Arbitration Using Sharia Law in Canada: A Constitutional and Human Rights Perspective

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Introduction

Recently, Canadian media reports warned that the Government of Ontario was considering the implementation of Sharia law as a judicial equivalent to Ontario law.[1] Such reports were not accurate. Rather, the issue was whether arbitration by Islamic tribunals using Muslim law, which is often called Sharia law by non-Muslims, ought to be allowed under the auspices of general arbitration statutes.[2] A cross-section of Muslim Canadians actively mobilized to oppose such a possibility through coalition-building and letter-writing campaigns.[3] In June 2004, Marion Boyd was commissioned by the province to examine the issues surrounding the use of private arbitration to resolve family and inheritance cases, and the impact of the same on vulnerable people. The *Boyd Report*, tabled in December 2004, recommended that religious institutions be allowed to arbitrate such disputes on the basis of religious law, provided that a list of forty-six safeguards were adhered to.[4]

After the *Boyd Report*, some religious groups argued in favour of religious adjudications.[5] Much public debate ensued, leading to a vociferous statement by Premier Dalton McGuinty, who vocally rejected religious adjudication.[6] Further, the Government of Ontario outlined that it "will ensure that the law of the land in Ontario is not compromised, that there will be no binding family arbitration in Ontario that uses a set of rules or laws that discriminate against women."[7] The province amended its *Arbitration Act*[8] and *Family Law Act*[9] to provide that family arbitrations were conducted "in accordance with Ontario law or the law of another Canadian jurisdiction."[10]

The controversy over this issue raises many questions in the minds of Canadians: Should Canada allow subsets of Canadians to be governed by Muslim law if they choose it? What is the basis of Canadian law? What is the basis of Muslim law? Can Muslim law be reconciled with Canadian laws and *Charter*[11] rights? If not, what are the constitutional obligations of the Canadian government to ensure that Muslim law is not used to bypass or subvert Canadian law? What are Canadian values? Can parties contract to be bound by unconstitutional laws? What practical considerations are inherent in sanctioning Muslim law? On the flip side, does prevention of the use of Muslim law to resolve private disputes violate freedom of religion? Is using other religious law acceptable? Given that arbitration has been used for decades in the commercial sphere, to what extent should it be extended to incorporate religious law? Finally, to what extent are Canadians prepared to allow the privatization of justice? The issues are complex and multi-dimensional. This article examines a few select perspectives that may help Canadians to ponder further upon these questions.

Issues Surrounding Sharia Law

At the outset, it is important to note that there does not exist a monolithic group of laws that are universally accepted by Muslim Canadians as constituting Sharia law. Indeed, Muslim Canadians are extremely diverse, hold varying religious beliefs, and recognize different sources of religious law and different religious leaders.[12] Many Muslim Canadians are extremely progressive in the area of gender equality and public service.[13] The very term "Islam" means "peace," and most Muslims conceive Islam as a religion that by its very essence is about peace and justice.[14] Further, most Canadian Muslims have chosen to immigrate to Canada, thus demonstrating their commitment to Canadian laws and values. Indeed, the Islamic Council of Imams of Canada confirms that the composition of the Muslim Canadian community is diverse.[15] This diversity is further accentuated in varied practices based on different schools of thoughts and cultural conventions, codified in some Muslim countries and regions. Thus, the Council of Imams warns that attempting to apply Sharia law "'could create controversies and problems in applying such varied law, standards, and principles with the multi-ethnic, multinational, diverse population in Ontario.'"[16] The Muslim Canadian Congress is blunt: "There is no such thing as a monolithic 'Muslim Family/Personal Law' which is just a euphemistically racist way of saying we will apply the equivalent to 'Christian Law' or 'Asian Law' or 'African Law.'"[17] "Sharia," meaning "the way,"[18] encompasses general codes of behaviour, the moral categories of human actions, the rules of rituals, as well as civil, commercial, international, and penal law.[19] Sharia is a comprehensive religious term used to define how Muslims should live, while *fiqh* (jurisprudence) is limited to laws promulgated by Muslim scholars based on their understanding of the Koran or the practices of the Prophet.[20] For the purposes of this article, "Muslim law" is used as a general term to refer to some limited interpretations of "Islamic personal law," expressly acknowledging that there is disagreement within the Muslim community as to the various interpretations.[21] Under Canadian arbitration statutes, binding arbitration is generally used in commercial contracts, and given that often these are international in scope, the parties expressly choose the law of the jurisdiction applicable to the contract. In 1991, Ontario along with other provinces, legislated a new arbitration act.[22] The wording of this act was broader than that of other provincial arbitration statutes. For instance, in Alberta, the *Arbitration Act* states: "In deciding a matter of dispute, an arbitral tribunal shall apply *the law of a jurisdiction* designated by the parties."[23] The Ontario *Arbitration Act*, on the other hand, states: "In deciding a dispute, an arbitral tribunal shall apply *the rules of law* designated by the parties."[24] In Ontario, religious institutions have interpreted the statute so as to permit them to arbitrate on the basis of religious law. Thus, Christians and Jews have been arbitrating private disputes through application of religious laws for some time.[25]

In 2003, a new organization called the Islamic Institute of Civil Justice (IICJ) was established to offer binding arbitration to the Muslim community of Ontario in the form of a Sharia Court. The new system sought to apply personal Islamic law, purportedly under the auspices of the province's *Arbitration Act*.[26] This development was perceived to mean that Muslims would be required to settle their personal disputes exclusively through the Sharia Court. In media comments, the president of the IICJ indicated that the decisions of the Sharia Court would be "'final and binding,'" and that in order to be regarded as "'good Muslims,'"[27] Muslims would be required as a part of their faith to agree to this forum for dispute resolution. Such statements raised acute alarm throughout Ontario and Canada about the fear that Canadian women could be subjected to abuse similar to that suffered by women in Afghanistan, Pakistan, Iran, and Nigeria that utilize Sharia law:[28]

> "We wish to state our opposition to the recent move for establishing an 'Islamic Institute for Civil Justice' in Canada. This move should be opposed by everyone who believes in women's civil and individual rights, in freedom of expression and in freedom of religion and belief . . . . [T]he reality is that millions of women are suffering and being oppressed under Shariah

> Law in many parts of the world. Some of us managed to flee to a safe country, a country like Canada with no secular backlash."[29]

Concerns were raised by many prominent Islamic Canadians, and Canadian Muslim organizations expressed anxiety about whether Islamic tribunals could fairly arbitrate, or to arbitrate at all, issues of family and property law.[30] As well, fear was expressed that the historical efforts of entrenching equality rights could be undermined through private arbitration.[31] For example, the Muslim Canadian Congress took the position that the Ontario *Arbitration Act*, at the time, did not permit the arbitration of family law disputes, such as marriage, divorce, custody, maintenance, access, or matrimonial property, which were to be resolved solely and exclusively by the Ontario family law statutes.[32] The Congress's submission contended that to the extent that the *Arbitration Act* purported to allow such arbitration, it was unconstitutional, because it breached sections 2, 7, and 15 of the *Charter*, the "unwritten constitutional norms" of the rule of law, and "common law rights of equality of citizenship."[33] Thus, it was repugnant to public policy in the *de facto* privatization of the legislative function and duty of Parliament.[34]

