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# **ISLAMIC ARBITRATION OF FAMILY LAW DISPUTES IN NEW ZEALAND**

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# Contents

<b>Introduction.....</b>	<b>1</b>
<b>Chapter One: Islamic Family Law Arbitration.....</b>	<b>3</b>
I Background to the Debate .....	3
A. Ontario.....	3
B. United Kingdom.....	4
II Islam.....	6
A. The Relationship between Islam and Islamic Law.....	6
B. Islamic Family Law.....	8
III Islamic Arbitration.....	12
A. Arbitration.....	12
B. Reasons Why Islamic Arbitration Appeals to Muslims .....	13
<b>Chapter Two: Application of the New Zealand Bill of Rights Act 1990.....</b>	<b>16</b>
I. Rights at Issue.....	16
II. Does the NZBORA Directly Apply to Arbitral Tribunals? .....	18
A. Section 3(a).....	18
B. Section 3(b).....	19
III. Does the NZBORA Indirectly Apply to Arbitral Tribunals? .....	23
<b>Chapter Three: General Legislative Framework Governing Family Law Arbitration in New Zealand.....</b>	<b>25</b>
I. Arbitration Act 1996.....	25
A. Purposes of the Act.....	25
B. Arbitration Agreement.....	27
C. Procedural Matters.....	29
D. Arbitral Award.....	30
II. Arbitrability of Family Law Disputes.....	31
A. ADR in the Family Court System.....	32
B. Property Disputes.....	33
C. Child-related Disputes.....	39

<b>Chapter Four: Multiculturalism and Islamic Family Law Arbitration in New Zealand.....</b>	<b>44</b>
I. New Zealand’s Muslim Community.....	44
A. Size.....	44
B. Composition.....	47
II. New Zealand’s Approach to Multiculturalism.....	48
A. Measures taken by the Government.....	48
B. Potential for a Favourable Reception of Islamic Family Law Arbitration.....	50
III. Striking the Right Balance between Group Rights and Individual Rights.....	53
 <b>Chapter Five: Recommendations for Regulation of Islamic Family Law Arbitration in New Zealand.....</b>	<b>56</b>
I. Clarification on the Status of Family Law Arbitration.....	56
II. Regulation of Islamic Family Law Arbitration.....	60
A. Establishing Consent.....	60
B. Challenging Awards with a Religious Basis.....	66
 <b>Conclusion.....</b>	<b>68</b>
 <b>Bibliography.....</b>	<b>70</b>

## Introduction

As New Zealand society becomes increasingly multicultural, the question inevitably arises as to how much scope a minority culture should be afforded to govern its internal affairs.<sup>1</sup> Add to this quandary the following concerns. First, the internal affairs over which the minority culture seeks control relate to the family; an institution ardently protected by the state for public policy reasons,<sup>2</sup> but which also plays a fundamental role in defining and maintaining a group's religious and cultural identity.<sup>3</sup> Second, the minority culture lives in accordance with religious laws that are widely perceived to be discriminatory and immutable, falling vastly short of the progressive family law advances that have been made for women and children in recent decades.<sup>4</sup> Finally, the avenue by which the minority culture seeks to exercise such control is a secular statute, one that somewhat inadvertently provides a mechanism for religious laws to be enforced by the state.<sup>5</sup>

All of these concerns (and more) have been raised in overseas jurisdictions in response to the practice of Islamic family law arbitration. The purpose of this paper is to examine the current scope for Islamic family law arbitration in New Zealand and to provide a reasoned argument in favour of the practice being accommodated, subject to specified regulation. This is a pertinent inquiry to undertake given New Zealand's

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<sup>1</sup> The term 'internal affairs' is used to refer to the unique practices of a particular culture; practices that are motivated by specific cultural and/or religious beliefs, and that would traditionally be classed as falling within the 'private realm' of the liberal state. See also Ayelet Shachar "Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies" (2005) 50 McGill LJ 49 at 51 to 53 and Marion Boyd "Religion-Based Alternative Dispute Resolution: A Challenge to Multiculturalism" in Keith Bantinh, Thomas J. Courchene and F. Leslie Seidle (eds) *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Institute for Research on Public Policy, Montreal, 2007) 465 at 465.

<sup>2</sup> Jehan Aslam "Judicial Oversight of Islamic Family Law Arbitration in Ontario: Ensuring Meaningful Consent and Promoting Multicultural Citizenship" (2006) 38 NYU J Int'l L & Pol 841, at 873; Ayelet Shachar *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press, Cambridge, 2001) at 46. See also Marion Boyd *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (prepared for the Ministry of the Attorney General, Ontario, Canada 2004) at 94 to 101.

<sup>3</sup> Boyd, above n 2, at 39 and 89; Shachar, above n 1, at 51; Shachar, above n 2, at 45 to 47; Ayelet Shachar "Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law" (2008) Theoretical Inq L 573 at 586 to 587.

<sup>4</sup> Boyd, above n 1, at 465; Natasha Bakht "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women" (2004) 1 Muslim World Journal of Human Rights Article 7 at 18 to 19 and 24; Muriel Seltman (ed) *Sharia Law in Britain: a threat to one law for all & equal rights* (One Law for All, London, 2010) at 2.

<sup>5</sup> Shachar 'Privatizing Diversity', above n 3, at 575.

growing Muslim community. The inquiry also raises unique questions for the New Zealand legislature, due to the silence of all of New Zealand's family law statutes on the role of arbitration in the Family Court system.

Chapter One will provide an overview of the practice of Islamic family law arbitration. This will involve a brief examination of how the practice has been received in overseas jurisdictions, and an explanation as to why the practice appeals to many Muslims.

Chapters Two and Three will examine the scope for Islamic family law arbitration under New Zealand's current legislative framework. The focus of Chapter Two will be on the effect of the New Zealand Bill of Rights Act 1990 (NZBORA) on the operation of arbitral tribunals. It will be contended arbitral tribunals do not fall within the application of the NZBORA; the corollary being that Islamic arbitral tribunals will only be subject to the general legislation governing arbitrations and family law matters. Chapter Three will examine this general legislation, contending that, in spite of the legislature's silence as to the role of arbitration in the Family Court system, there is scope for arbitral awards to be enforced. In light of the provisions in New Zealand's family law statutes governing private agreements, the enforceability of Islamic arbitral awards will be discussed.

Chapter Four will examine the implications of New Zealand's growing and diverse Muslim community, as well as the implications of the government's current approach to multiculturalism, on the practice of Islamic family law arbitration. It will also be contended that any type of religious family law arbitration, when properly regulated, provides the right balance between the protection of minority group rights and the protection of the rights of vulnerable individuals within those minority groups.

Finally, Chapter Five will make recommendations as to how the practice of Islamic family law arbitration should be regulated in New Zealand, focussing in particular on the issue of establishing consent.

# Chapter One: Islamic Family Law Arbitration

This Chapter will provide an overview of the practice of Islamic family law arbitration. Part I will discuss the jurisdictions in which the practice has generated particular controversy: Ontario, Canada and the United Kingdom. Part II will provide an overview of the relationship between Islam and Islamic law, as well as some insight into the substantive Islamic laws governing the family. Part III will locate the practice of arbitration under the umbrella of 'Alternative Dispute Resolution' (ADR), and will examine the reasons why Islamic arbitration appeals to many Muslims.

## I. Background to the Debate

### A. Ontario

The debate concerning the Islamic arbitration of family law disputes<sup>1</sup> was ignited in Ontario, Canada, in late 2003. At this time, the Islamic Institute of Civil Justice (IICJ) announced its intention to establish an arbitral body that would conduct binding family law arbitrations in accordance with Islamic law.<sup>2</sup> The IICJ's proposals were met with strong opposition from Muslims and non-Muslims alike.<sup>3</sup> The primary basis for this opposition was the fear that the rights of women and children would be overlooked in the awards made by the tribunal.<sup>4</sup> Furthermore, if the IICJ operated in accordance with the Arbitration Act 1991 (which it claimed to do), there was a risk that the tribunal's potentially discriminatory awards would be enforced by the state.<sup>5</sup> Adding to the controversy was the suggestion that an expectation would exist for

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<sup>1</sup> Often referred to by the media as the 'Shari'a debate'.

<sup>2</sup> Leslie Scrivener "New Islamic Institute set up for civil cases" *Toronto Star* (Canada, 12 December 2003) at A04; Marion Boyd *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (prepared for the Ministry of the Attorney General, Ontario, Canada 2004) at 3.

<sup>3</sup> Marion Boyd "Religion-Based Alternative Dispute Resolution: A Challenge to Multiculturalism" in Keith Bantinh, Thomas J. Courchene and F. Leslie Seidle (eds) *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Institute for Research on Public Policy, Montreal, 2007) 465 at 466.

<sup>4</sup> Scrivener, above n 2; Canadian Council of Muslim Women (CCMW) "Position Statement on the Proposed Implementation of Sections of Muslim Law [Sharia] in Canada" (2004) <[www.ccmw.com/activities/act\\_arb\\_muslimlaw\\_sharia](http://www.ccmw.com/activities/act_arb_muslimlaw_sharia)>.

<sup>5</sup> CCMW, above n 4; Ayelet Shachar "Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law" (2008) *Theoretical Inq. L* 573 at 575.

‘proper’ Muslims to approach the tribunals over secular courts.<sup>6</sup> This raised concerns over whether Muslims, in particular Muslim women, could freely consent to such arbitration.<sup>7</sup>

In response to the public outcry, the Ontario government appointed Marion Boyd to undergo a review of the scope for, and effect of, religious family law arbitration (the ‘Boyd Report’).<sup>8</sup> Ultimately, Boyd recommended that the practice be allowed to continue, subject to certain “safeguards”.<sup>9</sup> However, the government eventually succumbed to public pressure, and on the 11<sup>th</sup> September 2005, it was announced that all religious arbitration in Ontario was to be banned.<sup>10</sup> The prohibition of religious family law arbitration was enshrined in statute on the 15<sup>th</sup> November 2005.<sup>11</sup>

## **B. The United Kingdom**

In the mid 1970s there was an active lobby group in England advocating for the direct incorporation of Islamic family law into British law.<sup>12</sup> The group’s efforts were to no avail, largely because the government was wary of possible state-sanctioned human rights abuses.<sup>13</sup> As a corollary, informal Islamic dispute resolution services began to

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<sup>6</sup> Syed Mumtaz Ali, head of the IICJ, stated that Muslims should approach the Islamic arbitral tribunals “for reasons of conscience”: Interview with Syed Mumtaz Ali, President of the Canadian Society of Muslims (Rabia Mills, “A review of the Muslim Personal/Family Law Campaign”, August 1995) transcript provided by the Canadian Society of Muslims at <[www.muslim-canada.org/pfl.htm](http://www.muslim-canada.org/pfl.htm)>. See also Shachar, above n 5, at 585 to 587; Boyd, above n 2, at 3; Boyd, above n 3, at 466.

<sup>7</sup> CCMW, above n 4. An in-depth examination of factors that might prevent Muslim women from freely submitting to Islamic arbitral tribunals is provided in Chapter 5.

<sup>8</sup> Boyd, above n 3, at 466; Boyd, above n 2, at 5.

<sup>9</sup> Boyd, above n 2, at 133 to 142. Boyd’s recommendations will be examined in greater depth in Chapter 5.

<sup>10</sup> Keith Leslie “McGuinty rejects Ontario’s use of Shariah law and all religious arbitrations” *The Canadian Press* (Canada, 11<sup>th</sup> September 2005); Boyd, above n 3, at 472.

<sup>11</sup> Boyd, above n 3, at 472. Family Law Act RSO 1990 c F.3, s 59.2 now provides: “(1) when a decision about a matter described in clause (a) of the definition of “family arbitration” in section 51 is made by a third person in a process that is not conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction, (a) the process is not a family arbitration; and (b) the decision is not a family arbitration award and has no legal effect.”

<sup>12</sup> Pascale Fournier “The Reception of Muslim Family Law in Western Liberal States” (2004) CCMW at 23 to 24 <[www.ccmw.com/resources/res\\_Position\\_Papers.html](http://www.ccmw.com/resources/res_Position_Papers.html)>; David S. Pearl *Islamic Family Law and Its Reception by the Courts in England* (Islamic Legal Studies Program Harvard Law School (ILSP), Cambridge, 2000) at 4 to 5; Sheema Khan “The Ontario Sharia Debate: Transformational Accommodation, Multiculturalism and Muslim Identity” Keith Bantinh, Thomas J. Courchene and F. Leslie Seidle (eds) *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Institute for Research on Public Policy, Montreal, 2007) 475 at 480.

<sup>13</sup> Fournier, above n 12, at 24; Khan, above n 12, at 480; David Pearl and Werner Menski *Muslim Family Law* (3<sup>rd</sup> ed, Sweet & Maxwell, London, 1998) at [3-22] to [3-23].



operate in Britain, such as the Islamic Sharia Council (ISC).<sup>14</sup> A more contemporary example is the Muslim Arbitral Tribunal.<sup>15</sup> Such bodies functioned for decades without public concerns being aroused. However, on the 7<sup>th</sup> February 2008, the Archbishop of Canterbury, Dr. Rowan Williams, delivered a highly controversial speech concerning the place of Islam in the British legal system.<sup>16</sup> In his speech, the Archbishop referred to the possibility of Islamic law operating in Britain in the form of a “supplementary jurisdiction”.<sup>17</sup> This jurisdiction would be available for freely consenting Muslims who wished to determine civil matters in accordance with Islamic law and principles.<sup>18</sup> The Archbishop’s comments received support from the Lord Chief Justice, Lord Phillips of Worth Matravers, who stated: “There is no reason why principles of Sharia Law, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution.”<sup>19</sup>

After the Archbishop’s speech, the British public became highly opposed to the operation of Islamic arbitral tribunals.<sup>20</sup> Indeed, the debate continues to this day, with campaign groups actively lobbying to follow suit with Ontario and have religious arbitration banned.<sup>21</sup>

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<sup>14</sup> Fournier, above n 12, at 25; Pearl and Menski, above n 13, at [3-24]. The ISC continues to operate to this day: <[www.islamic-sharia.org](http://www.islamic-sharia.org)>.

<sup>15</sup> See <[www.matribunal.com](http://www.matribunal.com)>. See also Muriel Seltman (ed) *Sharia Law in Britain: a threat to one law for all & equal rights* (One Law for All, London, 2010) at 2.

<sup>16</sup> Rowan Williams, Archbishop of Canterbury “Civil and Religious Law in England: a Religious Perspective” (Foundation Lecture 2008, Royal Courts of Justice, London, 07 February 2008); Seltman, above n 15, at 2.

<sup>17</sup> Williams, above n 16.

<sup>18</sup> Ibid.

<sup>19</sup> Nicholas Phillips of Worth Matravers, Lord Chief Justice of England and Wales “Equality Before the Law” (East London Muslim Centre, London, 3 July 2008) at 9. See also Christopher Hope and James Kirkup “Muslims in Britain should be able to live under sharia, says top judge” *Daily Telegraph* (England, 4 July 2008) at 001; Seltman, above n 15, at 2.

<sup>20</sup> It seems that much of this opposition was based on a general misconception of what the Archbishop was proposing. Many believed the Archbishop was suggesting an equal or ‘parallel’ system of Islamic law in Britain. In fact, the Archbishop continued to stress that religious bodies would always be subject to state law. Chapter Four will discuss this misconception in greater depth.

<sup>21</sup> ‘One Law for All’ is the most active ‘anti-sharia’ campaign group in Britain: <[www.onelawforall.org.uk](http://www.onelawforall.org.uk)>. One Law for All released a report on the 17<sup>th</sup> June 2010 reviewing the practice of Islamic arbitration and mediation in Britain, and making recommendations as to how the practice be stopped: see Seltman, above n 15, at 24 to 25.

## II. Islam

Muslims account for approximately one-fifth of the global population, making Islam the second largest religion in the world.<sup>22</sup> The term ‘Islam’, however, does not denote a unified system of belief, with several branches of Islam existing worldwide.<sup>23</sup> Nevertheless, all Muslims believe that the Prophet Muhammad received revelations from God.<sup>24</sup> These revelations were subsequently compiled in the Quran, the most sacred text in Islam.<sup>25</sup> The Quran is supplemented by the Sunnah, which are the teachings and practices of Muhammad.<sup>26</sup>

### A. The Relationship between Islam and Islamic Law

The Quran and the Sunnah are the primary sources of Islam,<sup>27</sup> and Islamic law (or ‘Shari’a’) is generated from interpretations of these sources by Muslim jurists.<sup>28</sup> There are several jurisprudential schools in Islam<sup>29</sup> and the diversity of opinion within and between these schools is largely due to cultural influences.<sup>30</sup> It is, however, imperative to recognise that this diversity of opinion exists.<sup>31</sup> This is because accommodation of Islam is too readily dismissed in many jurisdictions on the false perception that Islamic law is a unified and immutable body of primitive rules.<sup>32</sup> Whilst a minority of Muslim jurists are reluctant to re-interpret the primary sources of

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<sup>22</sup> John L Esposito and others “Islam” *The Oxford Encyclopedia of the Islamic World* (2010) Oxford Islamic Studies Online < [www.oxfordislamicstudies.com/article/opr/t236/e0383](http://www.oxfordislamicstudies.com/article/opr/t236/e0383)>.

<sup>23</sup> Sunni and Shia are the two main branches of Islam, which Sunnis accounting for 85% of the global Muslim population and Shias accounting for 15% of the global Muslim population: John L. Esposito *What Everyone Needs to Know About Islam* (Oxford University Press, New York, 2002) at 39.

<sup>24</sup> Ibid at 39; Matthew S. Gordon *Islam: Origins, Practices, Holy Texts, Sacred Persons, Sacred Places* (Oxford University Press, New York, 2002) at 6.

<sup>25</sup> Esposito, above n 23, at 39; Gordon, above n 24, at 6 and 37; Azim Nanji *Dictionary of Islam* (Penguin Group, London, 2008) at 149.

<sup>26</sup> Gordon, above n 24, at 6 to 7; Nanji, above n 25, at 60 and 180.

<sup>27</sup> Gordon, above n 24, at 7; Jamila Hussain *Islam: Its law and society* (2<sup>nd</sup> ed, The Federation Press, Sydney, 2004) at 28.

<sup>28</sup> Gordon, above n 24, at 6 to 7; Hussain, above n 27, at 28; Pearl and Menski, above n 13, at [1-04]; Ian Richard Netton (ed) *Encyclopedia of Islamic Civilisation and Religion* (Routledge, New York, 2008) at 592.

<sup>29</sup> Esposito, above n 23, at 43; Netton, above n 28, at 592.

<sup>30</sup> Esposito, above n 23, at 42 and 141.

<sup>31</sup> The Archbishop of Canterbury described the diversity inherent in Islamic law well when he stated: “To recognise *sharia* is to recognise a *method* of jurisprudence governed by revealed texts rather than a single system”: Williams, above n 16.

<sup>32</sup> Williams, above n 16; Natasha Bakht “Religious Arbitration in Canada: Protecting Women by Protecting them from Religion” (2007) 19 Can J Women & L 119, at 131 to 132; Erich Kolig *New Zealand’s Muslims and Multiculturalism* (Brill, Leiden, 2010) at 179.

Islam to reflect modern circumstances,<sup>33</sup> there is a very strong movement towards liberal, progressive interpretations of the Quran and the Sunnah.<sup>34</sup>

Islamic law is of central importance to Muslims because it provides them with guidance as to how best serve God's will on a daily basis.<sup>35</sup> For this reason, it is a body of law that regulates all aspects of a Muslim's life: from personal matters (such as appropriate social conduct); to religious matters (such as how and when to pray); to what most 'Westerners' would deem to be traditional legal matters (concerning, for example, crime, commerce and the family).<sup>36</sup> Thus, within Islam there is no clear separation between law and religion, public and private, as exists in secular legal systems.<sup>37</sup>

In spite of the comprehensive nature of Islamic law, most Muslims recognise that when living as minorities in a secular liberal state, it is necessary to live both as Muslims and as an active citizen of that state.<sup>38</sup> The corollary is that Islamic law will always be subject to state law.<sup>39</sup> Ramadan explains how Muslims reconcile this inherent 'conflict of laws' situation.<sup>40</sup> He notes that Muslims undertake a "social pact" to abide by the laws of land in which they live.<sup>41</sup> Because God requires Muslims to honour their undertakings, they must remain loyal to that pact: "There is ... a reinforcement of the social pact by our religious conscience."<sup>42</sup>

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<sup>33</sup> Hussain, above n 27, at 40 to 41.

<sup>34</sup> Williams, above n 16; Hussain, above n 27, at 42 to 45; Bakht, above n 32, at 131 to 132.

<sup>35</sup> Esposito, above n 23, at 42 to 43. The Arabic term for Islamic law, 'shari'a' means "a way to a watering place": Hussain, above n 27, at 28.

<sup>36</sup> Hussain, above n 27, at 28; Pearl and Menski, above n 13, at [1-01] to [1-04]; Kolig, above n 32, at 178; Rex Tauati Ahdar "Slow Train Coming: Religious Liberty in the Last Days" (2009) 12 Otago Law Review 37 at 40; Natasha Bakht "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women" (2004) 1 Muslim World Journal of Human Rights, Article 7 at 15.

<sup>37</sup> Pearl and Menski, above n 13, at [3-01] and [3-03].

<sup>38</sup> Williams, above n 16; Tariq Ramadan "Religious Allegiance and Shared Citizenship" in Keith Bantinh, Thomas J. Courchene and F. Leslie Seidle (eds) *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Institute for Research on Public Policy, Montreal, 2007) 451 at 456 to 460.

<sup>39</sup> Williams, above n 16; Ramadan, above n 38, at 456 and 457.

<sup>40</sup> Ramadan, above n 38, at 457.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

The comprehensive nature of Islamic law must, nevertheless, be acknowledged in any discussion about the accommodation of Islam in a Western legal system.<sup>43</sup> This is because it is a relevant consideration that, to a devout Muslim, Islam is a “way of life”.<sup>44</sup> As noted by Ahdar, the corollary is that the right to freedom of religion “must embrace a wide understanding of the ‘religious’.”<sup>45</sup> Given the increasingly multicultural nature of society, it is imperative that all religions, not just those that enjoy a comfortable relationship with the liberal state (namely Christianity), are protected in such a way that endeavours to recognise their unique features.<sup>46</sup>

## **B. Islamic Family Law**

Given the multiple jurisprudential schools within Islam, it would be impossible to provide a comprehensive overview of traditional Islamic family law. Nevertheless, it is necessary to gain a preliminary insight into its substance.<sup>47</sup> This is because such law will inform the arbitral awards reached by Islamic arbitral tribunals. As will become apparent, traditional Islamic family law is patriarchal in nature.<sup>48</sup> However, there is very little in the primary sources of Islam that dictate this eventuality. Rather, the patriarchal aspects of Islamic law are primarily a result of the interpretations of male Muslim jurists,<sup>49</sup> who were naturally influenced by the social contexts in which they were writing.<sup>50</sup>

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<sup>43</sup> See Williams, above n 16.

