

1-30-2015

## Religious Law, Family Law and Arbitration: Shari'a and Halakha in America

Mohammad H. Fadel  
*University of Toronto*

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Dispute Resolution and Arbitration Commons](#), [Family Law Commons](#), and the [Religion Law Commons](#)

---

### Recommended Citation

Mohammad H. Fadel, *Religious Law, Family Law and Arbitration: Shari'a and Halakha in America*, 90 Chi.-Kent L. Rev. 163 (2015).  
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol90/iss1/8>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [dginsberg@kentlaw.iit.edu](mailto:dginsberg@kentlaw.iit.edu).

# RELIGIOUS LAW, FAMILY LAW AND ARBITRATION: SHARI'A AND HALAKHA IN AMERICA†

MOHAMMAD H. FADEL\*

## INTRODUCTION

Western democracies in recent years have witnessed dramatic and often highly-charged debates regarding Islamic law, women, and the limits of pluralism in a liberal polity. Perhaps the most relevant of these debates was the Shari'a Arbitration controversy of Ontario, Canada in 2004–2005 (Shari'a Arbitration controversy). Although other religious groups in Ontario had long made use of private arbitration for the resolution of intra-communal family disputes, a transatlantic controversy erupted when a group of Sunni Muslims announced their intent to establish a mechanism to allow Sunni Muslims to arbitrate their family law disputes in accordance with their understanding of Islamic law. This controversy was resolved only when Ontario took the drastic step of prohibiting the arbitration of all family law disputes in which the arbitrator purported to apply non-Canadian law.<sup>1</sup> Great Britain, too, experienced its own moment of Islamic law anxiety when the Archbishop of Canterbury suggested that British commitments to pluralism might require the English legal system to recognize certain aspects of Islamic law.<sup>2</sup> That controversy was subsequently

† This article is from my Keynote Lecture at the “Shari'a and Halakha in America” Conference held at the Institute for the Humanities, University of Illinois at Chicago, from April 15-16, 2013.

\* Mohammad H. Fadel is the Canada Research Chair for the Law and Economics of Islamic Law and an Associate Professor of Law at the University of Toronto Faculty of Law.

1. Numerous academic articles have been published in response to the Shari'a Arbitration controversy. See, e.g., Natasha Bakht, *Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and Its Impact on Women*, 1 MUSLIM WORLD J. HUM. RTS. 1 (2004); Anver M. Emon, *Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation*, 87 CANADIAN B. REV. 391 (2009); Jean-Francois Gaudreault-DesBiens, *The Limits of Private Justice? The Problems of the State Recognition of Arbitral Awards in Family and Personal Status Disputes in Ontario*, 16 WORLD ARB. & MEDIATION REP. 18 (2005); Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES L. 573 (2008); Melissa S. Williams, *The Politics of Fear and the Decline of Multiculturalism*, in THE TIES THAT BIND: ACCOMMODATING DIVERSITY IN CANADA AND THE EUROPEAN UNION 53 (John-Erik Fossum et al. eds., 2009). For a critical overview of the reaction to the controversy related to Islamic arbitration, see Natasha Bakht, *Were Muslim Barbarians Really Knocking on the Gates of Ontario?: The Religious Arbitration Controversy—Another Perspective*, 2006 OTTAWA L. REV. (40th Anniversary Ed.) 67.

2. See, e.g., John F. Burns, *Top Anglicans Rally to Besieged Archbishop*, N.Y. TIMES, Feb. 12, 2008, <http://www.nytimes.com/2008/02/12/world/europe/12canterbury.html> (discussing the controversy

heightened when it was revealed that British Muslims had already set up judicial councils that engaged in legally binding arbitration of family law disputes pursuant to British law.<sup>3</sup>

The debates surrounding whether to permit binding family law arbitration, particularly when such arbitrations are based on religious or otherwise non-liberal legal systems, raise many important and difficult questions from the perspective of liberal political theory. It forces a confrontation between various core values within the liberal tradition, particularly, gender equality and religious freedom, or even more generally, the conflict or potential conflict between liberalism's egalitarian commitments and its commitments to personal and associational autonomy.

This essay will attempt to answer the question, whether the results of religiously-based family law arbitration should receive legal recognition from the perspective of the principles of political liberalism. I will begin with a discussion of the role of the family within political society as set out by John Rawls in *The Idea of Public Reason Revisited*. Second, I will discuss why religious conceptions of the family will necessarily conflict in certain respects with the politically liberal conception of the family, using certain examples from some aspects of Muslim family law. Third, I will discuss Rawls' conception of reflective equilibrium, and argue that arbitration is, from an institutional perspective, an effective tool or even a catalyst for generating a reflective equilibrium between public conceptions of justice and non-conforming conceptions of justice, including religious ones. I will illustrate this by discussing Islamic conceptions of distributive justice within the family and comparing them to the default norms that apply in North America. I will conclude with a discussion of whether arbitration, in fact, can act as an effective tool for protecting the autonomy of individual religious believers while vindicating the liberal commitments to the political role of the family in a democracy.

that erupted in Britain as a result of Archbishop Rowan Williams' speech where he stated that recognizing certain elements of Islamic law would be consistent with British law); Rowan Williams, Archbishop of Canterbury, Archbishop's Lecture—Civil and Religious Law in England: A Religious Perspective, Address Before the Royal Courts of Justice (Feb. 7, 2008), available at <http://rowanwilliams.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective>.

3. Abul Taher, *Revealed: UK's First Official Sharia Courts*, SUNDAY TIMES (U.K.), Sept. 14, 2008, available at EBSCOhost 7EH4103866205. For more information on the operation of the Muslim Arbitration Tribunal in the United Kingdom, see MUSLIM ARBITRATION TRIBUNAL, <http://www.matribunal.com> (last visited Nov. 7, 2014).

