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KEEPING THE FAITH: AN EXPLORATORY ANALYSIS OF FAITH-BASED ARBITRATION IN ONTARIO

Cathy Huth

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ABSTRACT

In 2003, the Islamic Institute of Civil Justice announced their intention of providing arbitration services to resolve family law disputes according to Islamic law. Concerned that such arbitration might be inconsistent with principles of equality and Ontario family law, many women's organizations and members of the public called on the government of Ontario to prohibit the use of arbitration based on religious law, in particular Islamic law. On September 11, 2005 the Government of Ontario announced that all family arbitration must be conducted in accordance with Ontario and Canadian law, thereby making faith-based arbitration awards non-enforceable.

The purpose of this study is to explore the media's representation of faith-based arbitration in family law. A latent content analysis of Ontario newspaper articles was conducted to explore how the media portrayed the issue of faith-based arbitration. A sample of editorial, column, and opinion pieces from mainstream English Ontario newspapers published between December 13, 2003 and February 16, 2006 were selected.

An analysis of the articles found common representations of women, immigrants and the Islamic faith, multiculturalism and religious freedom, and the justice system. More specifically, the findings from this study indicate that the media was misguided in defining the issue of faith-based arbitration. This occurred in one of three ways; either as faith-based arbitration exceeding the boundaries of multiculturalism, as eroding the secular state, or as contradicting the principle of one law for all. A second finding from this study was that much of the media coverage was alarmist and misinformed with strong signs of Islamophobia and the stereotyping of religious groups. As well, in accordance with Ayelet Shachar's (2001, 2005) view that multiculturalism is often portrayed as in conflict with women's equality rights, one of the major findings of this study is that the media depicted faith-based arbitration as a competition between women's equality rights and religious freedom (or multiculturalism).

In conclusion, it is argued that the media's representation of faith-based arbitration was frequently misleading, alarmist, and uninformed. Although faith-based arbitration is conducted in other faith communities, the media coverage focussed primarily on the Muslim community, with stereotypes and alarmist rhetoric pervasive throughout the coverage. Indeed, there was a lack of knowledge about Islam, faith-based arbitration, and multiculturalism in the media's representation of faith-based arbitration.

INTRODUCTION

> "If Muslims want to live under shariah law, and if they believe they can't be good Muslims without following shariah, there are plenty of troubled countries to accommodate them" (Ottawa Citizen, September 3, 2004).

In 2003, the Islamic Institute of Civil Justice announced their intention to offer arbitration services using Islamic personal law to resolve family law disputes. Despite assurances by the Institute that arbitration decisions would abide by Canadian and Ontario law, the announcement raised concerns about the use of faith-based arbitration. Many women's organizations and members of the public were concerned that arbitration using religious law, in particular Islamic law, would be inconsistent with principles of equality and Ontario family law.

Faith-based arbitration has been conducted informally for decades in a number of religious communities, including Jewish and Ismaili communities, and has been permitted under Ontario's *Arbitration Act, 1991*, and the *Family Law Act of Ontario*. However, it was not until the Islamic Institute of Civil Justice's announcement that the public and media seemed concerned about, or even aware of, this ongoing practice. The proposal to establish Islamic tribunals ignited a debate over whether faith-based arbitration should be permitted for family law disputes in Ontario, with much of the coverage focussed on Islam and the Muslim community.

Amid protests and condemnation from members of the public, women's organizations, and some of the media, in 2005 the Government of Ontario declared that all family arbitration in Ontario must be conducted according to Ontario and Canadian family law, making faith-based family arbitration decisions of no legal force and equivalent to advice only.

1. Purpose of the study

While faith-based arbitration has been conducted in Ontario for a number of years in various religious communities, there is little academic literature on the practice. Of the literature that exists, most is written in the period between 2003, when the controversy began, and 2006, when the Government of Ontario amended the *Arbitration Act, 1991* and the *Family Law Act*. Very little has been written since the government's amendments. Although some of the literature suggests that the media's representation of the issue was alarmist and misinformed, a formal and complete analysis of the media's portrayal of faith-based arbitration is absent from the literature.

This study seeks to address these gaps in the literature by conducting an exploratory analysis of the media's representation of faith-based arbitration in Ontario. By examining the media's portrayal of the issue, this study attempts to provide an understanding of how the issue was defined by the media, to identify the persons and organizations cited, to determine whether a position of either favouring or opposing faith-based arbitration was presented, and to assess whether the issue was portrayed in an accurate and balanced manner. To accomplish this objective, a content analysis of editorial, column, and opinion piece from mainstream Ontario newspapers was conducted.

2. Definitions and terms

Virtually all of the media coverage and some of the academic literature refers to Islamic law as *sharia*, and the arbitration of disputes using Islamic law as *sharia tribunals*. *Sharia* literally means "the path leading to water" and encompass a general

code of behaviour and way of living for Muslims based on the *Koran* and the *sunnah* (Boyd 2004: 44). This religious code is not limited to family law disputes and covers many aspects of a Muslim's life such as prayer, financial dealings, family relations, and social responsibilities.

The term s*haria* is sometimes associated with countries that use a violent and oppressive interpretation of Islamic law. Because of this association, and because *sharia* refers to a general code of behaviour, it is misleading and inappropriate to use *sharia* to describe the laws and principles used to resolve family law disputes. Instead, Islamic tribunals and Islamic personal law (or Islamic law) will be used to describe arbitration using Islamic law and legal principles. Nonetheless, the term *sharia* will appear in direct quotes from media articles and academic literature that use this term. As well, the term is sometimes spelled differently in the literature, therefore the original spelling will be used as it appeared.

This study seeks to provide an informed and balance representation of faith-based arbitration through the choice of terminology and the information presented. A detailed review of the legislation governing faith-based arbitration and the history of such arbitration in Ontario seeks to provide an informed understanding of the issue.

3. Summary

This study utilizes the method of content analysis to conduct an exploratory analysis of the media's portrayal of faith-based arbitration in Ontario newspapers. The first chapter presents an overview of faith-based arbitration in Ontario and a review of the literature on such arbitration. This chapter provides a definition and description of

the law governing faith-based arbitration in Ontario before and after the 2006 legislative amendments. Ayelet Shachar's (2001, 2005) joint governance approach is outlined and discussed in Chapter Two. Shachar's approach to balancing women's equality rights with cultural group rights provides a theoretical framework for this study. Chapter Three describes the methodological approach of the research which utilizes the method of latent content analysis to explore the portrayal of faith-based arbitration in Ontario newspapers. This study will show that there were common representations of women, religious freedom, multiculturalism, and immigrants in the media's portrayal of faith-based arbitration. These findings and others generated from the study are presented in Chapter Four. An analysis and discussion of the findings will be presented in Chapter Five. The final chapter summarizes the study and discusses implications for the future.

LITERATURE REVIEW

The purpose of this review is to outline the evolution of faith-based arbitration in Ontario and to examine academic perspectives on this form of dispute resolution. Very little had been published on faith-based arbitration in Canada[1] until 2003, when the Islamic Institute of Civil Justice announced their intention of establishing an Islamic tribunal. Indeed, faith-based arbitration had received little notice in academia, the government, or the media prior to this event.

Almost all of the literature related to faith-based arbitration in Canada is centred around the controversy that arose in 2003, with a significant portion focused on the use of such arbitration in the Muslim community. Much of this literature is published before the 2006 amendments to the Ontario legislation governing arbitration in family law, and is primarily focused on Marian Boyd's 2004 evaluation of the subject. As such, almost all of the academic literature on faith-based arbitration in Ontario and Canada is limited to the period between 2003 and 2006.

To provide an understanding of the law relating to faith-based arbitration, the first section of this chapter will define faith-based arbitration. This will be followed by a summary of the law governing family arbitration before the government amended the legislation in 2006 to make faith-based arbitration awards non-enforceable. A brief comparison of this legislation before and after the 2006 amendments will show how faith-based arbitration in family law has changed as a result of the government's efforts to limit such arbitration. This chapter will then explore Marion Boyd's 2004 evaluation of family arbitration, and the response in the academic literature to her recommendations.

[1] More has been written on religious courts and tribunals conducted in Israel and the United States.

The final two sections of this chapter will explore the current context of faith-based arbitration in family law.

I. A Definition of Faith-Based Arbitration

Arbitration is a form of alternative dispute resolution where parties agree to have their dispute settled by an adjudicator agreed upon by both parties. Some of the perceived advantages of arbitration are that the process is generally more private than the mainstream justice system and is often less expensive than litigation (Bakht 2005: 7). Not all disputes can be resolved through arbitration. For instance, the arbitration of criminal matters or disputes involving parties who have not agreed to arbitration are not permitted. As well, disputes involving public status, such as marriage and divorce, cannot be resolved by arbitration.

Faith-based arbitration is the use of religious laws or principles as the legal framework by which a dispute will be settled. Often, the arbitrator is a member or representative of the religious community the parties have selected. Under the *Arbitration Act, 1991*, which governed arbitration in Ontario before 2006, the parties could select what rules of law to apply, and the neutral arbitrator of their choice, thereby allowing for family law disputes to be resolved using religious law or having a religious figure arbitrate the dispute (Boyd 2004: 12).

For example, a Jewish couples who is divorcing might choose to have their child custody and property division dispute resolved by a Jewish Rabbinical court instead of resolving the dispute on their own or proceeding through the mainstream justice system.

Based on Jewish law which favours granting custody of young children to the mother, the Rabbinical court might determine that the mother should gain custody of the child[2]. As well, according to Jewish law, while the woman is entitled to spousal support and child support upon separation, her claims to her husband's property is likely more limited when proceeding through the Rabbinical court than what the mainstream justice system may award according to Canadian provincial law (Syrtash 1992).

In matters involving children, the *parens patriae* jurisdiction of the state is protected under all forms of arbitration. Arbitration awards regarding child support, custody, and visitation are not seen as binding on the courts, allowing a judge to overturn awards that are not in the best interest of the child (Morris 2004: 22). For instance, in *Duguay v. Thompson-Duguay* (2000), the Ontario courts refused to enforce an arbitral award dealing with child custody because it was not in the best interest of the child.

Some of the perceived advantages of faith-based arbitration are that cultural and religious differences may be better understood by a member of the parties' faith community as opposed to a judge or outside arbitrator who may have little sensitivity, knowledge, or experience in religious and cultural matters (Syrtash 1992: 98). As well, the parties involved may be more satisfied and reconciled with a decision from a decision maker the parties view as part of their own culture instead of a judge or arbitrator from the 'majority' culture.

A perceived disadvantage of faith-based arbitration is that, depending on the system of law used to resolve a dispute, an individual may receive a more

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[2] The decision is always subject to the best interest of the child, both under Canadian and Jewish law (Syrtash 1992).

advantageous outcome from arbitration using Canadian law or the mainstream justice system than they would using faith-based arbitration (Syrtash 1992: 99). For example, under Jewish law, a woman's claim to a share of her husband's property may be more limited compared to most provincial law which stipulate an equal, or nearly equal, division of property owned by both spouses.

In 2006, the Government of Ontario amended the *Arbitration Act, 1991* and the *Family Law Act of Ontario* to make arbitration awards based on laws other than Ontario or Canadian law non-enforceable. The following section will compare the legislation governing faith-based arbitration before and after these amendments.

II. Family Arbitration Under the *Arbitration Act, 1991*

Before the Ontario government amended the *Arbitration Act, 1991* and the *Family Law Act of Ontario*, the *Arbitration Act, 1991* permitted parties to select the arbitrator of their choice, and did not require specific qualifications for the arbitrator except that they should be neutral as between the parties. Therefore, parties could select anyone as their arbitrator, such as a rabbi or an imam, and could select the law or principles to be used in resolving the dispute. This allowed for disputes to be settled according to religious law.

The Act allowed parties to waive their right to appeal an award (Gaudreault-DesBiens 2006: 160). In this way, an arbitration award could bind the parties and prevent them from appealing the decision to the courts. However, under the Act, parties could elect to make the arbitration award advisory only, rendering the appeal and

enforcement rights no longer applicable as the decision would not be binding (Boyd 2004: 14).

However, there were instances where the courts could become involved even if both parties had waived their right to appeal. Under the Act, a court could set aside an arbitration award in certain circumstances such as if one of the parties entered into an arbitration agreement while under a legal incapacity, or if the award was contrary to public policy, such as requiring unreasonable or unconscionable conditions like chastity (Bakht 2005: 15). In general though, the involvement of the court in arbitral matters related primarily to the following issues: to assist in the conduct of arbitrators; to ensure arbitrations were conducted in accordance with arbitration agreements; to prevent unfair or unequal treatment of the parties; and to enforce arbitration awards (Bakht 2005: 15).

Pointing to the case of *W. v. W (1991)*, John Syrtash (1992) contends that under the *Arbitration Act, 1991*, Ontario courts were generally cautious about interfering with religious arbitration boards where there was a sophisticated body of law that both parties agreed to be governed by. Syrtash notes that one of the primary reasons the Ontario court upheld the arbitration award by a rabbinical court in *W. v. W.* was that the parties involved were represented by counsel when they appeared before the religious court. The author believes that with the exception of the court's *parens patriae* jurisdiction, "given the decision in *W. v. W.*, it is doubtful that the secular courts would normally interfere, unless it could be demonstrated that the decision was outrageous" (Syrtash 1992:106).

Before the amendments to the *Arbitration Act, 1991*, parties could sign a binding arbitration agreement agreeing to resolve current or future disputes using arbitration;

once this agreement was signed, the parties could not choose to withdraw from arbitration (Bakht 2005: 7). For instance, if two people agreed at the date of marriage that they would resolve any future disputes, such as the division of assets should they divorce, through arbitration, this agreement would bind the parties to arbitration even if one of the parties changed his or her mind years later. In the case of faith-based arbitration, Bakht cautions that this provision may have been especially problematic for an individual whose religious beliefs had changed since they first made the agreement (2005: 7). For example, if two parties had agreed to resolve future disputes according to Jewish law, this agreement could still apply even if one of the parties no longer followed the Jewish faith.

III. Family Arbitration Under the *Family Statute Law Amendment Act, 2006*

The *Family Statute Law Amendment Act, 2006* amended the *Arbitration Act, 1991* and the *Family Law Act of Ontario*, creating a new statutory framework for family arbitration. These amendments apply to all forms of family arbitration, including but not limited to faith-based arbitration in family law. The new amendments require that both the *Arbitration Act, 1991* and the *Family Law Act* govern family arbitration; where there is conflict between these two acts the latter prevails (Dondy-Kaplan & Bakht 2006: 21).

Under the new legislation, for family arbitration awards to be enforceable, the arbitration must be conducted exclusively under Canadian law; arbitration using religious law, laws of another country, or according to the arbitrator's own notion of fairness will not be enforced by the courts (Gregory and Predko 2006: 2). Such

arbitration is not prohibited but has no legal effect and is equivalent to advice only. As such, family arbitration conducted according to religious law is still permitted as a form of dispute resolution but is not recognized by the courts as a binding agreement on the parties.

In addition, parties cannot waive their right to appeal; now, all parties have the right to appeal a family arbitration award. This differs from what was previously allowed under the *Arbitration Act, 1991* whereby parties could waive their right to appeal an arbitration award.

The Government of Ontario has also amended the regulations regarding the qualifications and training of family law arbitrators and the record-keeping of arbitrations. For instance, arbitrators must now complete a minimum 14 hour training program for screening parties for domestic abuse and power imbalances, as well as completing 30 hours of training in Ontario family law for arbitrators who are not members of the Ontario bar or another Canadian bar. Parties must also obtain independent legal advice and show a certificate to prove this. Such requirements did not exist under the *Arbitration Act, ,1991* where parties could select the arbitrator of their choice without requiring them to have any specific training or qualifications.

The recent amendments to the *Arbitration Act,1991* also require arbitrators to keep a record of every family arbitration conducted. These records must contain the evidence presented and considered, the arbitrator's notes taken during the hearing (if any), a copy of the signed arbitration agreement, the certificates of independent legal advice, the results of the screening for domestic violence or power imbalances, and the award and the arbitrator's written reasons for it (names of the parties can be excluded).

This requirement is also unique to the *Family Statute Law Amendment Act* as no record of the arbitration was required under the previous legislation.

A failure to comply with these conditions can result in the arbitration award being declared non-enforceable. Because faith-based arbitration awards are already non-enforceable, these conditions apply specifically to family arbitration based on Ontario and Canadian law.

IV. A History of Faith-Based Arbitration in Ontario

Although the controversy over faith-based arbitration gained prominence in 2003, the use of such arbitration has been permitted in Ontario for a number of years. Jewish communities, for example, have used arbitration boards to resolve disputes according to Jewish law since at least 1982 (Bakht 2004: 1). Other religious groups, such as the Ismaili community, have also provided arbitration services to their community members (Eisenberg 2006: 5). Despite the established practice of faith-based arbitration, there has been little media coverage or academic literature on the practice before 2003.

Many aspects of faith-based arbitration are unknown. For instance, there is very little knowledge about how often faith-based arbitration is conducted. The only information found on the frequency of such arbitration appeared in an article in The Globe and Mail which quoted Rabbi Reuven Tradburks, from the Beit Din (rabbinical courts) of the Council of Orthodox Rabbis of Toronto, as saying that of the approximately one hundred cases referred to rabbinical courts in a year, most involve business disputes and only a small number are family law disputes (Jimenez:

September 14, 2005). For example, in 2004, only two cases of family law disputes were heard in Rabbinical courts in Toronto. There is similarly little information about the types of family law disputes resolved using faith-based arbitration (e.g., spousal support, division of property, custody disputes). In the media and in the literature, there also lacks a consensus as to whether certain faith communities, such as the Mennonite and Catholic communities, practice faith-based arbitration. In this way, there remains a great deal unknown about faith-based arbitration in family law.

