*.¹⁸⁶ It is the practice of law and deals with the actual decisions, called *fatawa*, reached by applying *usul al-fiqh*.¹⁸⁷ The five major schools of *fiqh* agree on the four main elements of *fiqh*.¹⁸⁸

The four primary elements of *fiqh* emerged in the period after Muhammad and his companions who are called the Sahaba.¹⁸⁹ In order to engage in *fiqh*, a person attempting to make exegesis of the *Qur'an* must: 1) have a mastery of Classical Arabic,¹⁹⁰ 2) have a complete understanding of the overall message of Islam; 3) have the ability to perceive meanings, abstract relations, and generalizing principles apparent in the various passages of the *Qur'an*; and 4) be familiar with the traditions arising from

¹⁸⁰ Abdal-Haqq, *supra* note 15, at 38.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 50.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* (citing ISMAIL R. AL FARUQI & LOIS L. AL FARUQI, THE CULTURAL ATLAS OF ISLAM 267 (1986)).

¹⁸⁶ Abdal-Haqq, *supra* note 15, at 50.

¹⁸⁷ *Id.* (citing MOHAMMAD H. KHAN, THE SCHOOLS OF ISLAMIC JURISPRUDENCE 5 (1991)).

¹⁸⁸ *Id.* at 51.

¹⁸⁹ *Id.*

¹⁹⁰ The language of Arabic has many forms. For example, the Arabic spoken by Egyptians is different in significant ways from the Arabic spoken in Jordan, Syria, and Lebanon. Classical Arabic refers to the Arabic used in the *Qur'an*. It is the language used in newsprint throughout the Middle East. See SIONA JENKINS, EGYPTIAN ARABIC PHRASEBOOK 9-10 (2001).

Muhammad and the Sahaba.¹⁹¹ Apart from these four prerequisites, the various schools diverge in the techniques that are actually applied to generate *fiqh*.¹⁹² Thus, performing exegesis of the *Qur'an* is a serious affair requiring satisfaction of the prerequisites and knowledge of the deduction skills used by the particular school to which the exegete belongs.¹⁹³

It is important to note that the *Shi'a* school continues to allow its *imams* to perform *ijtihad* but the *Sunni* schools do not.¹⁹⁴ *Fiqh* among the *Sunni* schools relies completely on *ijtihad* conducted before the thirteenth century.¹⁹⁵ This particular difference is called *taqlid*, which means rigid conformity or blind following.¹⁹⁶ The *taqlid* policy began developing in the tenth century when the ulema (the jurist class in Muslim society) came to believe that all *Shari'a* principles that could possibly be reached through *ijtihad* had been reached.¹⁹⁷ Under *taqlid* no new judge or student of law may render a decision based on their own *ijtihad*.¹⁹⁸ Abdal-Haqq explains that this is roughly the equivalent of having an entire court system boot-strapped to stare decisis in every decision and having no legislature to make new laws.¹⁹⁹

Taqlid "was never proven legitimate" and, according to many commentators, "has had a devastating impact on Islamic law and culture."²⁰⁰ *Taqlid* remains a controversial doctrine. The results it brings for women in divorce property settlements (less than fifty percent of the net) were undoubtedly at the center of the *Shari'a* debate in Ontario. Yet, because of the difficulties that *taqlid* presents to legal issues arising in the modern Western world, many

¹⁹¹ Abdal-Haqq, *supra* note 15, at 52. These traditions are collected in the Hadith. *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 54 (citing IRA G. ZEPP, JR., A MUSLIM PRIMER 152-55 (1992)).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 60 (citing ABDUR RAHIM, THE PRINCIPLES OF ISLAMIC JURISPRUDENCE ACCORDING TO THE HANAFI, MALIKI, SHAFI'I AND HANBALI SCHOOLS 69 (Kitab Bhavan 1994)).

¹⁹⁷ Abdal-Haqq, *supra* note 15, at 60.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

members of the Muslim Diaspora of North America have come to believe that modern life here cannot adequately be addressed by the older *fiqh* traditions.²⁰¹ Thus, it is not uncommon to find Muslims engaged in *ijtihad* in North America.²⁰² This understanding mirrors the cultural conflicts that drove the creation of the original nineteen schools of *fiqh* ten centuries ago. Developing a new understanding of Muslim identity that does not betray the traditions of *Shari'a* is critical for the sake of the identity's authenticity.²⁰³

The Fiqh Council of North America, located in Virginia, is an example of a group working on issues related to the development of *fiqh* that is culturally relevant in North America.²⁰⁴ The Council is not affiliated with any established *fiqh* school; instead it advocates a new *fiqh* school specifically for Muslims living in non-Muslim countries.²⁰⁵ Since there is no *ulema* operating in North America, the development of *fiqh* is completely unimpeded.²⁰⁶ This means that an opportunity that has not been presented to Muslims in nearly 1,000 years, at least in the area of family law, was at play for Ontario's Muslim community prior to Premier McGuinty's declaration.²⁰⁷

C. The Practice of Shari'a-based Arbitration

In her commissioned report, Marion Boyd presented the arbitration structure of two different groups, one *Shi'a* and one *Sunni*, who have offered arbitration and mediation to Muslims in Canada.²⁰⁸ The formal organization of the groups is striking given that they exist only to resolve disputes brought in a small niche of

²⁰¹ *Id.* at 63 (citing W.D. MUHAMMAD, IMAM W. DEEN MUHAMMAD SPEAKS FROM HARLEM, N.Y. 33 (1985)).

²⁰² *Id.*

²⁰³ JAMES CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH CENTURY ETHNOGRAPHY, LITERATURE, AND ART 340-43 (1988).

²⁰⁴ Abdal-Haqq, *supra* note 15, at 63, n.189 (citing YUSEF T. DELORENZO, FIQH AND THE FIQH COUNCIL OF NORTH AMERICA AND MUSLIM LEGAL DIRECTORY & GUIDE TO YOUR LEGAL RIGHTS 60-62 (Kareema Altomare ed., 1995)).

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 81

²⁰⁷ *Id.*

²⁰⁸ BOYD, *supra* note 4, at 57-62.

the entire legal system. Observing these two groups offers an insight into the practical construction of *Shari'a*-based arbitration organizations in Canada and reflects the strength of the demand for this legal resource created by Muslim identity.

All of the groups offering arbitration and mediation service within the Muslim community in Ontario emphasized in their submissions to Boyd's report that the peaceful resolution of disputes is a primary goal of the Muslim faith.²⁰⁹ This goal is part of the Preamble of the *Shi'ite* Ismaili National Conciliation and Arbitration Board for Canada, which reads: "When differences of opinion or disputes arise between them, these should be resolved by a process of mediation, conciliation and arbitration within themselves in conformity with the Islamic concepts of unity, brotherhood, justice, tolerance[,] and goodwill."²¹⁰

Unlike *Sunnis*, who place greater emphasis on the individual, *Shi'ites* actually recognize authority figures who define the orthodox interpretation of Allah's will.²¹¹ These authority figures, called imams, succeed to their positions by heredity.²¹² Their authority is considered to be inherited from the Prophet Muhammad (pbuh) himself.²¹³ Today, the Ismailis are under the authority of His Highness Prince Karim Aga Khan, the forty-ninth Imam, who traces his lineal descent through the Prophet's daughter Fatima and son-in-law Ali.²¹⁴ Aga Khan is the spiritual leader of the Ismailis, who reside in twenty-five different countries.²¹⁵

The Imam drafts a constitution that governs the social relationships within Ismaili communities and the relationships between these communities.²¹⁶ The constitution is revised or

²⁰⁹ *Id.* at 57.