<sup>44</sup> Kolig, above n 32, at 14.

<sup>45</sup> Ahdar, above n 36, at 40.

<sup>46</sup> Kolig, above n 32, at 13 to 14; Ahdar, above n 36, at 51. Joanna Sweet provides a useful overview of the extent to which Christianity has influenced the laws and institutions of Western liberal states: Joanna Sweet “A Matter of Choice? How the Construction of Muslim Women’s Identity Shaped Ontario’s Faith-Based Arbitration Debates” (paper prepared for the 81<sup>st</sup> Annual Conference of the Canadian Political Science Association Carleton University, May 2009) at 3 to 5. Beaman also aptly describes the elevated position of Christianity when he states that “what constitutes a normal religion is rooted in mainstream Protestantism, and in Canada, Protestant and Roman Catholic, tenets”: Lori Beaman “The Myth of Pluralism, Diversity and Vigor: The Constitutional Privilege of Protestantism in the United States and Canada” (2003) 42 *Journal for the Scientific Study of Religion* 311 at 318.

<sup>47</sup> Specific Islamic family laws will be elaborated on in greater detail where necessary throughout this paper.

<sup>48</sup> Pearl and Menski, above n13, at [7-01]; Kolig, above n 32, at 181.

<sup>49</sup> Pearl and Menski, above n 13, at [7-01] and [7-06]; Hussain, above n 27, at 65.

<sup>50</sup> Esposito, above n 23, at 142; Kolig, above n 32, at 181; Pearl and Menski, above n 13, at [7-06].

## 1. Marriage as a contract

An Islamic marriage is the result of a contract between husband and wife.<sup>51</sup> This contract is usually in writing and specifies various conditions of marriage.<sup>52</sup> Such conditions could include that, upon divorce, the parties agree to submit any dispute to an Islamic arbitral tribunal for determination.<sup>53</sup>

As a corollary of the contractual nature of an Islamic marriage, the marriage operates as a “system of rights and duties.”<sup>54</sup> The husband has a general duty to provide for his family, which entitles him to obedience from his wife.<sup>55</sup> There is no universal consensus on what amounts to ‘disobedience’;<sup>56</sup> however a frequently cited example is a wife leaving the house without permission.<sup>57</sup>

## 2. Property rights

Men and women have full property ownership rights,<sup>58</sup> and property owned by both the husband and wife before marriage retains its status as separate property.<sup>59</sup> However, upon entering the marriage contract, the wife is entitled to the mahr.<sup>60</sup> The mahr is a specified amount of property or money that is given by the husband to the wife.<sup>61</sup> It is generally paid at the time of marriage; however the mahr can also be paid upon divorce or death of the husband.<sup>62</sup> The wife retains the mahr as her separate property,<sup>63</sup> except in limited circumstances when she surrenders her right to it.<sup>64</sup>

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<sup>51</sup> Hussain, above n 27, at 77 and 83 to 85; Esposito, above n 23, at 142.

<sup>52</sup> See Hussain, above n 27, at 85. Hussain notes provisions in a marriage contract that relate to non-monetary obligations (such as clauses preventing the husband from cursing at his wife) would probably not be enforceable in a state court: Hussain, above n 27, at 84 to 85.

<sup>53</sup> Natasha Bakht “Were Muslim Barbarians Really Knocking On the Gates of Ontario?: The Religious Arbitration Controversy – Another Perspective” (2006) 82 40<sup>th</sup> Anniv Ed Ottawa L Rev 67 at 73.

<sup>54</sup> Pearl and Menski, above n 13, at [7-08].

<sup>55</sup> Ibid, at [7-03] to [7-09].

<sup>56</sup> Ibid, at [7-04].

<sup>57</sup> Ibid, at [7-24]; Hussain, above n 27, at 92.

<sup>58</sup> Hussain, above n 27, at 98.

<sup>59</sup> Ibid.

<sup>60</sup> Pearl and Menski, above n 13, at [7-10]; Hussain, above n 27, at 82 to 83 and 98.

<sup>61</sup> Pearl and Menski, above n 13, at [7-10]; Hussain, above n 27, at 82 to 83.

<sup>62</sup> Pearl and Menski, above n 13, at [7-15].

<sup>63</sup> Hussain, above n 27, at 82.

<sup>64</sup> A wife can surrender her right to the mahr as a condition for being granted a divorce by an Islamic court: Hussain, above n 27, at 106.

Traditionally, women's inheritance rights to property are much less advantageous than men's.<sup>65</sup> For example, daughters are generally entitled to half as much inheritance as sons.<sup>66</sup>

### 3. Maintenance

A husband has a duty to financially maintain his wife throughout the marriage.<sup>67</sup> However, jurisprudential schools differ on whether maintenance should be payable after divorce, and for how long it should be payable.<sup>68</sup> Significantly, a 'disobedient' wife can disentitle herself to maintenance.<sup>69</sup> However, where a husband's financial means permit, an obedient wife is expected to enjoy a level of maintenance by her husband that reflects that standard of living to which she had become accustomed before marriage.<sup>70</sup>

### 4. Divorce

The 'talaq' is the right of the husband to divorce his wife without her consent,<sup>71</sup> and intricate rules exist governing how it is to be instituted.<sup>72</sup> The wife does not have the right to divorce her husband without his consent; however limited circumstances do exist where she can initiate a divorce with the assistance of an Islamic court.<sup>73</sup> When the wife successfully initiates a divorce, she is generally required to return her mahr.<sup>74</sup>

The husband's right to talaq, along with his right to multiple wives,<sup>75</sup> is frequently cited as evidence of the discriminatory nature of Islamic family law.<sup>76</sup>

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<sup>65</sup> Hussain, above n 27, at 123 to 124; Esposito, above n 23, at 144.

<sup>66</sup> Hussain, above n 27, at 117.

<sup>67</sup> Pearl and Menski, above n 13, at [7-23].

<sup>68</sup> See Pearl and Menski, above n 13, at [7-26] to [7-30]. Pearl and Menski note that some jurisprudential schools believe maintenance should only be payable if the wife is pregnant, while others say it should only be payable if the husband divorced the wife unjustifiably.

<sup>69</sup> Ibid, at [7-24]; Hussain, above n 27, at 92.

<sup>70</sup> Pearl and Menski, above n 13, at [7-26]; Hussain, above n 27, at 92.

<sup>71</sup> Pearl and Menski, above n 13, at [9-04]; Hussain, above n 27, at 101 to 103.

<sup>72</sup> See Pearl and Menski, above n 13, at [9-04] to [9-22] and Hussain, above n 27, at 102 to 104.

<sup>73</sup> Hussain, above n 27, at 101 and 105 to 110.

<sup>74</sup> Ibid, at 106. to 107. See also Seltman, above n 15, at 14.

<sup>75</sup> Hussain, above n 27, at 86.

<sup>76</sup> Pearl and Menski, above n 13, at [9-23].

## 5. Children

Mothers are generally afforded day-to-day care<sup>77</sup> of young children until those children are able to care for themselves independently, at which point the father gains day-to-day care.<sup>78</sup> For boys this transfer usually happens around age 7, and for girls around age 9 to 11.<sup>79</sup> Irrespective of which parent has day-to-day care at any particular time, a father always has a duty to financially maintain the children of the marriage.<sup>80</sup> The father also has a responsibility known as “guardianship of the person,”<sup>81</sup> which entitles him to make decisions about property and marriage that concern his children.<sup>82</sup>

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<sup>77</sup> ‘Day-to-day’ care is the term adopted by the New Zealand legislature to replace the term ‘custody’: New Zealand Ministry of Justice “Glossary” (2010) Family Court of New Zealand <[www.justice.govt.nz/courts/family-court](http://www.justice.govt.nz/courts/family-court)>.

<sup>78</sup> John L. Esposito (ed) *The Oxford Dictionary of Islam* (Oxford University Press, New York, 2003) at 101.

<sup>79</sup> Ibid, at 101; Boyd, above n 2, at 48 (Submission of the Canadian Council of Muslim Women, received July 23 2004); Islamic Sharia Council “Islamic Perspective on Child Custody after Divorce” (2010) Islamic Sharia Council <[www.islamic-sharia.org/children/islamic-perspective-on-child-custody-after-divorce-3.html](http://www.islamic-sharia.org/children/islamic-perspective-on-child-custody-after-divorce-3.html)>

<sup>80</sup> Pearl and Menski, above n 13, at [10-84]; ‘Financial maintenance’ of the children is what New Zealand’s family law statutes refer to as ‘child support.’

<sup>81</sup> Ibid, at [10-69] – [10-72].

<sup>82</sup> Ibid.

### III. Islamic Arbitration

#### A. Arbitration

Arbitration is a method of ADR whereby disputants appoint a neutral third person (or a panel of third persons) to determine their dispute.<sup>83</sup> This third person is called an ‘arbitrator’ and the decision of the arbitrator is called an ‘award’.<sup>84</sup> The disputants agree to be bound by the arbitrator’s award, and legislation is enacted to regulate the arbitral process and to ensure awards aren’t too readily overturned by the courts.<sup>85</sup>

Arbitration is beneficial for individual disputants and for the legal system as a whole.<sup>86</sup> For the former, arbitration generally provides a mechanism for disputants to resolve their dispute in a binding fashion that is: private; cost and time effective; and more suited to their individual procedural preferences.<sup>87</sup> For the latter, arbitration greatly alleviates pressure on the court system, by removing the need for disputants to submit their case to court for a binding determination.<sup>88</sup>

From the outset, it is important to distinguish arbitration from mediation. Mediation is a method of ADR expressly endorsed by the New Zealand legislature in relation to family law disputes.<sup>89</sup> However, mediation differs in several fundamental respects from arbitration. For example, disputing parties appoint a mediator to help them reach a consensual agreement.<sup>90</sup> Unlike an arbitrator, however, the mediator cannot make a

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<sup>83</sup> Gary Slapper and David Kelly *The English Legal System* (9<sup>th</sup> ed, Routledge-Cavendish, London, 2009) at 382; Phillip Green and Barbara Hunt *Green & Hunt on Arbitration Law & Practice* (looseleaf ed, Thomson Brookers) at [DA1.2.01].

<sup>84</sup> Arbitration Act 1996, s 2(1); Slapper and Kelly, above n 83, at 382; Green and Hunt, above n 83, at [DA1.2.01].

<sup>85</sup> The Arbitration Act 1996 regulates the arbitral process in New Zealand. Chapter Three will provide an in-depth discussion of the provisions of the Arbitration Act 1996 as well as a discussion of the relationship between the Arbitration Act 1996 and various family law enactments.

<sup>86</sup> Donald Brown “A Destruction of Muslim Identity: Ontario’s Decision to Stop Shari’a-based Arbitration” (2007) 32 NCJ Int’l L & Com Reg 495 at 500. For an in-depth discussion of the benefits of arbitration see Green and Hunt, above n 83, at [DA1.3.03].

<sup>87</sup> Ibid; Caryn Litt Wolfe “Faith-based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and their Interaction with Secular Courts” (2006) 75 Fordham L Rev 427 at 430 to 431. The term ‘generally’ is used because in the event that an arbitral award is challenged, the cost and time involved in taking a matter to court are introduced.

<sup>88</sup> Wolfe, above n 87, at 431; Brown, above n 86, at 500.

<sup>89</sup> Family Proceedings Act 1980, s 13.

<sup>90</sup> Slapper and Kelly, above n 83, at 382; Law Commission *Dispute Resolution in the Family Court* (NZLC R82, 2003) at [296].



binding determination on the dispute at issue.<sup>91</sup> Thus, while mediation generally results in an agreement between parties, arbitration always results in an award that the parties have agreed to be bound by, but that they don't necessarily agree with.<sup>92</sup>

## **B. Reasons Why Islamic Arbitration Appeals to Muslims**

In addition to the standard benefits arbitration affords to disputants, there are several unique benefits Islamic arbitration offers to many Muslims.<sup>93</sup>

First, Islamic arbitration enables Muslims to have their dispute determined in accordance with God's will and in a way that is recognised by the state.<sup>94</sup> This dual legitimacy is important to many Muslims, who do not consider being a good Muslim and being a good citizen to be mutually exclusive endeavours.<sup>95</sup> As noted by Boyd, writing in hindsight on the Ontario situation, "[b]y utilizing provincial legislation ... the Muslim community was drawing on the dominant legal culture to express itself and engage in institutional dialogue."<sup>96</sup>

Second, approaching Islamic arbitral tribunals is less daunting than approaching state courts to many Muslims, who might be unfamiliar with state laws, language and customs.<sup>97</sup> This reluctance is further exacerbated in those Muslim communities that discourage members seeking help from non-Muslims in relation to personal matters.<sup>98</sup> Submissions to the Boyd Report also indicated a fear on the part of many Muslims that Judges might discriminate against them in court.<sup>99</sup> This fear was based on the

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<sup>91</sup> For a helpful summary of the process of mediation and its emphasis on consensual agreement, see: *Duguay v Thompson-Duguay* [2000] RFL (5<sup>th</sup>) 301 at [36] per Perkins J.

<sup>92</sup> Email from Jodi Ryan to Laura Ashworth regarding family law arbitration (25 September 2010). See also Neil Addison "Forward: Sharia Tribunals in Britain – Mediators or Arbitrators? A Reflection by Neil Addison" in David G. Green (ed) *Sharia Law or 'One Law For All?'* (Civitas, London, 2009) viii at x to xi.

<sup>93</sup> Lee Ann Bambach "The Enforceability of Arbitration Decisions Made By Muslim Religious Tribunals: Examining The *Beth Din* Precedent" (2009-10) XXV Journal of Law and Religion 379 at 403.

<sup>94</sup> *Ibid*, at 405.

<sup>95</sup> Williams, above n 16; Boyd, above n 3, at 471.

<sup>96</sup> Boyd, above n 3, at 471.

<sup>97</sup> Bambach, above n 93, at 403 to 404; Jamila Hussain "Family Law and Muslim Communities" in Abdullah Saeed and Shahram Akbarzadeh (eds) *Muslim Communities in Australia* (University of New South Wales Press Ltd, Sydney, 2001) 161 at 179.

<sup>98</sup> Bambach, above n 93, at 405; Hussain, above n 97, at 180.

<sup>99</sup> Boyd, above n 2, at 66.

general climate of distrust surrounding Islam which has predominated in the West in recent years.<sup>100</sup>

Muslims also generally have greater certainty of outcome and satisfaction in approaching Islamic arbitral tribunals.<sup>101</sup> Greater certainty exists because state courts struggle to comprehend many Islamic laws.<sup>102</sup> The conflicting case law on whether the mahr is an enforceable contract encapsulates this problem.<sup>103</sup> Greater satisfaction is generally achieved because Islamic tribunals are better equipped to make awards that contemplate the wider implications of, for example, the distribution of property on the breakdown of a Muslim marriage.<sup>104</sup> Islamic property law is also, in many respects, much more advantageous to Muslim women than state law.<sup>105</sup>

Finally, Islamic tribunals are utilised extensively by Muslim women to free themselves from the 'limping marriage'.<sup>106</sup> A limping marriage is a situation in which the husband refuses to grant his wife an Islamic divorce.<sup>107</sup> Although granting a Muslim woman an Islamic divorce is not a matter that would engage the Arbitration

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<sup>100</sup> Ibid; Bakht, above n 53, at 78.

<sup>101</sup> Wolfe, above n 87, at 451 and 453 to 455; Bambach, above n 93, at 404; Hussain, above n 97, at 180.

<sup>102</sup> Wolfe, above n 87, at 451 and 453 to 455; Bambach, above n 93, at 404; Hussain, above n 97, at 180.

<sup>103</sup> Wolfe, above n 87, at 453 to 455; Bambach, above n 93, at 404; Bakht, above n 36, at 11 to 13; See *Kaddoura v Hammond* (1998) 168 DLR (4<sup>th</sup>) 503 at 511, where the Judge presumptively likens the mahr to the Christian marriage vows: "...I cannot help but think that the obligation of the Mahr is as unsuitable for adjudication in civil courts as is an obligation in a Christian religious marriage, such as to love, honour and cherish, or to remain faithful, or to maintain the marriage in sickness or other adversity so long as both parties live...such promises...bind the conscience as a matter of religious principle but not necessarily as a matter of enforceable civil law."

<sup>104</sup> This is because the Muslim conception of the family group, and the corresponding duties to wider family members, differs from the more restricted conception of the family to which state courts are accustomed: Boyd, above n 2, at 66 to 67.

<sup>105</sup> Boyd, above n 2, at 67. As discussed, under Islamic law it is the sole obligation of the husband to provide financially for his wife and children. After divorce, this financial obligation continues indeterminately with respect to his children, and for a fixed period of time with respect to his former wife. Significantly, no similar financial obligations are imposed on the wife under Islamic law. However, the wife's situation would be very different under New Zealand's family legislation. First, because there are no gender based presumptions regarding financial obligations under New Zealand's legislation, the wife would share financial responsibility with her former husband for their children. She could also be required to financially maintain her former husband if it were deemed appropriate in the circumstances. Second, all of the property the wife accumulated throughout the marriage would be presumed to fall under the equal sharing regime imposed by the Property (Relationships) Act 1976 [PRA]. Thus, the wife could not retain such property as separate property, as would be the case under Islamic law.

<sup>106</sup> Pearl and Menski, above n 13, at [3-96] to [3-100]. See also Muslim Arbitral Tribunal "Family Dispute Cases" (2010) <[www.matribunal.com/cases\\_faimly.html](http://www.matribunal.com/cases_faimly.html)>.

<sup>107</sup> Pearl and Menski, above n 13, at [3-100]; Muslim Arbitral Tribunal, above n 106.

Act,<sup>108</sup> it is beneficial for Muslims to be able to approach an Islamic tribunal that is capable of making arbitral awards on matters that could be enforceable by the state (such as property and child-related disputes), as well as make rulings on matters of a wholly religious nature (such as granting a religious divorce). The consequence is that a Muslim relationship breakdown can be dealt with holistically by the tribunal.

## **Conclusion**

Islamic family law arbitration is a highly controversial practice, as evinced by the ultimate prohibition of religious arbitration in Ontario. This prohibition is particularly noteworthy, as Canada is a country that is constitutionally committed to upholding its “multicultural heritage.”<sup>109</sup> Thus, interesting questions are raised as to how Islamic family law arbitration might be received in New Zealand, and furthermore, the scope for such a practice within our existing legislative framework.

The next chapter will begin to examine the scope for Islamic family law arbitration by determining the effect of the New Zealand Bill of Rights Act 1990 (NZBORA) on arbitral tribunals.

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<sup>108</sup> This is because for a divorce initiated by a Muslim woman to be of effect under Islamic law, it must be granted by an appropriate Islamic authority. A state court is not recognised within Islam as an appropriate authority to grant an Islamic divorce, thus there would be no reason to embody the issuing of an Islamic divorce into an arbitral award.

<sup>109</sup> Canadian Charter of Rights and Freedoms, s 27, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

## **Chapter Two: Application of the New Zealand Bill of Rights Act 1990**

Part I of this chapter will outline the rights at issue in the debate over Islamic family law arbitration. If the New Zealand Bill of Rights Act 1990 (NZBORA) was deemed to apply to arbitral tribunals, it is these conflicting rights that would have to be balanced by the courts with respect to the operation of Islamic arbitral tribunals. However, if the NZBORA does not apply to arbitral tribunals, such a balancing test would not need to be undertaken. As a consequence, Islamic tribunals would have greater scope to arbitrate in accordance with Islamic law. Part II will determine whether the NZBORA directly applies to arbitral tribunals by examining s 3 of the NZBORA, while Part III will determine whether the NZBORA indirectly applies to arbitral tribunals by examining the effect of s 6 of the Act.

### **I. Rights at Issue**

In New Zealand, proponents of Islamic family law arbitration would undoubtedly appeal to the religion clauses in the NZBORA: s 13 “Freedom of thought, conscience and religion”<sup>1</sup> and s 15 “Manifestation of religion and belief”.<sup>2</sup> The practice of Islamic arbitration is also supported by s 20 “Rights of minorities”.<sup>3</sup> Indeed, s 15 and s 20 of the NZBORA are pertinent with respect to religious arbitration, as they both expressly protect the right to practise one’s religion “in community” with others.<sup>4</sup>

If the New Zealand legislature considered prohibiting only Islamic arbitration of family law disputes, proponents of the practice could also appeal to s 19 “Freedom

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<sup>1</sup> Section 13 of the New Zealand Bill of Rights Act 1990 [NZBORA] provides: “Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adapt and to hold opinions without interference.”

<sup>2</sup> Section 15 NZBORA provides: “Every person has the right to manifest that person’s religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.”

<sup>3</sup> Section 20 NZBORA provides: “A person who belongs to an ethnic, religious or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language of that minority.”

<sup>4</sup> NZBORA, ss 15 and 20.

from discrimination”.<sup>5</sup> This is because religious belief is a prohibited ground of discrimination under the Human Rights Act 1993.<sup>6</sup> However, if the prohibition on Islamic arbitration was ultimately enshrined in statute, an appeal to s 19 would be of no effect by virtue of s 4 NZBORA.<sup>7</sup>

Opponents of Islamic family law arbitration would appeal to s 19 “Freedom from discrimination” in favour of having the practice prohibited.<sup>8</sup> As discussed in Chapter One, such opposition is on the perceived basis that Islamic law is discriminatory towards women. Discrimination on the basis of sex is also a prohibited ground of discrimination under the Human Rights Act.<sup>9</sup> However, as mentioned, for this argument to be of effect it would need to be established that the NZBORA applies to arbitral tribunals.

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<sup>5</sup> Section 19 NZBORA provides: “(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.”

<sup>6</sup> Human Rights Act 1993, s 21(1)(c).

<sup>7</sup> Section 4 NZBORA provides: “Other enactments not affected - No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), - (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or (b) Decline to apply any provision of the enactment – by reason only that the provision is inconsistent with any provision of this Bill of Rights.”

<sup>8</sup> See above n 5.

<sup>9</sup> Human Rights Act 1993, S 21(1)(a).