1. Regulating religious tribunals

Prior to the *Family Statute Law Amendment Act* in 2006, the government and the mainstream justice system have generally been cautious about interfering with the practices and decisions of religious arbitration boards. However, amid concerns that a religious divorce may be used by one party to pressure another in a family law agreement or settlement, the federal government and the Government of Ontario sought to somewhat regulate the process of religious divorce in order to implement safeguards.

In the Jewish faith, a religious divorce is called a GET. This process is separate from divorces under Canadian law in which a couple obtains a civil divorce under to the *Divorce Act*. However, according to Jewish law, even if a civil divorce is obtained, if the GET is not exchanged then the parties are not recognized as divorced and neither party can remarry according to the Jewish faith (Syrtash 1992: 114). In order for the GET to be recognized, the husband must present a religious divorce document to his wife, and

both parties must give and accept the document of their own free will. Rabbinical courts often supervise the giving and accepting of the GET.

In 1987, amid concerns that the GET was sometimes used by parties to pressure or coerce their spouse in family law settlements, the Minister of Justice requested B'nai Brith Canada to conduct a study on the prevalence of conflict or disagreement in the procurement of the GET (Syrtash 1992: 121). The study found that in more than 300 cases, the GET was used as a way for one party to pressure another in family law settlements, such as to give up child custody, agree to less support or a less than equitable share of property and assets.

To address this issue, legislative measures were enacted by the Government of Ontario and the Government of Canada. Section 2(4-7) of the *Family Law Act of Ontario* requires that before a settlement or agreement can be reached, parties must remove all barriers within their control that prevent the other spouse from marrying within their faith (i.e. the GET). Under section 56(5-7) of the same act, a court can set aside all or part of an agreement if the court believes that the removal of barriers to the other spouse's remarriage was a consideration in the making of the agreement or settlement. In this way, a party whose spouse uses a religious divorce to blackmail or coerce them can seek relief from the courts and have an unfair settlement overturned.

Syrtash notes that the purpose of the legislation is to prevent the abuse of a religious contract from interfering in the civil and secular rights of an economically disadvantaged spouse (1992: 143). The author goes on to argue that the legislation seeks to prevent a party from having to choose between adhering to their faith and insisting on the protection of their civil and property rights.

2. The controversy begins: The Islamic Institute of Civil Justice

The government's decision to amend the *Arbitration Act, 1991* and the *Family Law of Ontario* largely resulted from the controversy that arose in 2003 surrounding faith-based arbitration in family law. The controversy began in the fall of 2003 when retired lawyer Syed Mumtaz Ali announced the establishment of the Islamic Institute of Civil Justice in Ontario, providing arbitration services using Islamic law.

Announcing the opening to the media, Syed Mumtaz Ali suggested that Muslims would be required to settle disputes in an Islamic law tribunal if they were to be regarded as "good Muslims" (Boyd 2004: 3). Despite assurances by the Institute that these forums would be bound by Canadian and Ontario law, the announcement raised concern about the impact of such an approach to arbitration. Many women's organizations and members of the public were concerned that arbitration using religious law, in particular Islamic law, might be inconsistent with Ontario family law and with the pursuit of equality for women (McGill 2005: 54). While the Institute intended to provide arbitration services for a range of issues such as business disputes, much of the concern and attention was on the use of religious law to resolve family law disputes.

V. Marion Boyd's Report and Recommendations

Alarmed by the announcement by the Islamic Institute of Civil Justice, and fuelled by the media's coverage and portrayal of faith-based arbitration, a number of organizations such as the Canadian Council of Muslim Women and the International Campaign Against Sharia Law in Canada, met with the Government of Ontario to

discuss their concerns (Boyd 2004: 4). In 2004, in an effort to balance the concerns raised by the media and interested parties, the Government of Ontario requested former Attorney General Marion Boyd to explore the use of private arbitration to resolve family and inheritance cases, and to assess the impact such arbitration may have on vulnerable people.

The evaluation consisted of Boyd meeting with interested parties including women's organizations, religious groups, and family law practitioners. In the summer of 2004, Boyd met with and received submissions from close to two hundred individuals and organizations. Women's organizations, such as the National Association of Women and the Law and the Women's Legal Education and Action Fund, and religious groups, such as the Muslim Canadian Congress and B'nai Brith Canada, shared their views on faith-based arbitration with Boyd.

After extensive consultations with interested parties, Boyd released her recommendations in December 2004. Boyd outlined four possible courses of action available to the Government of Ontario: 1) that arbitration be disallowed for family law disputes; 2) that arbitration continue to be allowed for family law disputes; 3) that arbitration should not be based on religious laws, in particular Islamic personal law; and 4) that arbitration should be allowed in family law using religious principles.

Based on her consultations, Boyd concluded there was no evidence to suggest that women were being systematically discriminated against as a result of such arbitration and therefore supported its continued use with the implementation of certain safeguards. These safeguards included requiring a certificate of independent legal advice or an explicit waiver of legal advice; requiring mediators and arbitrators in family

law to be members of a professional organization; requiring mediators and arbitrators to screen the parties separately for domestic violence and power imbalances, and to ensure that each party entered into arbitration voluntarily and with the knowledge of the nature and consequences of the arbitration agreement (Boyd 2004: 134-136). Boyd also recommended that the courts be permitted to set aside an arbitration award in a family or inheritance matter if the award did not reflect the best interest of the child.

To provide parties, particularly vulnerable women, with information about their legal options, Boyd recommended that the Government of Ontario develop, in collaboration with community organizations and experts, public education initiatives to create awareness of the legal system, alternative dispute resolution options, and family law provisions (2004: 138).

Boyd maintained that one of the most urgent issues arising out of her evaluation was the need for some mechanism of oversight for arbitration in family law. She found that the government lacked information about the extent to which arbitration is used in family law and how this form of dispute resolution has affected vulnerable people. One of her recommendations to address this concern was to require family arbitrators to report annually to the Ministry of the Attorney General on the number of arbitrations conducted, the number of appeals or motions to set aside the outcome, and any complaints or disciplinary actions the arbitrators are aware of that have been taken against them by their professional body or the courts. Boyd further recommended that arbitrators of family law should be required to provide the Government of Ontario with summaries of each decision (free of identifying information), which could be made available for research, evaluation and consumer protection purposes.

VI. Reactions to Marion Boyd's Report in the Literature

A great deal of the academic literature on faith-based arbitration in Canada evaluates Marian Boyd's recommendations, and much of it is critical of some or almost all of her recommendations. The following section will explore the response to Boyd's evaluation in four recurring themes in the literature.

1. Faith-based arbitration as a form of alternative dispute resolution

Shelley McGill (2005) contends that many of Boyd's recommendations alter the basic tenets of alternative dispute resolution. McGill is critical of Boyd's "preference for supervising the quality of the arbitrator rather than the quality of the award", such as requiring arbitrators to become members of a professional organization with codes of conduct (2005: 64). McGill counters that "the alternative nature of arbitration and mediation lies in the free choice of professionals and the alternative skills these professionals bring to the forum. Regulation and standardization strike at the heart of these alternatives" (2005: 64). McGill believes that the private nature of arbitration would be jeopardized by mandatory record keeping and the submission of these records to the Government of Ontario.

2. The impact of faith-based arbitration on women

A common theme throughout the literature is an uncertainty as to how religious law is interpreted and applied in arbitration. Written before the Ontario Government's decision to limit faith-based arbitration, Natasha Bakht points to a lack of uniformity in

interpreting Islamic law as posing a difficulty in assessing the impact of such arbitration on women (2004: 17).

Pointing to Boyd's assertion that women should be free to "live as they choose", Bakht contends that the notion of free choice "in the context of family arbitration is gender-insensitive as it does not take into consideration the real power dynamics at play and the collective rights at stake for women" (2005: 64). For women subjected to domestic violence, Bakht questions whether they will be able to negotiate terms of an arbitration agreement in a way that is fair to their interests. "New immigrant women from countries where sharia law is practiced are particularly vulnerable because they may be unaware of their rights in Canada...[they] may be complacent with the decision of a sharia tribunal because arbitral awards may seem equal to or better than what might be available in their country of origin" (Bakht 2005: 28).

Although noting that Boyd's recommendation to standardize the screening of domestic violence and power imbalances in arbitration cases is well-intentioned, Bakht believes such recommendations underestimate the difficulty of screening for violence (2005: 59). Bakht concludes that due to the lack of record keeping on arbitration, "Boyd was unequipped to conclude that women are not being systemically discriminated against; and...Boyd seriously underestimated the challenges faced by vulnerable women in arbitration" (2005: 57).

Conversely, McGill is concerned about the burden placed on the arbitrator and lawyers involved to ensure free and informed consent of the parties (2005: 64). McGill contends that power is a factor in almost all relationships and it would be difficult for an arbitrator to find a relationship that has a completely equal power balance. She asserts

that Boyd's recommendations "shift the responsibility and risk for the choice of a religious tribunal to the lawyers, mediators, and arbitrators through broad [independent legal advice] and screening requirements. These changes strike at the heart of [alternative dispute resolution] processes" (2005: 66).

3. Faith-based arbitration and the privatization of justice

Bakht is concerned that the private nature of arbitration and a lack of mandatory training for faith-based arbitrators jeopardizes women's equality rights (2005: 26). Bakht contends that "one of the consequences of the 'privatization of justice' is that social inequality may be reproduced in privately ordered agreements, and yet remain hidden from the public eye" (2005: 28). Due to the private nature of such agreements, "unless the awards are challenged in court or need to be enforced, the process remains outside the public realm" (Bakht 2005: 12).

4. Appeals and legal representation in faith-based arbitration

Bakht is also critical of Boyd's failure to recommend mandatory legal advice and to alter the provision allowing for parties to waive their appeal rights (2005: 58). Without legal aid or mandatory legal representation, Bakht questions whether women will be truly free in their choice to arbitrate (2004: 19). In addition, Polly Dondy-Kaplan and Bakht express concern that the government's failure to fund independent legal advice may "seriously undermine many couples' ability to partake in legally enforceable family arbitrations" (2006: 22).

An additional concern for McGill is that in order to advise their clients about the nature and consequences of choosing religious law, lawyers must be experts in the religious law chosen (2005: 60). McGill believes this is an onerous requirement, and may therefore make the requirement of independent legal advice less effective.

VII. Literature on Faith-Based Arbitration Since the Government's Decision

There is some academic literature discussing faith-based arbitration since the government's decision to limit such arbitration in 2006. Much of the literature explores how the issue of faith-based arbitration was portrayed in the media, in academic literature and by the government, and the public's response to this representation.

Will Kymlicka (2005) contends that the issue of faith-based arbitration in Ontario was portrayed as a test-case for multiculturalism, specifically liberal multiculturalism. Kymlicka asserts, however, that faith-based arbitration is an issue of private dispute resolution as opposed to one of multiculturalism, since it is the *Arbitration Act, 1991* and not multicultural polices which govern faith-based arbitration. Kymlicka notes that the *Arbitration Act, 1991* was developed to resolve disputes, primarily commercial disputes, as opposed to accommodating cultural groups. As such, multiculturalism was not the cause of the controversy over faith-based arbitration, and "amending or abolishing multiculturalism will do nothing to solve the problem...if the Multiculturalism Act were repealed tomorrow, and all funding for multiculturalism policies stopped, this would have no effect whatsoever on the legal standing of sharia tribunals in Ontario" (2005: 65).

Similarly, Eisenberg believes the arbitration debate in Ontario was portrayed as an example of "multiculturalism's flaws, namely that multiculturalism privatizes the sexism of minority communities and covers up the racism of the mainstream communities" (2006: 2). The author contends that had the Canadian public understood multiculturalism in Canada accurately, they would have realized that freedom of choice and the right to be treated equally overrides private arbitration agreements.

Haroon Siddiqui (2007) similarly argues that the controversy over faith-based arbitration and its impact on women's rights was not an issue of multiculturalism but one of religious freedom. "Religions that discriminate against women do so not in the name of multiculturalism but freedom of religion" (Siddiqui 2007: 26). The author contends that the issue was framed as one of multiculturalism because opponents of faith-based arbitration "mistakenly and dishonestly suggest[ed] that the dreaded Islamic code of law was coming to Canada because Canadians are too accommodating of minority sensitivities" (Siddiqui 2007: 28).

Siddiqui notes that while the controversy surrounded the use of Islamic tribunals, "it could not be credibly argued that Muslim women faced any more pressures to conform than women of other faiths" (2007: 29). The author contends that because the controversy over faith-based arbitration only erupted when the Muslim community chose to use such arbitration, this reflects latent anti-Islamism in Canadian society.

VIII. The Current Context of Faith-Based Arbitration in Family Law

Public concern and the media's coverage of faith-based arbitration continued after the release of Boyd's evaluation in 2004. On September 8, 2005, protests against faith-based arbitration were held across Canada and Europe to urge the Government of Ontario to prohibit such arbitration. That same day, the Attorney General of Ontario released a statement saying there would be "no binding family arbitration in Ontario that uses rules or laws that discriminate against women" (McGill 2005: 66). However, it was unclear at the time whether this meant faith-based arbitration would be prohibited or that protections would be implemented to ensure women's equality rights.

Three days later, on September 11, 2005, Premier Dalton McGuinty made the following statement: "There will be no sharia law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians" (McGill 2005: 66).

In February 2006, the *Family Statute Law Amendment Act, 2006* received Royal Assent, thereby amending the *Arbitration Act, 1991* and the *Family Law Act of Ontario* to create a new statutory framework for family arbitration (Predko & Gregory 2006: 2). The regulations governing family arbitration came into force on April 30, 2007. The regulation requiring mandatory training for arbitrators stipulates that such training must be undertaken by April 30, 2008 or before the arbitrator conducts a family arbitration after that date.

The Ontario Government has decreed that all family arbitration must be conducted exclusively under Canadian law, thereby making family arbitration based on religious law of no legal force. Ann-Marie Predko and John D. Gregory note that "the

amendments do not focus on the use of religious law, but rather on the exclusive use of the law of Ontario or another Canadian jurisdiction" (2006: 2). Although the Ontario government chose to make faith-based arbitration awards in family law non-enforceable, Predko and Gregory suggest that the government has also taken advantage of the occasion to increase the regulation of family arbitration and to implement many of the safeguards recommended by Boyd. For instance, arbitrators must now complete a training program for screening parties for domestic violence and power imbalances, as well as training in Ontario family law for arbitrators who are not members of the Ontario bar or another Canadian bar. However, Predko and Gregory note that there is still uncertainty as to who is responsible for screening for domestic violence and what association or qualifications an arbitrator is required to posses.

IX. Perspectives on the Effects and Implications of the New Legislation

Some of the literature has questioned the impact of the recent amendments on the practice of faith-based arbitration in family law. There are concerns that the government's decision may have unintended consequences that could result in greater harm than before the amendments were implemented. The Canadian Jewish Congress contends that the decision "will not prevent or discourage people who would otherwise choose faith-based arbitration from doing so. It will only serve to remove the checks and balances that are already in place, and will prevent the enhancement of those checks and balances to ensure even greater protection under Canadian law" (2005).

Similarly, in her 2004 evaluation, Boyd cautioned that "simply withdrawing all statutory support and limitation (i.e. by prohibiting arbitration in family law matters altogether), would limit people's options for resolving their disputes and might push the practice of religious arbitrations outside the legal system altogether, thus limiting the court's ability to intervene to correct problems" (2004: 139).

Siddiqui (2007) also suggests that the government's decision may have the unintended consequence of driving faith-based arbitration underground where there will be less oversight and safeguards to protect vulnerable persons.

Dondy-Kaplan and Bakht caution that despite the government's insistence that the amendments prohibit faith-based arbitration, "religious arbitrators can simply conform to the amendments and perform religious arbitrations consistent with a family law jurisdiction in Canada" (2006: 22). What impact this potentially new form of arbitration may have is still unknown.

THEORETICAL FRAMEWORK

Efforts by the state to accommodate cultural groups can sometimes come at the expense of basic citizenship rights. For instance, a growing body of research shows that cultural accommodation in areas of family law may result in a systemic, sanctioned, and disproportionate burden on women (Shachar 2000: 396). Feminist and multicultural theorists often disagree as to which rights should have priority when this conflict arises, sometimes resulting in an either-or dichotomy in which the state, the cultural group, or the individual must choose either between cultural group rights or individual citizenship rights.

This chapter will compare two theoretical approaches to resolving conflicts between cultural group rights and women's equality rights; the first is the reuniversalized citizenship approach which advocates that the state protect the individual rights of its citizens, sometimes to the detriment of cultural group rights. The second is the unavoidable costs approach which supports a laissez-faire position by the state towards cultural groups, even when these groups violate the individual rights of its members. An evaluation of these two approaches will show that each of these options reinforces the either-or dichotomy in which either individual rights or group rights are protected at the expense of the other.

Given the tension between feminism and multiculturalism, a third approach is warranted whereby group rights and equality rights can be simultaneously protected. The joint governance approach, as described by Ayelet Shachar, provides an important analytical framework for reducing tensions between multicultural accommodation and

equality rights. Shachar's approach will be explored in this chapter, specifically in relation to family law, and will reveal how policies can provide religious and cultural accommodation without sacrificing the protection of equality rights for women.