²¹⁰ *Id.* (quoting Submission to Ontario Arbitration Review, His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board for Canada (Sept. 10, 2004)).

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ BOYD, *supra* note 4, at 57.

²¹⁵ *Id.*

²¹⁶ *Id.*

updated depending on changing needs and circumstances.²¹⁷ The most recent constitution, which includes a dispute resolution system, was created in 1986 and regulates nearly every aspect of daily life.²¹⁸ Dispute resolution is administered by the National Conciliation and Arbitration Boards (CABs).²¹⁹

The worldwide Ismaili community is divided into fourteen jurisdictions.²²⁰ Canada itself has five regional CABs, which handle the actual cases, and one national CAB, which mainly promulgates policies and programs.²²¹ There are formal rules governing arbitration for the CABs, including regulations about the composition of the arbitration panel, assistance for parties preparing submissions, and confidentiality.²²²

The CABs are comprised completely of volunteers appointed by the Imam to three-year terms.²²³ In Ontario, the volunteers included lawyers, social workers, businesspersons, other qualified professionals, and former senior community members.²²⁴ The group in Ontario at the time of Boyd's report consisted of thirty-four people, including sixteen women.²²⁵ CAB volunteers sought to resolve disputes in a manner that respected the individuals and the harmony of the community by trying to minimize the financial and emotional cost for both parties.²²⁶ By emphasizing community values in addition to individual values, the CABs hoped to act as both a dispute resolution body and a dispute prevention body.²²⁷

These twin goals of individual respect and the maintenance of community harmony were achieved by adherence to the following principles:

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ BOYD, *supra* note 4, at 58

²²¹ *Id.*

²²² *Id.* For the complete regulations of CAB mediation and arbitration, see *id.*, at 157-75.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ BOYD, *supra* note 4, at 58-59.

²²⁷ *Id.* at 60.

- 1) Before mediating or arbitrating on any dispute, the CABs must first satisfy themselves that the parties to the dispute have come to the CABs voluntarily and out of their own free will and desire to have their disputes resolved through the CAB system;
- 2) The mediation and arbitration processes are conducted by CAB members who have received appropriate training to ensure their competent and equitable handling of the matter;
- 3) The processes are conducted in accordance with rules that are intended to assist in assuring the appropriate standard of operation;
- 4) The duty of confidentiality to the parties to a dispute must be absolutely respected.²²⁸

The CAB reported that it was accessed in equal numbers by males and females.²²⁹ The parties were responsible for paying the cost of preparing their cases and obtaining legal advice, but the actual process was free.²³⁰ Obviously, this led to tremendous savings compared to the formal court system.²³¹ The group also reported that 769 arbitration or mediation cases had been brought to the CAB between 1998 and 2003.²³² The CAB allowed parties to opt out of the process at any time, but it still achieved a success rate of sixty-nine percent.²³³

Masjid El Noor, a *Sunni* mosque based in Toronto, offers an example of a *Sunni* system of mediation and arbitration.²³⁴ Masjid El Noor formally offered counseling, mediation, and arbitration services to its community beginning in 1982 and informally before that time.²³⁵ The director of the mosque, Mubin Shiakh, was also the chief mediator.²³⁶ The mediation board he directed consisted of seven people, one of whom was an imam, with the remaining

²²⁸ *Id.* at 59.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² BOYD, *supra* note 4, at 59.

²³³ *Id.*

²³⁴ *Id.* at 60 (citing the Submission of Masjid El Noor (Aug. 24, 2004)).

²³⁵ *Id.*

²³⁶ *Id.*

seats going to men and women equally.²³⁷ Most of the mediators were professionals from the community who volunteered their services.²³⁸ Participation at Masjid El Noor by the parties to the process was strictly voluntary.²³⁹ To help ensure that consent was freely given, both parties were given a copy of the pamphlet “Family Law in Ontario” which was translated in Gujarati and Urdu by the mosque for those who needed language assistance.²⁴⁰ While parties are given the option of appeal to the formal court systems, Masjid El Noor reported that no appeal had ever been made.²⁴¹

Despite the highly structured and equitable service provided by the CABs and Masjid El Noor, other Muslims in Ontario reported widely varying practices across the province.²⁴² In some instances, the results of *Shari’a*-based arbitration were in direct conflict with Ontarian and Canadian law.²⁴³ While not relating directly to arbitration, a quote from Ali Hindy, leader of the Alaheddin Mosque in Scarborough, Ontario, serves as an example of the way some members of the Muslim community flouted family laws:

The *Qur’an* says a man is limited to four wives. Canadian law doesn’t allow it—God does, so I marry them myself. If your wife doesn’t like sex, you can take another wife. If she can’t give you children, you can take another wife. If a man is financially capable and a woman doesn’t have a husband, you can marry her as well.²⁴⁴

The actions and statements of people like Ali Hindy only serve to confuse the debate. Some leaders in the Muslim community may

²³⁷ *Id.*

²³⁸ BOYD, *supra* note 4, at 60.

²³⁹ *Id.*

²⁴⁰ *Id.* Gujarati and Urdu are common in India and Pakistan. See CIA World Factbook, India, <https://www.cia.gov/cia/publications/factbook/geos/in.html>; CIA World Factbook, Pakistan, <https://www.cia.gov/cia/publications/factbook/geos/pk.html>.

²⁴¹ BOYD, *supra* note 4, at 61 (citing Submission of Mubin Shaikh, ‘Sharia Tribunals and Masjid El Noor: A Canadian Model’ (Aug. 24, 2004)).

²⁴² *Id.*

²⁴³ *Id.* at 60.

²⁴⁴ *Id.* (quoting Sally Armstrong, *Criminal Justice*, 152 CHATELAINE 158 (Nov. 2004)).

sanction activities, such as a polygamous marriage, that are consistent with *Shari'a* but inconsistent with Ontario's laws. As mentioned before, conducting a polygamous marriage in Ontario is not only in violation of the limits of the Arbitration Act, it is also a criminal offense.²⁴⁵ Nothing about Ontario's arbitration system which allowed religious arbitration facilitated or encouraged actions like those of Ali Hindy. Hindy's actions, therefore, are not related to considerations of whether the arbitration system allowing use of religious laws was fundamentally sound. Instead, they merely demonstrate the need to educate the public and properly enforce the subject matter and conscionability constraints provided by the Arbitration Act.

D. Women Under Shari'a

The continuation of practices like those of Ali Hindy certainly concerned the opponents of *Shari'a*-based arbitration. The concern, however, was not merely that certain imams might be operating outside the law. Opponents also claimed that even within the constraints of the Arbitration Act, the results for Muslim women were systematically discriminatory.²⁴⁶ Such views are consistent with the prevailing conceptions of the Muslim woman that are present in Western societies. These images shaped much of the debate in Ontario. The Western view of the Muslim woman since the eighteenth century has been of a woman innately oppressed.²⁴⁷ This oppression is portrayed by either the "rebellious renegade," a Muslim woman who rebels against the Islamic world, or the "submissive nonentity."²⁴⁸ Many authors have stressed that Muslim women should speak out to complicate these images in Western minds in order to realize change.²⁴⁹

²⁴⁵ *Id.*

²⁴⁶ Examples of groups echoing this view are 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 Women of Canada. *Id.* at 31.

²⁴⁷ MOHJA KAHF, *WESTERN REPRESENTATIONS OF THE MUSLIM WOMAN* 177 (1999).

