

POST-NEOLIBERAL MULTICULTURALISM: THE CASE OF FAITH-BASED ARBITRATION

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I INTRODUCTION

The conventional geometry of multicultural debates triangulates individual, community and state. The line linking individual and community may contain strands that are enriching, oppressive, formative, constraining, and constitutive. The multiculturalist state, committed to the liberty and equality of its citizens within the sphere of governance, is alternately called upon to protect individuals by respecting certain practices of a sub-state community, and to protect individuals by refusing to accommodate other practices of the same communities. Sometimes, the categorization seems relatively easy: The wearing of Sikh turbans by RCMP are an easy 'yes' for accommodation in the name of religious freedom and individual equality; female genital mutilation is an easy 'no' for most commentators. Of course, the characterization of the practice in question as an exercise of liberty or a manifestation of inequality is often sharply contested, as illustrated by seemingly endless debate about the signification of the headscarf (hijab) worn by some Muslim females.

Legal discussions around cultural and religious diversity investigate whether and how the justice system can recognize and accommodate cultural difference (a question sometimes framed in terms of liberty) while maintaining its commitment to equality, including gender equality. The way the questions are framed presupposes a generalizable, neutral legal landscape onto which some particularized "culture" is projected. Yet, as many commentators have observed, the religious secularism and cultural neutrality of western liberal states is, at best, exaggerated. It is perhaps an illustration of normative diffidence at the pinnacle of the formal legal order that in Canada, the *Canadian Charter of Rights and Freedoms* protects freedom of religion (s. 2), guarantees equality and freedom from discrimination on grounds of religion, national or ethnic origin (s. 15), promotes interpretation consistent with Canada's 'multicultural heritage' (s. 27), and then also proclaims in the Preamble that "Canada is founded upon principles that recognize the supremacy of God".

In any event, the secular legal system is not generally regarded as implicated in the form or substance of whatever multicultural 'problem' it is called upon to resolve. Legal enactments are simply the instruments through which the state executes its rational choice about the contours of the triangle. But the norms and processes of the legal order often shape the emergence of multicultural dilemmas; as such, the legal regime is as much a part of the problem as the solution. At a minimum, it should be apparent that law simultaneously configures and reflects the social meaning and political implications of culture, liberty, and equality. Although this should caution against any attempt to assign an unreflexively prescriptive role to law as solvent for competing claims, assumptions about the putative neutrality of law proves difficult to dislodge, especially when positioned against the avowed partiality of culture.

I examine this complex aspect of law's role through an examination of the recent controversy over the recognition of so-called Shari'a tribunals in Ontario. The first part of my paper sketches the family law regime in Ontario. Next, I review the dominant representation of the issue, namely as a multiculturalist conflict between respect for religious freedom and gender equality. I then refract it through a different lens, one which shifts the focus to dynamics of liberalism and privatization within the system of public justice. I contend that in this particular instance, casting the issue almost exclusively as a prototypical multicultural dilemma managed to obscure and de-politicize the secular legal framework within which the case arose. I conclude by offering examples of how this perspective might have fruitfully raised questions and generated policy options that did not figure in the debate or in its political resolution.

II SURVEYING THE LEGAL TERRAIN

A review of the family law context as it existed when the controversy erupted is necessary to situate the debate. The family law regime governing couples in Ontario is a complicated admixture of federal law (*Divorce Act*) and provincial law (*Family Law Act*). For present purposes, suffice to note that the statutes set out default rules for distribution of property, support (spousal and child) and custody following relationship breakdown. Reformist projects over the last thirty years have made considerable progress in addressing the gendered consequences of marriage breakdown. Property division rules recognize the role that the unpaid labour of wives play in enabling husbands to maximize their career development and wealth accumulation. Spousal support guidelines acknowledge that many women forfeit their own careers in the paid labour force to stay home with children, and some may simply never attain full financial independence, much less the financial position they would have attained had they not married. The default rules have moved far beyond regarding the traditional role of stay-at-home wife as a choice for which husbands bear no financial responsibility upon marriage breakdown.

At the same time, parties may, to a significant degree, opt out of the process and substance of the statutory family law regime. Rather than litigating property division, custody, child and spousal support in the ordinary courts, parties may resolve these issues by negotiating an agreement on their own or with the assistance of a neutral mediator. The resultant agreements are labelled "domestic contracts" under the Ontario *Family Law Act*. Parties may also engage an arbitrator of their choosing to adjudicate the dispute in a less formal manner than a courtroom trial before a judge. Arbitrations are governed by the *Arbitration Act*, which enables judicial enforcement of arbitral awards across a range of commercial and private disputes. Arbitration of family law disputes under the *Arbitration Act* is seldom used in comparison to mediation and negotiation under the *Family Law Act*.

Having embarked on any of these private mechanisms of alternative dispute resolution (ADR), the parties may adopt the default rules regarding equal division of property as the framework for resolving their dispute. Alternatively, they may bargain according to their own preferences, values and priorities. These can range from maximizing economic self-interest to abiding by religious norms. If they employ the services of a mediator or arbitrator, they may instruct that person to guide them (in the case of a mediator) or apply (in the case of an arbitrator) a legal regime other than

¹. Where parties avoid litigation and resolve their matters privately, a court will likely never see the contract, settlement or award in advance of its implementation. The notable exception involves child support. If a married couple wish to divorce, a judge will require evidence that appropriate child support arrangements have been made prior to issuing a divorce decree.