## II. Does the NZBORA Directly Apply to Arbitral Tribunals?

If the NZBORA directly applies to arbitral tribunals, Islamic tribunals could not arbitrate in a manner inconsistent with the human rights standards contained within the Act.<sup>10</sup> Arbitral tribunals must fall within the wording of s 3 in order for the NZBORA to directly apply to them. Section 3 provides:

3. Application - This Bill of Rights applies only to acts done –
- (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
  - (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

### A. Section 3(a)

It is highly unlikely that arbitral tribunals would fall under s 3(a). The only contention that could be made is that they fall within the “judicial” branch of government. However, there are two problems with this argument. First, if arbitral tribunals were caught by s 3(a), every act of the tribunals would be subject to NZBORA scrutiny.<sup>11</sup> This is because, unlike s 3(b), s 3(a) is worded in such a way as to suggest all functions of the three branches of government are public, and thus subject to the Act.<sup>12</sup> Given the considerable scope the Arbitration Act 1996 affords disputants to determine the procedures adopted by the arbitrator, it is unlikely that Parliament intended every act of an arbitral tribunal to be subject to the NZBORA.<sup>13</sup> Second, it would be a strained interpretation of the term “judicial” to include arbitral tribunals.

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<sup>10</sup> Butler and Butler argue that entities caught by s 3 of the NZBORA are still entitled to benefit from the rights protected by the Act. However, with respect to such entities, they note: “their ability to benefit is subject to the concept of ‘practicability’ provided for in s 29...and ‘reasonable limits’ in s 5.” See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, Wellington, 2005) at [5.12.3]. Thus, if the NZBORA was deemed to apply to arbitral tribunals, Islamic arbitral tribunals could still benefit from the religion and minority rights clauses (s 13, 15 and 20), however this would always be subject to s 29 and s 5.

<sup>11</sup> See Butler and Butler, above n 10, at [5.3.3].

<sup>12</sup> Ibid.

<sup>13</sup> The only mandatory procedural requirement in the Arbitration Act 1996 is that both disputants be treated equally by the arbitrator: Arbitration Act 1996, art 18 of sch 1. The provisions of the Arbitration Act will be discussed in greater detail in Chapter Three.

Although there is very little case law on how to interpret the term,<sup>14</sup> history demonstrates that tribunals are generally dealt with by the courts under s 3(b).<sup>15</sup> Furthermore, the awards made by arbitral tribunals must be recognised by the courts in order to be fully determinative of the parties' rights.<sup>16</sup> This indicates a clear distinction between the judicial branch of government and the operations of arbitral tribunals.

### **B. Section 3(b)**

There is more scope to argue that arbitral tribunals perform a "public function" under s 3(b) of the NZBORA. Section 3(b) is recognition by Parliament that some entities, while not official branches of the government, still wield significant power over citizens in the performance of certain functions (thus attracting NZBORA scrutiny).<sup>17</sup>

Randerson J, in *Ransfield v The Radio Network Ltd*<sup>18</sup> divided s 3(b) into three distinct elements, each of which must be satisfied for the NZBORA to apply. His Honour provided that the relevant act must occur:

- “(a) in the performance of a function, power or duty by any person or body;
- (b) which is conferred or imposed by or pursuant to law; and which
- (c) is public.”<sup>19</sup>

The first element is clearly satisfied when an arbitral tribunal (or an individual arbitrator) performs the function of arbitration.<sup>20</sup> The second element is also satisfied, provided the function of arbitration is assumed in accordance with the provisions of the Arbitration Act 1996.<sup>21</sup> As noted by Rishworth, “a function may be said to be

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<sup>14</sup> Butler and Butler, above n 10, at [5.6.1].

<sup>15</sup> Ibid, at [5.6.1] to [5.6.3]; Paul Rishworth “When the Bill of Rights Act Applies” in Rishworth and others (eds) *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 70 at 98.

<sup>16</sup> Arbitration Act 1996, art 35 sch 1.

<sup>17</sup> Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1985] I AJHR A6 at [10.20] and [10.21].

<sup>18</sup> *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233.

<sup>19</sup> Ibid, at [47].

<sup>20</sup> Arbitrating a dispute could arguably be classed as either a ‘function’ or a ‘power’ (neither term is defined in the NZBORA). For this reason I will refer to arbitrating as a ‘function’ for the remainder of this chapter.

<sup>21</sup> See Rishworth, above n 15, at 96 to 97.

conferred pursuant to law if law facilitates the voluntary assumption of that function.”<sup>22</sup> Thus, Rishworth interprets the term “confer” broadly in the context of s 3(b) to mean ‘make something lawful’, as opposed to the more ordinary and narrow meaning: ‘to give.’<sup>23</sup> Such a broad interpretation is supported by the Court of Appeal decision of *R v N*,<sup>24</sup> where Richmond P held that a “generous interpretation” must be given to s 3(b) in light of the purpose of the NZBORA and the importance of the rights affirmed within it.<sup>25</sup> It is the third element, that the function must be ‘public’ in nature, which is the most contentious in relation to arbitral tribunals.

## 1. Is the function of arbitrating a dispute “public” in nature?

The ambiguity surrounding the term “public” was acknowledged by Randerson J in *Ransfield*,<sup>26</sup> New Zealand’s leading authority on the proper interpretation of s 3(b).<sup>27</sup> In *Ransfield*, his Honour posits the matter as “an area of developing jurisprudence”<sup>28</sup> and stresses that any determination will ultimately be fact specific.<sup>29</sup> Nevertheless, Randerson J endeavours to provide some helpful guidance.<sup>30</sup> Of particular significance to arbitral tribunals is his Honour’s statement that a public function “may be performed in private.”<sup>31</sup> However, his Honour stresses that the main focus is to be on the particular function and whether it is “‘governmental’ in nature”.<sup>32</sup> This requires an evaluation of how broadly the function is “connected to or identified with the exercise of the powers and responsibilities of the state.”<sup>33</sup>

<sup>22</sup> Ibid.

<sup>23</sup> Alex Latu “A Public/Private Power Play: How to Approach the Question of the New Zealand Bill of Rights Act 1990’s Direct Application Under Section 3(b)?” (LLB (Hons) Dissertation, University of Otago, 2009) at 19; Randerson J in *Falun Dafa Association of New Zealand Inc v Auckland Children’s Christmas Parade Trust Board* (2008) 8 HRNZ 680, [2009] NZAR 122 at [40] acknowledged that Rishworth’s interpretation “may be open” although he did not decide the matter conclusively.

<sup>24</sup> *R v N* [1999] 1 NZLR 713; Latu, above n 23, at 21. See also Rishworth, above n 15, at 97 to 98, where Rishworth provides further arguments in favour of a broader interpretation of the term ‘confer’.

<sup>25</sup> *R v N*, above n 24, at 721, per Richmond P.

<sup>26</sup> Above n 18, at [49]; Randerson J also cites Lord Nichols of Birkenhead in the House of Lords decision of *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2003] UKHL 37, [2004] 1 AC 546 at [6] who also acknowledged the extent to which “public” is: “a term of uncertain import, used with many different shades of meaning” [*Aston Cantlow*].

<sup>27</sup> Butler and Butler, above n 10, at [5.7.5].

<sup>28</sup> *Ransfield*, above n 18, at [51].

<sup>29</sup> Ibid, at [54], [69] and [70].

<sup>30</sup> Ibid, at [69].

<sup>31</sup> *Ransfield*, above n 18, at [69].

<sup>32</sup> Ibid.

<sup>33</sup> Ibid. In the same paragraph, Randerson J then provides a non-exhaustive list of relevant factors to be considered.



Based on Randerson J's observations in *Ransfield* as well as other New Zealand<sup>34</sup> and international<sup>35</sup> authority, it is unlikely that arbitral tribunals would be deemed to perform a 'public function' under s 3(b).<sup>36</sup> As noted in *R v N*, while a "generous interpretation" must be given to s 3(b), the act must still come "fairly" within the wording of the section.<sup>37</sup> To ensure a fair determination is made, Richmond P notes that consideration must be given to "the suggested source of the function ... and how it is conferred or imposed by law."<sup>38</sup>

The source of arbitration is a private and voluntary agreement between disputing parties.<sup>39</sup> Arbitration is then conferred (that is, made lawful<sup>40</sup>) by the Arbitration Act 1996. The Arbitration Act confers arbitration in such a way that recognises the inherently private nature of the function. For example, the Act empowers parties to determine virtually every aspect of how the arbitration takes place.<sup>41</sup> This includes a choice as to the relevant laws to be applied by the arbitrator.<sup>42</sup> The Act also upholds the sanctity of the disputant's private agreement by providing very limited circumstances in which arbitral agreements and awards will be set aside by the courts.<sup>43</sup> Both of these factors clearly illustrate an absence of the requisite nexus between arbitral tribunals and the "powers and responsibilities of the state."<sup>44</sup>

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<sup>34</sup> See *R v N*, above n 24; *Falun Dafa*, above n 23.

<sup>35</sup> *Aston Cantlow*, above n 26; *Austin Hall Building Ltd v Buckland Securities Ltd* [2001] Build LR 272, 80 ConLR 115; *National Ballet of Canada v Glasco et al* 49 OR (3d) 230.

<sup>36</sup> See also Natasha Bakht "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women" (2004) 1 Muslim World Journal of Human Rights, Article 7 at 4.

<sup>37</sup> *R v N*, above n 24, at 721.

<sup>38</sup> *Ibid.*

<sup>39</sup> Marion Boyd *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (prepared for the Ministry of the Attorney General, Ontario, Canada 2004) at 72; *Austin Hall*, above n 35, at [27]. In contrast, persons or bodies that are generally held to fall within s 3(b) generally derive their 'function, power or duty' from a licence conferred by statute or else they are subject to significant control by the government in other respects: Butler and Butler, above n 10, at [5.7.9].

<sup>40</sup> See Rishworth, above n 15, at 96 to 98.

<sup>41</sup> The only mandatory procedural requirement is that both disputants be treated equally by the arbitrator: Arbitration Act 1996, art 18 of sch 1.

<sup>42</sup> Arbitration Act 1996, art 28 sch 1.

<sup>43</sup> Arbitration Act 1996, s 10 provides that an arbitration agreement can only be set aside if it is contrary to public policy or otherwise illegal. Art 8(1) Sch 1 of the Act also requires that the arbitration agreement must not be "null and void, inoperative, or incapable of being performed" and there must in fact be a "dispute between the parties with regard to the matters agreed to be referred." Art 36 Sch 1 of the Act lists the limited circumstances in which an award will not be enforced. These will be discussed in greater depth in Chapter Three.

<sup>44</sup> *Ransfield*, above n 18, at [69].

The obiter statements of Bowsher J in the English High Court decision of *Austin Hall Building Ltd v Buckland Securities Ltd*<sup>45</sup> also support the conclusion that arbitrations do not engage Bill of Rights scrutiny. *Austin Hall* focusses on what constitutes a “public authority” under the UK Human Rights Act;<sup>46</sup> however aspects of the judgment are applicable by analogy to s 3(b) of the NZBORA.<sup>47</sup> Bowsher J reinforces that when arbitration results from a private contract, the arbitrator’s function is “private in nature.”<sup>48</sup> His Honour then identifies two exceptional circumstances in which arbitrations would likely be subject to the Human Rights Act. The first is if the arbitration is required by law<sup>49</sup> and the second is if the arbitration is one in which the award could be enforced without judgment of the court.<sup>50</sup>

Neither of these circumstances arises in the context of family law arbitration in New Zealand. There is no requirement in law to arbitrate a family law dispute,<sup>51</sup> and arbitral awards in the family law context would have to meet very strict requirements (over and above those prescribed in the Arbitration Act) in order to be enforceable by the courts.<sup>52</sup> Even in the absence of the extra safeguards imposed by family law statutes, the Arbitration Act reserves the power of the courts to refuse to enforce an arbitral award or agreement if to do so would conflict with the public policy of New Zealand or would be otherwise illegal.<sup>53</sup>

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<sup>45</sup> *Austin Hall*, above n 35.

<sup>46</sup> Human Rights Act 1998 (UK), s 6.

<sup>47</sup> This is because the term “public authority” is defined in s 6(3)(b) of the Human Rights Act 1998 as including “any person certain of whose functions are functions of a public nature.”

<sup>48</sup> *Austin*, above n 3545, at [27].

<sup>49</sup> *Ibid*, at [28]. See also Boyd, above n 39, at 72.

<sup>50</sup> *Ibid*, at [35].

<sup>51</sup> Indeed, as will be discussed in Chapter Three, New Zealand’s family legislation is completely silent on the role of arbitration in resolving family law disputes.

<sup>52</sup> This will be discussed further in Chapter Three.

<sup>53</sup> Arbitration Act 1996, art 34(2)(b)(i) and (ii) sch 1. See also Arbitration Act 1996, s 10(1).

### III. Does the NZBORA Indirectly Apply to Arbitral Tribunals?

While it is unlikely that the NZBORA directly applies to arbitral tribunals, it is possible for the NZBORA to indirectly apply through the interpretation of the Arbitration Act.<sup>54</sup> This is by virtue of s 6 of the NZBORA, which provides:<sup>55</sup>

S 6. Interpretation consistent with Bill of Rights to be preferred -

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

With respect to Islamic arbitral tribunals, s 6 of the NZBORA raises the question as to whether the ‘choice of law’ provision in art 28 of sch 1 to the Arbitration Act can be interpreted in such a way as to preclude a choice of law that is inconsistent with the NZBORA.<sup>56</sup> If such an interpretation were adopted, a court could prevent a tribunal arbitrating in accordance with Islamic law if it was established the tribunal subscribed to discriminatory interpretations of Islamic law.

However, it is highly unlikely that s 6 would have this effect on the interpretation of the Arbitration Act. First, such an interpretation would frustrate the purpose of the Arbitration Act, which is to encourage private parties to resolve disputes in a binding fashion and according to a process that they both agree upon. Second, such a strained interpretation would likely breach s 4 of the NZBORA,<sup>57</sup> which protects the integrity of other enactments.<sup>58</sup> Finally, to interpret the Arbitration Act so as to preclude parties

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<sup>54</sup> *Ransfield*, above n 18, at [46].

<sup>55</sup> NZBORA, s 6.

<sup>56</sup> Arbitration Act 1996, art 28 sch 1 provides: “(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute” See also Bakht, above n 36, at 4.

<sup>57</sup> NZBORA, s 4 provides: “No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), - (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or (b) Decline to apply any provision of the enactment – by reason only that the provision is inconsistent with any provision of this Bill of Rights.”

<sup>58</sup> Butler and Butler, above n 10, at [7.7.5] and [7.9.1].

arbitrating according to religious laws would itself be inconsistent with the NZBORA, which actively protects religious freedom.<sup>59</sup>

## Conclusion

The NZBORA does not apply to arbitral tribunals directly or indirectly. The consequence of these findings is that Islamic arbitral tribunals will be subject only to the general legislative framework governing arbitration and family law matters.<sup>60</sup> This will give Islamic tribunals greater scope to arbitrate in accordance with Islamic law.

The next chapter will examine the general legislative framework governing arbitrations and family law matters. It will also assess the extent to which Islamic arbitration agreements and awards might currently be enforceable in the Family Court system.

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<sup>59</sup> NZBORA, ss 13, 15 and 20.

<sup>60</sup> See *R v N*, above n 24, at 718; *Ransfield*, above n 18, at [50]; Palmer, above n 17, at [10.20]. The general legislative framework governing arbitrations and family law matters includes: The Arbitration Act 1996; the Care of Children Act 2004; the Family Proceedings Act 1980; and the Property (Relationships) Act 1976. These enactments will be discussed at greater length in Chapter Three.

## **Chapter Three: General Legislative Framework Governing Family Law Arbitration in New Zealand**

This chapter will examine the relationship between the Arbitration Act 1996 and the family law enactments governing property and child-related disputes.<sup>1</sup> Part I will focus on the Arbitration Act and the three main stages of the arbitral process, while Part II will assess the arbitrability of property and child-related disputes. The enforceability of Islamic arbitral awards will also be discussed.

### **I. Arbitration Act 1996**

This section will provide an overview of how the Arbitration Act regulates the three main stages of the arbitral process: the agreement, the procedure and the award. First, however, a brief discussion of the purposes of the Act will be provided. These purposes are important to consider when assessing the value of arbitration to private disputants and to the legal system as a whole.

#### **A. Purposes of the Act**

##### **1. To protect the integrity of the arbitral process**

One of the overriding purposes of the Arbitration Act is to protect the integrity of the arbitral process from excessive court intervention.<sup>2</sup> Indeed, the prime reason for the enactment of the Arbitration Act was that its predecessor<sup>3</sup> enabled awards to be overturned too readily by the courts.<sup>4</sup> Parliament's intent to restrict court intervention

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<sup>1</sup> This chapter will not examine the arbitrability of spousal maintenance or child support disputes. This is because agreements related to maintenance and child support can be set aside or altered very readily by the courts, thus undermining the incentives for using arbitration. See ss 47 to 66A Child Support Act 1991 and s 182 Family Proceedings Act 1980. See also Mahoney and Peart (eds) *Brookers Family Law: Family Property* (looseleaf ed, Thomson Brookers) at [PR21A.06] and [PR21A.07].

<sup>2</sup> See Michael J Mustill and Stewart C Boyd *Commercial Arbitration* (2<sup>nd</sup> ed, Butterworths, London, 1989) at 3 to 5; David Williams and Fred Thorp *Arbitration for the 21<sup>st</sup> Century – a practical guide* (New Zealand Law Society, Wellington, 2001) at 6 to 7.

<sup>3</sup> Arbitration Act 1908 [repealed].

<sup>4</sup> A A P Willy *Arbitration in New Zealand* (2<sup>nd</sup> ed, LexisNexis, Wellington, 2003) at [1.2].

is given clear expression in s 5,<sup>5</sup> which lists two purposes of the Act as: “to redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards”<sup>6</sup> and “to facilitate the recognition and enforcement of arbitration agreements and arbitral awards.”<sup>7</sup>

The desire to restrict court intervention reflects the now predominant understanding of arbitration as private and contractual in nature.<sup>8</sup> The consequence is that, in the absence of legislative provision permitting court intervention,<sup>9</sup> the court is restricted to enforcing only that which parties expressly bargained for in their arbitration agreement.<sup>10</sup> This means that, in the absence of any procedural problem with the arbitration, there is very limited scope for an award to be overturned on purely substantive grounds.<sup>11</sup>

It is also in the best interests of the legal system as a whole to restrict court intervention in the arbitral process. As mentioned, pressure on the courts is alleviated when parties use arbitration.<sup>12</sup> However, arbitration would cease to be an attractive alternative to litigation for disputants if recourse to court was too readily available.<sup>13</sup>

## **2. To provide a mechanism for resolving “commercial and other disputes”**

Another purpose of the Act is: “to encourage the use of arbitration as an agreed method of resolving commercial and other disputes”.<sup>14</sup> On a literal interpretation,

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<sup>5</sup> *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 at 322, per Blanchard J. See also Willy, above n 4, at [1.2].

<sup>6</sup> Arbitration Act 1996, s 5(d).

<sup>7</sup> *Ibid*, s 5(e).

<sup>8</sup> See Law Commission *Arbitration: A discussion paper* (NZLC PP7, 1988) at [23] to [29] for a useful overview of two main conceptual approaches to arbitration.

<sup>9</sup> Arbitration Act 1996, art 5 sch 1 provides: “In matters governed by this Schedule, no court shall intervene except where so provided in this Schedule.” The Arbitration Act permits court intervention only in very limited circumstances, which will be discussed at greater length further on in this chapter.

<sup>10</sup> Mustill and Boyd, above n 2, at 4; Willy, above n 4 at [1.2].

<sup>11</sup> Natasha Bakht “Family Arbitration Using Sharia Law: Examining Ontario’s Arbitration Act and its Impact on Women” (2004) 1 Muslim World Journal of Human Rights, Article 7 at 6; Ayelet Shachar “Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies” (2005) 50 McGill LJ 49 at 73 to 74.

<sup>12</sup> Caryn Litt Wolfe “Faith-based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts” (2006-2007) 75 Fordham L Rev at 431; Law Commission *Improving the Arbitration Act 1996* (NZLC R83, 2003) at 2.

<sup>13</sup> Wolfe, above n 12, at 430 to 431.

<sup>14</sup> Arbitration Act 1996, s 5(a).

family law disputes clearly come within the meaning of the phrase ‘other disputes’. There has been no direct attempt by Parliament to limit this phrase to a particular type of ‘other’ dispute as the preceding word “commercial” is not sufficient to create a class of disputes that might inform our interpretation of the term.<sup>15</sup> It is also significant that there is no express prohibition on arbitrating family law disputes in New Zealand, as exists in other jurisdictions.<sup>16</sup> Finally, there is no reason in principle why arbitration should only be available when the dispute is commercial in nature. Provided a dispute meets the test of arbitrability under s 10,<sup>17</sup> any dispute should be capable of determination by arbitration.<sup>18</sup> Indeed, the Law Commission noted that when arbitration is not expressly provided for in a statute, “the presumption would be for arbitrability.”<sup>19</sup>

## **B. Arbitration Agreement**

The arbitration agreement entered into by parties outlines the disputes that are to be arbitrated and generally stipulates the procedures that are to be adopted in the course of arbitration.<sup>20</sup> However, in order for an arbitration agreement to be enforceable, the dispute itself must be arbitrable under s 10.<sup>21</sup>

Section 10(1) lists two situations in which a dispute is not arbitrable. The first is if the agreement is “contrary to public policy”.<sup>22</sup> It is suggested that neither an agreement to arbitrate a child-related dispute nor an agreement to arbitrate a property dispute would be deemed contrary to public policy. This is because family law enactments place a

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<sup>15</sup> It is acknowledged that the provisions of the Arbitration Act 1996 lend themselves to disputes of a commercial nature. As noted by Justice Perkins regarding the Ontario Arbitration Act - “Its terms about enforcing arbitration clauses and awards are not framed particularly for family law, and still less are they drawn for custody and access matters”: *Duguay v Thompson-Duguay* [2000] RFL (5<sup>th</sup>) 301 at [31].

<sup>16</sup> Compare Civil Code of Québec LRQ 1991 c C-1991, art 2639. Art 2639 provides: “Disputes over the status and capacity of persons, family matters, or other matters of public order may not be submitted to arbitration.”

<sup>17</sup> Discussed below.

<sup>18</sup> The arguments for an against family law arbitration in general are beyond the scope of this paper.

<sup>19</sup> Law Commission *Arbitration* (NZLC R20, 1991) at [230].

<sup>20</sup> Arbitration Act 1996, s 2(1); Bakht, above n 11, at 4.

<sup>21</sup> Article 8(1) of sch 1 to the Arbitration Act 1996 also requires that the agreement must not be “null and void, inoperative, or incapable of being performed” and there must “in fact” be a “dispute between the parties with regard to the matters agreed to be referred.”