²⁴⁸ *Id.*

²⁴⁹ See, e.g., *id.* at 179; Pascale Fournier, *The Ghettoisation of Difference in Canada: "Rape by Culture" and the Danger of a "Cultural Defense" in Criminal Law Trials*, 29 MANITOBA L.J. 81, 119 (2002) ("Women of colour should be encouraged to attack and problematise mainstream understanding of their culture . . .").

The Canadian Council of Muslim Women (CCMW), one of many interested groups to weigh in with formal position statements during the *Shari'a* debate, understood that a more modern and equitable *fiqh* might evolve in Ontario, but noted that "Muslims have . . . Five Pillars of Practice and there is no sixth pillar or belief which states that Muslims have to practise *fiqh*."²⁵⁰ The group, therefore, saw that there would be no guarantees that an equitable *fiqh* would emerge. If such a *fiqh* did not emerge and find widespread application, then any of the extant schools of Islamic law might be applied in the arbitration process.²⁵¹

The practices of Muslim leaders like Ali Hindy seem to confirm that, even in a best case scenario, an emergent *fiqh* would meet considerable opposition. Such practices are detrimental to women in the opinion of groups like CCMW.²⁵² It is understandable, then, that a group representing Muslim women's interests in Ontario might side against the uncertainties of arbitration, as CCMW did. Defeating religious arbitration would guarantee the gender equality of the Ontario court system to all Muslim women, a court system whose equality does not depend on some potentiality.²⁵³

CCMW raises the primary argument brought by the dissenters to Muslim arbitration: that women are treated unfairly under *Shari'a* law. Indeed, most of the debate was framed as a women's rights issue. Some dissenting groups, such as the CCMW, likely have a thorough understanding of exactly how women are treated in a Muslim society. Others, however, may approach the issue with significantly prejudicial misconceptions. Thus, before rebutting the argument raised by the CCMW and others that Muslim arbitration courts should not be allowed to operate in Canada, it is necessary to clarify the treatment of women under *Shari'a*.

Shari'a, under any *fiqh* school, discusses the rights of women in detail. Those rights primarily exist in the areas relevant to the

²⁵⁰ Canadian Council of Muslim Women, *Position Statement on the Proposed Implementation of Sections of Muslim Law [Sharia] in Canada* (rev. May 25, 2004), http://www.ccmw.com/Position%20Papers/Position_Sharia_Law.htm.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ See *supra* Section II C.

arbitration debate: marriage, divorce, custody of children, and inheritance. Despite the fact that the *Qur'an* is fairly liberal in its treatment of women, *taqlid* has effectively frozen much of the understanding of Muslim women's rights to the complete subjugation which existed in feudal societies 1,000 years ago.²⁵⁴ During that patriarchal period, the role of women was simply to produce children and provide pleasure for the husband.²⁵⁵ This subjugation of women is more deeply entrenched than other traditions in many Muslim communities.²⁵⁶ Slavery, for example, was a practice which was originally accepted under *Shari'a* but now has been widely abolished, while the old concepts of women's rights remain.²⁵⁷

Some principles of *Shari'a* regarding the treatment of women even date to the period before Islam, called *jahiliyah*,²⁵⁸ when women were largely treated as chattel.²⁵⁹ Practices from the *jahiliyah* period, called *adat*, have become part of *Shari'a* where the *Qur'an* or Sunnah did not directly address the issue.²⁶⁰ In some instances, however, the *Qur'an* improved women's rights over these practices.²⁶¹ For example, the *Qur'an* expressly forbade the common practice of inheriting women as a possession and rewarded those who did not bury an infant daughter alive, also a custom dating from the *jahiliyah* period.²⁶² During *jahiliyah* there was no limit on the number of women a man could marry.²⁶³ According to one commentator, the average number of wives for each man was ten.²⁶⁴ The verse from the *Qur'an* used to justify

²⁵⁴ See ENGINEER, *supra* note 121, at 1.

²⁵⁵ *Id.* at 3.

²⁵⁶ See *id.* at 5-6 (discussing the extreme seclusion of women in the Muslim communities).

²⁵⁷ See *id.* at 13.

²⁵⁸ See *id.* at 22-24.

²⁵⁹ SINGH, *supra* note 179, at 75.

²⁶⁰ ENGINEER, *supra* note 121, at 20.

²⁶¹ SINGH, *supra* note 179, at 75.

²⁶² ENGINEER, *supra* note 121, at 20-21. Again, this is only a relative improvement. Few women today would probably take solace in a set of laws that merely did not reward a man who buried his infant daughter alive.

²⁶³ *Id.* at 21.

²⁶⁴ *Id.* (quoting Imam al-Tabari). There were apparently instances of men marrying

polygamy, however, actually seeks to limit the number of wives a man takes:

And if you have reason to fear that you might not act equitably towards orphans, then marry from among (other) women such as are lawful to you – two, three, or four; but if you have a reason to fear that you might not be able to treat them with equal fairness, then (only) one—or (from among) those whom you rightfully possess. This will make it more likely that you will not deviate from the right course.²⁶⁵

Muslim marriage, called *nikah*, functions as both a religious duty, *ibadat*,²⁶⁶ and a civil contract.²⁶⁷ The legal aspect entitles the couple to engage in sexual intercourse and procreate.²⁶⁸ Instead of the marriage being a sacrament, as Christian marriages often are, Muslim marriage is sealed just like a contract with an offer by the potential husband and acceptance by the potential wife, called *ijab-wa-qubul*.²⁶⁹ As in any contract, both parties must voluntarily consent.²⁷⁰ To ensure the voluntary offer and acceptance, witnesses are generally required.²⁷¹

This contract has two key parts: the dower (*mahr*) and maintenance (*mata'a*).²⁷² The tradition of *mahr* dates from the *jahiliyah* when women were sold.²⁷³ Whereas in the earlier period a payment would be made to the marriage guardians (*wali*), now

five hundred women. *Id.* at 22.

²⁶⁵ *Id.* at 22 (quoting THE HOLY QUR'AN 4:3). This raises one of the fundamental issues among modern *Qur'anic* commentators—what norm should passages like these establish? *See id.* If context is discounted, the norm is that polygamy is appropriate. *Id.* When context controls, however, monogamous relationships can be viewed as the ideal because only those relationships guarantee that women will appropriately be treated with fairness. *Id.*

²⁶⁶ QURESHI, *supra* note 120, at 56-57.

²⁶⁷ *Id.* at 55.

²⁶⁸ SINGH, *supra* note 179, at 77.

²⁶⁹ ENGINEER, *supra* note 121, at 22-23.

²⁷⁰ QURESHI, *supra* note 120, at 55. Engineer notes that the practice of *wali*, where a male relative would retain an exclusive right to give the woman away and retain the *mahr*, has been done away with. ENGINEER, *supra* note 121, at 23.

²⁷¹ QURESHI, *supra* note 120, at 58. *Shi'a* law does not require a witness. *Id.* at 59.

²⁷² SINGH, *supra* note 179, at 5.