The parties may choose to file the contract, settlement or award with the ordinary courts and convert the private agreement into an enforceable court order. This means that if one party defaults on the agreement, the other party can seek judicial enforcement. In practice, private agreements tend not to be filed unless and until an aggrieved party believes the other has defaulted. Once again, no judge will review the domestic contract, settlement or award prior to converting it into an enforceable court order. This means, in effect, that the state lends its singular power of enforcement to agreements with little or no advance scrutiny of their content.

Proponents of these various forms of private justice promote them as cheaper, faster, less adversarial, less intimidating, more empowering and more satisfying for the parties than the traditional justice system. Just as no one knows what happens behind the closed doors of the family home, so too is confidentiality preserved behind the closed doors of the lawyer, mediator or arbitrator's room: it is private justice for the private realm. Of course, critics express concern precisely about this feature of the system. Behind the cloak of confidentiality shielding ADR from public scrutiny, feminists worry about the ways in which women's financial, emotional, and social dependence on men can be exploited to women's disadvantage in the course of negotiation, mediation or arbitration between ostensibly equal parties.

Arbitration is institutionally distinct from other ADR mechanisms insofar as it is regulated under the *Arbitration Act*, which applies to that other domain of the private, namely the market. Indeed, the statute was undoubtedly drafted primarily with a view to commercial disputes, although nothing explicitly prevented its extension to family law. The statute permits parties to a range of legal disputes – commercial, property, familial – to eschew the ordinary courts and select a private arbitrator who will conduct a relatively informal process and then render a binding decision called an arbitral award. The choice to use arbitration is voluntary, but once one enters an agreement to arbitrate, the agreement is an enforceable contract and the parties must arbitrate in accordance with it.

Section. 35 of the *Arbitration Act* directs that “an arbitral tribunal shall apply the rules of law designated by the parties”. The drafters of the legislation probably contemplated that parties who did not elect to be governed by Ontario law would choose the law of another Canadian jurisdiction, an option sometimes exercised in commercial disputes. Nevertheless, nothing in the legislation precludes the choice of religious law over secular law, or the law of Saudi Arabia over the law of Canada.

When parties enter an agreement to arbitrate their dispute, they also determine in advance how binding the arbitral award will be. An award may be advisory, meaning that it must be submitted to an ordinary court, where a judge will review it and make the final determination. At the other end of the spectrum, the parties may preclude any appeal to the courts.

¹ See, e.g. *Arbitration Act*, s. 35 (“an arbitral tribunal shall apply the rules of law designated by the parties”).

Between these two extremes, the parties may elect to make an arbitral award subject to appeal on questions of fact and/or law. Even where the parties stipulate that no appeal will be allowed, courts retain residual authority to ensure that agreements to arbitrate are consensual and voluntary, the arbitration process was procedurally fair and, in the case of family law, that the best interests of a child are served by custody and child support arrangements. However, the system depends on one of the parties challenging the court order in order to bring the issue to the attention of the courts.

Canadian family law prohibits parties from arbitrating status, including marriage, divorce or paternity². Arbitrators also possess no jurisdiction over Canadian criminal law, and one cannot 'opt out' of Canadian criminal law in favour of another normative regime. Thus, the spectre of Islamic arbitrators lawfully performing polygamous marriages or issuing sanctions for adultery were unfounded.

Three points about arbitration merit reiteration: first, arbitration is only one mechanism of private justice. Whether religious arbitrators are permitted to operate under the *Arbitration Act*, couples remain free to avoid the mainstream justice system and submit their disputes to whomever they wish, including religious authorities. Other than ensuring that child support arrangements are adequate, a court may never view the terms of the private agreement unless they are filed, become a court order, and then challenged in court by a party resisting enforcement. Secondly, the most important functional distinction between arbitration under the *Arbitration Act* and other modes of private ordering is that under the *Arbitration Act*, parties can select the degree of meaningful scrutiny of their agreements by the ordinary courts. The availability and scope of judicial review of domestic contracts (pre-nuptial agreements, separation agreements etc.) is set by statute, not by the parties. Thirdly, the terms of an arbitral agreement determining recourse to the courts differentially allocate the burden of seeking judicial intervention. If an arbitral award is advisory, it does not take effect unless and until a judge approves it. In all other cases, the award is filed and becomes enforceable with no automatic judicial oversight. This differential burden allocation has gendered consequences, to which I will return below.

III MUSLIM FAMILY LAW ARBITRATION

In 2003, Syed Mumtaz Ali, retired lawyer and self-styled "patron-in-chief" of the newly created Islamic Institute for Civil Justice (IICJ), announced that the IICJ would begin arbitrating in family and inheritance matters in accordance with Muslim law, which would then be enforceable under the terms of the *Arbitration Act*. These proposed tribunals were quickly dubbed "Shari'a courts" in the media., and the prospect of their arrival generated considerable alarm over the importation of oppressive, patriarchal practices associated with Islamic law in other countries. Ali himself did little to dispel the anxiety when he declared that 'good' Muslims would be obliged to use such tribunals to the exclusion of the ordinary courts.

In response to the public outcry, the Premier of Ontario sought the advice of his Attorney-General and the Minister Responsible for Women's Issues, who in turn

² In addition to policy reasons militating against allowing the determination of status via arbitration, Canada is a federal state, and the solemnization of marriage and its dissolution through divorce fall within federal jurisdiction. The provinces do not have jurisdiction over marriage and divorce.

³. Over the course of six months, Boyd received submissions in person, by phone and in writing from over fifty groups as well as many private individuals. She met with women’s organizations, religious bodies, immigrant settlement organizations, family lawyers, arbitrators, mediators and concerned citizens.

