
Perspectives

The Limits of Private Justice? The Problems of the State Recognition of Arbitral Awards in Family and Personal Status Disputes in Ontario

by **Jean-François Gaudreault-DesBiens***

Associate Professor, Faculty of Law,
University of Toronto

Introduction

What are the limits of private justice? Are all topics amenable to arbitration? This is, in essence, the questions raised by a debate that is currently raging in Canada, and more particularly in the province of Ontario. This debate arose as a result of the realization that the legal framework governing contractual arbitration in that province does not preclude arbitration of family-related or personal status-related disputes, as some statutes in force in other jurisdictions do. While this “loophole” has been present in the Ontario legislation since its inception in 1991, it is only recently that public awareness was raised about it. This came about following the announcement by the Society of Canadian Muslims, a private association, of the creation of an Islamic Institute of Civil Justice,¹ under the auspices of which arbitrations based on Islamic law (*Sharia*) would be

conducted and expertise in Islamic law would be pooled. Faith-based arbitrations—be they held on the basis of Islamic law, Jewish law, Canon law, or aboriginal spirituality—could be conducted prior to 2004, and such arbitrations were actually conducted. What prompted the public reaction in the *Sharia* case is probably the emphasis that the Islamic Institute of Civil Justice placed upon family-related and personal status-related disputes. Another reason was the fear of the impact of a possible expansion of *Sharia*-based arbitrations in the contemporary context of a rise of Islamic traditionalism and, in some cases, of Islamic fundamentalism. This fear in turn relied upon a perception that the basic individual rights of some of the most vulnerable members of Canadian society, such as immigrant women, could be at risk in such contexts through the application of religious norms and the use of “perfect” arbitration agreements that precluded almost any sort of judicial review of arbitral processes or appeal of arbitral awards.

In fairness to the Islamic Institute of Civil Justice, it should be stated that the Institute does not advocate for the systematic primacy of Islamic law over Canadian norms. For example, mandatory State norms such as the prohibition of polygamy would not yield to Islamic norms allowing for such a practice. The interplay of Islamic norms perceived as fundamental and Canadian norms enjoying a similar status, however, is not entirely clear. Moreover, and this further contributes to explaining public reactions to the idea of *Sharia*-based arbitrations, the Islamic Institute of Civil

Justice, as a private association, cannot claim any monopoly on the holding of such arbitrations—no more than, say, the Catholic Church can claim a monopoly on *the* Christian interpretation to be given to Christianity's sacred texts. As a result, in theory, nothing prevents fundamentalist Muslims from establishing arbitration boards that apply a radical interpretation of the *Sharia*. In this respect, the impossibility for the Islamic Institute of Civil Justice to claim to speak for all Canadian Muslims is evidenced by the staunch opposition to its project led by other Muslim organizations, such as the Muslim Canadian Congress and the Canadian Council of Muslim Women.

To assuage public anxieties and to clarify the stakes, the Attorney General of Ontario has appointed one of his predecessors, Ms. Marion Boyd, to look into this matter.

This article describes the most relevant—and sometimes problematic—features of the legislative framework governing the arbitration of family-related and personal status-related disputes in Ontario, especially those provisions allowing for some form of judicial monitoring of arbitral processes and awards (I). Second, it proposes a conceptual framework for approaching faith-based arbitration of family-related and personal status-related disputes (II). It then broadens its scope through an inquiry into the normative limits of multiculturalism-based justifications in a free and democratic society such as Canada (III). In conclusion, it warns against the danger of adopting legislative policies which, under the guise of the recognition of differences, may end up undermining the legitimacy of both multiculturalism, as a social value, and private arbitration, as an effective tool of dispute resolution.

I. The Statutory Framework and its Problems

In Ontario, it is the *Arbitration Act 1991*² that establishes the general legal framework for State-sanctioned, private arbitration. As mentioned earlier, it does not exclude family-related or personal status-related disputes from arbitration, nor does family law legislation, subject to the respect of some formal conditions or to a few substantive exceptions dealing with court powers over questions pertaining to the education, moral training, custody or access to children and to the protection of the children's best interests.³ Moreover, parties to an arbitration agreement can designate the rules of law applicable to the settlement of their dispute.⁴ This allows faith-based tribunals set up as arbitration boards to render legally binding awards in such disputes.⁵ The Arbitration Act, however, not only makes such awards legally binding and enforceable, but restricts to a bare minimum the possibilities of judicial review, first, of the way in which the arbitral process was conducted⁶ and, second, of the substance of the award.⁷ One of the grounds allowing for judicial review is evidence that the applicant was not treated equally and fairly,⁸ a ground which essentially requires equality before the law and administrative fairness. Although fairness could be construed as encompassing both procedural and substantive fairness,⁹ it is less clear whether the notion of equality can be construed as referring to *substantive* equality. Such a construction

would allow the applicant to contest the legitimacy of the norm applied. Moreover, the likelihood of a judicial review of an arbitral award is inversely proportional to the arbitral tribunal's level of expertise: It decreases whenever the tribunal's expertise increases. As Bakht observes, "[w]here an arbitrator can claim highly specialized expertise for example in a situation where two parties have agreed to have their dispute settled according to certain religious principles, courts will militate in favor of a high degree of deference, that is, they will favor upholding the arbitrator's decision."¹⁰

It is no surprise, then, that the possibility of faith-based arbitrations of family-related or personal status-related disputes has raised concerns, especially within women's groups. These concerns have been made more acute as a result of, first, a deemed waiver of the right to object to the non-compliance with a provision of the Arbitration Act in the course of arbitral proceedings,¹¹ and, second, and most importantly, of the difficulty of appealing arbitral awards. In this respect, subsection 45(1) of the Arbitration Act, 1991 provides that

If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,

- (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and
- (b) determination of the question of law at issue will significantly affect the rights of the parties.

So, theoretically, an appeal is possible, and the grounds mentioned in s. 45(1) are potentially broad enough to allow a challenge of an unjust faith-based arbitral award. It has been decided, however, that in exercising its powers under s. 45(1), a court "should not interfere with the Arbitrator's Award unless it is satisfied that the Arbitrator acted on the basis of a wrong principle, disregarded material evidence or misapprehended the evidence."¹² Section 45 goes on to say that "if the arbitration agreement so provides," a party may appeal an award to the court on a question of law, or on a question of fact, or on a question of mixed fact and law.¹³ Importantly, section 3 of the Act further specifies that "the parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act" except for a list of provisions which does not include section 45. As a result, a party may waive his or her right to appeal the award. Coupled with the filter role that the requirement to ask for leave plays, this means that appeals launched against awards rendered by religious tribunals will remain exceptional.

Incidentally, in spite of the fact that such tribunals, mainly rabbinical ones, have rendered awards under the auspices of the Arbitration Act since its inception in 1991, no report of any appeal of such awards could be found at the time of this writing. Obviously, we cannot entirely dismiss the remote possibility that all the parties to all faith-based arbitrations conducted since 1991 have always been satis-

fied with the awards rendered, but this indeed remains a very remote possibility. A more reasonable hypothesis is that the parties have waived their right of appeal, which raises the thorny question of whether their consent to such a waiver was genuinely free and informed. That question of consent will be examined later.

That being said, both the legal hurdles placed in the path of a potential appeal and the empirical evidence showing a conspicuous absence of appeals of faith-based awards since 1991 justify adopting the assumption, as a working hypothesis of this article, that, generally speaking, faith-based arbitrations are, and will continue to be, conducted on the basis of “perfect” arbitration agreements, *i.e.*, agreements that seek to exclude external judicial intervention to the fullest extent possible.¹⁴

II. A Conceptual Framework for Addressing Faith-Based Arbitration

Arbitration is a form of private justice and an effective means of rendering justice, particularly in commercial law contexts. The situation may be different, though, with disputes potentially affecting the status of the person, both as an individual and as someone embedded in a network of social relations. Such issues raise the potential application of constitutional values such as dignity and equality, over which the State may still legitimately insist upon retaining some normative monopoly. This is not to say that the application of religious norms in the context of an arbitration procedure will always lead to outcomes that undermine the dignity or the equality of the individuals involved. Actually, such an outcome may very well be the exception rather than the rule. Moreover, religious norms are susceptible to a plurality of possible interpretations. For instance, scholars are much divided on the interpretation to be given to Islamic law (*Sharia*).¹⁵ The same could be said of Jewish law, canon law, or aboriginal spirituality.

