MULTICULTURALISM IN A TIME OF PRIVATIZATION

Faith-Based Arbitration and Gender Equality.

ABSTRACT

In this article, Audrey Macklin explains how the family law regime permits separating or divorcing parties to opt-out of the default statutory rules for custody, property division and support and engage in private ordering by way of negotiation, mediation and arbitration. In law and in practice, courts seldom examine these arrangements in advance. When domestic contracts are reviewed, courts are reluctant to find lack of consent or to set aside substantively unfair outcomes. Macklin says disallowing faith-based arbitration under the *Arbitration Act* still enables parties to utilize faith-based mediators as a means of concluding judicially enforceable domestic contracts. In addition, parties can still seek out clerics to arbitrate their disputes; they simply cannot rely on the courts to enforce the agreements. Thus, it is not obvious that the Ontario government's resolution of the issue enhances the position of vulnerable women.

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The recent controversy over Islamic family law arbitration in Ontario is over – for now. The Ontario government recently announced that the *Arbitration Act* will exclude faith-based family law arbitration from its purview, meaning the courts will not enforce religiously based arbitral awards. For reasons that I will elaborate below, I doubt this decision will ameliorate the problems that many opponents associate with religious arbitration.

This issue has largely been fought on the terrain of multiculturalism, where the interests of vulnerable Muslim women subject to prejudicial rules are pitted against assertions of communal identity and self-determination. While many issues of multiculturalism concern accommodation of particular cultural or religious practices (such as style of dress or days of rest), state enforcement of decisions rendered by religious clergy delegates authority over an entire sphere of regulatory activity otherwise reserved to the state. This raises the prospect of limited self-governance or what Ayelet Shachar refers to as multicultural jurisdiction.

Viewed through this lens, attention is drawn toward the relationship between the religious/cultural community and the individual, where communal norms and practices are the source of the potential harm. Thus, a standard reading of the so-called sharia tribunal debate[1] goes something like this: Muslim women who submit to Islamic arbitration of their family law disputes will be judged according to an antiquated, sexist, set of norms that disadvantages them relative to the secular legal regime in terms of custody, support and property entitlements. Whether the content of Islamic law is inherently misogynist or whether it is so interpreted by men with an interest in maintaining patriarchal power, the result is the same. Because many Muslim women are recent immigrants, they tend to be financially, socially, linguistically and psychologically dependent on their husbands and religious community. Therefore, they are less likely to withhold consent to religious arbitration even if the outcomes predictably disadvantage them.

The role of the state in this scenario is to mediate between the legitimate interests of religious communities in regulating personal matters according to deeply held religious beliefs, while upholding the equal entitlement of Muslim women to the protection of the state law. Resolution of the Islamic arbitration issue thus seems to fit perfectly within the framework of the classic multicultural dilemma.

This triangulation of the state-individual-community nexus tends to treat the relationship between the individual woman and the state as presumptively unproblematic. Indeed, it is typically the normative referent against which a non-state community regime will be measured. At worst, the liberal democratic state will be complicit in oppressive conduct of a religious community if and when it enforces the latter's decisions.

I do not deny the validity of the analytical framework described above, but I want to suggest that it is decidedly partial. I elect to refract the debate through another lens, one that proceeds from the specificity of the Canadian legal context and which unsettles the putatively unproblematic relationship between the state and the individual subject of family law. My contention is that the state's commitment to privatisation actually provides more explanatory force in the present context

than do normative claims about multiculturalism and gender equality[2]. As a preliminary matter, it is necessary to sketch certain elements of the existing family law regime.

Many people assume that the current family law regime sets out universally applicable rules about property division, spousal support, child custody and child support that are triggered by relationship breakdown. Couples can litigate and let a judge apply the rules to the facts of their case, or the parties can agree to resolve their various issues in accordance with those rules and without litigating.

If this were an accurate depiction of reality, I am virtually certain that the Islamic arbitration proposal would have met with immediate and categorical rejection by the government. The campaign would have been read as an attempt to erect a parallel, independent justice system that exempts participating Canadian Muslims from the responsibilities and protections of the secular regime. Within this discursive field, the equality of all citizens before and under the law would, in my view, have handily prevailed over countervailing claims of multicultural rights and freedom of religion – even in Canada, this most multicultural of nations[3].