The Canadian Council of Muslim Women submitted that many forms of Muslim family law perpetuate a patriarchal model of community, and of family:

> "It is generally accepted that men are the head of state, the mosque and the family. The responsibilities outlined for males is that they will provide for their families and because they spend of their wealth, they have the leadership to direct and guide the members of their families, including women. . . . Most proponents of Muslim law accept that men have the right to marry up to four wives; that they can divorce unilaterally; that children belong to the patriarchal family; that women must be obedient and seek the male's permission for many things; that if the wife is "disobedient" the husband can discipline the wife; that daughters require their father's permission to marry and she can be married at any time after puberty. A wife does not receive any maintenance except for a period of three months to one year and most agree that the children should go the father usually at age 7 for boys and 9 for girls. If a wife wants a divorce she goes to court, while the husband has the right to repudiate the union without recourse to courts. Inheritance favours males, [because it is argued that they are responsible for the costs of the family] to the extent that the wife gets only a portion at the death of the husband."[35]

Shirin Ebadi, the first Muslim woman to win the Nobel Peace Prize (2003) and a leading human rights crusader in her native Iran, has firmly opposed the introduction of Islamic tribunals in Canada, warning that they open the door to potential rights abuses:

> "One country, one legal code, one court – for everybody." … because Muslim law is vulnerable to interpretation. As one extreme example, some Muslim countries allow polygamy and others do not. "Which interpretation would apply here? . . . Because there are many interpretations of the same Islamic teachings and laws, it's not clear what interpretation will be used. Often, a lot of the interpretations are anti-democratic and against human rights. That is my main concern."[36]

Finally, a coalition of Muslim Canadians submitted:

> "Shari'a considers women to be a potential danger by distracting men from their duties and corrupting the community. It therefore suppresses women's sexuality, whilst men are given the rights to marry up to four wives and the right to temporary marriage as many times as they wish. Young girls are forced to cover themselves from head to foot and are segregated from boys. These laws and regulations are now implemented in Canada. . . . According to Shari'a law, a woman's testimony counts for only half that of a man. So in straight disagreements between husband and wife, the husband's testimony will normally prevail. In questions of inheritance, daughters receive only half the portion of sons and in the cases of custody, the man is automatically awarded custody of the children once they have reached the age of seven. Women are not allowed to marry non-Muslim whereas men are allowed to do so."[37]

While the debate has often focused upon gender issues, Muslim law also raises issues of religious and minority rights: it encompasses anti-apostasy provisions, which make it a crime punishable by death for any Muslim to renounce their faith in Afghanistan.[38] Many Afghans are reported to have secretly converted to Christianity in recent years. An international outcry has failed to sway the Supreme Court of Afghanistan.[39] The case highlights the tensions between the West's vision of Afghanistan as a liberal democracy and the orthodoxy of its judiciary, whose outlook is shared by much of the population.[40] The Canadian Council of Muslim Women is concerned that those who are seen to question Sharia law may be accused of apostasy or blasphemy.[41]

As well, Muslims are far from homogenous adherents to a singular theology: there is a vast gamut of Sunnis and Shiites. Ahmadiyya Muslims have for over a hundred years interpreted the Koran as meaning "there is no 'jihad' of killing anymore; instead we have entered in an era of 'jihad' of pen or arguments."[42] Hundreds of these Muslims have been jailed or killed in Pakistan because of their declaration that they are peaceful Muslims. There are extensive and ongoing reports of religious persecution of minorities and of non-Muslims. For example, the Sharia Court in Kuala Lumpur acted against the wishes of a Hindu widow by forcing her Hindu husband, M. Moorthy, to have an Islamic burial instead of a Hindu cremation.[43] Thus, there are ramifications of broad-based persecution under the auspices of some forms of Muslim law of many types of minorities such as non-white Muslims, non-Muslims, followers of minority strand sects within Islam, homosexuals, and women.[44]

Considering that the tenets of the faith may require compliance as a demonstration of faith and morality, it is difficult to ensure free and voluntary consent to religious arbitration by all members of a religious minority. Thus it is not surprising that some of the *Boyd Report*'s recommendation are impractical. More generally, the recommendations are extensive, complex, and require amendments to arbitration and family statutes so as to safeguard concepts of Canadian law, such as "best interests of children" and the presumption of equal division of matrimonial property. In attempting to address such issues of consent, Boyd recommends that prior to entering into arbitration, mediators and arbitrators in family law and inheritance should be required to screen parties separately about issues of power imbalance and domestic violence,[45] and to certify that each party is entering into the arbitration voluntarily and with appropriate knowledge of the arbitration agreement.[46] It is impractical to ask mediators and arbitrators to assess power imbalance, domestic violence, and voluntaries in limited time, particularly without being duly informed of culture, religious, and individual circumstances. Such assessments would be subjective. Crucial terms such as "domestic violence," "power imbalance," and "voluntariness" are undefined, and are incapable of being objectively assessed or measured. Fundamentally, the parameters of religious law are not clearly defined and universally accepted by members of a faith; thus they are incapable of practical application. This raises the legal difficulty that even from an administrative law context, decisions would always be open to review on the basis that there had been an error of law on the face of the record. The state is in no position to be, nor should it become, the arbiter of religious dogma.[47] Basic principles of rule of law and need for certainty of law require demarcation between religious tenets and secular laws.

Should Canadians Be Allowed to Choose to be Governed by Muslim Law?

The Ontario Government acted appropriately to ensure that arbitrations were conducted in accordance with Ontario law or the law of another Canadian jurisdiction. In supporting this position, we must acknowledge that there are two conflicting approaches to the issue. On one hand, exist the constitutional rights of women, racial and religious minorities within the Muslim community itself, and other minorities to equal benefit and equal protection

of secular Canadian law. On the other hand, exist the desires of religious tribunals and, in this case, "Sharia tribunals"[48] to arbitrate personal disputes on the basis of Muslim law between consenting private parties.

Does Muslim law violate the *Charter*?