Nonetheless, while it is probably fair to surmise that only a few marginal interpretations of religious norms are likely to offend the fundamental human rights recognized both in Canadian and international law, the risk of conflict is real. The Ontario provincial government needs to determine how to approach the recognition of arbitral awards rendered on the basis of religious norms in family law contexts or in disputes affecting the personal status of the litigants.

The first element of the puzzle is consent. Although it is possible that most parties involved in faith-based arbitration willfully agree to participate in the procedure, we cannot exclude the possibility that some do not. If their consent is coerced, it is vitiated. Friedrich Hayek defines coercion as follows: “By coercion we mean such control of the environment or circumstances of a person by another that, in order to avoid greater evil, he is forced to act not according to a coherent plan of his own but to serve the ends of another. Except in the sense of choosing the lesser evil in a situation forced on him by another, he is unable either to use his own intelligence or knowledge or to follow his own aims and beliefs.”¹⁶ Arguably, some level of coercion is present in any form of human interaction. This factor, how-

ever, should not prevent the recognition that some contexts may be more likely to facilitate coercion leading to vitiating the consent of the affected persons.

Despite the nobility of their professed ideals, several religions have used, and still use, physical or psychosocial coercion to force individuals to comply with their dictates, with or without the complicity of the State. And, if these individuals were historically of both genders, a disproportionate number of them were, and still are, women. Thus, there is a risk that some, but not necessarily all, faith-based arbitral awards reflect or perpetuate circumstances of oppression and discrimination that a free and democratic society cannot tolerate. That risk is heightened when these norms affect groups that are especially vulnerable, such as immigrant women. That being said, there are different ways not to condone such circumstances and the processes which facilitate them.

One way is to rehabilitate the idea of State toleration of religious and cultural practices, which implies a more passive attitude on the part of the State, as opposed to their full-fledged recognition through positive law. Indeed, State recognition of the binding effect of faith-based arbitral awards, which can be appealed only in exceptional circumstances, amounts to condoning the commission or the perpetuation of potential acts of discrimination. But there is more. The vocation of private justice is, well, to remain as private as possible.¹⁷ This means that potentially unjust awards are never submitted to the broader, quasi-democratic scrutiny of the public institutions. In that, arbitral awards stand in stark contrast with public judgments issued by State courts. While private arbitrators need only to justify their awards, if at all, to the parties who appear before them, state judges, not only must ground their reasoning on publicly debated norms, they must also appeal to a form of public reason. Indeed, the legitimacy of a judicial judgment is in large part related to the court’s ability to persuade. Firstly, a universal audience must be persuaded; the universal audience consists of the parties to the dispute, their lawyers, the general public, and the media. Their expectations focus upon the fairness of the process. Secondly, the legitimacy of the judgment depends upon its acceptance by an audience consisting of other members of the legal community (other judges, lawyers, bar officials, legislators, law professors), who tend to be concerned about the coherence of the legal system and about the integration of the judgment into that supposedly coherent framework.¹⁸ In the public justice legitimization process, constitutional values are at least likely to be taken into consideration, while the risk that such values will not be taken into account is much greater in private justice context. For that reason, it is of the utmost importance to look critically at situations in which the State, either by positive action or by omission, does not seek to decrease the possibility that constitutional values will be ignored.

In this respect, the State’s recognition of the legality and legitimacy of a system of parallel justice—the word *system* is critical here—allowing for the use of non-State norms for the settlement of disputes simply cannot be assimilated to its validation, for example in family law contexts, of par-

ticular, individualized settlements arrived at by the parties to such disputes, and this, even though the arbitration agreement permitting access to this system of parallel justice itself stems from a contract. Indeed, the stakes involved in family law-related or personal status-related disputes as well as the risk of significant derogations to the State's most basic norms and values allowed by the existing private arbitration framework raise questions of a qualitatively different magnitude.

First, the parallel systems of justice so created are to be administered by groups defined on the basis of a shared socio-religious identity. Traditionally, these groups have either demanded their inclusion within society on a non-discriminatory basis, or have simply insisted on the State's non-interference in their religious affairs. The State recognition of omni-competent religious arbitral tribunals in an arbitration context, however, is a step closer to a broader recognition of these tribunals' *exclusive jurisdiction*, and thus *sovereignty* over a certain community of believers. Given the problems that may arise in some circumstances respecting issues of consent, these notions of jurisdictional exclusivity and sovereignty may not be as far-fetched as one might think intuitively. In other words, the identity-based legal pluralism that the present legislative framework allows may lead to the mutation of social minorities into political ones, because these minorities' identities are now to be viewed by the State as giving rise to a collective rights problem instead of being understood from the traditional perspective of individual rights.¹⁹ Such a mutation implies a conscious and politically-induced deepening of the minority's degree of diversity,²⁰ which inevitably leads that minority to require from the State the recognition of its now "deeply diverse" identity. Because of the political undertones of such a transformation, the members of this minority will "want ([...]) an identity that is collectively negotiated,"²¹ and the likely result of that negotiation will be the creation of separate institutions exercising some form of *imperium* over a segment of the population. In that sense, State recognition of a partial or exclusive, faith-based jurisdiction over most of the temporal and religious disputes of a non-territorialized community of believers is reminiscent of the millet system once in force in the Ottoman Empire, under which religious communities, with their respective separate institutions, were more or less self-governing in an otherwise Muslim State. Nowadays, such a regime of governance would be characterized as implementing a model of personal federalism.²²

This type of outcome is neither the necessary nor the inevitable consequence of State recognition of faith-based arbitral tribunals. Affirming it would amount to a *petitio principii* against something the Institute of Islamic Justice does not formally ask. Nor am I arguing that the mutation of a social minority into a political one is normatively unacceptable.²³

I deem it important, however, to point out that recognizing what is essentially an identity-based system of parallel justice, first, provides the embryo of a regime of radical legal pluralism the long-term consequences of which a democratic polity may legitimately want to examine further,

be it only as a matter of *realpolitik*, and, second, represents a very different thing from merely disregarding the potential use of non-State norms in the context of particular, individualized settlements arrived at by the parties to family law-related disputes. Moreover, it bears signaling that this form of identity-based legal pluralism is quite different from the "functional" type of pluralism informing commercial arbitration, whatever the legal regime chosen by the parties may be. Indeed, the public recognition of identity-based communities that are partially or entirely self-governing raises important questions pertaining to the nature of citizenship in a democratic polity, and the sharing of sovereignty within political communities. Even the most expansive system of commercial arbitration does not raise such questions.

So, in order to better grasp the problems posed by the faith-based arbitration of family law-related and personal status-related disputes, some basic parameters must be identified. These parameters stem from the text of the Canadian Constitution itself, as well as from the philosophical underpinnings of a society which perceives itself as a free and democratic one.

The first principle is derived from two of the core values informing the modern concept of democracy, *i.e.*, liberty and equality. Individuals are, or should be, free and equal, and a democratic polity has the responsibility to provide them with an environment in which that objective can be achieved. Although they are conceived of in a primarily individualistic way, liberty and equality may also carry a communitarian dimension. From their interplay, I believe that we can draw an overarching principle that I will call the principle of "freedom of identity." Any person should, to the extent possible, always be able to choose willfully and freely his or her own destiny, including the freedom to associate or not with a group. The possibility of discontinuing a group association in light of individual changes must *always* be possible in a free and democratic society. Such a disassociation should be possible regardless of whether the "belonging" to the group was inherited or acquired. This view echoes Sartre's definition of liberty as the capacity to tear oneself away from "givens." The State has a duty in a democratic society not to erect obstacles in the path of an individual who may exercise the right to exit. Viewed from this perspective, the optimal decision, to the extent that such a thing exists, would be one that seeks to maximize the freedom of identity of both individuals and communities, or, put negatively, that is the least likely to allow infringements of that freedom.

The second principle that must be taken into consideration when reflecting upon the interaction between religious norms and their potential recognition by the State through statutes such as the *Arbitration Act of 1991* is the very principle of freedom of religion, which is enshrined in section 2(a) of the *Canadian Charter of Rights and Freedoms*,²⁴ alongside freedom of conscience. On the one hand, freedom of religion should be curtailed as little as possible by governmental action. On the other hand, it must be borne in mind that, unless a constitution expressly grants particular rights to one or more religious groups or to their indi-

vidual members,²⁵ freedom of religion is conceptualized as a negative liberty. As such, it does to impose any “positive” duty upon the State, such as the obligation to *recognize* legal effects to religious norms.

