

CONFLICTS BETWEEN FUNDAMENTAL RIGHTS

Eva BREMS

Editor



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Eva Brems (ed.)

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MUSLIM PERSONAL LAW (MPL) IN CANADA: A CASE STUDY CONSIDERING THE CONFLICT BETWEEN FREEDOM OF RELIGION AND MUSLIM WOMEN'S RIGHT TO EQUALITY

WAHEEDA AMIEN*

1. INTRODUCTION

Canada's multicultural society includes different religious groups.¹ Its religious diversity consists of several Christian denominations, which constitute the majority of Canada's total population and numerous minority religions including

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¹ Other forms of diversity in Canada include race, culture, ethnicity, language, gender etc. Preamble of the Canadian Multiculturalism Act R.S.C. 1985, c. 24 (4th Supp.). (All Canadian references made to cases, regulations and statutes can be found at the website of the Canadian Legal Information Institute CanLII: <http://www.canlii.org/en/index.html>). W. Klassen, Religion and the Nation: An Ambiguous Alliance 40 *University of New Brunswick Law Journal* 87 at 95 (1991).

Muslims as the largest religious minority.² Canada attempts to accommodate its diversity through an official policy to support multiculturalism within its secular framework.³ This policy is regulated by the Canadian Multiculturalism Act,⁴ which promotes respect for religious and other forms of diversity and attempts to ensure that minority communities are treated equally in relation to the majority community.⁵ Respect for religious diversity is also endorsed through various constitutional provisions including s.27 of the Canadian Charter of Rights and Freedoms ('Charter').⁶ S.27 provides that the Charter "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." It therefore promotes a heterogeneous society⁷ and acts as an interpretive provision by requiring all Charter rights and freedoms including equality and freedom of religion to be interpreted in a way that augments Canada's multicultural legacy.⁸ Despite Canada's policy to support multiculturalism, it does not operate separate personal law systems in the public sphere for its different religious communities. Instead, Canada maintains one legal system for all.⁹

² Census 2001 results indicate that Muslims comprise 2% of Canada's total population, which is 29 639 030. The Christian groups constitute about 76.8% of the total population. Other religious groups include Jews (1.1%); Buddhists (1%); Hindus (1%); Sikhs (1%); Aboriginal spirituality (0.1%); and Pagans (0.1%). See online: <http://www12.statcan.ca/english/census01/products/highlight/Religion/Page.cfm?Lang=E&Geo=PR&View=1a&Code=01&Table=1&StartRcc=1&Sort=2&BI=Canada&B2=1> (visited on 15 November 2007).

³ Supreme Court of Canada (SCC) 1996, *Ross v. New Brunswick School District No. 15* 133 D.L.R. (4th) 1 para. 91; SCC 1985, *R. v. Big M Drug Mart Ltd* 18 D.L.R. (4th) 321 para. 94; Preamble of the Canadian Multiculturalism Act *supra* note 1; R. Ghosh, Multicultural Policy and Social Integration: South Asian Canadian Women, 1(1) *Indian Journal of Gender Studies* 49, 53, 55 (1994); W. S. Tarnopolsky, The Equality Rights in the Canadian Charter of Rights and Freedoms, 61 *Canadian Bar Review* 242, 262 (1983).

⁴ Canadian Multiculturalism Act *supra* note 1.

⁵ Preamble, sections 3(1)(e) and 5(1)(h) *ibid*; R. Ghosh, *supra* note 3, 53; N. Bakht, Human Rights Framework, *Arbitration, Religion and Family Law: Private Justice on the Backs of Women* 1, 1–2 (Ottawa: NAWL, March 2005). See online: http://www.lcc.gc.ca/research_project/bakht_main-en.asp (visited on 01 June 2006).

⁶ Part I, Schedule B of the Constitution Act, 1982. The other provisions include the Preamble, s.2(a) (freedom of religion) and s.15(1) (right to equality and non-discrimination on the ground of religion). Notably, diversity in Canada has been described as "a constitutionally recognized value." C. L'Heureux-Dube, A Conversation About Equality, 29(65) *Denver Journal of International Law & Policy* 68 (2000–2001).

⁷ Ontario Court of Appeal 1988, *Zylberberg v. Sudbury Board of Education* 65 O.R. (2d) 641 (C.A.) para. 86.

⁸ Federal Court of Canada, Court of Appeal 1994, *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)* (C.A.) 113 D.L.R. (4th) 67 (F.C.A.) para. 71; *R. v. Big M Drug Mart Ltd.*, *supra* note 3, para. 99; SCC 1986, *R.v. Edwards Books and Art Ltd.* 35 D.L.R. (4th) 1(SCC) para. 80; W.S. Tarnopolsky, *supra* note 3, 243, 262–263; T. Macklem, Faith as a Secular Value, 45 *McGill Law Journal* 1, 8 (2000); C. L'Heureux-Dube, *supra* note 6, 68; P. W. Hogg *Constitutional Law of Canada* 52–8.1 Vol.1 (Ontario: Thomson Canada Limited, 1997).

⁹ N. Bakht, *supra* note 5, 4. However, Davies notes that Canada adopts a pluralist system in respect of its indigenous territories. M. Davies, The Ethos of Pluralism 27(1) *The Sydney Law Review* 104 (March 2005).

However, religious communities can apply their religious personal law systems in the private sphere. Hence, Muslim Personal Law ('MPL')¹⁰ is operative within Canadian Muslim communities.¹¹

This study considers how the implementation of MPL in Canada manifests a conflict between Muslim women's right to equality and freedom of religion. To achieve this, the study takes into account the application of MPL within Canadian Muslim communities and analyses the way that the Canadian legislature has dealt with MPL. It will be argued that the application of conservative interpretations of MPL promotes freedom of religion at the expense of Muslim women's right to equality. Similarly, it will be argued that the legislature undermines Muslim women's right to equality when it attempts to either accommodate MPL without regulation or assimilate MPL into the dominant norms of Canadian society. These two approaches (accommodation and assimilation) are located at opposite ends of the religious diversity management spectrum. In the context of Canadian MPL, the implications of both approaches for freedom of religion and Muslim women's right to equality will be illustrated in the following instances: secular options for marriage and divorce; and arbitral awards arising from *Shari'a* arbitration tribunals (Islamic based family arbitrations) in Ontario. As an alternative to assimilation and accommodation, this study introduces a Gendered-Nuanced Integrationist approach ('GNI approach') for enhanced protection of Muslim women's right to equality. The GNI approach is situated in the middle of the religious diversity management spectrum and is derived from an integrationist method that requires religious rules and practices to be judged according to human rights standards. In general, the GNI approach is presented as a gendered-nuanced version of the integrationist method, which supports the protection of freedom of religion only to the extent that it does not infringe women's right to equality. More specifically in the context of MPL, the GNI approach respects only those MPL rules and practices that do not undermine women's right to equality.

¹⁰ This is the religious personal law system for Muslims, which regulates their family law and inheritance according to Islamic Law. Islamic Law is derived from primary and secondary sources. The primary sources consist of the *Qur'an*, which Muslims believe originates directly from God and *Sunnah*. The latter comprises the purported practices and sayings of Prophet Muhammad (p.b.u.h). Secondary sources include *ijma* (consensus among Muslim jurists), *qiyas* (decisions based on analogy), and *ijtihad* (independent juristic reasoning). N. Moosa, Muslim Personal Law Affecting Children: Diversity, Practice and Implications for a new Children's Code for South Africa, 115 *The South African Law Journal* 479, 479 (1998); S. Sardar Ali *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* 19–23 (The Hague, Netherlands: Kluwer Law International, 2000); W. Amien, Overcoming the Conflict between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages, 28 *Human Rights Quarterly* 729, 731 (2006).

¹¹ Interview with Syed Mumtaz Ali, President of the Canadian Society of Muslims (Toronto, Ontario: 5 June 2006) and Alia Hogben, President of the Canadian Council of Muslim Women (CCMW) (Kingston, Ontario: 7 June 2006).

Since both sex/gender equality and freedom of religion are guaranteed in the Charter,¹² the study also examines the Canadian jurisprudence relating to equality and freedom of religion to determine if and how the conflict between the two could be resolved. In particular, attention is paid to whether or not Canada's constitutional framework provides adequate protection for Muslim women's right to equality when it clashes with freedom of religion in the context of MPL. In the event that it does not and/or in the event that the Charter does not apply to MPL matters, consideration is also given to two statutory measures that could afford protection for Muslim women's right to equality namely, an extension of protective mechanisms within existing Canadian legislation and/or the adoption of a dual legal system to recognise aspects of MPL in a way that does not undermine Muslim women's right to equality. These statutory measures are proposed as components of a gender-sensitive regulatory framework, which is a product of the GNI approach and involves regulation of MPL within a women's rights friendly framework.

2. APPLICATION OF MPL

Not only do Canadian Muslims contribute to Canada's plurality, they are also among themselves a diverse group. Their heterogeneity is derived from different cultural practices imported from their homes of origin such as India and Pakistan,¹³ which impact on the way that they apply MPL coupled with the different Islamic schools of thought that they follow.¹⁴ While the majority of Canadian Muslims follow the *Sunni Hanafi* school of thought,¹⁵ some also follow the *Shia Ismaili* school of thought.¹⁶ Moreover, varying interpretations of MPL exist among the schools of thought.¹⁷ There is also no formal or informal regulation of MPL by Muslim structures within the Canadian Muslim communities.¹⁸ This is presumably due to the fact that Canadian Muslims are relatively new additions to

¹² S.2(a) guarantees freedom of religion while s.15(1) guarantees sex equality and s.28 guarantees sex- and gender equality.

¹³ Interview with S.M. Ali, *supra* note 11.

¹⁴ M. Boyd *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (2004) 43 ('Boyd Report'). See online <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf> (visited on 15 November 2007).

¹⁵ Interview with S.M. Ali, *supra* note 11.

¹⁶ In three Canadian cases involving the enforceability of dower (*mahr*), the Muslim parties followed the *Ismaili* school of thought. Supreme Court of British Columbia 1996, *Nathoo v. Nathoo* B.C.J. No. 2720 (S.C.) [Q.L.] para. 8; Supreme Court of British Columbia 2000, *Amlani v. Hirani* B.C.J. No.2357 (S.C.) [Q.L.] para. 10; Supreme Court of British Columbia 2004, *N.M.M. v. N.S.M.* B.C.J. No. 642 (S.C.) [Q.L.] *N.M.M.* para. 7.

¹⁷ Boyd Report, *supra* note 14, 44.

¹⁸ Interview with S.M. Ali, *supra* note 11.

Canada's multicultural population, as they constitute first and second generation Canadians.¹⁹ Therefore, they probably have not yet had an opportunity to organise themselves into structured groups to deal with issues pertaining to MPL. Instead, individual Muslim clerics such as imams pronounce on Muslim family law issues that are brought to them by community members.²⁰ Although progressive interpretations of MPL are possible,²¹ most Canadian imams apply traditional conservative androcentric interpretations that impact negatively on Muslim women.²² This is evident in their recognition of traditional rights and obligations between men and women in Muslim marriages, which places women in a submissive role in relation to men thereby creating an unequal relationship between the parties.²³ For instance, the husband's unilateral obligation to pay dower (*mahr*) to the wife or her representative entails the husband's concomitant right to have his wife be sexually available to him during the marriage.²⁴ Similarly, the unilateral obligation of the husband to maintain his wife during the marriage gives him the right to demand obedience from her.²⁵ Inequality between Muslim men and women is also evident when the parties wish to dissolve their marriages. For instance, while Canadian imams sanction *talaqs* for Muslim men,²⁶ Canadian Muslim women still have difficulty in obtaining *khuls* from them.²⁷ Furthermore, although *talaq* and *khul* are both forms of dissolution of marriage, they also confer disparate rights on the parties, which exacerbate the

¹⁹ Interview with A. Hogben and S.M. Ali, *supra* note 11.

²⁰ Interview with S.M. Ali *ibid*.

²¹ S. Sardar Ali, *supra* note 10, 24, 38–40, 42–43; W. Amien, *supra* note 10, 753–754.

²² N. Bakht, Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women, 1(1) *Muslim World Journal of Human Rights* 1, 17 (2004), quoting Faisal Kutty. See online: <http://www.bepress.com/mwjhr>.

²³ W. Amien, *supra* note 10, 738.

²⁴ Traditionally, dower must be agreed upon between the parties at the time of contracting a Muslim marriage in order for the marriage to be considered valid. The dower could comprise anything that is considered permissible according to Islamic Law and it forms part of the wife's estate exclusively. It could either be paid promptly by the husband to the wife or her representative at the time of contracting the marriage or its payment could be deferred until a later date that is agreed upon between the parties or it could be paid at dissolution of the marriage. Canadian cases dealing with dower reveal that an arrangement regarding dower is required to contract Muslim marriages in Canada. *Nathoo v. Nathoo*, *supra* note 16; *Amlani v. Hirani*, *supra* note 16; *N.M.M. v. N.S.M.*, *supra* note 16; Ontario Court of Justice, General Division 1998, *Kaddoura v. Hammoud* 168 D.L.R. (4th) 503, 44 R.F.L. (4th) 228, O.J. No.5–54, 83 O.T.C. See also translation and commentary by A. Y. Ali *The Holy Qur'an* 2:229, 2:236–237, 4:4, 4:19–21, 4:25 (Islamic Propagation Centre International, 1946); A.R.I. Doi *Shariah: The Islamic Law* 158–166 (London: Ta-Ha Publishers, 1984); Ibn Rushd (transl. by I.A.K. Nyazee) *The Distinguished Jurist's Primer* 23, 25–28, 36, 60 Vol II (Center for Muslim Contribution to Civilization, Garnet Publishing Limited, 1996); W. Amien, *supra* note 10, 735.

²⁵ *The Holy Qur'an*, *supra* note 24, 4:34; Ibn Rushd, *supra* note 24, 63; W. Amien, *supra* note 10, 745.

²⁶ Interview with S.M. Ali, *supra* note 11.

²⁷ Interview with A. Hogben, *supra* note 11.

imbalance between Muslim men and women. This is evident from the fact that *talaq* is available only to men and is affected by the husband simply uttering the word ‘*talaq*’ or its equivalent thrice, which results in his unilateral repudiation of his wife without her consent and without him having to prove any grounds for the dissolution of the marriage.²⁸ Moreover, the husband does not have to make any payment to be released from the marriage (other than any outstanding dower amount).²⁹ However, *khul* is traditionally obtained through mutual agreement between the husband and wife to dissolve the marriage therefore the husband’s consent could be required, or it could be granted by an Islamic Law judge (*qadi*) subject to payment of an amount by the wife to the husband that does not exceed her dower.³⁰ Thus, while the traditional components of a Muslim marriage and divorce that are endorsed by Canadian imams promote freedom of religion, they also undermine Muslim women’s right to equality. Since MPL is not subject to state regulation and involves private arrangements between Muslim parties, its application in Canada will most likely not be subjected to constitutional scrutiny. This is because the Charter does not apply to disputes between private parties if the dispute does not arise from legislation or where no governmental action is involved.³¹ Thus, the application of MPL within Canadian Muslim communities results in the privatised oppression of Muslim women because their religiously based subjugation remains hidden in the private sphere.³² This provides strong justification for the Canadian government to consider implementing a dual legal system in accordance with the GNI approach to statutorily regulate aspects of MPL in a way that will protect women’s right to equality. In fact, Canada’s international commitments arising from articles 2(f), 5(a) and 16(1)(a) and (c) of the Convention on the Elimination of All Forms of Discrimination against Women (‘CEDAW’) strengthen the argument for statutory regulation of MPL to eliminate *inter alia* religious-based discrimination against women in family law.³³ The

²⁸ Ibn Rushd, *supra* note 24, 72, 97, 119; W. Amien, *supra* note 10, 732.

