

## RELIGIOUS ARBITRATION IN ONTARIO – MAKING THE CASE BASED ON THE BRITISH EXAMPLE OF THE MUSLIM ARBITRATION TRIBUNAL

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### 1. INTRODUCTION

In 2006, the province of Ontario banned arbitration of family law disputes under any body of laws except Ontario law, in part to prohibit arbitration under religious laws.<sup>1</sup> The province passed this legislation amidst political pressure from lobbyist groups to prevent the establishment of the Islamic Institute of Civil Justice (IICJ), a religious arbitration tribunal.<sup>2</sup> The province took this action despite its initial strong optimism towards religious arbitration of family law disputes.<sup>3</sup> In light of the province's

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<sup>1</sup> See Almas Khan, *The Interaction Between Shariah and International Law in Arbitration*, 6 CHI. J. INT'L L. 791, 792 (2006) (noting that Ontario Premier Dalton McGuinty sought to pass legislation to prevent arbitration of family law disputes under any law except Ontario law to prohibit religious law from being employed in arbitration); Eli Walker, *Don't Throw Out My Baby! Why Dalton McGuinty Was Wrong To Reject Religious Arbitration*, 11 APPEAL REV. CURRENT L. & L. REFORM 94, 94 (2006) (explaining that Premier McGuinty opined that religious arbitration could not be part of a cohesive multicultural society and sought to end the debate on whether Ontario would continue to permit binding arbitration of family law disputes).

<sup>2</sup> See Walker, *supra* note 1, at 98 (suggesting that despite the recommendations by former Ontario Attorney General Marion Boyd to permit arbitration, even in the religious law context, Premier McGuinty's decision relied upon feminist critiques of multiculturalism).

<sup>3</sup> See Jehan Aslam, Note, *Judicial Oversight of Islamic Family Law Arbitration in Ontario: Ensuring Meaningful Consent and Promoting Multicultural Citizenship*, 38 N.Y.U. J. INT'L L. & POL. 841, 842 (2006) (noting that Ontario was regarded as being

actions, I will argue that Ontario should permit religious arbitration to resolve family law disputes, based on public policy grounds, given the demonstrated success of the Muslim Arbitration Tribunal (MAT) in England. The MAT, a binding arbitration tribunal, has addressed numerous issues in England ranging from social and cultural integration, human rights and commercial activity.<sup>4</sup> I will use the recent successes of the MAT as a baseline for comparison and argue that Ontario should permit religious arbitration because of its potential to: (1) establish a religiously acceptable dispute resolution forum that is fair and sensitive towards gender issues; (2) establish an effective dispute resolution system that addresses the concerns of questionable voluntary submission and informed consent; (3) further integrate the Muslim minority into broader society; (4) enable Muslims to freely practice their religion in an informed and constructive manner; (5) increase Muslim participation in the judicial system; (6) create regulated judicial oversight of community dispute resolution that would otherwise be subject to communal manipulation; (7) address human rights issues that are otherwise unaddressed in Ontario behind the cloak of "cultural customs;" (8) create organic solutions to address unique social problems within the demographic while promoting social integration; and (9) facilitate economic and time efficiency, while reducing the taxing emotional impact of adversarial litigation.

In conducting this analysis, I will begin with a historical overview of the proposal for religious arbitration according to Islamic Law in Ontario. I will explore the proposal's original legal

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favorable to experimenting with a formal religious arbitration system and opining that it was unfortunate that Premier McGuinty reversed his initial position).

<sup>4</sup> The MAT has played an integrative role whereby Muslims are creating constructive legal solutions to dispute resolution with the broader British society that interfaces with both Muslim and non-Muslims alike. See Afua Hirsch, *Fears Over Non-Muslim's Use of Islamic Law to Resolve Disputes*, GUARDIAN, Mar. 14, 2010, <http://www.guardian.co.uk/uk/2010/mar/14/non-muslims-sharia-law-uk>; Online Video: Lord Philip Hunt, Minister for Justice, Remarks at the Muslim Arbitration Tribunal Panel on Liberation from Forced Marriages, Birmingham, England (July 20, 2008), [http://www.matribunal.com/initiative\\_s\\_lh.html](http://www.matribunal.com/initiative_s_lh.html) (endorsing the Muslim Arbitration Tribunal for addressing the issue of forced marriages in the United Kingdom, including its "Liberation from Forced Marriages" initiative); *Values and Equalities of MAT*, MUSLIM ARB. TRIBUNAL, <http://www.matribunal.com/values.html> (last visited Feb. 14, 2012) (highlighting the values of MAT and encouraging the co-existence of civil and personal religious laws).

basis, and the policy arguments articulated against it that led to the eventual legislative ban on arbitration of family law issues under any law except Ontario law. Through this process, I will demonstrate that religious arbitration in Ontario did not present any constitutional or other legal issues prior to the ban in 2006, and that the ban was motivated by baseless fears of Islamic law (Shari'a) and the lobbying of various organizations, despite positive recommendations from government-ordered investigative research. I will then explore the history of religious arbitration in the United Kingdom, the development of the Muslim Arbitration Tribunal, and its initiative on forced marriages in the United Kingdom. Using the Muslim Arbitration Tribunal as a baseline, I will demonstrate how religious arbitration in Ontario could provide substantial benefits to the Muslim community and Ontario as a whole. To do this, I will first analyze the concerns of IICJ opponents, in light of the Muslim Arbitration Tribunal example, and then proceed to suggest various positive public policy implications in Ontario if the Muslim Arbitration Tribunal model were to be applied.

## 2. RELIGIOUS ARBITRATION IN ONTARIO

Before one can critique Ontario's ban on religious arbitration effectuated under the *Family Statute Law Amendment Act* and advocate for religious arbitration, one must first become familiarized with the historical background of religious arbitration in Ontario. This requires a brief review of the origins of the Islamic Institute of Civil Justice, its purpose and legal validity prior to the religious arbitration ban. Understanding the political climate and abrupt actions of the provincial government in 2006 will clarify the original just basis for the IICJ and the unfounded grounds on which the proposal was quashed.

### 2.1. *Historical background of the Islamic Institute of Civil Justice and religious arbitration in Ontario*

The controversy over using religious law to resolve family law issues in Ontario arose when the Canadian Society of Muslims, led by Syed Mumtaz Ali, proposed the establishment of *Darul Qada*, or

Muslim arbitration board.<sup>5</sup> This proposed arbitration board, otherwise known as the Islamic Institute of Civil Justice, would provide mediation and arbitration services for a range of issues, including family law.<sup>6</sup> The IICJ was proposed to provide Muslims living in Ontario with the option to resolve personal law matters according to religious values and beliefs, while remaining within the framework of the Ontario judiciary system and integrated with the social fabric in Ontario.<sup>7</sup> Because Islam is viewed as a holistic way of life, with all aspects of social life being guided by religious values,<sup>8</sup> the IICJ provided a practical institution through which Muslims could stay true to their beliefs, regulate personal law in a manner with which they might be most comfortable, and exist within the broader legal system in Ontario.<sup>9</sup>

Syed Mumtaz Ali's proposal was presented amidst the social context of Muslims being one of the fastest growing minority groups in Ontario.<sup>10</sup> Recognizing that socio-political tensions hindered their integration into society in a post September 11, 2001

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<sup>5</sup> See James Thornback, *The Portrayal of Sharia in Ontario*, 10 APPEAL REV. CURRENT L. & L. REFORM 1, 5 (2005) (noting that Syed Mumtaz Ali's proposal for a Muslim arbitration board sparked public debate in the media and opposition from various interest groups).

<sup>6</sup> *Id.*

<sup>7</sup> Interview by Rabia Mills with Syed Mumtaz Ali, President, Canadian Society of Muslims, in Toronto, Ontario (Aug., 1995), <http://muslimcanada.org/pfl.pdf> (explaining that the goal of establishing arbitration of personal/family law according to Islamic Law is to enable Muslims to live according to their beliefs while working within the Canadian judicial system and broader social fabric).

<sup>8</sup> See generally FREDERICK M. DENNY, AN INTRODUCTION TO ISLAM 107-37, 195 (2d ed. 1994) (describing the basic tenets and beliefs of Islam as "a religion and a way of life, extending into all areas of the community's existence and activity"); JAMAL J. NASIR, THE ISLAMIC LAW OF PERSONAL STATUS 1 (1986) ("From the days of the Prophet [pbuh], Islam was not just a religion but a complete code for living, combining the spiritual and the temporal, and seeking to regulate not only the individual's relationship with God, but all human social relationships.").

<sup>9</sup> See Mills, *supra* note 7 (highlighting how the use of personal/family law is an "opportunity to live your Islam to the best extent possible in the Canadian democratic context").

<sup>10</sup> See Donald Brown, Comment, *A Destruction of Muslim Identity: Ontario's Decision to Stop Shari'a-based Arbitration*, 32 N.C.J. INT'L L. & COM. REG. 495, 510 (2007) (providing a history of the presence of Muslims in Canada and the population's subsequent development into the country's largest religious minority).

context,<sup>11</sup> Ali hypothesized that if Muslims could practice their religion by leveraging the legal system they would be able to constructively address pertinent communal issues and contribute to the broader social fabric.<sup>12</sup> As will be shown, it would encourage them to substantively enhance their participation in Ontario's democratic legal system. Despite the proposals potential for enhanced social integration, positive public policy effects, and legal validity (until 2006), the idea of Shari'a being applied through the Ontario legal system sparked strong opposition.<sup>13</sup> Misconceptions voiced by various organizations about human rights and women's rights issues under Shari'a<sup>14</sup> fueled strong

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<sup>11</sup> *Id.* at 495-96.

<sup>12</sup> *See id.* at 544 (explaining that religious arbitration in Ontario would allow Muslims to maintain their identity, yet be subject to procedural safeguards on conscionability).

<sup>13</sup> *See* MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION 5 (2004), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf> (explaining that fears about religious arbitration in Ontario, specifically regarding women's rights, were exacerbated); Thornback, *supra* note 5, at 7-8 (examining an article representative of the criticisms levied against the enactment of Shari'a law); Walker, *supra* note 1, at 98 (suggesting that despite the recommendations by former Ontario Attorney General Marion Boyd to permit arbitration, even in the religious law context, Premier McGuinty's decision relied upon feminist critiques of multiculturalism).

<sup>14</sup> *See generally* EDWARD W. SAID, COVERING ISLAM: HOW THE MEDIA AND THE EXPERTS DETERMINE HOW WE SEE THE REST OF THE WORLD 25-32 (1981) (characterizing the Western view of Islam as being backward and despotic through an Orientalist lens that bolsters a view of the West as rational, liberal, right-thinking, honest, and progressive, which has been perpetuated in Western media following the Iranian revolution and an assumption by the United States of the imperial role historically played by France and Britain); Khalida Tanvir Syed, *Misconceptions About Human Rights and Women's Rights in Islam*, 39 INTERCHANGE 245 (2008) (addressing common misconceptions about human rights and women's rights in Islam and the parallels between Shari'a and the United Nations' 1948 Universal Declaration of Human Rights). Negative sentiment regarding Shari'a in general has become so commonplace that Justice Frankfurter even insulted it as a legal system in his dissenting opinion in *Terminiello v. Chicago*, 337 U.S. 1 (1949) by saying, "[t]his is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency" and suggesting that Shari'a is an irrational and arbitrary approach to legal decision-making diametrically opposed to the formal, rational approach of the U.S. legal system. *Terminiello*, 337 U.S. at 11. This remark was made despite Islamic Law's striking similarity in terms of structure, subject matter, substance, and approach to Jewish law, which has historically been cited as persuasive authority in Western courts. *See* Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the Beth Din Precedent*, 25 J. L. & RELIGION 379, 379-80 (2010) (discussing the

opposition to the IICJ.<sup>15</sup> Amidst this negative public spotlight on the IICJ, Premier McGuinty sought advice from the Attorney General, Michael Bryant, and the Minister Responsible for Women's Issues, Sandra Pupatello.<sup>16</sup> These Ministers commissioned Marion Boyd, seasoned politician and former Attorney General, to explore the use of religious arbitration and its potential impact on vulnerable people.<sup>17</sup> Boyd's research (the *Boyd Report*) determined that religious arbitration was legal and safe for use in Ontario, provided that the tribunals made use of practical safeguards in their administration.<sup>18</sup> Although the Ontario government initially endorsed the proposal, pressure from various interest groups and organizations convinced Ontario Premier Dalton McGuinty to pass legislation blocking the proposed arbitration tribunal, despite the results of the *Boyd Report*.<sup>19</sup> In February 2006, Ontario's legislature passed the Family Statute Law Amendment Act, prohibiting family law arbitration from using anything other than Ontario law as the basis for arbitration.<sup>20</sup>

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Supreme Court's approving use of "Mosaic Law," based on the Torah, to bolster Western moral thought).

<sup>15</sup> See Aslam, *supra* note 3, at 850 (understanding the argument of critics to be that women lack the protection of a court's safeguards in a way that disparately impacts them and therefore violates section 15 of the Canadian Charter).

<sup>16</sup> See BOYD, *supra* note 13, at 4-5 (describing the strong concerns of Muslim women's groups as a force behind seeking advice from Bryant and Pupatello).

<sup>17</sup> See *id.* at 5 (noting that the report is the result of a 2004 mandate to Boyd from the Attorney General and the Minister Responsible for Women's Issues to explore the use of private arbitration in family and inheritance cases as well as the impact such practices may have on vulnerable people).

<sup>18</sup> See *id.* at 133-42 (recommending that the Arbitration Act should be continued to permit arbitration under religious law, provided that certain safeguards are maintained). Safeguards identified by Boyd included, among others, affording mediation and arbitration agreements the same protection under the Arbitration Act as "domestic contracts," procedural mechanisms for the setting aside of arbitration, and mediation agreements similar to domestic contracts. *Id.*

<sup>19</sup> See Walker, *supra* note 1, at 100-03 (discussing the Boyd report and explaining that the proposed arbitration panel would result in benefits while alleviating problems such as inadequate oversight of family arbitration).

<sup>20</sup> *Id.* at 104 (explaining that "the Ontario legislature passed the Family Statute Law Amendment Act to give effect to McGuinty's promise that there would be one law for all Ontarians").

