Religious Arbitration: A Study of Legal Safeguards

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Reprinted from
(2011) 77 *Arbitration* 290-303
Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

SWEET & MAXWELL

Articles

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1. Introduction

Arbitration is such a well-entrenched element of modern legal systems that it is rare for its legitimacy to be challenged. One exception to this has been the recent debates over the place of Sharia in the legal systems of Western liberal societies. Groups have sought to gain recognition for Sharia in these societies through the rubric of the arbitration system, and, in doing so, have attracted a significant amount of controversy. This article will contribute to these debates through a focus on one of the arguments for arbitration: that it enhances the autonomy of those who participate in it, which is sometimes articulated as the benefit of the parties "owning their dispute". This article poses and addresses the question: how, if at all, can *religious* arbitration be justified on the same ground, i.e. of autonomy? In doing so, we hope to contribute to a fairly sophisticated debate on religious arbitration in liberal states.[1]

This debate was most eventful in the province of Ontario, Canada, in 2004–2006. (We will refer, hereinafter, to the debate in Ontario as the "Sharia arbitration debate" or the "Ontario Sharia arbitration debate".[2]) The debate seemed to have been sparked by the efforts of a Syed Mumtaz Ali to establish an Islamic Institute of Civil Justice to conduct arbitrations according to Sharia that would be recognised under the Ontario Arbitration Act and enforced by the state apparatus; that would in effect harness the powers of the state to implement a "Sharia court".[3] In response to the public reaction to these proposals—some of it rather impassioned—the Ontario government commissioned a former Attorney General, Marion Boyd, to conduct a public review of the issues around the recognition of arbitration of family law matters. Her report,[4] an invaluable resource on the Ontario Sharia arbitration debate,

* The authors thank all those who have assisted, including the Three Faiths Forum and the Institute for Advanced Legal Studies who provided support. We mention especially Professor Leslie Green, Dr Nazila Ghanea-Hercock, Muneer Ahmed, Jarrod Hepburn, Margaret Herrick, Fatima Lee, Bernard Luk, Howard Kislowicz and Zoë Sinel. Responsibility for any errors remains that of the authors. The views expressed herein are those of the authors alone and not of any employer or associated body.

[1] E.g. A.L. Estin, "Embracing Tradition: Pluralism in American Family Law" (2004) 63 Md L. Rev. 540; S. Poulter, "The Claim to a Separate Islamic System of Personal Law for British Muslims", in C. Mallat and J. Connors (eds), *Islamic Family Law* (London: Graham and Trotman, 1990), Ch.8; L. Fishbayn, "Litigating the Right to Culture: Family Law in the New South Africa" (1999) 13 Int. J. Law Policy Family 147; M. Boyd, "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion" (2004) available at *http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/* [Accessed June 10, 2011] ("Boyd Report"); R.D. Williams, "Civil and Religious Law in England: a Religious Perspective" (February 7, 2008), available at *http://www.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective* [Accessed June 10, 2011]; Phillips L.C.J., "Equality before the law" (July 4, 2008), available at *http://www.judiciary.gov.uk/media/speeches/2008/speech-lord-phillips-lcj-03072008.htm?wbc_purpose=Basic&WBCMODE=PresentationUnpublished* [Accessed June 10, 2011].

[2] We are aware that "Sharia" is not an unproblematic and monolithic concept: see, e.g., A.M. Emon, "Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation" (2008) 87 Can. Bar Rev. 391. This article deals with the relationship between liberalism and the state recognition of norms of minority religious communities, and is relevant to the state recognition of Sharia, whatever form it takes.

[3] Boyd Report, 2004, at p.3.

[4] Boyd Report, 2004, at p.3.

recommended that the state legal system of Ontario continue to recognise the validity of religious arbitration of family law matters. However, she recommended certain additional safeguards, such as the requirement that parties submitting themselves to arbitration be required to obtain independent legal advice,[5] that the religious law to be used in the arbitration be set out in advance,[6] that the arbitrators be subject to more stringent record-keeping requirements and so on.[7] The Ontario government ignored these recommendations and instead legislated to render invalid any arbitration that was not "conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction".[8] We are not aware of a jurisdiction where the debate about the place of religious arbitration in the state legal system has progressed as far as it has in Ontario, where it has sparked a government commission on the issue, as well as legislative reform that was advertised as an attempt to deal with the problem. The extent of the debate and the literature generated by it make these events an ideal case study for our question of whether religious arbitration can be justified on the grounds of autonomy.

During that controversy, some argued that religious arbitration was unfair to women and discriminated against them. Because women are sometimes coerced into arbitration,[9] because it shows them disrespect and because it harms their material interests, religious arbitration has the potential to harm autonomy.[10] We will expand on this argument in section four. While the question of whether or not religious arbitration harms the autonomy of women is important, this article takes the next step in this debate. We ask, if religious arbitration does have the potential to harm autonomy, what kind of legal safeguards can counteract or mitigate this potential? Since we use Ontario as a case study, we will focus on the existing legal safeguards and discuss how they currently protect the autonomy of vulnerable parties.

Of course, Canadians are not the only people to have had recent experience with this debate, the debate to which this article contributes is relevant for many liberal states, including the United Kingdom. A similar controversy erupted in other Western jurisdictions as well, notably in the United Kingdom, following the remarks of the Archbishop of Canterbury, Rowan Williams,[11] and Phillips L.C.J.[12] on the place of religious arbitration in the British legal system. They are indicative of the significance of the question that this paper addresses, not just for Canada, but for the United Kingdom and other liberal states.