²⁷³ *Id.* at 78.

the *mahr* goes directly to the wife.²⁷⁴ Her property is not merged with the property of the husband after the marriage.²⁷⁵ It is not intended to function as consideration but more as a nuptial gift.²⁷⁶ A more realistic appraisal of the *mahr* emerges in a study of Muslim women in India.²⁷⁷ The study shows that almost no women actually received a *mahr* and most have no idea about the nature or amount of the *mahr* negotiated at the marriage.²⁷⁸ The payment of the *mahr* pledged can be deferred to a later time (*mu'ajjal*).²⁷⁹ In these cases *mahr* functions more truly as psychological insurance because it provides a security against divorce.²⁸⁰

While the couple is married, the husband is completely obligated to provide for the wife according to his capacity regardless of her wealth.²⁸¹ The wife is not required to spend any of her money or relinquish any of her property.²⁸² This obligation is called the "maintenance" and includes payment for food, residence, and clothing.²⁸³ "Food" means cooked food such that the wife is not obliged to cook.²⁸⁴ Likewise clothing is meant to be more than cloth, meaning the woman bears no responsibility to sew her own clothes (an obligation rarely relevant in the developed world where ready-made clothes are the norm).²⁸⁵ The provision of a residence means either a completely separate house or a private area of the husband's parents' house with private

²⁷⁴ *Id.* at 79 (citing JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 161 (1964)).

²⁷⁵ QURESHI, *supra* note 120, at 56; *see also* ENGINEER, *supra* note 121, at 55.

²⁷⁶ ENGINEER, *supra* note 121, at 55.

²⁷⁷ SINGH, *supra* note 179, at 81.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 79 (citing F.B. TYABJI, MUSLIM LAW 107 (1968)).

²⁸⁰ *Id.* at 5; *see also* ENGINEER, *supra* note 121, at 134.

²⁸¹ ENGINEER, *supra* note 121, at 55. The complete financial obligation placed on males in Muslim marriages and the fact that assets are not commingled is part of the underlying justification for women receiving less in divorce settlements. *See id.* at 138.

²⁸² *Id.* at 54-55.

²⁸³ *Id.* at 116.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 116-17.

access if a separate house is beyond the husband's means.²⁸⁶ The man is supposed to pay the woman for breast feeding after she bears a child or provide a wet nurse if the wife does not wish to breast feed.²⁸⁷

Maintenance cannot be waived by an agreement of the parties, and there are very few releases for the husband from the maintenance duty.²⁸⁸ Mental or physical sickness are not sufficient to release the duty unless the illness prevents the consummation of the marriage.²⁸⁹ A release may occur if the woman commits a crime and is imprisoned but not if the man commits a crime and is imprisoned.²⁹⁰ Also, if a separation can be proved to be the fault of the wife, then no maintenance is due.²⁹¹ Slandering one's wife to make such proof is considered a sin.²⁹² Where the husband is not present to provide the maintenance, the wife is allowed to take out a loan in his name.²⁹³

Since marriage is a contract under *Shari'a*, a divorce dissolving the contract, called *talaq*, can be effected by the mutual consent of both parties.²⁹⁴ A unilateral dissolution is also possible under *Shari'a* for both the man and the woman (*khula*).²⁹⁵ Despite the fact that marriage is so easy to terminate under *Shari'a*, the *Qur'an* expressly discourages divorce, calling it the most disliked of permissible acts or *abghaz al-Mubahat*.²⁹⁶

In the event that a marriage comes to an impasse, the *Qur'an* specifically mandates that the couple undergo arbitration.²⁹⁷ The husband and wife are supposed to select an arbitrator together,

²⁸⁶ *Id.* at 117.

²⁸⁷ ENGINEER, *supra* note 121, at 116 (citing THE HOLY QUR'AN 65:6).

²⁸⁸ *Id.* at 118.

²⁸⁹ *Id.* at 117.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.* at 112 (citing THE HOLY QUR'AN 4:20).

²⁹³ ENGINEER, *supra* note 121, at 117-18.

²⁹⁴ *Id.* at 121-22. For a complete list of all *Qur'anic* verses regarding divorce, see ENGINEER, *supra* note 121, at 132-34.

²⁹⁵ *Id.* at 136.

²⁹⁶ *Id.* at 121.

²⁹⁷ *Id.* (quoting THE HOLY QUR'AN 4:35).

called a *hakam*, or appoint a person from both the husband and the wife's families.²⁹⁸ Commentators disagree about whether the ruling from the arbitration is binding or merely a recommendation.²⁹⁹

Either way, to perfect a divorce merely requires the male to pronounce the word '*talaq*' twice.³⁰⁰ This follows from a verse in the *Qur'an*:

Such divorce may be pronounced twice; then either retain them in a becoming manner or send them away with kindness. And it is not lawful for you that you take anything of what you have given them (your wives) unless both fear that they cannot observe the limits prescribed by Allah. But if you fear that they cannot observe the limits prescribed by Allah, then it shall be no sin for either of them in what she gives to get her freedom. These are the limits prescribed by Allah, so transgress them not; and whoso transgresses the limits prescribed by Allah, it is they that are the wrongdoers.³⁰¹

The pronunciation was actually a limitation on the practice of holding a wife in perpetual fear of divorce during *jahiliyah* when divorce might be repeated any number of times.³⁰² A third pronouncement of divorce under *Shari'a* becomes irrevocable.³⁰³ There is some controversy over whether all three pronouncements can occur at one time, a practice common among *Sunni* Muslims.³⁰⁴

This practice is very detrimental to women because the divorce is irrevocably valid even if the husband was just angry or even joking.³⁰⁵ Often it is done to punish a wife for refusing to submit to a husband's authority.³⁰⁶ There is no recourse for the woman or even the regretful husband in this situation.³⁰⁷ Divorces have been

²⁹⁸ *Id.* (quoting THE HOLY QUR'AN 4:35).

²⁹⁹ ENGINEER, *supra* note 121, at 121.

³⁰⁰ *Id.* at 123.

³⁰¹ *Id.* (quoting THE HOLY QUR'AN 2:230).

³⁰² *Id.*

³⁰³ *Id.* at 147.

³⁰⁴ *Id.*

³⁰⁵ ENGINEER, *supra* note 121, at 150.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

conducted like this despite the requirements of the *Qur'an* for arbitration.³⁰⁸ But as already shown, divorce in Ontario has only been allowed to have legal effect under the federal Divorce Act. The more significant issue in the arbitration discussion is what property a woman would be entitled to in the event of a divorce under *Shari'a*.

A divorced woman is entitled to stay at her husband's house during the divorce proceeding.³⁰⁹ After the divorce, the woman continues to be entitled to maintenance in addition to the *mahr*, which, if payment was deferred, is due at dissolution.³¹⁰ This flows from the *Qur'an* which states: "And for the divorced women, provision (must be made) in kindness. This is incumbent on those who have regard for duty."³¹¹

The amount of maintenance required after divorce and the period of time over which that amount must be provided are not clearly prescribed by the verse above.³¹² This has resulted in tremendous controversy. For example, in India, where Muslims elect to have *Shari'a* applied, a Muslim woman named Shah Bano appealed to the Supreme Court of India for maintenance from her husband following a divorce based on this verse from the *Qur'an*.³¹³ When the court awarded her maintenance in perpetuity, hundreds of thousands of Indian Muslims sought the enactment of a law that would limit the obligation of maintenance to the three months following a valid divorce (a period called *iddah*).³¹⁴

Only under one of the *Sunni* schools, *Hanafi*, is the obligation limited to the *iddah*.³¹⁵ While the words of the *Qur'an*, in 2:241, are fixed, the interpretation as to amount and length of provision is

³⁰⁸ *Id.* at 151 (noting that most Muslim divorces in India are performed in this way).

³⁰⁹ *Id.* at 153.

