

Were Muslim Barbarians Really Knocking On the Gates of Ontario?: The Religious Arbitration Controversy—Another Perspective[♦]

Natasha Bakht^{*}

On September 11th 2005, the Premier of Ontario, Mr. Dalton McGuinty, announced that “sharia arbitration” in family law matters would be banned from the province.¹ He was referring to the controversial debate that had consumed the province for over a year regarding the appropriateness of the voluntary use of religious principles to resolve certain family law matters in the arbitral context. The “sharia debate”, as it came to be known and as the name suggests, played out many of the usual myths as they relate to Islam and Muslims. For many weeks there was a prevalent misunderstanding, which continues to be repeated by both the media and opponents of arbitration, that the government of Ontario surreptitiously colluded with a Muslim organization known as the Islamic Institute of Civil Justice to create a parallel legal system for Muslims, thereby depriving them of their legal rights under Ontario and Canadian law.² With this myth came the accompanying “moral panic”³ that Muslim women in Canada would be stoned to death, that Muslim men would merely pronounce the words “talaq” three times for a divorce to be finalized and that the custody and access of children would favour men since the righteous place of Muslim men is at the head of the household. The familiar

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^{*} Assistant Professor, University of Ottawa

¹ Lee Greenburg, “Ban on religious courts draws multi-faith attack” *The Ottawa Citizen* (13 September 2005) A1. The irony of the date of the announcement combined with the excessive emphasis that Islam and sharia received in the religious arbitration debate in Ontario was not lost on most Muslims.

² Marion Boyd, “Arbitration in family law: Difficult choices” (2006) 18 *Inroads* 58 at 59.

³ Sherene Razack, “Imperilled Muslim Women, Dangerous Muslim Men and Civilized Europeans: Legal and Social Responses to Forced Marriages” (2004) 12 *Fem. Legal Stud.* 129 at 151 [Razack]. The caricatures of the “Imperilled Muslim Woman” and the “Dangerous Muslim Man” refers to Razack’s contention that in describing patriarchal violence within Muslim migrant communities there tends to be an over-reliance on culturalist arguments that is, explanations that depend on cultural deficit arguments that Muslims are uncivilized. I argue that a similar position was perpetuated with the religious arbitration controversy in Ontario.

caricature of the “imperiled Muslim woman” needing to be rescued from the “dangerous Muslim man” revealed itself in full force.⁴

Familiar Caricatures: “Imperiled Muslim Women and Dangerous Muslim Men”

Although in the contentious “sharia debate”, no “Muslim women’s bodies” were being “confined, mutilated or murdered”⁵ as in the headscarf, female genital mutilation and honour killing controversies, the discourse nonetheless resorted to sensationalized images so typical of Orientalist⁶ structures. The onslaught of fear-mongering newspaper articles, op-eds and television commentaries confirmed the view that the biggest threat in the world today is Islamic fundamentalism. For many months the media pursued the notion that sharia would change the landscape of Canadian law, overlooking the fact that legally nothing had changed. The *Arbitration Act* had since 1991 allowed parties to authorize a third person to resolve their civil disputes using the legal framework of their choice.⁷ Indeed Jewish tribunals or *Beis Din* had been operating in the province for years without similar alarm.⁸ Nonetheless, the media cautioned that “Muslim barbarians [were] knocking on the gates of Ontario.”⁹ Representations of Islam as barbaric, *other* than

⁴ *Ibid.*

⁵ *Ibid.* at 130.

⁶ Orientalism as Edward Said has noted is “a style of thought based upon an ontological and epistemological distinction made between ‘the Orient’ and (most of the time) ‘the Occident.’” Edward W. Said, *Orientalism: Western Conceptions of the Orient* (London: Penguin Group, 1995) at 2 [Said]. The Orient exists for the West, and is constructed by and in relation to the West. It is a mirror image of what is inferior and alien (“Other”) to the West and thus, seen as separate, eccentric, backward, sensual, passive and with a tendency towards despotism and away from progress.

⁷ *Arbitration Act*, S.O. 1991, c. 17 [the Act].

⁸ Lynne Cohen, “Inside the Beis Din” *Canadian Lawyer* (May 2000) 27 at 27.

