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Faith-Based Divorce Proceedings: Alternative Dispute Resolutions for Canadian Muslims [*]

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Introduction

Muslim families seeking to resolve their private disputes in accordance with their religious values and in compliance with Canadian law face multifaceted access to justice issues. They are burdened with duplicative responsibilities trying to simultaneously meet their obligations towards religious and secular legal systems. While Islamic law demands a personal commitment to its rulings in both Muslim and non-Muslim lands, it also obligates Muslim minorities in non-Muslim states to facilitate dispute-resolution mechanisms to reconcile governing law and religious practices.

Conflicting legal and religious authorities create dilemmas and social grief for families, especially for children and women who may not be able to resist different forms of social or religious abuse. [1] The experiences of Canadian Muslim couples navigating divorce processes between religious norms and legal systems are documented. [2] Their heightened state of vulnerability necessitates traveling to other countries "to follow the requirements of divorce according to their community of faith . . . in order to remove barriers to remarriage". [3] Such access to justice issues are not unique to the Muslim community: "[u]pon divorce, a Canadian Jewish or Muslim woman is faced with a puzzling dilemma . . . under the civil family law regime, she may divorce her husband without his consent, whereas under Jewish or Islamic law, she may involuntarily remain married to him." [4] These unattainable personal rights magnify existing barriers for Canadian Muslims, especially women, pursuing justice in their marital life decisions or struggling against different forms of social or religious abuse.

Civil marriages conducted under any legal system are deemed to be an Islamic marriage provided they do not contradict religious principles. This is because Islamic law prefers to legitimize an existing marriage whenever possible, [5] and even permits retroactively adjusting an otherwise invalid marriage contract to meet religious contract validity requirements. This, however, does not apply to cases in which both parties are prohibited from initiating the relationship (i.e., same-sex and degree of kinship) or when an integral part of the contract was not satisfied. For regulatory and administrative purposes, Muslims may be religiously encouraged to perform civil marriages to protect their rights through documentation.

On the other hand, the religious effect of a civil divorce conducted under a non-Islamic legal system is more controversial. Unlike Canadian law, Islamic divorce proceedings require the husband's consent or the intervention of a Muslim judge. The Islamic legal system also prescribes substantive obligations and rights for divorces comparable to the corollary relief provided by federal divorce or provincial family law statutes. The absence of religious quasi-judicial dispute resolution mechanisms poses barriers to Muslims: (1) obtaining a religious divorce or annulment, and (2) acquiring subsequent relief such as financial settlements and child custody, in accordance with religious beliefs.

This article examines how family law disputes in the Canadian Muslim community are understood and addressed in both cultural and legal contexts. Part I outlines the methods of Islamic marital dissolution in contrast to Canadian divorce procedures. Part II describes judicial applications of Islamic contractual agreements relating to deferred dowry payments. Part III examines vehicles for opting out of the secular law under provincial restrictions on faith-based arbitration and mediation of religious contracts. Part IV explores the potential for Canadian Islamic Alternative Dispute Resolution (ADR) to address religious divorce and corollary relief issues while avoiding concerns for civil rights equalities.

1. — Irreconcilable Differences: Islamic vs Secular Divorce Procedures

Islamic marriage and divorce laws operate at two levels: 1) regulating sexual intimacy and the lawful reproduction of children, and 2) introducing a set of economic relationships within the nuclear, and sometimes extended, family. [6] An Islamic marriage is a contractual agreement involving a male and a female with consent, dowry (*mahr*), and Muslim witnesses. Parties are allowed to add prenuptial conditions by mutual agreement. [7] Islamic law organizes marriage relationships by assigning specific rights and obligation to each spouse and simultaneously recognizes the need to dissolve marriages by giving both parties the right to terminate. [8] There are several methods for the dissolution of a marriage in Islamic law: the husband's consent, the relinquishment of his right of divorce, or a Muslim judge to decide on judicial annulment or court-ordered divorce. [9] These methods can be summarized as follows:

a) *Ṭalāq*: a verbal or written unilateral divorce issued by the husband, explicitly or implicitly signaling his [10] intent to divorce. The wife's consent is not required. No grounds of divorce are needed. [11]

b) *Khulʿ*: a verbal or written bilateral divorce initiated by the wife, denoting divestment. It is a contractual agreement that fiscally compensates the husband in exchange for his release of the marital bond. The husband's consent is required, and contract law rules apply. However, it is prohibited for the husband to compel his wife to agree to *khulʿ* as an alternative to his *ṭalāq*, otherwise, he would be disentitled to *khulʿs* financial compensation. [12]

c) *Tafwīḍ*: a verbal or written divorce issued by the wife if the husband previously transferred his inherent authority over divorce to her. The husband's transfer is revocable. [13]

d) *Faskh* and *Taṭlīq*: respectively, judicial annulment and court-ordered divorce. As the only methods involving the judiciary, they are issued by a Muslim judge based on prescribed grounds such as where the husband: refuses to grant a religious divorce, dies, disappears, converts to another religion, is financially incapable, or becomes physically impotent. Generally, neither *faskh* nor *taṭlīq* require the husband's consent, making them accessible alternatives to *khulʿ*. [14]

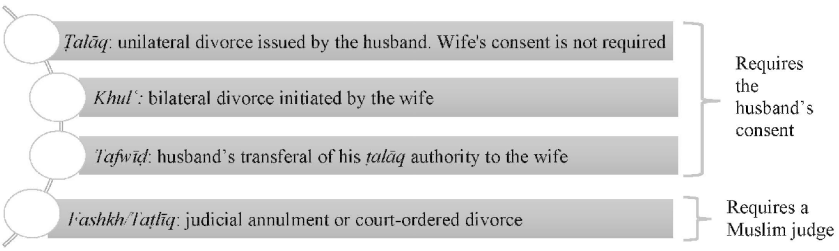

Figure 1 — Methods of Islamic Marriage Dissolution

There is no inherent equivalency between these Islamic methods and civil dissolutions of marriage. Only in limited circumstances can a civil divorce or annulment be treated as *ṭalāq* or *khulʿ*: if the husband and wife apply for a "joint uncontested divorce" or if the husband applies for a "simple divorce" (whether contested or uncontested by the wife). Outside of these scenarios, a wife who is granted a civil divorce or annulment despite the husband's contestation must independently acquire a religious marital dissolution. To facilitate marital dispute resolutions in Canada, Islamic legal authority is needed to: (1) grant a religious divorce or annulment complementing a civil divorce, and (2) mediate or arbitrate corollary relief using religious laws and principles.

The first issue stems from the religious disqualification of civil divorce as religious divorce. As detailed above, Islamic divorce proceedings require either the husband's eventual consent or the availability of a Muslim judge. The Canadian legal system, however, neither requires the husband's consent nor considers the faith identity of judges in determining the effectiveness of

their decisions. The social reality is that Canadian Muslim women in contested divorce cases are often limited to obtaining court-ordered divorces (which may not fulfill the requirements of Islamic divorce), or soliciting the help of their religious leaders, such as imams, religious counselors, or Islamic organizations (who may not have the binding legal authority under either Islamic or Canadian law). The religious disqualification of civil divorce as religious divorce is fundamentally a problem for the religious community; however, federal and provincial legislation has sought to remove barriers to religious remarriage. The secular frame of Canadian law, and the neutrality of the state towards religions, suggest that neither legislative nor executive branches of government should intervene in interpreting religious principles or resolving religious issues. Hence, this first issue is a problem for the religious community to solve.

The second issue stems from the Canadian reprehension for incorporating religious law in private consensual agreements. Strengthening quasi-judicial mechanisms for facilitating private family consensual agreements is a practical means of accommodating religious rulings within Canada's secular legal system. However, secular legal systems may preclude religious communities from relying on other religious laws to resolve private matters by restricting the enforceability of their private agreements. The limited accessibility and uncertain enforceability of faith-based ADR hinder the opportunity to apply Islamic family law in arbitral agreements or consensual separation and corollary relief agreements.

(a) — Legislative Attempts to Resolve Religious Barriers to Divorce

Parties obtaining a civil divorce and/or corollary relief under provincial or federal statutes may utilize legislation designed to address barriers to religious remarriage and endorse community-led quasi-judicial resolutions. Some provincial family law statutes entitle a party to set aside all or parts of separation agreements if religious barriers to remarriage were exploited in the making of the agreement. [15] Federally, the *Divorce Act* may pressure a spouse to remove barriers preventing the other spouse's remarriage that are in their control. [16]

The federal government consulted leaders of 50 religious groups across Canada to draft the *Divorce Act's* s. 21.1 (*Bill C-61*). [17] At that time, the Minister of Justice explained the underlying policy reasons at the Bill's second reading:

> [I]n some religions, the Roman Catholic, Greek Orthodox and Islam, annulment or divorce may proceed more easily and faster if the couple agree. However, in all these cases, the authority to grant the annulment or divorce rests with the religious tribunal, not the couple. An un-cooperative spouse may delay a decision, but ultimately he or she cannot prevent the religious tribunal from rendering its decision. [18]

These reasons were affirmed and expanded upon by the successor minister Kim Campbell during the Bill's third reading. The reasons highlighted the "severe consequences" of faithful women deprived of a *get*, even when civilly divorced, including the illegitimate status of children from a second civil marriage and their vulnerability to unfair pressure from the spouse withholding the *get*. [19] The policy motivations affirmed the absence of any authority within the modern rabbinical courts to compel the offer of *gets* since the rabbis' attempts to persuade husbands are often ineffective. [20] In *Marcovitz v. Bruker*, the Supreme Court of Canada legitimized Parliament's concerns and attested that "[i]t is public policy in this country that such barriers are to be discouraged." [21] The federal divorce amendments in 1990 followed a similar approach to that found in the earlier Ontario *Family Law Act*.