³¹⁰ *Id.* at 154, 214. At 4:20, the *Qur'an* specifically forbids taking back the *mahr* if the marriage has been consummated. THE HOLY QUR'AN 4:20. If the marriage has not been consummated, the husband is entitled to a return of one half of the *mahr*. *Id.*

³¹¹ THE HOLY QUR'AN 2:241.

³¹² ENGINEER, *supra* note 121, at 155.

³¹³ SINGH, *supra* note 179, at 130-63.

³¹⁴ ENGINEER, *supra* note 121, at 154-55.

³¹⁵ *Id.* at 155. There is also controversy within the *Hanafi* school regarding the verse. *Id.* at 156-57.

completely left up to human understanding.³¹⁶ Consequently, the amount a woman will receive under a *Shari'a*-based divorce arrangement is largely unpredictable and not subject to generalization. In short, there is no guarantee of fifty percent distribution.

A woman who initiates a divorce may be at an even greater disadvantage in a property settlement. When a woman sues for divorce under the right of *khula* mentioned above, it is widely accepted that she must return the *mahr* given to her, and she is not entitled to maintenance for any period unless pregnant.³¹⁷ The only exception would be situations where an agreement is made between the spouses before the exercise of *khula*.³¹⁸ This would occur when, for example, a wife agrees to provide for the children in exchange for an allotment of money from the husband.³¹⁹

IV. The Debate

The debate over *Shari'a*-based arbitration in Ontario was carried out on two levels. The first level of argument concerned the substantive results of religious arbitration in family law matters, focusing on the results for women considered in the preceding section. From the perspective of CCMW, and many others protesting *Shari'a*-based arbitration, the results are absolutely discriminatory.³²⁰ To declare something discriminatory, however, requires an appeal to some common set of norms. Creating such a common set of norms that covers all people becomes incredibly difficult when non-Western cultures are involved. The perspectives of cultural relativism and universalism offer different approaches to this level of the debate.

Even if *Shari'a*-based arbitration could be declared discriminatory, another problem remains. It is possible that some Muslim women who were fully apprised of the likely results of *Shari'a*-based arbitration and the Ontario formal court system nevertheless chose *Shari'a*-based arbitration when it was

³¹⁶ *Id.* at 156.

³¹⁷ *Id.* at 164.

³¹⁸ *Id.* at 165.

³¹⁹ *Id.*

³²⁰ BOYD, *supra* note 4, at 46-55.

permitted. But it seems strange that a person given the choice would elect a discriminatory over a non-discriminatory process. So it may be that either the process was not actually discriminatory, or that women were not actually freely choosing.

The problem of discrimination gives rise to a second level of the debate. For opponents of *Shari'a*-based arbitration there was serious doubt that Muslim women were truly "choosing" *Shari'a*-based arbitration.³²¹ True choice involves two components: 1) the Muslim woman must have full knowledge of the option of using the formal court system and the likely results of that system, and 2) the Muslim woman must also freely consent in the event she opts for *Shari'a*-based arbitration with full knowledge of both systems.

The first aspect of choice—the knowledge aspect—is not critical to the debate because it merely identifies the need for education. With proper funding, the government could, at least in theory, ensure that Muslim women, and all women in general, know their rights. The second aspect of choice—the free consent aspect—is more critical, however, because the freedom of conscience to consent is not necessarily something that the government can give someone. There are, however, political structures that can allow the individual greater room to negotiate options.

At first glance, the consent issue seems to be addressed by the Arbitration Act. After all, the most important limitation governing arbitration and contracts in general is that the parties must freely consent.³²² If it was shown that a woman did not consent to arbitration, then the results of the arbitration would be unenforceable.³²³ Opponents of *Shari'a*-based arbitration, however, argued that the consent of Muslim women is influenced on a much more subtle social level than the level observed by courts in considering whether to enforce an arbitral award. This subtle pressure is described in the submission of one group to Marion Boyd's report:

³²¹ See, e.g., Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women*, 12 COLUM. J. GENDER & L. 154, 218-19 (2003).

³²² BOYD, *supra* note 4, at 50.

³²³ *Id.* at 13.

[Our group] is concerned that arbitration may not be chosen freely in many circumstances. For some women there may be very strong pressures based on culture and/or religion, or fear of social exclusion. These issues may be very real in faith-based communities, where some women may be called a bad adherent to a particular faith or even an apostate if they do not comply with arbitration. Such condemnation would leave such women very alone, shunned in their communities or even their houses of worship, and would only compound feelings of alienation created by a family break-up. In addition, there are many women whose economic lives depend on a close association with their faith-based community or cultural group. This is particularly true of immigrant women who find jobs first in their own communities. These women may be particularly vulnerable to community pressure and may lose their jobs if they do not comply with arbitration. Some women may also fear immigration consequences. For other women there may be fear of violence When these conditions are present it is not accurate or reasonable to suggest that arbitration is being chosen freely.³²⁴

For groups like the one above, the only solution to this problem would be to ban religious arbitration. By banning arbitration outright, there could be no shame for a woman in using the formal court system of Ontario.³²⁵ The problem with this argument is that, in trying to ensure that women are never forced into “choosing” *Shari’a*-based arbitration, women lose the chance of choosing *Shari’a* arbitration. Such an approach seeks to resolve the inherent tension in multiculturalism by siding with individual rights to the complete exclusion of minority rights.³²⁶

A. *Cultural Relativism vs. Universalism*

Various methods for evaluating the problems raised by multiculturalism have been developing in the West for quite some time.³²⁷ Melville Herskovits presented an early conception of

³²⁴ *Id.* at 51 (quoting the submission of Legal Education and Action Fund (LEAF)).

³²⁵ *Id.* at 53.

³²⁶ *Id.* at 89.

³²⁷ Eibe Riedel, *Universality of Human Rights and Cultural Pluralism*, in CONSTITUTIONALISM, UNIVERSALISM, AND DEMOCRACY—A COMPARATIVE ANALYSIS 25, 27 (Christian Stark ed., 1999).

relativism which declared that cultural plurality makes the development of common norms impossible.³²⁸ For Herskovits, a dignity was inherent in every body of custom so the only unifying concept for all was toleration.³²⁹

Herskovits' approach would likely have allowed *Shari'a*-based arbitration to be practiced in Canada. Under a theory of cultural relativism, all of Canada's laws would have to be accountable to the notion of tolerance.³³⁰ When considering the Muslim community in Canada, all Canadians would have to recognize the dignity of the customs of that community. It would be improper, therefore, to criticize the results of *Shari'a*-based arbitration as discriminatory towards women because there are no common norms across the various cultures in Canada that would enable one to objectively call the results discriminatory.³³¹

This 'tolerance' approach, however, is fraught with problems. Stanley Fish, in his essay *Boutique Multiculturalism*,³³² recognized that multiculturalism fails at the contact point between cultures, ironically the concept's *raison d'être*. This is because the elevation of difference naturally leads to a suppression of particularized differences as cultures compete against the freedoms of other cultures on the basis of their own distinction.³³³ Eventually, society must choose one culture to side with in the competition, at which point the multicultural project fails.³³⁴

Not only is cultural relativism unsound philosophically, it can also have the practical effect of approbating gross cruelties in a

³²⁸ *Id.* at 30 (citing MELVILLE HERSKOVITS, *MAN AND HIS WORKS* 76 (1950)).

³²⁹ *Id.* at 30 (quoting MELVILLE HERSKOVITS, *MAN AND HIS WORKS* 76 (1950)).

