

JUDICIAL OVERSIGHT OF ISLAMIC FAMILY LAW
ARBITRATION IN ONTARIO: ENSURING
MEANINGFUL CONSENT AND PROMOTING
MULTICULTURAL CITIZENSHIP

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I. INTRODUCTION

Certain events in recent years have forced Canadians to reexamine their views towards religion, the state, and the celebrated multicultural paradigm. After nearly a decade of advocacy, a group of Canadian Muslims, organized under the aus-

pices of the Islamic Institute of Civil Justice (IICJ), succeeded in having its proposal to create Islamic family law arbitration tribunals pursuant to the Ontario Arbitration Act¹ recognized by the Ontario Government. The IICJ's proposal sparked a storm of controversy in Ontario and faced stiff opposition from within the Canadian Muslim community as well as from non-Muslims.² The spokesperson of the Muslim Canadian Congress referred to the proposed family law tribunals as "flea-market justice."³ Other critics condemned the idea as representing the "dark side of multiculturalism."⁴ Opponents fear that the application of Islamic law to family law disputes between Canadian Muslims is "inherently discriminatory and divisive"⁵ and that the women who might participate in such tribunals would most likely be immigrant women who do not fully understand their rights under either Islamic or Canadian law.⁶ As a result of the intensity of the opposition, the Ontario provincial government appointed former Attorney General Marion Boyd to study the issues involved in establishing faith-based arbitration tribunals. In her December 2004 report ("Boyd Report"), Boyd recommended the establishment of the IICJ tribunals.⁷

Ontario seemed poised to become Canada's first province to experiment with a formal system of arbitration grounded in religious law when Ontario Premier Dalton McGuinty announced that the Arbitration Act would be amended to exclude the application of religious law to decide family law dis-

1. *Ontario Arbitration Act*, S.O. 1991, ch. 17 (1991) (Can.) [hereinafter *Arbitration Act*].

2. Dahlia Lithwick, *How Do You Solve the Problem of Sharia? Canada Grapples with the Boundaries of Legal Multiculturalism*, SLATE, Sept. 10, 2004, <http://slate.msn.com/id/2106547>.

3. Marina Jiminez, *B'Nai Brith Recommends Sharia-Based Tribunals*, THE GLOBE & MAIL (Toronto), Sept 9, 2004, at A8.

4. *Id.*

5. *Id.* (quoting Tarek Fatah, spokesperson of the Muslim Canadian Congress).

6. Lithwick, *supra* note 2.

7. See MARION BOYD, *DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION* 133 (Dec. 2004), <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf> [hereinafter *BOYD REPORT*].

putes.⁸ In February 2006, Ontario's legislature passed the Family Statute Law Amendment Act, codifying McGuinty's decision by mandating that only Canadian law may be applied to family law arbitrations in Ontario.⁹

Premier McGuinty's sudden decision is unfortunate. Canada is an especially promising environment to test the effectiveness of religious arbitration tribunals because its commitment to multiculturalism is constitutionally enshrined in the Canadian Charter of Rights and Freedoms ("Charter").¹⁰ Far from undermining the rights of the parties involved, the creation of faith-based tribunals is consistent with the notion of respecting the individual, a concept that is at the core of liberal democratic thought. It would foster a multicultural identity that will enable these individuals to be both good Canadian citizens and good Muslims. Canada's commitment to multiculturalism has long afforded religious groups the opportunity to demand a forum in which their religious laws can be applied. For example, Jewish family law tribunals, the *Beit Din*, are well established in Toronto, Montreal, and Vancouver.¹¹ Under the new family law amendment, this long-established system of religious arbitration will no longer carry any legal force in Ontario.¹² Similarly, Muslims in Canada have long submitted their disputes to local religious leaders on an informal basis. Far from being a radical innovation, the IICJ's proposal sought only to formalize tribunals that were already permissible under the Arbitration Act.¹³

Ontario's decision to amend the Arbitration Act has not quieted the debate surrounding the propriety of an official sanction of faith-based arbitration. The debate raises impor-

8. John Jaffey, *Ontario Premier Says No to Religious Arbitration*, THE LAWYERS WEEKLY, Sept. 23, 2005.

9. Press Release, Ministry of the Att'y Gen., Ontario Passes Family Statute Law Amendment Act (Feb. 15, 2006), available at <http://www.attorneygeneral.jus.gov.on.ca/english/news/2006/20060215-famend.asp>.

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

11. Natasha Bakht, *Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women*, 1 MUSLIM WORLD JOURNAL OF HUMAN RIGHTS 1, 10 n.51 (2004), available at <http://www.bepress.com/mwjhr/vol1/iss1/art7>.

12. Jaffey, *supra* note 8.

13. Lithwick, *supra* note 2.

tant questions as to the proper balance between the values espoused by a liberal democracy and the respect for the rights of a religious minority in a nation committed to multiculturalism. Much of the difficulty in parsing the arguments raised by different sectors within this discourse stems from the fact that multiculturalism in Canada is a largely aspirational concept, and there is no agreement on either the theory or its implementation. The debate becomes further heated and murky when religion is the aspect of identity seeking both protection and affirmation through official recognition of religious institutions, in part because religion advocates for a worldview in which an authority other than the state is paramount. Religious ideologies are sometimes at odds with the aim of a liberal democracy to uphold the equality of individuals under the law, particularly when a vulnerable class, such as women, may suffer discrimination under religious law.

This Note inquires into the role that the judiciary can play in achieving balance between protecting individual rights and respecting group rights where religious law is implicated, and suggests that the creation of an Islamic family law arbitration tribunal is consistent with the liberal democratic notion of respecting the individual. At the very least, the proposal should not have been as controversial as the opposition suggested. Assuming *arguendo* that it is reasonable to believe that the application of Islamic family law may be discriminatory against women, the courts can play a valuable role in reviewing arbitration awards in a more rigorous manner than the Arbitration Act currently requires in order to honor their commitment to liberal values.¹⁴ A successful negotiation between individual rights and the demands of a religious minority to administer a family law regime could have provided an effective Canadian counter-example to the assimilation-at-all-costs rhetoric voiced by some European politicians in response to the continent's growing Muslim population. This Note also seeks to develop a theory of judicial review that the Canadian courts could have applied to appeals arising out of these Islamic family law tribunals, a theory that focuses sharply on ensuring meaningful

14. For the purposes of this paper, I wish to avoid starting with the assumption that Islamic law is somehow disadvantageous or unfair to women, but I recognize that the concerns of women's groups and other opponents are valid and ought to be addressed.

consent by the parties, thereby extending the current procedural protections afforded by the Arbitration Act.

In Part II, this Note will outline the existing procedural safeguards of the Arbitration Act and examine the IICJ's proposal and its critics in greater detail. This section will also consider the arguments for whether arbitration should be an option for settling family disputes, especially those involving religious law. The third part of this Note will examine the tensions between multiculturalism and individual rights in Canada. The value and the danger of recognizing religion as an aspect of cultural identity to be protected and promoted by the state will be discussed. I conclude that the establishment of the Islamic family law tribunals in Ontario is essential to preserving the religious identity of the province's Muslim citizens. The Boyd Report's endorsement of the IICJ proposal is the correct course of action to take for a state that is committed to protecting the multicultural heritage of its citizens. The fourth part of this Note will inquire into the relationship between religious law, religious claims, and the secular court system within Canada. First, the relatively uncontroversial existence of the *Beit Din* is contrasted with the outcry to the IICJ proposal, and I attempt to understand this difference in reception. Next, I will examine the Supreme Court of Canada's Charter section 2(a)¹⁵ religious freedom jurisprudence to determine how the Court has balanced a liberal, rational state interest with a claim that is religious in nature.

I conclude with my own suggested balance of liberal state interests with religious individual and group claims. I argue that judicial review of the decisions of the Islamic family law tribunals would allow Canadian courts to ensure that the proper procedures were followed. As opposed to engaging in the rubber-stamp procedural review that seems to be the current norm under the Arbitration Act, the courts should focus on developing a more meaningful notion of consent, paying attention to the idea that a liberal democracy such as Canada retains a strong interest in protecting its citizens from potentially illiberal religious legal decisions. I suggest that courts should employ a presumption that the party challenging the results of the arbitration did not consent to the process. This

15. *Canadian Charter of Rights and Freedoms*, *supra* note 10, at c. 2(a) (guaranteeing freedom of conscience and religion).

will require the defending party to prove that there was actual and informed consent to the arbitration. Such a presumption will allow the courts to ensure that individuals choosing religious arbitration understand their rights under both Canadian and Islamic law without requiring significant judicial oversight of the substantive application of religious law. This approach offers protection for the individuals involved in the arbitration without sacrificing the group rights of a religious minority.