(i) — Ontario Legislation

In 1986, two provisions that safeguard matrimonial negotiations from undue religious or cultural pressure were included in the Ontario *Family Law Act*. Under the first provision, s. 56(5), the court may "set aside all or parts of a separation agreement or settlement if the court is satisfied that the removal by one spouse of barriers that would prevent the other spouse's remarriage within that spouse's faith was a consideration in the making of the agreement or settlement." [22] This provision is applicable to consent orders, releases, discontinuances, abandonment notices, and other written or oral arrangements. Regardless of whether

religious divorce was stated in the separation agreement or not, the court could set the agreement aside if there was any undue influence exercised in exchange for the religious divorce.

The second provision, s. 2(4)-(7) appears more impactful as it is relied on more often in contested religious divorce cases. It was proven to be more efficacious and lower in cost compared to s. 56. [23] Subsection 2(4) allows for filing a statement indicating that "(a) the author of the statement has removed all barriers that are within his or her control and that would prevent the other spouse's remarriage within that spouse's faith; and (b) the other party has not done so, despite a request." [24] If the applicant fails to comply, their proceeding may be dismissed, and if the respondent fails to comply, their defense may be struck. [25]

In *Glass v. Glass*, [26] the husband applied under the second provision requiring the wife to file a statement that she had removed all barriers that prevented him from obtaining the *get*. The wife argued that she was unable to act in compliance with the law because the civil marriage was still in effect. Master Cork rejected her argument and ordered her to give irrevocable consent to the *get* in a form acceptable to rabbinical authorities. The Master concluded that s. 2(4) dealt with non-civil or religious concepts and envisioned the possibility of a civil marriage existing separately from a religious divorce. However, a religious divorce should be linked to a civil petition to prevent the situation of a party being legally married under *get* in one jurisdiction while being civilly married to another spouse in another jurisdiction. [27]

(ii) — Federal Legislation

Similar to s. 2(4) of the *FLA*, s. 21.1 of the *Divorce Act* allows a spouse to file an affidavit indicating the nature of barriers to remarriage, the removal of which are within the other spouse's control. [28] Upon the spouse's failure to comply, similar to s. 2(6) of the *FLA*, s. 21.1(3) of the *Divorce Act* allows courts to dismiss any applications and strike out any pleadings or affidavits filed under the *Divorce Act*. The dismissal of proceedings, under either statute, does not prevent a party who subsequently removed the religious barriers from having their claims of corollary relief adjudicated thereafter. [29]

Unlike the Ontario legislation, under s. 21.1(4) of the *Divorce Act*, a court can refuse to exercise its s. 21.1(3) powers if it is satisfied "that the spouse has genuine grounds of a religious or conscientious nature for refusing to remove the barriers." The onus of proving "genuine grounds" is on the objector. [30] Although s. 21.1(4) seems to reduce the strength of s. 21.1 in compelling husbands to give religious divorces, courts have rarely accepted such arguments following the Supreme Court's decision in *Bruker* rejecting the husband's religious objection.

Although s. 21.1 may be viewed by the religious community to be a positive step by the legal system to enhance equity rights and personal choice of marriage, it also triggered a judicial countertrend opposing state infringement on freedom of religion: compelling a spouse to perform a religious act. In *Bruker*, the majority relied on this amendment and the public policy behind it. Abella J. referenced legislation from other jurisdictions such as New York and Israel, that allow courts to compel a husband to give the religious divorce or consent to it even if no promise was initially made by him. [31] The reference was made with no reservations alluding to potential over-intervention in religious matters. Moreover, courts rejected the idea that s.21.1 is coercive in nature to maintain an effective purpose of the whole section. [32]

(b) — Ineffective Legislation: The Inaccessibility of Religious Divorce for Muslim Women

Where Islamic divorce is sought, cases can be classified into distinct categories. If the husband agrees to provide the wife a religious divorce, a court may enforce the agreement as a civil contract. [33] If a spouse is withholding religious divorce, a court may exercise its discretion to reject hearing their civil claims, or to strike their proceedings. Given the broad discretion, the distinctive facts of each case, and the court's sensitivity about infringing upon personal freedom of religion, judgments applying s. 21.1 of the *Divorce Act* and ss. 2(4)-(7) of the *FLA* vary. There are only five reported cases involving Muslim couples for which s. 21.1 was invoked to facilitate religious divorce.

The legislation does not grant a religious divorce in the way Islamic law may process it through an Islamic legal system or alternative religious adjudication. In *A. (S.) v. A. (A.)*, [34] Lee J. affirmed that religious divorce is not authorized under s. 21.1 or any other section of the *Divorce Act*. [35] The courts only have the power to consider the issue of religious barriers in limited circumstances. [36] Relying on the reasoning of Alberta's only precedent, *Darel v. Darel* [37] pertaining to a *get*, Lee J. negated any clear relationship between civil and religious divorces which would make the involvement with one's religious beliefs problematic. [38] Lee J. held s. 21.1 inapplicable and stated that "I know of no authority or jurisdiction that I would have to grant a Muslim or any religious divorce. I am not an Ima[m], nor do I have any religious authority as a Judge." [39]

There is at least one case where the court relied on its inherent jurisdiction, rather than explicit legislative grounds, to order the removal of religious barriers to remarriage. In *Bakhshi v. Hosseinzadeh*, J.S. McLeod J. ordered the husband to apply for an Islamic divorce and execute all its required documents through an approved agency of Islamic divorce. [40] To make such orders upon the request of the applicant wife, McLeod. J. relied on the authority of *Etemad*, where the husband's answer was struck for failing to remove all barriers to remarriage under section 2(6) of the *FLA*. [41] McLeod J. admitted that the case did not seek a claim for relief similar to that sought in *Etemad*. [42] This judgment has been subsequently criticized since the husband in *Bakhshi* was a self-represented litigant without the capacity to adequately argue religious or conscientious grounds involved in the granting of a religious divorce. [43]

Exercising judicial discretion raises arguments of freedom from compelled religious practices. In *Salehi v. Tawoosi*, [44] Myers J. emphasized his serious reservations whether the courts should grant a religious divorce because it implicates freedom of religion issues. [45] Justice Myers referenced s. 21.1(4) of the *Divorce Act* empowering the court to refuse the application of s. 21.1(3) based on the respondent's genuine religious grounds. [46] Myers J. commented on the judgment in *Bakhshi*, and highlighted that the court there did not "advert to the distinction between striking pleadings to try to encourage or coerce a religious divorce and the making of a mandatory injunction whereby a government official positively compels the respondent to perform a religious act." [47] On the other hand, in *Kariminia v. Nasser*, Justice Forth ordered the husband to execute all requirements for an Islamic Iranian divorce. [48] Forth J. considered the Supreme Court's limitations on freedom of religion when it disproportionately opposes public interests or causes harm to the other party. [49] Forth J. explicitly recognized that her specific order was not decided in *Bruker*, which did not endorse remedies of ordering a particular performance or enforcing religious marriage contracts. [50]

The prevalence of cases seeking religious divorces is not adequately represented by the utility of s. 21.1 of the *Divorce Act* or s. 2(6) of the Ontario *FLA*. Arguably, the provisions impacted marital negotiations by discouraging parties from bargaining the grant of religious divorce. It also reaffirmed the legislative and public policy intents of equality and freedom of religion. Empirical data on the problem of withholding *get* in the Jewish faith showed a significant decrease in the cases regarding *get* refusal by 75 percent, [51] and litigation under s. 21.1 has become scarce. [52]

Since 1990, case law interpreting and applying the above provisions have been sparse, illustrating the inefficiency of relying on the legal remedies of s. 2(6) of the Ontario *FLA* or s. 21.1 of the federal *Divorce Act*. Further, there are no cases that apply s. 62 of the Alberta *Family Law Act*. [53] This inefficiency is not because of the low number of cases that give rise to this factual scenario; but is due to the inability of courts to adequately address minority religion divorce matters. The sparse number of cases invoking these legislative remedies suggests that Muslim couples do not frequently rely on them in the process of obtaining religious divorces. In contrast, the number of custody cases among Muslim families seems to exceed the number of divorce cases. This disparity reveals greater comfort in seeking judicial intervention for child custody disputes than in pursuit of religious divorce. The differing socio-legal perceptions of 'accessing justice' across various types of family legal disputes are potentially the driving forces behind this disparity.

Section 21.1 of the *Divorce Act* and s. 2 of the Ontario *FLA* may be appraised from an Islamic perspective to potentially protect women from men's manipulation of religious authority, or required consent, over the different types of marriage dissolution. [54] These power relations explain why the remedies are sought by the wife in most cases. Courts are not obligated to consider the struggles of wives in obtaining religious divorces unless the wives advance their positions by filing under either provision. [55] Moreover, most of the cases were not fully argued on expert evidence of Islamic law or jurisdiction. Despite clear injustices committed by husbands in some cases, the complexity of Islamic divorce proceedings extends beyond the ability to remarry to include consequential financial and custody obligations.

Despite the willingness of courts to compel a husband to obtain a divorce under an Islamic jurisdiction, no court has ordered the husband to pronounce his Islamic divorce, verbally or in writing. In reality, few Muslims with existing marriages registered abroad can access divorce orders from official Islamic legal systems. Moreover, Muslim Canadians with marriages registered outside of Canada do not have any means of resolving their religious marital status. This overburdens Muslim Canadians, especially women, to register their marriages in Muslim countries to be able to have any potential disputes adjudicated and to obtain religious dissolution.

The federal legislature appears to reference quasi-judicial entities administered by religious communities by excluding s. 21.1 of the *Divorce Act* from applying to cases "where the power to remove the barrier to religious remarriage lies with *a religious body or official*." [56] In addition to the vagueness of s. 21.1(6) not defining "*religious body or official*", there is no case law interpreting the provision. Such religious authority may refer to a religious tribunal as referenced by the Minister of Justice at the second reading of the amendment (*Bill C-61*), where he compared access to religious authorities in Islam, Christianity, and Judaism:

> [I]n some religions, the Roman Catholic, Greek Orthodox and Islam, annulment or divorce may proceed more easily and faster if the couple agree. However, in all these cases, the authority to grant the annulment or divorce rests with the *religious tribunal*, not the couple. An un-cooperative spouse may delay a decision, but ultimately he or she cannot prevent the religious tribunal from rendering its decision. In these religions, the spouse initiating the action can ask the *religious authorities* to deal with this problem. The Jewish spouse does not have that recourse. [57]

Nonetheless, the Canadian Muslim community does not have a religious hierarchal authority that offers religious remedies or facilitates religious divorce or annulment.