Although the Ontario Sharia arbitration debate has largely subsided, the issues it raised are by no means resolved, and certainly remain interesting for lawyers and theorists alike. Indeed, it seems likely that they remain an important part of the way in which members of minority religious communities negotiate their relationships with the state, and as such, these issues are more likely merely to be lying dormant than to have disappeared completely. Indeed, the evidence seems to suggest that by the time of the Ontario Sharia arbitration debate, religious arbitration for Jews, Christians and Muslims seemed to have already been well established.[13] One scholar notes astutely that while the Ontario legislature's move may have stopped state recognition of religious *arbitration* to some degree, the legislation is

[5] Boyd Report, 2004, at pp.134, 137.
[6] Boyd Report, 2004, at p.135.
[7] Boyd Report, 2004, at pp.136–137.
[8] Family Statute Law Amendment Act 2006.
[9] Boyd Report, 2004, at pp.50–55.
[10] R. Gupta, *One Law for All rally* (November 21, 2009), available at *http://www.onelawforall.org.uk/november-21-a-successful-day-against-sharia-and-religious-laws/* [Accessed June 10, 2011]: "accommodating alternative systems of justice is not about choice or tolerance in a pluralistic society; it is not about Muslim women's autonomy. These demands emerge from fundamentalist politics—however they are dressed up." We elaborate on this reasoning in Luk and Ahmed, "Personal Autonomy and Religious Arbitration: Some Theoretical Questions", working paper, available from the authors.
[11] Williams, "Civil and Religious Law in England: a Religious Perspective", 2008.
[12] Phillips, "Equality before the law", 2008.
[13] Boyd Report, 2004, at pp.55–68.

silent on Sharia *mediation*.[14] For another thing, negotiated separation agreements, not involving binding arbitration but based on religious norms, are not affected by the amendments.[15] Another notes that the new regulatory regime in Ontario is unlikely to actually put an end to Sharia arbitration, citing former Attorney General Marion Boyd as stating that Sharia arbitration "will happen in mosques and community centers and it will just happen".[16] The Sharia arbitration debate, then, remains pertinent. By holding up the debate against the light of the value of autonomy, we hope to contribute to this lively debate according to terms its participants have already identified as important.

In section two, we briefly sketch how arbitration simpliciter might be justified on the grounds of autonomy. In section three we consider how the autonomy of certain vulnerable persons might be affected by religious arbitration—more so than private arbitration simpliciter. In section four we consider the particular case of family law arbitration, and the effects on women of the recognition of privately arbitrated agreements on family law issues, since this was the focus of the government's rationale for failing to enforce religious arbitrations. We concentrate, in particular, on aspects of Canadian legal doctrine on this question which have not been given much attention in the debates. Finally, in section five, we consider whether legal safeguards could address the concerns we raised about the harm to the autonomy of vulnerable persons.

2. Private Arbitration Simpliciter and the Autonomy Argument

Personal autonomy is the value of being (at least) part-author of one's own life.[17] Autonomy thus depends on the range and quality of options that one has. Arbitration is often justified on the grounds of (party) autonomy. As ex-Attorney General Boyd has written:

> "Private resolutions are likely to be more satisfactory to the disputants and thus more durable, because the parties have made them themselves and been able to tailor them to their needs more than a court is able to do."[18]

The case law also bears out the proposition that autonomy is an important justification for the recognition of arbitration. This can be seen in the leading case on arbitration in Canada, *Desputeaux v Éditions Chouette (1987) Inc.*[19] In that case the two parties, who disagreed about the authorship of the cartoon character Caillou, submitted their dispute to arbitration. The party that was dissatisfied with the arbitral award sought to have the validity of the arbitration overruled, taking their case all the way to the Supreme Court of Canada. The court upheld the validity of the arbitration and award. It accepted the submission of the party contented with the arbitral decision that the recognition of the "civil and commercial arbitration function" has, inherent to it, the "*decision-making autonomy*" of the parties.[20] The court observed that "the parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding".[21] It forthrightly observed that legislatures, in giving recognition to arbitral processes, "have themselves recognized the existence and legitimacy of the *private justice system*, often consensual, parallel to the state's judicial system".[22] The Supreme Court of Canada in *Desputeaux* in many instances invoked the concept of autonomy to justify the state

[14] Emon, "Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation" (2008) 87 Can. Bar Rev. 391 at 394.

[15] B. Ryder, "The Canadian Conception of Equal Religious Citizenship", in R. Moon (ed.), *Law and Religious Pluralism in Canada* (Vancouver, Toronto: University of British Columbia Press, 2008), pp.87–109, at p.105.

[16] T.C.W. Farrow, "Re-Framing the Sharia Arbitration Debate" [2006] 15 Const. F. 79 at 80.

[17] See generally J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986); G. Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge Studies in Philosophy, CUP, 1988).

[18] Boyd Report, 2004, at p.10.

[19] *Desputeaux v Éditions Chouette (1987) Inc* 2003 SCC 17 ; [2003] 1 S.C.R. 178.

[20] *Desputeaux* 2003 SCC 17 at [18] (emphasis added).

[21] *Desputeaux* 2003 SCC 17 at [22].

[22] *Desputeaux* 2003 SCC 17 at [40] (emphasis added).

recognition of private arbitration.[23] Although in some instances, it is clear that the court was talking about "the autonomy of the arbitration system", it is clear from many of the references that the autonomy of the parties is one of the underpinnings of the justification of state recognition of private arbitration. Other Canadian courts have used similar language to describe arbitration.[24] We can conclude, then, that autonomy is an accepted justification for arbitration outside the context of religious arbitration.

But autonomy has also been put forward as a justification for religious arbitration. Reading the remarks of the Archbishop of Canterbury and Phillips L.C.J. mentioned above, it seems that some notion of autonomy underlay both of their defences of the state recognition of religious arbitration. For instance, Phillips L.C.J. wrote:

> "Those who, in this country, are in dispute as to their respective rights are *free* to subject that dispute to the mediation of a chosen person, or to agree that the dispute shall be resolved by a chosen arbitrator or arbitrators. There is no reason why principles of Shariah Law, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution."[25]

Similarly, the Archbishop of Canterbury advocated "a scheme in which individuals *retain the liberty* to choose the jurisdiction under which they will seek to resolve certain carefully specified matters".[26] Both sets of remarks, then, draw on personal autonomy, broadly understood, as justifications for the state recognition of religious arbitration. However, as we will see, important arguments have been put forward suggesting that arbitration of the religious kind is harmful for the autonomy of its participants, and especially for women who participate in arbitrations in a family law context. We will deal with this apparent conflict later, but before we address those issues, we will lay some groundwork by putting family law arbitrations in Canada in their doctrinal context.

