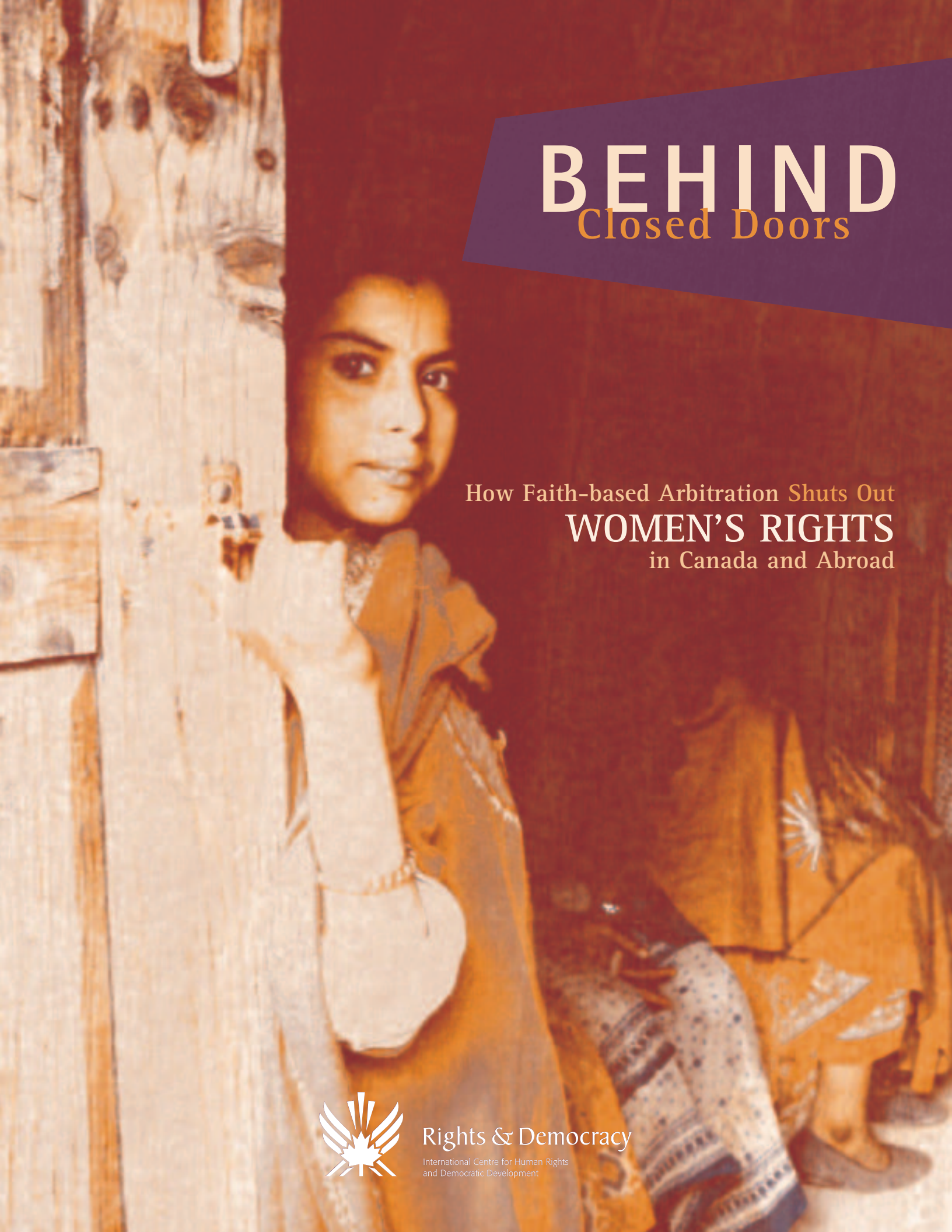

BEHIND
Closed Doors

How Faith-based Arbitration Shuts Out
WOMEN'S RIGHTS
in Canada and Abroad

Rights & Democracy
International Centre for Human Rights
and Democratic Development

The following resources were indispensable in the compilation of this publication. We invite you to refer to them for further information.