2. — Islamic Marriage Contracts in Canadian Courts

The inaccessibility of Islamic divorce, *ṭalāq* or annulment, *faskh*, drives the increasing rates of litigation of financial disputes (including *mahr*, division of property and child and spousal support), and parenting rights. In Islamic law, spousal earnings and marital property do not jointly belong to both couples as a married entity nor do they belong to just one of them as the sole legal personality of the marriage. Instead, each spouse maintains an independent financial capacity irrespective of their marital status. Since this may financially disadvantage the wife, she is compensated by the husband's three responsibilities of: 1) mandatory spousal maintenance during the marriage and for a few months after dissolution, 2) mandatory child support irrespective of marital status, and 3) spousal support [58] to be paid to the wife upon divorce. These rights and obligations are the default scheme governing all Islamic corollary relief absent any prenuptial agreement or contract.

Prior to *Bruker*, there was judicial inconsistency among the lower courts at the intersection of religion and family law. At times, Canadian judges apply secular principles to render religious outcomes and invoke religious practices to produce secular results. [59] For example, the British Columbia Supreme Court in *M. (N.M.) v. M. (N.S.)* rejected the husband's argument that *mahr* is a religious agreement that should not be recognized by a secular court. [60] In contrast, the Ontario Court of Justice in *Kaddoura v. Hammoud*, refused to enforce *mahr* considering it to be a "fundamentally Islamic matter," a place "the courts cannot safely and should not go". [61] Courts are more willing to enforce religious contracts after *Bruker*, contributing to increased uniformity in enforcing religious agreements. The Supreme Court held that contracts are not automatically unenforceable merely

because they are religious, as long as they satisfy the necessary requirements. [62] What constitutes a "religious contract" remains indeterminate; whether it is basing the contract on "canon" laws, or dictating spiritual practices within its terms, or waiving certain civil rights that are religiously prohibited to obtain.

Lower courts continue to inconsistently define what is religious or what are Islamic norms. This is exemplified in the judicial approaches to enforcing *mahr* agreements. The ambivalence lies in the courts' recognition of such agreements whose varying interpretations include: a mere religious undertaking, a contractual obligation, or a quantifiable amount of spousal support. Courts express *mahr* in different ways (*mahr*, *maher*, *meher*, and *mehr*) and inconsistently translate the concept into dowry, pre-nuptial agreement, marriage settlement, [63] a traditional contract, [64] or the religious marriage contract itself. [65] Inaccurate translations of religious obligations impact the characterization of the marriage by confusing the fluctuating cultures of the spouses with the fixed rulings of Islam.

The diversity of the Canadian Muslim community is reflected in the variety of religious sects, different theological and legal doctrines, and practices embedded in cultural norms. This diversity often involves a strong inclination of the immigrant community to maintain certain practices of their countries of origin. Modern Islamic law discourse attempts to balance the change of custom, recognizing the need to adapt to new circumstances, and the fixed fundamental cornerstones of the faith transcending time and place. The challenge lies in communal practices where individuals uphold cultural or ethnic traditions as unbending religious principles. This challenge is then brought before the courts when litigating family matters, where the intervention of culture and religion can be most complicated.

(a) — Litigating Mahr Agreements

Mahr, as defined by the Ontario Court of Justice, is a "gift or contribution made by the husband-to-be to his wife-to-be, for her exclusive property. It is not, however, a gift in the sense that a gift is given the grace of the giver, but . . . is obligatory and the wife-to-be receives it as of right." [66] *Mahr* can be cash or any other property, paid all upfront at the time of the marriage contract or divided into upfront and deferred payments. The quantum and timeline of payment are negotiated based on customary financial considerations approved by Islamic law. A wife-to-be cannot waive her right to the *mahr* but may waive her right to any deferred amount commonly payable upon divorce or death. Multiple scenarios affect the wife's entitlement to the *mahr*, in full or part, such as break-up before the consummation of marriage, judicial annulment, or a divorce was initiated by the wife.

Multiple questions arise before Canadian courts when faced with *mahr* agreements. [67] How is *mahr* characterized under a Canadian law regime? If it is a negotiated contract, what did the parties agree on? What reasons of equity or public policy may support its enforceability? Does it substitute or add to statutory obligations? In an attempt to characterize the *mahr*, courts may need to engage with Islamic legal interpretation beyond contract law rules and issues of procedural fairness. To answer these questions, courts frequently rely on expert evidence on Islamic legal norms, reconcile cultural differences of the litigants, and examine conflicts-of-laws issues depending on the jurisdiction in which the marriage was entered into, or the divorce was granted.

A review of case law demonstrates that both husbands and wives invoke *mahr* agreements in pursuit of different remedies to further their interests. Men may seek to exclusively enforce *mahr*, without secular remedies, arguing that entering a religious contract implies an expectation to be solely governed by Islamic law. On the other hand, women may seek to enforce *mahr* as an additional debt obligation to the civil scheme of division of property. If there are no marital assets to be acquired under the secular division of property regime, women may argue for enforcing *mahr* based on contract law or as a pre-nuptial agreement. Both men and women, whose marriages are registered in another jurisdiction, may try to avoid the equalization of property under Canadian law by obtaining foreign divorces. They may then seek to enforce the law of the jurisdiction where the marriage took place or the law of domicile. [68] While men and women have different incentives in arguing for or against enforcing the *mahr*, contemporary Islamic scholars generally warn couples against taking more than their prescribed Islamic law rights.

Although Islamic law enforces an estimated *mahr* in the absence of a written or oral agreement, to civilly enforce a *mahr* agreement as a type of domestic contract under provincial legislation, [69] it must be in writing, signed by both parties, and

witnessed. [70] Courts have refused to enforce a *mahr* agreement because of unequal bargaining power or procedural deficiencies against either the husband or the wife. [71] Even if the *mahr* is found to be a valid contract, courts may nonetheless choose to set aside the agreement as a matter of contract interpretation or choice of law principles. [72] If courts attempt to enforce the *mahr* as a valid contract, they face problems determining the appropriate quantum if the amount is vaguely stated, [73] or not stated at all. Moreover, courts struggle to determine whether religious obligations in the form of deferred *mahr* payments alleviate statutory financial obligations under provincial or federal laws. [74]

In a recent case, *El-Jaroudi v. El-Mikati*, Shergill J. found that providing a religious remedy for division of property may be done as an alternative to civil remedies, rather than ancillary to them. [75] The marriage contract met the criteria of a marriage agreement under the provincial statute, but the claimant was not entitled to the deferred dowry in the marriage contract. This was because the parties agreed on a deferred *mahr* as an Islamic legal remedy to be governed by *Sharīʿah*: "the parties to the marriage contract agree[d] to govern their affairs in accordance with Sharia Law, which dictates how and when the deferred dowry is to be paid." [76] Shergill J. found that, as a matter of contract interpretation, the contract did not stipulate that the agreement would apply in addition to obligations under Canadian law, nor could such a stipulation be assumed since the contract was entered into before the parties contemplated divorcing in Canada. [77] Notably, Shergill J. agreed with the wife that the religious marriage contract was disadvantageous to her in comparison to the provincial scheme of division of property, and stated in dicta that:

> . . . in any event, this court is not well placed to make a determination of entitlement to the *mehr*, since the criteria for entitlement are unique to Sharia law, where the focus is on who initiated the divorce proceeding, who is to blame for the marriage breakdown, and whether there was any mistreatment during the marriage that would entitle the claimant to receiving the dowry. Such considerations are predicated on a fault-based view of entitlement, which was rejected by our legislators long ago. [78]

In this way, the judicial reasoning seemed to recognize the distinction between what can be characterized as *ṭalāq* and *khulʿ* in terms of the right to the *mahr*.

The reliance of the courts on religious scholars or imams proffered as expert witnesses [79] in family disputes is concerning, as it results in inconsistent religiously prescribed remedies or negotiated agreements. Further, courts seek justification for the quantum of *mahr* compared to the length of the marriage. For example, in *Mohammadpoor v. Merati*, the court found the "on-demand" payment of 700 gold coins for a short marriage of two and one-half years to be unreasonable. [80] The trial judge in *Yar v. Yar* also found the stipulated *mahr* in the Islamic contract to be exorbitant and "completely out of line". [81] Although the Ontario Court of Appeal in *Yar* determined the enforceability of the *mahr*, it did revisit its quantum. [82] Similarly, in *El-Jaroudi v. El-Mikati*, Shergill J.'s reasoning was also motivated by the quantum, holding that the husband "would not have agreed to pay $60,000 (a not insubstantial amount in light of the parties finances) if he had known that he would also have financial obligations under Canadian civil laws." [83]

In summary, courts attempt to carefully engage with enforcing Islamic agreements according to their own legal terms and cultural context. Case law suggests three possible approaches for courts: 1) enforce *mahr* to the exclusion of other civil corollary relief rights, 2) enforce it in addition to other statutory rights, or 3) not enforce it due to contract validity or interpretation principles. There are a variety of reasons for the different judgments regarding *mahr* such as: the unfamiliarity of judges with religious law, intervening in religious community affairs or the risk of interpreting religious norms or jeopardizing women's rights. Furthermore, reasons extend beyond judicial treatment to include contradictory information provided to the courts by expert witnesses, [84] resulting from varying rules around *mahr* enforceability within Islamic law. In addition, judges tend to follow the parties' cultures rather than a standardized set of Islamic family law rules.

(b) — Analyzing Methods of "Opting out" of Secular Corollary Relief

Former Premier McGuinty advocated for: "[n]o Sharia law in Ontario . . . There will be no religious arbitration in Ontario . . . There will be one law for all Ontarians". [85] Such comments create the illusion that a uniform legal system applies to religious arbitration. This ignores the reality that prenuptial agreements and other domestic contracts remain a vehicle to opt-out of the default "one law for all Ontarians" Other misconceptions about arbitration law dominated public opinion about Islamic arbitration, including the erroneous beliefs that arbitral awards are not subject to judicial oversight, or that Muslims were being afforded special accommodation to the exclusion of other faiths.