Public discourse over Islamic family law tribunals rapidly crystallized into what could – with only slight exaggeration – be characterized as opposing answers to the late Susan Moller Okin’s provocative question “Is Multiculturalism Bad for Women?” At the risk of homogenizing internal variations on either side, the following stylized propositions capture the essence of the opposing positions:

“Freedom of religion (as guaranteed by s. 2 of the *Canadian Charter of Rights and Freedoms*) and our commitment to multiculturalism (as endorsed by s. 27 of the *Charter*) encourages us to respect different faith communities, and the constitutive role that these play in the lives of individual citizen. Islam is not monolithic, static, or intrinsically misogynistic. If people within a given identity group consensually agree to be guided in their private lives by their religious beliefs and do so within the confines of the existing law (in this case, the *Arbitration Act*), we should not interfere simply because we may disagree with individual outcomes.”

versus

“Delegating state power to faith-based arbitrators sacrifices Muslim women on the altar of multiculturalism. Given the patriarchal orientation of Islam (or at least the elite who exercise leadership within Muslim communities), arbitration according to Muslim law will systematically disadvantage women and leave them unprotected by the state from the social, physical, financial and emotional harm inflicted in the name of religion. Many Muslim women are newcomers to Canada, unfamiliar with their rights, and especially vulnerable to forms of physical, psychological and material coercion from kin and community. A commitment to the equality of women (as required by s. 15 of the *Canadian Charter of Rights and Freedoms*) requires that Islamic tribunals not be permitted to operate under the *Arbitration Act*.”

Indeed, Boyd asserts in her executive summary that the “fundamental tension that must be addressed is between respect for the minority group and protection of a person’s individual rights within that minority. . . .” Presumably, it is the protection of women’s entitlement to choose and the promotion of minority group inclusion within broader

³ Marion Boyd, “Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion”, 20 December 2004.. <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>, at 3.

society that the Report's sub-title "Protecting Choice, Promoting Inclusion", tacitly endorses.

My summary rendition of the competing positions attempts to portray each in its best light, but it should come as no surprise that some opponents to Islamic law arbitration were motivated in whole or part by Islamophobia, (Boyd notes that "some of [the] submissions were explicitly racist in content" (Report at 68)), and some Muslim proponents clearly had an authoritarian, inflexible and conservative view of what Islam required of practicing Muslims.

Having said that, self-identified Muslim individuals and organizations who made submissions to the Boyd inquiry expressed diverse and divergent views on the merits of enforceable faith-based arbitration in family law, and Islamic arbitration in particular. Some Muslim women spoke in favour of it on their own behalf or as representatives of Muslim organizations. The most visible and institutionally sophisticated group of Muslim women, the Canadian Council of Muslim Women (CCMW), strongly opposed arbitration of family law matters in general, and faith-based arbitration in particular. Indeed, the Report's account of the submissions seems to indicate that all but one ad-hoc group of Muslim women⁴ opposed arbitration of family law matters and/or faith-based arbitration of family law matters. Most secular or multi-ethnic women's organization expressed similar objections⁵.

The Muslim Canadian Congress also rejected Islamic law arbitration, whereas the Islamic Canadian Congress and the Council on American-Islamic Relations (Canada) supported it. The Report also indicates that most Muslim organizations that defended Islamic arbitration also supported a range of procedural safeguards, including independent legal advice and training of arbitrators to ensure voluntary and genuine consent. Indeed, some Muslim organizations (along with LEAF) insisted that decisions rendered by faith-based arbitration could and should be consistent with Canadian law, including the Ontario *Family Law Act* and the sex equality provisions of the *Canadian Charter of Rights and Freedoms*. Ironically, in her report, Boyd takes the position that the *Charter* would not apply to arbitral decisions anyway, thereby obviating the question of whether the Islamic law, if interpreted 'properly' is always capable of generating outcomes consistent with the *Charter*.

Religious bodies and organizations whose members already engage in faith-based dispute resolution, such as the Christian Legal Fellowship, the Salvation Army, B'nai Brith, the Sunni Masjid El Noor and the Ismaili Muslims all supported faith-based arbitration. The Christian Legal Fellowship rather smugly (and ironically) qualified their support by cautioning that "[i]t is much more difficult to balance competing rights of religious freedom and equal treatment under the law when a religious community does not believe that all members of the community are to be treated equally (for example if women are considered less worthy)" (Boyd Report, at 68). An organization of Jewish

⁴ Boyd describes a meeting with "a group of young Muslim women" who felt "insulted by the suggestion that Muslim women do not have the knowledge, strength and will to understand and take action to protect the vulnerable within their own communities"

⁵ An exception was the feminist legal advocacy organization, the Legal Education and Action Fund (LEAF). LEAF did not object to faith-based arbitration of family law issues under the *Arbitration Act* as long as the outcomes complied with the default regime in the Ontario *Family Law Act* and the equality provisions of the *Canadian Charter of Rights and Freedoms*.

A significant portion of Boyd's report consists of communicating the pertinent elements of family law and the arbitration regime to readers. The subtext appears to be a belief that much opposition to Islamic arbitration is predicated on ignorance or misunderstanding of family law, the scope and operation of the *Arbitration Act*, extant practices of faith-based arbitration, and the application of the equality provision of the *Canadian Charter of Rights and Freedoms* to private arbitration.