Given that there is no singular authoritative source of Muslim law *per se*, and that the interpretations of the same are broad and diverse, from a legal perspective, it is not possible to identify concrete parameters composing Muslim law. While individual interpretations of Muslim law need to be scrutinized with respect to whether they infringe the *Charter*,[49] in general, many of the rules of Muslim law on their face appear to do so. In accordance with the extensive submissions of Muslim Canadians and scholars, many interpretations of Muslim law expressly contravene the substantive *Charter* rights of freedom of religion, freedom of speech, freedom of association,[50] gender equality,[51] and process provisions of fundamental justice.[52] Again, in examining Muslim law, we must be cognizant that the same and similar issues arise with other religious law. For example, in the Jewish faith the husband "is responsible to give the *get*" – the revocation of the marriage contract (*ketubah*) – to facilitate divorce, while women receive it. "If a woman does not receive a *get* she becomes an *agunah* and is not free to marry in a religious ceremony; if she does remarry without the *get*, then any children from the new marriage are considered illegitimate (*mamzerim*)" and "will not be allowed to participate in religious ceremonies, to marry a Jewish person, or enjoy full citizenship in Israel."[53] Christian tenets, those of religions of the East, such as Hinduism and Buddhism, or even local Aboriginal spiritual tenets, are neither universally accepted by believers nor free of gender and other biases. The polygamist practices of the Fundamentalist Church of Jesus Christ of Latter Day Saints collide with existing criminal laws.[54] Based on the submissions and concerns of a number Muslim Canadians, let us assume for the purpose of this article that under any equality analysis,[55] a number of religious laws do violate *Charter* rights, both expressly, and in effect.[56]

The Constitution as the supreme law of Canada

The Constitution of Canada, including the *Charter of Rights and Freedoms*, is the supreme law of Canada and, to the extent that other laws are inconsistent with it, they are of no force or effect.[57] The *Charter* expressly overrides other statutes democratically passed by governments. Canadian laws are open to *Charter* scrutiny. Muslim law or religious law is not. Canadian laws are founded on parliamentary accountability, and are subject to democratic checks and balances. Muslim law or religious law is not. While the *Charter* does not apply to private parties,[58] it applies to arbitration acts. It applies to the statutory role of arbitrators to select the applicable law.[59] Once government creates a statutory regime to facilitate arbitrations, it has an obligation to ensure that these are conducted on the basis of constitutional laws.[60] Governments must accept responsibility for creating arbitration statutes and then turning a blind eye to arbitrations conducted through the application of blatantly unconstitutional rules. Legislatures may not enact laws that infringe the *Charter*, and they cannot authorize or empower another person or entity to do so.[61] For example, adjudicators who exercise powers delegated by governments cannot make orders infringing the *Charter*.[62] Granting arbitrators the right to choose unconstitutional laws to govern the proceedings is akin to delegation of legislative authority, something that attracts *Charter* scrutiny.[63] A governmental nexus may be found insofar as it pertains to the selection of rules governing the arbitration.[64] The action or inaction of governments in defining their relationships with relgious tribunals, and their use of Muslim laws or religious laws to arbitrate, is subject to the *Charter*.

Governments, just as they are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other "private" arrangements, cannot evade their constitutional responsibilities by delegating

the implementation of their policies and programs to private entities.[65] Arbitrations are not simply mechanisms to provide for private dispute resolution, but rather, are a means of providing quasi-judicial, comprehensive dispute resolution.[66] By requiring arbitrators to use Canadian law, Ontario has preserved *Charter* accountability.

Access to justice

All persons and all subsets of Muslim Canadians must have access to the protection of secular courts.[67] Through arbitration agreements some Muslim Canadians may be compelled to limit or extinguish their rights to appeal religious tribunal decisions to Canadian courts. Arbitration statutes generally provide for limited rights of review by superior courts from arbitral awards.[68] For example, the Ontario *Arbitration Act* provides appeals in limited cases, such as fraud.[69] While governments should continue to respect the role of private arbitration and the need to avoid recourse to the courts in private dispute resolution,[70] they must not permit private arbitrators to use laws that are not democratically passed and are not subject to constitutional scrutiny. Rule of law, in a secular sense, is the foundation of Canadian democracy and of the *Charter.*[71]

Had Ontario failed to act by ignoring Muslim law arbitrations, this would have been tantamount to the state permitting arbitrations under vague and arbitrary rules.[72] Legislatures must set reasonably clear and specific standards in circumstances where the grant of an unfettered discretion would lead to arbitrary, discriminatory, or otherwise unconstitutional restrictions.[73] A limit on *Charter* rights must be clearly determinable.[74] A limit must offer an intelligible standard.[75] Limitations on rights cannot be left to the unfettered discretion of administrative bodies,[76] in this case religious tribunals.

Cannot contract out of *Charter* rights and human rights

Some may argue that private parties are entitled to choose Muslim law to govern their private relationships, irrespective of any violation of constitutional rights. However, it is trite law that persons cannot contract out of constitutional and human rights protections.[77] To permit government to pursue policies violating *Charter* rights by means of contracts and agreements with other persons or bodies cannot be tolerated. The Supreme Court has consistently held that agreements that discriminate contrary to human rights codes are invalid.[78] In other words, persons cannot waive constitutional and human rights by way of contract. This is the case even if human rights statutes contain no explicit restriction on such contracting out.[79] Human rights law constitutes fundamental law, and no one, unless clearly authorized by law to do so, may contractually agree to suspend its operation and thereby put oneself beyond the reach of its protection.[80]

The prohibition against waiver of human rights provisions arises not only from a concern about inequality in bargaining power, but also because the rights guaranteed by human rights codes are seen as inherent to the dignity of every individual within our society.[81] "As a matter of public policy, such rights are not the common currency of contracts, but values which, by their very nature, cannot be bartered."[82] For example, if employees, through their union, voted to sign a collective agreement with their employer whereby they agreed that female employees would be laid off first in case of an economic slowdown, that contract would be invalid. Even if a female employee sincerely believed that it made economic sense that male employees have greater job security, because in her view they are the primary bread-winners in most families, courts would not condone a contract which, on its face, defined and devalued the position of an individual on the sole basis of her gender. As another example, employees can take jobs that require fingerprinting and disclosure of criminal records pertaining to offences for which a pardon has been granted, and even sign contracts to that effect. However, if the employees subsequently challenge the practice as violating the federal human rights act, the employer cannot rely upon the employees' consent to defend its conduct. The contract provisions would be void.

Nor can constitutionally entrenched rights be changed by a simple vote of Parliament. Human rights legislation is analogous in many respects to constitutional law. Indeed, section 7 of the *IRPA* protects the same equality right as section 15 of the Canadian *Charter*. Once extended, rights provided by provincial legislation cannot easily be withdrawn or circumscribed.[83] It is equally unacceptable that, by a simple majority vote, a group of private citizens would be permitted to waive fundamental rights, barring truly exceptional circumstances. In short, contracts having the effect of infringing human rights and constitutional rights are void, as contrary to public policy. This is equally applicable to contracts purporting to allow religious tribunals to adjudicate disputes on the basis of unconstitutional religious laws.

Human rights codes

In addition to constitutional challenges, human rights codes prohibit discriminatory conduct by both governments and private sector entities such as businesses, schools, restaurants, landlords, and private individuals.[84] Discrimination on the basis of gender, race, ethnic origin, religion, or sexual orientation is prohibited through federal and provincial human rights statutes.[85] These statutes have been held to be quasi-constitutional in nature and take supremacy over other statutes.[86] Both direct discrimination and adverse impact discrimination are prohibited,[87] and the manner of discrimination analysis is consonant with that undertaken in section 15 *Charter* analysis. Reasonable accommodation in a human rights context is generally equivalent to the concept of "reasonable limits" in a *Charter* case.[88] Governments that allow adjudication on the basis of Muslim law and other religious law violate anti-discrimination provisions of human rights statutes for the same reasons that they violate the *Charter*, and this conduct will not be defensible. In short, Ontario has correctly proceeded to legislate the use of Canadian law as the *modus operendi* of arbitrations.