II. THE IICJ PROPOSAL, THE ONTARIO ARBITRATION ACT, AND THE WISDOM OF SETTLING FAMILY LAW DISPUTES
BY THE ARBITRATION PROCESS

Arbitration is a form of alternative dispute resolution that involves the appointment of an impartial third party to adjudicate a dispute between private parties. The process and rules by which the arbitrator will hear and decide the dispute are shaped by the parties, but the decision of the arbitrator is generally binding in a manner similar to that of a judicial opinion. Many civil law disputes, including certain types of family law disputes, are decided by arbitration or other forms of alternative dispute resolution. This section will examine the current procedures and protections of the Arbitration Act and consider the IICJ proposal and critiques within this context. Arguments for and against the use of arbitration in family law disputes are outlined and inform my subsequent discussion of the type of judicial oversight that the Ontario court system can develop when reviewing faith-based arbitration decisions.

A. *A Closer Examination of the Ontario Arbitration Act*

The Arbitration Act allows for the arbitration of most civil law disputes, and the statutory language does not preclude arbitrators from deciding family law cases, including those involving child custody or access issues.¹⁶ The parties must agree on the choice of arbitrator, who is not required to have any particular training or certification.¹⁷ The arbitrator must

16. Bakht, *supra* note 11, at 5. Syed Mumtaz Ali, the founder of the IICJ, has said that child custody cases will not be decided under Islamic law, but the Arbitration Act does not prevent the IICJ from changing its position on this issue. *Id.*

17. Bakht, *supra* note 11, at 3.

be independent and impartial as to both parties.¹⁸ The Arbitration Act allows the parties some flexibility to choose the set of legal principles that they wish to govern their dispute.¹⁹ However, following the 2006 amendment to the statute, religious law is no longer an acceptable choice of law for arbitrations in Ontario. The arbitrator's award must be in writing and include reasons for the decision.²⁰

The parties are required to sign an agreement that outlines the time frame for arbitration and the scope of the issues to be adjudicated.²¹ This arbitration agreement is a binding contract that can be judicially enforced if either party tries to renounce or avoid the arbitration.²² While parties can contract out of certain rights provided by the Arbitration Act, they cannot waive the court's power to enforce the arbitration agreement.²³ The arbitration agreement can be challenged but will only be revoked according to general principles of contract law,²⁴ such as the legal incapacity of one of the parties, fraudulent conduct,²⁵ duress, coercion, undue influence, or unconscionability.²⁶

Arbitration agreements and awards can be reviewed by the courts either by means of an appeal or by judicial review.²⁷ An appeal involves a court reviewing an arbitration award on either a question of law or fact, but if this right has been waived in the arbitration agreement, a party can only appeal questions of law with permission of the court.²⁸ In such a case, it is likely that a court would apply secular Canadian law based on the idea that the same legal rules should apply to similar

18. BOYD REPORT, *supra* note 7, at 12. *See also Arbitration Act, supra* note 1, at § 11(1). R

19. BOYD REPORT, *supra* note 7, at 12. *See also Arbitration Act, supra* note 1, at § 32(1). R

20. BOYD REPORT, *supra* note 7, at 12. *See Arbitration Act, supra* note 1, at § 38(1). R

21. Bakht, *supra* note 11, at 4. R

22. BOYD REPORT, *supra* note 7, at 13. *See also Arbitration Act, supra* note 1, at § 50. R

23. BOYD REPORT, *supra* note 7, at 14. R

24. *Id.* at 12. *See also Arbitration Act, supra* note 1, at § 5(5). R

25. *Arbitration Act, supra* note 1, at §§ 46(1), (9). R

26. Bakht, *supra* note 11, at 4. R

27. *Id.* at 6. R

28. BOYD REPORT, *supra* note 7, at 15. R

cases.²⁹ If the right to appeal has been waived in the arbitration agreement, court oversight is also available to the parties through the process of judicial review. Unlike an appeal, judicial review is limited to a procedural review, with the court granting deference to the arbitrator's decision unless it is unreasonable.³⁰ Courts may be more likely to defer when the arbitrator is expert in the rules of law applied to the dispute.³¹ This sort of procedural review may entail ensuring that the parties were treated equally and fairly throughout the process, which means that each party must have had the opportunity to present his or her case and to respond to the other side.³² One Ontario court has interpreted the statutory requirement that the parties be treated equally and fairly to refer to the substantive outcome as well.³³ Courts cannot refuse to enforce an arbitration award on the basis that it violates public policy, but courts have circumvented this problem by relying on a provision of the Arbitration Act that enables them to set aside agreements on the grounds that they lack jurisdiction to grant the relief sought.³⁴

B. *The IICJ Proposal and Critiques*

According to the IICJ's website, parties can submit to the jurisdiction of the Islamic arbitration tribunals in one of two ways. In the first instance, both parties can choose to bypass the Canadian court system and consent to have their case heard by an arbitrator. Use of counsel, while advised, is not required. In the second instance, a Canadian court can recommend that the dispute be heard by an arbitrator. In either scenario, the parties can choose the law (Canadian or Islamic) to be applied by the arbitrator.³⁵

29. Bakht, *supra* note 11, at 6.

30. *Id.*

31. *Id.* at 6-7.

32. BOYD REPORT, *supra* note 7, at 14-15.

33. See Bakht, *supra* note 11, at 6 n.23 (quoting *Hercus v. Hercus*, [2001] O.T.C. 108).

34. BOYD REPORT, *supra* note 7, at 16. See also *Arbitration Act*, *supra* note 1, at § 50(7).

35. Syed Mumtaz Ali & Rabia Mills, *Darul Qada (The beginnings of a Muslim Civil Justice System in Canada)*, <http://muslim-canada.org/DARLQADAform2andhalf.html> (last visited Nov. 10, 2006).

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Many of the arguments for and against the IICJ proposal overlap with more general arguments concerning the wisdom of using arbitration in family law disputes. Proponents of family law arbitration note that the practice is prevalent throughout Ontario and that very few arbitration agreements are challenged in court.³⁶ Both parties tend to accept decisions of an arbitrator because the parties have the latitude to shape the process and determine the applicable legal framework, which provides a sense of ownership over even an unfavorable result.³⁷ The costs of arbitration can be less than those of litigation and are shared by the parties. Some proponents suggest optimistically that the arbitration process, being less adversarial in nature, could be less disruptive to the family than litigation.³⁸

In addition to the general issues surrounding arbitration of family law disputes, there are specific issues that have been raised concerning the IICJ proposal. Criticism of the IICJ proposal has come from non-Muslims and from certain segments within the Canadian Muslim community.³⁹ This criticism focuses on the inappropriateness of using Islamic legal principles in family law arbitration.⁴⁰ Many people have voiced the concern that the application of Islamic law discriminates against women and deprives them of the Charter values of gender equity and equality under the law.⁴¹ Islamic law appears rigid with respect to issues such as the length of time a woman is entitled to financial support after a divorce.⁴²

It should be noted, however, that opponents of the proposal do not have any body of contemporary case law upon which to rely for the argument that a wholesale application of Islamic law would discriminate against women. What confuses this debate even more is the fact that there is no singular body of law that can be identified as Islamic law.⁴³ Islamic law has evolved

36. BOYD REPORT, *supra* note 7, at 35.

37. *Id.*

38. *Id.* at 37.

39. *Id.* at 4-5.

40. *Id.* at 46-49 (quoting submissions from opposition groups).

41. *Id.* at 47 (quoting Homa Arjomand, founder of the International Campaign Against Shariah Court in Canada).

42. *See, e.g.*, JUDITH E. TUCKER, IN THE HOUSE OF THE LAW 92 (1998).

43. *Id.* at 43 (quoting a submission from the Muslim Canadian Congress stating that there is "no such thing as a monolithic Muslim family law.").

over the religion's history according to historical circumstances and different interpretive philosophies, and its modern application in Muslim countries varies.