Ultimately, Boyd endorsed the continued use of binding, enforceable arbitration of family law issues under the *Arbitration Act*: "The Review did not find any evidence to suggest that women are being systematically discriminated against as a result of arbitration of family law issues. Therefore the Review supports the continued use of arbitration to resolve family law matters." (Boyd Report, p. 133). She also made several proposals to safeguard participants in the process. Her suggested reforms fell into three categories: First, she suggested building more procedural safeguards into the existing arbitration regime in order to ensure that individual consent to arbitrate is voluntary and informed. These included a requirement that parties obtain or formally waive independent legal advice prior to entering into an agreement to arbitrate; that faith-based arbitrators norms disclose a "statement of principles" to prospective disputants outlining the norms that the arbitrator intends to apply; that an agreement to arbitrate be contemporaneous with the dispute; and, that arbitration agreements explicitly set out whether the arbitration is binding or merely advisory.

While mindful of the pressure a woman might experience to engage in faith-based arbitration, Boyd's recommendations did not contemplate that explicit or implicit threats of social, religious, financial or immigration penalties – essentially, non-violent coercion predicated on structural inequality -- would or should vitiate consent to arbitrate:

The law of contracts and Part IV of the *Family Law Act* offer the option to set aside an agreement where there has not been true consent because the person was pressured or coerced into entering into an agreement. More subtle community pressure may not qualify as coercion for this purpose, whereas threats of violence from a partner or family member almost certainly would. (Boyd Report, at 136)

Secondly, Boyd recommended subjecting family law arbitral awards to the same rules as domestic contracts under the *Family Law Act*. The main consequence would be that if and when an arbitral award was challenged in court, a judge could set aside the award awards on the same grounds as domestic contracts, including 'unconsciounability' (p. 4). Third, she makes a number of recommendations directed at professionalizing the practice of arbitration and mediation, and supporting community organizations in undertaking to "explain rights under Ontario and Canadian law in a way that is likely to be comprehensible to people of diverse backgrounds and culture" (p. 10).

Unsurprisingly, the Report did not quell the controversy. In particular, the Canadian Council for Muslim Women has intensified its campaign, in collaboration with

the National Association of Women and the Law (NAWL) and a major Canadian non-governmental organization, the Centre for Human Rights and Democratic Development (Rights and Democracy). They convened conferences and workshops to publicize the issue, orchestrated international letter writing campaigns to provincial politicians, and invited activists from around the world to publicize the negative impact of Islamic law on women's rights in various countries. The fate of 'Shar'ia tribunals' under Ontario law managed to garner the attention of individuals, activists and governments in Europe, the Middle-East, South Africa and Asia.

In September 2005, the Ontario government announced that it would not adopt the recommendations of the Boyd Report. Instead, it would amend the law to deny legal recognition to faith-based arbitration of family law dispute under the *Arbitration Act*, and to bring arbitration of family law disputes under the purview of the *Family Law Act*. In announcing his decision, Attorney-General Michael Bryant explicitly invoked gender equality and anti-discrimination as the motive for the rejection of the Boyd Report's main recommendation in favour of faith-based arbitration:

We have heard loud and clear from those who are seeking greater protections for women. We must constantly move forward to eradicate discrimination, protect the vulnerable, and promote equality. As the Premier reiterated this week, we will ensure that women's rights are fully protected. We are guided by the values and the rights enshrined in our Charter of Rights and Freedoms.

We will ensure that the law of the land in Ontario is not compromised, that there will be no binding family arbitration in Ontario that uses a set of rules or laws that discriminate against women⁶.

A few months later, the government enacted the *Family Law Statute Amendment Act*, which restricted judicially enforceable family law arbitrations exclusively to those applying the default rules contained in Ontario family law legislation, or the law of another Canadian jurisdiction: "In a family arbitration, the arbitral tribunal shall apply the substantive law of Ontario, unless the parties expressly designate the substantive law of another Canadian jurisdiction, in which case that substantive law shall be applied"⁷.

To the extent that the issue was presented as a staging of Okin's question "is multiculturalism bad for women?" Boyd gave a qualified 'no', while the Ontario government responded affirmatively.

IV ANOTHER LOOK AT THE LEGAL LANDSCAPE

A casual observer of the controversy within and beyond Ontario might plausibly have construed the Muslim arbitration initiative as heralding an unprecedented establishment of a parallel system of state-sanctioned religious law and the concomitant withdrawal of the secular legal system. As I hope the first part of this paper indicates, this portrayal -- one set of rules for Muslims, and another for everyone else -- is quite

⁶ Statement by Attorney General on Arbitration Act, 1991. <http://www.attorneygeneral.jus.gov.on.ca/english/news/2005/20050908-arb1991.asp>, 8 September 2005, (accessed May 16, 2006).

⁷ *Family Law Act*, RSO 1990, c. F-3, as am. SO 2006, .

misleading in respect of Ontario and many other Canadian and common law jurisdictions. demonstrably inaccurate. Had Muslim leaders actually mounted a campaign based strictly on multiculturalist arguments in favour of recognition of religious autonomy in family law, I submit that they would have encountered immediate and unequivocal rejection. Despite Canada's commitment to multiculturalism, instances of autonomous legal regimes outside of federalism do not really exist. Aboriginal peoples continue to struggle to create spheres of territorial and jurisdictional autonomy. Accommodation of existing laws, rather than the delegation of legal authority as such, marks the Canadian practice of multiculturalism. The principle that that equality and the rule of law requires one legal regime for everyone retains surprising durability and resonance in public discourse, and a bald demand for a separate legal system for Muslims would almost certainly have faltered before it.