3. Personal Autonomy and Religious Arbitration

Having outlined the role of personal autonomy as a justification for the enforcement of arbitration agreements, we can begin to think about the special considerations that apply in the case of religious arbitrations. A common worry about religious arbitration is that women and other vulnerable parties do not choose it freely. Instead, there are religious, social, cultural or familial pressures that effectively coerce them into arbitration.[27] The founder of the Islamic Institute of Civil Justice, which attempted to introduce organised religious arbitration in Ontario, suggested that a *good* Muslim would turn to Sharia arbitration rather than courts for dispute resolution; this comment is taken as evidence of some of this pressure to arbitrate according to religious norms.[28] The autonomy-based justification of religion derives from the idea that recognising arbitration gives parties more choice—of how, where, when and by whom their dispute is decided.[29] Naturally this justification is weakened if it is true that women are often coerced into religious arbitration, and are denied any choice.

However, there are further reasons why religious arbitration is thought not to be justifiable using the value of autonomy. The norms of religious arbitration are thought to be detrimental to the autonomy of women in two ways. First, these norms sometimes disadvantage women

[23] See, e.g. *Desputeaux* 2003 SCC 17 at [18], [51], [68].

[24] See, e.g. *Willick v Willick* (1994) 118 D.L.R. (4th) 51; 158 A.R. 52 at [26]; *Seneviratne v Seneviratne*, 1998 ABQB 289, at [32]; Indeed, personal autonomy may be one of the reasons that parties are willing to submit their disputes to an arbitrator. See also S.R. Cole, "Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution" (2000) 51 Hastings L.J. 1199 at 1201, citing E. Allan Lind and T.R. Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum, 1988), p.29.

[25] Phillips, "Equality before the law", 2008, (emphasis added).

[26] Williams, "Civil and Religious Law in England: a Religious Perspective", 2008, (emphasis added).

[27] Boyd Report, 2004, at pp.50–51.

[28] L. Resnick, "Family Dispute Arbitration and Sharia Law" (2007) available at *http://www.bccla.org/othercontent/07Sharialaw.pdf* [Accessed June 10, 2011].

[29] See generally Raz, *The Morality of Freedom*, 1986; Dworkin, *The Theory and Practice of Autonomy*, 1988.

in a material sense by affecting property rights,[30] the power to divorce[31] or rights to alimony or settlement on divorce. Secondly, the fact that women are disadvantaged by these norms and are sometimes treated as the wards of men might be taken to imply the inferiority of women. This in turn, one might argue, harms the self-respect of these women. Self-respect, for several reasons, is thought to be a necessary condition for autonomy.[32] Thus, again, the autonomy-based justification for arbitration is undermined when it comes to religious arbitration.

4. Family Law and the Recognition of Arbitral Awards

To understand the Ontario Sharia arbitration debate, it will be useful to outline the doctrinal basis for the state recognition of family law arbitrations in Canada. It will be helpful to begin with a discussion of the situation of family law in Canada. We will then proceed to discuss the doctrinal context for the state recognition of arbitrations. This discussion will help frame the terms of the debate and will highlight some salient features of the law which are often ignored in this context.

Family law: the doctrinal context

Interestingly, the issue of whether choice of different family law should be available to Canadians has been around since at least the time of confederation, in 1867. Some of the questions raised by Canadian federalism are now replayed in the Sharia arbitration debate. The Constitution Act 1867 assigns legislative competence over "Marriage and Divorce" to the federal government,[33] while legislative competence over the "Solemnization of Marriage in the Province"[34] and "Property and Civil Rights" is assigned to the provinces.[35] As the eminent Canadian constitutional law scholar Peter W. Hogg writes, the framers of the constitution wanted to balance federal uniformity with local preferences about the law governing familial relations:

> "In principle, one would expect the bulk of family law to come within provincial power. … It … concerns the ways in which people choose to live their private lives, and may be expected to reflect values which differ from one part of the country to another."[36]

However:

> "[t]he national interest in marriage and divorce consists in the desirability of nation-wide recognition of marriages and divorces. If marriage and divorce were provincial responsibilities, and if markedly different rules developed among provinces, there would be no assurance that a marriage or divorce performed or obtained in one province would be recognized by the courts of another province."[37]

[30] Under Islamic inheritance law, male heirs in the same relationship to the deceased as female heirs inherit more: A.A.A. Fyzee and T. Mahmood, *Outlines of Muhammadan Law*, 5th edn (Delhi, Oxford: Law in India Series, OUP, 2008), p.316.

[31] Jewish women, for instance, have approached courts in relation to the *get*. T. Rostain, "Permissible Accommodations of Religion: Reconsidering the New York Get Statute" (1987) 96 Yale L.J. 1147.

[32] J. Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1972), pp.178, 440.

[33] Constitution Act 1867, being the British North America Act (UK) 30 & 31 Vict. s.91(26).

[34] Constitution Act 1867 s.92(12).

[35] Constitution Act 1867 s.92(13).

[36] P.W. Hogg, *Constitutional Law of Canada*, 5th edn Supplemented (Scarborough, Ont.: Thomson Carswell, 2007), para.27-1.

[37] Hogg, *Constitutional Law of Canada*, 2007, at paras 27-1–27-2.