⁹ Haroon Siddiqui, “Sharia is gone but fear and hostility remain” *Toronto Star* (15 September 2005) A25. See also Ghammim Harris, “Sharia is not a law by Canadian standards” *Vancouver Sun* (15 December 2003) A15 and Sara Harkirpal Singh, “Religious Law undermines loyalty to Canada” *Vancouver Sun* (15 December 2003) A15. One newspaper headline warned of the impending doom of “Legal Jihad.” Gayl Veinotte, “A legal jihad: Islamic groups say they don’t want sharia law to apply only to Muslims. They want everyone to obey the Qur’an” *The Western Standard* (31 October 2005) 20.

values that are democratically elected and *outside* the Canadian mosaic, were strengthened because many such descriptions came from members within the Muslim community itself.¹⁰ Activist Homa Arjomand regularly referred to faith-based arbitration and its supporters as “backward”¹¹ and Quebec MNA Fatima Houda-Peppin led a unanimous motion opposing Islamic tribunals in the Quebec National Assembly¹² despite the fact that the province’s Civil Code specifies that arbitration cannot be used to resolve family law disputes.¹³

According to Sharmeen Khan, the “stereotype of Muslim women—hidden behind the veil, barred from public participation unless given permission by their husbands—has captivated the imagination of some feminists in Canada, and fuelled a commitment to ‘save’ the women behind the burqua.”¹⁴ While for the most part Canadian feminist mobilization on this issue has been careful not to portray patriarchy and violence as

¹⁰ The author acknowledges the limitations of using the phrase “Muslim community” which tends to connote a singular, homogenous group with similar interests and goals. Muslims in Canada are in fact, made up of people from a vast diversity of races, countries of origin and beliefs. “Diversities are so pronounced that one has to ask whether the term ‘the Muslim world’ is at all meaningful if it refers to such an amorphous, divergent, shifting composition of individuals and societies who are not infrequently in conflict with one another.” Fareeda Shaheed, “Asian Women in Muslim Societies: Perspectives & Struggle”(Keynote Address to the Asia-Pacific NGO Forum on B+10, July 2001, Bangkok) online: Women Living Under Muslim Law <<http://www.wluml.org/english/newsfulltxt.shtml?cmd%5B157%5D=x-15759336%20&cmd%5B189%5D=x-189-59336>>.

¹¹ For example, Homa Arjomand states: “in backwards cultures, especially under Sharia or any other religion, there is no consequence for beating your wife or abusing your children,” quoted in Terry O’Neill, “Homa Arjomand” *Western Standard* (19 September 2005) 32 at 32.

¹² Quebec International Relations Minister, Monique Gagnon-Tremblay stated: “Muslims who want to come to Quebec and who do not respect women’s rights, or rights, whatever they may be, in our civil code...[should] stay in their country and not come to Quebec, because it’s unacceptable....,” quoted in Mike De Souza, “Quebec leaders warn Ontario: reject Sharia: Minister wants immigrants who support it barred” *National Post* (11 March 2005) A8.

¹³ *Civil Code of Québec*, S.Q. 1991, c. 64, art. 2639 provides: “Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration.”

¹⁴ Sharmeen Khan, “Racism, feminism and the Sharia debate” *Briarpatch* 34:7 (November 2005) at 32.

unique to Islam,¹⁵ Canadian feminist organizations¹⁶ nonetheless proposed prohibiting all religious arbitration as the solution to the “sharia debate”.

I hope to examine this solution in light of the globalized phenomenon of imposing extraordinary measures of surveillance and control on Muslim communities in the name of gender equality. Given Canada’s commitment to both equality and religious freedom, it seems contradictory to prioritize secular and/or recognizable¹⁷ ways of life as the only acceptable means of protecting vulnerable women particularly where the Canadian legal system promotes the private resolution of family law disputes. In fact, a strategy of prohibiting religious arbitration operates to the detriment of religious women who may want to live a faith-based life. This article will also examine the *Family Statute Law Amendment Act*,¹⁸ the government’s response to the religious arbitration issue, in order to demonstrate the tremendous influence of the anti-religion lobby. Despite specific amendments that suggest that religious arbitration may be permissible in limited ways, the government has insisted on describing the Bill as an absolute proscription of legally enforceable religious decision-making.

Legitimate Feminist Concerns with Family Arbitration

¹⁵ The majority of the popular media coverage by contrast has resorted to typecasting Muslim women as victims.

¹⁶ In this article, my reference to Canadian feminist organizations includes such bodies as the Canadian Council of Muslim Women, the National Organization of Immigrant and Visible Minority Women Canada and the Muslim Canadian Congress who joined with mainstream women’s organizations such as the National Association of Women and the Law (NAWL), the YWCA Canada and the Women’s Legal Education and Action Fund (LEAF) in opposing the use of religious arbitration in Ontario.

¹⁷ It is noteworthy that the religious arbitration debate only became a controversy when Muslims became visibly involved. While the Christian and Jewish faiths are more familiar to the Western psyche than apparently threatening Islam, it was clear that the concern expressed over religious decision-making in family law had less to do with religion generically and more to do with those religions less recognizable as Canadian.

¹⁸ *Family Statute Law Amendment Act*, S.O. 2006, c.1 [*Family Law Amendments*].