²⁹ P. Fournier, In the (Canadian) Shadow of Islamic Law: Translating Mahr as a Bargaining Endowment, 44 *Osgoode Hall Law Journal* 649, 666–667 (2006).

³⁰ A.R.I. Doi, *supra* note 24, 192; *The Holy Qur’an*, *supra* note 24, 2:229; Amien, *supra* note 10, 732.

³¹ SCC 1986, *Retail, Wholesale and Department Store Union, Local 580, Peterson and Alexander v. Dolphin Delivery Ltd. et al.* 33 D.L.R. (4th) 174 paras 1, 40–42, 44, 46; SCC (1988) *B.C.G.E.U. v. British Columbia (Attorney General)* 3 CanLII 3, 53 D.L.R. (4th) 1 at para. 56; Boyd Report, *supra* note 14, 71–72; N. Bakht, *supra* note 22, 4.

³² Bakht refers to this as the “privatization of oppression.” N. Bakht id. 6, 19.

³³ Article 2(f) of CEDAW provides: “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: ... [t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.” (Emphasis added). Article 5(a) provides: “States Parties shall take all appropriate measures: ... [t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and

drafting of such MPL legislation would have to consider the views of Muslims within Canadian Muslim communities, which could encourage progressive-minded Muslims within those communities to offer women's rights friendly interpretations of MPL. In this way, the Canadian legislature could aid the reform of MPL in Canada. To provide adequate protection for Muslim women's right to equality, legislative regulation of MPL should occur within the auspices of a GNI approach, which would require MPL to conform to women's right friendly standards by being regulated within a women's rights friendly framework. The GNI approach is cognisant of the reality that MPL is operative within Muslim communities regardless whether or not it is subject to state control. It also acknowledges that MPL has nuances specific to its religious underpinnings and will recognise them only to the extent that they do not undermine women's right to equality. A practical application of this approach would involve an inquiry as to whether or not an interpretation of a MPL rule or practice exists or could be developed that would be compatible with women's right to equality. If such an interpretation is possible, it should be adopted. For example, a progressive interpretation of dower could exclude the obligation of Muslim wives to be sexually obedient to their husbands. If a progressive interpretation is not possible, the discriminatory rule or practice must either be subjected to strict regulation to afford adequate protection for women's right to equality or as a last resort it must be discarded. Therefore, the GNI approach entails respect for freedom of religion only as long as it does not undermine women's right to equality.

As mentioned in the introduction, the GNI approach is offered as an alternative to assimilation or accommodation of MPL on the basis that unlike the GNI approach, the assimilation and accommodation approaches ignore the reality that MPL is practised in a discriminatory fashion within the Muslim communi-

customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women." Article 16(1) provides: "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage; [and] ... (c) The same rights and responsibilities during marriage and at its dissolution." CEDAW was adopted by the UN General Assembly Resolution 34/180 of 18 December 1979 and entered into force on 3 September 1981. It was ratified by Canada in 1981. See Dawn Ontario Disabled Women's Network Ontario *FAFIA-AFAI. Update & Invitation: May 17. CEDAW 25th Anniversary Event* (10 May 2006). See online <http://dawn.thot.net/fafia6.html> (visited on 15 November 2007); L. Waldorf and S. Bazilli *Country Papers: Canada. The First CEDAW Impact Study* (n.d.). See online <http://www.iwrp.org/CEDAW/canada.pdf> (visited on 15 November 2007); Division for the Advancement of Women. Department of Economic and Social Affairs *Convention on the Elimination of All Forms of Discrimination Against Women* (n.d.). See online <http://www.un.org/womenwatch/daw/cedaw/> (visited on 15 November 2007). See also W. Amien and P. Farlam (eds.) *Basic human rights documents for South Africans* 54 (Rondebosch: Law, Race and Gender Research Unit, University of Cape Town, 1998); S. Beaulac, Recent Developments on the Role of International Law in Canadian Statutory Interpretation, 25(1) *Statute Law Review* 19, 19, 33–34 (2004).

ties. This contention will be illustrated in the following instances of legislative efforts to assimilate or accommodate Muslim communities in the area of family law: legislative measures that provide secular options for marriage and divorce; and the Ontarian legislative intervention relating to arbitral awards arising from *Shari'a* arbitration tribunals. Each of these will be discussed in the following sections with consideration to the manifestation of the conflict between freedom of religion and Muslim women's right to equality.

3. SECULAR OPTIONS FOR MARRIAGE AND DIVORCE

3.1. ASSIMILATION

In Canada, an assimilation approach is evident in the legal expectation that only marriages that comply with certain secular requirements are considered legal. Each Canadian province has its own secular legislation governing the formalities of a legal marriage as well as the patrimonial consequences of the marriage. Due to spatial constraints, the Ontario family legislation will be used as an example for the discussion since it served as precedent for similar legislation in the other provinces.³⁴ According to the Ontario Marriage Act,³⁵ the formalities for a legal marriage include the following: both parties must be over the age of majority and both must consent in person to be married to each other in the presence of two witnesses regardless of gender and in the presence of the person who is authorised to solemnise the marriage.³⁶ Muslim parties who wish to affect legal marriages must therefore comply with the above statutory formalities of the province within which they marry.³⁷ Since both parties are expected to adhere to the same formalities for a secular marriage, the advantage for Muslim women is that they enter into a secular marriage on equal terms with their spouses. Similarly, the consequences of a secular marriage promote the marital relationship as a partnership based on equality.³⁸ For example, a secular marriage imposes reciprocal support obligations on both spouses.³⁹ Furthermore, upon dissolution

³⁴ J.D. Payne and M.A. Payne *Canadian Family Law* 66 (Toronto: Irwin Law Inc., 2001).

³⁵ Ontario Marriage Act, R.S.O. 1990, c. M.3, CanLII.

³⁶ Sections 5(1), 8(1), 20(1), 24(3), and 25 of the Ontario Marriage Act, *id.* The age of majority for a secular marriage is 16 years with parental consent, and varies between 18 and 19 years without parental consent in the different provinces. See online: <http://www.justice.gc.ca/en/ps/sup/steps/s2c.html> (visited on 02 August 2007). See also A. Bunting and S. Mokhtari, Migrant Muslim Women's Interests and the Case of "Shari'a tribunals" in Ontario 13 (2006) (on file with author).

³⁷ J.D. Payne and M.A. Payne, *supra* note 34, 33.

³⁸ The Preamble of the Ontario Family Law Act R.S.O. 1990, c. F.3, CanLII.

³⁹ Sections 30–31 of the Ontario Family Law *id.*

of the marriage by a secular divorce order,⁴⁰ the parties would be entitled to an equitable division of the family property.⁴¹ In contrast, the formalities and consequences of a Muslim marriage traditionally promote a relationship of inequality. For instance, only the man is usually required to be physically present at and to participate in the marriage ceremony while the woman's consent can be conveyed via proxy. Furthermore, the notion of an equitable division of family property does not traditionally exist in Muslim marriages because the estates of the parties are usually kept separate at the outset of the marriage and during the course of the marriage.⁴² Muslim women who contribute financially to the growth of their husband's estates during the course of the marriage could find their right to equality being detrimentally affected if the economic scales do not tilt in their favour at the dissolution of the Muslim marriage. Mention has also already been made of the requirement for a dower agreement, which has negative gendered connotations and the differential rights and obligations that prevail during the subsistence of the Muslim marriage and upon its termination. Thus, if Muslim parties enter only into a secular marriage, it would provide more protection for women's right to equality than the traditional Muslim marriage.

However, Muslim parties who want to have a legal marriage may also wish to give expression to their religious tenets to marry by Muslim rites. The Canadian context makes this possible by allowing Muslims to enter into a dualistic mode of marriage or a one-stop-shop type marriage. The dualistic mode of marriage entails two separate marriage ceremonies whereby the parties contract a Muslim marriage before or after the secular marriage is performed. However, the one-stop-shop mode of marriage requires only one ceremony in which the Muslim marriage is officiated by an imam who is statutorily authorised to solemnise a legal marriage.⁴³ Anecdotal observations indicate that most Canadian imams are registered to solemnise secular marriages.⁴⁴ Although the one-stop-shop and dualistic modes of marriage appear to entail some accommodation of Muslim practices, it is an artificial accommodation that camouflages the fact that the Muslim marriage is still expected to assimilate into the secular norms of Canadian society if Muslims want their marriages to have any legal effect.⁴⁵ As illustrated

⁴⁰ Divorce Act R.S.O., 1985, c. 3 (2nd Supp.) CanLII. In terms of s.8(1), either spouse can apply for divorce on the ground that the marriage has broken down. S.8(2) lists the instances that would constitute a breakdown of a marriage.

⁴¹ For example, see s.5(1) of the Ontario Family Law Act, *supra* note 38.

⁴² A. Bunting and S. Mokhtari, *supra* note 36, 14.

⁴³ S.20(2) of the Ontario Marriage Act, *supra* note 35. In terms of this legislation, the Minister of Consumer and Business Services can register and authorise a religious representative to solemnise a marriage under the Marriage Act.

⁴⁴ Interview with S.M. Ali and A. Hogben, *supra* note 11.

⁴⁵ Shachar observes that the opportunity for religious representatives to simultaneously solemnise secular and religious marriages fits into a "modified secular absolutist model", whereby the Canadian government retains the power to regulate Muslim marriage and divorce affairs

above, one of the effects of this type of assimilation is that a secular marriage can afford protection for women's right to equality in a way that traditional Muslim marriages do not. However, the other effect is that negative nuances typically ascribed to Muslim marriages could still be operative within the Muslim communities. For example, even though statutorily authorised imams cannot solemnise legal marriages by proxy, there is nothing to preclude them from facilitating dower arrangements. Furthermore, where a Muslim marriage is performed independently of the secular marriage, the Muslim marriage could be concluded with the wife's proxy and an agreement relating to dower. Moreover, notwithstanding the fact that a secular marriage must be dissolved by court approval, Muslim couples may feel it religiously incumbent on them to also have their Muslim marriage dissolved by Muslim rites. This means that although they may obtain a secular divorce order, if dissolution of the marriage is at the instance of the wife, as indicated previously, she might experience difficulty in obtaining a Muslim divorce. This may place her in the unfortunate position of not being able to move on with her life and pursue a relationship with another man while the Muslim husband could easily enter into a subsequent secular and Muslim marriage. Furthermore, in the event that the Muslim marriage is dissolved, the Muslim wife could still be subjected to discriminatory practices such as the 'waiting period' (*iddah*).⁴⁶ Therefore, an assimilation approach relating to the formalities of a legal marriage is insensitive to the nuances of a Muslim marriage and ignores the fact that despite the existence of a legal marriage, Muslim parties could still privately implement discriminatory practices associated with Muslim marriages that undermine women's right to equality. In this way, the assimilation approach contributes to the privatised oppression of Muslim women. One way to prevent this could be to afford legal recognition to Muslim marriages through a GNI approach so that their nuances are regulated in a way that provides adequate protection for women's right to equality. Useful guidelines for this regulation could be extracted from the post-apartheid South African Muslim Marriages Bill, which attempts to balance the conflicting interests of conservative Muslim bodies and progressive human rights and women's rights groups. Although the Bill is not gender perfect,

even though it permits a degree of cultural sensitivity by investing Muslim individuals with concurrent authority to officiate marriages. A. Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* 77–78 (Cambridge: Cambridge University Press, 2001).

⁴⁶ Only women are required to observe this practice after dissolution of their marriage. During this time, they have limited freedom of movement because they are traditionally expected to be housebound and they cannot engage in a romantic relationship. The 'waiting period' lasts for three months after divorce, or four months and ten days after the husband's death, or until the birth of the child if the wife is pregnant at the time of dissolution of the marriage. Ibn Rushd, *supra* note 24, 54, 106, 115–116; A.R.I. Doi, *supra* note 24, 198–203; *Qur'an*, *supra* note 24, 2:228, 2:234, 33:49, 65:4; W. Amien, *supra* note 10, 735.

it does provide a worthwhile starting point for recognising the nuances of a Muslim marriage while trying to protect women's right to equality.⁴⁷

3.2. ACCOMMODATION

Apart from an assimilation approach in family law, Canada also attempts to accommodate married and unmarried cohabitants who prefer not to be bound by the statutory consequences of a secular marriage such as the equitable division of property, reciprocal spousal support obligations etc. The accommodation is offered through provincial family legislation in the form of legally enforceable 'domestic contracts', which are private agreements recorded in writing and signed by both parties in the presence of witnesses.⁴⁸ 'Domestic contracts' enable parties to regulate their own rights and obligations during the subsistence of the relationship and/or upon its termination.⁴⁹ Thus, Bunting and Mokhtari suggest that 'domestic contracts' permit "privatized legal pluralism" because parties can contract for less (or more) in their 'domestic contracts' than they would be entitled to under the statutory consequences of secular marriages.⁵⁰

There are three types of 'domestic contracts' that could be entered into depending on the nature of the relationship between the parties namely, 'marriage contracts', 'cohabitation agreements', and 'separation agreements'.⁵¹ On the one hand, cohabiting parties who intend to marry or who are already married can enter into a 'marriage contract' to regulate their rights and obligations during the marriage, and/or upon separation, and/or upon dissolution of the marriage.⁵² On the other hand, 'cohabitation agreements' are more applicable for unmarried parties who are cohabiting or who intend to cohabit to regulate their rights and obligations during their cohabitation and/or upon termination of their cohabitation.⁵³ Married or unmarried parties who cohabited and are separated from each other can also enter into a 'separation agreement' to regulate their rights and obligations upon termination of their relationship.⁵⁴ A 'separation agreement' is especially useful for parties to record an agreement relating to custody and access of chil-

⁴⁷ South African Law Reform Commission *Project 59 Islamic Marriages and Related Matters: Report* (2003). See online: <http://www.doj.gov.za/salrc/reports.htm> (visited on 15 November 2007). For a discussion of the South African Muslim Marriages Bill, see W. Amien, *supra* note 10, 741–747.