The twist in the Shari'a arbitration law is that the 'one law for all' governing property division, custody, child and spousal support in Ontario permits consenting parties to opt out of that law in favour of norms and processes of their choosing. My central claim, then, is that the debate about faith-based arbitration transpired on a discursive terrain already circumscribed by the logic of privatisation from which the *Arbitration Act* emerged. To put it another way, faith-based arbitration and its normative driver, multiculturalism, were already nested within the domain of privatisation and neo-liberal ideals of choice, liberty and autonomy. Privatisation of family law, and particularly the *Arbitration Act*, paved the way for faith-based arbitration in Ontario

The trend toward privatisation of government functions accelerated in the 1980s and 1990s as neo-liberal economic models extolled the virtues of the market and private ordering over state regulation. This disenchantment with the state extended to dispute resolution, especially in the commercial sphere, where sophisticated economic actors set up private arbitration regimes to achieve more expeditious, cheaper and expert resolution of disputes. Meanwhile, as family law regimes across Canada incorporated greater attention to gender equity in statutory provisions regarding property division and spousal support (partly to prevent divorcing women becoming impoverished and dependent on state support), they also formalized opportunities for couples to 'opt-out' of the statutory allocations through privately-negotiated domestic contracts that regulated custody, access, property division and support according to the parties' own values, priorities and wishes. In all these contexts, privatisation was promoted as autonomy enhancing as well as less adversarial and more efficient.

Against these converging patterns of privatisation in the commercial and family law spheres, Ontario's *Arbitration Act* can best be viewed as a formal articulation of private dispute resolution with the public justice system. By allowing the parties to select their arbitrator, their law and their preferred level of judicial review, arbitration under the *Arbitration Act* plays squarely into the rhetoric of individual choice, and of freedom from an interventionist state. At the time of its passage, feminists critiqued the characterization of arbitration in family law disputes as autonomy-enhancing when it transpired under conditions of systemic inequality. They cited the potential for abuse of power, sheltered behind the aegis of choice and shielded from public scrutiny or judicial oversight by the privacy of the arbitration room. Feminists lost that battle.

This historical context of arbitration opened certain discursive doors for proponents and closed others for opponents of faith-based arbitration. Proponents, in

effect, could correctly assert that they asked for nothing more than equal benefit of the existing regime. The range of rationales – efficiency, cheapness, multiculturalism, user-satisfaction, choice, discretion -- operating from diverse normative premises, could each be deployed by proponents in favour of a common position.

The *Arbitration Act* already permitted arbitration of family law disputes, already permitted parties to choose alternative normative frameworks (including religious law) and already permitted parties to shield outcomes from meaningful judicial oversight. Given these conditions, one could not easily target faith-based arbitration from among alternative normative frameworks without allegedly breaching the constitutionally protected freedom of religion and/or endorsement of multiculturalism. One could not single out Islamic law for exclusion without meeting the accusation of discrimination as between religions. Equality, freedom of religion, and multiculturalism could all be deployed in good faith in the service of faith-based family law arbitration. Supporters could easily accommodate proposals to strengthen procedural protections to ensure free and informed consent. After all, such modifications presupposed that genuine consent could and would result if only participants were free from the threat of physical violence and received enough accurate information about the likely consequences of their participation.

Opponents of Islamic arbitration were thus placed in the unenviable position of demanding retraction of some aspect of the *status quo*. The Canadian Council for Muslim Women, along with the National Association of Women and Law, and the National Organization of Immigrant and Visible Minority Women adopted a position that corresponded to the common denominator binding them as a coalition. In effect, they rehearsed the case against binding, enforceable arbitration of family law disputes. Albeit in cursory fashion, they argued that the privatisation of family law via arbitration subverted the equality gains achieved in legislation's default allocation of property, custody, spousal and child support. To the extent that certain renditions of Islamic law were particularly inequitable toward women, and devout Muslim women (especially recent immigrants) were especially vulnerable to forms of coercion not visible as such in law, Islamic family law arbitration was an exemplar the larger problem of private justice in the realm of family law as conceived under the *Arbitration Act*.

In presenting their arguments in this fashion, the Canadian Council for Muslim Women carefully situated and emphasized their identities as Muslims, as women and as citizens entitled to equal benefit of Canadian law. On the one hand, they criticized certain practices, attitudes and belief systems within their community; on the other hand, they refused to capitulate to an image of their faith as uniquely or intrinsically misogynist. The CCMW, along with their partners, linked their opposition to Muslim arbitration to wider feminist concerns about the privatisation of family law and its potentially deleterious impact on gender equality.

The trajectory following this point of departure would not be directed at Islamic law *per se*, but rather at the state's deliberate configuration of family law into a regime that permits parties to 'opt-out' of public norms and public scrutiny, leaving vulnerable women of all faiths and ethnicities with inadequate legal protection from exploitation. This approach would, however, challenge the implicit assumption that the secular operation of the *status quo* provides a satisfactory normative standard of fairness, gender equality and justice against which faith-based alternatives are measured.

To appreciate how this standard operates, consider the British Columbia case of *Hartshorne v. Hartshorne*⁸. A majority of the Supreme Court of Canada, reversing two lower court judgments, upheld a pre-nuptial agreement presented by the husband just before the wedding and signed by his future wife on their wedding day. The animating principle of the pre-nuptial agreement was the secular norm of formal equality: the property allocation upon divorce should “leave with each party that which he or she had before the marriage.” (para. 65). As is frequently the case, such a principle operated to the detriment of the woman⁹. Independent legal counsel advised the woman that that the agreement was grossly unfair in comparison to her default entitlements under the statutory family law regime in her province. Under the British Columbia *Family Relations Act*, Mrs. Hartshorne would have benefited from a presumption that she was entitled to a 50% share of the matrimonial home and 50% of family assets acquired after the marriage. She signed anyway.