³³⁰ *Id.*

³³¹ *Id.*

³³² Stanley Fish, *Boutique Multiculturalism*, in *MULTICULTURALISM AND AMERICAN DEMOCRACY* 69, 70 (Arthur M. Melzer et al. eds., 1998).

³³³ Leti Volpp, *Blaming Culture for Bad Behavior*, 12 *YALE J.L. & HUMAN.* 89, 109 n.124 (2000).

³³⁴ *Id.* To apply Fish's observation to *Shari'a*, it must be remembered that *Shari'a* is meant to govern all society. To fully "tolerate" *Shari'a* would mean to expand its application to everyone in Canada. Such expansion would inevitably offend certain orders, such as the Sunday Sabbath, which are important to Christian identity in Canada. It is at this friction point, when a choice must be made between the two competing customs, that pure relativism would fail.

judicial system through the development of cultural defenses.³³⁵ To illustrate, one might consider *Shari'a*-based arbitration and tolerate the practice because, while *we* do not award women so little in a divorce settlement, *they* (meaning Muslims) do. Since *Shari'a* is part of *their* culture, who are *we* to interfere? This form of tolerance in the face of certain cultural practices is known as the "cultural defense."³³⁶ One commentator who criticized the emergence of cultural defenses has pointed out "that culture is neither static nor homogenous and that culture is experienced and described variously by individuals situated differently within a particular community."³³⁷ The same critic insists that simply understanding and valuing differences between groups should not destroy our abilities to judge those differences.³³⁸

Pascale Fournier highlights a shocking case in Quebec that reflected a court operating under a philosophy of cultural relativism, implementing a doctrine of cultural defense.³³⁹ In *R. v. Ammar Nouasria*, which involved a Muslim defendant and victim, the thirty-seven year-old defendant was found guilty of the sexual touching of a person under the age of fourteen, invitation to the sexual touching of a person under the age of fourteen, engaging in anal intercourse with a minor, and sexual assault.³⁴⁰ The victim was the defendant's stepdaughter, who was between the ages of nine and eleven at the time of the incidents.³⁴¹ The sexual activity included fellatio, anal intercourse, touching of the breasts, and touching of the vaginal area with the defendant's penis and fingers but not vaginal intercourse.³⁴²

The maximum penalty for these crimes was ten years of imprisonment, but the defendant received only a concurrent sentence of twenty-three months and one year of probation.³⁴³ The

³³⁵ Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1595 (1996).

³³⁶ Volpp, *supra* note 333, at 110.

³³⁷ *Id.*

³³⁸ *See id.* at 112.

³³⁹ Fournier, *supra* note 249, at 115.

³⁴⁰ *R. v. Ammar Nouasria*, [1994] 63 Q.A.C. 109.

³⁴¹ Fournier, *supra* note 249, at 105.

³⁴² *R. v. Ammar Nouasria*, [1994] 63 Q.A.C. 109.

³⁴³ *Id.*

fact that the defendant had not engaged in vaginal intercourse was the mitigating factor for the court because, as the court saw it, the defendant had sought to preserve the girl's virginity.³⁴⁴ The court held:

The mitigating factors are the fact that the accused did not have normal and complete sexual relations with the victim, that is to say, vaginal sexual relations, to be more precise, so that he could preserve her virginity, which seems to be a very important value in their religion. We can say that, in a certain way, the accused spared his victim.³⁴⁵

Fournier remarks that the opinion reveals "the existence of a different value system for Muslim people living in Canada is constructed, one based on the notion of cultural difference as inferiority."³⁴⁶

The opinion delivered in *R. v. Ammar Nouasria* shows that cultural relativism is an untenable position for approaching cultural pluralism, especially in legal matters. The use of cultural relativism simultaneously delivers legal results that shock the mainstream society and offend the dignity of the defendant's cultural community. In addition to these practical shortcomings are the philosophical failings of the concept already introduced. Cultural relativism, therefore, is not a reasonable defense for *Shari'a*-based arbitration in Canada.

Many Canadians felt that the defeat of religious arbitration in Ontario was a rejection of cultural relativism. Recognizing the failing of the philosophy, Rosie DiManno echoed the views of many Canadians when she wrote, "[t]he time has come for Canadians to be weaned off the teat of multiculturalism as a primary source of sustenance and self-identity."³⁴⁷ But what philosophy was guiding those who successfully defeated religious arbitration in Ontario?

Universalism developed in response to cultural relativism's failings as an attempt to offer criteria that would allow certain actions to be criticized without offending the dignity of a person's

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ Rosie Dimanno, *Sharia Solution a Fair One and Not Racist*, TORONTO STAR, Sept. 16, 2005, at A2.

identity.³⁴⁸ The basic principal underlying universalism is in direct opposition to cultural relativism: a claim that the development of universal norms is possible because there are common features in all cultures relating to human values.³⁴⁹ Universalism is the basis for human rights theory and international systems implementing those theories, such as the Universal Declaration of Human Rights (UDHR).³⁵⁰

Universalism begins by declaring that all human beings have certain rights simply because they are human beings.³⁵¹ This concept of natural rights was first described by John Locke as the rights of life, liberty, and property, which were meant to stand in opposition to the absolutist state.³⁵² Immanuel Kant followed Locke with a philosophy based on the notion of human dignity as ethical autonomy.³⁵³ Kant described this human dignity as the spiritual autonomy of human beings.³⁵⁴

Universalism was the predominant philosophy of those who moved to defeat *Shari'a*-based arbitration in Ontario. Universalists viewed *Shari'a*-based arbitration as discriminatory towards women and called for banning it on that basis.³⁵⁵ When the new legislation was passed banning all forms of religious arbitration, Attorney-General Michael Bryant said that passage of the legislation meant there would be only one law for all Ontarians, regardless of their religion.³⁵⁶ This statement directly draws from the slogan "One Law for All," which was used in the debate by opponents of *Shari'a*-based arbitration.³⁵⁷

³⁴⁸ Riedel, *supra* note 327, at 37.

³⁴⁹ *Id.* at 31.

³⁵⁰ *Id.* at 30-31.

³⁵¹ *Id.* at 34 (citing Rhoda E. Howard, *Human Rights and the Culture Wars*, 8/1 INT'L J.-CAN. INST. INT'L AFF. 94, 95 (1997-1998)).

³⁵² *Id.* at 34.

³⁵³ *Id.* at 35.

³⁵⁴ Riedel, *supra* note 327, at 37 (citing RALPH ALEXANDER, LORZ MODERNES GRUND-UND MENSCHENRECHTSVERSTANDNIS 122 (1986)).

³⁵⁵ BOYD, *supra* note 4, at 46-55.

³⁵⁶ *Ontario Passes Bill Prohibiting Religious Arbitration*, GLOBE & MAIL (Toronto, Canada), Feb. 15, 2006, at A8.

³⁵⁷ See, e.g., Homa Arjomand, Speech in Paris: Sharia Law and Globalization of Political Islam (Oct. 24, 2005), <http://www.nosharia.com/Speech%20in%20Paris.htm>.