But as it happens, family law in Ontario does not conform to the picture I sketched above, and this divergence significantly complicates the resolution of the debate over Islamic law arbitration. The family law regime governing couples in Ontario is an admixture of federal law (*Divorce Act*) and provincial law (*Family Law Act*). For present purposes, suffice to note that the statutes set out default criteria for distribution of property, support (spousal and child) and custody, following relationship breakdown. Reformist projects over the last thirty years have made considerable progress in addressing the gendered consequences of marriage breakdown. Property division rules recognize the role that the unpaid labour of wives play in enabling husbands to maximize their career development and wealth accumulation. Principles of spousal support acknowledge that many women forfeit their own careers in the paid labour force to stay home with children, with the result that some may never redeem their early potential, or even attain complete financial self-sufficiency. The default rules have moved far beyond regarding the traditional role of stay-at-home wife as a choice for which husbands bear no financial responsibility upon marriage breakdown.

At the same time, parties may opt out of much of the 'one size fits all' model of the statutory regime. Rather than litigating in the ordinary courts, parties may resolve these issues by drafting their own agreement (domestic contract) or by employing a neutral mediator to assist them to negotiate an agreement (mediated settlement). They may also engage an independent arbitrator of their choosing to adjudicate the dispute in a less formal manner than a courtroom trial before a judge (arbitral award). Arbitration of family law disputes is seldom used in comparison to mediation, and this is an important consideration: regardless of the outcome of the arbitration debate, mediation will remain the more popular method of alternative dispute resolution (ADR) anyway. Negotiation, mediation and arbitration do not directly involve courts or judges. They are private.

Having embarked on any of these ADR paths, the parties may also choose the rules that will guide them. These can range from bargaining with a view to maximizing economic self-interest, to abiding by religious norms. If they employ the services of a mediator or arbitrator, they may instruct that person to advise them (in the case of a mediator) or to decide (in the case of an arbitrator) according to whatever norms they choose, including religious law[4].

In sum, the current state of the law already permits parties to engage in private ordering in family law. Parties may devise their own agreement, mediate, or hire an arbitrator to adjudicate according to whatever rules they choose. The results may not conform to the results that would have obtained had they applied the default rules, but the ordinary courts will generally enforce the agreements or awards anyway. Indeed, the *Arbitration Act* grants parties considerable latitude to stipulate whether and to what extent parties may have recourse to the courts in relation to the arbitral award. Apparently, a few religious arbitrations taken place in Ontario annually among Orthodox Jewish Beit Dins and Ismaili Muslim arbitration bodies.

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Proponents of ADR promote it as cheaper, faster, less adversarial, less intimidating, more empowering and more satisfying for the parties than the traditional justice system. Critics express concern about the privatization of family law. Behind the cloak of confidentiality shielding ADR from public and judicial scrutiny, some worry about the ways in which women's financial, emotional, and social vulnerability can be exploited to their disadvantage. Negotiation, mediation or arbitration among parties presumes formal equality, but no observer of family law can doubt the potential existence or depth of substantive inequality between a couple.

Arbitration is institutionally distinct from other ADR mechanisms insofar as it is regulated under the *Arbitration Act*, which applies to commercial disputes as well. In the domain of Canadian family law, parties may not arbitrate status, including marriage, divorce or paternity[5]. Arbitrators have no jurisdiction over Canadian criminal law, and one cannot 'opt out' of Canadian criminal law in favour of another normative regime. Thus, allegations that Islamic arbitrators would be legally entitled to perform polygamous marriages or order the stoning of adulterous women are unfounded and verge on fear-mongering.

The availability and scope of judicial review of these negotiated or mediated domestic contracts (pre-nuptial agreements, separation agreements etc.) is set out in Ontario under Part IV of the *Family Law Act*. For example, in Ontario, an agreement may be varied or set aside if a party challenges it and the court finds the agreement to be 'unconscionable'. It appears that, apart from ensuring adequate arrangements for financial support for children, courts do not routinely examine the custody, property or spousal support provisions at the time of contractformation. In other words, courts will not actually scrutinize the content of a domestic contract unless and until one party seeks to enforce or vary it over the objection of the other, a condition that may only arise years after a contract was signed, or never.

This position locates the initial menace to the norm of gender equality not in conflicting norms of Islamic law *per se*, but in the state's institutional configuration of family law into a system that permits parties to 'opt-out' of public norms and effective judicial scrutiny, exposing s usceptible women of all faiths (or no faith) and ethnicities to exploitation of economic, social, psychological advantage. Pitching the critique at this entry point challenges the implicit assumption that the secular operation of the *status quo* delivers a normatively satisfactory standard of fairness, gender equality and justice against which faith-based alternatives can and should be measured. It is important to submit the Ontario *Family Law Act* to this closer investigation partly because the Boyd Report concluded that concerns expressed by opponents of faith-based arbitration could be resolved by bringing arbitral awards under the domestic contract provisions of the *Family Law Act*.