## 2.2. Pre-2006 Legal Basis for Religious Arbitration in Ontario

The IICJ would have operated within the requirements of the Family Law Act and Arbitration Act of 1991.<sup>21</sup> After a careful analysis of the Family Law Act and Arbitration Act of 1991, it is clear that the IICJ was a legally valid method of resolving family law disputes outside of court. Further, the two pieces of legislation provided both procedural and substantive protections that enabled institutions like the IICJ to operate without compromising the rights and freedoms of parties who submitted to arbitration.<sup>22</sup>

Under the Family Law Act, couples may enter into domestic contracts, including marriage and separation agreements that define each spouse's respective rights relating to property, support, children, and "any other matter in the settlement of their affairs."<sup>23</sup> These contracts allow couples to enter into arbitration and mediation agreements.<sup>24</sup> Prior to 2006, under sections 2, 31, and 32 of the Arbitration Act, couples could submit to arbitration, and mutually agree upon an arbitrator and the law that such arbitrator would apply to resolve their disputes.<sup>25</sup> The IICJ would provide a formal institution that would arbitrate these disputes according to Shari'a law, and Ontario courts would enforce the resulting arbitration agreements.<sup>26</sup> Under section 37, arbitration awards would be binding unless changed on appeal or set aside by the

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<sup>21</sup> See Thornback, *supra* note 5, at 7 (explaining that "the *Family Law Act* and the *Arbitration Act* combine to allow spouses to contract out of the usual family law provisions with a minimal amount of judicial oversight").

<sup>22</sup> See Family Law Act, R.S.O. 1990, c. F.3 ss. 52-54; Arbitration Act, 1991, S.O. 1991, c. 17, §§ 2, 31, 32, 37; 45; 46(1) (outlining the various procedural mechanisms that protect parties in submitting to and conducting arbitration in Ontario); *Hercus v. Hercus* (2001), 103 A.C.W.S. (3d) 340, paras. 96-99, [2001] O.J. No. 534 (as a matter of public policy, "equally and fairly" can speak to substantive law matters, and is not limited to procedural fairness, in matters pertaining to family law disputes); Thornback, *supra* note 5, at 5-7 (detailing the IICJ's role as an arbitrator and mediator in family law).

<sup>23</sup> Family Law Act, R.S.O. 1990, c. F.3, §§ 52-54.

<sup>24</sup> See *id.* § 52 ("Two persons who are married to each other or intend to marry may enter into an agreement in which they agree on their respective rights and obligations . . .").

<sup>25</sup> See Arbitration Act, 1991, S.O. 1991, c. 17, §§ 2, 31, 32 (stating the applicability of various laws under different types of arbitration).

<sup>26</sup> See Thornback, *supra* note 5, at 5-6 (noting that couples can agree to submit to arbitration in a domestic contract).

court.<sup>27</sup> Questions of law may be appealed with permission of the court.<sup>28</sup>

In general, courts provide a high level of deference to arbitration awards.<sup>29</sup> However, there is indication that courts employ a lower level of deference on family law issues.<sup>30</sup> This lower level of deference is exercised through a limited number of grounds on which an arbitration award may be set aside. For example, courts exercise *parens patriae* jurisdiction in disputes involving children to alter arbitration awards.<sup>31</sup> For other issues in family disputes, a decision may be set aside if a party was not "treated equally and fairly," which encompasses more than just procedural fairness.<sup>32</sup> This can encompass situations where the arbitrator was unfairly biased against one party or an arbitration decision was obtained by fraud.<sup>33</sup>

Together, the Family Law Act and Arbitration Act of 1991 created a sensible legal framework through which the IICJ could have operated. The two acts provided grounds through which parties could appeal to alternative dispute resolution mechanisms and settle disputes contractually. The two acts enabled procedural and substantive mechanisms to protect all parties' rights, and gave the judiciary an oversight and appellate role of review to ensure those rights were maintained.

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<sup>27</sup> See Arbitration Act, 1991, S.O. 1991, c. 17, § 37 (providing that "an award binds the parties, unless it is set aside or varied").

<sup>28</sup> See *id.* § 45 ("[A] party may appeal an award to the court on a question of law with leave . . .").

<sup>29</sup> *Duguay v. Thompson-Duguay* (2000), 7 R.F.L. (5th) 301 at para. 31, [2000] O.T.C. 299, [2000] O.J. No. 1541 [*Duguay* cited to R.F.L.] (explaining that courts are reluctant to interfere with arbitration decisions and substitute their own judgment in matters resolved by private parties).

<sup>30</sup> See *id.* para. 41 (noting that under the Children's Law Reform Act, the court retains "its *parens patriae* jurisdiction to intervene when necessary in the best interests of children").

<sup>31</sup> *Id.* (same).

<sup>32</sup> See Arbitration Act, 1991, S.O. 1991, c. 17, § 46(1) (stating the reasons an arbitration agreement may be set aside, such as fraud or legal incapacity of one the parties); see also *Hercus v. Hercus* (2001), 103 A.C.W.S. (3d) 340, paras. 96-99, [2001] O.J. No. 534 (finding that as a matter of public policy, "equally and fairly" can speak to substantive law matters and is not limited to procedural fairness, in matters pertaining to family law disputes).

<sup>33</sup> See Arbitration Act, 1991, S.O. 1991, c. 17, § 46(1) (stating the grounds on which a court may set aside an award).



2.3. *Constitutional Concerns Regarding Religious Arbitration Are Unfounded as Charter Scrutiny Does Not Apply to Private Actions*

Some interest groups have argued that arbitration of family law issues under religious law creates constitutional problems.<sup>34</sup> In particular, critics such as the National Association of Women and the Law (NAWL) have argued that under Section 15(1) of the Canadian Charter of Rights and Freedoms, religious arbitration of family law disputes is unconstitutional.<sup>35</sup> Section 15(1) provides that where the Charter is applicable, “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”<sup>36</sup> Critics use this standard in conjunction with Section 28 of the Charter to argue that religious arbitration of family law and inheritance matters violates the Charter because it does not explicitly protect the equality of rights of women and children.<sup>37</sup>

Despite this argument, it is clear that religious arbitration of family and inheritance issues create no constitutional issues. First, under Section 32(1) of the Charter, the Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

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<sup>34</sup> See BOYD, *supra* note 13, at 71–73 (summarizing various arguments by commentators as to why religious arbitration of family law issues raises constitutional issues).

<sup>35</sup> *Id.* at 31.

<sup>36</sup> Canadian Charter of Rights and Freedoms § 15(1), Part I of The Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c.11 (U.K.).

<sup>37</sup> See BOYD, *supra* note 13, at 71–72 (expressing the opinion that “agreeing to be bound by an arbitrator’s decision . . . not subject to Charter scrutiny,” but noting that critics leverage Section 15(1) and Section 28 to raise an argument that religious arbitration of family law disputes is unconstitutional).

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.<sup>38</sup>

Section 32(1) creates a distinction between public actions and private actions. In essence, Section 32(1) restricts the Charter's application to state action under statute, common law, and through third parties who are given power to act by governmental agencies.<sup>39</sup> The Supreme Court of Canada's standard to determine whether there is a sufficient degree of government control in public action through third parties requires "both an institutional and a structural link between a public body and the government . . ."<sup>40</sup> Such a link exists "where the government delegates power to a non-government actor or agency."<sup>41</sup> The state confers power that it is granted by statute or common law.<sup>42</sup> However, if the decisions that guide day-to-day operations of an institution are not controlled or made by the government, the Charter does not apply, despite authority being granted by statute.<sup>43</sup> As former Attorney General Marion Boyd explains in the *Boyd Report*, private actions are not subject to Charter scrutiny:

Conversely, institutions . . . which derive their existence and powers from statute, are nonetheless deemed not to be controlled by government, if decisions that guide the day-to-day operations of these organizations are not taken by government. Therefore, in spite of being public institutions, in the case of hospitals and universities, or simply being regulated by statute, in the case of corporations, these entities are not bound by the *Charter*. On the other hand, as mentioned above, if the body is

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<sup>38</sup> Canadian Charter of Rights and Freedoms § 32. Part I of The Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c.11 (U.K.).

<sup>39</sup> See BOYD, *supra* note 13, at 69–71 (explaining that Section 32 both expands and limits the scope of the Charter's application).

<sup>40</sup> *Id.* at 70.

<sup>41</sup> *Id.*

<sup>42</sup> See *id.* at 69 ("[A]nything that constitutes government action, including legislation and regulation, is subject to the Charter. This includes action taken under the common law.").

<sup>43</sup> See *id.* at 70 ("Where a public service is being performed independently of government control the required link is not present and the *Charter* will not apply.").

implementing a specific government policy, then *Charter* scrutiny will ensue.<sup>44</sup>

Such institutions include schools, hospitals, universities and corporations.<sup>45</sup>

Arbitration decisions fall within the realm of private actions.<sup>46</sup> They are private because the decisions reflect the private, personal relationships of the parties involved, and the arbitrator derives his or her authority directly from the consent of the parties agreeing to arbitrate, and not from the Arbitration Act.<sup>47</sup> There is no state compulsion to arbitrate.<sup>48</sup>

Given that religious arbitration would be subject to the requirement of voluntariness, and would not constitute a public action, religious arbitration decisions would not be subject to *Charter* scrutiny.<sup>49</sup> This does not mean that arbitrations would not be subject to judicial review in limited contexts, as earlier explained, but no constitutional issues are created by permitting religious arbitration of family law issues.

One should note that this justification hinges on a requirement of voluntariness. The voluntariness requirement begs the question of whether, in practice, individuals would voluntarily assent to religious arbitration, or be forced into arbitration through various communal or other pressures. Although this is a valid concern, it will be shown that the concern easily dissolves in the context of a

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<sup>44</sup> *Id.* (citing *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624 (Can.); *Lavigne v. OPSEU*, [1991] 2 S.C.R. 211 (Can.); *McKinney v. Univ. of Guelph*, [1990] 3 S.C.R. 229 (Can.); *Stoffman v. Vancouver Gen. Hosp.*, [1990] 3 S.C.R. 483 (Can.)).

<sup>45</sup> *See, e.g., id.* (explaining that these institutions are not bound to the *Charter*, despite being public institutions, due to their independence from public influence on operations and daily decision making).

<sup>46</sup> *Id.* at 72 (indicating that arbitrations are private rather than public actions, because they address private relationships between parties and because arbitrators derive authority from each party's consent, rather than from public institutions).

<sup>47</sup> *See id.* (observing that the Arbitration Act neither compels people to arbitrate nor confers authority upon arbiters).

<sup>48</sup> *See id.* ("Muslims in Ontario retain . . . the right to choose the traditional justice system . . . for the resolution of their disputes. If they choose not to avail themselves of the services of an arbitrator who applies Islamic legal principles, the law does not compel them to do so.").

<sup>49</sup> *See id.* (clarifying that religious and family law arbitrations decided pursuant to the Arbitration Act would not be subject to the *Charter*).

religious arbitration tribunal administrated with the proper procedural guidelines and substantive considerations to protect and foster voluntary and informed consent. As issues of voluntariness will be addressed shortly, one can easily conclude that religious arbitration and the IICJ were completely justified and permitted in Ontario prior to 2006, raising strong suggestions that the ban on religious arbitration in Ontario was motivated by non-legal considerations.

### 3. THE FEAR OF SHARI'A AND SUPPOSED PUBLIC POLICY OBJECTIONS TO ARBITRATION UNDER RELIGIOUS LAW IN ONTARIO

#### 3.1. *Specific Objections to the IICJ and Religious Arbitration of Family Law Disputes*

Various interest groups that were outspoken against the IICJ proposal voiced numerous concerns against arbitration of family or personal law matters under Shari'a.<sup>50</sup> These concerns included inequity of power between genders in the context of religious arbitration, lack of informed consent to arbitration, sociocultural pressures limiting voluntary consent, and others.<sup>51</sup> Each of these concerns is addressed by the functional model of the Muslim Arbitration Tribunal in the United Kingdom and can easily be addressed in Ontario given the MAT's example. But before presenting the MAT's solutions to each of these concerns and how they may be implemented in Ontario, it is worth exploring each concern on its own merit to better understand the baseless grounds for objecting to religious arbitration in Ontario, as well as to appreciate the sophistication of the MAT in the United Kingdom.

##### 3.1.1. *Issue #1: Inherent Inequity Between Men and Women in Religious Arbitration*

The most common objection to the use of religious arbitration was the supposed inherent inequity between men and women in most religious contexts, and the resulting imbalance of power in

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<sup>50</sup> See *infra* Sections 3.1.1–3.1.4 (analyzing the common arguments of gender inequality, lack of voluntary submission, lack of informed consent, and specific issues pertaining to foreign spouses).

<sup>51</sup> See, e.g., BOYD, *supra* note 13, at 48–49 (quoting a variety of submissions from societies attempting to explain the practical implications of “religiously based arbitration”).

the arbitration setting.<sup>52</sup> Further, the risk of jeopardizing the wellbeing of children involved in disputes was a common concern.<sup>53</sup> The Canadian Council of Muslim Women, an outspoken group against the IICJ, summarized these concerns by depicting a biased and patriarchal model of Muslim family law:

It is generally accepted that men are the head of the state, the mosque and the family. The responsibilities outlined for males is that they will provide for their families and because they spend of their wealth, they have the leadership to direct and guide the members of their families, including the women . . . . Most proponents of Muslim law accept that men have the right to marry up to four wives;<sup>54</sup> that they can divorce unilaterally;<sup>55</sup> that . . . [i]f the wife wants a divorce she goes to court, while the husband has the right to repudiate the union without recourse to courts.<sup>56</sup>

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<sup>52</sup> See *id.* (explaining that amidst numerous solicitations for opinions on religious arbitration in Ontario, the most frequent objection was that of gender inequity in religious contexts, with notable opinions given by the Women's Legal Education and Action Fund and the Canadian Council of Muslim Women).

<sup>53</sup> See *id.* at 48 (“[W]hat is at stake is control and support of women and children.”) (quoting the Submission of Legal Education and Action Fund (LEAF) (Sept. 17, 2004)).

<sup>54</sup> But it must be kept in mind that Shari'a, as used to refer specifically to Islamic law, is not a single legal code, but rather a pluralistic legal system with multiple schools of thought and sophisticated legal techniques to engage in legal reasoning and interpretation ranging from linguistics, hermeneutics, grammar, and sophisticated statutory interpretive techniques (*usul al-fiqh*). Legal rulings are derived from the *Quran* and *Sunnah* (sayings and life example of the Prophet Muhammad (*pbuh*)), through strategies including judicial opinion (*ijtihad*), analogy (*qiyas*), adoption by others (*istihsan*) and consensus (*ijma'*). See generally FAZLUR RAHMAN, *ISLAM* 100-01 (1966) (providing an overview of the meaning of Shari'a). For example, although it is traditionally held that chapter 4, verse 3 of the *Quran* allows a Muslim man to marry up to four women only if he can treat them justly, some challenge this position because chapter 4, verse 129 states that a man will never be able to deal fairly and justly between women. As a result, polygamy has been banned in Tunisia. See NASIR, *supra* note 8, at 26 (noting that not all Muslim jurists hold that polygamy is permitted in Shari'a).

