

On Private Choices and Public Justice: Some Microscopic and Macroscopic Reflections on the State’s Role in Addressing Faith-Based Arbitration

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INTRODUCTION: THE *SHARI'A* COURTS DEBATE IN A NUTSHELL

What is the state's role in responding to religious claims? Is that role the same irrespective of the individualistic or collectivist nature of such claims? What are the respective strengths and weaknesses of private and public justice systems in addressing the concerns of religious believers? These questions, and many others, were raised in the context of the now famous Ontario debate on the state recognition of the legally binding and judicially enforceable nature of arbitral awards based on religious norms. This debate arose as a result of the realization that the legal framework governing contractual arbitration in that province did not preclude arbitration of family-related or personal status-related disputes based on religious law.¹ Although this possibility was open since 1991, it is only much later, i.e. as of 2003, that a debate ensued on the merits of legally acknowledging faith-based arbitration in family or personal status disputes. This came about following the announcement by the Society of Canadian Muslims, a private association, of the creation of an Islamic Institute of Civil Justice,² under the auspices of which arbitrations based on Islamic law (*Shari'a*) would be conducted and expertise in Islamic law would be pooled.

As mentioned, faith-based arbitrations—irrespective of the type of spirituality involved—could be conducted prior to the eruption of the debate in the public sphere, and such arbitrations were actually conducted.

¹ At the time of the debate, the *Arbitration Act 1991*, S.O. 1991, c. 17, did not exclude family-related or personal status-related disputes from arbitration, nor did family law legislation, subject to the respect of some formal conditions or to some substantive exceptions dealing with court powers over questions pertaining to the education, moral training, custody or access to children and to the protection of the children's best interests. Further limits were introduced after the debate, the most important being the decision to restrict the recognition of family arbitrations to those conducted exclusively in accordance with the laws of Ontario or of another Canadian jurisdiction. See: *Family Statute Law Amendment Act, 2006*, S.O. 2006, c. 1.

² Information on this project can be found on the following website: <<http://muslim-canada.org>>.

Various reasons, good and bad, prompted the public reaction in the *Shari'a* case.

One was the emphasis that the Islamic Institute of Civil Justice placed upon family-related and personal status-related disputes, as opposed to, say, business disputes. While questions pertaining to the relative vulnerability of the parties to arbitration may arise in the latter context, it is fair to assume that they are, generally speaking, more acute in the former. A widespread perception was that the basic individual rights of some of vulnerable members of Canadian society, such as women and especially immigrant women, could be at risk through the application of non-egalitarian religious norms and the use of “perfect” arbitration agreements that precluded almost any sort of judicial review of arbitral processes or awards. Indeed, the likelihood of a judicial review of an arbitral award is inversely proportional to the arbitral tribunal’s level of expertise: It decreases whenever the tribunal’s expertise increases. As Natasha Bakht correctly observes, “[w]here an arbitrator can claim highly specialized expertise for example in a situation where two parties have agreed to have their dispute settled according to certain religious principles, courts will militate in favor of a high degree of deference, that is, they will favor upholding the arbitrator’s decision.”³ Appeals of arbitral awards are equally, and possibly even more, difficult to entertain.

That being said, the Islamic Institute of Civil Justice did not advocate for the systematic primacy of Islamic law over Canadian norms. For example, and contrary to unfounded rumours about it, mandatory state norms such as the prohibition of polygamy would not have yielded to Islamic norms allowing for such a practice. But the Institute’s understanding of the exact interplay of Islamic norms perceived as fundamental, on the one hand, and Canadian norms enjoying a similar status, on the other, was not clear. Nor was its proponents’ understanding of the interpretation to be given to *Shari'a* norms. It is fair to surmise in this respect that these proponents’ very position on the ideological spectrum may have played a role in the strong reaction that their proposal triggered. Indeed, they were, to say the least, conservative Muslims, and although being conservative is not *per se* a problem, the prescriptive and

³ N. Bakht, “Family Arbitration Using Sharia Law: Examining Ontario’s Arbitration Act and its Impact on Women,” [2004] 1(1) *Muslim World Journal of Human Rights* 7. Bakht’s article is extremely interesting for its exhaustive analysis of the positive law dimensions of the debate from a feminist standpoint. See Natasha Bakht, “Were Muslim Barbarians Really Knocking on the Gates of Ontario?: The Religious Arbitration Controversy – Another Perspective,” at 227, this volume.

hegemonic tone of their discourse, especially about what is good for “the” Muslim community, as well as their vision of that community’s place within Canadian society, were not all that reassuring.⁴ For instance, in other writings demanding the recognition of Islamic personal laws instead of the imposition of state norms in that field,⁵ they had questioned the “secular bias” of public institutions in Canada and argued that the imposition of state personal laws constituted a secular interference in their exercise of their religion freedom.⁶ They had also contended that Muslims could not live as Muslims in Canada without the particular type of individual and collective self-determination regime that the state recognition of Islamic personal laws would allow, and that failure to provide such recognition, or the withholding of it, further violated their freedom of religion. Moreover, they made clear that the recognition of Islamic personal laws was a tool to protect and promote a Muslim identity in a non-Muslim world, and that since a good Muslim is one that submits to *Shari’a*, any real Muslim would support its application. They finally situated the claim for the recognition of Islamic personal laws within the broader context of a debate on the modes of exercising and sharing sovereignty in Canada.

It soon became clear that the Islamic Institute of Civil Justice’s project involved more than merely taking stock of the desire of some individual Muslims to resort to a private religious adjudicator in relation to their family disputes; a collective dimension was present as well in that project, which pointed to the political aspect of what superficially looked like a mere religious claim. That being said, the nexus between the individual and the collective operated through the *Shari’a* court claim was perfectly understandable. For conservative Muslims, separating the

⁴ For a position paper, see: S. Mumtaz Ali & A. Whitehouse, “The Reconstruction of the Constitution and the Case for Muslim Personal Law in Canada,” online: <<http://muslim-canada.org/case.pdf>>. Interestingly, the vision of *Shari’a* espoused in this document tends to present a kind of pure, untouched, *Shari’a* which stands in stark contrast with the *Shari’a* that is implemented in most Muslim states, where it is mixed with many other legal influences, including secular ones.

⁵ Generally speaking, “personal laws” or “personal status laws” refer to norms relating to marriage, divorce, separation, inheritance, alimony, custody of children, etc.

⁶ It is interesting to note that complaining about Western liberal societies’ “secular bias” or “aggressive secularism” is commonly heard among conservative religious communities, irrespective of their creed.

temporal from the spiritual is unthinkable.⁷ *Shari'a* is thus much more than a set of legal norms: it is a way of life, a form of *ethos*.⁸

Thus, the univocal conception of Islam advocated by the Islamic Institute of Civil Justice contributed to an explanation of the strong public reactions to the project of *Shari'a*-based arbitrations. But there was an additional problem. Obviously, as a private association, the Institute could not claim any monopoly on the holding of such arbitrations—no more than, say, the Catholic Church can claim a monopoly on *the* Christian interpretation to be given to Christianity's sacred texts. It means that, in theory, nothing prevented fundamentalist Muslims, rather than merely conservative ones, from establishing arbitration boards that would have applied a radically conservative interpretation of *Shari'a* norms in the sensible field of family law.⁹ In this respect, the impossibility for the Islamic Institute of Civil Justice to claim to speak for all Canadian Muslims was evidenced by the staunch opposition to its project led by other Muslim organizations, such as the Muslim Canadian Congress and the Canadian Council of Muslim Women.

All these reasons, coupled, sadly, with some level of post-9/11 Islamophobia,¹⁰ contributed to the demise of the *Shari'a* courts project proposed by the Islamic Institute of Civil Justice. This demise came about after the rejection by the Ontario government of the most important recommendation contained in a report that it had itself commissioned. The so-called “Boyd report” recommended maintaining the state

⁷ See: T. Oubrou, “La *chari'a* et/dans la laïcité,” (2005) 48 Archives de philosophie du droit 156.

⁸ See generally: S.A. Aldeeb Abu-Salieh, “Religion et droit dans les pays musulmans,” online: <<http://www.sami-aldeeb.com/articles/view.php?id=241>>.

⁹ The current context, where a surge of Islamic fundamentalism is easily noticeable, is one where what has been called “the Islamic reason” is debated as never before. See: S. Aoun, “Lectures musulmanes du statut de la femme: la modernité en référence et en question dans l'espace islamique” in *Congrès 2005 du Barreau du Québec* (Cowansville, Qc.: Yvon Blais, 2005) 363 at 387.

¹⁰ See e.g. R.A. Macdonald & A. Popovici, “Le catéchisme de l'Islamophobie,” in M. Jézéquel, ed., *La justice à l'épreuve de la diversité culturelle* (Cowansville, Qc.: Yvon Blais, 2007), p. 19. Although some level of Islamophobia certainly influenced some discourses during the *Shari'a* debate, it is important to note that the most vocal and vehement opposition to the tribunal came from *within* the Muslim community.

recognition of faith-based arbitrations in family contexts, provided that additional safeguards be added to protect the most vulnerable parties.¹¹

The Boyd report tried to find a middle ground between recognizing the legitimacy of individual choices to resort to religious arbitration, on the one hand, and the incorporation of minimal safeguards designed to regulate the consequences of making such choices, on the other. For example, it suggested the creation of a special judicial review procedure in order to reduce the risk of abuse in religious arbitrations, as well as another under which the authenticity of the consent given by the parties to the arbitration would have been examined by a secular, independent, third-party.

The report's will to protect the most vulnerable parties to faith-based arbitrations by linking religious norms and processes to state law—which would have allowed for a form of dialogical pluralism—was clearly commendable. However, the report could be faulted for a certain lack of realism. For example, while superficially appealing, the consent certification requirement envisaged in the report would in no way guarantee that a vulnerable party to an arbitration proceeding would actually disclose her feeling that she is being coerced, even in a confidential meeting with the independent third party, knowing that the refusal by that third party to issue the certification would terminate the proceeding and that this result would probably be attributed to her by the other party and by her community. Some could characterize this hypothesis as an extreme one, but if one is a recently-arrived woman from a very conservative segment of the Muslim community, who does not speak any of Canada's official languages, and whose only support network is her ethno-religious community, the hypothesis is not that far-fetched. In such a case, the risk of being ostracized from one's only support group, i.e. the religious community, is real, and the costs of exiting are possibly much too high in comparison to the disadvantages of agreeing to the arbitration.