Freedom of Religion

On the reverse side of the issue, does prescribing the use of Ontario law or Canadian law for arbitrations, at least in the family law context, violate the freedom of religion of consenting Muslim Canadians? Does the constitutional protection of freedom of religion and recognition of the multicultural heritage of Canada require that governments respect the choice of Muslim law or other religious law such as Jewish law or Catholic law by private parties in arbitrations?

Parameters of freedom of religion

Given that religion is a dominant aspect of culture, freedom of religion must be interpreted in light of section 27 of the *Charter*.[89] A law infringes freedom of religion if it makes it more difficult or costly to practice one's religion. All coercive burdens on religious practice, be they direct or indirect, intentional or unintentional, foreseeable or unforeseeable, are potentially within the ambit of section 2(a). Still, this does not mean that every burden on religious practices is offensive to the constitutional guarantee of freedom of religion.[90] Freedom of religion is not absolute.[91] Fundamental to a *Charter* right is the "no harm rule" contained in the definition of each right or freedom in the *Charter*. In other words, one is free to do only that which does not harm others.[92] Freedom of religion is inherently limited by the rights and freedoms of others.[93] This is consistent with international covenants that reflect similar restrictions. For example, the *International Covenant on Civil and Political Rights*[94] provides that freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or *the fundamental rights and freedoms of others*.[95] The *ICCPR* provides a restriction of freedom of religion when the freedoms and rights of others are at issue.[96]

Importantly, freedom of religion includes the right not to believe. Freedom of religion encompasses equally freedom from religion and coercion to comply with religious dogma.[97] In Canada, as with any religious institution, members of a faith will exemplify varying

levels of belief to the tenets of the religion. Religious belief is, by its nature, individual and personal.[98]

Maintaining a secular system of justice, grounded in constitutionally entrenched anti-discrimination guarantees, does not infringe freedom of religion;[99] to the contrary, preserves it. Governments have a positive duty to safeguard the freedom of non-belief of their citizens. The essence of freedom of religion is the right to entertain such religious beliefs a person chooses, the right to declare religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.[100] There is a distinction in determining the scope of freedom of religion between belief and conduct. The freedom to manifest beliefs is broader than the freedom to act on them.[101] Thus, freedom to hold certain gender or minority based views is broader than the right to implement such views through conducting arbitration rooted in unconstitutional laws.[102] Freedom of religion is not infringed by the requirement that Canadian law be followed.

Discrimination on the basis of religion

Under section 15 of the *Charter*, does denial of adjudication on the basis of religious law constitute discrimination on the basis of religion? A number of religious groups made submissions to Boyd that they ought to be allowed to adjudicate disputes on the basis of religious law as part of the expression of their freedom of religion.[103] Yet, even among these groups, some submitted that *their* religious law ought to be condoned but had reservations about the law of *other* groups.[104] Clearly, Canadians cannot provide preference to one religious law over another. Rather, the discrimination argument arises from acknowledging that private arbitration is used in the commercial sphere to resolve private disputes. Why not in the religious sphere? Denial of adjudicative rights to Sharia tribunals, or other tribunals adjudication on the basis of relgious law, for that matter, does not constitute differential treatment amounting to discrimination. As discussed, freedom of religion does not encompass the right to adjudicate on the basis of unconstitutional laws. Generally, in contrast to arbitrations on the basis of religious laws, in commercial arbitration contracts the parties choose western democratic law as the governing law. For example, Canadian commercial contracts generally provide that the law of a Canadian jurisdiction is applicable. In international contracts, the law of the jurisdiction most closely connected to the matter is generally selected. Such law is generally democratically prescribed and constitutionally accountable. This is not to say that the law of China cannot or has not been selected. In such cases, as discussed, the contracts would be found to be void as being contrary to public policy. In fact, where a particularly offensive provision may theoretically arise, current law pertaining to public policy is useful. Currently, there exist exceptions to the enforcement of awards that are contrary to public policy.[105] Theoretically, the reach of public policy is extremely broad and not capable of being exhaustively defined.[106] It has been invoked where enforcement would be "clearly injurious to public good or wholly offensive to ordinary reasonable and fully informed members of the public."[107] Fraud, bribery and corruption,[108] breach of the competition obligations under the European Community Treaty,[109] and an award obtained by perjury or some serious procedural unfairness[110] are all examples of behaviour that could, in theory, give rise to a public policy defence. Similarly, adjudication on the basis of unconstitutional laws would lead to awards that would be unenforceable on the basis of public policy.

Thus, requiring that arbitrations be conducted on the basis of Canadian law, particularly in family law contexts, is not tantamount to discriminating against a person on the basis of religion, and it is not tantamount to an infringement of a person's freedom of religion. Indeed, some Muslim Ismaili groups adjudicate disputes on the basis of Canadian law and successfully reconcile freedom of religion with secular constitutional law.[111]

Reasonable limits

Even if it were the case that discrimination could be established, in some sense, requiring the use of Canadian law in arbitrations constitutes a reasonable limit to any alleged infringement of freedom of religion and section 15 arguments.[112] Section 1 cannot be used to legitimize laws that collide directly with *Charter* rights and freedoms,[113] as do some Muslim laws. An assessment of reasonable limits is to be guided by the values and principles essential to "a free and democratic society." Guiding principles include respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[114] While section 27 of the *Charter* requires that the *Charter* be interpreted in a manner consistent with the preservation of the multicultural heritage of Canadians, section 27 does not confer substantive rights.[115] Indeed, the converse is true: section 27 requires that Muslim Canadians not be viewed stereotypically as a monolithic entity willing and ready to accept governance by unconstitutional, discriminatory rules that may be found in Muslim law.

