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Constructing an Islamic Institute of Civil Justice that Encourages Women's Rights

I. INTRODUCTION

Many Canadians are voicing concerns over the proposed Islamic Institute for Civil Justice ("IICJ") that would allow Muslims to settle certain disputes in Ontario in accordance with their religious Sharia law.¹ Some fear that an approved IICJ invites unjust situations comparable to those experienced by Amina Lawal and Bariya Magazu.²

In 2002, a Nigerian Sharia court sentenced Amina Lawal to be stoned to death for having a child out of wedlock; in contrast, the man named as the father denied responsibility, and as a result, the court dropped charges against him.³ In another case, teenager Bariya Magazu asserted that she was raped by three men and became pregnant as a result. Because she had sex outside of marriage, a Sharia court sentenced her to one hundred lashes, even though seven people corroborated her story.⁴ The men accused of the rape received no punishment.⁵

1. The Sharia is Islamic law that provides a religious code of living. Susie Steiner, *Sharia Law*, GUARDIAN UNLIMITED, Aug. 20, 2002, at <http://www.guardian.co.uk/theissues/article/0,6512,777972,00.html>. Sharia, an Arabic word, has been translated differently into English in various forms. Some of the most common national and regional translations are Shari'ah, Sharia, Shari'a, Shariah and Shariat. Lindsey Blenkhorn, Note, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189, 234 n.15 (2002). Sharia is spelled the same way throughout this comment, unless embedded in a direct quote.

2. Evelyn Myrie, *Women's Equality Is at Risk; Sharia Law: Unjust*, THE HAMILTON SPECTATOR, Sept. 25, 2004, at F09; Chris Wallace, *Letter of the Day Column*, THE TORONTO SUN, June 10, 2004, at Editorial/Opinion 18.

3. AMNESTY INT'L, *Amina Lawal: Sentenced to Death for Adultery* (Sept. 25, 2003), at <http://web.amnesty.org/pages/nga-010902-background-eng> [hereinafter *Amina Lawal*].

4. Rhoda E. Howard-Hassmann, *The Flogging of Bariya Magazu: Nigerian Politics, Canadian Pressures, and Women's and Children's Rights, in Globalization Working Paper Series* (2003), at <http://strange.mcmaster.ca/global/servlet/Xml2pdf?fn=x5>.

5. *Id.*

The extreme bias against women is apparent in sentences of adultery or fornication under Sharia. A woman is convicted simply by becoming pregnant, but a man is not condemned unless four people can testify that they *witnessed* the normally private acts of adultery or fornication.⁶ Countries such as Nigeria impose flogging, stoning, or severing off a hand as *hudood*, all of which are deterrent punishments for serious crimes mentioned in the Qur'an.⁷ The Canadian IICJ, however, will only arbitrate certain civil disputes; no criminal matter is subject to arbitration.⁸

The IICJ, though its authority vested by the Arbitration Act of 1991, can arbitrate civil matters according to Islamic personal law; at this time Sharia is legal in Ontario, "as long as both parties agree to it and the arbitrators' decisions don't violate Canadian law."⁹ This provides Canadian Muslims an opportunity to settle their personal disputes according to Canadian positive laws and their own beliefs. More importantly, this gives arbitrating parties "peace of mind and satisfaction that the Shariah law is obeyed and that the Ontario law is not flouted."¹⁰ The IICJ is also beneficial because arbitration is conducted in an informal religious setting, is cost and time efficient, and provides more flexibility than the court system.

The Canadian province of Ontario should allow Muslims to arbitrate according to Sharia law in accordance with the 1991 Arbitration Act, because the advantages of a Sharia tribunal far outweigh the disadvantages. Due to the real probability that Sharia law could constrict women's equality, however, Ontario

6. Carina Tertsakian, "Political Shari'a"? *Human Rights and Islamic Law in Northern Nigeria, Discrimination Against Women*, 16 HUM. RTS WATCH (2004), available at http://www.hrw.org/reports/2004/nigeria0904/3.htm#_Toc82565158.

7. Abdullah Mohammed, *Lashing, Stoning, Mutilating: Islamic Law Is Barbaric and Outdated: Defend the Case of Islam*, available at <http://www.jannah.org/moreArticles/4.html>. The *hudood* offenses include "adultery, fornication, false imputation of being unchaste (*qadhif*), drunkenness, armed robbery, sedition and apostasy." *Id.* In addition, the Arbitration Act excludes disputes involving public status, like marriage and divorce, from arbitration. NATASHA BAKHT, NAT'L ASS'N OF WOMEN & LAW, FAMILY ARBITRATION USING SHARIA LAW: EXAMINING ONTARIO'S ARBITRATION ACT AND ITS IMPACT ON WOMEN, <http://www.nawl.ca/brief-sharia.html#14>.

8. BAKHT, *supra* note 7.

9. See Arbitration Act, S.O., ch. 17, § 32(1), at 121 (1991) (Can.); Kerry Gillespie, *Sharia Protest Gets Personal*, THE TORONTO STAR, Sept. 9, 2005, at A9.

10. SYED MUMTAZ ALI & AZIM HOSEIN, AN ESSENTIAL ISLAMIC SERVICE IN CANADA: MUSLIM MARRIAGE MEDIATION & ARBITRATION SERVICE, at <http://muslim-canada.org/brochure.htm> [hereinafter MEDIATION & ARBITRATION BROCHURE].

needs to implement stricter guidelines to guard against inequality of women in areas such as child custody, inheritance, and spousal support.

Part II of this comment examines Sharia, Canadian, and international laws, as well as the recommendations made by Marion Boyd, who was chosen to study and report her findings on how the IICJ would affect vulnerable people. Part III discusses the advantages and disadvantages of the IICJ, and offers solutions, such as providing independent legal advice and education, amending current laws, and keeping written records. Part IV analyzes the civil matters that are possible subjects to Islamic arbitration.

II. LEGAL FRAMEWORK

Currently, the following report and laws are not mandatory in the Islamic tribunal, but the addition of the recommendations made in Marion Boyd's report, the Canadian Charter of Rights and Freedoms, Divorce Act, Family Law Act, and CEDAW would strengthen women's rights.

A. *The Sources of Sharia*

Muslims view the Sharia as the "will of God and a guide by which to live," that governs "every aspect of Muslim private life, social transactions, piety, and rituals."¹¹ Today, Sharia influences and shapes laws across the world.¹² The Sharia is the Islamic code of law based on the Qur'an, Sunnah of the Prophet, *qiyas* and *imja*, all of which are mutually independent and listed by weight of authority.¹³

The principal source of Sharia is the Qur'an, the Islamic holy book. The Qur'an is a collection of revelations that the Prophet Muhammad received from God which Muslims believe to be the literal word of God.¹⁴ Next in importance is the *Sunnah* of the Prophet Muhammad; the deeds, sayings and approvals of the

11. Religion A to Z, Canada and the World Backgrounder (Dec. 1999), at http://www.findarticles.com/p/articles/mi_qa3695/is_199912/ai_n8868098.

12. Kristine Uhlman UmHani, *Overview of Shari'a and Prevalent Customs in Islamic Societies: Divorce and Child Custody* (Jan. 2004), at http://www.expertlaw.com/library/attyArticles/islamic_custody.html [hereinafter *Divorce and Child Custody*].

