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Faith-Based Arbitration in Canada: The Ontario Sharia Debates

by

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To My Mother and Father
Ghodssi and Mohsen Razavy

Abstract

For years, particular Jewish and Christian groups in Ontario had had the option of opting out of the secular court system with respect to uncomplicated cases of divorce, child custody, and inheritance rights (among other things), instead allowing clerical courts to settle the matters (according to the tenets of their respective religious laws) with decisions that the province recognized as binding. In October of 2003, members of a group called the Islamic Institute of Justice (IICJ) publicly announced that they intended to open a business that would offer Muslims in Canada arbitration of family law matters. The announcement immediately drew fierce opposition both from within the Muslim community and from non-Muslim Canadians alike, quickly thrusting the little known worlds of faith-based arbitration and Sharia law front and center of Canadian public debates. This issue clearly represents one of the most dramatic clashes between religion and state to have occurred in this country in recent years.

Through several key areas of discussion, this dissertation broadly explores this interplay between religious rights and individual civil rights (principally those aimed at gender equality), particularly as they relate to processes of legal pluralism, brought about in part by forces of globalization. Regarding the issue of Sharia arbitration courts, this project argues two key points. First, it argues that Canada, through its various policies and laws, has created a template that enables Islamic Sharia courts to exist. Second, it argues that, despite the controversial nature of Islamic law, the Ontario government fell short regarding its responsibility to take a balanced approach on competing rights between religious freedom and legal justice in banning faith-based arbitration. In an effort to protect women's rights, the Ontario government's ban on all faith-based arbitration essentially ignores its continued, unregulated operation and disregards the significant weight that its decisions carry within segments of the Canadian Muslim community. A third alternative would introduce limited Islamic legal discourse into the Canadian legal framework (under a revised Arbitration Act), resulting in a more formalized, reformed, and transparent system of Canadian Sharia law.

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CHAPTER 1
Introduction

Globalization is a fact of life. But I believe we have underestimated its fragility
-Kofi Annan

We must all obey the great law of change. It is the most powerful law of nature
-Edmund Burke

On a crisp September fall afternoon, about 300 protesters gather at Queen's Park in Toronto, Ontario to campaign against faith-based arbitration. The scene is relatively restrained as far as protests go, punctuated with speeches and intermittent chants of "Shame! Shame!" bellowing from the crowd. Despite the seemingly controlled environment on this afternoon, however, it is evident that these protesters have come with a great degree of passion and intensity, hoping to convince Canadians, perhaps the world—about what they perceive to be the alarming inequity posed by faith-based arbitration—a form of alternative dispute resolution based on religious law. The rally is supposed to be against all faith-based arbitration, a fact that seems to have escaped the minds of many in attendance. Islamic law takes front and center this afternoon.

"This is a slap in the face to all of those who've immigrated to this country in search of a safe haven," declares Samira Mohyeddin, spokesperson

for the Canadian Committee for Democracy in Iran. Implementing faith-based arbitration will undermine the efforts of her parents who brought her to Canada when she was five because they did not want her to live under an Islamic system "where they would, at best, be treated like second-class citizens." When the co-ordinator of the International Campaign Against Sharia, Homa Arjomand, addresses the crowd she states that Ontario Premier Dalton McGuinty is playing a dangerous game that will put "the lives and safety of women and children in danger. Shame!" she yells.

Suddenly the attention of the crowd is drawn to a brief shoving match between an unknown man and Mubin Shaikh, one of the few supporters of faith-based arbitration in attendance. He speaks to the crowd with determination and resolve, "I subscribe to Islam. I've taken Islam as my way of life!" He has come this afternoon with his Polish, Muslim-convert wife, Joanne Sijka. She stands out in the crowd as the only woman wearing a burka. "Why do you have to impose your laws on me?" she questions. From the other side of the park, Wahida Valiante probes as to why it is that Jews and Christians can practice their faith according to faith-based arbitration, but Muslims cannot: "You are creating two classes of citizens: one who have certain rights and other who don't have certain rights" she formidably asserts.

As the afternoon draws on, and both sides continue their back-and-forth wrangling, it becomes clear that belief, irrespective of its designation, drives both sides of the debate. As the sun begins to set on the picturesque

Queen's Park, it also becomes clear that it will be a long time before these two sides will find a point of reconciliation.[1]

Despite the popularity of theories that predicted a move towards secularization, religion continues to thrive (Esposito, 1998; Foreign Affairs and International Trade Canada, 2008; Tehranian, 1997). Far from being extinct, the recent escalation of religious fundamentalism and religious conservatism affirms not only religion's institutional existence, but also its extensive scope. As it always has, religion continues to be a compelling force; it motivates passion, nurtures social ideals, and sustains mass movements. In the social milieu of Western liberal democracies, however, a fine tension continues to exist between the spheres of private and public life.

Arguably, this tension has not always existed, because religion partially provided the basis of modern law. It is significant, therefore, to note that some forms of religion are now being excluded from legal structures. For its part, Canada has long hailed itself as a 'secular' nation, and a nation where explicit division exists between matters pertaining to state and matters pertaining to personal conviction. At the same time, increased globalization has brought with it an influx of people from various backgrounds and various belief-systems who now must negotiate their

[1] Quotes and background information from CTV.ca (2005); Leong et. al., (2005:A.5).

identities and re-interpret their belief-systems to reflect the larger Canadian ethos.

In response to this tension, several faiths in Canada had established formal religious dispute resolution systems. From 1991 until 2005, for example, particular Jewish and Christian groups in Ontario had had the option of opting out of the secular court system with respect to uncomplicated cases of divorce, child custody, and inheritance rights (among other things), instead allowing clerical courts to settle the matters (according to the tenets of their respective religious laws) with decisions that the province recognized as binding.[2] These courts operated quietly and with little fanfare, largely unknown to the Canadian public, but all that was to change. In October of 2003, members of a group called the Islamic Institute of Justice (IICJ), under the leadership of retired lawyer, Syed Mumtaz Ali, publicly announced that they intended to open a business that would offer Muslims in Canada arbitration of family law matters, guided by Islamic principles and laws (Ali, 2003). The announcement immediately drew fierce opposition both from within the Muslim community and from non-Muslim Canadians alike, quickly thrusting the little known worlds of faith-based arbitration and Sharia law front and center in Canadian public debates.

The Debates

As the opening account in this chapter reveals, public discourse surrounding the Sharia debates was both forceful and passionate. Almost

[2] I use Ontario here, because the Arbitration Acts fall under the jurisdiction of provinces.

immediately following the IICJ's announcement, two camps emerged on the debate, with each presenting very differing views on the issue. Audrey Macklin (2006:1), in her assessment of the matter, offered the following stylized narrative, roughly characterizing the positions of either camp:

> Freedom of religion (as guaranteed by s. 2 of the Canadian Charter of Rights and Freedoms) and our commitment to multiculturalism (as endorsed by s. 27 of the Charter) encourages us to respect different faith communities, and the constitutive role that these play in the lives of individual citizens. Islam is not monolithic, static, or intrinsically misogynistic. If people with a given identity group consensually agree to be guided in their private lives by their religious beliefs and to do so within the confines of the existing law (in this case, the Arbitration Act), we should not interfere simply because we may disagree with individual outcomes.
>
> *versus*
>
> Delegating state power to faith-based arbitrators sacrifices Muslim women on the altar of multiculturalism. Given the patriarchal orientation of Islam (or at least the elite who exercise leadership with Muslim communities), arbitration according to Muslim law will systematically disadvantage women and leave them unprotected by the state from the social , physical, financial and emotional harm inflicted in the name of religion. Many Muslim women are newcomers to Canada, unfamiliar with their rights, and especially vulnerable to forms of physical, psychological and material coercion from kin and community. A commitment to the equality of women (as required by s.25 of the Canadian Charter of Rights and Freedoms) requires that Islamic tribunals not be permitted to operate under the Arbitration Act.

In response to the immediate outbreak of opposition over the IICJ's declaration, the government of Ontario requested Ontario's Attorney General at the time--and former Minister responsible for women's issues--Marion Boyd, to conduct a review of arbitration courts in Canada, dealing specifically with the proposed Islamic arbitration court. Boyd submitted her full report

in December 2004, and to the surprise of many, the report *supported* establishing an Islamic arbitration court in Ontario.

Boyd's recommendations did more than simply extract a significant protest—it quickly pitted two charter rights against one another: the rights of individual citizens in a secular nation against the rights of religious followers—both accredited with great importance under the law. In a highly controversial decision (and against Boyd's recommendations), the Ontario government recommended the repeal of the Arbitration Act for all faith groups. With this new legislation, the government no longer recognizes rulings passed in any religious arbitration courts (in other words, the rulings have no standing in civil law).

The issue of Sharia arbitration clearly had both its opponents and the supporters, but the issue seemed to gravitate consistently around the rights of women, and Canada's commitment towards guaranteed equality rights versus guaranteed freedom of religion rights. From this legal perspective, the seemingly disparate views offered by either camp turned out not to be very different at all. Indeed, both sides argued their positions starting from the perspective of basic guaranteed rights.

For instance, endorsers of Islamically based arbitration courts (IBACs) geared many of their arguments towards well-established Canadian laws and policies on religious freedom, multiculturalism, and diversity. For the most part, the arguments presented by proponents centered on rights and freedoms accorded in Canada's highest legal code, the Charter of Rights and

Freedoms. (As this project demonstrates, Canadian laws regarding freedom of religion are designed to protect religious belief and practice, both from other religious beliefs and practices, as well as from non-religion.) Employing the use of some precedent-setting court cases pertaining to the area of religious freedom, supporters argued that by not permitting IBACs, the government was working against Canadian conceptions of religious freedoms on numerous grounds. These grounds included the guarantee that individuals must be able to practice their faiths in the absence of constraints and coercion, and the guarantee that no citizen should be forced to act in a way contrary to his/her belief or conscience. As many proponents of the system argued, the inability to worship God as dictated by the tenets of one's faith (in this case living by the laws of Islam), was a constraint on one's capacity to exercise religious freedom. In the minds of many proponents of faith-based arbitration (FBA), these constraints proved inconsistent with essential freedoms guaranteed by the government and as interpreted through the courts.

Citing section 15 of the Charter, supporters of IBACs also argued that Muslims were entitled to be given equal treatment "before and under the law and have the right to equal protection and equal benefit of the law without discrimination, and in particular without discrimination based on race, national or ethnic origin, colour, RELIGION, sex, age, or mental or physical disability" (Section 15 of Charter as cited by Ali, 2003:3 [capitals in original quote]). On this point, proponents felt that the government had ignored

equal protection both through the application of neutral "secular" laws on religious adherents, and because the government appeared to show preference for one religion over another (as evidenced by the fact that for so many years other faiths had established arbitration courts, and yet Muslims were not extended the same rights).

In addition to legal challenges, proponents of IBACs also stressed through the course of these debates the significant advantages associated with officially establishing binding Sharia courts. Among other things, these benefits included the formalization and legitimization of decisions, increased judicial oversight, and a movement of religious tribunals out of the private sphere and into the public domain. This latter point was of particular importance to proponents of IBACs, because members felt that this movement would enable the development of a more reliable Islamic system of justice that, due to increased public scrutiny, would issue rulings more consistent with existing Canadian legal codes.

At the heart of the arguments presented by endorsers of IBACs, however, remained the significance of Islamic law to the lives of Muslims. As proponents continually emphasised during the course of the debates, for many Muslims, God's law alone is sovereign, and Muslim family law continues to be an integral part of life for many Muslims. In relation to this point, the IICJ stressed the fact that for particular religious groups (such as Muslims), adherents were obliged as part of their faith to follow certain tenets of law. Thus, the issue extended further than simply a matter of

choice--it was a matter of religious obligation, which if left unrealized, might have placed the religious and social lives of adherents in peril. This centrality of religious law in the lives of many Muslims was, perhaps, one of the most telling arguments presented by proponents of IBACs, as it raised interesting questions regarding the continued existence of these courts despite their non-endorsement by the government, and the potential effects that such continued existence would have on some segments of the Canadian Muslim community.

Similar to the proponents, opponents of IBACs too employed the use of Canada's highest legal code--the Charter of Rights and Freedoms--in making their case. For instance, opponents argued that faith-based arbitration, as an alternative legal system, blatantly contradicted equality protection, "without discrimination based on race, national or ethnic origin, colour, religion, sex, age..." as outlined in the Charter (Baqi, 2005:7).

In fact, the issue of gender equality, especially as contested through Islamic law, was the main thrust of virtually all the arguments presented by opponents of FBA. Contending that, for the most part, Islamic law remained a system that was both archaic and male-oriented, opponents argued that the implementation of such an out-dated system of law would undoubtedly work to the detriment of women. For instance, those against the implementation of Sharia law in Canada pointed to issues such as a man's unilateral right to divorce, unequal inheritance rights (where a woman's inheritance is only half that of a man's), and child custody laws that give preferential treatment to

fathers as examples of the inherent gender equality that would potentially result from Sharia rulings. In pointing to these particular laws, opponents argued that Islamic law stood in direct conflict with Canadian laws that provide men and women with equal rights.

Aside from potential gender inequalities, opponents of IBACs also argued that religious arbitration courts would work to the disadvantage of Muslim women because they largely ignored power hierarchies that often define many Muslim households. For opponents, the existence of a parallel legal system did not simply provide an "alternative choice" as implied by those in favour of Sharia arbitration. Rather, they pointed out that, for many Muslim women, the notion of free-choice not only underestimated their real position in society (very often immigrants, with little language skills, and little knowledge of their rights as Canadian citizens), but also the power dynamics that exist in many Muslim families (where men hold a more authoritative position over women). In the opinion of these opponents, these parallel justice systems were not, in fact, a realization of true multiculturalism, but rather an exercise in discrimination—an exercise that would result in rulings that went against the very fabric of Canadian standards on women's equality.

Regardless of what side they stood on, individuals' voices and experiences gave credence to these debates. In an exposé written on the perils of Sharia law, Sally Armstrong reveals the plights of three women caught in the tangled web of custody and divorce battles brought on by

Islamic law. One woman (who did not want her name used for fear of backlash in her community) stated poignantly, "'women stay in abusive relationships because they are told by their imams [religious leaders] that if they leave they'll lose their children'" (quoted in Armstrong, 2004). Precisely this type of misogynist perspective is what opponents did not want seen institutionalized. As outspoken opponent to Sharia arbitration, Homa Arjomand stated, "'everyone who believes in women's civil liberties and individual rights, in freedom of expression and in freedom of religion and belief" should stand against IBACs, because their existence only would "'increase intimidation and threats against innumerable women...'" (quoted in Boyd, 2006:46-47).

On the opposing side of the debate stands Razia, an English citizen who was married in Pakistan to a man whom, she later found out, simply wanted a visa. As soon as she got back to England she set about getting a divorce. Because English laws did not recognize her marriage, the courts could not issue her a divorce. Furthermore, as a believing Muslim, Razia was compelled to obtain an Islamic divorce, as stipulated by her faith. In her situation, "she felt the Islamic Sharia Council [an Islamic Sharia arbitration service] were the only people who could help" (Bell, 2007). As many proponents of IBACs argued, the need to live one's life in accordance to Islamic law necessitates the implementation of this type of arbitration system. Shahina Siddiqui, president of the Islamic Social Services Association in Winnipeg, supports this position: "'regardless of whether you agree or

disagree with Sharia, Muslims who live by it want to resolve family disputes within their own faith. I'd rather that be done in the light of day, [and] in a formal process'" (quoted in Armstrong, 2004).

This issue clearly represents one of the most dramatic clashes between religion and state to have occurred in this country in recent years. What is fascinating about the Sharia arbitration debates, however, is the wonderfully complex story they tell about the inherent tensions of accommodation in Canada. Indeed, these debates reveal the difficulties associated with a nation that must reconcile, on the one hand, its position in the world as a leader in multiculturalism and diversity, with, on the other hand, its position in the world as a staunch defender of individual rights and gender equality. The other, equally telling, story that emerges from these debates is that of legal pluralism and the role that its effects play in heightening the relevance of Canada's continued commitment to accommodation.

Research Question And Chapter Breakdown

Through several key areas of discussion, this dissertation broadly explores this interplay between religious rights and individual civil rights (principally those aimed at gender equality), particularly as they relate to processes of legal pluralism, brought about in part by forces of globalization. Regarding the issue of Sharia arbitration courts, I argue two key points. First, I argue that Canada, through its various policies and laws, has created a template that enables Islamic Sharia courts to exist. Second, I argue that,

despite the controversial nature of Islamic law, the Ontario government fell short of its responsibility to take a balanced approach on competing rights between religious freedom and legal justice in banning faith-based arbitration. In an effort to protect women's rights, the Ontario government's ban on all faith-based arbitration essentially ignores its continued, unregulated operation and disregards the significant weight that its decisions carry within segments of the Canadian Muslim community. As this project argues, a third, alternative solution to the Sharia debates exists, which differs from completely banning faith-based arbitration or from allowing it to operate under the old Arbitration Act with little government oversight. By deciding to ban faith-based arbitration, Ontario missed an excellent opportunity at drawing the private dealings of a minority group out of the shadows and into the wider Canadian legal context. A third alternative would introduce limited Islamic legal discourse into the Canadian legal framework (under a revised Arbitration Act), resulting in a more formalized, reformed, and transparent system of Canadian Sharia law. Ultimately, because the issue of Sharia law in Canada is intertwined with issues of individual rights and religious freedoms, federal and provincial governments will have to (re)visit the role that Sharia courts could play in this country.

In making these arguments, I have divided the project into six chapters.[3] Chapter 1 serves as an introduction to the issues, and spends

[3] I have tried, to the extent possible, to deliver a coherent and methodical discussion, but given the breadth of this subject area, it is almost impossible to discuss the issues

some time discussing methodology and theory. Because I look at this project through the duals lenses of legal pluralism and globalization, I devote some time discussing the relevance of these two areas of scholarship to this project. Chapters 2 and 3 argue that Canada, through its various laws and policies, has developed a template that, in turn, makes the Sharia debates possible and relevant. In making this argument, Chapter 2 discusses, at length, such pertinent areas as Canada's historic relationship with religion, the nation's changing demographic landscape, and the presence of religion in contemporary Canadian culture.

Chapter 3 sequentially discusses the unique position that Canada has in the world as a leader in the areas of multiculturalism and diversity. This chapter illustrates, in detail, how various legislations and policies encourage diversity in Canada, and, moreover, how Canada's unique standpoint on accommodation and freedom of religion feasibly creates a template for the presence of religiously-based courts. An assessment of several significant court cases dealing with freedom of religion cases further illustrates, first, how Canada defines freedom of religion, and second, the extent that, traditionally, Canadian courts have gone in protecting religious freedoms. Together, these two chapters are an essential component of this project because they provide the foundation for all subsequent arguments regarding the relevance of Sharia arbitration courts.

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without delving into (at times seemingly irrelevant) tangents, which nevertheless bear significant weight on the topic at hand.

In Chapter 4, I switch gears, launching into a detailed discussion on the nature of Sharia law, its historic development, and its place in contemporary society. This chapter is significant for two reasons. First, in detailing the development and breadth of Islamic law, I suggest that these qualities have created, in effect, a system that is both susceptible to abuse, as well as receptive to modifications and reform. This dual feature, in turn, suggests that Sharia is not necessarily a static, misogynist body of antiquated laws. Rather, it is a legal body capable of growth and re-development. These points are essential ones to this project because they illustrate both the danger that is associated with particular rulings of Sharia (especially as they occur outside the realm of external scrutiny), as well as the possibility of reconciling, in part, Islamic and Canadian laws through supervised arbitration tribunals.

Second, this chapter is significant in so far as it illustrates the central role of Sharia in the lives of Muslims. This latter point is crucial. Indeed, to be Muslim, is in large part to follow the Sharia--and it is only after understanding the immense force of Islamic law in the lives of many Muslims, and the consequential role that it plays in the lives of so many Muslims--that we can begin to truly understand why these courts will not simply disappear, but will continue to exist regardless of government approval.

Building upon these discussions, Chapter 5 moves into the heart of the actual Sharia debates that took place in Ontario. This chapter begins with a

brief discussion on the history and role of arbitration courts in Canada, including reasons for their popularity, and some of the downfalls associated with their use. The intent of this discussion is to illustrate that, despite its critics, arbitration continues to be a viable and recognized form of alternative law, with a long history of success not only in Canada, but also in Islamic society. At this juncture, I question why it is--if arbitration is a readily available and accepted form of alternative law, used by other faith-groups—there exists such controversy against its Islamic usage in Ontario. In answering this question, I examine, in detailed fashion, the arguments fuelling both sides of the Sharia debates.

In looking at these debates, I argue that, those opposing the system offered some very real concerns, centered largely on Charter rights aimed at protecting women, and promoting gender equality. Supporters of the system, however, offered equally credible arguments using similar legislative frameworks that, unfortunately, received much less public attention. A discussion of these arguments reveals that, despite some crucial shortcomings, the proposed Islamic system of arbitration nevertheless drew quite heavily on existing legal and cultural frameworks.

Finally, drawing together from previous chapters, Chapter 6 returns to the theoretical discussion of legal pluralism and globalization in providing several concluding remarks. From information presented in earlier chapters, I suggest that the Ontario government's decision to ban faith-based arbitration overlooked the powers of legal pluralism, which suggest that the

system of Islamic arbitration will continue, without supervision, to the possible detriment of women. This inevitable process essentially means that not only did the government not succeed in securing rights for women in the area of religious arbitration law, but also it did little to advance its much-touted mandate of religious freedom and cultural diversity. Given the possibility of this issue arising in other provinces in Canada, together with the exponential growth of the Muslim population in Canada, I suggest in this concluding chapter that--in an attempt at better balancing the twin rights of individual liberties and religious freedom--provincial and federal governments should re-visit the possibility of introducing Sharia courts.

Methodology

This study involves mostly research of primary and secondary source materials. In a manner similar to grounded theory (Glaser & Strauss, 1967) I try to generate rough categories for the data that I collect and analyze. I do not feel, however, that a meticulous transformation of content analysis data into a precise coded form is necessary because doing so evades the complex nature of the subject matter. Thus, I follow Kracauer (1953) and Crick (2006), who argue that by breaking down texts into quantifiable units for the purpose of establishing meaning, analysts may actually reduce the significance of the very thing that they are trying to study. In the case of this project, I am more interested in understanding how the data lends to a larger picture of the issue, as opposed to reducing my data to quantifiable units.

In the chapters that deal with the history, movement, and growth of Sharia, as well as the history of religion in Canada and Alternative Dispute Resolution (ADR) courts in Canada, I depend heavily on secondary analysis of books and academic articles. For the sections on the role of Sharia in Canada, I rely on Marion Boyd's 2001 Ontario government report on the issue of Sharia, together with materials (published documents and materials placed on-line) disseminated by the following organizations: The Canadian Council of Muslim Women, the Islamic Institute of Civil Justice, the International Campaign Against Shari'a Court in Canada, Canadian Islamic Congress, the Muslim Canadian Congress, the National Council of Women of Canada, Association of Muslim Arbitrators, the Canadian Council on American Islamic Relations – Canada (Cair-Can), and the Islamic Jurisprudence Committee of Islamic Council of Imams. For sections pertaining to globalization, legal theory discourse, and law and religion relations, I employ current academic literature obtained through books, and journal articles.

One of the main concerns that I have regarding my textual sources is that some materials are quite scarce, while others are readily abundant. For example, in writing on the history of Sharia, I have located a plethora of books that speak to this subject, and as such, the task has been to identify the more useful and accurate of the lot. In contrast, in trying to locate sources that speak specifically to Islamic communities in Canada, I have had a difficult time in finding more than a handful of sources. I also have found that individuals and groups against the implementation of Sharia in Canada

have been much more vocal, have published more, and have more websites devoted to voicing their opinion than those in favour of its implementation. This very public reaction has translated into the acquisition of many sources that speak against the implementation of Sharia, and fewer sources that speak in favour of it.

Another area where I have had some difficulty is finding materials that speak directly to the interface between religion and law in Canada. The intersection of law and religion (while not a new phenomenon) continues to grow and change with modernity, and as such, it continues to be a growing area of inquiry for academics who work in both subject areas (albeit more so in the United States than in Canada). Several key books and articles do exist that speak to certain elements of the religion/law debate, such as significant court cases or the history of the relationship between religion law in Canada,[4] but in large part, literature pertaining more specifically to the theoretical discourse of religion and law in Canada is relatively scarce.[5] Nevertheless, these materials provide sufficient information for the productive pursuit of this current research project.

Naturally, the largest impediment to this type of generalized study is in the classification of groups and the precise definition and explanation of terms. One of the main difficulties with this type of project, of course, is how

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[4] For example, see Beaman and Beyer, 2008; Beaman, 2008; Farrow, 2004; Henderson, 2006; Menendez, 1996; Moon, Nedelsky, Ogilvie, 2003; Schneiderman and Weinrib, 2008; and Syrtash, 1992.

[5] Among the most insightful theoretical discussions of religion and law in Canada are Benjamin Berger's 2006(a) "Understanding Law and Religion and Culture: Making Room for Meaning in the Public Sphere" and "The Cultural Limits of Legal Tolerance" (2008).

particular terms are defined. In this case, I am studying the position of Islamically-based arbitration courts in Canada, but the term 'Islam' by no means denotes a singular body. As William A. Graham notes, "nowhere in the history of religion is the danger of interpretative generalization becoming reductionist or simplistic more acute than in the study of Islamic religion" (1993:495). The breadth of the Islamic religion is so vast that, beyond the very basic tenets of the faith, no single entity called 'Islam' exists. Rather a multiplicity of 'Islams' exist, and nowhere is this reality more acute than when viewing the faith through the lens of globalization. The fascinating extent that is Islam is at once an opportunity to explore growth, development, and distinction, and at the same time to discover the rare thread of unity that binds adherents universally.

Islam is, in short, a chameleon. A single chapter in world religions textbook presents Islam, and yet Islam epitomizes change: historically, socially, culturally, and regionally. In addition to these factors, Islam also epitomizes variance. In fact, from the onset, it is important to note that the Sunni version of Islam that Canadians witnessed during the Ontario Sharia debates belies the reality that Islam is composed of numerous divisions and sects, each replete with their own vision and understanding of faith and Islamic law.[6] Indeed, what occurred in Canada was largely a Sunni enterprise, and portrayed a conception of Sunni law. While I recognize that this perception of Islam unduly discounts all other Muslim perspectives, I

[6] Sunni Islam or Sunnism is the largest branch of Islam.

nevertheless focus this project on the Sunni perspective because what occurred in Ontario ultimately was a Sunni matter, despite the implications that it may have had on other Canadian Muslim communities.

This extensiveness of Islam, perhaps, is the greatest hurdle in any investigation of the religion, and one that does not elude this project either. Often it is easy to lose sight of the greater picture, and to get lost in the many intricacies, variations, and changes that exist within Islam, even in a single nation (in this case Canada). Of course, the reality still remains that even within a particular tradition (for instance, Sunnism), understandings of, and opinions regarding Sharia law may differ tremendously from individual to individual.

While many often translate 'Sharia' loosely as 'Islamic law,' the term, in fact, deceives the complexity of what Sharia actually entails. To this end, and because it is precisely the complexity of the Sharia system that creates problems in its contemporary growth, I spend much of the chapter on Sharia discussing the intricacies of the system, and the problems associated with properly defining it. Thus, as I embark on this study, I recognize that there exists a plurality of opinions within the Muslim community itself on the role of Islamically-based arbitration courts and their place in Canadian society.

The Muslim community, however, is not the only sphere of pluralism. Canada itself is a diverse constellation of legal pluralisms, whether viewed at the national level (such as common law in English-speaking Canada, and French civil law in Quebec) or at the provincial level (where laws pertaining

to arbitration courts differ from province to province). Due to the extensive scope of law, therefore, I have restricted the boundaries of this current study to the implementation of Islamic courts in English-speaking common law Canada.

Ultimately, this body of research is not only important, but also necessary. As Canada's Muslim population continues to grow at a rapid pace, issues of human rights and the role of religious law in Canadian culture will become significant. Because Canada has the highest per-capita immigration in the world—(net international migration accounted for two-thirds of Canada's population growth between 2004 and 2005 [Statistics Canada, 2006])—together with a philosophy that embraces and encourages its unique multiculturalism and diversity policies, studies such as this one that seek to understand the tensions between religious liberties and the protection of citizens, and why problems exist in recognizing religious legal alternatives in Canadian cultural society, are essential.

Theoretical Discussions

I approach this project fully aware that no singular over-arching theoretical framework exists that I can fruitfully employ to explain the complex situation of Islamically-based arbitration courts in Canada. Indeed, many forces (such as secularization, multiculturalism legislation, religious pluralism, legal pluralism, charter law, etc.) have coalesced to create a uniquely Canadian culture, and all of which, when recognized collectively, are vital for understanding the compelling influences that have given rise to, and

continue to impact, the current Sharia debates. In order to productively understand these factors, however, I begin with a basic theoretical backdrop, which includes a discussion of two fields of scholarship that make the current study applicable: globalization and legal pluralism.

Globalization

Particularly in the era of globalization--denoted by a great movement of peoples and ideologies, and where global ideals such as Islamic belief become increasingly localized--the way in which Muslims currently interpret and implement religious law (particularly in the West) becomes a significant issue. 'Globalization' is a term that has gained momentum in academic circles, and has proven to be an essential part of any scholarship that deals with notions of modernity and Westernization. Globalization refers to one of the most fundamental processes that characterizes the 'modern' world, but *what* the process of globalization actually *is,* remains ambiguous. Like other equally vague terms (such as fundamentalism), one can often recognize its existence, but no singular theory can explain it lucidly.

In academic circles, definitions and conceptions of 'globalization' are assorted—ranging from the economics of internationalism to the proliferation of worldwide media, and almost everything in between.[7] Because meanings of globalization are quite numerous, depending on the angle from which observers view it, and depending on who is doing actually the viewing, globalization can mean countless things: from prosperity to

[7] For a broad array of definitions of globalization see, Giddens, 2000; Held, 1999; Robertson, 1992; Rosenau, 1990; and Scholte, 2005.

poverty, from the ancient to the modern, from capitalism to cultural. Thus, the term 'globalization' means many things and to many ends, and employing it to explain certain processes may result in degrees of ambiguity. I nevertheless do not discount it as an integral component in the study of contemporary religious practices, provided that I properly delimit and define it.

Mark Juergensmeyer (2006:3) begins his recently edited handbook of global religions with an interesting statement that speaks to this 'borderless' world together with the importance of incorporating the concept of globalization in the study of religion. The line simply reads, "Maps can deceive." He goes on to recall the days in which maps were color-coded according to religious beliefs, and where people studied religions in the context of their countries. This one-time method of studying religion, of course, is becoming less and less accurate (or even pertinent to the modern world), as forces of globalization continue to break the bonds that tie religion to nation, culture, or linguistics.

Amusing as it is, Juergensmeyer's map analogy also illustrates the need for scholars of religion to understand the challenges posed by globalization and the ways in which globalization's theoretical and methodological implications may alter the way in which we understand various religions. Trying to maintain tradition, continuity, and authenticity in light of transformations and innovations, religion offers a particularly interesting case study of the potential effects of globalization. In an era of

globalization when things change so rapidly, adherents of religious faiths continue to revise their worldviews and adjust their belief systems in ways in which they can locate themselves within the larger world.

While I have yet to come across a singular theory that satisfies my quest for a carefully fashioned and perceptive account of religion and globalization, books that discuss various *processes* or *aspects* of globalization as it pertains to religion are gaining popularity in academia.[8] Scholars such as Peter Beyer (1994, 2001, 2006), Mark Juergensmeyer (2005), Richter Kent (2005) and John Esposito (2008) have written extensively on the topic of religion and globalization, discussing in particular not only significant historic developments, but also examining contemporary (most often political) issues pertaining to religion and global society.

Also, in recent years (and surely due to recent political events) there has been an onslaught of books that deal specifically with the issue of Islam and globalization (Ahmed, 2007; Mandaville, 2007; Meuleman, 2002; Mohammadi, 2002; Roy, 2004, Schabler and Stenberg, 2004; Simons, 2003). With a few exceptions (most notably Olivier Roy's contributions that addresses both Muslims in the West and the effects of globalization), most of these works tend to center around a series of particular themes. Briefly, these themes are; the (in)compatibility of Islam with notions of

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[8] According to sociologist Robert Wuthnow (1992), a deficiency of academic publications relating specifically to global religion existed throughout the 1980s. This deficiency could have been, of course, because until the term "globalization" gained popularity, many academic works dealing with religion and international affairs or religion and global society employed "world-system" theory instead. See, for example, Wallerstein, 1976.

modernization, Westernization, and by extension globalization, the Middle East's response to globalization and its effects on Islam, issues pertaining to women in Islam, as well as issues of human rights and Islam on a global scale.

Perhaps the most well-known (and controversial) contributions to the area of Islam and globalization are Samuel Huntington's (1997) *Clash of Civilizations and the Remaking of World Order* and Benjamin Barber's (1996) *Jihad vs. McWorld.* Although both Barber and Huntington raise some critical issues and infuse the Islam globalization debate with some interesting analyses, their accounts, nevertheless, remain somewhat problematic because they tend to treat Islam as an experience or practice that is beyond the grasp of the Western world. In a similar vein, Bernard Lewis (1996) and Robert Kaplan (1993) see Islam as an outside entity, irreconcilable with globalization. Lewis points out that Islam, historically, underwent periods of motivated violence and that today, in opposition to Western civilization, "it is our misfortune that part, though by no means all or even most, of the Muslim world is now going through such a period, and that much, though again not all, of that hatred is directed against us" (1996). As Sean Yom (2002:91) argues, Lewis, Huntington, Kaplan, and other likeminded scholars tend to depict Islam as a religion that "opposes globalization, the West, or a combination of the two." Christoph Schumann candidly points out that Huntington and others perceive or approach Islam as something that is happening in 'strange and distant lands,' "subsumed and identified by the notion, 'Islamic Worlds'" (2007:11). In a sense, both Schumann and Yom

criticize Lewis, Barber, and others for portraying Islam as static, monolithic, and as 'other.'

The reality of course, is that the 'distant,' the 'strange,' and the 'other' are no longer territorialized civilizations beyond our grasp. With an estimated population of 1.2 billion worldwide, and an estimated 700,000 in Canada alone, Islam exists all around us, without borders, and most definitely not confined to a particular 'world.' Because Muslims now live in all parts of the world and on a permanent basis, their study must occur on a local, indigenous level and not as members of (as Edward Said would contend) 'outsider' 'exotic' communities.

In response to these varied debates on globalization, and for the purpose of this current project, I choose to follow Giddens (1990:64) in defining globalization as the rapid developments in communications technology, transport and information, which bring the remotest parts of the world within easy reach. Specifically, however, globalization as exemplified in this study, more accurately conveys the movement of people, the creation of diaspora communities, and the re-signification of religious belief systems. Whatever the outcomes of these processes are, it is almost certain that in part due to processes of globalization, more people than ever before are involved in more than one culture (Featherstone, 1990), resulting in a multiplicity of cultural identities.

Arguably, the area of research focussing on this subject area would be better suited under the umbrella of migratory studies, but it is not only physical

movement that this research looks at, but also the movement of people together with the global interchange of ideas and values—a concept that is inherent within traditional definitions of globalization. I use globalization also because it suggests that the religious practices and traditions at which I am looking at (in this particular case, Sharia) are lived and constantly shaped and reshaped in multiple ways.[9]

Religion And Law in Society

Ultimately, sociologists of religion are not concerned about the existence or nature of God, or other 'truth' claims. Rather, they are interested in understanding religion as it relates to practice, identity, the changing nature of religion, and with its interrelatedness with other social aspects of society. Because sociology grew out of the Enlightenment, it adopted many of the assumptions and beliefs intrinsic to the time. Amongst these beliefs were the subscription to Enlightenment's emphasis on rationality and science—a perspective that led to "an elitist and dismissive attitude towards the relevance of religion" (Dillon, 2009).

For a period of time, and according to modernization theories, the common mindset was that successful democracies and secularization operated concomitantly, and that a universal trend existed towards the privatization of religion (Costopoulos, 2005). Social thinkers of the nineteenth and early twentieth centuries such as August Comte, Sigmund Freud, Émile Durkheim, Max Weber, and Herbert Spencer subscribed to the

[9] I must stress that this project employs the theoretical discussion of globalization *only* as it pertains to the global movement of people and ideas.

idea that religion eventually would diminish, and would lose its stature with the onset of the Industrial Revolution. Sociologist C. Wright Mills even commented:

> Once the world was filled with the sacred—in thought in practice and institutional form. After the Reformation and Renaissance, the forces of modernization swept across the globe and secularization, a corollary historical process, loosened the dominance of the sacred. In due course, the sacred shall disappear altogether except, possibly, in the private realm (1959:32-33).

Still others believed that national ideologies or civil religions would replace traditional religions (Riesebrodt, 2003: 95).

Today, the realization that religion is alive and thriving in the world essentially raises uncertainty about years of work loosely labelled 'secularization theory,' and makes obsolete much of the literature on secularization theory penned by historians and social scientists (Berger, 1999; Stark & Finke, 2000).[10] Prominent secularization theorist, Peter L. Berger, renounced his earlier proclamations stating instead that, "the world today, with some exceptions ... is as furiously religious as it ever was, and in some places more so than ever.... There is no reason to think the world of the twenty-first century will be any less religious than the world is today" (1999:2, 12). Arguably, few anticipated the force of religion as such a powerful moulder of religious subjects, and current global events continue to increasingly corroborate Berger's latter claims about the speculative nature of religious secularization.

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[10] Of course, this is not to say that research on secularization does not still exist, and of course, not all scholars are in agreement about the demise of secularization theories.

Following this thread of scholarship, contemporary research on religion focuses, not as much on the secularization of religion, but rather on the intricate and multifarious nature of religion as it unfolds and interacts with other elements of society, and across diverse environments. Today, it appears that many scholars are interested in understanding religion as a cultural marker or the role that it plays in mediating assimilation of immigrants (particularly involving global religious movements). Many theoretical questions address the role of religious pluralism, and the varying impacts of religion on other aspects of social life (such as law, in this case).

The sociology of law is one such field that interacts with the study of religion. Influenced heavily by such thinkers as Ferdinand Tonnies (d. 1936), Max Weber (d. 1920), Karl Marx (d. 1883), Auguste Comte (d. 1857) and Emile Durkheim (d. 1917), the sociology of law addresses law's impact on society, including the ways in which law regulates, facilitates, or impedes various facets of societal and individual life. To these aforementioned thinkers, law was an integral element of modern society. Durkheim, for instance, saw law not only as a "visible symbol" of social solidarity (1893:64), but also as an orientation to a social life otherwise "perpetually in the process of transformation and incapable of being mentally fixed by an observer" (1895:45). Despite these thinkers' theorizing about the interconnectedness of law and other social institutions, not until the 1960s did a distinct sub-discipline known as the sociology of law emerge (Schwartz, 1965:1).

This contemporary research in the sociology of law (also referred to as the socio-legal perspective) focuses on the law as it operates within a changing society. Unlike the philosophy of law (which is more concerned with definitions of law, and the morality and validity of law), the socio-legal perspective is more multi-disciplinary in nature. Early theorists in the area acknowledged that law is not static, but rather that it is a dynamic force which interacts with other societal forces such as norms, values, beliefs, and so forth of the culture within which it operates. As Edwin Schur (1968) points out, sociologists have taken interest in the legal system because it is "a distinctive and more or less coherent (though continuously changing) set of legal roles, norms, and organizations, together with characteristic patterns of interrelation between the legal order and other institutional realms of society."

Schur's assessment of the legal order is becoming increasingly relevant as forces of globalization have created a much smaller world and a world wherein issues such as interculturality demand greater attention, particularly as they pertain to the spheres of religion and law. Understanding and negotiating the relationship between the two cultural markers of religion and law is not only a theoretical task, but also a functional task (as the recent Sharia debates illustrate), and as such it continues to be a source of serious inquiry amongst both legal and religious scholars. In pursuit of such inquiries, scholars have paid increased attention

to notions of pluralism both from the religious as well as the legal perspective.

To date, the theory of legal pluralism (the notion that no single worldview holds a monopoly of authority), stresses the importance of recognizing not only multiple bodies of law, from the local to the global level (municipal, provincial, international, etc.) but also alternate forms of law such as customary law, indigenous law, ethnic law, and religious law. Often, these pluralities of laws are incompatible, can intersect, or at times, can make competing claims of authority, impose inconsistent or contradictory demands, and create space of resistance and contestation (Merry, 1988:878). These numerous pockets of hybrid legal spaces in turn often require individuals to live under multiple legal, or quasi-legal systems, at times forcing them to choose between multiple affiliations (Moore, 1978:720).

Naturally, defining what precisely legal pluralism is remains a challenge. Earliest studies of legal pluralism were most prominently associated with colonialism (where the colonizer would impose a new legal framework on top of a pre-existing indigenous legal system) or with religion (where religious law co-existed with secular legal systems, often in an uneasy and tenuous relationship) (Merry, 1988; Pospisil, 1981; Weisbrod, 1980). Newer instances of legal pluralism, however, involve such diverse entities as international law and laws governing the Internet, and--with increased globalization--laws pertaining to cultural, religious, and ethnic institutions and networks (Jones, 1998, Merry, 1988).

Generally speaking, most of the literature agrees that legal pluralism is defined as a situation wherein two or more legal systems exist in the same social field (Merry, 1988; Moore, 1986; Pospisil, 1971). John Griffiths, who is one of the central developers of the theory, defines the process of legal pluralism as one in which:

> Law and legal institutions are not all subsumable within one 'system' but have their sources in the self-regulatory activities which may support, complement, ignore or frustrate one another, so that the 'law' which is actually effective in the 'ground floor' of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism and the like (Griffiths, 1986:39).

Denying the view of law as a single, monolithic and unified set of rules, theories of legal pluralism argue that the ideology of legal centralism (where one law emanates from the state and is uniform for all persons) is wholly inadequate and based on myth and illusion.

According to Griffiths, "precisely because it is an ideology, a mixture of assertions about how the world ought to be and a priori assumptions about how it actually and even necessarily is, legal centralism has long been a major obstacle to the development of a descriptive theory of law" (1986:3). In light of these assertions, newer theories help foster a better understanding of legal pluralism, the most notable of which is Sally Falk Moore's conception of the semi-autonomous social field.

Moore defines this social field as one that has "rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in

a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance" (Moore, 1978:54). This concept of the semi-autonomous social field has important implications for legal pluralism theory as it accentuates the fact that legal orders exist in relation to each other, and as such affect the way that each of them has the ability to operate, a point that more contemporary theories of legal pluralism also stress (see for example, Gunther Teubner, 1991).

In a similar vein to Moore, Merry also notes that:

> The new legal pluralism moves away from questions about the effect of law on society or even the effect of society on law toward conceptualizing a more complex and interactive relationship between official and unofficial forms of ordering. Instead of mutual influences between two separate entities, this perspective sees plural forms of ordering as participating in the same social field (1988:869).

This pluralism, in essence, is non-hierarchal, non-institutional, and focuses more on dynamic interaction amongst a multitude of legal orders within a single social field.

Having simply acknowledged that there exists in society a constellation of multiple claims of authority is significant, but unfortunately, it stops short of some important considerations. As theories of legal pluralism gain currency, scholars have effectively refined its various types. While the term is effective in describing an existing social phenomenon, the question now becomes not whether legal pluralism exists, but rather what form it takes in a given society. The problem ensues that these particular theories (of legal pluralism) are, for the most part, lacking some of the

conceptual tools necessary for the discrimination of various competing sources of authority. Ultimately, legal pluralism does not explicitly realize the effect of varying degrees of authority that various legal forms wield. In this sense, it is important to reiterate that not all forms of law and authority are equal within a given society.

As an example, in a famous American case a Hmong man accused of kidnapping and raping an underage female from his community in California argued that he was simply carrying out the Laotian tradition of "marriage by capture" or *zij poj niam* (People v. Moua, No. 315972-0 [Cal. Super. Ct. Feb. 7, 1985]). The authority of his cultural or religious norms, however, (while acknowledged) did not supersede state law. Cases such as this one are indicative of the fact that state law inevitably "sits above" other types of authority—and this is where the tension truly emerges.

To be a member of a particular society one must follow, for all intents and purposes, its laws. The maintenance of national political norms, social security, order and so forth, after all, are basic elements of citizenship. But having recognized the multiplicity of legal and normative systems, the question becomes what types of difference should the state permit, encourage, or even support?

Let us consider, for a moment, another type of authority—that of religion. Cultural anthropologist Clifford Geertz has described religion as one such competing system of belief. In his text, *The Interpretation of Cultures* (1973), Geertz depicts religion as a form of culture that finds authority in

transcendent tenets and permeates all facets of an adherent's life. For the adherent, religion plays a powerful role not only as it motivates their beliefs regarding the transcendent universe, but also as it influences the ways in which they interact with the social and political world around them. According to Geertz:

> Religion is never merely metaphysics. For all peoples the forms, vehicles, and objects of worship are suffused with an aura of deep moral seriousness. The holy bears within in everywhere a sense of intrinsic obligation: it not only encourages devotion, it demands it; it not only induces intellectual assent, it enforces emotional commitment. Whether it be formulated as *mana*, as *Brahma*, or as the Holy Trinity, that which is set apart as more than mundane is inevitably considered to have far reaching implications for the direction of human conduct (1973:126).

For Geertz, therefore, religion affects not only belief, but also action. Religious authority has the ability to pervade upon all aspects of the adherent's worldview, and there are no limits to the claims made by religion upon the subject (McLachlin, 2004).

Herein lies the problem at the heart of these debates—the clash of two ultimate, and crucial sources of authority, a tension that (borrowing from Benjamin Berger 2002:40) continues to "haunt" Canadian jurisprudence as courts struggle to negotiate the freedoms and boundaries of religious freedom with the protection and rights of state and individuals. The recent Ontario Sharia debates have focused our awareness to this inherent tension, and have once more given us, as a collective Canadian public, cause for consideration of what accommodation actually entails. As the opening vignette in this chapter shows us, passion continues to fuel the debates--one

side ardent about the protection of women's rights, the other fervent about their freedom to live their lives religiously, with the same rights and freedoms enjoyed by others. With the awareness of these compelling motivations, this project argues for a third alternative that would introduce limited Islamic legal discourse into existing Canadian law (under a revised Arbitration Act), resulting in the presence of a more formalized and reformed system of Canadian Sharia law.

CHAPTER 2
Religion and Religious Pluralism in Canada

Oh, East is East, and West is West, and never the twain shall meet,
Till Earth and Sky stand presently at God's great Judgment Seat.

—Rudyard Kipling (1865–1936)

As the old adage goes, "look to the past to see the future." For this project, however, it would benefit to look to the past for a better understanding of how Canada's religious and cultural history continues to mould its present and guide the future. From an historical perspective, religion played a central role in the creation of the Canadian narrative, and it continues to do so up through the present. Indeed, a brief survey of Canada's religious history reveals that the nation's relationship with religion has not always been effortless or conciliatory—but one that, nevertheless, set the stage for future patterns of religious discourse between religion and state.

In part due to forces of globalization in recent years, the influx of immigrants to Canada from around the world has added to the traditional patterns of Canadian religious discourse. As expected, these migrants bring with them their respective languages, cultural affinities, worldviews, and of course religious belief systems. This changing and dynamic Canadian landscape, in turn, has meant a transformation in social understandings—a process that continues to demand the formidable task of recognizing legal

pluralisms while carving out boundaries of accommodation and tolerance, and maintaining policies guided by human rights and the maintenance of civil liberties. Ultimately, the current Sharia debates are born out of this larger picture, and as such, a necessary part of this project is a discussion about the relationship between the Canadian government and religion, and the parameters of religion in public life in Canada.

In order to usefully comprehend, however, Canadian laws and policies regarding religion and accommodation, it is necessary to review both Canada's religious past and its contemporary cultural landscape. An analysis of Canada's past and present, coupled with various laws and policies enacted by the state in an effort at protecting and fostering religious freedom and multiculturalism ultimately suggest that--controversial as they are--parallel legal structures (particularly those that are religious in agenda) are able to exist in Canada. These uniquely Canadian characteristics and approaches to diversity and religious freedom, I argue, make subsequent debates over implementing Islamic arbitration law both relevant and possible. In arriving at this point in Canadian history, this chapter identifies several key factors that have coalesced to create a context that not only encourages diversity, but also necessitates its acknowledgement. These factors, I argue, include Canada's notable relationship with religion, the nation's changing demographic landscape, and the presence of religion in contemporary Canadian culture.