A third principle involves the practice of nondiscrimination.²⁶ It helps to define the State’s role *vis-à-vis* the direct or indirect recognition of religious norms. It is especially relevant in the context of the present debate about *Sharia* courts in Ontario. It follows that any new governmental policy regarding the statutory recognition of arbitral awards rendered by religious tribunals in family-related or personal status-related disputes should stay clear of singling out *Islamic* tribunals because of a fear of *Islamist* fundamentalist ideologies.²⁷ The only acceptable solution is one that would be applicable to all religious tribunals, whatever their creed.

A fourth principle arises out of section 28 of the *Canadian Charter of Rights and Freedoms*. It provides that “notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.” Not only is gender a prohibited basis for discrimination under subsection 15(1) of the Charter, but gender equality itself is expressly elevated to the status of an overarching principle. Because the “notwithstanding” in section 28 refers both to subsection 2(a)’s freedom of religion and to section 27’s multiculturalism provision,²⁸ this means that religion-based or multiculturalism-based arguments invoked to protect, shield, or hide, under the guise of a right, practices that potentially discriminate against women will be viewed with suspicion. A prudential principle can be drawn from this: To the extent that religious norms serve as a justification for discriminatory practices against women, section 28 makes the recognition of the legally binding nature of these norms even less acceptable. The principle implies adopting risk-minimizing strategies in tackling difficult situations in which fundamental constitutional values could be undermined.

The combination of these principles leads me to the following conclusion: Whenever there is a risk that the situation of a vulnerable party could be worsened as a result of the application (or misapplication) of religious norms, the State should at the very minimum ensure that it does not facilitate the application of such norms or reinforce their power over such a vulnerable party. Thus, in case of doubt, the State should elaborate its policies to favor the protection of individuals rather than the cohesion of groups, religious or otherwise. It should always ensure that its policies protect the right to dissociate from groups, which may imply a refusal to grant legal enforceability to the group’s norms or dogmas. In light of these considerations, arguments to the effect that State-sanctioned arbitration, because it is faster and cheaper than ordinary court proceedings, should remain available to parties involved in disputes raising family law or status-related issues carry little weight.

Bearing in mind these principles, what is the least problematic solution to be given to the problems presently posed by the *Arbitration Act of 1991* as it relates to religious courts? Three options can reasonably be considered.

The first option is to amend the Act to fill its gaps. For instance, a specific judicial review process could be instituted to reduce the risk of unfairness in faith-based arbitrations conducted in family-related or personal status-related disputes. It could provide for the verification of the authenticity of the parties’ consent to the process. It could include a detailed and fixed examination of the fairness of the arbitral procedure. Questions such as “Were testimonies provided by women given the same weight as those given by men?” could therefore be raised. Filling legislative gaps could, however, create more problems than it solves. Indeed, because “preliminary” questions, such the consent of the parties, and “procedural” ones, such the fairness of the procedure, inevitably raise substantive issues, we could end up in a situation in which ill-equipped secular judges would decide what is “true” Islam, “true” Judaism, or “genuine” aboriginal spirituality.²⁹

Let us take the example of consent. To ensure that the basic values of the Canadian constitutional order have not been ignored in the arbitration, a judicial tribunal would need to go beyond a formalistic assessment of consent. It would have to examine the whole context in which that consent was given, which could eventually induce it to look for potential sources of coercion. This, in turn, could lead the court to try to ascertain whether the interplay of religious norms and of social pressures created an environment in which the complainant was coerced.³⁰ The very identification of the relevant religious norms would itself be difficult given the possible plurality of sources in each case. The problem would be exacerbated by several competing interpretations of the sacred texts. The task of identification would require the secular court to rely on experts, who may themselves be difficult to identify. Ultimately, conflicts internal to religious groups themselves could be brought to bear in a public setting and judgments made about the coercive “nature” of a given community. Such a process could perpetuate or reinforce negative stereotypes. Legislative gap-filling would result in intrusive secular inquiries into a given religion’s norms. The potential—and virtual—benefit of adapting religious norms to fundamental constitutional values through the positive legal recognition of faith-based awards would be lost. Moreover, the amended legislation would allow a level of judicial interventionism that is antithetical to the functionality of private arbitration.³¹

Another option is to wait for a section 15 challenge of the present statutory framework governing family law-related and personal status-related arbitration on the basis that it indirectly condones discriminatory practices against some vulnerable groups such as women, by giving full legal effect to faith-based arbitral awards without substantially ensuring that basic rights and freedoms are respected in the arbitration process. If a case with the “right” factual background should arise, it would require gathering evidence of systemic discrimination. Given the confidentiality and privacy of arbitration, evidence-gathering may be difficult, if not impossible. Such a “wait and see” attitude, however, transfers the financial, psychological, and social costs of law reform to individuals, potentially vulnerable ones.

Thus, the solution lies elsewhere. First, it may lie in the amendment of the *Arbitration Act 1991* to exclude its application to faith-based arbitrations in disputes raising family law or personal status issues. This is more or less the policy adopted in the *Civil Code of Québec*, which provides, in article 2639, that “disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration.” In other words, such disputes would be legally inarbitrable.³²

What would be the effects of such an amendment be on parties to a faith-based arbitration involving such disputes, as well as on the religious groups who desire faith-based settlements of such disputes? On one hand, believers could still submit their disputes to a faith-based arbitration, but the award would not be legally binding. Therefore, parties would retain their right to exit from the process or disavow its result, or could instead voluntarily comply with the award. Thus, religious women (or other vulnerable members of religious groups) would not systematically be characterized as victims nor would religious clerics presiding over arbitration procedures be characterized as victimizers. In fact, the inspiration behind this type of amendment is the realization of the *contingency* of victimization in faith-based arbitrations, which means that victimization is neither necessary nor impossible. On the other hand, religious groups would still have access to religious tribunals as the amendment would in no way prohibit the existence of such tribunals—something that would likely be an unconstitutional restriction of freedom of religion—and believers could, and most of them probably would, voluntarily comply with the awards rendered by these tribunals.

That being said, a second, “softer,” option could also be considered. That option would be to amend provincial legislation, including family law legislation, in order to impose the use of State law in State-sanctioned arbitrations in which family law or personal status-related questions arise. This would present the advantages of retaining the benefits of arbitration, *i.e.*, its relative rapidity and low cost, and of ensuring that, to a large extent, the norms relied upon are aligned with Canada’s constitutional norms and values. While the “exit” problem would still be posed in this modified arbitration framework,³³ the mandatory reliance on State norms would possibly alleviate its impact.

That being said, the fate of faith-based arbitrations in family matters or affecting the personal status or capacity of the parties would be the same under this “softer” option or under the “stronger” one: Religious norms could not be chosen by the parties as their law of choice. In other fields of law, however, religious norms could still be relied upon, and arbitral awards rendered on their basis and enforced by State courts.

The “stronger” amendment proposal would maximize the freedom of identity of all the actors interested in faith-based arbitrations. Individual parties would be free to privilege their identity as individual, rights-bearing citizens or, alternatively, their identity as believers and members of a particular religious community. Such a choice might be excruciating, but what matters is that the capacity to choose never be impeded by State policies. The amendment would

also respect the freedom of identity of the religious group because the provision of religious justice would still be accessible to its adherents.³⁴ It would also remove intrusive State interventions in these now “self-enforcing” faith-based arbitrations, essentially confining such interventions to exceptional situations in which illegal coercion is used to achieve individual compliance. Subject to the “exit” caveat, the “softer” amendment proposal would essentially bring about the same benefits. But, most importantly, both of these options would take stock of the limits of private justice in certain settings.

Is it where the story ends? I am afraid not. To the extent that the amendments envisaged above would recognize State norms and religious norms as forming co-existing and sometimes conflicting legal orders, they point to a circumstance of legal pluralism. Not all types of legal pluralism, however, are acceptable in a democratic State. Arguably, in such a society, non-State legal orders must always remain semi-autonomous and never become radically autonomous. Some further remarks are, therefore, warranted on the nature of multiculturalism in Canada (and possibly elsewhere), and on the somewhat problematic coexistence of religious fundamentalism and democracy.