<sup>22</sup> Arbitration Act 1996, s 10(1).

significant emphasis on parties making private arrangements regarding such matters.<sup>23</sup> As noted by the Law Commission, “any dispute which can be settled between the parties by direct agreement should be able to be determined by arbitration.”<sup>24</sup> Furthermore, with particular reference to relationship property disputes, Willy argues there is “no reason” why they shouldn’t be arbitrable.<sup>25</sup>

The second situation that would prevent a dispute from being arbitrated upon is if “under any other law, such a dispute is not capable of determination by arbitration.”<sup>26</sup> This would not preclude the arbitration of a family law dispute by virtue of s 10(2) which provides:<sup>27</sup>

(2) The fact that an enactment confers jurisdiction in respect of any matter on the High Court or a District Court but does not refer to the determination of that matter by arbitration does not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.

Section 10(2) encapsulates the current situation regarding arbitration in New Zealand’s Family Court system: there is no reference to arbitration in any family law legislation, and jurisdiction over family law matters is conferred on the Family Court,<sup>28</sup> a specialist branch of the District Court.<sup>29</sup> It has been contended that because the Family Court has sole jurisdiction to determine family law matters, it is not possible to arbitrate family law disputes.<sup>30</sup> However, as noted by Willy, sole jurisdiction is “relevant only as between Courts who might otherwise have possessed

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<sup>23</sup> Review by Bill Atkin of Laura Ashworth’s submission to the New Zealand Law Student’s Journal on paper entitled “Should faith-based arbitration play a legitimate role in resolving family law disputes?” (June 2010).

<sup>24</sup> Law Commission, above n 19, at [231].

<sup>25</sup> A A P Willy *Arbitration in New Zealand* (Butterworths, Wellington, 1997) at [1.5]. It is worthy of note that in Willy’s second edition of the same text (above n 4), the reference to the arbitrability of relationship property disputes has been omitted. However, it is suggested Willy’s reasoning in the first edition is still persuasive.

<sup>26</sup> Arbitration Act 1996, s 10(1).

<sup>27</sup> *Ibid*, s 10(2).

<sup>28</sup> Family Courts Act 1980, s 11.

<sup>29</sup> *Ibid*, s 4; New Zealand Ministry of Justice “About the Family Court” (2010) Family Court of New Zealand <[www.justice.govt.nz/courts/family-court/about](http://www.justice.govt.nz/courts/family-court/about)>.

<sup>30</sup> Law Commission, above n 8, at [56]; Email from Jim Guest to Laura Ashworth regarding family law arbitration in New Zealand (14 September 2010).



the necessary jurisdiction” and shouldn’t of itself exclude the possibility of arbitration.<sup>31</sup>

### C. Procedural Matters

The Arbitration Act affords disputants considerable freedom to determine the procedural aspects of their arbitration.<sup>32</sup> Indeed, the only compulsory procedural requirement is that all parties to the arbitration be treated equally by the arbitrator.<sup>33</sup>

It is this procedural flexibility that facilitates the arbitration of disputes in accordance with religious laws. As mentioned, the specific enabling provision is art 28(1) of sch 1 to the Act, which provides: “the arbitral tribunal shall decide the dispute in accordance with *such rules of law* as are chosen by the parties as applicable to the substance of the dispute.”<sup>34</sup> The term “rules of law” is not restricted to the laws of a particular jurisdiction,<sup>35</sup> and religious arbitral tribunals in other jurisdictions operate under provisions of similar or identical wording.<sup>36</sup> Furthermore, the broad terminology of art 28(1) would enable any interpretation of Islamic law to be used in arbitration.<sup>37</sup>

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<sup>31</sup> Willy, above n 25, at [1.5].

<sup>32</sup> Schedule 1 of the Arbitration Act 1996 enables parties to determine: the number of arbitrators they wish to have on the arbitral tribunal (art 10 sch 1); the process by which arbitrators are appointed (art 11 sch 1); whether or not the tribunal can grant interim measures (art 17A sch 1) or issue preliminary orders (art 17C sch 1); the place of arbitration (art 20 sch 1); the date on which proceedings commence (art 21 sch 1); the language to be used in proceedings (art 22 sch 1); the period of time within which parties must make statements of claim and statements of defence (art 23 sch 1); whether evidence should be presented orally or in written form (art 24 sch 1); what constitutes a default of one party to the proceedings (art 25 sch 1); whether or not experts can be appointed by the arbitral tribunal (art 26 sch 1); the rules applicable to the substance of the dispute (art 28 sch 1); whether a majority vote of arbitrators is required in order for a dispute to be conclusively determined (art 29 sch 1); whether a settlement reached during proceedings can be recorded as an arbitral award (art 30 sch 1); whether or not arbitrators give reasons for the award made (art 31 sch 1) and whether interest should accrue on the sum awarded (art 31(5) sch 1); whether the arbitration is terminated (art 32(2)(b) sch 1); the period of time within which a party may request a correction or interpretation of an award, or an additional award to be made (art 33 sch 1).

<sup>33</sup> Arbitration Act 1996, art 18 sch 1 provides: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting that party’s case”.

<sup>34</sup> Article 28 of sch 1 to the Arbitration Act 1996 (emphasis added).

<sup>35</sup> Phillip Green and Barbara Hunt *Green & Hunt on Arbitration Law & Practice* (looseleaf ed, Thomson Brookers) at [ARSch1.28.03]; Marion Boyd *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (prepared for the Ministry of the Attorney General, Ontario, Canada 2004) at 12 to 13; Law Commission, above n 19, at [381].

<sup>36</sup> See Arbitration Act SO 1991 c 17, s 32(1) (which now excludes the possibility of religious arbitration for family law disputes by virtue of s 32(3)) and Arbitration Act 1996 (UK), s 46.

<sup>37</sup> See also Bakht, above n 11, at 18; Shachar, above n 11, at 74 to 75.

## D. Arbitral Award

An arbitral award is the final decision of the arbitrator on the relevant dispute.<sup>38</sup> In signing the arbitration agreement, the disputants agree to be bound by the arbitral award.<sup>39</sup> There are several formality requirements that the award must adhere to, including that it be in writing and signed by the arbitrator(s).<sup>40</sup> The parties can agree that no reasons be given for the award if they wish.<sup>41</sup>

The only grounds upon which a party may apply for an arbitral award to be set aside by a court are those listed in art 34(2) and (3) of sch 1 to the Act.<sup>42</sup> The listed grounds are: an invalid arbitration agreement,<sup>43</sup> a procedural problem with the arbitration;<sup>44</sup> an award dealing with matters beyond the scope of the arbitration agreement;<sup>45</sup> the subject matter being incapable of determination by arbitration;<sup>46</sup> and the award being contrary to public policy.<sup>47</sup> Article 34(6) provides that an award will be contrary to public policy if fraud or corruption influenced the making of the award,<sup>48</sup> or if there was a breach of natural justice at any stage during the arbitral process.<sup>49</sup> Essentially the same grounds are required for a court to refuse recognition or enforcement of an arbitral award under art 36(1) of the Act.<sup>50</sup>

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<sup>38</sup> Arbitration Act 1996, s 2(1).

<sup>39</sup> Green and Hunt, above n 35, at [DA1.2.01].

<sup>40</sup> See Arbitration Act 1996, art 31 sch 1.

<sup>41</sup> Ibid, at art 31(2) sch 1.

<sup>42</sup> Ibid, at art 34(1) sch 1.

<sup>43</sup> Ibid, at art 34(2)(a)(i), sch 1.

<sup>44</sup> Ibid, at art 34(2)(a)(ii) and (iv) sch 1.

<sup>45</sup> Ibid, at art 34(2)(a)(iii) sch 1.

<sup>46</sup> Ibid, at art 34(2)(b)(i) sch 1.

<sup>47</sup> Ibid, at art 34(2)(b)(ii) sch 1.

<sup>48</sup> Ibid, at art 34(6)(a) sch 1.

<sup>49</sup> Ibid, at art 34(6)(b)(i) and (ii) sch 1.

<sup>50</sup> The only ground for “refusing recognition or enforcement” of an award under art 36(1) which is not repeated in art 34(2) is subsection (1)(a)(v) of art 36. Art 36(1)(a)(v) enables a court to refuse recognition or enforcement of an award when a party gives proof that the award “has not yet become binding on the parties or has been set aside or suspended by a court of the country which, or under the law of which, that award was made”.

## II. Arbitrability of Family Law Disputes

This part will examine the scope for arbitrating two types of family law dispute in New Zealand: property disputes and child-related disputes.<sup>51</sup> Both types of dispute are governed by specific enactments that have a somewhat ambiguous relationship with the Arbitration Act. This ambiguity arises because there is no explicit provision for arbitration in any of New Zealand's family law legislation. As mentioned, by virtue of s 10(2) of the Arbitration Act, this does not "of itself" mean family disputes aren't arbitrable.<sup>52</sup> However, the lack of provision for arbitration does create difficulties in determining what is required for a binding arbitral agreement and award in the family law context.

Before examining the arbitrability of property and child-related disputes, I will briefly discuss the emphasis on alternative dispute resolution (ADR) within New Zealand's Family Court system. This emphasis is noteworthy because it highlights the importance the legislature places on resolving family disputes by private agreement. Although arbitration does not necessarily result in an award that both parties agree on, it is a procedure that both parties agree to use and that can be tailored significantly to their procedural preferences.<sup>53</sup> For this reason, parties are generally much more satisfied with an arbitral award than a court order.<sup>54</sup> Thus, it is suggested that many of the rationales underlying the emphasis on ADR in the Family Court system can be extended to the practice of arbitration.

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<sup>51</sup> As mentioned (above n 1), this chapter will not examine the arbitrability of spousal maintenance or child support disputes. This is because agreements related to maintenance and child support can be set aside or altered very readily by the courts, thus undermining the incentives for using arbitration. See ss 47 to 66A Child Support Act 1991 and s 182 Family Proceedings Act 1980. See also Mahoney and Peart (eds) *Brookers Family Law: Family Property* (looseleaf ed, Thomson Brookers) at [PR21A.06] and [PR21A.07].

<sup>52</sup> Arbitration Act 1996, s 10(2).

<sup>53</sup> See above discussion on arbitration.

<sup>54</sup> See Marion Boyd "Religion-Based Alternative Dispute Resolution: A Challenge to Multiculturalism" Keith Bantinh, Thomas J. Courchene and F. Leslie Seidle (eds) *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Institute for Research on Public Policy, Montreal, 2007) 465 at 467 to 468; Boyd, above n 35, at 74.

## A. ADR in the Family Court System

New Zealand's Family Court system places a significant emphasis on parties resolving disputes outside of court.<sup>55</sup> This is recognised in the Family Proceedings Act 1980 (FPA), which expressly endorses the use of conciliation and mediation.<sup>56</sup> Indeed, the FPA places a duty on lawyers to ensure their clients are "aware of the facilities that exist for promoting reconciliation and conciliation" whenever an issue arises that could come within the scope of the FPA or the Care of Children Act 2004 (COCA).<sup>57</sup> Issues arising under these Acts include spousal maintenance and child disputes. The Court is under a similar duty to consider the possibility of reconciliation or conciliation when such proceedings come before it.<sup>58</sup> Although the FPA does not expressly endorse arbitration, the LexisNexis Family Law Service insists that the Act creates a "three-tiered structure" for resolving disputes, with arbitration constituting the third tier.<sup>59</sup>

Significantly, the role of ADR in resolving child disputes under the COCA assumed an even greater status with the introduction of the Early Intervention Process (EIP) on the 12<sup>th</sup> April 2010.<sup>60</sup> The EIP establishes a "Standard Track" for non-urgent applications under the COCA so as to free up the Family Courts for more urgent cases.<sup>61</sup> The Standard Track requires parents to attend counselling sessions, followed by mediation and a judicial conference if necessary.<sup>62</sup> A court hearing will only be required if all three of these steps fail.<sup>63</sup>

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<sup>55</sup> Peter Boshier "Dispute Resolution in the Family Court – LEADR Conference" (2007) Family Court of New Zealand <[www.justice.govt.nz/courts/family-court/publications](http://www.justice.govt.nz/courts/family-court/publications)>.

<sup>56</sup> Family Proceedings Act 1980, ss 8 to 19A.

<sup>57</sup> Section 8, Family Proceedings Act 1980. Section 8 specifically provides: "(1) In all matters in issue between spouses, civil union partners, or de facto partners that are or may become the subject of proceedings under this Act or the Care of Children Act 2004, every barrister or solicitor acting for either spouse, civil union partner, or de facto partner shall – (a) Ensure that the spouse, civil union partner, or de facto partner for whom the barrister or solicitor is acting is aware of the facilities that exist for promoting reconciliation and conciliation; and (b) Take such further steps as in the opinion of the barrister or solicitor may assist in promoting reconciliation or, if reconciliation is not possible, conciliation."

<sup>58</sup> Family Proceedings Act 1980 s 19(1)(a) and (b).

<sup>59</sup> PRH Webb and others *Family Law Service* (online looseleaf ed, LexisNexis) at [2.1].

<sup>60</sup> Peter Boshier, Principal Family Court Judge "Why the Family Court Needs and Early Intervention Process" (speech presented at the Child and Youth Law Conference 2010, The Rydges, Auckland, 22 April 2010) at 1.

<sup>61</sup> *Ibid*, at 7.

<sup>62</sup> *Ibid*, at 7 to 8.

<sup>63</sup> *Ibid*, at 8.

## **B. Property Disputes**

The Property (Relationships) Act 1976 (PRA) provides the statutory regime governing the division of relationship property in New Zealand. This regime represents couples' entitlements under state law<sup>64</sup> and is grounded in a presumption in favour of equal sharing of relationship property.<sup>65</sup> However, it is possible for parties to contract out of this equal sharing regime.<sup>66</sup>

### **1. Relationship of the PRA to the Arbitration Act**

The PRA is a code<sup>67</sup> and s 4A of the PRA provides that all enactments “must be read subject” to the PRA unless there is express provision to the contrary.<sup>68</sup> The Arbitration Act does not expressly override the PRA, and in fact defers to other enactments in the event of an inconsistency.<sup>69</sup> The corollary of this for relationship property arbitration is twofold. First, an arbitration agreement would have to comply with the contracting out provisions of the PRA in order to be valid.<sup>70</sup> Second, the agreement and resulting award would have to withstand the extra safeguards contained in the PRA in order to be enforceable. If an arbitration agreement or award failed to withstand PRA scrutiny, the PRA would apply as if no attempt to contract out of the Act had been made.<sup>71</sup>

### **2. PRA contracting out requirements**

Section 21 and 21A of the PRA enable couples to contract out of the Act by making “any agreement they think fit with respect to the status, ownership, and division” of

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<sup>64</sup> See also Boyd, above n 35, at 22.

<sup>65</sup> Property (Relationships) Act 1976, s 11.

<sup>66</sup> *Ibid*, at Part 6.

<sup>67</sup> *Ibid*, at, s 4.

<sup>68</sup> *Ibid*, at s 4A.

<sup>69</sup> Arbitration Act 1996 s 9(1) provides: “Where a provision of this Act is inconsistent with a provision of any other enactment, that other enactment shall, to the event of the inconsistency, prevail.”

<sup>70</sup> Email from David Carden (former president of the Arbitrators and Mediators Institute of New Zealand) to Laura Ashworth regarding the relationship between the Property (Relationships) Act 1976 (PRA) and the Arbitration Act (30 August 2010).

<sup>71</sup> Property (Relationships) Act 1976, s 21M.

property.<sup>72</sup> While the substance of such agreements will usually stipulate the “status, ownership and division” of property, s 21D(1)(e) provides that the agreement can “prescribe the method by which the relationship property, or any part of the relationship property, is to be divided.”<sup>73</sup> Arbitration is a “method” of determining the division of relationship property. Thus, it is suggested that s 21D(1)(e) contemplates parties using arbitration agreements to contract out of the Act, even though arbitration agreements themselves do not stipulate how relationship property is to be divided.<sup>74</sup>

In order to be valid under the PRA, an arbitration agreement must meet the formality requirements under s 21F, and be contractually sound under s 21G.

#### *(a) Section 21F - formalities*

Section 21F states that a contracting out agreement will be void unless it complies with the requirements listed in subsections (2) to (5):<sup>75</sup>

- (2) The agreement must be in writing and signed by both parties.
- (3) Each party to the agreement must have independent legal advice before signing the agreement.
- (4) The signature of each party to the agreement must be witnessed by a lawyer.
- (5) The lawyer who witnesses the signature of a party must certify that, before that party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.

Explaining the “effect and implications” of an arbitration agreement under subsection (5) will necessarily involve some guesswork by the lawyer as to how the arbitrator might determine the distribution of property. Nevertheless, legal advice on the arbitration agreement is considered sufficient in other jurisdictions that expressly

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<sup>72</sup> Ibid, at ss 21 and 21A. S 21 agreements are generally entered into before a relationship breakdown, whereas s 21A agreements are entered into after a relationship breakdown: Mahoney and Peart, above n 1, at [PR21.01] to [PR21.02] and [PR21A.01] to [PR21A.02].

<sup>73</sup> Property (Relationships) Act 1976, s21D(1)(e).

<sup>74</sup> Even if arbitration agreements were not deemed to fall within the wording of s 21D(1)(e), this would not preclude arbitration agreements from falling within the contracting out provisions of the PRA. This is because s 21D only provides guidance as to what contracting out agreements “may” do: Property (Relationships) Act 1976, s 21D.

<sup>75</sup> Property (Relationships) Act 1976, s 21F.

provide for relationship property arbitration in their family law statutes.<sup>76</sup> Furthermore, Justice Hardie Boys in the Court of Appeal decision of *Coxhead v Coxhead* acknowledged that in circumstances where it is impossible to know all relevant facts, a lawyer can still satisfy subsection (5) if the advice given is appropriately qualified by the lack of necessary information.<sup>77</sup> Thus, provided a lawyer advises their client on the uncertainty involved in submitting their dispute to arbitration, and explains how the arbitral award might deviate from the client's entitlements under the PRA, subsection (5) should be satisfied.<sup>78</sup>

Subsection (5) will pose some practical difficulties in the context of Islamic arbitration agreements. This is because the lawyer will need to have sufficient understanding of Islamic law and principles as well as the entitlements under the PRA so as to properly advise the client on the "effect and implications" of the arbitration agreement.<sup>79</sup> Indeed, lawyers unfamiliar with Islamic law would be wary of potential negligence liability if they were to certify an arbitration agreement with an Islamic element.<sup>80</sup>

If an agreement fails to comply with s 21F, s 21H enables the Court to validate the agreement "if it is satisfied that the non-compliance has not *materially prejudiced* the interests of any party to the agreement."<sup>81</sup> If it could be established that a non-complying agreement would have been signed even after full compliance with s 21F, it is likely the agreement would be validated under s 21H.<sup>82</sup> However, as noted by Mahoney and Peart, it would be difficult to establish lack of material prejudice if no legal advice had been given under s 21F(5).<sup>83</sup>

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<sup>76</sup> See Ontario's Family Law Act: Family Law Act RSO 1990 c F 3, s 59.6(b).

<sup>77</sup> *Coxhead v Coxhead* [1993] 2 NZLR 397 at 403. See also Mahoney and Peart, above n 1, at [PR21F.07] and Fisher (ed) *Fisher on Matrimonial and Relationship Property* (looseleaf ed, LexisNexis NZ) at [5.71].

<sup>78</sup> See *Coxhead v Coxhead*, above n 77, at 403 and Mahoney and Peart, above n 1, at [PR21F.07] to [PR21F.15].

<sup>79</sup> See Bakht, above n 11, at 14. This will be discussed at greater length in Chapter Five where specific recommendations to remedy this problem will be proposed.

<sup>80</sup> Bakht, above n 11, at 14 and Mahoney and Peart, above n 1, at [PR21F.12] to [PR21F.15].

<sup>81</sup> Property (Relationships) Act 1976, s 21H(1) (emphasis added).

<sup>82</sup> Fisher, above n 77, at [5.74]; Mahoney and Peart, above n 1, at [PR21H.03].

<sup>83</sup> Mahoney and Peart, above n 1, at [PR21H.04].

***(b) Section 21G - Contractually sound***

Section 21G preserves “any enactment or rule of law or of equity” relating to enforceable contracts.<sup>84</sup> Thus, for example, the existence of undue influence, duress or an unconscionable bargain would be grounds upon which a contracting out agreement could be set aside.<sup>85</sup>

Undue influence<sup>86</sup> is a ground upon which a Muslim woman might try to have an Islamic arbitration agreement set aside under s 21G. This would be on the basis that she was unable to exercise independent judgement when entering into the arbitration agreement because of undue pressure that was exerted upon her to sign the agreement. Although there is no presumption of undue influence in a marriage,<sup>87</sup> provided it was established that the marriage in question was notably patriarchal in nature, a court could find the woman was unduly influenced when she signed the agreement.

A common argument raised by opponents to Islamic arbitration is that women are unable to freely consent to arbitration due to the religious pressures exerted upon them to remain loyal to Islam.<sup>88</sup> However, it is suggested that inability to consent to arbitration due to general religious pressure is beyond the scope of the doctrine of undue influence.<sup>89</sup> This is because undue influence has to be exercised by one party over another party.<sup>90</sup> Thus, it would need to be established that a particular individual (such as a husband or Muslim imam) exerted religious authority over the woman, the effect of which was to induce her to sign the agreement.<sup>91</sup>

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<sup>84</sup> Property (Relationships) Act 1976, s 21G. See Mahoney and Peart, above n 1, at [PR21G.01] to [PR21G.07].

<sup>85</sup> Mahoney and Peart, above n 1, at [PR21G.01] and [PR21G.04]; Fisher, above n 77, at [5.47].

<sup>86</sup> Mahoney and Peart define undue influence as “influence or pressure (that is less than duress) that prevents someone from exercising an independent judgement”: above n 1, at [PR21G.01].

<sup>87</sup> *Pealing v Pealing* [1982] 1 NZLR 499 at 505, (1982) 1 NZFLR 65 at 71; See also Fisher, above n 77, at [5.47].

<sup>88</sup> This argument will be explored in greater depth in Chapter Five.

<sup>89</sup> See Boyd, above n 35, at 136.

<sup>90</sup> Stephen Todd “Duress, undue influence and unconscionable bargains” in John Burrows, Jeremy Finn and Stephen Todd (eds) *Law of Contract in New Zealand* (LexisNexis NZ Ltd, Wellington, 2007) 341 at [12.3.1].

<sup>91</sup> See *Allcard v Skinner* (1887) 36 Ch D 145. In *Allcard* a woman entered a religious sisterhood and was required to give up her property to the sisterhood as part of a vow of poverty. When the woman left the sisterhood she sought the return of her property. She successfully argued that the sisterhood, and in particular the “lady superior” of the sisterhood, exerted undue influence over her.