History of Religion in Canada

From the time that it became a confederated constitutional monarchy under the religiously motivated title "dominion" in 1867 through to the present, Canada has grappled with, espoused, rejected, and still maintained its religious nature. Commencing with the Fathers of Confederation expressing their religious sentiment in Canada's motto, *A Mare usque ad Mare*, (a translation of the Latin) from Psalm 71, "He shall have dominion also from sea to sea"[11] to the first time *God* was mentioned with statutory status in Canadian legislation in the preamble to the Canadian Bill of Rights under the Diefenbaker government in 1960, to its inclusion in the National Anthem, religion would help shape the development of a uniquely Canadian culture.

For much of its history, Canada has had to incorporate two realms of religious, cultural, and linguistic identity—French and English.[12] Granted, the arrival and subsequent presence of these two great forces in Canada did not occur without great political and cultural spectacle. Nor was their presence absent of religious strife and discord as Protestant and Catholic factions (backed by their supporting nations) fought for dominance of the new land. Up until the period of the French colonization of Canada, both Roman Catholicism and Protestantism played crucial roles in the formation

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[11] When the dominion of Canada was formed in 1867, Methodist Leonard Tilley of New Brunswick applied the words of Psalm 72:8, "He shall have dominion also from sea to sea."

[12] While most literature locates Canada as a nation borne of French and English traditions, I also acknowledge the important presence of early Native Indian communities and their contributions to the development of the nation.

of early religious traditions. Political strife in France between Catholics and Protestants, led to the government granting a Charter in 1627 to the Company of New France that forbade non-Roman Catholic colonists to be deployed—a prohibition that stayed in effect during the entire period of French rule. As such, New France was almost exclusively Roman Catholic, and would have perhaps remained that way had it not been for the British conquest of Canada in 1763 that dramatically changed the religious landscape.

Royal instructions from England demanded that General Murray (who was the first civil governor of the province) to admit no "Ecclesiastical Jurisdiction of the See of Rome" and to instead encourage the establishment of Protestant schools and churches, "to the end that the Church of England may be established both in principles and practice, and that the said inhabitants may by degrees be induced to embrace the Protestant religion" (Wallace, 1936). This edict was eventually reversed, and in 1774, the Quebec Act allowed the Roman Catholic Church to legally collect tithes, essentially endorsing the presence of the church. But this endorsement provided only limited freedom for Catholics, as Great Britain instructed governors to "hold the [Catholic] church on a tight leash, to restrict its freedom as much as possible, and to do everything they could to promote the interests of the Protestant religion" (Choquette, 2004:145). In spite of this instruction, having been legally enstated under the crown through both the 1774 Quebec Act and the Constitutional Act of 1791, Roman Catholicism held a

commanding presence on the Canadian scene, particularly in francophone Quebec, until fairly recently. In fact, not until much later did the Anglican and Protestant religious communities gain more prominence in Quebec.

The American Revolution to the south also played an integral role in the formation of religious identity in Canada (Wallace, 1936). The American Revolution resulted in the movement of more than 36,000 United Empire Loyalists into British North America, some who were Roman Catholic, but the majority Protestant, Anglicans, Presbyterians, and Lutherans (Choquette, 2004). The religious needs of these communities, however, were largely ignored since few ministers in their respective denominations reached out to them. This neglect continued until the Constitutional Act of 1791.

Arguably, the Constitutional Act of 1791 effectively carved a space for the Church of England in Canada. The Act made provisions for Clergy Reserves, or the setting apart of large sections of land for the "support and maintenance of the Protestant clergy" (wherein Protestant denoted the Church of England) [Wallace, 1936]. Unfortunately for the Church of England, however, the British government did little in the way of supplying chaplains and missionaries, and fairly soon Methodist, Presbyterian, Roman Catholic, Baptist and Mennonite communities began to spring up, leading to half a century of sectarian strife (specifically regarding disagreements over Clergy Reserves, the rights to perform marriage, and control over education) in Upper Canada.

During the late 18th and early 19th centuries, Protestant Canadians began reinforcing their various denominations, and evangelizing new areas, while at the same time Canada's Catholics began their own form of religious revival. The result was that during the 19th century, religion had advanced in Canada (in part due to the support provided by British and Scottish missionary organizations) to the degree that churches were well established through most of Canada's inhabited areas. Sectarian rivalries were critical in raising interest in religion during the first half of the nineteenth century, pushing ministration of the Christian faith to even the most remote of areas. Competition amongst groups also resulted in a tendency towards the amalgamation and adjustment of various denominations (as opposed to the United States where there was an all-out denominational competition).

As historian Marguerite Van Die (2002) explains, a strange paradox unfolded in Canada as a result of these occurrences, wherein "formal disestablishment in reality turned into two informal or shadow establishments, two highly public expressions of religion: Protestantism in English Canada and Roman Catholicism, primarily in Quebec." Until this point, however, church/state relations remained fairly uneasy. In relation to this tension, historian Robert Choquette observes that, "If Canada did not end up with the Church of England as a full-blown state religion, it was not for lack of trying by the government of Great Britain in the last quarter of the eighteenth century. The policy of establishment ran aground in the goals of political, ethnic, social, economic, and religious diversity" (2004:165). These

tensions further escalated as a result of the continued presence of the 1791 Clergy Reserves, which created intense rivalry and jealousy among religious denominations, leading to "bitter" disputes (Moir, 2002:17).

In 1854, the Clergy Reserves Act essentially abolished these Reserves, declaring the intent to "remove all semblance of connexion between Church and State . . . ." (Moir, 2002:17). This act was, arguably, one of the most critical points in the history of church/state relations in Canada. Choquette (2004) refers to this point as the "end of an era in the relations between the churches and state in Canada." Similarly, Moir (2002b) refers to the Reserves as the "last vestige of establishment" and argues that together with the secularization of King's College, the Clergy Reserves Act "created practical separation of church and state in Canada . . . ." (Moir, 2002c: 80).[13] Thus, by the time of Confederation in 1867, a position of "legally disestablished religiosity" (Moir, 1967: xiii) ran throughout Canada. According to Moir, this disestablished religiosity signified that "Canadians in fact assume the presence of an unwritten separation of church and state, *without denying an essential connection between religious principles and national life* or the right of the churches to speak out on matters of public importance" (Moir, 1967: xiii, my emphasis).

[13] By the late nineteenth century when Protestant pluralism gripped Canada, many religious denominations established faith-based schools (for example, King's College in Toronto, which in 1850 was secularized and transformed into the University of Toronto).

By the late nineteenth century, the proclaimed disestablishment of religion together with increased migration marked the beginning of a new Canadian era. Immigrants from Ireland and Southern Europe were responsible for the creation of new Catholic communities in English Canada, while immigrants from Eastern Europe created new Eastern Orthodox communities, and immigrants from the United States created new Mormon and Pentecostal communities.

Well into the 20th century, Canada's religious landscape was painted with Protestant and Catholic elements, dominated by a largely Protestant English-Canadian elite. Through to the 1960s, in fact, Canada continued with its Lord's Day laws that placed limitations on Sunday activities. Following WWII, however, the nation began to experience a period of liberalization. Law makers and politicians slowly began eliminating explicitly Christian laws (such as laws against homosexuality) and with the abolishment of policies that favoured Christian immigration, Canada's landscape began to change dramatically as global migration increased and communications and technology, transport, and information began to proliferate.

Prior to 1961, most European immigrants came from the Netherlands, Germany, Italy, and the United Kingdom, reflecting the fact that for over a century Protestants outnumbered Catholics in Canada (in 1901, Protestants accounted for 56% of Canada's population, compared to 42% Roman Catholics [Statistics Canada,_96F0030XIE2001015]). For the first time following Confederation, however, by 1971, Catholics outnumbered

Protestants, reflecting once again changing immigration patterns. In 1971, Roman Catholics represented 46% of the population, compared to 44% Protestants (Statistics Canada, 96F0030XIE2001015). While immigration of individuals of the Roman Catholic faith to Canada in the past forty years has steadily declined, the group still remains the largest religious denomination with a population of roughly 12,800,000. Canadian Protestants are smaller with an estimated population of 8,700,000 (Statistics Canada, 96F0030XIE2001015).[14]

As many scholars have pointed out, years of Christian influence contributed to the formulation of early Canadian political and cultural identity and to the way in which Canadian society has developed in the past several hundred years (Choquette, 2004; Noll, 2007; Rawlyk, 1995; Grant, 1988). Canadian historian Roger O'Toole points out that Christianity played a critical role in shaping the identity of the nation to the point that many modern features of Canadian life "including the political party system, the welfare state, foreign policy goals and a distinct 'law and order' bias arguably originate, at least in part, in religious ideas..." (1996:121). In fact, to date, there remains, embedded in society, remnants of Canada's religious past.

While many are quick to point to the formal existence of separation between church and state in Canada (Biles, 2005), there is still no denying that considerable Christian influence continues to pervade Canadian society (to the extent that some have described Canada as a nation with a "shadow

[14] Refer to Appendices 1.0 and 2.0.

establishment" [Martin, 2000]). Evidence of the influence and privilege accorded to Christianity today is plentiful and includes the existence of denominational schools in many provinces (Seljak, 2005), the presence of Christian undertones in many national symbols and images (Biles and Ibrahim, 2005), the recurrent debates over the presence of prayers during the openings of councils and legislatures (Harvey, 2000), and of course a calendar year that makes Christian holidays public ones (just to name a few). While it is true, however, that Roman Catholic and Protestant churches long enjoyed a somewhat de facto status as established denominations, and that their status and power encouraged a particular social structure and attitude that some would argue lingers on even today (Bannerji, 2000), forces of globalization and the ensuing increase in migration from non-Christian nations, are continually challenging this mark of Canada's history.

Pluralism in Canada

As demonstrated, the relationship between religion and state in Canada has never been an uncomplicated affair, with lines defining the two spheres often blurring together. Although (as earlier mentioned) there was no "established" religion instituted during confederation, particular religious denominations (primarily Roman Catholic and Protestant) had constitutionally guaranteed education rights established during the nation's founding in 1867. Together with such events as the aforementioned Anglican clergy reserves, the liaison between state authority and religious matters was complicated from the onset. Since that period, Canada's relationship

with religion has been tested on such varied grounds as sectarian prayers in public schools, Sunday closing laws, and religious education. Such episodes both in Canada's past, as well as in its present, have resulted in a clear realization that in Canada there has never been a literal and distinct separation between religion and state. Rather, the considerably intricate and complex relationship between religion and state in Canada is best represented in the concept of "accommodation" (Schneiderman, 2008).

There is a great deal of literature on the topic of accommodation, particularly as it applies to Canada, but in short, it will suffice here to say that the concept of accommodation, as it applies to this project, represents the state's obligation to facilitate pluralism of beliefs.[15] Naturally, the task of accommodation becomes more pronounced as the demographic landscape becomes increasingly diverse, and as distinct legal agendas encounter one another. In discussing these issues, I next examine the contemporary Canadian landscape to illustrate the diversity and growth of cultural and religious communities in this century. Building upon this information, the following chapter will offer an analysis of the ways in which Canada has defined and sought to protect religious freedoms through its various policies and legal frameworks.

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[15] I use here *pluralism of beliefs* in place of *religious pluralism* in acknowledgement of values such as atheism or agnosticism that may not be religious in nature, but are beliefs nonetheless. On the topic of accommodation, see especially, Abu-Laban, 2006; Bouchard and Taylor, 2008; Beaman and Beyer, 2008, Choudry, 2008; Kelly, 2002 and Rowe, 1990, Ryder, 2008.

The Contemporary Canadian Landscape

Increased migration from other areas of the world has dramatically altered Canada's religious make-up during the course of the past several decades, resulting in a diverse and vibrant religious profile. The country has the highest per-capita immigration in the world--net international migration accounted for two-thirds of Canada's population growth between 2004 and 2005 (Statistics Canada, 97-557-XWE2006001).[16] In October 2006, the federal government revealed that Canada intended to accept between 240,000 and 265,000 migrants as permanent residents in 2007, which would be the highest level of migrants in twenty-five years (Citizenship and Immigration Canada, 2006).

Migration from areas outside of Europe, (in particular Asia and the Middle East) has increased steadily since the 1960s, resulting in a shift in religious affiliations. In 1971, 61.6 percent of immigrants to Canada were from Europe, and only 12.1 percent of immigrants arriving in the late 1960s were Asian-born (Statistics Canada, Region of Birth of Recent Immigrants to Canada, 1971-2006). For the first time in 2006, the proportion of migrants born in Asia and the Middle East (40.8%) surpassed the proportion of migrants born in Europe (36.8%).[17]

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[16] Statistics Canada last asked the question of religious affiliation in the 2001 Census of Canada. The question will again appear on the 2011 Census. More recent surveys (such as the General Social Survey) also ask questions regarding religiosity but with much smaller sample sizes. There also exists the 2002 post-census Ethnic Diversity Survey (Statistics Canada, 89-593-XIE) that includes more sufficient numbers.

[17] A number of factors contribute to this change in immigration patterns, including changes in Canada's immigration policies, and international incidents that resulted in the movement of many migrants as refugees (Statistics Canada, 96F0030XIE2001015).

In part, this increased migration from non-European nations has played a critical role in altering the religious landscape of Canada. For example, according to census data, out of 1.8 million new immigrants arriving in Canada during the 1990s, Muslims accounted for 15 percent, Hindus 7 percent, and Buddhists and Sikhs 5 percent each. In the last census that asked about religious affiliation (which took place in 2001), individuals identifying themselves as Hindu in 2001 increased by 89% from 1991 to roughly 297,200; Sikh affiliation also rose by 89% in the period between 1991-2001 to about 278,400, while the number of people identifying themselves as Buddhist increased between 1991-2001 by 84% to just over 300,000 (Statistics Canada, 96F0030XIE2001015). The projections for religious diversity in Canada are also quite interesting. While non-Christians composed 6.3 percent of Canada's population in 2001, Statistics Canada projections expect that this number will rise to 11.2 percent in 2017. Muslims in Canada are projected to number some 1.8 million, while Hindus, Sikhs and Jews are expected to number 709,000, 587,200 and 399,000 respectively (Statistics Canada, 91-541-XIE).

Muslim Demographics

Most importantly for the study at hand is the rapid increase in the Canadian Muslim population. Research indicates that Muslim migration to Canada took place in four major waves: from the second half of the nineteenth century through till World War II, from the post-war period to roughly 1967, from 1967 until about 1990, and finally from about 1990 up

until the present time (Abu-Laban & Abu-Laban McIrvin, 2008). While directly before and after World War II, growth within the Muslim community was the result of more births than deaths, the period following 1951 saw an increase in the Muslim population resulting mostly from migration. Around 1951, the Muslim population in Canada is estimated to have been between two to three thousand. By 1971, this number increased dramatically to an estimated 33,370, and by 1981, the population again tripled to roughly 98,160. Between the years of 1981 and 1991, the Muslim population in Canada grew 158 percent to 253,260. Those identifying themselves as Muslim in Canada had the largest increase from 1991 to 579,600 in 2001 representing 2 percent of the Canadian population .[18]

Muslim migrants to Canada are ethnically, linguistically, and culturally diverse. The majority of these migrants are of Asian (including Indo-Pakistani) and North-African descent, followed by West-Asian, North Africa Arabs, Iranians, Turks, as well as a small population of East and Southeast Asians (Chinese and Filipinos). Remaining Muslim migrants hail from such diverse areas as Europe, Africa, and the Caribbean (Abu-Laban & Abu-Laban McIrvin, 2008). While the majority of Muslims in Canada belong to the Sunni sect (roughly 70 percent), there also exists a vibrant Shi'a community composed of Ismail'is (20 percent) and Twelvers. Rounding off the community are members of the Druze and Ahmadi's (Qadianis) Muslim groups. Muslims make up the largest non-Christian community in ten out of

[18] Refer to Appendix 2.0.

twenty-five Canadian cities, as well as in the province of Alberta (Hamdani, 1997). Current Statistics Canada predictions foresee an increase of approximately 160 percent in the current number of Muslims in Canada, with much of the concentration in Canada's large metropolitan cities (Appendix 3.0).

What these statistics reveal to us is that while Canada was at one time predominantly Christian, the country is in for a dramatic shift in its population's religious composition. Increased migration from predominantly non-white countries is altering significantly the ethnic and racial diversity of the nation, transforming many of the large urban areas into global microcosms. Undoubtedly, this change in landscape will also have vast implications not only for many areas of public policy, but also for how we define what it means to be Canadian. For example, the executive director of the Association of Canadian Studies, Jack Jedwab, sees this shift as a fundamental move away from the traditional vision of Canada (as primarily European and Christian) and towards an increasingly pluralistic society that will challenge many current aspects of society from educational establishments to the workplace and foreign policy (*The Banner*, 2009). Interestingly enough, several decades ago, John Webster Grant alluded to the effects of this shift when he declared boldly that Canada had entered an age of religious pluralism, and predicted that "the future is likely to belong . . . neither to a static pluralism of inherited denominational traditions nor to a polarized pluralism of completing claims to religious control, but rather to a

dynamic pluralism of cells acting as leaven in the lump of society" (1977:20). Yet, we must not be so quick to discount the formidable role that Christianity continues to play.

While demands on the nation to address issues of multiculturalism and religious pluralism continue to increase at a remarkable pace, Canada, in the opinion of sociologist Roger O'Toole, remains "remarkably Christian" (1996:122). Indeed, while Christianity played a formidable religious role in Canada's early years, it also has pressed upon the nation an important cultural influence as well. The reality that Christianity still remains the dominant religion in Canada, and that Canada's history is deeply steeped in Christianity creates a particular social environment that may have important implications for non-Christian Canadians.

These implications could form the basis for an entirely separate research project, but for the purpose of the discussion at hand it is important to recognize that the conception of Canada as a 'secular' nation does not fully encapsulate reality, and demands some elucidation. It is true that Canada is secular to the extent that it does not outwardly endorse one religion over another, or religion over non-religion for that matter, and that it is a nation that not only tolerates, but also encourages, diversity. Yet, it is hard to disregard the fact that many (originally) Christian tenets have become so ingrained in Canadian society (our weekends falling on Saturday and Sunday for example, or many Christian holidays such as Christmas and Good Friday being statutory holidays) that often they have become synonymous with

'Canadian.' More importantly, however, is the often-ignored fact that, in large part, Canada's current legal system was heavily influenced by Christian law (Ogilvie, 2003).[19]

Notwithstanding Christian influences, however, it is important to note that for the most part governments in Canada have not been oblivious to the implications of this changing landscape, as evidenced through the development of various public policies seeking to facilitate and protect equality and harmony. Such policies aimed specifically at issues of diversity (some of which will be discussed at length in the next chapter) include the Canadian Human Rights Act, the Immigration Act, The Canadian Charter of Rights and Freedoms, the Employment Equity Act, and the Canadian Multiculturalism Act.

Summary

The aim of this short, albeit essential, section was to illustrate that from very early on in Canada's young history, religion occupied an important place in the public square—a precedent that has continued through the years. From the outset there existed in Canada struggles over religious authority, yet, despite a dominant and influential Protestant community, Canada never had an *official* established religion, per se. This lack of an established religion, however, belies the fact that Christianity did lay the early foundations of Canadian culture, and that early Christian beliefs and practices permeated the Canadian ethos in ways that persist even today.

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[19] This Christian impact is significant, as I later discuss, because some segments of the Canadian population do not necessarily see themselves reflected within these laws.

Through this brief analysis of Canada's religious history, two important factors become evident.

First, it becomes apparent that religious pluralism is not a new phenomenon in our nation. Indeed, from the time of its founding, Canada has had to grapple with the existence of competing claims of religious authority. Arguably, many contemporary Canadian policies and laws regarding the public recognition and acceptance of religious practices is a testament to earlier struggles in Canada's religious history.

Second, and most importantly for the discussion at hand, current statistics indicate that Canada now plays home to a diverse field of ethnic, racial, and religious groups. Unprecedented levels of immigration, mostly from non-European countries, indicate that Canada's minority groups are growing at a formidable pace. These shifts in Canada's demographic landscape will figure prominently into future discussions on the negotiation of space in fields of legal pluralism, especially as it pertains to Canada's burgeoning Islamic community.

CHAPTER 3
Religion in Canadian Policy and Jurisprudence

"Recognizing and accommodating...differences without watering down human rights protections is the difficult challenge of human rights protection in the 21st century. But it is a challenge that we must face. As the former Chief Justice of the Supreme Court of Canada, Antonio Lamer said in Delgamuukw, a case dealing with reconciling aboriginal claims in Canadian society: 'Let us face it, we are all here to stay'."

- Mclachlin (2008:15).

"I am a Canadian, a free Canadian, free to worship God in my own way, free to stand for what I think right, free to oppose what I believe wrong, free to choose those who shall govern my country. This heritage of freedom I pledge to uphold for myself and all mankind."

- Prime Minister Diefenbaker, House of Commons Debates, January 6, 1958.

Introduction

On February 23, 2006, during a speech to the Sydney Institute, former Australian Finance Minister Peter Costello demanded that immigrants accept "'Australian values or leave'" (Costello quoted in Cook, 2006). The comments came on the heels of earlier remarks by Costello including his declaration that "'if your loyalty isn't to Australia, well, there may be another country where you feel happier'" and "'if multiculturalism means eating *souvlaki* and dancing the *zorba,* I'm absolutely for it; if multiculturalism means not assimilating into Australia ... then I'm against it'" (Costello quoted in Henderson, 2006). What ensued because of these and similar provocative

statements was a firestorm of banter between politicians and various immigrant groups over fighting to understand the role of diversity and multiculturalism in Australian society. These Australian debates were not unique; rather, they represented a small element of political ideology underpinning the agendas of many nations.[20] Naturally, at the heart of these debates (which touch upon principles of secularism, assimilation, and multiculturalism) is religion.

Theoretical opinions regarding the role of multiculturalism and the nature of secularism are numerous as they are varied.[21] Prominent amongst these opinions is the body of work that argues that a strict distinction between private and public spheres is essential to multiculturalism. For example, in his work in the area, J. Rex (1986) argued that separation

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[20] Nations around the world have varies policies regarding the degrees of assimilation practices, and the role of multiculturalism and secularism in a nation. Political theories and philosophies guiding such policies constitute part of a burgeoning area of study that deal with concepts of nationhood and citizenship. For a variety of perspectives see; Audi, 1989; Bader, 1999; Button, 2008; Kymlicka, 2001, 2007; Larmore, 1990; Modood, 1998; Nagel, 1991; and Rawls, 1993.

[21] Addressing issues of difference and reconciliation, Will Kymlicka and Bashir Bashir (2008) illustrate some of the various models for inclusive citizenship developed by political theorists. These include models of 'multicultural' democracy, 'contestatory' or 'agonistic' democracy, and 'deliberative' or 'communicative' democracy. All of these models aim to generate greater opportunities for traditionally marginalized segments of society "to be recognized and heard, to have their legitimate interests and identities respected, and to contest inherited practices, rules and narratives that exclude or disadvantage them" (2008:2). In many ways these theoretical models are interesting points of analysis for understanding the identities and narratives of marginalized segments of Canadian society. While I acknowledge that there exists a tremendous amount of literature pertaining to the political and philosophical debates guiding such models, they ultimately fall outside the scope of the current discussion. I also understand that terms such as multiculturalism, diversity, secularism, and so forth are highly contentious and open to a great deal of interpretation. My goal remains to outline these terms as they apply to Canadian society, and as articulated through government policies, laws, and jurisprudence. For a more thorough discussion of secularism and multiculturalism and citizenship see: Benson, 2000; Habermas and Shuller, 2006; Kelly, 2002; Kivisto, 2005; Kymlicka, 2001, 2007a, 2007b; Levey and Modood, 2009.

between private and public spheres is crucial for the ability of all citizens to enjoy equal opportunities and uniform treatment. In contributing to this model, J. Habermas (1994) determined that while recipient societies cannot force immigrants to assimilate, a democratic regime must act in a way so as to:

> preserve the identity of the political community, which nothing, including immigration, can be permitted to encroach upon, since that identity is founded in the constitutional principles anchored in the political culture and not on the basic ethical orientations of the cultural form of life predominant in that country.

In fact, the concept of rigorous citizen assimilation and the preservation of a particular political/national identity lies at the core of many nations' policies guiding multiculturalism.[22] As an essential (and at times contentious) component of culture, the public role of religion often becomes the gauge of a country's position on these debates, as is evidenced by the recent headscarf debates that inundated parts of Europe (in particular France) and Turkey.

Although France's concept of laïcité originally connoted the absence of religion in governmental affairs, as well as the absence of government in religious affairs, the French government recently has defined the term in a far more restricted manner. In 2004, a French parliamentary vote effectively banned all overt religious and political symbols from schools, including headscarves, crosses, and *kippas* (Hassoux, 2004; Sciolino, 2004). The decision to ban public displays of religion within the school system was driven, in part, by a largely neo-republican discourse that views such

[22] See for example, Joppke and Morawska, 2003 and Rogers and Tillie, 2001.

assertions of religious public identity not as a legitimate demand for citizenship, but rather an attack on the very essence of the republic (Ryder, 2008). The restriction against public displays of religion is even more resolute in Turkey, where policies resembling France's laïcité operate against any perceived threats to the system (Davison, 2003; Yavuz, 2003).

In 1989, the Turkish Constitutional Court found that legislation permitting the donning of the Islamic veil or headscarf at Turkish universities was a violation of the nation's tenet of state secularism.[23] In a high-profile case, Leyla Sahin, a practicing Muslim who considered it her religious duty to wear the Islamic headscarf, was banned from entering an examination at the school of medicine at Istanbul University for wearing the head covering. Sahin subsequently complained to the European Court of Human Rights, which it dismissed her case stating that:

> In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire...(Leyla Sahin v. Turkey, 2005, at para. 116).

The court's decision was fed by a conception of secularism that demanded a strict separation between political and religious spheres. This separation, in turn, would allow the state to act as a "neutral and impartial organizer of... religions...." Barring any sort of legislation designed to accommodate

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[23] According to a memo circulated by the Vice-Chancellor of the university on this matter, the restriction was not only on students wearing head-coverings but also on students with beards. See Sahin v. Turkey, 2005, note. 12.

believers in the public square, according to the court, was a justifiable measure as the elimination of public expressions of religion would be "conducive to public order, religious harmony, and tolerance in a democratic society" (Leyla Sahin v. Turkey, 2005, at para. 107).

In both France and Turkey, the veiling issue has come to represent a refusal on the behalf of Muslims to integrate into French/Turkish secular culture and society. Alternately, many secularists see this refusal to integrate as a threat not only to their respective cultural and political values, but also to their tenacious efforts at immigrant assimilation into a secular culture (Gokariksel and Mitchell, 2005). The position driving this model is the belief that public spaces must remain free of any 'particularist' influences [Taylor, 1998] (including, of course, religious influences) so that public spaces will remain neutral and egalitarian, and once on equal-footing, all citizens can interact as rational individuals (Gokariksel and Mitchell, 2005).

This preference for a secular idea of public citizenship, of course, stands in stark contrast to Canada's approach. While tensions between secular liberalism and religious consciousness continue to exist in Canadian society (Berger, 2002; McLaren & Coward, 1999; Nock, 1993; Ogilvie, 2003; Syrtash, 1992), through various policies and laws, Canada continues to recognize that social existence consists of multiple forms of identity, and subsequent legal pluralisms that guide daily life. Moreover, in Canada, the belief that citizens, and in particular immigrants, must concede public religious and cultural proclivities is largely absent. This difference in

approach (as entrenched in many of Canada's highest legal frameworks and policies) has resulted in the creation of a political and philosophical agenda that is uniquely Canadian. Building upon discussions of Canada's historic relationship with religion, and the demographic shifts in its contemporary landscape in the last chapter, this chapter discusses the unique position that Canada has in the world as a leader in the areas of multiculturalism and diversity. Through an analysis of various legislations and policies, I argue that Canada's unique standpoint on accommodation and freedom of religion, together with the ways in which Canadian courts have traditionally defined freedom of religion and acted in ways in which to protect these freedoms, ultimately informs, and allows for, subsequent Sharia debates.

Uniquely Canadian

As suggested in the preceding chapter, religion has always been a vital social force, and the recognition of religious pluralism is ingrained within the folds of Canadian history. Picking up at this historic juncture, I now turn to a discussion on the various legislations and policies that act to support and encourage diversity in Canada. Motivated by earlier discussions of globalization and legal pluralism, this chapter demonstrates how Canada encourages culture generally, and religion specifically, beyond private boundaries in society. Guided by the awareness that forces such as globalization constantly shift our conception of the accommodation of religion and that this conception is highly contingent on the changing population, I draw from various policies of multiculturalism and diversity,

together with the treatment of law under the Charter and as explicated through the courts, to argue that Canada's unique structural standpoint on accommodation and freedom of religion feasibly creates a template for the presence of religiously based courts.

As several key legal cases[24] together with other pertinent debates (such as, for instance, Christmas celebrations in public schools, allocating time and space for Muslim prayers in schools and workplaces, and so forth) reveal, the real test of Canada's changing demography revolves around issues of religious accommodation. As many defining moments in the nation's various encounters with religion suggest, Canadian society, in theory, has the conceptual tools to address issues of religious diversity according to existing legal and social frameworks. Many, to date, have debated the effectiveness of Canada's stance on accommodation and multiculturalism, or the associated political and social values of religious accommodation in Canada.[25] Outside of these disputes, however, what remains significant is that, regardless of its effectiveness, religious accommodation and the recognition of minority practices are features that Canada, through its political, legal, and social frameworks, continues to emphasize (at least on paper) as an essential part of Canadian identity.

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[24] See for example, Bhinder v. CN, [1985 2 S.C.R. 561]. Supreme Court of Canada. 1985; Multani v. Commission scolaire Marguerite-Bourgeoys; B. (R.) v. Children's Aid Society of Met. Toronto, [1997] 1 S.C.R. 315; Syndicat Northcrest v. Amselem.

[25] See for instance, Banting, 2007; Barnett, 2006; Berger, 2002, 2006a; and Kymlicka, 2008.

The pursuit of the legal protection of human rights and freedoms (in which freedom and protection of religion plays a central role) is a defining characteristic of Canadian history. The ensuing struggle in achieving this protection and freedom has become the model Canadian narrative—it defines Canadian identity and sets out what Canadian historian George Egerton believes to be "normative ideals and purpose to Canadian nationhood and jurisprudence" (2004:1). Born early in Canada's past, the endeavour to protect human rights has continued through the years to permeate all aspects of Canadian life, and continues to guide and influence many associated policy initiatives and legislations.[26] While many of these efforts have become more incisive as a result of the influx of new migrants, they continue to focus on systems of diversity as they pertain to language, race, ethnicity, and culture.

Religion, of course, is a significant ingredient in these dimensions of diversity and, as discussed in the previous chapter, played an essential part in the development of the nation. Arguably, Canada's contemporary willingness to address and acknowledge diversity may be an extension of past French-English negotiations where early religious differences between these two cultures, while contentious at times, nevertheless existed alongside each other. This early manifestation of religious diversity in Canada's history undoubtedly continues to inform contemporary attitudes of accommodation.

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[26] For several good accounts of the human rights narrative in Canada see, Egerton, 2004; Ignatieff, 2007; MacLennan, 2003; and Tarnopolsky, 1975.

Public Policy and Legislation

Canada has long taken pride in its "mosaic" (as opposed to the American "melting-pot") policy, whereby Canadian society does not mandate that migrants conform to a particular national identity. Rather, Canada encourages citizens to maintain their cultural, linguistic, and religious heritages, an approach that is unlike the one experienced by many migrants to other nations who (through policies of systematic assimilation) are both socially and politically pressured to "abandon their religious and cultural beliefs and become 'others'" (Delic, 2008). The importance of recognizing the diversity and the various demands of faith that inform some citizens is a responsibility that Canada does not take lightly. That the nation encourages religious people to participate fully and equally in public life without abandoning their beliefs and practices stands in stark contrast to some other liberal democracies where public extensions of belief often give way to the secular demands of public citizenship.

According to Breton (1986), various facets of Canadian policy--such as the Charter of Rights and Freedoms, the policy of Multiculturalism, and the Canadian Human Rights Act--"constitute symbolic statements of considerable importance" for immigrant communities. While this section simply outlines various policies and laws created to protect and ensure religious freedom and equality, it does so keeping in mind that these various policies, particularly when institutionalized, offer various communities a mechanism with which to negotiate political, social, and judicial boundaries. Collectively,

these policies create a template that effectively allows the Sharia debates to occur, and that continue to assign credibility to the possible implementation of religious arbitration tribunals in the future.

Immigration & Multiculturalism

Even though Canada prides itself on being a nation that encourages diversity of culture (including religious diversity), the issue has never been a definitive one. This ambiguity can be attributed to several factors, including differences in understanding the scope of freedom of religion, as well as shifting demographics that beg for constant refinement of what the nation deems appropriate and within the sphere of acceptability. In order to understand the current Sharia debates in Canada, it is imperative that we understand what the nation's legal positions are on religion through a brief analysis of several key policies, laws, and legislations that have come together to create a uniquely Canadian stance on accommodation.

One of the most important factors shaping Canada's current relationship with religion is its policies of multiculturalism and diversity. While for many years Canada's identity was formulated around its French and English founding cultures with reference to First Nations people, today Canadian culture is far more diverse.[27] Prior to 1971 Canadian society largely mimicked British society both symbolically and culturally (through, for example, Canada's political and economic institutions). In fact, up until

[27] The 2006 Census enumerated over six million foreign-born people in Canada (accounting for virtually 20 percent of the population, which is the highest that it has been in 75 years) (Statistics Canada, 2006).

the passage of the Canadian Citizenship Act in 1947, all Canadians were identified as British subjects. According to reports, until this period authorities "dismissed the value of cultural heterogeneity" considering ethnic and cultural differences of the population as "inimical to national interests" and "detrimental to Canada's character and integrity" (Dewing and Leman, 2006:4). Unsettling relations between English and French relations in Canada, demands made by Canada's Aboriginal communities, and the rise of Quebecois nationalism in the mid-1960s, all led to increasing tensions within society. More importantly for this current study, however, were the perceived challenges presented by the arrival of immigrants from an array of diverse ethnic and cultural backgrounds into Canada (Elliott and Fleras, 2003:51-75).

In response to the mounting cultural tensions, the government of Canada established the *Royal Commission on Bilingualism and Biculturalism* in 1962 to examine issues of identity in Canada and to seek possible resolutions to these strains. Through a series of cross-country hearings, the Commission determined that older policies of assimilation were no longer effective, and in 1969, the Royal Commission published Book IV of its report in which it offered vast changes acknowledging cultural pluralism. Among other things, the commission recommended a new vision of Canada that subscribed to *integration* as opposed to assimilation, and where ethnic groups had full citizenship rights and the right to equal participation in Canadian society. This blueprint of Canadian society (unlike the melting pot

model of the United States) reflected the government's acknowledgement of difference and its endorsement of cultural pluralism. This new vision, (loosely labelled the cultural mosaic model) viewed pluralism not as a detriment to Canadian identity, but rather the backbone of Canadian identity (Multiculturalism in Canada, 2005).

In 1971, the federal government of Canada under then Prime Minister Pierre Trudeau announced its policy of multiculturalism that would recognize the existence of pluralism while at the same time would encourage all Canadians (regardless of language, ethnicity, or religion) to participate fully and equally within society. Some of the key points of this new policy included (and continue to include):

- To assist cultural groups to retain and foster their identity
- To assist cultural groups to overcome barriers to their full participation in Canadian society; (thus, the multiculturalism policy advocated the full involvement and equal participation of ethnic minorities in mainstream institutions, without denying them the right to identify with select elements of their cultural past if they so chose); and
- To promote creative exchanges among all Canadian cultural groups (Statement of Right Hon. P.E. Trudeau [PM], House of Commons Debate, 1971).

The creation of a policy that encouraged and celebrated difference was integral in planting the early seeds of cultural and legal pluralism. By becoming the first country in the world to adopt multiculturalism as an official policy, Canada firmly established itself as a nation willing to embrace diversity. For Trudeau, this acceptance of pluralism was not just an act of compassion—it was essential for a healthy functioning nation:

> A policy of multiculturalism . . . commends itself to the government as the most suitable means of assuring the cultural freedom of Canadians. Such a policy should help to break down discriminatory attitudes and cultural jealousies. National unity if it is to mean anything in the deeply personal sense, must be founded on confidence in one's own individual identity; out of this can grow respect for that of others and a willingness to share ideas, attitudes and assumptions. A vigorous policy of multiculturalism will help create this initial confidence. It can form the base of a society which is based on fair play for all. *The government will support and encourage the various cultures and ethnic groups that give structure and vitality to our country* ....A policy of multiculturalism ... is basically *the conscious support of individual freedom of choice.* We are free to be ourselves. But this cannot be left to chance. *It must be fostered and pursued actively.* If freedom of choice is in danger for some ethnic groups, it is in danger for all. It is the policy of this government to eliminate any such danger and to "safeguard" this freedom... (Right Hon. P.E. Trudeau [PM], House of Commons Debate, 1971, my emphasis).

Thus, the Canada that Trudeau's new policy envisioned was one wherein there would be a co-existence of pluralities, founded on respect and the protection of diversity. Furthermore, this vision included the participation of an active government that would be accountable for "fostering" and "safeguarding" this freedom of diversity. With the inception of this new policy, Canada claimed its place in the world as a global leader in multiculturalism and diversity, conveying a model of (fairly) peaceful co-existence of multiple cultures and religions (Wood and Gilbert, 2005:680). Indeed, politicians in Canada's House of Commons acknowledged this achievement, recognizing "cultural pluralism [as] the very essence of Canadian identity" (Canada House of Commons, 1971:8580).

During the 1980s, in an effort at further bolstering multiculturalism as an official component of Canadian identity, the government increasingly

began to institutionalize many aspects of multiculturalism policy through legislation. Chief among these endeavours was the government's placement of multiculturalism in the Canadian Charter of Rights and Freedoms. Section 27 of the Charter boldly states, "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." As Dewing and Leman (2006:6) point out, this particular clause is crucial because it locates multiculturalism within the wider context of Canadian society, and authorizes the Canadian court system to consider multiculturalism as *an essential factor* in making decisions (a point that I discuss in greater detail shortly).

Efforts at refining multiculturalism in Canada did not stop there. In 1984, a Special Parliamentary Committee on Visible Minorities produced its (by now well recognized) report, *Equality Now!*, which made a series of eighty recommendations for governmental, institutional, and organizational cooperation to promote equity among various ethnicities in Canada. The report's recommendations included modifications in the areas of social integration, employment, public policy, and legal and justice issues (Equality Now!, 1984). In July 1988, Parliament adopted the Canadian Multiculturalism Act (Bill C-93), making Canada the first nation in the world to pass a national law on multiculturalism. The Act played a critical role in recognizing multiculturalism as a primary characteristic of Canadian society, and creating a "social ideal and organizing nationalist vision" (Wood and Gilbert, 2005:680).

With its adoption by Parliament in July 1988, the Multiculturalism Act took on a more nuanced and purposeful direction. This definitive act secured the place of tolerance, acceptance of diversity, and appreciation of difference at the core of the Canadian political and social identity. Yet, like so many policies, multiculturalism policies still had to maintain a balance between providing citizens with the right to identify with their cultural heritage (which of course includes religion), while at the same time maintaining "full and equitable participation ... in all aspects of Canadian society" (Government of Canada, 1988). While many Canadian policies and legislations speak to the freedom of individuals to practice religion without prejudice or intrusion, the Multiculturalism Act went one step further in recognizing the productive role of religion as part of Canadian society:

> AND WHEREAS the Government of Canada recognizes the diversity of Canadians as regards race, national, or ethnic origin, colour *and religion as a fundamental characteristic of Canadian Society* and is committed to a policy of multiculturalism (Canadian Multiculturalism Act, 1988, my emphasis).

The government created the Department of Multiculturalism and Citizenship in 1991, which it later dismantled and integrated into the larger Department of Heritage in 1993, but the program was never without its critics. As a part of addressing some of the concerns raised over the department and the role of multiculturalism in Canada, the Department of Canadian Heritage launched a review of its multiculturalism programs in 1995. Towards the end of 1996, the government announced a more refined program of

multiculturalism that focused upon social justice, civic participation, and identity. This new program would work to:

- Assist in the development of strategies to facilitate the full and active participation of ethnic, racial, religious and cultural communities in Canada;
- Support collective community initiatives and responses to ethnic, racial, religious and cultural conflict and hate-motivated crimes;
- Improve the ability of public institutions to respond to ethnic, racial, religious and cultural diversity;
- Encourage and assist in the development of inclusive policies, programs and practices within federal departments and agencies; and
- Increase public awareness, understanding and public dialogue with respect to multiculturalism, racism and cultural diversity in Canada (Dewing and Leman, 2006:7).

In effect, this refined agenda upholds the essential core of multiculturalism policy, which is to allow people of varied religious, cultural, and ethnic backgrounds to participate fully within Canadian society without having to abandon their identities.

Whether or not this type of official stance on multiculturalism is effective or desirable is an issue that many have debated at length. On the one hand, some critics fear that multiculturalism policy is more divisive than uniting, and that such a policy undermines a cohesive Canada, effectively creating a 'separation of culture'.[28] On the other hand, others maintain that because of its pluralistic heritage, there never has existed an established "Canadian" identity and that the multiculturalism policy has been an effective

[28] See among others, Abu-Laban and Stasiulis, 1992; Bisoondath, 2002; Granatstein, 2007; and Gwyn, 1995.

way of allowing immigrants to more easily integrate into Canadian society without forsaking other essential components of themselves.[29]

While these debates are both interesting and thought provoking, it nevertheless remains that, despite their controversy, these policies currently remain in place and are celebrated by the highest levels of government as the cornerstones of 'freedom' in Canadian society:

> Prudent decisions by our 18th and 19th century founders prior to Confederation created a constitutional framework for Aboriginal rights, minority language rights, and religious freedom that it is our responsibility to maintain. Immigrants to Canada know from experience how hard won, how rare in history, and how precious our freedoms are. Their commitment should make us even more determined to pass this legacy of freedom on to future generations – stronger and more secure than ever. Their pride should make us more proud, and their gratitude should make us more grateful, to be Canadian. For our government, that is what it means to be inclusive. Not just to welcome new Canadians and to celebrate the heritage they bring with them. But also to include them in the Canadian story. To invite them to write the next chapter (The Honourable Jason Kenney, Minister of Citizenship, Immigration and Multiculturalism, on the *Annual Report on the Operations of the Canadian Multiculturalism Act, 2007-2008*. Citizenship and Immigration Canada, 2009).

It is evident, therefore, that the presence of Multiculturalism policy, which remains in effect today[30] and is enfolded within the highest codes of federal law, both formulates and articulates the nation's commitment towards the recognition, promotion, encouragement, and advancement of diversity within Canada.

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[29] See for instance, Kymlicka 1998.

[30] Most provinces and municipalities also have adopted some capacity of federal multiculturalism policy particularly within their respective areas of jurisdiction including education, policing, and human rights (Multiculturalism in Canada, 2009:7).

The Charter of Rights and Freedoms

While religion permeates the pages of Canadian history, not until Prime Minister John Diefenbaker's government enacted the Canadian Bill of Rights[31] in 1960 did the federal government expressly acknowledged human rights within the context of diversity, including the freedom of religion:

> It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, color, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (b) the right of the individual to equality before the law and the protection of the law
>
> (c) freedom of religion
>
> (Canadian Bill of Rights, S.C. 1960, c. 44).

The impact of the passage of this bill was enormous, particularly for immigrant populations to Canada seeking to maintain their respective cultural and religious identities. It remained, however, that the Bill of Rights--while groundbreaking in its guarantees--was limited in scope (Cardozo and Pendakur, 2008:23).[32] While the Bill of Rights remains in effect, it is largely overshadowed today by the Canadian Charter of Rights and Freedoms. Compared to the Bill of Rights, the Charter wields greater authority because it is part of the Constitution—the supreme law of Canada.[33]

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[31] It should be noted, however, that around the time that Diefenbaker's government enacted the Canadian Bill of Rights, the government already recognized an Implied Bill of Rights. See Hogg, 2009.

[32] The Canadian Bill of Rights is a quasi-constitutional law that has legal power but not constitutional authority. See Magnet, 1989. Part VI, Chapter 1.

[33] The Charter of Rights and Freedoms is technically a bill of rights entrenched in the Canadian Constitution. The Charter forms the initial section of the 1982 Constitution Act.

Perhaps more than any other declaration, legislation, or policy, the Canadian Charter of Rights and Freedoms is the defining document when it comes to understanding the status and scope of religion in Canada. The Charter of Rights and Freedoms is the supreme law of Canada in the sense that all other laws must act in accordance with the Constitution. The Constitution applies to both federal and provincial jurisdictions, making it the superlative legal framework under which all other laws operate. The placement of religion in this quintessential document is important on two fronts. First, it shows that despite the fact that Canada is a 'secular' nation, matters of faith still retain an important position (a feature that is further substantiated by the bold placement of God in the preamble of the Charter). The placement of not only overt allusions to religion, but also guarantees of its freedom in the Charter essentially delegates faith as a credible component of Canadian life, on par with other essential freedoms and rights guaranteed to citizens.

Second, the fundamental freedoms accorded to religion and the protection of human dignity in the Charter not only demand discussions surrounding what entails religious freedom, but also how the country must honour such normative commitments. These debates of course, unfold in the halls of our nation's judicial system, since the Charter forms the basis for subsequent interpretations and articulations of case law dealing with the placement and practice of religion in Canadian society.

While religion holds a coveted position within the Charter, singled out as a separate component worthy of attention, its presence in the Charter, and its subsequent treatment in jurisprudence, often is mitigated or at times enforced by the presence of other, supporting sections, such as those dealing with equality, human dignity, multiculturalism, and diversity. These sections operate concurrently in creating a uniquely Canadian perspective on the position and parameters of religion in society. A brief examination of some of these supporting sections illustrates some of the compelling arguments that permit the Sharia debates.

Supporting Sections of the Charter

In large part, Canada's global reputation as an egalitarian nation is reinforced through many of its Charter provisions. For example, section 28 of the Charter guarantees equality between men and women, and section 27 states that the Charter "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians" (Charter). The quintessential section of the Charter dealing with equality, section 15, prohibits any sort of discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability, and demands equality for all individuals under the law.

According to much of the legal literature, many of these inclusions within the Charter are premised on the notion that individuals "possess universal and inalienable rights" that are derived from sources "beyond the state, sources more recently referred to as natural *human dignity*" and the

Charter is designed in such a way so as to protect these "pre-existing human rights" (Penney and Danay, 2006:4, my emphasis). For example, according to Justice Iacobucci of the Supreme Court of Canada, the Charter aims at preventing the:

> violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political and social prejudices, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration (Law v. Canada [Minister of Employment and Immigration], [1999] 1 S. C. R. 497).

Nevertheless, the matter of human dignity does not simply translate into equal treatment before the law.

As several key cases illustrate, interpretations of the notion of 'human dignity' within the Charter also recognize that individuals may be guided by a plurality of laws and norms, and that often the protection of citizens' 'universal and inalienable rights' may conflict with state jurisprudence. For instance, in R. v. *Oakes*, ([1986] 1 S.C.R. 103, at para. 136), Chief Justice Dickson refers to the essential position of maintaining human dignity under the Charter, stating that:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

Similarly, in R. V. Morgentaler, ([1988] 1 S.C.R. 30, at p. 166), Justice Wilson expresses the importance of human dignity as provided by the Charter, writing that:

> The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue.

In R. v. Edwards Books, ([1986] 2 S.C.R. 713), the court alluded to the notion that human dignity involves, in part, the comprehension that individuals are motivated and driven by various external factors. Thus, protecting human dignity at times entails curbing state interference: "the purpose of s.2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, *a higher or different order of being*. These beliefs, in turn, govern one's conduct and practices" (my emphasis).