When a group of Muslims from Toronto known as the Islamic Institute of Civil Justice announced their intention to create Islamic arbitration tribunals, little was known about the impact of religious family arbitration upon women. In response to concerns by a group of Muslim women, the National Association of Women and the Law undertook a comprehensive examination of the legal implications of religious arbitration upon vulnerable individuals, women in particular.¹⁹ Canadian feminist organizations were particularly valuable in uncovering many problematic features of the *Arbitration Act* that had been created primarily for commercial purposes yet that could be used in the area of family law where history has shown many women to be vulnerable regardless of their culture/religion. In fighting for the protection of the interests of women, Canadian feminists brought to the forefront many complicated and detrimental shortcomings of the Act that had somehow remained hidden from the public since 1991.

In particular, feminist criticism focused on the trend to privatize family law through the increasing use of alternative dispute resolution processes. It was noted that despite the theoretical choice to submit to arbitration, vulnerable people may not actually have free choice. Social inequities may be reproduced in privately ordered agreements, and remain hidden from the public eye such that the status quo is maintained and women's inequality in relation to the "private sphere of the family is no longer a public concern."²⁰ Because so much of women's time and energy goes into the preservation and maintenance of the

¹⁹ See Natasha Bakht, "Arbitration, Religion and Family Law: Private Justice on the Backs of Women" (March 2005), online: National Association of Women and the Law <<http://www.nawl.ca/Documents/Arbitration-Final-0305.doc>> [Bakht].

²⁰ S. A. Goundry, *et al.*, *Family Mediation in Canada: Implications for Women's Equality* (Ottawa: Status of Women Canada, 1998) and R. Mandhane, *The Trend Towards Mandatory Mediation in Ontario: A Critical Feminist Legal Perspective* (Ottawa: Ontario Women's Justice Network, 1999) at 34.

private realm, family law raises unique concerns as a key site of oppression for women. Gender discrimination in family law has systemic effects on women's equality, given the substantive breadth of that law, as well as its impact on women's ability to exercise specific rights.²¹ Family law in Canada defines property relations between spouses and determines the economic and parental consequences of divorce. For women, these stakes are especially high with separation and divorce typically resulting in the feminization of poverty.²²

The arguments against alternative dispute resolution practices, which offer people a voluntary alternative to the increasingly lengthy and expensive cost of litigation under the traditional court system, have long been a part of the feminist arsenal to ensure that the Canadian state takes responsibility for protecting women's interests. In the specific context of faith-based arbitration, feminist groups were additionally concerned that Ontario's *Arbitration Act* did not require arbitrators to have any specialized legal training, yet the decision of these arbitrators could be filed with a court and have the force of law. Parties to arbitration could contract out of their rights to appeal, thereby removing an important mechanism of judicial oversight.²³ The decision to arbitrate did not need to be made contemporaneously with the breakdown of the relationship. Thus, an arbitration agreement could be made in a marriage contract many years before the actual decision to arbitrate was embarked upon, making true consent illusory. The Act failed to impose and

²¹ Bakht, *supra* note 19 at 40.

²² *Moge v. Moge*, [1992] 3 S.C.R. 813 at para. 55, L'Heureux-Dubé J.

²³ Although, the court cannot always be trusted to make decisions in favour of women as the recent decision in *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees*, [2004] 3 S.C.R. 381 indicates, given the tremendous legal strides made in women's rights since the notorious case, *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, judicial oversight of the substantive content of an arbitral award remains nonetheless important.

fund independent legal advice prior to the signing of an arbitration agreement, removing a significant means of ensuring an informed decision. The Act had no record keeping requirement, thus preventing data collection and analyses on the impact of family arbitration on women. References to equality and fairness in the Act were essentially procedural guarantees that had little impact on the substantive equality of arbitral awards.²⁴ And most disappointingly, the old *Arbitration Act* permitted parties to resolve their family law disputes using any “rules of law.” Essentially, this allowed any conservative or extreme right wing standard to be used to resolve family law matters in Ontario despite the significant gains made for women in Canadian family jurisprudence over the past thirty years. Such a system of arbitration with very few substantive protections for equality did not protect vulnerable individuals, women in particular.²⁵

The work of feminists in elucidating these severe deficiencies with the *Arbitration Act* was significant since the lack of records in arbitration prevented an empirical examination of discrimination against women in this context. Using the aforementioned analysis, feminists rightly speculated that the gender-based consequences of family arbitration with few limits would likely have intersecting class, (dis)ability, cultural and religious implications.²⁶ Where feminist mobilization went astray was in their lobbying efforts to prohibit all religious arbitration. Canadian feminists resolved that the vulnerable interests of women, Muslim women in particular, were best protected through the strict separation of law and religion.

²⁴ There is some case law to suggest that courts will interpret certain sections of the Act to include certain guarantees as to the substance of the arbitral award. See *Hercus v. Hercus*, [2001] O.J. No 534 at paras. 96-97 (Sup. Ct. J.) (QL) [*Hercus*].

²⁵ Bakht, *supra* note 19 at 27-29.