## I. EQUALITY IN THE FAMILY AND POLITICAL LIBERALISM

During the Shari'a Arbitration controversy in Ontario, one of the central objections to the legal recognition of Islamic family law arbitrations was that Islamic law would conflict with Canadian commitments to gender equality within the family.<sup>4</sup> The meaning of equality within the family, however, remains deeply contested, even among liberals. And even religions that are commonly viewed as endorsing a patriarchal family structure have their own conceptions of gender equality. Islam, for example, teaches its followers about the equal moral worth of men and women, and the New Testament states that men and women are "all one in Christ Jesus."<sup>5</sup>

Equality, therefore, can mean radically different things, especially in connection with its application to particular disputes. Numerous plausible (though incompatible) theories regarding the family exist, which are consistent with some theory of liberal equality. For example, one could take the view that gender equality in marriage should be viewed as a matter of distributive justice. In that case, equality means that men and women should receive an equal share of the benefits of married life. One potential drawback of such a conception, however, is that it would not exclude marriages organized around a gendered division of labor, if such a marriage resulted in an equal (or relatively equal) sharing of the burdens and benefits of marriage.<sup>6</sup> Alternatively, equality within the family could produce a conception of marriage as "an egalitarian liberal community" that "resists individual accounting" of desert.<sup>7</sup> But such a conception would preclude traditional homemakers from receiving any tangible rewards for non-market services they perform in the household.<sup>8</sup> Some feminists, however, argue that marriage should be treated in a manner analogous to a partner-

4. See, e.g., Anna C. Korteweg, *The Sharia Debate in Ontario*, 18 ISIM REV. 50, 50-51 (Autumn 2006).

5. Quran, *Al 'Imrān* 3:195 ("And so their Lord answered their prayers, saying 'I suffer not the loss of the deeds of any of you, whether male or female; you are of one another.'") (author's translation from original Arabic); *Al-Nisā'* 4:124 ("Whosoever does a righteous deed, whether male or female, and is a believer, they shall enter Paradise . . .") (author's translation from original Arabic); *Galatians* 3:28 (New International Version).

6. Empirical evidence in fact suggests that traditional marriages are more likely to produce this result than most two-wage earner couples. Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 519 (1998).

7. Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 77-79 (2004).

8. Frantz and Dagan argue that any attempt to value the individual contributions of each member to the marital estate would inevitably undermine the communal ethic, which underwrites the marital venture. *Id.* at 89-90. While there must be limits on exploitation of the asymmetric contributions of one of the partners, the ideal of community according to them cannot be realized in the absence of a sense of vulnerability. *Id.* An ethic of desert that would guarantee the monetary value of all contributions to the marriage would destroy this aspect of marital community. *Id.*

ship, in which case equality would require valuing the individual contributions of each spouse to the family, including the non-monetary contributions historically provided by wives, namely child rearing and housework.<sup>9</sup> If “care work” is monetized, though, it might encourage women to continue to specialize in household rather than market production.<sup>10</sup> This would have the unintentional effect of reinforcing the gendered-division of labor that many feminists have traditionally sought to eliminate.<sup>11</sup>

Political liberalism does not attempt to determine which of these liberal (or non-liberal) conceptions of equality is correct. It instead regulates the family from the perspective of what is required “to reproduce political society over time” in a manner consistent with its ideal of treating all citizens as “free and equal.”<sup>12</sup> Because the family is part of political society’s basic structure, labor inside the family is “socially necessary labor.”<sup>13</sup> On Rawls’ account, however, the family is an association<sup>14</sup> and therefore “political principles of justice—including principles of distributive justice—[do not] apply directly to the internal life of the family.”<sup>15</sup> They are relevant only in a negative sense, meaning that the basic rights of women as citizens place limits on permissible forms of family organization.<sup>16</sup> The public constraints of justice on matters of internal associational life must not be so severe, however, as to constrain “a free and flourishing internal life [of the association].”<sup>17</sup>

Rawls’ analysis of the family effectively places it in a median position between public institutions (to which the principles of justice apply directly) and associations (to which the principles of justice require only a right of exit). On the one hand, the family, because of its essential role in the reproduction of political society over time, is part of the basic structure of society. On the other hand, it is a voluntary association and therefore the principles of justice do not apply to it in the same way that the principles of justice constrain a wholly public institution, such as the legislature or

9. Cynthia Lee Starnes, *Mothers, Myths, and the Law of Divorce: One More Feminist Case for Partnership*, 13 WM. & MARY J. WOMEN & L. 203, 232–233 (2006).

10. Philomila Tsoukala, *Gary Becker, Legal Feminism, and the Costs of Moralizing Care*, 16 COLUM. J. GENDER & L. 357, 421–22, 425 (2007).

11. *Id.*

12. John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 779–80 (1997).

13. *Id.* at 788.

14. *See generally*, JOHN RAWLS, POLITICAL LIBERALISM 40–43 (2005) (describing “association” as a kind of voluntary ordering within political society that, because of its voluntary nature, is entitled, among other things, to offer different terms to different persons in the association).

15. Rawls, *supra* note 12, at 790.

16. *Id.* at 789–90.

17. *Id.* at 790.

courts. Rawls' analysis of the family within political liberalism has important implications for equality within a system of family law that is politically liberal: it tolerates the continued existence of inequality within the family, but on the condition that such inequality "is fully voluntary."<sup>18</sup> Religiously justified hierarchies of the family, therefore, are consistent with the principles of justice if the background conditions of political justice are met.