13. JOHN L. ESPOSITO, WOMEN IN MUSLIM FAMILY LAW 3 (1982); *Divorce and Child Custody*, *supra* note 12.

14. FARLEX, INC., *Sharia*, at <http://encyclopedia.thefreedictionary.com/Sharia>.

Prophet Muhammad are translated into *hadith*, stories and anecdotes, to illustrate a concept.¹⁵ Third is the *ijma*; specific personal or political issues that are solidified by Islamic scholars.¹⁶ Of least importance is the *qiyas*, the legal precedent from former cases that a Sharia judge may use to decide a pending case.¹⁷

Critical to the development of Sharia was the division of Muslims into two groups, the Sunni and the Shia, after the death of the Prophet Muhammad. Each group subsequently developed different *madhhabs of fiqh*, also known as schools of law.¹⁸ The different *madhhabs* agree on "certain fundamental legal issues, but their various interpretations and views of the sources of Shari'a have given rise to different rules on many points of law."¹⁹ The Sunnis have four *madhhabs of fiqh* whereas the Shias have three.²⁰ Sharia has been codified in many countries with Muslim populations, to apply to both personal and family law issues, such as marriage, divorce, child custody, familial succession, and criminal law issues.²¹

B. Canadian Laws

1. Constitutional Act

Canada's main constitutional instrument, the Constitution Act of 1867, distributes legislative powers.²² Section 91 of the Constitution Act lists areas with exclusive federal jurisdiction, including marriage and divorce, whereas Section 92 lays out areas of exclusive provincial jurisdiction, including the solemnization of marriage, property rights and civil rights in the province.²³

15. *Id.*; Dennis J. Wiechman et al., *Islamic Law: Myths and Realities*, 12(3) CRIM. JUSTICE INT'L ONLINE 1, 3 (May-June 1996), reprinted in Office of Int'l Crim. Justice at the Univ. of Ill., at http://muslim-canada.org/Islam_myths.htm [hereinafter *Islamic Law: Myths and Realities*].

16. *Islamic Law: Myths and Realities*, *supra* note 15; *Divorce and Child Custody*, *supra* note 12.

17. See *Islamic Law: Myths and Realities*, *supra* note 15.

18. *Divorce and Child Custody*, *supra* note 12.

19. *Id.*

20. *Id.* The four Sunni *madhhabs of fiqh* are Hanafi, Shafi'i, Maliki and Hanbali. The three main Shia *madhhabs of fiqh* are Ithna-Ashari, Zaidi, and Ismaili. *Id.*

21. ESPOSITO, *supra* note 13, at 3. See generally Tertsakian, *supra* note 6, at http://www.hrw.org/reports/2004/nigeria0904/3.htm#_Toc82565158.

22. Claude Belanger, *The Constitution Act, 1867*, at <http://www2.marianopolis.edu/quebechistory/federal/bna-act.htm> (last modified Feb. 19, 2001).

23. *Id.*

2. Canadian Charter of Rights and Freedoms

The Constitution Act was amended in 1982 to include the Canadian Charter of Rights and Freedoms (“Charter”).²⁴ The Charter guarantees everyone the fundamental freedom of conscience and religion; thought, belief, opinion, and expression; peaceful assembly; and association.²⁵ Most importantly, the Charter guarantees equality between the sexes.²⁶

The Charter, however, applies only to state actions, not to private individuals. In Section 32, the Charter applies to “the Parliament and government of Canada,” and to the “legislature and government of each province.”²⁷ Thus, the Charter does not per se bind arbitrators in actions involving private individuals. Furthermore, it is “difficult to predict what impact [the Charter] will have on legislation that allows two parties with informed consent to agree to arbitration using any rules of law.”²⁸

3. Divorce Act & Family Law Act

The Divorce Act is a federal law in Canada. The Act holds jurisdiction over the divorce procedure itself and other issues inherent in a divorce, such as child custody, child support, and spousal support.²⁹ Canada’s federal law, however, does not apply to couples who are not married, or who are separating. It is left to the provinces to legislate in these areas.³⁰

Ontario’s provincial laws, the Family Law Act and the Children’s Law Reform Act, are much broader than the federal Divorce Act. These provincial laws are open to anyone, to both married couples seeking divorce as well as married and unmarried couples desiring legal separation.³¹ Therefore, married couples who file for divorce may use either the federal or provincial laws to settle their particular disputes, whereas common law couples

24. See generally CAN. CONST. (Constitutional Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), schedule B, available at http://laws.justice.gc.ca/en/const/annex_e.html.

25. *Id.* § 2(a).

26. *Id.* § 15, 28.

27. *Id.* § 32.

28. BAKHT, *supra* note 7.

29. See generally Divorce Act, R.S.C., ch. 3, §§ 2(1), 3(1), at 2, 3 (1986) (Can.).

30. See *id.*

31. See generally Family Law Act, R.S.O., ch. F.3 (1990) (Can.); Children’s Law Reform Act, R.S.O., ch. C.12, pt. II, § 4, at 2 (1990) (Can.).

and married couples, who separate rather than divorce, *must* use the provincial laws.³²

4. Arbitration Act of 1991

The Arbitration Act of 1991, adopted by Ontario in 1992, provides Ontarians an alternative forum to take their disputes, rather than taking their case into the judicial court system. Under this Act, arbitrating parties agree to let a third person resolve their dispute using the parties' choice of law, and the parties consent to abide by the third party's decision.³³ The main legal limitation, in contrast to the court system, is that the arbitration must be voluntary.³⁴ In addition, the arbitrator's decision is binding on the parties, unless the parties opt to appeal their decision to the courts.³⁵

The drafters of the Arbitration Act originally intended that choice of law would mean parties could choose any provincial law.³⁶ The language of the Act, however, which states that "[i]n deciding a dispute, an arbitral tribunal shall apply the rules of law designated by the parties," allows religious groups to resolve civil family disputes within their faith, provided that the parties give their consent and the outcomes respect Canadian laws and human rights codes.³⁷ In practice, the Ontario government has accepted the plain language of the act rather than the drafter's intent; since the act passed, Christians, Jews, and Muslims arbitrate according to the precepts of their faith.³⁸

Parties have the option to arbitrate disputes involving matters of child custody, inheritance, and spousal support. Parties may not, however, arbitrate matters prohibited by jurisdiction or statute, such as federal jurisdiction over criminal offenses or civil divorce.³⁹

32. MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION, 18 (2004), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf> (emphasis added) [hereinafter BOYD REPORT].

33. See Arbitration Act, S.O., ch. 17, §§ 1, 32(1), 34, 37 at 110, 121 (1991) (Can.).

34. BOYD REPORT, *supra* note 32, at 33.

35. Arbitration Act § 37, at 121.

36. BOYD REPORT, *supra* note 32, at 12.

37. Arbitration Act § 32(1), at 121; Tarannium Kamlani & Nicholas Keung, *Muslim Group Opposes Sharia Law*, THE TORONTO STAR, Aug. 28, 2004, at A2.