Irrespective of the strengths and weaknesses of the Boyd report, the Ontario government did not follow its recommendation to maintain state-sanctioned religious arbitrations. Indeed, in 2006, the legislative assembly amended the relevant legislation along the following lines.

¹¹ M. Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, December 2004, online: Ontario Ministry of the attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>>.

Firstly, it redefined family arbitration as referring to arbitral procedures conducted exclusively in accordance with the laws of Ontario or of another Canadian jurisdiction. Thus, the 2006 amendment does not single out religious arbitration, but extends the withdrawal of positive legal effects to all arbitrations conducted under non-Canadian positive legal regimes. In all likelihood, two principal reasons explain this extension. On the one hand, singling out religious arbitration could possibly have been challenged on the basis of equality rights. On the other hand, the legal regime of some countries is based, as far as family law is concerned, on the principle of personality, and the application of that principle may lead to an application of religious norms. In that sense, extending the withdrawal of legal effects to non-Canadian positive norms can also be understood as an anti-avoidance measure.

Secondly, family arbitration is now submitted to stricter procedural rules. For example, it is not possible anymore to waive one's right to appeal in the context of family arbitration. In commercial arbitration, such waivers are frequent. Moreover, to ensure the actual consent of parties to family arbitration, arbitration compromises can only be made once the dispute has arisen, instead of in advance in a compromissory clause included in, for example, a marriage contract. Furthermore, each party must now receive independent legal advice before agreeing to the arbitration. As can be seen, these procedural safeguards have effected a dissociation of the regime of family arbitration from that of commercial arbitration.

It is of the utmost importance to note that, under the new regime and contrary to some persistent rumours, procedures grounded upon religious norms in family matters *have not, strictly speaking, been prohibited*. Their prohibition would have constituted a serious and arguably unredeemable violation of freedom of religion. What the 2006 amendment did was to withdraw the recognition of positive legal effects to family arbitrations conducted under the auspices of religious law and of non-Canadian positive law. Under the new regime, Muslim couples are, for example, still free to ask their Imam to resolve a marital dispute on the basis of Islamic law and to abide by his decision. The only thing is that, from the standpoint of positive law, such a decision is not legally binding and is thus unenforceable before a state court of law. Whether this is good legislative policy remains debatable, but "informal arbitration" is still available and has not been made unlawful by the 2006 amendment. Thus, a regime of legal pluralism still exists, even though its configuration now reflects a "watertight compartments" model, where state and

religious norms each operate in their separate realm. Admittedly, this type of “back-alley arbitration” does not entirely solve the problem of the protection of vulnerable parties when informal religious arbitration procedures are conducted in a context that is not conducive to the protection of basic individual rights. As I shall conclude later, there is no optimal solution to this conundrum, and, in this regard, the 2006 amendment can at best be seen as the lesser of two (or many) evils.

Thirdly, arbitral awards based on religious norms are still legally enforceable provided they do not fall under the statutory definition of family law arbitration. This means, for instance, that faith-based awards issued in the field of commercial law remain legally binding and judicially enforceable. This is not negligible.

A last observation is warranted. Ontario’s new legal regime does not preclude the appointment of a religious cleric as the parties’ arbitrator of choice. We can surmise in this regard that such an arbitrator could instil some religious sensitivity in his (or, less likely, in her) interpretation of broad legal standards applicable in family law, as the case may be.

In light of those recent evolutions, I will propose in this article a reflection on the relationship of faith-based arbitration to state-centered justice models. More specifically, I will address the question of the state’s role in devising legal frameworks that are not only inclusive but that are perceived as such. Needless to say, this particular role becomes critically important when arbitration is used in areas where constitutionally-entrenched fundamental societal values are likely to be affected by the outcome of arbitral processes. Questions pertaining to individual agency, gender equality, freedom of religion, and the acceptable level of state paternalism thus become inescapable.

But given that faith is almost always intrinsically linked to culture and identity, faith-based arbitration in the field of family law raises broader questions pertaining to the macroscopic management of cultural diversity within a democratic state. In light of this, it is not appropriate, in my view, to envisage it solely from a microscopic and utilitarian angle, i.e. one that conceives of faith-based arbitration as a mere mechanism for solving *private* disputes.

I will thus examine in this article claims relating to that type of arbitration from both a microscopic and a macroscopic angle. I will first propose a conceptual framework for approaching claims demanding the state’s formal recognition of positive legal effects to religious arbitration

(I). I will then examine the interplay between private and public justice in light of the religious believers' individual agency to opt for one system or the other (II).

I. A CONCEPTUAL FRAMEWORK FOR ADDRESSING FAITH-BASED ARBITRATION

Arbitration, which is a form of private justice, is an effective means of rendering justice, particularly in commercial law contexts. The situation may be different, though, with disputes potentially affecting the status of the person, both as an individual and as someone embedded in a network of social relations. Such disputes raise the potential application of constitutional values such as dignity and equality, over which the state may arguably insist upon retaining some normative preeminence. This is not to say that the application of religious norms in the context of an arbitration procedure will always lead to outcomes that undermine the dignity or the equality of the individuals involved. Actually, such an outcome may very well be the exception rather than the rule. Moreover, many religious norms are open to a plurality of possible interpretations. For instance, scholars are much divided on the interpretation to be given to the Islamic normative corpus.¹² The same could be said of other faiths as well.

Nonetheless, even if we adopt the charitable position that only some religious norms, or interpretations of these norms, are likely to offend the fundamental human rights recognized both in Canadian and international law, the risk of conflict is real. The fact is that some of these norms, including Islamic ones, *do* clash with modern, secular understanding of various rights, one obviously being gender equality.¹³

¹² At least four, internally diverse, schools of interpretation have been reported to exist. See P. Fournier, "The Erasure of Islamic Difference in Canadian and American Family Law Adjudication," (2001) 10 J.L. & Pol. 51 at 67. For an example of the diversity and richness of Sharia interpretations within a single tradition, *i.e.* Sunni Islam, see Y. Ben Achour, "Nature, raison et révélation dans la philosophie du droit des auteurs sunnites" in J.-Y. Morin, ed., *Les droits fondamentaux* (Brussels: Bruylant, 1997) 163.

¹³ Even though religion has correctly been characterized as an "elephant in the room" with which intellectuals are uncomfortable for fear of offending the sensitivities of various actors (see G. Stevenson, "Religion is the elephant in the room," (2008) 22 *Inroads* 53 at 56), I deem it important address the conflict directly instead of artificially concealing clashes between religious and secular norms behind an idealistic rhetoric seeking to persuade that conflicting religious norms *could* be construed in such a way that they do not clash with secular ones. Such "liberal"

States faced with claims for a formal, positive law, recognition of faith-based arbitration must thus confront diverse, and often contradictory, viewpoints on several issues.

The first element of the puzzle is consent. Although it is quite possible that most parties involved in faith-based arbitration willfully agree to participate in the procedure, the possibility that some do not cannot be excluded. If their consent is coerced, it is vitiated. Friedrich Hayek defines coercion as follows:

By coercion we mean such control of the environment or circumstances of a person by another that, in order to avoid greater evil, he is forced to act not according to a coherent plan of his own but to serve the ends of another. Except in the sense of choosing the lesser evil in a situation forced on him by another, he is unable either to use his own intelligence or knowledge or to follow his own aims and beliefs.¹⁴

Arguably, some level of coercion is present in any form of human interaction. This fact, however, should not prevent the recognition that some contexts may be more likely to facilitate coercion leading to vitiating the consent of the affected persons.

Again, it is of the utmost importance to acknowledge that despite the nobility of their professed ideals, several religions have used, and still use, physical or psychosocial coercion to force individuals to comply with their dictates, with or without the complicity of the State. And, if these individuals were historically of both genders, a disproportionate number of them were, and still are, women. Notwithstanding the rosy picture that is often given of the religious experience, especially in a certain judicial discourse which primarily conceives of religion as a locus of identity,¹⁵

interpretations are surely possible, but they may take place in a context that is not always conducive to their reception. As such, they often remain marginal. Alternatively, they may come from religious scholars who have themselves accepted the basic tenets of liberalism and who may thus be situated outside the interpretive mainstream of their religious tradition. The impact that that these contextual variables may have on the receptiveness of a religious tradition to alternative interpretations of its *corpus juris*, can be felt both in internally diverse and decentralized traditions, such as Islam, and in unified and centralized ones, such as Roman Catholicism.

¹⁴ F.A. Hayek, *The Constitution of Liberty* (Chicago: Chicago University Press, 1960) at 20–21.

¹⁵ For a critique of some Supreme Court of Canada's rulings enshrining that rosy picture, see: J.-F. Gaudreault-DesBiens, "Quelques angles morts du débat sur

there is in my view no use in obscuring the *historical fact* that religion has been, over the past few millennia, a most potent force of oppression and of abuse of men by men, and, more often than not, of women by men. But it would be *equally problematic* to deny that, in other contexts, it has provided an anchor for individual and collective emancipation movements; think of the role of the Catholic Church in the resistance to communism in Poland.

This simply means that the relationship between religion and what we now view as basic individual rights is contingent. It further means that there is indeed a risk that some, but not necessarily all, faith-based arbitral awards reflect or perpetuate circumstances of oppression and discrimination that a free and democratic society cannot tolerate, let alone condone. That risk is heightened when these awards bind individuals belonging to vulnerable groups.

There are different ways not to avoid condoning such circumstances and the processes which facilitate their creation. One way is to rehabilitate the idea of state toleration of religious and cultural practices, which implies a more passive attitude on the part of the state, as opposed to their full-fledged recognition through positive law. Indeed, state recognition of the binding effect of faith-based arbitral awards, which can be reviewed or appealed only in exceptional circumstances, may amount to condoning the commission or the perpetuation of potential acts of discrimination.¹⁶

So, in order to better grasp the problems posed by the faith-based arbitration of family law-related (and personal status-related) disputes, some basic parameters must be identified. Since the *Shari'a* courts debate took place in Canada, we will look at the framework applicable in that country. It bears noting, however, that several of these parameters have functional equivalents elsewhere. In Canada, those parameters stem from the text of the constitution itself, as well as from the philosophical underpinnings of a society which perceives itself as a free and democratic one.

l'accommodement raisonnable à la lumière de la question du port de signes religieux à l'école publique: réflexions en forme de points d'interrogation" in M. Jézéquel, ed., *Les accommodements raisonnables. Quoi, comment, jusqu'où? Des outils pour tous*, (Cowansville, Qc.: Yvon Blais, 2007) at 241.