III. The Normative Limits of Multiculturalism in a Democratic Society

I shall first deal with multiculturalism. Some, but not all, proponents of State-sanctioned religious arbitration argue that the very existence of particular faith-based communities entitles them to an unspecified and unqualified “right” to have the activities of their religious courts not only recognized by the State but also to be left undisturbed by the State. If this is their argument, it is legally incorrect and philosophically problematic.

It is legally incorrect because, as noted earlier, freedom of religion, being a negative freedom, does not impose any positive obligation upon the State. Moreover, the *Canadian Charter of Rights and Freedoms*’ multiculturalism clause is merely a principle of interpretation and does not and cannot alone give rise to new substantive rights. The autonomist argument is philosophically problematic because of the vision of multiculturalism that apparently informs it. So, how should multiculturalism be construed in the free and democratic society that Canada is and wants to remain?

While taking seriously the plurality of identities that accompany the *fact* of multiculturalism is of the utmost importance, this position should not be construed as requiring the recognition of the democratic legitimacy of radical multiculturalism. On the contrary, claiming an absolute right to a given identity in view of retrenching oneself around that identity clashes with the democratic ideal itself. Indeed, such a retrenchment presupposes a withdrawal from the processes of identity negotiation that democracy implies. Such processes can only be successful if an inter-identity dialogue takes place, and involvement in such a dialogue renders inevitable a certain level of mutual acculturation. Sociologist Alain Touraine observes that,

Although democracy is not compatible with the rejection of minorities, it is not compatible either with the rejection of the majority by minorities and with the affirmation of counter-cultures and alternative societies that define themselves not by their conflicting position within society, but by a rejection of that very society, the discourse of which is then equated with mere dominance....There is no democracy without acknowledging the existence of a political field where social conflicts are expressed, and where decisions recognized as legitimate by the whole society are taken by a majority vote.³⁵

Touraine's premise is conflict rather than collaboration. For him, because all groups and individuals are involved in social relations characterized by inequality and authority, the idea of justice can only be conceived of as proceeding from a compromise rather than a consensus. As such, his position demonstrates a greater level of realism than most other theoretical approaches to this issue, and may allow for a more complex grasp of identity-based conflicts.

Striving to attain an intersubjective legitimization of democratic decisions seems even more necessary in societies in which multiculturalism enjoys constitutional recognition, as is the case in Canada. The public recognition of the collective dimension of a given identity, however, whether it is a minority one or not, does not free individuals who, together, are claiming the identity, from the obligation to adhere to, or at least respect, the set of core constitutional values that are deemed virtually inalienable by the State in which they wish to express their difference. It is actually arguable that the recognition by the majority of the collective values of minorities is to some extent a function of the adherence to, or respect of, these core constitutional values by the affected minorities. Reflecting on the metaphor of the "multicultural mosaic," Katherine Swinton suggests that

It is useful...to remember what a mosaic is and is not. It is, indeed, a collection of many stones, but they are not free-floating; rather, they are cemented into a frame in order to convey a harmonious image. So, too, is the cultural mosaic in Canada part of a larger society with certain shared aspirations and values. Therefore, a nation committed to multiculturalism can, in some circumstances, require assimilation of ethnic or racial groups. Indeed, the ideal of multiculturalism, for many of its proponents, is ultimately integration with many of the dominant norms of Canadian society, not a right to preserve the culture of another race or country in pristine form...[W]hile the Courts must strive for sensibility to the minority's experience, they need not always accept diversity as the ultimate or primary value.³⁶

Such a position may not reflect a genuine will effectively to recognize minorities or disadvantaged groups and may prevent them from enjoying a decisional space in which their collective identity can self-deploy without fear of majoritarian intrusions through the State. It seems that the

social values that are posited as core constitutional values are *imposed* on minority groups. If we leave aside Polyanna-like thinking, however, which we should do, the outcome appears simply inevitable. Recognition does not take place in a vacuum. It takes place in a particular constitutional framework which is not entirely negotiable. This point is convincingly made by Jeremy Webber:

I don't think we can avoid the fact that sheer imposition may sometimes be involved. There are no universally accepted standards nor any impartial umpire to which to appeal in these controversies. All of us start within particular traditions, and may face issues that others approach with radically different premises. Nor...does deference get us off the hook. Deference is never simple. We have to choose to defer; we have to decide what community is most relevant to the issue concerned; we have to weigh the reasons for accommodation. We cannot wash our hands of that fact that members of minority cultures are also members of our society. In those circumstances, the only response we have is to recognize that we may be driven to impose standards, and to take responsibility for weighing the reasons for imposition, all the time adhering to an ethic of respect, of humility, one that does recognize the value of cultural pluralism.³⁷

This, I insist, is not intolerance. On the contrary, it reflects a desire to ensure the perpetuation of the basic social and normative conditions that will allow tolerance to flourish and risks of intolerance, be it in the public or private sphere, to be minimized.³⁸

Beyond the compulsory adherence to, or respect of, a set of core constitutional values, there may be some room left for a reasoned and well-tempered negotiation of a country's constitutional image. Assuming that the constitutional identity of a State is always capable of confronting sub-State identities,³⁹ we may nevertheless aspire at arriving, sometimes, at "win-win situations," without falling into the trap of angelism. What is of the utmost importance is that identity be regularly reexamined through a constant dialogue. Demanding that citizens remain open to changes in their identity provides a negative answer to the question about the legitimacy of radical multiculturalism, *i.e.*, understandings that posit the absolute autonomy of alternative normative spaces or that seek by all means possible to operate a closure of identity. My understanding of a free and democratic society incites citizens to fight against artificial, but eminently comfortable, identity cocoons to remain open to the creation of new meanings for themselves as individuals and for the groups to which they choose to belong.⁴⁰ While it recognizes that the very presence of a multiplicity of cultures enriches the process of creating new meanings, it rejects the use of culture and multiculturalism as a means of promoting a society's normative resignation.⁴¹ It also rejects the assimilation of toleration to a blind and unilateral form of acquiescence, because toleration implies the reciprocal engagement of all the parties to a relation.⁴² This leads me to say that a democratic society can, and must, reject

relativistic ideas that reduce democracy itself to a “mere preference.”⁴³ To that extent, it is at least arguable that democracies *should* manifest a certain level of militancy about the defense of the core fundamental rights that they all value.⁴⁴ Such a militancy seems all the more indicated given the rise of certain ideologies. Religious fundamentalism is one of them.

This brings me to the last question which I want to tackle, that of the uneasy relationship between democracy and fundamentalism, especially religious fundamentalism. Some seem to argue that, precisely because of the values it cherishes, a democracy should not be unduly concerned with religious fundamentalism. Adherence to a fundamentalist view of a given religion merely illustrates someone’s tangible exercise of his or her individual right to freedom of religion, thought, and conscience. This, I submit, is a naïve approach to fundamentalism.

Leaving aside the fact that, from a religious fundamentalist’s perspective, the need for some degree of separation between the State and religion represents a nonsense, it is the rapport that the fundamentalist entertains with truth and freedom that is the most problematic from a democratic standpoint. If we return to the view according to which democracy implies a continuing openness on the part of individuals, but also on the part of the State, to the creation of new meanings, we must conclude that it is hardly compatible with views advocating a radical closure of the mind. This idea of encouraging the creation of new meanings explains why freedom of thought, conscience, and expression are so important in democracies, and why attempts at constraining these freedoms, be it in the public or in the private sphere, should be viewed with suspicion or, at the very least, not encouraged.