<sup>55</sup> See generally DAWOUD S. EL ALAMI & DOREEN HINCHCLIFFE, *ISLAMIC MARRIAGE AND DIVORCE LAWS OF THE ARAB WORLD* 22-32 (1996) (explaining the various methods of divorce under Islamic law).

<sup>56</sup> BOYD, *supra* note 13, at 48 (quoting the Submission of the Canadian Council of Muslim Women of July 23, 2004).

These issues collectively were meant to suggest that not only is Shari'a law unfair to women and children and perpetuates a patriarchal system of family law, but that it also impedes the safety of women and children where domestic abuse may be a factor in family disputes.<sup>57</sup>

3.1.2. *Issue #2: Lack of Voluntary Submission to Religious Arbitration*

Apart from issues regarding gender inequity, some have questioned whether the parties involved in religious arbitration of family law issues actually voluntarily consent to it.<sup>58</sup> Many interest groups, such as the Women's Legal Education and Action Fund (LEAF), argue that women may be forced into arbitration due to a diverse set of pressures.<sup>59</sup> These pressures include conformity to culture and avoidance of resolving personal matters in public forums, pressure to submit to what is believed to be a religious dispute resolution mechanism so that one may consider themselves, and be considered by their community, a righteous and practicing Muslim, pressure from family and community members, and fear of social exclusion.<sup>60</sup>

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<sup>57</sup> See Caryn Litt Wolfe, Note, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 *FORDHAM L. REV.* 427, 460 (2006) (exploring various concerns regarding gender inequality, such as women being disadvantaged by "religious laws and the cultural views of male-female relationships," in faith-based arbitration).

<sup>58</sup> See *id.* at 463-64 (questioning whether religious arbitration will protect women amidst social and familial pressure, given that courts have been reluctant to identify these pressures as forms of duress); see also BOYD, *supra* note 13, at 50-51 (stating that women may feel compelled to submit to arbitration due to economic, social and cultural pressures).

<sup>59</sup> See BOYD, *supra* note 13, at 50 (detailing the view of specific advocacy groups that suggests that cultural, religious, and "fear of social exclusion" pressures will be prevalent).

<sup>60</sup> See BOYD, *supra* note 13, at 50-51 (listing the cultural, and religious pressures that women would experience); Maria Reiss, Note, *The Materialization of Legal Pluralism in Britain: Why Shari'a Council Decisions Should Be Non-Binding*, 26 *ARIZ. J. INT'L & COMP. L.* 739, 764 (2009) (considering that "[the] outcomes are especially worrisome when considering the pressure Muslim women receive from their family and community"); Wolfe, *supra* note 57, at 461, 463-64 (highlighting that sociocultural factors can restrict a woman's ability to make voluntary choices to submit to arbitration for fear of reprimand or social exclusion).

In many Muslim immigrant communities in Canada, there is a desire to be integrated into the broader community.<sup>61</sup> Amidst this desire, immigrants are often subject to communal and familial pressure to resolve family disputes either through extended family intervention or the assistance of respected community members.<sup>62</sup> These methods of dispute resolution are often insensitive to an individual's rights and can impose patriarchal biases, but are tolerated for the sake of community acceptance or inter-familial relationships.<sup>63</sup> Thus, according to this theory, many Muslims, especially women, may be considered bad adherents to their faith, socially shunned and excluded from society, or alienated from family.<sup>64</sup> A person may even be subjected to economic hardship if

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<sup>61</sup> See Brown, *supra* note 10, at 510-513 (explaining that the Muslim population in Canada, which consists largely of immigrants and second generation Canadians, is confronted with the challenge of attaining religious freedom from a social framework that incorporates activities that are beyond the limits of Islam). Some Muslims feel pressured to integrate with broader society at the expense of various religious beliefs or practices. Thus, while many Muslims do continue to perform many of the five "pillars of faith" to varying degrees, many struggle to find a balance. Further, although the Muslim population in Canada does cultivate a strong sense of Canadian identity, some Muslims continue to experience racism or discrimination based on their religious identity and believe their identity is under attack by social pressures. *Id.*

<sup>62</sup> See *Shari'a in the West – Whose Law Counts Most?*, ECONOMIST, Oct. 16, 2010, at 61, 62 (explaining that many Muslims still submit to non-binding arbitration often administered informally, which defeats the purpose of the ban on arbitration of family law issues in Ontario).

<sup>63</sup> See BOYD, *supra* note 13, at 50 (highlighting that women may fear that if they do not submit to religious arbitration, they may be considered a bad adherent to their faith or endure both social and economic reprimand in the context of insulated culturally defined communities); MUSLIM ARBITRATION TRIBUNAL, REPORT—LIBERATION FROM FORCED MARRIAGES 5-9, available at <http://www.matribunal.com/downloads/MAT%20Forced%20Marriage%20Report.pdf> (noting various methods through which individuals may be forced into marriages due to cultural influence, and various rituals and traditions that are common in cultural belief); Wolfe, *supra* note 57, at 461, 463-65 (finding that women suffer greatly as a result of multiculturalism).

<sup>64</sup> See BOYD, *supra* note 13, at 50 (noting that the Legal Education and Action fund suggests that arbitration is not chosen freely in numerous instances); MUSLIM ARBITRATION TRIBUNAL, *supra* note 63, at 5-9 (detailing the background of forced marriages and the cultural, religious, and familial pressures associated with the practice); Wolfe, *supra* note 57, at 461, 463-64 (describing the pressures women feel to pass on cultural and religious ideologies whereas even an accusation of disloyalty may be enough to force them into religious arbitration).

his or her economic life depends on close association with his or her faith-based community.<sup>65</sup>

3.1.3. *Issue #3: Lack of Informed Consent to Religious Arbitration*

Critics also have argued that the parties to arbitration, especially women, may not be fully informed about their rights under Ontario law and the legal implications of arbitration.<sup>66</sup> People may simply be unaware of their rights under Ontario family law and are coerced into arbitration.<sup>67</sup> Further, when submitting to arbitration, the parties may not be aware of the binding effect of arbitration agreements, how to procedurally contest an arbitration agreement, or the benefits and costs of alternative methods of dispute resolution.<sup>68</sup> In conjunction with a patriarchal community and dangerous social implications, this lack of knowledge can severely impact the well-being of women and children.<sup>69</sup> It can subject women to abusive domestic relations resulting from unfair arbitration decisions, and put children at risk of physical abuse as well as psychological trauma resulting from domestic violence.

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<sup>65</sup> See BOYD, *supra* note 13, at 50 (quoting a September 17, 2004 submission of the Legal Education and Action Fund which states that, "there are many women whose economic lives depend on close association with their faith-based community or cultural group"); MUSLIM ARBITRATION TRIBUNAL, *supra* note 63, at 8 (noting that parents may threaten revocation of inheritance or financial support if their child does not consent to an arranged marriage).

<sup>66</sup> See BOYD, *supra* note 13, at 52 (citing to respondents opposed to the use of religious based arbitration who suggest that insufficient understanding of the law prevents women from fully comprehending the consequences of choosing between religious law and the courts); Wolfe, *supra* note 57, at 464 (noting that many women who are pressured into religious arbitration are not familiar with the legal system in Ontario and their accompanying civil liberties and civil rights).

<sup>67</sup> See BOYD, *supra* note 13, at 52 (arguing that many respondents who were opposed to the use of religious based arbitration did not understand the interaction between Canadian and religious practices).

<sup>68</sup> See *id.* (arguing that the majority of respondents opposed to the use of religiously based arbitration maintained that "women in relatively closed Muslim communities" cannot fully know the consequences of proceeding under Canadian Law versus religious arbitration); Wolfe, *supra* note 57, at 464 (observing that many who consent to religious arbitration are unaware of their entitlement to a lawyer).

<sup>69</sup> See Wolfe, *supra* note 57, at 464 (stating that informational lapses cause unknowing deprivation of rights).



### 3.1.4. Issue #4: Religious Arbitration Involving a Foreign Spouse

Finally, many commentators object to the use of religious arbitration for disputes involving marriage contracts that were entered into in other countries.<sup>70</sup> It is not unusual for recent Muslim immigrants, or second generation Canadians under pressure from their parents and community and against their own will, to wed a Muslim from their country of origin.<sup>71</sup> This practice is common for several reasons: it helps maintain family or social ties, it is a cultural practice, and it is a simple mechanism to enable immigrants to attain citizenship in Canada.<sup>72</sup>

There are several risks commonly associated with such marriage contracts being subject to religious arbitration. First, the inclusion of arbitration clauses in these marriage contracts may not be properly understood by the foreign spouse due to language barriers or lack of familiarity with Ontario law and may cause the foreign spouse to compromise his or her rights in Ontario at the outset of the marriage.<sup>73</sup> Second, religious arbitration clauses in these contracts can force a foreign spouse into family dispute resolution methods where arbitrators have a gender bias.<sup>74</sup> Faced with social and familial pressures, foreign spouses may find themselves in marriages and domestic circumstances that they

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<sup>70</sup> See BOYD, *supra* note 13, at 50 (explaining that it is not uncommon for a Canadian spouse to return to their country of origin for marriage).

<sup>71</sup> See *id.* at 49 (noting that the Review heard of many instances “where women were contracted to marry without their knowledge and then could not invalidate the contract”); MUSLIM ARBITRATION TRIBUNAL, *supra* note 63, at 10 (noting that a similar trend exists in England regarding marrying foreign spouses, often times under communal or family coercion).

<sup>72</sup> See BOYD, *supra* note 13, at 49-50 (discussing arranged marriages and their role in Muslim tradition); MUSLIM ARBITRATION TRIBUNAL, *supra* note 63, at 5-11 (highlighting some of the rationales behind forced marriages, such as tradition and securing citizenship for one party).

<sup>73</sup> See BOYD, *supra* note 13, at 50 (noting that a woman may be bound by her consent to religious arbitration in her marriage contract even though she did not participate in its creation); Wolfe, *supra* note 57, at 464 (asserting that communities are “so insular and self-sufficient that members may not be aware of all of their rights”).

<sup>74</sup> See BOYD, *supra* note 13, at 50-51 (discussing a September 22, 2004 submission of Karen Graham that argues that some religious and community leaders are male traditionalists who hold tightly to outdated and inaccurate beliefs that conflate cultural custom with religious law); Wolfe, *supra* note 57, at 460-61 (stating that “religious cultures often perpetuate the idea that women are subordinate and inferior creatures”).

never wished to be a part of, nor could have foreseen.<sup>75</sup> Given that these marriage contracts involve recent immigrants who often lack a social support system of family and friends to cope with abusive domestic issues in a new country, religious arbitration can limit immigrants in their recourse to get out of the marriage without being stigmatized for opting for a non-religious dispute resolution mechanism.<sup>76</sup> Finally, it can force Canadian citizens into remaining in marriages that they did not want to enter, and limit their rights amidst abusive spouses or grim family circumstances.<sup>77</sup>

### *3.2. General Objections to Arbitration of Family Law Disputes*

Apart from specific objections to religious arbitration under Shari'a, various interest groups raise several arguments against arbitration of family law disputes, generally. First, critics raise constitutional issues against arbitration of family law disputes under the Charter and Arbitration Act.<sup>78</sup> This argument was sufficiently dismissed, as earlier explained. Apart from the legality issue, some also voiced a concern for the balance of power in alternative dispute resolution of family law matters, especially where domestic violence may subject women to dangerous circumstances.<sup>79</sup> The National Association of Women and the Law (NAWL) raises the concern that arbitration agreements entered into at the time of marriage may limit a spouse's options where an issue arises years later and the spouse would prefer to resolve an unforeseen issue through the court system.<sup>80</sup> Gender-biased

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<sup>75</sup> See BOYD, *supra* note 13, at 50-51 (describing the pressures culture can place on compliance with forced marriages).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* (noting that individuals may be stuck in marriages to keep up appearances where the marriage was entered into for immigration purposes, lack of support or guidance when encountering abuse, or pressure from familial or communal relations).

<sup>78</sup> See *id.* at 71-72 (discussing the limited scope and applicability of the Charter). See generally Natasha Bakht, *Family Arbitration Using Shari'a Law: Examining Ontario's Arbitration Act and Its Impact on Women*, 1 MUSLIM WORLD J. HUM. RTS. 1 (2004) (outlining what an argument might look like to challenge religious arbitration on constitutional grounds as a violation of the Charter).

<sup>79</sup> See Bakht, *supra* note 78, at 2-3 (noting that personal relationships and circumstances can change drastically from the time of entering into marriage, which may make compulsory arbitration undesirable as a matter of public policy to protect women in abusive or otherwise unwanted marriages).

<sup>80</sup> See *id.* at 3.

alternative dispute resolution mechanisms and sociocultural pressures compound these dangers.

NAWL also takes concern with the public/private dichotomy which enables the government to effectively “clean its hands” of any responsibility for the state of the ‘private’ world in the name of judicial efficiency, at the cost of personal rights of individuals in family disputes.<sup>81</sup> Alfred Mamo, a lawyer from London, Ontario who frequently acts as an arbitrator, summarizes the concern:

One big deficiency with the arbitration process is that it does not need to adhere to the traditional concept of open justice, which ensures a just result through transparency, public scrutiny and accountability. This lack of openness can easily lead to the vulnerable being drawn into a process that is not procedurally or substantively in keeping with the principles of fundamental justice. Given the private nature of the process, especially in cases where there is no appeal from the arbitrator’s decision, the process and the substantive result are both immune from scrutiny.<sup>82</sup>

Further, A. Burke Doran, a common arbitrator in Ontario, explains that many of the procedural and substantive advantages of private solutions like arbitration may be lost where the busy schedule of the arbitrator and delays in the presentation of evidence prolongs the length of the arbitration process.<sup>83</sup> In these cases, he opines, arbitrators could be inclined to be overly patient or reluctant to issue harsh resolutions.<sup>84</sup> Thus, the public/private dichotomy may cleanse the hands of the courts at the expense of the public.

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<sup>81</sup> See Susan Boyd, *Introduction* to CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW AND PUBLIC POLICY 3 (Susan Boyd ed., 1997) (explaining that through a process of re-privatization of public institutions that are used to ensure the rights and economic status of the underprivileged in society, the disadvantaged become further disadvantaged by depoliticizing the disparities that arise through privatization).