As one can see, the way the federal structure of Canada has been set up already poses a big challenge to those who claim that there is some great imperative for "one law" to apply to all Canadians.[38] Moreover, the survival of this system for almost a century and a half, a period that saw great changes to family life in Canada, is testament to the ability of a system of divided legislative jurisdiction over the family to function. Finally, understanding the divided nature of family law in Canada will also be important in seeing that in the debate about Sharia arbitration in Ontario, certain topics were never thought to be subject to arbitration because they are in federal, rather than provincial jurisdiction.

"Marriage and Divorce" is a federal head of power in Canada. In this context, "[m]arriage is a status that is conferred on individuals by the State".[39] Prior to the statutory codification of the status of marriage in the wake of the same-sex marriage debate,[40] the definition of marriage in Canadian law existed only at common law.[41] Similarly, divorce as a status existed only at common law until federal statutory codification in 1968; in some cases, a federal statute was required to give effect to each divorce.[42] Currently, a divorce is only available through the procedure established by the federal Divorce Act 1985, which restricts the granting of divorces to federally appointed courts.[43] Moreover, federal jurisdiction over divorce includes the authority to grant "corollary relief" in the event of a divorce.[44] The federal jurisdiction extends to matters that have a "rational, functional connection" to the divorce.[45]

The civil status of divorce, being only available through judicial declaration under the authority of the Divorce Act s.8, is beyond the purview of any civil arbitration.[46] Moreover, nothing in the Divorce Act provides for the power of private parties to use a contract to oust the jurisdiction of a divorce-granting court over any corollary relief, namely, child support, spousal support and child custody orders. However, since those types of relief are only available on application by "either or both spouses",[47] the statute as it currently stands effectively puts any federal power over the material consequences of the divorce at the disposal of the parties, should they wish to use them.[48] If a prior domestic contract contains an agreement not to resort to corollary relief proceedings, a court will have the discretion to decide whether to enforce the agreement as written.[49] In the debate over the role of Sharia in the settlement of family law disputes in Ontario, commentators have not usually noted that despite provincial recognition of the results of family law arbitration, the federal legislature retains jurisdiction over many aspects of divorce, and could choose to legislate over it if it saw fit.

[38] Consider, for instance, one of the submissions, by a Karen Graham, to Boyd's review of the use of arbitration in family law, as cited by the Boyd Report, 2004, at pp.47–48: "Rather than increase the number of religious codes being allowed to operate within Canada's judicial system, please give serious consideration to reducing the control of these religious and community organizations and tribunals. A society divided by law, will further divide, such that the perceived differences of race, religion and gender will also grow. In an attempt to recapture the equality across the board for all Canadians, I appeal to you not to pass the proposal to allow an increase in religious-based family law, but to establish a proposal to investigate the means to reduce such existing laws and eventually to remove the existing [Arbitration] Act."

[39] J.D. Payne and M.A. Payne, *Canadian Family Law*, 2nd edn (Toronto: Irwin Law, 2006), p.23.

[40] Civil Marriage Act, S.C. 2005, c.33, s.2, states, "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others."

[41] *Hyde v Hyde* (1866) L.R. 1 P. & D. 130 at 133; *Halpern v Canada (Attorney General)* (2003) 65 O.R. (3d) 161; *Reference re Same Sex Marriage* [2004] 3 S.C.R. 698.

[42] Hogg, *Constitutional Law of Canada*, 2007, at paras 27-6–27-7.

[43] Divorce Act 1985 (2nd Supp.) as amended, s.8(1).

[44] Hogg, *Constitutional Law of Canada*, 2007, at paras 27-8–27-9, 27-12–27-21; especially citing *Papp v Papp* [1970] 1 O.R. 331.

[45] *Papp v Papp* [1970] 1 O.R. 331 at 336.

[46] Boyd Report, 2004, at p.14.

[47] Divorce Act 1985 ss.15.1(1), 15.2(1), 16(1).

[48] Divorce Act 1985 s.15.1(5).

[49] *Miglin v Miglin* [2003] 1 S.C.R. 303; *Hartshorne v Hartshorne* [2004] 1 S.C.R. 550 .

Provincial jurisdiction over family law matters is generally thought to derive from the heads of legislative power over "The Solemnization of Marriage in the Province" and "Property and Civil Rights". Provincial jurisdiction is therefore understood to be wide enough to cover the consequences of breakdown both of formally solemnised marriages that have been recognised by the state, as well as of less formal, "common-law" relationships.[50] In addition to concurrent jurisdiction over custody over children, and spousal and child support, provincial legislation also establishes rules over the division of matrimonial property. Moreover, the provinces have exclusive jurisdiction over inheritance and succession, adoption and guardianship, among other fields. In Ontario, the provincial legislature has enacted the Family Law Act[51] to govern issues such as the division of matrimonial property, the obligations of ex-spouses to support each other and the children of the marriage, and so on; and it has enacted the Children's Law Reform Act[52] to govern issues like access and custody.

Arbitration: the doctrinal context

Ontario, like many other provinces,[53] provides for the state recognition and enforcement of settlements that arise from an arbitration.[54] The Arbitration Act 1991 provides for the recognition of contracts between parties in a dispute to bring their dispute before an arbitrator, and family law contracts, such as separation agreements or marriage contracts, were capable of being arbitrated in just the same way as ordinary commercial contracts. Under the Arbitration Act 1991, the parties to the arbitration had the authority to designate the rules of law to be applied by the arbitrator.[55] The parties also have the authority to vary or exclude the application of law and equity.[56] Moreover, the parties have the authority to vary or exclude the right of the parties to seek an appeal.[57]