In fact, the notable secularist, former Prime Minister Pierre Elliot Trudeau himself believed that inalienable rights and rights pertaining to human dignity transcended the powers of the state:

> 'The very adoption of a constitutional Charter is in keeping with the purest liberalism, according to which all members of a civil society *enjoy certain fundamental, inalienable rights* and cannot be deprived of them by any collectivity (state or government) or on behalf of any collectivity (nation, ethnic group, religious group, or other). To use Martain's phrase, they are "human personalities," they are beings of a moral order—that is *free and equal among themselves, each having absolute dignity and infinite value.* As such, they transcend the accidents of place and time, and partake in the essence of universal Humanity. They are therefore not coercible by any ancestral tradition, being vassals neither

> of their race, nor to their religion, nor to their condition of birth, nor to their collective history' (Trudeau, quoted in Penney and Danay, 2006:28, my emphasis).

Entering the arena of human rights and the natural law tradition is a formidable task worthy of separate attention, but I briefly mention it here because in discussing the importance of protecting human dignity under the Charter, Canadian courts are in part recognizing that many invaluable rights are not necessarily derived from the state or other 'worldly' legal spheres, but rather from other 'sacred' or 'higher' sources, thereby revealing the nation's acknowledgement of legal pluralism.

Of course, the protection afforded to human dignity is not an exclusively Canadian occurrence. Rather, as Penney and Danay (2006) argue, the concept of human dignity remains a guiding theme of many international and human rights legal systems (many of which, such as the Universal Declaration of Human Rights that Canada is a signatory to). [34] Granted, in many of these aforementioned cases, human dignity is protected by the absence of state action. Yet, as will become apparent in subsequent discussions on religious arbitration tribunals, the protection of human dignity, as part of a complex web of other protections, often requires *the presence* and protection of state authority.

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[34] For a list of all the treatise and conventions regarding human rights that Canada is signatory to, refer to http://www.international.gc.ca/rights-droits/policy-politique.aspx?lang=eng.

Freedom of Religion in the Charter

As earlier discussed, the protection of religious practice in Canada dates back to the 1770s when British legislation permitted Quebec residents to exercise freely their Catholic faith. In the year 1852, the government passed legislation acknowledging legal equality amongst religious denominations. The legislation (that still exists in Ontario as the Religious Freedom Act), guarantees:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, provided the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province assured to all Her Majesty's subjects within the same (R.S.O. 1990, c. R-22. Originally enacted as 14 & 15 Vict., c. 175.).

Other subsequent Acts and cases also discussed early religious rights in Canada,[35] but not until the Charter of the Rights and Freedoms did religion take on a truly normative position in the nation. Beginning with the proclamation that "Canada is founded upon principles that recognize the supremacy of God" the Canadian Charter of Rights and Freedoms also alludes to religion through guarantees of equality and freedom from discrimination on grounds of religion, national, or ethnic origin (s.15), and as previously mentioned through the promotion of interpretations consistent with Canada's multicultural heritage (s.15).

The most overt statement in the Charter pertaining to religion, though, explicitly guarantees "the freedom of conscience and religion" (2a),

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[35] These other Acts and cases include, for instance, the Constitution Act of 1867, the Guibord case of 1874, Chaput v. Romain, 1955 and the Canadian Bill of Rights.

and is situated alongside other essential freedoms guaranteed to all citizens such as freedom of thought, belief, opinion and expression (2b), freedom of peaceful assembly (2c), and freedom of association (2d). As other rights and freedoms guaranteed under the Charter, however, freedom of religion is subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (s.1.). This critical clause restricting religious freedom to an agenda of "reasonable limits" while seemingly simple, belies the complexity behind determining what exactly constitutes the notion of "reasonable limits." Indeed, as the Sharia debates, together with other telling court cases reveal, determining where lines of acceptable accommodation should and can be drawn remains, at best, an onerous task.

At the core of the Charter declaration on religion lies the idea that society must accommodate individuals' freedom to hold and practice religious beliefs and participate in religious observations, unless it in somewhat interferes with the rights of others. As Ryder (2008:87) points out, this portion of the Charter plays an important role because it aims to prevent governments from "enforcing laws or policies, absent a compelling justification, that have the purpose or effect of *coercing individuals to abandon sincerely held beliefs*..." (my emphasis). The courts, guided by the Constitution, ultimately act as adjudicators of what constitutes religious freedom, and they largely demarcate which religious practices are worthy of accommodation and protection and which practices fall outside the scope of

these margins. Because these court decisions play an integral role in the nation's conception of religious freedom and have a large bearing in later framing the Ontario Sharia debates, I will spend time addressing some key Canadian court cases, and the ways in which these cases have defined and appropriated religion.

Granted, religious consciousness in Canada does not operate independent of such other dynamic forces as liberalism and secularism, and often religion's presence in the public sphere is steeped in discussions of what constitutes civil society.[36] In this particular section, I am interested not so much in what informs or guides the role of religion in Canada, but rather, how the legal system understands and defines the role of religion. In doing so, I wish to illustrate the rather bold approach to religious citizenship that appears in Canadian jurisprudence that sets it apart from other similarly liberal countries.

Religion in the Courtrooms

In a nation that plays home to such a rich array of cultures and religious belief systems, Canadian courts play a crucial role in evaluating religious consciousness amidst the backdrop of the civic values of "human dignity, autonomy, and security" (Berger, 2002:40). The task has not been effortless—indeed, Canada has been pressed with issues pertaining to religion and human rights as diverse as Sikhs' rights to wear ceremonial daggers (*kirpans*) to school to the rights entitled (or not entitled) to a family

[36] See, for example, discussions on liberalism, secularism, and civil society provided by, Benson, 2000; Gellner, 1994; Rawls, 2005; Taylor, 1995; and Tester, 1992.

of Jehovah's Witnesses refusing blood transfusions for their dying child. In each of these cases, (and there have been plenty of them),[37] the Canadian government and judiciary has had to decide where religious freedom ends, where civil liberties begin, and how multiple sources of authority are to be reconciled. The story of the Ontario Sharia debates represents yet another such decision point.

Cases in Canada's courts reveal a great deal about the position that courts take when it comes to matters of religion. At times, for example, the state protects religious belief and practice—or "freedom for cases." (For example, O'Malley v. Simpsons-Sears, and Bhinder v. CNR.) At times, the state protects individuals and groups *from* religion--or "freedom from cases." (Examples include religion in public schools: Zylberberg v. Sudbury Board of Education and Canadian Civil Liberties Association v. Ontario Minister of Education .) Thus, while courts premise cases that advocate for the freedom of religion on the basis that courts must protect religion, the courts premise cases of 'freedom from' on a guarantee of freedom from state coercion in matters of religious belief, or the *absence* of coercion (Brown, 1999). By discussing several key cases, I wish to elucidate Canada's unique position of balancing competing sources of authority to the extent that religion does not harm or jeopardize public or individual safety.

[37] See Ogilvie, 2003 for the most comprehensive compilation of such cases.

Freedom of Religion

The Supreme Court of Canada critically gauged the issue of freedom of religion under the *Charter* for the first time in the 1985 case R. v. Big Drug Mart (also known as Big M). In this particular case, several retailers convicted of opening their businesses on Sunday questioned the constitutionality of the Lord's Day Act, which required businesses to close on Sundays, on the grounds that the act compelled adherence to the Christian Sabbath. That the Lord's Day Act compelled religious observance was a detail that Chief Justice Brian Dickson alluded to when he stated that:

> To the extent that it binds all to a sectarian Christian ideal, the Lord's Day Act works a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the State, translates them into a positive law binding on believers and non-believers alike. The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture.[38]

What was more profound about this case (and what ultimately develops into the guiding definitional parameters of religion used in many succeeding court cases) however, was the way in which Justice Dickson defined the freedom of religion. According to the Justice:

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[38] What is interesting about this case is that while it was struck down because it violated section 2(a), a year later the Court found that an Ontario Sunday closing law was fine in that it fulfilled a secular purpose in establishing a rest day for workers, and was constitutionally upheld. See R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713. This variation is indicative of the discrepancies that exist when claimants present cases with varying objectives. The latter case was presented as fulfilling a secular purpose, whereas R. v. Big Drug Mart clearly had a religious connotation.

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constrain, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or conscience.

Closer analysis of this particular passage reveals some interesting points. First, according to this understanding of the freedom of religion, religion is not a force that society is to relegate to the private sphere. Rather, it is something that people should have the ability to engage in openly and publicly without the fear of suppression or reprisal.

Second, according to this definition, freedom of religion is not only about the proactive nature of freedom, but rather, it demands the absence of coercion—not only direct coercion, but indirect coercion as well, "which determine or limit alternative courses of conduct available to others." This

latter statement is particularly telling in the case of religiously based arbitration courts where proponents of the system argue against the potential removal of alternate legal systems of conduct. Finally, and most importantly, according to this definition, freedom is not an absolute concept. Rather, freedom of religion must occur in accordance with legal limits, the protection of the public order and the rights of others.[39] Thus, courts permit the freedom of religion only if that freedom does not infringe on other rights and laws. This latter point is one that opponents of religious arbitration tribunals heavily employed in their struggle against the legal implementation of such alternate systems of law, when they argued that the existence of such tribunals infringe (among other areas) freedoms of equality.

Religious Equality

Canada's commitment to the protection of religious freedom extends beyond the realm of belief, worship, and dissemination, to include the right to exercise religious practices without interference. In a way, the move from simply having the freedom to hold a belief to having the freedom to practice that belief, illustrates the breadth of constitutional protection for the freedom of religion. Several cases have spoken directly to the protection of religious practice, perhaps the most interesting of which was O'Malley vs. Simpsons Sears.[40]

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[39] On this point, see also, Jones v. The Queen, [1986] 2 S.C. R. 284 at 310, which reiterates that rights granted under the Charter are not absolute (314), and that they are only protected insofar as they fall within the "limits of reason" (300).

[40] I am well aware that the cases that I provide here all illustrate instances where the courts sided with religious freedom. Indeed, some may argue that this analysis is rather

In 1975, Theresa O'Malley started working at a Sears store in Kingston Ontario. Because she was a full-time salesperson, she was required, as per company policy, to work two Saturdays out of three per month (with Saturday being the busiest retail day of the week). In 1978, O'Malley became a member of the Seventh-day Adventist Church, and was required by the tenets of her faith to observe the Sabbath. As such, she was unable to work between sunset Friday to sunset Saturday. Unable to reach a resolution with her supervisor, O'Malley was forced to give up her full-time position, working part-time instead. O'Malley complained to the Ontario Human Rights Commission on the grounds of religious discrimination, asking for monetary compensation. When the case finally reached the Supreme Court of Canada, the court ruled in favour of O'Malley, stating that the rule requiring her to work on Saturday was "adverse discrimination" and the otherwise neutral rule in her place of employment had an "adverse effect" on her.[41] Therefore, an otherwise neutral employment rule created for economic and business

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misleading, and neglectful of the plethora of cases that exist where courts rule on the side of *not* officially sanctioning religions. It is not my aim here to simplify what is in reality a very complex picture of religion in Western societies. Indeed, as I have alluded to, the role of religion in Western society often requires both the courts and the state to play a fine balancing act, at times restricting, at times negotiating, and at times accommodating religious practices based on the specific details of the case, and the extent to which religious freedoms in each of these cases challenge other values and constitutional principles. I have purposely chosen to present these cases here for two reasons. First, there is agreement within Canadian legal circles that, together with several others, these particular cases tend to be precedent setting cases, against which most other freedom of religion cases are measured against (Ogilvie, 2003). Second, I purposely have chosen these cases to illustrate to the reader that, where religious freedoms do not necessarily challenge other fundamental rights (or these challenges are deemed inconsequential), Canadian courts *have* traditionally sided with religion.

[41] According to the Canadian Department of Justice (2009), the definition of "adverse effect" or "systemic discrimination is simply stated as arising when laws, practices, or policies that are intended to be neutral have a discriminatory impact on a prohibited ground on some groups.

purposes, and equally applicable to all employees, nevertheless can be discriminatory and affect certain individuals (in this case with a certain religious proclivity) in an unintended negative way.

Notwithstanding other important factors such as employment law, and the limits and onus of reasonable accommodation, this case elucidates an essential point that speaks to the heart of the Canadian model of equal religious citizenship, namely, the government must adjust otherwise neutral laws in ways that permit people of faith to participate *equally* in society. Similar to Big M, the court in the case of O'Malley vs. Simpsons Sears recognized that otherwise neutral rules might actually produce coercive burdens on religious freedoms. Unless the state can demonstrate that the rules produce reasonable limits on religious freedom, this type of coercive burden is otherwise unconstitutional. In the interest of true equality, therefore, *certain rules and laws demand differentiation.*[42]

A case that also touches upon the differentiation of otherwise neutral laws in protecting religious freedom is Syndicat Northcrest v. Amselem (2004). In this particular case, the Supreme Court of Canada upheld the rights of observant Jews in Montreal to erect *succahs*[43] on their condominium balconies for the purpose of fulfilling (in accordance with the Hebrew Bible)

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[42] This concept of reverse discrimination and religious equality also arises in Big M. In the case, Chief Justice Dickson commented that "[t]he equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment" (R. v. Big Drug Mart, [1985] 1. S.C.R. at 347).

[43] A *succah* is a small hut, open to the heavens, in which observant Jews dwell temporarily during *Succot*, which lasts nine days. The festival commemorates the forty years during which the Children of Israel supposedly wandered in the desert and lived in temporary shelters.

a practice of dwelling in a temporary hut during the annual religious festival of *Succot* (Nehemiah 8:2-3, 13-15). The problem arose as a result of a condominium prohibition of public decorations on balconies, designed both as a safety measure as well as to preserve the austere architectural style of the building. The condominium board had refused permission for the building of the *succah*, offering instead to erect a communal *succah* on the syndicat grounds (an offer that the Canadian Jewish Congress approved), but which complainants felt did not fulfill their religious obligations. In its ruling on the matter, the Supreme Court of Canada reversed an earlier lower Quebec court decision, permitting the construction of the *succahs.*

This case represents (together with R. v. Big M Drug Mart), one of the most seminal decisions with respect to the interpretation and application of the freedom of religion clause in the Charter, and infuses some interesting elements into the religious debate in Canada, worthy of note. First, Justice Frank Iacobucci, writing for the majority, acknowledged the difficulty, if not impossibility (para. 22), of precisely defining 'religion' but concluded that an "outer definition" would be useful as "only religious beliefs, convictions and practices rooted in religion, as opposed to those that are 'secular', socially based or conscientiously held, are protected by the guarantee of freedom of religion" (para, 39). Thus, in attempting to define religion, the court did so in a manner that acknowledged the possible existence of a higher being, intrinsically tied to a person's view of himself or herself and with his or her need to fulfill certain spiritual obligations:

> Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, *religion is about freely and deeply held personal convictions* or beliefs connected to an individual's spiritual faith *and integrally linked to one's self-definition and spiritual fulfillment*, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith (at para. 39, my emphasis).

In addition to alluding to the possibility of a higher being guiding the lives of adherents, another factor that makes the majority's statement so interesting is its focus on the individual nature of religion and belief.

By emphasizing personal choice, subjectivity, and autonomy, the majority view that *sincerity of belief* is a sufficient enough premise to warrant protection (thereby providing a broader framework of defence than just those beliefs or practices that are objectively recognized and approved by religious experts as being requisite components of a certain religion) essentially broadened the definition of freedom of religion through its inclusion of individual rights. The majority's view that secular governments should not act as judges of proper or obligatory religious conduct or the truth guiding moral beliefs further reinforced this focus on individual belief:

> As such, a claimant need not show some sort of objective religious obligation, requirement or precept to invoke freedom of religion. It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection. The State is in no position to be, nor should it become, the arbiter of religious dogma ... the focus of the inquiry is not on what others view the claimant's religious obligations as being, but what the claimant views these personal religious 'obligations' to be (Syndicat v. Amselem [2004] at para. 26-28).

In permitting the building of the balcony *succah,* however, the Supreme Court emphasized the underlying tension that continues to exist between religious freedom and the protection of other rights:

> ... religious conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular Charter right must be measure in relation to other rights and with a view to the underlying context in which the apparent conflict arises (Syndicat v. Amselem [2004] at para. 14).

Thus, as stressed pointedly in Big M, the Charter guarantees religious freedom in so far as other fundamental freedoms are not compromised and no harm comes to others. Exactly how the courts negotiate this latter point is the crux of many debates involving religion in Canada's public sphere, and has played out in several key high-profile cases.[44] The case Multani v. Commission scolaire Margerite-Bourgeoys (2006) is one such case that demonstrates the extent that a court will guarantee religious freedom and expression, while negotiating other fundamental freedoms, including even issues of safety.

The appellant in Multani v. Commission scholaire Marguerite-Bourgeoys (hereafter Multani), Gurjab Singh, was a young orthodox Sikh male who, following a basic tenet of the Sikh faith, wore a *kirpan* (a religious object resembling a dagger) at all times. Upon having accidentally dropped

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[44] Additional cases that illustrate the tension between fundamental freedoms include, Trinity Western University v. British Columbia College of Teachers, 2001 SCC 31; B. (R) v. Children's Aid Society of Metropolitan Toronto, 1995 1 S.C.R.; and Chamberlain v. Surrey School District No. 36. 2002 SCC 86.

the *kirpan* in the schoolyard, the school board, following a policy prohibiting the carrying of weapons to school, informed the appellant that he was no longer permitted to wear a traditional *kirpan*, encouraging him to carry a symbolic one instead. Having to choose between religious obligation and attending public school the appellant was forced to withdraw and attend a private school instead.

As with previous cases, the Supreme Court of Canada emphasized in the case of Multani that the Charter of Rights and Freedoms establishes a minimum constitutional protection for the freedom of religion that legislatures and administrative tribunals must take into account (Multani, note 1 at para. 16). Similar to Amselem, this case also raised the importance of personal belief and conviction, but stressed the importance of protecting other fundamental freedoms including the safety of others. Like Amselem, this case centered on issues of reasonable accommodation, mainly that the school-board's refusal to agree to a reasonable accommodation had violated the plaintiff's freedom of religion. The court found that the child's need to wear the *kirpan* was not erratic, but rather a sincerely held religious belief "based on a reasonable religiously motivated interpretation" and a practice that he must adhere to "in order to comply with the requirements of his religion" (Multani, note 1, at para. 36 and 38).

Furthermore, similar to Amselem, the courts also disregarded the fact that other Sikhs would accept a compromise by wearing *kirpans* made of other materials (such as wood or plastic) as irrelevant, again stressing the

importance that the court places on *personal conviction*. As Justice Charon stated in the majority opinion, "The fact that other Sikhs accept such a compromise is not relevant, since as Lemelin J. mentioned at para. 68 of her decision, 'we must recognize that people who profess the same religion may adhere to the dogma and practices of that religion to varying degrees of rigour" (Multani, at para. 39).

The Court also stressed, however, that freedom of religion is a freedom that is not absolute in nature, yet if the plaintiff carried the *kirpan* in a safe manner (sealed within his clothing), it would not create much cause for concern. More interestingly, however, is that the court, in its ruling, rejected the argument that the *kirpan* should be prohibited as it sends out a message of violence, and has the potential to be violent. The court stated that such a view was disrespectful to the Sikh community, that it sent the message that "some religious practices do not merit the same protection as others" (SCC, 6: 2006) and that it would "stifle the promotion of values such as multiculturalism [and] diversity" (SCC, 6, at para. 78: 2006). In emphasizing the importance of maintaining ideals of multiculturalism and diversity, the court felt that allowing the student to wear the *kirpan* under certain conditions "demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities" (Multani, para. 79).

I include in this discussion Multani together with Amselem and Big M because these cases all illustrate how, to date, courts have endeavoured

(notwithstanding blatant infringements on other rights) to protect the freedom of religious belief and practice. These cases further illustrate the power of the Charter in creating a society wherein Canadians may declare religious belief openly through worship and practice and where the courts will protect and defend religious accommodation (in following the dictates of the Charter).

Given that the Charter is still relatively new, it is certain that courts and administrative tribunals still have a long way to go when it comes to defining the boundaries between freedom and other rights. Yet, as evidenced through these three cases, the courts have interpreted the Charter's protection of religious freedom emphasizing the importance of several key principles:

- the essence of the concept of freedom of religion is:
    - the right to entertain such religious beliefs as a person chooses;
    - the rights to declare religious beliefs openly and without fear of hindrance or reprisal; and
    - the right to manifest religious belief by worship and practice or by teaching and dissemination;
    - the absence of coercion and constraint (O'Malley vs. Simpsons Sears; R. vs. Big Drug Mart)
- no one is forced to act in a way contrary to his or her beliefs or conscience, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others (R. vs. Big Drug Mart; subsequently Multani v. Commission scholaire Marguerite-Bourgeoys);
- achieving religious equality may at times and within reasonable limits, demand a differentiation of otherwise, or seemingly neutral rules or laws (O'Malley vs. Simpsons Sears and subsequently Amselem vs. Syndicat).
- the state is not to dictate what are the religious obligations of the individual--the individual is to determine them (R. vs. Big Drug Mart;

subsequently Amselem vs. Syndicat and Multani v. Commission scholaire Marguerite-Bourgeoys);

- freedom of religion consists of:
    - the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith
    - this freedom is irrespective of whether official religious dogma requires a particular practice or belief or if the questioned practice or belief is in concordance with the position of religious officials (Syndicat v. Amselem subsequently Multani v. Commission scholaire Marguerite-Bourgeoys);
- in order to establish that a claimant's freedom of religion has been infringed, the claimant must show that she/he sincerely believes in a practice or belief that has a nexus with religion, and that the impugned conduct of a third party interferes with her/his ability to act in accordance with that practice or belief (Syndicat v. Amselem); and
- this interference must be more than trivial or insubstantial (Syndicat v. Amselem, subsequently Multani v. Commission scholaire Marguerite-Bourgeoys).

Thus far, I have shown through various government policies, laws, and Canadian court cases that, despite its contestations, Canada has long maintained a rather robust approach towards the maintenance and protection of religious equality and religious freedom, guided on principles of neutrality. This recognition and reinforcement of religious equality and rights reflects, in part, the state's attitude when it comes to acknowledging and considering that citizens are at times guided by other laws outside of the scope of Canadian secular jurisprudence.

It remains, however, that the primary function of the Canadian judicial system is to try cases based on a secular legal framework. Guided in part by section 2(a) of the Charter, the degree to which courts intervene in religious

matters (at least on the surface) appears to be reserved in those cases involving human rights and freedom issues. Entertaining specific religious laws is not ideal as seen in Syndicat v. Amselem where, "[s]ecular judicial determinations of a theological or religious dispute, or of contentious matters of religious doctrine, *unjustifiably entangle* the court in the affairs of religion" ([2004] S.C.J. 551, at 50, my emphasis). In a similar vein, three judges from the Supreme Court of Canada also recently wrote:

> [I]t is no longer the state's place to give active support to any one particular religion .... The state must respect a variety of faiths whose values are not always easily reconciled. ... As a general rule, the state refrains from acting in matters relating to religion. It is limited to setting up a social and legal framework in which beliefs are respected and members of the various denominations are able to associate freely in order to exercise their freedom of worship ....In this context, the principle of neutrality must be taken into account in assessing the duty of public entities, such as municipalities, to actively help religious groups (Congrégation des témoins de Jéhovah *v.* Lafontaine (Village), [2004] SCC 48).

From the government and judiciary's perspective then, religion is a deeply-rooted matter of conviction that, while motivates and rules people, is best left to individuals and their respective communities. While religion is not barred from public spaces, and in fact, cultural diversity is not only permitted, but also encouraged through various government laws and policies, in matters of religious conscience and faith, the government and the courts try to steer clear of such matters, focusing instead on the routine operations of civil society.

With increasing cultural diversity, however, brought upon in part by

forces of globalization, Canadian courts, at times, have had to amend their policy of distanciation and actually play a part in judging religious law in order to address religious questions that affect other areas of citizen's lives. My research indicates that there exist quite a few cases that have come before various levels of Canadian courts that demand judges to consider personal faith matters in their decisions.[45] What these cases illustrate is that

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[45] See for example, Bruker v. Marcovitz, 2007; Bhatti v. Canada, 2003; Amjad v. Canada, 2005. Perhaps the most cited of these cases is Bruker v. Marcovitz where lower court Justice Allan Hilton wrote that the obligation of a Jewish *get* (alternately *get*), was religious in nature and so could not be judged by the civil courts, "Although one cannot help but be sympathetic to the plight of a Jewish woman whose former husband delays or denies her a *get* ... manifestly it is not the role of secular courts to palliate the discriminatory effect of the absence of a *get* on a Jewish woman who wants to obtain one ...." The lower courts ruling, however, was overturned by the Supreme Court of Canada where Justice Abella (at para. 18) stated that, "In deciding cases involving freedom of religion, the courts cannot ignore religion. To determine whether a particular claim to freedom of religion is entitled to protection, a court must take into account the particular religion, the particular religious right, and the particular personal and public consequences, including the religious consequences, of enforcing that right." Furthermore, in elucidating the importance of interpreting religious law in accordance with Canadian secular law, Justice Abella (at para. 63 and 82) stated that, "the enforceability of a promise by a husband to provide a *get* harmonizes with Canada's approach to religious freedom, to equality rights, to divorce and remarriage generally, and has been judicially recognized internationally.... Moreover, under Canadian law, marriage and divorce are available equally to men and women. A *get*, on the other hand, can only be given under Jewish law by a husband. For those Jewish women whose religious principles prevent them from considering remarriage unless they are able to do so in accordance with Jewish law, the denial of a *get* is the denial of the right to remarry.... The refusal of a husband to provide a *get*, therefore, arbitrarily denies his wife access to a remedy she independently has under Canadian law and denies her the ability to remarry and get on with her life in accordance with her religious beliefs." Alternately, consider that in Kaddoura v. Hammoud, a case dealing with the issuance of *mahr* (very loosely translated as an Islamic dowry) Justice Rutherford, subsequent to hearing rather extensive testimony from Islamic scholars and leaders on the matter stated that "I don't think, even if I had received clear and complete Islamic doctrine from these experts, that I could, as if applying foreign law, apply such religious doctrine to a civil resolution of this dispute. In any case, the matter isn't that easy. Mufti Khan in particular, said that only an Islamic religious authority could resolve such a dispute and a proper resolution involved a number of factors and a proper application of principles derived from the Holy Qur'an, the words of the Prophet and from the religious jurisprudence...In my view ... [this case] ... would necessarily lead the Court into the 'religious thicket' a place that the courts cannot safely go and should not go" (Kaddoura v. Hammoud, 1998).

in recognizing the existence of legal pluralism in the lives of citizens, Canadian courts have acknowledged religious law in their decisions, and at times followed the prescriptive of religious law within certain frameworks.[46] It remains, however, that this (somewhat contradictory) acknowledgement of religious law within Canadian courts certainly raises questions regarding what *precisely* the role of religion is in the secular court system and what this ambiguous role means for observant Canadians whose lives are dictated, in part, by religious laws.

Summary

The preceding discussion reveals several important features of religion in Canadian society that figure prominently into subsequent discussions on faith-based arbitration courts. As argued in this chapter, Canada is a nation founded heavily upon values of multiculturalism, diversity and religious freedom—all of which collectively inform and allow for discussions relating to the implementation of Sharia courts to take place. With increased migration, resulting in part from forces of globalization, Canada continues to invite new migrants into the folds of Canadian society, cognizant of their differences. Lauded for its official policies of multiculturalism and diversity, Canada is unique in its efforts at identifying and preserving difference while maintaining basic Canadian values of democracy and liberalism. In contrast to societies such as Turkey and France

[46] Courts have, to date, dealt with varied religious scenarios involving, for instance, the Islamic principles of *mahr* (loosely dowry), *talaq* (divorce) and Jewish *gets* (divorce). See Bruker v. Marcovitz, 2007; Bhatti v. Canada, 2003; Amjad v. Canada, 2005.

that are driven by varied philosophies of secularism, the Canadian conception of religious equality is founded on the recognition that "religious belief and affiliation are fundamental aspects of one's identity, closely connected to cultural membership, and often pervade all aspects of a believer's life" and that Canada believes in an individual's right "to be equally and simultaneously members of multiple communities of faith and political affiliation" (Ryder, 2008:92). The placement of religion in Canada's highest code of authority, the Charter of Rights and Freedoms, is a bold statement regarding the prominent place that religion holds in Canadian society.

The freedom of religion clause in the Charter is qualified in various ways, including the importance of conscience and human dignity (section 2a, Charter), equality (section 15, Charter), and the preservation and enhancement of culture (section 27, Charter). It remains, however, the responsibility of the courts to qualify the freedom of religion by "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (section 1, Charter). Effectively, the courts hold the power to interpret the fundamental freedom of religion as drawn out in the Charter whilst maintaining and balancing other fundamental freedoms and rights. As this chapter reveals, however, the role of the courts concerning matters of religion has not always been straightforward. Indeed, at times courts have backed away from matters of faith with the conviction that courts are not suitable venues for the dealing with matters of personal conviction, while at other times, courts have shown the capacity to deal with

cases involving faith, as they pertain to other rights issues.

Following the prescriptive, however, that, generally, Canadian courts tend to stay away from cases pertaining specifically to religious matters suggests a certain void in state-protected religious legal venues. Given Canada's strong affinity (as articulated through its various policies and laws) towards the endorsement and protection of religious freedoms, (particularly as they pertain to the protection of other essential freedoms), together with the courts' acknowledgement that some Canadian lives are guided by forces beyond normative legal systems, it is interesting to note that official religious legal venues are no longer available to those Canadians whose religious belief systems demand adherence (particularly in the area of family law) to an alternate body of law.

Without jumping too far ahead, it is worth mentioning that while the Ontario government's decision to ban faith-based arbitration applies to all faiths, the decision came as the result of debates surrounding *Islamic law*, specifically. Naturally, this detail elicits many questions, chief among them, what it is about the Islamic system of law that incited such an intense reaction from so many Canadians, effectively removing it as an alternate, religious route of legal jurisprudence? And more significantly, what are the implications of removing Sharia as a viable form of arbitration? As I will argue in the remaining chapters, in deciding to dismiss the IICJ's proposed Sharia arbitration courts, the Ontario government failed not only in living up to the Canadian mandate promoting religious freedom and encouraging and

fostering diversity (as outlined in preceding chapters), but also in ensuring women's equality rights (the guaranteed right that opponents believed religious freedom in this case was infringing upon). Building upon the existing Canadian policies and laws as outlined in this chapter, I suggest that by deciding to ban faith-based arbitration, Ontario missed an excellent opportunity at introducing Islamic legal discourse into the wider Canadian legal framework (under a revised Arbitration Act), which in turn may have led to a more formalized, reformed, and transparent system of Canadian Sharia law. In addressing these issues, however, I first turn to the system of Islamic law itself.

CHAPTER 4
Islamic Jurisprudence

"Sharia for me is not what the fuqaha and the jurists have defined as only Islamic law. It is much more than that, it is the way towards faithfulness. We have to think the laws in the light of this way. This Sharia way is just providing the broad visions that we have to achieve. When a German law is telling me that men and women are to treated equal before law or that you get the same salary for the same work, this is sharia for me."

– Tariq Ramadan May 24, 2009, tariqramadan.com.

To this point, I have illustrated that--guided by various policies, initiatives, and the nation's highest legal framework (the Charter of Rights and Freedoms)--Canada historically has, and continues to take, a rather robust approach to religion. In recognizing that some citizens are guided by multiple sources of authority, Canada has carved out a space for religion within society, ensuring its equality with other religions, as well as its protection from other beliefs and principles (including non-religion). Given, (at least on paper), Canada's rather open and liberal stance towards religion in the public sphere, together with the historic existence of government-backed religious tribunals, it may initially appear surprising that the proposal of Sharia-based arbitration would cause such a high degree of public outcry. As this chapter illustrates, however, much of the negative reaction towards Sharia had to do with the nature of Sharia itself—as a system of law that *can* pose great challenges to Western, liberal notions of

gender equality. In fact, it was largely on the grounds of protecting women's rights that the government so quickly dismissed the proposal.

The government's swift dismissal of the proposed Sharia arbitration tribunals, however, helped reinforce the negative image of Sharia, portrayed by those against its implementation in arbitration, as a backwards, misogynist system of law that is inherently bad for women. As I argue in this chapter, however, this very simplistic portrayal of Sharia belies its highly interpretive,[47] complex, and multifaceted nature—features that make the system both susceptible to abuse, but also receptive to modifications and reform. Furthermore, the government's swift dismissal of Sharia as a feasible basis for arbitration disregards the important role that Sharia law plays in the lives of many Muslims. When viewed from these perspectives, we can begin to understand why Sharia arbitration will never cease to exist, how its continued "unofficial" status operation can pose serious risks to issues of women's equality, and finally, how the interpretive quality of Islamic law can allow for a reformed version of Sharia that can better suit the purposes of Canadian arbitration systems.

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[47] I realize that this interpretive quality is not unique to Islamic law, and that in fact, it is characteristic of most every legal / hermeneutical tradition. The interpretive ambiguity in Islamic law, however, is rooted traditionally in the variance between the perfected divine mandate (Sharia) and the fallible human agenda (*fiqh*). This tension between what the faithful believe God has ordained as law, and how humans comprehend and translate the law is what makes Sharia unique.

Introduction

Understandably, the implications of membership in a minority religion are extensive within a pluralistic society. Belonging to a non-dominant faith group can be an important facet of identity formation and can lend meaning to an individual's experiences (Moore, 1995:136). The religious construction of identity, particularly within a pluralistic society, while not the thrust of this project, nevertheless plays an important role when it comes to the discussion of Islam in Canada. As the following section argues, for many Muslims, religion does not simply play a minor role in identity formation. Rather, for adherents of the Islamic faith, religion is an all-encompassing force that not only influences all details of life, but also is an indispensable factor in the formation of self-hood. As the current study shows, however, dissonance arises when some Muslims who rigorously identity themselves with their religion find themselves faced with alternative notions of law that are based on highly secular principles, and for all intents and purposes void of any religious authority. In these cases, many Muslims must resort to following Islamic judgements that currently operate devoid of any external scrutiny or official endorsement—an action that may pose serious risks to issues of women's equality rights.

To comprehend fully the magnitude of this issue demands a brief analysis of Islamic law, or Sharia.[48] Through my analysis, I will explore the

[48] Many, particularly in the West, often mistakenly use the term 'Sharia' as an inclusive term for Islamic law, but this conception is only partially true. Muslims believe Sharia to be divine law, as revealed through the Qur'an and the *Sunna* (the body of accounts about

extent that Islam deals with legal matters, the formation of the legal schools of thought, and the development of contemporary legal rulings. In examining this issue in more detail, this chapter looks to the past, and more specifically the creation and expansion of Sharia. The discussion of the development of Sharia, in turn, highlights the fact that despite various decrees, regulations, and commandments in the Qur'an, the actual formulation and articulation of a body of Islamic law was not a simple or swift task. Rather, the Islamic legal system is a product of several hundred years of study, debate, elaboration, interpretation, and transmission by early religious-legal scholars (Bearman & Vogel, 2005).

Granted, the study of Islamic law is an enormous task—one that demands far greater discussion that what I provide here. I nevertheless offer a discussion on Sharia law because I believe that understanding the nature, composition, and development of Islamic law allows us to glean a greater appreciation into some of the complexities involved in transplanting and downloading this type of legal system into a Canadian context. An analysis of Sharia law also suggests, however, that--given its rather malleable nature—the future development of an organic Canadian-Islamic legal system also may be a feasible occurrence. In writing this chapter, I rely heavily on many of the exemplary works written in this area, primarily those by noted Islamic legal

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the sayings and actions of Muhammad). The elaborated, expanded, and interpreted law that early scholars produced is known as *fiqh*. Together, *fiqh* and Sharia constitute Islamic law. For simplicity, however, I will use the more popularly recognized term 'Sharia' to refer to the corpus of Islamic law.

scholars Noel Coulson, Wael Hallaq, Fazlur Rahman, and J.D. Anderson (among others).

Briefly, I have divided this chapter into two sections. The first section examines the preliminary developments of Sharia: the Qur'an, and *Sunna*, *qiyas* (analogical reasoning), *ijma* (consensus), and the formation and proliferation of legal schools. In looking at the creation and proliferation of Sharia, I argue that the process was not systematic and unified (with a special emphasis on its inclusivity of various cultures), and that from the beginning scholars hotly debated an assortment of various religious rulings (Bakhtiar, 1996; Coulson, 1978; Wael, 2001; 2005). The second section of this chapter focuses on some of the challenges that Sharia poses in contemporary times and contemporary settings. Three points that I raise in this section directly speak to the current Sharia debates in Canada.

First, I raise the issue of human fallibility when it comes to interpretation and decision-making. Ultimately, Sharia derives itself from the Qur'an, as well as the *Sunna* of the Prophet. While it is true that Muslims believe the Qur'an to be the word of God, the Qur'an itself does not speak to all issues concerning life,[49] and at times, the Qur'an can be highly ambiguous. The *Sunna* of the Prophet, as well, are numerous, and at times, contradictory. Even when employing those *hadiths* that Muslims believe to be "sound" (such as Bukhari's collection), one often finds that the accounts themselves are, for the most part, historic and contextual. It also appears that some of the

[49] As one example, the Qur'an does not discuss many matters pertaining to issues of health or medical ethics.

accounts (even those located in the best collections) are incongruous.[50] Thus, it is no surprise that, for the most part,[51] the Islamic law derived from these sources, and in particular, those laws that scholars have issued based on the processes of *ijma* and *qiyas*, are open to interpretation and degrees of opinion (Bakhtiar, 1996; Coulson, 1978; De Seife, 1994; Hallaq, 1997; 2001; 2005; Rahman, 1979).

Secondly, because numerous versions of Sharia (through different traditions and schools[52]) circulate and because many of these schools took on local customs as they spread, no single and definitive form of Islamic law exists. Thus, discrepancies can arise not only amongst these various schools of law, but within them as well. Additionally, interpretations of Sharia cover the spectrum, from the liberal (such as those employed by the Ismaili sect of Muslims) to the restrictive (such as those forms of Sharia practiced by the Taliban in Afghanistan).[53] When brought together through the process of globalization into a multi-cultural nation, these varied opinions mean that ascertaining a singular form of Islamic law that all can agree upon becomes a formidable task.

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[50] Legal scholars in Islam, however, had their own methods of overcoming the problems with contradictions, either through the examination of *isnad* (line of transmission), or letting the law stand, as is, and refusing to define it (Melchert, 2001:383).
[51] I use the phrase "for the most part" here because sections of Sharia (based on the Qur'an), such as those pertaining to *ibadat* (or worship), and alcohol consumption, for example, are clearly stated, and as such are not explicitly open to interpretation.
[52] In Islam, mainstream Sunni's recognize four systems of law: the Hanafiyya, Malikiyya, Shafi'iyya, and Hanbaliyya. The Shi'ite tradition recognizes the Ja'fariyya, as well as the lesser Zaydiyya, and Isma'iliyya schools of law. In addition, there also exists the separate sect of the Ibadiyya law school.
[53] The terms 'liberal' and 'restrictive,' however, are subject to personal opinion and subjective bias. Arguably, members of the Taliban do not necessarily see their form of Sharia as restrictive, but rather the *correct* form.

Finally, I address the issue of reform in Islamic law. As earlier mentioned, Islamic law--as derived from the Qur'an and the Sunna, and created through the processes of *ijma* and *qiyas*--is open to interpretation. While the range of interpretation (and its ensuing modifications) illustrates the flexibility of Islam, it also reveals a process prone to alleged abuse (Marshall, 2005). In raising this point, I wish to illustrate that variations in what is 'correct' are numerous and vary in degree, and as such, the system is susceptible to perceived abuse for those who wish to interpret Islamic law in a way that meets their own agendas. Through discussing these issues, I will demonstrate how one of the primary strengths of Islamic law—its flexible nature—proves also to be its chief weakness in contemporary Sharia debates. After I discuss these issues at length in this chapter, in the next one I will present a comprehensive assessment of the current Sharia debates in Canada, together with the ensuing implications of Ontario's decision to ban *all* faith-based arbitration. In particular, I will discuss how this decision raises some quintessential questions regarding current notions of religious freedom and multiculturalism in Canada.

Spirit of Law in Islam

Perhaps one of the most difficult areas of Islamic scholarship to understand for Westerners is the philosophy behind Islamic law. For Christians, law never developed in a similar manner as it did for the Jewish and Islamic communities. Indeed, Christ did not disseminate a new law and

instead elaborated upon the separation of secular and religious obligations.[54] During the Middle Ages when Christianity dominated Western society, this separation of religious and secular law continued to permeate society. As Nasr points out, day-to-day laws were taken from Roman sources or from common law, and these laws stood separate from Divine Law which "in the Christian context involved Christian principles and not ordinary laws dealing with society in general" (2002: 115). As the West increasingly progressed towards secularism, the legal system was based on societal needs and circumstances, and with the rise of parliamentarian democracy, representatives undertook the task of designing and amending legal frameworks. As Nasr candidly points out, this approach to law was quite different from the way that law developed in the Jewish and Islamic communities "where the Will of God ... is meant to *determine society rather than be determined by it*" (my emphasis, 2002:116).[55] According to the

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[54] The division of secular and religious obligations in the Christian faith is evidenced in several places, including Matthew 22:21, "Then (Jesus) said to (the Pharisees): 'render therefore to Caesar the things that are Caesar's and to God the things that are God's'" and again in the first Epistle of Peter 2:13-14, "Be subject, for the Lord's sake to every human institution, whether it be to the emperor as supreme, or to the governors as sent by him to punish those who do wrong and to praise those who do right." Accordingly, the Canon Law of the Roman Catholic Church preserved this division between the religious and secular, stating in the *Corpus Juris Canonici*, "All laws are either human or divine. The divine laws consist of those of nature, the human laws consist of customs .... The divine law is called *fas*, the human law is called *ius*" (Decretum Gratiani, I. I, I.).

[55] As Nasr (2002) points out however, this view is somewhat flawed because, while currently acceptable, a thorough reading of the Bible reveals that its comprehension of law is not dramatically different from the Islamic notion of law. As Nasr points out, the Bible designates law as God's commandments (*Mitzvah* – for example in Deut, 11:13), or teaching and instruction (*Torah*—see Gen. 26:5), utterances (*Davar*, as in Deut. 4:13), and norm (*Mishpot*; Exodus. 21.1). Furthermore, Nasr points out that as part of the sacred Christian scripture, the Old Testament also views violation of the law as both a moral and societal sin whereby individuals are held accountable before God (Gen. 20:6; Lev. 19-20, 22), and not only does the Bible itself not distinguish between religious and

Islamic perspective, however, God prescribes law with the purpose of regulating society and the actions of individual members. This top-down comprehension of law, whereby God dictates a specific law, is quite different from the Western development and comprehension of law that is, in comparison, highly secularized.

Like Judaism, Islam places an emphasis on religion as a way of life, and on the importance of religious observance and obedience to (what they believe to be) God's law (Esposito, 2004, 2005; Lincoln, 2003). The comprehensive nature of the Sharia (literally, "way" or "path to the water source")[56] is located within its various directives: the personal dimension (spiritual practice, such as prayer), the communal dimension (almsgiving), and the legal dimension. The Islamic faith requires Muslims to "strive or struggle (*jihad*) in the path (Sharia) of God, to realize, spread, and defend God's message and community" and to "call for righteousness, enjoin justice, and forbid evil" (Esposito et. al, 2008; Qur'an, 3: 104; 3:110).[57] While today Muslims are guided by various sources of law, there still remains amongst many members of the community a fond conviction that God alone is the sole

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secular faults against the law, but it also views law as a norm incumbent on all beings (Gen. 2.11-17; 9:1-7).

[56] The term Sharia originally denoted 'the path or the road leading to the water' or alternately, the path to the source of life (water) (Rahman, 1966:100). While the term appears as such only once in the Qur'an at Sura 45:21 which reads, "Men we set thee upon an open way (shari'a) of the Command; therefore follow it" the root of the term appears in at least three other places (Suras 42:13, 5:48, 42:21). These verses speak of Sharia not as a judicial norm, but rather as a route or path to be followed (Al-Ashmawi, 2009:2).

[57] All Qur'anic citations are from the Dawood, 2006 translation.

legislator (*al-Shari'*), effectively removing any distinction between secular and religious, sacred and profane realms.

Islamic law ranges from issues as diverse as contracts, marriage, divorce, torts, crimes of property, crimes of conduct, to ritual, ritual conditions, eating, drinking, table-manners, state-welfare, government conduct, taxes, and wills. In many Islamic legal texts, one would find rather detailed discussions of these and other topics. Yet, as Bakhtiar indicated, even the largest of legal texts would not encompass the range of Islamic law because Muslims "believe that for every conceivable human act in any possible circumstance there are correct ways to act, and very possibly incorrect ways to act" (1996:xxxiii). Invariably, because all acts of human conduct have an existing moral significance, they remain under the auspices of Sharia law.

In short, Sharia touches upon many aspects of existence (a characteristic that is located in the Islamic notion of *shumuliyyat al-Islam* -- the comprehensiveness, or wholeness of Islam). As such, Islam is characterised by a holistic view of the world wherein all spheres of life, including religion, politics, morality, and law meld into one. The Islamic principle of *tawhid*, or the oneness of God as sole authority, guides this totality of spheres. So interconnected are the realms of private belief and public action in Islam that, as Tariq Ramadan remarks, "Many Muslims have continued down through the ages to say formulaically, as if they were

presenting evidence: 'There is no difference for us, between private and public, religion and politics: Islam encompasses all areas" (2006:68).

Indeed for many years, to be Muslim meant not only to belong to a religious group but also to live in an Islamically-oriented community, one that was governed (at least in theory) by Islamic laws. While living in an Islamically-oriented society may no longer be a reality, the close link between faith and law is one that many Muslims, nonetheless, seek to embed as part of their daily lives. Thus, in stark contrast to religions such as Christianity that emphasizes a *spiritual* relationship between humans and God, Islam is more accurately a religiously based way of life, or *Din*.[58]

Sharia, Fiqh, & the Roots of Islamic Law

Muslim believers commonly accept that no separate institution in society is committed to the task of expressing God's commandments. Rather, according to the well-cited aphorism in Islam, 'God has not revealed Himself and His nature, but rather His law.' The central role that law plays in Islam is best expressed within the Qur'an, which favours Muslims, Jews, and Christians as recipients of legally binding revelations. Sura, or verse, 5:48 of the Qur'an states:

> We have revealed unto you the Book [i.e., the Qur'an] with the Truth, confirming whatever Scripture was before it . . . so judge between them by what God had revealed, and do not follow their desires away

[58] *Din* is the Arabic term that the Qur'an uses to describe Islam. Both the Qur'an and the *Sunna* employ the term *Din* to signify a life wherein the material and spiritual realms do not correspond to dichotomous forms of experience, but rather, "are regarded as a continuum and an integrated whole in which all aspects of life . . . are not only interrelated, but are also sustained by faith and endowed with religious meaning and ethical significance" ('Abd al-Rahim, 2005: xvi).

> from the Truth.... for *We have made for each of you* [Christians, Jews, Muslims] *a law and a normative way to follow.* If God had willed he would have made all of you one community (my emphasis).

As Hallaq's (2005) research indicates, the Qur'an is replete with references, enjoining believers to judge by the laws revealed to them: "For who is better than God in judgement" (Sura 5:49-50), and "He who does not judge by what God has revealed is a disbeliever" (5:44).[59] This law, generally referred to as Sharia, goes beyond the normal boundaries of what we in the West would refer to as normative jurisprudence. Indeed, Sharia refers to a host of actions, moral, ethical, legal, social, and personal binding upon on all Muslims, male and female who are of legal age.[60]

Similar to the West, law for Muslims is crucial in providing the necessary tools for the existence of a good and just society. Where there is divergence, however, is in the Muslim view that following prescribed religious law ultimately will lead to personal salvation as well (Ruthven, 1997). Understanding this fundamental difference in belief is significant in appreciating some of the motivation driving current Sharia debates.

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[59] Additional examples include Suras 2:213, 3:23, 4:58, 105; 5:44-45, 47; 7:87; 10:109; and 24:48.

[60] The Qur'an is specific in addressing the Law to both men and women: Verily, men who surrender unto God, and women who surrender, and men who believe and women who believe, and men who obey and women who obey, and men who speak the truth and women who speak the truth ... and men who give alms and women who give alms, and men who fast and women who fast, and men who guard their modesty and women who guard (their modesty), and men who remember God much and women who remember—God hath prepared for them forgiveness and a vast reward. (Sura, 33:35). Of course, there also are categories of people that are exempt from following certain directives of law.