This is where the problem lies with religious fundamentalism. The ordinary, albeit pious, believer, who sees the word of God in his or her religion’s sacred text, is also able to recognize the relative indeterminacy and the potential plurality of meanings of this text, which also explains its enduring appeal and richness. While inspired by the word of his or her God, the believer sees no contradiction between fidelity to the creed and human agency. On the contrary, the fundamentalist believer, who denies that a sacred text is susceptible of having a plurality of meanings, seeks to impose a regime of truth crafted on the basis of his or her vision of who God is, what God wants, and what God intended to say. Fundamentalists share the certainty that they are the guardians of the integrity of the meaning of a text the letter of which is deemed to reveal God’s commandments, commandments that soon become “givens” by virtue of an interpretive closure operated through the assertion of these very fundamentalists’ authority to determine the sense of God’s revelation—hence, the French word *intégrisme*. Fundamentalism thus relies on a pre-interpretation that precludes any further interpretation. It is about literalism, power, and, if needed, coercion. It seeks to establish a system of thought under which individual agency systematically yields to God’s design, as revealed in a text the meaning of which is itself revealed by the fundamentalists. It instrumentalizes human beings. Fundamentalism is thus in-

timately linked to absolutism, and a potentially successful fundamentalist project can only lead to religious totalitarianism. In that context, thought is a nuisance, and freedom of thought, an aberration. It is worth reflecting on these remarks made a century ago by French philosopher Alain:

To think is to say no. [...] No to what? To the world, to the despot, to the preacher? This is only appearance. In all these cases, it is to itself that thought says no. It breaks the happy acquiescence. It severs itself from itself. It struggles against itself. There is no other fight in the world. [...] What allows the despot to be my master is that I respect instead of examining. Even a true doctrine becomes false as a result of such drowsiness. Men enslave themselves through belief. To reflect is to deny what we believe. [...] He who only believes doesn’t even know anymore what he believes. [...].⁴⁵

To these considerations Alain adds, speaking of the Cartesian epistemological break, that “[what] was needed was a reflection on consciousness itself: “ ‘I think,’ ” Descartes said. Then doubt appeared, attached like a shadow to all of our thoughts. Simple faith was not diminished; quite the contrary, doubt is the backdrop to mere appearances. To do otherwise is to sleep.”⁴⁶

It would also be sleeping to fail to notice fundamentalism’s political dimension. Speaking of Islamic fundamentalism, which may be the most vocal form of fundamentalism today, Mohammed Arkoun observed that its two foundational cornerstones are, first, an institutionalized ignorance of the Enlightenment, and, second, a rejection of modernity and of its positive sides because modernity is equated with, or rather reduced to, colonialism.⁴⁷ Subject to minor variations, all fundamentalisms share that same rejection of modernity and of its legacy, including, in large part, the idea of *individual* human rights.⁴⁸ For example, a branch of Christian fundamentalism views with considerable skepticism the scientific method and the discoveries it led to. Thus, for that reason, fundamentalism is politics. But it is a paradoxical kind of politics because the philosophy of closure that inspires fundamentalism prevents the compromises that the very notion of politics promotes. Indeed, as soon as something falls under the mantle of faith, any compromise becomes a logical impossibility for the fundamentalist. Democracy, however, compels us to challenge, confront, and to always be ready to accept that our beliefs are wrong or, at least, fragile. As such, democracy is the political theory of the virtual and perpetual fissure that is, and must remain, present within both individuals and society. Democracy fosters both anxiety and hope. For hope to be fulfilled, one must always seek not only to reach to the other, but also to find a part of otherness within oneself. Fundamentalism precludes this kind of search, simply because, in its cosmogony, the other is evil. In the fundamentalist mindset, identity is a limit, not a springboard. This is why I was talking earlier about the uneasy relation between democracy and fundamentalism. This characterization clearly understates the opposition, though. Calling a

spade a spade, it would indeed be more appropriate to describe that relation as one of radical incommensurability.

What does this digression on religious fundamentalism have to do with religious courts and their legal treatment by the State? At first glance, an easy answer could be “very little.” But that would be a misleading answer. The risk alluded to earlier, that the fundamental individual rights could be trampled in faith-based arbitrations, is heightened when the arbitration is presided over by a religious fundamentalist. Even though it is fair to assume that the majority of priests, imams, or rabbis presiding over faith-based arbitrations are not fundamentalist, and even though we can also assume that they honestly seek to find a just solution to the disputes they have to settle, the risk still remains. This renders even more acute the necessity of applying the “risk-minimizing” principle evoked earlier whenever a “comprehensive doctrine,”⁴⁹ such as a religious one, is relied upon for adjudication purposes.

The risk of abusing or neglecting basic constitutional rights in faith-based arbitrations, which is only enhanced by the possibility, albeit remote, that a fundamentalist cleric presides over such arbitrations, explains why the State’s approach to such arbitrations should be informed by a logic of toleration rather than one of recognition.

Conclusion

Continuous migration creates highly diverse layers within society. Migrant groups now seek limited adaptation to the host society and demand the preservation of their group identity. Moreover, a certain moral vacuum creates a kind of “market of beliefs”⁵⁰ where ideologies seeking to instrumentalize the human subject flourish. The question of the space left by democratic States to potentially incommensurable value systems is not merely a theoretical question. While there is no ontological incommensurability between most religious creeds, be they Islam, Christianity, Judaism, or Hinduism, and democracy, some interpretations of these creeds may lead to a conclusion of incommensurability.

It is of the utmost importance for those who value multiculturalism not to fall prey to an attitude of systematic normative resignation which, ultimately, debases multiculturalism itself. As well, those who are sympathetic to the idea of legal pluralism should not fall into the trap of epistemological hypochondria by denying all relevance or, worse, legitimacy to positive legal norms in view of beefing up their claim in favor of legal pluralism. More specifically, the fact that positive legal norms may once have been used to discriminate against, or to exclude, some groups, the fact that they may have been conceived of in a context of colonialism or imperialism, should not entirely determine the way we approach them. Systematically invoking the somewhat problematic context of elaboration or application of a norm so as to reject it outright or to deny it any legitimacy is a very easy way to refuse to engage debate and to revisit one’s presuppositions. The main problem with such a logic of “ascription to origins,” under which “the effective con-

ditions surrounding the genesis of a work (of an idea, of a reasoning”) determine, alone, its validity,”⁵¹ is its unduly generic nature. Generic because of the historical fact that, as Walter Benjamin once put it, “[t]here is no document of civilization which is not at the same time a document of barbarism.”⁵² Paul Ricoeur was making the same type of argument when he wrote that “[t]he most reasonable State, the State governed by the rule of law bears the scar of the original violence of history-making tyrants.”⁵³ It is thus way too easy and simplistic to deny legitimacy to an entire system of thought or to a whole set of institutions under the pretext that, at one point in their evolution, they were imposed by force as part, or as an off-spring, of an imperialist project. Besides, it bears remembering that several religions, from Christianity to Islam, spread through force or conquest, which, under a view ascribing them to their origins, would “taint” them forever.

Rejecting this logic of ascription to origins appears even more important in respect of positive norms entrenching fundamental human rights. Again, the fact that the application of such norms by the judiciary has sometimes been unduly and unnecessarily insensitive to the preoccupations and circumstances of religious or ethno-cultural groups does not justify the wholesale rejection of these norms and of the system of public justice applying them, and the corollary withdrawal from this system though the creation of identity-based systems of parallel justice.⁵⁴ Ultimately, let us not lose sight of the federating role of positive norms, which Hannah Arendt once eloquently summarized as follows: “The hurdles posed by positive laws are to the political existence of man what memory is to his historical existence: they ensure the pre-existence of a common world, the reality of a certain continuity, which transcends the duration of the individual life of each generation, absorbs all new beginnings and feeds itself from them.”⁵⁵

Those who support private arbitration as an efficient and relatively cheap mechanism for resolving disputes should consider that abuses of fundamental rights committed in arbitration contexts are likely to undermine the legitimacy of arbitration itself as an alternative dispute mechanism. Thus, for that reason, it may be preferable to forgo the use of arbitration in areas in which such abuses are the most likely to be committed. This is what the Ontario debate on faith-based arbitrations in family matters appears to involve. Although the dream of a perfectly consensual solution to the dilemma posed by such arbitrations is nothing but a chimera, it remains to be seen what approach will be adopted in the report commissioned on the question by the Attorney General of Ontario. This report, which was tabled on December 20, 2004, will be examined in a forthcoming issue of the **WAMR**.

Endnotes

* © All rights reserved, Jean-François Gaudreault-DesBiens, 2004. The author would like to thank his colleagues Ayelet Shachar and Sujit Choudhry, from the University of Toronto, and Pascale Fournier, from McGill University, with whom he has had

several illuminating conversations while drafting this article. Obviously, the usual disclaimer applies: The author remains solely responsible for the content of the article.

¹ Information on this project can be found on the following website: <http://muslim-canada.org>.