For many, the underlying principle of this uniting law is secularism. Take, for example, Homa Arjomand's appeal, which expresses the secular absolutism prevailing in France:³⁵⁸

We need a secular state and secular society that respects human rights and is founded on the principle that power belongs to the people and not a God. It is crucial to oppose the Sharia law and to subordinate Islam to secularism and secular states We, the defenders of secularism, believe that the introduction of a Shariah tribunal or a "Shariah court" in Canada would discriminate against . . . women.³⁵⁹

The criticism of Arjomand's position is that she fails to appreciate that *Shari'a* cannot be clearly discerned as one single body of law. Arjomand can only conceive of one *Shari'a*, and it is always oppressive to women. The appeal also improperly assumes that the secularism hoped for will actually be free from influence by the Christian norms already latent in Canadian society. But, under an ostensibly secular society in the West, the most basic things, such as the structure of the work week, are completely based on Christian norms.³⁶⁰

Consistent with this observation, universalism draws the immediate criticism that, far from being a unifying system, it is merely Western imperialism in disguise.³⁶¹ Critics of the theory point out that universalism is too individualistic and anti-collectivist to be compatible with cultures that emphasize community identity over individual rights.³⁶² For a culture that values an individual's role as part of a group, such as a family or clan, spiritual autonomy is a threat to the subsistence of its cultural traditions.³⁶³

The application of universalism to Islamic cultures clearly

³⁵⁸ BOYD, *supra* note 4, at 89 (citing AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 73 (2001)).

³⁵⁹ *Id.* at 47.

³⁶⁰ *Id.* at 46.

³⁶¹ Riedel, *supra* note 327, at 27 (citing *Human Rights: A Western Contract With Limited Applicability*, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 1, 4 (Adamantia Pollis & Peter Schwab eds., 1979)).

³⁶² *Id.* at 32.

³⁶³ *Id.*

reveals the cultural threat of this individualist approach.³⁶⁴ The most basic problem for many Muslims is that *Shari'a* claims to represent the principles of Allah for humanity.³⁶⁵ Locke's anthropocentric notion of natural rights is anathema to Muslims holding this traditional view.³⁶⁶ For example, apostasy is still considered a most serious crime in Islamic states.³⁶⁷ People who change their religion no longer receive the traditional punishment of death in these countries, but they still suffer legal disadvantages.³⁶⁸ Islamic cultures refuse to recognize a personal freedom to choose a religion, so their conception of apostasy is in direct conflict with Kant's notion of individual spiritual autonomy.³⁶⁹

Notwithstanding the difficulty of fitting universalism to certain views of Islam, many modernist and secularist Muslim authors attempt to harmonize universalism with *Shari'a*.³⁷⁰ This is a prime example of the use of *ijtihad*. These harmonization attempts typically frame *Shari'a* in its historical context and then add modern notions of equality, such as individual liberty.³⁷¹ Yet, given that many Muslims desire to practice *Shari'a* in its traditional form, general acceptance of human rights requires the reservation of space for these traditional groups to adapt to universal norms.³⁷²

³⁶⁴ *Id.* at 39.

³⁶⁵ *Id.* at 38. Riedel notes that there is no one unifying conception of human rights among Islamic scholars. There are at least four main schools of thought: Islamists, traditionalists, modernists, and secularists. Modernist authors, such as Abul a'la Mawdudi, have tried to show that human rights can be deduced from the *Qur'an*. *Id.* at 35, 38.

³⁶⁶ Riedel, *supra* note 327, at 39 (citing Hassan Hanafi, *Minimal Standard, Pluralisation and Universalisation, Introduction*, in MENSCHENRECHTE ZWISCHEN UNIVERSALISIERUNGSANSPRUCH UND KULTURELLER KONTEXTUALISIERUNG 239, 243 (Han May & Sybille Fritsch-Oppermann eds., 1993)).

³⁶⁷ *Id.* at 39.

³⁶⁸ *Id.* (citing Heiner Bielefeldt, *Menschenrechte und Islam*, in DIE MENSCHENRECHTE-UNSERE VERANTWORTUNG 124, 127 (Herman Weber ed., 1991)).

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 40.

³⁷¹ *Id.* See, e.g., ENGINEER, *supra* note 121 (emphasizing the importance of *jahiliyah* for a contextual understanding of Islam's approach to women's rights).

³⁷² Riedel, *supra* note 327, at 41.

Universalism ultimately fails because it does not comprehend that identity is not fixed.³⁷³ Islam and Muslim communities are not monolithic, unified, ahistorical realities.³⁷⁴ Under cultural relativism, *Shari'a*-based arbitration would be accepted even though the results seem oppressive to women because oppression of women must be a norm of being Muslim. Universalism that acts too soon would reject *Shari'a*-based arbitration outright because it is oppressive and insists that Muslim women assimilate to the ostensibly universal, but actually Western, norms of the majority. What is needed instead is the opportunity for Muslims in Ontario and members of the majority to carry on a cultural exchange—to negotiate, as Fournier says, “[the] knowledge of what it means to be different, and how and why it matters.”³⁷⁵ Only by promoting this exchange can Muslim identity be properly preserved and melded into Western society.

B. Autonomy and Consent

At the extreme end of the opposition to *Shari'a*-based arbitration, dissenters were concerned not only that a Muslim woman might be pressured into consenting to the process against her will, but also that a Muslim woman might actually freely consent to the process. In words that directly mirror Plato’s vision of the family state,³⁷⁶ Arjomand sets out her vision for a society where the social slate is wiped clean of Islam or any other “inferior” set of values:

One thing I need to make clear in here is that children have no religions. No parents own the children. It is the society that decides what is good for children All children should be treated equally No one has the right to impose religion on children under the age of 16. No one has the right to prevent the child from [experiencing] all norms and standard[s] of the mainstream society[,] and it is the state[’s] duty to protect the universal rights of children.³⁷⁷

For Arjomand and others like her, even if universalism’s goal of

³⁷³ Fournier, *supra* note 249, at 117.

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 118.

³⁷⁶ See AMY GUTMAN, DEMOCRATIC EDUCATION 25-26 (rev. ed., 1999).

³⁷⁷ Arjomand, *supra* note 357.

finding a unifying set of values looks almost impossible, the mere possibility of discovering something so valuable calls for the subordination of all other values.³⁷⁸ Amy Gutman points out that the only rebuttal to a claim like Arjomand's is to show that the freedom of individuals to pursue their own vision of the good life and the good society has a value.³⁷⁹ Catriona McKinnon states that "[t]he place to start is with the claim that cultural group membership is an intrinsic good; that is, that it realises a good that is necessary for and integral to the good of individual members, and that this good cannot be realised in any other way."³⁸⁰ McKinnon's case can be made by focusing on the self-respect enjoyed by individual members in the group.³⁸¹ Empowering self-respect means allowing a person to act "in ways at least consistent with, and preferably supportive of, her self-conception."³⁸² This cannot be achieved if Muslim women are forced never to choose *Shari'a*-based arbitration.

It is interesting to note that Canada has heeded Gutman's and McKinnon's advice in the past, even if Ontario departed from it in the *Shari'a* debate. Canada considered a ban on the *hijab* in public schools only a decade ago in a case that raised an allegation of the nonconsensual oppression of Muslim women.³⁸³ In that case, the Quebec Human Rights Commission was able to identify the value of the freedom Gutman spoke of for a Muslim girl.³⁸⁴

Thirteen year-old Émilie Ouimet was excluded from her middle school in Quebec in 1995 for wearing the *hijab* in violation of a school dress code.³⁸⁵ The dress code prohibited any clothing or accessories that would marginalize a student.³⁸⁶ Opponents of the *hijab* argued with universalist gusto, just as they have in the arbitration debate, that the *hijab* is oppressive to women who do

³⁷⁸ GUTMAN, *supra* note 376, at 25.

³⁷⁹ *Id.*

³⁸⁰ CATRIONA MCKINNON, *TOLERATION: A CRITICAL INTRODUCTION* 198 (2006).

³⁸¹ *Id.* (citing WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* 192-93 (1989)).