In 2006, the provincial government made important amendments to this statute in the wake of the debate about Sharia arbitrations, creating exceptions to the general picture of arbitration described above. It legislated certain restrictions on the operation of family law arbitrations in the province.[58] It established a definition of a "family arbitration", and to qualify as such, an arbitration over matters that could be dealt with in a marriage contract, separation agreement, cohabitation agreement or paternity agreement must be "conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction".[59] Any arbitration that does not conform to this definition of "family arbitration", according to the amended statute, "has no legal effect".[60] Moreover, the powers that parties to non-family arbitrations have of designating the rules of law to be applied by the arbitrator, the powers to vary or exclude the application of law and equity and the powers to vary or exclude the right of parties to seek an appeal, were all taken away from participants in a family arbitration.[61]

The statutory framework for the recognition of family law arbitrations in Ontario, of course, does not complete the doctrinal picture. If one of the arbitrating parties resists the enforcement of an arbitral award, he or she may bring the matter to court. The Arbitration Act as enacted provided that arbitrating parties could contract to exclude appeals to court, but the 2006 amendments took away this provision. However, even without the amendment,

[50] Hogg, *Constitutional Law of Canada*, 2007, at para.27-2.
[51] Family Law Act 1990.
[52] Children's Law Reform Act 1990.
[53] Boyd Report, 2004, at p.11.
[54] See generally, Arbitration Act 1991, as amended.
[55] Arbitration Act 1991 s.32(1).
[56] Arbitration Act 1991 ss.3 and 31.
[57] Arbitration Act 1991 ss.3 and 45.
[58] Family Statute Law Amendment Act 2006.
[59] Family Statute Law Amendment Act 2006 s.1.
[60] Family Statute Law Amendment Act 2006.
[61] Family Statute Law Amendment Act 2006 s.3.

courts in family law cases have intervened to grant relief to a resisting party who wishes to resile from the terms of a domestic contract. In section five below we see that the courts have already established analytical frameworks for considering whether to override the intentions of a couple as expressed in written agreements. For the purposes of this article, it is reasonably safe to infer that a similar approach would be applied to clauses in marriage and separation agreements that give authority to arbitrators to decide the disputed issues in a relationship breakdown. Where there is an application for divorce, the courts retain the jurisdiction to ignore any agreement into which the divorcing couple have entered.

For the purposes of an analysis of the implications of autonomy for the Sharia arbitration debate, this outline of the legal context of family law in Ontario provides some caveats by way of the framing of the debate. Given the federal structure of Canada, provincial legislation gives legal validity to arbitration in a limited range of fields. Divorce, for instance, is excluded as it is a civil status that can only be granted under circumstances set out in federal statute. The Divorce Act requires that a court satisfy itself of certain conditions before granting the divorce; among them, that "there has been no collusion in relation to the application for divorce",[62] that "reasonable arrangements have been made for the support of any children of the marriage"[63] and that "there is no possibility of the reconciliation of the spouses".[64] The reasonableness of any arrangements made for the support of any children of the marriage is generally considered with reference to a widely accepted set of Federal Child Support Guidelines.[65] If a party petitioning for a divorce retains counsel, the lawyer will be under a professional obligation to advise the party as to his or her legal rights under the state legal system with respect to the divorce. Thus, in the very act of petitioning for divorce, spouses necessarily involve state officials in evaluating certain aspects of the conditions under which the divorce is to take place, and the arrangements that have been made to address the consequences of the divorce.

As one can see, although arbitration may offer some degree of autonomy to parties that opt for it, the state retains firm control of certain key aspects of family law proceedings. Most notable is the state's control of—specifically the federal government's monopoly over—the civil statuses of marriage and divorce. To get married in Canada, one must comply with federal statute, and the same goes for divorce. And to get divorced in Canada, the federal statute requires a court appearance, and it requires judges to satisfy themselves that the divorce is in good faith and that the children of the marriage are reasonably provided for. Although an agreement to arbitrate may exclude the court's jurisdiction over the division of marital property, the law as it stands does not permit a divorce to take place on Canadian soil without the involvement of at least one judge, who is obliged to consider the divorce according to the above criteria.

The freedom to arbitrate family law disputes, although broad, is therefore subject to definite limits. The worries of the more anxious opponents of religious arbitration in Ontario, of Saudi-style stoning of adulterous wives in downtown Toronto, seem overblown.[66] Some of the features we have discussed here, in other words, constitute safeguards against these concerns. We will say more about such safeguards in section five. Nonetheless, private arbitration can determine other important issues, such as the division of assets, support, custody and access.

[62] Divorce Act 1985 s.11(1)(a).
[63] Divorce Act 1985 s.11(1)(b).
[64] Divorce Act 1985 s.10(1).
[65] "Federal Child Support Guidelines: Simplified Tables" available at *http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/legis/fcsg-lfpae/index.html* [Accessed June 10, 2011].
[66] See, e.g. Boyd Report, 2004, at p.52, for reports of worries about stoning, beating and public humiliation.

5. Legal Safeguards

A natural question given the possibility outlined above, that religious arbitration harms the autonomy of some women, is then: is there some way to protect these women while keeping religious arbitration open to those for whom it is a genuinely autonomy-enhancing option?

We think that the state legal system in Canada already has three main types of safeguard that will have some effect in protecting the autonomy of women in religious arbitration. The first is the division of powers between the federal and provincial orders of government. The second is the distinctive way that courts read agreements between spouses. The third is the legal duties that the state imposes on those carrying out arbitrations. Our discussion of these safeguards is meant, not only to consider what protections there currently are, but also to suggest how they can be expanded to address the concerns raised in the previous section.

The first type of safeguard, from federalism, has already been discussed in some detail in section four above. The gist of the argument is that marriage and divorce in Canada are civil statuses over which the federal government has a constitutionally established legislative monopoly. Marriage and divorce are currently only available through certain statutorily regulated conditions. Divorce is currently only available through a judicial order, and judges are obliged to satisfy themselves that the divorce is in good faith and that the children of the marriage are financially reasonably provided for. As long as the communities that participate in religious arbitration of family law matters find the civil status of marriage (and therefore, divorce) to be statuses important to their modes of behaviour, the state will always maintain some safeguards over the conduct of divorces. The safeguards are by no means comprehensive, but in our view they are not insignificant either.