Both arbitration and domestic contracts are governed by provincial legislation. While some provinces restrict the enforceability of arbitral awards, only Quebec and Ontario do so on grounds of religion. Although domestic contracts offer an alternative to religious arbitration, they do not fulfill the need for adjudicating complex religious matters.

(c) — The Inability to Arbitrate out of Secular Law Using Faith-Based Arbitration

Generally, arbitration law across Canadian provinces endorses providing individuals with the right to consensually resolve their matters outside of court. Provinces can be categorized into four groups in applying religious law to arbitral awards:

1) provinces whose legislation is silent on the choice of applicable law to arbitration agreements,

2) provinces permitting parties to designate the law of a jurisdiction of their choice,

3) provinces permitting parties to designate the law of a jurisdiction of their choice only when it is consistent with provincial or federal legislation; and

4) provinces explicitly precluding the application or enforcement of religious law.

The first category consists of provinces whose legislation is silent on the choice of applicable law to arbitration agreements. Nova Scotia's, [86] Newfoundland's, [87] and Prince Edward Island's *Arbitration Act*s [88] do not have explicit "conflict of laws" or "application of rules of law" provisions. The absence of these provisions provides flexibility for parties to elect any rule of law; arguably including religious law. Thus, it is possible for Islamic law to be designated to arbitration in these provinces due to the legislative silence and according to the default freedom to contract.

Provinces in the second category, Alberta [89] and New Brunswick, [90] permit parties to designate the law of a jurisdiction of their choice. If none is designated, both provinces explicitly provide in their arbitration legislation that the arbitral tribunal shall assign the law of the jurisdiction it considers appropriate. The explicit mention of "law of a jurisdiction" necessitates parties who wish to have their agreement governed by religious law to choose a foreign jurisdiction that applies Islamic law. However, the enforceability of such agreements remains uncertain.

The third category of provinces, British Columbia, [91] Manitoba, [92] and Saskatchewan, [93] allow parties to apply the law they designate to their arbitration process. However, they have restrictions in enforcing arbitral awards inconsistent with provincial or federal legislation. As of 2020, family law arbitration in British Columbia is governed by the *Family Law Act*, [94] to the exclusion of its *Arbitration Act*. [95] The B.C. *Family Law Act* restricts enforcing corollary relief and parenting arbitral awards by stating that "despite any agreement of the parties to a family law dispute, a provision of an arbitration award that is inconsistent with this Act or the *Divorce Act* (Canada) is not enforceable." [96] Similarly, Saskatchewan does not enforce arbitral awards that are inconsistent with provincial family legislation. [97] Most recently, Manitoba's *Arbitration Act* was amended in 2019 to make provisions of family law arbitration awards inconsistent with other provincial legislation unenforceable. [98] Hence, the freedom to designate Islamic law in an arbitration agreement is burdened by the stipulation for the arbitral award to align with Canadian law.

Lastly, Quebec and Ontario are the most restrictive in both applying and enforcing religious law in family arbitration; with Quebec's *Civil Code* not permitting family law arbitration at all.[99] In 2005, the Quebec National Assembly unanimously adopted a motion expressly prohibiting religious arbitration in family law matters.[100] A proponent of the motion cited section 15 of the *Charter* and emphasized that Muslim women are the victims of *Sharīʿah*.[101] Notably, the *Civil Code* does not prohibit religious arbitration in commercial matters and provides a high degree of deference to such arbitral awards.[102] Hence "religious arbitration in Québec is entirely possible and is treated equally with non-religious arbitration" in commercial matters.[103] The court in *Grunbaum c. Grunbaum*, a father-son property dispute, did not consider religious arbitration agreements to have any special status and acknowledged that they can be, in theory, enforced like any other arbitral award.[104] Thus, while Islamic law may be applied to commercial arbitration agreements in Quebec, arbitrating family disputes is entirely banned in the province.

The provincial arbitration scheme in Ontario previously permitted an arbitral tribunal to apply the rules of law designated by the parties without qualification; its legislation mirrored the majority of the provinces in the first category.[105] However, in 2006, the *Arbitration Act* was amended to limit the parties' choice of substantive law from governing in family arbitration.[106] At the same time, the *Family Law Act* was amended in 2006 to condition the enforceability of arbitral awards on their compliance with the *Arbitration Act*.[107]

Outside of family law, Ontario courts continue to enforce arbitration agreements choosing religious adjudicative procedures. For example, in *Gerstel v. Kelman*, the Plaintiff sought an order to remove the Beis Din arbitrators and to set aside the Beis Din arbitral award.[108] Lederer J. affirmed the statutory direction and court practice of not intervening in an arbitration given its nature as a private contract "where the selected arbitrator honours community leadership and reflects community values and faith."[109] Lederer J. confirmed the validity of the stipulation in the arbitration agreement to be based on "an interpretation of *Halacha* described as *Torah Law*" and asserted:

> There is nothing intrinsically wrong with this. It is not inherently contrary to any relevant legal principle found in our law. It would be inappropriate for the court to impose its view of the process by which these values are to be achieved. It is for those who understand these values and the manner in which their community respects them to set the process. This falls within the responsibility of the *Beis Din*.[110]

However, Lederer J. cautioned that the Beis Din did not have absolute power and was limited by both the *Arbitration Act* as well as other limitations set by the parties.[111]

A court will presume a chosen arbitrator is competent, and the party seeking to set aside an arbitral agreement has the burden of proving the arbitration should not be performed by the chosen arbitrator. In *Popack v. Lipszyc*, the business parties agreed to submit their commercial disputes to a Beis Din. The trial judge refused the plaintiff's argument that the Beis Din did not have jurisdiction over the dispute.[112] The Ontario Court of Appeal confirmed that the plaintiff failed to meet the burden of proving that the arbitration should not be performed by the Beis Din. The Court affirmed the "well-established preference in favour of maintaining arbitral awards rendered in consensual private arbitrations" and reasoned that the parties' selection of their forum implies both a preference for the outcome arrived at in that forum and a limited role for judicial oversight of the arbitral award.[113]

(d) — The Controversy over Islamic Arbitration in Ontario

Since 2005, the use of religion in family law arbitration in Ontario has been controversial, attracting legal scholarship across common law jurisdictions. Prior to the 2006 ban, for years, Christian, Jewish, and several Muslim groups used faith-based arbitration, in Ontario and other provinces. One of the earliest Muslim formal services was established in 1982 by Masjid al-Nour, a Sunni mosque in Toronto. The mosque formed a committee consisting of the imam and six qualified individuals equally divided between men and women. The committee "won the respect and confidence of the court in its ability to resolve disputes

within Muslims" and was "often called upon by the family courts to mediate and sometimes arbitrate." [114] Another service is the Ismaili Conciliation and Arbitration Boards (CABs), which exist in 14 jurisdictions globally and in Canada since 1990. In addition to formal arbitration platforms, many mosques and Muslim religious leaders provided ADR services related to separation and divorce proceedings in an unorganized and undocumented manner and continue to do so to this day.

As one of the fastest-growing minorities in Ontario, [115] the Muslim community hastened to utilize Ontario's *Arbitration Act* in 1991, the same year it became law. [116] The Canadian Society of Muslims proposed to establish Ontario arbitration boards called the Islamic Institute of Civil Justice (IICJ) to provide a venue for Muslims to resolve their personal matters according to their religious beliefs while remaining within the Canadian judicial system. [117] Significant media attention heightened the socio-political tension between individuals perceiving the forum of Islamic arbitration to be a means of enhancing social integration, and those who perceived the application of *Sharīʿah* in Ontario to potentially infringe on women's rights. [118] The Ontario government appointed the former Attorney General of Ontario, Hon. Marion Boyd, to investigate the practicality of using religious law to arbitrate family disputes. Boyd's report concluded that the province should allow faith-based arbitration to maintain cultural autonomy and did not legitimize the concern of *Sharīʿah* to undermine women's rights or equality. [119]

By 2005, Islamic arbitration in Ontario was opposed by 87 national and international human rights groups because it "did not reflect how ordinary Sharia is in the everyday lives of many Canadian Muslims, but instead portrayed it as alien within a liberal democratic context." [120] In 2006, the ongoing pressure from lobbyists and the negative public spotlight on the IICJ led to the provincial ban of religious tribunals from applying laws foreign to Ontario law. [121] Although the Boyd Report recommended legislative and procedural mechanisms for Ontario to regulate religious arbitration, [122] it did not define or describe *Sharīʿah* that should govern arbitral proceedings. Many of Boyd's proposals regarding arbitrators' training, transparency, and accountability were adopted in the 2006 amendments; however, religious arbitration was not allowed.

(e) — The Potential to Contract out of Secular Law Using Faith-Based Mediation

Theoretically, no enacted law in any province prevents Muslims from incorporating religious law or involving religious leaders in their consensual family dispute resolution processes. It is not illegal in any province to use Islamic, or any religious, law in arbitration or even to establish a religious tribunal. The impact of the legislative changes in Ontario and the long-standing situation in Quebec lies primarily in the issue of the enforceability of arbitral awards rather than of separation and other domestic agreements (whether negotiated or mediated). Both provinces restrict the enforceability of religious-based arbitral awards. [123] Neither prevents the enforcement of religious-based domestic contracts. The current situation leaves Muslim spouses seeking to apply Islamic principles related to marital dissolution with one potentially enforceable mechanism: separation agreements or other domestic contracts.

Spouses in Canada have the authority to contract out of the default statutory regime by entering into domestic contracts. By virtue of their freedom to contract, couples can negotiate almost any family dispute in a marriage contract, separation agreement, cohabitation agreement, or paternity agreement. [124] This includes many corollary relief issues pertaining to division of property, equalization payments, custody, access, parenting, child support and spousal support. Through these private agreements, individuals are currently able to optout of the "one law for all" that allegedly governs all family disputes.