According to Rawls, the only gender-based inequality that must be abolished as a matter of the principles of justice is that which is involuntary.<sup>19</sup> Religiously justified inequality satisfies the voluntariness requirement because adherence to religion in a politically liberal regime is, by definition, voluntary. While Rawls appears indifferent as to whether the burdens of labor in the family should be shared equally between men and women, or whether it is enough for women to be fairly compensated for taking on a disproportionate share of such labor, he insists that justice requires that one of these two possibilities be satisfied.<sup>20</sup>

Therefore, for Rawls, family law plays a secondary role in guaranteeing gender equality, because women enjoy all the basic rights of citizens and also have access to the material means necessary to allow them to make effective use of their liberties and opportunities.<sup>21</sup> In such circumstances, any residual gender-based inequality can be assumed to be voluntary. From a "Rawlsian" perspective, therefore, what is crucial is that women are fairly compensated for any additional work they take on with respect to reproductive labor (measured against a hypothetical baseline of reproductive labor that reflects a gender-neutral division of labor). If this is the case, and the background political conditions are otherwise just, political liberalism has nothing to say about the internal organization of the family, even one that explicitly endorses a gendered division of labor.<sup>22</sup>

18. *Id.* at 792 ("[A] liberal conception of justice may have to allow for some traditional gendered division of labor within families—provided it is fully voluntary and does not result from or lead to injustice."). Rawls further explains that an action is only "voluntary" if it is rational from the perspective of the actor and "all the surrounding conditions are also fair." *Id.* at 792 n.68.

19. *Id.* at 792.

20. *Id.* at 792–93.

21. RAWLS, *supra* note 14, at 469–71.

22. One might object to this conception of the family because it does not sufficiently take into account the effect upon children of growing up in a family organized around principles of gender hierarchy. Presumably, Rawls' reply would be that children are also exposed to the principles of justice through mandatory public education, and therefore a family organized around principles of gender hierarchy would not be free to insulate their children from the egalitarian norms of public reason. See *id.* at 199–200.

## II. CONFLICTING VALUES BETWEEN RELIGIOUS AND POLITICALLY LIBERAL CONCEPTIONS OF THE FAMILY

Political liberalism regulates the family with the purpose of insuring that it nurtures the next generation of citizens in a fashion that is consistent with basic constitutional values.<sup>23</sup> Religious conceptions of the family, by contrast, are generally organized around much broader concerns, such as promoting that religion's particular way of life, including its conception of the good, and in the case of salvation religions, preparing the ground for its members' ultimate salvation. The much broader concerns of religious regulation of marriage are reflected in the importance that traditional religions accorded marriage, which was often viewed as a relationship that included both secular and other-worldly concerns.<sup>24</sup>

In the case of Islam, marriage is viewed as so significant to one's standing as an upright member of the community that it is often referred to as "half of religion."<sup>25</sup> Marriage is viewed as indispensable to an individual's spiritual well-being because, among other things, it allows for the licit expression of sexual desire. It is also generally productive of a thick web of family relations, not only because most marriages will produce children, but because it is expected that marriage will generate important ties of social (and moral) solidarity between the families of the spouses.

At the same time, however, marriage represented a critical secular institution that was probably more important to the lives of its members than any other institution with which an individual interacted. Marriage involved the formation of a household and generally triggered substantial transfers of property. Marriage imposed a regime of economic rights and responsibilities among the members of the household (and sometimes others in an extended family relationship); established rules for the intergenerational transfer of wealth; rules for affiliating children to parents and assigning financial and nurturing responsibility over them; and rules for the

23. Rawls, *supra* note 12, at 779. ("[T]he government would appear to have no interest in the particular form of family life, or of relations among the sexes, except insofar as that form or those relations in some way affect the orderly reproduction of society over time.")

24. The Roman Catholic Church, for example, regulated marriage through the institution of Canon Law, even though Canon Law in principle only applied to the internal operation of the Church, on the theory that marriage itself was a religious sacrament. See D. L. D'AVRAY, *MEDIEVAL MARRIAGE: SYMBOLISM AND SYMBOLISM* (2005), for a detailed discussion of the sacramental nature of marriage in Catholic religious doctrine and its impact on the development of family law in Latin Christendom.

25. See, for example, 9 IBN ḤAJAR AL-ʿAṢQALĀNĪ, *FATH AL-BĀRĪ SHARḤ ṢAḤĪḤ AL-BUKHĀRĪ* 138 (ʿAbd al-ʿAzīz b. Bāz ed., Dār al-Kutub al-ʿIlmiyya 1989) (Leb.).

dissolution of households, along with a substantial body of rules governing ongoing economic relations among the former members of the household.<sup>26</sup>

In considering how Islamic conceptions of marriage interact with liberal ones, therefore, it is always crucial to distinguish, to the extent possible, those Islamic commitments that are religious in nature from those that are more narrowly legal. Islam, as a legal system, regulates the formation of marriage contracts by stipulating who has the capacity to enter into such contracts, the conditions for the validity of such contracts, and the remedies for defective marriage contracts as well as breaches of the marriage contract.<sup>27</sup> Because of the existence of legal pluralism within Islamic law, numerous potential answers exist to these questions, some of which may be more in conformity with liberal values of equality than others.<sup>28</sup>

As a general rule, Islamic law's conception of family law was highly structured by gender, with men and women assigned different rights and obligations within the household—men were generally expected to specialize in economic production outside the household while women were expected to specialize in domestic and reproductive labor inside the household.<sup>29</sup> Islamic law also afforded men the prerogative to divorce their wives at will as well as the right to marry another woman while remaining married to their first wife, without recognizing a reciprocal right in the wife.<sup>30</sup> Men also had a qualified right to discipline their wives, including the privilege to use force in limited circumstances.<sup>31</sup> Inheritance rules provided that males of the same class would receive twice as much as a similarly situated female, e.g., a widower would receive one-fourth of the estate of his deceased wife, while a widow would receive only one-eighth of the estate of her deceased husband. Sons also received twice the share of simi-

26. For a brief overview of Islamic family law and the various rights and obligations that are produced by virtue of marriage, see JOSEPH SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* 161–74 (1964) and WAEL HALLAQ, *SHARI'A: THEORY, PRACTICE, TRANSFORMATIONS* 271–95 (2009).