Nonetheless, critics note that women are treated unequally under most religious legal regimes,⁴⁴ and for this reason, some have suggested that arbitration is an inappropriate mechanism for resolving family law disputes in general. The position papers of the National Association of Women and the Law and the Canadian Council of Muslim Women indicate that a constitutional challenge could be brought against the use of the Arbitration Act for deciding family law disputes irrespective of the choice of law. The argument would be that women are disparately impacted by family law arbitration⁴⁵ because arbitration often lacks the procedural safeguards of litigation and, therefore, tends to mirror any inequities that exist within a marital relationship. A disparate impact claim in this context may constitute a violation of section 15 of the Charter, which states that every individual is equal under the law.⁴⁶ It is beyond the scope of this paper to assess the merits of such a claim, but it provides some indication of how strongly women's groups are opposed to the use of arbitration in certain types of civil law disputes.

Opponents of the IICJ proposal should realize that their otherwise well-intentioned arguments are paternalistic. The ability of each individual to determine her concept of the good life is at the heart of the liberal project. Moreover, the proposed arbitration system is completely optional and voluntary. Only those who are willing to submit to Islamic law would participate. It is neither inconceivable nor antithetical to liberal values to imagine that some individuals might choose religious law over secular law in resolving private disputes. For these individuals, their identities in both the public and private spheres of life are important, but the religious aspect of their identity is paramount. Proponents of religious arbitration note that people of faith should be allowed to live accord-

44. *Id.* at 48.

45. *Id.* at 31.

46. *Canadian Charter of Rights and Freedoms*, *supra* note 10, at c. 15. Unlike American Equal Protection jurisprudence, a disparate impact claim may be enough to allege a violation of section 15. See Clare F. Beckton, *Section 27 and Section 15 of the Charter*, in *MULTICULTURALISM AND THE CHARTER* 9 (1987).

ing to their beliefs even if those beliefs adversely impact the rights guaranteed to them by civil, secular society.⁴⁷ This sentiment has been voiced by the Christian Legal Fellowship, a supporter of the IICJ proposal, which noted that, “by choosing to have a Christian arbitrator and instructing that the decision is to be resolved according to Biblical principles, it is more important to that [Christian] individual that the dispute is resolved Biblically than that the outcome be in his or her favour.”⁴⁸

The sharpest criticism of the IICJ proposal and of religious arbitration in general centers on the notion of consent.⁴⁹ There is a concern that Muslim women may not freely choose to arbitrate their disputes but instead will submit to the jurisdiction of religious tribunals because of social and cultural pressures, such as a compromised reputation within a patriarchal community should a woman not choose the specialized tribunal.⁵⁰ A desire to conform to the norms of one’s culture, however, is not unique to the Muslim community, and this pressure is not necessarily different from other types of pressure exerted upon members of groups, such as social pressure about whom to marry. It is impossible to eliminate such influences entirely in the quest to facilitate an individual’s ability to craft her identity, and it is debatable whether a government should even attempt to do so. As will be discussed further in Part III, a liberal state should promote the opportunity for individuals to shape their identity through exposure to a variety of perspectives. Eliminating the social pressures that are inherent in membership in a cultural group does not advance the development of individual identity that can occur through critical exposure to competing value systems.

Nevertheless, the fear that women are not in a position to knowingly consent to these tribunals is heightened in the case of recent immigrants or those who are in abusive situations. These women may be more likely to be isolated within their community, worry about losing the sponsorship of their husbands, or fear violence as a result of their decisions.⁵¹ Women

47. BOYD REPORT, *supra* note 7, at 63.

48. *Id.*

49. *Id.* at 50-52.

50. *Id.* at 50.

51. *See* Bakht, *supra* note 11, at 19-20.

who are socially isolated may not know their rights under Canadian law and may not be aware of their entitlements under Islamic law.⁵²

These concerns about the appropriateness of arbitration should be taken seriously, particularly in situations where domestic violence is a factor. There is often an inherent power imbalance in many family disputes even in the absence of abuse,⁵³ but the unequal bargaining power of a battered woman is magnified. In order to avoid confrontation with her batterer, a woman may agree to waive some of her legal rights in arbitration.⁵⁴ Private enforceable contracts may serve to codify the imbalance of the relationship and disadvantage the party with the weaker bargaining power, usually the woman.⁵⁵ The influence that can be exerted on the weaker party during the course of arbitration may not actually rise to the level of coercion or duress that is required to revoke a contract⁵⁶ but may constitute tangible pressure nonetheless.

Much has been written about how vulnerable parties fare in extra-judicial proceedings. Professor Anthony Amsterdam has observed that “[t]he potential assertion of legal rights, the continuing development by courts of a body of legal rights, and the possibility of recourse to a court to adjudicate legal rights are the only significant leverage of the economically and politically weak against the economically and politically strong.”⁵⁷ Family law arbitrations over the issue of spousal support often proceed on the tenuous assumption that the husband and wife stand in a position of equal bargaining power relative to each other.⁵⁸

There is no reason to believe, however, that an arbitrator is incapable of creating a neutral forum and a process through

52. BOYD REPORT, *supra* note 7, at 51-52.

53. See Brenda Cossman & Roxanne Mykitiuk, *Reforming Child Custody and Access Law in Canada: A Discussion Paper*, 15 CAN. J. FAM. L. 13, 68 (1998).

54. *Id.* (recommending that alternative dispute resolution for family law disputes be voluntary, and that certain issues, such as whether violence has occurred, should not be adjudicated in an alternative dispute resolution setting).

55. *Id.* at 70.

56. Andre R. Imbrogno, *Arbitration as an Alternative to Divorce Litigation: Redefining the Judicial Role*, 31 CAP. U. L. REV. 413, 428 (2003).

57. *Id.* at 423-24 (quoting Anthony G. Amsterdam).

58. *Id.* at 414 (arguing that arbitration on spousal and child support issues should not be allowed for public policy reasons).

which each party can present his or her case without fear of retribution from other parties. Efforts can be made to address social isolation by requiring that the arbitrator hearing a specific case ensure that parties are aware of their rights under both sets of laws. For example, an arbitrator could advise the parties to seek or retain independent legal counsel to assist them in evaluating the merits of their cases under both Islamic and Canadian law.

Opponents of family law arbitration decry the “privatization of public justice,”⁵⁹ arguing that the wholesale removal of family law disputes from the oversight and purview of the courts will result in a loss of public scrutiny and culminate in the stagnation of family law.⁶⁰ This could remove issues such as domestic violence and women’s rights from the public discourse. While these are valid arguments, it is doubtful that family law disputes will be removed entirely from the jurisdiction of the courts. Commercial disputes are often arbitrated, yet no one expresses concern that Canadian courts will no longer develop business law jurisprudence. An arbitrator with more experience hearing family law cases may also be in a better position to advance the development of the law than a generalist judge for whom family law disputes comprise only a small percentage of her docket.

Domestic violence and the exploitation of women are serious issues that should neither be ignored nor trivialized in the debate over whether religious arbitration is a viable alternative to the Ontario court system. Nevertheless, these are social issues that transcend contexts in which religious law is implicated. Furthermore, under the IICJ proposal, only a small subset of all family law cases in Canada, those involving Muslims who consent to have their cases arbitrated under religious law, would be removed from the courts, so these issues will remain a part of Canadian public discourse.

The focus of the debate, therefore, should be not on whether these tribunals should be allowed at all but rather on the types of procedures that can be implemented to ensure that the women who appear before the tribunals do so of their own volition. A theory of judicial review of arbitration decisions should be developed that not only respects the claims of

59. *Id.* at 422.

60. *Id.*

religious groups and individuals but is also sensitive to the rights of vulnerable parties in family law disputes. Such a theory should involve a more robust idea of consent, as will be discussed further in Part IV. An exploration of whether women are in fact willing to consent to the authority of the proposed tribunals is necessary, but calling for an outright ban on religious arbitration undermines women's agency and individual autonomy to make decisions that will structure their family affairs. Refusing to affirm the religious identity of some individuals by denying them a forum in which their disputes can be adjudicated under religious law undermines the objectives of a liberal democracy, a theme that will be explored in Part III.

III. THE TENSION BETWEEN LIBERAL VALUES AND CANADA'S COMMITMENT TO MULTICULTURALISM

This section examines different theories of liberal democracy and the role that the state should play, if any, in fostering an environment in which minority groups can survive and thrive. In particular, religious identity appears to pose a danger to the liberal democratic model because it requires adherents to acknowledge an authority that is greater than that of the state. For some adherents, acknowledging another authority may mean espousing views that privilege the group at the expense of the individual, who is at the center of the liberal democratic model. The controversial nature of promoting religious identity by the state is discussed. The section concludes by examining Canadian judicial pronouncements on the meaning of multiculturalism under section 27 of the Charter and examines the types of obligations that are imposed on the Canadian government by this provision.