¹⁶ Actually, it may well be that the recognition paradigm that is so prevalent in contemporary identity politics has exhausted its heuristic and political usefulness. For an attempt to articulate such a position, see: K. Oliver, *Witnessing: Beyond Recognition* (Minneapolis: University of Minnesota Press, 2001).

The first principle is derived from two of the core values informing the modern concept of democracy: liberty and equality. Individuals are, or should be, free and equal, and a democratic polity has the responsibility to provide them with an environment in which that objective can be achieved. Although their conceptualization is primarily individualistic, liberty and equality may also carry a communitarian dimension since, as Kymlicka puts it, individuals generally exercise their rights and freedoms and make their life choices within a particular “societal culture.”¹⁷ From the interplay of liberty and equality can be drawn an overarching principle that I will call the principle of “freedom of identity.”

Any person should, to the extent possible, be able to choose willfully and freely her own destiny, including the freedom to associate or not with a group. This means that the option of discontinuing a group association in light of individual changes must *always* be available in a free and democratic society. Whether that association was inherited at birth or acquired later should not be regarded as relevant for the purpose of implementing the principle of freedom of identity. This view echoes Sartre’s definition of liberty as the capacity to tear oneself away from “givens.”¹⁸ It follows that the state has a duty not to erect obstacles in the path of an individual who wants to exercise the right to exit, and that right should always be exercisable, even if its exercise represents a major, and somewhat unexpected, shift in the identity or personality of that individual. Viewed from this perspective, any “optimal” policy on the part of the state, to the extent that such a thing exists, would be one that seeks to maximize the freedom of identity of individuals, or, put negatively, that is the least likely to allow infringements of that freedom.

The second principle that must be taken into consideration when reflecting upon the interaction between religious norms and their potential recognition by the state through instruments such as arbitration statutes is the principle of freedom of religion, which is enshrined in section 2(a) of the *Canadian Charter of Rights and Freedoms*,¹⁹ alongside freedom of conscience. On the one hand, freedom of religion should be curtailed as

¹⁷ See generally W. Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995).

¹⁸ J.-P. Sartre, *L’être et le néant. Essai d’ontologie phénoménologique* (Paris: Gallimard, 1943) at 543.

¹⁹ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].

little as possible by governmental action. On the other hand, it must be borne in mind that, unless a constitution expressly grants particular rights to one or more religious groups or to their individual members,²⁰ freedom of religion is conceptualized as a negative liberty. As such, it does not impose any “positive” duty upon the State, such as the obligation to *recognize* legal effects to religious norms.

Does the withdrawal of the possibility of accessing a particular legislative framework (here the state-sanctioned private arbitration regime in family law) constitute, in and of itself, an infringement of freedom of religion? No, unless one believes there exists a right to some form of legislative *status quo*. This type of claim is extremely difficult to defend in a democracy where parliamentary sovereignty, as constrained it may now be, still retains its legal relevance. In fact it is only in exceptional circumstances that such a claim might be accepted, and, in all likelihood, the criteria for such acceptance would not be met here.²¹ But claiming a

²⁰ In Canada, the only minority group that could possibly invoke a constitutional provision—s. 35 of the *Constitution Act 1982*—to support the claim that they have (1) a *right* (2) to a separate justice system (3) based on norms substantially different from those applicable elsewhere in the federation is composed of the various Aboriginal peoples of Canada. Indeed, as a matter of principle, section 35 recognizes that the Aboriginal peoples of Canada, which formed self-governing societies prior to contact with the European settlers, may prove that they have an inherent right to self-government, which could possibly include a right to have separate tribunals applying Aboriginal norms, including those informed by Aboriginal spirituality. Of course, provinces may choose, while exercising their constitutional jurisdictions (especially that over property and civil rights), to enact norms that reflect the inspiration of different legal traditions (the case of Québec, as a mixed legal order, immediately comes to mind), but this general constitutional *power* or *competence* is conceptually different from a specific constitutional *right*. In any event, a province that would deliberately decide to substitute a religious legal system to its previously secular one would, in all likelihood, face several constitutional hurdles, as the effects of such a decision would possibly infringe on its citizens’ freedoms of religion and conscience in several areas of life.

²¹ For example, in *Ferrel et al. v. Ontario (Attorney General)* (1998) 42 O.R. (3d) 97 (Ont. C.A.), a constitutional challenge to the repeal by the Ontario legislature of an employment equity statute on the basis that this repeal unconstitutionally affected the claimants’ equality rights was rejected. *Ferrel’s ratio* was later summarized by the Ontario Court of Appeal as “...in the absence of a constitutional right that requires the government to act in the first place, there can be no constitutional right to the continuation of measures voluntarily taken, even where those measures accord with or enhance *Charter* values.” (*Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505 at para. 94). Thus, it will only be in exceptional circumstances that a court of law will accept an argument that there exists a vested right to some form of legislative *status quo*. In *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, which dealt with s. 2(d)’s freedom of

right to some form of legislative *status quo* might very well be a pretext for imposing, though the back door, what is essentially a positive conception of freedom of religion. In that sense, the defence of state-sanctioned religious arbitration on the basis of freedom of religion is first and foremost an attempt to radically reconceptualize that freedom as a positive liberty; that is, as a liberty which may be the source of positive duties imposed upon the state. Such a reconceptualization would be radical because unless the Canadian constitution expressly grants particular rights to one or more religious groups or to their individual members, freedom of religion has traditionally been conceptualized, as mentioned, as a negative liberty. As such, it does not impose on its own any positive duty upon the state, such as the obligation to *recognize* legal effects to religious norms.

Indeed, for a freedom of religion argument of this type to succeed, this freedom would have to be reconceptualized as *per se* imposing positive duties upon the state not only on an *ad hoc* and particular basis—such as the duty to reasonably accommodate *individual religious practices*—but on a general basis, which would entail the obligation to recognize legal effects to religious norms and to recognize religions *envisaged as collectives*. Remember that the duty to accommodate implies the bending of state norms in respect of minority *practices* but not

association, the Supreme Court did so when it found that claimants could not meaningfully exercise their constitutional right unless there was a prior statutory framework allowing them to do so. The considerations circumscribing the possibility of challenging underinclusion under s. 2 of the *Charter* were listed as follows by the Court: (1) claims of underinclusion should be grounded in fundamental *Charter* freedoms rather than in access to a particular statutory regime; (2) the evidentiary burden in cases where there is a challenge to underinclusive legislation is to demonstrate that exclusion from a statutory regime permits a substantial interference with the exercise of protected s. 2(d) activity; and (3), in order to link the alleged *Charter* violation to state action, the context must be such that the state can be truly held accountable for any inability to exercise a fundamental freedom. Since the mere unenforceability of faith-based arbitration in family law would in no way prevent believers from submitting disputes to religious authorities, it is hard to see how the latter—or the religious courts themselves—could be described as needing a particular statutory support to exercise their freedom. The point here is not that the legislative repeal of a particular legal regime can never be challenged from a constitutional standpoint. Such a repeal can be challenged, but a demonstration that it caused a constitutional violation is necessary (see, by analogy, *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381). This highlights the need to prove a violation of a pre-existing, freestanding, constitutional right, since the existence of a particular statutory regime does not in itself entail that this regime is constitutionally mandated, even if it is preferred by the plaintiffs.

necessarily, as of a right, the positive recognition of minority institutions.²²

That being said, one cannot underestimate the consequences of a reconceptualization of this nature, should it ever be accepted. The idea of recognizing religions as collectives in the context of a rethinking of freedom of religion as a positive liberty could somehow imply that the state has the obligation to *support* religion, and, more precisely, *all* religions because it cannot discriminate between them. This could mean a constitutional right to claim support (or endorsement) from the state, be it symbolic or financial. Such an outcome would blatantly contravene the separation of church and state, even if this principle suffers significant exceptions in the Canadian context.²³ Even bearing that in mind, one can

²² In *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650, LeBel J., dissenting (with Bastarache and Deschamps JJ. co-signing his dissent), alludes to an exceptional situation where s. 2(a) could warrant the imposition of positive obligations on the State, i.e. when freedom of religion would have no tangible meaning absent that positive intervention. LeBel J. surmises that this could be the case if building a house for religious worship is made absolutely impossible on the territory of a municipality because of its zoning by-laws. In such a case, he argues, the refusal by the municipality to adapt its by-laws to the evolution of collective needs could constitute a violation of s. 2(a). But, again, it is hard to see how removing the access to state-sanctioned, religious arbitration in family law is comparable to the hypothetical situation evoked by LeBel J.. In a recent case, an order to stop using a dwelling (a lakeside cabin) for religious purposes, contrary to a zoning by-law, was issued against a religious community by the Québec Superior Court. The Québec Court of Appeal upheld the order, on the basis that even if the zoning by-law indirectly constrained the owners' freedom of religion, by precluding them from using their cabin for a non-residential purpose, its impact on their freedom of religion was found to be negligible, given that the by-law allowed for the use or erection of religious buildings (churches, synagogues, etc.) in other areas of the municipality and that the religious community owned a vacant parcel of land in one of these areas. The Court also observed that the religious community had acted in bad faith for several years by falsely representing to the municipality that its lakeside dwelling was not used for religious purposes and, then, by trying to protect its derogatory use of the land by invoking freedom of religion. In that context, the Court of Appeal, at para. 46, rejected an absolutist conception of that freedom, stating that "[f]reedom of religion does not imply the right to celebrate one's creed, or to establish a religious school, wherever one desires to." [translated by author]. See: *Val-Morin (Municipalité) c. Congregation of the Followers of the Rabbis of Belz to Strengthen Torah*, 2005 CanLII 32754, [2005] R.J.Q. 2629, (Sup. Ct.), aff'd 2008 QCCA 577, leave to appeal to S.C.C. dismissed, 2008 CanLII 48619.