Usul al-Fiqh (Roots of Law)

While we employ the term Sharia to denote loosely Islamic law, it is important to note that this usage is only partially accurate. As mentioned earlier, Sharia encompasses a wide array of rules and modes of conduct. The literature, however, that explains, elaborates, and delivers Sharia juristically, is *fiqh* (loosely defined as knowledge, understanding, or more technically jurisprudence). The development of *fiqh*, in turn, is a highly elaborate, sophisticated process of religious and philosophical inquiry, and the product of several hundred years of deliberation. In this following section, I explain briefly the four main roots of Islamic law, and their contribution to the development of Islamic jurisprudence. As I will illustrate, the process of creating a codified body of law from these four sources was a progression riddled with interpretation, subjective thinking, rationalization, and the product of melding local and foreign customs.

Islamic law is classically a product of four roots, referred to as *usul* (see Appendix 4.0).[61] These are, in order of preference: the Qur'an, the *Sunna* (traditions of the Prophet), *ijma* (consensus), and *qiyas* (analogy).[62] The Qur'an contains roughly ninety verses pertaining specifically to law. These

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[61] It is important to note that this is true only of the Sunni majority. While for the most part practices are similar, some Muslim denominations approach Islamic jurisprudence differently. For example, the Shi'ite community does not recognize analogy as a source of law (Kamali, 2009:4).

[62] At times, the sources of *ra'y* (the exercise of personal opinion) and *ijtihad* (independent legal reasoning in search of an opinion) also are cited as sources of Islamic law. The majority of sources that I have consulted, however, while acknowledging the importance of these two factors in the development of Islamic law, do not necessarily list them as separate categories of *usul fiqh* (roots of law). Rather, *qiyas* is recognized as a type of *ijtihad*, while the early use of *ra'y* was replaced by *qiyas*.

references, known as God's law, remain the foundations of Islamic legal discourse. The remaining corpus of Islamic law results from jurisprudence (*fiqh*), which (as earlier mentioned) is the human attempt at codifying Islamic beliefs into practice. This comprehension and interpretation of law is ultimately a human endeavour. Herein lies the distinction between Sharia (the law of God) and *fiqh* (the human understanding and practice of that law), whereby this latter portion of Islamic law is human-generated and thus considered fallible rather than divine.[63]

Despite this essential difference between Sharia and *fiqh*, however, it is rather common for popular discourse to employ the term Sharia to denote all Islamic legislation, including *fiqh*. Increasingly, however, contemporary religious scholars have questioned this merging of terms, calling instead for a distinction between Shariah and *fiqh*, and the reform of *fiqh*. A brief examination of these four areas of *usul al-fiqh* together with the subsequent development of several major schools of Islamic jurisprudence reveals a meticulously planned, yet at times highly incongruous, body of rule. As will become evident, this inherent ambiguity and inconsistency within Islamic law ultimately both aids and complicates its transplantation and implementation.

[63] Some modern reformists would argue that Muslims must deconstruct and move past this classical notion of the "divine" and the "fallible" components of Islamic law by focussing instead on liberating certain legal issues from what they believe to be the grasp of a restrained and incomplete epistemological framework created by early jurists.

Qur'an

To Muslims, the Qur'an is the unmediated and direct Word of God revealed through the Prophet. The Qur'an comprises 114 chapters arranged according to length from longest to shortest, with of course, the exception of the first chapter. In general, scholars agree that the longer verses are of later origin, reputedly revealed to the Prophet after the *hijra* (emigration) from Mecca to Medina in 622 AD. The Meccan chapters, which total roughly ninety in number, vary both stylistically and in content from the Medinese chapters, with the former more spiritual, and poetic, while the latter chapters tend to focus more on practical matters and are more prosaic (reflecting the period where the Prophet was more active in lawmaking). Thus, while earlier Qur'anic revelation largely was concerned with issues of faith, and morality, revelation took a new turn after the Hijra (626 AD) where issues of community (*umma*) particularly as possessors and practitioners of law became a central part of the message.

While Muslims perceive the entire contents of the Qur'an as a divine commandment, (with the majority emphasis on social interrelationships and the affairs between individuals and societies with God), only a small portion of the Qur'an's 6000 verses discuss matters pertaining specifically to legal matters (most of which are found in the later Medinese chapters).[64] Of the

[64] Although Hallaq (2005:21), disagreed with suggestions that the number of legal verses in the Qur'an are relatively small in number. Following research conducted by Goitein (1960), Hallaq asserted that "if we consider the fact that the average length of the legal verses is twice or even thrice that of the non-legal verses, it is not difficult to

350 legal verses in the Qur'an, known as *ayat al-akham*, roughly 140 deal with devotional matters, and ritual (*ibadat*).[65] Regulations pertaining to *'ibadat* involve matters concerning prayer requirements, almsgiving, fasting, and pilgrimage. Verses pertaining to *mu'amulat* (civil matters, dealings, contracts and so forth) include (but are not limited to) prohibitions on certain types of food (pork, wine, animals slaughtered as part of pagan rituals), legal rules concerning family matters (including matters of marriage, divorce, and inheritance), criminal law, commercial regulations, contracts, issues regarding slaves, orphans, business transactions (such as the ban on usury), and the rules of war and retaliation.

Many of these matters presented in the Qur'an, however, are rarely clear-cut, and often pose challenges of interpretation, comprehension, and analysis of details. While Muslims and scholars alike have long deliberated the oft-ambiguous nature of the Qur'an, the complexity of interpretation, and the ensuing consequences pertaining to legal affairs, it will suffice here to cite several key examples of the difficulties located in trying to derive definitive directives from the Qur'anic text.

First, there is the issue of time and place. As previously alluded to, Muslims consider the Qur'an as both timeless and immutable,[66] yet there is

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argue . . . that the Qur'an contains no less legal material than does the Torah, which is commonly known as 'the Law'."

[65]Those regulations concerning humans' responsibility to God are known as matters of *'ibadat*, while those concerning humans' interactions with one another known as *mu'amulat*. There is also a third category that I do not go into detail about referred to as *mu'asharat* (social interactions).

[66] As Kamali (2009:4) points out, while Islamic law, to Muslims, is immutable because it is divinely ordained, it nevertheless remains open on a philosophical level to adaptation

little question that the Qur'an did not legislate within a social, historical, and cultural vacuum. Rather, the Qur'an addressed itself to a pre-Islamic Arabian society, which had its own cultural and moral principles, and much Qur'anic legislation speaks to the daily challenges that emerged in the course of developing and establishing a Muslim community. This tension between timeless and timely has inevitably left many questions regarding the applicability of certain injunctions and certain legislations outside of the particular time and space within which they were mandated.

Consider for instance, an issue that many (in particular female reformists) point to regarding the issue of inheritance. On the matter, the Qur'an forthrightly states that, "a male shall inherit twice as much as a female" (Sura 4:7). Despite many of the ethical and interpretive questions that this commandment elicits, it also demands, according to many scholars, contextualization. Thus, academics such as Wadud (2007:163) argued that the message of this statement is timeless in its broader ethical implications. Because the Qur'an charges men with the task of being financial caretakers of women, they are granted twice the inheritance, denoting "reciprocity between privileges and responsibilities." This message of reciprocity, according to Wadud, is the fundamental lesson, and should not be lost in the midst of a modernity that demands greater equality between sexes particularly where women (more so that in the past) are financially independent and/or provide for their families. Of course, this type of

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and adjustment on the level of implementation through the exercise of human reasoning.

contextualization often is lost on many literalists whose adherence to the concept of the "timelessness and immutability" of the Qur'an eclipses this type of interpretation.

Second, the issue of abrogation or *naskh* complicates the applicability of Qur'anic verses as definitive law. The Qur'an itself states that some later revelations abrogate earlier revelations: "And when We exchange a sign [verse] in the place of another verse, and God knows what he is revealing" (Sura 16:102; cf. 2:106, 13:39). Seemingly, some disagreement exists amongst scholars as to whether or not abrogation of verses pertains exclusively to Qur'anic text, or if abrogation extends to earlier scriptures (such as the Torah, or New Testament) as well (Neusner et. al. 2000). Nevertheless, even within the context of the Qur'an itself there are many instances where later verses seemingly contradict or abrogate earlier verses, leading to some confusion as to which verses supersede (if at all) others.

For instance, with respect to the consumption of wine, using the principle of *naskh* or abrogation, religious scholars have determined the Islamic prohibition of alcohol, despite earlier verses in the Qur'an which states that from "the fruits of the palm and the vine, from which you derive intoxicants and wholesome food. Surely in this there is a sign for men of understanding" (Sura 16:67), and later that one should attempt to refrain from attending prayers intoxicated (Sura 4:44), and finally that the harm in the consumption of wine outweighs its benefits (Sura 2:220). It is, however, Sura 5:91 (which ultimately declares that wine should be all together

avoided) that abrogates earlier verses, and that the Muslim community accepts as definitive, leading one to question the existence, application, and or usefulness of previous verses.

As Neusner et. al (2000) point out though, the concept of abrogation is not always handled in the same way. For instance, while abrogation ultimately prohibited the consumption of alcohol, legalists maintain that on some verses (such as those related to warfare), all verses are applicable depending on varied circumstances, and that later verses do not necessarily trump earlier ones. This deviation over abrogation of verses even seeps into the folds of various schools of Islamic jurisprudence where legal scholars often hold varying opinions on the abrogation of particular Qur'anic verses in the Qur'an itself, abrogation of Qur'anic verses by the *Sunna*, or *hadiths*, or on the practice of abrogation as a whole (Neusner et. al, 2000:70). It remains that there still appears to be no unilateral agreement amongst scholars regarding what abrogation actually entails, and to which texts or traditions abrogation applies.

Third, an issue exists regarding the interpretation in terminology resulting from often-ambiguous terms and circumstances in the Qur'an.[67] For example, consider the Qur'anic stipulation that divorced women must

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[67] The Qur'an itself admits to the presence of ambiguity, stating, "It is He who has revealed to you the Book. Some of its verses are precise in meaning (*mukham*) – they are the foundation of the Book – and others ambiguous (*mutashabih*). Those whose hearts are infected with disbelief follow the ambiguous part, so as to create dissension by seeking to explain it. But no one knows its meaning except God" (Sura 3:6). To date, there has been little agreement amongst scholars regarding the meanings of *mukham* and *mutashabih* and which verses they pertain to. See for example, Dammen McAuliffe's (1988) "Qur'anic Hermeneutics: The Views of al-Tabari and Ibn Kathir:" 46-62.

keep "themselves from men, three menstrual courses (*quru'*)" (Sura, 2:229). While the verse seems fairly straightforward, questions nevertheless arise over the exact interpretation of the term *quru'*. As Neusner et. al, (2000:76), point out, the term *quru'* could denote menstruation whereby the woman would be able to marry again after the third menstrual period, or it could refer to "states of purity" that exist between menstrual cycles, which would force women to wait until the end of three periods *between* menstruation. Another example of a definitive, yet speculative legal ruling is the issue of marriage and daughters. Sura 4:23 of the Qur'an states, "Forbidden to you are your mothers, your daughters . . ." a fairly explicit statement signifying that daughters are forbidden to a father in marriage. In practical terms, however, questions arise as to the parameters of the word "daughter" which could include illegitimate daughters, stepdaughters, foster-daughters, granddaughters, and so forth (Kamali, 2009).

Finally, while not specifically a Qur'anic challenge, but a challenge generated by the Qur'an nonetheless, is the issue that Islam and its sacred book replete with legal doctrines did not necessarily remove existing pre-Islamic legal codes or local customs. As Hallaq (2005) has pointed out, communities would have had a difficult time espousing a new faith while completely abandoning the traditions and customs of their ancestors. This inclusionary principle resulted in an appealing system whereby Islamic principles and worldview determined the outcomes of new problems encountered by the Prophet and the emerging *umma*, "while the old

institutions and established rules and customs remained largely unchallenged" (Hallaq, 2005:24).[68]

In addition, research also indicates that Sharia never really operated as the sole source of legal authority within a given region (Shahar, 2008). Rather, many times Islamic law would operate within a marketplace of religious ideas, and, over time, Islamic law would incorporate some of these alternate laws into its own fold. Interestingly, this element of shared association, and the accommodation of many indigenous traditions and laws, illustrates both the flexibility of Islamic law as well as its capacity to operate in conjunction with other systems of rule.

Accordingly, despite the ambiguity that lies within the Qur'an whether from interpretation, abrogation, notions of time and space and so-forth, for many Muslims this elusiveness does not necessarily translate as a weakness of the system. Rather, many Muslims see this ambiguity as "a function of Islam's inherent historicity, itself a function of its intended universality" (Neusner et. al, 2000:81). The tension behind historicity and universality subsequently echoes another related tension--that behind the ideal divine law (Sharia) and the human, fallible, attempt at implementing that will.

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[68] Jurists further justified the retention of local customs and traditions on the basis that not only did the Prophet never repeal them, rather he (either implicitly or in practice) endorsed them (Hallaq, 2005:25). Examples of the implementation of local laws and ancient customs into the folds of Sharia are abundant (see for example, Goitein, 1966, 92-94; Hallaq, 2005, 25, 32; Hazm, 1966, 838-39; Schacht, 1964, 218; Schacht, 1967; and VerSteeg, 1999, 178).

Sunna

Ultimately, the Qur'an, as a finite textual property, does not offer directives for all aspects of justice for all times. Therefore, Muslims must rely on sources outside of the Qur'an both in exploring issues not discussed within it, as well as clarifying and establishing rules of conduct for other issues. In addressing these issues, Muslims often turn to the next root of Islamic law, the *Sunnah*. *Sunna* (pl. *sunan*), is an ancient Arabic word that translates roughly into "exemplary mode of conduct" (Hallaq 2005:46). Although the term appears to have pre-dated Islam, in contemporary Islamic terms, Muslims use the term to denote the conduct and cumulative tradition typically based on the example of the Prophet. Because Muslims believe that Muhammad acted on behalf of God, following divine commands, his actions and sayings hold an essential place within the Islamic faith.

The Qur'an itself singles out Muhammad as a guide for the community, stating that he is skilled with the ability to help explain revelation; "To you We have revealed the Admonition, so that you may proclaim to men what was sent down for them, and that they may give thought" (Sura 16:44), and further that, "...your compatriot (Muhammad) is not in error, nor is he deceived! He does not speak out of his own fancy. This is an inspired revelation. He is taught by one who is powerful and mighty" (Sura 53:2-4).[69] According to the Qur'an, God charged Muhammad with the

[69] In addition, the Qur'an declares, "He who obeys the Messenger obeys God" (Sura 4:80), and "Whatsoever the Messenger ordains, you should accept, and whatsoever he forbids, you should abstain from" (Sura 59:7).

task of delivering, from God, "the book and the wisdom" (Sura 62:2). Islamic scholars such as Al-Shafi'i (founder of the Shafi'i school of jurisprudence) maintained that while the "book" is the Qur'an, the "wisdom" is the *Sunnah*. Thus, to obey the Prophet is, in essence, to obey God.

The Prophet's *Sunnah* is composed of his various deeds, actions, sayings and consents reported often in the form of anecdotes in which he participated in or commented upon. The body of Prophetic sayings, collectively known as the *hadith*, represents the oral tradition of the Prophet and those close to him, and the scholarly method in which these sayings were preserved, transmitted and codified (Ayoub, 2004:114). These collective sayings form an essential part of Islamic jurisprudence as, when there arise times when the Qur'an may be silent or ambiguous on a particular matter, Muslims generally turn to the *hadiths* for answers or clarification. In particular, many Prophetic discussions and sayings often arose due to various political and legal needs of the community thereby providing an abundance of jurisprudential material.[70] Because Muslims believe that the Prophet spoke and acted from divine inspiration, these *hadiths* played a critical role in the early formation of the Islamic legal system.

Coherent legal-decision making, based solely on *hadiths* and the *Sunna*, however, is a complicated task. The creation of a meticulous system of *hadith* collection (scholars developed a highly formulated system of sifting

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[70] Hallaq (2005:52), however, notes the existence and early usage of alternate *Sunans*, including those of Abu-Bakr, Umar, Uthman, and Ali, together with other companions. References to these non-Prophetic *Sunans* remain fairly uncommon today.

through, evaluating, eliminating questionable sources and preserving reliable ones)[71] took over two centuries, but once complete, these works provided the community with a second authoritative source to assist it in social and legal affairs. In time, six *hadith* collections came to be accepted as authoritative; Ismail al-Bukhari (d. 870), Muslim ibn al-Hajjaj (d. 875), Abu Dawud (d. 888), al-Nisai (d. 915), al-Tirmidhi (d. 892), and Ibn Maja (d. 896). Scholars recognize the collections of al-Bukhari and Muslim as the most authoritative of these sources (Hallaq, 2005).

Despite the formidable efforts associated with developing *hadiths* into a reliable secondary source, questions still exist as to the reliability, authenticity, and occasions of some of them.[72] Among others, scholars such as Hungarian Arabist Ignaz Goldziher, Joseph Schacht, and modernists Sir Sayyed Ahmed Khan, G.H.A. Juynboll (and to a lesser extent) Fazlur Rahman, have questioned the authenticity of some *hadiths* on the grounds that they may be "anachronistic in content, contradict each other, or are at variance with the spirit or letter of the Qur'an" (Ruthven, 1984:132). The scepticism regarding the authenticity or faithfulness of various *hadiths*, however, is in

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[71] The *hadith* has two main sections. The first in called the *isnad* and refers to the opening citation of individuals who transmitted the particular *hadith*. This chain of ascriptions is an important way of determining the authenticity of each report. The second part of the *hadith* is the *matn*, or the main text. Because of the occurrence of fabricated *hadiths*, scholars heavily scrutinized the *isnad* of each *hadith* in order to establish authenticity.

[72] Consider, for example, the sporadically cited *hadith* in which the Prophet kisses his wife while fasting. The work of Ibn Kutayba (2004) shows the existence of a second, contradictory *hadith* that states that when asked if one's fast would be considered violated if they kissed their wife, the Prophet answered in the affirmative. For an excellent discussion on some of the problems associated with *hadiths*, see Goldziher, 1971:85-143.

large part inconsequential, because the vast majority of Muslims view the Prophet's *Sunna* and *hadiths* as the "uncontested and uncontestable second root of divine law" (Ruthven, 1997:78). Still, the development of an Islamic legal system would be highly unfeasible considering the contentious and uncertain aspects of both the Qur'an and the *Sunna* if not for the additional two roots (*usul*) of Islamic law—*ijma* and *qiyas*.

Qiyas

Recognized almost universally as the third source of Islamic law, *qiyas* was instrumental in the development of Islamic law. In the absence of other precedents either within the Qur'an or the *hadiths*, the exercise of independent scholarly judgement (*ijtihad*) came to play an essential role in Islamic jurisprudence. According to Shafi'i's *Risala* (treatise or thesis), "On all matters touching the Muslim there is either a binding decision or an indication as to the right answer. *If* there is a decision, it should be followed; if there is no indication as to the right answer, it should be sought by ijtihad" (cited in Lowry, 1984). One such type of *ijtihad* is *qiyas*. Loosely translated as analogical reasoning, early religious scholars often would employ *qiyas* in cases when neither the Qur'an nor the *hadith* could resolve a specific situation and scholars would attempt to find an analogous situation where a specific resolution did exist.

During the formative years of Islamic law, the use of *qiyas* was controversial because some jurists argued that its use ascribed inadequacy to the Qur'an and *hadiths*. Proponents of *qiyas*, however, defended it based on a

specific *hadith* in which the Prophet questioned his companion Mu'adh ibn Jabal before he departed to Yemen as a judge:

> 'How will you reach a judgement when a question arises?'
> 'According to the word of God', replied Mu'adh
> 'And if you find no solution in the word of God?'
> 'Then according to the sunna of the Messenger of God.'
> 'And of you find no solution in the sunna of the Messenger of God nor in the Word?'
> 'Then I shall take a decision according to my own opinion (rayi)'[73]
> Then the messenger of Allah slapped Mu'adh on the chest with his hand saying:
> 'Praise be to Allah who has led the messenger of the Messenger of Allah to an answer than pleased him"
> (Adapted from "Kiyas" in Gibb and Kramers, 195:267).

The practice of *qiyas* begins by determining a common denominator (also known as the *'illah, ma'na* [meaning or idea], or *asl* [root or basis]) amongst precedents set in the Qur'an and *Sunnah* and the issue at hand. Once the *'illah* or *usul* is located, the ruling of the precedent is then applied to the case in question. Thus, *qiyas* is not simply a judgement based on mere similarity, but rather involves the determination of a precedent, verifying what part of the precedent is parallel to the case in question, and lastly, applying the ruling to the case in question. As an example, the effective cause for the

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[73] The term *ra'y* used in this *hadith* denotes 'opinion,' but as Denny (1994:198) points out, it is immediately preceded by a verb denoting 'to exercise' one's intellect, from which the term *ijtihad* is derived. *Ijtihad* and *qiyas* are often used interchangeably, though *ijtihad* is broader in definition. According to Denny (1994:198), this type of intellectual exercise served as a crucial method in the elaboration of Islamic law during the early centuries but "as positions gradually solidified and opinions were widely adopted, the Muslims tended more and more to imitate and accept on authority what their predecessors had to struggle to achieve. This development led to *taqlid*, 'imitation' and acceptance on authority without engaging in original *ijtihad*." Many reformists, however, and in particular, feminists who view the stagnation of Islamic law as incongruent with the growing needs and developments of the Islamic community, increasingly challenge this practice.

prohibition of alcohol is its intoxicating effects. By extension, despite the Qur'an's silence on the matter, anything that intoxicates (such as some narcotics) would thereby also be forbidden by means of *qiyas*.

Ijma

Following the reign of the four-ruling caliphs, it became ever more apparent that there existed innumerable differences in legislative and legal circles. Under the Umayyad Caliphate, religious leaders and jurists, who in turn legislated according to their personal opinions on the Qur'an and *Sunnah*, undertook the task of legislation and jurisprudence. While *qiyas* arguably created some form of consistency, it nevertheless remained that, for the most part, Islamic legal jurisprudence represented an "uncoordinated body of opinion" (Rahman, 1966:72). *Ijma*, or consensus, played a key role in providing a dynamic process of assimilation, bringing in line some rulings, while providing an innovative method of interpretation and adaptation for issues on which Qur'an or *Sunnah* were silent or ambiguous.

According to Rippin (2005:95), *ijma* is seen as "the most crucial element of the whole legal structure, for it is through its action that all elements are confirmed, especially individual *hadith* reports and even, one might say, the Qur'an itself, which is only authoritative because all Muslims agree that it is so." With such wielding influence, *ijma* is, arguably, the most influential of the four sources of law, as it is *ijma* that determines how, when, and what other legal sources will be employed.

Muslims typically derive the authority behind the use of *ijma* from a saying of the Prophet, "My community shall never agree on an error" (Hallaq, 2005). While this particular *hadith* was not widely circulated during the lifetime of Muhammad, it gained currency after his death when there was no longer a sole authority directing guidance in legislative matters. In this way, the doctrine of *ijma* also reflects Islam's strong consideration of and importance vested in the community, or *ummah*. The employment of *ijma* reflected an important element in the development of Islamic jurisprudence. Jurists and scholars worked at great lengths in order to substantiate through the Qur'an and the *Sunnah*, the use of *ijma*, and once deemed a legitimate process, *ijma* would act to confirm rulings.

As an early source of Islamic law, *ijma* consisted of scholars within a given region agreeing on the appropriate Islamic approach on a particular issue. Many times, these agreements were highly informal and included a reliance on local *hadiths*, and as such, local customary practice played a large role in influencing the development of Islamic law (given that the local practice did not directly contradict Islamic norms). This use of *ijma* provided a flexible tool in attracting converts to Islam, as the new legal code incorporated into itself certain familiar regional elements of tradition and practice. One consequence of this legal flexibility, however, as exercised through *ijma*, was the disparity in law that local Islamic communities began to display.

As Ruthven (1997:79) pointed out, had Islamic jurisprudence continued in this vein, "it is probable that a proliferation of regional sects, each claiming for itself universal status, would have resulted." In an attempt to curb this increase of parallel Islamic legal systems, the great jurist al-Shafi'i took great strides at standardizing the law, attempting to limit the number of concise *hadiths*, thereby eliminating inconsistencies. What ensued, in part because of his efforts, was an *ijma* that began to show preference for community consensus rather than scholarly consensus. The rationale behind Shafi'i's approach was that attaining consensus through an entire community was more difficult than attaining consensus among a limited number of leaders, and consequently, this shift would (unavoidably) limit the scope of use involving *ijma.*

In addition to shifting consensus from the hands of jurists and scholars into the hands of the entire community, Shafi'i also proposed another dramatic shift in the conception of *ijma.* Until his time, rulings based on *ijma* appear to have been limited to current generations, and each subsequent generation was free to establish its own consensus on particular matters. Shafi'i, however, asserted the importance of making *ijma* irrevocable, arguing that, as subsequent generations were further from the source of revelation, and thus, more prone to errors in judgement (Neusner et. al, 2000). As such, Shafi'i contended that no generation could overrule the consensus of a previous generation, even through the process of *ijma.*

Today, there continues to be great debate regarding whose opinions are relevant for *ijma*. While some argue that only scholars and jurists may offer valid opinions, others, following Shafi'i, believe that the laity also must be included in *ijma*. It remains, however, that once an *ijma* is established, it becomes precedent. Thus, *ijma* is an essential component in the development of Islamic law because it provided a tool for intellectual flexibility, while at the same time it also provided stability, authentication,[74] and a powerful source of conformity.

Thus far, I have illustrated how, for Muslims, there is an inseparability between law and religion—rather law is considered by Muslims to be divine and because nothing in Islam (including law) falls outside of the scope of divine commandment, Muslims view law as an integral element of the Islamic faith. This amalgamation of law and religion is embraced in the term Sharia, denoting a way or path of ethical, moral, and legal action. The science, or philosophy of law is known as *fiqh*, or understanding. Scholars of law, or *fuqaha*, were individuals of judgment who created *fiqh* out of Sharia for the purpose of practical jurisprudence, thereby conceptualizing the "implications of the divine will" (Cragg and Speight, 1988:43). In conceptualizing this

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[74] As Fazlur Rahman observed (1968:83-84), however, it would be inaccurate to view all *ijma* as infallible, in the literal sense: "One must distinguish between authority and infallibility in this context. . . .What is regarded as infallible by the early Muslim scholars, an infallibility more assumed than expressed, is the *Ijma'* as method and principle rather than its contents which are regarded as authoritative, not infallible. The Muslim doctrine of *Ijma'* has a strong practical rectitude-value. But rectitude values change. . . . [*ijma'*] is an organic process. Like any organism it both functions and grows; at any given moment it has supreme functional validity and power and in that sense is 'final' but at the same moment it creates, assimilates, modifies and rejects."

divine will, Islamic jurisprudence relied on the *usul fiqh*, or the roots of *fiqh*. As discussed above, these are the Qur'an, the *Sunna*, *qiyas*, and *ijma*.

The last section ended with a discussion on *ijma*, but it is important to note at this juncture that consensus did not simply arise. Rather, it required leaders who would formulate opinions giving rise to the institution of *ijtihad* (new interpretation), which in turn would generate the exercise of *ijma*. The construction of *ijtihad*, however, was not an ordinary task that could be conducted by anyone. Instead, it took an individual of great intelligence, deeply familiar with the Qur'an, and the *Sunna* of the Prophet, and with skills of grammar and jurisprudence. These individuals, collectively, were known as *fuqaha* (masters of jurisprudence) and *ulama* (religious scholars). Over time, and from these beginnings, various schools of jurisprudence (*madhhab*, pl., *madhahib*) arouse within the Sunni community, each offering its own opinions and interpretations on matters pertaining to law in Islam. The four major schools that have survived today are the Hanafi, the Maliki, the Shafi'i, and the Hanbali.

The partition of Islamic jurisprudence into various schools, each reflective of a particular region, was a long and complicated process, but one that nevertheless had, and continues to have, vast implications for the Muslim community. In the end, the Sunni majority was left with four major schools of jurisprudence, and the Shi'ite community developed three.[75] As

[75] While this study only looks at Sunni law, I will note here that vast differences exist in the content and comprehension of Islamic law between Sunni and Shi'ite jurisprudence. For example, while Sunni jurisprudence espouses *ijma* and *qiyas*, law nevertheless

will become evident from a brief overview of these four schools of jurisprudence, despite certain similarities, these schools tend to emphasize different aspects of Islamic law, and it is customary for these schools to provide different rulings on a host of legal issues. This variance amongst schools, in turn, lends to one of Islamic jurisprudence's biggest strengths and weaknesses. That is, a certain flexibility is associated with "forum-shopping" for law that, at the same time, undermines the singularity of a uniform and systematic legal code—features that transpire in the course of the Ontario Sharia debates.

Schools of Jurisprudence

The Hanafi School, named after Abu Hanifah al-Numan ibn Thabit (699-767) retains the largest following of the four schools, in part due to its official adoption in the early sixteenth century by the Ottoman Turks. In its formative years, *ra'y* played a central rule in the school's method, but this was soon restricted. Abu Hanifah was, however, a great advocate of legal reasoning through analogy (*qiyas*), and his school came to be recognized as one of the most liberal and flexible of the four schools of law. At present, the Hanafi *madhhab* remains dominant in Central and Western Asia (including Afghanistan, the Balkans, Transcaucasia, and Turkey), Lower Egypt, and the Indian subcontinent, the central Asian republics, and China.

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remains fixed. The majorities of Shi'ites, alternately, do not recognize *ijma* as a source of law, but invest legal decision-making abilities to an imam (religious leader) whom they see as God's appointed agent on earth. This difference in-turn, gives rise to the contractualist versus authoritarian approach to law between the Sunni and Shi'ite schools respectively.

The second surviving school, the Maliki School, founded by Malik ibn Anas al-Asbahi (715-95) grew out of Mecca and Medina. The Maliki School, following the local community's predilection for consensus, advocated the use of *ijma*. As a great collector of *hadiths*, Malik also exemplified the routine incorporation of local custom into law. Malik's book, *Al-Muwatta* (literally, the beaten path), remains a significant collection of his judgments and opinions often referred to by followers of this particular *madhhab*. Today the Maliki School exists mostly in rural parts of Egypt, Palestine, Jordan, the coastlands of Yemen, and in populations in Pakistan, India, and Indonesia.

The third school is the *madhhab* of Muhammad ibn Idris al-Shafi'i (d. 819), also known as the Shafi'i School. As one of the leading intellectuals behind the development of *fiqh*, Shafi'i is credited with systemizing and defining the central principles of Islamic jurisprudence, or *usul al fiqh*. Perhaps Shafi'i's greatest achievement, however, was his involvement in the categorization of, and partiality towards, Prophetic *hadiths*. In so doing, Shafi'i managed to elevate the authority of the Prophetic tradition to second, behind (and at times at par with) the Qur'an. His methodologies and explanations are clearly outlined in his seminal work, the *Risala* (treatise or thesis). In addition to raising the status of the Prophet's *Sunna*, Shafi'i also was responsible for refining the use of *qiyas*, and *ijma*. Today, the Shafi'i School is most prominent in Southern Egypt, the Arabian Peninsula, East Africa, Indonesia, and Malaysia.

The last of the four major Sunni *madhhabs* was founded by Ahmad Hanbal (d. 855), and is known as the Hanbali School. Like his contemporary, Shafi'i, Hanbal felt strongly about the use of the Qur'an and the importance of the Prophetic *Sunna* when it came to legal decisions. The Hanbali School, however, never gained widespread prominence early on. Rather it remained somewhat of a dormant reformist movement until it was revived in the eighteenth century under Muhammad ibn' Abdul Wahhab in the central Arabian highlands (today more popularly known as the founder of the Wahhabi school of ideology). For two centuries now, the Hanbali School has remained the dominant school in northern and central Arabia (Saudi Arabia) and Afghanistan.

Despite some of their differences in opinion and method, these four Sunni *madhhabs* each regard one another as orthodox and equally valid.[76] While I have only briefly introduced each school here, it is important to remember that they developed over years, and formulated and refined both their approach and comprehension of law employing sophisticated tools of inquiry. In addition, it is possible to see that in each of these schools, early local tradition seems to have permeated legal thought, and consequently, many of these schools continue to retain specific cultural affinities. Broadly speaking, however, these differences diminish in the broader shared ideal of the Sharia as a fundamental component of Islamic belief and practice.

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[76] Some scholars, such as Sherman Jackson (1995), questioned this view of mutual respect and tolerance between the various legal schools, suggesting a scenario that is much less tolerant. On this point, see also Rapoport, 2003.

Islamic jurisprudence, as elaborated in the science of *fiqh* (*ilm usul al-fiqh*) and through various *madhhabs*, is far from a linear, static, codified body of law. As suggested, each of the four major schools of jurisprudence has its own particular predilection when it comes to the execution of law, relying (at different levels) on various methods of legal development. Some rely more heavily on textual sources, while some more openly endorse the use of personal opinion on particular matters. In addition, while *fiqh* remained uniform in broad terms, the specific details differed, in part due to the variance arising from the *ijtihads* of various scholars, and in part because of local influences. The extent was such that, at times, even scholars of a particular town would offer varied legal opinions (Rahman, 1966:80). As different schools took on different local elements of law, a broad spectrum of jurisprudence slowly evolved within the Islamic world—all of which were equally orthodox.[77]

While at times problematic, this diversity in legal rulings nevertheless yields certain benefits. According to a popular Muslim epithet, the Prophet is

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[77] Still, to suggest that Islamic legal jurisprudence existed and functioned within Islamic society, undeterred by other parallel legal systems, would be an inaccurate assessment. Despite the fact that some scholars tend to view Sharia as a somewhat autonomous and independent legal system, there exists much evidence pointing to the contrary. In fact, Sharia has long operated in conjunction with, and been limited by, other legal frameworks (Coulson, 1964; Lewis, 1993; Schacht, 1956; Shahar, 2008). Starting from as early as the Umayyad (661-750) and 'Abbasid (750-1258) dynasties, through the Mamluk and Ottoman empires, and into the modern era, numerous examples exist of Islamic law employing and working in conjunction with alternate legal systems (Anderson, 1959, 1976; Shahar, 2008). While, for the most part, these systems appeared to operate concurrently, increasingly, Sharia became marginalized as Muslim countries began adopting more Western-style statutory laws. This shift resulted in either a complete replacement of Sharia (as in Turkey), or Sharia was simply integrated into a singular legal system. In many of these cases, however, Sharia did maintain its authority in the matters of personal and family law.

quoted as having said, "In difference is a mercy" (Bakhtiar, 1996: xxxi). This principle of 'mercy in difference' is one that the community of Muslim legalists has taken in earnest, and has encouraged the Muslim community to celebrate as a beneficial and advantageous feature of the system. The flexibility of the Islamic system, which in turn translates to 'mercy,' is better understood through the Islamic concepts of *takhayyur* (or *takhyir*) and *talfiq*. In Islamic terms, *takhayyur* denotes selection and preference of "one among the available rulings or opinions of a single madhhab" (Kamali, 2007:406). In a similar vein, the concept of *talfiq*, which literally means, "piecing together," denotes the derivation of particular legal rulings from various legal schools, in an effort to create a suitable ruling.

These methods of legal reasoning, however, have created an interesting, yet at times complicated legal picture. For example, as Kamali has pointed out, family reforms of the twentieth century often incorporated Maliki legislation pertaining to divorce in many Hanafi nations, while those countries that were predominantly Maliki often would incorporate certain aspects of Hanafi law pertaining to marriage contracts (2007:406). This "borrowing" of law was done on the premise that Hanafi laws concerning divorce are typically more limited and rigid (Hanafis do not recognize judicial divorce) while their laws on marriage contracts are more liberal (an adult may terminate his/her own marriage without the intervention of a legal guardian). Alternatively, the Maliki School offers better options for arbitration of family disputes. As Shahar (2008:117) posited, this multiple

judgeship format opens many questions regarding the procedural make-up of this "forum-shopping."[78]

While (as I earlier suggested) the differences between the four major schools of jurisprudence are relatively minor, in some cases a variation could mean the difference between life and death. Consider, for instance, Shahar's portrayal of this variance when it comes to a person accused of heresy:

> While the majority opinion in the Hanafi, Shafi'i and Hanbali schools requires qadis [judges] to spare the lives of heretics who subsequently return to the fold of Islam, the Maliki qadi is required to impose capital punishment in every case of proven heresy, regardless of repentance. If a man who has been accused of uttering blasphemy manages to have his case heard by a Shafi'i judge before witnesses to his heresy appear in the Maliki qadi's court, he can ask the Shafi'i qadi (or any other qadi who is required to accept the repentance of a heretic) to accept his repentance. Such a judgment would protect the accused from possible execution at the hands of a Maliki judge (2008:133).[79]

The area of family law (which is the issue at hand in the current Sharia debates), also is replete with varied rulings from the four *madhhabs,* whose differences may result in rather profound consequences.

For example, as I mentioned earlier, Hanafi law entitles a woman to conclude her own marriage contract without the consent of a guardian, whereas the other schools require the consent of a guardian in order for a

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[78] For a candid discussion on this concept of shopping amongst *madhhabs* see Keebert Von Benda Beckmann 1981.

[79] It should not be assumed, however, that this type of forum shopping can exist without proper justifications. As Coulson (1969:34) posited, "the jurists maintained that such a change of school must rest on the bone fide belief that the doctrine of the alternative school was intrinsically sounder, and could not be grounded on personal convenience." I have found little evidence, however, illustrating just how the Muslim community ensured that their forum shopping had more to do with the soundness of a particular legal ruling versus its personal convenience to the believer.

valid marriage to take place. The Hanafi ruling follows the Qur'ani'c stipulation (Sura 4:6) that an adult female has full authority to manage her own financial affairs, and this by analogy was applied by the Hanafis to marriage (Kamali, 2009:1). Yet, the Hanbali *madhhab*, which some consider to be the most restrictive of the legal schools, states that a man may stipulate as part of his marriage contract that he will not take on a second wife (polygyny is permissible but not required under Sharia law). The other legal schools, however, disallow this inclusion in the marriage contract on the grounds that Sharia has made the practice of polygyny lawful, and thus it cannot be nullified through contractual amendments. As another illustration in the difference in judicial renderings, the Shafi'is and Hanafis place more emphasis on externality of conduct, while the Malikis and Hanbalis place a greater importance on intent. Thus, in a marriage contract, if a man marries a woman with the purpose of sexual gratification only, and quickly divorces her, the marriage according to the Malikis and Hanbalis is invalid because the intent behind the marriage was inappropriate. The Hanafi and Shafi'i schools, however, consider the marriage lawful on the grounds that the legal marriage requirements were impartially fulfilled (Kamali, 2009:2).

Still, as a matter of consideration, it is important to recall that legal rulings resulting from varying methodological and geographical differences may have profound consequences for Muslims. When this type of variable system is transported out of a locale (where for the most part, geographically the majority of a population will follow a particular school), and into a new

region, there exists the problem of variances both amongst competing schools, as well as between religious and indigenous (local) laws of the new region. While these factors are expressed again in light of the Ontario Sharia debates, at this juncture I illustrate a few examples of variances in rulings amongst the four major schools of Islamic jurisprudence. Consider the following two vignettes taken from Bakhtiar's comparison of Islamic *madhhabs*:

Section 10.4. Stipulation of Conditions By the Wife

The Hanbali school is of the opinion that if the husband stipulates at the time of marriage that he will not make her leave her home or city, or will not take her along on journey, or that he will not take yet another wife, the condition and the contact are both valid and it is compulsory that they be fulfilled. In the event of their being violated, she can dissolve the marriage. The Hanafi, Shafi'i, and Maliki schools regard the conditions as void and the contract as valid, and the Hanafi and Shafi'i schools consider it compulsory in such a situation that the wife be given a suitable dowry, not the dowry mentioned.

According to the Hanafi School, when the man puts the condition that the woman would have the right to divorce, such as when he says "I marry you on the condition that you can divorce yourself," the condition is invalid. But if the woman makes such a condition and says to the man, "I marry myself to you on the condition that I shall have the right to divorce," and the man says in reply, "I accept," the contract and the condition are both valid and the woman can divorce herself whenever she desires (1996:403).

Section 10.13.1 The Right to Act as a Custodian

If it is not possible for a mother to act as the custodian of her child, to whom will this right belong? The Hanafis observe that it is transferred from the mother to the mother's mother, then to the father's mother, then to the full sisters, then to the uterine sisters, then to the paternal sisters, then to the full sister's daughter, and so on until it reaches the maternal and paternal aunts. The Malikis say that the right is transferred from the mother to her mother, howsoever high; then to the full maternal aunt; then the uterine maternal aunt, then the mother's maternal aunt, then the mother's paternal aunt, then the father's paternal aunt, then his (father's) mother's mother, then his fathers mother and so on. The Shafi'i's say that the mother, then the mother's mother, how high so ever, on condition that she inherits; then the father, then his mother howsoever high, on condition that she inherits; then

the nearest among the female relatives, and then the nearest among the male relatives. According to the Hanbalis, the mother is followed by her mother, then her mother's mother, then the father, followed by his mothers; them the grandfather followed by his mothers; then the full sister; then the uterine sister; then the paternal sister; then the full maternal aunt; then the uterine maternal aunt, and so on (1996:470).

The existence of multiple legal frameworks, however, seemed (for the most part) to have not presented a problem for many Muslims, as (geographically speaking) different areas of Muslim concentration followed, for the most part, one *madhhab*. Of course, globalization has dramatically altered the face of the Islamic community, which has meant that Muslims, particularly those living outside of Islamic areas, now reside within a single area yet belong to varied schools of jurisprudence. This non-uniformity of the community has raised its own set of particular concerns, especially in matters of organization and governance. These concerns become acutely visible through the lens of the Ontario Sharia debates, where questions surrounding which schools, and what laws became all too common.[80]

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[80] A ten-year study conducted by Women Living Under Muslim Laws (WLUML) looked at the way in which Muslim law applied to women in various countries around the world. Their research revealed that similar Qur'anic verses yielded very different results depending on the historic development of Islamic law within the particular region in which practiced. In reference to this body of research the WLUML stated:

> Today, most statute laws and even uncodified Muslim Laws applied by courts as 'muslim laws' are derived from an eclectic mixture of provisions from the various Schools. These are added to an acceptance of the principles of modernization (particularly reflected in the need for state regulation of marriage and divorce) and to remnants of customary practices (for example, the refusal of courts in many systems to recognize women's property rights on divorce.) In the W & L research, we also found that frequently judges and communities stated that their application of Muslim laws reflected a particular sect (e.g., Maliki or Hanafi laws), even though people of the same sect elsewhere do things differently (WLUML, 2006:15).

Ijtihad and Reform in Law

Undoubtedly, Sharia and its derivative *fiqh*, represent an extraordinary achievement of Islam, as provider of both moral order and as a religious cultural system. Yet, as Ruthven (1984:135) pointed out, "it is arguable that modern Islamic societies have become victims of this very historic success: because the system worked so well, the legal structure remained intact for more than twelve centuries." Indeed, this stagnation of independent and original reasoning (the so-called 'closing of the gates of *ijtihad*') continues to raise concerns for the Muslim community.

Generally speaking, many historians of Islamic law agree that jurists blocked the right to use independent judgement as a source of law in Sunni Islam sometime in the tenth century.[81] Early legal discourse, for the most part, was relegated to the domain of the *'ulama* (literally, men of knowledge). Over time, these individuals, who were well versed in the areas of Arabic, the Qur'an, and *hadiths*, came to overtake the domain of legal discourse, in which earlier a broad array of community elders and professionals shared. As Calder (1993) indicated, however, a major shift took place from mainly oral discussions to a greater reliance on the written texts of *hadith* and *fiqh* literature that restricted the base of religious authority "from a broad spectrum of social classes to a narrow band of suitably educated persons." In an effort to self-regulate, to curb the relatively free exercise of authority, and

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[81] There continues to be great debate, however, as to the extent and time period of the 'closing of the gates of ijtihad." See for example, Calder, 1993; Christelow, (1988); Hallaq, 1984; and Watt, 1974). Hallaq (1984) and Watt (1974) argued that there never was a full closure of *ijtihad.*

to prevent deviations that resulted from increased innovation (which many believed would mar the authenticity of Islamic legislation [see for example, Neusner et. al, 2000:64]) these various law schools came to rely extensively on the texts and methodologies of their respective schools. This increasing reliance on textual materials naturally placed a constraint on *ijtihad*, and the garnering of consensus for innovations of *'ulama* from each school of jurisprudence became an ever-increasingly difficult task. In turn, this constraint gave rise to the doctrine of "the closing of the door (or gate) of *ijtihad*." From this point forward all legal decisions would result from the practice of *taqlid* (imitation) of earlier legal scholars, and any new innovations or attempts at *ijtihad* were condemned as *bidah* (a term of negative connotation denoting "any modification of accepted religious belief or practice" [Esposito, 2003:138]).[82]

Sharia after the 19th Century

Adding to the multifarious and intricate nature of Sharia are the effects that forces of globalization have had on the system. From its onset, Islam has been a global religion in the traditional sense (in that it was global both in movement, as well as global in message, meant not for one particular population, but rather for all of humankind) (Juergensmeyer, 2006; Karram, 2004; Simons, 2003). At its height,[83] Sharia law operated with relatively little incident in the Muslim world, accommodating itself both to its surroundings

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[82] The notion of *bidah* is rooted in the *hadith*, "any manner or way which someone invents in this religion such that that manner or way is not part of this religion is to be rejected" (Esposito, 2003:138).

[83] Coulson (1964) marked this height as the Middle Ages.

as well as the changing times (Coulson, 1964:149). Not long afterward, however, Western influences on the Muslim world began to affect the modus operandi of Sharia in quite a profound way. In the 19th century, increased contact between the Muslim world and the West led to dramatic shifts in the legal system of many Muslim nations. The rise and movement of the West as a weighty economic, ideological, and political power forced the Muslim world to re-evaluate its own legal framework, its various successes and failures, as well as many of its moral, ethical, and legal challenges, particularly as it operated on a global scale. Naturally, these responses also emerged in large part, as the Islamic community confronted an era of unparalleled rapid change and modernity.

The growing influence of the West was critical in developing and shaping secular law in many Muslim nations. The Ottoman Middle East and the Indian subcontinent, for instance, were among the first to replace Islamic law with Western (European) inspired commercial and penal codes. By the start of the 20th century, in many Islamic countries the legal Sharia system was almost exclusively limited to personal and family law, while English common law and Western-style courts became the norm (Nasr, 2002:154). Accordingly, a shift began to take place from the practice of scholarly opinions issued by the ulama towards codified state law (for example the Ottoman Mejelle of 1877). In many of parts of the Muslim world, secular courts, (*nizamiyya*) took over the administration of most civil and criminal cases, while Sharia courts became mostly limited to the areas of family law.

As noted historian Noel Coulson (1964:149), indicated, this onset of Western influence on the Muslim world had a profound effect on the way in which the Muslim community ultimately understood and administered law:

> Politically, socially, and economically, Western civilization was based on concepts and institutions fundamentally alien to Islamic tradition and to the Islamic law which expressed that tradition. Because of the essential rigidity of the Sharia and the dominance of the theory of *taqlid* (or strict adherence to established doctrine), an apparently irreconcilable conflict was now produced between the traditional law and the needs of Muslim society, in so far as it aspired to organize itself by Western standards and values.

In response to this influence, and in acknowledging the inability of Islamic law to address in a global and innovative manner many of the issues brought on by modernity, the Muslim community became largely divided into schisms that went beyond simply the boundaries of various schools of jurisprudence. These new partitions were carved, not necessarily on legal lines, but rather on ideological ones, with each group offering its own interpretation of the role and capacity of Sharia (Aslan 2006, Brown 1996, Hallaq 2001, Ramadan 2005). Scholars often classify these schisms into four main groups: the secularists, the conservatives or traditionalists, the Islamists or fundamentalists, and the Islamic reformists or modernists.[84] The attitudes of these various camps towards Sharia reflect the breadth of responses and attitudes that exist with respect to the role of Sharia, particularly as it moves

[84] Other scholars may use other, similar terms to differentiate amongst these groups. For example, Husain (1995) categorized using the names revolutionary Islamists, Traditionalist Islamists, and Modernist Islamists. I have also come across Modernists referred to as adaptationists, revisionists, apologists, and syncretists.

from the Muslim world into the West, and to what extent (if any) Muslims should reform laws.[85]

Muslims thinkers such as Muhammad Abduh (1849-1905), Sayyid Ahmad Khan (1817-1898) and Muhammad Iqbal (1876-1938),[86] for instance, assert that Islam is compatible with modernization, and they advocate the reinterpretation of religious doctrine with respect to the needs of modern society. For them, and for their contemporaries who continue to think in the same vein, Sharia can *and should* be updated and re-interpreted, introducing reforms that both reclaim and reflect the Islamic ethos. For this group, legal reform should occur by distinguishing between what adherents believe to be divinely revealed (and thus are immutable laws) and laws that are of human interpretation (that perhaps served the needs of past communities, but are no longer relevant). Broadly speaking, by making this distinction, these reformers contend that the unchanging laws of God (such as those pertaining to prayer, pilgrimage, fasting, etc.) are non-negotiable, but social legislations and legal matters *can and should be* renewed and changed.