When the couple separated nine years later, Mrs. Hartshorne’s entitlement under the pre-nuptial agreement consisted of approximately 20% of the family assets. Mr. Hartshorne walked away from the marriage with a net worth of \$1.2 million dollars and Mrs. Hartshorne walked away with a net worth \$280,000. In other terms, the assets available upon dissolution of the marriage were split 80/20 in favour of Mr. Hartshorne¹⁰.

In comparison to Ontario, British Columbia’s default regime is more generous to the economically weaker spouse. In addition, where parties opt out and enter into a domestic contract, a reviewing court in British Columbia may intervene if the outcome of the agreement is ‘unfair’ at the time of distribution. In Ontario and in many other provinces, the enforcement of the domestic contract at the time of distribution must meet a higher standard of unconscionability to justify judicial re-apportionment¹¹.

Despite the more generous regime and the lower threshold for judicial intervention, the Supreme Court of Canada allowed Mr. Hartshorne’s appeal and rejected the argument that the prenuptial agreement was unfair. The Supreme Court employed a test developed in an earlier case for assessing whether a domestic contract was unfair at the time of distribution:

[T]he determination that a marriage agreement operates fairly or unfairly at the time of distribution cannot be made without regard to the parties’ perspectives. A contract governing the distribution of property between spouses reflects what the parties believed to be fair at the time the contract was formed (presuming the absence of duress, coercion, and undue influence). . . . If the parties’ lives unfold in precisely the manner they had contemplated at the time of contract formation, then a finding that the contract operates unfairly at the time of distribution constitutes, in essence, a substitution of the parties’ notion of fairness with the court’s notion of fairness, providing that nothing else would suggest that the parties did not really consider the impact of their decision in a rational and

⁸ [2004] 1 SCR 550.

⁹ The agreement gave Mrs. Hartshorne a 3% interest in the matrimonial home per year of marriage, up to a maximum of 49%. (*Hartshorne*, para. 6)

¹⁰ It should be noted that Mr. Hartshorne was still obliged to pay child and spousal support to Mrs. Hartshorne.

¹¹ *Hartshorne*, para. 14.

comprehensive way. Thus, central to any analysis . . . is consideration of how accurately the parties predicted, at the time of contract formation, their actual circumstances at the time of distribution, whether they truly considered the impact of their decision and whether they adjusted their agreement during the marriage to meet the demands of a situation different from the one expected, either because the circumstances were different or simply because implications were inadequately addressed or proved to be unrealistic.(para. 44)

In brief, the Court signalled two indicia of unfairness: lack of genuine consent at the time of contract formation, or a significant disparity between the expectations of the parties about their future circumstances and what actually happened. On the latter point, the majority of the Supreme Court of Canada found that life unfolded roughly the way the parties expected: Mr. Hartshorne continued his law practice and Mrs. Hartshorne stayed home and raised their two children, the second of whom was born after the marriage and had special needs.

Although the majority of the Supreme Court overruled both the trial and appellate courts of British Columbia, and despite the dissenting opinion of a minority on the Supreme Court, all judges agreed on the point that Mrs. Hartshorne was not coerced or under duress when she signed the pre-nuptial agreement on her wedding day. Here is what the dissent said about power relations between the couple:

There are indications that the respondent was in a vulnerable position in negotiation – [though] not enough for the agreement to be unconscionable. . . . The respondent had already been out of the workforce and dependent on the appellant for almost two years and had only ever worked as a lawyer (and before that, an articling student) in the appellant's firm. The agreement was concluded under pressure with the wedding fast approaching. The respondent sought changes to the agreement before execution but was unable to persuade the appellant to agree, except with respect to minor changes, such as the insertion of a clause to the effect that her signature was not voluntary and was at his insistence. These circumstances illustrate the appellant's position of power within the relationship, as well as the respondent's correlative dependence. That she remained at home for the rest of the marriage relationship to take care of the couple's children further illustrates the power dynamics at play. (para. 90).

Importantly, this inequality of bargaining power described by the dissent did not vitiate Mrs. Hartshorne's consent. Indeed, the majority paints the Agreement with the patina of mutuality by describing it as reflective of the "intention of the parties", and admonishes that "if the Respondent truly believed that the Agreement was unacceptable at that time, she should not have signed it." (para. 65). In the result, the Supreme Court of Canada endorses a stark, zero-sum approach to autonomy and consent: If the circumstances do not amount to "duress, coercion or undue influence" in law (which all levels of court and both majority and dissent on the Supreme Court agree they did not), then the context is irrelevant to assessing the fairness of the Agreement, and the irrebuttable presumption is that both parties acted with equal autonomy. Because the Court determined that events in their life together as husband and wife unfolded

approximately as anticipated by the pre-nuptial agreement, and because Mrs. Hartshorne was still entitled to spousal and child support, the majority of the Supreme Court of Canada declined to find the agreement unfair.