<sup>82</sup> BOYD, *supra* note 13, at 34 (quoting the September 16, 2004 submission of Alfred Mamo).

<sup>83</sup> *Id.* (contrasting the premise that arbitration is time and cost efficient with issues that can arise to eliminate these efficiencies in practice).

<sup>84</sup> *Id.* (noting that in private arbitration settings, neutral parties acting as arbitrators or mediators may allow emotions, general reluctance of harsh penalties, or other factors that would not arise in public court to make an impact on arbitration decisions). This can be problematic in ensuring just outcomes, especially where arbitration decisions are binding and non-appealable.

#### 4. RELIGIOUS ARBITRATION IN THE UNITED KINGDOM

Religious arbitration in the United Kingdom addresses all of the issues that opponents to the IICJ in Ontario raise, and even presents unique benefits such as remedying sociocultural pressures involving domestic violence and forced marriages, and enabling Muslims to participate and contribute in the broader legal system. Additional benefits include the social integration of Muslims in Western societies, protection of people's human rights, and the establishment of judicial regulation and review of otherwise entirely private and unregulated community derived solutions. However, to fully appreciate how current religious arbitration in the United Kingdom accomplishes this and presents a model example for Ontario, one must become familiar with the history of Islamic arbitration in the United Kingdom and the development of the Muslim Arbitration Tribunal. Reflecting upon the origins of a demand for religious arbitration in the United Kingdom and the subsequent initiatives that the MAT developed,<sup>85</sup> it will become clear that the issues raised by critics in Ontario are easily dealt with.

##### 4.1. *Evolution and Legality of Islamic Arbitration in the United Kingdom*

##### 4.1.1. *Origin of Islamic Arbitration in the United Kingdom and the Growing Demand for Binding Religious Arbitration*

Shari'a arbitration has evolved and developed into an effective alternative dispute resolution mechanism in secular countries, amidst growing demand for Shari'a based solutions to disputes. A recent survey by the Centre for Social Cohesion found that forty percent of Muslim students in the United Kingdom wanted Shari'a

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<sup>85</sup> See *infra* Section 4.2 (giving an overview of the sophisticated procedural guidelines of the MAT that address issues such as gender biases, informed consent, voluntariness, and language barriers); *infra* Section 4.3. (providing an account of proactive initiatives on human rights abuses in the context of forced marriages); *infra* Section 5 (analyzing how the MAT's model encourages social integration by empowering the Muslim community through community derived justice within the broader legal system, and uniquely addresses the sociocultural issues of the Muslim community by leveraging well informed legal professionals and religious scholars placed within a sophisticated, regulated dispute resolution mechanism).

law introduced there.<sup>86</sup> In the United Kingdom, Muslims have submitted to informal “Shari’a Councils” to resolve their matters for roughly thirty years.<sup>87</sup> These tribunals originally operated out of mosques, and were not considered legally binding.<sup>88</sup> They normally sat in private, with a single Islamic scholar presiding.<sup>89</sup> They provided an outlet for people to resolve issues within their community according to their own values.<sup>90</sup> The disputants typically had control to select the authority to which they appealed, but recourse was still available in the legal system because the decision of the arbitrator was non-binding.<sup>91</sup> These non-binding decisions were merely accepted if the parties agreed and were intended to be an amicable method for parties to resolve disputes on religious terms without implicating a legal remedy.<sup>92</sup> Apart from these Shari’a councils, many Imams and Islamic scholars who were not a part of a council provided similar services in private either from their homes or at local mosques, but on a smaller scale than compared to Shari’a councils.<sup>93</sup> This was a

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<sup>86</sup> See Matthew Hickley, *Islamic Sharia Courts in Britain are now ‘Legally Binding’*, MAIL ONLINE, Sept. 15, 2008, <http://www.dailymail.co.uk/news/article-1055764/Islamic-Shari'a-courts-Britain-legally-binding.html> (reporting that Shari’a courts have operated unofficially for years and are gaining momentum).

<sup>87</sup> See Laureve Blackstone, *Courting Islam: Practical Alternatives to a Muslim Family Court in Ontario*, 31 BROOK. J. INT’L L. 207, 218-19 (2005) (describing both advantages and disadvantages of Muslim arbitration tribunals); The Interfaith Legal Advisors Network, Muslim Arbitration Tribunal, (Paper – Third Meeting, Centre for Law and Religion, Cardiff University, Jan. 19, 2009), available at <http://www.law.cf.ac.uk/clr/networks/Muslim%20Arbitration%20Tribunal.pdf> (explaining that prior to the emergence of the MAT in the United Kingdom, Shari’a arbitration started off as unregulated, non-binding councils that were typically administered privately by community leaders either at a local mosque or from a private home, and originated as a community-derived method of dispute resolution shaped by the values of the community members).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> See Reiss, *supra* note 60, at 769 (acknowledging that non-binding religious arbitration not only allows people to resolve disputes on their own terms, but they may do so efficiently and in a less adversarial environment compared to litigation, which tends to have a less taxing impact on individuals and their personal relationships).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> See The Interfaith Legal Advisors Network, *supra* note 87 (describing the Muslim Arbitration Tribunal and how matters are dealt with, who the decision makers are, and the policies that govern).

noticeably different model from the IICJ where arbitration decisions would be binding, but subject to judicial review.

By 2007, British Muslims had established informal Shari'a courts to handle a variety of domestic disputes.<sup>94</sup> These informal courts were leveraged by Muslims because the results were enforced by mutual agreement by the parties, and were much more efficient in terms of time and money.<sup>95</sup> Further, the process was more amicable than the trial process, relieving the adversarial nature of trial, which helped preserve personal relationships between the parties.<sup>96</sup>

4.1.2. *Giving People Choices – Binding Islamic Arbitration is Established in the United Kingdom*

In 2007, Shaykh Faiz Siddiqi established the Muslim Arbitration Tribunal.<sup>97</sup> Shaykh Siddiqi followed the Jewish example of the Beit Din rabbinical court in the United Kingdom, a binding religious court that derived its power from the Arbitration Act of 1996 for over 100 years.<sup>98</sup> He established the MAT as a legally binding arbitration tribunal operating under religious laws by similarly seeking jurisdiction under the Arbitration Act of

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<sup>94</sup> See Reiss, *supra* note 60, at 768 (highlighting that these courts delivered non-binding decisions, but provided an outlet through which Muslims could resolve disputes through decisions based on Islamic ideologies while realizing cost efficiencies and more amicable trial process as opposed to litigating in civil court).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See Abul Taher, *Revealed: UK's First Official Sharia Courts*, SUNDAY TIMES (London) Sept. 14, 2008, <http://www.timesonline.co.uk/tol/comment/faith/article4749183.ece> (noting that the rulings of the courts are enforceable with the full power of the judicial system through county courts or the High Court, unlike prior tribunals that depended on voluntary compliance by submitting parties).

<sup>98</sup> *Id.* (noting that the British Arbitration Act permits both the Jewish Beit Din courts and the Muslim Arbitration Tribunal to function under British law); see also Reiss, *supra* note 60, at 765 ("Britain has allowed religious Jewish courts . . . to hand down decisions based on Jewish ideologies for over one hundred years."); see generally Bambach, *supra* note 14 (noting that the Beit Din and Jewish law has often held persuasive authority and respect in Western legal systems, and that the Beit Din derives its legal validity in the United Kingdom under the Arbitration Act of 1996).

1996.<sup>99</sup> The Arbitration Act of 1996 was created to allow parties to “obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense . . . [by] . . . agree[ing] how their disputes are [to be] resolved, subject only to such safeguards as are necessary in the public interest . . . .”<sup>100</sup> The England and Wales Court of Appeals explained in *Halpern v. Halpern* that “arbitral tribunals can and indeed should decide disputes in accordance with the law chosen by the parties” under the Arbitration Act of 1996.<sup>101</sup> By operating as a tribunal, and being subject to the procedural and substantive provisions set forth in the Arbitration Act of 1996, MAT decisions are enforceable under British law.<sup>102</sup> As the MAT explains on its website, it “will operate within the legal framework of England and Wales thereby ensuring that any determination reached by MAT can be enforced through existing means of enforcement open to normal litigants.”<sup>103</sup> The arbitration awards are enforceable under British law but subject to judicial review.<sup>104</sup>

The MAT’s idea received powerful support from the comments of the Archbishop of Canterbury, Dr. Rowan Williams, and Lord Phillips, the Lord Chief Justice, who acknowledged both the legal validity of the Shari’a courts and the integrative role they could play within the British legal system.<sup>105</sup> The Archbishop, in a

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<sup>99</sup> See Reiss, *supra* note 60, at 761–62 (noting that the MAT may hand down binding decisions as long as they do not break fundamental tenants of human rights).

<sup>100</sup> See Arbitration Act, 1996, c. 23, § 1(a)–(b) (U.K.) (restating and improving the laws pursuant to an arbitration agreement).

<sup>101</sup> *Halpern v. Halpern*, [2007] EWCA (Civ) 291, [37] (Eng.).

<sup>102</sup> See Arbitration Act, 1996, c. 23, § 42 (U.K.) (describing enforcement of tribunal orders as akin to legally binding court decisions).

<sup>103</sup> MUSLIM ARB. TRIBUNAL, <http://www.matribunal.com/> (last visited Feb. 14, 2012) (demonstrating that the MAT establishes its legitimacy under the existing British legal system, and seeks to integrate with the judiciary to allow parties to attain judgments that are consistent with their religious beliefs, but at the same time leverage the protections and values of the broader British society and legal system).

<sup>104</sup> See PROC. RULES MUSLIM ARB. TRIB. § 23, available at [http://www.matribunal.com/procedure\\_rules.html](http://www.matribunal.com/procedure_rules.html) (describing the procedural rules under the MAT); see also Arbitration Act, 1996, c. 23, §§ 66–71 (U.K.) (detailing the rules surrounding challenges and appeals of awards).

<sup>105</sup> See Lord Phillips, Lord Chief Justice of Eng. and Wales, Equality Before the Law, Speech at the East London Muslim Centre (July 3, 2008), [http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj\\_equalit](http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_equalit)

speech at the Royal Courts of Justice in London, commented that the incorporation of Shari'a into the legal landscape in the United Kingdom was "unavoidable" and called for "transformative accommodation" through a "scheme in which individuals retain the liberty to choose the jurisdiction under which they will seek to resolve certain carefully specified matters . . . . This may include aspects of marital law, the regulation of financial transactions and authorized structures of mediation and conflict resolution . . . ." <sup>106</sup> The Lord Chief Justice further supported the Archbishop's comments by explaining that:

It was not very radical to advocate embracing Sharia Law in the context of family disputes, for example, and our system already goes a long way towards accommodating the Archbishop's suggestion. It is possible in this country for those who are entering into a contractual agreement to agree that the agreement shall be governed by a law other than English law . . . . There is no reason why principles of Sharia Law, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution. It must be recognised, however, that any sanctions for a failure to comply with the agreed terms of the mediation would be drawn from the laws of England and Wales. So far as aspects of matrimonial law are concerned, there is a limited precedent for English law to recognise aspects of religious laws, although when it comes to divorce this can only be effected in accordance with the civil law of this country. <sup>107</sup>

In essence, the Archbishop and Lord Phillips understood the growing demand for the services of the MAT, and noted how the MAT could establish a symbiotic relationship with the judiciary in

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y\_before\_the\_law\_030708.pdf (articulating that Shari'a law is a legitimate basis for voluntary mediation); Rowan Williams, Archbishop of Canterbury, Archbishop's Lecture - Civil and Religious Law in England: A Religious Perspective (Feb. 7, 2008), <http://www.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective> (expressing the need for "transformative accommodation" to give people choices within the legal system to apply their religious beliefs privately, while engaging with the broader British legal system).

<sup>106</sup> Williams, *supra* note 105.

<sup>107</sup> Phillips, *supra* note 105, at 9.



regulating justice through the British system, reflective of society's values, while empowering Muslims to generate grassroots solutions to community issues through alternative dispute resolution.

Given the negative public perception of Shari'a law, the comments by the Archbishop and Lord Chief Justice sparked uproar within the United Kingdom.<sup>108</sup> Many accused the Archbishop of proposing a separate legal system to implement Shari'a in the United Kingdom.<sup>109</sup> He received sharp criticism for his comments as many misinterpreted his suggestion of social integration and peaceful dispute resolution through "transformative accommodation"<sup>110</sup> to mean separate legal systems, undermining the rule of British law in the state.<sup>111</sup> Amidst the negative publicity though, the Shari'a courts have flourished, resolving a wide range of disputes and creating inroads for integrating the Muslim community with the broader British legal and social community.<sup>112</sup>

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<sup>108</sup> See Sameer Ahmed, Recent Developments, *Pluralism in British Islamic Reasoning: The Problem with Recognizing Islamic Law in the United Kingdom*, 33 YALE J. INT'L L. 491, 491 (2008) (commenting that after the Archbishop of Canterbury's comments, "'all hell broke loose'") (quoting Noah Feldman, *Why Shariah?*, N.Y. TIMES, Mar. 16, 2008, § MM (Magazine), at 46.).

<sup>109</sup> See *id.* (quoting the director of a private British religious organization, who stated, "[i]f Muslims want to live under sharia law then they are free to emigrate to a country where sharia law is already in operation"); Ruth Gledhill & Philip Webster, *Archbishop of Canterbury Argues for Islamic Law in Britain*, TIMES (London), Feb. 8, 2008, at 1 (suggesting that the Archbishop's comments were intended to support segregating the legal system and permitting Muslims to implement their own law, which would undermine the British legal system).

<sup>110</sup> The term "transformative accommodation" became a buzz phrase after the Archbishop of Canterbury's remarks. According to Shaykh Siddiqi, this phrase means "give people choices" in terms of private arbitration, and was not meant to indicate separate legal systems for various communities, undermining the British legal system or creating the potential for law forum shopping. See Online Video: Shaykh Faiz Siddiqi, Founder, Muslim Arbitration Tribunal, Muslim Arbitration Tribunal Press Conference on Liberation from Forced Marriages (June 12, 2008), <http://video.google.com/videoplay?docid=7263090663949480890> [hereinafter Siddiqi Press Conference].

<sup>111</sup> See Gledhill & Webster, *supra* note 109 (highlighting instances of opposition across the board to the Archbishop's recommendations).