Canadians are entitled to the benefit and protection of secular laws. Indeed, many Muslim Canadians may have deliberately chosen to immigrate to Canada to benefit from secular laws not amenable in their countries of origin.[116] The Ontario Government can show that its requirement that arbitrators choose the law of a Canadian jurisdiction is reasonable in the Canadian context. It can show that the requirement meets both the minimal impairment test,[117] and the proportionality test. Noteworthy is the fact that choice of jurisdiction within Canada is still permissible. Legislative inaction in the face of blatantly unconstitutional action and arbitration would not have been viewed as reasonable judgment sufficient to meet the requirements of section 1.[118] Requiring parties to adhere to Canadian law does not constitute an unreasonable limit on any alleged infringement of *Charter* rights. Indeed, where the justification advanced for a law that is impugned on one *Charter* ground, such as freedom of religion, is inconsistent with other constitutional protections, it is more difficult for proponents of religious law to argue that the concern is pressing and substantial in a free and democratic society.[119]

Conclusion

Canadian governments have an obligation to ensure that all persons in Canada are governed by Canadian laws and have the benefit and protection of the *Canadian Charter of Rights and Freedoms*. Both constitutional and human rights laws compel governments to meet this obligation. Requiring Canadians to resolve private disputes using Canadian laws as opposed to any form of religious law, including Muslim law, does not abridge *Charter* rights. Rather, it preserves them. Nor does such requirement undermine the arbitration process. Rather it respects it. It continues to acknowledge the needs of private parties to resolve their disputes without intrusion by governments and courts. It simply requires that private disputes are grounded in democratic and constitutional laws. In short, governments must necessarily be liable for failing to prevent systematic institutional *Charter* infringement by tribunals who act under the powers of provincial arbitration statutes. The integrity of Canada's justice system rests upon rule of law and secularism.

Opening the door to adjudication under religious law – whether based on Jewish, Catholic, Hindu, or Buddhist tenets – subject to multi-dimensional interpretations contravenes these precepts. Secular laws preserve and safeguard freedom of religion:

> We believe that Islam's principles are for equality of women in every aspect, from religious, spiritual duties to practical daily rights and responsibilities of citizens.
>
> For us, Islam is a religion of peace, compassion, social justice and equality, and we know that many of the interpretations and practices of Muslim law do not always reflect these

principles. Further, we think that these fundamentals are embodied in the Canadian Charter of Rights and Freedoms.

And we advocate that as we are not compelled by our faith to live under Muslim family law, we as Canadian Muslim women want the same laws to apply to us as to all other Canadians and not to have our equality rights jeopardized by the application of another system of jurisprudence.[120]

Notes

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1 "Ontario report criticised by Shariah opponents" *CBC News* (20 December 2004), online: <http://www.cbc.ca/story/canada/national/2004/12/20/sharia-boyd041220.html?print>. See also "Quebec gives thumbs down to Shariah law" *CBC News* (27 May 2005), online: <http://www.cbc.ca/story/canada/national/2005/05/26/shariah-quebec050526.html?print>; CTV.ca News Staff, "Protesters march against Shariah law in Canada" *CTV.ca* (9 September 2005), online: <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1126181967010_31/?hub=TopStories>; Laura Trevelyan, "Will Canada introduce Shariah law?" *BBC News* (26 August 2004), online: <http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/3599264.stm>; International Society for Human Rights (ISHR) Germany, "Shari'ah Law, Adultery, and Rape," online: <http://www.ishr.org/activities/campaigns/stoning/adultery.htm> [ISHR].

2 This inquiry raised the issue of adjudication using religious law in general. This article examines Muslim law as an example of issues that arise in applying religious law. For a discussion of the relationship and distinctions between Muslim law and Sharia law, see below at 64.

3 One example is the Canadian Coalition of Muslim Women. See online: CCMW <http://www.ccmw.com/MuslimFamilyLaw/muslim_family_law.htm>.

4 Marion Boyd, "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion" (December 2004) at 5, online: Ontario Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf> [*Boyd Report*]. The recommended safeguards include: facilitating continued family law arbitrations include court review if the award does not reflect best interests of children; independent legal advice; regulatory amendments requiring that arbitration agreements set out the form of religious law applicable if Ontario law not used; public legal education; training and education of professionals; oversight and evaluation of arbitrations; government funding for community development to ensure that organizations inform persons of their rights and obligations; and further policy development. *Boyd Report*, *ibid.* at 133-42.

5 "Jews, Muslims to fight for tribunals" *CBC News* (14 September 2005), online: <http://www.cbc.ca/story/canada/national/2005/09/14/sharia-protests-20050914.html>; Beth Duff-Brown, "Jews, Muslims to Seek Tribunals in Canada" *ABC News* (14 September 2005), online: <http://abcnews.go.com/International/wireStory?id=1126490&CMP=OTC-RSSFeeds0312>; and ISHR, *supra* note 1.

6 Associated Press, "Ontario Rejects Use of Islamic Law" *FOXNews.com* (12 September 2005), online: <http://www.foxnews.com/story/0,2933,169125,00.html>. In the report, the Premier is reported as stating: "There will be no Shariah law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians." See also Margaret Atwood *et al.*, "Don't ghettoize women's rights" *The Globe and Mail* (10 September 2005) A23 ["Don't ghettoize women's rights"]; and Associated Press, "Canadians Protest Islamic Law Proposal" *FOXNews.com* (9 September 2005), online: <http://www.foxnews.com/story/0,2933,168865,00.html>.

7 Ministry of the Attorney General, "Statement by Attorney General on the Arbitration Act, 1991" (8 September 2005), online: Government of Ontario <http://ogov.newswire.ca/ontario/GPOE/2005/09/08/c7547.html?lmatch=&lang=_e.html>.

8 *Arbitration Act, 1991*, S.O. 1991, c. 17, online: <http://www.canlii.org/on/laws/sta/1991c.17/20060614/whole.html>.

9 R.S.O. 1990, c. F.3, online: <http://www.canlii.org/on/laws/sta/f-3/20060614/whole.html>.

10 *Family Statute Law Amendment Act, 2006*, S.O. 2006, c.1.

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

12 Muslims include Sunnis, Shias [including Ismailis, Druze, Voras, and Ishnashris], Ibadis, and other smaller denominations. Sunnis have two sets of enumerated creeds: the Five Pillars of Islam and the Six Articles of Belief; Shias have Roots of Religion and the Branches of Religion; while others have different denominations of creeds. See "Aqidah," online: Wikipedia, The Free Encyclopedia <http://en.wikipedia.org/wiki/aqidah#inroduction>. The leaders include ayatollahs [Shia clergymen], Caliphs [leader of the Ummah]; imams [having different meanings for Shias and Sunnis], Mawlanas [Islamic spiritual masters and guides], mullahs [who have studied the Koran and Hadith, and are considered experts in religious matters], mufti [Islamic scholars who interpret or expound upon Islamic/Sharia law], Mujtahid [interpreters of the Koran and Hadith], and Muezzins [who serve mosques]. See "Islamic Religious Leaders," online: Wikipedia, The Free Encyclopedia <http://en.wikipedia.org/wiki/Islamic_religious_leaders>. The sources include the Koran, the Hadith, Sira, and there are theological divisions among Muslims such as secularists, traditionalists, reformers, and salafis. See "Sharia," online: Wikipedia, The Free Encyclopedia <http://en.wikipedia.org/wiki/Sharia>. See also Ziauddin Sardar & Merryl Wyn Davies, *The No-Nonsense Guide to Islam* (Toronto: Between the Lines, 2004) at 13 [Sardar & Wyn Davies]; and see the Muslims of Edmonton website, online: <http://www.edmontonmuslims.com>.

13 The Ismaili Community of Edmonton Chair was a female for the years 1999-2005. See also see Muslims of Edmonton, *ibid*.