38. BOYD REPORT, *supra* note 32, at 4.

39. Arbitration Act § 2, at 110.

C. International Laws: Convention on the Elimination of All Forms of Discrimination Against Women

The United Nations General Assembly, in response to discrimination towards women throughout the world in the 1960s and the 1970s, and recognizing the need for a comprehensive human rights treaty to ensure women's equality, created the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") in 1981.⁴⁰ As of October 2004, CEDAW has been ratified by Canada and 178 other state parties, over ninety percent of the UN member states.⁴¹

By ratifying CEDAW, these parties declared that they consented to be bound by the terms of the treaty.⁴² Ratifying state parties have the option, before or after ratification, to make a reservation to the treaty, declaring that they are not bound by a certain provision or provisions within the treaty.⁴³ In accordance with the Vienna Convention on the Law of Treaties, a state can submit a reservation to any provision, as long as it is not incompatible with the object and purpose of the treaty.⁴⁴ A reservation is considered incompatible if it intends to derogate from the essential provisions of the treaty.⁴⁵ This principle is codified in Article 28 of CEDAW, which explains that a "reservation incompatible with the object and purpose of the

40. United Nations Division for the Advancement of Women, Dep't of Economics and Social Affairs, *Short History of CEDAW Convention*, at <http://www.un.org/womenwatch/daw/cedaw/history.htm> (last modified Oct. 4, 2004).

41. *Id.*

42. United Nations, Convention on the Elimination of All Forms of Discrimination Against Women, Signatures and Ratifications, Sept. 3, 1981, 1249 U.N.T.S 13, 80, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty10.asp> [hereinafter CEDAW, Signatures and Ratifications]; United Nations, *United Nations Treaty Collection, Treaty Reference Guide*, at <http://untreaty.un.org/English/guide.asp> [hereinafter *UN Treaty Guide*].

43. *UN Treaty Guide*, *supra* note 42.

44. Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 19(c), 1155 U.N.T.S. 331, available at <http://www.un.org/law/ilc/texts/treaties.htm> [hereinafter Vienna Convention]. In 1951, prior to the passage of the Vienna Convention, the International Court of Justice (ICJ) stated that reservations to treaties are allowed as long as they do not conflict with the object and purpose of the treaty. This principle was ultimately incorporated in the Vienna Convention on the Law of Treaties. William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOKLYN J. INT'L L. 277, 318 (1995).

45. Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3, n. 24, available at <http://www.ohchr.org/english/countries/ratification/11.htm#reservations> [hereinafter CRC].

present Convention shall not be permitted.”⁴⁶

The CEDAW committee, which monitors state parties' implementation of CEDAW, declared that Articles 2 and 16 are core provisions that relate to the “object and purpose” of the treaty.⁴⁷ Article 2 explains that states agree to eliminate discrimination against women by implementing equality between the sexes in their constitutions, legislation, and legal systems through proficient national tribunals and other public institutions, and by abolishing laws, regulations, customs, practices and penal provisions that discriminate against women.⁴⁸

A reservation to these core provisions violates the object and purpose of CEDAW in two ways: first, a state may try to “invoke the provisions of its internal law as justification for its failure to perform a treaty,” and second, a state fails to take affirmative steps to eliminate discrimination against women.⁴⁹ Article 2 lays out the nature of state parties' obligation to end such discrimination.⁵⁰ Article 16 directs states to eliminate discrimination against women in matters of marriage and family relations.⁵¹ Specifically, women are granted equal rights: to enter marriage, within a marriage, at dissolution, as parents, to have children, to choose a profession, and in property.⁵² The committee declares that because “[n]either traditional, religious or cultural practice nor incompatible domestic laws and policies can justify violations of the Convention,” reservations to Article 16 are incompatible with CEDAW and thus impermissible.⁵³

Significantly, twelve parties have made reservations to

46. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, art. 28(2), 1249 U.N.T.S. 13, 19 I.L.M. 33, (entered into force Sept. 3, 1981), reprinted in DAVID WEISSBRODT ET AL., SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND BIBLIOGRAPHY FOR RESEARCH ON INTERNATIONAL HUMAN RIGHTS LAW [68, 77] (3rd ed. 1999) [hereinafter CEDAW].

47. United Nations Division for the Advancement of Women, Dep't of Economics and Social Affairs, *Reservations to CEDAW*, at <http://www.un.org/womenwatch/daw/cedaw/reservations.htm> (last modified Oct. 04, 2004) [hereinafter *Reservations to CEDAW*]; AMNESTY INT'L, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women -Weakening the Protection of Women from Violence in the Middle East and North Africa Region*, at <http://web.amnesty.org/library/Index/ENGIOR510092004>.

48. CEDAW, *supra* note 46, at 69.

49. See Vienna Convention, *supra* note 44, at art. 27.

50. See *Reservations to CEDAW*, *supra* note 47.

51. CEDAW, *supra* note 46, at art. 16.

52. *Id.*

53. *Reservations to CEDAW*, *supra* note 47.

CEDAW Article 2 and/or Article 16, explicitly asserting that these provisions are incompatible with Sharia.⁵⁴ Some Muslim states enter very broad reservations, such as making a reservation to any article in general which conflicts with religious law.⁵⁵ Others have entered narrowly tailored reservations, such as making a reservation to a particular article as to why it conflicts with Sharia.⁵⁶ But some Islamic party states, such as Nigeria, have ratified CEDAW without making any Sharia-based reservations. This makes Sharia-based CEDAW reservations perplexing because the precise requirements of Sharia are unknown and the future is unclear as Sharia is subject to evolving, and multiple interpretations and practices.⁵⁷

There are multiple interpretations of Sharia because it derives from four sources, is divided into two distinct branches, and is further separated into different schools of law. Confusion also arises because there is no distinction between the sources of Sharia, “such as the Quran, which is sacred, and Islamic *fiqh* (jurisprudence), which is not.”⁵⁸ For example, even though CEDAW Articles 2 and 16 do not conflict with the Qur’an, which guarantees women’s rights, several states have taken reservations because it is sometimes unclear whether Sharia and CEDAW will actually conflict.⁵⁹ Because the interpretation of Sharia can vary from state to state and even among citizens within a state, states may make a reservation, “not because Islam [is] against the equality of women, but as a precautionary measure.”⁶⁰

It is unclear whether the arbitral tribunal, IICJ, as constituted, would violate the core principles of Articles 2 and 16 as evidenced by the murky relationship between Sharia and CEDAW. Inconsistent explanations given on how Sharia will

54. See generally *UN Treaty Guide*, *supra* note 42.

55. See generally *id.*

56. See generally *id.*

57. *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women: Report by the Secretariat*, Comm. on Elimination of Discrimination Against Women; U.N. GAOR. 16th Sess., Provisional Agenda Item 8, CEDAW/C/1997/4 (1996).

58. Mariz Tadros, *Women Debate Rights on Woman’s Day*, AL-AHRAM WEEKLY ON-LINE, at <http://weekly.abram.org.eg/1999/420/focus.htm> (Mar. 11-17, 1999).