Canadian Council of Muslim Women (www.ccmw.com).

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"Sharia is neither Canadian, nor Islamic," by Taj Hashmi, in *Muslim Wakeup Magazine*, December 2004 (muslimwakeup.com).

"Arbitration, Religion, and Family Law: Private Justice on the Backs of Women," by Natasha Bakht for the National Association of Women and the Law, January 2005 (www.nawl.ca/whatsnew.htm).

"The Limits of Private Justice? The Problems of State Recognition of Arbitral Awards in Family and Personal Status Disputes in Ontario," by Jean-François Gaudreault-DesBiens, in *World Arbitration and Mediation Report*, Vol. 16, No. 1, January 2005 (www.ccmw.com).

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"Religion, State and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies," by Ayelet Shachhar, in the *McGill Law Journal*, February 2005.

"Women and Poverty Fact Sheet," published by the Canadian Research Institute for the Advancement of Women (CRIAW), Third Edition – 2005 (www.criaw-icref.ca).

"Women's Experience of Racism: How Race and Gender Interact," published by the Canadian Research Institute for the Advancement of Women (www.criaw-icref.ca).

Marion Boyd's full report can be viewed at www.attorneygeneral.jus.gov.on.ca/english.

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BEHIND Closed Doors

Under Ontario's Arbitration Act *(and similar legislation in other provinces), disputants can hire third parties to privately adjudicate their disputes, using any agreed upon rules or laws. The privatization of law is highly problematic. In family law disputes, dispensing justice behind closed doors, especially if religious laws are applied, will have damaging implications for the rights of women and their children.*

Arbitration privatizes justice in two ways: first, by using laws that are not democratically enacted and, second, by occuring in unmonitored forums. In civil and commercial disputes, the government may legitimately wish to encourage private arrangement, freeing the courts to focus on matters of public importance—matters like family law. The legal treatment of family breakdown involves critical social policy issues, including child welfare and the protection of women's economic and personal security. However, since the Act does not expressly prohibit the settlement of family law disputes, it is also being used to arbitrate matters such as spousal and child support, custody, the division of property upon separation. This legal "loophole" has been brought to public attention through a recent proposal to implement Sharia-based (Muslim) Family Law Tribunals in Ontario, under the Act's authority.

In fall 2005, the Ontario legislature will be considering recommendations made by former Attorney-General Marion Boyd to legally enforce arbitration in family matters including the application of religious laws. We oppose the adoption of these recommendations. In the family law context, where disputes can be fraught with power imbalances, gender inequality, violence and abuse, arbitration can exacerbate women's disadvantage and violate their constitutional equality rights. While technically arbitration is voluntary, where religious laws are used women may face great pressure to "accept" this route, denying them the full and equal protection of federal and provincial family law. Following immense public pressure and international demonstrations, on September 11, 2005, Ontario Premier Dalton McGuinty made a surprise announcement to prohibit all religious-based tribunals to settle family matters. While we applaud this announcement, we must ensure that public policy remains in the public sphere and women's constitutionally and internationally guaranteed human rights are safeguarded.

How Did the Current Debate Arise?

In fall 2003, Syed Mumtaz Ali, President of the Canadian Society of Muslims, announced the establishment of the Islamic Institute of Civil Justice (Dar-ul-Qada), a private tribunal for settling family and inheritance matters using Sharia-based laws, under the *Arbitration Act*.

Following opposition to state-sanctioned religious family law courts, in June 2004, the Ontario government appointed Marion Boyd to review the *Arbitration Act* for its use in family and inheritance matters and the application of religious laws. Her review was to pay particular attention to possible implications for vulnerable people, including women.

Family Law and Public Policy

The family, as the basic unit of society, plays a key role in allocating rights and responsibilities to individuals. Traditionally, it has given rise to a divide that continues to place men at the helm of public and political life, and women behind the closed doors of the home. As a result, women are underrepresented in decision-making structures, and still do the lion's share of unpaid domestic work. Women and children are therefore especially vulnerable to poverty upon marriage breakdown.