I. The Reuniversalized Citizenship Approach

According to the reuniversalized citizenship approach, the rights of individual citizens deserve greater protection than those of cultural groups. The state is expected to throw its weight behind the individual in any conflict between the individual and their cultural group, even if this contributes to one's alienation from the group (Shachar 2000: 399). As such, the reuniversalized citizenship approach can threaten cultural group rights.

Some feminists, such as Susan Moller Okin, support this position, claiming that the interrelation of multiculturalism and gender occurs because "most cultures have as one of their principle aims the control of women by men" (1998: 667). As such, Okin (1999) contends that multiculturalism is bad for women. To support her position that equality rights should supersede multicultural rights, Okin points to the *Program for Action* issued at the Fourth World Conference on Women which states that "any harmful aspect of certain traditional, customary or modern practices that violates the rights of women should be prohibited and eliminated" (in Okin 1998: 666).

To address the tension between multiculturalism and feminism, Okin argues that intragroup inequalities must be evaluated when developing accommodation policies, and allow for adequate representation of less powerful group members to ensure their

interests are promoted and not harmed by such policies (1998: 684). She further suggests that minority women "might be much better off if the culture into which they were born were either to become extinct (so that its members would become integrated into the less sexist surrounding culture) or, preferably, to be encouraged to alter itself so as to reinforce the equality of women" (1999: 22-23).

A concern with the reuniversalized citizenship approach is that too much intervention by the state to protect the citizenship rights of group members may result in the group closing itself off from the outside world. In order to resist external forces of change such as secularism and modernity, cultural groups may impose a strict adherence to their cultural laws, norms and practices as a way to insolate and protect the culture. Shachar calls this reactive culturalism and suggests that when this occurs, "debates regarding the future of the community and its norms are stifled, and in-group attempts to bring about less hierarchical interpretations of the group's traditions are effectively blocked" (2001: 35). As such, the reuniversalized citizenship approach may prevent group members from reforming practices and traditions which systemically discriminate against women.

The reuniversalized citizenship approach and theorists such as Okin are "guided by an either-your-rights-or-your-culture ultimatum, in which women may either enjoy the full spectrum of their state citizenship rights or participate in their communities [but] cannot have both simultaneously" (Shachar 2000: 403). Critiques of this approach often come from multicultural theorists and cultural feminists who believe that group rights should be protected, even when individual rights are violated.

II. The Unavoidable Costs Approach

While the reuniversalized citizenship approach advocates the prioritization of women's rights over multicultural or religious rights, the unavoidable costs approach suggests that group rights should receive greater state protection than individual rights. This approach contends "that a truly multicultural state has little, if any, justification for intervening in a minority group's affairs, even if that minority community systematically violates certain members' basic citizenship rights" (Shachar 2000: 399). As such, this approach, like the reuniversalized citizenship approach, requires group members to choose between their cultural group and the rights and protections offered by the greater society.

Ranjoo Seodu Herr (2004), a self-proclaimed third-world feminist, defends multiculturalism against attacks by Okin and other feminists. Herr contends that ethnic minority women may not convert to the more gender-equal liberal society because culture has an intrinsic value which plays an important role in identity formation, and has a strategic value as the cultural group's values and institutions can act as a protective factor against oppression from the dominant society. While acknowledging that liberal feminist concern for sexism in some cultures is justified, Herr argues that the solution is not to abandon multiculturalism, but rather "for the insiders of these cultures to *democratize* their decision procedures and to arrive at a substantively representative and collective consensus on multicultural issues that incorporates feedback from all members, including female members" (2004: 95; italics in original). Herr maintains that the position that "the state's intervention is justifiable in some cases, goes against the

very spirit of instituting and implementing multiculturalism for national minorities" (2004: 102).

Similarly, Chandran Kukathas contends that each cultural community should have a certain amount of independence and must be, to some extent, "impervious to the values of the wider liberal society" (1992: 127). As such, although individuals have the right to be a member of a cultural group, they cannot expect that their individual rights will be protected if it results in the violation of the cultural group's traditions or practices. Kukathas contends that as long as the individual has the right to exit his or her cultural group, a minority culture can impose restrictions on the citizenship rights of its members.

The reuniversalized citizenship and the unavoidable costs approaches illustrate the either-or dichotomy often present in multicultural discourse. Each approach advocates the protection of one right over the other, which has resulted in a tension between multiculturalism and women's rights. Equality rights and group rights, however, do not have to be incompatible. Shachar (2001) puts forth the joint governance approach whereby justice between the state and the cultural group is enhanced while also reducing injustice within these groups. The following sections will explore Shachar's approach to multicultural accommodation, and show how this method of resolving tensions between group and individual rights can be applied to multicultural policies governing family law.

III. The Joint Governance Approach

Shachar contends that cultural accommodation policies pose a threat to individual rights when those policies which seek to enhance cultural group rights unwittingly allow the systematic maltreatment of individuals within these groups (2001: 2). This maltreatment may be so severe that it essentially nullifies the individual's citizenship rights, and reinforces and legitimizes existing power hierarchies within the cultural group. Shachar refers to this phenomenon as the paradox of multiculturalism.

1. The paradox of multiculturalism in family law

The paradox of multiculturalism can impact members of cultural groups differently, with some vulnerable group members, such as women and children, bearing a disproportionate share of the cost of multicultural accommodation. Shachar contends that accommodation policies, especially in the area of family law, can result in the systemic discrimination of women. Granting marriage-making and breaking authority to cultural groups can have a negative economic impact on women if their cultural community grants them limited or no legal rights to property, financial support, or custody of their children (Shachar 2000: 398). As well, within cultural groups, women and family are central to the symbolic transmission and manifestation of a group's culture (Shachar 2005: 51). "Idealized and gendered images of women as mothers, caregivers, educators, and moral guardians of the home come to represent the ultimate and inviolable repository of 'authentic' group integrity" (Shachar 2005: 51). As such, in order to protect the group from perceived assimilation and secularization, conservative

group leaders will often impose a strict reading of the culture's traditions and practices. In this way, the paradox of multiculturalism can disproportionately affect women within the cultural group.

Shachar (2001) believes that cultural traditions and practices are more fluid than sometimes acknowledged by multicultural and feminist theorists. In this way, there is an opportunity within cultural groups to reform and re-interpret traditions that may systematically discriminate against vulnerable group members. To accomplish this, Shachar (2005) contends that policy and law makers must be vigilant in attending to intragroup diversity to ensure the representation of women and other vulnerable members. Without the consultation of these group members, accommodation policies may unknowingly support "a multiculturalism that empowers those who are already well-established in the group at the expense of silencing alternative voices and points of view, especially where the latter reflect more moderate and reformist understandings of the group's own tradition" (Shachar 2005: 53). Shachar contends that legal institutions must balance the protection of individual rights with respect for multicultural differences. To accomplish this, she puts forth the joint governance approach.

2. The joint governance approach in depth

The joint governance approach recognizes that individuals belong to more than one political community, and as such, does not force them to choose between being a citizen of the greater society and being a member of their cultural group. Instead, a system of shared jurisdiction is promoted so that individuals are never subjected solely to the authority of the cultural group or the state (Shachar 2005: 72). This results in

greater flexibility and opportunity for vulnerable group members to negotiate their position because a failure to perform by one actor can lead to the loss of jurisdiction over its members. In this way, multicultural policies can create an incentive for a cultural group to reinterpret their traditions in ways that preserve culture and identity, while at the same time allowing individual members to improve their standing within the group.

Shachar outlines three principles of the joint governance approach; the first is the *submatter allocation of authority* principle which involves "identifying the unique and interrelated functions involved in the specific social arena in which accommodation is sought" (2005: 72). Contested social arenas, such as family law or education, are divisible into submatters or separable legal components (Shachar 2001: 119). While other approaches to multiculturalism perceive social arenas as falling under the exclusive jurisdiction of either the state or the cultural group, joint governance contends that the jurisdiction of a social arena can be divided into subsections. For example, the social arena of family law can be divided into the submatters of status, which involves changing an individual's marital status and their entitlement to membership in a cultural community, and the division of property, which includes issues of child custody and financial support. By subdividing, the joint governance approach avoids the either-or dichotomy. Furthermore, this approach recognizes that the state or the cultural group may attach greater value to one submatter over another. In the area of family law, a cultural group may place greater importance on issues of status while the division of property may be of greater importance for the state.

The second principle of joint governance is the *no-monopoly rule* which holds that "neither the group nor the state can ever acquire exclusive control over a contested social arena that affects individuals both as group members and as citizens" (Shachar 2001: 121). Both the state and the cultural group become complimentary power-holders, where they can cooperate or compete to win the support and loyalty of their members. In this way, because the state and the group can no longer rely on exclusivity as the basis for their authority in a social arena, joint governance provides an incentive for both the state and the group to serve its members better. For example, both the cultural group and the state can share the authority for marriage and divorce, with the state responsible for distributive matters while the cultural group maintains authority over status.

The final principle of joint governance is the *establishment of clearly delineated reversal points* which allows individuals "to discipline the relevant jurisdictional powerholder by turning to the competing jurisdiction when the original powerholder has failed to provide an adequate remedy" (Shachar 2005: 72). If either the state or the cultural group fails to respond to a member's needs or to provide the necessary remedies for their concern, an individual can opt-out of one jurisdiction to be governed by the rival powerholder. Shachar contends that "since these group leaders depend on their constituents' support for survival, they will be that much more motivated to attune themselves to the needs of their members" resulting in opportunities for meaningful participation by group members (2001: 123).

This principle is more than a solution to a specific dispute but is also a future oriented remedy in that members can challenge established doctrine that systematically

discriminates against vulnerable group members (Shachar 2001: 124). To accomplish this, the joint governance approach advocates clear reversal points whereby the state and the group negotiate on the entrance, exit and re-entrance options for members, so that when these conditions are breached, the individual is automatically entitled to the protection of the competing jurisdiction. This relieves the vulnerable member from negotiating on their own with the state or the group on a case-by-case basis. For example, parties participating in faith-based arbitration could have the option of appealing a faith-based arbitration award to the mainstream justice system.

Joint governance is valuable for addressing the concerns of cultural accommodation because it encourages internal solutions as opposed to having a competing jurisdiction, such as the state, intervene and impose an external solution. In this way, the joint governance approach "seeks to create institutional conditions where the group recognizes that its own survival depends on its revoking certain discriminatory practices, in the interests of maintaining autonomy over submatters" (Shachar 2001: 125). Furthermore, this approach encourages cooperation as both actors will need to compromise and work together when allocating the jurisdiction of submatters and negotiating reversal points. Finally, joint governance empowers group members to challenge the hierarchical power structures within a cultural group and to reform policies and practices which systematically discriminate against cultural group members.

3. Joint Governance in the context of faith-based arbitration

Shachar has explored the controversy of faith-based arbitration in Ontario and found that the issue illustrates a number of the problems that joint governance seeks to

address. For example, faith-based arbitration was presented by some religious organizations as an either-or dichotomy. The Islamic Institute of Civil Justice, in their efforts to recruit Muslims to use their services to resolve family law disputes, asked "do you want to govern yourself by the personal laws of your religion, or do you prefer governance by secular Canadian family law?" (Shachar 2005: 62). Group members were asked to choose between a loyalty to their culture and faith, and governance by the state, and were not presented with the option of resolving disputes according to their religious beliefs while retaining the protection and oversight of the state.

A second issue which joint governance seeks to address is the failure of cultural groups to consult with vulnerable group members. Shachar asserts that women's organizations, such as the Canadian Council of Muslim Women, and other actors, such as the Government of Ontario, should have been consulted when the Islamic Institute of Civil Justice and similar organizations sought to establish faith-based arbitration services (2005: 63).

Shachar (2005) contends that these concerns could have been more effectively addressed through the joint governance approach, such as dividing the authority for family law disputes between the cultural groups and the state. For example, an arbitration board could be empowered to dissolve marriages or divide property based on the principles and traditions of the parties' religious beliefs, while child custody and support obligation could be governed by the state based on Ontario and Canadian law. In this way, each actor would only have partial and contingent jurisdiction over family law.

In addition, Shachar contends that under this approach, clear reversal points could be implemented whereby the individual would have access to pre-determined safeguards when using faith-based arbitration (2005: 72). These might include mandatory legal representation, a review of arbitration decisions by a third party, or allowing members to turn to the civil courts if they feel their rights are violated. In this way, members of a religious community can resolve family law disputes using faith-based arbitration, but can still rely on state sanctioned safeguards to protect their citizenship rights. These safeguards may also encourage the cultural group, represented in this case by a religious arbitration board, to ensure the process does not violate the citizenship rights of the parties as this may result in the individual abandoning the arbitration process to seek out an alternative means to resolve the dispute.

Ultimately, Shachar contends that the joint governance approach offers the most promising method for reducing tensions between multicultural accommodation and the protection of women's equality rights. Because a contested social arena is never under the exclusive jurisdiction of either the state or a cultural group, group members are more empowered to challenge the hierarchical power structures within their cultural group and to reform policies and practices that systematically discriminate. In this way, joint governance seeks to enhance justice between the group and the state, and to reduce injustice within the cultural group.

Shachar's joint governance approach is a valuable method for understanding how cultural group rights and individual rights can be reconciled, ensuring both sets of rights are respected and protected. This approach is needed as feminist and

multicultural theorists may sometimes portray these as competing rights, suggesting one can only be protected at the expense of the other. However, Shachar puts forward an alternative viewpoint, one that is important for addressing the tension between cultural rights and equality rights as found in faith-based arbitration.

Drawing on Shachar's approach, it will be theorized in the discussion chapter that the tension arising between women's equality rights and cultural group rights over the issue of faith-based arbitration in Ontario should be addressed by regulating such arbitration and implementing necessary safeguards and oversight. It will be suggested that cultural group members should have the opportunity to choose for themselves how to best resolve family law disputes, while retaining the protection and oversight of the state. Through a shared jurisdiction between the state and a cultural group as advocated by Shachar, a balance can be sought between protecting individual rights and respecting multiculturalism and religious freedom.

METHODOLOGY

The purpose of this research is to explore how the issue of faith-based arbitration was portrayed in the Ontario media, particularly how the controversy that arose in 2003 was represented. The methodology of this exploratory study has adopted a qualitative approach using content analysis and the inductive process of thematic analysis. This chapter provides an overview of the methodological approach, an explanation of how the data was collected and analyzed, and an examination of the study's limitations.

I. Qualitative Approach

A qualitative approach was selected for this research to explore how the issue of faith-based arbitration was portrayed in Ontario media. The qualitative approach allows a researcher to develop a description of a phenomenon, to analyze the data for themes or categories, and to interpret or draw a conclusion about the personal or theoretical meanings of a phenomenon (Creswell 2003: 182). This methodological approach is typically an inductive process whereby patterns, categories and themes of the research are built from the bottom-up (Creswell 2007: 38). In order to analyze common themes presented by the media on the subject of faith-based arbitration, the qualitative approach was adopted as it facilitates a complex and detailed understanding of an issue.

II. Data Collection Technique: Content Analysis

Content analysis was the research method utilized for this study. Content analysis is a set of approaches for analyzing the symbolic content of communications (Singleton, Straits, Straits & McAllister 1988: 347). This method has been used for nearly a century to gather and analyze the content of texts, and is especially well suited for documents including books, newspapers, official documents, and images (Neuman 1997: 273; Babbie 2001: 305). The objective of this technique is to reduce the total content of a text to a set of relevant and manageable categories representing the characteristics of research interest (Singleton et al. 1988: 347).

Content analysis was selected for this research as it allows for the measurement and analysis of messages and themes, and to discover features in the content of a large amount of material that may otherwise go unnoticed (Neuman 1997: 31, 277). In particular, latent content analysis, used to code the implicit or underlying meaning of a communication (Maxfield & Babbie 2006: 266), was used to analyze the underlying meaning of the media coverage. Berg (1995) describes latent content analysis as a process whereby researchers immerse themselves in the documents to identify the dimensions or themes that are meaningful to the producers of each message.

As with most research, content analysis begins with a research question. The researcher then selects the unit of analysis to be studied, such as a newspaper, speech or other document type (Singleton et al. 1988: 349). The mode of sampling is then selected which defines the population for study (such as the type of newspaper or the time period to be analyzed) (Neuman 1997: 277). Once the sample has been selected,

the operational terms are defined and rules are established for classifying the data. To ensure reliability, the terms, categories and rules for coding should be clearly defined, exhaustive and mutually exclusive (Singleton et al. 1988: 348). The coding systems, or systems of enumeration, identify the characteristics of the text content, such as the appearance, frequency, or intensity of a measure. Once the content has been coded, an analysis is conducted by relating the content categories to one another or to some other variable.

Advantages and limitations of content analysis

An advantage of content analysis is that it is nonreactive; the placing of words, messages or symbols in the text occurs without the influence of the researcher (Neuman 1997: 273). As well, the use of pre-existing data is well suited for studying a phenomenon that occurred in the past. Records and other archival evidence avoid the inaccuracy of memory that can occur if respondents are asked to describe past events (Singleton et al. 1988: 335). In addition, the cost and commitment required for measuring a phenomenon over time, such as changes in attitudes and opinions, is greatly reduced when pre-existing data is used. Finally, latent coding can capture implicit meanings in communications that may depend on context, thus increasing the validity of the findings (Neuman 1997: 276).

While content analysis is a valuable research technique, there are some limitations with this method. Indirect measurement is often a concern if the available data being analyzed is not precisely the phenomenon the researcher intends to study (Singleton et al. 1988: 342). Similarly, this method is limited to examining existing

messages and documents. As a result, the researcher may need to develop creative measures to approximate the variables of interest. As well, concerns of reliability can arise with latent content analysis as the coding may be influenced by the coder's knowledge of language and social meaning (Neuman 1997: 276).