59. *Id.*

60. See Press Release, Committee on the Elimination of Discrimination against Women, Monitoring Body for Women’s Anti-Discrimination Conventions Takes up Reports of Egypt, WOM/1250 (Jan. 19, 2001), available at <http://www.un.org/News/Press/docs/2001/wom1250.doc.htm> [hereinafter *Press Release on Egypt*].

apply in the IICJ elevates this confusion. Syed Mumtaz Ali, one of the founders of the Islamic Institute of Civil Justice, explains that the IICJ will apply “a watered-down Sharia, not 100 per cent Sharia. Only those provisions that agree with Canadian laws will be used. If there is a conflict between the two, Canadian law will prevail.”⁶¹ Previously, however, Mr. Ali stated that Sharia “cannot be customized for specific countries. These universal, divine laws are for all people of all countries for all times.”⁶² Thus, it is unclear what kind of Sharia Muslims will be subjecting themselves to when they take their cases to arbitration.⁶³ This is because the IICJ has yet to release any rules or guidelines explaining how the different schools of Muslim law will interact with family law matters in relation to women’s rights.⁶⁴

D. Marion Boyd’s Recommendation

Marion Boyd, who previously served as both Attorney General and Women’s Issues Minister of Ontario, was appointed to review Ontario’s arbitration process and its impact on women.⁶⁵ She delivered her report to the Ontario government in December 2004 on whether Ontario should have an Islamic arbitration tribunal.⁶⁶ She advised that arbitration continue as an alternative dispute resolution in family and inheritance cases and that Canadians may continue to resolve disputes using religious law in the confines of the Arbitration Act, subject to the recommendations of her report.⁶⁷

Her main recommendations are: (1) amend the Family Law Act and Arbitration Act to make the acts more interconnected; (2) require independent legal advice or an explicit waiver of such; (3) publicly educate the community regarding the Arbitration Act,

61. Lynda Hurst, *Ontario Sharia Tribunals Assailed*, THE TORONTO STAR, May 22, 2004, at A1.

62. *Id.*

63. MEDIATION & ARBITRATION BROCHURE, *supra* note 10.

64. *Id.*

65. News Release, Ministry of the Attorney General, Ontario Government Releases Report on Review of Arbitration Process (Dec. 20, 2004), at <http://www.attorneygeneral.jus.gov.on.ca/english/news/2004/20041220-boyd.asp>.

66. BOYD REPORT, *supra* note 32, at 1.

67. MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION: EXECUTIVE SUMMARY, 3 (2004), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.pdf> [hereinafter BOYD SUMMARY].

family law and immigration law issues, alternative forms of dispute resolution and general rights and obligations under the law; (4) train and educate the arbitrators; and (5) add more checks and balances so the Ontario government can oversee and evaluate the arbitration process.⁶⁸

III. THE INNER WORKINGS OF THE IICJ

The Islamic Institute for Civil Justice (“IICJ”) is a tribunal that arbitrates disputes using Sharia law. Discussed below are the advantages and disadvantages to arbitrating according to religious principles as an alternative to the court system. In addition, possible solutions are laid out to rectify the disadvantages of the IICJ.

A. *Advantages of the IICJ*

Many people prefer settling their legal disputes in arbitration rather than through the court system because the arbitration process is more private, less expensive, and the arbitral award can be filed with a court and enforced as a court order.⁶⁹ In addition, courts may be willing, in the family law context, to interpret arbitral awards equitably because the Arbitration Act allows courts to intervene to prevent unfair treatment of parties to arbitration agreements.⁷⁰

But what draws people to faith-based arbitration, and in particular Muslim arbitration, is the opportunity to resolve their disputes while following the tenants of their religion. Many people prefer this system because it allows them to comply with the teachings of their faith, and it can be specifically tailored to the school of Muslim law to which they subscribe. Furthermore, the Qur’an states that Muslims cannot call themselves Muslim unless they abide by the “guidelines, counsel, and principles related to them through the Qur’an and the Prophet Muhammad.”⁷¹ Thus, it is the duty of each Muslim to follow the Sharia, and the IICJ provides him or her with a forum to abide by their religious obligations.

68. *See generally id.*

69. BAKHT, *supra* note 7.

70. Arbitration Act, S.O., ch. 17, § 6, at 111-12 (1991) (Can.).

71. Interview by Rabia Mills with Syed Mumtaz Ali, President, Canadian Society of Muslims (Aug. 1995) at <http://muslim-canada.org/pfl.htm>.

B. Disadvantages of the IICJ

1. Coercion

Despite the advantages of the IICJ, many concerns still exist over the possible implementation of a Sharia tribunal. The first potential problem is that women, especially immigrants, might feel coerced into participating in a binding arbitration according to Muslim family law, rather than resolving disputes through the Canadian secular court system.

This fear exists because women who have recently emigrated from a Muslim county will have limited contact with society.⁷² Since the women generally do not speak English and are accustomed to staying in their own communities, the only contact these women have is through their husbands and in-laws.⁷³ Therefore, these women will need more protection under the law, because their frame of legal reference is limited to what their community and husbands tell them.

Syed Mumtaz Ali, the founder of the IICJ, however, assures detractors that these women will not be coerced into settling matters at the IICJ, rather than through a secular court. He supports his assertion by citing two Qur'an verses: 2:256, "There is no compulsion in religion" and 4:35, which states that two arbitrators, one from his family and the other from hers, should be appointed in matters of divorce.⁷⁴ But, he adds "to be a good Muslim, one *must* go to a Muslim court rather than a secular court."⁷⁵ He states further that those "Muslims who would prefer to be governed by secular Canadian family law may do so. It would be preferable, however, for Muslims to choose governance by Muslim Personal Family Law for *reasons of conscience*."⁷⁶

The Council on American-Islamic Relations Canada (a non-profit organization who seek to educate and empower Canadian Muslims) also approves a Muslim-based arbitration system, but it is concerned that "there are no safeguards to ensure all parties are

72. Clifford Krauss, *Canadian Tolerance Meets Islam's Sharia Law; Critics Say Openness Must Have Limits*, THE INT'L HERALD TRIB., Aug. 5, 2004, at News2.

73. *Id.*

74. Mirko Petricevic, *A Choice in Law; Legal Application of Sharia Divides Canada's Muslim Community*, THE REC., June 26, 2004, at Faith18.

75. *Id.* (emphasis added).