²⁶ *Ibid* at 29.

Law and Religion: An Unhealthy Mix?

In Canada, it is fair to speak of a system of law that generally attempts to separate religion and the state. However, the degree of Canada's secularism is tempered by the fact that our *Canadian Charter of Rights and Freedoms*²⁷ protects religious freedom understood as "the right to declare one's religious beliefs openly and the right to manifest religious belief by worship, teaching, dissemination and religious practice."²⁸ Indeed an absolute model of separation does not maximize religious freedom nor is it necessarily neutral.²⁹ Both fiercely secular states and theocratic states have been known to be equally oppressive to religious freedom.³⁰

Where an issue is intrinsically religious in nature, Canadian courts have tended to decline to intervene, claiming the inappropriateness of civil courts deciding questions of religious doctrine.³¹ However, Canadian judges will become involved in religion where necessary to prohibit practices that are harmful, that violate civil or property rights or that infringe a person's constitutional rights.³² Although there is no direct incorporation of foreign norms into Canadian law as new immigrants arrive and integrate into Canadian culture,³³

²⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

²⁸ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 336-37. See also *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 57.

²⁹ W. Cole Durham in Vicki C. Jackson & Mark Tushnet, eds., *Comparative Constitutional Law* (New York: Foundation Press, 1999) at 1159 [Durham].

³⁰ The secular state of France and the theocratic state of Saudi Arabia have both been known for the deleterious effects that their policies have had on the ability to practice individual religious freedom.

³¹ *Levitts Kosher Foods Inc. v. Levin* (1999), 45 O.R. (3d) 147 (Sup. Ct. J.).

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

³³ In Germany and France, different aspects of state Muslim law have been transplanted into these Western legal nations though international private law rules which directly incorporate certain foreign norms. Pascale Fournier, "The Reception of Muslim Family Laws in Western Liberal States" (Winter 2005) *Women Living Under Muslim Laws Dossier 27* [forthcoming][on file with author]. In Canada, unlike in France or Germany, it is the law of domicile and not the law of the parties' citizenship that is applicable in matters of family law.

the accommodation of minority groups occurs regularly in both the legislative and judicial context and indeed is seen as a necessary component of living in a multicultural society. This model of differentiated citizenship levels the playing field among various groups, in order to destabilize the impact of the political, economic, social and cultural hegemony of the majority.³⁴

While there is little doubt that the accommodation of minority groups is an indisputable virtue, equally important is the dilemma concerning the potentially injurious effects of accommodation policies on vulnerable individuals within such minority groups.³⁵ The creation of group rights cannot allow systemic maltreatment of individuals such as women within the accommodated minority group.³⁶

A recent case called *Khan v. Khan*³⁷ suggests that courts in Ontario are capable of drawing such a distinction. In *Khan*, a Nika Namma or a valid marriage contract in Pakistan was upheld as a valid domestic contract per Ontario's *Family Law Act*, but the waiver of spousal support by the wife legitimated by the apparent bar on spousal support under Hanafi Islamic jurisprudence was deemed unconscionable. The court aptly noted that

deference should be given to religious and cultural laws and traditions of groups living in Canada...[but] if cultural groups are given complete freedom to define family matters, they may tread on the rights of

³⁴ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, (Oxford: Oxford University Press, 1995) at 153.

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

³⁶ *Ibid.*

³⁷ *Khan v. Khan*, [2005] O.J. No. 1923 (Ct. Just.) (QL).

individuals within the group and discriminate in ways unacceptable to Canadian society.³⁸

This decision while deceptively simple was impressive in its nuance. A Muslim marriage contract was not summarily denied enforcement in Canada merely because of its religious origins. The beliefs of the religious participants were respected in this way. Yet a term of the contract, the waiver of spousal support, which clearly would have produced unconscionable results, was rejected for its inconsistency with Ontario's family law. Canadian feminists could have used a similar logic in resolving the "sharia debate" in Ontario. Rather than proposing a blanket prohibition on all religious arbitration, a more nuanced approach that showed consideration for the religious rights and the equality rights of women would have been more useful.

Protecting Religious Women by Protecting them From Religion

In June 2005, the "No Religious Arbitration Coalition" was formed. This coalition comprised of over 100 organizations and individuals brought together by the Canadian Council of Muslim Women to actively oppose the use of religious laws in family law arbitration in Ontario. While certain members of the Coalition opposed the use of any form of private arbitration in family law,³⁹ the group was united in focusing its efforts on ending religious arbitration, since this was seen as particularly dangerous for vulnerable

³⁸ *Ibid.* at para. 52.