Alternately, a group of Islamic modern reformists argue for reform but shift the emphasis from the secular and divine towards a hermeneutic re-reading of the Quran. For many of these reformists (who include

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[85] I cannot stress enough that these categories are fluid and that different categories can share the same opinions on certain matters, while disagreeing on others. I prefer to think of these groups as points on a spectrum rather than individual segments so as to reflect their permeability and scope.

[86] Other important reformists in the area include: Mahmoud Taha (1909-1985), Ali Shariati (1933-1977), Mohsen Kadivar (1959-), Fazlur Rahman (1919-1988), and Tariq Ramadan (1962-).. Important women reformists include Leila Ahmad (1940-) and Fatima Mernissi (1940-).

individuals such as Nasr Hamid Abu Zayd [1943-2010], Abdolkarim Soroush [1945-], Mohammad Arkoun [1928-2010], and Abbas Amanat [no dates available]) Islamic texts need to be understood not simply as texts, but also as a humanistic discourse, conditioned by history and culture. Collectively, these modern reformists maintain that Islamic law can and should be updated in a manner more closely aligned with the needs and demands of contemporary society and in a way that does not place Sharia in direct conflict with Western law.

Members of the Islamist or fundamentalist ideological camp (of whom we can include such Muslims as Hasan al-Banna [1906-1949], Sayyid Qutb [1906-1966] and Mawlana Abul Ala Mawdudi [1903-1979]) differ from the modernists in the sense that while they are not against modernization per se, they are typically opposed to Westernization. (In this case, modernization represents more the embrace of new technologies, and advancement in knowledge, whereas westernization represents the embrace of Western culture, social ideologies, and so forth.) Although all of the aforementioned thinkers approach the significance of Sharia and the role of Islam in the West with some variation (from selective criticism to violence), they share the belief that the failure of Muslims and Muslim societies is the result of their having strayed from (what they believe to be) God's divinely revealed path and the sacred blueprint of life, the Sharia. Unlike traditionalists who stress the importance of classical formulations of law, the fundamentalists stress a return to the 'fundamentals' or *usul* of the law, and they are willing to

reinterpret classical law in order to reflect what they consider to be the fundamentals of the Qur'an and the *Sunna*.[87]

Many Islamic modernists, reformists and Islamists, however, argue for the re-opening of the gates of *ijtihad*, with the perspective that it is an essential move towards a renewal of Islam that the Muslim *ummah* needs for the modern period (An-Nai'm, 1990). A great deal of literature exists which speaks directly to contemporary debates of Islam and modernity, and as such I will not go into great detail, but it will suffice to say that there continues to be a group of Muslims who question the applicability to contemporary times of Islamic law, interpreted and elaborated in the past, and for the most-part closed for discussion. Hallaq (1997:209) bemoans of this situation, where the success of an elaborative and sophisticated system of law has overshadowed the growing need for change:

> Law has become so successfully developed in Islam that it would not be an exaggeration to characterize Islamic culture and legal culture. But this very blessing of the pre-modern culture turned out to be an obstacle in the face of modernization. The system that had served Muslims so well in the past now stood in the way of change—a change that proved to be so needed in a twentieth-century culture vulnerable to an endless variety of western influences and pressures.

Since the 1980s, a major development has taken place as more women activists and Muslim intellectual feminists re-visit issues of Islamic law. Again, the approaches among this group vary as well---from those who argue for a complete eradication of Islamic law citing gender inequalities, opting instead for a secular law system---to those who look to work from within the

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[87] This perspective often translates into a literalist interpretation of Islam.

Islamic system, reforming and re-interpreting aspects of Islamic law in a manner that they feel is more representative of the spirit of Islam.

Despite the fact that the Qur'an gives detailed instructions regarding the role and rights of women (including equal human dignity, equal moral responsibility, rights concerning inheritance, marriage and divorce, property, and witness testimony, and the prohibition of female infanticide), there still remains a great deal of uncertainty regarding the position of women in Islam--a point that becomes exacerbated particularly in an era of modernity, and especially in the West where there has long been a push for laws protecting gender equality. For many female Muslim scholars, the challenge has been, and continues to be, a greater articulation of the role of women within Islam that is free of historic acts of male-domination, and a scholarship that for all intents was largely male-dominated from the on-set.

The work of female scholars (among the well known are Amina Wadud [1952-], Asma Barlas [1950-], Nimat Barazangi [dates not available], Leila Ahmad [1940-], and Fatima Merenissi [1940-]) is critical particularly in the area of legal jurisprudence where, very often, women are potentially the inheritors of an unequal and mostly deficient framework of legal protection. These female scholars have been particularly influential in providing re-readings, re-formulations, and re-interpretations of not only the Qur'an but many of the ways in which Muslims have come to understand *hadiths,*

Sunnahs, and dictums of law.[88] According to many of these women, Islamic jurisprudence (particularly those laws pertaining to the role and rights of women) are tainted with years of male-centered interpretation and a closure of innovative thought at a critical juncture where modernity meets elements of a distant past. It is important to remember, however, that for many of these women, they do not challenge the actual content of the Qur'an, *hadiths*, and *Sunnah*.[89] Rather, it is the "oppressive andocentric intent" that stems

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[88] See for example, Mernissi (1991:49) who does a superb job of deconstructing a *hadith* included in *Bukhari's Sahih* collection which states, "Those who entrust their affairs to a woman will never know prosperity." Through an in-depth historic and methodological investigation, Mernissi illustrates how this particular *hadith* has transformed from its original meaning into a tool of oppression against woman. In fact, most of Mernissi's later works focus on the deconstruction of relationship to time, to power and to the female gender, focusing in particular on the role of misogyny as a tool used by some male scholars for the protection of Muslim identity. Mernissi's 1987 book entitled *Beyond the Veil: Male-Female Dynamics in Modern Muslim Society*, also provides an excellent summary on the debatable family relations between men and women, as conceived by traditional, male, Muslim scholars.

[89] For Wudud, for instance, a re-reading of the Qur'an allowed her to understand the text shed of "centuries of historical androcentric reading and Arab-Islamic cultural predilections." Common amongst all of these women is the premise that (as Leila Ahmad developed in her 1992 book entitled *Women and Gender in Islam*), Islam can and should be gender-equal, and ethical. Moreover, these women are highly critical of classical *tasfir*, and the classical *fiqh* system derived from it. They see these developments as ones "framed by patriarchal societal structures and as dominated by male scholars" (Hammer, 2008:449). In a similar vein, Leila Ahmad (1992) provides a detailed discussion of marriage, divorce, and polygamy in the Qur'an, arguing that in male-interpretation, early Muslim elite have marred the ethos of the message that stresses equality and justice. For instance, she states on the matter:

> Verses such as those that admonish men, if polygamous, to treat their wives equally and that go on to declare that husbands would not be able to do so—using a form of the Arabic negative connoting permanent impossibility—are open to being read to mean that men should not be polygamous. In the same way, verses sanctioning divorce go on to condemn it as 'abhorrent to God.' The affirmation of women's right to inherit and control property and income without reference to male guardians, in that it constitutes a recognition of women's right to economic independence (that most crucial of areas with respect to personal autonomy), also fundamentally qualifies the institution of male control as an all-encompassing system (1992:63).

It should be noted, however, that many of these women's works, are not without critics. Indeed, many of these scholars face resistance, including claims that their interpretive approach is "disloyal to Islam" and that it "denies" Islamic heritage (where heritage

from "the male-dominated interpretive tradition," which they contest (Greifenhagen, 2004:65). Undoubtedly, the area of scholarship pertaining to gender (particularly women's rights) in Islam is extensive and worthy of new scholarship and inquiry. I acknowledge this burgeoning area of study as far as the vital role that gender equality/inequality plays within the contemporary Sharia debates, and further, as an indication of the potential revision and reformulation of Islamic jurisprudence. Indeed, the 'voices' that emerge from these scholars are key in providing new insight into existing practices, and in engaging the Muslim community with the possibility of a new adaptive framework to Islamic law.

Sharia Arbitration Courts

Subsequently, these discussions suggest that Islamic law is a complex, highly interpretive and dynamic legal system, deeply rooted in history and culture. What these discussions do not tell us, however, is how Sharia—with all its variance, and interpretive qualities--operates in practice, and specifically through arbitration tribunals. Cultivating an understanding as to the specific ways in which a Sharia court operates, and what measures these courts could possibly embed to ensure that individual rights are upheld, are essential components to the debates at hand, and as such, I briefly discuss here what a representative court may look like. In so doing, I rely on a

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symbolizes the interpretations of the male *ulama* who acted as legal guardians) (Scott, 2009:61).

summarized procedural and agenda format derived from the Muslim Arbitration Tribunal (MAT) in Birmingham, England (MAT, 2010), the Islamic Sharia Council in London England (Islamic Sharia Council, 2010), and as well, the Sharia Arbitration Tribunal of Texas, U.S. (Saad Interview, 2010). These tribunals range from the more restrictive (Islamic Sharia Council) to the more progressive (MAT).[90]

According to all three of these organizations, the arbitration services that they provide are of great value to members of the Muslim community who wish to live their lives, to the extent possible, according to religious law. The number of people who employ these services, however, varies from organization to organization. For instance, the Sharia Arbitration Tribunal of Texas reported that roughly ten people a year use their services (Saad Interview, 2010), while reports suggest that by the mid 1990s, the Islamic Sharia Council had dealt with almost 1500 cases (roughly 50 cases a year) (Fournier, 2004). Interestingly, while there does not appear to be any information regarding the number of Muslims who employ arbitration services through the MAT, a spokesperson for the group did recently state that there had been a "15 percent rise in the number of *non-Muslims* using Sharia arbitrations in commercial cases this year" (up from the more than

[90] According to their website, one of the MAT's central directives is to ensure cohesion between secular and state law. In so doing, they rely a great deal on interpretations of Sharia that best compliment the secular law of the land (MAT, 2010). The Islamic Sharia Council, which operates unofficially (as opposed to MAT), is viewed by many as being more restrictive in nature, upholding "a disturbing reaction on the part of what might best be termed the spokesmen of Muslim male interests" (Carroll, 1997). See also Fournier, 2004.

twenty non-Muslims who used the system in 2009) (Hirsch, 2010). Conversely, while the MAT stated that the majority of their arbitration cases dealt with civil and commercial cases, they are now "'increasingly dealing with reconciliation and mediation in marriage'" cases (Chedie, quoted in Hirsch, 2010). Similarly, according to reports, the majority of cases that the Islamic Sharia Council arbitrates are cases dealing in matters of divorce, "whereby the wife had obtained a civil divorce but the husband refused to pronounce *talaq*" (Fournier, 2004).

In initiating a Sharia-based arbitration case, individuals or parties wishing to employ the services of an Islamic Sharia tribunal must follow some basic procedural steps, starting with initial contact with the arbitration board. This contact occurs via telephone, letter correspondence, and through scheduled and unscheduled visits (but primarily through telephone) (Bano, 2007). At this point, parties can find out information about how the tribunal operates, and calendar dates regarding when / if a hearing can occur. If they find the information suitable, then parties can request a hearing.

Before a tribunal can arrange a hearing, however, applicants must read and complete a set of documents. These documents include a detailed explanation of the procedures involved, information on registration fees, and a request for certain basic information about the dispute. In response to this application, parties provide written correspondence to the tribunal, detailing the grounds for the case, including any supporting reasons for those grounds, and any contact information for witnesses that the applicant anticipates to

use as evidence in the case. In addition, applicants must state whether or not they have authorized a representative to act for them in the case, and if so, the contact information for the representative.[91] If the issue brought forth is one that is filed jointly by the two parties, then both parties will complete the aforementioned steps. If the issue is brought forth by one person (for instance in many divorce cases), then the tribunal will serve the other party with a copy of the request for a hearing, and it then becomes incumbent upon the receiver of the request to file, with the tribunal, a copy of any statements of evidence, and other documents of relevance. Typically, parties and/or their representatives meet with the arbitrators in order to finalize the procedures (establishing general rules), times, and at times to sign an document indicating that they will abide by any decision resulting from the arbitration process (if the tribunal has the power to render binding decisions).[92]

Upon receiving all the pertinent information, and finalizing paperwork, a meeting is typically setup where, for instance, in the case of divorce, couples (and/or their representatives) will meet with the arbitration panel and discuss their grievances, with each side providing details of the case.[93] Upon hearing the evidence, arbitrators will then discuss amongst

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[91] The use of representation in these tribunals is significant, particularly for women who may not feel comfortable because of existing power issues, or due to discomfort in publically voicing their grievances (NPR, 2008).

[92] Although, as noted elsewhere, parties can appeal decisions to the mainstream court system if they feel that they were in some capacity treated unfairly.

[93] All sessions, meetings, and so forth are typically conducted within designated social spaces and offices either within administrative buildings belonging to the organizations, or within an affiliated mosque or Islamic center.

themselves the legal religious parameters of the case, and agree on a ruling suitable for the case at hand. Arbitrators will then produce a written decision, together with pertinent reasons for that decision, within the agreed period of time (this typically ranges from two-three weeks) copies of which they also provide to all parties. At this point, the arbitration board will finalize and file all remaining paperwork. The decision of the arbitrator (if it is binding arbitration) is now binding and can be entered as an enforceable court judgment. In the case that disputants do not comply with the arbitral award, the awarded party has to choice to go to the secular courts in order to enforce the award.

Unfortunately, it is virtually impossible to find out precisely what rulings various Arbitration boards render for each case and what their justifications for these decisions are, particularly when they operate unofficially and under the radar of government sanction. As such, the task of knowing the most pivotal points of modus operandi regrettably goes unobserved. What we *can* observe, however, are the ways in which these various organizations approach Islamic arbitration in terms of who exactly serves as arbitrators, which schools of Islamic law they employ in rendering decision, and what steps they take in ensuring women's rights. Answers to these questions, in turn, can reveal some interesting insights into the inner-workings and dynamics of these arbitration tribunals.

Research into existing Sharia tribunals reveals that these religious courts each approach the areas of arbitrator and legal school selection in

assorted ways. For instance, in some tribunals, each party will select one member of the community whom they want as arbitrator, and the two arbitrators will then collectively select a third. In this manner, parties are believed to have equal representation (NPR, 2008). Alternately, some tribunal services have their own arbitrators who are selected based on their knowledge of Islamic law, and their knowledge of secular state law. The Islamic Sharia Council has an in-house panel of scholars who arbitrate cases (although it is unclear as to how many members are assigned to each case, and it appears that all the panel members are male—although there is a female counsellor on staff who helps people with various problems) (Islamic Sharia Council, 20100). In the case of the Muslim Arbitration Tribunal, each panel consists of one Islamic arbitrator who is educated in varied forms of Islamic law, and a lawyer representing English common law (according to the MAT, the lawyer must be UK qualified with a minimum three years experience after being qualified) (MAT, 2008). The MAT specifically chooses female lawyers to fill this latter position with the belief that they will not only ensure that decisions fall in line within secular legal frameworks, but also that decisions are attuned to issues of gender equality. Similar to the Islamic Sharia Council, the Texas arbitration tribunal has a panel of scholars (three who are assigned to each case), although all these members are male (Saad, 2010).[94] (That there are few female scholars of Islamic law reflects the fact

[94] According to Sheikh Saad, the Texas Arbitration Tribunal would more than welcome female arbitrators, but so far, they have had a difficult time finding any women who have an extensive background in Islamic law (Saad, 2010)

that, at least historically, the study of jurisprudence has been primarily a male undertaking, although this demographic is sure to change as Islamic law gains more currency in mainstream schools of law.)

Perhaps one of the most confusing aspects of Sharia arbitration courts operating in non-Islamic countries is the question of, "which school of law?" Again, research into existing tribunals reveals a difference of approach on this matter, too. For instance, some tribunals will allow the aggrieved parties to choose which form of jurisprudence they wish to be arbitrated under. If they cannot agree as to which school of *fiqh*, then the arbitrators will decide according to specific cases and circumstances. The Texas Sharia Tribunal, for instance, charges arbitrators with the task of selecting the school of *fiqh* that most closely resembles Texas state law on particular matters. According to a representative of the Tribunal, the breadth of Islamic law makes finding a solution that reflects state law an easier task (Saad, 2010). Thus, arbitrators spend a great deal of time locating sections of Islamic law that closely resemble State law.[95]

Similarly, the MAT states as part of its procedural guidelines that, in arriving at its decision, "the Tribunal shall take into account the laws of England and Wales" together with a recognized school of Islamic jurisprudence (MAT, 2008). The MAT differs somewhat from both the Texas Sharia Tribunal and the Islamic Sharia Council in terms of espousing reformed visions of Sharia that will fulfill mandates of both religious and

[95] It is not clear precisely what school of jurisprudence the Islamic Sharia Council follows, and my repeated requests for information were left unacknowledged.

secular legal systems. Again, while it is impossible to know the exact decisions, and justifications rendered by the MAT in individual cases, it appears, based on their literature, that the MAT spends a great deal of time exploring novel interpretations of Sharia rulings, not only as they appear in classical *fiqh*, but also in the laws of many Islamically-based countries.[96] In fact, in their literature, the MAT acknowledges not only the importance of Islamic law in the lives of Muslims, but also the innate apprehension that some might have regarding its place in Western liberal society. In recognizing this trepidation, however, the MAT nevertheless is assertive in its belief that secular and religious law can co-exist:

> We understand that some people will be concerned about taking a case to MAT thinking it may be just a group of Imams sitting in a mosque. Will they be biased against women? Will they understand young people? Will they understand contemporary problems in modern Britain? The short answer is we will have young qualified people, male and female, sitting as members of the Arbitration Tribunal. They are not scholars or lawyers from abroad but from here.... There will be no race or sex discrimination in this organization!... We believe in the co-existence of both English Law and personal religious laws. We believe that the law of the land in which we live is binding upon each citizen, and we are not attempting to impose Shariah upon anyone... Sharia plays an important role in the personal lives of Muslims, however, the objective shall be that both Shariah and the Common law will be satisfied in the decisions of the MAT (MAT, 2010).

In fact, nowhere are the forces of legal pluralism more visible than in the MAT's recognition of the predominance of state law. According to the MAT, the presence of state law does not necessarily mean that religious law *cannot*

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[96] See for instance their research work in the area of forced marriages, available on their website at: http://www.matribunal.com/

and *should not* play a role in the lives of citizens, so long as the two forces of law can complement each other to some degree. The thorough nature of their procedural guidelines,[97] together with their inclusions of some key safeguards meant to ensure basic levels of gender equality (such as having a female civil lawyer present at all arbitrations), in-turn, serve as useful examples of how this particular arbitration court has dealt with some of the challenges surrounding Sharia courts.

Summary

As this past section illustrates, Islamic law--unlike traditional Western law—differs in development, breadth and most importantly, in the adherents' belief that it is derived from divine origins. As illustrated, the process of Islamic jurisprudence--from the definition, extrapolation and interpretation of primary sources, to the methodological derivation of legal rulings--was a product of human exertion. For many Muslims, however, the spirit of the law, and its essential place within the Islamic fold, remains entirely divine. This tension between the divine and the human ultimately becomes the *raison d'être* for subsequent Sharia scholarship.

Interpretations of Islamic law may vary according to time and location, yet Islam stresses the timeless and immutability of the Sharia, "a timeless manifestation of the will of God, subject neither to history nor circumstance" (Ruthven, 1997:75). The complex relationship between the

[97] The procedural guidelines for the MAT are available on their website, at: http://www.matribunal.com/.

divine commandment and the human reasoning of it, together with the belief that legal duty is religious duty for Muslims, lies at the core of Islamic law, separating it from Western, secular notions of legal jurisprudence.

Fiqh, the human attempt at comprehending Sharia, is the result of a sophisticated legal discourse created and elaborated upon by Islamic scholars. In all possible manners, these scholars of religion have attempted to create a body of *fiqh* with the understanding that there lies a gap between the divine commandment and the human comprehension and practice of it. As such, for the most part, these scholars have tried to locate *fiqh* within the verifiable sources of moral knowledge, primarily, the Qur'an and the *Sunna*. In addition to these two sources, scholars also have employed a combination of sources and methodologies (whose study is referred to as *ilm usul al-fiqh* – science of the principles of jurisprudence) to determine the proper course of action. The work of these earlier Sunni scholars resulted in the creation of various schools of jurisprudence, each replete with its own justifications and legal rationalizations.

In this section, I have discussed these developmental aspects of Islamic law at length to elucidate several key points. First, deriving a coherent understanding of Islamic law has never been an easy process. This difficulty is the result of several factors, including ambiguity in Qur'anic language, abrogation, and dictums of law believed by many to be both timely and timeless. Adding to this complexity has been the variances between schools of law, the infiltration of Islamic law with local indigenous law and

cultural practices, and the oft-cited gender inequality, believed by many (in particular female-scholars) to be the result of years of male, andocentric interpretive practice. All of these factors combined have occluded the vision of a singular, unified, Islamic law. Yet, adherents do not necessarily view these ostensible weaknesses as deficiencies of the system. Rather, many Muslims feel that Islamic law is merciful *precisely* because it is so varied, and because of its immense flexibility and scope of potential interpretation.

Secondly, from the midst of these developments has arisen a broad array of attitudes concerning the place and mode of Sharia, ranging from the ultra conservative to the moderate and avant-garde. Added to this gallery of opinions is the extensive area of scholarship in the area of Sharia law, ranging from the unsympathetic and critical to the complimentary and optimistic. The existence of such an expansive and at times incoherent breadth of opinion in turn informs and feeds the opinions of Canadian Muslims with respect to how they should approach the issue of Islamic law, particularly in the West. Understandably, therefore, when forces of globalization compel Muslims from a host of backgrounds to re-establish a Muslim *ummah* (community) in a new country and collectively posit a single worldview, they often encounter clashes of opinion.[98]

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[98] As earlier pointed out, a critical issue that comes into play is the 'experience factor,' or those prior experiences that many Muslims bring with them into Canada. For example, women who were treated harshly and inequitably under Sharia law in their former countries may have left in order to avoid Islamic law. Thus, their perceptions of the role of Islamic law in the public sphere may be very different from, say, a Muslim immigrant from a non-Islamic nation. These variances play an essential role in the formation of opinions.

Adding to the complexity is the fact that Muslims are exercising Islam (and by extension Islamic law) in a Western, 'secular' society – a practice which undoubtedly has its own ramifications. Finally, notwithstanding the intricate complexities of Islamic law, it is essential to recall that, for adherents, God alone is sole legislator, and following His divine laws is the path that will ultimately lead to salvation. This very powerful detail cannot be underestimated. As many have pointed out, to be Muslim is to practice Sharia—the two cannot be estranged from one another.[99] Thus, for many adherents it remains not a matter of "if" they can practice their lives guided by Islamic law, but rather, "how."

Providing an extensive discussion of Sharia in this chapter was an imperative undertaking for several reasons. First, as I have argued, Sharia plays a significant role in the lives of many Muslims. Following certain tenets of Islamic law is an undertaking that many Muslims believe affects not only their present lives, but may in fact pave the path to future salvation. This type of formidable motivation suggests that Sharia arbitration courts will not cease to exist regardless of the government's decision to ban faith-based arbitration.

Second, as I have argued, Sharia is a highly complex, and highly interpretive system of jurisprudence—a feature which makes the system both susceptible to abuse and to reform. This characteristic of Sharia is

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[99] Although, the statement that "to be Muslim is to practice Sharia" represents an assortment of technical complexities because, as illustrated, Muslims do not necessarily subscribe to a singular form of Sharia, and some may neglect, or ignore certain aspects of Sharia (out of choice or necessity) but may still identify themselves as Muslims.

essential in ensuing discussions, since I argue that, left to operate unofficially, Sharia arbitration courts have the potential to interpret certain laws to the great detriment of women. Alternately, that Sharia law also is quite multifaceted and highly interpretive means that Islamic law does not have to be static, antiquated, and necessarily bad for women. Indeed, the malleable feature of Islamic law denotes great room for reform processes that can act to protect women's rights in Canadian arbitration courts. As I subsequently will argue, making Islamic arbitration official may have been the first step towards this reform process, partly because rulings coming out of these courts *would have to have* adhered to Canadian standards of justice. By not entertaining the possibility of faith-based arbitration under a revised Arbitration Act, the Ontario government missed an opportunity at inviting the dealings of a private community into the larger Canadian legal framework. In denying Muslim's faith-based arbitration, the Ontario government also essentially removed the possibility of creating a formalized, reformed, and transparent system of Canadian Sharia law.

CHAPTER 5
Ontario Sharia Debates

One Law for the Lion & Ox is Oppression
– William Blake

With its pluralist origins, its rapidly changing demographics, and its various policies and laws intended to encourage multiculturalism and protect religious belief systems, Canada, in theory, is disposed towards the implementation of alternate religious legal orders. Yet, theory does not always translate into practice. Indeed, it remains that despite the state's acknowledgement that some citizens are guided by forces beyond normative state law, and despite the nation's endorsement and protection of religious freedoms, alternate, religious legal venues are no longer a viable option for the citizens of Ontario.

As previously discussed, theories of legal pluralism indicate members of some religious communities are obligated to live their lives under more than one legal framework. In the case of the Muslim community, many adherents believe religious law (Sharia) to be the ultimate source of authority dictating all aspects of life. Yet, globalization has created a situation wherein a variety of religious groups, each subscribing to its faith in varied forms and degrees, relocate into a secular, liberal society, with its own set of laws.

What makes the Canadian situation particularly interesting is its existing policies, laws, and legislations that enable religious communities to pursue their religious beliefs, not only within the confines of their private lives, but also through public channels. These public channels, however, are not (for the most part), mainstream Canadian courts. As illustrated earlier, Canada is a nation with no established religion, and a nation that aspires to implement lines of separation between church and state, with the courts choosing to forgo the task of becoming "arbiters of dogma." Furthermore, as I illustrated earlier, the courts have the task of maintaining no preference between religion and non-religion, or amongst religions in deciding cases. Court cases that have directly employed aspects of religious law (while in existence) remain fairly rare as courts try not to get involved in matters of faith either because they are ill-equipped to, or more importantly because they attempt to maintain boundaries between the religious and the secular spheres of law. Still, in acknowledging the existence of legal pluralism in the lives of many Canadians, for years the province of Ontario permitted, through the Arbitration Act, the operation of religiously-based arbitration courts that catered to various religious communities.

The role of these faith-based courts, however, came under extreme scrutiny following the announcement that a particular group intended to create similar, Islamically-based arbitration courts (tribunals) wherein arbiters would judge adherents based on the precepts of Islamic law (Sharia) in certain matters of family law. As the previous chapter illustrated, Islamic

law is not a simple, straightforward system of jurisprudence. Indeed, it is a system that is both susceptible to abuse, and capable of reform. More importantly, however, is the fact that for many Muslims, Islamic law remains *an important source of authority*, extending beyond the boundaries of the nation, and permeating many aspect of life.

Building upon these previous discussions, this chapter moves into the very heart of the Sharia debates that took place in Ontario. The chapter begins with a brief discussion of the history and role of arbitration courts in Canada, including reasons for their popularity, and some of the pitfalls associated with their use. Through these discussions, I argue that despite its critics, arbitration continues to be a viable and recognized form of alternative law, with a long history of success, not only in Canada, but also in many Islamic societies. Next, I question why there is so much controversy about its usage, particularly as it pertains to Islamic law. In answering this question, I examine, in detailed fashion, the arguments fuelling either side of the Sharia debates.

In my examination of the Ontario Sharia debates, I argue that, despite some *very* real concerns advanced by those opposing the system--centered largely on Charter rights aimed at protecting women, and promoting gender equality--proponents of the system offered equally credible arguments using similar legislative frameworks that, unfortunately, received much less public attention. A discussion of these arguments reveals that, despite some crucial

shortcomings, the proposed Islamic system of arbitration nevertheless drew quite heavily on existing legal and cultural frameworks.

Background

In October 2003, members of a group called the Islamic Institute of Justice (IICJ) publicly announced their intent to open a business that would offer Muslims in Canada arbitration of family law matters, guided on Islamic principles and laws (Ali, 2003). As some have noted, however, the proposal did not emerge through the customary democratic deliberation process, a standard law-reform procedure or an amendment to the constitution (Shachar, 2008). Rather, through a series of press releases the Canadian Society of Muslims (through the sub-group of the IICJ), announced its intent to establish a Sharia tribunal that would operate within an existing legal framework, known as the Arbitration Act.

Interestingly, the implementation of an Islamically based-arbitration board is not a new occurrence. In fact, in 1994, a Sharia Council formed in Montreal for the purpose of settling civil disputes between Muslims in the areas of contract and family law and labour disputes. Modelled on Britain's Islamic Sharia Council, the Montreal council stressed that its arbitration outcomes would most likely yield the same results as those produced by the Quebec courts, but in a more culturally sensitive and cost-efficient manner (Norris, 1994). Increased public pressure, however, forced the Quebec government to announce a review of the proposed tribunal, which ultimately never materialized, and the council soon disbanded. The hype and intense

debate regarding Sharia tribunals died down--that is until the Islamic Institute of Justice announced *its* intent to establish a Sharia court that would operate in accordance with an *already existing* legal framework--Ontario's 1991 Arbitration Act.

The man behind this bold endeavour was Syed Mumtaz Ali, an outspoken advocate for Muslim political identity in Canada. Ali claimed that once his group established Islamically-based arbitration courts in Canada, all "'good Muslims,'" as part of their faith, should use them instead of Canadian secular courts (Ali, quoted in Boyd, 2005:71). The announcement immediately drew fierce opposition both from within the Muslim community and from non-Muslim Canadians alike. Naturally, women's groups were among the most vocal forces opposed to what they felt was an unwarranted and iniquitous proposal. Alarmed by the IICJ's announcement, groups such as the Canadian Council of Muslim Women (CCMW), the International Campaign Against Sharia in Canada, the Law Society of Upper Canada, the National Council of Women (NCW), the National Association of Women and the Law (NAWL) and the Canadian Federation of University Women (CFUW) (amongst others) participated in extensive lobbying.

It seemed at the time that large portions of Canadian Muslims and non-Muslims were adamantly opposed to the implementation of a parallel legal system in Canada--particularly one that reflected so-called "Islamic law." In response to this immediate opposition, the government of Ontario requested Ontario's Attorney General at the time--and former Minister

responsible for women's issues--Marion Boyd, to conduct a review of arbitration courts in Canada, dealing specifically with the proposed Islamic arbitration court. Boyd submitted her full, 150 page plus appendices report in December 2004, and to the surprise of many, the report *supported* the establishment of an Islamic arbitration court in Ontario.[100]

While the government did not follow the recommendations of the Boyd report and quickly quelled the efforts of Ali and others, the issue remains an important one that perhaps did not die as much as it temporarily moved to the sidelines. Less pronounced in the public eye at the time of these events were the efforts of such groups as members and associates of the Jewish *Beth Din* (Jewish religious tribunal), for example, who saw the suppression of the Islamic court as potential to eradicate, down the line, *all* religiously based court systems in Canada. Adding to the list of players were those who questioned the legality of the government *not* confirming such courts on the grounds of multiculturalism, human rights issues, and the right to practice one's religious beliefs in Canada. Ultimately, the debates pitted two groups against each other—those whose members felt that there was a legitimate need for such a system in order to address the religious obligations of adherents, and those who felt that the Arbitration Act violated equality rights under the Canadian Charter of Rights and Freedoms by creating a tiered justice system (Hogben, 2006:133; Razack, 2007).

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[100] The report supported the establishment of an Islamic arbitration board, albeit with a list of 46 recommendations. See Appendix 5.0.

Due to the significant advantages of arbitration, many countries and states have opted to employ it, together with other forms of dispute resolution, as an alternative to the traditional court system. For years various countries and states additionally have permitted the use of faith-based arbitration—a process wherein arbitrators apply religious doctrines to dispute resolution— with their respective courts generally sanctioning the decisions made by these tribunals (Wolfe, 2006:428). In Ontario, faith-based arbitration existed as a viable form of dispute resolution for years, particularly within the context of family law, for several faith-based communities. These groups employed the system quietly and with little fanfare until members of the Muslim community announced their intent to create an Islamically-based arbitration board. That faith based arbitration operated mainly within the context of family law immediately raised many questions and concerns regarding human rights issues involving the most vulnerable members of society—chiefly women and children. But what precisely is arbitration, and why is it a cause for concern when coupled together with religion? The following sections will outline briefly the process of arbitration in Canada (in particular Ontario), and as well, provide a detailed account of some of the issues that arose on either side of the Sharia arbitration debates.

Arbitration

Both federally and provincially, Canada (similar to other nations and states), encourages the employment of a wide array of dispute resolution

methods that offer alternatives to the traditional medium of the win/lose court system. ADR (Alternative Dispute Resolution) refers to all methods, other than litigation, of resolving disputes. These methods commonly involve mediation, conciliation, and arbitration. The most traditional of these methods—arbitration—involves an arbitrator, or a panel of arbitrators gathering information (documents, briefings, testimonies, etc.) and making a ruling that is binding upon the parties (Bennett, 2002).

A 1990 Uniform Law Conference of Canada (a federal-provincial-territorial law harmonization and reform body) recommended to the provinces and territories the adoption of a *Uniform Arbitration Act.*[101] In all, seven provinces--Ontario, Alberta, Saskatchewan, Manitoba, New Brunswick, Prince Edward Island, and Nova Scotia--adopted this recommendation (known since 1992 as the Arbitration Act) essentially replacing or revamping some older versions of the Act in some provinces.[102] Consequently, each province has some provision for arbitration – including Newfoundland, which has the Judicature Act, and Quebec, which has the *Code of Civil Procedure.*[103]

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[101] The principles of the reform are reported in the Law Reform Commission of Canada Proceedings of the Seventy-First Annual Meeting (Law Reform Commission of Canada, 1989), online: http://www.bcli.org/ulcc/proceedings/1989.pdf and in the Law Reform Commission of Canada Uniform Arbitration Act (Law Reform Commission of Canada, 1990), online: http://www.ulcc.ca/en/us/arbitrat.pdf. See also, Arbitration Act: S.O. 1991 c.17, online: http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/91a17e.htm.
[102] For example, Ontario's old Arbitration Act dated back to the nineteenth century.
[103] While there is limited legislation for arbitration at the federal level (for example with respect to labour arbitration under the Public Service Staff Relations Act), the general consensus is that it is really not necessary at the federal level (Horrocks, 1982:333).

While government officials initially created the Arbitration Act with the intent of resolving commercial disputes, both the old and new statues of the Arbitration Act extend beyond commercial and business transactions, applying to a gamut of disagreements including family law and inheritance matters (Boyd, 2004). The growing breadth of the Act, as Marion Boyd stated in her report, was the result of the government's changing perspective towards the legitimacy of arbitration together with a greater trust bestowed on the ability of arbitrators in making a wide array of decisions (2004:5).

Currently, in most provinces, the Arbitration Act is applied generally to all arbitrations with the exception of a few that the Act excludes (such as international commercial arbitrations that are governed with special statutes). Correspondingly, for over a century the province of Ontario has encouraged the employment of alternate resolution methods in a large number of family law disputes. In fact, Ontario law always has permitted parties to choose arbitration as an alternate mean of resolving family law matters and inheritance matters, *as long as both parties agree to the methods without coercion, and as long as the rulings do not contravene with Canadian civil law* (Boyd, 2004).

Under Ontario Arbitration Law, both parties can agree on an arbitrator or panel of arbitrators, and can choose a particular form of law[104] (which until recently included religious law) by which their case would be

[104] As Boyd (2004:12) points out, the composers of the Arbitration Act (whether intentionally or not) drafted the Act in a way amenable to choice of law: "The drafters of the Arbitration Act had in mind a choice of law of some other place than Ontario."

judged. As it stands, however, the Arbitration Act does not state any necessary qualifications that a person must have in order to be an arbitrator (Bennett, 2002). As such, parties are free to choose any person whom they wish to arbitrate over their matters. The only rule that the Act does provide for is that the arbitrator should be neutral (Boyd, 2005). Furthermore, the Arbitration Act applies only to civil matters that are subject to provincial jurisdiction (i.e. marital separation, property division, support of spouses and dependent children), as well as certain matters such as labour law. Those matters falling under federal jurisdiction such as criminal law, civil divorce,[105] and so forth, are not arbitrable.

This alternate route mechanism is by no means a new development in the legal world— or amongst religious communities. There is early evidence of the use of alternative dispute mechanisms operating in the most primitive of societies (Horrocks, 1982). Jewish, Christian, and Islamic societies have long employed some type of internal dispute resolution system (Abdal-Haqq, 1996; Fried, 2004; Sturman, 2000; Shippee, 2002).[106] For years, the Jewish community, for example, has had an internal legal system based on the *Hebrew Bible* and the *Talmud* (Deuteronomy 16:18; Fried, 2004, Sturman, 2000). Today, the Jewish community continues to resolve internal disputes, based on Jewish legal principles, through the Beth Din (literally, house of Judgement). These forums typically involve the adjudication of a case by a

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[105] Under Canadian law, divorcing couples must employ the federal Divorce Act, whereas separating couples employ provincial legislation.
[106] Native American groups also rely heavily on these types of alternative dispute resolution systems. See for example, Taylor, 2004.

rabbi, or panel of rabbis. These Beth Dins preside over a variety of matters including religious divorces, conversions, and commercial and business matters employing the principles and laws of Jewish law, or *halakhah* (bethdin.org/rules.htm, 2008).

Similarly, Islam also has a strong tradition of employing alternate dispute resolution, including arbitration (*tahkim*), mediation (*wasatah*), and conciliation (*sulh*), using Islamic law in resolving disputes.[107] This tradition stems from various sources, including the Qur'an, which encourages Muslims to initiate peace and reconciliation through dialogue (Shippee, 2002:245). For instance, the Qur'an instructs "All who believe, stand out firmly for Allah as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just, for that is next to piety . . ." (Sura 5:8). In the matter of marital discord, the Qur'an explicitly encourages believers to "*appoint an arbiter* from his people and another from hers" (Sura 4:34, my emphasis). The use of dispute resolution in Islamic societies is evidenced from as far back as the time of Muhammad, where in Medina, many recognized him as not only prophet of the *ummah*, but also as arbiter, settling disputes and quarrels amongst various tribes (Rodinson, 2002:155). Historical accounts also suggest that after the death of the third caliph, Uthman, members of the *ummah* decided that his succession should be resolved using arbitration, "according to the Qur'an." (Bierschenk, 1988:68; Crone, 1988:63).

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[107] See Waugh (on file with author:8) for a more refined account of the historical use of arbitration in Islam.

Dispute resolution outside of formal court settings continued to maintain an important position in Islamic societies. According to historian R. Jennings (1978:147):

> Muslihun (those who help negotiate compromise and reconciliation) were regular features of the court. Often, litigants reported to the court that Muslihun had negotiated sulh [conciliation] between them, indicating that a compromise had been accomplished away from the court.[108]

In addition to the historic presence of arbitration as a preferred and familiar method of legal jurisprudence amongst Muslims, other factors exist that make arbitration a desirable alternative to the general population.

For instance, as forces of globalization continue the trend of global migration, many communities find themselves residing in foreign, at times unfamiliar, locations. For many, the ability to employ a valid and recognized method of jurisprudence using one's peers, who may be more attuned to the subtle cultural, religious, and social nuances of a particular case, may mean a more satisfactory encounter with the law. It is also often the case that certain groups prefer to have specific cases tried before a panel of their own peers who may be more familiar with the inner dynamics and workings *within* a particular community. Commenting on this importance of expertise and familiarity, Horrocks (1982) suggested that this localization of dispute resolution has the effect of eliciting decisions influenced by the "spirit of mediation, situation equity, and responsiveness to local community

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[108] On the use of alternate dispute resolution forms in Islamic societies, see also, Marin, 2003; Schacht, 1957 and in particular Miller, 2003.

expectations and relationships." In turn, these factors may effectively contribute to the harmonization of laws, whereby citizens can better align (in familiar and expert settings) the demands of their religious beliefs with (in this case) Canadian laws.[109]

Advocates of the arbitration system also point to the benefit of cost and time-savings associated with forgoing the official judicial route and opting for private dispute resolution. Indeed, many sources indicate that arbitration is beneficial to society in general, because it eases the already over-burdened court system and drastically reduces costs involved in trials and inconsequential claims (Bennett, 2002, Boyd, 2005:72, Lew, 2002, Wolfe, 2006).

In addition to these aforementioned points, other reasons parties may chose to arbitrate, particularly in the area of religious law, include the following:

(1) Participants do not publicly file pleadings and sessions are not open, and decisions remain accessible only to parties involved, leading to more privacy.
(2) Arbitration provides more flexibility in what rules and procedures will be involved in making a judgement.
(3) Arbitration allows parties to present their side of the situation in a neutral forum.
(4) Parties have the ability to choose an arbiter within a particular area of expertise.

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[109] Ayelet Shachar provides a wonderfully insightful assessment of this plural take on citizenship in her 2008 article entitled, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law.* In it, she discusses the concept of privatized identities and the ensuing tensions some citizens feel as the result of a public/private dichotomy. For an excellent discussion on issues of citizenship, integration, reconciliation, and the role of religion and politics see also Kymlicka and Bashir, 2008.

(5) Arbiter has greater flexibility in rendering decisions that may be more amenable to the parties involved.
(6) Arbitration allows for some degree of reconciliation between religious and secular laws.
(7) Arbitration provides a legal venue to hear religious cases that secular courts otherwise often would dismiss.
(8) Some cultural minorities distrust the secular court system, fearing discrimination. Often times, they prefer to have cases settled internally.
(9) There may be an increased sense of comfort presenting arguments before arbitrators who share a similar value system.
(10) Arbiters are often more familiar with religious laws.
(11) An internal system of authority may help in the preservation of community culture and ethics

(Adapted from Wolfe, 2007:441).

Nevertheless, dispute resolution, particularly faith-based through arbitration, has its critics. As is evidenced through much of the legal literature, as well as through many of the arguments presented by the no-arbitration coalition and similar groups, faith-based arbitration (as it currently stands), contains certain limitations and drawbacks that can lead to unfavourable results. Chief among these reasons are the following:

(1) Arbitration lacks the protection of the court system.
(2) Arbitrators are typically not held accountable by a supervising authority.
(3) Arbitrators are often not required to rely on precedent.
(4) It is rare that an arbitrator provides a written reason for his/her decision.
(5) The existence of an alternative to the secular court system may create social pressure for their use, particularly for women, resulting in social ostracization.
(6) Family law issues (including divorce, child custody, financial support, etc.) tend to involve vulnerable members of society (women and children) who may benefit more from the protections accorded by secular courts.
(7) Religious doctrines used to resolve issues are often highly contentious and many times inconsistent. Many critics believe these laws to be antiquated and sexist, and as such, governments

> should eliminate forms of arbitration that would allow for such laws as a viable form of legal jurisprudence.
> (Bakht, 2005; Goundry, 1998; Wolfe, 2007).

While the Arbitration Act has both strengths and weaknesses, it remains a popular method of dispute resolution for many individuals and groups for a variety of reasons. The question that does arise, however, is whether (as it currently exists) arbitration is indeed the most appropriate agency through which to exercise religious law. Ultimately, as discussed, the government initially designed the Arbitration Act for resolving commercial disputes--not for the faith-based resolution of family law matters. Reservations, accordingly, occur as one questions whether the real issue at hand is the inability for multiple legal fields to exist under Canadian jurisdiction, or if the real hindrance lies in the fact that, in Ontario, faith-based dispute resolution was etched upon a pre-existing (and for the purposes of religious arbitration) ill-equipped procedure of law. While I return to this question in the next chapter, I first turn to the arguments fuelling both sides of the Ontario Sharia debates.

The Sharia Debates

Before declaring his intention for creating an Islamically based arbitration court, Syed Mumtaz Ali and Anab Whitehouse disseminated an article entitled, *Oh Canada, Whose land, whose Dream?: Sovereignty, Social Contracts and Participatory Democracy: An Exploration Into Constitutional Arrangements* (1991), in which they argued that there were a number of ways in which Muslims felt marginalized, "if not denied," by the present

constitutional makeup of Canada. Chief among the ways in which Ali and Whitehouse believed the Canadian government marginalized Muslims was that, through existing legal frameworks, Canadian Muslims were unable to realize "the promise" of religious freedom, particularly in the area of Muslim family law (1991:41).

As many (including Ali himself) have suggested, family life--and by extension those laws governing family affairs--remain an important aspect of the Muslim faith with the widest application, either directly or indirectly, through codifications of the Sharia (Vikor, 2005:299). In fact, family law (including inheritance laws) are the most "exhaustively treated" areas of law in the Qur'an (Hallaq, 2004:33). The centrality of family law issues in the Qur'an, and their extensive discussion in subsequent *fiqh* jurisprudence signifies the importance of not only family issues, but also the approach taken towards family in the Islamic world.[110] Indeed, many Muslims view family law as "the core of Islamic public law [*mu'amilat*]" (Bakhtiar, 1996: xxxv). Encompassing issues of women and gender, however, certain components of Islamic family law also make it the most controversial area of law, particularly in relation to modern "Western" norms. Despite these objectionable aspects of Muslim family law, it nevertheless remains an area that individuals like Syed Mumtaz Ali feel is a necessary component in the

[110] As the extent and power of Islamic law changed considerably through the years in many parts of the Muslim world (with secular laws replacing many Islamic laws), Muslim family law (particularly those governing marriage, divorce, and inheritance) retained its influence, albeit with constant revision and reassessment since the twentieth century (Esposito, 2005:145).

lives of many Muslims seeking to combine their religious and national identities.

Given then Islam's familiarity and partiality towards systems of alternate dispute resolution (primarily arbitration and mediation), and given the centrality of family law to Islam's code of law, it would appear, at least on the surface, that the entwining of arbitration and family law would be an uncomplicated and much desired system of alternate jurisprudence for many Canadian Muslims. As the heated debates in Ontario revealed, however, uniform agreement and easy progression would hardly be the case. Both sides argued passionately for the protection of rights, which they believed the government--either by allowing or by disallowing religious arbitration—had the responsibility of guaranteeing. The account that follows is based primarily on my examination of various media accounts, Marion Boyd's (2005) commissioned report on Sharia-based arbitration tribunals, and the websites and reading materials disseminated by various organizations arguing both for and against the establishment of Sharia based courts in Canada. It becomes evident from the following discussion how relevant and convincing the arguments from both sides of the debate were, and how it came to be that this particular arbitration issue raised some quintessential questions regarding Canada's mandates and policies, both in the defence and protection of religion and multiculturalism, and in protecting its citizens from potential discrimination.

Arguments Against the Establishment of Faith-Based Arbitration

In a 2003 news bulletin, The Canadian Society of Muslims (CSM), under President Syed Mumtaz Ali (a retired lawyer) declared that (via the division of the Islamic Institute of Civil Justice) it had been looking into the establishment of a *Darul-Qada* (a judicial tribunal). This proposed tribunal would operate as a "private Islamic Court of Justice" employing certain aspects of Islamic law, within certain permissible areas of jurisdiction, and without infringing on any existing Canadian laws (Ali, 2004:1). According to the group, recent adjustments to Ontario's arbitration and family laws, together with the existence of established Jewish and Christian arbitration courts, sanctioned the society's intention to create its own, formal Islamic arbitration board:

> It is now clear that according to the current Canadian Law, we are free to set-up independent Muslim Arbitration Boards (Darul-Qada) to serve those who choose to come to them. The decisions of Darul-Qada once rendered will be binding on the parties, the relevant Rules of Civil Procedure would be applicable, and the decisions will be enforceable through the normal enforcement agencies of the government in the same way as any order of a Canadian Court (Ali, 2004:1).