⁴⁸ 'Domestic contracts' are regulated by Part IV of the Ontario Family Law Act, *supra* note 38. See also J.D. Payne and M.A. Payne, *supra* note 34, 65–67; Boyd Report, *supra* note 14, 19.

⁴⁹ J.D. Payne and M.A. Payne, *supra* note 34, 65–66.

⁵⁰ A. Bunting and S. Mokhtari, *supra* note 36, 3–4.

⁵¹ S.51 of the Ontario Family Law Act, *supra* note 38.

⁵² S.52(1) of the Ontario Family Law Act id; J.D. Payne and M.A. Payne, *supra* note 34, 66, 68.

⁵³ S.53(1) of the Ontario Family Law Act id; J.D. Payne and M.A. Payne, id, 66, 70.

⁵⁴ S.54 of the Ontario Family Law Act id; J.D. Payne and M.A. Payne, id, 66, 70–72.

dren because they are not permitted to do so in a ‘marriage contract’ or ‘cohabitation agreement’.⁵⁵ However, all three types of ‘domestic contracts’ could include terms relating to ownership in or division of property, spousal and child support obligations, education and moral training of children, and any other matter that the parties wish to incorporate into their ‘domestic contract’.⁵⁶ Nevertheless, in the absence of a separation agreement, parties subject to a ‘marriage contract’ are afforded some protection by being entitled to an equal right to possession of the matrimonial home regardless of what agreement has been reached in respect of ownership of the property.⁵⁷ At the same time, a ‘domestic contract’ or any of its provisions could be set aside by a court if certain statutorily prescribed conditions prevail, including the following: provisions relating to children that are not in the latter’s best interest;⁵⁸ provision for support or a waiver of the right to support that results in unconscionable circumstances;⁵⁹ non-disclosure of significant financial information at the time of entering into the ‘domestic contract’; failure by either of the parties to understand the nature and consequences of the ‘domestic contract’; and on the basis of the law of contract.⁶⁰ The latter refers to common law grounds such as ‘undue influence’ and ‘duress’ upon which a court could set aside a contract.⁶¹

‘Domestic contracts’ can be used by Muslim parties who wish to be married or are married by Muslim rites to incorporate MPL provisions into legally enforceable agreements. To the benefit of Muslim women, the statutory mechanisms mentioned above for judicial oversight of ‘domestic contracts’ could provide some protection where they are parties to those contracts. For example, ‘marriage contracts’ and ‘cohabitation agreements’ that make provision for dower and the unilateral obligation of husbands to maintain their wives could arguably be set aside by a court on the ground that the concomitant obligation of wives to be sexually and otherwise obedient to their husbands constitutes an “unconscionable circumstance”. However, this could place Muslim women in an economically disadvantageous position. Therefore, to prevent Muslim women from being left financially bereft, the court could alternatively accept a progressive interpretation of dower and maintenance agreements and apply them without their negative

⁵⁵ S.52(1)(c), 53(1)(c), and 54(d) of the Ontario Family Law Act id.

⁵⁶ Sections 52(1)(a)-(d), 53(1)(a)-(d) and 54(a)-(c) and (e) of the Ontario Family Law Act id.

⁵⁷ S.19 of the Ontario Family Law Act id; J.D. Payne and M.A. Payne, *supra* note 34, 68.

⁵⁸ S.56(1) of the Ontario Family Law Act id; J.D. Payne and M.A. Payne, id, 67; Boyd Report, *supra* note 14, 16.

⁵⁹ S.33(4)(a) of the Ontario Family Law Act id; J.D. Payne and M.A. Payne *ibid*.

⁶⁰ S.56(4)(a)-(c) of the Ontario Family Law Act *ibid*; J.D. Payne and M.A. Payne, id, 75, 77.

⁶¹ Both common law grounds involve the inducement of one party by another party to behave in a certain way. More specifically, ‘undue influence’ arises in a relationship characterised by an imbalance of bargaining power where one party abuses his (or her) “unequal bargaining power” while ‘duress’ requires a form of coercion through “*the use of or threat of the use of physical force or mental pressure*”. J.D. Payne and M.A. Payne, id, 77–78.

gendered implications. This would require Muslim female litigants to place evidence before the court relating to progressive MPL interpretations, which in turn could promote further research among progressive-minded Muslims to generate women's rights friendly interpretations of MPL to ensure that freedom of religion is not protected at the expense of Muslim women's right to equality. In this way, the judiciary could also play a role in facilitating MPL reform. Another protective statutory provision relates to the criminalisation of polygamy⁶² therefore contractual provision cannot be made for Muslim polygyny. However, provincial family legislation recognises the reality that although polygynous unions entered into in Canada are illegal, they continue to be practised therefore some protection is afforded to polygynous parties (especially polygynous wives) by enabling them to claim spousal and child support.⁶³ Furthermore, parties to polygynous marriages that are entered into outside of Canada in jurisdictions where they are recognised as valid are considered spouses under Canadian law and they can claim matrimonial relief such as division of property and reciprocal spousal support obligations.⁶⁴

Notwithstanding the statutory judicial oversight mechanisms mentioned above, academic authors observe that the Canadian Supreme Court has also shown great deference to private 'domestic contracts'.⁶⁵ This could have both positive and negative implications for Muslim women's right to equality where Muslim women are parties to 'domestic contracts' that incorporate MPL terms. Given that 'domestic contracts' between Muslim couples could arise from private negotiations between themselves, positive consequences for Muslim women's right to equality could arise if Muslim women are sufficiently empowered to negotiate the inclusion of progressive interpretations of MPL rights and obligations.⁶⁶ For example, 'domestic contracts' could include provisions for dower and maintenance payments by the husband to the wife with the explicit exclusion of the wife's obligation to obey her husband. Those agreements could also make provision for maintenance to be paid by the husband to the wife during and beyond the 'waiting

⁶² S.293(1) of the Criminal Code RS, 1985, c. C-46. This section proscribes polygamy.

⁶³ J.D. Payne and M.A. Payne, *supra* note 34, 29–30; Boyd Report, *supra* note 14, 52; A. Campbell, How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International, Comparative Analysis *Polygamy in Canada: Legal and Social Implications for Women and Children. A Collection of Policy Research Reports* 6, 27–28 (Ottawa: Status of Women Canada, 2005); M. Lloy Luhtanen et al., Separate and Unequal: The Women and Children of Polygamy *Polygamy in Canada: Legal and Social Implications for Women and Children. A Collection of Policy Research Reports* 23 (Ottawa: Status of Women Canada, 2005). See online: http://www.swc-cfc.gc.ca/pubs/pubspr/0662420683/index_e.html. See also s.1(2) of the Ontario Family Law Act, *supra* note 38.

⁶⁴ J.D. Payne and M.A. Payne, *ibid*; A. Campbell, *id.*, 31; s.1(2) of the Ontario Family Law Act *ibid*.

⁶⁵ A. Bunting and S. Mokhtari, *supra* note 36, 6; Boyd Report, *supra* note 14, 73.

⁶⁶ Bakht suggests that the availability of diverse interpretations of Islamic Law could strengthen arguments that favour women's rights. N. Bakht, *supra* note 22, 15.

period' and they could include protective MPL mechanisms such as the wife's right to a delegated divorce (*tafwid-ul-talaq*).⁶⁷ The latter entails the husband delegating his right to *talaq* to his wife so that she can terminate the Muslim marriage in the same way and on the same basis that he can.⁶⁸

Apart from private negotiations between Muslim parties, 'domestic contracts' could also arise from Islamic Law-based counseling and advice by imams or as a result of mediation processes facilitated by imams in which Islamic Law principles are applied.⁶⁹ Given the power imbalances that prevail within many marriages and the conservative MPL interpretations of Canadian imams,⁷⁰ negative consequences could arise for vulnerable Muslim women who may be unable to negotiate the choice of 'domestic contract' and/or the insertion of protective clauses. They could therefore become victims of discriminatory MPL provisions that could be incorporated into any of the three types of 'domestic contracts'. The choice whether or not to enter into a 'marriage contract' as opposed to a 'cohabitation agreement' would probably depend largely on the willingness of parties to comply with the procedural requirements of a secular marriage and the extent to which they wish to contract out of the statutory consequences of a secular marriage. Therefore, 'marriage contracts' may appeal to Muslim parties who are willing to adhere to the formalities of a secular marriage while those who do not may prefer to enter into 'cohabitation agreements' because the latter could incorporate a provision for the wife's consent to the marriage by proxy. Furthermore, provisions relating to dower,⁷¹ maintenance of separate estates, *talaq*, unilateral obligation of the husband to support the wife, and observation of the 'waiting period' could be included as terms in a 'marriage contract', 'cohabitation agreement', and/or 'separation agreement'. However, unlike the 'marriage contract', which gives

⁶⁷ Z. Mir-Hosseini, *The Construction of Gender in Islamic Legal Thought and Strategies for Reform*, 1 *HAWWA* 1, 24–25 (2003).

⁶⁸ L. Carrol and H. Kapoor (eds.) *Talaq-I-Tafwid: The Muslim Woman's Contractual Access to Divorce* 11 (No place: Women Living Under Muslim Laws, 1996), quoting *The Holy Qur'an* 33: 28–29.

⁶⁹ Canadian Muslim community leaders such as imams regularly provide advice, counseling and mediation services in family law issues. Mediation is defined as a voluntary extra-judicial dispute resolution mechanism that is commonly used as an alternative to civil litigation. Both parties are required to enter the mediation process voluntarily and they have to agree on a third-party mediator who facilitates the process and its outcomes. A. Bunting and S. Mokhtari, *supra* note 36, 4–5, 7–8, 17; N. Bakht, *supra* note 22, 2. See also s.3 of the Ontario Family Law Act, *supra* note 38, which provides for consensual mediation in the family law arena.

⁷⁰ N. Bakht, *supra* note 22, 17, quoting Faisal Kutty.

⁷¹ Although the Ontario Court of Justice did not recognize the dower agreement as capable of being secularly enforced, there is precedent by the British Columbia Supreme Court of Appeal for the recognition and enforceability of dower as a 'marriage agreement' provided it conforms to the secular requirements of the British Columbia Family Relations Act R.S.B.C. 1996, c. 128. A 'marriage agreement' is equivalent to a 'marriage contract' under the Ontario Family Law Act, *supra* note 38. See *Nathoo v. Nathoo*, *supra* note 16, *Amlani v. Hirani*, *supra* note 16, *N.M.M. v. N.S.M.*, *supra* note 16; and *Kaddoura v. Hammoud*, *supra* note 24.

the parties an equal right to possession of the matrimonial home, 'cohabitation agreements' and 'separation agreements' are not subject to the same requirement for equal possession of the matrimonial home. Therefore, 'cohabitation agreements' and 'separation agreements' may be more appealing to those parties who have sole ownership rights over the matrimonial property and who wish to exclude their spouse from obtaining an equal right to possession of the property. The potential for contracting a 'cohabitation agreement' or 'separation agreement', which provides less protection than a 'marriage contract' and for including traditionally discriminatory MPL provisions in 'domestic contracts' could be greater for Muslim women who are unable to negotiate the conclusion of a 'domestic contract' from a position of power. This could undermine their right to equality while protecting freedom of religion.

The above discussion illustrates that accommodation of MPL rules and practices in 'domestic contracts' reflects an overly sensitive approach to the nuances of Muslim marriages, which could manifest a conflict between freedom of religion and Muslim women's right to equality by negating the latter and promoting the former. However, it is unclear whether or not discriminatory MPL provisions contained in 'domestic contracts' could be constitutionally challenged. Given the private nature of 'domestic contracts', it is possible that they may not be subject to Charter scrutiny. Yet, there is a possibility that the Charter could apply to 'domestic contracts' given the fact that they derive their legal enforceability from legislation. This contention is based on the principle that the Charter could apply between private parties where one of the parties acts on the authority of legislation so that the latter is measured against the Charter.⁷² Thus, where legislation enables discrimination to arise from a 'domestic contract', the impugned legislative provisions could arguably be rendered unconstitutional and the resulting contractual provisions could be deemed invalid. However, Muslim women who do not have the resources or the emotional strength to engage in litigation to challenge discriminatory provisions in 'domestic contracts' will continue to suffer privately and will remain victims of privatised oppression. Therefore, the GNI approach deems it imperative for the legislature to expand the existing mechanisms in provincial family legislation to increase the scope of judicial oversight of 'domestic contracts' and to afford sufficient protection for women's right to equality. This could also prove useful for protecting their right to equality in the event that 'domestic contracts' cannot be constitutionally challenged.

⁷² *Retail ... v. Dolphin Delivery*, *supra* note 31, para. 44; Boyd Report, *supra* note 14, 71; N. Bakht, The Potential Impact of the Arbitration Regime on Women, *Arbitration, Religion and Family Law: Private Justice on the Backs of Women* 1, 3 (Ottawa: NAWL, March 2005) *supra* note 5.

4. SHARI'A ARBITRATION TRIBUNALS

An assimilation approach by the legislature is also evident in an amendment that was affected by the Ontario legislature in 2006 to its Arbitration Act and Family Law Act in respect of family arbitrations.⁷³ Prior to 2006, Ontario permitted private family arbitrations to be conducted according to religious principles.⁷⁴ While the amending legislation confirms the pre-2006 position that private arbitrations are permitted to resolve disputes in the area of family law,⁷⁵ it alters the pre-2006 arrangement through an assimilation requirement that only secular law is to be applied to family arbitrations.⁷⁶ Therefore, arbitral awards arising from religious-based family arbitrations are no longer legally enforceable by a secular court.⁷⁷

⁷³ The Arbitration Act R. S.O. 1991, c. 17 and the Family Law Act, *supra* note 38 were both amended by s.1 of the Family Statute Law Amendment Act R.S.O. 2006, c.1. The Ontario Arbitration Act allows disputes of a civil nature between private persons to be resolved through an arbitration process. Arbitrations are extra-judicial voluntary dispute resolution mechanisms that constitute an alternative to civil litigation. The parties must mutually consent to submit their dispute to arbitration, agree on an arbitrator, and enter into an arbitration agreement that sets out the terms of the arbitration process. They are entitled to choose whomever they wish to arbitrate their dispute, and the third party is not required to have undergone any special training to act as arbitrator. Unlike mediation where the mediator facilitates the resolution of the dispute, arbitration removes the decision-making capacity from the disputing parties and places it entirely within the scope of the arbitrator. Boyd Report, *supra* note 14, 9–10; A. Shachar, Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies, 50 *McGill Law Journal* 49, 61 (2005); N. Bakht, *supra* note 22, 2–3; A. Bunting and S. Mokhtari, *supra* note 36, 3–4, 8; M. Jimenez, Islamic law in civil disputes raises questions *The Globe and Mail* (11 December 2003). See online: http://www.theglobeandmail.com/servlet/Page/document/v4/sub/MarketingPage?user_URL=http://www.theglobeandmail.com%2Fservlet%2Fstory%2FLAC.20031211.SHARIA11%2Fstory%2F%3Fquery%3DIslamic%2Blaw%2Bin%2Bcivil%2Bdisputes%2Braises%2Bquestions&ord=1145270142626&brand=theglobeandmail&force_login=true (visited on 1 June 2006).