The second type of safeguard is the distinctive way in which courts interpret domestic contracts between spouses. We have not found any cases that are precisely on the point of how a court will regard the clauses contained in a family arbitration agreement, but it is likely that the courts' approach will be guided by previous case law on how to interpret domestic contracts. The types of provision that worry opponents of religious arbitration, such as the exclusion of the jurisdiction of the courts of the state legal system in an arbitration agreement, the uneven division of marital property or access to and custody of the children of the marriage in a separation agreement, are likely to be considered in a manner analogous to that in which the Canadian courts have dealt with parties that renege on provisions of domestic contracts.

The leading cases from the Supreme Court of Canada on this issue are *Miglin v Miglin*[67] and *Hartshorne v Hartshorne*.[68] In *Miglin*, the couple had executed a "final separation agreement" that contained a release of any future claims for spousal support. Ms Miglin, however, applied to the court five years after the execution of the separation agreement for an order for spousal support from her ex-husband. A majority of the court ruled against the claim. It based its decision on a reading of the federal Divorce Act, which specifies:

> "(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse."[69]

[67] *Miglin v Miglin* [2003] 1 S.C.R. 303.
[68] *Hartshorne v Hartshorne* [2004] 1 S.C.R. 550.
[69] Divorce Act 1985 s.15.2(4).

Since the presence of an agreement between the spouses is only one of the factors that the statute directs the courts to consider, the court decided that a spousal agreement cannot be dispositive of the outcome of corollary relief applications.[70] Instead, the majority decision established a two-step test for considering whether to discount a spousal support agreement. First, a court is to consider whether there were any circumstances in the execution of the agreement that would be reasons to discount it. Factors that the court suggested might weigh that direction include:

> "... any circumstances of oppression, pressure, or other vulnerabilities, taking into account all of the circumstances … and the conditions under which the negotiations were held, such as their duration and whether there was professional assistance".[71]

The court was careful to note that the standard for intervention does not rise to the level of "unconscionability" as it is understood in the law of contracts.[72] The court's formulation of the first factor is significant given our discussion in the previous section. If a court were indeed to discount any family arbitration agreement (extrapolating from *Miglin*) in which there were "circumstances of oppression, pressure, or other vulnerabilities", this might well address many of our concerns relating to women and other vulnerable persons in religious groups.

The second step of the test is also important for our purposes. The decision directs courts to consider the substance of the agreement. Courts are to:

> "... assess the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is in substantial compliance with the objectives of the Act at the time of its creation". [73]

As examples of the objectives of the Act, the majority judgment referred to a list of factors in the Divorce Act s.17(7) that courts should take into account in granting a variation for a support order:

> "(a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
> (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
> (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
> (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time."[74]

Besides the conditions under which women agree to religious arbitration, concerns about the *content* of such agreements play a prominent role in discussions on whether they should be enforced. We provided some examples of agreements which are thought not to give women a fair deal above,[75] for instance, to give them inadequate spousal support or child custody. But if it is a condition for the enforcement of an agreement, including a religious arbitration agreement, that it be substantially compliant with objectives (a)–(d) above, agreements which are unfair to women are highly unlikely to be enforced.

[70] *Miglin v Miglin* [2003] 1 S.C.R. 303 at 29–47.
[71] *Miglin v Miglin* [2003] 1 S.C.R. 303 at 81.
[72] *Miglin v Miglin* [2003] 1 S.C.R. 303 at 82.
[73] *Miglin v Miglin* [2003] 1 S.C.R. 303 at 87.
[74] *Miglin v Miglin* [2003] 1 S.C.R. 303 at 91; Divorce Act 1985 s.17(7).
[75] See Constitution Act 1867 ss.91(26), 92(12), 92(13).

Only if the agreement passes the two stages of the test should "the court … defer to the wishes of the parties and afford the agreement great weight".[76] Applying this test to *Miglin*, the court refused to grant a spousal support order, thus enforcing the terms of the parties' agreement. But it is important to note that the court was willing to test the content of the separation agreement with the objectives of what is essentially social welfare legislation: the Divorce Act. If courts were willing, more generally, to test family arbitration agreements against the objectives of welfare legislation, then grossly unfair, exploitative or gender-unjust agreements are unlikely to be enforced. This would go a long way towards assuaging the concerns raised in section four above.[77]

Aside from the *Miglin* and *Hartshorne* safeguards, it is also important to recall that the common law courts see themselves as being empowered by an "inherent *parens patriae* jurisdiction". This means that the courts view themselves as having the power to "intervene where necessary in the best interests of children".[78] Thus, if an arbitrated settlement of a relationship breakdown were ever to go before the courts, the courts retain the power to deviate from the arbitrated settlement where they believe they should impose a different result in the best interests of the children affected by the settlement. This *parens patriae* jurisdiction imposes important limits on the extent to which an arbitrator can impose a decision that deviates too much from the norms of the state legal system with relation to matters such as custody, access and division of assets between the spouses, and is a power the courts possess over the determination of child support beyond that already discussed above with relation to the granting of a divorce.

This second type of safeguard is also admittedly not very comprehensive. It will only apply where a party regrets the domestic contract that she or he purportedly entered into at an earlier time, and which is now alleged to be defective in some gross way. The courts have shown themselves more willing to intervene where one party regrets a domestic contract than in cases where a party regrets a contract simpliciter. It is not necessary for a domestic contract's odium to rise to a level of unconscionability, but merely to meet the criteria set out above.

The foregoing is not meant to be a thorough legal analysis of the conditions under which a court will intervene to set aside a domestic contract, but is meant to show that there are definite ways in which arbitration and separation agreements, however unfair they may be, are unlikely to become proverbial contracts of slavery, at least under the current rubric of Canadian law. The courts have preserved for themselves plenty of room to intervene to safeguard the rights of weaker parties to domestic contracts.