27. HALLAQ, *supra* note 26, at 271–80.

28. For a discussion of the differences between various schools of Islamic law as to marital rights and obligations, see Mohammad H. Fadel, *Political Liberalism, Islamic Family Law and Family Law Pluralism*, in *MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION* 164, 175–78 (Joel A. Nichols ed., 2012) (stating that some legal positions are more compatible with liberal family law than others).

29. For some of the gender-based rules that characterize Islamic family law, see HALLAQ, *supra* note 26, at 277 (husband's dower obligation and right to marry up to four women simultaneously). See also *id.* at 278–79 (difference of right to sexual enjoyment depending on gender); *id.* at 279 (husband's obligation to maintain the wife out of his property and earnings); *id.* at 280 (husband's prerogative to dissolve the marriage unilaterally); *id.* at 287–88 (rules governing child custody and husband's obligation to maintain the wife).

30. *Id.* at 163–65.

31. SCHACHT, *supra* note 26, at 166.

larly situated daughters.<sup>32</sup> The rules governing custody and guardianship of minor children were similarly gendered. For example, upon the dissolution of a marriage, the mother would generally be awarded custody of the couple's minor children, but upon the children reaching a specified age, which differed for sons and daughters, the father would become the custodial parent.<sup>33</sup> In all cases, the father was entrusted with guardianship over the children from the time of their birth until they became legal adults.<sup>34</sup>

The gendered-structure of rights within the family could be remedied to a certain extent, however, with contractual stipulations of the parties to a marriage contract. A woman could obtain a condition within the marriage contract that prohibited her husband from exercising his right to marry a second wife without her approval; alternatively, a woman could require her husband to give her a right to divorce upon his taking a second wife, or give her the option in this circumstance either to divorce herself or the second wife.<sup>35</sup> She could also stipulate the right to divorce her husband at will, at least according to the Ḥanafis.<sup>36</sup> Likewise, the gendered rules of inheritance law could be circumvented through other means of intergenerational wealth transfers, such as *inter vivos* gifts, which were subject to a norm of equality without regard to gender, or trusts, which permitted the founder to specify with great freedom which persons—heirs, and non-heirs—would receive his property.

Religious norms, however, emphasized the spiritual element of marriage, such as the notion prevalent among some Muslims that marriage is a ritual that has otherworldly significance in addition to its secular functions.<sup>37</sup> This ritualistic view of marriage, in turn, encouraged an ethic of sacrifice and self-abnegation, particularly among females, in the name of preserving the family, and promised women special religious merit for patiently bearing with abusive husbands, for example.

Religious ideals also influenced the way jurists interpreted provisions in marriage contracts. Instead of interpreting contractual provisions using an assumption of arm's-length bargaining, which is appropriate for commercial contracts (*mushāḥḥa*), they interpreted stipulations in marriage

32. HALLAQ, *supra* note 26, at 292.

33. *Id.* at 287.

34. Mohammad Fadel, *Reinterpreting the Guardian's Role in the Islamic Contract of Marriage: The Case of the Maliki School*, 3 J. ISLAMIC L. 9 (1998) (discussing preconditions for a minor's emancipation from his or her father's guardianship).

35. Fadel, *supra* note 28, at 164, 179–80.

36. 3 IBN 'ĀBIDIN, RADD AL-MUḤTĀR 'ALĀ AL-DURR AL-MUKHTĀR 329 (Dār al-Fikr 1992) (Leb.) (*nakaḥāhā 'alā amrahā bi-yadhīhā ṣaḥḥā* [If a man marries a woman on the condition that she can divorce herself, it is valid]).

37. Fadel, *supra* note 28, at 181–82.

contracts under an assumption that marriage contracts should be construed pursuant to a norm of mutual generosity (*mukārama*).<sup>38</sup> At times, such an assumption could be favorable to women, like the rule adopted by one school of Islamic law that breaches of representations that were irrelevant to the wife's ability to perform the marriage contract (e.g., physical virginity) were not legally actionable. At other times, such an assumption could be disadvantageous to women, as illustrated by the rule that a woman's contributions to household expenses, though legally a loan to the husband, would be deemed gifts if the wife failed to enforce her claim against her husband in a timely fashion.

Despite the gendered nature of Islamic law, I have argued elsewhere that there are good reasons to believe that many of these gendered rules do not represent categorical Islamic commitments, nor is it implausible to believe that Muslim citizens of liberal regimes would be more inclined to adopt interpretations of Islamic law that are more in line with values of gender egalitarianism. I have also argued that the very same extra-legal religious discourse that was used in the pre-modern period to justify an ethic of self-sacrifice can be expected to take a different, more egalitarian turn in the context of liberal regimes, where even religiously conservative Muslims tend to interpret the religious aspects of marriage in a more gender-egalitarian fashion.<sup>39</sup> The question here is whether the arbitration of family law disputes can be viewed as a normatively justified institutional solution to the conflict between liberal family law norms and religious family norms, and its potential to encourage the adoption of more liberal interpretations of Islamic family law and religious conceptions of the family.