For women, the struggle to make inequality in the home a public issue has been the struggle for justice. Positive outcomes include the criminalization of domestic assault and marital rape at the federal level and several provincial family law reforms like support payments and presumptively equal division of property.

Under Canadian law, *divorcing* couples *must* settle their affairs using the federal *Divorce Act*. Legally *separating* couples (married or common law) turn to provincial legislation. In Ontario, the *Family Law Act* handles child and spousal support and the division of property, while custody and access are dealt with under the *Children's Law Reform Act* (CLRA).

> *"A woman may be told that it is her religious or community duty to accept whichever adjudicative route is chosen for her. Her fear of isolation from her community, the possible negative impact on her children, and concerns of being considered an apostate in her faith may force her into submitting to one form of dispute resolution over another. The problem may be compounded by the intersectionalities of vulnerabilities that include perceived immigration sponsorship debt, disabilities, issues of class and race, violence and abuse."* (Boyd, p. 107)

What Is Arbitration?

As opposed to court adjudication, arbitration is a process where parties choose a private party to decide their dispute after an informal hearing, according to the law they have chosen (Canadian or otherwise). Because it seeks to provide speedy, cost-effective results, it can involve parties forfeiture of legal advice and appeal rights. When parties agree to arbitrate they cannot withdraw, nor can they pursue court action on their dispute. While arbitration is unmonitored and decisions are not reviewed, under the *Arbitration Act* they are legally binding and court enforceable.

How Does This Differ From Mediation?

In mediation, disputants have a third party help them to reach an agreement. A mediator, unlike an arbitrator, has no decision-making authority, but rather facilitates communication and makes recommendations. Parties can withdraw at any time and do not give up rights to pursue court action. Court-ordered mediation agreements are reviewed by judges to ensure fairness and accordance with public policy.

What Do the Courts Offer?

Unlike private arbitration, the courts require judges to base their decisions in democratically enacted laws and reasoning that respects the *Charter of Rights and Freedoms*. Some legal aid (though increasingly being cut back) is available to those facing severe economic disadvantage (whereas it is unavailable in arbitration). The courts also offer language interpretation and information services, duty counsel, and most importantly, accountability.

The *Boyd* Report

Why Is Marion Boyd Supporting Family Law Arbitration, Including the Use of Religious Laws?

Marion Boyd concluded that since arbitration is a process "in which people participate only by choice," it should remain a viable alternative to the public courts. She recommended the use of religious laws be permitted to accommodate values and beliefs that may be different from Ontario law. She states that the *Arbitration Act* is a way to formalize a process that presently occurs informally, so that people who face economic or cultural barriers to the courts have more choices.

What's Wrong With This?

Although Marion Boyd insists that no one should be forced to enter arbitration against their will, the ability to make a voluntary choice requires equality in social and economic power, neither of which is present in many couples. In light of these power imbalances, meting out justice behind closed doors and away from public scrutiny threatens women's rights.

Hard-won legal entitlements—like fair spousal and child support and the recognition of women's unpaid labour in calculating family assets—are put at risk. Family law arbitration can also hide sexual violence and systemic discrimination, which if dealt with publicly might fuel positive social reform.

While the application of religious laws does not automatically mean that women's rights will be trampled on, in practice, they often are. Marion Boyd acknowledges that immigrant and minority women could be especially disadvantaged by the "choice" of faith-based arbitration in family matters.

As a result, "choice" can be overshadowed by women's social and economic disadvantage, both within and outside the home. Making religious tribunals readily available and their decisions enforceable under Ontario law will only legitimize women's lack of real choices. Marion Boyd appears to understand this yet dismisses it in her final recommendations.

> *"If women are not required to choose between dispute resolution methods but rather are required to go through the court system, there will be no shame to them or to their spouses because the law requires them to take that route."* (Boyd, p. 53)

Thus government approval of binding faith-based arbitration may in fact facilitate coercion, threatening women's constitutionally protected equality rights.