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To appreciate how this secular standard contained in the *Family Law Act* operates, consider the 2004 case of *Hartshorne v. Hartshorne*. The Supreme Court of Canada reversed two lower court judgments and upheld a pre-nuptial agreement prepared by the man, presented to her, and signed by his future wife on their wedding day. The couple already had one child and the woman was pregnant with their second child, though neither party was aware of it at the time of the wedding. The animating principle of the pre-nuptial agreement was the wholly secular norm of formal equality: the property allocation upon divorce should "leave with each party that which he or she had before the marriage." (para, 65). As is typically the case, such a principle operated to the detriment of the woman. Independent legal counsel advised the woman that that the agreement was grossly unfair in comparison to her default entitlements to the matrimonial home and property under the statutory family law regime in her province[6]. She signed anyway. Here is what the dissent said about power relations between the couple:

> There are indications that the respondent was in a vulnerable position in negotiation – [though] not enough for the agreement to be unconscionable. The respondent had already been out of the workforce and dependent on the appellant for almost two years and had only ever worked as a lawyer (and before that, an articling student) in the appellant's firm. The agreement was concluded under pressure with the wedding fast approaching. The respondent sought changes to the agreement before execution but was unable to persuade the appellant to agree, except with respect to minor changes, such as the insertion of a clause to the effect that her signature was not voluntary and was at his insistence. These circumstances illustrate the appellant's position of power within the relationship, as well as the respondent's correlative dependence. That she remained at home for the rest of the marriage relationship to take care of the couple's children further illustrates the power dynamics at play. (para. 90).

Despite this context, the majority paints the Agreement with the patina of mutuality by describing it as reflective of the "intention of the parties", and baldly admonishes the wife that "if [she] truly believed that the Agreement was unacceptable at that time, she should not have signed it." (para. 65). In the result, the Supreme Court of Canada endorses a stark, zero-sum approach to autonomy and consent: If the circumstances do not amount to "duress, coercion or undue influence" in law (which both majority and dissent agree they did not), then the context is irrelevant to assessing the fairness of the agreement, and the irrebuttable presumption is that both parties acted with equal autonomy. Because the Court determined that events in their life together as husband and wife unfolded more or less as anticipated by the pre-nuptial agreement[7], and because Mrs. Hartshorne was still entitled to spousal and child support, the majority of the Supreme Court of Canada declined to find the agreement unfair.

A salient difference between domestic contracts (including pre-nuptial agreements) and arbitration is that in the former, the parties ostensibly negotiate the terms of their contract, whereas in the latter, the parties negotiate the terms of the agreement to arbitrate, but the outcome of the arbitration itself is imposed by an external adjudicator. It is not evident, however, what normative or legal consequences should attach to this distinction. The inquiry into consent in arbitration settings would simply be displaced to the consent to submit a dispute to arbitration. In terms of assessing substantive outcomes, one might consider it defensible to hold people more strictly to contractual terms they devise themselves, while taking a more generous approach to those who have had a

potentially unjust or perverse award inflicted upon them by an arbitrator. However, if the terms in a domestic contract are more or less dictated by the stronger party (as they were in *Hartshorne*), and if arbitration outcomes fall within a predictable range, the normative gap between contract and adjudication narrows and this formal d istinction between contract and adjudication seems unable to bear the normative burden of distinguishing between acceptable and unacceptable exploitations of unequal bargaining power[8].

The specificity of Muslim women's vulnerabilities may diverge from those of Mrs. Hartshorne (a white, Christian, middle-class, Canadian citizen lawyer). Nevertheless, decisions like *Hartshorne* suggest that the Supreme Court of Canada takes a fairly inflexible view of consent and of the remedial options available in the face of consent obtained under conditions of unequal bargaining power[8].

If opposition to Islamic family law arbitration is predicated on a prediction of inferior outcomes (from a gender-equality perspective) than the default statutory regime, one must surely take into account the current impact of private ordering as an alternative to the statutory regime, and both the practical and doctrinal impediments to judicial intervention in the event of substantively problematic outcomes.