### III. FAMILY LAW ARBITRATION AND POLITICAL LIBERALISM

As discussed above, political liberalism, in its "Rawlsian" conception, recognizes a certain degree of pluralism within the family. Pluralism is tolerated within the family because the role of the family, from the political perspective, is limited to contributing to the reproduction of political society, literally and morally. Permissible forms of family life, therefore, may be restricted in light of those goals, but otherwise the equal freedom of individual citizens means that they should be able to pursue their differing conceptions of what constitutes a good family life as an inherent part of their right as citizens to pursue their rational conceptions of the good. This is

38. *Id.* at 182.

39. *Id.* at 183–84.

particularly important for religious citizens, in light of the central role that family plays in religious conceptions of the good.<sup>40</sup>

The fact that religious communities are permitted to pursue their rational conceptions of the good within their families, however, does not necessarily support recognizing a right to arbitrate family disputes pursuant to the norms of that religious community. I do not argue that political liberalism mandates recognition of such a right. Still, recognition of a qualified right to arbitrate family law disputes in accordance with the internal norms of a religious community, whether properly religious or otherwise, is deeply consistent with the ideals of political liberalism. In fact, it may be an ideal institution for effecting the kind of interaction between the public principles of justice and the internal norms of various religious communities that may reject some applications of those norms.

One of the central values of political liberalism, indeed, perhaps its most crucial value, is the hope to generate terms of political justification to which all reasonable citizens can agree. Rawls derived his account of the principles of justice by using the heuristic of the “veil of ignorance,”<sup>41</sup> but in order for such an arrangement to become practical in the real social world, it is necessary for a reflective equilibrium to exist in the minds of reasonable citizens that reconciles their personal convictions with the principles of justice.<sup>42</sup> As Rawls describes it, a reflective equilibrium results from a dialectical process between our considered convictions and the results of our theoretical inquiry resulting from the original position. It comes into existence when “our principles and judgments coincide,” but even after reflective equilibrium is reached, “[i]t is liable to be upset by further examination of the conditions which should be imposed on the contractual situation and by particular cases which may lead us to revise our judgments.”<sup>43</sup>

Just as Rawls envisions individuals engaging in a dialectic between their subjective ethical commitments and the results of their philosophical inquiry until the two reach a kind of equilibrium, it is possible to imagine a similar process taking place between the public institutions of justice and the internal norms of a religious community. Public arbitration provides an institutional forum in which a dialectical process helps to generate a “re-

40. See generally D'AVRAY, *supra* note 24.

41. RAWLS, *supra* note 14, at 22–28 (describing the “original position” as decisions as to society’s basic structure, under the assumption that individuals are ignorant of their particular social circumstances).

42. JOHN RAWLS, A THEORY OF JUSTICE 19–21 (1971) (describing the process by which actual convictions and theoretical convictions are brought into accordance through a process of mutual reflection).

43. *Id.* at 20–21.

flective equilibrium,” or to use Rawls’s term in *Political Liberalism*, an “overlapping consensus.”<sup>44</sup> Binding arbitration can perform this function of deepening an overlapping consensus with respect to a liberal society’s political commitments to both religious freedom and gender equality because it empowers private parties to adjudicate their disputes pursuant to their own rules, provided that the results of the arbitration do not contradict mandatory principles of justice.

The process of binding family law arbitration, therefore, mirrors, in institutional terms, the relationship between the family and the principles of justice as envisioned by Rawls; pluralism, while presumptively permissible within the family, is subject to the limits demanded by the principles of justice. Accordingly, arbitration, far from insulating a religious community’s practices from the principles of justice, acts to confirm that a community is applying its norms in a manner consistent with the requirements of justice. Binding family law arbitration, particularly when performed by religious communities, also provides public institutions, as represented by courts, an opportunity to determine whether mistakes have been made in the formulation of the principles of justice. It thus provides a means for practical adjustments to mandatory legal rules by forcing the legal system to confront new circumstances and justifications that it had not perhaps considered when it formulated its rules.

Arbitration, it should be clear, is limited to such issues as the parties themselves have the legal authority to resolve by consensual agreement. The right to submit family law disputes to binding arbitration is therefore an extension of the parties’ own contractual freedom. It is also limited by the contractual nature of arbitration; the parties to a dispute cannot arbitrate, for example, the rights of third parties, like children, or matters of criminal law or civil status, such as granting a divorce. What this means, in practice, is that binding family law arbitration is generally limited to financial matters between spouses, such as division of marital property and future support obligations.

#### IV. COMMON OBJECTIONS TO, AND CRITICISMS OF, RELIGIOUS FAMILY LAW ARBITRATION

Many who are opposed to recognizing binding Islamic family law arbitrations have pointed to the disparate rights given to men and women under Islamic family law to justify their position without considering whether those discriminatory rules would ever be relevant to a binding

44. *Id.*; RAWLS, *supra* note 14, at 133–71.

family law arbitration in a liberal jurisdiction such as the United States or Canada. For example, Islamic law's gendered approach to child custody and divorce could never be implicated in an Islamic family law arbitration in either the United States or Canada because the arbitrator lacks the power to grant or deny divorce or to resolve questions of child custody. Islamic law, however, does include its own rules regarding the distribution of marital assets and post-marital support obligations that are inconsistent with the prevailing approach to these questions in North America. First, there is no concept of marital property in Islamic law; both parties enter the marriage with their own property entitlements intact, with some qualifications that are of little importance in this context.<sup>45</sup> Second, so long as the marriage remains intact, the husband is under a non-waivable obligation to maintain his wife.<sup>46</sup> He is also under an absolute obligation to maintain his children until they reach the age of majority, in the case of minor boys, or until they marry, in the case of minor girls.<sup>47</sup> Third, upon dissolution of the marriage, the husband's obligation to maintain his wife for all practical purposes ends, although he is encouraged to give his former wife a departing gift.<sup>48</sup>