Fixing What's Broken

The public courts are far from problem-free. Many people continue to face discrimination and barriers to access. Indeed racism in the Canadian justice system is well documented. It can manifest itself through overt and systemic bias, police targeting and profiling and lack of access and representation. Marion Boyd herself acknowledges that some laws have a disproportionate impact on minorities, alienating them even further. The prohibitive cost of public courts, coupled with limited legal aid can also make arbitration preferable. However, what is most troubling is that these facts lead her to recommend private tribunals for religious minorities, rather than improving the public system so that it serves everyone. "Multiculturalism" should not be used to further isolate ethnic and religious communities and avoid addressing exclusion in our public and legal institutions.

The public courts have a special obligation to operate with fairness. Government must enact policy that improves access to public legal justice and adopt measures to sensitize the courts to the population's changing needs.

The *Whos* and *Whys* of Faith-based Arbitration

What Are the Proponents of Faith-based Family Arbitration Saying?

Proponents of binding faith-based arbitration say their faith requires it. However, religion is a relationship with God, and not with the state. We question in what way *absence* of legally binding faith-based arbitration violates freedom of religion—especially if religious rulings are supposed to be consistent with Canadian laws to begin with. People would still be free to consult their religious leaders for guidance, and faith-based dispute settlement could still be used for advisory purposes.

Proponents of Sharia-based tribunals say that since other faith communities have their own tribunals, it would be unfair to deny them to Muslims. While it is true that the Orthodox Jewish and Ismaili Muslim communities operate their own tribunals under the *Arbitration Act*, the vast majority of cases handled by both are commercial disputes. Furthermore, the Ismaili tribunal does not apply religious laws in arbitration. Contrary to some beliefs, ecclesiastic tribunals do not operate under the Act and are only used to grant annulments of religious marriage. What is unique about the proposed Sharia-based tribunals is that their central mandate would be to settle family disputes—which can have far-reaching public policy impact.

What Is the Motive Behind Implementing Religious Family Law Tribunals in Ontario?

Although one of the primary stated reasons for allowing faith-based arbitration is supposedly to save time and resources, a number of religious elites have much to gain from state-enforced tribunals, including power, resources and state legitimacy of their authority. Given the central role of family in most societies, control over family law is one of the first pillars of strengthening power over the community. Religious laws—especially in family matters—have long been a battleground between progressive and fundamentalist forces. When controlled by the latter, they can have particularly devastating impacts on women and girls. Fundamentalism in all major religions involves similar views on gender relations and sexuality. Among other things, it seeks to establish and strengthen male-dominated control over the family and curtail women's sexuality and deny sexual and reproductive rights, especially abortion. Fundamentalism is not a religious movement—it is a political one that seeks control over public and private life.

What Is Sharia?

Sharia is a set of regulations and principles from which Muslim laws are drawn. It is not divine, but rather based on divine text, the Quran, and thousands of sayings of Prophet Muhammed, collected more than two centuries after his death. In Islam there is no central religious authority, and no definitive, codified "Muslim law." In fact, what is referred to as "Muslim law" can include codified and uncodified state laws and informal customary practices which vary according to the cultural, social and political context.

While Islam promotes social justice and moral growth, in many places Sharia has been exploited for political purposes. Most Sharia-based injunctions, in fact, find no trace in the Quran itself.

Whose Sharia?

There are at least four Sunni and several Shiite schools of thought, each with their own Sharia code. Despite the fact that Islam recognizes a wealth of entitlements, misogynist interpretations of Sharia-based laws have been used to deny women even their most basic human rights. While Muslim women have property rights, according to some schools of thought, inheritance overtly favours males and a husband can leave his wife with virtually no financial support or property upon divorce. Cultural practices can further compound women's oppression. For example, while Islam says women have the right to choose their spouses, forced marriage, even of young girls, is common among Muslims in Pakistan, Bangladesh and India. The Wahabi and other Muslim schools of thought endorse female genital mutilation in the name of Islam, despite the fact that it has no basis in the Quran.

Syed Mumtaz Ali says that "arbitration cannot apply those provisions of Muslim Law/Sharia which do not agree with Canadian laws or Canadian value system" (http://muslimcanada.org/ambitioninterview.html). However, in the absence of full monitoring and review, there is no way to ensure this.