²³ Protestants and Catholics enjoy particular educational rights as per ss. 93 and 133 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, preprinted in R.S.C. 1985, App. II, No. 5. These rights are historical artifacts that are exceptional in nature. As such, it was decided that they could not be expanded, on the basis of constitutionally-enshrined equality rights, to other religious groups. See *Adler v. Ontario*, [1996] 3

reasonably argue that this principle minimally imposes upon the state a duty not to erect hurdles in the way of those who want to exercise their freedom *from* religion.²⁴ Moreover, freedom of religion should be not examined without due regard to the freedom of conscience of the individual believers, especially, it can be argued, when the former is used as a guise through which what is essentially a group right is claimed. It is of the utmost importance to bear in mind this dialectical relation between these two freedoms when evaluating the risks state-sanctioned faith-based arbitration create for more vulnerable believers.

If we now examine the 2006 amendment from the perspective of freedom of religion understood as a negative liberty, we can make the following observations.

On the one hand, believers can still submit their disputes to religious arbitrators, but their awards are neither legally binding nor judicially enforceable. Therefore, parties retain their right to exit from the process or disavow its result, by going to state courts, or may instead voluntarily comply with the award. Believers are therefore placed in a position to exercise their freedom to comply with the decision made by the religious authority, a freedom which stands at the core of freedom of religion and which remains unaffected in the reformed scheme. Arguably, the amendment even broadens the believers' individual liberty by facilitating their exit should they choose to opt for that path, for any type of reasons, including religious ones. In a way, the impact of the amendment on the believers' freedom of religion, if any at all, is compensated by their increased possibility to manifest their freedom of conscience.

On the other hand, religious groups still have access to religious tribunals as the amendment does not prohibit the existence of such tribunals—something that, as evoked, would be an unconstitutional restriction of freedom of religion—and individual believers can, and most

S.C.R. 609. This, however, does not prevent their expansion to such groups, but as a matter of legislative policy and not as a matter of constitutional law absent constitutional amendment.

²⁴ As an aside, imposing a duty to recognize positive legal effects to religious normative systems and decisions made on their basis could amount to imposing upon the state the duty to condone discriminatory practices (given the discriminatory nature of some religious norms) that the state itself could not validly engage in. The state would somehow be forced to do indirectly what it cannot do directly. The opening of the legal system, on constitutional grounds, to situations of “compelled discrimination outsourcing” would in that sense be extremely problematic.

of them probably do, voluntarily comply with the awards issued by these tribunals. But what about religious tribunals, *qua* tribunals? Legally, moral persons such as religious corporations do enjoy freedom of religion, and, arguably, so do religious jurisdictional institutions.²⁵ Under the 2006 amendment, however, religious tribunals would not be prohibited from existing, or from engaging in faith-based decision-making. They have every right to exist but their decisions are not legally enforceable according to state law, although from the perspective of the devout member they can of course be seen as binding from the point of view of God. That is a matter for each individual—not the state—to evaluate. In this respect again, the 2006 amendment does not constitute an encroachment upon freedom of religion, or, if it did, the encroachment would be a very trivial one dealing with a merely peripheral dimension of the entitlements that freedom of religion guarantees.²⁶

A third principle involves the right of equality.²⁷ It helps to define the state's role *vis-à-vis* the direct or indirect recognition of religious norms. It was especially relevant in the context of the *Shari'a* courts debate in Ontario. It follows that any governmental policy regarding the statutory recognition of arbitral awards rendered by religious tribunals in family-related or personal status-related disputes should stay clear of singling out *Islamic* tribunals because of a fear of *Islamist* fundamentalist ideologies.²⁸ The only acceptable solution is one that is applicable to all religious tribunals, whatever their creed. This, incidentally, is the solution that was adopted by the Ontario legislature in 2006.

²⁵ See A. Saris, "Les tribunaux religieux et le droit étatique" in: *Congrès 2005 du Barreau du Québec* (Cowansville, Qc.: Yvon Blais, 2005) 389 at 399.

²⁶ A trivial infringement of freedom of religion does not amount to a violation of that freedom. See *R. v. Jones*, [1986] 2 S.C.R. 285.

²⁷ S. 15(1) of the *Charter* reads as follows: "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."

²⁸ More particularly, it is of the utmost importance to resist the temptation of "orientalism," which, in a nutshell, designates "a style of thought based upon an ontological and epistemological distinction made between "the Orient" and (most of the time) "the Occident." See E. Said, *Orientalism* (New York: Vintage Books, 1979) at 2. It is often characterized by a propensity to depict Islam and Arabs as a monolithic entity defined around stereotypical—and sometimes conflicting—characteristics such as backwardness, violence or sensuality. In any event, it implies an "exoticisation" of the Other.

The 2006 amendment does not establish a *summa divisio* between state law and religious law, with the implication that the latter is inherently less worthy of respect than the former. Thus, there is no discriminatory denial of the equal benefit of the law based on religion according to the current constitutional framework.²⁹ Obviously, the situation would have been much more problematic if only the resort to religious norms in family law arbitration had been banned. In such a case, there would have been a distinction based on religion, and a plausible argument—if not necessarily a persuasive one—could have been made that such a distinction impinged on the dignity of the believers by conveying the message that the religious normative system to which they adhere is less worthy than alternative secular normative systems. If we consider that religious faith provides a horizon of meaning to believers—which it does—, this horizon remains intact with the 2006 amendment.

A fourth principle arises out of section 28 of the *Canadian Charter of Rights and Freedoms*. It provides that “notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.” Not only is gender a prohibited basis of discrimination under subsection 15(1) of the Charter, but gender equality itself is expressly elevated to the status of an overarching principle. Since the “notwithstanding” in section 28 refers both to subsection 2(a)’s freedom of religion and to section 27’s multiculturalism provision,³⁰ this means that religion-based or multiculturalism-based arguments invoked to protect, shield, or hide, under the guise of a right, practices that potentially discriminate against women will be viewed with suspicion. A prudential principle can be drawn from this: To the extent that religious norms serve as a justification for discriminatory practices against women, section 28 makes the recognition of the legally binding nature of these norms even less acceptable. The principle implies adopting risk-minimizing strategies in tackling difficult situations in which fundamental constitutional values could be undermined.

The combination of these principles leads me to the following conclusion: Whenever there is a risk that the situation of a vulnerable party could be worsened as a result of the application (or misapplication)

²⁹ *Law v. Canada*, [1999] 1 S.C.R. 497. I will thus not address whether this non-recognition could be redeemed under s. 1.

³⁰ S. 27 reads as follows: “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”

of religious norms, the state should at the very minimum ensure that it does not facilitate the application of such norms or reinforce their power over such a vulnerable party. Thus, in case of doubt, the state should elaborate its policies to favor the protection of individuals rather than the cohesion of groups, religious or otherwise. It should always ensure that its policies protect the right to dissociate from groups, which may imply a refusal to grant legal enforceability to the group's norms or dogmas. In light of these considerations, arguments to the effect that state-sanctioned arbitration, because it is faster and cheaper than ordinary court proceedings, should remain available to parties involved in disputes raising family law or status-related issues carry little weight.

In my view, the 2006 amendment generally satisfies the legal and non-legal requirements discussed above. Firstly, it respects the freedom of identity of all the actors interested in faith-based arbitrations. Individual parties are free to privilege their identity as individual, right-bearing citizens or, alternatively, their identity as believers and members of a particular religious community. Such a choice might be excruciating, but what matters is that their capacity to choose is never impeded by state policies. Unless one affirms a positive right to access a regime of state-sanctioned arbitration, the 2006 amendment does not impede the capacity of the believer to choose one identity or the other, and to reverse that decision at a later stage. The amendment also respects the freedom of identity of religious groups because the provision of religious justice is still accessible to its adherents. Secondly, it does not systematically characterize religious women (or other vulnerable members of religious groups) as victims nor does it characterize clerics presiding over religious arbitration procedures as victimizers. The amendment merely takes stock of the *contingency* of victimization in faith-based arbitrations, which means that victimization is neither necessary nor impossible. Thirdly, it presents the advantages of retaining the benefits of arbitration in the field of family law, i.e. its relative rapidity, more relaxed procedure, and, hopefully, lower cost, and of ensuring that, to a large extent, the norms relied upon are aligned with Canada's constitutional norms and values. In doing so, it takes stock of the limits of private justice in certain settings.

That the 2006 amendment meets the legal and non-legal requirements that I have identified does not mean that it represents a perfect solution. From the standpoint of the defense of the rights of potentially vulnerable parties, it could indeed be argued that it leaves them undefended because their very vulnerability and the context in which they live practically prevent them from seeking redress, under the

common law, against potential instances of coercion in informal religious arbitration. Some have forcefully argued that it would have been more appropriate to follow the Boyd report's recommendations and to increase the state monitoring of religious arbitral processes both in view of preventing abuses and of socializing religious clerics and believers to fundamental Canadian norms by "including" them (and the religious norms to which they adhere) in a normative conversation with Canadian secular standards.³¹ The idea underlying this view is that formally institutionalizing a strong form of legal pluralism while ensuring the permanent existence of contact points between legal orders, could lead to the transformation of religious legal orders through their regular contact with the state's legal order, and that this transformation could in turn lead to a better protection of individual rights in faith-based arbitration. This strong form of institutionalized legal pluralism is generally associated to the excellent work of Ayelet Shachar on joint governance³² and, more recently, of Veit Bader on associational governance.³³

This is a very serious argument that would deserve to be thoroughly examined, but it is beyond the scope of this article to do so. I shall instead content myself with making a few brief, and eminently pragmatic, observations.

The first one has to do with the context in which strong forms of institutionalized legal pluralism are better discussed and assessed. Ontario's *Shari'a* tribunals debate primarily revolved around the consent and vulnerability of potential users of state-sanctioned religious arbitration. The angle of approach that I adopt in this article reflects in part that orientation. In that, this debate took a definitely microscopic turn. However, as mentioned earlier, it was as much about the configuration that structures of governance should take in a multicultural society as it was about individual preferences for a normative regime rather than another. In other words, the stakes it raised were political and collective, and not merely religious and individualistic. Moreover, the legal springboard for that debate was the possibility of using a private arbitration statute for certain specific purposes in a particular field of law.

³¹ See, for example, L. Bégin, "Enjeux identitaires et droits: l'affaire des tribunaux islamiques" in: M. Jézéquel, ed., *La justice à l'épreuve de la diversité culturelle*, *supra* note 10 at 171.

³² A. Shachar, *Multicultural Jurisdictions. Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001).