To what extent does political liberalism require some kind of equitable distribution of household assets as a condition to respecting the parties' private resolution of their claims? Rawls suggests that political liberalism does impose such a duty. He states in *The Idea of Public Reason Revisited* that because reproductive labor and household labor are both socially productive, women must be compensated in one form or another for such labor.<sup>49</sup> Moreover, he suggests that the preferred mode for compensating women for their specialization in household and reproductive labor is to award them the equivalent of a partner's interest in their husband's earnings during the marriage:

But a now common proposal is that as a norm or guideline, the law should count a wife's work in raising children (when she bears that burden as is still common) as entitling her to an equal share in the income that her husband earns during their marriage. Should there be a divorce,

45. SCHACHT, *supra* note 26, at 167. For a brief overview of the operation of Islamic property law in the context of the family, see Fadel, *supra* note 28, at 188–90.

46. Fadel, *supra* note 28, at 188–89.

47. SCHACHT, *supra* note 26, at 168.

48. This follows from the fact that upon divorce, the former spouses stand in a relationship of strangers to one another, and the general Islamic rule regarding maintenance, i.e., that no stranger has a duty to maintain another stranger, applies.

49. Rawls, *supra* note 12, at 788 (“reproductive labor is socially necessary labor”); *id.* at 792–93 (“If a basic, if not the main, cause of women's inequality is their greater share in the bearing, nurturing, and caring for children in the traditional division of labor within the family, steps need to be taken either to equalize their share, or to compensate them for it.”).

she should have an equal share in the increased value of the family's assets during that time.

Any departure from this norm would require a special and clear justification. It seems intolerably unjust that a husband may depart the family taking his earning power with him and leaving his wife and children far less advantaged than before. Forced to fend for themselves, their economic position is often precarious. A society that permits this does not care about women, much less about their equality, or even about their children, who are its future.<sup>50</sup>

Yet, this is what Islamic law appears to do; upon dissolution of the marriage, the husband is entitled to depart with his earning power. It is far from clear, however, that Islamic law's refusal to recognize an ongoing post-divorce maintenance obligation akin to traditional alimony, or an obligation to allow the wife to share in the increased value of the family's assets during the term of the marriage, inevitably leads to the stark conclusion that Islamic law "does not care about women, much less about their equality, or even about their children."<sup>51</sup> Indeed, it would be extremely implausible to believe any society could long exist if it were truly indifferent to the fate of its women and children in the manner Rawls seems to suggest might be the case if the rule he suggests is not adopted.

While it is certainly true that as a default matter, most jurisdictions in North America adopt a presumption of equal sharing of assets acquired during a marriage,<sup>52</sup> parties are permitted to depart from this norm, whether by entering a valid pre-nuptial contract, or pursuant to a settlement agreement concluded at the time of divorce. In both cases, so long as the terms of the agreements are untainted by unconscionability, courts will enforce them in accordance with their terms.<sup>53</sup>

The recent Canadian case, *Quebec (Attorney General) v. A*, confirmed the willingness of liberal jurisdictions to tolerate property divisions which vary widely from the default norm of equality.<sup>54</sup> In this case, the appellant challenged the constitutionality of Quebec's rules governing division of family assets insofar as their provisions applied only to *de jure* but not *de facto* spouses. The appellant and her partner lived together for many years and had three children when they separated. The appellant argued that she should be entitled to the same legal benefits a divorcing *de jure* spouse would receive, and that Quebec's failure to extend such benefits to her

50. *Id.* at 793.

51. *Id.*

52. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.09(1) (2002).

53. *Id.* §§ 7.01–7.11 (2002) (setting out rules governing marital agreements).

54. *Quebec (Att'y Gen.) v. A*, [2013] 1 S.C.R. 61, 73–74 (Can. Que.).

amounted to a violation of the Canadian Charter's guarantee of equal treatment as provided in Section 15. The Court, in large part, rejected her argument on the grounds that to impose the property regime attached to *de jure* marriage to *de facto* relationships would amount to an unjustifiable interference in the autonomy of the parties.<sup>55</sup>

Moreover, not all scholars are convinced that an equal sharing of marital surplus is the appropriate rule rather than, for example, a norm based on unjust enrichment. Under an unjust enrichment model, one spouse, the husband for example, would compensate the wife for the value of the services she provided to the household during the term of the marriage, as well as the opportunity costs she incurred for specializing in household production.<sup>56</sup> From an *ex ante* perspective, it is not clear which rule would consistently further the equality of women who specialize in household and reproductive labor. For example, if the woman is fortunate enough to marry a successful professional, the sharing rule recommended by Rawls might make her better off than a rule based on unjust enrichment, unless the couple failed to amass significant household assets because they preferred to consume the husband's income immediately. When marital assets are scarce, either because the husband did not generate significant income or because the couple dissipated his earnings, the wife would clearly be better off with a remedy that simply compensated her for her contributions to the household, without regard to the value of the household's wealth.

The above example illustrates that, unless women are given an option to choose which of the two remedies makes them better off *ex post*, a possibility that itself seems unfair, Rawls was perhaps a bit optimistic when he suggested that a strong rule in favor of equal sharing should be mandatory. Perhaps the most straightforward answer to the problem of female specialization in household and reproductive labor would be the recognition that the public has a duty to compensate household and reproductive labor, at least insofar as we accept Rawls' characterization of such labor as "socially necessary" labor. Reliance on the redistribution of private resources from the male partner to the female is too contingent on the *availability* of such

55. *Id.* at 190.