A salient difference between domestic contracts (including pre-nuptial agreements) and arbitration is that in the former, the parties ostensibly negotiate the terms of their contract, whereas in the latter, the parties negotiate the terms of the agreement to arbitrate, but the outcome of the arbitration itself is imposed by an external adjudicator. It is not evident, however, what normative or legal consequences should attach to this distinction. The inquiry into consent in arbitration settings would simply be displaced to the agreement to arbitrate. In terms of assessing substantive outcomes, one might consider it defensible to hold people more strictly to contractual terms they devise themselves, while taking a less stringent approach to those who have had a potentially unjust or perverse award inflicted upon them by an arbitrator. However, if the terms in a domestic contract are more or less dictated by the stronger party (as they were in *Hartshorne*), and if arbitration outcomes fall within a predictable range, the normative gap between contract and adjudication narrows and this purely formal approach to consent seems unsatisfactory. Consider that in *Hartshorne*, the Supreme Court upheld a pre-nuptial agreement that led to an 80/20 apportionment of property rather than the default 50/50 split. If a Muslim woman, after obtaining independent legal advice, enters into an agreement to arbitrate according to a version of Islamic law that putatively and predictably sanctions a similar outcome, would or should a court view this any differently?

The particulars of Muslim women's vulnerabilities may diverge from those of Mrs. Hartshorne (a white, Christian, middle-class, legally trained Canadian citizen). Indeed, my point here is not to dispute the outcome in *Hartshorne*. Nevertheless, if the opposition to Islamic family law arbitration is predicated on the damage wrought by privatised dispute resolution on women's equality gains under family law legislation, decisions like *Hartshorne* do not bode well for a nuanced conception of consent, or of substantive unfairness, or unconscionability, that takes account of structural inequalities in bargaining power. As noted earlier, Boyd specifically stated that "more subtle community pressure may not qualify as coercion . . . , whereas threats of violence from a partner or family member almost certainly would".

Given this juridical landscape, how might one distinguish a domestic contract (including an agreement to arbitrate) informed by faith-based principles from the domestic contract in *Hartshorne*? Obviously, one route would be to vitiate the consent of the Muslim woman owing to the influence of faith, kin and community, but absent evidence of real or apprehended violence, one would have to depart from the narrow understanding of duress and coercion applicable to non-Muslim women and, in the process, construct a patronizing portrait of Muslim women as uniquely incapable of exercising autonomy.

Of course, the very activism of the Canadian Council of Muslim Women in opposing Islamic arbitration belies the stereotype of the meek and shrouded Muslim woman. Ironically, the Boyd Report invoked the dynamism of the CCMW to refute the claims of vulnerability made by CCMW on behalf of other Muslim women. Boyd was so impressed with the CCMW and other grassroots organizations that she concluded that these organizations could undertake legal literacy programs within their community,

thereby redressing the ignorance of Muslim women about their rights under Canadian family law. Thus, insulation of arbitration from public scrutiny need not raise undue concern about the welfare of Muslim women because civil society (in the form of the CCMW) would fill the void with education “about rights, obligations and options with respect to family law” (131). The fact that the CCMW “worked hard since its inception within the various Islamic communities to enhance the role of women within the faith and to foster an understanding of the principle of equality so central to Islamic teachings” (p. 130) is deployed in part to obviate public responsibility for protection of vulnerable women in favour of civil society assuming the task. In effect, the Review commends privatised protection (by civil society) as a principal safeguard against the risks created by the privatisation of dispute resolution in family law.

The Review goes on to extol the Canadian Coalition of Jewish Women as “a strong role model to other women’s groups concerned about potential abuses of religiously based mediation and arbitration” (130). The Coalition has indeed produced and disseminated educational materials to observant Jews on this theme. Nevertheless, promoting the Canadian Coalition of Jewish Women as a role model for Muslim women seems ironic, and not for the reasons one might think. Apart from educating Jewish women about the Jewish divorce process, the notable achievement of the Coalition was that it successfully lobbied for amendments to the *Divorce Act* and the *Family Law Act* to protect Jewish women from intransigent husbands who withheld the ‘get’ from their wives¹². In other words, the Coalition sought and obtained state intervention precisely because its own educational efforts could publicize but not ameliorate the substantive inequity of the Jewish law.

A central issue for feminists in the Islamic arbitration debates concerned whether and how secular law should protect encultured women from the risk of oppressive intra-communal practices. The most publicized elements of the debate concerned the existence of a unified Islamic law, its content, its variability, its manipulation in the service of patriarchy, and the extent to which women would be coerced into submitting to Islamic arbitration. Indeed, few proponents of Islamic arbitration denied the possibility that certain interpretations of Islamic personal law could be inimical to the welfare of Muslim women. However, the prevalence of those interpretations, the ability of Muslim women to assert and defend their own interests, and the competing value to participants of engaging in faith-based dispute resolution were all hotly contested. The discussion then devolved into a set of options as stark as it was false: permit Islamic law arbitration or prohibit it.

V MULTICULTURALISM MEETS PRIVATISATION: OPTIONS FOR REFORM

In reality, the question was never whether Muslim men and women can lawfully rely on religious authorities to negotiate domestic contracts, to mediate disputes or to

¹² Section 36 (5) of the *Family Law Act* states that “The court may, on application, set aside all or part of a separation agreement or settlement, if the court is satisfied that the removal by one spouse of barriers that would prevent the other spouse’s remarriage within that spouse’s faith was a consideration in the making of the agreement or settlement.” R.S.O. 1990, c. F.3, s. 56 (5). Section 21.1 of the federal *Divorce Act* authorizes a court, inter alia, to dismiss an application for a civil divorce by a husband who withholds the *get* from his wife.

arbitrate the consequences of marital dissolution. They have done so in the past, they do so now, and they will continue to do so in the future. They may participate more or less voluntarily, and abide by more or less fair outcomes. The state possesses neither will nor resources to police whether and how people resolve disputes outside the formal judicial system. In fact, unless one of the parties deliberately engages the formal legal system, the agreement will be insulated from judicial scrutiny.