Upon Mumtaz Ali and the IICJ's announced proposal, many groups (in particular women's groups) quickly galvanized and joined forces, petitioning the government of Ontario to voice their concerns. Many independent groups joined forces under various umbrella groups including Homa Arjomand's International Campaign Against Sharia (http://www.nosharia.com/) and the No Religious Arbitration Coalition (a

joint initiative between the Canadian Council of Muslim Women [CCMW] and the National Association of Women and the Law [NAWL].

These larger groups were supported by various other Canadian feminist organizations and a few self-declared "moderate" "secular" or "cultural" Muslim organizations (Backhouse, 2006:2), including: Women's Legal Education and Action Fund (L.E.A.F.),[111] the Metropolitan Toronto Action Committee on Violence Against Women (M.E.T.R.A.C), and the National Council of University Women, among others. Undeniably, the number of individuals and organizations involved in the struggle against faith-based arbitration (FBA, hereafter) were large and crossed beyond Canadian borders. The International Campaign Against Sharia alone included over 183 organizations from over 14 countries with thousands of volunteer activists (Arjomand and Glazov, 2007).

The efforts of these groups were significant in lobbying the Ontario government in an effort to ban, down the line, *all* FBA in family law matters. For many individuals involved in the opposition, the underlying conviction was that Islamic arbitration would result in Muslim women risking many of their civil liberties particularly under conservative Muslim interpretations of women's rights. Furthermore, many felt that entering arbitration would not be a decision that many women would make out of free will, but rather, community pressures and influence would coerce them into accepting faith-

[111] I should note, however, that L.E.A.F. initially supported the use of religious principles in the matters of arbitration as long as they did not contradict Canadian Law, citing the benefits of lower cost and the quicker resolution of matters as positive steps in jurisprudence. L.E.A.F. later changed its position.

based arbitration. Interestingly, the level of perceived crisis from the opposition groups ranged from the diplomatically nuanced and precise (where arguments were contained to specific details and alluded specifically to very fundamentalist interpretations of Islamic law) to the dramatic. (Consider for example, Homa Arjomand's comments that Sharia was a "'barbaric act'" and that employing faith-based arbitration in family law matters would "'escalate slavish obligations of the wife towards the husband'" [Arjomand cited in Razack, 2007:13].)

Despite the variety of approaches, however, it remains the case that the proposal to introduce Sharia arbitration in Ontario received attention not only *across* the nation but also *internationally*, with protests occurring in Toronto, Ottawa, Vancouver, Victoria, Montreal, Waterloo, and in Europe (where rallies and events were held outside Canadian embassies and consulates in Düsseldorf, Stockholm, Paris, and the Netherlands [Western Resistance, 2005]). In the course of these debates, it became apparent that while proponents of FBA saw the system as an intentionally Canadian occasion displaying legal flexibility and an awareness for minority rights, opponents of the system felt that the existence of faith-based arbitration revealed a "legal loophole" in need of repair (Baqi, 2005:3). The following analysis provides some of the key arguments that many of these groups and individuals made in opposition to the proposed idea of Sharia-arbitration in particular, and faith-based arbitration in general.

Issues

Interestingly enough, some of the very arguments used in favour of the implementation of IBACs in Canada were the same as those against their implementation. At the crux of the debate, of course, lingered Canada's controversial multiculturalism policies together with certain rights guaranteed within the Charter of Rights and Freedoms. As illustrated earlier, Islamic law in particular has raised questions regarding the rights and roles accorded to Muslim women. As many oppositional groups attested to, whether it was the result of male-oriented interpretive practice, doctrine, or culture, it remained the case that women's rights (as presented in the Sharia and particularly as articulated through the area of family law), were problematic at best.

Opponents of FBA, however, did not uniformly call for reform to Islamic law; rather, they focussed on its contemporary image as a legal body that was both archaic and male-oriented, arguing that the implementation of such an out-dated system of law would work to the detriment of women. Among other things, individuals against the implementation of Sharia law in Canada pointed to factors such as a man's unilateral right to divorce, unequal inheritance rights,[112] and child custody laws that give preferential rights to

[112] While it is true that Islam was revolutionary in providing women with rights of their own, such as the right to inherit property, a women's inheritance, (according to the Qur'an), is only half that of a man: "God decrees a will for the benefit of your children; *the male gets twice the share of the female*" (Sura 4:11, my emphasis).

fathers under some forms of Islamic law (Jaffer, 2005).[113] Addressing these issues, opponents argued that precisely because large parts of Islamic law were outdated, male-centered, and gender-biased, they stood in direct conflict with Canadian laws that provide women with equal rights. While some opponents outwardly dismissed the notion of Islamic law as a whole, others were more cautious in their discourse, simply analyzing and calling for reform, yet not necessarily rejecting the whole corpus of Sharia.

Interestingly, however, the Ontario Sharia debates were not simply about Islamic law. Rather, opponents argued for the abolition of *all* faith-based arbitration. Pointing to the efforts of the past thirty to forty years in separating Judeo-Christian values from family law (basing decisions on human rights principles instead) many groups felt that the introduction of a parallel religious legal system was in fact, a step backwards for Canadian jurisprudence. In their opinion, this step backwards would entail grave consequences, as the privatization of family law would create a parallel system of law that would allow particular religious, cultural, and political elites to determine their conception of applicable law, thereby circumventing Canadian family law that--for all intents and purposes--grants women equal rights (Jaffer, 2005).

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[113] Worth noting, however, is that these rulings, as explained in an earlier Chapter, for the most part, are not definitive or singular, depending on legal school, culture, and other similar dynamics.

Numerous submissions to Marion Boyd made by many women's groups persistently echoed this fear that FBA would inherently work against these hard-won freedoms and equality rights accorded to women in Canada:

> The National Association of Women and the Law (NAWL), in conjunction with the Canadian Council of Muslim Women (CCMW) and the National Organization of Immigrant and Visible Minority Women of Canada ... challenge the constitutionality of using the Arbitration Act for family matters, citing section 15 of the Charter of Rights and Freedoms and arguing that it is inherently discriminatory against women to allow the use of other forms of law, for example religious laws, as opposed to Canadian law, to determine family law matters (in Boyd, 2004:31).

In the opinion of many opponents, FBA, as an alternative legal system, starkly contradicted the supreme law of the land, as faith-based arbitration could not guarantee equal protection, "without discrimination based on race, national or ethnic origin, colour, religion, sex, age." In particular, there were no guarantees that decisions resulting from FBA tribunals would adhere to section 28 of the Charter guaranteeing rights equally to both men and women (Baqi, 2005:7).[114]

The Sharia debates were in large part a discourse about the limits of accommodation, with one side arguing that accommodating minority rights is a necessary component of multicultural society, while the other side argued that even multicultural societies must limit, at some point, the extent

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[114] In her report, however, Marion Boyd stated that the Charter does not apply to arbitration as carried out through the Arbitration Act because only government action is subject to the Charter, and arbitrators derive their authority not from the government, but rather from private agreements. Various groups, however, have ardently challenged her assessment, arguing that because under the Arbitration Act government action makes arbitral decisions legally binding, so the decisions must, by extension, be Charter compliant. See for example, (Baqi, 2005) and Canadian Council of Muslim Women (www.ccmw.com).

to which minority groups can assert their sovereignty. But interestingly, in the midst of these debates a third and perhaps less familiar argument emerged from the opponent's side--one that questioned the compatibility of multiculturalism with women's rights. In fact, it was the political theorist Susan Moller Okin who first posed the question, "Is multiculturalism bad for women?" and in so doing began an area of scholarly inquiry that would employ a gender lens in examining policies of multiculturalism. Okin, like her contemporaries, concluded that the notion that multiculturalism and feminism are both progressive, and thus reconcilable, is at best questionable (Okin, 1998:665).[115]

The Ontario Sharia debates witnessed the expression of similar sentiments from some opponents. For instance, Homa Arjomand argued--much like Okin--that multiculturalism, in effect, is a destructive force for women: "'I chose to come to Canada because of multiculturalism ... but when I came here, I realized how much damage multiculturalism is doing to women. I'm against it strongly now. It has become a barrier to women's rights'" (Arjomand, quoted in Wente, 2004). In response to the perspective that multiculturalism, and in fact, cultural relativism are bad for women emerged yet another, equally fascinating, feminist perspective that

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[115] In arguing the dangers of multiculturalism, Okin claimed that when a liberal democracy gives legal recognition to minority groups, or privileges to assist groups in protecting their culture or religion, it is essentially doing harm to women. Because of this harm then, liberal democracies should not preserve cultures or religions that deprive women of certain freedoms and of dignity (Okin, 1998). Naturally, the problem with this type of argument is that it assumes numerous sociological facts many of which are, at best, contentious.

questioned the implications of such a latter perspective in the reaffirmation of the second-class status of non-white women in need of "saving" by a modern white culture (Razack, 2007; Volpp, 2001).[116] These varied perspectives that emerged during the course of the debates generated interesting and insightful discussions on the obligations of liberal democratic countries to embrace religiously-based practices that seem adversative to women's rights in the host society.

While I recognize that this expansive feminist discourse exists, a robust debate of the issues would be futile for the purpose of this project since, regardless of merit, multiculturalism remains a central tenet in Canada embedded in both law and policy. At the same time, however, it remains true that some of the most significant, telling criticisms of Sharia that emerged during these debates centered around Sharia's capacity to reproduce, in the eyes of many, a second-class citizen status for women. In fact, many opponents pointed specifically to areas of Islamic law that they believed were significant areas of potential gender inequality. Indeed, certain literalist interpretations of Sharia in the areas of divorce, maintenance, and child custody (all of which may be arbitrated with the exception of divorce that remains under the aegis of the federal *Divorce Act*), could potentially

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[116] For instance, Volpp (2001), in response to Okin's assertion that multiculturalism is bad for women, argues that such an assumption reinstalls the notion of the superiority of the West. Volpp argues that Okin's assumptions are based on her perceptions of Muslim women as victims of their culture, devoid of all personal agency, and in contrast to her more liberated Western counterparts.

generate highly disadvantageous results for women.[117] The following comparison between Islamic and Canadian laws in three contentious areas of family jurisprudence highlights these real-world concerns. [118]

Divorce

It is important to note that Canadian law does not recognize alternative divorces (which include religious divorces). Indeed, a divorce in Canada may only be initiated through the Federal Divorce Act (Douglas, 2006). Similar to Judaism, however, divorce plays an important role in the lives of many Muslims, particularly as it pertains to issues of remarriage and child custody. Although Islam does not necessarily look upon the practice of divorce with great favour, it nevertheless remains an option for Muslims (Bakhtiar, 1996). Without a religious divorce, many Muslim women would be unable to remarry within the faith, and as such, Muslims may choose to have a Muslim divorce in addition to a civil divorce in order to remove the barrier to remarriage. It is possible, however, that some Muslims may opt to follow the rulings of the religious divorce (together with subsequent maintenance and custody rulings), in fulfilling their religious obligations. As with many other areas of Islamic law, those rules governing divorce are numerous and comprehensive—a task that makes an overview of the area onerous. Nevertheless, a reading of Islamic divorce laws reveals a varied

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[117] These interpretations, of course, are typically void of new reforms, some of which I summarize in each section.

[118] I should reiterate that there is a considerable range of juristic opinions and varied approaches on national and local levels on many of these issues. What I outline in these sections is simply a very brief and simplistic summary of the positions.

system of jurisprudence that stands in rather stark contrast to the Canadian system, and a system that, at least outwardly works far more to the advantage of males.

In Islam, marriage is a civil contract, and a divorce is a dissolution of that contract. In traditional Islamic law, it remains that the power to divorce is given primarily to men—and they can divorce women without giving any reason despite the fact that jurists say that divorce without a valid reason is morally reprehensible (*makruh*) (Bakhtiar, 1996). The fact, however, that repudiation remains the right of a husband poses understandable challenges to women's equality issues.[119]

Under traditional Islamic law, divorce can occur through several routes. The most common among these are the *sunnah* divorce (*talaq*), the negotiated divorce (*khul*), and the judicial divorce (*faskh*). A *sunnah* divorce commences with the husband's pronouncement of divorce (often by stating the word *talaq* [literally, "I repudiate you"] three times, although there does exist a difference of opinion according to legal school and country as to how and when this type of divorce may take place.)[120]

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[119] According to Nasr, the Sharia defines repudiation as "the dissolution of a valid marriage contract forthwith or at a later date by the husband, his agent, or his wife duly authorized by him to do so, using the word *talaq*, a derivative or synonym thereof" (1994:75)

[120] For instance, the issue of a *talaq* pronounced by an intoxicated man is considered valid by some schools of fiqh, *talaq* pronounced under pressure or duress is valid under Hanafi law, but not according to Maliki, Shafi'i or Hanbali law. Alternately, Hanbali, Hanafi and Shafi'is place a great deal of emphasis on intention where words referring directly (or unambiguously) to *talaq* bring the process into action, whereas for the Maliki's intention does not play a significant role.

The process of *talaq* may differ according to school and region, but typically under the Sharia, a husband must state the *talaq* at a time when his wife is not menstruating, and twice more successively during each of the periods following the cessation of the women's menstrual cycle (Bakhtiar, 1996). As many feminists and opponents of Sharia family law point out, however, the important thing to remember about *talaq* is that (despite moral advice against such acts) a husband really needs no reason to seek a divorce from his wife, and often the wife is not required to consent to the divorce, or even have knowledge of it in order for the divorce statement to be valid (CCMW, pamphlets). (Recall that even though marriage in Islam is a contract that requires the agreement of both spouses, Muslim law nevertheless considers divorce to be a unilateral action of the man.) Furthermore, under some forms of Sharia law, during the waiting period when the divorce is not yet finalized, the husband may choose to take his wife back—an action that does not necessarily require the wife's consent (Shukri, 2009). Consequently, the wife has little grounds upon which she can refuse the marriage despite the fact that earlier her husband tried to divorce her.[121]

Alternately, in some regions a husband may also state the *talaq* three times in succession at the same time (*bidah*, or quick divorce), provided that it is at a time when the women is not menstruating. Despite the fact that

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[121] There exist varying opinions regarding the proper rules regarding taking back a wife during the waiting period, but what becomes a real point of contention is the wife's knowledge that her husband has taken her back. As Clarke and Cross (2006) point out, while Muslim jurists typically condemn the action of taking back a wife without her knowledge, leaving her unaware of the action is not necessarily illegal.

many Islamic jurists disapprove of this type of divorce, it is nevertheless legally effective through all schools of Sunni jurisprudence (Clark and Cross, 2006). At this point, the wife is in a state of *'idda*, or waiting period, for three months during which time she is forbidden to marry. In a *bidah* divorce, however, a husband does not have the right to take back his wife, touch her, or approach her in any manner, as this type of divorce is instantaneously final. Also during the *'idda* period, the husband is required to provide financially for his wife, but not thereafter (a point which I will return to shortly) (Shukri, 2009).

Aside from the process of *talaq*, there are several other ways under Islamic law that couples can dissolve a marriage. It should be noted, however that it remains very difficult for a woman to obtain a divorce under traditional Islamic law. Unlike a man, a woman cannot divorce by herself—it remains the case that the husband has a unilateral power of divorce whereas a woman typically *must ask* for a divorce from her husband or from a judge. For a woman there exists traditionally two methods through which she can obtain a divorce. These methods are a negotiated divorce (*khul*), or a judicial divorce (*faskh*). Also referred to as *mubarat*, a *khul* (or *khula*) divorce is accomplished through mutual consent with the wife giving to the husband something in return for her freedom. In the case of *khul*, a wife may initiate the divorce, but she typically must give up her right to all or part of her *mahr* (dowry) as provided in the marriage contract, or some other type of

compensation to the husband (CCMW, pamphlets). This act is effected through the Quranic ruling that:

> . . . it is not lawful for you that ye take from women aught of that which ye have given them except in the case when both fear that they may not be able to keep within the limits imposed by God. And if ye fear that they may not be able to keep the limits of God, it is no sin for either of them if the woman ransom herself (Sura 2:229).

Naturally, the degrees of compensation differ from school to school and region to region, but it remains true that *khul* compensation is a matter of negotiation (ranging from a woman giving up all her *mahr* and other benefits to giving up nothing at all). It is essential to recall, however, that under traditional law, the decision to grant a divorce under *khul* still resides with the husband, who may refuse to grant the divorce.

As mentioned, it is possible under *khul* that a husband not agree to a divorce. Under these circumstances, a woman may turn to the courts who, in turn, may grant her a divorce on specific grounds, even if the husband does not consent to it. Under this model, a woman appeals to the courts for a judicial divorce (*faskh*) on certain articulated grounds. Again, depending on the school of jurisprudence, there is a great variance in the number of accepted grounds with the Hanafi school being the most restrictive, and the Maliki providing the most options to women. Laws in some modern states provide grounds for judicial divorce on the following grounds including: sexual dysfunction, communicable or repugnant disease, madness, absence of the husband for a certain period (including absence as a result of imprisonment, a husband's marriage to a second wife) particularly when the

first wife is not consulted, physical abuse, immoral behavior, and sinking to a social level that is below the dignity of the wife (CCMW pamphlets, Bakhtiar, 1996).[122]

In addition to these two traditional approaches, there also exists another method for a woman to obtain a divorce, one which is gaining more currency throughout the Muslim world—the delegated right of divorce (*tafwid*). Under *tafwid*, the husband grants the wife the power to divorce herself from him whenever she chooses. This type of divorce option often is written into the marriage contract, and can include all sorts of stipulations ranging from a wife's freedom of movement to a certain amount of monetary support throughout the duration of the marriage. Divorce through *tawfid* generally enables women an unconditional divorce without having to pay financial compensation, and is immediately binding. Writing this type of divorce provision into a standard marriage contract, however, does not prevent a man from initiating divorce first, and through one of the aforementioned methods.

In contrast to the Islamic approach, in Canada divorce is governed by the federally legislated *Divorce Act*. Under Canadian divorce law, a validly married man and woman can apply for a divorce to end their marriage and

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[122] It is also worth noting that radical progress regarding the dissolution of marriage by the wife has come to fruition in many countries, often on Maliki-inspired grounds. According to Schacht and Layish (2010), examples of these reforms include "a certificate of impossibility of reconciliation" that in Iran can be obtained by either spouse and on various grounds. This certificate essentially gives women the freedom to initiate divorce, on a broad range of grounds, and without having to remit anything to the man. Couples create these types of pre-nuptial contracts before or even during the course of a marriage.

resolve all related issues that stem from divorce, including maintenance and child custody (Government of Canada, 1993). It is important to recall, however, that unless a marriage is properly registered with the state, one cannot obtain a divorce.[123] Under the Canadian *Divorce Act*, a divorce can be initiated by either a man or a woman and only on one ground--marriage breakdown. According to section 8 of the Act, a marriage breaks down when:

a) Spouses have been living separate and apart for at least one year,
b) Either spouse has committed adultery, or
c) Either spouse has treated the other with such physical or mental cruelty that it is no longer possible for them to live as husband and wife (in the case of adultery or abuse it is not required that the parties live separate and apart for one year).

In addition to the aforementioned, there also needs to be a recognition that the marriage is over—a need that only has to come from one of the spouses (*Divorce Act*, 1985).

Obtaining a divorce in Canada can occur through one of several ways. In general, couples divorcing in Canada fill out appropriate divorce forms outlining such pertinent issues as presence of children, parenting agreements, financial support and maintenance. If the spouses agree on all the issues raised in the divorce (uncontested divorce) then couples submit the paperwork detailing all arrangements to the courts where the divorce is

[123] This regulation, in turn may become an issue for couples who are religiously married, but do not have a civil marriage that is acknowledged by the state and are seeking a divorce. The law also can also be problematic for women who are in polygamous marriages whose unions are likewise not registered with the state. These examples point to the fact that there exist citizens who, because their unions were not traditional state unions, may fall through the cracks of state laws that fail to acknowledge or provide recourse for the dissolution of their marriages.

processed by court officials. In this case, spouses are notified by email as to the dissolution of the marriage and they need not appear in court. In an uncontested divorce spouses do not contest because they agree with the outlined terms. If the couple cannot agree on terms of divorce (contested divorce) then the divorce proceedings typically go to trial. The judge will make a decision based on Canadian laws governing divorce on any issues that spouses cannot agree upon (Douglas, 2006). What we can glean from this brief assessment of divorce laws in Canada then is that, for the most part, gender plays a very limited role when it comes to issues of divorce under Canadian law, as both men and women can apply for a divorce, and judicial rulings pertaining to issues of divorce occur within the framework of maintaining gender equality between spouses.

Maintenance

The ways in which Canadian and Islamic law approach the issue of divorce vary tremendously, but out of the divorce issue arises another hotly contested issue of equality rights as provided by these respective bodies of laws—that of maintenance. Spousal support of a wife under traditional Muslim law comes from two sources: the dower (*mahr*) which is pledged at the time of marriage, and maintenance (*nafaqah*) which is paid during the time of marriage and, at times, shortly thereafter. Maintenance, under Islamic law, is the lawful right of the wife under a valid marriage contract and upon specified grounds (Nasir, 1994). A husband must provide for his wife, relative to his means during the period of the marriage, and at times, shortly

after. In addition, according to classical Sharia law, any income that a woman brings into the marriage, or makes during the course of the marriage belongs solely to her--she can do with it as she pleases—and her finances do not mitigate the husband's financial responsibility towards her (Clark and Cross, 2006). As many critics of Islamic family law point out, however, it is the precarious nature of maintenance contingent upon 'proper behavior' and its virtual eradication following the dissolution of marriage that proves disadvantageous to women.

While under traditional Islamic law, men are charged with the task of providing maintenance for their wives during the marriage, there is considerable variance regarding the amount of support that husbands are obliged to provide, and on what grounds this maintenance exists. For instance, according to the Shafi'is the level of support due to a wife is determined by the husband's lifestyle and his ability to pay. Alternately, according to the Maliki and Hanafi schools, the level of support is determined by the woman's own status and wealth and the way that she was previously accustomed to living. The Hanbalis, conversely believe that the level of support due to a woman in based upon the circumstances of the husband and wife together (Bakhtair, 1996). More important for this discussion, however, is that under some forms of Islamic law, this maintenance (regardless of amount) *is contingent* upon certain factors. For instance, under some varieties of Sharia, while a husband must provide maintenance to his wife during the course of the marriage, this obligation may be suspended if

the wife is 'disobedient.' Examples of disobedience again are far-ranging and varying, but typically include things such as a wife's refusal to move into her marital home, or leaving her marital home without good reason. All schools with the exception of the Hanafi's regard the wife's refusal to have sexual intercourse with her husband also acceptable grounds for the suspension of marriage (Peters, 2010). Naturally, this type of arrangement raises questions regarding the rights of women and their disproportionate status in a marriage.

Although there exist a breadth of opinions on the matter, as a general rule there is no such thing as long-term or lifetime maintenance, alimony, or spousal support under classical Sharia law. This is one of the key reasons why the amount of *mahr* that the wife receives is so crucial, as in many cases it is the only monetary support that the wife will have if the husband divorces her. After divorce the husband must pay to the wife any remaining dowry either at the finish of the *'iddah* (waiting period) if it is a *sunnah* divorce, or immediately if it is a quick divorce (Shukri, 2009). This claim to *mahr*, however, assumes that it is the husband who initiates the divorce. As previously mentioned, a woman may have to negotiate away part or all of her *mahr* if she initiates the divorce under the *khul* process. When applying for a judicial divorce, a judge will decide the issue of *mahr* based on his/her evaluation of the case. In terms of post-divorce maintenance, most schools of jurisprudence concur (although this too varies considerably according to school, circumstance, and region) that following the termination of marriage,

a husband is required to provide financial maintenance for his wife *only until the end of the 'idda* (waiting period), typically lasting three months. This provision is based upon the Quranic injunction that states:

> And the divorced women, too, shall have (a right to) maintenance in a goodly manner; this is a duty for all who are conscious of God (Sura 2:241).[124]

The Hanafi school of jurisprudence allows for a wife to receive full maintenance even during the waiting period following a final divorce that was not initiated by the wife, while in other schools of jurisprudence a wife is entitled to partial support (usually in the form of housing) in the interim period following a final divorce (CCMW, pamphlets). A husband also is responsible for the full maintenance of his divorced wife if she is pregnant until the birth of the child.

This lack of support for women following a divorce is based on the traditional Islamic assumption that in Muslim society, a divorced woman would return to her family home to be supported once again by the men in her immediate family. Consider the following response given by Amtul Mateen, a public speaker on women's issues and administration manager at the Islamic research and education fund of India, on the question of maintenance for women following divorce:

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[124] The three-month maintenance period was developed by jurists and does not appear to have any premise in the Qur'an. Modernists have interpreted "fair provision" to mean that support will be given for the lifetime if the woman or until she remarries. Other Muslim authorities have interpreted "fair provision" to mean that support will be paid for one or two years only (CCMW pamphlets).

> . . . the maintenance of a woman is to be undertaken by a man throughout her life . . . if she is a widow the responsibility [for maintenance] is on her sons. . . . if a woman gets divorced and she waits for her three menstruations in the same house, within the three waiting periods the responsibility is on the same husband who divorces her . . . after the waiting period the girl, she will return to her parent's house, and the responsibility will be fulfilled by the parents, the sons, the brothers whoever she is having, and in the case she gets married to another person after the waiting period is completed then the responsibility is on that person to whom she gets married (Mateen, 2007).

In terms of the division of property in Muslim law, we find that again, according to traditional Islamic law, there appears to be no concept of family property. Under classical Sharia, the property of spouses remains separate with the husband and wife each having control over their own assets without impediment from the other (Clark and Cross, 2006). Naturally, this non-division of property assets does have a positive aspect for women as they can accumulate their own property—whether it is through inheritance, dower, or their own business ventures—assets which remain their own even following a divorce. The obvious drawback to this type of arrangement is that in contemporary times, a husband is more likely to accumulate more wealth than his wife, particularly if a woman chooses a stay-at-home career as wife and mother.

In summary then, under traditional Sharia law, a divorced wife is entitled to the unpaid portion of her dower and maintenance during her waiting period or during her custody of children under a certain age.[125] Outside of this, classical law makes no provisions for financial support of a

[125] This age can range from anywhere between two and seven. Refer to next section on child custody, or *hadana*.

divorced wife, including the division of the matrimonial home if it belonged to the husband. Naturally, many activists for women's rights in the twentieth century have questioned the fairness of a system that requires a wife to care for her husband, children and the matrimonial home throughout the marriage, and then leaves her with only three months' maintenance upon divorce, regardless of the circumstances surrounding her divorce, the wealth accumulated during the marriage, or the likelihood that the woman will fall into destitution (Clark and Cross, 2006).

In Canada, the issue of spousal support falls under the federal *Divorce Act*, wherever a divorce judgment is arranged. Only applications by unmarried cohabitees and married spouses who are not divorced, and do not plan on seeking a divorce, are regulated through provincial legislation. Couples can apply for support under the *Act* only when the requirements for marriage breakdown are satisfied (see preceding section on divorce in Canada). Canadian courts will grant support under the *Act* only after a divorce is granted (although the *Divorce Act* does make provisions for interim support for the duration of the divorce proceedings--but on specified grounds) (*Divorce Act*, 1985). There exists no limitation period within which a claim for spousal support under the *Divorce Act* can be pursued (*Divorce Act*, 1985). Unlike Islamic law, where a man is obligated to pay for the maintenance of his wife during the course of a marriage, Canadian law does not entertain this type of practice as it views marriage as a partnership of two individuals (CCMW pamphlets).

Generally speaking, section 15(5) and (7) of the *Divorce Act* provide detailed criteria regarding the issuance of spousal support. In Canada, spousal support is intended to recognize the economic advantages and disadvantages to a spouse resulting from the breakdown of a marriage (Douglas, 2006). However, whether support will be paid, how much, and for what period of time is very circumstance specific. Typically, the courts will take into consideration: length of time the spouses cohabitated, the functions performed by the spouse during cohabitation, and any existing order, arrangements, or agreements relating to support of the spouse (Government of Canada, 1993). According to section 15(7) of the *Act*, any order made under this section providing support of a spouse should:

1) recognize any economic advantages or disadvantages to the spouse arising from the marriage or its breakdown;

2) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8);

3) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

4) insofar as predictable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

(*Divorce Act*, 1985)

As a general rule, spousal support is calculated based on the disposable income of the paying spouse and the needs of the recipient spouse. These payments can be issued in the form of lump sum payments, escalated payments, through the division of assets, and for specified periods of time,

and depending on the financial status of spouses (Douglas, 2006). As with Divorce, there exist, under Canadian law, relatively no gender-specific statutes that dictate the direction of maintenance.

Child Custody (*Hadana*)

The debates that took place in Ontario were generally underscored by issues of marriage and divorce, and indeed, as these previous discussions have revealed, there exist some very real concerns pertaining to gender inequality. But surprisingly, the focus that these debates generated around issues of marriage and divorce seemed, in large part to overshadow perhaps the most contentious issue in Islamic family law--that of child custody, or *hadana*. While it is true that when questioned on the issue, Mumtaz Ali of the IICJ stated that the Islamic tribunals in Canada would not arbitrate issues pertaining to child custody, as other scholars have noted, Ali's statements do not necessarily mean that Islamic arbitration boards *could not* legally entertain custody cases.[126] That there may have even been the most remote possibility that these courts could delve into child custody cases did not sit well with many women, and perhaps with good reason. As the following section illustrates, despite such traditional rulings as that of Caliph Abu Bakr, who consoled a grandmother weary of having her grandchild taken away from her by its father, stating in her favor that, "the hugs and kisses of that

[126] While Ali stated that Islamic family law would not be used in child custody cases because "Canadian law is very sensitive to the interest of the child" (Jimenez, 2003), NAWL, CCMW, and the National Organization of Immigrant and Visible Minority Women of Canada (NOIVMWC) all argued that despite Ali's comments, there was indeed no impediment to arbitrating "child support, custody of or access to the child" (Bakht, 2004).

old woman to the child are more important and valuable than whatever material wealth you can offer the child" (Department for National Development, 2004:22), Sharia law on child custody still has the capacity to be interpreted in ways that could work to the serious detriment of women.[127] The following section will outline the various Islamic legal approaches to the issue of custody, and a subsequent discussion on the Canadian legal perspective on issues of child custody.

Custody, according to Sharia law, is generally defined as "'The protection of the child as far as possible from any potential cause of injury thereto and the provision for its upbringing and safe-guarding of its interest'" (*Moroccan Law*, quoted in Nasir, 1994:131).[128] Following a divorce, Sharia law attempts to provide, on varying levels, for a child's needs, including physical, financial, and educational. Under Sharia, fathers generally are charged with the financial provision and legal guardianship of the child, while mothers are given a limited role as physical caregivers.[129] In recognizing the essential role of the female caregiver in the life of an infant, all Islamic juristic schools give priority to a mother's claim to the physical custody of a child, provided that she fulfils the requirements of a custodian

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[127] Interestingly, according to the Department for National Development, the provision of traditional Sharia that extends favourable rights to women in custody disputes also has the additional benefit of "placing restraint on indiscriminate divorce" as "in effecting a divorce the husband has to consider the unpleasant prospect of losing custody of the children" (2004:22).

[128] Similar to Moroccan Law, Algerian Sharia Law defines custody as, "the catering for a child, its upbringing and education in the religious faith of its father, and provision for its protection, health and righteousness" (Algerian Law, quoted in Nasir, 1994:131).

[129] As previously noted, however, a woman typically is entitled to receive wages from the father to help with the maintenance of the child following divorce and during the period of the mother's custody of the child.

(for example, must be of sane mind, must be of majority age, and so forth) (Bakhtiar, 1996). One of the more controversial of these provisions is that, under most juristic schools, while acting as custodian of her child, a mother cannot re-marry a stranger (a non-relative of the infant).[130] Re-marriage often can lead to a mother's loss of custodial rights over the child. Much to the chagrin of many women, these same types of limitations on re-marriage do not apply to fathers, who are permitted to bring children from another marriage to live with a new wife.[131]

The most divisive issue, pertaining to child custody in Islamic law, however, remains the fact that according to some schools of Islamic law, the period of female custody is temporary, ending once the child reaches a particular age. At this time, a father takes physical custody of the child (keep in mind that the father already has legal custody of the child) unless the mother and father agree to different terms. When and if this custodial transfer takes place again varies, depending on the school of jurisprudence, and the laws in modern Muslim states. Traditionally, however, Malikis fix the

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[130] Here, various law schools defined 'stranger' differently. For instance, the Hanafis and Malikis "restrict the marriage that deprives the woman of her right to custody to that with a stranger or a relation who is not prohibited to marry the infant. A woman who marries, say, a cousin of the infant shall lose that right, but shall retain it if she marries its uncle, in which event, loving care for the infant may be assumed...." (Nasir, 1994:136). According to Clark and Cross (2006:68), this prohibition on remarriage for a woman may stem from the fear that an unrelated man "may interfere with the child, especially a girl."

[131] This difference of provision occurs despite alternate legal rulings that imply that a woman can retain custody through re-marriage. For instance, traditional law books sometimes point out the opinion of the legal scholar Hasan al-Basri who stated that a remarried woman does not lose custody of her children (Clark & Cross, 2006). Similarly, some nations give the courts great discretion in allowing a woman to keep custody of her children despite re-marriage if it is not to the detriment of the ward (Nasir, 1994).

age of transfer from mother to father at puberty for boys, and consummation of marriage for girls, whereas the Hanafis fix the age of transfer between seven to nine for boys and nine for girls (Clark and Cross, 2006; Zahraa and Malek, 1998).[132] Hanbalis maintain that children should remain with the mother until the age of 7, at which point they may choose between parents (Clark and Cross, 2006).[133] Alternately, Shafiis allow female custody of the child until the child reaches the age of discretion (typically between 7-9) at which time they may choose either parent as custodian.

Despite the fact that each school of jurisprudence outlines rough ages for custodial transfer of children, they also reiterate that the transfer of children *must reflect the best interest and welfare of the child* (Zahraa and Malek, 1998). Indeed, in many of their rulings on this matter, these various schools of jurisprudence provide elaborate justification as to why their custody laws do indeed serve the best interest of the child. These justifications range from the need for a child to feel the emotional connection of a mother in the period of infancy, to the Hanafi explanation that a child should not have the right to choose its legal guardian, since children will naturally gravitate towards "the parent who keeps [them] under the least restraint" and not necessarily the parent who has the child's best interest at heart (Zahraa and Malek, 1998:167). In recognizing the importance of "best

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[132] Some sources state that Hanafi jurists differ on precisely what age a mother's custody of her daughter ends (Clark and Cross, 2006).

[133] Although Zahraa and Malek state that Hanbali law requires that fathers take custody of girls at the age of seven, as "it is in the interest of the girl to be with her father when she attains the age of seven as the father is the one who can protect her" (1998:168).

interests," some Muslim nations have taken great strides in reconciling traditional Islamic legal perspectives with more contemporary perceptions of custody that engage both parents in serving the best interests of the child (Department for National Development, 2004; Nasir, 1994).[134] Despite these measured changes, however, it remains true that many literalists *may* ignore the overarching themes of 'best interest' guiding custody laws, opting instead to unerringly follow the most stringent forms of custodial transfer, including tearing a child away from its mother's home at the prescribed age, and forbidding mothers from seeing their children.

Child Custody in Canada

In Canada, many times parents have the legal capacity to decide on custody arrangements of their children in a separation agreement.[135] If parents are unable to come to a mutual decision, or if they defer to the courts, then the issue of custody will then be adjudicated through the Provincial Family Court system using only Canadian Law (Kronby, 2006). In Ontario, for instance, the court system employs the use of laws in the *Divorce Act* and the *Children's Law Reform Act* in deciding custody matters.

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[134] For instance, on the recognition of best interests, Provins (2006:537) states that:
> "Tunisia and Bangladesh have been interpreting Sharia-based gender laws far more liberally than other countries with Sharia. In Bangladesh, the Bangladesh Supreme Court has been granting mothers custody of their children beyond the typical age limits, based on the best interests of the child. Tunisia has interpreted hadana more liberally than Bangladesh; in Tunisia, hadana of every child belongs to the parents jointly. At divorce, the child can be awarded to either parent or a third party, taking into account the child's interest. There is no age when the mother's custody is terminated."

[135] Of course, the courts can choose to disregard the agreement if they feel that the decision does not best suit the interests of the child (CLEO, 2010).

While both these acts are a significant source of direction, they nevertheless reserve significant room for discretion (CCMW pamphlet).

Canada takes the issue of child custody very seriously. According to both the Canadian *Divorce Act* and the *Ontario Children's Law Reform Act*, a judge must decide custody and access based *only upon* the child's best interest. In this sense, it is only the interests and well-being of the child that the courts take into account, and not the interests or well-being of parents. Some of the issues that the courts will take into account when considering custody cases (as reflected in the *Children's Law Reform Act*) in Canada are:

1) The emotional ties between the child and the individual seeking custody and/or access
2) The presence of other family members who may live with the child or assist with the care giving of the child
3) The child's wishes (so long as the child is old enough to understand and show interest)
4) The stability of the child's current home situation and the period of time that the child has resided in that home
5) The ability and willingness of each parent to take care of the emotional, physical and other needs of the child,
6) The intentions that each parent has for the care and the upbringing of the child
7) The permanence and stability of the family each parent could provide for, and
8) Which parent has, till present, done the majority of the parenting.

(Adapted from CLEO, 2010)

In addition to these aforementioned points, Canadian courts also take the position that, barring any extraneous circumstances, it benefits a child to maintain a relationship with both of its parents, and to have maximum contact with each parent to the extent that it benefits the child's well-being (CCMW pamplet). In terms of the financial provision for children in issues of child custody, Canadian law generally charges *both* parents with the task of supporting their children to the extent that they are able (as opposed to Islamic law where the burden falls wholly unto the father) (CLEO, 2010). Typically, the parent with primary custody of the child provides for the daily expenses of the child, while the non-custodial parent pays a certain sum (child support) monthly (Kronby, 2006). This support is based solely on the supporting parent's gross income, and is subject to change reflecting any changes in the income level of both parents. Generally, Canadian courts grant parents with joint custody equal say in personal matters pertaining to a child's upbringing, including spiritual and educational. In joint custody both parents share the legal rights and responsibilities and decision-making capacities involving the child. In situations where one parent has sole custody, or when one parent has very limited rights to the child, courts charge the custodial parent with these rights (YWCA, 2010).

These rough summaries highlighting some of the differences between Islamic and Canadian law illustrate just why opponents of Sharia arbitration were so concerned about the protection of women's rights. As these preceding discussions reveal, Sharia law does allow for the

formulation of some very conservative, literalist approaches that, without doubt, subordinate the status and position of women. Indeed, as many opponents argued, the idea that a man could divorce his wife so effortlessly, and with such little consequence, or that a woman may have to leave her matrimonial home upon the dissolution of her marriage, or further, that she may lose her children in a custody system that appears to favour men, is antithetical to notions of equality as articulated through Western liberal states.

Arbitration, Coercion, and Free-Choice

Aside from the real-world criticisms of Sharia law itself, opponents also argued against the implementation of faith-based arbitration based on several other factors. For instance, one of the main arguments that *endorsers* of FBA argued for was the notion of free choice, particularly when it came to the selection of a legal system that best supported one's worldview (which I discuss in more detail in a subsequent section). According to endorsers, free choice meant that women were actually at an advantage because they are able to choose whether to participate in the formal, secular court system or in FBA, (which, proponents continuously stressed, remained an entirely voluntary process). Opponents of FBA were quick to point out that the notion of so-called 'free choice' for many women was a fallacy that under-evaluated the position of women in society (Bakht, 2005; Goundry, 1998).[136]

[136] Armed with statistics, opponents of FBA argued that immigrant women (the group most likely to be effected by FAB), continue to be among the most vulnerable groups in Canada, often lacking language skills and education, and are isolated from the wider

Women's groups argued that this erroneous assumption of 'choice' implied that women "have access to the same opportunities and resources as men, to make informed, independent choices in times of crisis." Furthermore, they argued that the notion of 'free-choice' was "gender insensitive as it did not take into consideration the real power dynamics at play and the collective rights at stake for women" (YWCA, 2005:3).[137] As

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Canadian culture. They stay dependent on their families, and have little knowledge of rights guaranteed to them under Canadian law (Wente, 2004). Shachar (2008:36) also speaks to this point, arguing that "subtle social processes of coercion ... eventually restrict the agent's free will, especially those who are in more marginalized or subordinated positions within the group," and further, that "immense pressure is likely to be imposed on women to turn to community-based tribunals, as a way of expressing their "'loyalty'" to the group." (N.B. Ali's statement that "'good Muslims'" will use Sharia tribunals [cited in Boyd, 2004:1]). These statements all reflect critics' contestation of the notion of free-will.

[137] On the notion of women's free will in religious fields in general see also, Diduck, 2006; Grewal and Kaplan, 1994; Kandiyoti, 1991; Razack, 1998; and Singer, 1994. It should be noted, however, that some showed a great distaste for this conception of a woman as disempowered and unable to make her own decisions. Homa Fahmy from the Federation of Muslim Women stated in this regard that, "The fact that I've been characterized as being unable to make a sound judgment in this matter, I find deeply offensive" (Fahmy, quoted in Leong, 2005:A12). Interestingly, Fahmy was not alone. What began to emerge from these debates was an intense aversion by certain people who began to take issue with the backlash of feminist arguments that portrayed the Muslim women as oppressed and exploited. Professor of Law at the University of Ottawa, Natasha Bakht, while recognizing some of the inherent gender inequalities within Sharia jurisprudence, nevertheless argued for the attack on gender inequality rather than an attack on Islam. Like others, Bakht contended that to ban all faith based arbitration actually was a disservice to women who otherwise choose to live a "faith-based life." She maintained that this separation policy that the coalition has adopted suggests that "religion is necessarily bad for women" and "precludes any of the progressive possibilities that religious arbitration may entail for some women, undermining the work of many feminist religious scholars and reformers who have argued that religion can and indeed does support women's rights." Similarly, Sherene Razack (2004) raised a similar argument in her thoughtful assessment of the Ontario arbitration debates, stating "how is it possible to acknowledge and confront patriarchal violence within Muslim migrant communities without descending into cultural deficit explanations (they are overly patriarchal and inherently uncivilized) and without inviting extraordinary measures of stigmatisation, surveillance and control?" Like Bakht and others (see for example Sheema Khan's work in the area) Razack does not shy away from admitting the existence of gender equalities within the Muslim community. Rather, like others, she argued that the strategy of banning faith based arbitration actually may catalyze further polarization between Muslims and the larger community. She

Sherazee (2005:2), for instance, indicated, many Muslim women face "cultural and linguistic barriers, threats of stigmatization and pressures of assimilation—all made worse by their economic inequality. . . ."

Again, pointing to the Charter, opponents stressed that any decisions ensuing from an arbitration decision wherein a woman entered under coercion or duress challenged the Charter right of gender equality (Baqi, 2005:3). In her report, Boyd also alluded to this point, observing:

> A woman may be told that it is her religious or community duty to accept whichever adjudicative route is chosen for her. Her fear of isolation from her community, the possible negative impact on her children, and concerns of being considered an apostate in her faith may force her into submitting to one form of dispute resolution over another. The problem may be compounded by intersectionalities of vulnerabilities that include perceived immigration sponsorship debt, disabilities, issues of class and race, violence and abuse (Boyd, 2005:107).

This point, of course, was not new to the development of IBACs, since others previously had suggested similar issues facing, particularly, women in the Jewish arbitration court system (Armstrong, 2004). Yet, as Boyd herself specified, no outright evidence existed to suggest that the marginalization and isolation of women from their communities necessarily occurs.[138]

The CCMW and WLUML were particularly vocal on this issue, arguing that society must not underestimate the pressure towards arbitration that many women would face, and that the Arbitration Act simply did not include

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suggested instead the fostering of a "positive climate" in which progressive Muslims can "internally contest patriarchal narratives" (Razack, 2004:161).

[138] On this point, Boyd stated in her Review "the government lacks information about the extent to which arbitration is used in family law and inheritance and how this mechanism has impacted vulnerable people" (2004:133).

safeguards to protect women from their families and communities in such an event.[139] The group LEAF also echoed this sentiment regarding community pressure towards arbitration, pointing to, in particular, the potential for communities to ostracize and label women as bad adherents of faith, which, in the end, could result in economic, social, and emotional hardship for the female:

> LEAF is concerned that arbitration may not be chosen freely in many circumstances. For some women there may be very strong pressures based on culture and/or religion, or fear of social exclusion. These issues may be very real in faith-based communities, where some women may be called a bad adherent to a particular faith or even an apostate if they do not comply with arbitration. Such condemnation would leave such women very alone, shunned in their communities or even their houses of worship, and would only compound feelings of alienation created by a family break-up. In addition, there are many women whose economic lives depend on a close association with their faith-based community or cultural group. This is particularly true of immigrant women who find jobs first in their own communities. These women may be particularly vulnerable to community pressure and may lose their jobs if they do not comply with arbitration. Some women may also fear immigration consequences. For other women there may be fear of violence. In some cases it may be a lack of resources or information. When these conditions are present it is not accurate or reasonable to suggest that arbitration is being chosen freely. Education is not enough to overcome these pressures, at least not in the short term, and particularly where women's sources of information are primarily found in local media such as community papers or radio, where there may be little critique of patriarchal points of view (LEAF Submission to Boyd, 2004:50-51).

Another issue that opponents of FBA in general and IBACs specifically had was in relation to the limits of legal pluralism. As I have indicated, Islam, and

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[139] Although the IICJ made statements effectually stating that IBAC would not arbitrate custody and child support matters, lawyer Natasha Bakht (2004) pointed out that there was in fact "no legal impediment" from the standpoint of the Arbitration Act in doing so.

by extension Sharia, is an all-encompassing code of conduct that offers legal jurisdiction in areas ranging from belief, to commercial contracts, to child custody and divorce (Chapter 4). On deciding to create Islamically based arbitration courts *only* in the area of family law, thus, raised some interesting questions regarding the parameters of Islamic law in Canada. In reference to this point, the Canadian Council of Muslim Women asked:

> As the proponents claim that God wants them to live under Sharia/Muslim law, the question then arises as to why they are advocating for only one aspect of Muslim jurisprudence? Why the focus only on family law and not the whole, total system of laws including criminal? Or will this be the second stage of their demand of religious right? (CCMW, Submission to Boyd Report, 2004:54).

It is important to recall, however, that laws governing faith-based arbitration existed under provincial jurisdiction, and only within a very small area of jurisprudence. Thus, Muslims wishing to establish a faith-based tribunal in Ontario had little choice as to the extent or area of law that they could (under the Arbitration Act) arbitrate.

Adding to the confusion surrounding just how much Sharia adherents could and should follow were the barrage of inconsistent statements on the matter disseminated by Ali and his followers that seemed to add credence to opponents' arguments concerning the futility of importing "part" of a legal system. For instance, when Mumtaz Ali first presented his case for Islamic arbitration, he did so stating that, "the rules, obligations, injunctions and prohibitions laid down by, or derived from the Qur'an and the *Sunnah* produce a complete picture of the Muslim community, from which *no part*

can be removed without the rest being damaged" (Ali, 2004, my emphasis). Yet, on another occasion, Ali stated that he had a chance to "Canadianize Muslim jurisprudence . . ." (www.muslim-org) and moreover, that it would be a "'watered-down Sharia, not 100 per cent Sharia. Only those provisions that agree with Canadian laws will be used'" (Ali quoted in Hurst, 2004).

Indeed, Ali's latter point regarding the agreement of religious laws with Canadian laws was accurate to the extent that, by virtue of living in Canada, existing laws would limit the scope of Sharia's reach. For critics of IBACs, however, Ali's comments were confusingly at odds with an article written for the *Calgary Herald* by Syed Soharwardy, a founding member of the IICJ, in which he wrote, "Sharia *cannot be customized* for specific countries. These universal, divine laws are for all people of all countries, for all times" (2004:S10, my emphasis). Naturally, critics of IBACs took these and other similar statements as an indication of uncertainty on the part of Ali and his supporters. As many opponents would suggest, if, according to Ali, "no part of Sharia could be removed without damaging the rest," then what was the point of implementing even a small portion of it? Furthermore, if Sharia cannot "be customized" for any particular nation, then why the attempt to create a "watered-down" Canadian version?

In addition to these issues, opponents also questioned how, in 'customizing' Sharia, such tribunals would seek to reconcile Islamic laws that traditionally worked against women with secular Canadian laws. Many groups questioned, for instance, how FBA would protect women's rights

concerning certain religious dictates such as Islamic inheritance laws (where a daughter's share is half that of a son's) or Islamic laws that require a husband to provide only four months of maintenance to his divorced wife (Baqi, 2005). For many opponents of FBA, these religious tribunals simply could not (and more importantly, may not) reconcile religious laws in a way that met Canadian equality standards.