³⁹ See for example the National Association of Women and the Law's letter to the Premier of Ontario, the Attorney General and the Minister Responsible for the Status of Women urging them not to adopt Marion Boyd's recommendations (24 February 2005), online: NAWL <<http://www.nawl.ca/Documents/BoydLetter.doc>>. A similar position has been adopted by the Metropolitan Action Committee on Violence against Women and Children (METRAC). See Ontario Women's Justice Network "No Religious Arbitration Legislation Introduced" (16 November 2005), online: <<http://www.owjn.org/issues/mediatio/legislation.htm>>.

women and children, regardless of their religious beliefs.⁴⁰ The Coalition included most Canadian feminist organizations and some Muslim organizations that identified themselves as moderate and/or secular/cultural Muslims.

The “No Religious Arbitration Coalition” was extremely effective in its lobbying efforts and eventually succeeded in convincing the government of the dangers of religious arbitration. This success was no doubt fueled by the surrounding hysteria that had been generated in the name of Islam and Islamic fundamentalism.⁴¹ Despite a report commissioned by the Attorney General and Minister Responsible for Women’s Issues, which recommended the continued use of religious arbitration with certain safeguards,⁴² the government was persuaded that allowing sharia to get a foothold in Canada would seriously jeopardize Canadian values. The broad-based support for this perspective⁴³ was not at all surprising given the dominant perception post 9/11 that Muslims are synonymous with terrorists and that the West must protect itself from barbaric Islam.⁴⁴ Indeed the support for the banning of religious arbitration by some Muslims permitted

⁴⁰ *Ibid.*

⁴¹ Protests against the use of sharia to settle family law disputes were held across Canada and Europe. Murray Campbell, “McGuinty still in the line of fire over religious tribunals” *The Globe and Mail* (23 January 2006) A11.

⁴² Marion Boyd, “Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion” (20 December 2004) online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>>. While many of the recommendations in Boyd’s report attempted to correct some of the deficiencies in the *Arbitration Act*, on the whole, the report failed to find an appropriate balance between the rights of religious minorities and women. It unquestionably gave preference to religious freedom and demonstrated a clear refusal to assume responsibilities for the protection of vulnerable persons within minority groups, women in particular. For an analysis of the Boyd Report see Bakht, *supra* note 19 at 56-60.

⁴³ According to a survey conducted by the Centre for Research and Information on Canada, “[s]ixty-three per cent of Canadians oppose giving any religious community the right to use faith-based arbitration to settle divorce, custody, inheritance and other family disputes.” See Norma Greenway, “Ontario was right to Reject Religious Arbitration: Survey” *The Montreal Gazette* (31 October 2005) A12.

⁴⁴ Leti Volpp, “The Citizen and the Terrorist” (2002) 49 U.C.L.A. L. Rev. 1575 at 1592.

ordinary Canadians and the government to feel safe in their position that the complete opposition to religion was for principled and not prejudicial purposes.⁴⁵

The blanket prohibition against religious arbitration assumes that religion is necessarily bad for women. It precludes any of the progressive possibilities that religious arbitration may entail for some women, undermining the work of many feminist religious scholars and reformers who have argued that their religion can and indeed does support women's rights. Increasingly, religious feminists are asserting that traditions can be modified. This understanding of religion is something that is shifting and contested rather than fixed and static; it contains a plurality of meanings and can be subject to various interpretations.⁴⁶ Muslim feminists and Islamic reformers have asserted that the Qur'an and the example of the Prophet provide much support for the idea of expanded rights for women. Jewish women have also sought progressive, women-friendly interpretations of religious laws.⁴⁷

Importantly, Canadian judicial interpretation of religious freedom emphasizes the importance of an individual's sincere belief in a particular religious practice. One's sincere belief is given predominance over even the normative legal code of belief

⁴⁵ Toronto Star columnist, Rosie DiManno reminded Canadians that we should not be labeled racist for "daring to champion the secular over the infantilizing religious". "Sharia solution a fair one, and not racist" *The Toronto Star* (16 September 2005) A02.

⁴⁶ Merav Shmueli, "The Power to Define Tradition: Feminist Challenges to Religion and the Israel Supreme Court" (S.J.D. Thesis Introduction, Faculty of Law, University of Toronto, 2005) [unpublished, on file with author].

⁴⁷ See for example: Judith Plaskow, *Standing Again at Sinai - Judaism from a Feminist Perspective* (New York: HarperSanFrancisco, 1991); Blu Greenberg, *On Women and Judaism - A View From Tradition* (Philadelphia: The Jewish Publication Society of America, 1981) and Judith Hauptman, *Rereading the Rabbis: A Woman's Voice* (Boulder: Westview Press, 1998).

purported by religious authorities or the community,⁴⁸ thus sustaining the idea that religious law is mutable and that custom and practice can assist in modifying religious traditions over time. These narratives, which complicate the religious debate, were glaringly absent from both the media and feminist strategies to protect Muslim women. By promoting a ban on religious arbitration, feminists have supported the view that religion is bound to patriarchal tradition, unchangeable and ultimately dangerous for women.