Duress is established when such a degree of pressure is exerted upon a person that they fear personal harm might result if they don't comply with the demand being made.<sup>92</sup> Threats of physical violence would suffice to establish duress.<sup>93</sup> It is also likely that a husband's threat to withhold granting his wife an Islamic divorce or pay her mahr unless she signed an arbitration agreement would constitute duress.<sup>94</sup>

### **3. Extra safeguards under the PRA**

#### ***(a) Section 21J - Serious injustice***

Even if an arbitration agreement is valid, s 21J permits the Court to set the agreement aside if enforcement would cause "serious injustice."<sup>95</sup> "Serious injustice" is a very high threshold to meet, and was inserted into the PRA in 2001 to prevent contracting out agreements from being set aside too easily by the courts.<sup>96</sup> In determining whether enforcement would cause "serious injustice", s 21J(4) requires the Court to have regard to:<sup>97</sup>

- (a) the provisions of the agreement:
- (b) the length of time since the agreement was made:
- (c) whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was made:
- (d) whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made (whether or not those changes were foreseen by the parties):
- (e) the fact that the parties wished to achieve certainty as to the status, ownership, and division of property by entering into the agreement:
- (f) any other matters that the Court considers relevant.

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<sup>92</sup> Todd, above n 90, at [12.2.1]; Mahoney and Peart, above n 1, at [PR21G.01].

<sup>93</sup> Todd, above n 90, at [12.2.1].

<sup>94</sup> See Lee Ann Bambach "The Enforceability of Arbitration Decisions Made By Muslim Religious Tribunals: Examining The *Beth Din* Precedent" (2009-10) XXV Journal of Law and Religion 379 at 397.

<sup>95</sup> Property (Relationships) Act 1976, s 21J(1).

<sup>96</sup> Webb and others, above n 59, at [7.422]; Mahoney and Peart, above n 1, at [PR21J.04]; Fisher, above n 77, at [5.78]. See also *Wood v Wood* [1998] 3 NZLR 234, (1998) 17 FRNZ 1 at 235, 2. The prior threshold was whether enforcement of the agreement would be "unjust": s 21(8)(b) Matrimonial Property Act 1976.

<sup>97</sup> Property (Relationships) Act 1976, s 21J(4).

Section 21J would permit the Court to consider an arbitration agreement in conjunction with the resulting award. This is because the section provides scope for the actual division of relationship property to be scrutinised. If the Court was satisfied enforcement of the agreement or the award would cause “serious injustice” the whole submission to arbitration would be invalidated.<sup>98</sup>

An arbitration agreement might be set aside under s 21J if it was entered into at the start of the marriage. This would be on the basis that the agreement has “become unfair or unreasonable” under s 21J(4)(d) because the challenging party no longer truly consents to submitting the dispute to arbitration.<sup>99</sup> The potential for family arbitration agreements to become unfair over time is recognised in the Ontario Family Law Act, which prevents family arbitration agreements from being entered into before the dispute arises.<sup>100</sup>

In general terms, it is suggested that the Court would be wary to stray too far from the provisions of the Arbitration Act with respect to enforceable arbitration agreements and awards. This is by virtue of s 21J(4)(e) of the PRA, which recognises the certainty the parties intended to achieve by their agreement. It is also acknowledged that the content of Islamic arbitration agreements and awards will pose interesting questions for the courts under s 21. However, a more detailed recommendation as to the method by which the courts should approach Islamic arbitral awards is provided in Chapter Five.

### ***(b) Section 26 – Interests of children***

The PRA also permits the Court to alter any contracting out agreement if it “considers it just...for the benefit of the children” of the relationship.<sup>101</sup> This would give the Court the power to alter the substance of an arbitral award.

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<sup>98</sup> Ibid, at s 21M.

<sup>99</sup> See Natasha Bakht “Were Muslim Barbarians Really Knocking On the Gates of Ontario?: The Religious Arbitration Controversy – Another Perspective” (2006) 82 40<sup>th</sup> Anniv Ed Ottawa L Rev 67 at 73; Jehan Aslam “Judicial Oversight of Islamic Family Law Arbitration in Ontario: Ensuring Meaningful Consent and Promoting Multicultural Citizenship” (2006) 38 NYU J Int’l L & Pol 841 at 872.

<sup>100</sup> Family Law Act RSO 1990 c F 3, s 59.4.

<sup>101</sup> Property (Relationships) Act 1976, s 26(1).

## C. Child-related Disputes

Disputes over children generally concern day-to-day care<sup>102</sup> and contact arrangements, as well as guardianship issues.<sup>103</sup> An arbitrator could not make a binding award determining any of these matters because they are governed exclusively by the Care of Children Act (COCA).<sup>104</sup>

### 1. Private agreements under the COCA

The COCA strongly encourages parties to reach private agreements regarding their children,<sup>105</sup> and enables such agreements to be enforced as orders under the Act.<sup>106</sup> However, before making an agreement into an order, the Court must be satisfied that the agreement is in the “welfare and best interests” of the child to whom it relates.<sup>107</sup> This is because s 4 requires the “welfare and best interests of the child” to be the “first and paramount consideration” in any proceedings that involve day-to-day care, contact or guardianship matters.<sup>108</sup>

Thus, while parties are not precluded from submitting a child-related dispute to arbitration,<sup>109</sup> the arbitral award will only be enforceable if it passes a ‘welfare and best interests’ determination.

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<sup>102</sup> ‘Day-to-day’ care is the term adopted by the New Zealand legislature to replace the term ‘custody’: New Zealand Ministry of Justice “Glossary” (2010) Family Court of New Zealand <[www.justice.govt.nz/courts/family-court](http://www.justice.govt.nz/courts/family-court)>.

<sup>103</sup> Guardianship is defined by the Ministry of Justice as: “the duties, power, rights and responsibilities in relation to a child’s upbringing, e.g. religion, education and health. Guardianship is usually exercised by a parent, but may also be exercised by another person appointed by the Family Court”: New Zealand Ministry of Justice, above n 102.

<sup>104</sup> Part of the rationale for this is that the High Court has a ‘parens patriae’ jurisdiction to “take care of those who are not able to take care of themselves”: *Pallin v Department of Social Welfare* [1983] NZLR 266 at 272, per Cooke J; *Re JSB (A Child)* [2010] 2 NZLR 236 at 243. This jurisdiction is preserved by s 16 of the Judicature Act 1908: *Re an Unborn Child* [2003] 1 NZLR 115, [2003] NZFLR 344 at [38]; See also Mahoney (ed) *Brookers Family Law: Child Law, Volume 1* (looseleaf ed, Brookers) at [CC4.06].

<sup>105</sup> Care of Children Act 2004, ss 3(2)(d) and 39.

<sup>106</sup> *Ibid*, at ss 40(1)(b) and 40(3); See Webb and others, above n 59, at [6.103].

<sup>107</sup> Care of Children Act 2004, s 4.

<sup>108</sup> *Ibid*, at 4(1)(a) and (b).

<sup>109</sup> As discussed under, there is nothing to preclude the arbitration of a child-related dispute under s 10 of the Arbitration Act 1996.

## 2. The ‘welfare and best interests of the child’

In making a ‘welfare and best interests’ determination, the judge must have regard to the “relevant” principles listed in s 5 of the Act.<sup>110</sup> Applicable to arbitral awards is principle 5(a) which provides that parents be “encouraged to agree to their own arrangements, for the child’s care, development, and upbringing.”<sup>111</sup> While it might be contended that an arbitral award represents the decision of the arbitrator rather than the parties’ own agreement,<sup>112</sup> it is suggested that s 5(a) would extend to respecting the parties’ agreement to submit the dispute to arbitration.

There are two aspects of a ‘welfare and best interests’ determination that are of particular significance to Islamic arbitral awards:

### (a) *Principle 5(f)*

Principle 5(f) provides: “the child’s identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.”<sup>113</sup> The effect of s 5(f) could be that a judge gives weight to the ‘Islamic’ nature of an arbitral award when deciding if the award should be embodied into a Court order. However, the judge would need to be satisfied that the award “preserved and strengthened” the child’s identity as a Muslim.<sup>114</sup> This may be difficult to establish because it is the parents who decide to submit a dispute to an Islamic arbitral tribunal. Indeed, the courts have been careful to differentiate between the interests of the parent and child in making ‘welfare and best interests’ determinations.<sup>115</sup> As noted by Judge Inglis QC in *Gray v McGill*, by equating the parents’ interests with the child’s, the Court fails to respect the child as an individual human being that:<sup>116</sup>

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<sup>110</sup> Care of Children Act 2004, s 5.

<sup>111</sup> Ibid, at s 5(a).

<sup>112</sup> Indeed, arbitration is generally utilised because parties can’t agree themselves.

<sup>113</sup> Care of Children Act 2004, s 5(f).

<sup>114</sup> Ibid.

<sup>115</sup> Mahoney, above n 104, at [CC4.14].

<sup>116</sup> *Gray v McGill* (2001) 20 FRNZ 476, [2001] NZFLR 782 at [6]; Mahoney, above n 104, at [CC4.14].

... is entitled to expect that the custodial parent's own personal preferences and decisions will be made with a responsible awareness of the priority of the child's own long-term welfare.

While it is likely Muslim parents will consider it to be in their childrens' "long-term welfare" to have arrangements concerning those children determined in accordance with Islamic law, a Family Court Judge would not share that sentiment to the exclusion of other relevant considerations. Indeed, the Court of Appeal in *Re J (An Infant)* expressly held that the right of parents to manifest their religious belief under s 15 of the NZBORA does extend to doing "anything likely to place at risk the life, health or welfare of their children."<sup>117</sup> Furthermore, even in the absence of likely harm to the "life, health or welfare" of the child, a Family Court Judge is required by statute to have regard to other relevant considerations in making an order under the COCA.<sup>118</sup> These considerations include: the child's own views,<sup>119</sup> the importance of "continuity in arrangements"<sup>120</sup> and the importance of preserving relationships between the child and his or her wider family.<sup>121</sup> A mandatory consideration is also the child's safety, especially "from all forms of violence" (which includes "psychological abuse").<sup>122</sup>

***(b) The "particular child in his or her particular circumstances"***

Section 4 of the COCA also requires "the welfare and best interests of the particular child in his or her particular circumstances" to be considered.<sup>123</sup> In furtherance of this requirement, when making an order for day-to-day care, the Court cannot presume that a person of a particular gender will better serve a child's welfare and best interests.<sup>124</sup> This presumption cannot be made irrespective of the child's age.<sup>125</sup>

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<sup>117</sup> *Re J (An Infant): B and B v Director-General of Social Welfare* [1996] 2 NZLR 134 at 146; See also Rex Ahdar and Ian Leigh *Religious Freedom in the Liberal State* (Oxford University Press, New York, 2005) at 197.

<sup>118</sup> Care of Children Act 2004, s 5.

<sup>119</sup> *Ibid.*, at s 6.

<sup>120</sup> *Ibid.*, at s 5(b).

<sup>121</sup> *Ibid.*, at s 5(d).

<sup>122</sup> *Ibid.*, at s 5(e); See Mahoney, above n 104, at [CC5.08].

<sup>123</sup> Care of Children Act 2004, s 4(2).

<sup>124</sup> *Ibid.*, at s 4(4).

<sup>125</sup> *Ibid.*

One particular concern expressed by campaign groups is that Islamic arbitrations will be conducted in accordance with gender-biased Islamic laws that have no regard for the child's best interests.<sup>126</sup> As discussed in Chapter One, several Islamic jurisprudential schools prescribe that fathers be awarded day-to-day care of boys around age 7 and girls around age 9 to 11.<sup>127</sup> This is because it is believed that girls need protection upon reaching puberty, and that boys need "male discipline" once they are able to care for themselves independently.<sup>128</sup> Mothers are considered best able to care for children at a young age due to the perception that women are better nurturers than men.<sup>129</sup> Indeed, if the mother was unable to care for her young children (or she lost her right to day-to-day care by marrying another man), most schools would grant day-to-day care of the young children to female relatives in preference to the father.<sup>130</sup>

An Islamic arbitral award that was clearly made on the basis of such gender-biased presumptions would not pass a 'welfare and best interests' determination under the COCA. Indeed, there is House of Lords authority that expressly posits Islam's day-to-day care laws as "arbitrary and discriminatory."<sup>131</sup> However, if no reasons were given for the award,<sup>132</sup> it would be difficult to establish that it was in fact made on such a basis.

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<sup>126</sup> Muriel Seltman (ed) *Sharia Law in Britain: a threat to one law for all & equal rights* (One Law for All, London, 2010) at 13 and 14.

<sup>127</sup> Boyd, above n 35, at 48 (Submission of the Canadian Council of Muslim Women, received July 23 2004); Seltman, above n 126, at 13; Islamic Sharia Council "Islamic Perspective on Child Custody after Divorce" (2010) < [www.islamic-sharia.org/children/islamic-perspective-on-child-custody-after-divorce-3.html](http://www.islamic-sharia.org/children/islamic-perspective-on-child-custody-after-divorce-3.html)>; John L. Esposito (ed) *The Oxford Dictionary of Islam* (Oxford University Press, New York, 2003) at 101.

<sup>128</sup> Esposito, above n 127, at 101.

<sup>129</sup> David Pearl and Werner Menski *Muslim Family Law* (3<sup>rd</sup> ed, Sweet & Maxwell, London, 1998) at [10-32]; Islamic Sharia Council, above n 127.

<sup>130</sup> Esposito, above n 127, at 101; Pearl and Menski, above n 129, at [10-35] to [10-38]. Note, however, that this would not be enforceable as an arbitral award, as arbitral proceedings can only relate to the parties that bring the proceedings: Bakht, above n 11, at 3.

<sup>131</sup> *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64 at [6], per Lord Hope of Craighead; See also Neil Addison "Forward: Sharia Tribunals in Britain – Mediators or Arbitrators? A Reflection by Neil Addison" in David G. Green (ed) *Sharia Law or 'One Law For All?'* (Civitas, London, 2009) viii at xiii.

<sup>132</sup> Parties to an arbitration can agree whether or not reasons be given for the award: Arbitration Act 1996, art 31(2) sch 1.

## **Conclusion**

Property and child-related disputes are arbitrable in New Zealand. However, the awards reached and the procedures adopted in the course of such arbitrations would have to meet the extra safeguards prescribed by New Zealand's family law legislation. There is considerable scope for Islamic law to be utilised in property arbitrations. This is because for an award to be set aside under the PRA it would need to be established that a "serious injustice" would occur if the award was enforced. This is a very high threshold, and it is unlikely the enforcement of an award based on Islamic laws would, of itself, result in a serious injustice. There is, however, less scope for Islamic law to be utilised in the arbitration of child-related disputes. This is because any award made would have to pass a 'welfare and best interests of the child' test under the COCA to be enforceable

The next chapter will examine the multicultural implications of Islamic family law arbitration in New Zealand.

## **Chapter Four: Multiculturalism and Islamic Family Law Arbitration in New Zealand**

This chapter will examine the implications of New Zealand's unique Muslim community, as well as the Government's current approach to multiculturalism, on the practice of Islamic family law arbitration in New Zealand. Part I will focus on the implications of the size and composition of New Zealand's Muslim community. Part II will evaluate the Government's current approach to multiculturalism by examining the legislative and institutional measures that have been implemented in response to New Zealand's increasingly multicultural society. The likely reception of Islamic family law arbitration in New Zealand will also be discussed. Finally, Part III will contend that, when appropriately regulated, religious arbitration provides the right balance between the protection minority group rights and the protection of the individual rights of vulnerable members within that minority group.

### **I. New Zealand's Muslim Community**

New Zealand's cultural make-up has changed markedly in recent decades, with a diverse range of ethnicities immigrating to New Zealand from all over the world.<sup>1</sup> This pattern of immigration has impacted significantly on both the size and the composition of New Zealand's Muslim population.<sup>2</sup>

#### **A. Size**

An estimated 40,000 Muslims currently live in New Zealand, thus accounting for approximately 1% of the total population.<sup>3</sup> While this number might seem insignificant, the rapid rate at which the Muslim community in New Zealand is growing is undeniable. The 2006 Census recorded that the number of Muslims in New

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<sup>1</sup> Erich Kolig *New Zealand's Muslims and Multiculturalism* (Brill, Leiden, 2010) at 74; Statistics New Zealand *QuickStats About Culture and Identity: 2006 Census* (2006) at 2.

<sup>2</sup> See Erich Kolig and William Shepard "Introduction: Muslims in New Zealand" (2006) 8 *New Zealand Journal of Asian Studies* 1 at 1.

<sup>3</sup> *Ibid*; Kolig, above n 1, at 6.



Zealand had increased over 50 percent since 2001.<sup>4</sup> The Census also recorded that, of the total New Zealand Muslim population, 77 percent were migrants and 48 percent of these migrants had arrived less than five years before the Census was taken.<sup>5</sup> These findings are significant, as they illustrate both the exponential growth of New Zealand Muslim community, and its relative youth.<sup>6</sup> Such factors will have several implications on Islamic family law arbitration.

First, because of the sheer increase in numbers of Muslims, it is inevitable that Islamic family law matters will surface in New Zealand's Family Court system in the near future. Indeed, Aarif Rasheed,<sup>7</sup> has confirmed that "serious discussions" are in progress regarding the need for Islamic arbitration services in New Zealand; services that Rasheed maintains hold a "huge importance for a growing Muslim community."<sup>8</sup> As discussed in Chapter One, there are several reasons why Islamic arbitration appeals to many Muslims, not the least of which is that state courts tend to deliver conflicting judgements on Islamic family law matters, such as the mahr.<sup>9</sup>

Second, because the Muslim community in New Zealand is still relatively small and insulated from wider society, exactly how the prospect of Islamic family law arbitration might be received by the general populace remains uncertain. There is no strong history of animosity between Muslims and non-Muslims in New Zealand.<sup>10</sup> However, New Zealand Muslims are not immune from the stigmatising effects that

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<sup>4</sup> The Muslim population increased from 23, 631 to 36,072 between 2001 to 2006. That is a 52.6% increase: Statistics New Zealand, above n 1, at 12.

<sup>5</sup> Statistics New Zealand, above n 1, at 12.

<sup>6</sup> Muslim immigrants have lived in New Zealand for over 100 years, but their numbers have only increased exponentially in the past few decades: Kolig and Shepard, above n 2, at 1 to 2.

<sup>7</sup> Aarif Rasheed is a Barrister of the Auckland Defence Chambers and is heavily involved in promoting education of Islam and peaceful relations between different faith groups in New Zealand. To this end, Rasheed helped set up the 'Centre for Interfaith Dialogue and Education' (CIDE) in memory of his father, Abdul Rahim Rasheed. CIDE is part of the Human Rights Commission's Diversity Action Programme. See CIDE < [www.cide.org.nz](http://www.cide.org.nz) >.

<sup>8</sup> Email from Aarif Rasheed, Barrister, Auckland Defence Chambers, to Laura Ashworth regarding Islamic Tribunals in New Zealand (17 September 2009).

<sup>9</sup> Lee Ann Bambach "The Enforceability of Arbitration Decisions Made By Muslim Religious Tribunals: Examining The *Beth Din* Precedent" (2009-10) XXV Journal of Law and Religion 379 at 404; Caryn Litt Wolfe "Faith-based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts" (2006-2007) 75 Fordham L Rev 427 at 451.

<sup>10</sup> Kolig and Shepard, above n 2, at 4 to 5. Shepard discusses isolated incidents where Muslims have been targeted in New Zealand, including: being subject to increased surveillance by government agencies; instances of physical attack and the vandalism of mosques in several main centres: see William Shepard "New Zealand's Muslims and their Organisations" (2006) 8 *New Zealand Journal of Asian Studies* 8 at 16 to 17.

can result from the actions of Muslim extremists in other countries.<sup>11</sup> Furthermore, states are often reluctant to accommodate a Muslim minority that seems unwilling to adapt to, and participate in, that state's 'mainstream' culture.<sup>12</sup> Indeed, history has demonstrated that when Muslim communities seek avenues to live according to Islamic, rather than secular law, their attempts are generally met with strong opposition for this very reason.<sup>13</sup> Hirshel and Shachar go so far as to posit any request for accommodation that directly challenges the superiority of state "norms and institutions" as pushing the boundaries of what even the most tolerant liberal society will accept.<sup>14</sup>

Finally, because the New Zealand Muslim community is still in its youth, it could be some time before Islamic arbitrators with sufficient knowledge of New Zealand law as well as Islamic law and principles will be available to arbitrate family law disputes.<sup>15</sup> Rasheed stresses this factor to be the main challenge in establishing Islamic arbitral tribunals in New Zealand.<sup>16</sup> Rasheed also notes that Muslim "judges" generally refrain from ruling on Islamic matters in a foreign country until they have become familiar with that country's laws and customs.<sup>17</sup> This is in accordance with the Islamic principle that the state laws are paramount.<sup>18</sup>

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<sup>11</sup> Kolig and Shepard, above n 2, at 4 to 5; Shepard, above n 10, at 15 to 16; Kolig, above n 1, at 9 to 10 and 86. Two prime examples of such extremist actions are the 9/11 terrorist attacks in New York and the 7/7 bombings in London: Kolig and Shepard, above n 2, at 4 to 5; Shepard, above n 10, at 15 to 16; Kolig, above n 1, at 3.

<sup>12</sup> Kolig, above n 1, at 3; Erich Kolig "A Gordian Knot of Rights and Duties: New Zealand's Muslims and Multiculturalism" (2006) 8 *New Zealand Journal of Asian Studies* 45 at 47.

<sup>13</sup> Ran Hirschl and Ayelet Shachar "The New Wall of Separation: Permitting Diversity, Restricting Competition" (2009) 30 *Cardozo L Rev* 2535 at 2535 to 2536; See also Ayelet Shachar "Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law" (2008) *Theoretical Inq L* 573 at 584.

<sup>14</sup> Hirschl and Shachar, above n 13, at 2536. This sentiment is echoed by Aslam who notes that any request to retreat fully into one's culture "may be perceived as undermining, rather than supporting, core liberal values concerning the right to shape individual identity": Jehan Aslam "Judicial Oversight of Islamic Family Law Arbitration in Ontario: Ensuring Meaningful Consent and Promoting Multicultural Citizenship" (2006) 38 *NYU J Int'l L & Pol* 841 at 866.

<sup>15</sup> Rasheed, above n 8.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.* See also Tariq Ramadan "Religious Allegiance and Shared Citizenship" in Keith Bantinh, Thomas J. Courchene and F. Leslie Seidle (eds) *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Institute for Research on Public Policy, Montreal, 2007) 451 at 456 to 457.