Faith-based agreements reached through negotiation or mediation may simply be complied with by the parties, as is true for most domestic agreements. If necessary, such agreements can be enforced by courts, even without involving lawyers or obtaining independent legal advice, so long as the agreements align with provincial domestic contract laws. Enforceability of provisions of domestic contracts can be challenged when the agreements are contrary to the best interests of the child, unreasonable having regard to the child support guidelines, or conditional on one party remaining chaste. [125] Moreover, there are statutory grounds for setting aside or overriding domestic contracts which resemble judicial intervention in religious arbitration. [126]

Although domestic contracts offer some leeway to incorporate religious law in private agreements, arbitration is frequently an eventual necessity for couples who are unable to reach an agreement through negotiation or mediation. The discrepancy of not enforcing faith-based arbitration awards while enforcing faith-based domestic contracts can be further investigated by: 1) analysing the degree of judicial intervention in these instruments and 2) examining the effectiveness of domestic contracts as an alternative in light of numerous Islamic laws of separation settlements.

If religious family law arbitration awards are unenforceable due to public policy reasons, it is legally unclear, and confusing to the Muslim community, to enforce most religious-based domestic contracts whose processes share the same cultural and religious influences. Faith-based domestic contracts and arbitral awards are both drafted or dictated by religious authorities mutually selected by the parties. Comparable to parties' agreement on terms of faith-based domestic contracts, parties must agree on rules predicting the terms of faith-based arbitral awards. These rules would be publicly accessible and available to parties prior to arbitration to ensure and safeguard consent. In fact, faith-based mediation of domestic contracts relies on the parties' consent to rules by self-pronounced religious experts.

Domestic contracts and arbitration agreements attract comparable levels of judicial intervention. With respect to a religious-based domestic contract, the grounds to vary it or set it aside include unwitnessed agreements, inadequate financial disclosure, undue influence, and unconscionability. [127] For a religious-based arbitral award, courts have wide jurisdiction to set aside, vary, or remit an arbitral award if a party was not treated equally, fairly, or if the arbitration process lacked procedural fairness or the arbitral award did not apply the proper law. [128] These similar ways of ensuring that a domestic contract and arbitral award are not procedurally unfair to the parties should motivate their comparable enforcement. Although there is a difference between negotiated contractual terms and imposed arbitral terms, this difference is practically trivial in the case of the Muslim community. Muslim disputants entering domestic contracts are not freely negotiating substantive rights because of their overwhelming reliance on religious and community leaders.

Many Canadian Muslims, regardless of their level of religiosity, choose to apply Islamic law rules in their family law issues and seek the help and facilitation of their religious leaders. This does not negate the community's desire to integrate into the larger society. The Muslim population in Canada, consisting largely of immigrants and second-generation Canadians, is confronted with a paradox of experiencing religious freedom within a social framework based on non-Islamic objectives. This freedom is possibly greater than in the countries they left behind. Muslims face constant pressure to adapt to societal practices or customs that exceed the limits of their faith, fueling sensitivity towards liberal ideals, and a fear from committing sins. This fear is amplified in the family realm because it fundamentally intersects with the religious, social ad spiritual spheres of life. Autonomy over these religious matters is deeply connected to the identity of the community members.

Upon entering or negotiating any dispute, Muslims must maneuver between personal interests, cultural pressures, and religious rights and obligations. Surpassing the entitlements allowed for in Islamic law is generally prohibited, even if obtained in a manner compliant with the civil legal system. Inversely, taking less than their Islamic rights may be permitted, to maintain family or community relations. Culturally, women are more vulnerable to issues of reputation than men and may face more pressure to compromise despite increasing community attention to securing women's rights. On the other hand, men are more likely subject to economic hardship when women seek the enforcement of both religious and civil obligations. The gendered nature of these disputes requires a variety of resolutions to provide alternatives for wronged individuals.

Many disputants continue to bring their issues before imams or religious counselors. Drafting domestic contracts based on religious principles requires a reconciliation between legal and religious laws specific to each couple. Even though parties have domestic contracts capturing the religious and secular rights available to each spouse upon divorce, they may take advantage of the civil system's unfamiliarity with Islamic law. Parties may persuade the court to enforce the contract according to their proffered expert witnesses or set it aside by claiming they themselves did not understand it.

The complexity of Islamic divorce proceedings and corollary rights necessitates the involvement of religious leaders as decision-makers rather than just as consultants. Currently, the intervention of imams begins through mediation; however, due to religious and cultural motives, this often results in an unofficial arbitration in which the final religious ruling will be left to them. The

parties' ultimate reliance on religious guidance and leadership triggers the question of the feasibility of religious arbitration. Religious arbitration would reconcile religious and secular rights upon divorce for individuals consenting to quasi-judicial resolutions for their disputes. More importantly, it would also support the institutionalization of Muslim religious leaders' granting of religious annulments for Muslim women in a sound manner that avoids social or religious abuse and circumvents the legal controversy of compelling the husband to perform a religious act.

3. — Examining the Potential of Canadian Islamic ADR

With socio-political circumstances driving the rise in the divorce rate, Muslim couples in Canada are hesitant to resort to civil legal processes when unable to resolve their disputes within the community. [129] The Islamic rites of marriage and divorce are central to the Muslim community including its nonobservant members. To many Muslims, Islamic family law represents "most of what remains of pre-colonial Islamic legal system." [130] The complexity of family disputes in the community is exhibited in a cultural process of handling disputes outside the scope of civil law. It relies on a form of "private ordering" determined by religious rulings, ethnic customs, socio-cultural norms, or influences of spiritual leaders. This private ordering encompasses a strong inclination of the immigrant community to preserve practices of their country of origin. The failure of these dynamics causes the Muslim community to resort to formal legal processes to obtain secular relief while bargaining their remaining religious rights in the community. The ineffectiveness of the legislative remedies and the challenges of litigating Islamic marriage contracts in Canadian courts pose the question of whether it is feasible for ADR mechanisms to settle religious private affairs in a context that is more adapted to the needs of the community.

Different approaches towards the establishment of Islamic arbitration bodies, whether in supporting multiculturalism or calling for legal integration, dominate academic literature. The discussion focuses on theoretical concepts of state neutrality and legal pluralism. However, the compatibility of Islamic ADR laws with provincial ADR statutes remains unexplored. Few legal writings assess how religious ADR bodies can adapt to secular environments. [131] Canadian legal literature does not address how the Muslim community may adopt Islamic legal principles while procedurally exercising the civil right of arbitrating its disputes within secular justice norms.

Models for such integration may be confused with perceptions of modern Islamic legal systems, especially those of Saudi Arabia and Iran. [132] Such a reductionist view ignores the diversity of Islamic legal systems across the globe and disregards the flexibility of classical and modern Islamic law. To address evolving social dynamics and gendered economic inequalities, modern Islamic legal systems continuously reform their family laws by applying various legal doctrines beyond orthodox positions. Some of these reforms entitle women to more rights upon divorce and encourage cultural awareness of their legal autonomy.

To embrace legal pluralism, the focus must shift from the state to the legal subjects themselves. Litigants can influence ADR bodies by broadening the scope of Islamic customary law: "(subjects of religious law) living in secular settings develop expectations of religious law based on the legal norms of the country in which they live." [133] The social dynamics of the community and its normative interactions with religion prompt Islamic legal reasoning to create precedents for novel settings. All of these factors create precedents for novel settings. All of these factors — neutrality of the state, substantive Islamic ADR law, and the evolving Islamic-Canadian customs — can contribute to successful Islamic ADR models avoiding contravention of the Canadian constitutional, legal, and societal ideals.

Successful Islamic-based ADR models are well-established in Western common law jurisdictions. Below is a chart capturing some of these institutions in Europe and North America that are still functioning until today.

Organization	Country	Est. Date
The Islamic Shari'a Council	United Kingdom	1982
Ismaili Conciliation and Arbitration Board	Globally including Canada	1986
Shariah Board of America: Darul-Qadha	United States & India	1998
Muslim Arbitration Tribunal	United Kingdom	2007
London Fatwa Council	United Kingdom	2009
Darul Hikmah Consultancy LLC	United States	2011

Figure 2 — Islamic Family ADR Institutions in Secular Common Law Jurisdictions

To date, the interactions between the state and these religious tribunals or entities have not been assessed in terms of judicial intervention, reactionary legislation, maintaining a dual legal system, or incorporating religious law. [134]

Multiple attempts to establish Islamic tribunals or to provide Islamic arbitration in the United States have attracted commentaries on their effectiveness and interactions with the legal system. [135] The American Jewish faith experiences of the Bies Din are constantly contrasted, endorsing the belief in the potential success of Islamic tribunals without contradicting public policy. [136] Two developing US Islamic arbitration institutions exist today. The Shariah Board of America (Darul-Qadha) [137] functions in three branches in the US and one in India. The second institution is Darul Hikmah Consultancy. In Canada, only the Ismaili Conciliation and Arbitration Boards (CABs) exist as an entity belonging to the Islamic faith. [138] Given its narrow religious denomination, CABs' service is inaccessible to both Sunni and most Shia communities that follow a different set of laws. [139]

Islamic arbitration in the United Kingdom appears to be the most mature experience thus far that has proved a great success in multiple institutions. [140] Similar to the Canadian Muslim experience, there were many years of unregulated and non-binding services unofficially administered by imams or community leaders at local mosques or even privately in homes. Islamic arbitration in the UK now:

> 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. [141]

Various UK Islamic institutions provide mediation and arbitration services. [142] In 1982, the Islamic Shari'a Council was founded by ten UK Muslim organizations and consists of scholars and field workers from diverse Sunni legal schools. The Council has dealt with 10,000 cases, the majority of which concern divorce. [143] In 2009, London Fatwa Council was established to provide legal advice, marital counselling, and advocacy for women's rights against abuse. [144]

One of the prominent UK organizations is the Muslim Arbitration Tribunal (MAT). MAT was established in 2007 to provide ADR resolutions for personal matters such as marriage, divorce, inheritance, and wills under the English 1996 *Arbitration Act*. [145] MAT adjudicates commercial matters, family law disputes, and other personal matters. [146] It serves both Muslims and non-Muslims [147] by granting enforceable arbitral awards which are subject to judicial review. [148] MAT exemplifies that the concerns relating to Islamic arbitration in Ontario can be adequately addressed. MAT's value system, the tribunal's composition of Muslim British lawyers from both genders, and procedural transparency demonstrate the potential of Muslim minorities to holistically integrate civil and religious laws. Building on the successes of the North American Jewish community and the UK Muslim community as well as the experiences of Muslims in Ontario, there may be a possibility for Canadian Muslim disputants to secure their private rights through Islamic ADR mechanisms in common law jurisdictions.