76. Interview with Syed Mumtaz Ali, *supra* note 71 (emphasis added).

acting voluntarily, especially the vulnerable; there are no mechanisms to ensure that parties are fully apprised of their rights under the act; and the act does not specify any standards for arbitrators.”⁷⁷

In addition, devout women will be pressured to consent to arbitration under Sharia law. Ali’s previous statement is consistent with the views of many Muslims and applies to all Canadian Muslim women; they will all feel the pressure of being a “good Muslim” and might have their disputes arbitrated in a Sharia court simply out of religious obligation. Furthermore, their husbands or other community members may *remind them* that Muslims are bound to regulate their conduct, according to Islamic laws, wherever they may be.⁷⁸ Thus, the implementation of a Sharia tribunal will put all Canadian Muslim women at the risk of “coercion, condemnation and alienation within the Muslim community, should disputes arise and they fail to *voluntarily* opt for resolution through Sharia tribunal.”⁷⁹

The prospect of this happening has been presaged in Beis/Beit Din arbitration tribunals. Jews have arbitrated successfully in several Canadian provinces, according to Jewish law, *halacha*, to resolve business, commercial, and divorce disputes.⁸⁰ One rabbi from the Toronto Beit Din stated the tribunal is not coercive, but the “[h]alachah forbids Jews from taking each other to secular court,” and secular court may only be used if everything else fails.⁸¹ Another rabbi admitted they encourage Jews a little to arbitrate according to Jewish law, because using the Beis Din is a commandment from God, an obligation.⁸² This type of subtle coercion is very likely to occur in a Sharia tribunal as well because Sharia is based upon the Qur’an, which is the literal word of God, and Muslims living in non-Muslim countries are called to “observe the Divine Laws just like all the

77. Riad Saloojee, *CAIR-CAN: Announcements*, at http://www.caircan.ca/ann_more.php?id=1162_0_9_0_C.

78. See MEDIATION & ARBITRATION BROCHURE, *supra* note 10 (citing As-Sarakhsy, ‘*Al-mubsur*’ X,95).

79. Bonnie Collings, *Allowing Sharia Law a Threat to Women*, LONDON FREE PRESS, Sept. 3, 2004, at A8 (emphasis added).

80. Ron Csillag, *Jewish Input Sought in Review of Religious Courts*, THE CANADIAN JEWISH NEWS, Aug. 5, 2004.

81. *Id.*

82. BAKHT, *supra* note 7 (citing Letter from Ministry of Attorney General, Policy Branch, to Ms. Alia Hogben, Executive Director (Apr. 26, 2004)).

believers.”⁸³

Similarly, in cases where a woman agrees to settle a dispute in the IICJ, she has the option to take the arbitration settlement to a secular court if she believes the settlement was unfair. Unfortunately, many women may not exercise this right because of the “overwhelming pressure from her family and community.”⁸⁴

2. Premarital Agreement Coercion

Another type of coercion disadvantageous to women in an Islamic tribunal is premarital agreement coercion. Even though there is a defense of duress/coercion in holding premarital agreements invalid, the courts have set a high threshold for establishing this defense.⁸⁵ In *Hartshorne v. Hartshorne*, Mr. Hartshorne presented his new bride a marital agreement and a pen during the wedding reception.⁸⁶ In front of her husband and friend, Leslie Walton, the new bride, cried and proclaimed, “[y]ou’re my witness, I am signing this under duress.”⁸⁷ She testified that she had no choice but to sign the agreement because she had a toddler, was planning on having another child, and believed Mr. Hartshorne would not marry her unless she signed the agreement.⁸⁸

The trial judge ruled that even though Mrs. Hartshorne was upset when she signed the agreement, “the evidence falls far short of establishing a basis for a finding that the agreement was unconscionable, or that it was entered into by the defendant under duress, coercion or undue influence.”⁸⁹ On appeal, both the Court of Appeals and Supreme Court of Canada agreed with the trial judge’s ruling.⁹⁰ Because it is difficult to establish premarital coercion in the court system, presumably it is as hard, if not harder, to establish this defense in an informal arbitration system.

83. MEDIATION & ARBITRATION BROCHURE, *supra* note 10 (citing Sahih Muslim: V. 139-140).

84. *Id.*

85. BAKHT, *supra* note 7.

86. *Hartshorne v. Hartshorne*, D110253, 1999 B.C.T.C. LEXIS 2016.

87. *Id.* para. 44.

88. *Id.* para. 43.

89. *See id.*

90. *See Hartshorne v. Hartshorne*, [2004] 236 D.L.R. (4th) 193, 196; *see Hartshorne v. Hartshorne*, [2002] 220 D.L.R. (4th) 655.

C. Solutions to the Disadvantages of the IICJ

There are a number of women who will freely agree and want to arbitrate in the IICJ. For those women who want to observe their religious faith but who are unaware of their legal options, it is possible to encourage them to make voluntary decisions through independent legal advice, education, by amending current laws and written records.

1. Independent Legal Advice

The majority of Canadians agree that the single most important mechanism for protecting vulnerable people is Independent Legal Advice (“ILA”), but currently ILA is not required in arbitration.⁹¹ ILA usually helps parties achieve a clear understanding of the nature and consequences of the agreement, as required by the Family Law Act. The Family Law Act states that the court may set aside a domestic contract, *i.e.* a marriage contract, separation agreement, or cohabitation agreement, if one of the parties did not “understand the nature or consequences” of the contract.⁹²

ILA would also help eliminate involuntariness by providing an independent legal counselor who can explain to women their rights under Canadian law.⁹³ The voluntary nature of arbitration can be supported by “insisting that both parties receive independent legal advice and be informed of their right to appeal the arbitration decision once rendered, and of their right to challenge the arbitrator’s ruling under section 13 of the act.”⁹⁴ To further assure that parties freely enter arbitration on their own volition, the independent legal counselor should have both parties sign a document stating they understand their legal rights and are voluntarily consenting to religious arbitration.

Despite the overwhelming advantage of mandating ILA, some believe that if enforced in actuality, ILA would be of little use in the IICJ because Ontario lawyers are trained to counsel their clients in the Canadian legal context, and are “unaware of [the] repercussions and consequences of a system of law” with

91. BOYD REPORT, *supra* note 32, at 119.

92. Family Law Act, R.S.O., ch. F.3, § 56(4), at 382 (1990) (Can.).

93. See Saloojee, *supra* note 77.

94. *Id.*

which they are not familiar.⁹⁵ A more pressing concern, however, is the financial constraints with arbitration. Those who decide to arbitrate are not eligible to receive any legal aid; parties must use their own resources to pay for the arbitrator, any independent legal advice, and all other costs associated with the case.⁹⁶

Without financial assistance, it is unreasonable to mandate that each party seek independent legal advice before going to arbitration. Because it is in the court's best interest to encourage parties to use alternative dispute resolution, so as to alleviate the burdens on the court, legal aid should be extended to cover anyone seeking legal advice, whether it be for court, arbitration, mediation, or conciliation.

Arbitration is economically advantageous as well because even when ILA is required, it may be significantly cheaper than the secular court process.⁹⁷ For example, the court can set aside an agreement if there is no clear understanding of the nature and consequences of the agreement, as in *Dhanna v. Dhanna*.⁹⁸ In that case, Mrs. Dhanna, the wife, did not receive meaningful independent legal advice and the court set aside their marital agreement that released any claims to net family property, other property, and spousal support, on the grounds that Mrs. Dhanna did not understand the nature or consequences of the agreement.⁹⁹ Analyzing this situation, it is apparent that it would have been more efficient for the parties to spend a smaller amount of money at the start of the lawsuit to receive legal advice, rather than having to pay the court expenses for an entire trial and possibly an appeals process. Thus, the most efficient solution, taking into account women's equality and economic exigencies, is to mandate ILA and provide financial assistance.

2. Education

Independent legal advice will help minimize coercion, but, alone, it is insufficient. Many parties are unaware of the arbitration process and all their legal options. The public, especially

95. BAKHT, *supra* note 7 (citing Lynne Cohen, *Inside the Beis Din*, CANADIAN LAWYER 32, May 2000).

96. BOYD REPORT, *supra* note 32, at 104.

97. BOYD REPORT, *supra* note 32, at 10.

98. *Dhanna v. Dhanna*, 03-FA-11700FIS, 2004 CanLII 46660 (ON S.C. Dec. 10, 2004), at <http://www.canlii.org/on/cas/onsc/2004/2004onsc12724.html>.