56. Elizabeth S. Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 VA. L. REV. 1225, 1277 (1998) (arguing that, *ex ante*, parties might very well rationally opt to treat the contributions of the party specializing in household production to the party acquiring market-valuable human capital as a debt to be repaid at an above-market interest rate rather than an equity investment on account of the risky nature of the investment); *id.* at 1315-16 (suggesting that alimony be structured as compensation for the opportunity cost of specializing in household labor and foregoing, perhaps permanently, opportunities in the labor market).

resources to provide generally effective assurances that women will in fact be compensated for their contribution to the reproduction of political society through their household labor.

Viewed from this perspective, there is nothing necessarily sinister about Islamic law's approach to the distribution of property upon the termination of a marriage. Instead of judging whether a particular distributive norm is, on its face, consistent with the equality of women, it might be more important to determine whether the woman is left in a precarious economic position solely because of the divorce. There are at least two reasons to think this may not be the case if arbitrators applied the Islamic law of property in cases of marital dissolution. First, because Islamic law recognizes the independent property rights of a wife and requires a husband to make a marital gift of property to the wife at the time of the marriage, it could very well be that her marital gift has substantial economic value. Second, because Islamic law does not require a wife to contribute to the household's expenses, if the wife worked outside the home, she might already have a substantial sum of money in her own name that she saved from her own market labor. If, on the other hand, she used her earnings to offset household expenses, it is not unreasonable to believe that a Muslim arbitrator could deem such sums to be loans to her husband, which he must repay at the time of divorce. An arbitral award based on the combination of her marital gift and the economic value of her household contributions could very well prevent the result that rightly concerned Rawls: that divorce should not leave a woman in an economically precarious position, at least in circumstances where she had been an active contributor to the welfare of the household.

Of course, it is possible that an arbitrator applying Islamic law could fail to take into account the wife's non-monetary contributions to the household when he is determining how much household property should be allocated to the wife. This might be a particular risk for stereotypical households characterized by a professional husband who specializes in market labor and a non-professional wife who specializes in domestic and reproductive labor and thus lacks any skills that are valuable in the market. It may even be the case that some Muslim men would prefer to use Islamic law in an effort to minimize the amount they would have to pay to their former spouses. Such a motivation is not in itself wrongful from a political perspective, however, as evidenced by the fact that, generally speaking, only unconscionable pre-nuptial agreements and separation agreements are

unenforceable.<sup>57</sup> Accordingly, so long as the arbitrator's award does not lead to an unconscionable result, it is hard to understand why there should be a principled objection to an arbitration based on principles of Islamic law that leads to an unequal, but not unconscionable, distribution of household property upon divorce.

Others might argue that even if in particular cases application of Islamic family would not produce results that are repugnant to public policy, a liberal state should still refuse recognition of such arbitration because to do so would be to endorse a mode of legal reasoning that, in its broad contours, does not recognize gender equality as a fundamental principle. In other words, to recognize the results of Islamic family law arbitration would amount to an expressive injury insofar as it would uphold the results of a mode of reasoning that is broadly inconsistent with liberal modes of legal reasoning.

This argument might be plausible if Islamic law could be construed as endorsing unequal distribution of household assets as a means of expressing a dogmatic view, for example, that marital breakdown is always the fault of women, and therefore, women must be punished when divorce occurs. In fact, however, the distribution of household assets in Islamic law is a result of gender-neutral principles of property law, which will vary in terms of gender impact in light of the particular circumstances of the spouses. In certain circumstances, for example, the stereotypical case (which drew the attention of Rawls in *The Idea of Public Reason Revisited*) of the high-earning professional male and the woman who specializes in household and reproductive labor and thus is economically dependent upon her husband, the Islamic rules governing division of property upon marital dissolution clearly favors the male relative to the norm of equitable division. In other circumstances, however, Islamic rules could very well favor the female if, for example, the wife works outside the home earning an income equal to, or nearly equal to, that of her husband. She could claim reimbursement against her former husband for any personal funds that she contributed to household expenses. In no circumstances could she be saddled with her equitable share of the household's debts incurred for household expenses or with an obligation to maintain her husband post-divorce.<sup>58</sup> Islamic law's rules governing the distribution of marital assets does not communicate an explicit or implicit message of female inferiority, and in

57. See generally, AMERICAN LAW INSTITUTE, *supra* note 52, § 7.05; Brian H. Bix, *Premarital Agreements in the ALI Principles of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 231, 235-39 (2001).

58. Fadel, *supra* note 28, at 188-89.

many cases could result in a distribution of marital assets that is skewed in favor of the female relative to the norm of sharing espoused by Rawls and other liberals. Accordingly, it is hard to understand on what grounds one might argue that recognition of even substantively fair arbitrations concluded under Islamic law should not be enforced on the grounds that they undermine fundamental commitments to gender equality.

#### V. NEW YORK ARBITRATION LAW AND JEWISH FAMILY LAW AS PRACTICAL EXAMPLES OF POLITICALLY LIBERAL RELIGIOUS FAMILY LAW ARBITRATION

One might concede that, as a theoretical matter, liberal family law ought to permit binding arbitration of family law disputes in accordance with religious norms in the proper case, but nevertheless object on the grounds that, as a practical matter, religiously-grounded arbitration will effectively shield the discriminatory practices of religious communities from public scrutiny. This argument is based partially on the erroneous belief that there is no effective appeal from the results of arbitration. Accordingly, parties to family law arbitration might enter into an agreement that effectively insulates the results of the arbitration from meaningful judicial review. This objection appears to confuse the power of courts to review the substantive decisions of an arbitrator with the power of a court to determine, as a threshold matter, whether a particular legal claim is amenable to arbitration. While it is true that courts are highly deferential to the substantive decisions of arbitrators on the merits of the parties' claims, they review *de novo* the threshold jurisdictional question of amenability to arbitration.