14 Sardar & Wyn Davies, *supra* note 12 at 8. See also at 16: "Even if you stretch our your hand against me to kill me, I shall not stretch out my hand to kill you. I fear Allah, the lord of the world" (Koran).

15 *Boyd Report*, *supra* note 4 at 43 (Submission of Homa Arjomand, 21 July 2004, Submission of the Muslim Canadian Congress, 26 August 2004).

16 Quoted in *ibid.* (Submission of Islamic Council of Imams-Canada, "Islamic Arbitration Tribunals and Ontario Justice System," 23 July 2004).

17 Quoted in *ibid.* at 43 (Submission of the Muslim Canadian Congress, 26 August 2004).

18 Another translation is "path leading to water." See *ibid.* at 44.

19 *Ibid.*, quoting V.A. Behiery & A.M. Geunter, *Islam: Its Roots and Wings – A Primer* (Mississauga, ON: Canadian Council of Muslim Women, 2000) at 14.

20 Submission of Canadian Council of Muslim Women to Marion Boyd Review of the Ontario Arbitration Act and Arbitration Processes, Specifically in Matters of Family Law (23 July 2004), online: <http://www.ccmw.com/MuslimFamilyLaw/submission%20made%20to%20Ms%20Marion%20Boyd.htm> [Canadian Council of Muslim Women].

21 *Boyd Report*, *supra* note 4 at 45: "Most submissions to the Review were adamant that the term Sharia should not be used to describe the proposed use of the Arbitration Act to deal with matters of family law for Muslims." See also at 45, wherein it was noted that most respondents preferred the term Islamic personal law or Muslim personal law be used by the Review to describe the issue accurately.

22 *Supra* note 8.

23 R.S.A 2000, c. A-43, s. 32(1).

24 *Supra* note 8, s. 32(1).

25 *Boyd Report*, *supra* note 4 at 4.

26 *Supra* note 8.

27 Syed Mumtaz Ali, quoted in *ibid.* at 3.

28 Joanne Lichman, *The National*, CBC Television (8 March 2004), cited in *Boyd Report*, *ibid*.

29 Quoted in *Boyd Report*, *ibid*. at 46-7 (Submission of Homa Arjomand, 21 July 2004).

30 *Ibid.* at 42-55. See also various articles posted at Stop Religious Courts in Canada, online: <http://www.muslimchronicle.blogspot.com>.

31 *Boyd Report*, *ibid.* at 3 (Submission of the Muslim Canadian Congress, 26 August 2004).

32 *Ibid.* at 29-30.

33 Quote in *ibid* at 30.

34 *Ibid* at 29-30.

35 Quoted in *ibid.* at 48 (Submission of the Canadian Council of Muslim Women, 23 July 2004). The Council did balance this view by outlining some rights ascribed to women in Islamic personal law (*ibid.* at 48-9).

36 Quoted in Ingrid Peritz, "Ebadi decries Islamic law for Canada" *The Globe and Mail* (14 June 2005) A7. See online: Stop Religious Courts in Canada, *supra* note 40, citing opposition to Sharia

law or Muslim law in Canada by many, including Margaret Atwood, Sheila Copps, Tarek Fatah, the Muslim Canadian Congress, and Amnesty International.

37 Quoted in *Boyd Report*, *supra* note 4 at 49 (Submission of Homa Arjomand and her coalition of thirty-five members, who outlined their personal experiences under Sharia law in Iran, Saudi Arabia, Pakistan, Kuwait, and Iraq, 21 July 2004).

38 Daily Telegraph, "Powers struggle over apostate's fate" *Edmonton Journal* (18 June 2006) A4.

39 *Ibid.*

40 *Ibid.*

41 *Boyd Report*, *supra* note 4 at 45. See further references to comments made by Aly Hindy, a self-described fundamentalist, to Sally Armstrong, "Criminal Justice" *Chatelaine* (November 2004) 152 at 158: "If a person says, 'I don't believe in Shariah,' he or she is not a Muslim. To go to hell is easy. To go to paradise takes work. Many people who call themselves Muslim are going to hellfire."

42 Mohyuddin Mirza, Letter to the Editor, "Many Muslim Sects" *Edmonton Journal* (18 June 2006) A19.

43 BBC News, "Muslim burial for Malaysian hero (28 December 2005), online: *bbc.co.uk* <http://news.bbc.co.uk/l/hi/world/asia-pacific/4563452.stm>.

44 See James M. Arlandson, "Sharia sure ain't gay: Muhammad and the homosexual," online: Answering Islam, A Christian-Muslim Dialog and Apologetic <http://answeringislam.org/Authors/Arlandson/homosexual.htm>; and ISHR, *supra* note 1.

45 *Boyd Report*, *supra* note 4 at 136 (Recommendation 18).

46 *Ibid.* (Recommendation 19).

47 *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47; but see *R. v. Jones*, [1986] 2 S.C.R. 284, 1986 CanLII 32 [*Jones*], wherein the converse was held – *i.e.* that it is not for the Court to question the validity of one's religious beliefs even though few share them. The two cases demonstrate the need to demarcate between religious tenets and secular laws.

48 This term is used here only to refer to tribunals adjudicating personal disputes using Sharia law.

49 *Supra* note 11.

50 *Ibid.*, s. 2. Section 2 states: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association."

51 *Ibid.*, s. 15. Section 15(1) states: "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." Also, s. 28 states: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

52 *Ibid.*, s. 7. Section 7 states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

53 *Boyd Report*, *supra* note 4 at 40.

54 CNN, "Fugitive polygamist sect leader caught near Las Vegas" (30 August 2006), online: CNN.com <http://www.cnn.com/2006/LAW/08/29/jeffs.arrest/index.html>. Also see Jeremy Hainsworth, "Polygamy power struggle predicted" *cnews* (30 August 2006), online: <http://cnews.canoe.ca/CNEWS/Canada/2006/08/30/178219-cp.html>.

55 See *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497, 1999 CanLII 675; and *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 1989 CanLII 2.

56 The author is examining the submissions of some Muslim Canadians to Marion Boyd, rather than professing expertise in the content of Muslim law or Islamic theology.

57 *Supra* note 11, s. 52.

58 Section 32(1) of the *Charter* states: "This Charter applies *a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and *b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

59 See *e.g.* Alberta's *Arbitration Act*, *supra* note 23, s. 32(1); and Ontario's *Arbitration Act, 1991*, *supra* note 8, s. 32(1).

60 Both *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 1997 CanLII 327 [*Eldridge*], and *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 1998 CanLII 816, deal with laws that regulate private activity, and not the acts of a private entity.

61 *Eldridge*, *ibid.*

62 *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R 1038, 1989 CanLII 92 [*Slaight Communications*]. See also *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, 1990 CanLII 63 [*Douglas College*].