In a constant return to this particular argument, and in response to proponents' call that their faith *demands* attention to religious law, opponents reiterated the futility of the "partial" Sharia debate raising questions regarding the limits of alternate law systems. The existence of even "some" Sharia, according to opponents, created a problem in that if the government permitted IBACs to operate arbitration courts on grounds of religious freedom and equality, then down the line, religious groups would employ the same defences to justify the creation and implementation of jurisprudence that touches upon *other* areas of law.

Also in response to calls of religious duty, opponents of the proposal began to suggest alternate modes of formulating the tenuous relationship between religious legal demands and secular society. For example, in one publication, the author suggested that, "...religion is a *relationship with God, and not with the state.* We question in what way absence of a legally binding faith-based arbitration violates freedom of religion—especially if religious rulings are supposed to be consistent with Canadian laws to begin with. People would still be free to consult their religious leaders for guidance, and

faith-based dispute settlement could still be used *for advisory purposes. . . .*" (Baqi, 2005:5, my emphasis). Despite these types of alternate explanations, however, it remained that for some opponents, the implementation of one section of Sharia law into secular jurisprudence translated into an opportunity, down the road, into a further expansion of Islamic jurisprudence into other areas of Canadian law—a result that could possibly lead to the further erosion of rights granted under secular law.

For opponents, disputes concerning the extent and scope of Sharia law under Canadian jurisprudence paved the way for yet another area of contention. As I outlined earlier, far from being a homogenous civil code, the Sharia system is a complex system composed of both codified and uncodified law, loosely categorized (for the Sunni majority) into four main schools of jurisprudence. Within these schools there are further variances depending on the geographic location of the school, since Islamic law had a tendency to accommodate certain elements of local culture as it grew. (Each Muslim State has its own understanding of Sharia law, based on a specific concoction of years of cultural and religious melding [Chapter 4].) In the previous chapter, I outlined how, for many Muslims, the multiple interpretations of Sharia is not a weakness, but rather a strength of the system. Yet, the multiplicity of interpretations within Sharia poses a rather interesting predicament when relocated into a new environment. The largest issue, of course, remains that globalization has resulted in a host of Muslims arriving into Canada from a variety of different countries, replete with their own comprehensions of

Islamic law. Thus, the question that arises, and that certainly many opponents of FBA continuously asked, was simply, "which Sharia?"

As many opponents were quick to point out during the course of these debates, maintaining consistency between schools of jurisprudence--when these schools are relocated onto a canvas such as Canada—is a challenging task, at best. (Of course, maintaining consistency between schools is in addition to the already problematic nature of identifying a unified interpretation of Islamic law, as explored in an earlier chapter).[140] While Ali and the IICJ stated as part of some of their literature that the IBACs would employ *any* of the four schools of jurisprudence that the parties agreed upon in rendering their rulings, the lack of any further explanation concerning problems arising from the existence of multiple schools of jurisprudence exacerbated the situation. For instance, opponents argued that, among other things, Ali and the IICJ never addressed as part of their proposal how they would ensure consistency in rulings between the four *madhabs*, what recourse arbiters would take if parties could not agree on a particular school, and how the system would ensure that religious and cultural elements of Islamic law were separated.

In addition to these matters, opponents further raised questions (not discussed in any great detail by Ali and the IICJ) regarding the panel of arbiters themselves. For instance, one of the chief concerns of opponents

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[140] Debates over Sharia tribunals in the UK have similarly raised concerns over issues of plurality of schools, and the general diversity and complexity of Islamic law. See Fournier, 2004 for an excellent analysis.

was that there existed virtually no formal certification process to appoint someone as a qualified interpreter of Islamic law. As Canadian lawyer Faisal Kutty explained:

> As it stands today, anyone can get away with making rulings so long as he has the appearance of piety and a group of followers. There are numerous institutions across the country (Canada) churning out graduates as *alims* (scholars), *faqhis* (jurists) or *muftis* (juris-consults) without fully imparting the subtleties of Islamic jurisprudence. Many, unfortunately, are more influenced by cultural worldviews and clearly take a male-centered approach (2004).

Not only did the IICJ *not* address this point regarding the lack of trained religious scholars, but it also did not offer any more details regarding the number, background, education, and gender of individuals who hypothetically would serve on an arbitration panel. Opponents of the proposal felt that the Ontario Sharia proposal lacked a clear plan that fully explicated all of these sorts of queries. Likewise, opponents argued that without an agreed upon system of Sharia that could ensure consistency of outcome, adopting the proposal would have resulted in a system prone to exploitation and misuse.

As expected, the explosive nature of the debates in Ontario relayed many accounts of personal experiences, particularly from women who previously had resided in countries such as Pakistan, Iran, and Saudi Arabia, where Islamic law traditionally has had the "'effect of discriminating against women'" (Emon, quoted in Cheadle, 2005). Indeed, many women and families left their native countries to come to Canada precisely with the

intention of avoiding religious law.[141] To find that there was even the most remote possibility that they may once again be faced even with the *option* of religious law was unnerving. Perhaps one of the most outspoken critics against the implementation of Sharia law in Canada was the coordinator of the International Campaign Against Sharia Courts in Canada, Homa Arjomand, who was forced to flee Iran in 1989 after her fellow activists were executed.[142] In a letter to Boyd's Review (2004:46-47), Arjomand passionately stated that the move to implement IBACs:

> . . . Should be opposed by everyone who believes in women's civil and individual rights, in freedom of expression and in freedom of religion and belief. We also wish to emphasize that even the mere suggestion of the Sharia tribunals causes an atmosphere of fear among women who came from 'Islamic' countries. If this Institute gains validity, it will increase intimidation and threats against innumerable women and it will open the way for future suppression. . . . It is a sad and painful fact that, even in Canada, we still have to talk about the religious oppression of women. Nonetheless, the reality is that millions of women are suffering and being oppressed under Sharia law and in many parts of the world. Some of us managed to flee to a safe country, a country like Canada with no secular backlash. . . ."

For many opponents of IBACs, particularly those who had had negative first-hand experiences with Sharia law, the only feasible way of preventing others from discrimination and exploitation at the hand of religious law, was by completely obliterating its usage from any part of Canadian law. Again, quoting from Arjomand:

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[141] Many individuals who made individual submissions to Boyd's Review spoke of their personal experiences with religious law, particularly from countries where Sharia plays a very comprehensive role. Some of these women had been tortured and imprisoned as a result of their opposition to Sharia (Boyd, 2004).

[142] This case in point speaks also to the important role that experience and nation/culture of migration plays in the context of globalization.

> We need a secular state and secular society that respects human rights and that is founded on the principle that power belongs to the people and not a God. It is crucial to oppose the Shariah law and to subordinate Islam to secularism and secular states.... One must bear in mind that Shariah is not only a religion; it is intrinsically connected with the state. It controls every aspect of an individual's life from very personal matters such as women's periods to the very public ones such as how to run the state. It has rules for everything. An individual has no choice but to accept the rule of Shariah or face extreme consequences, as non believers are shown no tolerance.... We, the defenders of secularism, believe that the introduction of a Shariah tribunal or a 'Shariah court' in Canada would discriminate against the most vulnerable sectors of society: women and children. It would deny them the Canadian values of equality and gender equity (in Boyd, 2004:47).

For adversaries of FBA like Arjomand, religious law would provide nothing but a parallel legal system that would create further divisions between minority communities and society at-large.

While the arguments that opponents of Sharia tribunals presented were numerous, this brief summary presents their side through coverage of their central claims. It bears repeating, however, that for many opponents, it was not Sharia *per se* that they were against (after all, recall that Sharia also includes such mainstay components of Islamic faith such as prayer and almsgiving). Rather, it was what many of them believed to be the male-oriented, archaic interpretations of Sharia that they were against. For opponents, these interpretations (particularly in the area of family law and in the context of current arbitration laws) worked to the detriment of women and were clearly inferior to Canadian secular laws.

Arguments For the Establishment of Faith-Based Arbitration

In response to the IICJ's proposal, opponents were able to quickly galvanize forces and launch campaigns that, as previously discussed, garnered international attention. As discussed, opponents raised many points, all of which inevitably led to the their main contention—that in the case of Sharia arbitration tribunals, religious freedom challenged guaranteed rights for women's equality. In making their case, opponents relied heavily on Charter rights aimed at protecting women, and promoting gender equality.

While proponents of Islamic arbitration were not as successful at instigating a public debate on the matter, it nevertheless remains that they too relied on *very similar* legal tactics in making their case for religious arbitration. As I argue in this section, despite the numerous deficiencies in the proposal put forth by Ali and the IICJ, it remains true that their proposal also drew quite heavily on existing legal and cultural frameworks—thus largely legitimizing their case. Partially due to a highly vocal opposition, and a rather ominous political climate, however, many Canadians ostensibly failed to recognize the legitimate nature of arguments posed by those endeavouring to create Sharia arbitration court and their supporters. This oversight, consequently, has led to a situation where not only Canada's laws and policies guiding religious freedom and diversity remain unrealized, but also, women's rights are not necessarily protected either.

A large section of this project explores the current role of religion in Canada as recognized through the nation's highest laws and courts as well as

through various policies. As demonstrated, religion holds a coveted place within Canadian society, its observation protected by the highest governing bodies. Following this precedent then, it should come as little surprise that when the IICJ, under the leadership of Mumtaz Ali, announced its intention to establish an Islamically-based arbitration tribunal, many of the justifications employed in support of its endeavour were derived from these very laws and policies. Pointing to s.2 (religious freedom), s.15 (equality before and under the law) and s.27 (multiculturalism), of the Charter, the IICJ presented formidable arguments why Muslims should have the option of an alternative legal code.

Of course while the arguments presented by Ali and the IICJ were reasonable (in so far as they fell within the parameters of existing laws), the ensuing debates cast a light onto a much larger dynamic at play—the plurality of laws guiding the lives of some members of society and the need to reconcile, as best as possible, some of these laws. As discussed in Chapter 4, like Judaism, Islam is a comprehensive faith in that it provides guidelines not only for moral, but for all aspects of life. The Qur'an is explicit regarding the importance of law in the lives of Muslims, and adhering to these commands through Sharia is a practice that guides the lives of many Muslims.

In acknowledging the importance of religious law in the lives of Muslims, Mumtaz Ali and his supporters proposed the establishment of an Islamically-based arbitration tribunal that (following existing Canadian laws) would arbitrate certain family law matters according to Islamic law. For Ali

and his followers, Ontario seemed like the optimal location for the implementation of Sharia arbitration courts. After all, through its various laws and policies, Canada had identified itself as a nation that both promoted and endorsed religious freedom and practice, acknowledging all the while the need to protect the culture of its minority communities. Furthermore, other faiths, for years, had had the benefit of utilizing faith-based arbitration for their communities. Thus, it would seem on the surface paradoxical (particularly given Canada's commitment to not showing preference between religions) that Muslim faith-based arbitration would be the cause for such great controversy. In trying to understand this ostensible contradiction between policy and practice, the following section delves deeper into some of the key arguments as presented by Ali, the IICJ, and various other endorsers of the proposed Islamically-based Arbitration Boards.

Issues

Drafters of the Islamic Arbitration proposal, Mumtaz Ali and the IICJ, defended the establishment of Islamically-based arbitration courts on several grounds. Foremost was the issue of legal pluralism guiding the lives of many Muslim adherents. As I outlined in earlier sections, for Muslims, (what they believe to be) God's law alone is sovereign, and as an integral part of Muslim law, many Muslims see family law as a binding part of their faith. Competing Canadian laws, however, make it difficult for some Muslim-Canadians to reconcile these differences. In articulating the precarious topic of legal pluralism, the IICJ stressed that for particular religious groups, such as

Muslims, adherents are obligated as part of their faith to follow an alternate set of legal dictums.

Expressing the centrality and significance of religious law in Islam, Ali began with the following introduction in a pamphlet entitled, An Essential Islamic Service in Canada: Muslim Marriage Mediation and Arbitration Service:

> The Shariah (Muslim Law) says: Muslims living in non-Muslim countries are regarded as 'Bedouins' (the wandering Muslim Arabs of the desert). They must observe the Divine Laws just like all the believers. (Sahih Muslim: V. 139-140). Based on this, the universally dictum of law by the great jurist Abu Yusuf, is: 'A Muslim is bound to regulate his conduct according to the laws of Islam, wherever he may be" (As-Sarakhsy, 'Al-mubsut' X, 95). Similarly, a very well known Muslim scholar of our times, Maulana Manzoor Nomani, has also given his legal opinion that: 'Muslim Personal Law [which includes family law] is a part of the religious structure of Islam and no non-Muslim government has the right to interfere with it. Muslims living under non-Muslim systems are, as such, required to make every possible effort for the recognition of this principle by their governments (Ali and Hosein).

Continuing to state the subsequent importance of implementing Muslim Family Law, Ali further claimed that "When Muslims are forced to resolve their conflicts under a system that is governed by different motives, Muslims *place their spiritual and social lives in peril* because they are thus made to submit to that which is other than what Allah has ordained for those who wish to submit to Him" (Ali, 2003:3, my emphasis). This statement reflects an important contention for many who endorsed the proposal of an IBAC, mainly that the reconciliation of religious and secular law pervaded outside the normal lines of reconciliation—for many Muslims it was a matter of

protecting their spiritual and social lives both in this life and in the hereafter. Naturally, the vital role that religious laws plays in the lives of some adherents, potentially affecting their entire worldview, raised important questions with respect to freedom of rights in the area of religion, as well as equality rights, designed to maintain human dignity and protection of the self.

Naturally then, endorsers of IBACs geared many of their arguments towards already-established Canadian laws and policies.[143] Largely, these discussions centered on rights and freedoms accorded in Canada's highest legal code—The Charter of Rights and Freedoms. While there was some confusion regarding the Charter's application to matters of Arbitration (see note 97 and as well Boyd, 2004: 31-32, 70-74), Marion Boyd insisted in her report that both Federal and Provincial levels of government were bound by the Charter (recall that the Arbitration Act operates predominantly on the Provincial level),[144] and that "no government can authorize actions that are contrary to the Charter. . . . State action under statute, under the common law, and through third parties is subject to the Charter" (Boyd, 2004:69). Boyd's statements regarding the authority of the Charter would act as

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[143] As Ali repeatedly pointed out, it is, *precisely because* Canada has in place laws and legislations designed to protect these rights that this debate could even exist (www.muslim-org).

[144] Boyd states in her report that "both Parliaments and Legislatures have 'lost the power to enact laws that are inconsistent with the Charter of Rights'" and that "anything that constitutes government action, including legislation and regulation, is subject to the Charter. This includes action taken under common law" (2004:69).

validation for members of the pro-Sharia camp who felt that not permitting IBACs was inherently unconstitutional.

As earlier suggested, Canadian laws regarding freedom of religion are designed to protect religious belief and practice, both from other religious beliefs and practices as well as from non-religion. (Recall that the courts cannot show preference for one religion over another, or for religion over non-religion and vice versa, and they cannot act in a way as to impede the practice of faith[145] [Chapter 3].) Yet, many proponents of IBACs questioned just how far these laws translated into practice.[146] Using the definition of religious freedom provided in Big M Drug Mart (1985 1. S.C.R. 295 at 336-337—see Chapter 3) which states, "Freedom in a broad sense embraces both the right to manifest beliefs and practice and the absence of coercion and constraint. Freedom means that, subject to such limitations as are necessary . . . no one is to be forced to act in a way that is contrary to his beliefs of his conscience," Ali and his followers argued that by not permitting IBACs, the government would be, in fact, working against Canadian conceptions of religious freedom on several grounds.

For instance, Ali claimed that by banning faith-based arbitration, the alternatives available to individuals would be limited, thereby blatantly contradicting the statement guaranteeing individuals against the "absence of

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[145] Of course, this freedom operates within a matrix of other essential rights and freedoms. Religious freedoms cannot violate other Canadian laws.

[146] Consider Ali's statement that, "while Canada prides itself as a nation in which, theoretically, individuals are free to commit themselves, if they wish, to a religion of their choice without interference from the government, in practice this is not always the case" (2003:13).

coercion or constraint" by the government in matters of access to faith. Accordingly, being compelled to a course of action or inaction that they would otherwise not have chosen, individuals would not be acting of their own volition and thus could not claim to be "truly free." Moreover, Ali (2003:3) maintained that by denying the opportunity to choose faith-based arbitration, Muslims would be "prevented from freely pursuing and committing themselves" to their religious beliefs, thereby contradicting the Charter assertion that ". . . no one is to be forced to act in a way that is contrary to his beliefs of his conscience." If, according to Ali and Whitehouse (1991:42), one cannot worship God as dictated by the tenets of one's faith (which, in the case at hand, involves living under the auspices of religious law), then "severe, oppressive, constraints have been placed upon one's capacity to exercise religious freedom"—another clear violation of Charter guarantees (1991:42). In the minds of many proponents of FBA, these constraints proved inconsistent not only with the essential freedoms guaranteed by the government, but also as interpreted through the courts.

Another point of contention presented by supporters of IBACs was with respect to equality rights. Citing section 15 of the Charter, supporters argued that Muslims were entitled to be given equal treatment "before and under the law and have the right to equal protection and equal benefit of the law without discrimination, and in particular without discrimination based on race, national or ethnic origin, colour, RELIGION, sex, age, or mental or physical disability" (Section 15 of Charter as cited by Ali, 2003:3). Despite

these assurances, however, many proponents felt that the government ignored equal protection and equal benefit of the law on two fronts.

First, they argued that, while in theory equality was a good idea, it nevertheless did not translate in practice because it ignored the fundamental reality that not all citizens are equal. Quoting William Blake's famous epithet, "one law for the lion and ox is oppressive," Mumtaz Ali and his supporters fiercely challenged the assumption that secular law allowed for the equal and fair treatment of all citizens.[147] According to Ali and his supporters, the idea that a singular, secular law ensured equality for all Canadians, was in itself problematic because it ignored those people who may live their lives more closely aligned with their faiths and who view secularism more as a constriction than a freedom. Canadian common law, as Boyd pointed out, is framed "by the combined influence of the Judeo-Christian tradition and the enlightenment focus on the individual as opposed to the community, both grounded in English common law" (2005:73). These factors, consequently, mean that "secular" laws and the way in which they are applied are "more easily digestible" by some cultures as opposed to others (Boyd, 2005:73).[148] Many proponents of FBA argued that in an era of globalization, where citizens come from a variety of different religious belief systems, it was understandable that many Canadians simply did not see themselves reflected

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[147] It is interesting to note that, ironically, the argument suggesting that that not all citizens are equal is one that many feminists employ when discussing equality issues between men and women.

[148] Boyd contends, "Secular state laws do not treat everyone equally because people's individual backgrounds lead to differences in the impact of these laws (2004:3 Executive Summary).

in the laws of Canada. Naturally then, endorsers of the proposal (pointing to the imperative role of law in Islam), argued that, given the inclusive nature of the Islamic faith, Muslims were more at risk of discrimination from neutral "secular laws" than were other Canadians.

Supporters of faith-based arbitration often exemplified this perceived discrimination resulting from the application of neutral "secular laws" on religious adherents through the family law example of marriage and divorce, in particular when observant women choose to follow the requirements of divorce according to their respective faiths (Ali, 2003; Boyd, 2004; Shachar, 2008). As commentators pointed out, in many Islamic and Jewish communities it would simply not be enough to obtain a divorce through the state. In order to remove the barriers of marriage couples would have to do so according to religious law. The inability to remove these barriers would potentially deny a woman the chance for remarriage and the ability to build a new family. Often, according to the dictates of the faith, any off-spring resulting from any subsequent unions (where the old ones were not religiously dissolved) are considered illegitimate. In commenting on this particular tension, Shachar (2008:4) argues that for many observant women, a civil divorce simply does not suffice:

> It does not, and cannot, dissolve the religious aspect of the relationship. Failure to recognize their 'split status' position—namely, that of being legally divorced according to state law, though still married according to their faith—may leave these women prey to abuse by recalcitrant husbands who are well aware of the adverse

> effect this situation has on their wives and they fall between the cracks of the civil and religious jurisdictions.[149]

This textbook example of legal conflict between religious and secular law in marriage and divorce illustrates not only the how secular law may not apply to all individuals equally, but it also explains why, for some believers, the presence of religious law is so crucial to their livelihood.

The notion of secularism as a disadvantage to particular groups and individuals also led, in these debates, into an added, often overlapping controversy—the notion of one law for all. While earlier discussions revealed opponents' strong adherence to the model of a single unified law as a means of ensuring equality for all Canadians (many images taken during rallies and protests showed opponents carrying signs that read 'one law for all'), proponents of the tribunals could not disagree more on the issue of a single law.

In fact, the concept of "one law for all" was a preposterous notion for proponents of FBA, as they pointed to existing layers of legal frameworks (for instance, Canadian Common law, Quebec civil law, Aboriginal self-government, municipal laws, etc.) all functioning and working in conjunction

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[149] Interestingly, this point is also corroborated through a high-profile Canadian court case that went all the way to the Supreme Court of Canada. In a 2007 case, the court ruled in favor of a Jewish woman whose estranged husband refused to grant her a religious divorce, releasing her from her marriage for 15 years. In a 7-2 majority vote, Stephanie Bruker was awarded damages amounting to $47,500 on the basis that her right to remarry and have children in a new union, within the parameters of her faith, were unjustly denied to her by her ex-husband Jason Marcovitz (Bruker vs. Marcovitz, SCC 54, [2007] 3 S.C.R. 607). For more on this case, see Chapter 3, note 39.

with one another. The idea that already there exists in Canadian society multiple bodies of governing law effectively raised questions as to why governments allowed some types of law to exist, while they hesitated in permitting others (such as religious law). As some observers on this issue pointed out, even Canadian law at the highest levels has endorsed the notion of choice in some areas of jurisprudence.

For instance, in her report, Boyd (2004) demonstrated Canada's acknowledgement that certain laws are more recognizable and customary for some than others, and for this very reason when it comes to such personal issues as family law, Canadian jurisprudence recognizes various paths of law. Diverse acts in provincial legislation, as well as rulings from assorted court cases, illustrate the existence of numerous legal routes from which Canadians have the option to choose—a point that was not lost on proponents of Sharia courts.

Supreme Court Justice Bastarache stressed the importance of this right to selection in a recent court decision where he stated, "Individuals may choose to structure their affairs *in a number of different ways, and it is their prerogative to do so*" (Hartshorne v. Hartshorne, 2004, my emphasis). For many proponents of FBA, the fact that Canadians have the choice to opt out of democratically formulated family law measures and to choose other legal routes illustrated that the statement, "one law for all" was not one that even the Canadian court system itself espoused. Pointing to the nation's own endorsement of legal pluralism and employing previously made arguments

that true equality does not necessarily stem from uniform law, Ali and others maintained throughout the course of the debates that, in fact, uniform law may act to the detriment of some groups and communities. By omitting religion as one method of dispute resolution, questions arise regarding the position of religion in the country.[150] Ironically, in trying to realize "one law for all," critics suggested that all that changed as a result of the Ontario Sharia debates was that religious Canadians were no longer permitted to make individual choices in religious courts, yet other alternate routes still remained intact (Bakht, 2006; Emon, 2005).[151]

The second front of equality rights that proponents argued was (what they perceived to be) the Ontario government's show of preference for some religions over others, and later, of non-religion over religion. In the case of the Sharia debates, Ali and others argued that numerous other religious groups had been employing faith-based arbitration for years, and with little fanfare.[152] As the Canadian Islamic Council (CIC) pointed out, Ontario's Catholic, Jewish and Ismaili communities had been using faith-based

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[150] On the topic of accommodating diversity and the formula of "one law for all," I have found Barry, 2001; and Waldron 2002 quite informative. The interesting part of these discussions is the belief held by some that accommodating diversity, particularly religious and cultural diversity, inevitably leads to the foundational marring of modern citizenship ideals that espouse a unitary law.

[151] As Bakht clearly stated, "it is not accurate to speak of only one family law for all Canadians when most family law jurisdictions in Canada promote alternative dispute resolution mechanisms that permit parties to take personal responsibility for their financial well-being upon the dissolution of their marriage" (2006:16).

[152] Because of the limited research in the area of family arbitration in religious courts in Canada, it is difficult to ascertain whether other religious courts operated in Canada for so many years and with little display due to varying gender dynamics in the respective faiths or due to varied implications of the legal systems these faiths employed. Increased research in this area would undoubtedly clarify some of these issues.

arbitration for years, with all indications pointing towards a valuable alternative to settling family disputes (Dawes, 2006).[153] Indeed, the Jewish community in Canada has been settling marriage, custody, and business disputes for years through the Beth Din (in parts of Canada since 1982—see Cohen, 2000:27), and Catholics have been able to annul religious marriages according to Canon law for years (CTV, 2005).

Forbidding Muslims the same rights offered to other religious communities drew fierce allegations of discrimination by many, drawing into question why some religions were permitted to have rights that were denied to others. In a submission to Marion Boyd's review (2004:87), the Islamic Society of North America (ISNA) raised this essential point on constitutional grounds:

> Hassidic Jews, Catholics and Ismailis have used their religious doctrine to settle disputes for a decade without a hue and cry about threats to the secular state. Secularism, as practiced in Canada, requires that *the state remain neutral between religions and not promote a single faith at the expense of other faith groups.* Secular law can accommodate (and has been accommodating) law inspired by religious doctrine for decades (my emphasis).

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[153] It should be mentioned, however, that the Orthodox Jewish Beth Din in Toronto voluntarily restricted its jurisdictional authority by asking members seeking arbitration in family matters to sign a binding agreement stating that any religious divorce settlements awarded by the tribunal would be made in accordance with civil conditions outlined in Canada's national and provincial family legislation. Effectively this meant that short of removing religious barriers to divorce and remarriage (provided of course that parties have already obtained or are in the process of obtaining a civil divorce) all other specific family law rules take precedence. Shachar, 2008:67 argues that this "self-restriction route" allows a religious community to "protect its most cherished identity (or demarcating) aspects of family law, while complying with state norms in divorce-related matters of distribution of assets, obligations, and responsibilities." This use of civil law within a religious context also was very similar to the system employed by the Ismaili community through their arbitration board, when members employed civil law but within a religious/cultural context (Keshavjee, 2003).

Similar arguments also were raised by other proponents and critics who similarly claimed that the inability of Muslims to have a religiously-based legal system in an area that the government of Ontario had previously permitted other religious groups to employ one was clearly in violation of equality rights as presented in the Charter.

The government of Ontario's decision to effectively ban all faith-based arbitration raised another point of disputation—the preference of non-religion over religion. When the Sharia debates first began, various religious groups lent support to the IICJ's proposal, in particular members of the Canadian Jewish Beth Din, who (correctly) predicted that barring Muslim arbitration may lead to the termination of all faith-based arbitration down the road. Sharing similar religious values, particularly with the essential role of law in faith, these groups (together with the pro-Sharia contingent) argued that barring religious groups from arbitrating family law and inheritance matters, while permitting others to arbitrate with principles of their choosing, would again contradict Charter rights.[154]

Aside from the typical arguments in favour of arbitration outlined earlier (cost, speed, cultural affinity, language barriers etc), the IICJ also relied on policies of multiculturalism, particularly as articulated through the Charter, to legitimate its proposal. According to proponents of IBACs, living

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[154] This particular Charter conflict was one that many commentators pointed to, including Boyd, who in her report stated that "given that the Arbitration Act provides a framework for arbitration for all Ontarians, the government should not exclude a particular group of people on the basis of a prohibited ground" (2004:75).

in a multicultural nation (particularly one that so openly endorses multiculturalism) comes with certain fundamental values, including respecting other's customs and religious beliefs, so long as they do not conflict with existing legal frameworks. Yet, the feeling that multiculturalism policies are actually fulfilling their intended purpose did not necessarily resonate among some proponents of FBA. For these individuals, multiculturalism policies, in large part, amounted only to lip service, often falling short of genuine implementation. Proponents would argue that for many Muslims, Canada remained a culture dominated by "British culture" and a "Judeo-Christian" influence—a culture more agreeable for some than others. For Ali, the absence of Islamic arbitration tribunals signalled not only a deficiency in Canada's implementation of multiculturalism policies, but also the government's facilitation of the advancement of some group's legal codes (in the name of increased multiculturalism) over others. Pointing to the autonomous legal systems enjoyed by Francophones and Aboriginals, Ali charged that "In the barnyard of democratic, multicultural Canada, some are more equal than others" (2004, 2).[155]

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[155] On the point of Aboriginal rights, however, Boyd referred to these as "problematic and unjustifiable comparisons" (2005:88). She summarized:

> It must be noted that Aboriginal people, unlike any other group in Canada, have rights that are specifically recognized in Canada's Constitution Act, 1982. These rights stem from the historical, legal relationship between different First Nations, the original inhabitants of this land, and the Canadian state, often achieved through treaties signed by both as sovereign nations. This position is not comparable to any other relationship or obligation the Canadian state has with any other groups, or any other individuals. The unique status of aboriginal people is reflected in other pieces of legislation, such as the federal Employment Equity Act, which defines visible minorities as, 'persons, *other than aboriginal peoples*, who are non-Caucasian in race or non-white in colour' (emphasis

As earlier mentioned, the Charter also guarantees citizens freedom of religion in a manner that is to be interpreted so as to enhance the multicultural heritage of Canadians. Following this position, Ali maintained that in order for Muslims to feel apart of Canadian society they had to be able to reconcile their Canadian identities with their Islamic obligations—a reconciliation which could be realized in Ontario through the practice of Muslim family law—insofar as it operated in accordance with Canadian secular law[156]--and in accordance with existing multiculturalism policies. Together with other proponents of FBA, Ali argued that if properly implemented, multiculturalism (as articulated within Canadian legislation) would result in the creation of an autonomous, and dignified Muslim community more prone to becoming "integrated, active participants" of the Canadian mosaic (Ali and Whitehouse, 1991:43). This improved integration, argued Ali, could be realized only through the recognition of difference, and through the acknowledgement of varied needs:

> Indeed, the very idea of multiculturalism is inextricably caught up with the acknowledgement that there are a multiplicity of special and distinct societies within Canada. Our task as a multicultural nation is to construct a set of alternatives from amongst which the different peoples of Canada can choose those which are most conducive to, and congruent with, the needs, interests and characteristics of different

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added). To compare any group of people, whether they are distinct on a cultural, ethnic or religious basis, to the First Nations of Canada in this country's legal and historical context reveals a misunderstanding of the nature of the relationship between the Canadian state and the First Nations. From my perspective, comparisons in this direction are erroneous at best (Boyd, 2004:87-88).

[156] It is worth noting, however, that in his earlier website writings (1997), Ali stated that arbitration was useful to Muslims in part because there was no government oversight. In his later statements Ali began to stress that because Sharia is context-dependent it can and should fall within the precepts of Canadian law (http://www.muslim-org.).

> peoples and which will permit all of them the opportunity to preserve and enhance the quality of their respective sovereignties as a distinct and special people (muslim-canada.org: 11).

The importance of multiculturalism as a tool for the integration of minority groups within mainstream society was a point that, in her report, Boyd stressed as a central factor in the continued existence of FBA.[157] Additionally, Boyd argued that by employing provincial legislation that had been in place for years, and that other religious groups had previously employed, the Muslim community simply was drawing upon the "dominant legal culture" in an effort to define itself. In turn, by employing conventional legal principles and "openly engage[ing] in institutional dialogue," Boyd argued that minority groups were, in reality, "inviting the state into its affairs" in the form of judicial oversight (2004:93).

In fact, making use of the Arbitration Act, according to Boyd, was a positive step for minority groups in attempting to engage and interact within the larger community. Citing scholarly work by Adeno Addis, Boyd reiterated in her report the importance of minority groups locating themselves within the larger society as, "in multicultural societies such as our own, this type of engagement ultimately aims at creating a *'genuine sense of shared identity, [and] social integration*" (Addis, 1997:128, my emphasis). The concept of inviting one into the affairs of one's community, combined

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[157] Boyd quoted important research on the area of multiculturalism and minority integration, stating that "'incorporating cultural minority groups into mainstream political processes remains crucial for multicultural, liberal democratic societies" (Kymlicka, 1995:150). On this point, see also Chapter 6, note 14.

with allegations that women and children were at risk of exploitation under some interpretations of Sharia law, leads to the next point that many endorsers of FBA raised in favour of establishing IBAC—that legitimizing the system by introducing it into the mainstream would curtail oppressive or unfair Sharia-based rulings.

As many commentators relentlessly pointed out (and as discussed above), faith-based arbitration was not a new occurrence within the Islamic community, and in fact, Sharia law had long guided the affairs of many members of the Canadian-Islamic community often through the consultation of senior community members (regularly local Imams).[158] Throughout the debates, proponents of IBACs stressed the fact that Sharia law, unbeknownst to many, already operated as a legal field, guiding the decisions of many adherents. At the time of the debates, their concern was how the current system of Islamic arbitration (that would continue to operate with or without official endorsement)[159] could be legitimized in a way that would fulfill the needs of a religious community while protecting individual rights.

Repeatedly, proponents of FBA stressed the key advantages of officially establishing IBACs. These benefits included the formalization and

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[158] According to Imam Hamid Slimi (2004), the Islamic Council of Imams Canada has been involved in mediation and arbitration for more than ten years, dealing with a host of issues including Islamic divorce.

[159] As Marion Boyd stated, Sharia arbitration "will happen in mosques and community centers and centers and it will just happen" (Boyd quoted in Sims, 2005). Mubin Sheikh, a member of the Masjid al-Noor mosque in Toronto made a similar observation, noting that forbidding FBA would not stop adherents from employing it as a viable legal system: "'Is the government going to stand outside every mosque and ask if people are going in to do faith-based arbitration? No . . . a ban will change nothing'" (quoted in Jimenes, 2005:A1).

legitimization (binding nature) of decisions as well as increased judicial oversight. Relocating arbitration tribunals out of the private sphere and into the public domain, argued advocates, also would result in the expansion and growth of a more reified Islamic system of justice, more consistent in judgements and better harmonized with existing Canadian legal codes. Furthermore, bringing Sharia law into the public domain would help shed the veil of secrecy surrounding an otherwise unknown system of law, by allowing suitable media analysis of "methods and verdicts" (Endersby, 2008:1).

Unfortunately, these latter points concerning increased judicial oversight and greater consistency between Islamic and Canadian laws were ones that never seemed to make great headway in mainstream discourse, and ones that opponents of the system never publically addressed. More importantly, opponents of the system also did not address how precisely the *absence* of formalized Islamic arbitration courts would ensure gender equality—a consequential point that I will return to in the next chapter.

Outcome

Despite determined efforts on the part of proponents of faith-based arbitration, on September 11, 2005, Premier Dalton McGuinty, (in opposition to Marion Boyd's recommendation) turned down the IICJ's proposal to establish IBACs. The premier, however, went one step further, eliminating a long-standing practice in his province when he declared the eventual elimination of *all* faith-based arbitration tribunals, stating that such courts,

"threaten our common ground" (CTV, 2005). Naturally, proponents such as Homa Arjomand were thrilled with the announcement,[160] immediately announcing a victory for women's rights in the nation. The premier's news, however, left supporters of faith-based arbitration stunned, including the IICJ and members of other practicing faith-based arbitration groups. Calling the decision "blatantly unfair" and referring to the premier's decision as a "'harrowing, tragic mistake...unique in the world,'" proponents vowed to fight back (Syrtash, quoted in Csillag 2006).

In 2005, the Ontario legislature passed the *Family Statute Law Amendment Act*,[161] effectively replacing parts of the Arbitration Act. The new law requires that all family law arbitrations in Ontario be conducted only in accordance with Canadian law, effectively eliminating faith-based arbitration in family law as a viable option. As part of the press release, Attorney General of Ontario Michael Bryant announced that the new law was committed to protecting those who choose arbitration, and that in the matter of family law arbitrations, there would only exist "one law"[162] (Attorney

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[160] In response to the announcement, Arjomand thanked McGuinty for "'listening to the people and for having the courage to make this historic decision'" and adding that the ruling "'will improve the standard of human rights for everyone in Ontario'" (Arjomand, quoted in Dawes, 2006).

[161] The new statute came into force on April 30, 2007. See *Family Statute Law Amendment Act, 2009. Available at: http://www.e-laws.gov.on.ca/html/source/statutes/english/2009/elaws_src_s09011_e.htm*

[162] It is interesting to note, however that this new law requires that all arbitrations be conducted exclusively in accordance with Ontario law, *or with the law of another Canadian jurisdiction.* This, of course, raises questions regarding the presence of a singular law, especially considering that arbitration laws vary from province to province.

General of Ontario, 2005). This announcement, however, immediately raised questions once again regarding the relegation of religion to the sidelines.

Given that arbitration traditionally allowed for the selection of any type of law (given that it did not contradict existing Canadian laws), critics again quickly questioned why religious law *alone* was being excluded as a viable form of dispute resolution. (Natasha Bakht, [2006:16] for instance, drew attention to this incongruity, questioning why it is that ordinary Canadians can opt out of "democratically formulated law measures" yet, "religious Canadians should be prevented from similarly taking ownership over their decisions.") For the man who envisioned the establishment of Sharia tribunals, Mumtaz Ali, the answer was clear. For him, the McGuinty government's decision was one based less on political accuracy, and more on "Islamophobia." Reiterating that the decision to ban faith-based arbitration categorically infringed upon guaranteed freedom of religion rights and pointing to the changing demographics of the nation, Ali predicted that the issue would surface once again (Dawes, 2006).

Of course, there were other essential factors that may have influenced the outcome of the current debate and that merit mentioning. First, opponents of the Sharia debate often were quick to advise that the man who spear-headed the Sharia-court process, Syed Mumtaz Ali, was quite orthodox in his outlook, and a man whose notion of Sharia was "unabashedly fundamentalist and political" (Cheadle, 2005). In fact, through his various statements, Ali appeared to justify many of the claims made by opponents of

the system with respect to gender inequality and coercion. For instance, Ali's rather uncompromising position on Sharia is evidenced in a 1995 interview where he stated:

> 'As Canadian Muslims you have a clear choice. Do you want to govern yourself by the personal law of your own religion, or do you prefer governance by secular Canadian family law? If you choose the latter, then you *cannot claim that you believe in Islam as a religion and a complete code of life actualized by a Prophet who you believe to be a mercy to all*... You cannot shirk from your religious and moral duty... .' (Ali, quoted in Mills, 1995:2, my emphasis).

Another source quoted Ali as stating, "'You must surrender to the will of Allah. If you don't then *you are not a good Muslim*'" (www.muslim-org, my emphasis). And yet again, "'Sharia is the law for all Muslims. If they reject it, they are bad Muslims who reject Islam'" (Ali quoted in Armstrong, 2004).

While supporters of FBA largely ignored these comments, Marion Boyd (2009:94) insightfully pointed out that "questioning religious orthodoxy is frequently said to be tantamount to heresy, and those who challenge Islamic orthodoxy are often simply told they are not real Muslims." Consequently, as suggested by Boyd, the types of comments made by Ali may have resulted in many Canadians having a difficult time in "believing that the rights of women in arbitrations undertaken by Imams or other male members of the communities will be respected or that the individual rights of any community members will be honoured if there is conflict with the interpretation of Muslim law being used" (2009:94).

Around the same time (and to the great detriment of those trying to educate and persuade the public about Islamic law in Canada), media

coverage also began circulating about an Ontario area cleric who presided over the Scarborough Salahuddin Islamic Centre, Ali Hindy. According to sources, Hindy had "blessed" more than thirty polygamous marriages in the Ontario area, citing the precedence of Islamic law over secular law: "'The Qur'an says a man is limited to four wives. Canadian law doesn't allow it—God does, so I marry them myself'" (Hindy, quoted in Armstrong, 2004).[163] Hindy further claimed that "'this is in our religion and nobody can force us to do anything against our religion. If the laws of the country conflict with Islamic law, if one goes against the other, then I am going to follow Islamic law, simple as that'" (Hindy, quoted in Javed, 2008). These comments further fuelled suspicions and seemed to give weight to statements made by opponents of Sharia tribunals regarding the safeguarding of women's rights, and the incongruous nature of Islamic and Canadian laws.

Another issue that may have played a significant role in the outcome of the Sharia debates was regarding the Sharia tribunal proposal itself. As many critics repeatedly pointed out, the proposal (as outlined by Ali and the IICJ) clearly was lacking in several areas. First, the common complaint circulated that Muslim groups had either never heard of Mumtaz Ali and the

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[163] Ironically, on the issue of polygamy, Mumtaz Ali referred to the Sharia, which according to him "states that a Muslim living in a non-Muslim country must obey Muslim Law to every extent possible, and that we *must also adhere to the laws of the host country.* Therefore, we accede to the Canadian Law on this point without accepting its superiority or supremacy over Muslim Law" (Ali and Mills, 1995, my emphasis). Moreover, Ali claimed that, "'Muslims should not enter into polygamy while they are living in Canada, because the local Canadian law prevails. It overrules the Islamic law if there is a conflict between the two'" (quoted in Javed, 2008).

IICJ, or that they were never consulted in the proposal process (Hurst, 2004). Adding to their blatant exclusion, many Canadian Muslim communities and groups felt that the choice between using a secular system or a religious system of jurisprudence as a form of illustrating community loyalty resulted in "an over-unified vision of the 'Muslim community' that was far too simplistic (Shachar, 2008).

Critics also pointed out that the proposal, as it stood, lacked any sort of clear guidelines as to particular standards including which particular schools of Islamic jurisprudence judges would employ in arbitration courts, how arbitrators would discern between codified and uncodified Islamic family laws, what types of additional safeguards would be enacted to protect women and children against fundamentalist interpretations, who would be arbitrating, what type of representation women would have on these arbitration boards, how consistency amongst rulings would be ensured, and so forth (Baqi, 2005, Braganza, 2005, Hogben, 2006, Hurst, 2004, Slimi, 2004).[164]

While all of these aforementioned factors contributed to the formation and intensity of these debates, the dialogue that took place was also undoubtedly shaped by an ominous, post 9-11 era political climate. Arguably, these debates acted as a catalyst for some much larger questions, including what forces connect and divide us as citizens of a modern nation-

[164] Although some critics are correct in their claim that the IICJ did not precisely address many of these concerns, Mumtaz Ali did offer some direction, particularly with respect to whom he would like to see acting as arbiters (lawyers, retired judges, religious scholars and so forth) in several places. See for instance, Mills, 1995.

state. On the issue of Sharia, in particular, the media played a large role in informing/misinforming citizens about particular issues such as the role of gender in Islam. In doing so, the media effectively created (in the opinion of some scholars), contrasting notions between the ideal secular system, and harmful religious traditions (Bakht, 2005; Razack, 2007, Shachar, 2008). Ultimately, these types of portrayals extended to the proposed Sharia tribunals, where these tribunals came to represent "a polarized oppositional dichotomy that allows either protecting women's rights *or* promoting extremism" (Shachar, 2008). What ensued from these media accounts was an accompanying "moral panic" (Razack, 2004).[165]

Three days following an article about the IICJs proposal in the *Canadian Law Times*[166] an American news story announced that "Canadian Judges soon will be enforcing Islamic law, or Sharia, in disputes between Muslims, possibly paving the way to one day administering criminal sentences, such as stoning women caught in adultery" (WorldNetDaily, 2003). Thus began a barrage of opinion pieces in the media that included

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[165] In her seminal 2004 article, Razack employed the descriptor terms of the "Imperilled Muslim Woman" and the "Dangerous Muslim Man" to convey her claim that depictions of patriarchal violence within Muslim migrant communities often are steeped in an over-emphasis of culturalist arguments that suggest some type of cultural shortcomings that portray Muslims as uncivilized. Others have raised similar arguments with respect to the cultural stereotypes of Muslims in the case of the Sharia Arbitration debates in Ontario. See for instance, Bakht (2005:2), who, following Razack's logic, suggested that the discourse of the Ontario Sharia debates were "typical of Orientalists structures." According to Bakht (2005), many statements reinforce such representations of Islam as "barbaric" and "other" because they came from *within* the Muslim community. (Consider, for instance, Homa Arjomand's statement that, "'in backwards cultures, especially under Sharia or any other religion, there is no consequence for beating your wife or abusing your children'" [Arjomand, quoted in O'Neill, 2005:32].)

[166] The earliest media coverage that I have found on this topic was a story by Judy Van Rhijn in the *Law Times*, entitled, "First Steps Taken Towards Sharia law in Canada" (2003).

such attention grabbing headlines as "Muslim barbarians [were] knocking at the gates of Ontario" (Siddiqui, 2005), "Sharia is gone, but fear and hostility remain" (Siddiqui, 2005), "Religious Law Undermines Loyalty to Canada" (Singh, 2003), and "A legal jihad: Islamic groups say they don't want Sharia law to apply only to Muslims. They want everyone to obey the Qur'an" (Western Standard, 2005). While there did appear in the media some informative, sensible stories (Morris, 2006), the majority dutifully created representations of Islam as the "other" and aided in strengthening reified notions of the vulnerable, intimidated, and ill-informed Muslim woman, bullied at the hands of barbaric Muslim men (Razack, 2004).[167] Undoubtedly, the media hysteria surrounding the Sharia debates in Ontario played a significant role in colouring the attitudes of many Canadians regarding the presence of faith-based arbitration, and may have, in fact, influenced, the government's decision to ban the practice.

Conclusion to Debates

Despite their efforts, the pro-Sharia campaign was unable to realize their goal of instituting a government-endorsed Islamic arbitration tribunal. While the issue remains once again--and for the time being--dormant, one cannot underestimate the significance of the events. Passionate beliefs drove both sides of the debates—both sides presenting to the government and

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[167] Consider, for instance, an editorial piece appearing in the *Globe and Mail* where Islamic law was compared to the ancient custom of "female foot-binding" (Mallick, 2004). In yet another piece in the *Toronto Sun*, author Peter Worthington advised, "Muslims women are vulnerable to intimation, coercion, being bullied into accepting Sharia intervention" (2004).

ultimately the world— compelling, fervent arguments. Religious affairs and beliefs spilled out of the private domain and into public view with protests and conferences on the issue springing up not only all over Canada, but also globally. What became immediately clear from these debates was that the issue was not simply a Muslim one. Rather, it was an issue that concerned all Canadians--women, children, reformists, traditionalists, the religiously inclined and the secularists—as the debates touched upon some of the nation's most esteemed laws and policies, and pitted freedom of religion against other essential freedoms.

As this chapter has illustrated, arbitration has long been a mainstay of the Canadian legal landscape—offering an alternative, at times more familiar and culturally relevant alternative to the secular court system. This system of alternative law, as suggested, is not foreign to Islam either. In fact, arbitration continues to be a desired and germane method of dispute resolution within Islamic societies. Despite the popularity of arbitration as an alternate dispute resolution method, however, it remains true that arbitration systems (as they currently operate in many provinces), may not necessarily provide the security mechanisms required to successfully implement religious law. As I argue in the final chapter, however, proposed changes to the current Arbitration Act in Ontario may play an important role in creating a system that can handle religious laws in a more meaningful and protective matter.

In addition to discussing the nature of arbitration itself, this chapter also examined, at great length, the actual Sharia debates that took place in Ontario. As argued, despite some crucial shortcomings, those seeking to establish official Sharia courts offered credible arguments using existing legislative frameworks and laws. These arguments, which centered largely on issues of religious freedom, equality rights, and laws and policies aimed at protecting multiculturalism and diversity, however, received considerably less public attention than those posed by persons against the implementation of faith-based arbitration. Increased and principled consideration, however, would have revealed that proponents were not (contrary to popular opinion) attempting to introduce a new, and unprecedented form of alternative law in Canada. Rather, they were simply building upon *existing* laws and frameworks that other religious institutions had, for years, relied upon.

In turn, those who opposed the implementation of faith-based arbitration argued (again using similar legislative frameworks) that these alternative legal systems would endanger the rights guaranteed to women by the Canadian government. Indeed, a short comparison of Canadian and Islamic laws in several areas of family law jurisprudence reveals that certain interpretations of Sharia can lead to decisions that are unfavourable to women, and contradict Canadian positions on gender equality. What was largely left out of these debates, however--and what I turn to in the final chapter-- was precisely how banning faith-based arbitration from official status would *ensure* the protection of women's rights (as many opponents to

FBA implied that it would). Indeed, the nexus between the potential for gender inequality in some areas of family law, the central role that unofficial Sharia plays in the lives of some Canadian Muslims, and Canada's official position on multiculturalism and religious freedoms, raises interesting questions concerning the suitability of the Ontario government's decision to ban faith-based arbitration.