## B. Composition

A relatively open immigration policy in recent decades has also resulted in a very diverse Muslim community in New Zealand.<sup>19</sup> As noted by Kolig and Shepard, because Muslims have travelled to New Zealand from all over the world,<sup>20</sup> the Muslim community represents not only the traditional ‘religious divide’ between Sunnis and Shias, but also the ethnic divides that exist globally.<sup>21</sup> These ethnic divides are manifested in a variety of cultural practices and Islamic jurisprudential allegiances.<sup>22</sup> Indeed, the New Zealand Muslim community represents the whole spectrum of approaches to Islamic law; from Muslims who subscribe to liberal and progressive interpretations, to Muslims who reject any deviation from traditional schools of thought.<sup>23</sup>

The corollary is that Islamic arbitral tribunals in New Zealand will need to accommodate the diverse range of affiliations with Islam.<sup>24</sup> In other jurisdictions, this has generally been achieved through the establishment of Islamic arbitral tribunals that represent a particular branch of Islam, such as Sunni or Shia.<sup>25</sup> The more established of these arbitral bodies then endeavour to have representative arbitral panels hear disputes, so as to give a thorough and considered determination on the matter at issue.<sup>26</sup>

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<sup>19</sup> Kolig and Shepard, above n 2, at 2.

<sup>20</sup> The 2006 Census recorded that most of New Zealand’s Muslim migrants are from Southern Asia, however they also originate from the Middle East: Statistics New Zealand, above n 1, at 12. Kolig and Shepard also note that Muslims in New Zealand have migrated from Morocco, the Balkans and Africa: Kolig and Shepard, above n 2, at 2.

<sup>21</sup> Kolig and Shepard, above n 2, at 2.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> See Marion Boyd *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (prepared for the Ministry of the Attorney General, Ontario, Canada 2004) at 43 (Submission of Islamic Council of Imams – Canada, received 23 July, 2004).

<sup>25</sup> Boyd, above n 24, at 57 to 61.

<sup>26</sup> Ibid, at 58 to 60.

## II. New Zealand's Approach to Multiculturalism

### A. Measures taken by the Government

New Zealand has no official multiculturalism policy as exists in other jurisdictions such as Canada and Australia.<sup>27</sup> However, several legislative and institutional measures have been taken by the government to recognise and protect the increasingly multicultural nature of New Zealand society.<sup>28</sup> In terms of legislative measures, a number of provisions in the New Zealand Bill of Rights Act 1990 (NZBORA) directly protect the cultural and religious rights of citizens.<sup>29</sup> As observed by Kolig, New Zealand is also a signatory to almost every United Nations convention promoting human rights, and more specifically the rights to culture and religion.<sup>30</sup>

The government has also established several bodies dedicated to the task of promoting a peaceful multicultural society.<sup>31</sup> The Office of Ethnic Affairs is one such body,<sup>32</sup> as is the Office of the Race Relations Commissioner (a branch of the Human Rights Commission).<sup>33</sup> The Human Rights Commission's Diversity Action Programme has been particularly active in promoting respect for minority cultures and religions,

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<sup>27</sup> For information on Australia's official multicultural policy, see the Australian Government's most recent multicultural statement: Commonwealth of Australia "Multicultural Australia: United in Diversity" (12 May 2003) Australian Government - Department of Immigration and Citizenship < [www.immi.gov.au/media/publications](http://www.immi.gov.au/media/publications) >. For information on Canada's official multicultural policy see: Government of Canada "Policy and Legislation Concerning Multiculturalism" (2008) Citizenship and Immigration Canada < [www.cic.gc.ca/english/department/laws-policy/multi-policy](http://www.cic.gc.ca/english/department/laws-policy/multi-policy) >. Canada has gone further than most countries with respect to implementing its multicultural policy by enshrining its commitment to "the preservation and enhancement of the multicultural heritage of Canadians" in s 27 the Canadian Charter of Rights and Freedoms: see Will Kymlicka "Canadian Multiculturalism in Historical and Comparative Perspective: Is Canada Unique?" (2003) 13 Const F 1 at 4.

<sup>28</sup> Kolig, above n 12, at 51; Kolig, above n 1, at 85.

<sup>29</sup> These provisions are: s 13 Freedom of thought, conscience and religion, s 15 Manifestation of religion and belief, s 19 Freedom from discrimination, and s 20 Rights of Minorities.

<sup>30</sup> As noted by Kolig, these conventions include the United Nations Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights 1967: Kolig, above n 1, at 73 and Kolig, above n 12, at 51 (footnote 8).

<sup>31</sup> Kolig, above n 12, at 51.

<sup>32</sup> The Office of Ethnic Affairs is directly involved in advising the Government on how to fully engage with and recognise the diversity of ethnicities within New Zealand: <[www.ethnicaffairs.govt.nz](http://www.ethnicaffairs.govt.nz)>.

<sup>33</sup> The Office of the Race Relations Commissioner works directly with minority communities to facilitate positive inter-community relations and provides a mechanism for complaints to be made about racial discrimination: <[www.hrc.co.nz/home/hrc/racerelations](http://www.hrc.co.nz/home/hrc/racerelations)>.

having released both a “Statement on Religious Diversity” and a “Statement on Race Relations”.<sup>34</sup>

The Statement on Religious Diversity expressly recognises that, as a result of immigration, “increasing religious diversity is a significant feature of public life” in New Zealand.<sup>35</sup> Furthermore, whilst acknowledging New Zealand’s Christian heritage, it affirms that New Zealand has no “official religion”.<sup>36</sup> In addition to prescribing various norms to which both the government and religious groups should adhere,<sup>37</sup> the Statement reaffirms the religious and non-discrimination rights contained in the NZBORA, as well as the rights to safety and freedom of expression.<sup>38</sup> The Statement is unique because it was formulated through extensive consultation with a wide range of religious groups in New Zealand.<sup>39</sup> Thus, it has been endorsed by a considerable number of New Zealand religious organisations.<sup>40</sup> The Human Rights Commission are hopeful that the Statement will serve as a “starting point” of reference when religious disputes arise in New Zealand.<sup>41</sup>

New Zealand’s current approach to multiculturalism is grounded in the assumption that cultural diversity is valuable to society.<sup>42</sup> The Government is no longer intent on assimilating minorities into mainstream culture,<sup>43</sup> and Kolig notes that attempts to do so would likely be contrary to the rights of minorities protected in the NZBORA and other human rights conventions.<sup>44</sup> However, in spite of clear efforts to preserve the

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<sup>34</sup> Copies of the most recent editions of both the Statement on Religious Diversity and the Statement on Race Relations are available on the Human Rights Commission’s website at <[www.hrc.co.nz/home/hrc/racerelations/](http://www.hrc.co.nz/home/hrc/racerelations/)> .

<sup>35</sup> Human Rights Commission *Religious Diversity in Aotearoa New Zealand: Statement on Religious Diversity* (Wellington, 2009) at 2.

<sup>36</sup> *Ibid*, at 3.

<sup>37</sup> These include: The State endeavouring to treat religious and non-religious groups equally; The State taking “reasonable steps ... to recognise and accommodate diverse religious beliefs and practices”; schools teaching a wide range of religious traditions; religious debate being exercised reasonably and peacefully; and a promotion of “mutual respect and understanding” between the Government and religious groups: Human Rights Commission, above n 35, at 3 to 4.

<sup>38</sup> Human Rights Commission, above n 35, at 2 to 4.

<sup>39</sup> *Ibid*, at 4.

<sup>40</sup> The Federation of Islamic Associations of New Zealand and the Islamic Women’s Council both official endorse the Statement on Religious Diversity. A full list of endorsements is provided on the back of the Human Rights Commissions brochure: above n 35, at 13.

<sup>41</sup> Human Rights Commission, above n 35, at 5.

<sup>42</sup> *Ibid*, at 2; Kolig, above n 1, at 87.

<sup>43</sup> David Griffiths “Pluralism and the Law: New Zealand Accommodates the Burqa” (2006) 11 Otago L Rev 281 at 284. See also Kolig, above n 1, at 85.

<sup>44</sup> Kolig, above n 12, at 52.

group identity of minority cultures, Kolig posits New Zealand as “cautiously multicultural.”<sup>45</sup> By this he means that efforts to accommodate minority cultures will not extend to accommodating cultural practices, or making exceptions for minority cultures, that might threaten national unity.<sup>46</sup> There is, of course, no standard test for determining when national unity might be threatened.<sup>47</sup> Nevertheless, it is necessary to examine how the practice of Islamic family law arbitration might be received in New Zealand, given this inherent limit to cultural accommodation.

### **B. Potential for a Favourable Reception of Islamic Family Law Arbitration**

In commenting on the negative public outcry that was generated in response to the Archbishop of Canterbury’s lecture in the United Kingdom, Kolig argues that “New Zealand would undoubtedly evince the same reaction” to any proposal for recognition of Islamic law.<sup>48</sup> However, it is suggested that there is nothing inevitable about the practice of Islamic family law arbitration being met with strong opposition in New Zealand. There are two main reasons for this.

First, much of the controversy in other jurisdictions has been generated by misrepresentations of the practice of Islamic family law arbitration by the media.<sup>49</sup> In general, Islamic arbitral tribunals have been portrayed as operating in the form of a “parallel legal system” in which primitive Islamic laws are routinely imposed on Muslim women, without any recourse available to state courts.<sup>50</sup> There are, however, several inaccuracies in such reports. First, Islamic arbitral tribunals operate under state arbitration legislation, the corollary being that the tribunals are always subject to

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<sup>45</sup> Kolig, above n 1, at 73.

<sup>46</sup> Ibid, at 73 to 74.

<sup>47</sup> Ibid, at 74.

<sup>48</sup> Ibid, at 13.

<sup>49</sup> Shachar, above n 13, at 584 to 585; Marion Boyd “Religion-Based Alternative Dispute Resolution: A Challenge to Multiculturalism” Keith Bantinh, Thomas J. Courchene and F. Leslie Seidle (eds) *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Institute for Research on Public Policy, Montreal, 2007) 465 at 466 and 471; Archbishop of Canterbury, Dr. Rowan Williams “Civil and Religious Law in England: a Religious Perspective” (Foundation Lecture 2008, Royal Courts of Justice, London, 07 February 2008).

<sup>50</sup> Boyd, above n 49, at 466; Boyd, above n 24, at 3 to 4; Shachar, above n 13, at 584; Natasha Bakht “Were Muslim Barbarians Really Knocking On the Gates of Ontario?: The Religious Arbitration Controversy – Another Perspective” (2006) 82 40<sup>th</sup> Anniv Ed Ottawa L Rev 67 at 69 to 70; Sherene H. Razack “The ‘Sharia Law Debate’ in Ontario: The Modernity/Premodernity Distinction in Legal Efforts to Protect Women from Culture” (2007) 15 Feminist Legal Studies 3 at 8.

state law.<sup>51</sup> Thus, to posit the tribunals as operating as a “parallel legal system”, or to imply that they are in some way on ‘equal footing’ with the state, is a misnomer.<sup>52</sup> Second, and incidental to the first point, those who submit a dispute to an Islamic arbitral tribunal will always have recourse to state courts. Indeed, as discussed in Chapter Three, there are several extra hurdles an arbitral award must pass to be enforceable under New Zealand’s family law legislation. Arbitration is certainly not a determinative process in and of itself. Finally, such reports portray Islam in a negative, highly stigmatised light.<sup>53</sup> They conveniently focus on the fundamentalist sects of Islam,<sup>54</sup> without any recognition of the diversity of beliefs within Islam and the existence of liberal interpretations of Islamic law.<sup>55</sup>

Islamic family law arbitration also has a greater chance of acceptance in New Zealand because of the peaceful co-existence of New Zealand Muslims and non-Muslims to date.<sup>56</sup> This peaceful co-existence is in stark contrast to the relatively hostile relationship that exists, for example, between Muslims and non-Muslims in the United Kingdom.<sup>57</sup> Establishing a solid foundation for positive relations between faith-groups, and between faith-groups and the government was one of the prime rationales underlying the Statement on Religious Diversity.<sup>58</sup> As noted by former Prime Minister, Helen Clark, in 2006 when asked in an interview why the Statement was necessary: “There is a capacity for tensions generated offshore ... to be reflected back into one’s own country if one isn’t proactive about promoting inclusion and acceptance across faiths.”<sup>59</sup> Indeed, Rasheed is confident that there will be no significant problems establishing Islamic arbitral tribunals in New Zealand.<sup>60</sup> He

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<sup>51</sup> See Boyd, above n 24, at 4.

<sup>52</sup> Even referring to Islamic law as being given “official recognition” by the state is misleading because it tends to suggest a direct incorporation of Islamic law into state legislation, or some kind of ‘positive act’ by the government. See Ayelet Shachar “Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies” (2005) 50 McGill LJ 49 at 61.

<sup>53</sup> Bakht, above n 50, at 69 to 70 and 76; Razack, above n 50, at 8; Shachar, above n 13, at 584 to 585; Williams, above n 49.

<sup>54</sup> For example, by highlighting incidents of brutal punishments delivered in foreign countries, such as women being stoned to death: Razack, above n 50, at 8; Williams, above n 49.

<sup>55</sup> Bakht, above n 50, at 70; Williams, above n 49.

<sup>56</sup> See Kolig and Shepard, above n 2, at 4.

<sup>57</sup> Maria Reiss “The Materialization of Legal Pluralism in Britain: Why Shari’a Council Decisions Should be Non-Binding” (2009) 27 *Ariz J Int’l & Comp Law* 739 at 759.

<sup>58</sup> Human Rights Commission, above n 35, at 4 to 5.

<sup>59</sup> Audrey Young “Clark Calls for Action to Combat Extremism” *New Zealand Herald* (New Zealand, 27 December 2006).

<sup>60</sup> Rasheed, above n 8.

hopes that, “rather than having to react to a negative” situation,<sup>61</sup> New Zealand Muslim lawyers will have the opportunity to “proactively” contribute to “positive discussion” regarding the need for Islamic family law arbitration services.<sup>62</sup>

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<sup>61</sup> As discussed, the media tend to lay the ground work for ‘negative situations’.

<sup>62</sup> Rasheed, above n 8.



### **III. Striking the Right Balance between Group Rights and Individual Rights**

A common objection raised against multiculturalism policies is that, by endeavouring to protect the group identity of minority cultures (through, for example, the accommodation of certain cultural practices), the state fails to protect the rights of vulnerable members within those cultures, such as women.<sup>63</sup> The corollary is that the ‘group rights’ of a minority culture tend to be juxtaposed against the ‘individual rights’ of its vulnerable members.<sup>64</sup> Indeed, this is precisely how the debate over Islamic family law arbitration has been framed: opponents of the practice ardently assert that the rights of women and children will be abused if arbitral tribunals are permitted to operate in accordance with Islamic law, thus warranting a total abolition of religious arbitration.<sup>65</sup> On the other hand, strong proponents of the practice believe that arbitral tribunals should be given free reign to operate in accordance with Islamic law, with minimal to no state interference.<sup>66</sup> The assertions of both sides are contestable on several grounds; full discussion of which is beyond the scope of this paper.<sup>67</sup>

The focus of this part is on the problematic tendency of both sides of the debate to posit ‘group rights’ and ‘individual rights’ as inherently contradictory. To do so ignores the reality for most Muslims living in the West, who identify themselves both as Muslims (with associated group rights) and as citizens (with associated individual rights).<sup>68</sup> Thus, to prohibit Islamic arbitration on the basis that it threatens the

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<sup>63</sup> Shachar, above n 52, at 57; Shachar, above n 13, at 584; Bakht, above n 50, at 74; Williams, above n 49; Boyd, above n 49, at 469. See also Wolfe, above n 9, at 461; Faisal Bhabha “Between Exclusion and Assimilation: Experimentalizing Multiculturalism” (2009) 54 McGill LJ 45 at 57; Joanna Sweet “A Matter of Choice? How the Construction of Muslim Women’s Identity Shaped Ontario’s Faith-Based Arbitration Debates” at 2 and 7 (paper prepared for the 81<sup>st</sup> Annual Conference of the Canadian Political Science Association Carleton University, May 2009) at 1 to 2.

<sup>64</sup> Boyd, above n 24, at 89. See also Bhabha, above n 63, at 47 to 50 and 53.

<sup>65</sup> Bakht, above n 50, at 74. Boyd, above n 24, at 89 to 90; Bhabha, above n 63, at 84. See also No Religious Arbitration Coalition “Original Declaration on Religious Arbitration in Family Law & Membership” (2005) YWCA Toronto at 1 < [www.ywcatoronto.org/](http://www.ywcatoronto.org/)>; Canadian Council of Muslim Women “Position Statement on the Proposed Implementation of Sections of Muslim Law [Sharia] in Canada” (2004) <[www.ccmw.com/activities/act\\_arb\\_muslimlaw\\_sharia](http://www.ccmw.com/activities/act_arb_muslimlaw_sharia)> and Boyd, above n 24, at 89.

<sup>66</sup> Boyd, above n 24, at 89; Bhabha, above n 63, at 84 to 85.

<sup>67</sup> For a thorough discussion of the inherent disadvantages of the claims made by proponents and opponents of Islamic family law arbitration with respect to group rights vs individual rights see Boyd, above n 24, at 89 to 91 and Boyd, above n 49, at 468 to 470.

<sup>68</sup> Shachar, above n 13, at 577; Boyd, above n 49, at 470; Bhabha, above n 63, at 53; Williams, above n 49.

individual rights of vulnerable members within the Muslim community is to disregard a Muslim's religious identity.<sup>69</sup> It also has the unintended effect of drastically increasing the chances of individual rights abuses occurring. This is because the practice will continue unofficially, without any built in safeguards.<sup>70</sup> Similarly, to officially recognise Islamic arbitration on the basis that it protects the group identity of the Muslim community, without adequately regulating the practice, is to disregard the rights of vulnerable members within the Muslim community.<sup>71</sup> Thus, as argued by Shachar, we need to recognise these "multiple legal affiliations" by ensuring "greater access to, and coordination between, these multiple sources of law and identity."<sup>72</sup> Enabling Islamic family law arbitration to occur, subject to appropriate government regulation,<sup>73</sup> would provide this much needed recognition.<sup>74</sup>

Regulating Islamic family law arbitration will also have the effect of engaging the Muslim community in an "institutional dialogue" with the state.<sup>75</sup> There are several benefits in such a dialogue taking place. First, it would indicate the state's good faith intention to take reasonable steps to accommodate religious practices and to promote positive relations with religious minority groups in New Zealand.<sup>76</sup> Second, it will encourage the Muslim community to integrate into New Zealand society, by utilising the state legislative framework.<sup>77</sup> Third, because the Islamic arbitral tribunals will have a vested interest in having their awards enforced by the courts, regulated Islamic family law arbitration will encourage the tribunals to arbitrate in a manner that respects liberal human rights standards.<sup>78</sup> This phenomenon of "change from within"

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<sup>69</sup> Shachar, above n 13, at 593.

<sup>70</sup> Bhabha, above n 63, at 83; Boyd, above n 24, at 139.

<sup>71</sup> Shachar, above n 52, at 57; Shachar, above n 13, at 584; Bakht, above n 50, at 74; Williams, above n 49; Boyd, above n 49, at 469.

<sup>72</sup> Shachar, above n 13, at 578.

<sup>73</sup> Exactly what such regulation should entail will be discussed in Chapter Five.

<sup>74</sup> Shachar, above n 13, at 593. This is also consistent with the "accommodation approach" propounded by Bhabha, above n 63, at 56.

<sup>75</sup> Boyd, above n 49, at 471.

<sup>76</sup> These are specific undertakings that were listed in the Statement on Religious Diversity: Human Rights Commission, above n 35, at 3 to 4. Aslam explicitly notes the negative impact a complete prohibition would have on relations between minority cultures and the state: Aslam, above n 14, at 874.

<sup>77</sup> Boyd, above n 49, at 471; Boyd, above n 24, at 93. See also Aslam, above n 14, at 874, who argues that the effect of a complete ban of religious arbitration would be to "threaten the nexus between cultural identity and democratic citizenship that Canada has fostered and developed."

<sup>78</sup> Shachar, above n 13, at 601 to 602.

is what Shachar refers to as “transformative accommodation”,<sup>79</sup> a notion enthusiastically endorsed by the Archbishop of Canterbury.<sup>80</sup>

## Conclusion

The increasingly multicultural status of New Zealand society will have several implications on the practice of Islamic family law arbitration. First, New Zealand’s growing and diverse Muslim community will require arbitral tribunals that accommodate a diverse range of affiliations with Islam. The relatively recent arrival of a significant proportion of the New Zealand Muslim community will also mean that it might be some time before tribunals with experienced Muslim arbitrators can be established. Second, while the New Zealand Government has taken institutional and legislative steps to accommodate minority cultures and religions, it remains “cautiously multicultural.”<sup>81</sup> Nevertheless, there is significant potential for the prospect of Islamic family law arbitration to be received favourably by the general populace. This will depend in large part on how the practice is represented by the media, but it is promising that New Zealand Muslims and non-Muslims have co-existed relatively peacefully to date. Finally, provided Islamic family law arbitration is subject to appropriate government regulation, it should strike the right balance between the protection of Muslim minority group rights and the protection of individual rights within the Muslim community.

The next chapter will make specific recommendations as to what this government regulation should entail.

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<sup>79</sup> Shachar, above n 13, at 602.

<sup>80</sup> Williams, above n 49.

<sup>81</sup> Kolig, above n 1, at 73.

## **Chapter Five: Recommendations for Regulation of Islamic Family Law Arbitration in New Zealand**

This chapter will propose several recommendations for the regulation of Islamic family law arbitration in New Zealand.<sup>1</sup> Part I will contend that certain aspects of Ontario's Family Law Act 1990<sup>2</sup> (FLA) should inform how family law arbitrations are incorporated into New Zealand legislation. Part II will examine two issues unique to religious arbitrations: establishing consent and courts ruling on religious arbitral awards.

### **I. Clarification on the Status of Family Law Arbitration**

It is recommended that the legislature clarify the status of family law arbitration in New Zealand. As demonstrated in Chapter Three, more certainty is needed as to the requirements for enforceable family arbitral agreements and awards. Although it is beyond the scope of this paper to discuss the benefits of family law arbitration in general,<sup>3</sup> it is noteworthy that similar jurisdictions (such as Australia and Ontario) utilise the practice extensively, especially for determining relationship property disputes.<sup>4</sup> It is suggested that the following aspects of the Ontario FLA inform how arbitration agreements should be incorporated into New Zealand's family law legislation.<sup>5</sup>

The FLA includes family arbitration agreements in the definition of "domestic contract".<sup>6</sup> The Act then stipulates various formalities that must be met for all types of

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<sup>1</sup> These recommendations are applicable to all types of religious family law arbitration.

<sup>2</sup> Family Law Act RSO 1990 c F3.

<sup>3</sup> For a useful discussion of the benefits and disadvantages of family law arbitration in general, see: Marion Boyd *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (prepared for the Ministry of the Attorney General, Ontario, Canada 2004) at 29 to 39. Natasha Bakht also who provides an overview of the potential disadvantages arbitration can have on women: Natasha Bakht "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women" (2004) 1 Muslim World Journal of Human Rights, Article 7 at 20 to 23.