63 The *Charter* applies to delegated legislation such as regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the legislatures: *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591, 1989 CanLII 132 [*Black*]. Where government action of such nature is present, and where a private litigant relies on it to cause an infringement of the *Charter* rights of another, the *Charter* applies. For example, the rule of a Law Society, purportedly adopted pursuant to statute, constituted a "law" within the meaning of the *Charter*, and was found to infringe the mobility rights provisions (*Black*, *ibid.*). The *Charter* applies to rules of civil procedure as they amount to legislation by judges sanctioned by various judicature acts, and thus amount to laws of the province having the force of statutes. See, *e.g. Baker v. Tanner* (1991), 77 D.L.R. (4th) 379 (N.S.C.A.), 1991 CanLII 2496. See also *Slaight Communications*, *ibid*: The *Charter* applies to orders made by adjudicators that are creatures of statute. They are appointed pursuant to a legislative provision and derive their powers from statute. Note that it was held in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, 1991 CanLII 68 that the *Charter* applies to government even when it engages in activities that are in form "private" or "commercial,", and the provision and management of the labour force necessary for the provision of public education cannot in any event be considered commercial.

64 *Blainey v. Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (C.A.) [*Blainey*].

65 *Blainey*, *ibid.*; *Eldridge*, *supra* note 60.

66 In *Eldridge*, *ibid.*, while the Government's failure to prescribe sign language interpreters was not held to violate the *Charter*, it was held that the failure of the Medical Services Commission and hospitals to provide sign language interpretation where it is necessary for effective communication constituted a *prima facie* violation of the s. 15(1) rights of deaf persons.

67 Media reports indicate a public desire for maintaining the secular nature of institutions. See *e.g.* Philip Symons, "Canadian Unitarians urge Government to ensure 'separation of church and state'" (11 June 2005), online: Stop Religious Courts in Canada <http://muslimchronicle.blogspot.com/2005/06/canadian-unitarians-urge-government-to.html>. See also Nadia Khouri, Editorial, "Keep Mosque and state separate" *National Post* (21 September 2004) A17. A number of academics have called for secularization in their justice systems wherein Islamic or *Sharia law* may apply: Salbiah Ahmad, "Islam in Malaysia: Constitutional and Human Rights Perspective" (2005) 2 Muslim World Journal of Human Rights, Article 7. The author calls for increased secularization of the justice system in Malaysia.

68 See *e.g.* Alberta's *Arbitration Act*, *supra* note 23, s. 44. Section 44 provides that if the arbitration agreement does not provide for appeal to the courts then there is very limited basis for review by the courts.

69 *Supra* note 8, s. 46.

70 J. Bryan Casey & Janet Mills, *Arbitration Law of Canada: Practice and Procedure* (Huntington, NY: Juris Publishing, 2005) at 315 [Casey & Mills].

71 *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, 1988 CanLII 3.

72 Indeed, Ontario may well have improperly allowed arbitrations under other religious law until its *Arbitration Act*, *supra* note 8, and *Family Law Act, supra* note 9, were amended in the early 1990s.

73 *Slaight Communications*, *supra* note 62.

74 *Luscher v. Deputy Minister of National Revenue (Customs & Excise)* (1985), 17 D.L.R. (4th) 503 (F.C.A.); *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 1989 CanLII 87 [*Irwin Toy*].

75 *Irwin Toy*, *ibid.*

76 *Reference re Education Act of Ontario and Minority Language Education Rights* (1984), 10 D.L.R. (4th) 491, 47 O.R. (2d) 1 (C.A.).

77 *Douglas College*, *supra* note 61 and, in a human rights context, see *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, 1992 CanLII 30 [*Dickason*]. Parties may not generally contract out of a human rights statute. This rule resulted from the concern that there may be a great discrepancy in bargaining power between the person contracting out of human rights legislation and the party receiving the benefit of that term. See also *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3, 1996 CanLII 190: Human rights legislation sets out a floor beneath which the parties cannot contract out. Parties can contract out of human rights legislation if the effect is to raise and further protect the human rights of the people affected.

78 *Dickason*, *ibid.* See also *Ontario Human Rights Commission v. Borough of Etobicoke*, [1982] 1 S.C.R. 202, 1982 CanLII 15: In response to the city's argument that mandatory retirement at age 65 was justified because the parties had agreed to it in a collective agreement, Justice McIntyre wrote (at 213-14) that while it was submitted that a the condition, being in a collective agreement, should be considered a *bona fide* occupational qualification and requirement, to give it effect would be to permit the parties to contract out of the provisions of *The Ontario Human Rights Code*. The majority held that acceptance of a contractual obligation might well, in some circumstances, constitute a waiver of a *Charter* right especially in a case like mandatory retirement, which not only imposes burdens but also confers benefits on employees. Usually, however, such an arrangement would require justification as a reasonable limit under s. 1 especially where a collective agreement may not really find favour with individual employees subject to discrimination.

79 *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, 1982 CanLII 27 [*Heerspink*]; see also *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, 1985 CanLII 48.

80 *Dickason*, *supra* note 77.

81 *Dickason*, *ibid*.

82 *Dickason*, *ibid*.

83 *Heerspink*, *supra* note 79 at 158

84 *Blainey*, *supra* note 64.

85 See *e.g. Canadian Human Rights Act*, R.S.C. 1985, c. H-6, and Alberta's *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14.

86 *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, 1985 CanLII 18 [*Simpsons-Sears*]; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, 1987 CanLII 73; and *Canadian National Railway v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, 1987 CanLII 109.

87 *Simpsons-Sears*, *ibid.*,and *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3, 1999 CanLII 652 [*Meiorin*].

88 *Eldridge*, *supra* note 60. See also *Meiorin*, *ibid.* Finally, regarding s. 11.1 of the Alberta *Human Rights, Citizenship and Multiculturalism Act*, *supra* note 85, see *Dickason*, *supra* note 77, wherein the *Oakes* analysis (*R. v. Oakes*, [1986] 1 S.C.R. 103, 1986 CanLII 46) was applied in the context of human rights codes with a measure of flexibility.

89 *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, 1986 CanLII 12 [*Edwards*]. In the case of holiday shopping legislation preventing Sunday sales, the legislation was held to abridge the freedom of religion of some Saturday-observers, but was held justifiable as a reasonable limit under s. 1 of the *Charter*.

90 *Ibid.*

91 *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006], 1 S.C.R. 256, 2006 SCC 6.

92 *Syndicat Northcrest v. Amselem*, *supra* note 47: religious conduct which would potentially cause harm to or interference with rights of others is not automatically protected and must be measured in relation to other rights.

93 *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141, 1993 CanLII 35.

94 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].

95 *Ibid.*, art. 18(3).

96 While international treaty norms are not binding in Canada unless incorporated by enactment into Canadian law, the courts may be informed by international law in seeking the meaning of *Charter* provisions: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (CanLII).