Would it – or should it – matter to a court if a pre-nuptial agreement or a separation contract whose terms departed significantly from the default regime happened to have been mediated by an imam? Given the existing juridical landscape, one must ask whether a court would look behind the signature on the contract unless a party was genuinely misled, did not obtain independent legal advice, or was coerced by real or apprehended violence. Trying to distinguish an 'Islamic' agreement from the secular domestic contract in *Hartshorne* raises the risk of resorting to a pathologized construction of Muslim women that renders them uniquely incapable of consent owing to the influence of their faith, their kin and their community. Alternatively, a court could declare that Islamic law (in all possible forms) is necessarily, inherently, or inevitably misogynist, and thus inevitably generates substantively unjust outcomes. The objectionable nature of these distinctions should be obvious.

If the hidden culprit in this story is the opt-out aspect of family law's default regime, one solution might be to prohibit alternative dispute resolution according to any rules other than the public, legislated standards of Ontario family law. Pre-nuptial agreements would become pointless, since the rules of property division and support cannot be applied in advance of the relationship. Parties would also generally be precluded from consensually departing from the fixed model of distributing the financial and custodial consequences of family breakdown. Faith-based arbitration would simply be one among the prohibited forms of alternative dispute resolution[9]. Parties could organize the financial and personal consequences of relationship breakdown as they wished, (as they can now), but could not rely on the courts to enforce those arrangements.

Another approach would be to preserve the ability of individuals to choose their own rules (religious or otherwise), but require all domestic contracts and awards to be reviewed at an early stage by a judge for adherence to such broad public norms as gender equality, fairness, reasonable expectations and autonomy. If we can agree that compliance with these norms can be realized through a diverse array of practical arrangements, it should be possible to validate private agreements that depart from the outcomes that would obtain under the legislative framework. Of course, this would entail a diminution of privacy for affected parties, and a certain increase in judicial workload. Reducing the burden on the courts is one of the major reasons for encouraging private ordering in the first place, and probably operates to constrain the political feasibility of any options that emerge from a principled approach to gender equality or multiculturalism.

Religious women who participate in faith-based ADR and then enter into domestic contracts can expect the same level of scrutiny, concern and protection by the courts that secular women currently receive. Whether this is read as a source of relief or concern remains in the eye of the beholder.

Each of these options begets its own theoretical, political and pragmatic challenges. These are properly the subject of a more extensive discussion. At present, the government's proposed resolution will mean that faith-based family law arbitrations will not be recognized by the ordinary courts. People may still rely on imams or rabbis or ministers to adjudicate their disputes, and may confront various types of informal but powerful communal pressure to abide by those outcomes despite the absence of state-based coercion. Alternatively, people can consult a cleric informally or employ religious mediators to attain the same or similar results through mediation, and those agreements will be incorporated into divorce proceedings and potentially enforceable in the ordinary courts. Religious women who participate in faith-based ADR and then enter into domestic contracts can expect the same level of scrutiny, concern and protection by the courts that secular women currently receive. Whether this is read as a source of relief or concern remains in the eye of the beholder.

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Similarly, the fact that many European states actually allow or require non-nationals to resolve family law matters according to the state of their nationality may

appear to be 'multicultural' in effect, but these regimes are decidedly not 'multicultural' by design, at least not in any contemporary sense.

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Notes

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[4] See, e.g. *Arbitration Act*, s. 35 ("an arbitral tribunal shall apply the rules of law designated by the parties").

[5] In addition to policy reasons militating against allowing the determination of status via arbitration, Canada is a federal state, and the solemnization of marriage and its dissolution through divorce fall within federal jurisdiction. The provinces do not have jurisidiction over marriage and divorce.

[6] Under the terms of the pre-nuptial agreement, Mrs. Hartshorne would have received a 50% interest in the matrimonial home and 50% of property accumulated during the marriage. Instead, upon separation, Mrs. Hartshorne's share of property (including matrimonial home) was estimated at $280,000, while Mr. Hartshorne's share was $1.2 million.

[7] In fact, the woman had a second child (unbeknownst to her, she was pregnant when they married) and the child had special needs.

[8] I do not suggest that there are no countervailing reasons in support of holding people to their agreements (predictably, closure, incentivizing responsibility etc.); reasonable people may disagree about the correctness of the *Hartshorne* decision.

[9] Prohibiting only faith-based arbitration, would serve little purpose. Most couples prefer mediation over arbitration anyway, and there is no reason to think that faith-based mediation would pose different or fewer problems than faith-based arbitration.