Furthermore, enforcing religiously based decisions will solidify the power of imams like Ali Hindy, head of Toronto's Salaheddin Islamic Centre, who has said,

"The Qur'an says a man is limited to four wives. Canadian Law doesn't allow it—God does, so I marry them myself.... If your wife doesn't like sex, you can take another wife. If she can't give you children, you can take another wife." (Boyd, p. 61)

Some of the most vocal opposition to legally binding Sharia-based family law arbitration has come from within the Muslim community itself. Dr. Taj Hashmi of the York Centre for Asian Research at York University in Toronto, and member of the Muslim Canadian Congress says,

"It is quite puzzling that secular Canada should toy with the idea of incorporating Sharia into its legal system while several Muslim countries are gradually replacing the Sharia with secular codes and some have already done away with it. Canada should be even more cautious about implementing Sharia, as there are few Islamic scholars in the country, qualified enough to interpret the Quran and the teachings of Islam." (www.muslimwakeup.com)

Surely the government has no authority to determine which views are truly authentic to a given faith, but that is exactly what it would be doing by enforcing religious rulings. It would effectively privilege certain religious interpretations, at the expense of others, violating constitutionally protected freedom of religion. This will further marginalize and silence dissenting voices within the community, especially those calling for progressive and women-friendly reforms of religious traditions. Buying into the demands of religious elites—almost always men—is an affront to the struggle against sexism. Furthermore, it will perpetuate racist stereotypes and the ghettoization of ethnic and religious communities. A progressive Canadian democracy requires both the separation of religion from public policy, and political commitment to promoting social equality.

The *Myth* of "Regulation"

But if Arbitration Is Occurring Informally, Shouldn't the Government Regulate It?

To answer this, we should consider just what regulation Marion Boyd is proposing. Most of her amendments to the *Arbitration Act* are limited to formalistic changes like revisions to legislative wording, requirements for agreements and decisions to be in writing and clearer statements of arbitral rules and principles. The procedural safeguards are neither practical nor adequate. For example, she recommends a standardized screening process for domestic violence to ensure that consent has not been forced. However, not only do arbitrators lack guidelines and expertise to "screen," they also have a financial or political interest in conducting arbitrations.

Effective "regulation" of arbitration to provide full and adequate protection to women in family law disputes would defeat its purpose to deliver speedy, private, and less costly results. Cost and efficiency seem to be at the core of Marion Boyd's recommendations. Despite noting that almost all the respondents in her review said that legal advice should be obtained prior to entering family law arbitration, she waives the requirement, stating that it would make the process "more legalistic and time consuming." (Boyd, p. 137) But without legal advice people may be unaware of their entitlements under Canadian law. Her recommendations also do not require mandatory professional training for arbitrators, nor do they require expertise in Canadian or religious law.

Furthermore, Marion Boyd does not amend the Act's limited appeal mechanisms. The right to appeal is a cornerstone of fundamental justice and the rule of law. Without it, parties have no recourse when they are on the receiving end of an unfair deal. While technically arbitrating parties can waive legal advice and their appeal rights, in the family law context women may be pressured to forgo these rights. Appealing or annulling arbitral awards can also be difficult in light of the *Arbitration Act* and the narrow scope of judicial review. Generally, courts show a high degree of deference to decisions made by specialized tribunals and may face difficulty in ruling on decisions not based on Canadian law.

In short, Marion Boyd's recommendations appear to be based more on financial concerns than legal or human rights considerations.

In the face of an overburdened public justice system, arbitration presents a cheap band-aid solution for the government, though it can come at a high cost for women and children. We believe that arbitration simply is not the proper vehicle for settling public interest issues like family law. Because of this very concern, in Quebec, arbitration of family matters is expressly prohibited by law. State-enforcement of religious rulings is *not* regulation—it is giving legitimacy to private power.

Legal Frameworks

Women's Equality Rights Under Canadian and International Law

Section 15 of the *Canadian Charter of Rights and Freedoms* guarantees all individuals equal protection and benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. The Charter is part of the Canadian constitution, the supreme law of the land. This means that laws that do not comply with it, in either purpose or effect, will be struck down.