⁷⁴ P. Cross, An Analysis of Marion Boyd's Review "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion", 5 (Toronto: Ontario Women's Justice Network, 2005). See online: <http://www.owjn.org/issues/mediatio/boyd.htm> (visited on 15 November 2007); A. Bunting and S. Mokhtari, *supra* note 36, 5; N. Bakht, *supra* note 22, 3; A. Shachar, *id.*, 75; Boyd Report, *supra* note 14, 11–12.

⁷⁵ Sections 1, 2.2(1)(a)-(b), 50.1 of the Ontario Arbitration Act, *supra* note 73; and sections 51, 59.1(1), 59.2(1), 59.3, 59.5 of the Ontario Family Law Act, *supra* note 38. S.1(a) of the Ontario Arbitration Act and s.51(a) of the Ontario Family Law Act defines a "family arbitration [as] an arbitration that ... deals with matters that could be dealt with in a marriage contract, separation agreement, [or] cohabitation agreement ... under Part IV of the Family Law Act." S.51 also recognises family arbitration awards and extends the definition of 'domestic contracts' to include 'family arbitration agreements'.

⁷⁶ S.1(b) of the Ontario Arbitration Act, *ibid.*, and s.51(b) of the Ontario Family Law Act, *ibid.*, requires a "family arbitration [to be] conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction." See also Boyd Report, *supra* note 14, 4–5; A. Bunting and S. Mokhtari, *supra* note 36, 6.

⁷⁷ A. Bunting and S. Mokhtari, *id.*, 1, 5.

The legislative amendment was the culmination of three years of controversy surrounding the establishment of *Shari'a* arbitration tribunals (*Dar-ul-Qada*) in Ontario. The controversy was sparked in 2003 when Syed Mumtaz Ali, President of the Canadian Society of Muslims, announced that the latter would establish an Islamic Institute of Civil Justice ('IICJ'), which would set up tribunals to conduct legally enforceable Islamic Law-based arbitrations for the resolution of family law and inheritance disputes.⁷⁸ The IICJ invoked sections 2(a) (freedom of religion), 15(1) (equality and non-discrimination on the basis of religion), and 27 (preservation of Canada's multicultural heritage) of the Charter to lend constitutional credence for the creation of the tribunals.⁷⁹ As mentioned previously, Ontario's Arbitration Act did not at that time prohibit these types of privately conducted faith-based arbitrations provided they complied with the procedural requirements of the Arbitration Act. Therefore, where the tribunals applied MPL principles within the procedural parameters of the pre-2006 Arbitration Act, their resultant arbitral awards would have been legally binding and enforceable.⁸⁰ In fact, prior to the 2006 amendment, these types of arbitrations had been conducted for many years within numerous religious communities including the Muslim communities.⁸¹ Therefore, Ali's announcement regarding the establishment of the tribunals simply publicised a long-standing practice within religious communities that was already sanctioned by the pre-2006 Ontario Arbitration Act.⁸²

⁷⁸ Boyd Report, *supra* note 14, 4; P. Fournier, *supra* note 29, 654–655; P. Cross, *supra* note 74, 3; A. Bunting and S. Mokhtari, *id.*, 8; A. Shachar *supra* note 73, 61–62; Rights and Democracy 'Behind Closed Doors: How Faith-based Arbitration Shuts Out Women's Rights in Canada and Abroad' (29 September 2005). See online: <http://www.ddrd.ca/site/publications/index.php?lang=en&subsection=catalogue&id=1431&page=2> (visited on 1 June 2006); N. Bakht, Law Reform Options *Arbitration, Religion and Family Law: Private Justice on the Backs of Women* 1,1 (Ottawa: NAWL, March 2005). See online: http://www.lcc.gc.ca/research_project/bakht_main-en.asp (visited on 1 June 2006); The initiative was supported by *Masjid El Noor's* Muslim arbitration board, and several individual Imams and Muslim leaders. See P. Fournier, *supra* note 29, 656.

⁷⁹ S.M. Ali, The case for Judicial autonomy through the establishment and operation of the Islamic Institute of Civil Justice: The Muslim Court of Arbitration (Darul Qada). Presented at Upper Canada College, Toronto, Ontario, Canada to the Ontario Model Parliament (8 April 2006) (on file with author). See also N. Bakht, *ibid.*

⁸⁰ Arbitral awards are considered binding unless reversed on appeal or review. The substance of the arbitration decisions cannot be challenged since the review and appeal mechanisms only consider procedural irregularities. See sections 6(3) and 19 of the Ontario Arbitration Act, *supra* note 73; N. Bakht, *supra* note 22, 3; A. Bunting and S. Mokhtari, *supra* note 36, 8; A. Shachar, *supra* note 73, 64.

⁸¹ For example, arbitration (and mediation) services are offered by Shia Imami Ismaili Muslims through the Ismaili National Conciliation and Arbitration Board for Canada as well as the Sunni mosque namely *Masjid El Noor* in Toronto. The Christian Legal Fellowship also conducts arbitration services within the Christian communities, and the Jewish communities have utilised the Arbitration Act since 1982 to establish arbitration tribunals called *Beis Din* for the resolution of civil disputes according to Jewish law. Boyd Report, *supra* note 14, 5, 55–57, 60; N. Bakht, *supra* note 22, 1.

⁸² Boyd Report, *id.*, 5; P. Cross, *supra* note 74, 5.

However, the announcement sparked a huge outcry by numerous human rights, women's rights, and progressive Muslim advocates because they suddenly realised that a secular court could legally enforce private arbitral awards arising from religious arbitrations.⁸³ Although they objected to the legal enforcement of religious arbitral awards generally, they were particularly apprehensive about the implications that enforceable MPL-based arbitral awards would have for women. Some of their concerns are summarised as follows: While women's rights friendly interpretations of MPL are possible, the converse is equally possible and could be applied to the detriment of women.⁸⁴ Therefore, women's rights proponents feared that conservative MPL-based arbitral awards that discriminate against women would be enforced in secular courts.⁸⁵ This was not an unreasonable concern given that conservative imams and conservative Muslim scholars were used to conduct the arbitrations.⁸⁶ Women's rights adherents were also worried that

⁸³ Informal discussion with Anu Bose, Executive Director of National Organization of Immigrant and Visible Minority Women of Canada (NOIVMWC) on 08 June 2006, Ottawa, Ontario. These organizations include the Canadian Council of Muslim Women (CCMW), Muslim Canadian Congress (MCC), National Association of Women and the Law (NAWL), Women's Legal Education and Action Fund (LEAF), NOIVMWC, Metropolitan Action Committee on Violence Against Women and Children (METRAC), International Campaign Against Shariah Court in Canada, National Council of Women, Canadian Federation of University Women's Clubs, and National Council of Women of Canada (NCWC). Organizations such as CCMW, NAWL, NCWC and METRAC also lobbied against the use of arbitration per se in the family law arena on the ground that it is an inappropriate mechanism to resolve family law disputes especially since the Ontario Arbitration Act, *supra* note 73 had originally been designed for the commercial context. Furthermore, arbitration is a private process therefore inequalities could be hidden from public scrutiny. Boyd Report, id, 4–5, 29–33, 43, 46–47, 49–53; A. Bunting and S. Mokhtari, *supra* note 36, 5; P. Fournier, *supra* note 29, 655–656; N. Bakht, *supra* note 78, 6–8; N. Bakht, *supra* note 22, 24; N. Bakht, *supra* note 72, 6; A. Shachar, *supra* note 73, 63, 75.

⁸⁴ For example, Boyd's Report reveals that domestic abuse within Canadian Muslim communities is justified in many instances with reference to Qur'anic revelation and *Sunnah*. Boyd Report, *ibid.*, 98; N. Bakht, *supra* note 72, 1; A. Shachar, *id.*, 63.

⁸⁵ P. Cross, *supra* note 74, 3; N. Bakht, *supra* note 78, 1; Boyd Report, *id.*, 31, 46–47; interview with A. Hogben, *supra* note 11.

⁸⁶ A. Shachar, *supra* note 73, 63; Bakht, *supra* note 22, 17, quoting Faisal Kutty; M. Jimenez, *supra* note 73. Ali contends that Muslims living in a non-Muslim country are obliged to adhere to the laws of that country but must also apply Islamic Law wherever possible. Therefore, he suggests that Canadian Muslims should apply Islamic Law only to the extent that it does not conflict with Canadian law. However, in a personal interview with Ali, he conceded that other Muslim arbitrators might not apply this principle. Furthermore, he revealed a conservative inclination by suggesting that where he arbitrates a case that deals with spousal maintenance, he would apply Islamic Law, which means that he would most likely not award maintenance to a divorced wife beyond her 'waiting period'. Moreover, he indicated that he would not advise the woman of her right to challenge the award by seeking recourse in the secular judicial system because he was under no legal obligation to do so. Interview with S.M. Ali, *supra* note 11. See also N. Bakht, Family Arbitration Using Sharia Law, in: *Arbitration, Religion and Family Law: Private Justice on the Backs of Women* Part 1, 11 (Ottawa: NAWL, March 2005), *supra* note 78, Boyd Report, *id.*, 4–5.

secular enforceability of awards arising from the arbitrations would transmit a message that the Ontarian government sanctions gender discriminatory rules and practices.⁸⁷ Furthermore, although arbitrations are required to be voluntary, Ali conveyed the message that Canadian Muslims are religiously required to utilise *Shari'a* arbitration tribunals.⁸⁸ Forced to choose between their secular rights and their purported religious obligations,⁸⁹ alarm was expressed by the probability that Muslim women would feel compelled to have their family law disputes resolved according to MPL principles instead of seeking recourse in the secular system.⁹⁰ While this would most likely not be an exercise of real choice,⁹¹ the fear was that those women might not succeed on a challenge to the arbitral awards through a review or appeal process on the common law grounds of “duress” or “coercion” if they consented to have their disputes arbitrated according to Islamic Law.⁹² Yet, a Charter challenge could be brought to bear on those common law grounds on the basis that they need to be adapted to conform to the Charter value of equality.⁹³ Although Charter *rights* do not apply to private disputes that are based only on the common law,⁹⁴ the Supreme Court found that the Charter does apply to the common law, which must be developed and applied by the judiciary “in a manner consistent with the fundamental values enshrined in the Constitution.”⁹⁵ Therefore, the Supreme Court held that a private litigant could argue that the common law is inconsistent with Charter *values* and should therefore be modified to conform to those *values*.⁹⁶ Where the common law conflicts

⁸⁷ Interview with A. Hogben, *supra* note 11.

⁸⁸ Boyd Report, *supra* note 14, 4, 50–51, 64; A. Shachar, *supra* note 73, 74; P. Cross, *supra* note 74, 3; N. Bakht, *supra* note 22, 10; N. Bakht, *supra* note 86, 11; M. Jimenez, *supra* note 73.

⁸⁹ A. Shachar, *supra* note 73, 62–63, 87; A. Shachar, *supra* note 45, 78; C. Bulbeck, *Re-Orienting Western Feminisms: Women's Diversity in a Postcolonial World* 35, 72 (Cambridge: Cambridge University Press, 1998).

⁹⁰ Boyd Report, *supra* note 14, 5; N. Bakht, *supra* note 86, 11; P. Cross, *supra* note 74, 3.

⁹¹ P. Cross, *id.*, 7.

⁹² These are common law defences to prove the invalidity of private agreements. N. Bakht, *supra* note 22, 9, 20.

⁹³ Equality is a confirmed Charter value. SCC 1986, *R v. Oakes* 26 D.L.R. (4th) 200, para. 67. Bakht also argues that arbitration of family law matters could be informed by Charter values including equality. See N. Bakht, *id.*, 4.

⁹⁴ This is based on the contention that the common law regulates rights and duties between individuals and the Supreme Court has determined that individuals do not owe constitutional obligations to each other. However, the Charter will apply to disputes between private parties if in addition to common law, the dispute is also based on legislation. *Retail ... v. Dolphin Delivery*, *supra* note 31, para. 1, 32, 40, 42, 46; *B.C.G.E.U v. British Columbia*, *supra* note 31, para. 56; SCC 1995, *Hill v. Church of Scientology of Toronto*, 126 D.L.R. (4th) 129, para. 98.

⁹⁵ *Retail ... v. Dolphin Delivery*, *id.*, para. 42, 46 (emphasis added). Alexander also argues that the Charter applies to the common law because s.52(1) of the Canadian Constitution subjects all law to Charter scrutiny, which includes the common law as part of Canadian law. E.R. Alexander, *The Supreme Court of Canada and the Canadian Charter of Rights and Freedoms* 40 *University of Toronto Law Journal* 1, 12 (1990). See also P.W. Hogg, *supra* note 8, 35–21.

⁹⁶ *Hill v. Church of Scientology ...*, *supra* note 94, para. 95, 98.

with Charter *values*, the Court has held that a balancing approach should be adopted to weigh the common law principles against the Charter *values*, and the latter would serve as the guidelines for the modification of the common law principles.⁹⁷ Therefore, the common law grounds of “duress” and “coercion” could be interpreted to invalidate an inequitable arbitral award in situations where women consent to private agreements as a result of religious compulsion or due to power imbalances that arise from their marital or other relationships. The latter is based on the concern that vulnerable women such as newly arrived Muslim immigrant women would especially be disadvantaged because they may be unaware of their secular rights or be unable to access those rights due to gender-based power imbalances within the Muslim communities and within their marriages.⁹⁸ Moreover, opposition to the *Shari’a* arbitration tribunals was particularly based on a perception by Ali that the utilisation of the secular system to enforce MPL-based arbitral awards was a step towards establishing a dual legal system in Canada, which would entail a separate personal law system for Canadian Muslims.⁹⁹ The implementation of such a system without any accountability to Charter rights and freedoms could undoubtedly have harmful effects for women’s right to equality. However, the converse as suggested by the GNI approach is equally true: State regulation of aspects of MPL that provides sufficient protection for women’s right to equality could enable implementation of the religious nuances of the system without infringing women’s right to equality. This would prevent Muslim women’s oppression from remaining concealed in the private sphere. Nevertheless, opponents of the *Shari’a* arbitration tribunals were adamantly against the regulation of any aspect of MPL in the public sphere either through legislation or via judicial enforceability of private agreements such as arbitral awards.¹⁰⁰

As a result of the furore surrounding the *Shari’a* arbitration tribunals, the Attorney-General of Ontario and the Minister Responsible for Women’s Issues appointed Marion Boyd during 2004 to review Ontario’s arbitration process.¹⁰¹ Her brief was to provide recommendations regarding the utilisation of private arbitrations including religious-based arbitrations to resolve family and inheritance matters.¹⁰² In particular, she was required to consider the impact private arbitrations would have on vulnerable people including women.¹⁰³ After several months of extensive consultations with a diverse range of individuals and

⁹⁷ *Id.*, para. 100.