<sup>4</sup> For example, the Australia Family Law Act 1975 gives the court the power to refer relationship property disputes to arbitration: Family Law Act 1975 (Cth), s 13E.

<sup>5</sup> It is important to note that the FLA is a comprehensive family law statute in that it deals with property and child matters. Thus, the FLA differs from New Zealand's family law legislation whereby individual acts govern specific family law matters.

<sup>6</sup> Family Law Act RSO 1990 c F 3, s 51.

domestic contract to be enforceable,<sup>7</sup> and prescribes the circumstances in which domestic contracts will be set aside.<sup>8</sup> These formality and enforcement provisions are very similar to those already governing contracting out agreements under the Property (Relationships) Act 1976 (PRA) and private agreements under the Care of Children Act 2004 (COCA).<sup>9</sup>

In addition to expressly treating arbitration agreements as domestic contracts, the FLA dedicates a number of provisions to the regulation of family law arbitrations.<sup>10</sup> These provisions preserve the effect of the Ontario Arbitration Act,<sup>11</sup> but only to the extent that it is consistent with the FLA.<sup>12</sup> The FLA also renders unenforceable any arbitration agreement or resulting award if the arbitration agreement was entered into before the relevant dispute arose.<sup>13</sup> Several “conditions of enforceability” for arbitral awards are then prescribed in s 59.6.<sup>14</sup>

The Family Arbitration Regulation<sup>15</sup> (made under Ontario’s Arbitration Act) prescribes a number of mandatory requirements that must also be satisfied for an award to be enforceable under the FLA.<sup>16</sup> This regulation requires parties to certify that they sought independent legal advice before signing the arbitration agreement.<sup>17</sup> The arbitrator must also certify that he or she: “will treat the parties equally”; has received government approved training; and is satisfied, after having screened both parties separately, that there was no power imbalance or domestic violence in the

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<sup>7</sup> Ibid, at s 55(1). Section 55 (1) requires the agreement to be “in writing, signed by the parties and witnessed”.

<sup>8</sup> Ibid, at s 56.

<sup>9</sup> Thus, little change would need to be made to the Property (Relationships) Act 1976 or the Care of Children Act 2004 in order to comply with the Family Law Act RSO 1990 c F3 in this respect. The Property (Relationships) Act 1976 would simply need to expressly recognise arbitration agreements in its contracting out provisions (perhaps in s 21D), and the Care of Children Act 2004 would simply need to acknowledge arbitration agreements as falling within the scope of s 40.

<sup>10</sup> Family Law Act RSO 1990 c F3, s 59.1 to s 59.8.

<sup>11</sup> Arbitration Act SO 1991 c 17.

<sup>12</sup> Family Law Act RSO 1990 c F3, s 59.1(2).

<sup>13</sup> Ibid, at s 59.4.

<sup>14</sup> Ibid, at s 59.6. Section 59.6 provides: (1) A family arbitration award is enforceable only if, (a) the family arbitration agreement under which the award is made is made in writing and complies with any regulations made under the *Arbitration Act, 1991*; (b) each of the parties to the agreement receives independent legal advice before making the agreement; (c) the requirements of section 38 of the *Arbitration Act, 1991* are met (formal requirements, writing, reasons, delivery to parties); and (d) the arbitrator complies with any regulations made under the *Arbitration Act, 1991*. ”

<sup>15</sup> Family Arbitration, O Reg 134/07.

<sup>16</sup> Family Law Act RSO 1990 c F3, s 59.6(1)(d).

<sup>17</sup> Family Arbitration, O Reg 134/07, s 2(4) para 4.

relationship.<sup>18</sup> Finally, a record of the arbitration must be kept containing certain pieces of information (such as the reasons for the arbitrator's award).<sup>19</sup> The arbitrator must also report details on the substance of the arbitration and resulting award to the Attorney General.<sup>20</sup>

These extra requirements for family law arbitrations are warranted because standard arbitration statutes generally contemplate two parties of relatively equal bargaining power.<sup>21</sup> As discussed in Chapter Three, this means that there usually needs to be a procedural problem with the arbitration before an award will be overturned.<sup>22</sup> However, because of the vulnerable parties involved in a relationship breakdown and the related public policy concerns at issue, extra measures are required to protect the interests of parties submitting to family law arbitration.<sup>23</sup>

Most of these requirements were inserted into the FLA as a result of the Boyd Report.<sup>24</sup> However, none of Boyd's recommendations relating to the facilitation of

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<sup>18</sup> Ibid, at s 2(4) para 5.

<sup>19</sup> Ibid, at s 4(1) para 1 to 3. Section 4(1) provides: "Subject to subsection (2), every arbitrator who conducts a family arbitration shall create a record of the arbitration containing the following matters: 1. The evidence presented and considered; 2. The arbitrator's notes taken during the hearing, if any; 3. A copy of, i. the signed arbitration agreement, ii. The certificates of independent legal advice, iii. if the screening for power imbalances and domestic violence was conducted by someone other than the arbitrator, the report on the results of the screening, and iv. The award and the arbitrator's written reasons for it."

<sup>20</sup> Fam Arb Reg, s 5(1). Section 5(1) provides: "Every arbitrator who conducts a family arbitration shall report the following information about the award to the Attorney General, in a form provided by the Ministry of the Attorney General: 1. The date and length of the hearing, if any, leading to the award. 2. The matters addressed in the arbitration and in the award. 3. Details of the following, to the extent relevant to the award: i. the ages of the parties to whom the award relates, the length of their relationship, their approximate incomes and the approximate total value of each party's assets. ii. The ages and genders of any children of any party to whom the award relates, and custody and access arrangements and child support awarded in respect of them. iii. Spousal support awarded. iv. Equalization of property awarded. v. any provisions in the award restraining contact or communication between the parties."

<sup>21</sup> Ayelet Shachar "Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law" (2008) *Theoretical Inq. L* 573 at 599. See also *Duguay v Thompson-Duguay* [2000] RFL (5<sup>th</sup>) 301 at [31] and Jehan Aslam "Judicial Oversight of Islamic Family Law Arbitration in Ontario: Ensuring Meaningful Consent and Promoting Multicultural Citizenship" (2006) 38 *NYU J Int'l L & Pol* 841 at 873.

<sup>22</sup> Bakht, above n 3, at 6; Ayelet Shachar "Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies" (2005) 50 *McGill LJ* 49 at 73 to 74.

<sup>23</sup> Aslam, above n 21, at 873 to 874; Shachar, above n 21, at 590 and 599. As stated by Aslam, "[s]ociety should not conceive of familial relationships as rational, utility-maximizing transactions from an economic perspective": Aslam, above n 21, at 874.

<sup>24</sup> Aslam, above n 21, at 872 to 873; Marion Boyd "Religion-Based Alternative Dispute Resolution: A Challenge to Multiculturalism" in Keith Bantinh, Thomas J. Courchene and F. Leslie Seidle (eds) *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Institute for Research on Public

religious arbitration were adopted.<sup>25</sup> As discussed, because of the controversy that was generated around Islamic family law arbitration in Ontario, *all* religious arbitration was ultimately prohibited by s 59.2 of the FLA.<sup>26</sup> However, as has been contended in this paper, a blanket prohibition on religious arbitration is both an unsatisfactory and unwarranted response to the concerns raised by the debate. Thus, the New Zealand legislature should depart from Ontario's FLA with respect to the FLA's prohibition on religious arbitration.

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Policy, Montreal, 2007) 465 at 472. See Boyd, above n 3, at 133 to 142 for a list of all of Boyd's recommendations.

<sup>25</sup> Boyd, above n 24, at 472.

<sup>26</sup> Family Law Act RSO 1990 c F 3, s 59.2 now provides: "(1) when a decision about a matter described in clause (a) of the definition of "family arbitration" in section 51 is made by a third person in a process that is not conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction, (a) the process is not a family arbitration; and (b) the decision is not a family arbitration award and has no legal effect."

## II. Regulation of Islamic Family Law Arbitration

### A. Establishing Consent

It is fundamental to the arbitral process that both parties freely consent to the arbitration taking place. This is because lack of consent is grounds for having an arbitral award set aside.<sup>27</sup> As discussed briefly in Chapter Three, a prime concern raised in the debate over Islamic family law arbitration is that some Muslim women are not capable of freely consenting to the arbitral process.<sup>28</sup>

#### 1. Why establishing consent can be problematic

There are several reasons why a Muslim woman's consent to arbitration has been considered worthy of increased scrutiny.

First, Muslim women are often subject to pressures from the wider Muslim community to demonstrate their loyalty to Islam.<sup>29</sup> As noted by Shachar, this pressure is particularly concentrated on Muslim women because they play "a crucial symbolic role in constructing group solidarity vis-a-vis wider society."<sup>30</sup>

Second, the patriarchal model of the Muslim marriage might also inhibit free consent to the arbitral process, especially if domestic violence is a fact of the relationship.<sup>31</sup> Domestic violence is, of course, not an issue unique to Islam. However, disagreement exists as to whether the primary sources of Islam permit a husband to physically discipline his 'disobedient' wife.<sup>32</sup> Thus, in the context of Islamic family law

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<sup>27</sup> Arbitration Act 1996, arts 8, 34 and 36 sch 1. See Shachar, above n 21, at 588. As discussed in Chapter Three, lack of consent is also grounds for contracting out agreements to be set aside under the Property (Relationships) Act 1976, s 21G.

<sup>28</sup> Boyd, above n 3, at 50; Shachar, above n 21, at 588 to 590; Marie Egan Provins "Constructing an Islamic Institute of Civil Justice that Encourages Women's Rights" (2005) 27 Loy LA Int'l & Comp L Rev 515 at 526.

<sup>29</sup> Boyd, above n 3, at 50 to 51 (Submission of Legal Education and Action Fund (LEAF), received September 17 2004); Provins, above n 28, at 527; Shachar, above n 22, at 51.

<sup>30</sup> Shachar, above n 22, at 51. See also Caryn Litt Wolfe "Faith-based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts" (2006-2007) 75 Fordham L Rev at 461.

<sup>31</sup> Boyd, above n 3, at 51 to 52; Bakht, above n 3, at 19 to 20.

<sup>32</sup> Boyd, above n 3, at 96 to 99; David Pearl and Werner Menski *Muslim Family Law* (3<sup>rd</sup> ed, Sweet & Maxwell, London, 1998) at [7-07].



arbitration, where any interpretation of Islamic law could be imposed,<sup>33</sup> concerns regarding domestic violence are particularly acute. Indeed, if left unregulated, it is plausible that Muslim arbitrators, who view physical ‘disciplining’ as a legitimate practice, will have the power to disregard or even endorse clear incidents of violence when making awards.

Third, Muslim women may not understand their entitlements under state law.<sup>34</sup> Various factors can contribute to this lack of knowledge, including language barriers, and the reality that some Muslim women are insulated by their community from wider society.<sup>35</sup> Given that New Zealand’s Muslim community is comprised significantly of recent migrants, it is highly likely that many New Zealand Muslim women will be unaware of their state entitlements for such reasons.

Finally, Muslim women are sometimes induced to sign contracts as a condition for a religious barrier to be removed.<sup>36</sup> Such religious barriers generally concern the granting of an Islamic divorce by the husband to the wife.<sup>37</sup> Being granted an Islamic divorce is critical for a Muslim woman because she cannot enter into a new relationship and have children that are recognised by the Muslim community until her prior marriage is dissolved in accordance with Islamic law.<sup>38</sup>

## **2. The need for the state to respect a religiously motivated agreement**

It is important to recognise that coercive forces exist which might render some Muslim women susceptible to participating in the arbitral process against their will. However, it is equally important to recognise the rights of minorities to live in accordance with their religion where it is reasonable for them to do so.<sup>39</sup> This is

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<sup>33</sup> See Bakht, above n 3, at 18 and Shachar, above n 22, at 74 to 75.

<sup>34</sup> Provins, above n 28, at 526; Wolfe, above n 30, at 461; Bakht, above n 3, at 19.

<sup>35</sup> Provins, above n 28, at 526. See also Jamila Hussain “Family Law and Muslim Communities” in Abdullah Saeed and Shahram Akbarzadeh (eds) *Muslim Communities in Australia* (University of New South Wales Press Ltd, Sydney, 2001) 161 at 179 to 180.

<sup>36</sup> See Boyd, above n 3, at 21 to 22.

<sup>37</sup> Section 56(5) of the Ontario Family Law Act is aimed at preventing this mischief. It enables the court to set aside an agreement if the removal of a religious barrier to remarriage was a condition of the agreement: Family Law Act RSO 1990 c F 3, s 56(5).

<sup>38</sup> Shachar, above n 21, at 576 and 594.

<sup>39</sup> See Boyd, above n 3, at 11, and 74 to 76; Pearl and Menski, above n 32, at [3-16] to [3-18]; Aslam, above n 21, at 871 to 872.

especially the case in a liberal multicultural society, where divergent views on what constitutes the “good life” are expected to co-exist.<sup>40</sup> In the absence of undue coercion, a Muslim woman who makes an informed decision to submit her dispute to an Islamic arbitral tribunal must be respected for having made that decision.<sup>41</sup> Indeed, given the emphasis that the New Zealand legislature has placed on resolving family law disputes privately, it would be highly problematic to render an agreement unenforceable purely because it was reached in accordance with the parties’ religious beliefs.<sup>42</sup> As stated aptly by Fadel, “religious reasons are legitimate private reasons.”<sup>43</sup>

### 3. Striking an appropriate balance through regulation

In establishing free consent to religious arbitration, it is necessary to balance the aforementioned risks of coercion against an individual’s right to make a religiously motivated agreement.<sup>44</sup> This section will evaluate two scholarly suggestions as to how this balance is best achieved.

#### (a) *Shachar*

Shachar contends that “regulatory oversight” is required throughout the family arbitral process.<sup>45</sup> The premise for this argument is that it cannot be reasonably expected that vulnerable parties (such as women) will challenge an arbitral award they believe to be unfair.<sup>46</sup> Shachar notes that, because parties to commercial arbitrations have greater power to challenge arbitral awards, restricting judicial intervention until after the

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<sup>40</sup> See Rex Ahdar and Ian Leigh *Religious Freedom in the Liberal State* (Oxford University Press, New York, 2005) at 40 and 42; Donald Brown “A Destruction of Muslim Identity: Ontario’s Decision to Stop Shari’a-based Arbitration” (2007) 32 NCJ Int’l L & Com Reg 495 at 542.

<sup>41</sup> Boyd, above n 3, at 63 (Submission of Christian Legal Fellowship, received August 27 2004) and 74 to 75.

<sup>42</sup> See also Boyd, above n 3, at 74 to 75; Canadian Broadcasting Corporation (CBC) “Talking Philosophy: Secularism Part 1” (2010) CBC Radio – Ideas <[www.cbc.ca/ideas/episodes/2010/08/03/talking-philosophy-secularism-part-1-listen](http://www.cbc.ca/ideas/episodes/2010/08/03/talking-philosophy-secularism-part-1-listen)>; Joanna Sweet “A Matter of Choice? How the Construction of Muslim Women’s Identity Shaped Ontario’s Faith-Based Arbitration Debates” (paper prepared for the 81<sup>st</sup> Annual Conference of the Canadian Political Science Association Carleton University, May 2009) at 7; Natasha Bakht “Religious Arbitration in Canada: Protecting Women by Protecting them from Religion” (2007) 19 Can J Women & L 119, at 137 to 138.

<sup>43</sup> CBC, above n 42.

<sup>44</sup> Aslam, above n 21, at 872.

<sup>45</sup> Shachar, above n 21, at 599.

<sup>46</sup> Ibid, at 599 to 600.

arbitration has taken place is more justified in those cases.<sup>47</sup> However, because of the “gendered and communal pressures at issue” with family law arbitration, she asserts that more comprehensive regulatory oversight is warranted.<sup>48</sup> It is worthy to note that Shachar posits the recommendations proposed in the Boyd Report (most of which, as discussed, were incorporated into the FLA) as providing this much needed oversight.<sup>49</sup>

In an earlier paper, Shachar also suggests that all religious arbitral awards be subject to a “mandatory review” prior to being enforced.<sup>50</sup> In the review process, the religious award would be measured against a standard that was agreed upon by a review board.<sup>51</sup> Shachar notes that this review board should be a mixture of state legal professionals and religious law experts.<sup>52</sup> The purpose of having a mandatory review would be to eliminate the possibility of a Muslim woman being labelled as ‘disloyal’ in the event that she challenged an Islamic arbitral award.<sup>53</sup> By removing the need to challenge the award, Shachar asserts that the interests of Muslim women receive greater protection.<sup>54</sup>

#### *(b) Aslam*

Aslam is critical of Shachar’s recommendation that all religious arbitral awards be subject to a mandatory review,<sup>55</sup> asserting that such a review would constitute an unreasonable limit on religious freedom.<sup>56</sup> It is Aslam’s prime contention that adequate protection would lie in a presumption of non-consent to all family law arbitrations.<sup>57</sup> To this end, Aslam also endorses Boyd’s recommendations with respect to screening for domestic violence and the requirement for independent legal advice.<sup>58</sup> In the event that an arbitral award was challenged, the party seeking to uphold the

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<sup>47</sup> Ibid, at 598 to 599.

<sup>48</sup> Ibid, at 599.

<sup>49</sup> Ibid, at 599 to 600.

<sup>50</sup> Shachar, above n 22, at 76.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid, at 76 (footnote 90).

<sup>53</sup> Ibid, at 76.

<sup>54</sup> Ibid.

<sup>55</sup> Aslam, above n 21, at 871.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid, at 874.

<sup>58</sup> Ibid, at 872 to 873.

award would then have the burden of proving that the unsatisfied party did in fact consent to the arbitration taking place.<sup>59</sup> According to Aslam, this will encourage parties to fully acquaint themselves with the arbitral process and its implications before signing an arbitration agreement.<sup>60</sup> Aslam further asserts that arbitral tribunals would have a greater incentive to “develop procedural safeguards” to ensure their awards were upheld by state courts.<sup>61</sup>

*(c) An evaluation of both models*

Both Shachar’s and Aslam’s endorsement of Boyd’s recommendations is warranted. Provided both parties to the arbitration are screened for power imbalances and domestic violence, in addition to being required to seek independent legal advice, many of the aforementioned concerns regarding free consent to the arbitral process are eliminated.

In addition to these general requirements, it is suggested that Boyd’s recommendation that religious arbitral tribunals be required to provide potential clients with a “statement of principles”<sup>62</sup> be adopted. Boyd notes that this statement would explain “the parties’ rights and obligations and available processes under the particular form of religious law”<sup>63</sup> and would need to be given to clients before they sought independent legal advice.<sup>64</sup> A declaration that the statement is accepted by the parties would be required in order for the award to be enforceable,<sup>65</sup> and the lawyer providing independent legal advice would need to certify that he or she reviewed the tribunal’s statement prior to advising the client on submitting their dispute to arbitration.<sup>66</sup> It is suggested that by requiring lawyers to review such statements, the possibility of them facing negligence actions for advising on a religious contract is considerably

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<sup>59</sup> Ibid, at 874.

<sup>60</sup> Ibid, at 874 to 875 (footnote 166).

<sup>61</sup> Ibid, at 874 to 875.

<sup>62</sup> Boyd, above n 3, at 136.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid, at 137.

<sup>65</sup> Ibid, at 135.

<sup>66</sup> Ibid, at 137.

lessened.<sup>67</sup> This is because lawyers will be better placed to advise the client on the “effect and implications” of submitting their dispute to the arbitral tribunal.<sup>68</sup>

The mandatory review proposed by Shachar with respect to religious arbitral awards is problematic for several reasons. First, given the apparent dearth of instances in New Zealand whereby any type of religious family law arbitration takes place, such a board would be a costly and unwarranted addition to the New Zealand Family Court system. Second, given the multiplicity of interpretations of Islamic law,<sup>69</sup> determining which Islamic experts were to comprise the review board would be highly contentious.<sup>70</sup> Third, formulating the ‘agreed upon standard’ against which all awards would be measured simply reintroduces the issue as to whether state norms or religious norms should prevail in the area of family law.<sup>71</sup> This issue was highlighted by Aslam’s contention that a mandatory review could constitute an unreasonable limit on religious freedom.<sup>72</sup>

Thus, it is suggested that the FLA requirements (discussed in Part I), in addition to the requirement for tribunals to provide a statement of principles, would offer the best protection to Muslim women utilising Islamic arbitral tribunals in New Zealand. The benefit in this approach is that it enables Muslims to live in accordance with Islamic law without undue state interference, while at the same time ensuring both parties to the arbitration are freely consenting and informed participants.<sup>73</sup>

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<sup>67</sup> See Chapter Three.

<sup>68</sup> See Property (Relationships) Act 1976, s 21F(5). See also Boyd, above n 3, at 137.

<sup>69</sup> All of which, as discussed in Chapter Four, are represented by New Zealand’s Muslim community.

<sup>70</sup> Given the internal complexity of all religions, this same problem would be encountered with respect to any religious tribunal.

<sup>71</sup> See Ran Hirschl and Ayelet Shachar “The New Wall of Separation: Permitting Diversity, Restricting Competition” (2009) 30 *Cardozo L Rev* 2535 at 2536 to 2537.

<sup>72</sup> Aslam, above n 21, at 871. Whether or not the review in fact constituted such an unreasonable limit would turn upon the agreed upon standard against which the religious arbitral awards were measured.

<sup>73</sup> See Aslam, above n 21, at 871 to 872.

## B. Challenging Awards with a Religious Basis

When Islamic arbitral awards are challenged in court, judges are asked to rule on a matter with an inherently religious component. At first sight this prospect arouses concerns over the separation of church and state, a fundamental pivot of the liberal state.<sup>74</sup> Indeed, time and time again, judges have asserted the need for the courts to avoid entering the “theological thicket” when matters of a religious nature come before them.<sup>75</sup>

In overseas jurisdictions, however, courts have generally managed this dilemma by applying “neutral principles of contract law”.<sup>76</sup> A prime example of this approach is the Supreme Court of Canada’s decision in *Bruker v Marcovitz*.<sup>77</sup> In this case, a Jewish husband was ordered to pay damages to his former wife for failing to fulfil his contractual undertaking to approach the *beth din*, so as to initiate a Jewish divorce.<sup>78</sup> As noted by Shachar, the *Marcovitz* decision is particularly noteworthy because, rather than ordering specific performance (which would require that the husband attend a religious tribunal), the Court ordered the husband to pay standard contractual damages for his breach.<sup>79</sup> Thus, the Court avoided potential issues associated with ordering the performance of a religious obligation.<sup>80</sup>

It is acknowledged that the application of contract law principles is not neutral from the standpoint of some religious parties, who might not recognise their legitimacy.<sup>81</sup> However, it is suggested that this approach is to be preferred over the alternative, which would necessarily require judges to elevate certain religious interpretations over others.<sup>82</sup> Thus, it is contended that the New Zealand legislature, if faced with an

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<sup>74</sup> See Lee Ann Bambach “The Enforceability of Arbitration Decisions Made By Muslim Religious Tribunals: Examining The *Beth Din* Precedent” (2009-10) XXV Journal of Law and Religion 379 at 389. See also Rex Ahdar and Ian Leigh *Religious Freedom in the Liberal State* (Oxford University Press, New York, 2005) at 72 to 75.