99. *Id.*

immigrant and minority women, need to be educated about their rights and options in family-law disputes, through a proactive education campaign using culturally and linguistically accessible literature.¹⁰⁰ Such education can be achieved by expanding the system already in place.

At present, the Ministry of the Attorney General and the Department of Justice Canada provide a resource booklet, "What You Should Know About Family Law in Ontario."¹⁰¹ This booklet, however, is only in English and French, is not distributed to all minority communities, and does not even *mention* arbitration.¹⁰²

In India, which is twelve percent Muslim, the majority of the population speaks Hindi.¹⁰³ Sri Lanka has a Muslim population of seven percent with Sinhala as the main language.¹⁰⁴ Both India and Sri Lanka rank in the top five countries of recent immigrants to Canada, but this booklet is not understandable to the majority of Muslim immigrants.¹⁰⁵ Thus, a woman emigrating from either of these popular countries is at a disadvantage because she cannot comprehend this booklet.

But even for those women who can read French or English, the family law booklet will not help them understand Canada's arbitration system. Presumably, if the woman's husband were to take her to a religious arbitration proceeding, she would think the laws in force there were similar to those in her home country. In addition to distributing the booklet in various languages to accommodate Canada's immigrant population, the publishers of the booklet ought to update it to explain faith-based arbitration and the alternatives.

Besides the written word, the government can educate

100. Saloojee, *supra* note 77.

101. MINISTRY OF THE ATTORNEY GENERAL, WHAT YOU SHOULD KNOW ABOUT FAMILY LAW IN ONTARIO (1999), available at <http://www.attorneygeneral.jus.gov.on.ca/english/family/familyla.pdf>.

102. BOYD REPORT, *supra* note 32, at 128. (emphasis added).

103. CIA, WORLD FACTBOOK INDIA, available at <http://www.cia.gov/cia/publications/factbook/geos/in.html> (last modified Apr. 21, 2005).

104. CIA, WORLD FACTBOOK SRI LANKA, available at <http://www.cia.gov/cia/publications/factbook/geos/ce.html> (last modified Apr. 21, 2005).

105. Grant Schellenberg, Statistics Canada: Business and Labour Market Analysis Division, *Trends and Conditions in Census Metropolitan Areas: Immigrants in Canada's Census Metropolitan Areas* (Aug. 2004), available at <http://www.statcan.ca/english/research/89-613-MIE/2004003/89-613-MIE2004003.pdf>.

through other media resources, such as television and radio. This has the potential of reaching more people and is usually easier to understand. This may be as effective, or more effective, than the booklet.¹⁰⁶ Regardless of whether the government increases education through an improved booklet and/or the media, a more important effect is that the government has taken proactive steps towards educating immigrant and minority women.

In addition to the government's efforts, Muslim Canadian groups can provide help to these isolated women. This may be more effective because these groups tailor their message to the needs of Canadian Muslims, and thus, are better equipped and more knowledgeable on how to reach and educate women who may be unaware of all their legal options. Also, if fellow Muslims counsel these women, this will tend to promote equality in their religion and make it less likely for them to think that they are departing from the pillars of their faith, if they choose not to take their dispute to faith-based arbitration.

3. Amending Current Laws

The Canadian Charter does not currently apply to private arbitration, but many people believe that the Charter must apply to parties involved in faith-based arbitration.¹⁰⁷ Marion Boyd points out that the Charter does not prohibit the use of arbitration, but that "additional safeguards that recognize the values inherent in the *Charter of Rights and Freedoms*," need to be implemented.¹⁰⁸ Such implementation can be achieved by amending Section 32, which states to whom the Charter applies.¹⁰⁹ Therefore, the Charter can be amended to apply to private arbitrators in alternative dispute resolution settings, in addition to the legislature and government of each province, the government of Canada and the Parliament.¹¹⁰

4. Written Records

The 1991 Arbitration Act does not mandate that the

106. BOYD REPORT, *supra* note 32, at 132.

107. See Saloojee, *supra* note 77 ("significant efforts must also be made by the provincial government, in partnership with minority communities, to craft a regulatory scheme for the selection, education and training of qualified arbitrators.").

108. BOYD REPORT, *supra* note 32, at 77.

109. CAN. CONST., *supra* note 24, at § 32.

110. See *id.*

arbitration tribunals keep written records or transcripts. In fact, the arbitration agreement does not even need to be in writing; only the arbitration award becomes part of the legal record.¹¹¹ With no written evidence required to document the proceedings, the potential for illegal activity and unjust awards arises.¹¹² Compounding the problem, without written records of the decision, the appeals process becomes more difficult, because if an appeal were granted it would involve one person's word against another.

The solution to this quandary is simple: mandate that after a decision is rendered, arbitrators provide a written transcript of their decisions to a provincially created registry.¹¹³ Marion Boyd further recommends encouraging arbitrators to keep a written record of the arbitration by amending the Arbitration Act or the Family Law Act, to state that if written records are not maintained, then a party may seek to have the arbitral award set aside.¹¹⁴

VI. CIVIL MATTERS THAT CAN BE ARBITRATED IN THE IICJ

The IICJ only arbitrates civil disputes. Some of the most controversial topics that may be arbitrated in the IICJ are discussed here: *iddat*, *Mahr*, child custody, and inheritance.

A. *Iddat*

In Bangladesh, and in many Muslim countries, laws are written in ways that favor men. For example, men can get a divorce much easier than women can, men get more money when they divorce, they pay minimal spousal support, and are awarded custody of the children.¹¹⁵ At divorce, a Muslim husband only needs to pay maintenance; that is, he is required to pay spousal support to his ex-wife during the *iddat*, which is the mandatory waiting period for a woman that begins at the time of divorce and ends after her third menstrual cycle, after which a new marriage is

111. Arbitration Act, S.O., ch. 17, §§ 5(3), 38(1), at 111, 121 (1991) (Can.).

112. BAKHT, *supra* note 7 (citing Letter from Ministry of Attorney General, Policy Branch to Ms. Alia Hogben, Executive Director, (April 26, 2004) Canadian Council of Muslim Women at 5).

113. See Saloojee, *supra* note 77.

114. BOYD REPORT, *supra* note 32, at 137.

115. See Danial Latifi & Anor v. Union of India and Other Petitions, [2002] 4 LRI 36.

permitted.¹¹⁶

Consequently, the ex-husband must give his former spouse maintenance in that time frame and provide for her in the future as well, in an amount that is "reasonable and fair."¹¹⁷ But, after this three-month period expires, if the wife is inadequately compensated, her family must pay her maintenance.¹¹⁸ If the family is unable to pay her expenses, then the burden falls on the State Wakf Board, a charitable Islamic organization that is regulated and overseen by the state.¹¹⁹ Encouragingly, in a few recent Bangladeshi cases, the Bangladesh Supreme Court has extended a divorced woman's period of *iddat* until she remarries.¹²⁰

In predominantly Muslim countries, organizations like the State Wakf Board will collect money to support women in divorce cases, who do not receive adequate maintenance from their ex-husbands. Canada, however, maintains a different standard. In *Moge v. Moge*, the court stated that the Divorce Act embraced the notion that the "primary burden of spousal support should fall on the family members, not the state."¹²¹ Since then, courts in every province have adhered to this principle. The only exception occurred in one Ontario decision, in which the judge ruled that the primary burden of support should not rest "upon the shoulders of a . . . former spouse whose income is at the margin of self-support."¹²² The judge in this case based the wife's support on two sources: the social welfare system, and the ex-husband in an

116. Majid Fakhry, *An Interpretation of the Qur'an* 40 (2004).

117. *Danial Latifi v. Union of India*, A.I.R. 2001 S.C. 3958, para. 37.