Moreover, domestic contracts are also subject to traditional common law contract law doctrines that govern circumstances under which a court may decline to enforce promises contained in the contract. In the event that doctrines such as duress, undue influence, frustration, etc. can apply to a situation where the *Miglin* test does not, those doctrines are available to a party that wants to go back on an arbitration agreement or a contract to comply with an arbitral decision.

Finally, the third type of safeguard is that of rules that govern the conduct of arbitrations. The state's recognition of private arbitration is generally not a carte blanche. The statute lays out certain procedural requirements for the conduct of the arbitration, such as equal

[76] *Miglin v Miglin* [2003] 1 S.C.R. 303 at 87.

[77] *Hartshorne v Hartshorne* [2004] 1 S.C.R. 550, is distinguished from *Miglin v Miglin* [2003] 1 S.C.R. 303, mainly in that the agreement that the applicant sought to vary was a marriage agreement rather than a separation agreement. The applicant's ex-husband had insisted that the applicant on their marriage day sign a marriage agreement that the applicant's independent legal adviser had suggested to her was grossly unfair. The agreement contained terms that would have divided the property between the divorcing spouses in a highly unequal manner. The *Hartshorne* court applied a similar analytical rubric to that in *Miglin*. First, courts are to consider whether the parties anticipated their personal and financial circumstances at the time of distribution and the impact of their choices. If they have so anticipated, then "a finding that their Agreement operates unfairly should not be made lightly": *Hartshorne v Hartshorne* [2004] 1 S.C.R. 550 at 46.

[78] *Duguay v Thomson-Duguay* (2000) 7 R.F.L. (5th) 301 at 41. See also Family Law Act 1990 s.56(1) and (1.1), which provide a statutory recognition of this power.

and fair treatment of the parties, and the equal right of each party to present its case.[79] Statutes recognising arbitration do provide for circumstances in which a party may apply to a court to prevent the state apparatus from enforcing an arbitral judgment. In Ontario, a court may intervene if it finds that the arbitrator has committed an error of law, as long as a court grants leave to appeal on the basis that the importance of the matters at stake in the arbitration justifies an appeal, and that the determination of the question of law at issue will significantly affect the rights of the parties.[80] Alternatively, an agreement between the parties may also oust the jurisdiction of a court to hear an appeal on a question of law.[81] A court may also set aside an arbitration award if there are defects going to the validity of an arbitration agreement, if the arbitrator exceeded the scope of the question that the parties submitted to arbitration, if the subject matter submitted to arbitration "is not capable of being the subject of arbitration under Ontario law"[82] or if the arbitrator committed some kind of procedural defect.[83] These procedural safeguards might do more for vulnerable persons than is obvious at first glance. We noted earlier that religious arbitration harms women's autonomy, by attacking the foundation of their self-respect.[84] Many commentators believe that procedural safeguards, besides promoting accuracy of decision-making, express respect for persons.[85] Laurence Tribe, for instance, believes that process rights:

> "... express the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is to be done with one … [they activate] the special concern about being personally talked to about the decision rather than simply being dealt with". [86]

Those anxious about religious arbitration may nonetheless reply that the second and third types of safeguard depend on an oppressed party having sufficient autonomy to invoke those arguments, and to take the oppressing party to court. Those points are well taken, but then it would be helpful to remember that the objection applies to family law under the state legal system as well as under religious arbitration. The courts can only intervene through the corollary relief proceedings under the federal Divorce Act when one of the parties makes an application under those rules, and a person so oppressed by the community is unlikely to make such an application, with or without religious arbitration. Similarly, non-religious family law arbitration is likely to have the same effect on such an oppressed person as religious family law arbitration: the oppressed person is unlikely to seek to vary the enforcement of a non-religious arbitral agreement either.

However, the oppressed person may be less likely to seek these state legal remedies where a religious proceeding is available, because the person may fear the community's perception of the act as a disloyalty. Having a religious option may *increase* the perceived disloyalty of pursuing the state option. It might also be reasonably argued that any resort

[79] Family Law Act 1990 s.19.

[80] Arbitration Act 1991 s.45.

[81] Arbitration Act 1991 s.45; see also *Denison Mines Ltd v Ontario Hydro* (2002) 58 O.R. (3d) 26. For a more extensive review of the case law on this question, see B. Barin, A.D. Little and R.A. Pepper, *The Osler Guide to Commercial Arbitration in Canada: A Practical Introduction to Domestic and International Commercial Arbitration* (The Hague: Kluwer Law, 2006), pp.128–129.

[82] However, commentators have observed that "there is little case law from which to discern general guidelines on what is 'properly' the subject of an arbitration agreement". Based on the comments of the Supreme Court in *Desputeaux v Editions Chouette (1987) Inc* 2003 SCC 17, on the importance of interpretations of restrictions on arbitration that "preserve decision-making autonomy within the arbitration system", it seems reasonable to infer that the courts will take a narrow reading of subject matters that are not capable of being the subject of arbitration: Barin, Little and Pepper, *The Osler Guide to Commercial Arbitration in Canada*, 2006, at p.40.

[83] Family Law Act 1990 s.46.

[84] See Constitution Act 1867 ss.91(26), 92(12), 92(13).

[85] C. Harlow and R. Rawlings, *Law and Administration*, 3rd edn (Cambridge: CUP, 2009), p.631; *R. (on the application of Wooder) v Feggetter* [2002] EWCA Civ 554; [2003] Q.B. 219; P. Craig, *Administrative Law*, 6th edn (London: Sweet & Maxwell, 2008), p.372; T. Endicott, *Administrative Law* (Oxford: OUP, 2009), pp.194–195.

[86] L. Tribe, *American Constitutional Law*, 2nd edn (New York: Foundation Press, 1988), p.503.

to courts, be there a religious arbitration option or not, will be perceived as a grave disloyalty. Whether more of one type of case exists than the other is an empirical question beyond the scope of the present discussion.