² *Arbitration Act, 1991*, S.O. 1991, c. 17.

³ The *Family Law Act*, R.S.O. 1990, c. F.3, provides at s. 56(1) that “[i]n the determination of a matter respecting the education, moral training or custody of or access to a child, the court may disregard any provision of a domestic contract pertaining to the matter where, in the opinion of the court, to do so is in the best interests of the child.” For a contract to be characterized as a “domestic” one, it has to be a marriage contract, separation agreement, or cohabitation agreement (*Family Law Act*, s. 51). These types of contracts are all broadly defined. Contrary to marriage contracts and cohabitation agreements, separation agreements may include provisions dealing with the right of custody of, and access to, the children (*Family Law Act*, s. 54(d)). Separation agreements can also deal with the right to direct the education and moral training of the children, ownership in or division of property, support obligations, and any other matter in the settlement of the parties’ affairs (*Family Law Act*, s. 54(c), (a), (b), (e)). An arbitration agreement would fall under the last category. See *Duguay v. Thompson-Duguay*, [2000] O.T.C. Lexis 2662 (Ontario Superior Court of Justice), at par. 33. Thus, as a matter of principle, faith-based arbitrations can be held respecting all such matters, but a court may disregard awards respecting the education, moral training, custody, or access if it finds they are not in the best interests of the child. In principle, domestic contracts are enforceable provided they are made in writing, signed by the parties, and witnessed (*Family Law Act*, s. 55(1)). If these formal requirements are satisfied, courts should exercise “the highest deference to arbitration awards and arbitration clauses generally.” See *Duguay v. Thompson-Duguay*, *supra*, at par. 31. Further, section 68 of the *Children’s Law Reform Act*, R.S.O. 1990, c. C.12 states that “[w]here a domestic contract as defined in the *Family Law Act* makes provision in respect of a matter that is provided for in this Part [which deals with custody, access, and guardianship], the contract prevails except as otherwise provided in Part IV of the *Family Law Act*.” That part of the *Family Law Act* is precisely the one addressing “domestic contracts,” and the *Children’s Law Reform Act* reiterates the norm expressed in s. 56(1) of the former by confirming, at section 69, that “[t]his Part does not deprive the Superior Court of Justice of its *parens patriae* jurisdiction.”

⁴ *Arbitration Act, supra*, s. 32.

⁵ *Id.*, s. 37

⁶ *Id.*, s. 19

⁷ *Id.*, s. 46

⁸ *Id.*, s. 19.

⁹ *Hercus v. Hercus*, [2001] O.J. No. 534 Q.L. (Ontario Superior Court of Justice), at par. 96-97.

¹⁰ N. Bakht, *Family Arbitration Using Sharia Law: Examining Ontario’s Arbitration Act and its Impact on Women*, 1(1) MUSLIM WORLD J. HUM. RHTS. Art. 7.1(1), at 7 (2004). Bakht’s article is extremely interesting for its exhaustive analysis of the positive law dimensions of the debate from a feminist standpoint.

¹¹ *Arbitration Act, supra*, s. 4. Obviously, the waiver applies if the objection is not raised within a reasonable time, if no specific delay is provided for. There is nothing exceptional in that kind of provision but it bears noting that it closes another door by which a potentially coerced party to a faith-based arbitration could exit.

¹² *Ross v. Ross*, [1999] O.T.C. Lexis 3047 (Ontario Superior Court of Justice), at par. 6.

¹³ *Arbitration Act, supra*, ss. 45(2)(3).

¹⁴ This points to the need for *drafting* arbitration agreements that are as perfect as possible, even though subsection 5(3) of the *Arbitration Act 1991* states that such agreements need not be in writing. This imperative will be reinforced by a recent decision of the Ontario Superior Court of Justice in *Finkelstein v. Bisk*, [2004] O.J. 1176, in which the court found that one of the parties to an alleged agreement to defer jurisdiction over an investment dispute to the *Beis Din*, a rabbinical tribunal, had never intended to bind himself to arbitration. Although subsection 17(1) of the *Arbitration Act 1991* grants arbitral tribunals the power to rule on their jurisdiction, which includes the power to rule on objections with respect to the existence or validity of the arbitration agreement, the court noted that this provision was only permissive and that the case at bar was not one “where the scope or applicability of an arbitration clause [was] an issue or where the special expertise of the tribunal will assist in determining its jurisdiction.” (Par. 14). It added that “[w]hile there are strong policy reasons to ensure that parties who agree to arbitrate disputes cannot ignore that process and access the court, those considerations do not apply where there was no intention to arbitration.” (Par. 15). The evidence brought before the court was to the effect that, although the investment contract that was at the source of the dispute broadly referred to “Jewish law,”²² it contained no arbitration clause conferring jurisdiction to the *Beis Din*, which was a requirement of that religious tribunal for accepting jurisdiction. It is in that context that the court makes one of its most relevant findings for the purpose of this article.

An argument was indeed made by the defendant that the failure to reduce the arbitration agreement in writing could be explained “on the basis that it is so obvious to observant Jews that it does not need to be said expressly and because there is a custom that one tries to avoid putting negative possibilities into writing.” (Par. 19). In other words, the argument was that “arbitration by the *Beis Din*, the accepted arbitration tribunal of the observant Jewish community in Toronto, is an implied term for all observant Jews.” (Par. 13). In spite of the fact that the contract referred to Jewish law, that there had been discussion of the *Beis*

Din when the contract was signed, that the plaintiff had had a previous, but limited, experience with the rabbinical tribunal, that he had, after the dispute erupted, consulted a rabbi to see how the resolution of the dispute could be made speedier, the court found that this did not amount to an intention to arbitrate on the part of the plaintiff. Furthermore, a rabbi working with the *Beis Din* testified that he was not aware of the alleged custom not to put in writing “negative possibilities..” What is interesting here is that, on the basis of the evidence and of the court’s decision, it is very unlikely that an argument alleging that submitting disputes to a religious tribunal is an “implied term” for any religious observer could ever be accepted. This might seem trite to many, but hegemonic arguments of that type are not unknown in some conservative religious circles. In consideration of the above, the assumption that arbitration agreements granting jurisdiction to religious tribunals will generally be as perfect and watertight as possible, and always in writing, seems indeed all the more reasonable.

¹⁵ At least four, internally diverse, schools of interpretation have been reported to exist. See P. Fournier, *The Erasure of Islamic Difference in Canadian and American Family Law Adjudication*, J. L. & POL’Y. 51, 67 (2001). For an example of the diversity and richness of Sharia interpretations within a single tradition, *i.e.*, Sunni Islam, see Y. Ben Achour, *Nature, raison et révélation dans la philosophie du droit des auteurs sunnites*, in: J.Y. MORIN (ed.), *LES DROITS FONDAMENTAUX* 163 (Brussels: Bruylant, 1997).

¹⁶ F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 20-21 (1960).

¹⁷ Ontario law does not provide for the establishment of a mandatory registry of family law-related arbitral awards. As a result, such awards remain unpublished and their content, unknown. It is, therefore, impossible to gather information on them. So far, the Institute of Islamic Justice has not indicated that it would voluntarily create such a registry. Thus, no functional equivalent to the practice adopted by some arbitral institutions, such as the International Chamber of Commerce, which allows for the publication of arbitral “case law,” has so far been contemplated.

¹⁸ See, *e.g.*, C. PERELMAN, *LOGIQUE JURIDIQUE, NOUVELLE RHÉTORIQUE* (1970); C. PERELMAN, *TRAITÉ DE L’ARGUMENTATION* (5th ed. 1988).

¹⁹ The distinction between political and social minorities has been proposed by Canadian legal theorist Andrée Lajoie. For her, *political* minorities are those whose primary locus of identification is a sub-State entity (which in and of itself forms a political community) rather than the global polity constituted by the State, and for whom belonging to the latter is conditional upon the respect by that polity of their primary identification with the sub-State entity. In contrast, *social* minorities are those who are in a legitimate position to advance an equality claim, but whose sense of belonging to the political community formed by the State is not conditioned by any prior, and primordial, identification with another sub-State political community. As a result, claims made by political minorities potentially threaten the integrity of the

State while those made by social minorities do not. See A. LAJOIE, *QUAND LES MINORITÉS FONT LA LOI* (Paris: Presses Universitaires de France, 2002). Using Will Kymlicka’s typology of group-differentiated rights, political minorities will generally demand “self-government rights” while social minorities will more likely claim “polyethnic rights” and, occasionally, “special representation rights.” See W. KYMLICKA, *MULTICULTURAL CITIZENSHIP* (Oxford: Oxford University Press, 1995).