118. *Id.*

119. *Id.*

120. Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of all forms of Discrimination Against Women: Third and Fourth Periodic Reports of States Parties (Bangladesh), Committee on the Elimination of Discrimination Against Women, U.N. Doc. CEDAW/C/BGD/3-4 (1997), available at <http://www.un.org/esa/gopher-data/ga/cedaw/17/country/Bangladesh/C-BGD3-4.EN> [hereinafter Bangladesh Report]. The Bangladesh government, however, has continued to validate the inequity between men and women in their rights and responsibilities during both marriage and at divorce. *Id.*; CEDAW, *supra* note 46, at art. 16. Even though this inequality is beginning to be recognized, the Bangladesh government is not publicly discussing it for fear of offending the religious sentiments of the majority Muslim population in the country. See Sultana Kamal, *Law for Muslim Women in Bangladesh*, in *Women Living Under Muslim Laws: Publications Dossier 4: Law for Muslim Women in Bangladesh* (1988).

121. *Moge v. Moge*, [1992] 3 S.C.R. 813, 865.

122. *Papaspirov v. Soussoudis*, [1999] 90 A.C.W.S. (3d) 610.

amount he could reasonably afford.¹²³

Sharia and Canadian laws have different methods for awarding spousal support. In order to reconcile the two so that the practice of iddat may continue, the iddat period should be lengthened. The iddat period could extend until the woman remarried, as in Bangladesh, or be lengthened for another period of time that the IICJ and the Ontario government deem reasonable, to ensure that a majority of women can financially support themselves.

B. Mahr

The second civil issue subject to arbitration is Mahr, a gift that the husband promises to give his wife if the marriage ends by divorce or death; without it, there can be no Muslim marriage.¹²⁴ Giving Mahr derives from the Qur'an, which states that a man must give Mahr to the woman at marriage as a free gift.¹²⁵ The purpose of the Mahr is to assist the wife at divorce, while simultaneously discouraging the husband from exercising his right, unilaterally in many countries, from ending the marriage.¹²⁶ The wife can only lose her entitlement to the Mahr if the husband or the wife dissolves the marriage before consummation.¹²⁷

In *Kaddoura v. Hammoud*, the groom, his father and father-in-law negotiated a \$35,000 Mahr, \$5,000 to be paid before the wedding ceremony and \$30,000 to be payable at death or divorce.¹²⁸ Eighteen months after the couple exchanged vows, they divorced.¹²⁹ The wife argued entitlement to the \$30,000 Mahr, claiming that it constituted a marriage contract under Section 52(1) of the Family Law Act, which covers agreements by couples in "which they agree on their respective rights and obligations under the marriage or on separation, on the annulment or dissolution of the marriage or on death," including support

123. *Id.*

124. Abed Awad, Court Enforces Mahr Provision in Muslim Marriage Contract, at <http://www.niqabiparalegal.com/awad.php>; *Kaddoura v. Hammoud*, [1998] 168 D.L.R. (4th) 503, 507 (Ont. Gen. Div.).

125. MAJID FAKHRY, AN INTERPRETATION OF THE QUR'AN 81, 85 (2004).

126. Awad, *supra* note 124.

127. DAVID PEARL & WERNER MENSKI, MUSLIM FAMILY LAW 180 (Sweet & Maxwell eds.-3d ed. 1998).

128. *Kaddoura*, 168 D.L.R. (4th) at 508.

129. *Id.* at 505.

obligations and other matters in the settlement of their affairs.¹³⁰ The husband, on the other hand, argued that the Mahr contract is a question of religious obligation, and thus, not justiciable in the Ontario civil courts.¹³¹

Even though the court agreed that giving the Mahr is obligatory, the judge found in favor of the husband, agreeing that the Mahr contract should not be adjudicated in the civil courts. He stated that courts cannot safely and should not go through the "religious thicket," but that "only an Islamic religious authority could resolve such a dispute . . . [through] proper application of principles derived from the Holy Qur'an, the words of the Prophet and from the religious jurisprudence."¹³² Most likely, the outcome of this case would have been different had the contract been civil; the judge stated that he "drew a boundary between a debt enforceable in civil law and the obligation of the Mahr."¹³³ Thus, the reason this contract was not justiciable was due to its religious nature; cases of Mahr today are not adjudicated.

In Britain, the Islamic Shari'a Council (ISC) provides conciliation services, similar to mediation, using Islamic law.¹³⁴ The ISC handles approximately fifty cases a year, the majority of which involve Mahr.¹³⁵ Muslims in Britain prefer this type of legal service; sixty-six percent of British Muslims would rather settle their dispute using Muslim law versus English law.¹³⁶

If Ontario allows Muslims to arbitrate within the bounds of the Arbitration Act, this would provide Muslims an opportunity to collect on their Mahr in the IICJ. Since Mahr is not a court issue, women's contractual rights to Mahr are not being enforced. Therefore, allowing a Muslim arbitration system would further both justice and women rights.

C. Child Custody

In Islamic law, the mother has *hadana*, the right to custody of

130. Family Law Act, R.S.O., ch. F.3, § 52(1), at 380 (1990) (Can.).

131. *Kaddoura*, 168 D.L.R. (4th) at 510.

132. *Id.* at 511-512.

133. *Kaddoura v. Hammoud*, No. 53247/96, 1999 WL 33181569 (Ont. Gen. Div. Jan. 22, 1999).

134. BOYD REPORT, *supra* note 32, at 81.

135. *Id.*

136. *Id.*

a child, for the first part of the child's life.¹³⁷ At a certain time in a child's life, the mother's *hadana* ends and the father can then claim custody.¹³⁸ Typically, this time is when a male child reaches the age of seven and when a female child reaches puberty.¹³⁹ While these are the default rules, a divorcing couple can mutually consent to altering the *hadana* through a written agreement.¹⁴⁰ The agreement, however, neither affects the father's financial responsibility to provide maintenance and custody costs for the child, nor eliminates the possibility of the mother losing custody of her child if she remarries a person not related to her child.¹⁴¹

Tunisia and Bangladesh have been interpreting Sharia-based gender laws far more liberally than other countries with Sharia. In Bangladesh, the Bangladesh Supreme Court has been granting mothers custody of their children beyond the typical age limits, based on the best interests of the child.¹⁴² Tunisia has interpreted *hadana* more liberally than Bangladesh; in Tunisia, *hadana* of every child belongs to the parents jointly. At divorce, the child can be awarded to either parent or a third party, taking into account the child's interest.¹⁴³ There is no age when the mother's custody is terminated.¹⁴⁴

Canadian law is similar to Tunisian law; in child custody and access cases, the court must always determine what is in the best interest of the child.¹⁴⁵ The Family Law Act codifies this principle, stating that the court "may disregard any provision of a domestic contract . . . where, in the opinion of the court, to do so is in the best interests of the child," when determining the custody of or access to a child.¹⁴⁶

Mr. Ali asserts that Islamic family law would not apply to child custody cases in Canada, because "Canadian law is very

137. TAHIR MAHMOOD, *STATUTES OF PERSONAL LAW IN ISLAMIC COUNTRIES: HISTORY, TEXTS AND ANALYSIS* 269 (2d ed. 1995).

138. *Id.* at 268-69.