³⁸² *Id.* at 104.

³⁸³ Fournier, *supra* note 249, at 115.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.*

not freely consent to wearing it.³⁸⁷

The Quebec Human Rights Commission disagreed.³⁸⁸ The court recognized that many people might feel a concern for the right of equality for Muslim women “who consciously or not, might not wear the veil entirely of their own will.”³⁸⁹ Despite this risk, the court asserted the following:

Out of respect for the people who choose to wear the veil we must assume that this choice is a way of expressing their religious affiliation and convictions. In our view it would be insulting to the girls and women who wear the veil to suppose that their choice is not an enlightened (sic) one, or that they do so to protest against the right to equality In general terms, therefore, the veil should be seen as licit, to be prohibited or regulated only if it can be proved that public order or the equality of the sexes is threatened.³⁹⁰

Fournier observes that knowledge of the Muslim woman in the court’s view is undefined, rather than anchored in the traditional Western view of the Muslim woman as “oppressed.”³⁹¹ This departure from the essentialist cultural identity of Muslim women is consistent with the intersectionist perspective which sees individuals at the intersection of various identities.³⁹² The two competing aspects of the Muslim woman’s identity are her role as a member of the Muslim community and her role as a citizen of Ontario. Intersectionist perspectives seek to offer a response to the tension between Arjomand’s pro-state secular absolutism that prioritizes the individual and the cultural relativism-influenced, non-interventionist perspective which prioritizes the minority group.³⁹³ Allowing *Shari’a*-based arbitration would have been

³⁸⁷ *Id.* at 117.

³⁸⁸ *Id.* at 115.

³⁸⁹ Fournier, *supra* note 249, at 116 (quoting Monique Rochon & Pierre Bosset, *Religious Pluralism in Quebec: A Social and Ethical Challenge*, in THE QUEBEC HUMAN RIGHTS COMMISSION 9 (Feb. 1995)).

³⁹⁰ *Id.* at 116.

³⁹¹ *Id.*

³⁹² BOYD, *supra* note 4, at 91-92.

³⁹³ For a general discussion of intersectionality and the related concept of multidimensionality, see Darren Leonard Hutchinson, *Identity Crisis: “Intersectionality “Multidimensionality” and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285 (2001).

consistent with an intersectionist perspective.

V. Conclusion

Ontario has an arbitration system that can be used voluntarily to settle private disputes between individuals. The Arbitration Act is largely related to procedure, leaving the substantive issues to private parties. This wide discretion has the potential to generate results that are different from the results that the Canadian or Ontarian legal system would deliver.

In Ontario, the Arbitration Act does not operate without any conscionability limitations. The statutes allowing the operation of family law arbitration and domestic contracts consistently attempt to anticipate unfairness and prohibit it.³⁹⁴ This is especially true in regard to the identification of dependents' claims in domestic contracts.³⁹⁵ It is true, therefore, that no person in Canada is completely free in his or her private arrangements.

From one perspective, the fact that Muslim arbitration might not be able to fully function under Ontario's current system of arbitration and domestic contracts is a fatal blow to the argument for allowing it. The basic premise of the argument for allowing Muslim arbitration is that Islamic law is critical to Muslim identity. But if Islamic law would not fully operate even under the system that allowed limited arbitration, then Muslim identity would never be fully realized.

This perspective, however, fails to appreciate that the application of *Shari'a* to family law issues is arguably the most important to Muslim identity. Whereas many areas of *Shari'a*, such as the traditional prohibition of usury, are extremely difficult for orthodox and even progressive Muslims living in Western societies, Alka Singh writes, "the question of marriage or divorce . . . touches the very basis of interpersonal and intrapersonal relationships."³⁹⁶

This same perspective also fails to take into account that the conscionability limits on the arbitration process are much more fatal to the argument of those who dissented against *Shari'a*-based

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ SINGH, *supra* note 179, at 3.

arbitration. After all, if *Shari'a*-based arbitration would not be allowed to operate outside the constraints of fairness imposed on all Ontarians, to declare it unfair would be to declare all of Ontario's legal system unfair. Arguing against *Shari'a*-based arbitration merely on the grounds of its results, therefore, becomes tantamount to racism, revealing the latent imperialist strain in the ostensibly universalist arguments. The racism inherent in some of the arguments presented against *Shari'a*-based arbitration was exceedingly difficult to hide given that opposition to religious arbitration generally did not appear until 2003 when the IICJ attracted attention. The condemnation of *Shari'a*-based arbitration came after years of open religious arbitration in Ontario by Catholics and Jews.

Muslim arbitration may create singular offenses to fairness by generating results that are consistently on the fringes of conscionability through its systematic disadvantage toward women. But that merely furthers the argument that the policies defining fairness in arbitration and domestic contracts need to be changed for all Ontarians. Indeed, Marion Boyd recommended that Muslim arbitration be allowed to operate, but also suggested numerous reforms to arbitration and family law in Ontario.³⁹⁷ Instead of involving the diverse interests of Canada's secular and religious groups in developing a common set of acceptable constraints, McGuinty opted for the "nuclear option" by removing all religious arbitration outright.

For the most sophisticated contributors to the debate, the difficulty with religious arbitration, and *Shari'a*-based arbitration specifically, was the combination of financially disadvantageous results in arbitration compared to the formal court system and the risk that women would not freely consent to arbitration. The dissenters recognized, however, that the differences between *Shari'a*-based arbitration and the formal court system are justified on the basis of the voluntary consent of the private parties. Informed consent to the process becomes critical to the outside observer sensitive to fairness where a result in arbitration for one party is less attractive than the likely result for that party in the formal court system. This is especially true where the disadvantages of a certain type of arbitration become consistent

³⁹⁷ BOYD, *supra* note 4, at 133.

and the gender of the disadvantaged party is predictable. The protection of the individual's consent, however, cannot be honored at the expense of the group aspect of the individual's identity.

The Arbitration Act provided the quintessential intersectionist solution to this dilemma by providing a process for the resolution of the private matters most important to identity (family law) with regulated government oversight of the process. By using arbitration, the Muslim community was actually able to draw on the legal structure of the mainstream society to express itself.³⁹⁸ At the same time, the state was actually invited into the community through the judicial oversight guaranteed by the Arbitration Act.³⁹⁹ This interaction must inevitably lead to the dialogue referenced by Fournier, where the knowledge and importance of differences can be negotiated.⁴⁰⁰

While many voices in the Muslim community sounded resolutely opposed to such negotiation, the Muslim identity, grounded in *Shari'a*, already contains the resources necessary for the negotiation project. The very fact of the emigration of many Muslims out of the Muslim world reflects that the previously dormant tool of *ijtihad* has the potential of awakening again. *Ijtihad* provides an opportunity for Muslim identity to evolve while remaining connected to the past, a point crucial to the authenticity of an identity.

It is encouraging that Marion Boyd has already produced a report making recommendations to improve the process in Ontario should the debate ever swing back in favor of permitting religious arbitration. Other governments would do well to consider the policy advice she has offered when approaching the question of religious arbitration. In Ontario, hopefully cooler heads will prevail as time passes, and the idea of religious arbitration for family law issues will be revisited. The innate need for such a process has not vanished with the passage of legislation banning it. The voices of those already in Ontario who supported *Shari'a*-based arbitration only promise to become louder with each fresh wave of immigration.

DONALD BROWN

³⁹⁸ *Id.* at 93.

³⁹⁹ *Id.*

⁴⁰⁰ Fournier, *supra* note 249, at 118.