A. *An Overview of the Liberal Culturalism Model*

Intrinsic to the concept of a liberal democracy is the notion of individual freedom and the guarantee of significant latitude to make decisions about the course one's life ought to take.⁶¹ This notion stems from the Kantian conviction that human dignity arises from the autonomy of each individual to

61. WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 80 (1995) [hereinafter *MULTICULTURAL CITIZENSHIP*].

determine what constitutes the good life.⁶² A liberal society is one that recognizes that individuals lead better lives when they are afforded opportunities to critically examine their beliefs and reformulate them as necessary based on experiences with alternative or competing value systems.⁶³ It follows, then, that liberalism places a premium on the right to individual privacy, education, and freedom of expression and association.⁶⁴ The classic liberal view posits that the state must remain neutral with respect to the notion of the good life and that it should limit its power to equal treatment of its citizens.⁶⁵

Will Kymlicka presents an interesting argument concerning the role of multiculturalism in a liberal society. He accepts as reality that the modern world is composed of "societal cultures,"⁶⁶ defined as an incorporation of practices and institutions that "provides its members with meaningful ways of life across the full range of human activities encompassing both public and private spheres."⁶⁷ Kymlicka then assumes that access to, or membership in, a societal culture provides individuals with the framework to meaningfully evaluate different practices or beliefs.⁶⁸ While he recognizes that the development of a dominant societal culture in which people share common membership and engage with common institutions is an inevitable feature of the modern democratic society,⁶⁹ integration of minority groups can be costly.⁷⁰ In fact, Kymlicka asserts that liberals ought to expect that cultural identity is something people want to maintain.⁷¹ Further, cultural membership provides individuals with a sense of belonging, and an individual's self-respect is positively correlated with the respect that is accorded to his or her minority group.⁷²

62. Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM* 57 (Amy Gutmann ed., 1994). See also Sanford Levinson, *On Political Boundary Lines, Multiculturalism, and the Liberal State*, 72 *IND. L.J.* 403, 412 (1997).

63. *MULTICULTURAL CITIZENSHIP*, *supra* note 61, at 81.

64. *Id.*

65. Taylor, *supra* note 62, at 57.

66. *MULTICULTURAL CITIZENSHIP*, *supra* note 61, at 75.

67. *Id.* at 76.

68. *Id.* at 83.

69. *Id.* at 76-77.

70. *Id.* at 85.

71. *Id.* at 86.

72. *Id.* at 89.

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At the heart of the contemporary multiculturalism debate is the idea that one's identity is affected by recognition by others (usually the dominant culture) to the extent that non-recognition or misrecognition can actually inflict psychic and social harms.⁷³ For example, Charles Taylor notes that women in patriarchal societies internalize a sense of inferiority, and this negative self-image can sometimes prevent them from taking advantage of tangible opportunities for advancement.⁷⁴ Taylor devotes much attention to developing a definition of what he terms the "politics of equal recognition,"⁷⁵ which consists of two main branches of thought. The first is a politics of universalism that focuses on the equal dignity of all citizens that translates into an "equalization of rights and entitlements."⁷⁶ The second is the politics of difference that seeks to recognize the unique identities of individual and groups.⁷⁷ While the politics of difference may seem diametrically opposed to the politics of universalism, Taylor argues that the former is a natural outgrowth of the latter because recognition and equal treatment alone will not positively reinforce individual constructions of dignity and self-worth. Instead, the politics of difference seeks to redefine nondiscrimination (the essence of the politics of universalism) as requiring that certain historically disadvantaged groups deserve different treatment.⁷⁸ Individuals and groups require respect from society for those aspects of their identities that make them unique.⁷⁹

73. See Taylor, *supra* note 62, at 25.

74. *Id.* "Due recognition is not just a courtesy we owe people. It is a vital human need." *Id.* at 26.

75. *Id.* at 37.

76. *Id.*

77. *Id.* at 38.

78. *Id.* at 39. While those familiar with the affirmative action debate in the United States will recognize some of these arguments (specifically, that social programs targeting minority groups are designed to level the playing field so that society can eventually return to the difference-blind ideal of universalist politics), Taylor suggests that these arguments do not "justify some of the measures now urged on the grounds of difference, the goal of which [are] . . . to maintain and cherish distinctness . . . forever. After all, if we're concerned with identity, then what is more legitimate than one's aspiration that it never be lost?" *Id.* at 40.

79. K. Anthony Appiah, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction*, in *MULTICULTURALISM*, *supra* note 61, at 161 (arguing that "[i]t will not even be enough to require being treated with equal dignity despite being Black, for that will require a concession that being

Having advanced a theory of liberal democracy in which people's freedom to make meaningful choices is rooted in a notion of cultural identity and membership, Kymlicka argues that the state should take affirmative steps to protect and promote its national cultures.⁸⁰ Liberal nationalism allows a state to assume a national culture but does not prohibit individuals from expressing alternative national identities.⁸¹ Similarly, under a theory known in the literature as "liberal multiculturalism," the state should accommodate the claims of minority groups, including religious minorities, through measures such as recognition of minority holidays, incorporation of the history of minority groups into education curricula, and cultural sensitivity training for public employees.⁸² The convergence of liberal nationalism and liberal multiculturalism, according to Kymlicka, implies the birth of a greater, hybrid liberalism known as liberal culturalism, a theory which demands state protection of individual civil and political rights and the recognition of the claims of distinct minority groups.⁸³

The emerging concept of hybrid liberalism is complicated because individual freedoms often conflict with efforts to preserve and nurture minority cultures.⁸⁴ For example, a collective notion of the good life arguably defies the liberal project of granting the individual the autonomy to shape and define her identity. The tensions within such a scheme arise over the limitations, if any, that should be placed on official state recognition of minority group claims that are in conflict with liberal values.⁸⁵ Nonetheless, a state that recognizes such collective visions can be liberal, provided that it respects the diversity of

Black counts naturally or to some degree against one's dignity. And so one will end up asking to be respected *as a Black*.").

80. WILL KYMLICKA, *POLITICS IN THE VERNACULAR* 39 (2001) (referring to *liberal nationalism*, which envisions the state creating public institutions that utilize national languages and national symbols and enable national minorities to exercise self-government on "issues that are crucial to the reproduction of their language and culture.").

81. *Id.*

82. *Id.* at 41-42.

83. *Id.* at 42.

84. *Id.*

85. Kymlicka believes that liberals can only promote group rights so long as they do not undermine individual rights to freedom and autonomy. See MULTICULTURAL CITIZENSHIP, *supra* note 61, at 75.

its citizens who do not share such views of the good life.⁸⁶ Taylor advances a model of such a state that is “willing to weigh the importance of certain forms of uniform treatment against the importance of cultural survival, and opt sometimes in favor of the latter.”⁸⁷

Other scholars disagree with such a model, arguing that liberal democracies cannot take action to *guarantee* survival of cultural groups, because doing so would “necessarily rob [members of such groups] of the very freedom to say yes or no that is necessary if they are to appropriate and preserve their cultural heritage.”⁸⁸ This view fails to consider that the existence of a group is necessary in order for an individual to exercise a meaningful choice about her membership and her identity. This in turn suggests that the state may need to play a role in the preservation of cultural groups.

Canada represents one possible adaptation of the liberal culturalism model. The Charter, incorporated into the Constitution in 1982,⁸⁹ is animated by liberal values. It grants certain individual rights and freedoms and dictates that such rights and freedoms be applied equally to all citizens.⁹⁰ However, the Charter also contains provisions that pose a threat to traditional liberalism. Section 15 of the Charter contains a clause that permits affirmative action programs,⁹¹ recognizing that for some groups, equal treatment under the law may mean differential treatment. The Charter also includes a language rights scheme that privileges English and French speakers.⁹² Finally, the Charter explicitly recognizes Canada’s commitment to preserving and enhancing the multicultural heritage of its citizens.⁹³ The Charter itself embodies a thick concept of culture, forcing Canadian society to confront the conflicts that arise from hybrid liberalism, as discussed above. The tensions embodied by the Charter’s understanding of culture vis-à-vis individual rights may predispose Canadians to try multicult-

86. Taylor, *supra* note 62, at 59.

87. *Id.* at 61.

88. Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, in MULTICULTURALISM, *supra* note 61, at 130.

89. Bakht, *supra* note 11, at 4.

90. *Canadian Charter of Rights and Freedoms*, *supra* note 10, at c. 15.

91. *Id.*

92. *Id.* at c. 23.

93. *Id.* at c. 27.

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tural experiments. Some exploration of these constitutionally enshrined values is needed in order to give some context to the IICJ's proposal and the ensuing controversy.

B. *The Value and Danger of Recognizing Religion as an Aspect of Cultural Identity to be Promoted by the Multicultural State*

In relation to other aspects of identity, religion strikes those of the liberal school of thought as something different and less deserving of promotion by the state, at least when it seeks to enter and influence public discourse. Religious identity is often seen as a divisive force in society.⁹⁴ Many religious worldviews tend to provide for a singular concept of the good life, which place them squarely at odds with the allegedly neutral liberal state. Religion poses a unique threat to the liberal state because it is a "social force [that] exists outside the state . . . and den[ies] the absolute authority of the state and the infallibility of its views."⁹⁵

Liberal democrats argue that public political decisions should not rely on religious arguments. This argument is based on the idea that mutually binding laws should be reciprocal and not based on faith.⁹⁶ Such a position assumes that religious arguments are "essentially private"⁹⁷ in nature, not an unreasonable assumption to make in a pluralist society. The liberal democrat resists treating religious beliefs as inherently special because doing so would provide weight for religiously-supported public decisions.⁹⁸ Religion "cannot justify a coer-

94. *Id.* While the political philosopher Alexis de Tocqueville considered religious believers in general to be public-regarding citizens, Amy Gutmann argues that the public utility of religion is mixed. AMY GUTMANN, *IDENTITY IN DEMOCRACY* 162-63 (2003).

95. Paul Horwitz, *The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond*, 54 U. TORONTO FAC. L. REV. 1, 52 (1996).

96. GUTMANN, *supra* note 94, at 156.

97. *Id.*

98. *Id.* The public value of a religious argument lies not in its alleged truth, but in its accessibility to non-religious citizens as representing a democratic ideal. *Id.* at 160. Gutmann notes that the strength of liberal democracy lies not with "firmer foundations [than religion] but rather for its better fit within a publicly defensible conception of politics, its lack of necessary foundation in any comprehensive philosophy, and its overlap with all reasonable philosophies, where reasonable philosophies include religious ones." *Id.* at 157.

cive law because it cannot reasonably expect the public assent of citizens who . . . do not share the religious faith of those who take its dictates on faith."⁹⁹

While the strong liberal interest in according its citizens equal respect ought to preclude treating religiously-based claims as inherently special, the state arguably does a disservice to its commitment to honor and uphold the dignity of its citizens by discounting religious identity. Liberal philosophy regards religion as a private and arbitrary choice that should not influence public discourse. This implies that any arbitrary or private sentiment has no place in public discourse and, instead, that all public discourse must consist of purely rational ideas.¹⁰⁰ Canadian courts have adopted an approach where rationally-conceived state goals often trump religious claims.¹⁰¹ As will be discussed further in Part IV(B), religious beliefs are often viewed by the courts as personal in nature, while the social and collective aspects of religious identity are often ignored.¹⁰² In cases involving claims of violations of the freedom of religion, courts have analyzed the constitutionality of the state interest by asking whether it is a reasonable limit on the allegedly infringed right.¹⁰³ The state interest usually passes constitutional muster.¹⁰⁴ By ignoring the collective aspects of religious identity when considering the effect of a potentially conflicting state law, the state effectively compartmentalizes aspects of an individual's identity that, for the individual, may not be severable. Conceiving of religion as solely an individual right may result in the individual feeling less respected for who he is.

This approach fails to consider that, for many believers, religion provides the framework by which they process the stimuli of their environment. Any responses to such stimuli will be in the language of their faith. The religious community can play an integral role in the shaping of individual identity and often mediates the individual's interaction with other

99. *Id.*

100. John Von Heyking, *The Harmonization of Heaven and Earth?: Religion, Politics, and Law in Canada*, 33 U. BRIT. COLUM. L. REV. 663, 665 (2000). See also Horwitz, *supra* note 95, at 5.

101. See Horwitz, *supra* note 95, at 5.

102. Von Heyking, *supra* note 100, at 668.

103. Horwitz, *supra* note 95, at 33.

104. *Id.*

members of society and the state.¹⁰⁵ Discounting the value of arguments in the public arena simply because they are religious ignores the intrinsic force of such ideas to their proponents. This can effectively bar a religious citizen from fully participating in civic matters,¹⁰⁶ which threatens the idea of citizenship in a multicultural society.

Instead of being excluded from public discourse, religious arguments should be allowed to expand the boundaries of acceptable debate¹⁰⁷ and facilitate the participation of religious citizens in significant political decisions. Indeed, by providing an alternative means of expression and comprehension of the world, religious groups can serve as a counterweight to the authority asserted by the state.¹⁰⁸ A properly functioning liberal democracy should be strengthened by this greater diversity of viewpoints and filter out arguments that are illiberal and undermine basic norms that the state strives to uphold irrespective of whether those arguments are religious or not. Religion should be recognized as an essential feature of individual identity that should be accommodated, rather than dismissed, by the state.

C. *The Meaning of Multiculturalism in Canada:
Interpretations of Section 27*

If there is one thing that various commentators, politicians, and judges can agree on, it is that there exists no one definition of multiculturalism. The definitions that have been proffered are informed and limited by government reports,¹⁰⁹ the Multiculturalism Policy of 1971 and accompanying legislative history,¹¹⁰ the Canadian Multiculturalism Act,¹¹¹ Canada's constitutional principle of dualism with respect to Canada's official language minorities,¹¹² the specific text of section 27,¹¹³

105. Horwitz, *supra* note 95, at 48.

106. *See id.* at 27.

107. *Id.* at 52-53.

108. *Id.* at 52.

109. Vern W. DaRe, *Beyond General Pronouncements: A Judicial Approach to Section 27 of the Charter [forthcoming?]*, 33 ALTA. L. REV. 551, 556 n.20 (1995).

110. *Id.* at 556 n.21.

111. *Canadian Multiculturalism Act*, R.S.C. 1985, c. 24, s. 3.

112. DaRe, *supra* note 109, at 554-55. "[W]ith respect to those areas of the constitution that reflect duality . . . anglophone and francophone minorities stand in a preferred position [as to other ethnic minorities]." *Id.* at 554

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and its limited case law.¹¹⁴ One critic has decried multiculturalism as it has been implemented as nothing more than “a choice of pizzas, won ton soup, and kosher style pastrami sandwiches to which one can add ethnic radio programs.”¹¹⁵

Even if the Kymlicka notion of culture were accepted, this still does not suggest the proper approach to multiculturalism in Canada. The constitutional record of section 27, an important interpretive canon of Canadian constitutional law, notes that multiculturalism includes freedom from discrimination and the right to group survival.¹¹⁶ These two conceptualizations may be difficult to realize because multiculturalism is conceived of as both an individual right (the right of freedom from discrimination) and as a group right (the right to survival).¹¹⁷ The right of freedom from discrimination can be framed as a negative right, whereas the right to survival connotes a positive right. Understanding multiculturalism as either a negative or a positive right has ramifications for the type of actions and policies that the state is expected to undertake with regards to the cultural identities of its citizens. State action and policies also involve expenditure of resources. While the provision of negative rights can demand a significant allocation of resources, such as police enforcement of anti-discrimination statutes, positive rights may involve even more, since the state may be required to affirmatively provide institutions that will sustain minority groups.

According to Joseph Magnet, the minority rights understood to be encompassed by section 27 can be understood by what he terms “symbolic ethnicity”¹¹⁸ and “structural ethnicity.”¹¹⁹ Symbolic ethnicity finds resonance in both the Kymlicka and Taylor hypotheses of culture shaping individual iden-

n.17. The dualism principle limits the scope of s. 27 such that instead of being read as a grant of absolute minority rights, it is interpreted as providing a broad negative right to culture. *Id.* at 555.

113. *See id.* at 567.

114. *See id.* at 559 (“Judicial approaches to s. 27 have ranged from ambivalence to avoidance.”).