139. *Id.* at 269. The different schools of Islamic law vary on when the mother's *hadana* ends, but only a few have extended the "mother's custody beyond seven years of a male child's age and beyond puberty or marriage of a female child." *Id.*

140. *Id.* at 270.

141. *Id.*

142. *Bangladesh Report*, *supra* note 120 at 2.15.8.

143. MAHMOOD, *supra* note 137, at 270.

144. *Id.*

145. *Wiltshire v. Wiltshire*, [2003] O.J. No. 3099 (ON.C., 2003).

146. Family Law Act, R.S.O., ch. F.3, § 56(1), at 382 (1990) (Can.).

sensitive to the interest of the child” and therefore only Canadian law can be used to decide custody.¹⁴⁷ Yet, the National Association of Women and the Law (“NAWL”), Canadian Council of Muslim Women (“CCMW”), and National Organization of Immigrant and Visible Minority Women of Canada (“NOIVMWC”) all assert that there is no legal impediment to arbitrate child support, custody of or access to the child.¹⁴⁸

Although the Family Law Act protects a mother’s right to custody, in that the child will not be taken away from her simply because the child has reached a certain age, when couples arbitrate in the IICJ, they may choose *any* legal rules they want, even those that do not use the Family Law Act or Divorce Act.¹⁴⁹

Marion Boyd suggested that both the Arbitration Act and the Family Law Act be amended, so that when a dispute is arbitrated in the IICJ, the Family Law Act must be followed.¹⁵⁰ Specifically, the Arbitration Act should be amended so that a court could not allow an arbitral award in a family or inheritance matter if the “award does not reflect the best interests of any children affected by it.”¹⁵¹ The best interest of the child will thus prevail above all else in custody cases.

D. Inheritance

The last civil matter that may be arbitrated in the IICJ is inheritance. According to Ontario law, if the net family property of the deceased spouse is greater than that of the surviving spouse, “the surviving spouse is entitled to one-half the difference between them,” regardless of whether the person died testate (with a will) or intestate (without a will).¹⁵² In addition, dependent children have an automatic first claim on their parent’s estate.¹⁵³ Aside from these two regulations, an Ontarian may leave their assets to whomever they chose, as long as they leave a will.¹⁵⁴

147. Marina Jimenez, *Islamic Law in Civil Disputes Raises Questions*, THE GLOBE AND MAIL, Dec. 11, 2003, at A1.

148. BAKHT, *supra* note 7.

149. *Id.* (emphasis added).

150. *See generally* BOYD REPORT, *supra* note 32.

151. BOYD SUMMARY, *supra* note 67, at 4.

152. Family Law Act, R.S.O., ch. F.3, § 5(2), at 354 (1990) (Can.).

153. *See* BOYD REPORT, *supra* note 32, at 27.

154. *Id.* at 26-27.

If the deceased dies intestate and there are no children, the spouse inherits everything.¹⁵⁵ If there is one child, the spouse receives a preferential share as prescribed by the Lieutenant Governor in Council and the remainder of the money is divided equally among the children.¹⁵⁶ If there is more than one child, the surviving spouse again receives his or her preferential share plus one-third of the inheritance, and the children equally divide the rest of the inheritance.¹⁵⁷

Conversely, under Sharia law, men get the bulk of marital assets; the Qur'anic rule is a double share for the male, such that a widow's share is only half to that of the widower and a son inherits twice as much as a daughter.¹⁵⁸ Opponents of the IICJ thus argue that the tribunal may distribute unequal inheritance settlements for women.¹⁵⁹

If the deceased dies testate, then Ontario law is not in conflict with Sharia law, as long as the deceased has acted in accordance with Ontario's rules regarding the surviving spouse and dependent children. However, Sharia law may conflict with Ontario law if the deceased assigns assets in a way that is not prescribed by the Qur'an.

If the deceased dies intestate, however, there is a conflict between both Sharia law and Ontario law. Ontario gives the spouse the largest proportion and then divides the remainder equally among surviving children, whereas Sharia law mandates that the deceased's male relatives receive fifty percent more of the share than the deceased's female relatives, independent of actual relationship. If the surviving parties decide to bring an inheritance dispute to the IICJ, all parties need to be clear on the implications of both Canadian and Sharia inheritance laws.

VII. CONCLUSION

Ontario could realize potential advantages in granting their Muslim citizens the opportunity to take their disputes to faith-based arbitration. The Canadian Charter of Rights and Freedoms, Divorce Act, Family Law Act, and CEDAW, although not

155. Succession Law Reform Act, R.S.O., ch. S.26, pt. 2, § 44, at 329 (1990) (Can.).

156. *Id.* § 46(1).

157. *Id.* § 46(2).

158. MAHMOOD, *supra* note 137, at 275.

159. AFP, *Some Canadians May Use Sharia Law*, AL JAZEERA ENGLISH EDITION, Dec. 26, 2003.

currently required in arbitration, should be implemented to protect women's rights. To further safeguard women's rights, rules or guidelines need to be prepared so that those subjecting themselves to arbitration know what kind of Muslim law they will be using.

Coercion without knowledge of other alternatives is the biggest impediment to women's equality and must be adequately addressed, along with keeping written records to increase the accuracy of the appeal process. Although coercion can never fully be eliminated, requiring independent legal advice, educating women, and amending current laws would protect Canadian Muslims who voluntarily decided to have their dispute resolved in faith-based arbitration. The benefit is that in the areas of iddat, Mahr, child custody, and inheritance, Muslims have the opportunity to arbitrate according to their belief systems, albeit with some restrictions, whereas they would not have the same alternatives in the secular court system. These benefits allow for the fundamental right of freedom of religion to be expressed.

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* The reader is advised to note that on September 11th, 2005, Ontario's Premier Dalton McGuinty declared that "[t]here will be no Sharia law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians." Prithi Yelaja and Robert Benzie, *McGuinty: No Sharia Law*, THE TORONTO STAR, Sept. 12, 2005, at A1. His ruling will ultimately eliminate the 1991 Arbitration Act and subsequently the Jewish, Christian and Muslim arbitration systems in Ontario. This decision follows the Quebec legislation's unanimous vote on May 26th, 2005 that "rejected the use of Islamic tribunals in the[ir] legal system." Les Perreux, *Quebec Rejects Islamic Law*, THE TORONTO STAR, May. 27, 2005, at A8.