<sup>112</sup> The MAT has played an integrative role with the broader British society whereby Muslims are creating constructive legal solutions to dispute resolution that interfaces with both Muslims and non-Muslims alike. See Hirsch, *supra* note 4 (contrasting the increase in non-Muslim participation in MAT proceedings with the growing backlash against the system); *Types of Cases That We Deal With*,

#### 4.2. *The Muslim Arbitration Tribunal (MAT) – an Overview*

Although informal Shari'a Councils existed in the United Kingdom for more than thirty years with sustained demand, many Muslims in the United Kingdom felt the need for a more formal, structured approach to dispute resolution according to Shari'a within the context of the British legal system.<sup>113</sup> In particular, Muslims felt a tribunal was necessary to address some of the shortcomings of the informal Councils, namely, lack of binding effect of resolutions, informal or varying council procedures, and need for arbitrators who are objectively qualified in both Islamic and British law, as opposed to informal community leaders.<sup>114</sup>

With this desire emerging from within the Muslim community in the United Kingdom, Shaykh Faiz Siddiqi established the Muslim Arbitration Tribunal in 2007<sup>115</sup> with the stated view:

We believe in the co-existence of both English law and personal religious laws. We believe that the law of the land in which we live is binding upon each citizen, and we are not attempting to impose Shariah upon anyone. Shariah does however have its place in this society where it is our personal and religious law.<sup>116</sup>

The MAT can exercise jurisdiction as an arbitration tribunal over all civil and personal religious matters, except civil divorce proceedings (the MAT can handle the religious component of divorce to remedy "limping marriages"<sup>117</sup>), child custody, and

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MUSLIM ARB. TRIBUNAL, <http://www.matribunal.com/cases.html> (last visited Feb. 16, 2011) (listing among the disputes arbitrated by the MAT: forced marriage, domestic violence, family matters, commercial and debt, inheritance, and mosque disputes).

<sup>113</sup> See The Interfaith Legal Advisors Network, *supra* note 87 (noting that the Muslim community desired a system sophisticated enough to integrate within the British legal system which permits arbitrations to have binding effect under the Arbitration Act of 1996).

<sup>114</sup> *Id.*

<sup>115</sup> See Taher, *supra* note 97 (tracing the foundation of the MAT).

<sup>116</sup> *Values and equalities of MAT*, *supra* note 4.

<sup>117</sup> "Limping marriages" are terminated marriages in civil law, but not yet considered terminated under religious law. Limping marriages can have detrimental effects on Muslim women, who cannot remarry until their marriages are religiously annulled, and who have no recourse to state law because they have been civilly divorced. This places them at the mercy of their estranged spouses, held captive by husbands who coerce them into accepting unfavorable terms on

criminal matters.<sup>118</sup> The majority of the issues that are submitted to the MAT can be categorized as cases of forced marriage, domestic violence, family disputes, commercial and debt disputes, inheritance disputes, and minor community nuisance.<sup>119</sup>

This model has demonstrated notable success and growth. Seven locations have been established in London, Bradford, Manchester, Birmingham, Nuneaton, Glasgow, and Edinburgh.<sup>120</sup> As of 2008, the network of tribunals adjudicated approximately one hundred cases, and has experienced continued growth since its formation.<sup>121</sup> Notably, in 2009, due to the perception that the Tribunal is equitable, efficient, and effective to resolve disputes, there was a fifteen percent increase in the number of cases brought to the Tribunal which involved or were filed by non-Muslims regarding commercial or debt disputes involving Muslims.<sup>122</sup>

The Tribunal has established extensive procedural rules through which it is governed.<sup>123</sup> While a detailed explanation of the rules and procedures is beyond the scope of this Comment, some general details are worth noting. The Tribunal itself must consist of at least one scholar of "Islamic Sacred Law" and one barrister or solicitor of England and Wales.<sup>124</sup> Parties may apply to the High Court for judicial review of the decisions of the Tribunal.<sup>125</sup> Parties may appoint representatives, and submit detailed oral, documentary, or other evidence relevant to a case.<sup>126</sup>

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financial compensation, property, and child custody. Moreover, limping marriages can create complicated social, communal and religious issues where individuals are uncertain about the religious status of their marriages and family relationships, and are subjected to communal scrutiny in closely-knit, culturally centered communities. For a discussion of limping marriages and the aforementioned complications, see Ahmed, *supra* note 108, at 492–93.

<sup>118</sup> See The Interfaith Legal Advisors Network, *supra* note 87 (noting the MAT has no jurisdiction over civil divorce, child custody, and criminal matters).

<sup>119</sup> *Types of Cases That We Deal With*, *supra* note 112.

<sup>120</sup> Taher, *supra* note 97.

<sup>121</sup> Hickley, *supra* note 86.

<sup>122</sup> See Hirsch, *supra* note 4 (noting that more than twenty non-Muslims chose to arbitrate at the MAT tribunals in 2009).

<sup>123</sup> See generally PROC. RULES MUSLIM ARB. TRIB. (providing the MAT's procedural requirements).

<sup>124</sup> PROC. RULES MUSLIM ARB. TRIB. § 10.

<sup>125</sup> PROC. RULES MUSLIM ARB. TRIB. § 23; Arbitration Act, 1996, c. 23, §§ 66-71 (U.K.) (providing procedures for challenging arbitration awards and procedures).

<sup>126</sup> PROC. RULES MUSLIM ARB. TRIB. §§ 13–14.

Parties are entitled to detailed notice of hearings and hearings are held in private unless both parties wish for a public hearing, subject to the Tribunal's discretion to limit public attendance for the betterment or protection of the parties involved.<sup>127</sup> Detailed procedures exist for requesting a hearing, filing documents, withdrawing a case, and adjournment, amongst other common formal dispute resolution procedures.<sup>128</sup> The Procedural Rules of Muslim Arbitration Tribunal outlines all of the procedural guidelines.<sup>129</sup>

#### 4.3. MAT Initiative on Forced Marriages

##### 4.3.1. *Forced Marriages in the United Kingdom and the Flawed Forced Marriage (Civil Protection) Act 2007*

Forced marriages, namely marriages that involve some form of coercion to force one or both parties into a marriage, are a growing problem in the United Kingdom, particularly within the British-Asian Muslim community.<sup>130</sup> Statistics show that approximately seventy percent of marriages that take place between a British-Asian citizen and a spouse from the Asian Sub-Continent involve an element of coercion against the will of the British citizen.<sup>131</sup> Governmental studies estimate that this occurs in three hundred cases per year or more.<sup>132</sup> As a result, the United Kingdom enacted the Forced Marriage (Civil Protection) Act 2007.<sup>133</sup> This piece of

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<sup>127</sup> PROC. RULES MUSLIM ARB. TRIB. §§ 12, 17.

<sup>128</sup> See generally PROC. RULES MUSLIM ARB. TRIB. (detailing the requirements and procedures of the MAT).

<sup>129</sup> *Id.*

<sup>130</sup> See Forced Marriage (Civil Protection) Act, 2007, c. 20, § 1 (Eng.) (providing protection for "individuals against being forced to enter into marriage without their free and full consent" in England, Wales, and Northern Ireland); MUSLIM ARBITRATION TRIBUNAL, *supra* note 63, at 4–9 (providing a comprehensive overview of the sociocultural factors that create pressure on young adults to enter into forced marriages and proposing a practical solution through collaboration of the MAT with the British legal system); Dominic Casciani, *Forced Marriage Plea to Schools*, BBC NEWS, July 2, 2009, [http://news.bbc.co.uk/2/hi/uk\\_news/8129466.stm](http://news.bbc.co.uk/2/hi/uk_news/8129466.stm) (recognizing the growing number of forced marriages that are being detected by teachers who observe changes in the behavior of students in school).

<sup>131</sup> See MUSLIM ARBITRATION TRIBUNAL, *supra* note 63, at 9.

<sup>132</sup> *Id.*

<sup>133</sup> See Forced Marriage (Civil Protection) Act, 2007, c. 20, § 1 (Eng.) (protecting individuals from marriages that are "without their free and full

legislation creates a mechanism through which the victimized British citizen may apply to the courts for a protective order to avoid the forced marriage.<sup>134</sup>

The Forced Marriage (Civil Protection) Act 2007 was subject to the criticism that although it is a step towards addressing the problem, community pressures, and procedural and individual autonomy issues, may impede the purpose of the Forced Marriage (Civil Protection) Act 2007.<sup>135</sup> The Act requires the victim to apply for the protective order, even amidst pressure from his or her family and community, and within the context of cultural custom, issues of social status, and familial ties.<sup>136</sup> Factors creating such coercion include:

1. Marriages that have been agreed [to] at the birth of the children must be fulfilled irrespective of later circumstances and desires of the parties;
2. Marriages that are dictated by the caste of the families;
3. Marriages that are decided by historical local friendships of members of the family;
4. Marriages that are the product of familial necessity i.e. the desire to settle a poorer wing of the family;
5. Marriages that are decided by the material aspirations and advancements of the parents;
6. Marriages that are linked to political aspirations of the parents either within the family or the community;
7. Marriages that solidify the strength of one parent's side of the family over the other;
8. Marriages that protect the interests of the parents in their ancestral agricultural farmland, by the family of the other spouse; [and]

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consent" and "protecting individuals who have been forced to enter into marriage without such consent").

<sup>134</sup> *Id.* § 63A.

<sup>135</sup> *Forced Marriages*, MUSLIM ARB. TRIBUNAL, [http://www.matribunal.com/cases\\_forced\\_marriages.html](http://www.matribunal.com/cases_forced_marriages.html) (last visited Feb. 5, 2012) (noting that placing the burden on a potential victim to voluntarily submit to a court will likely prevent remedial action from being taken due to family and communal pressure, and thereby asserting that increasing victims' confidence in a suitable forum necessitates a more customized solution that operates within the context of British Muslim communities).

<sup>136</sup> See Family Law Act, 1996, c. 27, § 63C (Eng.); *Forced Marriages*, *supra* note 135 (questioning whether victims will be confident enough to apply for a protective order given the risk of facing acts of recrimination by family members).

9. Marriages that are primarily aimed at fulfilling the care/needs of the parents.<sup>137</sup>

At the risk of recrimination by family and community members, many victims are simply coerced not to apply for the protective order.<sup>138</sup> As a result, the solution presented by the Forced Marriage (Civil Protection) Act 2007 often fails to achieve its purpose because individuals are coerced or frightened into refraining from applying for a protective order at the risk of social, familial, and occasionally economic reprobation.

4.3.2. *The MAT Initiative on Forced Marriages – Working with the Legal System Through Community Derived Solutions*

The MAT took the initiative to work with the British legal system to properly address the shortcomings of the Forced Marriage (Civil Protection) Act 2007.<sup>139</sup> The MAT initiative analyzes the sociocultural and legal aspects of marriages within the community and creates a framework to address the confidence and coercion issues of victims.<sup>140</sup>

Where a victim is forced to marry a spouse from abroad, the MAT identifies a fundamental problem: There is no point during the immigration process at which authorities can detect a forced marriage due to immigration procedures or pressures forcing victims to pretend that forced marriages are indeed consensual.<sup>141</sup> The MAT's solution is summarized as follows:

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<sup>137</sup> See MUSLIM ARBITRATION TRIBUNAL, *supra* note 63, at 5–6 (listing common factors that contribute to coercing individuals into forced marriages).

<sup>138</sup> *Id.* (explaining the strongly entrenched cultural beliefs and traditional values that explicitly or implicitly prevent a party in a forced marriage from voluntarily applying for a protective order).

<sup>139</sup> *Id.* at 4 (stating that the MAT is the appropriate institution to work with the government in addressing the issue of forced marriages, given its knowledge of Shari'a, expertise in understanding sociocultural pressures on individuals, and its authoritative role both within the Muslim community and the judicial system).

<sup>140</sup> *Id.* at 13–18 (noting that the MAT addresses coercion in forced marriages by leveraging a socio-culturally and religiously-knowledgeable institution that can exert a counter-balancing pressure within society without triggering social reprimand, given the community-derived basis of its solution).

<sup>141</sup> *Id.* at 13 (discussing the MAT proposal for voluntary submission whereby a British citizen can choose to provide oral deposition that there was no coercion in the decision to marry).

The British citizen sponsoring a foreign spouse to settle in the UK will be invited by **voluntary submission**, to give an oral deposition to the Judges of MAT, satisfying them that the marriage he/she entered into was neither forced nor coerced. The British citizen will not be forced to give this voluntary deposition as a legal requirement. The voluntary deposition, if successful, would result in a written declaration from the Judges of MAT, that they were satisfied that the marriage entered into was without any force or coercion. The British citizen can then use this declaration to support the application of the foreign spouse to settle in the UK. If however, the foreign spouse fails to produce such a declaration from MAT or any other appropriate evidence, then it would be open for the ECO at the entry clearance point, to draw such inferences deemed appropriate as to the status of the marriage.<sup>142</sup>

The key to this proposal turns on two factors: (1) the voluntariness requirement and (2) the expertise of qualified MAT judges to inquire about the nature of a potential marriage, in light of social and cultural customs.<sup>143</sup>

The voluntariness requirement is crucial for two reasons. First, it does not encroach on any individual freedoms that force people into arbitration, and it is easily integrated into the existing legal framework regarding marriage and immigration.<sup>144</sup> Second, an abstention to get a declaration from the MAT serves as a “red flag” to immigration officials or courts hearing forced marriage cases under the Forced Marriage (Civil Protection) Act 2007, creating a procedural mechanism to separate legitimate marriages from ones of coercion.<sup>145</sup>

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<sup>142</sup> *Id.*(emphasis original).

<sup>143</sup> *Id.* at 13–14 (explaining that by creating a mechanism through which individuals can freely voice their concerns about a forced marriage without fear of social reprimand, and by constructing that mechanism on a foundation of legal experts trained in both religious and secular law, the MAT addresses the core fatal flaws of the Forced Marriage (Civil Protection) Act 2007).

<sup>144</sup> *Id.* (stating that the MAT solution simply builds on the current legal process by creating a mechanism to make the existing legal process more informed about the true circumstances of a possible forced marriage).

<sup>145</sup> *Id.* (explaining how the voluntary submission requirement could operate to more readily identify forced marriages, which could provide government officers and the judiciary with an additional tool to detect forced marriages).