III. Data Analysis Process: Thematic Analysis

Thematic analysis was used to analyze the data for this study. Thematic analysis is a process of coding qualitative data, and can be used for many methods of qualitative research including content analysis (Boyatzis 1998: 4). Themes are used to code and analyze the data. Boyatzis defines a theme as "a pattern found in the information that at minimum describes and organizes the possible observations and at maximum interprets aspects of the phenomenon" (1998: 4). Themes can be identified at the latent or manifest level, and may be generated inductively from the data or deductively from a theory or prior research.

The process utilized for this research was an inductive approach and was primarily coded using a data-driven method. Although the data was not analyzed based on a theory or prior research, the approach and analysis of the data was influenced by the researcher's knowledge of how the issue was framed in the academic literature. Boyatzis terms this a hybrid approach as the information is shaped by the researcher's knowledge, ideas and perceptions, but is not analyzed deductively from a specific theory or prior research (1998: 52).

Boyatzis (1998) describes three stages of thematic analysis; the first requires the researcher to decide on a sampling and design issue. At this phase, researchers must immerse themselves in the data, compare and contrast the information before them, and index the information into categories and sub-samples. The second stage consists of developing themes and a code, and determining the reliability of the code. During this stage, preliminary themes are identified, which are then applied to the sub-samples to determine how the themes should be revised. The final stage requires the researcher to apply and validate the revised code by applying it to the entire sample.

Boyatzis contends that a proper thematic code should have five elements; a label, a definition of what the theme concerns, a description of how to know when the theme occurs, a description of any qualifications or exclusions to the identification of the theme, and examples to eliminate possible confusion when looking for the theme (1998: 31). For example, in coding an interview conducted with female prisoners, one thematic code might be children. The researcher might specify that only the participant's discussion of her own children (whether biological, adopted, or step children) will be coded as such and any reference to other children or of her own childhood will be excluded.

1. Advantages and limitations of thematic analysis

Some of the advantages of thematic analysis is that it enables researchers to use a variety of types of information in a systemic manner to increase and sensitize the understanding and interpretation of the data (Boyatzis 1998: 5). As well, Boyatzis contends that this process facilitates communication with a broad audience of scholars

and researchers who may use different methods or approaches from the researcher. A concern with thematic analysis is the potential for the research to project their values or conceptualizations onto the data they are analyzing, causing them to 'read into' findings that may not be accurate.

2. The value of knowledge: Thematic analysis and phenomenology

In addition to identifying themes and patterns, Boyatzis (1998) affirms that knowledge about the phenomenon being studied is an important component of the analysis. This knowledge aids the researcher to recognize patterns in the data, to give it meaning and to conceptualize the observations. For instance, the hybrid approach relies on the thoughts, ideas, perceptions and experiences of the researcher to articulate meaningful themes in the data. For this research, an existing knowledge about the discourse of the debate, namely concerns over women's equality rights, multiculturalism and religious freedom, assisted in recognizing and articulating themes in the newspaper articles.

Although the researcher's knowledge and ideas are valuable, the researcher should be aware as to how their thoughts and experiences may affect the analysis and understanding of the data. Drawing from the phenomenological approach, a researcher should self-reflect on how their position and their experiences may influence the collection and analysis of the data (Orbe 2000: 611). Although this can seldom be perfectly achieved, a researcher can begin their study by describing their experiences with the phenomena and 'bracketing out' their views before proceeding to analyze the

data (Creswell 2007: 60). This allows the researcher to acknowledge and understand how their knowledge and experiences may influence the analysis of the data.

IV. Research Sample

The sample for this research was purposively selected. A purposeful sample is when the researcher selects subjects for study because they purposefully inform an understanding of the research problem and the central phenomena of study (Creswell 2007: 125). In order to understand how the controversy over faith-based arbitration was portrayed in the media, editorial, column, and opinion pieces from mainstream Ontario newspapers were analyzed.

The sample included all English Ontario newspapers available through the Factiva database, accessed through the University of Ottawa. The sample included editorial, column, and opinion pieces from national and local newspapers in which faith-based arbitration in Ontario was the main focus of the article. The following search terms were used: Arbitrat* AND Ontario AND Religio* OR Faith based. One thousand three hundred and eighty seven (1387) articles were returned from which eighty-eight (88) editorial, column, and opinion pieces were selected. Letters from the public were not included. All of the articles were treated with the same weight; no consideration was given to the distribution number or political leanings of the newspaper.

The time period for the search was open but the only relevant articles returned were between 2003 and 2006. The dates of the articles ranged from December 13, 2003 to February 16, 2006.

News articles were excluded from the sample as an initial search of all articles reporting on faith-based arbitration resulted in a sample of close to 300 articles; too large a sample for the purpose of this research. A number of these news articles were duplicates, where the same story appeared in a number of different newspapers. As well, many of the news articles were limited to reporting on an event or an announcement, and few took a position on the issue. Finally, the editorial, column, and opinion pieces were found to include a greater number of themes relating to faith-based arbitration, such as women's rights and multiculturalism, and generally took a position on faith-based arbitration. As such, the editorial, column, and opinion pieces provided a richer and more detailed text for analysis.

Although the issue of faith-based arbitration in Ontario was featured in newspapers outside of the province, including international coverage, the purpose of this research is to examine how the issue of faith-based arbitration was portrayed in Ontario, where the issue was most salient and the outcome would have the most significance. As a result, only Ontario newspapers were included in the sample.

V. Data Collection and Analysis

For this research, Ontario newspaper articles were analyzed according to the following research question:

- How was the issue of faith-based arbitration portrayed in Ontario media?

More specifically, editorial, column and opinion pieces in Ontario newspapers were analyzed with the following questions in mind:

- What are the common themes in the articles?
- What arguments are presented by the authors?
- Do the authors take a position on faith-based arbitration? If so, do they support or oppose faith-based arbitration?
- Which 'voices' are included in the article? What organizations or individuals are cited? What arguments or position do they represent?
- Is there a particular event or occurrence around which the articles are written?

Given the exploratory nature of the study, the themes for coding the articles were developed only after reading all of the articles in order to identify the common themes and arguments presented, reflecting the thematic analysis approach as described by Boyatzis (1998).

The unit of analysis for this study were editorial, column and opinion pieces in Ontario newspapers. To begin the study, all of the articles were read and preliminary themes were developed based upon the issues and arguments presented in each of the articles. The preliminary themes from each article were compared to identify common themes. The articles were then re-read to revise the preliminary themes to remove duplication, to ensure consistency, and to verify that each theme was clearly defined and could be easily identified within each article. Common descriptors and titles were used to clearly and reliably identify the themes. For example, a preliminary theme developed from reading the articles was the theme of *women*. Upon comparing the theme of women in each article, it was determined that a clearer and more specific theme was needed. Sub-themes were developed which included *women as vulnerable*, *women requiring protection*, and *women forced into faith-based arbitration*.

Once a code of common themes was developed, each article was read again and coded according to the themes and sub-themes presented (the coding sheet can be found in Appendix A). As well, sections were added to the coding sheet to include additional information from the articles such as the arguments presented by the author, the organizations and individuals cited, the context or event around which the article was written (if any), and whether the author supported or opposed faith-based arbitration. An author's position was almost always explicitly stated. For positions that were unclear or appeared to be neutral, the article was coded as *neutral*.

VI. Limitations of the Research

A concern in all qualitative studies is the role of the researcher, specifically the personal values and assumptions that can bias the results of the study. Therefore, a self-reflection is necessary for understanding how the collection and analysis of the data may be influenced by the researcher. As a white, English-speaking woman with no identifying connection to a religion or faith, my characteristics can shape my collection and interpretation of the data. Also, my intent to explore the data through a feminist lens means that a significant portion of my analysis focuses on how women were portrayed in the media's coverage of faith-based arbitration.

Other limitations of the research relate to representation and sample size. Mainstream Ontario newspapers were selected for the research and only print articles were included. As a result, other forms of media including online sources, television,

and radio, as well as alternative media and newspapers outside of Ontario, were excluded.

Because reliability can be a concern with latent content analysis, as the coding can be influenced by the coder's knowledge and interpretation of the text, clear guidelines and definitions were developed for the coding of the data to improve the consistency and reliability of the coding.

Finally, to enhance the internal validity of the study, rich and complete descriptions were used to convey the findings, and negative or discrepant information that may run counter to the themes are presented (Creswell 2003: 196).

VII. Ethical Considerations

The research sample of publicly available news articles was obtained using the Factiva database accessed through the University of Ottawa. As a result, there are no ethical concerns with the collection and analysis of the newspaper articles.

FINDINGS

A total of eighty-eight articles were analyzed for this research. Of this sample, twenty-nine articles support the practice of faith-based arbitration, fifty-four articles oppose such arbitration, and five are neutral or their position is unclear. Most of the articles were written within a few days of certain major events related to faith-based arbitration. For example, twelve articles were written within a few days of a protest held in Canada and Europe against faith-based arbitration in September 2005, and thirty-two articles were written within a few days after the government's announcement that faith-based arbitration would be restricted. Other events include the release of Marian Boyd's evaluation in December 2004, and the passing of legislation amending the *Arbitration Act, 1991* and the *Family Law Act* in February 2006.

I. Voices in the Media

The most common individuals and organizations cited in the articles are the Canadian Council of Muslim Women (sixteen times), Tarek Fatah of the Muslim Canadian Congress (eight times), and Homa Arjomand of the International Campaign Against Sharia Courts in Canada (seven times). All of these organizations and individuals oppose faith-based arbitration. The most commonly cited individual or organization supporting faith-based arbitration is the Canadian Jewish Congress which was quoted in three articles.

Some authors consider the influence such organizations may have had on the faith-based arbitration debate. For instance, commenting on Boyd's recommendation that such arbitration should continue since it has been practiced without incident in other faith communities, Sheila Copps asserts "the argument would be a whole lot more convincing if allowing sharia law wasn't opposed by the Canadian Council of Muslim Women and spokespersons for the Muslim Canadian Congress" (National Post, December 24, 2004). Haroon Siddiqui of the Toronto Star, however, counters that the Canadian Council of Muslim Women "has a reported membership of 1,000 and the [Muslim Canadian Congress] fewer, out of 650,000 Canadian Muslims. Yet the media, too, keep quoting them, out of laziness or because they like what they hear" (June 12, 2005).

Only a few authors wrote repeatedly on the subject of faith-based arbitration. Haroon Siddiqui of the Toronto Star and Margaret Wente from The Globe and Mail wrote most frequently on the subject, each writing three articles.

II. Factual Errors and Misconceptions

A number of the articles contain factual errors and misconceptions regarding faith-based arbitration, the *Arbitration Act, 1991*, and other issues related to faith-based arbitration. For instance, when the controversy first arose in late 2003, some authors report that the Islamic Institute of Civil Justice had succeeded in making Islamic tribunals "part of Ontario's justice system" (Toronto Star, January 16, 2004), or that such arbitration "only needs the provincial government's stamp of approval, to make this

system of law applicable to Muslims living in Ontario" (September 25, 2004). Such statements suggests that the Ontario government had already changed or would change the law to allow Islamic tribunals; a false assertion since the *Arbitration Act, 1991* already allowed parties to resolve family law disputes according to their religious beliefs. As well, the latter statement insinuates that Muslims in Ontario will be required to participate in Islamic tribunals.

As well, an article in the Sault Star asserts that "Child custody cases should always be decided by the courts based on the welfare of the child rather than religious tenets" (December 22, 2004). The author fails to acknowledge that child custody cases, even under the *Arbitration Act, 1991*, are always based on the best interest of the child.

Other authors seem to misrepresent the authority or jurisdiction of arbitration by describing events that have little relation to faith-based arbitration. Margaret Wente, for example, tells the fictional story of a woman from Pakistan living in Canada who agrees to have a custody dispute resolved using faith-based arbitration. "In Muslim family law, the husband usually gets custody of the kids. He may stop supporting her entirely after a short time and keep nearly all the family assets. He may send her back to Pakistan and keep the kids here. All this is okay under the law, so long as she agrees to it" (December 23, 2004). It is unclear how any law could allow one individual to force another to live in another country, and even more difficult to understand how family law would have any bearing on an immigration matter.

Similarly, James Wallace describes a case where a Muslim woman seeking a divorce was forced to give up spousal support and pay her husband $5,000 in exchange for custody of their child. The author asserts that "She feared her former husband

would take her child back to his country unless she agreed, which the tribunal could have allowed" (Kingston-Whig, September 12, 2005). The author is referring to a hypothetical Islamic tribunal that he believes would condone the exchange should the government allow faith-based arbitration. The author does not appear to have any evidence to support his claim that a tribunal would support such an agreement, and fails to recognize that a formal arbitration process with safeguards and oversight may have in fact prevented this from occurring.

The following sections will explore the common themes presented by the media, beginning with an examination of how woman have been represented throughout the debate over faith-based arbitration.

III. The Portrayal of Women

The primary focus of almost all of the articles is the potential impact of faith-based arbitration on women. This is not unexpected as the purpose of Marion Boyd's evaluation, which many of the articles discuss, is the effect such arbitration may have on vulnerable persons, particularly women and children. More specifically, a number of authors caution that some women may be pressured into faith-based arbitration. Many authors also portray women as vulnerable and in need of protection, either through the use of safeguards and oversight or by prohibiting faith-based arbitration. As the following section will show, there is a particular focus on the vulnerability of Muslim women. This over-representation of immigrant and Muslim women as vulnerable persons will be more fully explored later in the chapter.

1. Vulnerable women

One of the most common depictions of women in the articles is of vulnerability. While almost all of the authors examine, or at least mention, the vulnerability of women in faith-based arbitration, there lacks a consensus as to how this vulnerability can best be addressed. For some, faith-based arbitration exacerbates this vulnerability while others perceive such arbitration as a way to protect women.

The vulnerability discussed in the articles is generally suggested to result from a woman's lack of power in a patriarchal culture, as well as language difficulties, social isolation, and little knowledge about Canadian rights and law. For instance, commenting on Marian Boyd's evaluation, Sheila Copps argues:

> "Does she really believe that a penniless mother with four or five children, no Canadian work experience and limited English or French language skills has choices? Is she naïve enough to think there are choices when one party (usually male) holds all the economic power and the other party lives in a dependent situation?" (National Post, December 24, 2004).

As a result of this vulnerability, women are thought to accept, or refuse to appeal, unfair arbitration awards. A majority of the authors who discuss the vulnerability of women believe that faith-based arbitration should not be permitted in order to protect these women. "Allowing religious interpretation and arbitration of those laws is a dangerous practice that could erode equality and jeopardize those unable or poorly equipped to make their own choices" (The Mississauga News, November 5, 2004).

Some authors, however, believe vulnerable persons can be protected through the use of safeguards and oversights. For example, an article in The Globe and Mail contends "There is legitimate concern that vulnerable women...will be pushed toward tribunals that will be unfair to them. That's why Ontario...appointed feminist Marion

Boyd to consider the idea. Ms. Boyd astutely recommended new safeguards" (May 28, 2005).

Interestingly, a few authors suggest that faith-based arbitration may offer greater protection for vulnerable women and children compared to the mainstream justice system. "By operating pursuant to Ontario law, the Islamic tribunal may offer more protection, not less, to women in the Muslim community" (The Globe and Mail, August 28, 2004). Similarly, Imam Hamid Slimi in the Toronto Star contends that "Women should have nothing to fear or to be sceptical about the institute's motives. In fact, many women, in the absence of an authoritative sharia tribunal, are deprived of a chance to be represented or heard, especially in cases of divorce" (June 1, 2004). However, this position is shared by only a few authors, with the majority of authors affirming that the mainstream justice system offers greater protection and equality for vulnerable women. The media's portrayal of the justice system and its protections will be more fully explored later in the chapter.

2. Freedom of choice

Approximately one quarter of the authors caution that women may be pressured or forced into faith-based arbitration by their community, family or partner. The authors express concern that women will be forced to accept decisions that are unfair, and may similarly be pressured to not appeal an unjust award. "Within some cultures and religious communities, women cannot claim equal status with their male counterparts, making them susceptible to persuasion by more empowered family members or fearful of being ostracized from their families should they refuse religion-based arbitration" (The

Mississauga News, November 5, 2004). "These decisions can be appealed to the regular courts. But for Muslim women, the pressures to abide by the precepts of *sharia* are overwhelming. To reject *sharia* is, quite simply, to be a bad Muslim" (The Globe and Mail, May 29, 2004).

Haroon Siddiqui, however, highlights that women from other faiths may similarly face judgement and pressure from their faith community; "Muslim women may be told they are not good Muslims if they do not conform. They might, in the same way Catholic or Hutterite or Orthodox Jewish women wanting abortions are warned of God's wrath" (Toronto Star, June 10, 2004). Similarly, other authors suggest that women are capable of choosing for themselves whether to participate in such arbitration, thereby countering the argument that women will necessarily be forced into arbitration. The following section will more fully explore the theme of choice.

IV. Choosing Faith-Based Arbitration

As discussed in the previous section, a number of the articles evaluate a woman's ability to freely choose faith-based arbitration. Many suggest that a woman's culture, social position, and circumstances prevent her from voluntarily participating in such arbitration. However, some authors challenge this assumption by emphasizing the voluntary nature of arbitration and asserting that women are capable of choosing for themselves whether to participate in the process. "As with all forms of voluntary arbitration, Canadian Muslims must opt in before they are bound by Sharia. The

majority of women will not do so if it would mean being transported back to the Middle Ages" (National Post, September 9, 2005).