115. Joseph Eliot Magnet, *Interpreting Multiculturalism*, in MULTICULTURALISM AND THE CHARTER 145, 146 (1987) (quoting Professor Howard Brotz).

116. *Id.* at 147.

117. DaRe, *supra* note 109, at 558.

118. Magnet, *supra* note 115, at 148.

119. *Id.*

tity and assumes that cultural identification is a voluntary, individual choice.¹²⁰ Structural ethnicity, in contrast, is a collective enterprise to create an institutional infrastructure that will maintain and preserve the cultural group.¹²¹ Magnet notes that Canadian multiculturalism policy supports symbolic ethnicity by allocating government funds for ethnic conferences and festivals. By comparison, government-funded French language education programs blur the line between symbolic and structural ethnicity, because maintenance and survival of a language necessarily depends on a group. To the extent that section 27 connotes symbolic ethnicity, it can be understood as affording protection from discrimination associated with the individual choice to identify with a particular group and can be articulated as a negative right.¹²² Whether section 27 lends itself to an interpretation that imposes an affirmative requirement on the part of government to provide cultural groups with a meaningful institutional infrastructure is less clear.

Canadian courts have not grappled much with the meaning of section 27¹²³ and even less with the Canadian Multiculturalism Act, the statute instructing the Canadian government to, inter alia, “recognize and promote the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to preserve, enhance, and share their cultural heritage.”¹²⁴ In addition to the imprecise text of section 27 and the lack of clarity regarding the proper balance between the individual and collective rights suggested by the constitutional record and legislative debates, the judiciary may not be the best branch of government to charge with promoting and enhancing minority groups through the establishment of institutions. This is because courts can most effectively redress concrete problems arising from a narrow set of issues and facts. Courts are less equipped to design prospective solutions to policy issues because they lack the resources to investigate alternatives and are not institutionally competent to bal-

120. *Id.*

121. *Id.*

122. *Id.* at 148-49.

123. DaRe, *supra* note 109, at 564 (noting that some judicial decisions tend to “cite [section] 27 and then virtually ignore the provision.”).

124. *Canadian Multiculturalism Act*, R.S.C. 1985, c. 24, s. 3(1)(a).

ance an entire legislative agenda by allocating financial expenditures accordingly. Perhaps in part because of these difficulties, the Supreme Court of Canada explicitly rejected Magnet's concept of structural ethnicity but adopted his definition of symbolic ethnicity in its interpretation of section 27 in *R. v. Keegstra*.¹²⁵ The case involved an appeal by a Canadian teacher convicted of making anti-Semitic statements to his students under a provision of the Criminal Code that penalized the willful promotion of hatred against an identifiable group. The teacher challenged the constitutionality of the statute as violating his section 2(b) right of freedom of expression. The government argued in part that section 27 helped inform both the scope of the section 2(b) right and the analysis of the statute as a "reasonable limit" on the right of freedom of expression under section 1.¹²⁶ Noting that the section 27 commitment to multiculturalism legitimized the government's objective in targeting hate propaganda, the Court framed section 27 as representing a "principle of non-discrimination,"¹²⁷ thereby protecting the individual's feelings of self-worth by preventing attacks against her culture in accordance with Magnet's definition of symbolic ethnicity. The dissent was harsh in its critique of the government's argument that section 27 should be used to limit the scope of section 2(b), stating that multiculturalism was neither a right nor freedom but instead an "abstract value"¹²⁸ that should not undermine the wide protections granted to expressive speech under section 2(b).

The IICJ's proposal represents an interesting challenge to the *Keegstra* philosophy of multiculturalism because it advocates for a form of structural ethnicity that would consist of the establishment of a legal institution that can subsequently dictate the content of its members' rights. Judicial pronouncements notwithstanding, the IICJ proposal itself may not be inconsistent with the meaning of section 27. Courts may shy away from promoting structural ethnicity under section 27 because doing so would require them to engage in the sort of legislative-type policy decisions that they simply are unable to

125. [1990] 3 S.C.R. 697; DaRe, *supra* note 109, at 564-65.

126. *Keegstra*, 3 S.C.R. at 757-58 (upholding the hate speech statute as a "reasonable limit" under § 1).

127. *Id.*

128. *Id.* at 835-36 (McLachlin, J., dissenting).

perform well without an opportunity to develop a comprehensive record of the issues and resources that are implicated. However, the Ontario legislature may be in a better institutional position to encourage a definition of multiculturalism that includes the establishment of infrastructure that can facilitate the promotion and survival of a minority group.

The government-commissioned Boyd Report's approval of the IICJ's proposal indicates Ontario's respect for the desire of the Muslim community to administer religious personal and family law regimes. Despite the fact that Muslims will opt out of Canadian law in order to participate in the arbitration tribunals, their sense of national loyalty may well increase as they are able to be both "good" Muslims and "good" Canadians without violating either religious or secular law. A liberal democracy has a compelling interest in its own perpetuation and should work to include those individuals who have potentially conflicting identities. By having various aspects of their identities supported, people are likely to feel more comfortable participating in public and political discourse. Through the promotion of infrastructure in which its citizens' differences can co-exist openly rather than be repressed, Canada can provide a solution which other liberal democracies can adapt, particularly those societies with growing immigrant populations.

The difficulty with the IICJ proposal is that the application of religious law to family disputes could potentially undermine some of the protections granted to all Canadian citizens by the Charter. It should be the responsibility of the Canadian judiciary to balance individual rights with the respect for the group rights claimed by the IICJ. The IICJ proposal in particular may force Canadian society to define the scope and limits of its multiculturalism and religious freedom guarantees.

IV. THE RIGHT OF FREEDOM OF RELIGION AS CURRENTLY UNDERSTOOD IN CANADA

This part describes Canadian judicial pronouncements on the scope of the right of freedom of religion under section 2(a) of the Charter. The courts have historically construed this right as an individual one, and attempts to frame the right as belonging to a group have generally been received with skepticism. Understanding the judicial approach to religious freedom informs my recommendations for how courts ought

to review decisions of the Islamic family law tribunals while taking into account the courts' preference for the rational, the secular, and the individual in disputes where claims on behalf of a religious group are made. I also place the IICJ proposal within a larger history of faith-based arbitrations in Ontario in order to attempt to understand the motivations of its opponents.

A. *The Beit Din and Understanding the IICJ
Controversy in Context*

As previously noted, Orthodox Jews have long submitted their private disputes to the *Beit Din* religious tribunals throughout Ontario. Courts have opted to defer to the opinion issued by the tribunals in the few decisions that have been appealed.¹²⁹ What is notable about the existence of the *Beit Din* is that there has been no comparable opposition to that encountered by the IICJ proposal. There may be no singular or satisfactory explanation for the difference in reception, but one glaring distinction is that, unlike the Muslim community in Ontario, Orthodox Jews are forbidden by the tenets of their religion to submit to the jurisdiction of a secular civil court.¹³⁰ In contrast, while Muslims face no such prohibition, the IICJ suggests that Muslims affirmatively opt out of the Canadian judicial system. Thus, whereas mere tolerance of the status quo with respect to the *Beit Din* could be characterized as an omission or failure to act, to borrow an analogy from American constitutional law, official government sanction of the tribunals proposed by the IICJ may be described as state action facilitating an exit from liberal society. This state-condoned exit may seem particularly troubling to those opposed to the tribunals. While much emphasis is placed on the right to exit *from* cultural groups as a cornerstone of liberal society,¹³¹ the IICJ proposal involves exit of the opposite variety and may be perceived as undermining, rather than supporting, core liberal values concerning the right to shape individual identity.

129. See *Weidberg v. Weidberg*, [1991] 32 R.F.L.3d 110 (Ont. Ct. Justice) at ¶ 12.

130. BOYD REPORT, *supra* note 7, at 55.

131. See Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 536 (2001).

Nonetheless, the decisions of the *Beit Din* raise some of the same conflicts as the IICJ tribunals. Thus, the existence of the *Beit Din* should have served to diffuse some of the controversy over the IICJ proposal. The IICJ simply sought formal recognition by the state to operate tribunals that would have been permitted by the text of the Arbitration Act prior to the 2006 amendment.¹³² The successful effort by the opposition to have the statute amended so that it prohibits the application of religious law to any arbitration is misguided. For reasons that have been outlined in Part III, some individuals will choose to govern their lives according to religious principles and will voluntarily and informally submit their disputes to be adjudicated under religious law. The state should validate these choices while ensuring access to the judicial system to protect those parties that may not want to submit to the jurisdiction of these specialized tribunals but are coerced into doing so.