³³ V. Bader, *Secularism or Democracy? Associational Governance of Religious Diversity* (Amsterdam: Amsterdam University Press, 2007).

In short, the context of the debate did not allow for a thorough discussion of all the microscopic and macroscopic stakes it involved. Joint governance or associational governance regimes may be appealing, but they are precisely about governance, rather than the mere private use of a particular legal regime, as the question was framed by most participants to the *Shari'a* tribunals debate. This debate simply did not provide the appropriate forum to discuss the introduction of joint governance or associational governance regimes.³⁴

My second observation relates to the very idea of introducing such alternative governance regimes in the Canadian legal setting. As alluded to, I personally tend to find joint governance or associational governance models intellectually appealing. But as appealing as they may be, could models like these be successfully introduced in a country such as Canada, and, if so, at what legal, political and cultural costs? Where *could* the recognition of such alternative regimes lead to, especially as it relates to the introduction of *Shari'a*? Can theoretical models inspired, more or less explicitly, by actual political-constitutional models implemented in other states be transplanted in a different constitutional, political, and cultural environment?

Where *could* the recognition of such alternative regimes lead? It is important to state at the outset that the state's recognition of the legality and legitimacy of a system of parallel justice—the word *system* is critical here—allowing for the use of non-state norms for the settlement of disputes simply cannot be assimilated to its validation, for example in family law contexts, of particular, individualized settlements arrived at by the parties to such disputes, and this, even though the arbitration agreement permitting access to this system of parallel justice itself stems from a contract. Again, the stakes involved in family law-related or personal status-related disputes as well as the risk of significant derogations to the state's most basic norms and values allowed by the existing private arbitration framework raise questions of a qualitatively different magnitude.

First, the parallel systems of justice so created are to be administered by groups defined on the basis of a shared socio-religious identity. Traditionally, these groups have either demanded their inclusion

³⁴ For a thorough analysis of the stakes raised by religious arbitration in the particular context of Ontario's *Shari'a* debate, see J.-F. Gaudreault-DesBiens & A. Shachar, "Thinking Through Faith-Based Arbitration in a Democratic State" University of Toronto, 2006 [unpublished, on file with the author].

within society on a non-discrimination basis, or have simply insisted on the state's non-interference in their religious affairs. However, the state recognition of religious arbitral tribunals in an arbitration context is a step closer to a broader recognition of these tribunals' *jurisdiction*, and thus *sovereignty* over a certain community of believers. Therefore, the identity-based legal pluralism that joint governance or associational governance models presuppose, as well as the collective definition of identity they seek to facilitate, may lead to the mutation of social minorities into political ones, since these minorities' identities are now to be grasped by the State as giving rise to a collective rights problem instead of being apprehended from the traditional perspective of individual rights.³⁵ Such a mutation implies a conscious and politically-driven deepening of the minority's degree of diversity,³⁶ which inevitably leads that minority to require from the state the recognition of its now "deeply diverse" identity. Because of the political undertones of such a transformation, the members of this minority could "want (...) an identity that is collectively negotiated,"³⁷ and the likely result of that negotiation will be the creation of separate institutions exercising some form of *imperium* over a segment of the population. In that sense, the state recognition of a partial or exclusive, faith-based, jurisdiction over most of the temporal and religious disputes (both types being functionally

³⁵ The distinction between political and social minorities has been proposed by Canadian legal theorist Andrée Lajoie. For her, *political* minorities are those whose primary locus of identification is a sub-state entity (which in and of itself forms a political community) rather than the global polity constituted by the State, and for whom belonging to the latter is conditional upon the respect by that polity of their primary identification with the sub-state entity. In contrast, *social* minorities are those who are in a legitimate position to advance an equality claim, but whose sense of belonging to the political community formed by the State is not conditioned by any prior, and primordial, identification with another sub-state political community. As a result, claims made by political minorities potentially threaten the integrity of the State while those made by social minorities do not. See A. Lajoie, *Quand les minorités font la loi* (Paris: Presses Universitaires de France, 2002). Using Will Kymlicka's typology of group-differentiated rights, political minorities will generally demand "self-government rights" while social minorities will more likely claim "polyethnic rights" and, occasionally, "special representation rights." See W. Kymlicka, *supra* note 17.

³⁶ Elaborated by philosopher Charles Taylor, the concept of "deep diversity" essentially refers to situations where belonging to a larger polity is mediated by, or conditional upon, belonging to another smaller community which can also be characterized as political. See C. Taylor, "Shared and Divergent Values," in R. Watts & D. Brown, eds., *Options for a New Canada* (Toronto: University of Toronto Press, 1991) at 53. Note the overlap with Lajoie's concept of "political minority."

³⁷ M. Walzer, *On Toleration* (New York & London: Yale University Press, 1997) at 44.

collapsed) of a non-territorialized community of believers is reminiscent of the millet system once in force in the Ottoman Empire, under which religious communities, with their respective separate institutions, were more or less self-governing in an otherwise Muslim State. Nowadays, such a regime of governance would be characterized as implementing a model of personal federalism.³⁸

Admittedly, this type of outcome is neither the necessary nor the inevitable consequence of the state recognition of faith-based arbitral tribunals, and, indeed, some could consider this hypothesis to be completely far-fetched. In the end, aren't we simply talking about the application of a different set of norms to some juridical acts or facts that punctuate family life? From a superficial angle, this is probably true. However, in the particular context of the *Shari'a* courts debate, the answer might be different. Why is that? Essentially because in the particular case of Islamic law, at least understood from a conservative perspective, it is difficult, if not outright impossible, to distinguish between the temporal and spiritual realms. Since *Shari'a* is more than a normative regime, but, as mentioned, as way of life or an *ethos* that reflects and prescribes a global normative vision of the relationship between religion, society and the individual, the religious inevitably becomes political, and religious claims risk hiding fundamentally political ones.³⁹ Granted, there are many ways to interpret Islamic law, to such an extent that it is more accurate to refer to the existence of a variety of Muslim laws, but let us not forget the particular subtext of the claim made by the Islamic Institute of Civil Justice. As we saw earlier, some of its proponents clearly understood the *Shari'a* courts project as a first step toward a larger identity-related, political, project. Possibly for strategic reasons, the broader political undertones of the project were not upfront in the debate, but they were there nevertheless.

I am not arguing here that such a political project is inherently illegitimate or unthinkable. Indeed, conservative Muslims are free to entertain all the peaceful political projects that they want, exactly as believers of other faiths or, if one prefers, secularization activists, do. I

³⁸ See generally A.N. Messara, *Théorie générale du système politique libanais* (Paris: Cariscript, 1994).

³⁹ In this respect, the challenge posed by the state recognition of *Shari'a* courts, in a North American liberal polity such as Canada, is arguably different, from a qualitative standpoint, from the challenges posed by the recognition of other religious legal orders, such as those governing some forms of Hassidic Judaism or Anabaptist Protestantism for example.

am not arguing either that the mutation of a social minority into a political one is normatively unacceptable.⁴⁰ However, I deem it important to point out that recognizing what is essentially an identity-based system of parallel justice, first, provides the embryo of a regime of radical legal pluralism the long-term consequences of which a democratic polity may legitimately want to examine further, be it only as a matter of *realpolitik*, and, second, represents a very different thing from merely disregarding the potential use of non-state norms in the context of particular, individualized settlements arrived at by the parties to family law-related disputes. Moreover, it bears signaling that this form of identity-based legal pluralism is quite different from the “functional” type of pluralism informing commercial arbitration, whatever the legal regime chosen by the parties. Indeed, the public recognition of identity-based communities that are partially or entirely self-governing raises important questions pertaining to the nature of citizenship in a democratic polity, and the sharing of sovereignty within political communities. Even the most expansive system of commercial arbitration does not raise such questions. And if I may add, these questions are particularly sensible in Canada, which is already an extremely fragmented polity that is still struggling to find a way to recognize older pre-existing political entities present in its realm, i.e. Quebec and the Aboriginal peoples, without compromising its rather thin political unity. Ultimately, this line of discussion points to potential legitimation problems for any joint governance or associational governance regime that would be implemented without having first been thoroughly scrutinized from the perspective of its advantages and disadvantages, and, most importantly, of its integration within the Canadian constitutional, political and cultural environment.

Wondering about the integration in Canada of regimes of strong institutionalized legal pluralism brings me back to my other question: can theoretical models inspired, more or less explicitly, by actual political-constitutional models implemented in other states be transplanted in a different constitutional, political, and cultural environment? Even leaving aside the broader political dimensions of religious claims and focusing instead on family law, the answer is not clear. In Canada, it is the law of domicile that has historically been applied in private international law as regards family matters. This means that, as a matter of principle, all residents are submitted to the applicable federal and provincial norms, irrespective, for example, of where they married or procreated. This

⁴⁰ On this, see S. Choudhry, “National Minorities and Ethnic Immigrants: Liberalism’s Political Sociology” (2002) 10 *Journal of Political Philosophy* 54.

approach stands in stark contrast to that adopted in most countries of continental Europe, where it is the law of nationality, inspired by the principle of personality, that prevails.⁴¹ Under that model, even if, for example, a Moroccan national has spent most of his adult life in Belgium, the juridical resolution of his family law problems will still be governed by Moroccan law.

As I am no expert in family law, let alone private international law, I would not dare venturing further in those areas. I am, however, a comparative lawyer, and can offer the observation that introducing the principle of personality into a system that has always been based on the principle of territoriality risks not being easy. Anthropological and comparative law literature has long highlighted the systemic problems raised by enthusiastic, but naïve, legal transplants. Interestingly, this literature came out of the realization that several norms and institutions transplanted by colonial powers into their colonies simply did not work once transplanted, while they were doing a good job in the origin state. It seems to me that we are currently witnessing the repetition, but in reverse, of this type of approach, as evinced by the rather liberal use that is made of foreign legal models which, for centuries, have been founded upon the principle of personality. Indeed, joint governance or associational governance models universalize, by abstracting and theorizing them, particular models that, for socio-historical reasons, may be perfectly adapted to meet the needs expressed in their original environment, but which could not fit so easily in a different context. More specifically, major explicit or implicit sources of inspiration for these models have often been Israel or India, where the principle of personality plays a central role in the legal order. Some advocates of these models purport to export them because they represent in their view a normative ideal, one that is pluralist rather than monist, as far as the legal management of ethno-religious pluralism is concerned.⁴² I just want to point out here that even if they do represent a legal pluralist's normative ideal, context matters, and there is no evidence that transplanting such models, or variations of them, in a legal environment where the principle of

⁴¹ In Canada, the regime of official language rights provides an exception to the pre-eminence of the principle of territoriality.