The expertise of qualified MAT judges is also crucial for several reasons. First, it enables inquiries to take place with the level of intimate knowledge required to identify coerced marriages.<sup>146</sup> The judges selected for these inquiries include both British lawyers and religious scholars who are familiar with both the cultural customs of the Asian community as well as the broader multicultural British society in which second generation British citizens socialize.<sup>147</sup> Thus, they are well equipped to interview potential victims by asking inquisitive questions and understanding the subtleties to a potential victim's sociocultural and personal circumstances, while understanding both the religious and legal implications for the interviewee. Second, the MAT's social position within the British-Asian Muslim community removes any social backlash against potential victims because they are submitting to a socially acceptable and respected forum.<sup>148</sup>

As a result, two key goals are accomplished. First, cases of forced marriage can be easily identified: either the interviewee will openly confess to being pressured into a marriage because the interviewee is in a socially safe forum, or in instances of a more hesitant interviewee, the judges will have the expertise to tease out

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<sup>146</sup> *Id.* at 14 (discussing how MAT judges will approach the issue of forced marriage with the "scrutiny and compassion it deserves").

<sup>147</sup> *Id.* (emphasizing that the qualifications of judges include the ability to interpret the law, as well as the ability to understand the personal issues relating to cultural and communal custom, thus strengthening their ability to critically assess the issues and risks of potential forced marriage victims).

<sup>148</sup> See Mona Rafeeq, Note, *Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional American Notions of Justice?*, 28 WIS. INT'L L.J. 108, 126 (2010) (explaining that the MAT requires its arbiters to be Islamic scholars "deemed worthy enough to be a scholar in the community's eyes, in terms of both religious study and experience"); Interview with Shaykh Faiz Siddiqi, Founder, Muslim Arbitration Tribunal, in Nuneaton, U.K. (Mar. 11, 2008) (explaining that the MAT is perceived as an acceptable forum for dispute resolution because it reflects the British Muslim community's values, has legal credibility, and is intimately aware of the issues prevalent in today's society); Online Video: Shaykh Faiz Siddiqi, Founder, Muslim Arbitration Tribunal, Muslim Arbitration Tribunal Press Conference Question and Answer Session (June 12, 2008), [http://www.matribunal.com/initiative\\_qa\\_sfs.html](http://www.matribunal.com/initiative_qa_sfs.html) [hereinafter Shaykh Siddiqi Press Conference Q&A] (fielding questions regarding the newly formed Muslim Arbitration Tribunal); MUSLIM ARBITRATION TRIBUNAL, *supra* note 63, at 14 (explaining that the MAT is the appropriate dispute resolution forum for members of the U.K. Muslim community because its officials possess a particular understanding and expertise in the U.K. Muslim community's distinct culture).



the facts and reality of a given situation.<sup>149</sup> In addition, by identifying forced marriages, the MAT helps to create pressure on the community to avoid such practices, as religious scholars and professionals within the community articulate their disapproval of forced marriages.<sup>150</sup> Because this shift in the community's perspective derives from the most respected individuals within the community, the community will deem views against forced marriages as more reliable and acceptable.<sup>151</sup>

4.3.3. *The MAT Initiative is Easily Implemented into the Current Legal System and Leverages Smart Procedural Processes to Protect British Citizens*

The action plan implemented by the MAT to tackle the issue of forced marriages is extensive and well equipped to integrate with

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<sup>149</sup> See MUSLIM ARBITRATION TRIBUNAL, *supra* note 63, at 14 (stating that MAT professionals will possess extensive experience with evaluating forced marriages, which "will give British Muslims the confidence to come forward to utilise [sic] the [MAT] process to its fullest potential"); Interview with Shaykh Faiz Siddiqi, *supra* note 148 (corroborating the premise that the unique expertise of the judges helps distinguish cases of forced marriages from consensual marriages); Shaykh Siddiqi Press Conference Q&A, *supra* note 148 (answering questions pertaining to the newly formed Muslim Arbitration Tribunal).

<sup>150</sup> See MUSLIM ARBITRATION TRIBUNAL, *supra* note 63, at 15–16 (outlining various strategies used by the MAT to discourage forced marriages within the community such as leveraging the involvement of appropriate community members as mediators, issuing written warnings, customizing advice to victims and involving police, and judicial/administrative authorities). Indeed, one course of action by the MAT would be:

[w]here appropriate the Judges may call upon senior members of the community close to the British spouse to visit his/her family in the UK and to allude them of the legal ramifications of participating or being complicit in a coerced or forced marriage.

The aim of the visit would be to allow the perpetrators of the forced marriage to register the fact that their actions are now under social, community and legal scrutiny. It is envisaged that the visit of the community elder shall be a source of great embarrassment in itself and shall cause the perpetrators to avoid undue actions.

*Id.* at 16.

<sup>151</sup> See, e.g., *id.* (noting that the MAT could enlist respected elders and professionals in the British Muslim community to admonish community members who continue to coerce individuals into entering and/or maintaining forced marriages).

the existing legal system and the Forced Marriage (Civil Protection) Act 2007. In particular, the MAT documented detailed methods of risk assessment for individuals, formed national and local working groups, and conducted in-depth training for various community and legal participants (including Imams, Muslim scholars, Members of Parliament, Local Councilors, police officers, civil servants, and social workers).<sup>152</sup> As a result, the MAT has developed a comprehensive system—attuned to the religious, social and cultural needs within the community—that is well integrated with the broader British society and British citizens' needs.<sup>153</sup> Furthermore, the MAT solution has been well received by the British government and legal community, and has been endorsed by Justice Minister Lord Hunt.<sup>154</sup>

The procedural format allows British citizens to escape forced marriages without backlash from families or community.<sup>155</sup> It creates a religiously acceptable method of escaping cultural practices that force both women and men into making undesirable decisions. The MAT solution works collaboratively with the British legal system, creating a channel for substantive engagement with the broader legal system.<sup>156</sup> Finally, the solution provides

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<sup>152</sup> *Id.* at 22–27 (outlining a comprehensive and collaborative action plan, which includes involving community members, social workers, law enforcement, and the judiciary system, thereby integrating the Muslim community with the broader British social fabric).

<sup>153</sup> *Id.* at 13–18 (describing a framework that requires MAT arbiters to both interpret law and understand the intimate issues relating to cultural and communal custom within the context of British society in order for them to optimally assess the issues and risks of potential forced marriage victims); Interview with Shaykh Faiz Siddiqi, *supra* note 148 (corroborating that MAT judges' particular expertise help them effectively distinguish between cases of forced marriages from consensual marriages); Shaykh Siddiqi Press Conference Q&A, *supra* note 148. *See also supra* note 140 and accompanying text (detailing ways in which the MAT's cultural and religious expertise help address issues such as confidence and coercion when dealing with marital arbitration amongst English Muslims).

<sup>154</sup> *See, e.g.,* Online Video: Lord Philip Hunt, *supra* note 4 (endorsing the MAT's efforts to combat forced marriage).

<sup>155</sup> *See* MUSLIM ARBITRATION TRIBUNAL, *supra* note 63, at 14–16 (noting procedures designed to minimize social backlash amongst parties participating before the MAT).

<sup>156</sup> *See* MUSLIM ARBITRATION TRIBUNAL, *supra* note 63, at 13–16 (outlining procedures whereby MAT participants can avoid ostracism by their family or community for seeking formal legal channels but also noting that the MAT may

judicial oversight over tribunals which might otherwise operate with sub-standard judges and unfair rulings motivated by cultural customs.<sup>157</sup> The MAT accomplishes this through its integration with the existing legal system; sophisticated training of judges, religious scholars, and stakeholders; educational and professional requirements for tribunal composition; and its constant awareness of both cultural and modern social circumstances within the community and society at large.<sup>158</sup>

#### 5. ANALYZING THE POLICY CONCERNS ARTICULATED AGAINST THE IICJ IN LIGHT OF THE MAT EXAMPLE

By analyzing the concerns raised in Ontario regarding the IICJ in light of the example of the MAT, it is clear that the concerns raised by various interest groups against the IICJ constitute either inaccurate assumptions about religious arbitration or issues that can be alleviated by structuring the tribunal appropriately.

##### *5.1. Remedying Gender Bias Through Clearly Defined Values, Informed Judges, Balanced Tribunal Composition, Carefully Crafted Jurisdiction, and Religious Education*

As noted earlier, the most common objection to religious arbitration is the alleged imbalance of power between men and women.<sup>159</sup> The MAT demonstrates how the IICJ could properly address this issue. Its composition, expertise, and value system speak directly to the issue. The MAT notes that it is not merely a group of recently immigrated “Imams sitting in a mosque” (describing a typical stereotype for patriarchal, gender-biased figureheads) nor is it biased against women, but rather, that it is

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involve the English judicial system or authorities for violations of English laws prohibiting forced marriages).

<sup>157</sup> See PROC. RULES MUSLIM ARB. TRIB. § 23 (providing that even though decisions of the tribunal are final, the “rule shall not prevent any party applying for Judicial Review with permission of the High Court”).

<sup>158</sup> See *supra* notes 152, 154, 156 and accompanying text (enumerating how the MAT integrates with the English legal system and remains keenly aware of the Muslim community’s particular nuances including through employing officials with relevant expertise).

<sup>159</sup> See, e.g., BOYD, *supra* note 13, at 48. (noting that an opposition group to the IICJ argues that Muslim family law “perpetuate[s] a patriarchal model”).

well-informed about the needs of women and young people.<sup>160</sup> The tribunals are composed of British lawyers, many of them young and of both genders.<sup>161</sup> The MAT explicitly states that “[t]o promote harmony, we intend to provide female lawyers to sit as the legally qualified member as often as possible. There will be no race or sex discrimination in this organisation!”<sup>162</sup>

These values are reflected in the MAT’s initiative on forced marriages, a problem that disproportionately affects young British Muslim women.<sup>163</sup> By considering the sociocultural issues that affect women caught in coercive marriages, the MAT defends precisely the rights of women that many interest groups claimed would be at risk in the context of the IICJ.<sup>164</sup> Not only does the MAT provide communal and legal solutions tailored to the needs of women and young people, it does so through mechanisms that are sensitive to the same communal and familial pressures that cause concern for interest groups in Ontario.<sup>165</sup> Issues such as

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<sup>160</sup> See *Values and Equalities of MAT*, *supra* note 4 (explaining that the tribunal comprises of members who are well versed in the sociocultural issues its community members face, and that coupled with its religious and secular legal expertise, it can resolve issues in a manner that sufficiently addresses the needs of women and young people).

<sup>161</sup> *Id.* (“[W]e will have young qualified people, male and female, sitting as members of the Arbitration Tribunal.”). See also PROC. RULES MUSLIM ARB. TRIB. § 10 (requiring tribunals to be composed of both Islamic scholars and English lawyers).

<sup>162</sup> *Id.* (emphasizing the MAT’s commitment to equality and women’s rights).

<sup>163</sup> See *Need to Know: Forced Marriage* (Teachers TV broadcast Jan. 5, 2009, distributed under license by the Department of Education, United Kingdom and is Crown Copyrighted), available at <http://www.tes.co.uk/teaching-resource/Teachers-TV-Forced-Marriages-6047638/> (explaining the various sociocultural pressures that young women are subjected to in forced marriages, the sociocultural implications and underpinnings of forced marriage, and the resulting violation of their basic human rights, as well as how the Muslim Arbitration Tribunal helps address these specific issues with educated and culturally aware jurists that work alongside the current British legal system).

<sup>164</sup> *Id.* (explaining how the MAT is aware of the various sociocultural pressures victims face in the context of forced marriage, and its ability to exercise communal pressure, educate families about the consequences and religious implications of their actions, and to work within the context of the existing legal framework to give potential victims choices where they can voluntarily submit to the tribunal for help after informed consent without being subjected to familial or communal repercussions).

<sup>165</sup> See, e.g., MUSLIM ARBITRATION TRIBUNAL, *supra* note 63, at 14–16 (describing the MAT’s approach to curbing forced marriages through leveraging socio-

voluntariness and fear of social reprimand are alleviated through the informed, structured, consultative, and integrated approach the MAT utilizes in its detailed procedural rules.<sup>166</sup>

Further, the MAT's structure still protects various civil rights and freedoms of Muslims in the West. For example, the MAT lacks jurisdiction to resolve civil divorce and child custody issues, and its decisions are subject to judicial review on appeal.<sup>167</sup> However, by handling domestic violence and family dispute issues, the MAT is able to engage in preventative dispute resolution to preserve relationships and prevent divorces or family breakdown.<sup>168</sup> Further, in the case of "limping-marriages," where a couple is civilly divorced but one spouse claims that they are not religiously divorced, the MAT provides a forum to complete the religious divorce and plays an active role in the peaceful resolution of disputes in a manner that is less vulnerable to negative community scrutiny.<sup>169</sup> As a result, the MAT demonstrates a workable model

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culturally, religiously knowledgeable legal and religious experts, thereby cultivating a framework better attuned to address communal and family pressures in the British Muslim community). The MAT outlines various strategies, such as liaising with legal authorities, involving various community mediators, educating families, and exerting various other forms of communal pressure to fight against forced marriage). *Id.* at 13-18. *See also* Interview with Shaykh Faiz Siddiqi, *supra* note 148 (corroborating that the unique expertise of the judges, the MAT's detailed procedural guidelines, and the role of the MAT within the community can help ensure individuals voluntarily submit to the tribunal on an informed basis, without fear of social or familial reprimand); Shaykh Siddiqi Press Conference Q&A, *supra* note 148 (fielding questions regarding the newly formed Muslim Arbitration Tribunal); *see also generally* PROC. RULES MUSLIM ARB. TRIB. (providing a detailed description of the procedural rules of the MAT that help ensure voluntary submission and informed consent).

<sup>166</sup> *See generally* PROC. RULES MUSLIM ARB. TRIB. (providing detailed rules governing the MAT's arbitration process which are tailored to provide sufficient cultural sensitivity to reduce individuals' fear of social or community reprimand for engaging in marital arbitration before the MAT).

<sup>167</sup> *See* The Interfaith Legal Advisors Network, *supra* note 87, at 3 (indicating that section 23 of the Procedural Rules for the MAT allows parties to apply for judicial review with permission of the High Court).

<sup>168</sup> *See* Reiss, *supra* note 60, at 768 (noting that non-binding Shari'a-based arbitrations possess the advantage that they are "more amicable than the trial process, thus helping to better preserve the relationship between the parties") (quoting ALBERT K. FIADJOE, ALTERNATIVE DISPUTE RESOLUTION: A DEVELOPING WORLD PERSPECTIVE 27 (2004)).

<sup>169</sup> *See* Ahmed, *supra* note 108, at 492-93 (explaining that limping marriages, where individuals are uncertain about the religious status of their marriages and family relationships, raise complicated social, communal, and religious questions

for the IICJ, in which procedural mechanisms and carefully crafted jurisdiction permit religious arbitration to supplement and enhance the secular legal system.