B. *Section 2(a) Jurisprudence: The Development of an Individual Right of Freedom of Religion*

The liberal tradition privileges freedom of religion as a fundamental right but regards it as one belonging to the individual and ignores the communal characteristics of religion. The Supreme Court of Canada has constructed an expansive notion of the right of freedom of religion in its seminal cases,¹³³ but this right has been framed in largely personal terms that evince a liberal understanding of religion as an individual choice.¹³⁴ In *Edwards Books*,¹³⁵ the Court stated that the “purpose of s. 2(a) is to ensure that society does not interfere with *profoundly personal beliefs* that govern one’s perception of oneself [and] humankind.”¹³⁶ A concept of religious beliefs

132. *Arbitration Act*, *supra* note 1, at § 32(1).

133. Horwitz, *supra* note 95, at 29-31. The seminal cases are *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, ¶ 125 (rejecting a strong distinction between belief and action and recognizing that “the interests of true equality may well require differentiation in treatment” of religions), *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 (rejecting a sharp distinction between direct and indirect burdens placed on the practice of religion), and *R. v. Jones*, [1986] 2 S.C.R. 284.

134. Horwitz, *supra* note 95, at 30.

135. [1986] 2 S.C.R. 713.

136. Horwitz, *supra* note 95, at 31.

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as “profoundly personal” relegates them to the private sphere and ensures that liberal thought and rationales govern the public sphere.¹³⁷ A religious, decidedly non-rational belief that is perceived as an individual choice often is not accorded much weight as compared to a liberal, rational claim, and secular courts are more likely to favor the latter when the two conflict.¹³⁸

In *R. v. Jones*,¹³⁹ the Court did not find a section 2(a) violation, rejecting the plaintiff’s argument that applying to a public school board for certification of his private religious school involved an acknowledgment of an authority other than God and thus violated his religious beliefs.¹⁴⁰ The majority acknowledged that the statute requiring certification of private schools could constitute government interference with individual freedom of religion, but found that the government’s interest in ensuring minimum standards for education throughout the province was compelling and the certification requirement constituted a reasonable limit on the freedom of religion under section 1 of the Charter.¹⁴¹ The dissent expressed skepticism that the certification requirement even compromised the plaintiff’s religious beliefs and chose instead to limit the scope of the right of freedom of religion as opposed to determining whether the state’s interest in private school certification was a “reasonable limit on this right.”¹⁴² More notable is the difference in the approaches utilized by the majority and dissent to evaluate the religious claims. The majority assumed both the sincerity of the plaintiff’s religious beliefs and that the certification requirement infringed upon those beliefs and proceeded to evaluate the constitutionality of the statute under section 1.¹⁴³ However, the court noted that the sincerity of a religious belief is a valid question of fact to be ex-

137. *Id.*

138. *Id.* at 33.

139. [1986] 2 S.C.R. 284.

140. Horwitz, *supra* note 95, at 32.

141. *Jones*, 2 S.C.R. at 295, 297.

142. *Id.* at 313-15 (Wilson, J., dissenting) (“[T]he appellant has failed to show any substantial impact of this legislation on his belief that God and not the state is the true source of authority over the education of his children. . . . I do not believe, therefore, that it gives rise to a violation of s. 2(a) of the Charter.”).

143. *Id.* at 295, 297 (majority opinion).

amined in cases where an exemption from a law is being sought.¹⁴⁴ Justice Wilson, in dissent, found that the plaintiff failed to establish that the certification requirement infringed upon his right of freedom of religion, noting that the Charter does not preclude the legislature from imposing any burdens on religion.¹⁴⁵ Justice Wilson's willingness to examine the claim more rigorously enabled him to outline the borders of the section 2(a) right of religious freedom¹⁴⁶ in contrast to the majority's presumption that the plaintiff's right was per se violated. The dissent's approach places religious claims at an inherent disadvantage, because it fails to consider that to a religious individual, acknowledging the state's authority over a religious institution may be a grave violation of his beliefs.

The argument has been made that, in cases involving a conflict between religious beliefs and state interests, a court should suspend its rationalist bias and instead treat the religious claim with the same regard that the believer holds toward it.¹⁴⁷ Such an approach is necessary if the right of freedom of religion in a liberal state is to be of any significance, because, as Horwitz notes:

Many judgments in disputes between state goals and religious beliefs are informed by a skepticism that treats religion as an individual belief—a valuable belief, perhaps, but a mere belief nonetheless. Against this belief is mustered the rational, provable interests of the state. Particularly where there may already be a general attitude of deference to the state, a religious claim will be far more likely to fall short in the balance if it is examined from a rationalist perspective, or even a sympathetic outsider's perspective.¹⁴⁸

This is not to suggest that religious claims should always prevail over state interests, but the state should have the bur-

144. *Id.* at 295.

145. *Id.* at 313-14 (Wilson, J., dissenting).

146. *Id.* at 315 ("If the statutory machinery has any impact at all on the appellant's freedom of conscience and religion which . . . I doubt, it is an extremely formalistic and technical one.")

147. Horwitz, *supra* note 95, at 56-57.

148. *Id.* at 56.

den of showing a “truly compelling”¹⁴⁹ interest before being able to overcome a conflicting religious belief.

Such a judicial balance of religious and state interests is attractive, but it is difficult to imagine its translation into a practical context. The approach, requiring that a judge view the conflict wearing the lens of the religious believer, envisions the role of judge as an anthropologist, which would require a different, non-legal sort of training. Even if a judge were called simply to make a good-faith effort to adopt the religious believer’s perspective, an anthropologist is required to “[*learn*] to live another form of life and to speak another kind of language.”¹⁵⁰ While such an undertaking is not impossible, the judge will be practically limited by the record before her. It is also difficult for a judge trained in a legal culture that privileges individual rights to prevent the imposition of those values even when attempting to consider the religious belief at issue for its intrinsic worth. In a society that strives to uphold the rule of law as to each citizen, it is debatable whether we even want judges to abandon their rationalist methods of adjudication in cases where religious beliefs are at dispute. Nonetheless, some balance of religious beliefs and state interests needs to be struck, particularly if Ontario courts face appeals from the Islamic family law arbitration tribunals. This would recognize that for some individuals religious identities may be so highly valued that a categorical rejection of their beliefs in a public arena would have the effect of marginalizing them and deterring their participation as citizens.

V. A PROPOSED THEORY OF JUDICIAL REVIEW: PRESUMPTION OF NO CONSENT

Balancing religious and state interests requires the judiciary to weigh the necessity of protection of vulnerable parties, particularly women, against the desire of religious groups to structure and regulate their members’ lives according to the group understanding of the good life.

A judicial review of the decisions from religious arbitration tribunals should assume the form of a procedural review. As outlined in Part II(A) above, such a review would ensure

149. *Id.* at 57.

150. TALAL ASAD, GENEALOGIES OF RELIGION 180 (1993).

that the parties had an equal opportunity to present their arguments but would stop short of wholesale deference to the arbitrator's decision. The current standard of review on issues of law where the arbitration tribunal has a high degree of expertise in the substantive law being applied is reasonableness.¹⁵¹ It is the most deferential standard of review, and Canadian courts may feel compelled to apply it when reviewing appeals from the Islamic family law tribunals. However, decisions governed by religious law should be entitled to an intermediate standard of review that does not disadvantage the party seeking the safeguards that normal judicial oversight provides. The standard of review applied should also avoid intruding upon the authority of the religious tribunals to guide the organic evolution of their laws.

One scholar has proposed that all arbitration awards arising out of these tribunals should be subject to a mandatory judicial review in order to relieve the aggrieved party of the burden of the cultural disapproval that may accompany an appeal of the tribunal's decision.¹⁵² A mandatory review surely would not be a reasonable limit on the section 2(a) right of freedom of religion even under the dissent's rule in *Jones*, because imposing Canadian legal principles upon the arbitration decisions in order to "create an incentive for the religious arbitrators to develop a more reformist and egalitarian interpretation of the tradition"¹⁵³ presents the scenario that Canadian law will have the final say over the content of Islamic family law. Requiring judicial review in these cases means that Muslims will have to acknowledge a source other than God's law as authoritative.¹⁵⁴ Further, if there is no requirement of a mandatory review in comparable situations, such as the *Beit Din* decisions, such a proposal suggests a deeper distrust of Islamic law and the ability of tribunals to administer a just Mus-

151. *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, 590.