“Secularist insistence...that religion be confined to the ever-diminishing ‘private sphere’”,⁴⁹ where the state does not regulate people’s lives, might make sense in a minimalist state, but such a claim is impracticable in a country such as Canada where the enforcement of hundreds of laws and regulations control virtually every aspect of peoples’ existence including criminal law, family law, education, property, employment and health care. The anti-religion position undertaken by feminist groups showed no sympathy for the devout Muslim woman.⁵⁰ Feminists insisted upon secularism as the obvious solution to gender inequality despite Talal Asad’s reminder that secularism is also congruent with “repeated explosions of intolerance”⁵¹ in the world’s history.

While secularism may be an appropriate and understandable strategy in certain contexts, in Canada where the grip of fundamentalism cannot be compared to such countries as

⁴⁸ *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at paras. 46-47.

⁴⁹ Durham, *supra* note 29 at 1162.

⁵⁰ “What many neo-secularists cannot grasp is the desire to cultivate a deep personal connection with God in daily life.” Sheema Khan, “What close-minded liberals can learn from a rape victim” *The Globe and Mail* (12 November 2005) A23.

⁵¹ Talal Asad, *Formations of the Secular* (Stanford, California: Stanford University Press, 2003) at 7.

Saudi Arabia or Iran, it is appropriate that our strategies for managing potential violations of individual rights based on religion be different. By setting up the secular against the religious, Canadian feminists perpetuated the dichotomy between the modern, enlightened West and pre-modern, backward Islam.⁵² Also furthered was the notion of the irreconcilable “clash of civilizations”⁵³ between the West and Islam wherein Islam possesses “neither a commitment to human rights, women’s rights nor to democracy.”⁵⁴ The idea that “sharia could be an operational system that allows for discretion, nuance and change is one that is nearly unthinkable in light of the current politically symbolic role [that] Islamic law is forced to play.”⁵⁵ At the centre of the controversy surrounding religious arbitration stood Sherene Razack’s notion of the “imperiled Muslim woman.”⁵⁶

We cannot forget for an instant the usefulness of her body in the contemporary making of white nations and citizens. Her imperiled body has provided a rationale for engaging in the surveillance and disciplining of the Muslim man and Muslim communities.⁵⁷

In a post 9/11 world where the surveillance and control of Muslims and those perceived as Muslims has been justified under the guise of national security, feminist endorsement of an exclusively state run apparatus has failed to understand the legitimate resistance to government policies that perpetuate punitive and stigmatizing measures against people of colour.⁵⁸

⁵² Razack, *supra* note 3 at 130.

⁵³ Samuel P. Huntington, “The Clash of Civilizations?” (1993) 72 *Foreign Affairs* 22.

⁵⁴ Razack, *supra* note 3 at 130.

⁵⁵ Anver Emon, “Understanding Sharia Law: Further Education about Islamic History and Islamic Law Necessary” *The Bulletin University of Toronto* 59:6 (31 October 2005) 20 at 20.

⁵⁶ Razack, *supra* note 3.

⁵⁷ *Ibid.* at 168-169.

⁵⁸ Canada’s *Anti-terrorism Act*, S.C. 2001, c. 41, has codified extensive surveillance measures that have unduly targeted Muslims and those perceived as Muslims.

One Law for All Canadians?

Opponents of religious arbitration regularly relied on the slogan that there should be only one law for all Canadians. They invoked the idea of the rule of law wherein all Canadians regardless of status, colour, religion or creed are subject to the same legal rights and responsibilities in accordance with written laws adopted democratically. Certainly, the idea that personal characteristics ought to determine the law applicable to a group of people is repugnant to most. Why should Muslim women, the argument went, not benefit from the democratic and judicial reforms that have been forged in the area of family law?⁵⁹

In fact, it is disingenuous to speak of “one law for all” when Ontario’s family law permits parties to opt out of the default statutory regime such as the equal division of matrimonial property.⁶⁰ Parties can, through negotiation, mediation or arbitration, based on the right to contract freely, agree to almost any resolution of their marital affairs. Other than matters involving children such as custody and child support, where the courts will invoke their *parens patriae*⁶¹ jurisdiction to approve agreements that are in the best

⁵⁹ Engaging in religious arbitration of course, requires the voluntary consent of the parties involved. Muslim women would not be subject to sharia arbitration unless they agreed to it first. Feminists have noted the concerns regarding “real choice.” By contrast, Homa Fahmy of the Federation of Muslim Women has stated: “The fact that I’ve been characterized as being unable to make a sound judgment in this matter, I find deeply offensive.” Melissa Leong, “Muslims Groups Promise Liberals a Fight on Sharia” *National Post* (15 September 2005) A12.

⁶⁰ *Family Law Act*, R.S.O. 1990, c. F.3, s. 5(1) [FLA].