While Charter rights can be subject to reasonable limits that can be justified in a free and democratic society, section 28 states that they are guaranteed equally to men and women, implying that laws that result in gender-based discrimination are unlikely to be justifiable.

Women's human rights are also protected by international law. In 1979, the United Nations adopted the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW). CEDAW is legally binding upon its 180 signatories, including Canada. CEDAW compels states to eliminate discrimination and violence against women, ensure gender equality in family benefits, public institutions and in matters relating to marriage and family relations. Notably, "Sharia" or "Islamic law" have been cited by several Muslim states, including Saudi Arabia, Pakistan, Egypt and Kuwait, as the main reason for reservations to CEDAW provisions.

Freedom of Religion and Cultural Rights Under Canadian and International Law

Many people believe that Charter provisions on freedom of religion and multiculturalism require the government to endorse the use of religious tribunals. This is legally incorrect. Not only is freedom of religion (section 2a of the Charter), subject to reasonable limits, it does not, in and of itself, require any positive state action. Indeed, religious freedom can only flourish in the *absence* of state intrusion so that all individuals can peaceably interpret and practice their faiths as they wish. Given the multiplicity of Quranic interpretations, this is especially important in the present context.

Canada is also bound by the *International Covenant on Civil and Political Rights* (ICCPR), one of five key instruments of the United Nations Bill of Rights. While it states that minorities have the right to enjoy their cultures and practise their religions, it also recognizes women's equal civil and political rights. In fact, General Comment 28 (on article 3 of the ICCPR) of the UN Human Rights Committee added that States parties must ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's equality and Covenant rights.

Under international law, Canada and its provincial governments have a legal duty to prevent discrimination caused not only by government action or omission, but also by private actors, as may be the case in faith-based arbitration.

Charter Need Not Apply

Marion Boyd says that the Charter does not apply to arbitration carried out under the *Arbitration Act*. While it is true that only government action is subject to the Charter, she argues because arbitrators derive their authority from private agreement and not the government, arbitration escapes Charter scrutiny. We challenge this reasoning. It is government authority, under the *Arbitration Act*, that makes arbitral decisions legally binding. Surely decisions that are enforceable by our public courts must be Charter-compliant.

It's a Small World After All

Our opposition to state-enforced use of religious laws is part of a larger concern about the rise of religious conservatism across the world. Several countries around the world are watching how the Sharia debate unfolds in Ontario. Giving state legitimacy to faith-based rulings will provide legal and political ammunition for religious extremists around the world, while eroding women's rights at home. Omar Safi, Chair of the Progressive Muslims Union of North America. says, "It is unrealistic to think that the ayatollahs of Iran, the proponents of Wahabism in Saudi Arabia and other countries will not use this to promote the viability of their oppressive visions." (www.pmu.com)

Our *Recommendations*

Rights & Democracy is supporting a coalition headed by the Canadian Council for Muslim Women (CCMW) in the fight against private, religious family law justice. The coalition has secured the support of hundreds of concerned individuals and organizations from across Canada and abroad. Our joint *Declaration on Religious Arbitration in Family Law* can be found at www.ccmw.com. Letters of support can be found at www.dd-rd.ca.

We recommend the complete removal of family matters from the *Arbitration Act*, and the exclusive use of provincial legislation in family law disputes. This must be coupled with government commitment towards accessible, responsive public justice, including restoration of legal aid, the provision of culturally sensitive information and support, and efforts to increase input of traditionally disadvantaged groups within the legal system.

We ask our political representatives to respect and protect women's constitutionally and internationally protected human rights by ensuring access to a single, uniform family law regime. Equally, we ask that religious freedoms of the majority not be confined to the interpretation of a limited few.

Rights & Democracy (International Centre for Human Rights and Democratic Development) is an independent Canadian institution created by an Act of Parliament in 1988. It has an international mandate to promote, advocate and defend the democratic and human rights set out in the International Bill of Human Rights. In cooperation with civil society and governments in Canada and abroad, Rights & Democracy initiates and supports programmes to strengthen laws and democratic institutions, principally in developing countries.

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