Similarly, a column in The Globe and Mail affirms "I believe that Muslim women have the capacity to freely choose whether to use *sharia.* The question should be how the arbitration agreement is drafted to include safeguards from a perverse interpretation of *sharia*, not whether the choice is made" (August 19, 2004). In this same way, some authors question the government's intervention in a process that consenting parties may freely submit to. An editorial in The Globe and Mail contends "people are free to live their lives more or less as they wish. The state should usually intervene only if there is a proven harm, or at least a powerful danger of it" (September 12, 2005). "So long as both parties agree to arbitration of their own free will, there is no injustice, and no need for state supervision" (National Post, September 17, 2005).

Others suggest that what some may perceive to be an unfair process or outcome is simply a different way of resolving disputes. "The ability to choose *sharia* to govern an arbitration is a matter of human rights. The possibility of making such a choice has been criticized, largely from the perspective that women might be coerced into abandoning what is perceived by critics to be Ontario's more rational and generous system of law. But is it more generous, or simply different?" (The Globe and Mail, August 19, 2004). Similarly, Ouahida Bendjedou in a column in The Globe and Mail asks "While you may disagree with our values, should we be prevented from choosing *sharia* if parties to the dispute wish it?" (August 19, 2004).

In this way, some authors suggest that a different or even unequal arbitration award is not necessarily an unfair decision for the parties because they may have

values, roles and norms that differ from the mainstream society. "Most world religions posit different roles for men and women in marriage, and hence could be judged as 'discriminatory' according to many current definitions of women's rights. Yet the validity of these religiously based value systems in providing guidance and stability in family life is widely accepted" (Standard, April 30, 2005).

Furthermore, to support the use of faith-based arbitration, some authors point to other instances where consenting adults voluntarily give up certain rights. "It is common, for example, for parties to give up some rights to attain other goals. For example, many beneficiaries do not contest wills for the greater priority of family unity, while parties might agree to a marriage contract regarding an unequal separation of marriage assets" (Ottawa Citizen, September 15, 2004). In this way, although an arbitration award may differ from what would be awarded in the mainstream justice system, some authors argue this does not necessarily mean it is an unfair decision for the parties involved.

V. Immigrants

Throughout the media coverage of faith-based arbitration, immigrants tend to be portrayed in one of two ways; either as vulnerable, naïve, and unaware of their rights and of Canadian laws, or as rigid and uncompromising, unwilling to adapt their cultural values and practices to Canadian society.

In terms of the latter, faith-based arbitration is depicted by some authors as a cultural practice immigrants should abandon upon arriving in Canada. In this way, a

number of articles seem to suggest that it is only immigrants who partake in faith-based arbitration, thereby ignoring the participation and involvement of Canadian-born citizens in faith-based arbitration. For example, the Sault Star contends that "those hoping to immigrate to Canada should understand that civil law governs certain aspects of life here, and that they have the same opportunity as everyone else to use the political process to change laws – but new laws would also apply to everyone equally, too" (December 22, 2004).

Some authors go a step further and suggest that if immigrants are unwilling to resolve disputes according to Canadian law, they should return to their country of origin. "Presumably people come here for better lives and to be treated as equals under secular law. If Muslims want to live under shariah law, and if they believe they can't be good Muslims without following shariah, there are plenty of seriously troubled countries to accommodate them" (Ottawa Citizen: September 3, 2004). Another editorial states:

> "We have one set of laws which apply to all Canadians. Church and state have long been separated, and our judicial system is wholly secular in character. Sharia courts offend against both these conditions – leaving us to wonder anew what our immigration authorities are up to when they allow entry to Canada of those who, far from adopting Canadian values, would reject them in favour of their own" (Evening Guide: December 28, 2004).

Seeming to counter the suggestion that immigrants should leave or be prevented from coming to Canada, an editorial in The Globe and Mail affirms that "Modern Canada does not judge, in advance, those who come to its shores based on the actions (real or perceived) of their co-religionists" (August 31, 2005). However, of the articles that mention immigrants, about one quarter of the entire sample, almost all portray immigrants as either rigid and unwilling to adopt Canadian norms and practices, or as vulnerable and naïve.

The portrayal of immigrant women is similar to how the media represents other women involved in faith-based arbitration, namely that they are vulnerable to being pressured into such arbitration. However, immigrant women, and immigrant Muslim women in particular, are portrayed as being especially vulnerable because of language barriers, their isolation from Canadian society, and a lack of knowledge about the justice system and their rights. As stated in the Toronto Star:

> "...many Muslim immigrants and refugees come from highly oppressive sharia regimes in Africa and the Middle East. Their knowledge of Canadian mores, let alone equality rights, is therefore nil. There is nothing demeaning in protecting the interests of the vulnerable now that they live in Canada" (September 17, 2005).

Similarly, an article in the Windsor Star claims:

> "Most Muslim women are recent immigrants from countries where women have few rights. These women often struggle with English (or French) and have little or no knowledge of the Canadian legal system or the Charter of Rights" (September 22, 2005).

In The Globe and Mail, Margaret Wente states:

> "Immigrant women are among the most vulnerable people in Canada. Many don't speak English, are poorly educated, and are isolated from the broader culture. They may live here for decades without learning the language, and stay utterly dependent on their families. They have no idea of their rights under Canadian law" (May 29, 2004).

Although the most common portrayal of immigrant women was that of vulnerability and naivety, in responding to an assertion made by Homa Hoodfar of Concordia University that Muslim women living in self-contained immigrant enclaves "are much more subject to community pressure", Haroon Siddiqui asserts that "There is no proof that they are, any more than any other group of immigrant women have been, or are, in other ghettos" (Toronto Star, June 10, 2004). The author goes on to argue that "Muslim women will be as vulnerable as those of other faiths, unless we want to say

that Ontario Muslims are a lesser breed that cannot be trusted – the not-so-unsaid subtext here" (Toronto Star, September 11, 2005).

Perhaps because nearly all of the media coverage of faith-based arbitration is focussed on Islamic tribunals as opposed to arbitration in other faith communities, the depiction of immigrants is primarily of Muslims; there is no mention of immigrants from Jewish or Christian faiths being pressured into faith-based arbitration, nor of them being unwilling to adapt their cultural practices to Canadian society. For instance, Margaret Wente asserts:

> "The Arbitration Act has already been used by Jewish, Catholic and Ismaili Muslim courts, without incident. But chances are that women in these groups are more assimilated into Canadian life than your average newcomer from Pakistan" (The Globe and Mail, December 23, 2004).

These statements illustrate how Muslim immigrants are singled out from other faith groups and depicted as either vulnerable women or newcomers unwilling to adapt to their new home. In addition, the media's attention to immigrants seems to ignore the involvement of Canadian-born citizens in faith-based arbitration.

VI. The Portrayal of Islam

As discussed in the previous section, there is a greater focus by the media on Muslims and Islamic tribunals compared to other faith communities. A significant portion of this coverage involves comparisons between Islamic arbitration in Canada to the implementation of Islamic law in other countries. As well, some authors suggest that faith-based arbitration is the first step in an attempt to spread political Islam in Canada. As a result of this unbalanced and often exaggerated portrayal of Islamic

tribunals, some authors caution that the coverage of the issue, and ultimately the government's decision to limit faith-based arbitration, is marred in Islamophobia and racism.

1. Faith-based arbitration in Muslim and other faith communities

Almost all of the articles at least remark that faith-based arbitration has been permitted and practiced by other faith groups such as Jewish and Ismaili communities. However, less than half of these authors suggest that it may be unfair to deny Muslims what other faith groups have been using for years. "Given the current faith-based arbitration initiatives by the Jewish and Christian communities, why would the Muslim community not be entitled to do the same?" (Ottawa Citizen, September 15, 2004). Sheema Khan in The Globe and Mail calls attention to this apparent double standard:

> "Consider the following: During the 14 years of operation of Jewish, Aboriginal and Ismaili arbitration tribunals, the issues of 'one law for all Ontarians,' of 'parallel justice systems' and the 'ghettoization of minority groups' were never raised by the public. Why all the hue and cry when Muslims wish to avail themselves of the same rights as their fellow Ontarians?" (September 15, 2005).

Some authors note that faith-based arbitration has been conducted by other faith groups without incident. For example, an editorial in the Ottawa Citizen contends that Premier McGuinty "took the easy way out, tearing down the entire edifice, even for non-Muslims who have demonstrated for the past 14 years that religious-based arbitration is possible" (September 13, 2005).

However, even of those authors who note that faith-based arbitration has been conducted without incident, many still argue that such arbitration should not be permitted for the Muslim community. To support their position, a few authors

differentiate between Islamic tribunals and those of other faiths. Margaret Wente affirms "The Arbitration Act has already been used by Jewish, Catholic and Ismaili Muslim courts, without incident. But chances are that women in these groups are more assimilated into Canadian life than your average newcomer from Pakistan" (The Globe and Mail, December 23, 2004). Similarly, Mark McNeil of The Spectator asserts:

> "McGuinty also correctly recognized that in order to say no to sharia he would also have to shut down all religious arbitration, which currently allows Orthodox Jews and Christians to submit to voluntary faith-based alternative dispute resolution. These practices are less troubling than Sharia law but the Charter requires equal treatment of religions" (September 13, 2005).

While some authors distinguish between faith-based arbitration in different faith communities, other authors make no distinction in their opposition to such arbitration, affirming that it should be prohibited for all faith groups. "Muslims should have the same rights as other religious groups. That is, no religious groups should have such rights in 21st - century Canada" (Sault Star, December 22, 2004).

2. Comparing arbitration to Islamic regimes abroad

Many of the articles refer to Islamic law regimes in other countries, specifically countries where these laws are used to justify the oppression and abuse of citizens. This occurs primarily by authors who oppose faith-based arbitration in order to caution against allowing such arbitration in Ontario.

> "In other nations where shariah is enforced – whether as the state law, as in Saudi Arabia or Iran, or as part of a dula system of religious and secular laws, as in Egypt and Jordan – open opposition by reformers and secularists condemns them to persecution, imprisonment or death. Sharia courts have been abused in other countries and could be abused here. (National Post, September 21, 2004).

Similarly, a column in the Ottawa Citizen maintains that:

> "Not only is [shariah law] practised in countries such as Iran, Afghanistan and Saudi Arabia, it is also now used in Ontario as a measure for resolving civil disputes outside of the public courts. Under Shariah law, a man can have four wives, can beat his wife and can abandon her by simply saying 'I divorce you' three times" (March 12, 2005).

In this way, some authors make little distinction between Islamic law in countries like Nigeria and Saudi Arabia, and Islamic tribunals in Ontario.

Other authors are more subtle in their connection between oppressive regimes and faith-based arbitration in Ontario; many will simply describe Islamic law in these countries without openly suggesting this will occur in Ontario. For instance, an article in the Windsor Star affirms:

> "It is a discriminatory system of rough justice that is applied inconsistently and often barbarically throughout the world. In its most extreme form, Sharia law sees women sentenced to whipping, stoning and gang rape. Even in moderate forms, Sharia law discriminates against women. Only men can initiate divorce proceedings, for example, and male heirs receive a greater share of inheritance" (The Windsor Star, December 23, 2004).

Other authors attempt to distinguish between Islamic law regimes in other countries and how Islamic tribunals would be implemented in Ontario. Referring to a motion passed in Quebec to prohibit such tribunals, an editorial in The Globe and Mail asks: "But do Quebec's legislators fear that a sharia tribunal in Canada would recommend the stoning of adulterous women, or automatic custody to fathers in divorce? The stoning of women would be a crime under Canadian law, and the automatic custody for fathers would have no legal validity in Canada" (May 28, 2005). However, such articles are a minority compared to those that compare violent and oppressive regimes to faith-based arbitration in Ontario.

3. Islamophobia in a post-9/11 era

Similar to the connections made to Islamic regimes in other countries, some authors link faith-based arbitration to religious extremism and political Islam, suggesting that faith-based arbitration contributes to a spread of Islamic fundamentalism in Canada and abroad. For example, an article in the National Post states that "Boyd's endorsement of Sharia law, therefore, unintentionally provides a trojan Horse for the global project of Muslim fundamentalism" (July 22, 2005). Similarly, a column in The Globe and Mail affirms that "The gradual implantation of *sharia* in Western countries is part of an extremist Islamist agenda" (September 5, 2005). "Empires lie in jeopardy" cautions an editorial in the Sault Star; "Religious arbitration is the first line of defence, which bodes strong resistance to McGuinty's reforms. He must stand steadfast" (September 13, 2005).

In this way, faith-based arbitration is thought by some authors to be a catalyst for Islamic fundamentalism, although an editorial in The Globe and Mail affirms that "Those who fear fundamentalism should accept that deep religious expression is not necessarily a sign of militancy or extremism" (August 28, 2004).

Other authors explore the impact Islamophobia and the post-9/11 era has had on faith-based arbitration in Ontario. For instance, "Boyd's recommendations seem to be aimed at compensating Muslims for the ugly Islamophobia that has surfaced in North America in the wake of the Sept. 11, 2001, attacks. But women must not pay the price for liberal guilt" (Daily Mercury, February 3, 2005). Commenting on the government's decision to limit faith-based arbitration, Paul Schliesmann argues that "It didn't stand a chance in our post-9/11 world. Shariah looks and feels too much like the culture of

Osama bin Laden and al-Qaida and extremist interpretations of the Qur'an" (Kingston Whig-Standard, September 14, 2005). As these passages show, the influence of the political climate on the media, the public, and the government's decision is apparent to many authors. Indeed, some point to this heightened fear of Islamic fundamentalism to justify their opposition to faith-based arbitration.

4. Recognizing the alarmist portrayal of faith-based arbitration

As previously shown, the media's portrayal of faith-based arbitration and the public's reaction to the issue, is sometimes alarmist. Some authors comment on this climate, noting that "the outcry has escalated to the point that the public is under the impression that soon Muslim women will be stoned to death, or their hands chopped off, and the country turned into an Islamic state" (Toronto Star, June 1, 2004). Similarly, a column in the Toronto Star affirms "More than stopping sharia, we need to stop the hysteria surrounding it. So misleading and dishonest has the debate been that it reveals more about our political and media prejudice than the minority in question" (June 12, 2005). "Undoubtedly, *sharia*-phobia has skewed the debate over Ontario faith-based arbitration to such a frenzied level that lies were perpetrated as facts, paranoia as patriotism" (The Globe and Mail, September 15, 2005).

Some of the authors themselves call attention to the media's alarmist portrayal of the issue and offer an explanation for this polarized representation. "It appears the outcry results from a fear of the unknown, both in terms of the content of *sharia* and the manner in which it is interpreted" (The Globe and Mail, August 19, 2004). Similarly, Haroon Siddiqui of the Toronto Star suggests "Media like conflicts. We often let the

extremes define the norm. We are crude in covering social conflicts, especially if they involve immigrants" (September 11, 2005).

VII. Fitting Faith-Based Arbitration with Canadian Society and Values

In addition to comparing faith-based arbitration to oppressive Islamic law regimes and making reference to the terrorist attacks of September 11th, 2001, some authors also portray faith-based arbitration and Islamic tribunals in particular, as a backwards or outdated system for resolving disputes.

1. Faith-based arbitration as an obsolete form of dispute resolution

With suggestions that faith-based arbitration will "turn back the clock" (Lindsay Daily Post, June 9, 2004), and asking "what century is this, anyway?" (The Globe and Mail, December 23, 2004), some authors depict faith-based arbitration as a regressive and obsolete form of dispute resolution. Indeed, Salim Mansur in the National Post claims "Sharia became, and remains, a closed legal system locked in an ancient era" (July 22, 2005).

Portrayals of Islamic law and faith-based arbitration as outdated is further emphasized by portraying Canadian law and the mainstream justice system as modern and developed. "It makes no sense to enforce 1,400-year-old foreign laws and customs; not when Canada has developed a Charter of Rights and Freedoms that is envied around the world" (Standard, September 9, 2005). Similarly, an article in the North Bay Nugget argues that "Certain religious organizations expressed shock over

McGuinty's decision, but they fail to recognize that a developed, educated society must rely on the objectivity and fairness of the court and Canadian law" (September 13, 2005). Furthermore, a number of the articles describe those who oppose faith-based arbitration as "liberal and progressive" (The Record, August 12, 2005), thus contributing to the image of faith-based arbitration as backwards and outdated.

Conversely, a few articles suggest that allowing faith-based arbitration will be a progressive and modern step for Ontario and Canada. For instance, an editorial in The Globe and Mail affirms "Canada is the New World, and should aim high" (August 31, 2005). However, such depictions are a minority compared to the number of articles that portray faith-based arbitration and Islamic tribunals as archaic and obsolete.

2. A clash of values

In addition to the portrayal of faith-based arbitration as outdated, some authors further suggest that faith-based arbitration is incompatible with Canadian society and values and should therefore not be permitted. Carol Goar of the Toronto Star asks: "Where does a tolerant nation draw the line between respecting minorities and importing values that clash with its own?" (January 16, 2004). Similarly, Sheila Copps describes "how faith-based traditions and customs can clash with the values and principles our civil laws strive to defend" (National Post, December 24, 2004). In this manner, faith-based arbitration and particularly Islamic tribunals are portrayed as incompatible with Canadian society and values.

This clash between faith-based arbitration and Canadian laws and values is suggested by some authors to result from the interpretation and application of religious

law, as opposed to such law being inherently unfair or discriminatory. "Islamic law is not inherently unfair to women. But it can be applied in ways that are harsh and regressive by Canadian standards" (Toronto Star, January 16, 2004). Similarly, an editorial in the Toronto Star affirms that "While Islamic law if often portrayed as being biased against women, in fact the Qu'ran espouses the equality of the sexes. But like Jewish and Christian canon law, Islamic law has been applied in different ways in different times and places" (May 30, 2004).