⁶¹ The courts’ *parens patriae* jurisdiction refers traditionally to the role of the state as sovereign and guardian of persons under legal disability such as minors or the mentally unwell. See Bryan A. Garner, ed., *Black’s Law Dictionary*, 7th ed. (St. Paul, MN: West Group, 1999) at s.v. “*parens patriae*”.

interests of children,⁶² couples' decisions to settle their family law affairs are generally left un-reviewed by the courts.

Thus, it is not accurate to speak of only one family law for all Canadians when most family law jurisdictions in Canada promote alternative dispute resolution mechanisms that permit parties to take personal responsibility for their financial well-being upon the dissolution of their marriage. In fact, "the current court infrastructure could not handle the volume of family cases if alternative resolution processes were not available and encouraged."⁶³ Given that ordinary Canadians can opt out of democratically formulated family law measures, it seems strange that religious Canadians should be prevented from similarly taking ownership over their decisions.

Family law in Ontario does not require that secular agreements be subject to *Charter* scrutiny. In fact, secular arbitrations that are inconsistent with *Charter* values are sometimes upheld by the courts. The Supreme Court of Canada in the *Hartshorne* decision upheld a private agreement that it recognized was unfair.⁶⁴ Justice Bastarache noted the court's reluctance to second-guess the arrangements of parties: "Individuals may choose to structure their affairs in a number of different ways, and it is their

⁶² Section 56(1.1) of the *FLA*, *supra* note 60, additionally provides that a court may disregard any provision of a domestic contract where the child support provision is unreasonable having regard to the child support guidelines. Significantly, in *Duguay v. Thompson-Duguay*, [2000] O.J. No. 1541 (Sup. Ct. J.) (QL) and *Hercus*, *supra* note 24, the Court explicitly held that it retains its inherent *parens patriae* jurisdiction to intervene in arbitral awards where necessary in the "best interests of the children." See also *Children's Law Reform Act*, R.S.O. 1990, c. C.12 at s. 69.

⁶³ Shelley McGill, "Religious Tribunals and the Ontario *Arbitration Act, 1991*: The Catalyst for Change" (2005) 20 J.L. & Soc. Pol'y 53 at 59.

⁶⁴ *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550.

prerogative to do so.”⁶⁵ The plethora of secular arbitration cases suggests that the precise meaning of equality in the context of the dissolution of one’s marriage will depend upon a variety of circumstances. With equality in family law being so elusive, one wonders why some religious agreements are being over-policed? Why are “breaches of equality” permitted in some contexts but not in others? Is it because as civilized Westerners, we gain something from attempting to rescue imperiled Muslim women from dangerous Muslim men?⁶⁶ If there is really to be “one law for all Canadians”, much more than just religious arbitration will be affected; it would mean a major change in the way family law currently operates.

The Government’s Supposed Ban on Religious Arbitration

Premier McGuinty announced that “he would not let his province become the first Western government to allow the use of Islamic law to settle family disputes and that the boundaries between church and state would become clearer by banning religious arbitration completely.”⁶⁷ Relying on the entrenched Orientalist model that Islam and faith based tribunals necessarily “threaten our common ground”,⁶⁸ the government of Ontario introduced *The Family Statute Law Amendment Act*.⁶⁹ Many of the amendments take into account feminist criticism that the *Arbitration Act* has a gendered impact that threatens women’s equality. Thus, several changes to the Act have been proposed,

⁶⁵ *Ibid.* at para. 36.

⁶⁶ Razack, *supra* note 3 at 129.

⁶⁷ CTV.ca News Staff, “McGuinty rules out use of sharia law in Ontario” (12 September 2005) online: CTV.ca <http://www.ctv.ca/servelet/ArticleNews/story/CTVNews/1126472943217_26/?hub=TopStories>.

⁶⁸ *Ibid.*

⁶⁹ *Family Law Amendments*, *supra* note 18.

including for the first time the regulation of family law arbitrators,⁷⁰ the requirement that family law arbitration agreements be in writing and that each party receive independent legal advice,⁷¹ the prohibition of advance agreements to arbitrate family law matters and the prohibition on the waiver of one's right to appeal to a court of law. Perhaps the most far-reaching amendment is that family law arbitrations will no longer permit a "choice of law" provision. Under the new amendments, any family law arbitrations would be "conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction."⁷²

Despite the fact that the Bill has been publicized as prohibiting religious arbitration,⁷³ the package of legislative amendments does not in fact forbid religious arbitration. Firstly, people can always settle their differences on any basis that they please, so long as both parties consent. However, the new amendments mean that only arbitral decisions using the family law of a Canadian jurisdiction will have the power of the state behind them. Thus, Muslim women may still utilize religious arbitration (that is not binding in law) and the feminist concern regarding women's vulnerability to the conscious or

⁷⁰ Under the new amendments, family law arbitrators would be required by regulation to: (a) be members of a recognized professional dispute resolution organization; (b) undergo training including screening parties separately for power imbalances and domestic violence; (c) inquire into matters such as power imbalances and domestic violence and; (d) keep proper records and submit reports to be tracked by the Ministry of the Attorney General. Ontario Ministry of the Attorney General "Backgrounder: The Family Statute Law Amendment Act, 2005" (15 November 2005), online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/news/2005/20051115-arbitration-bg-EN.pdf>> at 2.