97 In the seminal case of *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 1985 CanLII 69 [*Big M Drug Mart*], the *Lord's Day Act*, R.S.C. 1970, c. L-13, was held to violate s. 2(a) of the *Charter:* to the extent that it bound all persons to a sectarian Christian ideal, the *Act* worked a form of coercion inimical to the spirit of the *Charter* and the dignity of non-Christians. In proclaiming the standards of a Christian faith, the *Act* created a climate hostile to, and giving the appearance of, discrimination against non-Christian Canadians. The *Lord's Day Act* translated a law, rooted in Christian morality, using the power of the state to bind believers and non-believers alike.

98 For example, many Catholics use birth control and favour abortion in contradiction to the commonly held tenets of their faith, yet still regard themselves as Catholics.

99 See *Edwards*, *supra* note 89 regarding the general principle in the context of secular holiday legislation. See also *Jones*, *supra* note 47, wherein the Court held that a pastor's freedom of religion was not offended by requiring him to recognize the secular role of school authorities.

100 *Big M Drug Mart*, *supra* note 97.

101 *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31 (CanLII). In this case, the Supreme Court of Canada was faced with the task of reconciling the religious freedoms of individuals wishing to attend a private institution, the tenets of which prohibit homosexuality, with broader equality concerns ensuring non-discrimination against homosexuals. The Court divested itself of dealing squarely with the conflict between equality rights and religious freedoms by finding that the rights in this case could be reconciled. It held that absent evidence that training teachers at TWU fosters discrimination in the public school system, the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. It held that any potential conflict between religious freedoms and equality rights should be resolved through the proper delineation of the rights and values involved.

102 *Big M Drug Mart*, *supra* note 97. See also *Jones*, *supra* note 47, wherein the majority of the Supreme Court of Canada held that a pastor's freedom of religion was not offended by requiring him to recognize the secular role of school authorities. The provisions of the Alberta *School Act*, R.S.A. 1980, c. S-3, required every child of a certain age to attend public school unless excused for certain reasons, such as where a child is under certified home instruction or in private schooling. The accused, a fundamentalist pastor, claimed that the authority over his children and his duty to attend to their education came from God, and that it would be sinful for him to seek certification from the state to permit him to do God's will. The Court ruled that the provisions did not offend freedom of religion.

103 *Boyd Report*, *supra* note 4 at 55-68.

104 "It is much more difficult to balance competing rights of religious freedom and equal treatment under the law when a religious community does not believe that all members of the community are to be treated equally (for example if women are considered less worthy)." Submission of the Christian Legal Fellowship (27 August 2004), quoted in *Boyd Report*, *supra* note 4 at 68.

105 David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (London: Sweet & Maxwell, 2005) at 444-47. See also Casey & Mills, *supra* note 69 at 73-76; and David St. John Sutton & Judith Gill, *Russell on Arbitration*, 22d ed. (London: Sweet & Maxwell, 2003) at 16 and 377.

106 Joseph, *ibid.* at 444.

107 *Joseph, ibid.* See also the English Court of Appeal case of *Deutsche Schachtbau v. Shell International Petroleum Co. Ltd.* [1990] 1 A.C. 295, 316 (CA), Lord Donaldson, reversed on other grounds in the House of Lords.

108 *Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd.* [1999] 2 All E.R (Comm) 146 (challenge unsuccessful).

109 See the decision of the Court of Justice of the European Communities in *Eco Swiss China Time Ltd. v. Benetton International NV*, [1999] 2 All E.R (Comm) 44, ECR 1-3055 (BAILII).

110 As a note, there are certain types of arbitration agreements that are manifestly void or illegal. An example commonly given is an agreement between two highwaymen to arbitrate the division of spoils. Where this is apparent from the award, such an agreement will not give rise to any enforceable award, as the making of the arbitration agreement itself would almost certainly be considered to be unlawful. Even if the making of the arbitration agreement is not unlawful, where it is apparent from the award that sums have been awarded in respect of an illegal enterprise (illegal either under the governing substantive law or the law of the place of performance or under the curtail law), then the English courts will be entitled to conclude that the enforcement of the award would be contrary to public policy. The fact that in such a case the illegality is recited in or manifest from an award and not a court judgement makes no difference. The court is entitled to protect the integrity of its own process and to see that it is not abused. *Minmetals Germany Gmbh v. Ferco Steel Ltd.*, [1999] 1 All E.R (Comm) 315, Justice Colman; *Irvani v Irvani* [2000] 1 Lloyd's Rep. 412.

111 Quoted in *Boyd Report*, *supra* note 4 at 59-60 (Submission of His Highness Prince Aga Khan, Shia Imami Ismaili National Concilation and Arbitration Board of Canada, 10 September 2004):

> "The Ismaili CAB system is rooted in tradition, yet its modern infrastructure interfaces comfortably with the national legal systems within which it functions. The CAB system is grounded in the ethics of the faith and complies with the laws of the various lands where the Ismaili live"

112 Section 1 states: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Two central criteria must be satisfied to establish that a

limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns, which are pressing and substantial in a free and democratic society, before it can be characterised as sufficiently important.

113 *A.G. (Que) v. Quebec Assn. of Protestant School Boards*, [1984] 2 S.C.R. 66, 1984 CanLII 32.

114 *Oakes*, *supra* note 88.

115 *Roach v. Canada (Minister for State for Multiculturalism & Culture)* (1994), 113 D.L.R. (4th) 67, 1994 CanLII 3453 (F.C.A.). See also two recent articles by Ayelet Shachar regarding critiques of multiculturalism pertaining to gender and other minority rights: "Two Critiques of Multiculturalism" (2001) 23 Cardozo Law Review 253 at 257-59, 261-75; and "Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies" (2005) 50 McGill Law Journal 49.

116 See *Boyd Report*, *supra* note 4. See also Natasha Fatah, "One law for all" *CBC News* (1 April 2004), online: <http://www.cbc.ca/news/viewpoint/vp_fatah/20040401.html>: "I've lived in Pakistan and Saudi Arabia, two countries that practise Shariah law. I love the country of my birth, and the country of my youth, and now Canada, the country of my choice. And with that choice I've agreed to live by the laws of this land."

117 Oakes, *supra* note 88. The impairment must be "minimal"; that is, the law must be carefully tailored so that rights are impaired no more than necessary. As held in *Eldridge*, *supra* note 60, the application of the *Oakes* test requires close attention to the context in which the impugned legislation operates. The failure to provide sign language interpreters fails the minimal impairment branch of the *Oakes* test under a deferential approach. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. Legislatures are given some flexibility in exercising legislative choice, and legislation need not be tuned to judicial precision: *Edwards*, *supra* note 89. See also *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S. C.R. 199, 1995 CanLII 64 at para. 160. Legislative inaction in the face of blatantly unconstitutional action and arbitration cannot and will not be viewed as reasonable judgment sufficient to meet the requirements of s. 1: *Irwin Toy*, *supra* note 73.

118 *Irwin Toy*, *ibid.*

119 *Kask v. Shimizu*, [1986] 4 W.W.R. 154 (Alta. Q.B.), 1986 CanLII 100 (AB Q.B.).

120 Canadian Council of Muslim Women, *supra* note 20.