For some authors, it is a difference in the interpretation of religious law that is problematic; "There is no consensus on sharia...so whose interpretation of sharia would Ontario Muslims follow? And who would have the authority to decide?" (Daily Mercury, February 3, 2005). However, most of these authors fail to acknowledge a similar lack of consensus on the interpretation of religious law in other faith communities.

Fewer authors perceive religious law, specifically Islamic law, as inherently unfair and discriminatory. "Sharia law is sexist and imbued with a current of misogynism starkly at odds with the Charter. It is a discriminatory system of rough justice that is applied inconsistently and often barbarically throughout the world" (The Windsor Star, December 23, 2004). In this way, a clash of Canadian laws and values with faith-based arbitration is thought by more authors to occur from how religious law may be interpreted as opposed to the law or the religion itself being inherently unfair. Nevertheless, the depiction of faith-based arbitration as outdated and in conflict with Canadian values is a concern discussed by many of the authors.

VIII. Religious Freedom, Equality Rights, and the Limits of Multiculturalism

Multiculturalism, religious freedom and women's equality rights are common themes repeated through out most of the articles. These themes are often interwoven although they also appear as separate points of discussion in the articles. For instance, close to one quarter of the articles frame the issue of faith-based arbitration as a competition between multiculturalism (and/or religious rights) versus women's equality rights, and nearly as many discuss freedom of religion and whether such arbitration exceeds the limits of multiculturalism. Due to the complex relationship between these themes, each will be explored separately, however, the interconnection of these concepts will be apparent in the excerpts from the articles.

1. A competition between religious rights and equality rights

Approximately one quarter of the articles frame the issue of faith-based arbitration as a competition between women's equality rights and either multicultural or religious rights. The depiction of equality and religious/multicultural rights in conflict with one another is apparent with the language used by some authors; for example, the government's decision to limit faith-based arbitration is often described as a "victory for equality" (North Bay Nugget, September 13, 2005), and "a clear victory for women's rights" (Ancaster News, September 16, 2005). Indeed, this discourse is evident to the Rabbinical Council of Toronto who in a Globe and Mail column argues that: "It is...unconscionably divisive and deceptive for the Ontario government to frame the

public discussion as a contest between women's rights versus religious rights so that it can present itself as the champion of women's rights" (January 23, 2006).

Multiculturalism and religious rights are sometimes portrayed in the media, in academic literature and by women's organizations, including Muslim women's groups, as taking away from women's rights, suggesting that advancements in multiculturalism and religious freedom come at the expense of equality rights. In an article by Margaret Wente, the author includes the following quote from the president of the Canadian Council of Muslim Women to support her opposition to faith-based arbitration:

> "This is an abuse of multiculturalism...There is a lack of courage [on the part of the governments], and also a fear of offending Muslim sensitivities. I chose to come to Canada because of multiculturalism...But when I came here, I realized how much damage multiculturalism is doing to women. I'm against it strongly now. It has become a barrier to women's rights" (The Globe and Mail, May 29, 2004, parentheses in original).

Similarly, another author contends that "on the surface, [faith-based arbitration] appears to be an approach based on cultural tolerance and acceptance, but in reality, it's a thinly-disguised attempt to undo decades of advances in equality rights" (Lindsay Daily Post, June 9, 2004).

Of the authors who consider equality and religious rights, only a few differ from the majority in their representation of these rights. For instance, two articles challenge the notion that women's equality rights should be protected over religious rights. An editorial in The Globe and Mail notes that Catholics, who are the largest religious group in Canada, prohibit women in the priesthood, "so Canadians may wish to be careful about seeking to limit religious expression to protect women's rights" (May 28, 2005). Similarly, the National Post contends "protecting the rights of vulnerable persons is a must, but eliminating the rights of all religious groups – as has been suggested – is not

the way to do this" (September 21, 2004). These arguments, however, are a minority compared to the number of the authors who portray women's equality and religious/multicultural rights as incompatible.

2. Religious freedom

Religious rights and freedoms, specifically those guaranteed under the *Charter of Rights and Freedoms*, is a common theme discussed by a number of the authors. Many of those in favour of faith-based arbitration invoke this "basic Canadian value" to support their position (The Globe and Mail, August 28, 2004). Those who oppose such arbitration contend there are limits to religious freedom, or try to distinguish faith-based arbitration from religious freedom. For instance, Tarek Fatah, a founding member of the Muslim Canadian Congress who opposes faith-based arbitration contends:

> "My position is not against religion. On the contrary, I stand for the constitutional guarantee of freedom of religion. However, freedom of religion does not mean that we dilute laws and strengthen the power of imams, rabbis and priests over their communities – especially the most vulnerable" (The Record, August 12, 2005).

In the same manner, a group of female Canadian artists wrote an open letter to the Premier stating "This is in no way an infringement on religious freedom, which we endorse as an equally important tenet of Canadian democracy. Religion should simply remain an important part of the lives of citizens but not of public law" (The Globe and Mail, September 10, 2005). Almost paradoxically, the authors argue that by prohibiting faith-based arbitration, the government will be protecting freedom of religion; "We urge you to speak strongly in favour of Ontario's commitment to one system of laws for all, as well as for freedom of religion and anti-racism".

Many of the authors who invoke religious freedom are those in favour of faith-based arbitration, with many citing the *Charter of Rights and Freedoms* and judicial decisions to support their position. For instance, an article in the Ottawa Citizen affirms that "Permitting members of religious minority groups to have the option of resolving civil disputes according to their own religious doctrine within a framework that is respectful of the Charter of Rights and Freedoms is consistent with the Charter's own guarantee of freedom of religion" (September 15, 2004). Similarly, "'Canada is founded upon principles that recognize the supremacy of God and the rule of law' says the very first line of the Charter of Rights and Freedoms. This is a country that respects freedom of religion" (The Globe and Mail, August 28, 2004).

An editorial in The Globe and Mail more fully explores freedom of religion noting an interconnection of religion with Canadian law and life, such as in marriage, life and death. "Those who would extend [religious] observances into family disputes are exercising the same basic freedom that brings people into a church in the first place for their wedding" (The Globe and Mail, September 13, 2005). The editorial goes on to argue that the religious sphere is a partially protected one, with religious institutions exempt from conducting same-sex marriages and being able to exclude women from the selection of clergy. "For the most part, religious expression and the rule of law co-exist peaceably" (The Globe and Mail, September 13, 2005). In effect, the editors question why faith-based arbitration should not be permitted since religion, law, and life are already interwoven.

3. The limits of multiculturalism

The limits of multiculturalism, specifically whether faith-based arbitration exceeds these boundaries, is discussed by many authors. A number of articles include questions about the limits of multiculturalism such as "how does a multicultural society accommodate different ways of life without compromising the common values and basic laws that hold the country together" (The Globe and Mail, September 12, 2005). Some authors, however, use more inciting language, labelling faith-based arbitration as "misguided multiculturalism" (Kingston Whig-Standard, September 12, 2005), "multiculturalism gone mad" (The Globe and Mail, September 5, 2005), and "multiculturalism gone wrong" (Expositor, September 10, 2005).

Some authors suggest that faith-based arbitration exceeds the boundaries of Canadian multiculturalism and that "diversity has its limits" (The Globe and Mail, September 13, 2005). Jeffrey Simpson contends that the issue of faith-based arbitration expands the bounds of multiculturalism:

> "The majority of citizens pushed back against what they saw as multiculturalism gone wild. Behind all the government-sponsored folk festivals and pronouncements about the virtues of formal multiculturalism, Canada is a highly assimilationist society...Public tolerance for deep multiculturalism is limited, if it means special rules for a particular group" (The Globe and Mail, September 14, 2005).

In a similar manner, an editorial in the Kingston Whig-Standard defends the government's decision and the public's support to limit faith-based arbitration by noting:

> "Not that we've become a bigoted mosaic here in Ontario. The effect of McGuinty's sudden change of direction will be to remove the unnecessary set of religious and cultural irritations and place all people, Muslims included, on an equal footing in our society" (September 14, 2005).

In this way, a number of the authors seem to suggest that the government's decision signals what the state and the public will tolerate in terms of cultural accommodation and multiculturalism. However, with most of the authors focussed on Islamic tribunals, it appears it is faith-based arbitration in the Muslim community more so than other faith communities, which re-defines the boundaries of multiculturalism and appears to exceeds these limits.

IX. A Separation of Religion and State

A theme discussed by approximately one-third of the authors is the separation of religion from the state. Almost all of these authors oppose faith-based arbitration and point to the 'separation of church and state' to support their position. "Church and state have long been separated, and our judicial system is wholly secular in character" (Evening Guide, December 28, 2004). Only one author counters the assertion that Canada is and should remain secular. "Mr. Fatah seems to want Canada to follow Turkey's model, and impose secularism on his people. That is not Canada's way (The Globe and Mail, August 28, 2004).

Some authors seem to express great concern that faith-based arbitration is erodes secularism in Canada. "At best, introducing parallel systems of justice fosters the fragmentation of society. At worst, it raises the spectre of theocracy encroaching on the secular state" (National Post, August 23, 2004). Similarly, an author in the North Bay Nugget cautions "We should never allow religion to dictate the law and human rights" (September 13, 2005).

Secularism and the separation of church and state is portrayed by some authors as fundamental to equality, democracy, and fairness. "Surely the separation of church and state is understood by today's politicians to be the fertile ground upon which modern, rights-based democracies such as that in Canada have flourished" (The Globe and Mail, September 10, 2005). Similarly, an article in the Ottawa Citizen affirms that "Canada is a secular country; secular law is our basic legal framework" (September 14, 2005). In this way, faith-based arbitration is thought to challenge the secular nature of Canada, in turn threatening Canada's legal and democratic foundation.

X. The Privatization of Justice and the Ghettoization of Minorities

A small number of authors discuss how faith-based arbitration may result in the privatization of justice and the formation of a parallel legal system. Three concepts in particular are discussed by these authors in relation to the privatization of justice.

The first is a concern that faith-based arbitration will create a parallel legal system which may fracture the mainstream justice system and Canadian society as well. "Extending formal recognition to tribal or religious laws and procedures is dangerous. It suggests that Canada isn't a country. At best, introducing parallel systems of justice fosters the fragmentation of society. At worst, it raises the spectre of theocracy encroaching on the secular state" (National Post, August 23, 2004).

A second concern expressed by some authors is that family law disputes, such as child custody and support are "too important to be settled in private" (The Globe and Mail, December 23, 2004). "It is virtually impossible to ensure fairness when justice is

meted out in private" (Toronto Star, June 8, 2004). Some authors point to the symbolic importance of having an open, public justice system for family law disputes, while other authors caution that a private arbitration system cannot provide the necessary safeguards and oversight to protect vulnerable individuals.

> "While our public system of law is not always perfect, it is designed to recognize the realities of all citizens and is open to public scrutiny and improvement. Such is not the case with private systems of law, such as religious law...Allowing the use of religious arbitration will lead to divisiveness, the ghettoization of members of religious communities as well as human-rights abuses, particularly for those who hold the least institutional power within the community, namely women and children" (The Globe and Mail, September 10, 2005).

A third concern raised by some authors is that faith-based arbitration will result in a second-class parallel legal system for minority groups, thus dividing minorities from the rest of society.

> "If implemented, this law will also cut along class and race lines a publicly funded, accountable legal system run by experienced judges for mainstream Canadian society, and cheap, private-sector, part-time arbitrators for the already marginalized and recently arrived Muslim community...we believe that introducing sharia into the judicial system ghettoizes the Muslim community...into one second-class compartment in the determination of human and family-law rights" (Toronto Star, June 22, 2005).

Similarly, a column in the Toronto Star contends that faith-based arbitration would mean the "exclusion [of Muslim women] from the Canadian mainstream" (September 17, 2005). Tarek Fatah of the Muslim Canadian Congress contends that "if the Ontario government implements the Boyd report, I believe the move will further ghettoize the already marginalized Muslim community and will play into the hands of the racists who want nothing better than to exclude Muslims from the mainstream" (The Record, August 12, 2005).

Interestingly, the position that faith-based arbitration will lead to the privatization of justice appears to disregard the prevalence of alternative forms of dispute resolution already used for family law disputes. For instance, Quebec requires pre-hearing mediation for almost all family law disputes, and mediation and arbitration are used throughout Ontario and Canada to resolve family law disputes. Many of the authors fail to specify whether their concerns over the privatization of justice includes all forms of alternative dispute resolution or whether it is specific to faith-based arbitration.

XI. The Mainstream Justice System

Approximately one quarter of the articles discuss the mainstream justice system, either by comparing it to faith-based arbitration or commenting on how this system will be affected if faith-based arbitration is limited. Of these articles, a majority contend that the justice system already provides the safeguards and oversight needed to protect vulnerable women, or it will provide such protection with the implementation of certain safeguards such as those recommended by Marion Boyd. In this manner, a number of authors express confidence in the justice system to protect vulnerable persons. Other authors caution that if faith-based arbitration is prohibited, this may overwhelm the courts with additional cases, creating a strain on the justice system.

1. Confidence in the justice system

A number of authors believe that the courts and the law provide the necessary safeguards to protect vulnerable women and children from any unfair decisions that

may occur in faith-based arbitration. As such, many of these authors support the continued use of such arbitration. For instance, an editorial in the Toronto Star states:

> "The Arbitration Act, which governs tribunals, provides safeguards against wrongdoing. Besides decreeing that rulings must be consistent with Canadian laws, it ensure there is a right to appeal decisions to a regular court. And choosing to use a tribunal is voluntary. No one can be forced to give up their right to have a case heard in a regular courts" (May 30, 2004).

Some of the authors go further, expressing confidence in Ontario and Canadian law and the justice system to be objective and ensure equality for women. Many of these assertions come from authors opposed to faith-based arbitration as they believe equality and justice will only come from the justice system. Commenting on how women may be pressured into "participating in a male-dominated arbitration process that would result in unfair spousal and child support", an opinion piece in The Record argues "there is only one shied strong enough and acceptable enough to protect such individuals. It is called the law of Ontario" (September 13, 2005). Another author contends that the government's decision to limit faith-based arbitration:

> "has spared Muslim women from being robbed of their human rights. A male-dominated society must not dictate rules to women. Women are equal under all aspects of the law...Men should not dictate what is an appropriate settlement for a woman during a divorce. That job belongs to an objective court" (North Bay Nugget, September 13, 2005).

Similarly, Murray Campbell contends that it is not enough for Premier McGuinty to limit faith-based arbitration, "His challenge now is to persuade women in unequal relationships that Canada's courts are there for them. Only when they have the confidence to act on this will they enjoy true equality" (The Globe and Mail, September 13, 2005). In this way, some authors portray the law and the mainstream justice system as an objective system, capable of protecting the equality rights of women.

2. Doubting the protection and fairness of the justice system

Despite the confidence of some authors in the justice system, a number of authors express concern that the justice system and the law are insufficient safeguards for protecting vulnerable women participating in faith-based arbitration. "In theory, [faith-based arbitration] decisions aren't supposed to conflict with Canadian civil law. But because there is no third-party oversight, and no duty to report decisions, no outsider will ever know if they do" (The Globe and Mail, May 29, 2004). Similarly, a column in the Toronto Star cautions that "it is virtually impossible to ensure fairness when justice is meted out in private. No matter what safeguards are put in place...a woman who speaks little English and fears being ostracized from her community will be vulnerable to victimization" (June 8, 2005).

Two authors challenge the assertion that the justice system is necessarily a fair and preferable form of dispute resolution. One author argues that although faith-based arbitration may not adequately protect women's rights, "even in the current system of family law, [women] experience disadvantage" (Daily Mercury, September 13, 2005). Mohammed Elmasry, a faith-based mediator writing for The Record contends that "In matters of family conflict, our Canadian legal system often does more harm than good, as it is based on the premise that in difficult times, the other person becomes an adversary or opponent" (September 14, 2005).

3. A strain on the justice system

Some authors contend that limiting faith-based arbitration "would produce a flood of court cases, requiring an expansion of the justice system" (Toronto Star, June 8,

2005) and "might force more people to participate in a legal system that is already slow, expensive and whose values sometimes appear to be out of touch with the wishes of the populace" (Niagara Falls Review, September 13, 2005). Although a number of these authors do not support the continued use of faith-based arbitration, many express concern that limiting or prohibiting faith-based arbitration will create a burden on the justice system. Some of the authors in favour of faith-based arbitration similarly caution that prohibiting the practice may strain the justice system, and to further support their position highlight the benefits of alternative dispute resolution such as lower costs and a more efficient process.

In this way, while some authors express confidence in the justice system to ensure equality and to protect women's rights, others are less optimistic that the justice system is as effective and objective as some portray it to be. As well, both authors in favour and those opposed to faith-based arbitration caution that prohibiting such arbitration may negatively affect the justice system.

XII. One Law For All and Equality Under the Law

A theme discussed in almost half of the articles is equality and the law. This theme was generally presented in one of three ways; as having one set of laws or rights for all Ontarians (or Canadians), as the law applying equally to all citizens, and using the law to ensure equality under the law. While these notions are sometimes interconnected, they require a separate evaluation.

1. One law for all

The notion of having one law for all citizens, or one set of rights, was the most common component of this theme with close to one-third of the authors discussing this concept. This may have occurred because of the language used by Premiere McGuinty in his announcement that faith-based arbitration would be limited, saying that "there will be one law for all Ontarians".