Moreover, the decision by the Ontario government to deny legal recognition to faith-based arbitration does not prevent parties' from engaging mediators (as opposed to arbitrators) who can guide them using faith-based principles, or from negotiating agreements according to advice from religious authorities about the requirements of religious law. Section 59(2) of the amended Family Law Act implicitly makes this point:

59.2 When a decision about a matter described in clause (a) of the definition of "family arbitration" in section 51 is made by a third person in a process that is not conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction,

(a) the process is not a family arbitration; and

(b) the decision is not a family arbitration award and has no legal effect.

2006, c. 1, s. 5 (10).

(2) Nothing in this section restricts a person's right to obtain advice from another person. 2006, c. 1, s. 5 (10).

Ultimately, a salient question remains about whether, how, and to what extent the state will constrain, supervise and ultimately lend its singular power of enforcement to these mediated or negotiated arrangements.

This complex question of the interface between the state and private dispute resolution was largely deflected in the Report, except for the following recommendation:

The Ministry of the Attorney General should conduct further policy analysis of the legality and desirability of providing a higher level of court oversight to settlements of family and inheritance cases based on religious principles than is available to non-religiously based settlements under Part IV of the *Family Law Act*. (Boyd Report, para. 146).

Assuming for the moment that domestic contracts informed by religious norms pose a qualitatively graver threat to vulnerable women than do domestic contracts generated by secular bargaining practices, what options might exist for calibrating judicial oversight of these contracts?

Between denying legal recognition to faith-based settlements (the path taken by the Ontario government regarding arbitral awards), and enforcing them without judicial scrutiny, except with respect to child support (the *de facto status quo* for mediated and negotiated domestic contracts¹³) lie a range of possible institutional arrangements. For example, one could subject all faith-based private agreements/awards to automatic paper review by a court for compliance with enumerated normative criteria (e.g. fairness, equality, legitimate expectations of parties, etc.) within a defined period following conclusion of the agreement/award. Settlements that meet the stipulated standards would

¹³ I rely here on informal conversations with a practicing family lawyer.

be registered as enforceable court orders, and those failing the standard could be returned to the parties.

Obviously, this option carries implications for utilization of judicial resources, the interaction of religious and secular norms, the nature of the task performed by mediators and arbitrators¹⁴, and the allocation of the burden between the parties of accessing the courts. On this last point, it seems important to emphasize that any scheme animated by a concern for vulnerable parties that requires them to trigger the process by commencing litigation is less likely to be effective than one that makes judicial involvement automatic.

As noted earlier, several proponents of faith-based arbitration who participated in the Review insisted that decisions rendered by religious arbitrators could and would be consistent with the Canadian Constitution and Ontario family law¹⁵. Indeed, Boyd observed that “again and again, members of the Muslim community assured the Review that Muslims who live in countries not governed by Islamic law are required by their faith to be obedient to the law in place in their country of residence”. Taking these claims at face value, judicial supervision should be less threatening to the integrity of faith-based arbitration than it might otherwise appear. In any event, it would certainly provide an open opportunity for testing the hypothesis of the compatibility of religious and secular norms.

Having said that, members of a faith community might harbour legitimate concerns about judicial sensitivity and respect toward traditions or practices that seem novel and beyond the range of judges’ experience. One advantage, however, is that the review process creates an opportunity to educate and sensitize judges and religious mediators alike. Moreover, one could institute this relatively intense level of judicial scrutiny for a specified period of time with a view to developing an empirical basis for re-evaluating the desirability and necessity of maintaining it in the future. In other words, one could structure a relationship between the state and faith-based communities that contemplates the possibility of evolution over time.

The option presented above does not exhaust the range of possibilities. Apart from (hopefully) addressing concerns of gender inequality, one of its virtues over the *status quo* regarding both faith-based arbitration on the one hand and faith-based mediation/negotiation on the other is that it explicitly brings the secular, public legal order and faith-based private regimes into conversation with one another. Promotion of this type of dialogue corresponds in some respects to the model of ‘transformative accommodation’ proposed by Ayelet Shachar in her book *Multicultural Jurisdictions*. Shachar contends that a creative sharing of jurisdiction between the state and the identity group will empower vulnerable members and give leaders within the identity group an incentive to interpret and apply traditional practices in non-oppressive ways in order to retain those members. I take a less schematic and more modest view of what such measures can achieve. However this dilemma of faith-based dispute resolution is addressed, I am sceptical that the vulnerable Muslim women who animate the concern

¹⁴ They would also entail differential burdens on arbitrators and mediators to reduce into writing the facts, rules, and findings leading to a settlement, in order to provide a reviewing judge with enough information to meaningfully assess the settlement or award.

¹⁵ Review, pp. 43-45 (Council on American-Islamic Relations Canada; Islamic Council of Imams - Canada), p. 63 (Christian Legal Fellowship); “When pressed by the Review, even the Islamic Institute of Civil Justice has consistently stated that arbitration under Muslim family law would still have to accord with Canadian and Ontario law” (p. 124)

about exploitation will choose the 'exit' option if they are treated unfairly by religious arbitrators. Moreover, unlike Shachar, I would neither envisage nor commend its precipitation by a process of elite bargaining between state officials and leaders of the relevant community.

Of course, if one is concerned enough about the potential harms of privatised, faith-based justice regimes to subject them to some form of mandatory review according to public norms of justice, *Hartshorne* reminds us that we might ask deeper questions about the content of those public norms and why only some forms of privatisation warrant attention and concern.

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