<sup>75</sup> See *Police v Abdul Zohoor Razamjoo* (2005) 8 HRNZ 604, [2005] DCR 408 at [66] and [67] and Bakht, above n 3, at 12

<sup>76</sup> Wolfe, above n 30, at 446; Bambach, above n 74, at 389; Bakht, above n 3, at 12 to 13.

<sup>77</sup> *Bruker v Marcovitz* 2007 SCC 54, [2007] 3 SCR 607.

<sup>78</sup> See Shachar, above n 21, at 594 to 597 for an in-depth discussion of *Bruker v Marcovitz* and how the case was dealt with through the hierarchy of courts. .

<sup>79</sup> Shachar, above n 21, at 597.

<sup>80</sup> Ibid; Bambach, above n 74, at 389.

<sup>81</sup> Wolfe, above n 30, at 455.

<sup>82</sup> See Wolfe, above n 30, at 455.

Islamic arbitral award that is challenged, should adopt the 'neutral principles' of law approach.

### **Conclusion**

Family Law arbitrations should be incorporated into New Zealand's family law legislation in accordance with the provisions of the Ontario FLA, discussed in Part I. These provisions would ensure both parties to the arbitration are willing participants. Because of the particular concerns regarding the ability of vulnerable parties to consent to religious arbitration, however, Boyd's recommendations with respect to the issuing of a statement of principles by religious arbitral tribunals should also be adopted. Finally, if an Islamic arbitral award is challenged, it is contended that the most satisfactory response is for the courts to apply neutral principles of contract law to the award.

## **Conclusion**

The most pronounced views in the international debate regarding the Islamic arbitration of family law disputes have framed the matter as a conflict of absolutes. This has resulted in demands being made on both ends of the spectrum: strong proponents of the practice calling for absolute accommodation (with little to no state interference), to strong opponents calling for an absolute prohibition. This paper has endeavoured to provide a solution that addresses the fundamental concerns of both sides of the debate. To this end, it has been contended that Islamic family law arbitration should be accommodated in New Zealand, subject to adequate regulation.

The focus of Chapters Two and Three was the scope for Islamic family law arbitration under New Zealand's current legislative framework. Chapter Two contended that the New Zealand Bill of Rights Act 1990 does not apply either directly or indirectly to arbitral tribunals, thus giving Islamic tribunals greater scope to arbitrate in accordance with Islamic law. As discussed in Chapter Three, however, this scope would be limited by the provisions of New Zealand's family law legislation that govern private agreements. Although these provisions do not expressly mention arbitration, it was argued that arbitral awards are enforceable with respect to property and child-related disputes. However, the awards would need to satisfy the extra safeguards imposed by the applicable family law provisions. These safeguards give the court greater scope to examine both the substance of a family arbitration award and the fairness of upholding a family arbitration agreement.

With the aim of providing a principled argument in favour of Islamic family law arbitration, Chapter One examined the main reasons as to why the practice appeals to many Muslims. Chapter Four continued on this path. Having assessed the implications of both New Zealand's growing and diverse Muslim community, as well as the Government's current approach to multiculturalism, it was suggested that significant potential exists for the practice to be accepted favourably in New Zealand. It was also suggested that religious arbitration, when appropriately regulated, strikes the right balance between the protection of minority group rights and the protection of the rights of vulnerable members within those groups.



Finally, Chapter Five made concrete recommendations as to how religious family law arbitration should be incorporated into New Zealand legislation. It was suggested that aspects of the Ontario Family Law Act 1990 (which adopted Boyd's recommendations) inform how this is done. However, unlike Ontario, it was contended that religious arbitration should be accommodated in New Zealand. To address concerns regarding the consent of both parties to religious arbitration, it was suggested that Boyd's additional recommendations regarding a 'statement of principles' be adopted. Furthermore, in the event that a religious arbitral award was challenged, it was recommended that New Zealand courts apply neutral principles of contract law to the award.

# Bibliography

## I. Primary Sources

### Cases

#### **New Zealand**

*Coxhead v Coxhead* [1993] 2 NZLR 397.

*Falun Dafa Association of New Zealand Inc v Auckland Children's Christmas Parade Trust Board* (2008) 8 HRNZ 680, [2009] NZAR 122.

*Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318.

*Gray v McGill* (2001) 20 FRNZ 476, [2001] NZFLR 782.

*Pallin v Department of Social Welfare* [1983] NZLR 266.

*Peeling v Peeling* [1982] 1 NZLR 499, (1982) 1 NZFLR 65.

*Police v Abdul Zohoor Razamjoo* (2005) 8 HRNZ 604, [2005] DCR 408.

*R v N* [1999] 1 NZLR 713.

*Ransfield v Radio Network Ltd* [2005] 1 NZLR 233.

*Re an Unborn Child* [2003] 1 NZLR 115, [2003] NZFLR 344.

*Re J (An Infant): B and B v Director-General of Social Welfare* [1996] 2 NZLR 134.

*Re JSB (A Child)* [2010] 2 NZLR 236.

*Wood v Wood* [1998] 3 NZLR 234, (1998) 17 FRNZ 1.

#### **Canada**

*Bruker v Marcovitz* 2007 SCC 54, [2007] 3 SCR 607.

*Duguay v Thompson-Duguay* [2000] RFL (5<sup>th</sup>) 301.

*Kaddoura v Hammond* (1998) 168 DLR (4<sup>th</sup>) 503.

*National Ballet of Canada v Glasco et al* 49 OR (3d) 230.

#### **England**

*Allcard v Skinner* (1887) 36 Ch D 145.

*Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2003] UKHL 37, [2004] 1 AC 546.

*Austin Hall Building Ltd v Buckland Securities Ltd* [2001] Build LR 272, 80 ConLR 115.

*EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64.

## **Legislation**

### **New Zealand**

Arbitration Act 1908 [repealed].

Arbitration Act 1996.

Care of Children Act 2004.

Child Support Act 1991.

Family Courts Act 1980.

Family Proceedings Act 1980.

Human Rights Act 1993.

Judicature Act 1908.

New Zealand Bill of Rights Act 1990.

Property (Relationships) Act 1976.

### **Australia**

Family Law Act 1975 (Cth).

### **Canada**

Arbitration Act SO 1991 c 17.

Canadian Charter of Rights and Freedoms s 27, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) 1982, c 11.

Civil Code of Québec LRQ 1991 c C-1991.

Family Arbitration O Reg 134/07.

Family Law Act RSO 1990 c F 3.

## **England**

Arbitration Act 1996 (UK).

Human Rights Act 1998 (UK).

## **International Declarations/Covenants**

International Covenant on Civil and Political Rights 1967.

United Nations Declaration of Human Rights 1948.

## **II. Secondary Sources**

### **Books and Book Chapters**

Addison, Neil “Forward: Sharia Tribunals in Britain – Mediators or Arbitrators? A Reflection by Neil Addison” in David G. Green (ed) *Sharia Law or ‘One Law For All?’* (Civitas, London, 2009) viii.

Ahdar, Rex and Leigh, Ian *Religious Freedom in the Liberal State* (Oxford University Press, New York, 2005).

Boyd, Marion “Religion-Based Alternative Dispute Resolution: A Challenge to Multiculturalism” in Keith Bantinh, Thomas J. Courchene and F. Leslie Seidle (eds) *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Institute for Research on Public Policy, Montreal, 2007) 465.

Butler, Andrew and Butler, Petra *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, Wellington, 2005).

Esposito, John L (ed) *The Oxford Dictionary of Islam* (Oxford University Press, New York, 2003).

Esposito, John L *What Everyone Needs to Know About Islam* (Oxford University Press, New York, 2002).

Gordon, Matthew S *Islam: Origins, Practices, Holy Texts, Sacred Persons, Sacred Places* (Oxford University Press, New York, 2002).

Gray, John *Two Faces of Liberalism* (Blackwell Publishers Ltd, Cambridge, 2000).

Hussain, Jamila “Family Law and Muslim Communities” in Abdullah Saeed and Shahram Akbarzadeh (eds) *Muslim Communities in Australia* (University of New South Wales Press Ltd, Sydney, 2001) 161.

Hussain, Jamila *Islam: Its law and society* (2<sup>nd</sup> ed, The Federation Press, Sydney, 2004).

Khan, Sheema “The Ontario Sharia Debate: Transformational Accommodation, Multiculturalism and Muslim Identity” in Keith Bantinh, Thomas J. Courchene and F. Leslie Seidle (eds) *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Institute for Research on Public Policy, Montreal, 2007) 475.

Kolig, Erich *New Zealand’s Muslims and Multiculturalism* (Brill, Leiden, 2010).

Mustill, Michael J and Boyd, Stewart C *Commercial Arbitration* (2<sup>nd</sup> ed, Butterworths, London, 1989).

Nanji, Azim *Dictionary of Islam* (Penguin Group, London, 2008).

Netton, Ian Richard (ed) *Encyclopedia of Islamic Civilisation and Religion* (Routledge, London, 2008).

Pearl, David and Menski, Werner *Muslim Family Law* (3<sup>rd</sup> ed, Sweet & Maxwell, London, 1998).

Pearl, David S *Islamic Family Law and Its Reception by the Courts in England* (Islamic Legal Studies Program Harvard Law School (ILSP), Cambridge, 2000).

Ramadan, Tariq “Religious Allegiance and Shared Citizenship” in Keith Bantinh, Thomas J. Courchene and F. Leslie Seidle (eds) *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Institute for Research on Public Policy, Montreal, 2007) 451.

Rishworth, Paul “When the Bill of Rights Act Applies” in Rishworth and others (eds) *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003).

Shachar, Ayelet *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (Cambridge University Press, Cambridge, 2001).

Slapper, Gary and Kelly, David *The English Legal System* (9<sup>th</sup> ed, Routledge-Cavendish, London, 2009).

Todd, Stephen “Duress, undue influence and unconscionable bargains” in John Burrows, Jeremy Finn and Stephen Todd (eds) *Law of Contract in New Zealand* (LexisNexis NZ Ltd, Wellington, 2007) 341.

Williams, David and Thorp, Fred *Arbitration for the 21<sup>st</sup> Century – a practical guide* (New Zealand Law Society, Wellington, 2001).

Willy, A A P *Arbitration in New Zealand* (Butterworths, Wellington, 1997).

Willy, A A P *Arbitration in New Zealand* (2<sup>nd</sup> ed, LexisNexis, Wellington, 2003).

## **Journal Articles**

Ahdar, Rex Tauati "Slow Train Coming: Religious Liberty in the Last Days" (2009) 12 Otago Law Review 37.

Aslam, Jehan "Judicial Oversight of Islamic Family Law Arbitration in Ontario: Ensuring Meaningful Consent and Promoting Multicultural Citizenship" (2006) 38 NYU J Int'l L & Pol 841.

Bakht, Natasha "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women" (2004) 1 Muslim World Journal of Human Rights, Article 7.

Bakht, Natasha "Religious Arbitration in Canada: Protecting Women by Protecting them from Religion" (2007) 19 Can J Women & L 119.

Bakht, Natasha "Were Muslim Barbarians Really Knocking On the Gates of Ontario?: The Religious Arbitration Controversy – Another Perspective" (2006) 82 40<sup>th</sup> Anniv Ed Ottawa L Rev 67.

Bambach, Lee Ann "The Enforceability of Arbitration Decisions Made By Muslim Religious Tribunals: Examining The *Beth Din* Precedent" (2009-10) XXV Journal of Law and Religion 379.

Beaman, Lori "The Myth of Pluralism, Diversity and Vigor: The Constitutional Privilege of Protestantism in the United States and Canada" (2003) 42 Journal for the Scientific Study of Religion 311.

Bhabha, Faisal "Between Exclusion and Assimilation: Experimentalizing Multiculturalism" (2009) 54 McGill LJ 45.

Brown, Donald "A Destruction of Muslim Identity: Ontario's Decision to Stop Shari'a-based Arbitration" (2007) 32 NCJ Int'l L & Com Reg 495.

Griffiths, David "Pluralism and the Law: New Zealand Accommodates the Burqa" (2006) 11 Otago L Rev 281.

Hirschl, Ran and Shachar, Ayelet "The New Wall of Separation: Permitting Diversity, Restricting Competition" (2009) 30 Cardozo L Rev 2535.

Kolig, Erich "A Gordian Knot of Rights and Duties: New Zealand's Muslims and Multiculturalism" (2006) 8 *New Zealand Journal of Asian Studies* 45.

Kolig, Erich and Shepard, William "Introduction: Muslims in New Zealand" (2006) 8 *New Zealand Journal of Asian Studies* 1.

Kymlicka, Will "Canadian Multiculturalism in Historical and Comparative Perspective: Is Canada Unique?" (2003) 13 Const F 1.

Provins, Marie Egan “Constructing an Islamic Institute of Civil Justice that Encourages Women’s Rights” (2005) 27 Loy LA Int’l & Comp L Rev 515.

Razack, Sherene H. “The ‘Sharia Law Debate’ in Ontario: The Modernity/Premodernity Distinction in Legal Efforts to Protect Women from Culture” (2007) 15 Feminist Legal Studies 3.

Reiss, Maria “The Materialization of Legal Pluralism in Britain: Why Shari’a Council Decisions Should be Non-Binding” (2009) 27 Ariz J Int’l & Comp Law 739.

Shachar, Ayelet “Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law” (2008) Theoretical Inq L 573.

Shachar, Ayelet “Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies” (2005) 50 McGill LJ 49.

Shepard, William “New Zealand’s Muslims and their Organisations” (2006) 8 *New Zealand Journal of Asian Studies* 8.

Wolfe, Caryn Litt “Faith-based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and their Interaction with Secular Courts” (2006) 75 Fordham L Rev 427.

## **Official Sources**

### **Appendix to the Journals of the House of Representatives**

Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1985] I AJHR A6.

### **Law Commission Reports**

Law Commission *Arbitration* (NZLC R20, 1991).

Law Commission *Arbitration: A discussion paper* (NZLC PP7, 1988).

Law Commission *Dispute Resolution in the Family Court* (NZLC R82, 2003).

Law Commission *Improving the Arbitration Act 1996* (NZLC R83, 2003).

### **Other**

Boyd, Marion *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (prepared for the Ministry of the Attorney General, Ontario, Canada 2004).

Human Rights Commission *Race Relations in Aotearoa New Zealand: Statement on Race Relations* (Wellington, 2008).

Human Rights Commission *Religious Diversity in Aotearoa New Zealand: Statement on Religious Diversity* (Wellington, 2009).

Statistics New Zealand *QuickStats About Culture and Identity: 2006 Census* (2006).

### **Looseleafs**

Fisher (ed) *Fisher on Matrimonial and Relationship Property* (looseleaf ed, LexisNexis NZ).

Green, Phillip and Hunt, Barbara *Green & Hunt on Arbitration Law & Practice* (looseleaf ed, Thomson Brookers).

Mahoney and Peart (eds) *Brookers Family Law: Family Property* (looseleaf ed, Thomson Brookers).

Mahoney (ed) *Brookers Family Law: Child Law, Volume 1* (looseleaf ed, Brookers).

Webb, PRH and others *Family Law Service* (online looseleaf ed, LexisNexis).

### **Newspaper Articles and Press Releases**

Hope, Christopher and Kirkup, James “Muslims in Britain should be able to live under sharia, says top judge” *Daily Telegraph* (England, 4 July 2008) at 001.

Leslie, Keith “McGuinty rejects Ontario’s use of Shariah law and all religious arbitrations” *The Canadian Press* (Canada, 11 September 2005).

Scrivener, Leslie “New Islamic Institute set up for civil cases” *Toronto Star* (Canada, 12 December 2003) at A04.

Young, Audrey “Clark Calls for Action to Combat Extremism” *New Zealand Herald* (New Zealand, 27 December 2006).

### **Internet Materials**

#### **Specific**

Boshier, Peter “Dispute Resolution in the Family Court – LEADR Conference” (2007) Family Court of New Zealand <[www.justice.govt.nz/courts/family-court/publications](http://www.justice.govt.nz/courts/family-court/publications)>.

Canadian Broadcasting Corporation (CBC) “Talking Philosophy: Secularism Part 1” (2010) CBC Radio – Ideas <[www.cbc.ca/ideas/episodes/2010/08/03/talking-philosophy-secularism-part-1-listen](http://www.cbc.ca/ideas/episodes/2010/08/03/talking-philosophy-secularism-part-1-listen)>.

Canadian Council of Muslim Women (CCMW) “Position Statement on the Proposed Implementation of Sections of Muslim Law [Sharia] in Canada” (2004) <[www.ccmw.com/activities/act\\_arb\\_muslimlaw\\_sharia](http://www.ccmw.com/activities/act_arb_muslimlaw_sharia)>.



Commonwealth of Australia “Multicultural Australia: United in Diversity” (2003)  
Australian Government - Department of Immigration and Citizenship  
< [www.immi.gov.au/media/publications/](http://www.immi.gov.au/media/publications/)>.

Esposito, John L and others “Islam” *The Oxford Encyclopedia of the Islamic World*  
(2010) Oxford Islamic Studies Online < [www.oxfordislamicstudies.com/article/opr/t236/e0383](http://www.oxfordislamicstudies.com/article/opr/t236/e0383)>.

Fournier, Pascale “The Reception of Muslim Family Law in Western Liberal States”  
(2004) CCMW <[www.ccmw.com/resources/res\\_Position\\_Papers.html](http://www.ccmw.com/resources/res_Position_Papers.html)>.

Government of Canada “Policy and Legislation Concerning Multiculturalism” (2008)  
Citizenship and Immigration Canada < [www.cic.gc.ca/english/departement/laws-policy/multi-policy](http://www.cic.gc.ca/english/departement/laws-policy/multi-policy) >.

Islamic Sharia Council “Islamic Perspective on Child Custody after Divorce” (2010)  
<[www.islamic-sharia.org/children/islamic-perspective-on-child-custody-after-divorce-3.html](http://www.islamic-sharia.org/children/islamic-perspective-on-child-custody-after-divorce-3.html)>.

Muslim Arbitral Tribunal “Family Dispute Cases” (2010) <[www.matribunal.com/cases\\_faimly.html](http://www.matribunal.com/cases_faimly.html)>.

New Zealand Ministry of Justice “About the Family Court” (2010) Family Court of  
New Zealand <[www.justice.govt.nz/courts/family-court/about](http://www.justice.govt.nz/courts/family-court/about)>.

New Zealand Ministry of Justice “Glossary” (2010) Family Court of New Zealand  
<[www.justice.govt.nz/courts/family-court/about/glossary](http://www.justice.govt.nz/courts/family-court/about/glossary)>.

No Religious Arbitration Coalition “Original Declaration on Religious Arbitration in  
Family Law & Membership” (2005) YWCA Toronto at 1 < [www.ywcatoronto.org/](http://www.ywcatoronto.org/)>.

## **General Websites**

Centre for Interfaith Dialogue (CIDE) <[www.cide.org.nz](http://www.cide.org.nz)>.

Citizenship and Immigration Canada <[www.cic.gc.ca](http://www.cic.gc.ca)>.

Federation of Islamic Associations of New Zealand (FIANZ) <[www.fianz.co.nz](http://www.fianz.co.nz)>.

Human Rights Commission <[www.hrc.co.nz](http://www.hrc.co.nz)>.

Islamic Sharia Council <[www.islamic-sharia.org](http://www.islamic-sharia.org)>.

Muslim Arbitration Tribunal <[www.matribunal.com](http://www.matribunal.com)>

Office of Ethnic Affairs <[www.ethnicaffairs.govt.nz](http://www.ethnicaffairs.govt.nz)> .

Office of the Race Relations Commissioner <[www.hrc.co.nz/home/hrc/racerelations](http://www.hrc.co.nz/home/hrc/racerelations)>.

One Law for All <[www.onelawforall.org.uk](http://www.onelawforall.org.uk)>.

### **Speeches**

Boshier, Peter, Principal Family Court Judge “Why the Family Court Needs and Early Intervention Process” (speech presented at the Child and Youth Law Conference 2010, The Rydges, Auckland, 22 April 2010).

Phillips, Nicholas of Worth Matravers, Lord Chief Justice of England and Wales “Equality Before the Law” (East London Muslim Centre, London, 3 July 2008).

Williams, Rowan, Archbishop of Canterbury “Civil and Religious Law in England: a Religious Perspective” (Foundation Lecture 2008, Royal Courts of Justice, London, 07 February 2008).

### **Interviews**

Interview with Syed Mumtaz Ali, President of the Canadian Society of Muslims (Rabia Mills, “A review of the Muslim Personal/Family Law Campaign”, August 1995) transcript provided by the Canadian Society of Muslims at <[www.muslim-canada.org/pfl.htm](http://www.muslim-canada.org/pfl.htm)>.

### **Dissertations**

Latu, Alex “A Public/Private Power Play: How to Approach the Question of the New Zealand Bill of Rights Act 1990’s Direct Application Under Section 3(b)?” (LLB (Hons) Dissertation, University of Otago, 2009).

### **Personal Communications**

Carden, David (former president of the Arbitrators and Mediators Institute of New Zealand) to Laura Ashworth regarding the relationship between the PRA and the Arbitration Act (30 August 2010).

Guest, Jim to Laura Ashworth regarding family law arbitration in New Zealand (14 September 2010).

Rasheed, Aarif to Laura Ashworth regarding Islamic arbitral tribunals in New Zealand (17 September 2009).

Ryan, Jodi to Laura Ashworth regarding family law arbitration (25 September 2010).

### **Miscellaneous**

#### **Campaign Materials**

Seltman, Muriel (ed) *Sharia Law in Britain: a threat to one law for all & equal rights* (One Law for All, London, 2010).

### **Unpublished Sources**

Sweet, Joanna “A Matter of Choice? How the Construction of Muslim Women’s Identity Shaped Ontario’s Faith-Based Arbitration Debates” (paper prepared for the 81<sup>st</sup> Annual Conference of the Canadian Political Science Association Carleton University, May 2009).

### **Article Review**

Review by Bill Atkin of Laura Ashworth’s submission to the New Zealand Law Student’s Journal on paper entitled “Should faith-based arbitration play a legitimate role in resolving family law disputes?” (June 2010).