⁴² Their situation is not different in this respect from that of Will Kymlicka, who has found inspiration for his distinction between national minorities and ethnocultural groups in the Canadian context and has then universalized it. But while this distinction may indeed be relevant for some countries, such as Spain or Belgium, its application is not simple in other countries where the configuration of ethnocultural relations is markedly different from that of Canada.

territoriality prevails, would succeed. But there is no evidence either that such an enterprise would not succeed. Moreover, for all sorts of reasons, it may succeed better in state A than in state B, even if both states privilege the principle of territoriality. In short, I am simply pleading for a greater epistemological awareness of the contextual variables that may impact on the reception of theoretical models the foundations of which lie in a particular political-constitutional *terroir*, which is itself the product of layers of history and contextual choices. Thus, although I am ready to recognize the intellectual appeal of alternative models of governance as regards the interaction between the state and religious groups, a deeper analysis of the circumstances of their reception where their transplant is proposed is absolutely necessary. But the mere fact that allusions to such models were made in the *Shari'a* courts debate highlight the (re)constitutive nature and, ultimately, the constitutional dimension of the Islamic Institute of Civil Justice's project. Questions as deep and complex as that cannot be properly examined in the context of a debate about the scope to be given to a narrow arbitration statute. Besides, as Ayelet Shachar correctly observes, there is an important qualitative difference between, on the one hand, the structural accommodation of religious communities in view of granting them some autonomy as far as family or personal status law is concerned, and this in a context where the state monitors the appointment of religious adjudicators and imposes basic norms to be respected by all, and, on the other hand, the privatization of diversity that results from a contract-based religious arbitration regime as envisaged by the Islamic Institute of Civil Justice.⁴³

II. PRIVATE CHOICES AND PUBLIC JUSTICE

Three assumptions about the quality of justice in private and public settings have permeated, explicitly or implicitly, the Ontario debate over state-sanctioned, religious arbitration in family law. All have proven problematic to some extent, which is why it is useful to unpack them.

The first assumption consists in a belief in the inherent fairness, and even superiority, of private justice processes, while the second reflects the corollary belief that all enjoy, as of a right, an absolutely unfettered freedom to make whatever contractual "choices" they might want to make. The source of these first two assumptions can possibly be

⁴³ See A. Shachar, "Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law" (2008) 9 *Theor. Inq. L.* 573.

traced back to the cultural influence of the common law tradition, which has historically tended to value individual self-regulation more than the civil law tradition does, and has consequently enshrined a weaker notion of public policy than the civil law's *ordre public*. This factor may explain, in part at least, the significant difference between the legislative policies of Ontario and Québec as regards family arbitration.⁴⁴

The third assumption stands in stark contrast vis-à-vis the first two. Indeed, it postulates that state justice should always enjoy, notwithstanding the circumstances, an adjudicative monopoly over any type of dispute, and that state justice does a relatively good job in dealing with disputes involving members of ethno-religious minorities or vulnerable individuals.

Let us begin with the first assumption, which essentially presupposes that justice is better served by private, contract-based institutions than it is by a public system of state courts. It reproduces a positive stereotype of arbitration—that this dispute resolution mechanism is always good and profitable to the parties—that has been promoted by the United States Supreme Court since its famous 1985 *Mitsubishi* ruling.⁴⁵ While not going as far, it is arguable that, in the recent *Dell*

⁴⁴ S. 2639 of the *Civil Code of Québec* provides that “disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration.” In other words, such disputes are legally inarbitrable, irrespective of the type of law (secular or religious) upon which they could be arbitrated. However, this civil law/common law dichotomy, with the significantly more robust conception of citizenship and statist culture that exists in civil law jurisdictions, does not explain everything. Québec’s partial affiliation with the civil law provides a cultural subtext for decisions that are influenced by more pragmatic factors. For instance, the impetus for the enactment of s. 2639 of the *Civil Code of Québec* lies in the realization that disputes concerning the status and capacity of persons, as well as family matters, are likely to raise so many complex and fundamental questions affecting the very dignity of individuals that State courts should always retain their normative monopoly on them. It must be noted, however, that Québec’s *Code of Civil Procedure* provides, at ss. 814.3 to 814.14, that no dispute raising questions pertaining to the custody of children, alimony, or the patrimonial obligations of the parties can be heard by a judicial tribunal without these parties having first attended an information session on mediation. Mediation itself is therefore not compulsory. If the parties do decide to participate in a mediation procedure, nothing in the law prevents the mediator from being a religious cleric conducting the mediation on the basis of religious principles.

⁴⁵ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

Computer case, the Supreme Court of Canada is increasingly flirting with this idealized and decontextualized vision of arbitration.⁴⁶

I submit that that such a presumption, which uncritically encodes a “private is beautiful” philosophy, is too strong. It is not that private justice, and notably arbitration, is *per se* problematic, quite the contrary in fact. It is simply that private justice cannot be naïvely considered to always be conducive to the fostering of a democratic society’s most fundamental values and norms, particularly those enshrined in constitutional instruments. In other words, the above-mentioned assumption wilfully obscures the limits of private justice, which, it bears noting, also exist in the field of commercial arbitration.⁴⁷

One of these limits lies in the fact that the very vocation of private justice is to remain as private as possible. In the particular context of contractual arbitration, this means that potentially unjust awards are rarely submitted to the broader, quasi-democratic scrutiny of public courts. Indeed, criteria for judicial review are strict, and courts tend to defer, and correctly so, to the particular expertise of the arbitrator.

In that, arbitral awards stand in stark contrast with public judgments issued by state courts. While private arbitrators need only to justify their awards, if at all, to the parties who appear before them, state judges, not only must ground their reasoning on publicly debated norms, they must also appeal to a form of public reason. Indeed, the legitimacy of a judicial judgment is in large part related to the court’s ability to persuade.

Firstly, a universal audience must be persuaded. That audience consists of the parties to the dispute, their lawyers, the general public, and the media. Their expectations focus upon the fairness of the process. Secondly, the legitimacy of the judgment depends significantly upon its acceptance by an audience consisting of other members of the legal community (other judges, lawyers, bar officials, legislators, law professors), who tend to be concerned about the coherence of the legal system and about the integration of the judgment into that supposedly

⁴⁶ See *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801; and see further the more extensive discussion of this case by Trevor C. W. Farrow, “Public Justice, Private Dispute Resolution and Democracy,” at 301, this volume.

⁴⁷ See T.E. Carbonneau, *The Law and Practice of Arbitration* (Huntington, N.Y.: Juris Publishing, 2004) at 6–9.

coherent framework (a form of Dworkinian “fit”).⁴⁸ In the public justice legitimization process, constitutional values such as basic individual rights are at least likely to be taken into consideration, while the risk that such values will not be taken into account is much greater in private justice context. For that reason, it is of the utmost importance to look critically at situations in which the State, either by positive action or by omission, does not seek to decrease the possibility that constitutional values will be ignored.

The presumption that private justice is *always* good justice must thus be rejected. At a deeper level, this presumption relies on a prior belief in an unfettered *right* to private justice, which itself points to an unfettered right to freedom of contract and, ultimately, to a right to a particular legal mechanism, i.e. arbitration. Ironically, we have been witnessing lately the emergence of a discourse which, under the guise of adopting relativist-multiculturalist stances and in view of manifesting equal respect for all sorts of “different” cultures, advocates what could very well be characterized as a left-leaning *Lochnerianism*. This label refers to the ideology promoted in the 1905 case of *Lochner v. New York*⁴⁹ where the United States Supreme Court held that laws prescribing basic labour standards unduly interfered with the freedom of contract of parties to labour agreements, a freedom that was deemed to be protected under the “due process clause” of the United States Constitution’s 14th Amendment. In that case, the Court actually struck down a New York statute that made illegal, in the business of bakery, contracts providing for a number of weekly working hours above a threshold determined in the statute. Although the *Lochner* case, together with the rulings it later inspired, were eventually overruled in 1937,⁵⁰ the decision still designates a strong libertarian understanding of freedom of contract.

So why are there *Lochnerian* undertones to the claim that the state has the duty not only to not interfere in private contractual relations, but also to actually recognize each and every such relation?

Although this requirement of state recognition may seem paradoxical from a *Lochnerian* standpoint, which rather tends to picture the state as the arch-enemy of contractual freedom, it bears noting that the

⁴⁸ See e.g. C. Perelman, *Logique juridique, nouvelle rhétorique* (Paris: Dalloz, 1979); C. Perelman & L. Olbrechts-Tyteca, *Traité de l’argumentation*, 5th ed. (Brussels: Éditions de l’Université de Bruxelles, 2000).

⁴⁹ 198 U.S. 45 (1905).

⁵⁰ *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

assumption here is that the state is duty-bound to *recognize* contractual agreements, irrespective of their content and the circumstances of their conclusion. If one accepts that assumption, a most important consequence flowing from it is that the state is precluded from legitimately interfering within the parties' contractual sphere. In other words, this alleged *a priori* right to automatic state recognition would incorporate an *a posteriori* right to state abstention. This, in effect, is more or less what the *Lochner* case stood for. (As an aside, it is not the least paradox to realize that, under this view, the legal pluralism generated by contract-based private orderings would somehow need to be institutionalized through its formal recognition by the state.) Lastly, there are also *Lochnerian* undertones in the claim that parties to family law arbitration should *always* be free to choose whatever law they want in whatever context they are in. This attempt at privatizing the stakes raised by religious arbitration undoubtedly represents a shrewd move, though, as it helps to de-politicize claims that, as mentioned earlier, go beyond their immediately visible private law dimension.

To their credit, proponents of associational governance models such as Veit Bader, who support private religious arbitration in family law contexts, are forthright enough to recognize the "moderately libertarian" spirit of their proposal. This is a legitimate, and normatively defensible, position to hold. However, pushed to their limits, claims such as those examined above are problematic. Indeed, all such claims presuppose that parties to family law arbitrations are always perfectly free when they agree to arbitration, that there are no power imbalances between them, or, worse, that these power imbalances should be ignored if they do exist. While it is true that not all parties to family law arbitrations, whether faith-based or not, are vulnerable or coerced into participating into the arbitration, some may be both vulnerable and coerced. Importantly, the mere fact that a possible majority of participants to arbitration do it freely and wilfully should not necessarily preclude the state from elaborating policies seeking to protect the most vulnerable ones.