Admittedly, Muslim communities in North America view their religious leaders as voluntarily appointed mediators, arbitrators, and counsellors. [149] Numerous Muslim women seek unofficial help from imams and religious institutions to solve family disputes, resulting in a largely unregulated "ad hoc system of individual imams and arbitrators reaching unreported decisions". [150] The problems are numerous, and include the lack of legal authority or religious legitimacy of the process, the wrong or inaccurate assessments of unqualified individuals, the lack of documentation for these processes, the absence of administrative oversight, and the potential religious or emotional abuse by some individuals against vulnerable spouses.

Muslim communities in different majority non-Muslim countries, including Canada, have been seeking to provide institutional resolutions for issues of personal law and enforceability of faith-based agreements for over four decades. To "enable the emergence of a vibrant and authoritative Shariah for North American . . . [, o]ne option would be to allow independent religious tribunals to determine issues of personal family religious law." [151] The facilitation of religious arbitration would contribute to solving these personal issues for individuals who are consenting to quasi-judicial resolutions. Moreover, religious arbitration would contribute to creating a sound environment for institutionalizing the work of Muslim religious leaders to facilitate religious annulments for Muslim women in a manner that avoids legal controversy and social or religious abuse.

Conclusion

The Islamic consequences of marriage dissolution depend on whether the breakup is a *ṭalāq*, *khulʿ*, or *faskh*. The type of Islamic marriage dissolution will determine the validity of remarrying a previously divorced spouse, how quickly the wife can re-marry, as well as her rights to spousal support and deferred *mahr* payments. The substantive rights afforded to divorcing spouses under Islamic law may be comparable to the corollary relief afforded under federal divorce law or provincial family law statutes, but these Islamic rights are often mischaracterized by Canadian courts.

The freedom to contract allows individuals to designate any law, including religious law, in domestic contracts or arbitration agreements, albeit in a limited fashion. Despite the historic existence of faith-based arbitration in Canada, provincial arbitration laws differ in the enforceability of awards, especially when proposed by the Muslim community. While faith-based arbitral awards in Ontario and Quebec are not legally binding, the situation in other provinces remains practically uncertain. This article aims to serve as a springboard for future research to evaluate the enforceability of faith-based arbitral awards or domestic contracts and analyze the trends of using private adjudication by the Canadian Muslim community.

Footnotes

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1 See Pascale Fournier, "In The Canadian Shadow of Islamic Law: Translating Mahr as a Bargaining Endowment" (2006) 44:4 OHLJ 649.

2 Julie Macfarlane, *Islamic Divorce in North America: Choosing a Shari'a Path in a Secular Society* (Oxford University Press, 2012); Pascale Fournier, "Borders and Crossroads: Comparative Perspectives on Minorities and Conflict of Laws" (2011) Emory Int'l L Rev n 82.

3 Ayelet Shachar, "Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law" (2008) 9:2 Theoretical Inquiries in L at 576.

4 Pascale Fournier, "Calculating claims: Jewish and Muslim women navigating religion, economics and law in Canada" (2012) 8:alt1.tbl1 Intl J L 47 at 64; Keshet Starr, "Scars of the Soul: *Get* Refusal and Spiritual Abuse in Orthodox Jewish Communities", (2017) 31 J Jewish Women's Stud Gender Issues at 37.

5 ʿAbdulamalik al-Juwaynī, *al-Ghiāthī* 3rd ed by ʿAbdula ʿzīm al-Dīb (Jeddah: Dār Al-Minhāj 2011) at 552-554.

6 Mohamed Fadel, "Political Liberalism, Islamic Family Law and Family Law Pluralism:" in Joel A. Nicholes, eds, *Marriages and Divorce in Multi-Cultural Context: Reconsidering the Boundaries of Civil Law and Religion* (Cambridge University Press, 2010) at 173-75.

7 For details on stipulations in marriage contracts and divorce-based mechanisms for enforcing them, see Kecia Ali, "Marriage in Classical Islamic Jurisprudence: A Survey of Doctrines" in Asifa Quraishi, & Frank E. Vogel, eds, *Islamic Marriage Contract: Case Studies in Islamic Family Law* (Cambridge: Harvard Law School Islamic Legal Studies Program 2008) at 21-27.

8 Shagufta Omar, "Dissolution of Marriage: Practices, Laws and Islamic Teachings" (2007) 4:1 JL Policy Perspectives 91.

9 For a discussion on rights upon divorce, see Susan Spectorsky, "Introduction" in *Chapters on Marriage and Divorce* (Austin: University of Texas Press, 1993) at 27-39.

10 Islamic law only validates marriages between males and females. Hence, a masculine reference to the husband and feminine to the wife is maintained throughout this article.

11 Even if *ṭalāq* is validly granted, it may be religiously forbidden, making the spouse sinful in their dissolution of the union.

12 Fadel, *supra* note 6 at 177.

13 The husband's ability to revoke his transfer is disagreed upon among Muslim jurists. See Haifaa A Jawad, *The Rights of Women in Islam* (New York: St. Martin's Press, 1998) at 35-40.

14 See Sevak Manjikian, *Islamic Law in Canada: Marriage and Divorce* (PhD: McGill University, Institute of Islamic Studies, 2007) at 65-79.

15 See, for e.g., Ontario's *Family Law Act*, R.S.O. 1990, c. F.3, s. 2(4) [Ontario FLA]; S.O. 2006, c. 19, Sched. C, s. 1 (1) and Alberta's *Family Law Act*, SA 2003, c. F-4.5 s62.

16 *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 21.1: "Affidavit re removal of barriers to religious remarriage".

17 *House of Commons Debates*, 34th Parl, 2nd Sess, vol 6 (15 February 1990) at 8375-77 (Hon Doug Lewis).

18 *Ibid.*

19 *Marcovitz v. Bruker*, 2007 SCC 54, 2007 CarswellQue 11548, 2007 CarswellQue 11549, [2007] 3 S.C.R. 607 (S.C.C.) at paras. 7-8. (citing *House of Commons Debates*, 34th Parl, 2nd Sess, vol 8 (4 May 1990) at 11033-34 (Hon Kim Campbell). ["*Bruker*"].

20 *Ibid.*

21 *Ibid.* at para 81.

22 Ontario FLA, RSO 1990, c F.3, s 56(5) and (6). These provisions were first introduced in the *Family Law Act, 1986*, S.O. 1986, c. 4.

23 John Syrtash, *Religion and Culture in Canadian Family Law*, (Toronto: Butterworths, 1992) at 132.

24 Ontario FLA, RSO 1990, c F3, s 2.

25 *Ibid.* s. 2(6). See, e.g., *Etemad v. Hasanzadeh*, 2014 ONSC 6737, 2014 CarswellOnt 17252 (Ont. S.C.J.) at paras. 49-53 (invoking s.2(6) when the husband refused to agree to an Islamic divorce arguing that the parties were still considered married in Iran).

26 *Glass v. Glass*, 1987 CarswellOnt 3834 (Ont. S.C.).

27 *Ibid.* at para 11.

28 *Divorce Act*, s. 21.1(2).

29 *Tanny v. Tanny*, 2000 CarswellOnt 2245 (Ont. S.C.J.) at 38.

30 *Syndicat Northcrest c. Amselem*, 2004 SCC 47, 2004 CarswellQue 1543, 2004 CarswellQue 1544, [2004] 2 S.C.R. 551 (S.C.C.).

31 *Ibid.* at paras 88-89.

32 *H. (K.) v. S. (J.)*, 2000 CarswellQue 373 (C.S. Que.). The Court found that the husband's argument of being forced to appear before the Beth Din had no genuine religious or conscientious grounds. Similar judgment was given to *D. (A.) c. P. (J.)*, 2004 CarswellQue 203 (C.S. Que.).

33 *A.M. v. M.S.*, 2017 BCSC 2061, 2017 CarswellBC 3181 (B.C. S.C.) at paras. 156-158; *A. (N.) v. R. (S.)*, 2013 BCSC 42, 2013 CarswellBC 26 (B.C. S.C.) at para. 74(11); *Bruker*.

34 2004 ABQB 36, 2004 CarswellAlta 124 (Alta. Q.B.); additional reasons 2004 CarswellAlta 151 (Alta. Q.B.) (a Saudi-Arabian Muslim couple underwent a divorce where the wife raised s. 21.1(2) of the *Divorce Act* to make the divorce recognized in Saudi Arabia and other Muslim countries).

35 *Ibid.* at para 178.

36 *Ibid.* at para 179.

37 1999 ABQB 881, 1999 CarswellAlta 1100 (Alta. Q.B.).

38 *Ibid.* at para 181.

39 *Ibid.* at para 180.

40 2015 ONSC 7407, 2015 CarswellOnt 18684 (Ont. S.C.J.) at para. 28, ; reversed 2017 ONCA 838, 2017 CarswellOnt 16886 (Ont. C.A.).

41 *Ibid.* at para 23.

42 *Ibid.* at para 24.

43 *Zargarian-Tala v. Bayat-Mokhtari*, 2019 BCSC 448, 2019 CarswellBC 705 (B.C. S.C.) at para. 66 (Gomery J. commenting on *Bakhshi* that "[t]he matter may not have been fully argued as the husband appeared on his own behalf, and the reliance on *Etemad* is not persuasive, because, as I have noted, the order in that case was grounded in a statutory jurisdiction to refuse to hear a party who was refusing to consent to remove a barrier to remarriage.").