⁷¹ Although the requirement for independent legal advice has been met with approval by groups such as the No Religious Arbitration Coalition, they have noted that "currently legal aid does not apply in arbitration, which means that many women will not have the means to pay for legal advice." As a result, they advocated for Bill 27 to be amended to make provision for legal aid funding for women in need in these circumstances. See Ontario, Legislative Assembly, Standing committee on general government, "Family Statute Law Amendment Act, 2006" in *Official Reports of Debates (Hansard)*, No. G-11 (16 January 2006) at G-164 (Alia Hogben, No Religious Arbitration Coalition).

⁷² *Family Law Amendments*, *supra* note 18 at cl. 1.(1)(b).

⁷³ "Ontario prohibits religious tribunals in family disputes" *The Guardian (Charlottetown)* (16 November 2005) A9.

unconscious patriarchal practices of arbitrators remains. Some commentators have noted that we lost an opportunity to prevent “back-alley arbitrations” through a “regime of government regulation that could have ensured a measure of transparency, accountability and competence in adjudication.”⁷⁴

A second way in which the amendments do not actually ban religious arbitration is that religious arbitrators can simply conform to the regulations regarding training and record-keeping and then perform religious arbitrations that are consistent with Canadian family law. Such an outcome meets the concerns for gender equality that have been raised in this debate as well as the interests of religious groups. The challenge for religious groups is to ensure that all of their practices are consistent with Canadian family law statutes and jurisprudence. Given the flexibility of Ontario’s family law regime and the opinion of many religious scholars that Islam for example, is perfectly compatible with human rights norms, this challenge should not be difficult to meet.

Thus, the government’s insistence on describing the new amendments as “one family law for all Ontarians”⁷⁵ is inaccurate. It can only be presumed that the reason for this description is to distance Ontario’s progressive family laws from the potential influences of barbaric Islam. That the government fell prey to the “moral panic” generated by the tremendous anti-religion lobby is disappointing. Despite the government’s description,

⁷⁴ Professor Anver Emon asked “Would a regulated arbitration regime be perfect? Perhaps not. Would it have been better than the informal back alley Islamic mediations that are still in place? I suspect yes.” Anver Emon, “A Mistake to Ban Sharia” *The Globe and Mail* (13 September 2005) A21.

⁷⁵ Ontario Ministry of the Attorney General, “News Release: McGuinty Government Declares One Law for All Ontarians” (15 November 2005), online: Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/news/2005/20051115-arbitration.asp> at 1.

the new amendments appear to find a balance between religious freedom and equality by permitting family arbitration with religious principles, so long as such principles do not conflict with Ontario's family law. Such an approach means that each religious norm or practice will be examined on its own merit. Courts must be prepared to accommodate a religious group "by interpreting open-textured positive norms in a manner that is both beneficial to the collective interests of that religious group and not detrimental to the fundamental norms applicable to the State."⁷⁶ This approach may also propel internal change from within the minority group,⁷⁷ which may legitimately create a "third-space" for Muslim women between the patriarchy they may encounter within the minority group and the racism they may encounter outside of it.

Legislators may have unwittingly found the only viable solution to this divisive issue, but interestingly, the sigh of relief emitted by most Ontarians is the result of a false labeling of what the amendments actually do. While Ontario's previous *Arbitration Act* left much to be desired in the way of safety measures for women, the discovery of these deficiencies suggests that religious arbitration need not be discarded altogether. The association of religion with unavoidably sinister means does nothing to further the cause of women's equality. More importantly, it leaves the future of religious women dismally bleak with no allies to turn to for support. Fortunately, the new amendments ensure basic

⁷⁶ Jean Francois Gaudreault-DesBiens, "The Limits of Private Justice: The Problems of the State Recognition of Arbitral Awards in Family and Personal Status Disputes in Ontario" (2005) 16:1 World Arb. & Mediation Rep. 18 at 29.

⁷⁷ Ayelet Shachar's model of transformative accommodation attempts to balance the interests of cultural groups with the interests of the state to uphold the liberties of its citizens. Shachar offers a "joint governance" approach to the paradox of multiculturalism wherein the institutional design aspires to engender interaction, even competition, between state and cultural group sources of jurisdiction. Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001).

safeguards of equality thanks to the work of many feminists. Importantly, the new amendments may also provide an opportunity for feminists to reconsider their relationship with religion.