A few analogies may serve to make this point. It is not because a majority of workers are not particularly vulnerable that laws imposing basic labour standards become illegitimate or unnecessary. As well, simply because most consumers understand what they are doing when they buy a good does not make consumer protection legislation irrelevant. Among other things, that type of legislation is susceptible of reducing the costs associated with adducing and presenting evidence in disputes involving contractual relations statutorily deemed to present a higher risk

of substantial economic and informational imbalance between the parties. So, it does not become irrelevant unless, of course, one assumes the existence of an unfettered, fundamental right to freedom of contract, as was envisaged in the now discredited *Lochner* case.⁵¹

We should be careful, in this respect, not to project our own preconceptions about people's agency on what actually happens in the real world. Humans indeed tend to view reality through a particular prism, namely theirs, which is the product of their own particular socialization. There is nothing intrinsically problematic about this, but one has to acknowledge the limits of one's own perspective. For example, all the women that I know, be they Atheist, Muslim, Jewish or Christian, can be said to exercise agency, and there is no point in questioning their choice to work or not, to have children or not, to wear a religious veil or not, to go to religious ceremonies or not, to sign contracts or not, etc. They also happen to be all university-educated. In addition, several of them have post-graduate degrees, and most speak fluently at least two languages, and none is illiterate. We could reasonably assume their agency when signing up to a faith-based arbitration agreement. But is it the case of all women? Obviously not. The same remark could be made regarding other groups as well. All this is to say that lawyers, judges and other professionals, including public policy makers, should always remember that the environment in which they exist is often markedly different from the environment in which others do, and that their representations of *their* real world may not always correspond to what actually happens in the real world of other individuals who do not come from the same socioeconomic *milieu* or background.

So, can religious women who come from very traditionalist groups, who may in some cases be recent migrants, who are in any event

⁵¹ An argument could be made that freedom of contract entails the right to agree to a contract that is not in one's advantage and that the state should abstain from interfering in such decisions. Ultimately, this type of argument raises important questions which may be answered differently depending on one's conception of what a contract is and of what contractual justice is. However, even if one adopts a consequentialist approach to freedom of contract, i.e. one that posits that parties will rationally choose the course of action that will not only fit their interests but that will maximize their benefits, it does not follow that the examination of the parties' behaviour should be made without reference to the social, economic and cultural context in which that course of action was chosen. In that respect, a purely formalist approach will always lead to finding that the most vulnerable party was indeed perfectly free to agree to a grossly disadvantageous contract. But can law content itself with such formalism?

totally dependent upon their group of belonging, be said to *always* be in a position to exercise agency? And does the fact that most of them exercise it preclude the state from taking measures—positive and negative—to protect those who do not, notably by preserving their right to exit from their communities or to use non-communal dispute resolution if they so desire?

Again, the narrative here is not the specious one of systematic victimization of religious women at the hands of power-hungry male clerics acting as arbitrators. Nor is it that women or other potentially vulnerable clienteles are necessarily worse off with religious arbitration—this argument is often heard, but has not been proven as far as I know. The narrative is simply that some religious women may be victimized in the process, even though there may be advantages for them to use arbitration (especially in terms of informality, expediency, shared cultural references, cultural proximity to, and trust in, the process, language, etc). State policies addressing faith-based arbitration should not obscure the possibility of victimization for the sake of abstractly valuing private justice and non-state legal norms.

Regarding the reliance on non-state norms, it is of the utmost importance for those who value the idea and the practice of legal pluralism not to fall into the trap of epistemological hypochondria by denying all relevance or, worse, legitimacy of positive legal norms in view of beefing up their claim in favour of legal pluralism. More specifically, the fact that positive legal norms may once have been used to discriminate against, or to exclude, some groups, and the fact that they may have been conceived of in a context of colonialism or imperialism, should not entirely determine the way we approach them. Systematically invoking the somewhat problematic context of elaboration or application of a positive norm so as to reject it outright or to deny it any legitimacy is a very easy way to refuse to engage debate and to revisit one's presuppositions.

The main problem with such a logic of “ascription to origins,” under which “the effective conditions surrounding the genesis of a work (of an idea, of a reasoning)” determine, alone, its validity,”⁵² is its unduly generic nature. Generic because of the historical fact that, as Walter Benjamin once put it, “[t]here is no document of civilization which is not

⁵² C. Castoriadis, *La montée de l'insignifiance. Les carrefours du labyrinthe IV* (Paris: Seuil, 1996) at 234 [translated by author].

at the same time a document of barbarism.”⁵³ Paul Ricoeur was making the same type of argument when he wrote that “[t]he most reasonable state, the state governed by the rule of law bears the scar of the original violence of history-making tyrants.”⁵⁴ It is thus way too easy and simplistic to deny legitimacy to an entire system of thought or to a whole set of institutions under the pretext that, at one point in their evolution, they were imposed by force as part, or as an off-spring, of an imperialist project. Besides, it bears remembering that several religions, from Christianity to Islam, spread through force or conquest, which, under a view ascribing them to their origins, would “taint” them forever.

Rejecting this logic of ascription to origins appears even more important in respect of positive norms entrenching fundamental human rights. Again, the fact that the application of such norms by the judiciary has sometimes or even often been unduly and unnecessarily insensitive to the preoccupations and circumstances of religious or ethno-cultural groups does not justify the wholesale rejection of these norms and of the system of public justice applying them, and the corollary withdrawal from this system though the creation of identity-based systems of parallel justice.⁵⁵ Ultimately, let us not lose sight of the federating role of positive norms, which Hannah Arendt once eloquently summarized as follows: “The hurdles posed by positive laws are to the political existence of man what memory is to his historical existence: they ensure the pre-existence

⁵³ W. Benjamin, “Theses on the Philosophy of History” in *Illuminations* (New York: Schocken, 1969) 256.

⁵⁴ P. Ricoeur, *Du texte à l’action. Essais d’herméneutique II* (Paris: Seuil, 1986) at 401 [translated by author].

⁵⁵ A lack of confidence in the state justice system, because of its perceived incapacity to grasp a party’s religious interests or preoccupations, or a lack of familiarity with its functioning, are certainly factors that may lead that party to refuse to seek relief from a civil court and to opt for a religious tribunal. However, it is hard to see why these factors alone should induce us to conclude that religious courts should enjoy a normative monopoly on disputes raising the potential application of religious norms or beliefs. It is even harder to see how these factors offset the problems associated with state-sanctioned, unmonitored, religious courts and why their mere existence should convince us to renounce improving the level of sensitivity and understanding of civil courts. On the reluctance of many immigrant women to seek assistance from the public justice system, because of a prior internalization of the norms and expectations of their primordial community of belonging, of a lack of information about their positive rights, of a weak or non-existing proficiency in the country of adoption, and, more generally, for fear of social ostracism by their family and community, see E. Erez & C. Copps Hartley, “Battered Immigrant Women and the Legal System: A Therapeutic Jurisprudence Perspective” (2003) 4(2) *Western Criminology Review* 155 at 157–158.

of a common world, the reality of a certain continuity, which transcends the duration of the individual life of each generation, absorbs all new beginnings and feeds itself from them.”⁵⁶

Ensuring “the pre-existence of a common world, the reality of a certain community”: these are precisely things that public justice is supposed to do. For that reason, public justice can arguably be characterized as a public good. If this is the case, then “contracting out” of the public justice system is surely a possibility, but certainly not a fundamental right. Indeed, in fragmented multicultural societies, state courts constitute one of the very few *loci* where the status of society is *affirmed* as an association of members who, both as rights-bearing individuals *and* as members of diverse cultural groups, pursue common ends and aspirations. This affirmation is made both because and in spite of the plurality of “comprehensive,”⁵⁷ and potentially incommensurate, doctrines available in the socio-political field. However, it is not made in view of imposing a single, hegemonic conception of membership, but essentially as a means to ensure that a deliberative forum where fundamental norms of equity and equality are respected is always accessible to all, irrespective of their particular cultural affiliations.

Such an approach inevitably induces one to view with skepticism formalist arguments emphasizing the absolute freedom of choice allegedly enjoyed by those who opt out of the public justice system. From that “public justice as public good” standpoint, the mere fact that parties to religious arbitration retain a formal right to turn to public courts, as they did under the legal framework that gave rise to the religious arbitration debate in Ontario, is hardly convincing. The actual degree of freedom of choice enjoyed by religious individuals in some contexts, particularly ones where the family serves both as a springboard for a broader cultural identity and a shield against unwanted external influences, is variable at best, and is often predetermined. The genuineness of their consent thus remains a critical issue, and the nature of the mechanisms that can best monitor the existence of such consent, while preserving the advantages of private arbitration, is far from clear.

The bottom line of the “public justice as public good” argument is, first, that conceiving of justice as a commodity that may be bought, sold,

⁵⁶ H. Arendt, *Le système totalitaire* (Paris: Seuil, 1972) at 284 [translated by author].

⁵⁷ See: J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 146.

or exchanged on a market consisting of public and private offerings (the functioning of which is moreover posited as perfect rather than perfectible) is empirically wrong and normatively flawed. Secondly, it is that the abstract valuation of legal pluralism, not only as a result of the acknowledgment of the empirical existence of such pluralism, but as a reflection of an individual or societal attraction to an exotic legal other, can be as problematic as the traditional positivist assumption that non-state legal orderings are intrinsically inferior to positive ones. Like legal positivism, legal pluralism can easily be high jacked in view of promoting socio-political agendas that deserve closer scrutiny.

This is why it is crucial to be aware of the limits of magic solutions, which include those rooted in positive law. Indeed, a blanket imposition of state law does not, and cannot, solve all problems, including that of “clandestine,” informal religious arbitrations where abuses may still occur.⁵⁸ The best thing that positive law can do is not to erect hurdles to potential “exit” attempts from closed religious communities. This points, as alluded to earlier, to the absence of any optimal solution in responding to religious claims for group rights, to the limits of state paternalism, and, even more importantly, to the limited reach of state law itself. It ultimately forces us to recognize the limits of public justice. This brings me back to the third assumption that I identified, i.e. that state justice should always enjoy, notwithstanding the circumstances, an adjudicative monopoly over any type of dispute, and, more problematically, that it is always doing a good job in dealing with disputes involving parties from ethno religious minorities. That type of claim is also normatively dubious and empirically incorrect. However, it has the merit of forcing us to turn to the consequences of envisaging public justice as a public good.