⁹⁸ Boyd Report, *supra* note 14, 48, 86; A. Bunting and S. Mokhtari, *supra* note 36, 10; A. Shachar, *supra* note 73, 64 footnote 44; N. Bakht, *supra* note 22, 10, 19–20; N. Bakht, *supra* note 72, 2.

⁹⁹ S.M. Ali, *supra* note 79; N. Bakht, *supra* note 78, 1; Boyd Report, *id.*, 53–55.

¹⁰⁰ Interview with A. Hogben, *supra* note 11.

¹⁰¹ Boyd Report, *supra* note 14, 4–5, 143; N. Bakht, *supra* note 78, 2; A. Bunting and S. Mokhtari, *supra* note 36, 8; A. Shachar, *supra* note 73, 65; P. Fournier, *supra* note 29, 654–655.

¹⁰² *Ibid.*

¹⁰³ Boyd Report, *id.*, 143; A. Bunting and S. Mokhtari, *ibid.*; A. Shachar, *ibid.*; P. Fournier, *ibid.*

organisations and after reviewing numerous submissions from concerned parties,¹⁰⁴ Boyd published a comprehensive report at the end of 2004, which contained 46 recommendations.¹⁰⁵ The recommendations proposed that family arbitrations and religious arbitrations in the context of family law and inheritance disputes be retained provided that various safeguards were put into place to protect women's rights as far as possible.¹⁰⁶ One proposed safeguard related to legislative and regulatory amendments such as an extension of the definition of 'domestic contracts' in Ontario's Family Law Act to include "arbitration agreements" so that they would have the same legal protections as other forms of domestic contracts.¹⁰⁷ Other proposed safeguards included the obtaining of independent legal advice; public legal education; training and education for professionals; oversight and evaluation of arbitrations; community development; and further policy development.¹⁰⁸

Boyd's recommendations reveal an attempt to balance Canada's commitment to promote multiculturalism against women's human rights.¹⁰⁹ This balancing approach appears to have arisen from two premises relating to prevailing theories about multiculturalism. Firstly, Boyd construes the establishment of *Shari'a* arbitration tribunals as an attempt by the minority Muslim communities to express their religious identity through the secular mechanisms of the "dominant legal culture."¹¹⁰ She suggests that this type of engagement with institutional dialogue

¹⁰⁴ Boyd met with about 50 organisations, which included representatives from women's organisations, legal organisations, public legal education organisations, and religious organisations within the Jewish, evangelical Christian and Muslim communities. Some of these organisations included the MCC, Islamic Council of Imams, CCMW, NAWL, LEAF, International Campaign Against Shariah Court in Canada; NOIVMWC; NCWC; B'nai Brith, Christian Legal Fellowship; Council on American-Islamic Relations Canada (CAIR-CAN); Humanist Association of Canada. Boyd also met with religious leaders, family lawyers, scholars, and private individuals. Boyd's consultative approach coincided with Bakht's suggestion that law reform strategies for religious-based arbitrations should only be undertaken after obtaining input from Muslim and non-Muslim groups to develop strategies "for ensuring that women's constitutional equality rights are not infringed in the process of arbitration." Boyd Report, id., 5, 29–33, 43–47, 50–53, 56, 64; N. Bakht, *supra* note 78; N. Bakht, *supra* note 22, 1, 24; A. Bunting and S. Mokhtari, *ibid.*; A. Shachar, *ibid.*; P. Cross, *supra* note 74, 3, 5.

¹⁰⁵ Boyd Report, id., 133–142.

¹⁰⁶ Boyd Report, id., 77, 103, 133.

¹⁰⁷ These protections include the following requirements: the 'family arbitration agreements' would have to be in writing, signed by the parties and duly witnessed, and should be able to be set aside on the same grounds as other domestic contracts. Boyd Report, id., 133–134.

¹⁰⁸ Boyd Report, *ibid.*; A. Bunting and S. Mokhtari, *supra* note 36, 9. Shachar and LEAF suggest similar practical safeguards to protect women's rights in the context of religious-based arbitration for family law disputes. In addition, Shachar suggests that women's rights organisations should be required to enter each arbitration process on an *amicus curiae* basis, and LEAF recommends the availability of legal aid. A. Shachar, *supra* note 73, 75–76; N. Bakht, *supra* note 78, 5; P. Cross, *supra* note 74, 10.

¹⁰⁹ Boyd Report, id., 92.

¹¹⁰ *Id.*, 93.

was an opportunity for the Ontario government to step in and ensure that religious-based decisions conform to its secular framework.¹¹¹ Secondly, by insisting on the insertion of gendered safeguards, Boyd pays homage to Shachar's "joint governance" model,¹¹² which is a response to the "paradox of multiculturalism". The latter concept explains that accommodation of minority cultures or religions within a secular society can result in the perpetuation of gender-based inequalities within those communities.¹¹³

Furthermore, Boyd may also have recommended specific protection for women's rights because of the possibility that arbitral awards may not be subjected to constitutional scrutiny as they arise from disputes between private parties.¹¹⁴ However, as suggested previously in the context of 'domestic contracts', it may be equally plausible to argue that since the enforceability of the arbitral decisions arises from legislation, they could be constitutionally challenged.¹¹⁵ Due to a lack of case law on the issue, it is unclear whether or not private arbitral awards would be subjected to Charter scrutiny.¹¹⁶ In either case, Boyd's recommendations would in principle have covered both possibilities.

However, during mid-2005, a broad coalition of some of the same parties that challenged the establishment of the *Shari'a* arbitration tribunals issued a declaration against Boyd's recommendations.¹¹⁷ Their main objection was that her report

¹¹¹ Ibid.

¹¹² Shachar's "joint governance" model proposes that the secular state and minority religious communities should share jurisdiction over certain aspects of the communities' religious personal laws. In the context of *Shari'a* arbitration tribunals, Shachar suggests that the model would apply by enabling the tribunals to dissolve Muslim marriages in terms of Islamic Law requirements based on the school of thought chosen by the parties. However, division of family property, support obligations, custody and access issues etc. could be governed by Canadian law. A. Shachar, *supra* note 73, 73; A. Shachar, *supra* note 45, 96.

¹¹³ Boyd Report, *supra* note 14, 89; A. Shachar, *supra* note 45, 3; 29–32.

¹¹⁴ Boyd Report, *id.*, 71.

¹¹⁵ A private arbitral award is given its legal enforceability through legislation namely, an Arbitration Act. Therefore, an argument could be made that if the legislation permits discrimination to arise from the arbitral awards, it could arguably be rendered unconstitutional and the resulting awards could be deemed invalid.

¹¹⁶ A. Shachar, *supra* note 73, 64; Boyd Report, *ibid.*

¹¹⁷ The coalition was called 'The No Religious Arbitration Coalition', which consisted of about 55 women's organisations including Muslim women's organisations and 35 individuals. The organizations included: CCMW; Canadian Federation of University Women; METRAC; MCC; NAWL; National Council of Women of Canada; NOIVMW; and LEAF. *Urgent: Declaration on Religious Arbitration in Family Law*, 1–5 (Toronto: Ontario Women's Justice Network, 1 June 2005). See online: <http://www.owjn.org/issues/mediatio/declaration.htm> (visited on 15 November 2007); *ShariaHaunt.com. Faith based Laws breach Human Rights*, 2 (2005). See online: <http://shariahaunt.com/arbitration.html> (visited on 15 November 2007).

favoured freedom of religion and did not provide sufficient protection for women's right to equality because

*"[s]anctioning the use of religious laws under the Arbitration Act [would] provide legitimacy to practices that are abhorred by fair-minded Canadians, including Muslim women."*¹¹⁸

As a result, the Ontario legislature rejected Boyd's recommendation to retain religious arbitrations for family and inheritance disputes. However, it retained arbitrations as a dispute resolution mechanism for family law issues provided they were conducted only in accordance with secular law. The 2006 amendment therefore implemented *inter alia* Boyd's recommendation that "arbitration agreements" be included as a form of 'domestic contract'.¹¹⁹

As noted previously, the concerns raised by women's rights proponents were valid regarding the potential for conservative MPL-based arbitral decisions that could undermine women's right to equality.¹²⁰ However, the means adopted by the Ontario legislature to address those concerns may not have been the most effective. As well intentioned as the legislative amendment may have been to protect women's human rights, it failed to achieve this effect. This is mainly because the amendment ignores a number of realities, which is indicative of the Ontario legislature not being sufficiently mindful of the operational capability of MPL within Ontario's Muslim communities. Firstly, the amendment overlooks the fact that Muslim parties can thwart the prohibition against the enforceability of arbitral awards arising from MPL-based arbitrations because they can still enter into legally enforceable 'domestic contracts' based on Islamic Law, which do not arise from arbitral awards.¹²¹ The potential that these contracts have to negatively affect women's right to equality has already been previously canvassed in this study.

¹¹⁸ *Urgent: Declaration on Religious Arbitration in Family Law*, *supra* note 117, 1; *Behind Closed Doors. How Faith-based Arbitration Shuts Out Women's Rights in Canada and Abroad* (Montreal: Rights and Democracy, International Centre for Human Rights and Democratic Development, 2005); P. Fournier, *supra* note 29, 677; N. Bakht, *supra* note 78, 2, 7, 11 footnote 77. Quotation from Bakht, citing Alia Hogben in her letter to Dalton McGuinty, Premier, and Michael Bryant, Attorney General of Ontario (14 January 2005).

¹¹⁹ The amended Family Law Act, *supra* note 38 describes the agreements as "family arbitration agreements". The Ontario legislature also implemented Boyd's recommendation that parties obtain independent legal advice before entering the arbitration process. See sections 51 and 59.6(1)(b) of the Ontario Family Law Act, *supra* note 38.

¹²⁰ Prior to the 2006 amendment to Ontario's Arbitration Act, *supra* note 73 and Family Law Act, *supra* note 38, Bakht observed that in the context of religious arbitration tribunals generally, a tension existed between the right to equality and freedom of religion. More specifically, in the context of *Shari'a* arbitration tribunals in Ontario, Bakht argued that women were negatively affected mainly because of the private nature of the arbitration process and the fact that the Arbitration Act did not provide safeguards for their equality right. N. Bakht, *supra* note 22, 1, 18–20; N. Bakht, *supra* note 5, 1.

¹²¹ A. Bunting and S. Mokhtari, *supra* note 36, 5–6.

Secondly, the amendment disregards the fact that MPL-based family arbitrations are not prevented from being conducted within Ontario's Muslim communities. In fact, Ali confirms that the *Shari'a* arbitration tribunals continue to function within those communities.¹²² Although arbitral decisions emanating from those tribunals cannot be enforced through the secular system, the amendment does not take into account the fact that Muslim arbitrators could still give advisory opinions regarding the dispute that is brought before them and those advisory opinions could be incorporated into legally enforceable 'domestic contracts'.¹²³ Thirdly, the amendment does not consider the reality that MPL-based arbitral decisions will most likely be followed within the Muslim communities due to their moral weight and that in particular, many Muslim women feel obliged to have their disputes resolved according to Islamic Law principles because they feel religiously bound to do so.¹²⁴ Therefore, those women continue to go to Muslim arbitrators despite the fact that decisions rendered by the arbitrators have no legal force or effect.¹²⁵ The unfortunate consequence of the Ontario amendment is that its assimilation requirement that only secular-based arbitral awards will be legally enforceable has not succeeded in preventing Muslim women from falling prey to discriminatory MPL rules and practices. In fact, it has ensured that their religious-based oppression remains hidden and entrenched in the private sphere. Certainly, the prohibition against secular enforceability of religious-based arbitral awards will benefit Muslim women who are sufficiently empowered to make the choice to not allow discriminatory awards to be implemented against them. However, the same is most likely not true for vulnerable women who may find themselves unable to challenge decisions that they regard as morally binding on their conscience. Consequently, vulnerable women could become victims of privatised oppression, which would infringe their right to equality while promoting freedom of religion. In particular, the amendment stands as a testament to the inherent limitation of an assimilation approach, which ignores the fundamental truth that MPL is alive and well within Muslim communities replete with all its gendered oppressive accoutrements. Therefore, a GNI approach would support state regulation of religious arbitrations within a women's right friendly framework. Given the possibility that arbitral awards may not be subject to Charter scrutiny, it would be imperative for such regulation to incorporate sufficient gendered safeguards to ensure adequate protection for women's right to equality.¹²⁶

¹²² Interview with S.M. Ali, *supra* note 11; S.M. Ali, *supra* note 79.

¹²³ A. Bunting and S. Mokhtari, *supra* note 36, 5.

¹²⁴ Bunting and Mokhtari draw this conclusion from a study that they conducted with immigrant Muslim women. A. Bunting and S. Mokhtari, *id.*, 16.

¹²⁵ A. C. Korteweg, The Sharia Debate in Ontario, 18 (Autumn) *ISIM Review* 51, 2006.

¹²⁶ Bunting and Mokhtari also suggest that "a more formalis[ed] religious arbitration process would benefit women if various safeguards, state oversight, and greater public accountability are put in place." A. Bunting and S. Mokhtari, *supra* note 36, 17.

This could also assist in bringing Muslim women's oppression into the public arena of judicial oversight, which could potentially transform their subjugation into empowerment and could in turn decrease the risk of gender discriminatory MPL practices continuing unabated in the private sphere.

At the same time, should arbitral awards and 'domestic contracts' be subject to Charter scrutiny, it becomes imperative to determine how, if at all, the Canadian constitutional framework would deal with a conflict between freedom of religion and Muslim women's right to equality. Thus, attention will now be directed to that inquiry to ascertain how the Canadian jurisprudence deals with its right to equality and freedom of religion.

5. CONSTITUTIONAL FRAMEWORK

It is evident from prior discussions in this study that assimilation and accommodation approaches adopted by the Canadian legislature relating to MPL can manifest in a conflict between Muslim women's right to equality and freedom of religion. Moreover, the legislative interventions regarding secular options for marriage and divorce and non-enforceability of decisions arising from *Shari'a* arbitration tribunals present the conflict as the undermining of Muslim women's right to equality and the promotion of freedom of religion. In the event that the legislative interventions can be subjected to Charter scrutiny, the following discussion will consider the Canadian jurisprudence regarding equality and freedom of religion to obtain direction for a possible resolution of the conflict.

5.1. EQUALITY

Canadian jurisprudence recognises equality as a collective and an individual right.¹²⁷ The collective or group right to equality is protected as a multicultural right in s.27 of the Charter.¹²⁸ Accordingly, the theme of accommodating diversity is reflected in Canadian equality jurisprudence.¹²⁹ For example, the Supreme Court of Canada asserts that "*the accommodation of differences, ... is the essence of true equality,*" which necessitates that "distinctions" be made on a frequent basis.¹³⁰ Thus, the Supreme Court believes that differential treatment among individuals and/or groups is necessary for the accommodation of diversity in the

¹²⁷ W.S. Tarnopolsky, *supra* note 3, 243; P.W. Hogg, *supra* note 8, 52–8.1; V.C. Jackson and M. Tushnet *Comparative Constitutional Law* 902 (New York: New York Foundation Press, 1999).