Almost all of these authors contend that faith-based arbitration should not be permitted as there should only be one law for all citizens. "It's time to put an end to laws that apply to some and not others when we all live as Ontarians and Canadians" (The Globe and Mail, September 5, 2005). "There's supposed to be one law for everyone in this province, period, and anything which erodes that standard must be resisted" (Examiner, September 13, 2005).

Some authors caution that equality, social cohesion and liberal democracy will be compromised if different laws apply to different people. "While many Canadians may assume that we are all governed by one system of laws, created by publicly elected officials who are accountable to the electorate, your government is poised to shift the ground under this cornerstone of liberal democracy" (The Globe and Mail, September 10, 2005).

Only two authors dispute the assertion that allowing faith-based arbitration will jeopardize one law for all. Haroon Siddiqui maintains that "Everyone should be subject to the same law. But the counter-argument is that every arbitration ruling is subject to the same Canadian law" (Toronto Star, June 10, 2004). Andrew Coyne, in the National Post, points to affirmative action, funding for religious schools, and aboriginal

sentencing circles to argue that "If we really believe in one law for all, perhaps we should start practicing it" (September 17, 2005).

Related to the concept of one law for all is the argument presented by some authors that all citizens should have the same rights and protections. For instance, an editorial in The Mississauga News affirms that "Canadians, regardless of gender, ethnicity or religion, should be guaranteed the same access and the same level of protection under the laws of our land and the Charter of Rights and Freedoms" (November 5, 2004).

2. Equal application of the law

A related concept to 'one law for all' is the equal application of the law; that is, that the same laws should be applied equally to all citizens. For instance, "Canadian law should apply to all people equally, independent of religion or ethnicity" (Sault Star, December 22, 2004). Similarly, an article in The Record contends that the government's decision to limit faith-based arbitration "means all Ontarians will be treated the same way, according to the same principles, under the same laws. And what could be more just than that?" (September 13, 2005). These authors seem to suggest that by limiting faith-based arbitration, and having all family law disputes governed by the *Family Law Act of Ontario*, this will necessarily result in the equal and universal application of the law to all family law disputes.

3. Equality under the law

In addition to one law for all and the equal application of the law, some authors argue for equality under the law, most often by authors who oppose faith-based arbitration. These authors discuss the importance of having equality under the law, however, it is unclear whether any of these authors are referring to equality in the application of the law or the impact the application of law will have on equality. For example, some authors affirm that "all people are equal under the law regardless of race and religion" (The North Bay Nugget, September 13, 2005), "women should be treated equally without discrimination" (Times, September 16, 2005), and "everyone is created or treated equal in Canada, or should be" (Chatham Daily News, September 14, 2005). As these passages illustrate, it is unclear whether the authors are concerned with applying the law in a way that will produce equality or if they support the equal application of the law. This concept will be more fully explored in the discussion chapter in relation to formal and substantive equality.

XIII. The Future of Faith-Based Arbitration

A common theme discussed by close to one quarter of the authors is the potential for faith-based arbitration to continue in an informal manner despite the government's decision. In some articles, particularly those written before the government's announcement to limit faith-based arbitration, the authors note that faith-based arbitration occurs within faiths communities informally, sometimes without the regulation and oversight of the state. "Scholars, imams and community leaders already

arbitrate, mediate, reconcile and resolve differences and settle disputes daily in full compliance with Canadian laws" (Toronto Star, June 1, 2004). Similarly, an article in the Ottawa Citizen argues "Pure pragmatism indicates that a significant group of people want to, and will, resolve their disputes quickly, quietly and in keeping with deeply held religious convictions. Denying this, opponents are keeping their eyes shut" (September 15, 2004).

Many authors point to the informal process of arbitration to suggest that faith-based arbitration will likely continue even after the government's decision to make faith-based arbitration non-enforceable. "Faith-based arbitrations will still occur (no one can ban them, any more than one could ban a husband and wife from negotiating their separation agreement)" (The Globe and Mail, September 13, 2005).

For close to half of authors who recognize that dispute resolution using religious law occurred informally before the government's decision and will likely continue, these authors argue it is best to regulate the process to ensure the protection of vulnerable persons. Anver Emon in The Globe and Mail affirms "The idea of *sharia* arbitration brought with it the possibility of government regulation that could have ensured a measure of transparency, accountability and competence in adjudication, none of which currently exists in informal Islamic divorce procedures" (September 13, 2005). Similarly, Sheema Khan contends:

> "And for those who view this as a victory for the protection of women – think again. There are too many unqualified, ignorant imams making back-alley pronouncements on the lives of women, men and children. The practice will continue, without any regulation, oversight or accountability...we missed a golden opportunity to shine light on abuses masquerading as faith, and to ensure that rulings don't contradict the Charter of Rights and Freedoms" (The Globe and Mail, September 15, 2005).

However, the remainder of authors maintain that faith-based arbitration should be prohibited even if the process continues informally. Commenting on Boyd's recommendation to regulate arbitration to protect vulnerable persons, Lysiane Gagnon counters "This reasoning makes no sense. To take an extreme example, incest is committed every day behind closed doors. Should the state step in and draw up rules to limit the damage?" (The Globe and Mail, September 5, 2005). Similarly, Lynda Hurst in the Toronto Star argues "there was the threat Sharia courts will happen with or without government consent. No doubt. But so will crime. It doesn't mean the law should sanction it" (September 17, 2005).

The authors' opposition seems to be based on the symbolic importance of having the state regulate and permit a practice that some perceive to discriminate against women. "But by legitimizing the courts, Ontario would have sent a strong message to Muslims that shariah courts are equal to secular arbitration bodies, making it even more difficult for women to choose secular court over an arbitration within their own community" (The Windsor Star, September 22, 2005).

In this way, while a number of the authors agree that faith-based arbitration will likely continue informally, they remain divided as to how the state should best address this reality. For some, this is an opportunity for the state to regulate and implement important safeguards to ensure the protection of vulnerable members. For others, the government's allowance of faith-based arbitration would symbolize the state condoning a potentially unfair or discriminatory process.

DISCUSSION

An analysis of the media's portrayal of faith-based arbitration in Ontario finds common representations of women, immigrants and the Islamic faith, multiculturalism and religious freedom, and the justice system. In accordance with Ayelet Shachar's (2001, 2005) observation that multiculturalism is often portrayed as in conflict with women's equality, one of the major findings of this study is that the media depicted faith-based arbitration as a competition between equality rights and religious freedom (or multiculturalism). A second finding is that the media was misguided in defining the debate. This occurred in one of three ways; either as faith-based arbitration exceeding the boundaries of multiculturalism, as eroding the secular state, or as contradicting the principle of one law for all. A third finding was the media's frequent misrepresentation of the practice of faith-based arbitration, with much of the coverage being alarmist and uninformed with strong signs of Islamophobia and stereotypes of religious groups. The final section of the chapter will explore the future implications of the government's decision to limit faith-based arbitration in family law.

I. A Competition Between Women's Equality Rights and Religious Freedom

The findings from this study indicate that the media largely portrayed the issue of faith-based arbitration as a competition between women's rights and religious freedom (or multiculturalism), with many authors supporting individual equality rights over group rights. However, an important question is whether the government's decision to limit

arbitration is really a 'victory for women's rights' as much of the media claimed. Indeed, the legislative amendments may have unintended consequences for women. As well, the either-or dichotomy may fail to provide an effective and fair solution for either women's equality or cultural group rights.

1. Protecting vulnerable women

The protection of vulnerable persons who may face discrimination or oppression as a result of faith-based arbitration is a real and pressing concern. Although Boyd (2004) concluded in her evaluation that there was no evidence to suggest that women were being systematically discriminated against as a result of faith-based arbitration, she and other authors caution that safeguards and regulations are needed to ensure vulnerable persons, such as women and children, are protected from coercion and unfair decisions. Indeed, Boyd and others have warned that by relegating faith-based arbitration to the private sphere as the government did with its decision to limit such arbitration, the practice will continue but without the safeguards and oversight the government and justice system can provide (Dondy-Kaplan & Bakht 2006; Siddiqui 2007). In this way, the government's decision to limit faith-based arbitration seeks to address inequality and oppression in the public realm, but fails to provide meaningful protection for women within the private arena.

A large portion of the media's coverage of faith-based arbitration centred around protecting women and other vulnerable persons, however, there lacked an accurate examination of violence against women in these cultural groups. Although some authors pointed to countries where an interpretation of Islamic law allows women to be

stoned to death for adultery, the media failed to realistically consider how faith-based arbitration may influence or contribute to violence against women in cultural and religious communities.

Domestic violence is a problem to be addressed in all racial, ethnic, and cultural groups and is not specific to the communities participating in faith-based arbitration. However, the debate over faith-based arbitration failed to consider how culture and religion, family law and arbitration may intersect with violence against women. For example, cultural norms and religious doctrine may discourage women from religious and cultural communities from reporting abuse (Beaman-Hall & Nason-Clark 1997: 180). As well, research shows that some cultural values and traditions reinforce patriarchal values and promote negative attitudes towards women (Abu-ras 2007; Baobaid 2002; Ayyub 2000; Razack 1998). These attitudes may contribute to violence against women in these cultural communities. As well, male dominance may be further reproduced and reinforced through family law decisions based on these values and beliefs. Finally, sexist and oppressive cultural values and practices within these communities may be accepted or ignored by the greater society because of their traditional or cultural importance (Razack 1998: 58). An evaluation of how faith-based arbitration may intersect with violence against women is needed but is absent from the literature.

2. The unintended consequences

To illustrate how the government's decision may have unintended consequences, Haroon Siddiqui (2007) notes that the French law against hijabs (a

traditional Muslim headscarf) in schools is said to have pushed some Muslim girls from religious families into Islamic schools where they will likely have less interaction with the greater community and where public oversight of their rights may be reduced.

Similarly, Will Kymlicka (2007) believes that efforts should be made to keep children in public schools where there are necessary oversights and safeguards, even if this means accommodating conservative practices such as same-sex physical education classes. Kymlicka contends that "we can safely rely on the gravitational pull of liberal democratic institutions to diffuse a culture of rights over time, but only if people are in fact participating in those institutions" (2007: 153). In this way, children in school and women in family law disputes may be better protected if they remain under the supervision of the state and within mainstream society; segregating them to their cultural community will likely do little more than place them in a position of vulnerability and isolation.

3. Avoiding the either-or dichotomy of women's rights and religious freedom

The either-or representation of women's equality rights and religious freedom is not limited to faith-based arbitration. Indeed, this dichotomy is seen with concerns over women wearing the hijab and the segregation of women during religious worship. These issues, like faith-based arbitration, are often portrayed in a way that suggests a woman should choose between her equality rights and her membership in a cultural group.

The Government of Ontario and the media portrayed the decision to limit arbitration as a 'victory for women's rights'. However, the decision seems to have failed

to provide an effective or fair solution for either side. Many religious groups feel betrayed that the government has prevented them from resolving family law disputes according to their values, while women may be no more protected now since the practice will occur without the oversight of the state.

To address the controversy over faith-based arbitration, the Government of Ontario should seek to balance women's equality rights with cultural group rights instead of prioritizing one set of rights over another. Drawing on Shachar's (2005) joint governance approach, cultural group members should not be required to choose between their citizenship rights and membership in their cultural group. Instead, a process of shared jurisdiction between a cultural group and the state can provide individuals with the benefits and protection of each of these jurisdictions. In the case of faith-based arbitration, the parties involved should be free to choose how to resolve their disputes but still have the protections and oversight of the state, such as mandatory legal representation, screening for domestic violence and power imbalances, and allowing parties to appeal an arbitration award to the mainstream justice system. These measures will allow individuals to resolve disputes according to their cultural customs and beliefs without sacrificing their basic citizenship rights.

In addition, this approach may encourage cultural groups to adjust their practices and customs to be more inclusive and egalitarian. For example, if a group member has the recourse of the state and the mainstream justice system when resolving family law disputes, the cultural group may feel pressured to provide a process and decision that is egalitarian and fair to ensure the member's continued participation in arbitration. As well, as argued by Siddiqui (2007), external measures such as legal action or a group

losing their charitable tax status may persuade a cultural group to re-interpret practices and traditions to be more equal and respectful of women's rights.

Furthermore, a shared jurisdiction approach avoids the government's paternalistic imposition of an external solution. Instead, cultural group members can develop a solution that is unique and appropriate to their circumstances. This approach recognizes that group members are not identical; some members may be vulnerable to coercion or oppression, while other may be able to freely choose to participate or leave their cultural group. A shared jurisdiction approach can provide the necessary protections and oversight for vulnerable group members while allowing others to participate in their cultural customs and traditions.

II. Misrepresenting the Issue: Multiculturalism, Secularism and One Law for All

Faith-based arbitration in Ontario was largely represented by the media in three ways: as exceeding the limits of multiculturalism; as eroding the secular state; and as violating the principle of one law for all. Such representations, however, are misleading and as a result can lead to solutions that fail to adequately address the issue.

1. The boundaries of multiculturalism

The findings from this study show that much of the media portrayed faith-based arbitration as an issue of multiculturalism. However, Kymlicka (2005) argues that instead of a test-case for multiculturalism, the controversy over faith-based arbitration is an issue of alternative dispute resolution and should have been resolved accordingly.

Furthermore, Kymlicka (2007) notes that faith-based arbitration and other concerns over religious freedom and women's equality rights have little to do with multiculturalism as conflicts between the two will likely occur even without multicultural policies and programs. For example, the author points to controversial teachings in religious schools regarding sex education and homosexuality to show how conflicts between religious and equality rights often occur outside the jurisdiction of multiculturalism. Furthermore, Kymlicka notes that Canada's multicultural policies are founded upon and promote equality rights, and therefore should not be portrayed as opposing these rights.

Similarly, Siddiqui (2007) distinguishes between multiculturalism and religious freedom, affirming that gender equality in faith communities has little or nothing to do with multiculturalism but is instead an issue of religious freedom. In this way, while the media portrayed faith-based arbitration as exceeding the boundaries of multiculturalism, and labelled the practice as 'multiculturalism run amok', the controversy should be recognized and addressed as an issue of alternative dispute resolution and of religious freedom.

While it is certainly reasonable and even valuable to have discussions and debates about multiculturalism, it is important that such matters be appropriately defined. If not, issues like faith-based arbitration can negatively affect the public's perception of multiculturalism and lead to unnecessary changes to these policies. For instance, changes to Canada's multiculturalism policy will have no impact on the practice of faith-based arbitration, but framing the issue in this way could erode public support for accommodation and multiculturalism. Indeed, as the findings from this study

show, some of the media used the issue of faith-based arbitration to support limiting immigration, cultural accommodation and multiculturalism.

2. Secularism in Canada

A significant portion of the media expressed concern that allowing faith-based arbitration would erode the secular nature of Canada, with many pointing to the separation of church and state to justify their opposition. However, the media's assertion fails to recognize that the line between religion and state may already be blurred. If secularism is understood to be the separation of religion from government and public institutions, then Canada may not be truly secular in nature. For instance, Catholic schools in Ontario receive public funding, religious institutions are exempt from paying taxes, and the first line of the *Charter of Rights and Freedoms* reads "whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law". As well, the symbolic presence of religion in government can be seen with a number of provincial legislatures reciting a daily prayer and religious symbols decorating public institutions. While Canada is constitutionally secular without a state religion, the media's portrayal of faith-based arbitration as eroding secularism fails to acknowledge that the line between religion and state may already be blurred.

Perhaps secularism though is not the problem. Instead, the media, public and government may be more concerned with the separation of mosque and state, as opposed to church and state. As some of the media recognized, concerns over women's rights, the equal application of the law, and secularism in relation to faith-based arbitration only surfaced when the Muslim community chose to arbitrate decision

according to their faith, just as members of the Jewish, Christian and Ismaili community had been doing for decades.

A second consideration is whether a separation of religion and state should be sought in matters of family law, or if such an objective is even possible. Particularly with the issue of marriage, it is difficult to see how religion could be separated from such matters of family law. Indeed, should Canada strive to achieve this separation? If two people choose to marry according to their faith, with a leader of their religious community solemnizing the union, should religion be excluded if the couple chooses to divorce? Drawing on Shachar's joint governance approach, social arenas such as family law can be shared between the state and the cultural group so that both can govern different areas of family law such as marriage, divorce, and property division. Whether there should be a separation of religion from family law is an issue that deserves further study but is outside the scope of this research.

3. Equality under the law: One law for all

A significant portion of the media argued that the value or benefit of faith-based arbitration was superseded by the need to adhere to 'one law for all' and the equal application of the law. However, what many of these authors fail to consider is that differential treatment under the law already exists. For example, victim impact statements can influence sentencing, the *Criminal Code* contains special sentencing guidelines for Aboriginals, and domestic violence courts proceed with assault and related charges differently than the same offences outside a domestic situation. In this way, individuals and groups are treated differently under the law and the law is not

applied equally. It is misleading for the media, and in turn the government, to suggest that limiting faith-based arbitration will result in the equal application of the law and ensure one law for all.

An additional finding from this study is that a number of authors seemed to suggest that the equal application of the law means equality under the law; that having one law for all Ontarians will necessarily lead to justice and equality. However, these authors fail to distinguish between formal and substantive equality; namely, that while the government's decision may apply equally to all faiths and will only recognize family law decisions based on Canadian and Ontario law, this does not automatically result in equality or justice for the parties involved.