44 2016 ONSC 540, 2016 CarswellOnt 920 (Ont. S.C.J.); additional reasons 2016 CarswellOnt 2425 (Ont. S.C.J.); affirmed on other grounds 2016 ONCA 986, 2016 CarswellOnt 20590 (Ont. C.A.) (the wife chose to obtain her Iranian divorce and did not move under s.21.1. Myers J. affirmed that the religious divorce should be left to the Iranian proceedings).

45 *Ibid.* at para 48.

46 *Ibid.*

47 *Ibid.*

48 2018 BCSC 695, 2018 CarswellBC 1044 (B.C. S.C.).

49 *Ibid.* at 56 (citing *R. v. Big M Drug Mart Ltd.*, 1985 CarswellAlta 316, 1985 CarswellAlta 609, [1985] 1 S.C.R. 295 (S.C.C.) at paras. 337-346 and *Syndicat Northcrest c. Amselem*, 2004 SCC 47, 2004 CarswellQue 1543, 2004 CarswellQue 1544 (S.C.C.) at paras. 62-63).

50 *Ibid.* at para. 45. Also see *Zargarian-Tala v. Bayat-Mokhtari*, 2019 BCSC 448, 2019 CarswellBC 705 (B.C. S.C.) at paras. 84 & 71 (ordering the husband to provide the wife with all the required documents for her Iranian divorce. The court did not consider this as implicating his freedom of religion since he had no reasonable grounds for withholding the religious divorce).

51 John C. Khleefeld & Amanda Kennedy, "Delicate Necessity: Bruker v. Macrovitz and the Problem of Religious Divorce" (2008) Can J F L at t 53.

52 Lisa Fishbayn, "Gender, Multiculturalism, and Dialogue: The Case of Jewish Divorce" (2008) 21 Can JL & Jur at 91-93.

53 *Family Law Act*, S.A. 2003, c. F-4.5.

54 In Macfarlane's qualitative work, 80% of the documented personal experiences were acquired from women, signifying the more complicated duty upon Muslim wives to obtain a religious divorce. Macfarlane, *supra* note 2.

55 *Ghahrai v. Mohammad*, 2006 CarswellOnt 7325 (Ont. S.C.J.) (where the court found that the absence of an application from the wife made her claims of struggling to obtain a religious divorce irrelevant to the variation of spousal support).

56 1990, c. 18, s. 2, S. 21.1(6) (emphasis added).

57 *House of Commons Debates*, supra note 47 at 8375-77 (Hon Doug Lewis) [emphasis added].

58 Muslim jurists disagreed whether spousal support upon divorce by the husband is mandatory or only recommended.

59 Fournier, *supra* note 4 at 995-6.

60 *M. (N.M.) v. M. (N.S.)*, 2004 BCSC 346, 2004 CarswellBC 688 (B.C. S.C.); see also *Amlani v. Hirani*, 2000 BCSC 1653, 2000 CarswellBC 2663 (B.C. S.C.) (recognizing the possibility of enforcing *mahr* as a valid contractual agreement).

61 1998 CarswellOnt 4747, 168 D.L.R. (4th) 503 (Ont. Gen. Div.) at paras. 25 and 28, ; additional reasons 1999 CarswellOnt 191 (Ont. Gen. Div.); but see *Khan v. Khan*, 2005 ONCJ 155, 2005 CarswellOnt 1913 (Ont. C.J.) (considering the religious contract including the stipulated *mahr* to be justiciable).

62 *Bruker*, at para 123.

63 *Mohammadpoor v. Merati*, 2020 NSSC 218, 2020 CarswellNS 550 (N.S. S.C.) at para. 5 ("marriage settlement signed by the parties prior to their wedding").

64 *Bakhshi v. Hosseinzadeh*, 2017 ONCA 838, 2017 CarswellOnt 16886 (Ont. C.A.) at para. 22 ["*Bakhshi*"] (" . . . treat Mahers like any other contract that may impose a variety of different legal obligations").

65 *Akkawi v. Habli*, 2017 ONSC 6124, 2017 CarswellOnt 19656 (Ont. S.C.J.) at para. 6, ; additional reasons 2018 CarswellOnt 3290 (Ont. S.C.J.) (defining *Maher* as a marriage contract required under Muslim law).

66 *Kaddoura v. Hammoud*, 1998 CarswellOnt 4747 (Ont. Gen. Div.) at paras. 13-14, ; additional reasons 1999 CarswellOnt 191 (Ont. Gen. Div.).

67 E.g., Fareen Jamal, "Enforcing Mahr in Canadian Courts" (2013), 32 Can Fam L Q. 97.

68 See *Amin v. Canada (Minister of Citizenship & Immigration)*, 2008 CarswellNat 985, 2008 CarswellNat 293, [2008] 4 F.C.R. 531 (F.C.) at paras. 16-20 (addressing public policy issues arising from the enforcement of informal or religiously based divorces in Pakistan, in contrast with a Jewish *get*).

69 See Ontario FLA, R.S.O. 1990, c. F.3, s. 55 and Nova Scotia's *Matrimonial Property Act*, R.S.N.S. 1989, c.275, s. 24.

70 *Bakhshi* at paras 7-8.

71 See *Yar v. Yar*, 2015 ONSC 151, 2015 CarswellOnt 626 (Ont. S.C.J.) at para. 37, ; additional reasons 2015 CarswellOnt 1329 (Ont. S.C.J.); additional reasons 2015 CarswellOnt 5407 (Ont. S.C.J.) (the husband neither reads nor understands the language the *mahr* is written in) and *Shaikh v. Shaikh*, 2016 ONSC 7400, 2016 CarswellOnt 18600 (Ont. S.C.J.) at para. 60 (the wife may not have fully understood or appreciated the implications of the Nikah or of the rights and obligations created and affected).

72 See *El-Jaroudi v. El-Mikati*, *infra*.

73 See *Nadim v. Hakim*, 2018 BCSC 1999, 2018 CarswellBC 3073 (B.C. S.C.) (where E.M. Myers J. could not determine the quantum of *mahr* due to the vagueness of its measurement and its monetary value, being written according to the Iraqi culture).

74 *Ibid.* at para 51 (holding that the *mahr* would not, at any event, have any relationship to the financial obligations of the parties under British Columbia law *if it is meant to be a payment made upon divorce*); see *Bakhshi* (where the trial judge had incorrectly excluded the Maher payment from the calculation of the NFP and equalization payment).

75 2020 BCSC 868, 2020 CarswellBC 1444 (B.C. S.C.).

76 *Ibid.* at para 35.

77 *Ibid.* at para 38

78 *Ibid.*

79 See *El-Jaroudi v. El-Mikati*, 2020 BCSC 868, 2020 CarswellBC 1444 (B.C. S.C.) at para. 28 (where the judge found the Imam's testimony "very helpful to the court, and I have placed considerable weight on it.")

80 2020 NSSC 218, 2020 CarswellNS 550 (N.S. S.C.) at 42.

81 *Yar v. Yar*, 2011 ONSC 1256, 2011 CarswellOnt 1161 (Ont. S.C.J.) at para. 19.

82 *Yar v. Yar*, 2012 ONCA 658, 2012 CarswellOnt 12039 (Ont. C.A.) at paras. 29 & 30.

83 See *El-Jaroudi v. El-Mikati*, 2020 BCSC 868, 2020 CarswellBC 1444 (B.C. S.C.) at para. 43.

84 See Manjikian, *supra* note 16 at 253-54 (highlighting contradictory positions of expert witnesses, including an imam, in providing a proper definition of marriage).

85 Colin Freeze & Karen Howlett, "McGuinty government rules out use of sharia law" (12 September 2005), online: The Globe and Mail <www.theglobeandmail.com/news/national/mcguinty-government-rules-out-use-of-sharia-law/article18247682/> [perma.cc/NM8L-YENK].

86 *Arbitration Act*, RSNS 1989, c 19 ["Nova Scotia Arbitration Act"].

87 *Arbitration Act*, RSNL 1990, c A-14 ["Newfoundland Arbitration Act"].

88 *Arbitration Act*, RSPEI 1988, c A-16 ["Prince Edward Island Arbitration Act"]. However, drafted legislation not yet in force, SPEI 1996, c 4, ss 17(1), 32.32(1), 32(2), would place the province in the first group.

89 *Arbitration Act*, RSA 2000, c A-43, s 32 ["Alberta Arbitration Act"].

90 *Arbitration Act*, RSNB 2014, c 100, s 32 ["New Brunswick Arbitration Act"].

91 *Arbitration Act*, SBC 2020, c 2, s 19.10 ["British Columbia Arbitration Act"].

92 *The Arbitration Act*, CCSM c A120, s 32(1) ["Manitoba Arbitration Act"].

93 *The Arbitration Act*, 1992, SS 1992, c A-24.1, s 33(1) ["Saskatchewan Arbitration Act"].

94 *Family Law Act*, SBC 2011, c 25.

95 British Columbia Arbitration Act, *supra* note 91, s. 2(5)(b).

96 *Family Law Act*, SBC 2011, c 25, s 19.20(2).

97 Saskatchewan Arbitration Act, *supra* note 93, s 32(2).

98 Manitoba Arbitration Act, *supra* note 92, s 3.

99 *Civil Code of Québec*, SQ 1991, c 64, art 2639.

100 Rheal Seguin, "Quebec Squashes Idea of Islamic tribunals" (27 May 2005), online: *The Globe And Mail* <www.theglobeandmail.com/news/national/quebec-squashes-idea-of-islamic-tribunals/article18228375/> [perma.cc/3HVM-TTCJ].

101 Michel Venne, *L'annuaire Du Quebec 2006* (Institute du Nouveau Monde, 2007).

102 J. Brian Casey & Janet Mills, *Arbitration Law Of Canada: Practice And Procedure* (New York: Huntington Juris, 2005) at 30.

103 Nicholas Walter, "Religious arbitration in the United States and Canada" (2012) 52:2 Santa Clara LR at 542.

104 2002 CarswellQue 729 (C.S. Que.) at para. 10.