Finally, the MAT plays an active role in educating the Muslim and broader British community about the true nature of Shari'a law by dispelling myths that evolve through the conflation of religious law with cultural customs. The MAT explains:

The judges of MAT have come across many situations during the course of cases presented to them, where they have had to clarify the dichotomy between Islamic Laws and national cultures. For example, in the cases of domestic violence, there have been instances where the offender has submitted that the said course of action [(for example, disciplining one's wife, forced marriage, or limitations on a women's right to terminate a marriage)] was permitted under Islamic Law. The Judges of MAT have been efficient in sifting the myth from reality.<sup>170</sup>

In the case of forced marriages, the MAT explains clearly that, "forced or coerced marriages have no foundations in Islamic Law and shall be nullified under the edicts of Islamic tenets."<sup>171</sup> Thus, the MAT demonstrates how an institution like the IICJ has the potential to dispel myths about Shari'a, and play a constructive role within the framework of domestic law to protect the rights of women through religiously and communally acceptable mechanisms.

#### *5.2. Ensuring Informed Consent, Particularly by Individuals of Limited Education or of Foreign Backgrounds*

A second common concern raised by opponents to the IICJ was the potential for individuals of limited education or of foreign

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for English Muslims); *see also* Talal Youssef Eid, *Marriage, Divorce, and Child Custody as Experienced by American Muslims: Religious, Social, and Legal Considerations* 261-69 (May 2005) (unpublished Ph.D. dissertation, Harvard Divinity School) (on file with Harvard University Library) (describing the complicated overlap of Shari'a marriage law with civil divorces and emphasizing the utility of coordinating the two processes to remedy limping marriages, especially when social and communal pressures bind Muslims to marriages they have civilly terminated).

<sup>170</sup> MUSLIM ARBITRATION TRIBUNAL, *supra* note 63, at 4.

<sup>171</sup> *Id.*

backgrounds to unwittingly agree to religious arbitration when they are inadvertently caught in abusive or coerced marriages without recourse to equitable dispute resolution.<sup>172</sup> The MAT example, again, demonstrates various safeguards against these concerns. First, the detailed procedural rules of MAT provide safeguards which help ensure that parties submit to arbitration with informed consent, and require documents to be written in a language that all parties can understand and consent to.<sup>173</sup> This means all parties should be sufficiently informed by the Tribunal's judges about their rights when submitting to religious arbitration. The Tribunal must facilitate effective communication in a party's preferred language to ensure that all parties are sufficiently able to communicate and be informed when consenting to arbitration and throughout the arbitration process.<sup>174</sup> Second, the MAT's decisions are subject to judicial review, and thus provide parties with protection from decisions that are either biased, discriminatory, or a violation of human rights.<sup>175</sup> Arbitration decisions may not violate "fundamental tenets of the Human Rights Act, and the rights of women must be respected."<sup>176</sup> Third, its initiatives on forced marriages take steps to prevent coercive marriages from being formed even before disputes potentially arise from foreseeable high-risk forced marriages.<sup>177</sup> As such, the MAT model not only demonstrates a method of handling the issues of informed

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<sup>172</sup> See BOYD, *supra* note 13, at 50 (explaining that it is not uncommon for a Canadian Muslim to return to his country of origin for marriage where standards of consent differ from Canada, resulting in difficulty for women to invalidate marital agreements).

<sup>173</sup> See PROC. RULES MUSLIM ARB. TRIB. §§ 2, 3, 12, 14, 15 (outlining the procedure for requesting a hearing, filing documents and evidence, notification, admission of evidence, and language requirements for all documents).

<sup>174</sup> See *id.* §§ 12, 15 (providing that the Tribunal "must serve notice of the date, time, and place of the hearing on every party" and all documents must be submitted in English, or accompanied by an English translation).

<sup>175</sup> See *id.* § 23 ("No appeal shall be made against any decisions of the Tribunal. This rule shall not prevent any party applying for Judicial Review with permission of the High Court.").

<sup>176</sup> Reiss, *supra* note 60, at 762 (quoting *Church of Scotland Backs Islamic Sharia Law Courts*, SCOTSMAN, Oct. 10, 2008, <http://news.scotsman.com/scotland/Church-of-Scotland-backs-Islamic.4578904.jp>).

<sup>177</sup> See MUSLIM ARBITRATION TRIBUNAL, *supra* note 63, at 13-14 (suggesting that avoiding the MAT tends to imply a sham or problem marriage warranting intervention by the British government, thereby demonstrating that MAT may help detect and prevent involuntary or coerced marriages).

consent and procedural fairness in the context of religious arbitration when disputes arise, but the model can even further be used as a preventative mechanism to avoid issues from occurring at all. Fourth, by narrowly tailoring the jurisdiction of MAT, the MAT plays a constructive role in resolving family disputes, addressing domestic violence, and creating religiously and communally acceptable forums for marriage termination or reconciliation, while supporting the court system's jurisdiction over divorce and child custody.<sup>178</sup> The MAT demonstrates the positive role that a sophisticated institution with well-planned jurisdiction, procedural rules, and management could play for Muslims in Ontario to resolve family disputes in the context of Ontario law, while addressing the rights and freedoms that opponents of the IICJ are concerned about.

5.3. *Transformative Accommodation, Giving People Choices –  
Deriving Voluntariness Through Equity and Religious Values*

Another major concern articulated by opponents of the IICJ was whether participation in religious arbitration, especially by women, would actually be voluntary, and whether there would be an unfair balance of power during religious arbitrations.<sup>179</sup> Although people may be completely informed about their rights, it was suggested that people, especially women, submit to religious arbitration out of fear of social or familial backlash, having devastating impacts on their personal relationships, physical and

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<sup>178</sup> See *Types of Cases That We Deal With*, *supra* note 112 (listing the cases that the MAT addresses, including forced marriages, domestic violence, and family disputes); PROC. RULES MUSLIM ARB. TRIB. §§ 1, 23 (explaining the types of disputes and methods of dispute resolution the MAT provides, and the methods parties may use to appeal to the High Court); The Interfaith Legal Advisors Network, *supra* note 87, at 1 (describing the origins of informal "Shariah Councils" as a way to apply Shari'a law to "family and personal law"); *Values and Equalities of MAT*, *supra* note 4 (explaining the necessity for judges of the Arbitration Tribunal to be well acquainted with relevant social, cultural, and gender issues); Rafeeq, *supra* note 148, at 124–25 (explaining that the composition of the tribunal helps establish a dispute resolution forum that is acceptable to the British Muslim community).

<sup>179</sup> See BOYD, *supra* note 13, at 50–51 (summarizing arguments against the IICJ, including certain criticisms of Islamic law's treatment of women); Wolfe, *supra* note 57, at 463–64 (questioning whether women will be able to truly voluntarily consent to religious arbitration amidst social and familial pressure).



emotional well-being, as well as economic livelihood.<sup>180</sup> Framing the IICJ in the context of MAT, again, addresses these issues.

The MAT has defined itself as a communally acknowledged and acceptable forum for religious arbitration that is well informed about the issues unique to the cultural demographic within the context of Western society that it typically serves.<sup>181</sup> The MAT utilizes procedural rules and requirements to objectively protect the rights of all parties involved, while maintaining religious authority in its decisions.<sup>182</sup> For example, the requirements that tribunals be composed of both legal and religious scholars who are well informed about social issues and the commitment to female lawyer participation help balance the distribution of power between genders. The procedural guidelines required for consent to arbitration, language requirements for consent, documentation and evidence, a party's right to appoint representatives, and private arbitration settings with the option of public forum<sup>183</sup> all help to ensure that a person submitting to the MAT is well informed and enjoys a balance of power, while being protected from social reprimand within his community. Quite contrary to the suggested premise by opponents of the IICJ, a religious arbitration tribunal can create a forum that protects both men and women within their sociocultural contexts precisely because of the religious authority of the tribunals.<sup>184</sup> The religious nature and

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<sup>180</sup> See BOYD, *supra* note 13, at 50-51 (noting concern regarding whether women consent to arbitration by their own free will versus succumbing to the social pressure of adhering to religious traditions); see also MUSLIM ARBITRATION TRIBUNAL, *supra* 63, at 5-9 (underlining the high occurrence of coerced or forced marriages in Muslim cultures, which often stem from certain cultural traditions and rituals, as opposed to religious laws and beliefs); Wolfe, *supra* note 57, at 461, 463-64 (explaining that various sociocultural, communal, familial, and economic forces can inhibit individuals from exercising their autonomy when presented with family or personal law disputes).

<sup>181</sup> See PROC. RULES MUSLIM ARB. TRIB. § 10 (requiring tribunals to be composed of both legal and religious experts); *Values and Equalities of MAT*, *supra* note 4 (highlighting the necessity for arbitrators to be both familiar and sensitive to the social, cultural, and gender issues presented, which can be accomplished by having "young qualified people, male and female, sitting as members of the Arbitration Tribunal").

<sup>182</sup> See generally PROC. RULES MUSLIM ARB. TRIB. (stating the procedural rules maintained by the Muslim Arbitration Tribunal).

<sup>183</sup> *Id.*

<sup>184</sup> See generally Rafeeq, *supra* note 148 (discussing how a Muslim arbitration system can be reconciled in the cultural context of "American notions of justice");

communal derivation of the tribunals drive acceptance of the forum in the communities within which they operate.<sup>185</sup> By establishing a communally accepted dispute resolution forum that simultaneously protects the rights of individuals in a socially relevant context while leveraging its role as a religiously authoritative forum, the MAT example alleviates both the fear of unfair decisions on the one hand, and communal reprimand on the other, thereby promoting voluntary submission by prospective parties.<sup>186</sup> If the IICJ were to be modeled similarly to the MAT, previously expressed concerns about voluntary submission to arbitration would disintegrate.

#### *5.4. Maintaining Judicial Authority and Responsibility Through Judicial Review and Public Scrutiny*

A final major concern articulated by opponents to religious arbitration in Ontario is the argument of the judiciary “washing its hands” of family law disputes via arbitration, the lack of public scrutiny of decisions, and the potential procedural roadblocks, like the busy schedules of arbitrators.<sup>187</sup> Again, the MAT serves as a model that the IICJ could replicate to address these concerns. The MAT’s decisions are subject to judicial review, although in limited circumstances.<sup>188</sup> Nonetheless, these circumstances do prevent

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Interview with Shaykh Faiz Siddiqi, *supra* note 148 (explaining that the MAT is perceived as an acceptable forum for dispute resolution because it is reflective of the British Muslim community’s values, has legal credibility, and is intimately aware of the issues prevalent in today’s society); Shaykh Siddiqi Press Conference Q&A, *supra* note 148 (fielding questions regarding the newly formed Muslim Arbitration Tribunal).

<sup>185</sup> See generally Rafeeq, *supra* note 148, at 112 (arguing that “arbitration tribunals using new interpretations of Shari’a can be effectively implemented, provided that they are appropriately restricted”).

<sup>186</sup> See *infra* Sections 4.2, 4.3.2–3.3 for analysis on the necessity of voluntariness and informed consent from parties submitting to the MAT, the importance of the expertise of the MAT judges, the values of the MAT, the position of the MAT within its community, and the effects of the MAT within its community, as highlighted by its efforts to tackle the forced marriage problem in the United Kingdom.

<sup>187</sup> BOYD, *supra* note 13, at 33.

<sup>188</sup> See PROC. RULES MUSLIM ARB. TRIB. § 23 (stating that while the Tribunal decisions are not appealable, the parties are not barred from applying for Judicial Review “with permission of the High Court”); Reiss, *supra* note 60, at 762 (stating that under the Arbitration Act, Shari’a courts “must not preclude recourse” to regular courts).

unconscionable or illegal decisions from being rendered.<sup>189</sup> Secondly, the detailed voluntariness requirement helps ensure a degree of public scrutiny. If decisions consistently bias a particular gender or are consistently unfair in a noticeable way, people simply will not voluntarily submit to the MAT (or in the context of Ontario, the IICJ) for an objective forum for dispute resolution. Especially given the role that the MAT has grown into in its local communities, the MAT's constituents become aware of the fairness or lack thereof of its decisions.<sup>190</sup> Consequently, the voluntary nature of the tribunals (in light of judicial review and sociocultural, communal, and religious nuances making the forum acceptable to its constituents) helps avoid undesirable decisions. Naturally, parties who would submit to the IICJ for dispute resolution would leverage the same public scrutiny of the MAT.<sup>191</sup> Finally, given the structured procedural guidelines,<sup>192</sup> resources, and cost structure of the MAT, it is clear that a workable model can address potential cost and time efficiency issues, from which the IICJ would similarly benefit.

#### 6. ADDITIONAL PUBLIC POLICY JUSTIFICATIONS FOR THE IICJ, BASED ON THE MAT EXAMPLE

Beyond resolving the major concerns of the IICJ's opponents, there are five crucial public policy justifications for permitting religious arbitration in Ontario clearly identifiable in the MAT example. First, institutionalized religious arbitration helps prevent continued unregulated and possibly unconscionable arbitration in Ontario.<sup>193</sup> Second, it can help shape communities and relieve

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<sup>189</sup> See Reiss, *supra* note 60, at 761–62 (discussing three standards that the tribunal's decisions have to meet in order to be considered "binding under the Arbitration Act").

<sup>190</sup> See Rafeeq, *supra* note 148, at 125 (explaining how the MAT does not advertise and has established its credibility and functions within the community "by word of mouth").

<sup>191</sup> *Id.* (noting that the MAT relies on word of mouth, rather than conventional advertising, to bring in new cases, making public support for their decisions very crucial).

<sup>192</sup> See generally PROC. RULES MUSLIM ARB. TRIB.