The empirical question of whether having a religious option may increase the perceived disloyalty of pursuing the state option points to the limits of the effectiveness of state action. In the commercial arbitration setting, it has been suggested, the norms of the state legal system have an effect known as the "shadow of the law".[87] Ordinarily we would expect that even dispute resolution processes adjudicated by non-state agents would reach decisions similar to those reached by state officials adjudicating within the state legal system, because the state system is always available to disputants as an alternative. However, where the arbitration takes place within a community mistrustful of the state, it may be that the availability of the state option could have no effect on a settlement arbitrated within the community, or it may even have the opposite effect, if the participants wish to be seen to be eschewing the norms espoused by the state.

Put another way, these safeguards provide ways for state officials to intervene in the settlement of family law disputes where a party wishes to depart from contractual arrangements that he or she regrets. This is true for those who wish to resile either from undesirable arbitration agreements, or from having agreed to employ a biased person to arbitrate the dispute. The family law and arbitration law arrangements in Canada mean that parties are not strictly bound by such contracts. Moreover, divorce proceedings require that state officials be present and examine the financial and child-rearing arrangements arising out of the divorce. These elements, which, respectively, take away the freedom to contract, and inject state intervention into divorce proceedings, protect the ability of women to change their minds if they had previously agreed to some kind of oppressive arrangement. Paradoxically, such interventions serve to protect their autonomy.

As we have tried to show, the effects of religious arbitration on oppressed persons within minority communities is a nuanced question, and requires certain empirical propositions that we (or any theorists) are unable to furnish. Before we rush to judgment about the odious effects of state recognition of religious arbitration on women's rights, these empirical gaps must be filled.

6. Conclusion

We suggest that these safeguards are examples of tactics the state can deploy to try to mitigate possible negative effects on autonomy that religious arbitration might carry for the vulnerable.

One of the tactics—the state monopolisation of the civil status of marriage—means that the state will intervene in some way in all marriages and divorces, regardless of whether the parties seek the help of state officials. As stated above, in Canada the state has made itself the sole gatekeeper of the civil statuses of marriage and divorce. Arising out of this monopolisation is the requirement that parties seeking marriages and divorces must appear before an officer of the state, and must also conform to certain requirements set out in state law. Currently, the law in Canada is that judges determining whether to grant divorces are obliged to reassure themselves that, among other things, reasonable arrangements have been made to provide for the support of any children of the marriage. This simple requirement puts the provision of support for children of a marriage squarely within the realm of state supervision, thus allowing for judges to ensure that any arbitration will have dealt adequately with this issue.

[87] See, generally, R.H. Mnookin and L. Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale L.J. 950.

For those concerned about the impact of religious arbitration on women, it may be worthwhile to consider whether the list of topics to put within the issues that judges are required to consider can be expanded. This option is limited in Canada because of federalism considerations: the provincial exclusive legislative jurisdiction over property and civil rights means that using federal law to require judges to consider whether assets have been fairly divided between divorcing spouses is likely to be unconstitutional for being beyond the scope of federal jurisdiction. In legal systems like that of the United Kingdom, for example, such federalism issues would not arise, and could be a tactic a state could deploy to further protect vulnerable parties.

The other tactics—that of judicially providing for doctrinal ways for parties to back out of contractual obligations (such as to religious arbitration) that they regret, or providing for a way for parties to complain that the requirements of procedural fairness have not been met—establish further avenues for vulnerable parties to resile from unfavourable contracts for religious arbitration. These tactics require the initiative of a vulnerable party to be effective, and reflect the nature of the liberal state as one that generally does not intervene at its own initiative.[88]

These other tactics provide additional avenues for the state to justify its intervention in allowing a regretful party to go back on a promise that it may have entered through what would otherwise be an enforceable contract. (The duty of the arbitrator to ensure procedural fairness falls into this category because the parties agreeing to the arbitration presumably would have believed they were getting one kind of arbitrator, that one party no longer wishes for by the time she or he complains about the arbitrator's conduct.)

Such tactics could be made even more effective by expanding the conditions under which a party may resile from an arbitration agreement. The *Miglin* line of cases, for example, already provides that "circumstances of oppression, pressure, or other vulnerabilities" can justify the non-execution of an agreement. Depending on how broadly such a dictum is read, it is possible to conceive of courts discounting virtually all religious arbitration agreements that they come to believe are unfair. However, in that case, the state risks constraining the autonomy of parties to enter into contracts for religious arbitration that are very important to them, perhaps as a way of fulfilling a religious or cultural duty.[89]

This article does not purport to provide a solution to the religious arbitration debate. Instead we attempt to indicate, by way of example, legal safeguards that might protect vulnerable people who might be harmed by religious arbitration while keeping religious arbitration open as an option for those whose autonomy benefits from it, and have briefly sketched some ways in which those safeguards may be expanded.

As we discussed at the beginning of this article, while the most strident public discussions of the issue of state recognition of religious arbitration may have faded into the background, the issues behind those debates have not. As we have tried to show, these issues implicate the much larger question of the role of the state in the lives of citizens living under its claimed authority. A liberal state, likely to enshrine liberal values in its legal system, is likely to come into conflict with those communities that do not share some or many of those values. Arbitration is a way for citizens to order their affairs with one another with little or no intervention from the state, and hence naturally has become a way for members of multicultural communities to order their own affairs. It is therefore unsurprising that religious arbitration has become a site for contestation between liberalism and multiculturalism. What we hope we have provided is a more nuanced and contextually accurate exposition of how such contestation takes place within one of the legal systems where this debate has been especially vociferous.

[88] See, e.g. Boyd Report, 2004, at pp.9–10.
[89] F. Ahmed, "Personal Autonomy and the Option of Religious Law" (2010) 24 Int. J. Law Policy Family 222.