Numerous decisions of New York courts involving disputes between Jewish couples, who submitted or agreed to submit some or all of their family law disputes to Jewish religious courts for resolution, illustrate this dynamic. The New York case law is clear that, as a threshold matter, a court is to determine whether the dispute is amenable to arbitration, for example, that the dispute does not involve some matter of mandatory public law.<sup>59</sup> Because matters such as division of marital assets and post-divorce spousal support are not, as a general matter, subject to mandatory norms of public law, they are presumptively amenable to arbitration, provided the procedural requirements for a valid arbitration are met,<sup>60</sup> and in

59. *Glauber v. Glauber*, 600 N.Y.S.2d 740, 741–42 (N.Y. App. Div. 1993).

60. *Golding v. Golding*, 581 N.Y.S.2d 4 (N.Y. App. Div. 1992) (refusing to enforce an arbitrator's award where court found that wife was compelled to participate as a result of the husband's threat to refuse to grant her a Jewish divorce); *Stein v. Stein*, 707 N.Y.S.2d 754, 759 (N.Y. Sup. Ct. 1999)

these cases, the arbitrator's decision in these matters is binding.<sup>61</sup> Decisions regarding child custody, however, are not amenable to arbitration, because that would violate mandatory public policy, which in New York requires a court to determine custody arrangements in the "best interests of the child."<sup>62</sup> New York courts also specifically enforce the obligation to arbitrate the dispute, even if the arbitration agreement provides for religious norms to govern the arbitration.<sup>63</sup> More controversially, perhaps, New York courts refused to find that an agreement to arbitrate could be set aside on the grounds of duress despite the wife's claim that her religious community would subject her to the threat of "shame, scorn, ridicule and public ostracism" if she did not agree to participate in the arbitration.<sup>64</sup> In short, the jurisprudence of New York courts with respect to family law arbitration seems to enforce agreements to arbitrate and to enforce the results of such proceedings, but only to the extent that the court would enforce the parties' own private agreements.

### CONCLUSION

The New York courts' approach of policing arbitral results on a case-by-case basis for conformity with public policy, and only striking down those elements of an arbitrator's order that actually violate public policy, is consistent with Rawls' conception of a politically liberal family law. This approach understands that the function of public law in the context of the family is to ensure that the internal governance of the family does not deprive any of its members of their fundamental rights as citizens, and as long as that condition is satisfied, a family should enjoy autonomy. The approach of the New York courts contrasts with the approach taken by those who would categorically refuse the recognition of the family law arbitrations applying religious law, in general, or Islamic law, in particular. The success of New York courts in policing family law arbitrations in the Or-

(declining to confirm arbitrator's order where there was no evidence that procedural requirements of arbitration statute were satisfied).

61. See, e.g., *Hirsch v. Hirsch*, 333 N.E.2d 312, 315-17 (N.Y. 1975) (upholding agreement to arbitrate spousal support claims); *Hampton v. Hampton*, 689 N.Y.S.2d 186, 188 (N.Y. App. Div. 1999); *Lieberman v. Lieberman*, 566 N.Y.S.2d 490 (N.Y. Sup. Ct. 1991).

62. *Glauber*, 600 N.Y.S.2d at 742-43. New York courts, moreover, follow a principle of severance in the event that an arbitrator's decision included both permissible objects of arbitration and non-permissible objects of arbitration. *Lieberman*, 566 N.Y.S.2d at 493-96 (upholding decision of rabbinical tribunal granting a religious divorce, dividing marital assets, and awarding child support, but vacating order for joint parental custody).

63. *Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. Ct. App. 1983) (upholding order compelling husband to appear before a rabbinical tribunal pursuant to agreement contained in his *Ketubah*, a Jewish religious marriage contract).

64. *Lieberman*, 566 N.Y.S.2d at 494.

thodox Jewish community suggests that courts could easily do the same for arbitrations conducted pursuant to Islamic law. And as has occurred in the case of Jewish arbitrations, if the Muslim arbitrator rules in a manner that violates mandatory rules of public law, for example, by affirming a property division that is unconscionable, or rules on an issue outside the scope of his jurisdiction, like determining child custody, New York courts are perfectly capable of refusing recognition of *those* awards while affirming only those arbitral awards that are consistent with law.

Equally important, however, is that by enforcing Islamic family law arbitrations in cases where such arbitrations do not conflict with mandatory provisions of public law, arbitration could plausibly act as a catalyst in accelerating internal doctrinal reforms within Muslim communities on crucial questions, such as what constitutes a fair division of property between spouses upon dissolution of the household. If so, arbitration would strengthen the desired overlapping consensus by bringing within its reach communities that might otherwise believe that public norms are contrary to their own principles, and therefore resist them. At the same time, recognition of Islamic law as a legitimate tool for family law arbitration would require secular judges to gain greater familiarity with Islamic law as a legal system, a step that would help normalize Islamic law and remove the stigmas associated with it. To the extent that this is true, recognition of Islamic family law arbitration also helps strengthen the overlapping consensus around robust notions of religious freedom and religious pluralism. Far from undermining social unity, then, family law arbitration, even if conducted under the norms of religious law, seems to be an ideal tool for strengthening it.