¹²⁸ S.27 is also described as a collective right. *Ibid.*

¹²⁹ Jackson and Tushnet suggest that the Charter right to equality protects diversity. V.C. Jackson and M. Tushnet, *supra* note 127, 902.

¹³⁰ SCC. (1989), *Andrews v. Law Society of British Columbia* 56 D.L.R. (4th) 1 at 13, 26.

contemporary social order.¹³¹ However, since “[d]ifferential treatment does not necessarily produce inequality”, not all distinctions are prohibited; only those that result in discrimination are not permitted.¹³² This concept of non-discrimination is encapsulated as an individual right to equality, which is espoused in s.15(1) of the Charter as follows:¹³³

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

Consequently, s.15(1) proscribes discrimination including sex-based discrimination relating to the four types of equality rights mentioned in s.15(1).¹³⁴ Sex- and gender-based equality is also afforded protection in s.28, which comprises the other individual Charter right to equality.¹³⁵ While s.28 focuses only on sex- and gender-based equality, s.15(1) captures the inextricable link between its two core components namely, equality and non-discrimination.¹³⁶ The Supreme Court has established firm guidelines to determine discrimination under s.15(1).¹³⁷ For

¹³¹ *Andrews v. Law Society of British Columbia*, id., 13; C. L’Heureux-Dube, *supra* note 6, 69.

¹³² *Andrews v. Law Society of British Columbia*, *ibid*; N. C. Sheppard, Recognition of the Disadvantaging of Women: The Promise of *Andrews v. Law Society of British Columbia*’ 35 *McGill Law Journal* 207, 210, 217 (1989–1990). Hogg contends that the guarantee of equality cannot mean that the law must treat everyone equally, and Grabham suggests that not all distinctions equate to discrimination. P.W. Hogg, *supra* note 8, 52–13, 52–16.1, 52–18; E. Grabham, *Law v. Canada: New Directions for Equality Under the Canadian Charter?* 22(4) *Oxford Journal of Legal Studies* 641, 644–645 (2002).

¹³³ W.S. Tarnopolsky, *supra* note 3, 243; P.W. Hogg, *id.* 52–8.1.

¹³⁴ “Equality before the law”, “equality under the law”, “equal protection of the law”, and “equal benefit of the law”. The proscription against discrimination extends to direct and indirect forms of discrimination. The latter is also called “systemic discrimination”, which refers to laws that appear to be non-discriminatory or neutral on the face of it but operate in a discriminatory manner. In other words, although the law does not explicitly use one or more of the prohibited s.15(1) grounds, it nevertheless has a disproportionately disadvantageous effect. *Andrews v. Law Society of British Columbia*, *supra* note 130, 14; SCC (1993), *Rodriguez v. British Columbia (Attorney General)* 3 S.C.R. 519, 107 D.L.R. (4th) 342, para. 160; E. Grabham, *supra* note 132, 642, 645; P.W. Hogg, *supra* note 8, 52–42; N.C. Sheppard, *supra* note 132, 213.

¹³⁵ S.28 of the Charter provides: “Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.” W.S. Tarnopolsky, *supra* note 3, 243; P.W. Hogg, *id.*, 52–8.1.

¹³⁶ SCC 1999, *Law v. Canada (Minister of Employment and Immigration)* 170 D.L.R. (4th) 1 at para. 22; C. L’Heureux-Dube, *supra* note 6, 69.

¹³⁷ *Andrews v. Law Society of British Columbia*, *supra* note 130, 13; *Law v. Canada (Minister of Employment and Immigration)*, *id.*, para. 88.

instance, in *Law v. Canada (Minister of Employment and Immigration)*,¹³⁸ it expounded a three-step process,¹³⁹ which involves the following inquiry:

“First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant’s already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage? ... (In other words,) (d)oes the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?”¹⁴⁰

Discrimination therefore exists when a distinction results in differential treatment based on a listed ground including sex, which disadvantages the claimant by imposing a burden or denying a benefit in a way that promotes stereotyping and prejudice and undermines her or his human dignity.¹⁴¹ In particular, s.15(1) aims

¹³⁸ *Law id.*, para. 22.

¹³⁹ Grabham, *supra* note 132, 645; Bakht, *supra* note 72, 2.

¹⁴⁰ *Law v. Canada (Minister of Employment and Immigration)*, *supra* note 136, para. 39, 88.

¹⁴¹ It is irrelevant whether the distinction was intended to be discriminatory or not. Discrimination can therefore be direct or indirect (“adverse effect discrimination”). The grounds listed in s.15(1) relate to personal immutable characteristics of individuals. They are not exhaustive therefore grounds analogous to the enumerated grounds could also provide a basis for discrimination provided they are also immutable. At the same time, Kropp notes that religion is the only enumerated ground that is arguably not immutable. Furthermore, the Supreme Court has identified several contextual factors that could impair human dignity thereby contributing to a determination of discrimination and an infringement of s.15(1). These factors include *inter alia*: pre-existing vulnerability, prejudice, disadvantage, or stereotyping suffered by the affected individual and/or group whereby membership of a “discrete and insular” minority is a critical factor; a nexus between the ground upon which the discrimination claim is based and the claimant’s needs and circumstances; the remedial aim or impact of the law in question on a more disadvantaged individual and/or group; and the nature and extent of the interest affected by the law in question. *Andrews, v. Law Society of British Columbia*, *supra* note 130, 18–19, 22–24, 37, 39; *Rodriguez v. British Columbia (Attorney General)*, *supra* note 134, para. 162–166; *Law v. Canada (Minister of Employment and Immigration)*, *supra* note 136, para. 30, 88; D. Kropp, ‘Categorical’ Failure: Canada’s Equality Jurisprudence - Changing Notions of Identity and the Legal Subject,’ 23 *Queen’s Law Journal* 201, 227 (1997–1998); K. Mahoney, Canadian Approaches to Equality Rights and Gender Equity in the Courts, in: Rebecca Cook (ed), *Human Rights of Women. National and International Perspectives* 445 (Philadelphia: University of Pennsylvania Press, 1994); D. Pothier, Connecting Grounds of Discrimination to

to ameliorate the position of disadvantaged groups.¹⁴² This requires a consideration of the purpose of the impugned legislation, the impact of the impugned legislation on the circumstances of the claimant, how the group within which the claimant is located is treated and whether or not the claimant's human dignity has been impinged upon.¹⁴³ By analysing discrimination in terms of disadvantage, the Supreme Court rejected the formal equality approach espoused through the 'similarly situated' test in favour of a substantive, purposive, context-driven, and impact-based approach.¹⁴⁴ Mahoney believes that this type of substantive analysis of equality could generate "de facto" equality outcomes.¹⁴⁵ Moreover, as Sheppard suggests, its recognition of difference could promote gender equality because the reference point for establishing discrimination would not be from a male perspective.¹⁴⁶ Furthermore, Sheppard avers that differences between the sexes would have to be "accommodated to secure equality of outcomes."¹⁴⁷ Thus, the accommodation of religious diversity under the auspices of the multicultural right to equality appears to be balanced against the individual right to sex- or gender-based equality.

5.2. FREEDOM OF RELIGION

The accommodation of religious diversity is also protected in s.2(a) of the Charter, which provides that "[e]veryone has the ... fundamental ... freedom of ... religion."¹⁴⁸ Since religion is a central feature of culture, s.27 features prominently in the

Real People's Real Experiences, 13 *Canadian Journal of Women and the Law* 37, 38–39 (2001); N. Iyer, Categorical Denials: Equality Rights and the Shaping of Social Identity, 19 *Queen's Law Journal* 179, 189 (1993–1994); P.W. Hogg, *supra* note 8, 52–16, 52–16.1, 52–18, 52–23, 52–30, 52–31, 52–36.1, 52–41; E. Grabham, *supra* note 132, 648, 650–651; N.C. Sheppard, *supra* note 132, 210; C. L'Heureux-Dube, *supra* note 6, 69; N. Bakht, *supra* note 72, 2–3.

¹⁴² *Andrews v. Law Society of British Columbia*, id. 34; *Law v. Canada (Minister of Employment and Immigration)*, *supra* note 136, para. 3, 88; E. Grabham, id., 645; N.C. Sheppard, id., 224, 225, 230.

¹⁴³ *Andrews v. Law Society of British Columbia* id. 13; E. Grabham, id., 648; C. L'Heureux-Dube, *supra* note 6, 69; N.C. Sheppard, id., 224.

¹⁴⁴ The Supreme Court views equality as a substantive concept. E. Grabham describes the Supreme Court's approach as a "contextual effects-based" analysis, while Mahoney and Sheppard refer to it as an "effects-based approach". *Law v. Canada (Minister of Employment and Immigration)*, *supra* note 136, para. 1, 3, 7, 25, 30, 39, 88; SCC 1990, *McKinney v. University of Guelph* 3 S.C.R. 229, 76 D.L.R. (4th) 545 at 608h, 609c, 647c; D. Greschner, Does Law Advance the Cause of Equality?, 27 *Queen's Law Journal* 299, 300 (2001–2002); R. Ahdar and I. Leigh, Is Establishment Consistent with Religious Freedom?, 49(3) *McGill Law Journal* 635, 676 (2004); E. Grabham, id., 642–643, 645; C. L'Heureux-Dube *ibid.*; K. Mahoney, *supra* note 141, 445–446; N.C. Sheppard, id., 210.

¹⁴⁵ K. Mahoney, id., 445–446.

¹⁴⁶ N.C. Sheppard, *supra* note 132, 209, 214, 234.

¹⁴⁷ *Ibid.*

¹⁴⁸ *R. v. Big M Drug Mart Ltd.*, *supra* note 3, para. 94.

interpretation of s.2(a).¹⁴⁹ Consequently, freedom of religion is defined in distinct ways to maintain and promote multiculturalism.¹⁵⁰ Firstly, it is defined through an “absence of coercion or constraint.”¹⁵¹ This means that while s.2(a) does not prevent the state from supporting religion generally, it does prohibit the state from compelling or restricting religious practice.¹⁵² Secondly, the theme of non-coercion is extended by prohibiting the compulsion of minority religious communities to conform to the norms of the majority religious group.¹⁵³ Thus, freedom of religion in Canada’s constitutional democracy engenders respect for religious minorities by requiring them to be treated sensitively and to be protected against potential domination by the majority religious group.¹⁵⁴ Thirdly,

¹⁴⁹ *Zylberberg v. Sudbury Board of Education*, *supra* note 7, para. 86; *Edwards Books*, *supra* note 8, para. 80.

¹⁵⁰ Jackson and Tushnet claim that the Charter right to freedom of religion protects diversity. V.C. Jackson and M. Tushnet, *supra* note 127, 902.

¹⁵¹ *R. v. Big M Drug Mart Ltd.*, *supra* note 3, para. 94–95; C. Richter: Separation and Equality: An Argument for Religious Schools within the Public System, 28(1) *Ottawa Law Review* 23, 23 (1997).

¹⁵² Religious coercion is broadly understood to include almost any form of state support for religious practices and beliefs. For example, the Supreme Court indicated that if the burden is “capable of interfering with religious belief or practice” then it would be prohibited by s.2(a). Furthermore, it is irrelevant “whether a coercive burden is direct or indirect, intentional or unintentional, foreseeable or unforeseeable.” Although this excludes “trivial or insubstantial” coercive burdens, it would still be necessary to consider how the insignificant coercive burden “impacts on the rights of others in the context of ... competing rights.” This is premised on the assumption that behaviour that potentially infringes the rights of others is not subject to automatic protection. *Edwards Books*, *supra* note 8, para. 96–97; SCC 2004, *Syndicat Northcrest v. Amselem* 241 D.L.R. (4th) 1 at para. 58, 62; D. M. Brown, Freedom from or freedom for?: Religion as a case study in defining the content of Charter rights, 33 *University of British Columbia Law Review* 551, 565 (1999–2000); R. Moon, Liberty, Neutrality, and Inclusion: Religious Freedom under the Canadian Charter of Rights and Freedoms, 41 *Brandeis Law Journal* 563, 563, 572 (2003); E.R. Alexander, *supra* note 95, 18.

¹⁵³ *R. v. Big M Drug Mart Ltd.*, *supra* note 3, para. 95, 99, 129; *Zylberberg v. Sudbury Board of Education*, *supra* note 7, para. 29; D.M. Brown, *id.*, 585.

¹⁵⁴ This is in accordance with s.27 of the Charter and Canada’s accommodation approach towards religious diversity, which purports to “[value] all divergent views equally.” *Ross*, *supra* note 3, para. 91; *R. v. Big M Drug Mart Ltd.*, *id.*, para. 94, 96, 99; *Zylberberg v. Sudbury Board of Education*, *id.*, para. 42; *Syndicat Northcrest v. Amselem*, *supra* note 152, para. 1; W. Klassen, *supra* note 1, 98; N. Bakht, *supra* note 22, 21; D.M. Brown, *ibid.*, 615. Brown refers to Ontario Court of Appeal 1990, *Zylberberg v. Sudbury Board of Education and Canadian Civil Liberties Association v. Ontario (Minister of Education)* 71 O.R. (2d) 341 (C.A.), referred to as *Elgin County*.

by adopting a purposive and generous approach to the interpretation of s.2(a),¹⁵⁵ the Supreme Court has also defined freedom of religion as:

“[T]he right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.”¹⁵⁶

Thus, the Supreme Court’s description of freedom of religion includes the right to hold and express religious beliefs, and to manifest those beliefs through religious practices or through the propagation of religious beliefs.¹⁵⁷ Recognition of the right to manifest and propagate religious beliefs extended the application of religious belief from the private sphere to the public sphere.¹⁵⁸ However, although there is no strict separation of church and state in Canada, the promotion of substantive equality among religious groups and the constitutional commitment against the imposition of religion led the lower courts to interpret secularism as excluding religion from the public sphere.¹⁵⁹ Thus, freedom of religion has shifted to the private sphere where the judiciary is willing to accommodate only private religious activities.¹⁶⁰ This approach accords with the assimilation decision of the Ontarian judiciary and legislature in the context of MPL. However, Brown argues that the judiciary misinterpreted s.2(a), which he contends requires all religions to be accommodated in the public sphere in a non-coercive manner.¹⁶¹ Moon concurs with the criticism on the basis that it is unrealistic to expect “religious neutrality” in the public sphere.¹⁶² He observes that secular rules are grounded in the majority religion.¹⁶³ Therefore, “privatization of religion” results in favoured treatment for Christianity because Canadian citizens will not be able to access any other religious perspective in the public sphere.¹⁶⁴ Moon therefore favours an approach to freedom of religion that accords with the Preamble of the Charter, which provides that “*Canada is founded upon principles that recognize the*

¹⁵⁵ The Supreme Court observed that this approach is applicable to all Charter rights and freedoms. *R. v. Big M Drug Mart Ltd.*, *ibid.*, para. 117–118; A. Shachar, *supra* note 73, 83.