152. Ayelet Shachar, *Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, 50 MCGILL L.J. 49, 76 (2005).

153. *Id.* at 77.

154. *See supra* note 142 and its accompanying text (a mandatory judicial review that shapes the direction of Islamic family law jurisprudence in Canada may rise to a section 2(a) violation under Justice Wilson's formulation in *Jones*).

lim family law regime rather than a genuine concern for vulnerable women who may be subject to an illiberal legal system.

Since people usually agree to arbitrate in order to avoid the time and financial strain of litigation, many lack the prescience to accurately assess the value that they will place on judicial access should they wish to challenge the result later, particularly where the decision to arbitrate is made in advance of any potential familial dispute. The argument has been made therefore that arbitrated agreements are more deserving of substantial judicial oversight with respect to fairness than other types of contracts.¹⁵⁵ A more rigorous notion of consent than is currently required by the Arbitration Act is necessary in order to ensure that only people who wish to have their disputes governed by religious law submit to the authority of these tribunals. At the same time, such an approach should not marginalize the beliefs of religious groups or undermine an individual's autonomy to order her life according to religious principles.

The Boyd Report has recommended that certain amendments be made to the Arbitration Act in order to address some of the criticisms that the IICJ proposal has received. These include imposing an affirmative duty on arbitrators to interview each party separately about the power dynamics of the relationship in order to determine whether domestic violence has occurred and ensure that each party is voluntarily submitting to arbitration.¹⁵⁶ The Boyd Report also recommends that the parties should certify that they have received independent legal advice informing them of their rights under the applicable Ontario and Canadian laws or have explicitly waived this advice.¹⁵⁷ Canadian law expresses a strong preference for upholding private agreements made upon the dissolution of a marriage, especially when independent legal advice has been

155. Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 767 (2004).

156. BOYD REPORT, *supra* note 7, at 136.

157. This is not dissimilar to the criteria American courts consider in determining the issue of informed consent in medical malpractice cases. *See, e.g., Dunham v. Wright*, 423 F.2d 940, 944 (3d Cir. 1970) (informed consent in healthcare contexts requires an understanding of the consequences of both electing and foregoing the advised procedure and knowledge of the likelihood of success of alternative treatments).

sought, and courts are not permitted to infer unfairness simply because the terms of the arrangement deviate from statutory entitlements.¹⁵⁸ However, this recommendation should be made stronger by requiring the parties to obtain independent legal advice and not permitting them to waive this right. While many people choose alternative dispute resolution as a cheaper, less time-consuming option than litigation, the rights of women—historically socially and economically weaker parties—should not be compromised in an effort to save financial and judicial resources in the family law context.¹⁵⁹ The Arbitration Act should also be amended so that appeal rights can no longer be waived. While this could implicate finality concerns with respect to arbitrations, the Boyd Report has found that most arbitrated decisions are not currently appealed and has hypothesized that this indicates some amount of satisfaction by the parties with the process even when it does not yield a favorable outcome.¹⁶⁰

The law of arbitration, built upon the foundation of standard contract law, recognizes that agreements will sometimes be entered into where there exists a power imbalance between the parties. Courts often enforce private agreements even where there is unequal bargaining power.¹⁶¹ However, in the family law context, where there are significant public policy issues at stake (such as domestic abuse and spousal support), we might not wish to tolerate an arrangement that mirrors the inherent inequities of the familial relationship, quite apart from any considerations of an illiberal religious legal scheme. Family relationships usually lack “traditional safeguards of contractual fairness”¹⁶² that underlie contract law, including “consent, bargain, free will, free exchange, and wealth maximization.”¹⁶³ Arbitration of family law disputes could also result in the “definition of [legal] rights by the powerful rather than by the application of fundamental societal values reflected in the

158. *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550 at 586.

159. BOYD REPORT, *supra* note 7, at 31.

160. *Id.* at 35.

161. *Id.* at 22.

162. Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 LAW & CONTEMP. PROBS. 253, 255 (Winter/Spring 2004).

163. Stempel, *supra* note 155, at 792.

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rule of law.”¹⁶⁴ Society should not conceive of familial relationships as rational, utility-maximizing transactions from an economic perspective, and, arguably, the law should treat arbitration agreements about family disputes as a different type of agreement than commercial contracts.

There will always be a concern that women might not appeal decisions of a religious tribunal out of a sense of group loyalty and identity. There is only so much that the state can do to address this kind of pressure short of refusing to provide any accommodation to religious groups altogether. A complete refusal to accommodate, however, would threaten the nexus between cultural identity and democratic citizenship that Canada has fostered and developed. Instead, when reviewing decisions from the Islamic family law tribunals, Canadian courts should presume that the party appealing the award did not consent to the arbitration. This presumption of lack of consent need only apply to religious arbitration decisions because of the special concerns regarding the application of a potentially illiberal law to women as outlined above. The Arbitration Act does not currently indicate which party carries the burden of proving that there was consent, but it seems likely that judicial review of decisions under the statute currently imposes the burden upon the party contesting the award to prove that she did not consent.¹⁶⁵ Presuming that there was no consent shifts the burden of proof to the party satisfied with the results of arbitration to show that there was actual consent and would apply regardless of who challenges the result. This would have the effect of providing an incentive for the tribunals to develop procedural safeguards that more closely resemble those found in the traditional litigation context, which affords a more level playing field to those who may be otherwise disadvantaged by the arbitration process. Such safeguards would include, but would not be limited to, rules regarding the examination of witnesses, the introduction of evidence, discovery, and maintenance of a written record of the proceedings.¹⁶⁶ The development of these procedural protec-

164. Harry T. Edwards, Commentary, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 679 (1986).

165. I did not find any case law describing with which party the burden of proving lack of consent rests.

166. While these procedural rules could be imposed from the outset, the Islamic family law tribunals should still offer participants the flexibility of

tions would create an arbitration tribunal that applies substantive Islamic family law and is a viable alternative to the Canadian court system but also ensures that the tribunals do not become a tool for the oppression of vulnerable parties, especially women. Employing a presumption, a classic evidentiary tool, that there is no consent to an arbitration in judicial review of religious arbitration could help the Canadian judiciary develop a balance between the section 2(a) right of freedom of religion and the section 27 commitment to multiculturalism without necessarily having to intervene directly in the affairs of a religious group and reach the merits of a religious question.

VI. CONCLUSION

The IICJ proposal to establish formal Islamic family law arbitration tribunals has pushed the question of the rights of a religious minority vis-à-vis the rights of an individual to make choices about her life and to enjoy equality under the Charter to the top of the public agenda in Canada. Such a controversy was bound to arise in a liberal state that is committed to multiculturalism yet is still struggling to define the term politically. By initially endorsing the IICJ proposal, the Ontario government indicated that it respects the rights of its religious citizens to structure certain aspects of their lives according to their beliefs, a compromise that will facilitate the participation of Canadian Muslims as valued members in democratic politics. Unfortunately, the government's recent decision to eliminate faith-based arbitrations entirely from the purview of the Arbitration Act perhaps unwittingly signals that, as to religious identity, Ontario is unwilling to engage the concerns of its diverse citizenry.

The concerns that women's groups and some segments of the Canadian Muslim community have voiced in response to the IICJ proposal should not be ignored or trivialized. The fear that women will feel pressured into submitting their disputes to an Islamic arbitration tribunal, where they could be

designing an arbitration process that is amenable to the disposition of the specific dispute. Awareness of the use of a presumption of a lack of consent upon appeal may motivate the parties to ensure that they understand what the arbitration process entails and agree to undertake it. This would result in an arbitration that is organic, accessible, and tailored to the parties' needs, and may yield in greater satisfaction in the process and its outcome.

subject to a legal framework potentially less protective of their rights than Canadian law, is a legitimate one. However, criticisms such as these fail to recognize that, for some women, the desire to decide their disputes according to religious principles may take precedence over any potential advantage offered to them under Canadian law. The Arbitration Act should have been amended to allow the courts to mediate this conflict by developing a procedural theory of judicial review that respects religious group rights under section 2(a) but also includes a presumption that the disfavored party did not consent to the arbitration. That will satisfy the liberal state's interest in ensuring that the decision to arbitrate in a religious tribunal is an individual, informed, and voluntary one. This solution affords protection to the individual and respects the interests of a minority group and is one that Canada ought to consider.