Two observations are warranted here. Firstly, as much as it is important not to idealize private justice, it is equally important not to idealize secular justice, notably in family matters. In fact, over the centuries, both positive law and state justice have done a poor job at protecting vulnerable individuals from abuses occurring in family contexts. Actually, this protective function was not, historically, even part of the family law’s core objectives. Things have obviously improved, as least in democratic states, but putting all of one’s eggs solely

⁵⁸ I draw my readers’ attention to the following, and most stimulating, article: A. Emon, “Conceiving Islamic Law in a Pluralist Society: History, Politics, and Multicultural Jurisprudence” [2006] S.J.L.S. 331.

in the state's basket represents a dubious strategy, in addition to evincing the influence of an epistemological obstacle, i.e. statocentrism. Secondly, to permanently deserve the characterization of a public good, public justice must be concretely hospitable to all individuals, both as rights-bearing citizens and as members of cultural groups. To become meaningful, and thus legitimate, for members of minority cultural groups, public justice must be perceived as genuinely inclusive. Unfortunately, it is well documented that for many members of such groups, including the most vulnerable ones, it is not perceived as such.⁵⁹ It is thus no surprise that they may be inclined to opt out of public justice. In the Canadian context, where an express commitment to multiculturalism is enshrined in the Constitution, this arguably imposes upon the state a particular duty to ensure, and, if needed, to take the means necessary to increase the inclusiveness of the public justice system.

Accommodating instances of *individual* difference is only one way to achieve that goal. This means that courts should not shy away, when faced with civil claims informed by religious preconceptions or institutions, from accommodating religious parties by interpreting open-textured positive norms in a manner that is both beneficial to their individual religious interests, and not detrimental to the fundamental norms applicable within the state. In so doing, they could incidentally foster the collective interests of a religious group seeking to perpetuate itself. This presupposes that the accommodation would not impose any "undue hardship" on its debtor. A blatant contradiction of a constitutional rule or value by a religious norm should be viewed as imposing such an undue hardship. Conversely, absent any such contradiction, systematically refusing to accommodate believers should be seen as intrinsically problematic. Where possible, courts should try to find functional secular equivalents to religious obligations that parties to a dispute want to be performed. For example, instead of refusing to recognize civil effects to the *ma'hr*, they should determine whether this particular Islamic institution could be cognizable using and, if necessary, expanding secular ones, such as the concept of donation.⁶⁰ Refusing to

⁵⁹ For a broad-ranging examination of this question, see P. Noreau, *Le droit en partage: le monde juridique face à la diversité ethnoculturelle* (Montreal: Thémis, 2003).

⁶⁰ For example, in *Kaddoura v. Hammoud* (1998), 168 D.L.R. (4th) 503, the Ontario Court of Justice (Gen. Div.) refused to recognize positive legal effects to a Mahr, i.e. a financial obligation contracted under an Islamic marriage contract. The Mahr, which, once contracted, becomes obligatory under Islamic law, was found unenforceable simply because of the religious inspiration of the promise to pay. To deny it positive legal effects, the judge surprisingly compared this essentially

conceive of the interplay between positive law and religious law as governed by a “watertight compartments” approach is what the Supreme Court of Canada recently did in *Bruker v. Marcovitz*, where it determined that the law of Québec did not prevent parties to a contract from transforming an originally moral or religious obligation into a civil one and that such an obligation was justiciable.⁶¹ At stake in that case was the refusal by a husband to grant his former wife a *get* (i.e. a Jewish divorce allowing the former wife to remarry religiously) under the terms of a civil agreement incorporating a pledge to appear before rabbinical authorities to obtain the *get* immediately upon the granting of the civil divorce. Ms. Bruker sued her former husband in damages for having failed, for several years, to live up to his contractual pledge, thereby preventing her to remarry religiously. The Supreme Court confirmed the trial judge’s damage award. Interestingly, Madam Justice Rosalie Abella, speaking for the majority, emphasizes the casuistic nature of exercises of normative

financial obligation (a functional equivalent of a dowry) to the Christian religious obligations of loving, honouring and cherishing one’s spouse, or remaining faithful to him or her, and similar moral obligations (see at para. 25 of the judgment). A scathing critique of that decision can be found in P. Fournier, *supra* note 12. Refusing to follow the reasoning in *Kaddoura*, other Canadian decisions have found the Mahr legally enforceable. See, *inter alia*, *N.M.M. v. N.S.M.*, 2004 BCSC 346 (Sup. Ct.). Interestingly, two much older cases, a Canadian one from the mid-nineteenth century and an Indian one from the early twentieth century showed more much more openness than the *Kaddoura* case to the incorporation of religious or spiritual norms in a positive law setting, thereby opening the door to a form of dialogical pluralism. First, in *Connolly v. Woolrich*, (1867) 17 R.J.R.Q. 197, the Québec Superior Court confirmed on the basis of oral evidence the validity, under the laws of the province, of a marriage contracted according the “usages of the Cree country,” to which no religious or civil authority had attended, even if a similar relationship would have been characterized at the time in Québec as a sinful common law one. That judgment was confirmed by the Québec Court of Queen’s Bench, *sub nomine Johnstone v. Connolly*, (1869) 17 R.J.R.Q. 266. Secondly, in *Mullick v. Mullick*, (1925) 52 L.R. (Indian Appeals) 245, the Judicial Committee of the Privy Council examined the legal status of an idol under Hindu law in view of deciding a dispute between its co-guardians. The dispute concerned the idol’s removal from the sanctuary which had been built for it by the co-guardians’ father, who had consecrated the idol as a household deity prior to his death. Although the co-guardians relied on English property concepts to argue their respective cases about the fate of the idol, the court deemed determinative of the case the status of the idol as a legal person under Hindu law. Being vested with legal personality but unable to express its will, the idol was thus appointed a “disinterested next friend” responsible for defending its interests. For an illuminating analysis of accommodation strategies on the basis of a “joint-governance” model, see generally: A. Shachar, *supra* note 32, and more specifically her discussion of the “contingent accommodation” approach at 109–113.

⁶¹ 2007 SCC 54.

accommodation. Discussing the link between multiculturalism and an alleged right to difference, she states that:

The right to have differences protected, however, does not mean that those differences are always hegemonic. Not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance.⁶²

Thus, while it is of the utmost importance not to systematically defer to religious norms to avoid preventing abuses committed in the name of religion, even if it means acknowledging the existence of a relation of incommensurability, it is equally important to recognize that outsiders to a given cultural group "should not be too quick to jump to the conclusion that every practice that deviates from theirs constitutes such abuse."⁶³ Indeed, the perceived "foreignness" of a norm or practice does not make it *per se* incompatible with a democratic society's most fundamental norms. Each norm or practice has to be examined on its merit, but always bearing in mind the risk-minimizing principle I expounded earlier. This is why secular fundamentalism is problematic, and why religious fundamentalism is arguably more so.⁶⁴

⁶² *Ibid.* at para. 2.

⁶³ See D.G. Réaume, "Justice Between Cultures: Autonomy and the Protection of Cultural Affiliation" (1995) 29 U.B.C. L. Rev. 117, at 140.

⁶⁴ From a democratic perspective, religious fundamentalism (of all stripes) is notably problematic because of its inherent Manichaeism, which tends to reject democracy's commitment to religious, cultural, and political pluralism. See T. Todorov, *La peur des barbares. Au-delà du choc des civilisations* (Paris: Robert Laffont, 2008) at 155. It becomes even more problematic when it overlaps with a political project (i.e. the establishment of a theist regime enshrining the tenets of the fundamentalist *ethos*) that opposes the separation of the spiritual and the temporal spheres, as porous as this separation may sometimes be even in secular democracies. For a more elaborate discussion of the challenges posed by religious fundamentalism to democracy, see J.-F. Gaudreault-DesBiens "Constitutional Values, Faith-Based Arbitration, and the Limits of Private Justice in a Multicultural Society" (2005) N.J.C.L. 155 at 184–187.

CONCLUSION

Was the Ontario debate on religious arbitration conducive to a serene evaluation of the pros and cons of the formal state recognition of private religious orderings as sources of family law? I do not think so. Most of the problems that plagued the debate were due to its initial intellectual setting, that of a debate about private arbitration in a particular field of law. The first problem was that the debate itself was triggered by a legislative *bricolage* that some people purported to fix by adding another layer of legislative *bricolage*. Secondly, the debate's legal impetus—a private arbitration statute—facilitated the privatization of issues the nature of which were far from purely private. In that sense, the Ontario debate showed that family law arbitration, when coupled with religion and identity, raises deep political issues that should be characterized as such.

The debate also reminded us that hard cases rarely give rise to optimal solutions. In my view, the legal treatment of faith-based family arbitration certainly qualifies as a hard case. This might be because religion itself, as a phenomenon, is difficult to grasp from the standpoint of a positive legal system which relies on categorical thinking, however elastic the categories in force may be. It is also true that in an overwhelmingly secular society, we may have lost a certain ability to understand what the religious experience is about. But secular societies are not all the same; each has a particular experience with religion, and the outcome of the interplay between religion and identity is likely to reflect that specificity. Thus, context matters when addressing religious claims.⁶⁵ And, arguably, there is no such thing as a homogenous pan-Canadian context when assessing the value of such claims. Consider, for example, the different societal relation to religion that exists in Ontario as compared to Québec. It is worth asking, in this respect, whether the Supreme Court of Canada should consider recognizing in its case law on freedom of religion a kind of “provincial margin of appreciation,” to borrow from European law terminology.

Ultimately, the Ontario debate may have put to rest the chimeric dream of perfectly consensual solutions to challenges launched by religious groups in a society that is largely secularized. If, in passing, Ontario and Canada as a whole have lost a bit of their multiculturalist *naïveté* or secularist absolutism, that might not be a bad thing after all.

⁶⁵ R.A. Macdonald & A. Popovici, *supra* note 10 at 54–55.