¹⁵⁶ *R. v. Big M Drug Mart Ltd.*, *ibid.*, para. 94.

¹⁵⁷ D.M. Brown, *supra* note 152, 599; P.W. Hogg, *supra* note 8, 39–4.

¹⁵⁸ D.M. Brown, *ibid.*, 565, 614.

¹⁵⁹ *Zylberberg v. Sudbury Board of Education*, *supra* note 7, para. 86; *R. v. Big M Drug Mart Ltd.*, *supra* note 3, para. 124–125; Boyd Report, *supra* note 14, 86; R. Moon, *supra* note 152, 564–565, 570; D.M. Brown, *supra* note 152, 589–594, 615. Brown refers to *Zylberberg v. Sudbury Board of Education* *supra* note 7; *Elgin County*, *supra* note 154; and Ontario Court of Appeal 1997, *Bal v. Ontario (A.G.)* 101 O.A.C. 219 (C.A.).

¹⁶⁰ D.M. Brown, *id.*, 614.

¹⁶¹ D.M. Brown, *id.*, 594.

¹⁶² R. Moon, *supra* note 152, 571–572.

¹⁶³ *Ibid.*

¹⁶⁴ *Id.* 570, 572.

supremacy of God and the rule of law".¹⁶⁵ Although Canada is a secular society, the phrase "supremacy of God" has been interpreted to mean that no single religion is afforded the status of a dominant norm.¹⁶⁶ Similarly, Moon supports an approach where the state does not "prefer one religion over another" but instead accommodates minority religious activities in the public sphere.¹⁶⁷ Yet, in the context of MPL, the dower cases adjudicated by the British Columbia Supreme Court of Appeal indicate that this type of accommodation of religious diversity can impact negatively on Muslim women's right to equality.

Freedom of religion used to also be defined with internal limitations placed on it by the Supreme Court.¹⁶⁸ However, it is now treated as an unqualified right to do anything that is dictated by religious belief.¹⁶⁹ Freedom of religion can therefore theoretically accommodate harmful practices of a religious minority.¹⁷⁰ However, it has not been transformed into an absolute right.¹⁷¹ Although freedom of religion no longer contains internal limitations, it can still be limited by the

¹⁶⁵ Bakht suggests that the Preamble denotes respect for religion. N. Bakht, *The Separation of "Church" and State*, in: *Arbitration, Religion and Family Law: Private Justice on the Backs of Women 2*, *supra* note 5.

¹⁶⁶ *Rodriguez v. British Columbia (Attorney General)*, *supra* note 134, para. 178; *R. v. Big M Drug Mart Ltd.*, *supra* note 3, para. 18, 149; D.M. Brown, *supra* note 152, 552; Boyd Report, *supra* note 14, 86.

¹⁶⁷ R. Moon, *supra* note 152, 573, 572.

¹⁶⁸ The Supreme Court had permitted freedom of religion only to the extent that manifestations of religious beliefs did not harm others and did not impinge on their rights to have, express, and manifest their own religious beliefs. Implicit in this proviso was the view that freedom of religion would not protect potentially harmful minority religious practices. As examples, P.W. Hogg cites the refusal of school or medical treatment. However, where a contrary compelling governmental interest existed, the law would have been required to accommodate minority religions by allowing exemptions for their practices. Furthermore, the Supreme Court subjected freedom of religion "to such limitations as [were] necessary to protect public safety, order, health, or morals [and] the fundamental rights and freedoms of others." These restrictions resemble the limitations placed by Article 18(3) of the ICCPR on the international right to freedom of religion. Article 18(3) provides: "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." *R. v. Big M Drug Mart Ltd.*, *supra* note 3, para. 95, 124; *Ross v. New Brunswick School District No. 15*, *supra* note 3, para. 72; D.M. Brown, *supra* note 152, 601; P.W. Hogg, *supra* note 8, 39-6; R. Ahdar and I. Leigh, *supra* note 144, 649; W. Amien and P. Farlam, *supra* note 33, 36.

¹⁶⁹ The Supreme Court now believes that freedom of religion should retain its broad interpretation without being restricted by the impact of religious practices on the rights of other people. It has furthermore abandoned the position that freedom of religion only authorises religious practices that do not injure others. In fact, the Supreme Court refrains from subjecting freedom of religion to internal limits. *Ross v. New Brunswick School District No. 15*, *id.*, para. 73; SCC 1995, *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, CanLII 115, at 383-384; P.W. Hogg, *id.*, 39-7, 39-8.

¹⁷⁰ T. Macklem, *supra* note 8, 9.

¹⁷¹ Freedom of religion is not an absolute right. *Ross v. New Brunswick School District No. 15*, *supra* note 3, para. 72; D.M. Brown, *supra* note 152, 565, 599.

rights and freedoms of others.¹⁷² The internally unrestricted nature of freedom of religion is also arguably derived from the Supreme Court's acceptance of a subjective definition of freedom of religion that focuses on "sincerity of belief."¹⁷³ This means that an individual's personally held religious belief and not the "official position" of a particular religion must be considered when contemplating a potential infringement of s.2(a).¹⁷⁴ This does not mean that the Supreme Court does not acknowledge an objective understanding of freedom of religion.¹⁷⁵ The Supreme Court simply places greater emphasis on the subjective inquiry by finding that freedom of religion protects sincerely held religious beliefs without having "to prove ... that [they] are objectively recognized as valid by other members of the same religion."¹⁷⁶ It is therefore irrelevant whether or not other members of the religion regard the religious belief as valid.¹⁷⁷ An individual's belief regarding a religious practice would thus predominate over the beliefs that are purportedly held by a religious authority or religious community.¹⁷⁸ The Supreme Court's preoccupation with a subjective analysis of freedom of religion is problematic for three reasons. Firstly, it disregards the fact that freedom of religion "relates ... to religious views derived from established religious institutions."¹⁷⁹ Secondly, it ignores the fact that freedom of religion is both an individual and a collective right.¹⁸⁰ As Bastarache J. observes:

"Notwithstanding the wide variety of religious experience, no religion is or can be purely individual in its outlook, as ultimate concern is said to be. On the contrary, religions are necessarily collective endeavours. By the same token, no religion is or can be defined purely by an act of personal commitment, as the ultimate concerns of an individual are said to be. Instead, all religions demand a personal act of faith in relation to a set of beliefs that is historically derived and shared by the religious community. It follows that

¹⁷² The Supreme Court has also noted that respect for religious minorities is not absolute. Rather, it "must ... coexist alongside societal values that are central to the make-up and functioning of a free and democratic society." *Syndicat Northcrest v. Amselem*, supra note 152, para. 1, 136; *Ross v. New Brunswick School District No. 15*, ibid., para. 72; SCC 1993 *Young v. Young* 108 D.L.R. (4th) 193, 253g.

¹⁷³ *Syndicat Northcrest v. Amselem*, id., para. 43, 45.

¹⁷⁴ An individual's sincerely held religious belief could be ascertained by a factual inquiry, which could include an assessment of the person's credibility. Such an inquiry will not be rigorous and it will be made on a casuistic basis. *Syndicat Northcrest v. Amselem*, id., para. 45–46, 53, 142–143.

¹⁷⁵ An objective understanding of freedom of religion protects "religious belief or conduct that [is] objectively recognized by religious experts as being obligatory tenets or precepts of a particular religion." *Syndicat Northcrest v. Amselem*, id., para. 43.

¹⁷⁶ Ibid.

¹⁷⁷ *Ross v. New Brunswick School District No. 15*, supra note 3, para. 71.

¹⁷⁸ N. Bakht, Human Rights Framework in: *Arbitration, Religion and Family Law: Private Justice on the Backs of Women* 1, 6, supra note 5.

¹⁷⁹ *Roach v. Canada...*, supra note 8, para. 25.

¹⁸⁰ *Edwards Books*, supra note 8, para. 145; V.C. Jackson and M. Tushnet, supra note 127, 902.

*any genuine freedom of religion must protect, not only individual belief, but the institutions and practices that permit the collective development and expression of that belief.*¹⁸¹

Thus, the Supreme Court failed to pay attention to the collective nature of freedom of religion and instead emphasised the individual aspect of the right, which erroneously “reduce[d] freedom of religion to a single dimension.”¹⁸² Thirdly, the Supreme Court’s focus on the subjective inquiry coincides with its belief that it is inappropriate for the judiciary to intervene in religious issues or to enquire about the validity of religious beliefs.¹⁸³ In fact, the Supreme Court has explicitly expressed its disinclination to become entangled with religious doctrine in the following terms:

*“[T]he State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, ‘obligation’, precept, ‘commandment’, custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.”*¹⁸⁴

However, the judiciary should enter the arena of “religious disputes” because as illustrated by its assimilation approach regarding non-enforceability of dower agreements, failure to intervene can result in the privatised oppression of women. Furthermore, if courts do not adjudicate “religious disputes”, as Moon observes, “[they] will draw difficult and perhaps incoherent lines as they try to avoid public judgments about religious truth.”¹⁸⁵ Yet, Bakht seems to think that despite the judiciary’s unwillingness to engage with religion, it will become involved if it is necessary to prohibit harmful religious practices that infringe constitutional rights.¹⁸⁶ To reinforce this point, she observes that where religious rules conflict with the “rule of law,” Canadian courts have not invoked the “supremacy of God” and have instead allowed “the rule of law” to prevail.¹⁸⁷ In the context of family law, Mahoney is not as optimistic. She argues that where religious practices dis-

¹⁸¹ J. Bastarache wrote the minority judgment in *Syndicat Northcrest v. Amselem*, *supra* note 152, para. 137.

¹⁸² *Syndicat Northcrest v. Amselem*, *ibid*. In the same paragraph, J. Bastarache also wrote that “although private beliefs have a purely personal aspect”, the majority’s focus on individually held religious beliefs ignores “the other dimension of the right has genuine social significance and involves a relationship with others.”

¹⁸³ *Syndicat Northcrest v. Amselem*, *id.*, para. 43; N. Bakht, *supra* note 178, 6; N. Bakht, *supra* note 165, 2.

¹⁸⁴ *Syndicat Northcrest v. Amselem*, *id.*, para. 50. See also *Young v. Young*, *supra* note 172, 253b.

¹⁸⁵ R. Moon, *supra* note 152, 573.

¹⁸⁶ N. Bakht, *supra* note 165, 2.

¹⁸⁷ *Id.*, 1. See also *B.C.G.E.U. v. British Columbia*, *supra* note 31, para. 24.

criminate against women, the judiciary has failed to consider their perspective by allowing men to exercise their right to freedom of religion to the disadvantage of women.¹⁸⁸ In so doing, power imbalances within families are maintained and underscored by “*stereotyped sex roles ..., which usually favor men.*”¹⁸⁹

5.3. RESOLVING THE CONFLICT BETWEEN THE RIGHT TO EQUALITY AND FREEDOM OF RELIGION

When Charter rights and freedoms conflict with each other, the Supreme Court has taken the view that the conflict should be resolved through a balancing process.¹⁹⁰ Although rights and freedoms cannot be equally protected all the time, the balancing approach advocated by the Supreme Court is presumably an attempt to facilitate an enabling process to ensure that conflicting rights and freedoms are equally respected and can co-exist together.¹⁹¹ The Supreme Court therefore decided that conflicts between equally ranking rights and/or freedoms should be dealt with under the general limitations provision in s.1 because the latter has been interpreted to involve a balancing procedure.¹⁹² Since sections 15(1) and 2(a)

¹⁸⁸ K. Mahoney, *supra* note 141, 440.

¹⁸⁹ *Ibid.*

¹⁹⁰ SCC 1990, *R. v. Keegstra* CanLII 24, 93; SCC 1994, *Dagenais v. Canadian Broadcasting Corp.* 120 D.L.R. (4th) 12, para. 75; SCC 1995, *R. v. O'Connor* CanLII 51 para. 129; *B.C.G.E.U. v. British Columbia (Attorney General)*, *supra* note 31, para. 67; N. Bakht, *supra* note 178, 9.

¹⁹¹ *R v. Edwards Books and Art Ltd.*, *supra* note 8, para. 182 (per La Forest J. delivering a dissenting judgment); *Dagenais v. Canadian Broadcasting Corp.*, *id.*, para. 75, 175; *O'Connor*, *id.*, para. 129; N. Bakht, *supra* note 72, 3–4.

¹⁹² A distinction has been drawn between rights and freedoms in the sense that rights entail a positive duty to act and freedoms do not. Furthermore, freedoms are regarded as being inherently limited. Therefore, an inference can be drawn that rights rank higher than freedoms. However, a freedom that has been entrenched or guaranteed in the Charter is given the status of a right. Therefore, a Charter guaranteed freedom can rank equally to a Charter guaranteed right. Furthermore, La Forest contends that s.1 allows the courts “to determine what the proper balance between rights should be.” Saskatchewan Court of Appeal 1985, *Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955 et al. v. Government of Saskatchewan et al.* 19 D.L.R. (4th) 609 para. 9, 11; Ontario Supreme Court of Appeal 1987, *R v. Zundel* 35 D.L.R. (4th) 338, para. 53; British Columbia Court of Appeal 1986, *Cromer v. British Columbia Teachers' Federation And Attorney General Of British Columbia* 29 D.L.R. (4th) 641, para. 21; SCC 1953, *Saumur v. Quebec (City)* 4 D.L.R. 641 at para. 96; *Keegstra*, *supra* note 190, 93–94, 99; *B.C.G.E.U. v. British Columbia (Attorney General)*, *supra* note 31, para. 67; *Dagenais v. Canadian Broadcasting Corp.*, *id.*, para. 174; *Ross*, *supra* note 3, para. 73, 75; *R v. Edwards Books and Art Ltd.*, *supra* note 8, para. 94; *B. (R.)*, *supra* note 169, 383–384; G.V. La Forest, *The Canadian Charter of Rights and Freedoms: An Overview*, 61 *The Canadian Bar Review* 19, 25 (1983); P.W. Hogg, *supra* note 8, 33–25, 33–26. The Saskatchewan Court of Appeal in *Government of Saskatchewan* and the British Columbia Court of Appeal in *Cromer* referred to the McRuer Report on Civil Rights (Report of the Royal Commission Inquiry into Civil Rights, Honourable J.C. McRuer, Commissioner, Report 2 (1969), vol. 4, 108, 1493–96.

can both be overridden by s.33¹⁹³ and limited by s.1,¹⁹⁴ they are deemed to rank equally to each other. Therefore, a conflict between the two can be addressed under s.1.

S.1 provides:

“The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

This provision is activated after a Charter right or freedom has been infringed.¹⁹⁵ The aim of invoking s.1 is to determine whether or not the infringement qualifies as a justifiable limitation.¹⁹⁶ When the constitutional inquiry enters the s.1 phase,

¹⁹³ S.33 provides:

“(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).”