Kymlicka (2007) notes that to effectively address inequality and discrimination, more than formal changes to the law are needed. While anti-discrimination laws and equality provisions in the *Charter of Rights and Freedoms* are valuable for addressing inequality in public institutions, discrimination, inequality and oppression may still continue in private arenas, particularly in religious organizations and family matters where the courts have historically been reluctant to intervene (Kymlicka 2007). Instead, more substantive measures are needed to address issues of inequality and discrimination. As such, portraying 'one law for all' as necessarily leading to equality under the law is misleading and ignores the more entrenched forms of inequality and discrimination.

III. Misunderstanding Islam and Faith-Based Arbitration

Much of the media misrepresented the issue of faith-based arbitration. The alarmist and misinformed portrayal of the issue was pervasive, as were stereotypes and the negative representation of Muslims and Islam. As well, much of the media seemed uninformed about the practice of faith-based arbitration; for instance, the mistaken belief that faith-based arbitration would supersede Ontario and Canadian law was a recurring theme in the media coverage.

1. A focus on Islam and the Muslim community

One of the most significant findings of this study is the media's focus on Islamic tribunals and the Muslim community. The controversy over faith-based arbitration only arose when members of the Muslim community announced their intention of establishing a religious arbitration board, and the subsequent debate continued to focus on Muslims and the Islamic faith. The media's concentration on Islamic arbitration occurred despite the fact that the government and much of the media acknowledged that faith-based arbitration was occurring in other faith communities. However, it appears there was no critical examination of arbitration in Jewish or Ismaili communities; instead the media, public, and government seemed to assume that concerns over vulnerable women and the violation of equality rights did not apply to these communities.

How can this differential treatment be explained? The political context of the post-9/11 era is relevant. As well, that some countries use a violent and oppressive

interpretation of Islamic law may have also influenced the public and media's perception of Islamic tribunals. However, the media's representation of Islam and the Muslim community seems to suggest that Islamophobia shaped the debate over faith-based arbitration.

Janice Gross Stein (2007) contends that Canada's commitment to multiculturalism has been tested by concerns over terrorism, especially since the attacks of September 11, 2001. The racial profiling of minorities and the deportation and torture of Maher Arar are just some examples of how the perception and treatment of visible minorities, and Muslims in particular, has changed in recent years. The effect of the political climate on the arbitration debate can be seen with some of the media suggesting that faith-based arbitration is a form of Islamic fundamentalism that will spread an extremist political agenda in Canada. As well, the symbolic importance of the government announcing its decision to limit faith-based arbitration on September 11, 2005, the anniversary of the terrorist attacks in New York, must also be acknowledged.

2. The representation of Muslims and Islam

Much of the media's coverage of faith-based arbitration, particularly Islamic tribunals, was found to be alarmist and misinformed, with many of the authors relying on stereotypes to strengthen their opposition to faith-based arbitration. Catherine Morris (2004) asserts that much of the media coverage was misinformed, alarmist and negative in its portrayal of the issue, particularly the depiction of Muslims and Islam. The author contends that the media's representation of Islam and Islamic law imply "that Muslim women are all basically the same and all basically vulnerable to becoming

helpless victims of intimidation, coercion and bullying" (2006: 3). Similarly, in her evaluation of faith-based arbitration, Boyd (2004) notes that mainstream Canadian media was largely alarmist in its reporting.

Furthermore, Avigail Eisenberg affirms that the arbitration controversy relied on "implicit assessments of Muslim identity...largely based on misinformation and Western stereotypes of Islam rather than reliable information about shari'a, its character and role in Islam and its impact on Muslim women" (2006: 2). Eisenberg points to a lack of information and understanding about Islam and Islamic law as contributing to the fear mongering and inflated rhetoric that informed part of the public discussion. "Mainstream newspapers printed editorials, for example, which compared shari'a to incest, claimed that it endorsed chopping off people's hands, and that it treated women as chattel...This kind of rhetoric was allowed to fill the gap left by information about the nature of shari'a and its role in Islam" (Eisenberg 2006: 8).

As well, the media tended to portray Muslims uniformly, particularly Muslim women who were almost always portrayed as vulnerable and incapable of choosing for themselves whether to participate in faith-based arbitration. The media generally failed to distinguish between different communities within the Muslim faith, such as the more conservative and traditional groups from the more liberal communities. This representation overlooks the diversity of the Muslim faith and individuals within the Muslim community.

3. Religious literacy

Lois Sweet (1997) describes the concept of religious literacy as an educative process for teaching different religious beliefs and values. The author contends that religious literacy can teach children and others about religious differences and celebrate diversity; prejudice, stereotypes and misunderstandings can be addressed by learning about different religions.

Paul Bramadat and Edna Keeble (2007) believe that religious illiteracy can shape public perception and government policy. The authors point to recent attempts to amend the *Canada Elections Act* to require the visual identification of voters as an example of the consequences of religious illiteracy. The issue was framed as one of reasonable accommodation centred around whether Muslim women who cover their face with a veil should be required to visually identify themselves in order to vote. However, the issue did not arise because of demands for accommodation from the Muslim community. In fact, when the controversy began, a number of Muslim organizations publicly announced that special measures were not necessary and an acceptable solution would be for veiled Muslim women to show their face to a female official.

In this way, illiteracy about the Islamic faith complicated an issue that could have been resolved to the satisfaction of all parties. Instead, both the government's position and the media's coverage presented the issue as a minority group seeking an exemption from Canadian law because of a rigid adherence to their culture. Bramadat and Keeble (2007) believe that by learning more about different cultures and faiths,

religious literacy can reduce and help to resolve conflicts that arise between religious groups and the greater society.

In the context of faith-based arbitration, there was a lack of knowledge (or literacy) about Islam, faith-based arbitration, and the integration of immigrants and cultural groups. As previously discussed, the media largely misrepresented Islam, relying on stereotypes in their portrayal of the Muslim community. Secondly, there was, and remains, little knowledge about faith-based arbitration, such as the types of disputes most often resolved using faith-based arbitration, the law used to resolve disputes, and the parties' satisfaction and adherence to the decisions. Much of the media also confused the jurisdiction of faith-based arbitration, suggesting that the decisions would be exempt from Ontario and Canadian law.

Finally, the controversy over faith-based arbitration showed an illiteracy about multiculturalism, immigration and integration. As previously described, faith-based arbitration was misleadingly portrayed as an issue of multiculturalism, suggesting that changes in Canada's multiculturalism policy would affect such arbitration. As well, the media's focus on immigrants, particularly Muslim immigrants, overlooks Canadian-born citizens who participate in faith-based arbitration. Furthermore, immigrants and cultural communities were portrayed as rigid in their customs and practices and isolated from the greater society, suggesting that immigrants and cultural minority groups do not integrate and adapt to Canadian society.

However, Kymlicka (2007) contends that liberal multiculturalism can facilitate cultural groups adopting liberal values and participating in the greater society. The author terms this liberal expectancy and argues that immigrants typically become more

liberalized and adopt many of the values and practices of the dominant society into their own culture and identity. Kymlicka notes that in Europe there is little confidence that liberal expectancy is working, and as a result, there is pressure on the state to intervene in cultural communities, particularly Muslim communities, to test their adherence to liberal values. However, Kymlicka believes that Canadians tend to have greater confidence and experience with immigrants adopting liberal values, and as a result state intervention tends to only occur if there is harm as opposed to targeting specific cultures or religions.

In this way, the misinformation and alarmist rhetoric that shaped the debate over faith-based arbitration was largely misplaced. Many immigrants and cultural groups in Canada adopt liberal values and integrate into mainstream society. Concerns that faith-based arbitration would lead to the stoning of women or that Muslim fathers would automatically gain custody of children shows not only a misunderstanding of Canadian and Ontario law, but more importantly an illiteracy about Islam, faith-based arbitration, and multiculturalism.

IV. Looking to the Future

It is still unclear how the Ontario government's decision will affect faith-based arbitration and vulnerable women within cultural communities. While a number of authors and some of the media caution that such arbitration will continue despite the recent amendments, it is unknown how this arbitration will be conducted, with whom, and the type of disputes to be arbitrated.

The original intent of this study was to interview faith-based arbitrators to see how the *Family Statute Law Amendment Act* has affected the practice of faith-based arbitration. However, efforts to contact the arbitrators or even to obtain information about the practice were unsuccessful. Faith-based arbitration services are rarely publicly advertised and those that are were reluctant or unwilling to participate in the research. In an effort to learn more about the practice and to locate participants, cultural groups and organizations were contacted but many had not heard of faith-based arbitration, or did not know who or if there were arbitrators in their community. Of the fifteen individuals and organizations contacted for the research, only one arbitrator could be reached.

Currently, faith-based arbitration appears to be conducted in some Jewish, Muslim and Ismaili communities. However, from the attempts to contact arbitrators in these communities, it appears that faith-based arbitration may not be as prevalent or as organized as the media portrayed it to be. Indeed, that many of the religious organizations contacted had not even heard of faith-based arbitration seems to suggest that such arbitration is not a common or formal practice in many of the faith communities.

Recently, the Canadian Council of Muslim Women held an information session for family lawyers on how to address the vulnerabilities women from conservative Muslim communities may face in family law disputes. When the controversy first began in 2003, the Canadian Council of Muslim Women opposed faith-based arbitration over concerns that vulnerable women within the Muslim community could be coerced to participate in a process that may be unfair. The organization supported the

government's decision to make faith-based arbitration awards non-enforceable. However, the organization seems to recognize that some women in religious communities may still be vulnerable. In this way, there seems be a growing acknowledgement from organizations and academics on both sides of the debate that women in cultural communities may still be vulnerable to coercion and oppression in family law disputes despite changes to the law governing arbitration in Ontario.

Faith-based arbitration in other parts of Canada

Polly Dondy-Kaplan and Natasha Bakht (2006) have examined the legislation governing arbitration and family law in all Canadian provinces and territories to determine whether faith-based arbitration in family law is permitted in these jurisdictions. The authors conclude that Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, and Saskatchewan tacitly permit faith-based arbitration in family law because the legislation governing arbitration allows parties to select the law and principles to be used for arbitration, and the family law legislation does not explicitly prohibit such arbitration. Their examination of the legislation shows that faith-based arbitration in family law is not specific to Ontario. In fact, two other provinces have recently addressed whether to allow such arbitration for family law disputes.

In 2004, the Attorney General of British Columbia announced that he was unwilling to take any action to change the law to "give any special recognition of any set of religious laws" (Morris 2004: 6). While organizations opposed to faith-based arbitration perceived the announcement as a victory, the announcement appears to suggest that the status quo of allowing faith-based arbitration in British Columbia will

remain. The question of whether to allow religious tribunals recently arose in Quebec. Although the *Civil Code of Quebec* already prohibits the use of arbitration in family law disputes, in 2005 the provincial legislature passed a resolution opposing the establishment of Islamic tribunals (McGill 2005: 58).

For now, the issue of faith-based arbitration appears to be dormant in British Columbia and other parts of Canada, but it may only be a matter of time before an organization or individual such as Syed Mumtaz Ali and the Islamic Institute of Justice announce their intention to use existing laws and legislation to conduct faith-based arbitration for family law disputes. If this occurs, the provincial governments will need to decide whether to amend the legislation to restrict such arbitration, as was done in Ontario, or to continue to permit such arbitration, perhaps with the implementation of safeguards and oversight mechanisms as recommended by Marion Boyd.

CONCLUSION

The results of this study indicate that faith-based arbitration was misleadingly portrayed in the media, and that much of the coverage was alarmist and misinformed. That the issue was largely portrayed in the media as a competition between women's equality rights and religious freedom (or multiculturalism) is not confined to the controversy over faith-based arbitration. The representation of group rights as challenging individual rights, particularly equality rights, also occurs in debates over Muslim women wearing veils, the segregation of women in religious worship, religious leaders refusing to marry homosexuals, and other areas.

Framing the issue in this way suggests that individuals must choose between their membership in a cultural group and their basic citizenship rights. However, this study suggests that the either-or dichotomy of equality rights versus group rights can have unintended consequences. If cultural group members believe they must choose between these rights, this may further isolate an already marginalized population. Segregated to their cultural community, individuals may be in a position of greater vulnerability than had they remained part of mainstream society.

By accommodating religious and cultural practices, group members, most importantly vulnerable group members, may no longer feel that they must choose between the greater society and their cultural group. As a result, isolation to their cultural community may be reduced and state and public oversight can be strengthened. Therefore, debates over cultural accommodation and multiculturalism

should carefully consider the unintended consequences that may result from restricting cultural and religious customs and practices.

A second consideration resulting from this study relates to the protection of women in both the public and private sphere. While there may be symbolic value in the government's decision to limit faith-based arbitration, more substantive measures are needed to ensure women and other vulnerable persons are adequately protected. Indeed, the importance of substantive equality rights in both the public and private arena is not limited to faith-based arbitration, but may equally apply to discrimination based on gender, sexuality, religion, culture, age, and other factors. Whether the recent amendments to family arbitration have had the intended effect of protecting vulnerable persons is an important and necessary area of future research.

In addition, the issue of faith-based arbitration demonstrates how advocates of women's equality must acknowledge that women are not identical in their needs and their circumstances. For example, women from different religious and cultural groups may face different barriers from women of the dominant society. By overlooking the differences and unique circumstances of women, as occurred with the issue of faith-based arbitration, policies or solutions which seek to address women's rights may fall short. Instead, policies must be developed which address the unique circumstances of women from cultural and religious groups. Only when these differences are recognized can effective solutions be developed. One of the most important ways to develop effective policies is to include the voice of these women in discussions about women's equality. A failure to involve a range of women's views occurred in the debate over faith-based arbitration in which the voice of individuals and organizations opposed to

faith-based arbitration were represented while those who supported such arbitration, or suggested that women should be allowed to choose for themselves whether to participate, were marginalized and excluded from the media coverage.

This study has also examined how the media defined faith-based arbitration as an issue of multiculturalism. Debates over the boundaries of multiculturalism and the limits of accommodation are not limited to faith-based arbitration and appear frequently in the media. For example, after a provincial election in Quebec centred around *reasonable accommodation,* a committee was appointed to examine how cultural accommodation could be reconciled with Quebec culture and identity. As well, the issue of 'veiled voting' was a major issue of debate in the media and in Parliament in 2007. With increasing immigration and growing visible minority populations, debates over multiculturalism and cultural accommodation will likely continue to be a central issue of debate and controversy in government, the media and the public. While these discussions are often valuable, the controversy over faith-based arbitration demonstrates how stereotypes and racism can influence the debate and may ultimately alter the public and government's perception of the issue, particularly when these discussions centre around Islam and the Muslim community. As well, the controversy over faith-based arbitration illustrates how issues may be falsely attributed to multiculturalism, thereby misleadingly portraying the issue and potentially eroding support for multiculturalism and cultural accommodation.

In addition, this study has shown that the media can sometimes be uninformed in their reporting and misleading in their representation of an issue. For example, the inaccurate assumption that Muslim fathers will automatically gain custody of their

children under faith-based arbitration was often reported. Such inaccuracies may be especially problematic for an issue like faith-based arbitration where little is known about the practice. Indeed, this controversy illustrates the influence media can have on the way an issue is defined and understood, and the responsibility of journalists to report an issue in an informed, fair and balanced manner.

An additional consideration resulting from this study relates to alternative dispute resolution. Some of the academic literature and the media have discussed how the government's decision may affect the mainstream justice system, suggesting that the amendments could put a strain on the system if parties who may have once used faith-based arbitration now proceed through the courts to resolve family law disputes. Whether this occurs, or if parties continue to use faith-based arbitration, is an area which merits further research.

An evaluation of how the amendments to the *Arbitration Act, 1991* will affect other forms of family arbitration is also needed. The legislative amendments apply to all forms of family arbitration, and include requirements for standardized training for arbitrators, the screening for domestic violence and power imbalances, and mandatory legal advice for the parties involved. Further study on the implications of these requirements is necessary as they may prove to have a significant effect on the parties involved, family arbitrators, and alternative dispute resolution in general. For instance, requiring parties to obtain mandatory legal advice could place a financial strain on individuals and push them to settle family law disputes on their own. As well, standardized training may dissuade arbitrators from practicing because of the time and cost required to complete the training. Finally, such regulations may alter the basic

nature of alternative dispute resolution which generally seeks to provide a more informal and less costly process for resolving disputes.

A final consideration resulting from this study relates to an understanding of justice. While the media, interest groups, public and government were concerned with the equal application of the law and ensuring family law disputes were resolved according to Canadian law, there was little discussion of whether such measures necessarily result in justice. While some may believe that justice results from due process, an equal application of the law, and an unbiased or neutral decision maker, others may perceive justice in other ways, such as the inclusion of processes that reflect their values and beliefs. While it may be difficult for members of the greater society to understand why a woman would agree to a process which may award her less than she would receive from the mainstream justice system, there should be some acknowledgement that a different process does not mean it is wrong or unfair. Indeed, for individuals involved in faith-based arbitration and other alternatives to the justice system, the process in which the dispute is resolved may be more important than whether the award or settlement is gainful.

Ultimately, the findings from this study suggest that the issue of faith-based arbitration was not limited to a debate about alternative dispute resolution but encompassed a multitude of issues including equality rights, religious freedom, multiculturalism, equality of the law, secularism, immigration, and cultural accommodation. The government's decision to limit faith-based arbitration may fail to adequately protect women in cultural groups and will likely have far reaching implications and unintended consequences which merit additional research.

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APPENDIX A

CODING SHEET TEMPLATE

Article title	Date	Newspaper	Author	Type of article: Editorial, opinion, column	Support/ against

Themes	Arguments presented	Organizations cited	Issue around which it was printed	Other