²⁰ Elaborated by philosopher Charles Taylor, the concept of “deep diversity” essentially refers to situations in which belonging to a larger polity is mediated by, or conditional upon, belonging to another smaller community which can also be characterized as political. See C. Taylor, *Shared and Divergent Values*, in R. WATTS & D. BROWN (eds.), *OPTIONS FOR A NEW CANADA* 53 (Toronto: University of Toronto Press, 1991). Note the overlap with Lajoie’s concept of “political minority.”

²¹ M. WALZER, *ON TOLERATION* 44 (New York & London: Yale University Press, 1997).

²² See generally A.N. MESSARA, *THÉORIE GÉNÉRALE DU SYSTÈME POLITIQUE LIBANAIS*, (Paris: Cariscript, 1994).

²³ On this, see S. Choudhry, *National Minorities and Ethnic Immigrants: Liberalism’s Political Sociology*, 10 J. POL. PHIL. 54 (2002).

²⁴ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, constituting schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

²⁵ In Canada, the only minority group that could possibly invoke a constitutional provision—s. 35 of the *Constitution Act 1982*—to support the claim that they have a *right* to a separate justice system based on norms substantially different from those applicable elsewhere in the federation is composed of the various Aboriginal peoples of Canada. Indeed, as a matter of principle, section 35 recognizes that the Aboriginal peoples of Canada, which formed self-governing societies prior to contact with the European settlers, may prove that they have an inherent right to self-government, which would certainly include a right to have separate tribunals applying Aboriginal norms. This could hypothetically include Aboriginal spiritual norms.

²⁶ Subsection 15(1) of the *Canadian Charter of Rights and Freedoms* reads as follows: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

²⁷ More particularly, it is of the utmost importance to resist the temptation of “orientalism,” which, in a nutshell, designates “a style of thought based upon an ontological and epistemological distinction made between ‘the Orient’ and (most of the time) ‘the Occident.’” See E. SAID, *ORIENTALISM* 2 (New York: Vintage Books, 1979). It is often characterized by a propensity to de-

pict Islam and Arabs as a monolithic entity defined around stereotypical—and sometimes conflicting—characteristics such as backwardness, violence or sensuality. In any event, it implies an “exoticisation” of the Other.

²⁸ Section 27 reads as follows: “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”

²⁹ This would be highly problematic from a positive legal standpoint as the Supreme Court of Canada’s interpretation of freedom of religion clearly emphasizes that judges must refrain from examining or second-guessing the subjective beliefs of rights claimants for the purpose of identifying an objective “core” of principles for each religion. See *Syndicat Northcrest v. Amselem*, [2004] SCC 47.

³⁰ Another option could be to require statutorily a certification of the free and informed nature of the consent by an independent, non-religious, third party, a government-appointed lawyer, for example. While superficially appealing, this option would in no way guarantee that a vulnerable party to an arbitration proceeding would actually disclose her feeling that she is being coerced, even in a confidential meeting with the independent third party, knowing that the refusal by that third party to issue the certification would make the proceeding abort and that this abortion would probably be attributed to her by the other party and by her community.

³¹ This is not to say that a State court must *always* refuse to recognize positive legal effects to religious norms in adjudicating disputes involving believers of a same faith who agree on the interpretation to be given to the religious norms potentially applicable in the case at bar. It may even accommodate a religious group seeking to perpetuate itself by interpreting open-textured positive norms in a manner that is both beneficial to the collective interests of that religious group and not detrimental to the fundamental norms applicable in the State. This presupposes that the said accommodation does not impose any “undue hardship” on its debtor. A blatant contradiction of a constitutional rule or value by a religious norm should be viewed as imposing such an undue hardship. Conversely, absent any such situation, systematically and blindly refusing to accommodate believers should be seen as intrinsically problematic. For example, in *Kaddoura v. Hammoud*, [1998] O.J. No. 5054 (Q.L.), the Ontario Court of Justice refused to recognize positive legal effects to a Mahr, *i.e.*, a financial obligation contracted under an Islamic marriage contract. The Mahr, which, once contracted, becomes obligatory under Islamic law, was found unenforceable simply because of the religious inspiration of the promise to pay. To deny it positive legal effects, the judge surprisingly compared this essentially *financial* obligation (a functional equivalent of a dowry) to the Christian religious obligations of loving, honoring, and cherishing one’s spouse, or remaining faithful to him or her, and similar moral obligations (*see* at par. 25 of the judgment). A scathing critique of that decision can be

found in: P. Fournier, *The Erasure of Islamic Difference in Canadian and American Family Law Adjudication*, 10 J. L. & POL’Y 51 (2002).

Refusing to follow the reasoning in *Kaddoura*, other Canadian decisions have found the Mahr legally enforceable. See, *e.g.*, *N.M.M. v. N.S.M.*, [2004] B.C.J. No. 642 (Q.L.) (British Columbia Superior Court). Interestingly, two much older cases, a Canadian one from the mid-nineteenth century and an Indian one from the early twentieth century, showed more much more openness than the *Kaddoura* case to the incorporation of religious or spiritual norms in a positive law setting, thereby opening the door to a form of dialogical pluralism. First, in *Connolly v. Woolrich*, (1867) 17 R.J.R.Q. 197, the Québec Superior Court confirmed on the basis of oral evidence the validity, under the laws of the province, of a marriage contracted according the “usages of the Cree country,” to which no religious or civil authority had attended, even if a similar relationship would have been characterized at the time in Québec as a sinful common law one. That judgment was confirmed by the Québec Court of Queen’s Bench, *sub nomine Johnstone v. Connolly*, (1869) 17 R.J.R.Q. 266. Secondly, in *Mullick v. Mullick*, (1925) 52 L.R. (Indian Appeals) 245, the Judicial Committee of the Privy Council examined the legal status of an idol under Hindu law in view of deciding a dispute between its co-guardians. The dispute concerned the idol’s removal from the sanctuary which had been built for it by the co-guardians’ father, who had consecrated the idol as a household deity prior to his death. Although the co-guardians relied on English property concepts to argue their respective cases about the fate of the idol, the court deemed determinative of the case the status of the idol as a legal person under Hindu law. Being vested with legal personality but unable to express its will, the idol was thus appointed a “disinterested next friend” responsible for defending its interests. For a very enlightening analysis of accommodation strategies on the basis of a “joint-governance” model, *see generally* A. SHACHAR, *MULTICULTURAL JURISDICTIONS. CULTURAL DIFFERENCES AND WOMEN’S RIGHTS* (Cambridge: Cambridge University Press, 2001), and more specifically her discussion of the “contingent accommodation” approach, at 109-113.

To sum things up, my point is that, while it is of the utmost importance not to systematically defer to religious or cultural norms so as to prevent abuses committed in the name of religion or culture, even if it means acknowledging the existence of a relation of incommensurability, it is equally important to recognize that outsiders to a given cultural group “should not be too quick to jump to the conclusion that every practice that deviates from their constitutes such abuse.” See D.G. Réaume, *Justice Between Cultures: Autonomy and the Protection of Cultural Affiliation*, U.B.C. L. REV. 117, 140 (1995). Indeed, the perceived “foreignness” of a norm or practice does not make it *per se* incompatible with a democratic society’s most fundamental norms. Each norm or practice has to be examined on its merit, but always bearing in mind the risk-minimizing principle I expounded earlier.

³² Is such a radically different legislative policy due to the fact that Québec is a mixed jurisdiction where the *jus commune* is the civil law, and that, as such, it shares with several other civil law jurisdictions a significantly more robust conception of citizenship and statist culture than its common law counterparts in the rest of Canada? While superficially tempting, this hypothesis attributes a disproportionate influence to the broad sub-text of a legal tradition, *i.e.*, the civil law. The impetus for the enactment of article 2639 of the *Civil Code of Québec* is much more pragmatic. It lies in the realization that disputes concerning the status and capacity of persons, as well as family matters, are likely to raise so many complex and fundamental questions affecting the very dignity of individuals that State courts should always retain their normative monopoly on them. It must be noted, however, that Québec's *Code of Civil Procedure* provides, at articles 814.3 to 814.14, that no dispute raising questions pertaining to the custody of children, alimony, or the patrimonial obligations of the parties can be heard by a judicial tribunal without these parties having first attended an information session on mediation. Mediation is, therefore, not compulsory. If the parties do decide to participate in a mediation procedure, nothing in the law prevents the mediator from being a religious cleric conducting the mediation on the basis of religious principles.