S.33 enables the federal Parliament and provincial legislatures to enact laws that override *inter alia* the right to equality under s.15 and freedom of religion under s.2. The override power removes the relevant legislation from Charter scrutiny without having to show any reasonableness or demonstrable justification. P.W. Hogg, *supra* note 8, 33–10, 36–2, 36–4, 36–5.

¹⁹⁴ The British Columbia Supreme Court of Appeal confirms that s.15(1) is not absolute. Furthermore, the Supreme Court found that where discrimination exists under s.15(1), the next step is to consider whether or not it is justified under s.1. Moreover, the Supreme Court has found that an infringement of s.2(a) could also be justified by s.1. *Cromer v. British Columbia Teachers’ Federation ...*, *supra* note 192 para. 29; *R. v. Big M Drug Mart Ltd.*, *supra* note 3, para. 32, 121; *Rodriguez v. British Columbia (Attorney General)*, *supra* note 134, para. 156; *Andrews v. Law Society of British Columbia*, *supra* note 130, 19; J. Woehrling, *Minority Cultural and Linguistic Rights and Equality Rights in the Canadian Charter of Rights and Freedoms*, 31 *McGill Law Journal* 50, 66 (1985); A. Brudner, *What are reasonable limits to equality rights?*, 64 *The Canadian Bar Review* 469, 505 (1986); P.W. Hogg, *id.*, 35–2, 52–17, 52–19; N. Bakht, *supra* note 72, 5; N. Bakht, *supra* note 178, 5.

¹⁹⁵ The onus rests on the party seeking the limitation on the Charter right or freedom to prove it on a balance of probabilities. *R v. Oakes*, *supra* note 93, para. 16, 70–71; *R. v. Keegstra*, *supra* note 190, 99; *R. v. Big M Drug Mart Ltd. Drug, id.*, para. 121; *Andrews v. Law Society of British Columbia, id.*, 19, 21, 26, 33; P.W. Hogg, *id.*, 35–7, 35–8; E.R. Alexander, *supra* note 95, 34; E. Grabham, *supra* note 132, 644; A. Brudner, *id.*, 505; N. Bakht, *supra* note 72, 5.

¹⁹⁶ *R v. Oakes, id.*, para. 73; D. Beatty, *The Canadian Charter of Rights: Lessons and Laments*, 60 *The Modern Law Review* 481, 482–483 (1997); E.R. Alexander, *id.*, 31; N. Bakht, *id.*, 5. The *Oakes* test has been summarized in subsequent cases. See for example, *Keegstra, id.*, 29–30; *Zylberberg v. Sudbury Board of Education, supra* note 7 para. 61; *Edwards Books, supra* note 8

an “ad hoc balancing” approach is usually undertaken.¹⁹⁷ This requires each conflicting right and/or freedom to be considered on its own merits.¹⁹⁸ One aspect of this consideration involves a “searching degree of scrutiny”, which has regard to the “core value” of the relevant right and/or freedom.¹⁹⁹ The Supreme Court found that the further away an activity is from the “core value” of a right or freedom, the easier it will be to justify its restriction.²⁰⁰ “Ad hoc balancing” also requires a contextual analysis, which takes into account the circumstances of each case.²⁰¹ Thus, the decision to prioritise one right and/or freedom above the other is made on a casuistic basis with reference to strict justificatory criteria, which require a purposive interpretation of the right and/or freedom in question.²⁰² These criteria are derived from a two-tiered test formulated by the Supreme Court in *R v. Oakes*²⁰³ in respect of its s.1 analysis. The test involves the following considerations: Firstly, the objective of the legislative provision must be “sufficiently important.”²⁰⁴ This means that it must “relate to concerns which are pressing and substantial in a free and democratic society.”²⁰⁵ The phrase “free and democratic society” has been interpreted to mean that the judiciary must be guided by the underlying values of the Charter, which include equality and accommodation of diversity.²⁰⁶ Therefore, a legislative objective that is incompatible with the principles of equality and accommodation of diversity including religious diversity cannot justify a limitation under s.1.²⁰⁷ Both sets of values are thus afforded equal weight in the s.1 analysis. Secondly, a “proportionality test” must be undertaken, which involves balancing societal interests against individual or group interests,

para. 122; *Andrews v. Law Society of British Columbia, id.*, 25, 33, 34, 41. See also P.W. Hogg, *supra* note 8, 35–16, 35–17.

¹⁹⁷ P.W. Hogg refers to *R. v. Keegstra, supra* note 190 as an example of a case where the Supreme Court applied “ad hoc balancing”. P.W. Hogg contrasts this against the Supreme Court’s less preferred method, which he calls “definitional balancing”. The latter considers the conflicting rights and/or freedoms in relation to each other and confers general priority in relation to the ranking of the rights and/or freedoms. P.W. Hogg refers to *O’Connor, supra* note 190 as an example of a case where the Supreme Court applied “definitional balancing”. P.W. Hogg, *id.*, 33–26, 33–27.

¹⁹⁸ P.W. Hogg, *id.*, 33–26.

¹⁹⁹ *Ross v. New Brunswick School District No. 15, supra* note 3, para. 89–91.

²⁰⁰ *Id.*, 89–90.

²⁰¹ The Supreme Court has held that a flexible approach must be adopted in respect of s.1. *Ross v. New Brunswick School District No. 15, id.*, para. 78; *R. v. Keegstra, supra* note 190, 31, 93, 99; *Syndicat Northcrest v. Amselem, supra* note 152, para. 62; *B. (R.), supra* note 169, 384; *R v. Oakes, supra* note 93, para. 74.

²⁰² P.W. Hogg, *supra* note 8, 33–26, 33–27, 35–3, 35–6, 35–7, 35–8.

²⁰³ *R v. Oakes, supra* note 93.

²⁰⁴ *Id.* para. 73.

²⁰⁵ *Ibid.*; D. Beatty, *supra* note 196, 482–483; E. Grabham, *supra* note 132, 645.

²⁰⁶ *R v. Oakes, id.*, para. 67, 74; *Keegstra, supra* note 190, 93, 99; *Ross v. New Brunswick School District No. 15, supra* note 3, para. 77, 94; P.W. Hogg, *supra* note 8, 35–21.

²⁰⁷ P.W. Hogg, *id.*, 35–24.

or Charter rights and freedoms against competing social values.²⁰⁸ Essentially, this requires an appropriate compromise to be made between conflicting Charter values and legislative objectives.²⁰⁹ Therefore, the judiciary must consider “*the nature of the infringed right and the specific values [that are relied upon] to justify the infringement.*”²¹⁰ This could require that the harm caused by an infringement of the equality right be weighed against the benefit that retention of the inequality would provide to society.²¹¹ More specifically, the proportionality test requires that the means chosen to limit the right or freedom must be “reasonable and demonstrably justified.”²¹² To determine this, three factors have to be proven: Firstly, the means chosen to limit the right or freedom “*must be rationally connected to the objective.*”²¹³ Secondly, the means must impair the right or freedom as minimally as possible.²¹⁴ Thirdly, the impact of the means used to limit the right or freedom must be proportionate to the importance of the legislative objective.²¹⁵ Therefore, an infringed Charter right or freedom may be justified if a sufficiently important legislative objective is established coupled with a reasonable means used to accomplish the objective.²¹⁶

While the above synopsis can be applied to a conflict between sections 15(1) and 2(a), it will not necessarily resolve the conflict where the right to sex- or gender-based equality is implicated. This is because s.28 has been placed in a higher-ranking category of “privileged rights”, which outranks s.2(a) as a member of the lower-ranking category of “common rights”.²¹⁷ The higher ranking is justified by the fact that s.28 is not subject to s.33 and is most likely not subject to s.1.²¹⁸ While

²⁰⁸ As an example, Brown observes that “*the protection of one’s freedom of religion usually will involve a balancing with other competing claims of members of society.*” *R v. Oakes*, *supra* note 93, para. 74; *B.C.G.E.U. v. British Columbia (Attorney General)*, *supra* note 31, para. 67; *O’Connor*, *supra* note 190, para. 65; D.M. Brown, *supra* note 152, 565; P.W. Hogg, *id.*, 33–9.

²⁰⁹ P.W. Hogg, *id.*, 33–10.

²¹⁰ *Ross v. New Brunswick School District No. 15*, *supra* note 3, para. 78.

²¹¹ N.C. Sheppard, *supra* note 132, 222.

²¹² *R v. Oakes*, *supra* note 93, para. 74.

²¹³ *Ibid.*

²¹⁴ *Ibid.* Beatty calls this the “test of rationality or necessity” and also the “principle of avoidability (minimal impairment).” D. Beatty, *supra* note 196, 482–483, 486.

²¹⁵ *R v. Oakes* *id.*, para. 74. Beatty refers to this as “the test of consistency or equality”. D. Beatty, *id.*, 482–483.

²¹⁶ Alexander describes the proportionality test as an “ends-means analysis” and Weinrib suggests that the Supreme Court has adopted a “*reasonableness-based approach to limitation.*” E.R. Alexander, *supra* note 95, 35–36; L. E. Weinrib, *The Supreme Court of Canada in the age of Rights: Constitutional democracy, the rule of law and fundamental rights under Canada’s Constitution*, 80 *The Canadian Bar Review* 699, 738 (2001). For further discussion about the requirement of reasonableness, see E. Grabham, *supra* note 132, 644–645; P.W. Hogg, *supra* note 8, 35–15, 35–16.

²¹⁷ P.W. Hogg, *id.*, 33–24.

²¹⁸ Academic authors suggest that the wording of s.28 indicates that it may not be limited by s.1. The Charter also explicitly excludes it from the ambit of s.33. Furthermore, individual rights appear to be ranked higher than group rights because the latter are regarded as bargained for

the Supreme Court has held that a hierarchy of rights and freedoms should be avoided when faced with a conflict between rights and/or freedoms, it is difficult to ignore the fact that although s.28 is not regarded as an absolute right, the Canadian Charter has created a hierarchy of rights and freedoms by placing s.28 at its pinnacle.²¹⁹ Hogg argues that this hierarchy does not mean that higher ranking rights and freedoms will automatically be prioritised over lower ranking rights and freedoms when they conflict with each other.²²⁰ Nevertheless, in exceptional circumstances, the Supreme Court has also applied a less preferred method called “definitional balancing”.²²¹ This approach considers the conflicting rights and/or freedoms in relation to each other and confers priority in respect of the ranking of the rights and/or freedoms.²²² Thus, where freedom of religion undermines sex- or gender-based equality, an application of “definitional balancing” will certainly enable s.28 to be prioritised above s.2(a). Moreover, Bakht observes that this must also mean that an infringement of sex-based equality under s.15(1) cannot constitute a justifiable limitation under s.1.²²³ Therefore, Canadian jurisprudence can protect sex- or gender-based equality against discriminatory religious rules and practices. Moreover, Canada’s international obligations under CEDAW also assists an interpretation that favours the prioritisation of Muslim women’s right to equality when it is challenged by freedom of religion.²²⁴ In the context of Canadian MPL, this means that where freedom of religion conflicts with Muslim women’s right to equality, Canada’s constitutional framework enables the prioritisation of the latter above the former. This would apply to MPL-based disputes that are subject to Charter scrutiny and could also apply to legislative regulation of MPL to ensure that women’s rights to equality are not undercut by freedom of religion.

6. CONCLUSION

This study shows that application of conservative interpretations of MPL within Canadian Muslim communities manifests a conflict between freedom of religion

and contingent. P.W. Hogg, id., 33–10, 33–24, 36–4, 52–55; N. Bakht, *supra* note 178, 8; J. D. Whyte, Nations, Minorities and Authority, 40 *University of New Brunswick Law Journal* 40, 56–57 (1991).

²¹⁹ Charter rights and freedoms are not considered absolute. *R v. Oakes*, *supra* note 93, para. 68; *Dagenais v. Canadian Broadcasting Corp.*, *supra* note 190, para. 75; *R. v. O’Connor*, *supra* note 190, para. 129; N. Bakht, *supra* note 178, 9; N. Bakht, *supra* note 72, 3–4; P.W. Hogg, id., 33–24.

²²⁰ P.W. Hogg, id., 33–25.

²²¹ P.W. Hogg, id., 33–27. Hogg suggests that this approach was applied in the case of *R. v. O’Connor*, *supra* note 190.

²²² P.W. Hogg, id., 33–26, 33–27.

²²³ N. Bakht, *supra* note 178, 8–9.

²²⁴ CEDAW, *supra* note 33.

and Muslim women's right to equality by promoting the former and emasculating the latter. Furthermore, lack of state regulation of MPL allows discriminatory rules and practices to prevail within Canadian Muslim communities, which results in the privatised oppression of Muslim women. Similarly, the discussions relating to legislative interventions regarding secular options for marriage and divorce and *Shari'a* arbitration tribunals indicate that assimilation and unregulated accommodation of MPL promote freedom of religion at the expense of Muslim women's right to equality. This particularly occurs as a result of the under-sensitivity of the assimilation approach and the over-sensitivity of the accommodation approach to the specific nuances of MPL. By adopting assimilation or accommodation approaches, the Canadian legislature contributes to the privatised oppression of Muslim women because they permit discriminatory MPL rules and practices to be applied within the Muslim communities.

A resolution of the conflict between freedom of religion and Muslim women's right to equality is obscured by Canada's dual commitment to support multiculturalism on the one hand and to protect women's right to equality on the other hand.²²⁵ Bakht suggests that the challenge involves an attempt to balance these two contrasting commitments.²²⁶ For this balancing exercise, guidance can be derived from the Canadian jurisprudence relating to the Charter's limitation clause, which promotes a balancing approach involving identified criteria. However, where a balance cannot be obtained, the hierarchy of rights and freedoms encapsulated in Canada's constitutional framework justifies a prioritisation of women's right to equality above freedom of religion. This reinforces the GNI approach, which supports freedom of religion provided it does not undermine Muslim women's right to equality. A prioritisation of sex- or gender-based equality above freedom of religion would apply to judicial disputes that can be subjected to Charter scrutiny, which in turn would aid the eradication of Muslim women's privatised oppression. However, the matter becomes complicated when disputes do not fall within constitutional parameters, in which case secular regulation of MPL is required through the adoption of statutory measures to ensure adequate protection for Muslim women's right to equality. To this end, the GNI approach recommends a gender-sensitive regulatory framework by extending judicial oversight mechanisms in existing family legislation to shield Muslim women's right to equality against infringements by freedom of religion; and/or implementing a dual legal system to recognise aspects of MPL in a way that does not flout Muslim women's right to equality. In particular, a gender-sensitive regulatory framework could provide an opportunity to prevent discriminatory MPL rules and practices from continuing unabated in the private sphere. Moreover, a

²²⁵ N. Bakht, *supra* note 178, 1.

²²⁶ N. Bakht, *supra* note 78, 1.

gender-sensitive approach to MPL at legislative and judicial levels could also facilitate internal reform of MPL.