<sup>193</sup> See *Shari'a in the West – Whose Law Counts Most?*, *supra* note 62, at 62 (explaining that many Muslims still submit to non-binding arbitration often administered informally, which defeats the purpose of the ban on arbitration of

cultural baggage that Muslims face when reconciling their identity in a Western society.<sup>194</sup> Third, religious arbitration can help integrate the Muslim community with broader society amidst a time of socio-political tension.<sup>195</sup> Finally, the remaining fourth and fifth justifications are the typical dual benefits of any other type of arbitration, namely, (1) cost and time efficiency to remedy disputes in a non-adversarial environment, which (2) helps salvage and repair personal relationships, particularly where religious values are infused or underlie the dispute.<sup>196</sup>

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family law issues in Ontario). Shari'a is often misinterpreted or conflated with cultural customs and practices. See Arbitration Act, 1996, c. 23, §§ 66-71 (U.K.) (demonstrating that judicial review can be implemented to act as a safeguard against unregulated religious arbitration); PROC. RULES MUSLIM ARB. TRIB. § 23 (stating that parties are not barred from seeking Judicial Review); MUSLIM ARBITRATION TRIBUNAL, *supra* note 63, at 4 (stating the MAT judges have needed to separate myth from reality in explaining Shari'a law). For a list of the beneficial judicial constraints imposed on arbitration tribunals by courts in the United Kingdom, see Rafeeq, *supra* note 148, at 127-28 (including in the list of benefits: courts "may refuse an application to stay legal proceedings brought against a party . . . unless [the court] is convinced that the [arbitration] agreement is valid"; courts have the ability to remove the "arbitrator on grounds of bias, lack of qualification or physical or mental capacity"; courts have the ability to "decide questions of law" that "affect the magnitude of awards" or "substantially affects the rights of one or more of the parties"; and courts have the ability to set aside awards upon application for review by a party in arbitration).

<sup>194</sup> See MUSLIM ARBITRATION TRIBUNAL, *supra* note 63, at 5 (explaining that many issues that conflate cultural customs with religion within the Muslim community can be addressed through socioculturally aware jurists providing reconciliatory rulings in arbitration); Brown, *supra* note 10, at 544 (explaining that religious arbitration in Ontario would allow Muslims to maintain their identity, yet be subject to procedural safeguards of conscionability). See generally Faisal Bhabha, *Between Exclusion and Assimilation: Experimentalizing Multiculturalism*, 54 MCGILL L.J. 45 (2009) (opining generally that the Canadian Charter of Rights and Freedoms' multiculturalism provisions provide a legal framework for minorities to reconcile their identity within the context of Ontario's broader social values).

<sup>195</sup> See Aslam, *supra* note 3, at 875 (explaining that the IICJ would enable the Ontario government to respect "the rights of its religious citizens to structure certain aspects of their lives according to their beliefs, a compromise that will facilitate the participation of Canadian Muslims as valued members in democratic politics"). This is a similar sentiment to the progress of the MAT in engaging with various stakeholders within society. MUSLIM ARBITRATION TRIBUNAL, *supra* note 63, at 20-27 (outlining a comprehensive collaborative system involving community members, social workers, law enforcement, and the judiciary system, thereby integrating the Muslim community into the broader British social fabric).

<sup>196</sup> See BOYD, *supra* note 13, at 36-38 (stating that arbitration facilitates creative dispute resolution in an efficient and cost effective manner while providing a healing element to the community through non-adversarial proceedings).

6.1. *Preventing Unmonitored Arbitration and Abuse of Alternative Dispute Resolution Within Closed Cultural Communities*

One primary justification for institutionalizing binding religious arbitration and integrating it with the broader legal landscape is that it prevents unmonitored arbitration and helps protect against abuse of alternative dispute resolution methods. The IICJ's opponents correctly pointed out that there is a real risk of people being coerced into arbitration or subject to inappropriate decisions.<sup>197</sup> This risk is especially concerning where arbitration tribunals are held in private, unregulated settings that lack procedural structure and are administered by unqualified arbitrators.<sup>198</sup> Although such tribunals may be non-binding, they may be submitted to by parties for the cultural and social concerns IICJ opponents often articulate, namely, fear of social reprimand, lack of knowledge, and religious pressure.<sup>199</sup> Evidence shows that in Ontario, despite the ban on religious arbitration, people informally seek advice on family law disputes from religious advisors.<sup>200</sup> This practice has led to an increased number of women (and Muslims in general) being subjected to communal pressure and inequitable or even dangerous rulings that result from a misinterpretation of Islamic Law or are derived from patriarchal cultural customs.<sup>201</sup>

By institutionalizing religious arbitration tribunals, the government can ensure a sufficient level of control and protection of an individual's rights and freedoms.<sup>202</sup> The procedural rules and requirements for operating a system like the MAT, and its members' unique combination of knowledge and training, create a

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<sup>197</sup> See *supra* Sections 3.1.1, 3.1.2, and 3.1.3 for discussions on the inherent inequity between men and women in unregulated religious arbitration, the risk of lack of voluntary submission to religious arbitration, and the risk of lack of informed consent to religious arbitration, respectively.

<sup>198</sup> *Id.*; see also *Shari'a in the West—Whose Law Counts Most?*, *supra* note 62 (explaining that many Muslims still submit to non-binding arbitration often administered informally, which defeats the purpose of the ban on arbitration of family law issues in Ontario)

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> See discussion in *supra* note 193 (describing judicial safeguards that are made available if arbitral tribunals are institutionalized).

forum which is optimal for religious arbitration.<sup>203</sup> The religious and communally derived nature of these tribunals alleviates the sociocultural and religious concerns of Muslims.<sup>204</sup> Further, because the forum is a source of community-derived religious justice, the community will feel empowered, which will foster a feeling of participation in the legal system that will promote social integration.<sup>205</sup> Finally, the necessity for such tribunals to operate within the context of the domestic law and be subject to judicial review establishes a degree of government involvement and protection that would otherwise be impossible to establish in current informal Shari'a councils.<sup>206</sup>

### 6.2. *Shaping Communities and Reconciling Cultural Baggage Through Religious Arbitration*

A second benefit of religious arbitration in Ontario is the ability for institutionalized religious arbitration to play a formative role in communities. For example, the MAT acknowledges and addresses sociocultural issues that are promulgated under the guise of religion. These issues, such as abuse of women, forced marriage, domestic violence implicating children, patriarchal communities and the like, are usually derived from cultural customs from South Asia and the Middle East and are conflated with religion.<sup>207</sup> As the MAT example shows, institutionalized religious arbitration has the potential to reconcile these issues in a constructive forum recognized by the Muslim community.<sup>208</sup> This potential is clearly demonstrated by the MAT's initiative on forced marriages and its institutional commitments to recognizing the rights of women and empowering them through the tribunal system, both as judges and as parties.

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<sup>203</sup> See discussion and sources cited *supra* note 178 (discussing how Shari'a councils like the MAT are structured and their resulting ability to create acceptable resolutions for Muslim disputants living in non-Muslim countries).

<sup>204</sup> See discussion and sources cited *supra* note 186.

<sup>205</sup> See *id.*

<sup>206</sup> See discussion and sources cited *supra* note 193.

<sup>207</sup> See MUSLIM ARBITRATION TRIBUNAL, *supra* note 63, at 5 (detailing the influence of the Asian subcontinent's culture on marriage).

<sup>208</sup> See *supra* textual paragraph and quotation accompanying note 170 (arguing that the MAT can effectively allay myths about religious law and decouple cultural baggage from religious practices via its position within the communities in which it operates).

Because Muslims would recognize the authority of the IICJ in Ontario, the organization could effectively shape the views and education of its community members regarding the differences between cultural customs and Islamic Law—much like the MAT does today.

### 6.3. *Leveraging Religious Arbitration Tribunals to Promote Social Integration*

Apart from segregating cultural baggage, religious arbitration tribunals present a mechanism for social integration of the minority Muslim community into the broader society in Ontario. The United Kingdom example again presents evidence of this positive impact on communities. For example, non-Muslims are initiating an increasing percentage of the cases brought to the MAT<sup>209</sup> because it is regarded as an equitable and efficient method of dispute resolution. Further, the MAT has been endorsed and recognized for its initiatives by the British government and legal community, receiving the endorsement of Lord Hunt Justice Minister.<sup>210</sup> The participation of the non-Muslim community underscores the role that religious arbitration tribunals can play in establishing positive relationships with the rest of society. These positive relationships, and integration of Muslims with the rest of society through collaborative legal solutions, help avoid the risk of Muslims becoming an insular minority.<sup>211</sup> If the IICJ were to take a similar approach, it too could help prevent Muslims in Ontario from becoming an insular minority.

Further, the existence of the MAT encourages the Muslim minority in the United Kingdom to engage and participate in the British legal system, promoting positive social contributions within what have historically been closed communities. Through such a tribunal system, the community participates in the legal system

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<sup>209</sup> See Hirsch, *supra* note 4 (noting that non-Muslims are utilizing the MAT as a dispute resolution forum for commercial cases involving Muslims, presumably because the forum is equitable and effective).

<sup>210</sup> See Online Video: Lord Philip Hunt, *supra* note 4 (endorsing the MAT and its initiatives).

<sup>211</sup> See MUSLIM ARBITRATION TRIBUNAL, *supra* note 63, at 20–27 (outlining a system which incorporates existing English institutions and services with the MAT, thereby helping integrate the Muslim community with the broader British society).

through a community derived solution and leverages it as a positive contribution to broader British society.<sup>212</sup> The IICJ would likely accomplish these contributions to its society in Ontario by modeling itself after the MAT.

Finally, for young Muslims in western countries facing severe identity issues due to being both Western and part of an ethnic minority, religious arbitration tribunals can play a reconciliation role within its constituent communities. As shown by the MAT example, such tribunals can help separate cultural baggage from religious principles in an integrative method with the rest of society, thereby helping young people feel a part of their domestic society while remaining true to their cultural and religious roots.<sup>213</sup> Similarly, the IICJ would be able to replicate this effect on Muslim youth in Ontario to assist them in reconciling their own identity ambiguities.

#### *6.4. Cost and Time Efficiencies, While Eliminating Adversarial Litigation*

Two final positive considerations are worth mentioning, namely, the time and cost efficiency achieved by religious arbitration tribunals and the reconciliation effects in relationships derived from alternative dispute resolution. As demonstrated by the MAT, detailed procedural rules drastically expedite the arbitration process, as compared to the litigation process.<sup>214</sup> In addition, costs can be kept quite low, compared to the much more

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<sup>212</sup> This is a particularly important positive benefit where minority groups often find it difficult to have an impact on society's institutions and are subject to "neutral rules" that may not be neutral in practice. See JEFF SPINNER, *THE BOUNDARIES OF CITIZENSHIP* (1994) (discussing the problem of neutral rules and the need for pluralistic integration).

<sup>213</sup> See *supra* textual paragraph and quotation accompanying note 170 (explaining how the MAT dispels myths about religious law, and decouples cultural baggage from religious practices through its position in the communities it operates within); MUSLIM ARBITRATION TRIBUNAL, *supra* note 63, at 11, 14 (explaining that the tribunal has intimate knowledge of the sociocultural issues its community members face, as well as religious and secular legal expertise, enabling it to sufficiently address the needs of women and young people).

<sup>214</sup> See generally PROC. RULES MUSLIM ARB. TRIB.; see also Reiss, *supra* note 60, at 768 (acknowledging that religious arbitration is efficient and less adversarial compared to litigation).



expensive process of litigation.<sup>215</sup> Further, given that the parties voluntarily submit to arbitration, the process tends to be less adversarial, with arbitrators playing a neutral, facilitative role in enabling communication and settling disputes.<sup>216</sup> Especially in the religious arbitration context, judges who are well-oriented with the sociocultural and religious issues afflicting the parties are uniquely able to diffuse adversarial emotions and facilitate constructive conflict resolution tailored to the parties' lifestyle and cultural norms within their Western social context.<sup>217</sup> This can provide a less emotionally taxing experience for the parties involved, which increases the potential for amicable and constructive relationships to be salvaged during religious arbitration.<sup>218</sup>

## 7. CONCLUSION

After analyzing the historical legal roots of religious arbitration in Ontario and the progress of the Muslim Arbitration Tribunal in the United Kingdom, a case can easily be made that the fears about permitting religious arbitration in Ontario according to Islamic Law were overblown and that the practice should be permitted. There is ample evidence that many of the fears about Shari'a were motivated by patriarchal views of Islam and misconceptions about Shari'a. The legislative decisions by the McGuinty Government to prohibit religious arbitration of family law disputes was motivated by the views of various interest groups, despite initial support from the results of government investigations and legal validity under the Constitution.

Some concerns by critics, although valid, are easily solved by drawing from the best practices of the MAT. These best practices include comprehensive procedural rules that assure parties are voluntarily consenting to religious arbitration on an informed

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<sup>215</sup> See BOYD, *supra* note 13, at 36 (noting the benefits of arbitration including the reduced cost compared to traditional court adjudication); see also Hirsch, *supra* note 4 (referring to an MAT spokesman's claim that the MAT offers effective service at a cheap rate).

<sup>216</sup> See *id.* at 37

<sup>217</sup> See *id.*; see also Reiss, *supra* note 60, at 768 (explaining the positive effects of religious arbitration, including cost savings, time efficiencies, and increased chances of salvaging and rebuilding personal relationships); *supra* notes 139, 147 (noting the importance of the religious and sociocultural expertise of the MAT's jurists).

<sup>218</sup> See Reiss, *supra* note 60, at 768.

basis, judicial review, and accommodation of language barriers. If tribunals are equipped with qualified experts who are well aware of sociocultural circumstances and tribunals are given the appropriate substantive jurisdiction, an institution like the IICJ could not only circumvent the worries of its opponents, but could also help integrate the Muslim population into the broader Ontario social fabric. This process is furthered by integrative training for all stakeholders in the legal system from Imams to law enforcement and social workers, as demonstrated by the MAT example.

Furthermore, binding religious arbitration, when regulated effectively, can prevent ethnic minorities from becoming insular communities. Binding religious arbitration creates a relationship between community and governmental institutions, enabling members of the religious community to resolve disputes according to their religious beliefs with a feeling of ownership over solutions, while acting within the boundaries of government and integrating into broader society. This binding effect helps to prevent haphazard non-binding dispute resolution from continuing in private circles under the radar of government regulation. In addition, such an organization in Ontario can play a leading role in providing the subtle and intricate knowledge of sociocultural customs, practices, and communal issues that are requisites to solving community-wide social problems like domestic abuse. This knowledge creates the potential for social integration, reconciliation of cultural identity issues for new and second-generation immigrants, as well as constructive outlets for resolving the conflation between cultural customs and religious values that often perpetuates abusive cultural practices. Finally, the MAT model demonstrates that the IICJ has the potential to provide an efficient dispute resolution method, both in terms of time and money, which alleviates the stresses of adversarial litigation from individuals and their personal relationships.

Opponents' concerns about the IICJ are valid when one only considers surface observations about the IICJ's constituents. However, an institution like the IICJ, equipped with the appropriate procedures and best practices of the MAT, presents an option for religious arbitration in Ontario that would not only circumvent these concerns, but would address paternalistic sociocultural trends and problems within the Muslim community and be a unifying force in Ontario.