105 Previously, the Ontario *Arbitration Act* provided: "In deciding a dispute, an arbitral tribunal shall apply the rules of law designated by the parties or, if none are designated, the rules of law it considers appropriate in the circumstances." *Arbitration Act, 1991*, SO 1991, c 17, s 35(1).

106 *Arbitration Act, 1991*, SO 1991, c 17, s 32(3) and (4), added by the *Family Law Statute Amendment Act, 2006*, SO 2006, c 1, s 1(5) ["Ontario Arbitration Act"].

107 Ontario FLA, RSO 1990, c F 3, ss 59.1 to 59.6, added by SO 2006, c 1, s 5(10).

108 2015 ONSC 978, 2015 CarswellOnt 5346 (Ont. S.C.J.).

109 *Ibid.*, at para 72.

110 *Ibid.*

111 *Ibid.*, at para 73.

112 2015 ONSC 3460, 2015 CarswellOnt 8001 (Ont. S.C.J.); affirmed 2016 ONCA 135, 2016 CarswellOnt 2243 (Ont. C.A.) at para. 26.

113 2016 ONCA 135, 2016 CarswellOnt 2243 (Ont. C.A.) at para. 26 citing *Quintette Coal Ltd. v. Nippon Steel Corp.*, 1990 CarswellBC 232, [1991] 1 W.W.R. 219 (B.C. C.A.) at para. 229, ; leave to appeal refused (1990), 50 B.C.L.R. (2d) xxviii (note), [1990] S.C.C.A. No. 431 (S.C.C.); *Société d'investissements l'Excellence inc. c. Rhéaume*, 2010 QCCA 2269, 2010 CarswellQue 13339 (C.A. Que.) at paras. 52-62, ; leave to appeal refused 2011 CarswellQue 6090, 2011 CarswellQue 6091, [2011] S.C.C.A. No. 57 (S.C.C.).

114 Ontario, Ministry of the Attorney General, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, by Marion Boyd (20 December 2004) at 60-61 [Boyd].

115 See Donald Brown, "A Destruction of Muslim Identity: Ontario's Decision to Stop Shari'a-based Arbitration" (2007) N C J Intl L & Com Reg 32:3 at 510.

116 James Thornback, "The Portrayal of Sharia in Ontario" (2005) Appeal: Rev Current L & L Reform 10:1 at 5, n 23.

117 Rabia Mills, "Interview: A review of the Muslim Personal/Family Law Campaign" (August 1995), online (pdf): <perma.cc/6ETA-KTN5>. For more on the IICJ, see Bilal M Choksi, "Religious Arbitration in Ontario — Making The Case Based on the British Example of The Muslim Arbitration Tribunal" (2012) 33:3 U Pa J Intl L at 793-96.

118 Canadian Council of Muslim Women, "Tribunals Will Marginalize Canadian Muslim Women and Increase Privatization of Family Law" (24 October 2004), online: <perma.cc/GP2F-FXQP>.

119 Boyd, *supra* note 114 at 133 (where the report explicitly dismissed the allegation of arbitration infringing on women rights: "[t]he Review did not find any evidence to suggest that women are being systematically discriminated against as a result of arbitration of family law issues").

120 Jennifer A. Selby & Anna C. Korteweg, "Introduction: Situating the Sharia Debate in Ontario" in Anna C. Korteweg, & Jennifer A. Selby, eds, *Debating Sharia: Islam, Gender Politics, and Family Law Arbitration*, (Toronto" University of Toronto Press, 2012) at 22.

121 See Almas Khan, "The Intersection Between Shariah and International Law in Arbitration" (2006) Chicago J IntI L 6:2 at 791-792.

122 Boyd, *supra* note 114 at 133-42.

123 There is only one case in Ontario, decided after the legislative ban, permitting religious family arbitration because the arbitration agreement was entered into before the 2006 amendment. See *Cawthorpe v. Cawthorpe*, 2010 ONSC 1389, 2010 CarswellOnt 3367 (Ont. S.C.J.) at paras. 15, 21-22 (enforcing ten arbitral awards of a Beis Din on division of property, custody, access, child and spousal support).

124 For a primer on the differences between these types of domestic contracts and their scope, see chapter 7 in Michael G. Cochrane, *Family Law in Ontario: A Practical Guide for Lawyers and Law Clerks* (Toronto: Carswell, 1992).

125 See for example, Ontario FLA, ss. 56(1), (1.1) and (2).

126 See for example, Ontario FLA, ss. 56(4). For more on the enforceability of domestic contracts, see D.A. Rollie Thompson, "When is a Family Law Contract *Not* Invalid, Unenforceable, Overridden or Varied?" (2001) CFLQ 19:399.

127 *Rick v. Brandsema*, 2009 SCC 10, 2009 CarswellBC 342, 2009 CarswellBC 343, [2009] 1 S.C.R. 295 (S.C.C.). Provincial statutes have often codified grounds of challenging the enforceability of domestic contracts. See for example Ontario's *FLA*, RSO 1990, c F3 s 56(4).

128 Ontario *Arbitration Act*, *supra* note 106, s 45(5); Alberta *Arbitration Act*, *supra* note 89 s 45; British Columbia *Arbitration Act*, *supra* note 91, ss 58-61; Nova Scotia *Arbitration Act*, *supra* note 86, s 15; New Brunswick *Arbitration Act, supra* note 90, s 46; Newfoundland *Arbitration Act*, *supra* note 87, s 14; Manitoba *Arbitration Act*, *supra* note 92, s 45: Saskatchewan *Arbitration Act*, *supra* note 98 s 6.1(3).

129 Julie Macfarlane, "'Difference' or 'Sameness'? Law, Social Ordering & Islamic Marriage and Divorce in North America", (2015) 29:3 Austl J Fam L at 21-22.

130 *Ibid.* at 17.

131 Rabea Benhalim "Religious Courts in Secular Jurisdictions: How Jewish and Islamic Courts Adapt to Societal and Legal Norms" (2019) Brook L Rev 84:3 at 762.

132 *Ibid.*

133 *Ibid.* at 763.

134 For an examination of these reactions in the US, Canada, UK, Ethiopia, and Pakistan, see Julia McLaughlin, "Taking Religion Out of Civil Divorce" (2013) 65:2 Rutgers L Rev at 406-418.

135 See for example, Faisal Kutty, "'Islamic Law' in US Courts: Judicial Jihad or Constitutional Imperative?" (2014) 41:5 Pepp L Rev 1059; Charles P. Trumbull, "Islamic Arbitration: A New Path of Interpreting Islamic Legal Contracts" (2006) 59:2 Vand L Rev 609; Rabea Benhalim, "The Case for American Muslim Arbitration" (2019) 2019:3 Wis L Rev 532; Erin Sisson, "The Future of Sharia Law in American Arbitration" (2015) 48:3 Vand J Transnat'l L 891.

136 Cristina Puglia, "Will Parties Take to Tahkim? The Use of Islamic Law and Arbitration in the United States" (2013) 13:2 Ch Knet J Intl & Comp L at 173.

137 Shariah Board of America, "Darul-Qadha" online: *Shariah Board of America* <https://shariahboard.org/darulqadha>. [perma.cc/NRZ3-LBG5].

138 The Ismaili Conciliation and Arbitration Board, About the Conciliation and Arbitration Board, (online): *The Ismaili Conciliation and Arbitration* Board <https://the.ismaili/cab/about-conciliation-and-arbitration-board>. [perma.cc/QF6H-3EFF].

139 18% of Canadian Muslims choose not to identify, 64% identify as Sunni, 8% identify as Shia, and 10% identify with another affiliation such as Ismaili, Ahmadi, nondenominational, or other. Sarah Shah, "Canadian Muslims: Demographics, Discrimination, Religiosity, and Voting" (2019) at 28, online (pdf): Institute of Islamic Studies Occasional Paper Series file: <https://hdl.handle.net/1807/96775>.

140 Multiple works have examined Islamic ADR bodies in the U.K. drawing from some theoretical and practical aspects of modern Islamic law towards adaptability. See e.g., John J. Bowen, *On British Islam: Religion, Law, and Everyday Practice in Shari'a Councils*, (Princeton; Oxford: Princeton University Press, 2016). Another work that explored Muslim experiences in U.K. and Jewish experiences in the U.S. is Michael Broyde, *Sharia Tribunals, Rabbinical Courts, and Christian Panels*: *Religious Arbitration in America and the West* (Oxford University Press, 2017).

141 Bilal Choksi, "Religious Arbitration in Ontario — Making The Case Based on the British Example of The Muslim Arbitration Tribunal" (2012) 33:3 U Pa J Intl L 791 at 810.

142 Bowen, *supra* note 140 at 65-87.

143 The Islamic Shari'a Council, About us, online: *The Islamic Shari'a Council* <https://www.islamic-sharia.org/aboutus/> [perma.cc/GTZ9-S2HY].

144 London Fatwa Council, About, online: *London Fatwa Council* <http://londonfatwacouncil.org/about-lfc/> [perma.cc/7YP9-VU5T].

145 Choksi, *supra* note 141 at 812.

146 Muslim Arbitration Tribunal, "The Gateway to Islamic and English Legal Services — History", online: *Muslim Arbitration Tribunal* <http://www.matribunal.com/history.php>. [perma.cc/R72D-GFQ2]

147 See Afua Hirsch, "Fears Over Non-Muslim's Use of Islamic Law to Resolve Disputes" (14 March 2010), online: The Guardian <www.guardian.co.uk/uk/2010/mar/14/non-muslims-sharia-law-uk> [perma.cc/YC8Q-MRA7].

148 Choksi, *supra* note 141.

149 Zahela Kamarauddin, Umar A. Oseni, Syed Khalid Rashid, "Transformative Accommodation: Towards the Convergence of Shari'ah and Common Law in Muslim Authority Jurisdiction", (2016) 20:3 Arab LQ at 257.

150 Macfarlane, *supra* note 2 at 262.

151 *Ibid.*

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