³³ It would remain extremely difficult for a party to an arbitration agreement to prove an absence of consent. Even in respect of domestic contracts, the threshold for proving the presence of duress or coercion is very high. See N. Bakht, *supra* note 10, at 8-9. In *Weidberg v. Weidberg*, [1991] O.J. No. 3446 (Ontario Court of Justice, General Division), the court refused to dismiss a motion for summary judgment seeking to enforce a divorce award rendered by a Jewish Rabbinical Court that was challenged by the losing party—the wife—on the basis that, suffering from schizophrenia, she could not understand the proceedings and defend her interests. Evidence was indeed brought before the court showing that the wife was represented by counsel and assisted by family members during the arbitration proceedings, and that schizophrenia did not really affect her cognitive abilities outside of specific delusions.

³⁴ From the standpoint of the defense of the rights of potentially vulnerable parties, it could be argued that this option leaves them undefended because their very vulnerability and the context in which they live practically prevent them from seeking redress, under the common law, against potential instances of coercion. This view is not incorrect, but there are limits to State paternalism. Having rejected the option of an amendment of the statutory framework governing arbitration under which State courts would actively monitor faith-based arbitration proceedings, the only remaining alternative would be to prohibit the very existence of religious tribunals, even when their awards or decisions bear no positive legal effect. As alluded to earlier, however, such an amendment would probably be found unconstitutional.

³⁵ A. TOURAINE, QU'EST-CE QUE LA DÉMOCRATIE? 239 (1994) (author's translation).

³⁶ Swinton, *Multiculturalism and the Canadian Diversity*, in H.P. GLENN & M. OUELLETTE, LA CULTURE, LA JUSTICE ET LE DROIT 78, 92 (1994).

³⁷ Webber, *Multiculturalism and the Limits of Toleration*, in A. LAPIERRE, P. SMART & P. SAVARD, LANGUAGE, CULTURE AND VALUES IN CANADA AT THE DAWN OF THE 21ST CENTURY 269, 277-78 (1996).

³⁸ Is it ethnocentrism, or "Eurocentrism," a criticism often made by some North-American multiculturalism activists? I will simply—and maybe immodestly because of the self-referencing quotation—repeat the answer that I gave elsewhere to a similar objection: "...the reference I make to democracy clearly indicates the intellectual framework in which my reflection takes place—that of a democratic society embodying the Enlightenment's ideals, with their defects but also with their positive qualities. Such philosophical "ethnocentrism" is inevitable, and it may well be that some values are irreconcilable. Without any imperialist vocation, this ethnocentrism denies neither diversity nor Otherness; it simply acknowledges that it is only from our own standpoint that we can participate in a true and authentic dialogue with the Other. It also posits reciprocity in openness and compromise as an essential condition for such a dialogue to take place. Last, it acknowledges that in any interpretive community, the act of judging is, for historical reasons, constrained within a certain intellectual framework that is futile to hide." See J.F. Gaudreault-DesBiens, *From Sisyphus's Dilemma to Sisyphus' Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide*, 46 MCGILL L.J. 1117, 1133 (2001). I was referring in that context to R. Rorty's "epistemological relativism": R. RORTY, OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS, 30 (Cambridge: Cambridge University Press, 1991).

³⁹ Rosenfeld, *The Identity of the Constitutional Subject*, 16 CARDOZO L. REV. 1049, 1051 (1995).

⁴⁰ See C. CASTORIADIS, LA MONTÉE DE L'INSIGNIFIANCE. LES CARREFOURS DU LABYRINTE IV 63 (1996).

⁴¹ See generally C. Taylor, *The Politics of Recognition*, in PHILOSOPHICAL ARGUMENTS 153-254, 225 (Cambridge, Mass.: Harvard University Press, 1995); Morissette, *Quelques repères sur l'égalité dans un société multiculturelle*, CANADIAN BAR REV. (2000).

⁴² F. Bonhôte, *Réflexion sur la tolérance*, 126 REV. THEOL. PHIL. 1, 17 (1994).

⁴³ In that sense, see : C. Lefort, *La liberté à l'heure du relativisme*, in LES USAGES DE LA LIBERTÉ: TEXTES DES CONFÉRENCES ET ENTRETIENS ORGANISÉS PAR LES TRENTE-

DEUXIÈMES RENCONTRES INTERNATIONALES DE GENÈVE 1989, 237, 241 (Neuchâtel : Éditions de la Baconnière, 1999) (author's translation).

⁴⁴ On the concept of "militant democracies," see the classical articles published prior to WWII by Karl Loewenstein, *Militant Democracy and Fundamental Rights I*, [1937] AM. J. POL. SC. 417; *Militant Democracy and Fundamental Rights I*, [1937] AM. J. POL. SC. 638.

⁴⁵ ALAIN, PROPOS SUR LES POUVOIRS. ÉLÉMENTS D'ÉTHIQUE POLITIQUE, 351-352 (Paris: Gallimard, 1985, Collection "Folio-essais," no. 1) (author's translation).

⁴⁶ *Id.*, at 352-353 (author's translation).

⁴⁷ Arkoun, "Un Islam des Lumières," *Le Nouvel Observateur, Les nouveaux penseurs de l'Islam*, No. 54, at 8 (April-May 2004). While it is difficult to deny the contemporary strength of Islamic fundamentalism, I deem it important to reiterate the danger of equating, through a process of "Orientalism," Islam with Islamic fundamentalism, and to adopt the "clash of civilizations" model suggested by some. Recent history unfortunately shows, for example in Iran, in Afghanistan, in Algeria, or in Iraq, that most of the victims of Islamic fundamentalists were, and still are, devout Muslims themselves.

⁴⁸ It could be argued that the Catholic Inquisition started as a pre-Modern fundamentalist project and eventually evolved into an anti-Modern one.

⁴⁹ J. RAWLS, POLITICAL LIBERALISM 146 (New York: Columbia University Press, 1993).

⁵⁰ I borrowed this expression from P. Legendre, *Façonner, qu'est-ce à dire?*, in L. MAYALI (ed.), LE FAÇONNAGE JURIDIQUE DU MARCHÉ DES RELIGIONS AUX ÉTATS-UNIS 17, 18 (Paris : Mille et une Nuits, 2002).

⁵¹ C. CASTORIADIS, LA MONTÉE DE L'INSIGNIFIANCE. LES CARREFOURS DU LABYRINTHE IV 234 (Paris : Seuil, 1996) (author's translation).

⁵² W. Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS 256 (New York: Schocken, 1969).

⁵³ P. RICOEUR, DU TEXTE À L'ACTION. ESSAIS D'HERMÉNEUTIQUE II, 401 (Paris: Seuil, 1986) (author's translation).

⁵⁴ A lack of confidence in the State justice system, because of its perceived incapacity to grasp a party's religious interests or preoccupations, or a lack of familiarity with its functioning, are certainly factors that may lead that party to refuse to seek relief from a civil court and to opt for a religious tribunal. It is hard to see, however, why these factors alone should induce us to conclude that religious courts should enjoy a normative monopoly on disputes raising the potential application of religious norms or beliefs. It is even more difficult to see how these factors offset the problems associated with State-sanctioned, unmonitored, religious courts and why their mere existence should convince us to renounce improving the level of sensitivity and understanding of civil courts. On the reluctance of many immigrant women to seek assistance from the public justice system, because of a prior internalization of the norms and expectations of their primordial community of belonging, of a lack of information about their positive rights, of a weak or non-existing proficiency in the country of adoption, and, more generally, for fear of social ostracism by their family and community, see E. Erez & C. Copps Hartley, *Battered Immigrant Women and the Legal System: A Therapeutic Jurisprudence Perspective*, 4(2) WEST. CRIM. REV. 155, 157-158 (2003).

⁵⁵ H. ARENDT, LE SYSTÈME TOTALITAIRE 284 (Paris : Seuil, 1972) (author's translation). □