CHAPTER 6
Conclusion

"It is undeniable that legal rules change with the change of times—la yunkaru taghyir al-ahkam bi-taghyir al-azman"

—Kamali (2007:396)

Indeed, the very existence of pluralism depends on standpoint: an English judge presented with an issue involving a potential clash between English and Islamic principles may not even perceive or acknowledge that there is a conflict, let alone accept that Islamic law is valid 'law' in this context, whereas a devout Muslim may believe that Islamic law trumps English law.

—Twining (2003:250)

Much of the literature that exists tends to suggest that parallel legal institutions such as Sharia arbitration courts present a "false solution to women ... asking them to trade gender rights for religious freedom," and because of the potential for gender-equality abuses, such institutions should be banned at the official level (Moosa, 2010:43). The problems with this type of assumption, however, are three-fold. First, it assumes that gender rights and religious freedom (in this case religious law) are diametrically opposed—two rights that cannot be reconciled. Second, it assumes that all parallel legal institutions, inclusive of Sharia arbitration courts, are inevitably detrimental to a woman's welfare. Finally, such a statement presumes that the banning of official faith-based arbitration tribunals will protect women from gender abuses. Building upon previous sections, this chapter argues

that such assumptions are, at best, misleading, as they tend to ignore the continued existence of faith-based arbitration despite their exclusion from the formal legal systems, and the potential threat that they may pose to women. In this capacity, this chapter argues that the government of Canada has achieved little by way of ensuring women's rights in the area of religious arbitration, while concurrently discounting its much-celebrated position as a guarantor of religious freedoms and supporter of multiculturalism. Further, this chapter argues that it is only a matter of time before the Canadian government will have to revisit the issue of Sharia arbitration in Canada, due to an increasing Muslim population, precedents for Sharia arbitration in Great Britain, and several important legal concerns.

In the course of this project, I have tried to illuminate the inherent tension that exists as Canada tries to reconcile ongoing legal pluralisms—in this case, religious rights with other essential human rights, as accorded under the Charter. The Sharia debates offer us a wonderful glimpse into a real world translation of these tensions. Scholars have written extensively about legal pluralism and the effects of globalization on religion. It is not often, however, that we have the opportunity to witness, first hand, and in our own backyards, the unfolding of such events. Indeed, the Sharia debates did more than simply provide fodder for sensationalist media headlines. The debates forced us, as Canadians, to revisit the issue of religious freedom, the protection of individual rights, and the place accorded in our society to the preservation and enhancement of difference. These developments in Canada

cast into high relief questions raised by the existence of legal pluralism, and in particular the recognition of religious law. The role of religion and by extension religious law in a secular liberal society is a particularly precarious subject, in part because some religions hold a worldview in which there exists an authority above that of the state, and whose laws are superior to those of the state.[168]

Canada in particular has a great deal of potential when it comes to experimenting with margins of acceptability owing to its commitment to multiculturalism as enshrined in its Charter. As illustrated in earlier chapters, Canada has been dealing with issues arising from diversity from its early days of inception. Arguably, this diversity model was an essential force in the formation of many of the nation's highly held values, and while there exists no official 'model' per se, the Canadian approach to accommodating its diverse population does contain some core elements, including a culture of inclusion and a "commitment to core values of equality, accommodation, and acceptance" (Biles and Ibrahim, 2005:155).

This commitment is further motivated through the nation's recognition of the importance of individual freedom and human dignity--

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[168] Paul Horwitz (1996:54) suggested that religion is a unique threat to liberal states as it is "a social force [that] exists outside the state . . . and denies the absolute authority of the state and the infallibility of its views." This view is also echoed by Talal Asad (2004) who noted that secularism is a method by which the modern state secures its power and works actively towards producing citizens whose loyalties lie first and foremost to the state. Of course, forces of legal pluralism and globalization have challenged this belief.

concepts that frame liberal democratic thought.[169] The Charter also explicitly recognizes Canada's commitment to the protection and enhancement of the multicultural heritage of its citizens. Cumulatively, these factors are effective in predisposing Canadians towards an experiment in cultural and legal pluralism. In determining whether this experiment will ever take place remains to be seen, but for the time being, I wish to return to the dual lenses of globalization and legal pluralism, which have framed my larger assessment of the Sharia debates in providing some final considerations.

Starting from the definitional premise that globalization results in the "rapid and easy mobility of people" which in turn produces "expatriate communities of dispersed cultures around the world" (Juergensmeyer, 2006:5), it is logical to assume that this dispersion has transformed religion and culture in profound ways, resulting in what Juergensmeyer refers to as "issues of acculturation and transformation" (2006:5). As this project reveals to us, forces of globalization are an elemental factor in the increased existence of legal spaces, and the "multiple assertions of legal authority over the same act, without regard to territorial location" particularly in the areas of religion and culture (Berman, 2007:1159). In the case of the current project, the increased numbers of Muslims clearly exhibits this phenomenon, whilst revealing to us some of the profound consequences that arise when

[169] This concept derives from the Kantian belief that human dignity develops from the autonomy of an individual when determining what exactly constitutes the "good life" (Taylor, 1994:57).

some individuals find themselves guided by more than one type of legal framework.

If we recall from the first section of this project, theories of legal pluralism posit that the state is not the sole producer of law, and that non-state communities also are capable of producing their own legal frameworks. Viewing this inherent conflict of legal pluralism through the lens of globalization, we are reminded that state laws do not operate in solitary confinement. Rather, these laws often are bound by other external and alternate sources of law, including other state laws, laws of supranational organizations, and as well, laws of non-state organizations (the latter which, of course, includes religious law). Thus, while many nations have their own legal orders, below these orders (with or without the acceptance of official law) exist other legal orders that guide and dictate the lives of citizens, resulting in the presence of more than one legal order within a single space.

Essentially, this latter statement has been at the crux of this project. Indeed, through this research we have witnessed some of the tensions experienced by some Muslims-Canadians that result from trying to adhere both to Canadian and Islamic legal prescriptives. For these hybrid citizens, the choice has been to have either some aspects of family law tried by religious law (as dictated by their faiths, and without the official sanctioning of the state), or through secular state law, which ultimately may not serve to fulfill what they believe to be their religious obligations. Having to reconcile these overlapping spheres of authority may result in a number of outcomes

for some citizens ranging from attempts at harmonization to sealing themselves off from the broader community and becoming more insular.[170] In this manner, the Ontario Sharia debates offer a unique glimpse into the issues that arise when, at times, incompatible laws intersect, impose contradictory demands, and most importantly to the case at hand, create spaces of resistance and contestation (Merry, 1988:878).

One issue that becomes apparent from this project is that individuals and communities do not necessarily shed their ethnic and religious identities when they relocate to a new locality, instead at times holding on even more stringently to the collective identities of their origins. Retaining these deeply-rooted identities while adopting and negotiating new ones, however, is a complicated affair. As Berman pointed out in his research (and this current body of research supports), the norms asserted by these types of affiliations "frequently challenge territorially-based authority" and "continue to post constitutional and other challenges" (2007:1161).

Revisiting Sally Falk Moore's conception of the semi-autonomous field from the first chapter,[171] we cannot help but wonder about the state's responsibility regarding the recognition of multiple legal and normative systems, given the larger social matrix within which it operates. The question that naturally arises from this conception is, should the state

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[170] For a more in-depth discussion on these varied responses shown by members of religious communities when faced with multiple sources of authority, see Berman, 2007.
[171] Recall that Moore defined the semi-autonomous field as one that has "rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own insistence" (1978:54).

(through its laws and courts) acknowledge the existence of non-state legal orders and to what extent should it seek to accommodate these other normative forms of law?

When directed at Canada, these questions, as revealed through this study, posit some very interesting results. Looking specifically at the issue of religion, I have shown the way that Canada was born from pluralistic beginnings, and how religion from the start played an important role in the later formation of many of the nation's held values regarding religious and cultural diversity. This feature is evidenced through Canada's global position as a world leader in multiculturalism, a success often attributed to the official policy approval in 1971 which established that "cultural pluralism is the very essence of Canadian identity" (Canada House of Commons, 1971:8580). Also, recall that religion and religious freedom occupy an important place in the nation's highest legal code, the *Charter of Rights and Freedoms.* Through the earlier discussion of various court cases, it became apparent that the protection of a citizen's right to religious practice and belief (providing the guarantee of other essential freedoms) is an issue that the courts do not take lightly. Judiciary bodies, however, accommodate certain religious practices only to the extent that these practices do not interfere with other fundamental rights, and only to the extent that these practices are deemed acceptable by parameters of Canadian liberalism.

Indeed, when the McGuinty government decided to ban Sharia arbitration, it did so with the idea that, in this instance, religious freedoms

were interfering with other fundamental rights, mainly, that of gender equality. Indeed, as earlier sections of this project indicate, Sharia law often is susceptible to interpretations that work to the detriment of women, and against Canadian notions of gender equality. But, did this decision ultimately help the segment of society that it was intended to? Or have we simply missed (to borrow from Khan, 2005) a "golden opportunity" of inviting the private dealings of a minority group into the wider Canadian legal context?

What narratives of legal pluralism and globalization ultimately tell us is a story about the inevitable, continued existence of religious courts. Whether it is certain individuals employing them because of their belief in a sacred law as the guiding force of moral and social behaviour, or if it is a woman who simply wants to free herself from the bonds of a religious union—*even* if it is a woman whose family has coerced her into following the rulings of a religious tribunal—these courts continue to serve a purpose, and as I argue, will continue to operate, with or without official endorsement. Once we appreciate this fact, and all that it entails, might we then begin to realize the futility of the government's decision to ban faith-based arbitration with the intent of protecting women.

As I earlier alluded, leaving arbitration as an informal method of consultation poses the inherent danger that the system may continue to operate underground and away from any type of judicial oversight. Left to its own devices, it is very possible that believing Muslim women will continue to receive ill-suited advice and rulings from unqualified imams—judgements

that will contradict notions of gender equality. Women wishing to live their lives closely aligned to their faith may remain defenceless in the face of patriarchal traditions that will continue to operate without any degree of accountability or oversight. If, as it now stands, the state simply acknowledges the presence of legal normative orders, allowing them to operate but *without* official recognition (in a way granting them private space, or what Ehrlich [1975] refers to as *living law*), then the state runs the risk of turning a blind eye to certain practices that do not necessarily adhere to normative state legal standards.

As mentioned, the issue of precisely how banning faith-based arbitration would ensure gender equality was a concern that opponents of the system never addressed, and a matter that, surprisingly, received little public attention. The few that did broach the subject, however, seemed to agree that leaving arbitration as an informal method of consultation would do little to help protect gender equality within the Islamic community, as arbitration would continue to operate underground, and away from external scrutiny.

One outspoken observer of the Sharia debates, Sheema Khan, delineated the gravity of the situation, stating:

> There are too many unqualified, ignorant imams making back-alley pronouncements on the lives of women, men and children. The practice will continue, without any regulation, oversight, or accountability. Muslim women (and men) will still seek religious divorces and settlement of inheritance matters in accordance with their faith ... Nothing has really changed—except the fact that we have missed a golden opportunity to shine light on abuses masquerading as

> faith, and to ensure that rulings don't contradict the Charter of Rights and Freedoms (2005:A.21).

Law Professor and expert in the area of Islamic law, Anver Emon, also shared strong feelings on the matter. Commenting on the debates, Emon expressed his dismay at Ontario's decision to ban faith-based arbitration, calling it a "great disservice" to religious groups in Ontario, and a "missed opportunity" to create real support and protection of Muslim women in Canada (2005:21). In a *Globe and Mail* article, Emon stated what many supporters of IBACs (including Boyd) felt that--contrary to many statements put out by opponents--a ban on Sharia arbitration would yield few positive results for women:

> They are in exactly the same position they were in before the prospect of government-regulated arbitration. Many Muslim women seeking an Islamic divorce will remain vulnerable to the machinations of bad-faith husbands, uneducated imams, and patriarchal traditions if they wish to remain a part of their religious community. The idea of sharia arbitration brought with it the possibility of government regulation that could have ensured a measure of transparency, accountability and competence in adjudication, none of which currently exists in informal Islamic divorce procedures.

In fact, the argument to ban faith-based arbitration on grounds of human rights abuses stemming from gender discrimination only holds ground on the assumption that removing faith-based arbitration from the Arbitration Act would discourage people from using them. So far, this does not appear to have been the case.

In a recent documentary entitled "Sharia in Canada" (2005), producers endeavoured to bring to light the secret lives of Canadian Muslim

women who had personally experienced the unfavourable effects of Sharia family law. A portion of the documentary focused on the plight of three women, residing in Canada, who upon divorce had lost custody of their children to their husbands as per Islamic custody laws. While the intent of the documentary was to expose the effects of Islamic rulings on the lives of Muslims, implicitly, it revealed the real-life operations and effects of rulings coming out of arbitration tribunals in a province *where the government does not officially recognize such rulings.*[172] This unspoken narrative consequently insinuates the reality that Muslim women--coerced or of their own free will--still attend religious courts, despite their non-binding nature.

Even the IICJ under the leadership of Mumtaz Ali, while failing to address some very serious issues pertaining to the logistical elements of their proposed arbitration tribunal, nevertheless alluded to the continued presence of informal arbitration courts, and the need to dispose of disreputable, unfitting tribunals, headed by unqualified imams. In a submission to Boyd, Ali urged that:

> 'Right from the start, we have insisted that one of the main reasons for establishing the Institute is to bring some order and discipline to a code of professional ethics which seem to have grown like mushrooms to the chaotic back alleys, closed door ghetto-based confusingly and mistakenly so-called 'arbitrations' which have the tendency to flourish' (Ali quoted in Boyd, 2004:109).

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[172] The documentary does not state which province these women resided in, suggesting only that it was somewhere in Canada. The documentary also does not provide much information as to the specific details of the rulings, only that, in Canada, the interviewed women had lost custody of their children due to Islamic law. Only in one case, the woman stated that she had attempted to go to civil court to regain custody of her children, but that her ex-husband had fled the country. Some of the women were still looking for their children at the time the documentary was produced (Sharia in Canada, 2005).

Despite warnings that some arbitration services deliver unprofessional and inequitable forms of justice, however, it appears that business is not slowing down. In fact, research indicates that Muslims, including many women, continue to frequent places offering Sharia arbitration, despite their "unofficial status." Consider, for instance the results of a 1989 English survey which revealed that given the choice between unofficial Muslim law and English law, 66 percent of Muslims would opt to follow the former (Poulter, 1998). As Fournier (2004) pointed out in her research (and as I have indicated elsewhere), by the mid 1990s, the Islamic Sharia Council in England (which operates unofficially) had dealt with over 1500 cases.

In fact, a crucial issue often overlooked in these debates, is that Sharia arbitration courts provide invaluable services to some women, and that, contrary to popularized media accounts, not all Muslim women are downtrodden immigrant women unaware of their rights and coerced by familial pressures. In fact, research indicates that an overwhelming number of cases that take place in both official and unofficial arbitration courts continue to deal with matters of divorce, "whereby the wife ha[s] obtained a civil divorce but the husband refused to pronounce *talaq* . . . ." (Fournier, 2004:24-26). Interestingly, as Moosa indicated (2010:45), these cases are "generally filed by women looking to leave their marriages" and further, "many of these women have reportedly either been forced into marriage, or

else are stuck in a marriage because their husbands are not willing to divorce them under Islamic law."

Increasingly due to immigration, there also are a growing number of cases wherein a couple is married oversees in a union that is not recognized by Canadian courts. As previously mentioned, a Canadian divorce is only effective in legally recognized marriages. This detail means that the only recourse for some couples seeking dissolution of their marriage may be through parallel legal systems. As these and other examples suggest, Islamic arbitration courts—officially or unofficially--continue to play an important role in the lives of some Muslims, and that significantly, an overwhelming proportion of Muslims using these services *are women* seeking services which otherwise would not be available to them through the secular civil justice system. Still, as we have seen, that Muslims continue to employ the services of Sharia arbitration courts does not mitigate the fact that some tribunals have the potential to make rulings that breach Canadian ideals of gender equality.

Inevitably, the government fell short in realizing the force of Islamic law in the lives of many of its citizens. Indeed, a more engaging analysis would have revealed that many non-state normative orders exist independent of, and often prior to, state law. These normative orders (which in this case include Sharia law) are secondary or subordinate to the state only from the perspective of the state, and not necessarily from the perspective of the normative community. Had the state recognized the

pivotal role that Sharia continues to play in the lives of many Muslim adherents, it perhaps would have foreseen the continued existence of arbitration courts, and (by extension) the potential for gender equality. If, as I and others have suggested, these courts continue to operate without supervision and to the possible detriment of women, then the government has failed to fulfil its obligation towards the equal protection of women as outlined in the Charter. Moreover, in an attempt to protect women the government also has failed in fulfilling its own policies of fostering multiculturalism and protecting religious freedoms.

Not only, then, did the government's actions not ensure any level of gender equality for Muslim women, but it also failed to realize the essential goal of Canadian multiculturalism and religious pluralism--Trudeau's vision of an active government that would be accountable for "fostering" and "safeguarding" freedom of diversity. In trying to maintain its public image as a staunch supporter of women's rights and equality for all Canadians, the Ontario government essentially excused itself from having to seriously engage head-on with many of the contentious issues outlined in this project, and with trying to realize how best it could work to integrate the needs of this religious minority community into the wider Canadian legal framework.

Finally, it also is important to recognize that in the midst of all of these debates, the Islamic faith alone became the bearer of a red letter with respect to communal pressures and inequality towards women (despite the fact that the debate was about *all* faith-based arbitration). These types of concerns,

however, extend also to communities beyond Islam.[173] Given that women face similar pressures in any number of religious or cultural communities, it is questionable whether abolishing the practice of faith-based arbitration tribunals altogether generally will resolve many gender inequality concerns, or whether it will create larger issues pertaining to religious autonomy and matters of choice in law. Moreover, it is also important to recall from previous discussions that protecting women from the potentially harmful effects of religious arbitration tribunals instead may result in the eradication of their sense of agency. Inevitably, eliminating the choice for religious arbitration—a choice that had been available to the citizens of Ontario--will not necessarily eradicate the very serious issue of familial and communal pressures facing some women. The task of addressing these issues should more directly be the focus of intercession by various women's groups, government agencies, immigrant associations, and religious scholars.

The Future of Sharia in Canada

Despite my assertion that the official recognition of faith-based arbitration under a revised Arbitration Act may have been a positive step for legal reform within the Canadian Muslim community, I fully recognize that establishing a formalized Islamic arbitration system will not be an easy task. It would require the government, for instance, to engage with some very serious issues pertaining to religion and its role in the lives of its citizens,

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[173] Bowen (2009) for instance, pointed to research that reports similar pressures facing women in Hindu families. According to Bowen (2009:4), "one might ask whether persons embedded in Anglican or Catholic networks also experience [similar] pressure."

instead of banishing what makes them uncomfortable. Additionally, it would require the Islamic community to look internally--at issues ranging from identity to reform—in order to begin developing a model of Canadian Islam. Here, I will briefly remark on some of these issues that must be overcome in order for faith-based arbitration to operate with some degree of success.

First, despite the laws of the land, for some Muslims, their religious identities hinge largely on following the prescriptives of Islamic law. When the IICJ first broached the topic of creating an Islamically-based arbitration tribunal, it was partially in response to this inherent need within the community to follow the directives of their faith. The way in which the IICJ, however, approached the issue was problematic on several levels. For instance, the minimal consultation that the IICJ had with other Muslim groups and organizations left many within the Muslim community feeling excluded from the process. If the IICJ attempted to develop more open lines of dialogue with other community members, then perhaps they could have better anticipated and addressed many of the issues and criticisms that these groups would later raise.

Second, despite the IICJ's best efforts, it remains true that it did a fairly poor job when it came to addressing many of the criticisms levelled against their proposed tribunal, particularly those pertaining to gender equality. Short of stating the important role that IBACs play, the IICJ did not specifically address what measures would be put in place to ensure that rulings reflected gender equality, who specifically would be serving on

arbitration tribunals, and how their organization would ensure that individuals were not submitting to arbitration under coercion. In addition, the IICJ never addressed specifically the issue of inconsistencies in interpretations of Islamic law, and how arbitration tribunals would deal with the issue of multiple forms of Islamic jurisprudence. While the inability for the IICJ to address many of these issues undoubtedly assisted in the subsequent refusal of their proposal, I nevertheless feel that several points must be made, partially in response to some of the unanswered issues.

Indeed, as we have seen, Islamic views, and by extension the legal opinions that derive from these views, do range from the moderate to the extreme, reflecting a plethora of cultural, regional, political, and philosophical attitudes. Thus, it is apparent that there does not exist a singular voice for Islam, but at the same time, there also does not exist a singular voice for practically any other religious community ranging from Christians to Hindus. This multiplicity of views itself is not inherently the problem. As we have seen, the concept of a singular law itself is a fallacy. In reality, Canadians have the choice of law options in many areas of jurisprudence, and particularly under arbitration law, as long as both parties are in agreement with the choice of law (Chapter 5). The issue with the IICJ's proposal, as it stood, was the acute lack of safeguards against what many Muslims believe to be outdated and patriarchal interpretations of the law that stand in strict opposition to Islamic law.

Interestingly enough, Sheema Khan (whom you may recall, was an early advocate of faith-based arbitration for Muslims) later reflected that she had underestimated the breadth of legal opinions in Islam, referring to Sharia as a "'Rorschach blot'" (Khan, quoted in Green, 2010). Yet, despite her contention that "classical Sharia" was an ill fit for the Western secular system, she nevertheless did not disregard a "'reformed'" system of Sharia as more palatable to the Canadian system of jurisprudence—a task that, in her opinion, would require greater education and critical inquiry (Khan, quoted in Green, 2010). And Khan is not alone in her opinions regarding reform in Sharia. According to many scholars and Islamic jurists, the task of reformulation in Islamic law is not only possible but also necessary, achievable due of the differentiation between the Islamic concepts of *Sharia* and *fiqh* (Chapter 4). The issue of reform in Islamic law is a burgeoning field of inquiry, and many scholars (particularly female) have proposed a re-evaluation and reformation of many aspects of Sharia law, arguing that the law must be refurbished in order to reflect contemporary times, and to address issues of gender equality.

Progress towards reformation (with a greater attention to gender equality), and a better understanding of Islamic law already has begun. We need only to look to the introduction of Islamic universities in Malaysia, Pakistan, and Sudan (among other countries) that combine civil and religious legal programs, with an emphasis on better alignment of the two systems. Already, some nations have already taken steps towards reformed Islamic

law to reflect better gender equality. For instance, in Indonesia, both male and female judges try cases, and reformed law requires husbands and wives to show the same grounds for divorce petitions (Bowen, 2009). Changes in the laws of nations such as Iran, Jordan, and Malaysia have increased women's rights in numerous areas of family law, granting them, among other things, equal divorce rights, increased maintenance, and more equitable custody laws (Nasir, 1994). Furthermore, we should recall that the reformation of Islamic law within the boundaries of a secular state is not a new occurrence. Historically there have been instances of harmonization between Sharia and state (secular law) (Kamali, 2007:397), and in the past, Sharia courts have successfully operated parallel to other legal institutions (Shahar, 2008). All of these factors point to the adaptability of the Islamic legal system—a feature that is not lost upon many modern scholars of Islam. The onus lies upon members of the Canadian Muslim community to embrace these changing aspects of Islamic family law, and to enfold them into their current legal practices.

Until now, I have discussed several of the issues that the Canadian Muslim community needs to address with respect to the creation of a robust arbitration system, but I would be remiss if I did not also revisit the issue of the Arbitration Act itself, and the role that it continues to play in this debate. Undoubtedly, a huge anomaly in the implementation of Sharia arbitration courts in Canada had to do with the existing arbitration framework itself—a system that, as I have argued, was ill-equipped for the purpose of dealing

with religious law. Indeed, the Arbitration Act is a product of the nineteenth century, and applies to a host of arbitrations, covering the gamut from family law to commercial transactions. Something as sensitive as religious law cannot realistically operate under the same parameters guiding the arbitration of wholesale commercial goods. We should not, however, be quick to do away with arbitration in general as a viable forum for the exercise of limited forms of religious law. After all, as I discussed, the system has operated for centuries around the world as an effective means of resolving disputes. The system is effective in providing a more intimate and culturally familiar setting where arbitrators and parties are given the latitude to tailor decisions within an applicable legal framework to suit their respective needs, and (in the case of religious law) fulfilling certain obligations. Arbitration also has proven an effective means of providing a sense of ownership over results to litigants.

Since the current arbitration system, however, was not initially designed to handle some types of law, one logical step towards reconciling the issue of faith-based arbitration would be to rework the system for greater safeguards and more transparency. Boyd's extensive list of recommendations (Appendix 5.0) intended to ensure greater safety measures was a positive step towards this initiative. For instance, as part of her recommendations, Boyd suggested the following: the requirement that all mediators and arbitrators in family law and inheritance cases be members of voluntary professional organizations (recommendation 14); that

arbitrators who apply religious law in such matters develop a statement of principles of their faith-based arbitration that explain the parties' rights and obligations and available processes under the relevant religious law (recommendation 16); that arbitrators should screen participating parties individually regarding issues of power imbalance and domestic abuse and to ensure that parties are entering into arbitration voluntarily and with an awareness of the nature and consequences of an arbitration agreement (recommendation 18). As well, she recommended that any award that did not reflect the best interests of children, or if parties did not receive a copy of the arbitration agreement with written reasons, could be set aside (recommendation 9).

In addition to several other highly significant recommendations (including ones pertaining to the training and education of arbitrators and lawyers, and their oversight and assessment of the community at large), is Boyd's recommendation that arbitrators forward summaries of decisions (albeit with identifying features removed) to appropriate authorities. As Pengelley (2005) remarks, this particular recommendation is advantageous because these decisions would be "made available for research and other purposes . . . which of course would assist, over time, in identifying problems and trends." And of course, as always, where religious law clearly contravenes civil state law, parties can appeal to the courts and the courts can set aside any award emanating from arbitration tribunals, and assist with

parties who can demonstrate that they were under duress, coerced into arbitration, or deprived of their rights to legal advice.

These recommendations, if implemented in their full capacity, would undoubtedly help ensure that religious arbitration courts operated in a manner that, is more equitable, standardized, and transparent. Coupled with strides taken from within religious communities towards more equitable practices, and reform ideologies where necessary, religious arbitration could once again become a viable and robust form of alternative justice—much as it initially was intended to be. Naturally, critics would (and did) argue that the addition of a few safeguards would not ensure against the social pressures that some women might face to employ religious arbitration systems if they were to become available. The ramifications of reducing such a complex matter into potential social pressures faced by women, however, are far-reaching.

First, as I previously mentioned, there is little evidence that if religious courts ceased to exist officially, women would no longer be coerced into attending non-binding arbitration. To reiterate, "back-alley" arbitration, in all likelihood, will continue, and women still will undergo similar pressures to follow certain religious prescriptions, only without the protection afforded by a legalized state system. If we start from the assumption that these courts will continue to exist unofficially, and women will continue (for an array of reasons) to frequent them, then we can begin to

see the value in the implementation of these additional safeguards and in re-introducing formalized arbitration practices.

Second, without underestimating the significance of social pressure guiding the decisions of some women with respect to religious arbitration courts, we must recognize that the state is limited as to the lengths that it can go to in addressing the pressures that arise behind closed doors, short of refusing to grant accommodation to religious groups altogether. Refusing accommodation, as I have previously discussed, runs the risk of jeopardizing "the nexus between cultural identity and democratic citizenship" that Canada has worked hard to cultivate (Aslam, 2006:874).

Of course, discussions pertaining to the creation of pockets of 'living law' and the subsequent protection of such systems, are only as effective as society's acceptance of their importance. Unquestionably, part of the government's quick response to the idea of Islamic arbitration had in large part to do with the repute of Islam itself, and the sentiments that Canadians had towards it. Complicating the efforts of the IICJ was the fact that the Sharia debates did not evolve independent of current world events. Views and opinions analogous to those posed by Huntington (who remarked that "Islam's borders are bloody, and so are its innards" [1996:258]) continue to resonate post 9/11 public discourse, and fuel ensuing media coverage of Islam and Muslims. In the midst of this discourse, Canadians were inundated with media coverage focusing exclusively on Sharia—coverage that did little

to assist in the formation of factual and well-formed opinions as to what Sharia actually entails, and the capacity in which it would operate in Canada.

As previously mentioned, while opponents of Sharia fought not only against Islamic law but also against all religiously based arbitration tribunals, the media seemed to exclude increasingly the latter detail. Naturally, the shocking captions referring specifically to Sharia law (Chapter 5) that emblazed the pages of various newspapers played an important role in the formation of many public attitudes not only towards the implementation of religious law generally, but towards Islam specifically. As Anver Emon relates, "the rhetoric of the public outcry presented flashing *images only of Sharia and Muslims*—stoning, amputation and immigrant women too uneducated and subservient to know or press for their rights . . . and the government listened" (2005, my emphasis). The government did indeed listen, but the matter may not yet be over. Notwithstanding all the unprincipled press coverage of Sharia, the issue of formalized religious arbitration will likely resurface again for two notable reasons—the existence of legally-binding arbitration in Great Britain, and the continuing legal concerns over Ontario's decision to ban faith-based arbitration. Here I will briefly comment on each of these points.

First, with an rapidly growing population, it will likely only be a matter of time before Canadian Muslims look to their European neighbours and question why it is that Great Britain--a nation whose legal system and cultural ethos bears a striking resemblance to that of Canada's--is able to

accommodate religious arbitration where Canada cannot. In this sense, Great Britain acts as a useful model for the twin functioning of internal reform processes and state approval in the application of Sharia-based arbitration tribunals.

Indeed, Britain's Muslim population has grown immensely in the past several decades, and is currently the largest minority faith community in that country (Fournier, 2004). For some time, members of the British Muslim community had lobbied the government for some form of official recognition of a distinct Sharia legal system, but with the government's dismissal of their proposal, the community went on to create an alternate dispute resolution system that would address the legal needs of the growing community. In fact, research shows that many of the disputes that occurred amongst Muslims in England "never come before the official courts" of the country (Yilmaz, 2004 cited in Boyd, 2004:81). What this statistic reveals, of course, is that an increasingly large proportion of cases were being tried without the protection afforded by official British laws (Boyd, 2004). Of course, that was until fairly recently.

As of 2008, the government of England has sanctioned the rulings of a network of five Sharia courts (with the ability to rule on cases ranging from divorce and financial disputes even to cases involving domestic violence), enforceable with the full power of the judicial system (*Times Online*, 2008). Operating under the British Arbitration Act of 1996, Muslim arbitration tribunals now operate in London, Birmingham, Bradford, Manchester,

Nuneaton, and Warwickshire, with another two courts planned to open in Glasgow and Edinburgh. Similar to Canada, under the British Arbitration Act, the rulings of arbitration tribunals are binding in law so long as both parties involved in the dispute agree to the terms and conditions. As discussed in an earlier section, binding arbitration tribunals such as the MAT, have taken great strides in creating services that offer equitable, transparent, and culturally relevant rulings in matters of faith-based arbitration. This achievement is made possible in part because of increased safeguards (such as the presence of female British lawyers at all hearings) and because of internal reforms aimed at updating Islamic laws to better reflect the position and status of women in contemporary society (Bowen, 2009).

The system in England is relatively new and undoubtedly has its glitches. But it remains true that British proponents of Islamically-based arbitration courts have been effective in their efforts at establishing legitimate Sharia tribunals. If one subscribes at all to the notion of precedent, it will not be long before proponents of the system in Canada will make another attempt at reintroducing the idea here, arguing that if England can find it within its practices of accommodation then surely so can Canada.

Second, Canada may have to revisit the faith-based arbitration issue again due to several *legal* concerns. The issue of religious arbitration tribunals is a pressing concern for the whole country on two fronts. Firstly, while what took place concerning the implementation of Sharia was specific to Ontario, comparable tensions can emerge elsewhere in the nation. As a

recent Uniform Law of Canada conference reveals, the Ontario Sharia debates have caused other provinces to review comprehensively their existing arbitration laws. According to the Uniform Law of Canada Association, a review of these various Arbitration Acts across provinces reveals that "faith-based family arbitration appears to be legally valid under the arbitration laws of all common law provinces" and is certainly "legally valid under the Uniform Arbitration Act" of Canada (Gregory, Predko, & Nicolet, 2005).

As Appendix 7.0 reveals, however, the Arbitration Acts of each province are far more nuanced regarding the role of family law and the potential for faith-based arbitration than the Uniform Law of Canada conference concluded. What this table (Appendix 7.0) illustrates is that many of Canada's provinces may face similar issues regarding citizens' rights to arbitrate certain family law matters through religious laws, as per existing arbitration laws. Consider, for instance that in Alberta the current Arbitration Act permits parties to employ religious principles if both parties agree to it. In Manitoba, arbitration of family law is implicitly allowable, and parties may choose to employ religious law in the proceedings. In Nova Scotia, a choice of law provision exists that makes religious arbitration in family law matters permissible by default.[174] In these provinces (among others), there exists an underlying blueprint, which could potentially result in similar faith-based arbitration debates to those that took place in Ontario.

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[174] Please refer to Appendix 6.0 for a more detailed account of Arbitration laws for all Canadian Common law provinces.

Secondly, the incident that took place in Ontario has raised some profound questions about where the nation as a whole stands on issues of multiculturalism, gender equality, and protection of religious freedoms, and with respect to tensions that ensue when multiple forces of law guide citizens.[175] The Premier of Ontario brought an end to the current propositions put forth by the IICJ but the matter may be far from over, because Ontario remains vulnerable to Charter challenges on several grounds.

Proponents of faith-based arbitration, for instance, can (and have publically declared that they will [Keith, 2005]) challenge the Premier's decision based on Sections 2(a) (the right to the freedom of religion) and 15(1) (the right to religious equality) (Baines, 2006). Under these sections, proponents could argue that their ability to live out their lives according to their faiths has been unreasonably hampered by the actions of the government. (Recall from earlier chapters that, according to existing Canadian laws, the state cannot participate in an action that will impede a citizen's right to practice his/her faith within reasonable limits.) Even by allowing family law matters to go to arbitration, individuals could argue (as suggested by Boyd's report) that s. 2(a), "acts to guarantee the right to

[175] Worth recalling is that unlike in Quebec, where the government opted to completely exclude family or personal law status matters from arbitration (Civil Code of Quebec, 1991), the Government of Ontario formally passed an amendment that distinguished 'family arbitrations' from all other forms of arbitration. This amendment effectively held that family arbitrations would only have legal effect if they operated in exact accordance with the law of Ontario, or another Canadian jurisdiction (Family Statute Law Amendment Act, 2006). This, in effect, does not completely close the door on faith-based arbitration.

arbitrate according to the religious principles of choice of the parties to dispute" (2004:71). In other words, and to reiterate a point made earlier by Natasha Bakht (2004), the state cannot essentially interfere in the private arbitration process to the disadvantage of religious believers, claiming the superiority of one type of arbitration law to another.

Aside from the direct arbitration challenges, proponents of faith-based arbitration also may challenge the government's decision to ban faith-based arbitration on several other grounds. These grounds include the contention that the ban impairs the freedom of religion and religious believers who cannot, by nature of their faith bring cases before secular judges,[176] or alternately, religious believers who cannot bring certain cases before judges because the secular court system will not entertain some religious matters in court. The contention also exists that by not permitting Islamic faith-based arbitration the government has shown preference for other types of religious law over Islamic law, by allowing the other forms to operate for years, thereby contradicting the Charter provision that the government will not show preference for one religion over another.[177]

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[176] On this point, Boyd stated in her report that "according to the information given to the Review by representatives of the Beis Din, Orthodox Jews are forbidden to bring a lawsuit before secular judges" (2004:55).

[177] Recall also that according to Canadian courts, s.2(a), the freedom of religion clause in the Charter, protects citizens from "coercion in matters of conscience" (Canadian Charter of Rights and Freedoms, 1982), and prohibits the state from either limiting or compelling religious practice, or from showing preference amongst religion and non-religion (Moon, 2003).

Future Considerations

What theories of legal pluralism reveal to us is that there exist numerous sources of authority guiding the lives of citizens, made all the more acute by processes of globalization. As the Sharia debates illustrate, individuals and communities find themselves having to negotiate both laws and customs of their culture of origin (that they carry with themselves irrespective of territorial location) and the dominant culture that surrounds them.

In light of these tensions, this project has argued first, that Canada has an existing legal and cultural template that makes the Sharia debates relevant and second, that Canada has fallen short of achieving its mandate in protecting gender equality and religious freedom in the case of the Sharia debates. In the process of making these arguments, however, numerous other interesting and related issues have come about that contribute to the larger debate on the relationship between religion and law in Canada. These include: details such as the rapid growth of minority populations who do not necessarily see themselves reflected in Canada's laws (Chapter 2), disproportionate effects of secular law on some members of society (Chapters 3 & 4), issues regarding the efficacy of multiculturalism policies (Chapter 3), and the disconnection between policies and laws on paper and the ways in which courts implement and practice them (Chapter 4). In addition, what becomes clear from this project is how some of these aforementioned issues complicate further when confronted with the

complexities of Islamic law (Chapter 4). Both space and time restrictions bar more detailed analysis on these issues than those already put forth in this project, but they remain interesting points of inquiry, particularly as they relate to the larger Sharia debates. This current project provides a basis from which these other factors can be examined.

The one point, however, that the Sharia debates gave rise to, and continue to be largely absent from academic discourse around the debates, has been the way in which these recent events have affected the development of a genuine Canadian Islam. It is worth noting that, through the course of this project, I have been dealing with legal and cultural issues that are *specifically* Sunni in nature. Indeed, the entire Sharia debates affair that unravelled in Ontario was a Sunni enterprise, and a Sunni oriented challenge to the legal system. In fact, it was Sunni Islam's concern of law, and comprehension of law that ultimately dictated the debates, and inevitably cast the public mind in Canada towards *its* perspective on the issues. In effect, the debates may have pre-disposed Canadians to think of Islam as Sunni Islam as opposed to the varied, multifaceted, and comprehensive system of faith that it actually is. In turn, other modes of Islamic piety (such as Shi'ism or Sufism) became sidelined, if not completely eliminated, from the ensuing discussions as scholars addressed (and continue to address) Islam, predicated heavily on this bias. Clearly, this portrayal of Islam as a singular, Sunni entity is not only erroneous but it may also affect the way in which Canadian Islam will expand and mature.

Of course, this project focussed on the Sunni community in large part because what took place in Ontario was Sunni oriented, and involved a discussion of Sunni forms of jurisprudence. I would be remiss, however, if I did not acknowledge the fact that, while this issue may be of significance to all Canadian Muslims, not all Canadian Muslims are necessarily represented in the form of Islam presented here.

Despite this narrow perception of Islam and its implications for the development of a robust Muslim community in Canada, one should not underestimate the progress that many Muslims *are* making in marking their place in Canadian society. For instance, much should be said for the fact that Muslim Canadians eagerly participated in Boyd's 2005 study, with many of their recommendations regarding the *Ontario Arbitration Act* (better accountability, increased transparency, regulation and training of arbitrators, and so forth) having been adopted by both Boyd's review as well as the *Family Statute Law Amendment Act* (Khan, 2007). That Canadian Muslims are asking these essential questions and talking about the possibility shows small signs of progress towards a possible future realization of Islamic tribunals. Perhaps these modest beginnings will lay the foundation for the future formation of an organic and uniquely Canadian Sharia, where experts from both the Canadian legal system and Islamic legal schools can adjudicate disputes in a manner that adheres to both religious and secular law. Still, in order for Sharia-based arbitration to operate in the future in Canada, community members and lawmakers must take necessary precautions--

including increased education for women as to their rights, and available alternatives. While, in my opinion, we are still years away from the establishment of this type of faith-based tribunal, the process is nevertheless underway, sure to mature over time and will come yet again to the forefront of Canada's political landscape, if only in response to the rapid growth of Canada's Muslim population.

On a more theoretical level, it remains true that Canada is relatively in its formative years when it comes to figuring out what role religion, in general, should have in society. This role naturally changes with the evolving demographic landscape and the juncture of competing sources of law. Canada has created a template for what it envisions the role of religion to be, through its various policies of multiculturalism, Charter rights on religion, and seemingly on its comprehension of the merits inherent in granting room for religious recognition in the healthy functioning of a liberal society.[178]

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[178] This positive relationship between recognition and a sense of belonging among minority groups and positive society experiences is an issue that scholars have more recently begun to probe. For instance, in his research, Will Kymlicka (1995) revealed the importance of cultural membership to an individual's sense of belonging in society. Moreover, he posited the existence of a positive correlation between the self-respect that an individual experiences from this sense of belonging and the respect that his/her minority group experiences from its surrounding society. On another front, Horwitz (1996), revealed the important role that a religious community plays in the formation of individual identity, and how a sense of identity helps to reconcile individuals' interactions with other members of society and the larger state. Building on these earlier findings, and focusing specifically on the issue of religious legal systems, Aslam (2006) further argued that allowing religious groups to participate in their own legal systems actually may result in an increased sense of national loyalty, as citizens will no longer have to choose between being either a 'good' believer, or a 'good' citizen, without having to infringe either religious or secular law. Ultimately, what this research indicates to us is that allowing individuals, to some extent, to fulfill the pressing demands of their multiple roles is beneficial, because a liberal democracy "has a compelling interest in its own perpetuation and should work to include those

Nevertheless, while Canada *officially* declares that its citizens enjoy freedom of religion, where this freedom intersects with law (as the Sharia debates demonstrate), the state seeks to control and/or restrict that freedom depending on how lines of accommodation and acceptability are drawn. This project, which looks specifically at the Sharia debates through legal pluralism, usefully leads to future discussions around this much broader narrative regarding the paradoxical nature of legal and religious culture. Without delving into too much detail at this juncture, it will suffice to make a few brief remarks on this point.

Until now, we have seen the utility in employing legal pluralism in helping us move past the state/hierarchy mentality towards a study of alternate sources of authority that guide the lives of citizens. In fact, theories of legal pluralism are effective in explaining the ways in which laws are constantly constructed through the meeting of assorted norm-generating communities, and the bi-directional nature of these laws. Where theories of legal pluralism fall short, however, is in detailing the degree of this bi-directionality, or the quality and/or nature of the encounter between state law and normative legal orders. Out of this deficit, interestingly, develops a fascinating discourse and future area of study (particularly as it pertains to the Sharia debates) on the cultural elements of law, and our understanding of acceptable accommodation.

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individuals who have potentially conflicting identities" (Aslam, 2006:865). See also McLachlin (2008).

The underlying tenet of the rule of law is that all are subject to its authority. As previously stated, religion makes a similar comprehensive claim. What materializes as a result of these competing claims is the question of how one authoritative "system of cultural understanding—the rule of law" makes room for another seemingly inclusive system of belief (McLachlin, 2004:16). Paradoxically, freedom of religion is secured by law, but it does not sit on par with law, despite the fact that both state law and religion (and by extension religious law) can make claims on the lives of a citizen. As Benjamin Berger (2008) argued, state law ultimately manages and adjudicates religious difference while enjoying a particular *autonomy* from it.

Given this conjecture then, as Berger (2008) suggests, every time religious groups find themselves before the law, we may assume that the outcome is already decided because constitutionalism already has drawn the lines of acceptable accommodation. The state simply will not entertain practices falling outside of those lines, which ironically may result in practices of assimilation more than accommodation (Berger, 2008). How this larger discussion on religion and law as cultural markers, and ensuing comprehensions of accommodation, interacts with the need for recognition and autonomy in religious groups will undoubtedly prove to be an interesting area of future research. In relation to this latter point, Sharia law (in particular), will provide an interesting future case study due to its complicated and contentious nature, combined with its innate flexibility. In

fact, that Sharia law historically has transformed and adapted over time and space will surely provide interesting insights into prospective accommodation/assimilation debates.

I am not yet sure what the future holds for state/religion relationships in Canada, nor am I convinced that there ever will be a time when the two spheres will operate without friction alongside one another. What I have come to appreciate, however, is the inevitability of change in legal forms and pluralisms over time and space. Even religious laws, which many adherents believe to be true for all of time, are not immune to these forces of change. How Canada's approach to the growing existence of these alternate sources of law will change overtime, possibly resulting in the creation of increased space for religious law in the nation's legal fabric, will be a litmus test for Canada's commitment to the establishment of a multicultural, liberal state. We ultimately stand on the cusp of an exceptional and dynamic period in Canadian history as we attempt to negotiate our Canadian identities against a rapidly changing demographic backdrop. As we continue in the future to increasingly address issues such as the Ontario Sharia debates, we must do so all the while appreciating that the very Canadian laws that encourage diversity also must struggle to regulate it.

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Appendix 1.0

Immigrants by Major Religious Denominations and Period of Immigration, Canada, 2001

Religious Denomination	Period of Immigration (%)				
	Before 1961	1961-1970	1971-1980	1981-1990	1991-2001[2]
Total Immigrants	100	100	100	100	100
Roman Catholic	39.2	43.4	33.9	32.9	23.0
Protestant	39.2	26.9	21.0	14.5	10.7
Christian Orthodox	3.8	6.3	3.8	3.0	6.3
Christian[1]	1.3	2.2	3.8	4.9	5.3
Jewish	2.7	2.0	2.2	1.9	1.2
Muslim	0.2	1.3	5.4	7.5	15.0
Hindu	0.0	1.4	3.6	4.9	6.5
Buddhist	0.4	0.9	4.8	7.5	4.6
Sikh	0.1	1.1	3.9	4.3	4.7
No Religion	11.0	13.5	16.5	17.3	21.3
Other Religion	2.1	1.0	1.1	1.3	1.4

Source: Statistics Canada, Catalogue no. 96F0030XIE2001015.

1. Not included elsewhere. Includes persons who report "Christian", as well as those who report "Apostolic", "Born-again Christian" and "Evangelical."
2. Includes data up to May 15, 2001.

Appendix 2.0

Major Religious Denominations, Canada, 1991[1] and 2001

Religious Denomination	2001		1991		Percentage Change 1991-2001
	Number	%	Number	%	
Roman Catholic	12,793,125	43.2	12,203,625	45.2	4.8
Protestant	8,654,845	29.2	9,427,675	34.9	-8.2
Christian Orthodox	479,620	1.6	387,395	1.4	23.8
Christian[2]	780,450	2.6	353,040	1.3	121.1
Muslim	579,640	2.0	253,265	0.9	128.9
Jewish	329,995	1.1	318,185	1.2	3.7
Buddhist	300,345	1.0	163,415	0.6	83.8
Hindu	297,200	1.0	157,015	0.6	89.3
Sikh	278,415	0.9	147,440	0.5	88.8
No Religion	4796,325	16.2	3,333,245	12.3	43.9

Source: Statistics Canada, Catalogue no. 96F0030XIE2001015.

1. For comparability purposes, 1991 data are presented according to 2001 boundaries.
2. Not included elsewhere. Includes persons who report "Christian", as well as those who report "Apostolic", "Born-again Christian" and "Evangelical."

Appendix 3.0

Distribution (in percent) of Canadian population[1] by religious denomination, 2001 and 2017 according to five scenarios

Religious Denomination	Base Population 2001	Projections 2017 Scenario A	Scen. B	Scen. C	Scen. D	Scen. S
Total	100.0	100.0	100.0	100.0	100.0	100.0
Total Non-Christian	6.3	9.2	9.9	9.9	10.7	11.2
Muslim	1.9	3.7	4.1	4.1	4.6	4.9
Jewish	1.1	1.1	1.1	1.1	1.1	1.1
Buddhist	1.0	1.1	1.2	1.2	1.2	1.3
Hindu	1.0	1.6	1.7	1.7	1.9	1.9
Sikh	0.9	1.3	1.4	1.4	1.6	1.6
Other Non-Christian	0.3	0.4	0.4	0.4	0.4	0.4
Rest of the Population[2]	93.7	90.8	90.1	90.1	89.3	88.8

Source: Statistics Canada Demography Division 2017 Projections - Catalogue no. 91-541-XIE

1. Excluding non-permanent residents.
2. Christian religions and no religious affiliation.

Population[1] percentage change by religious denomination from 2001 to 2017 according to five scenarios

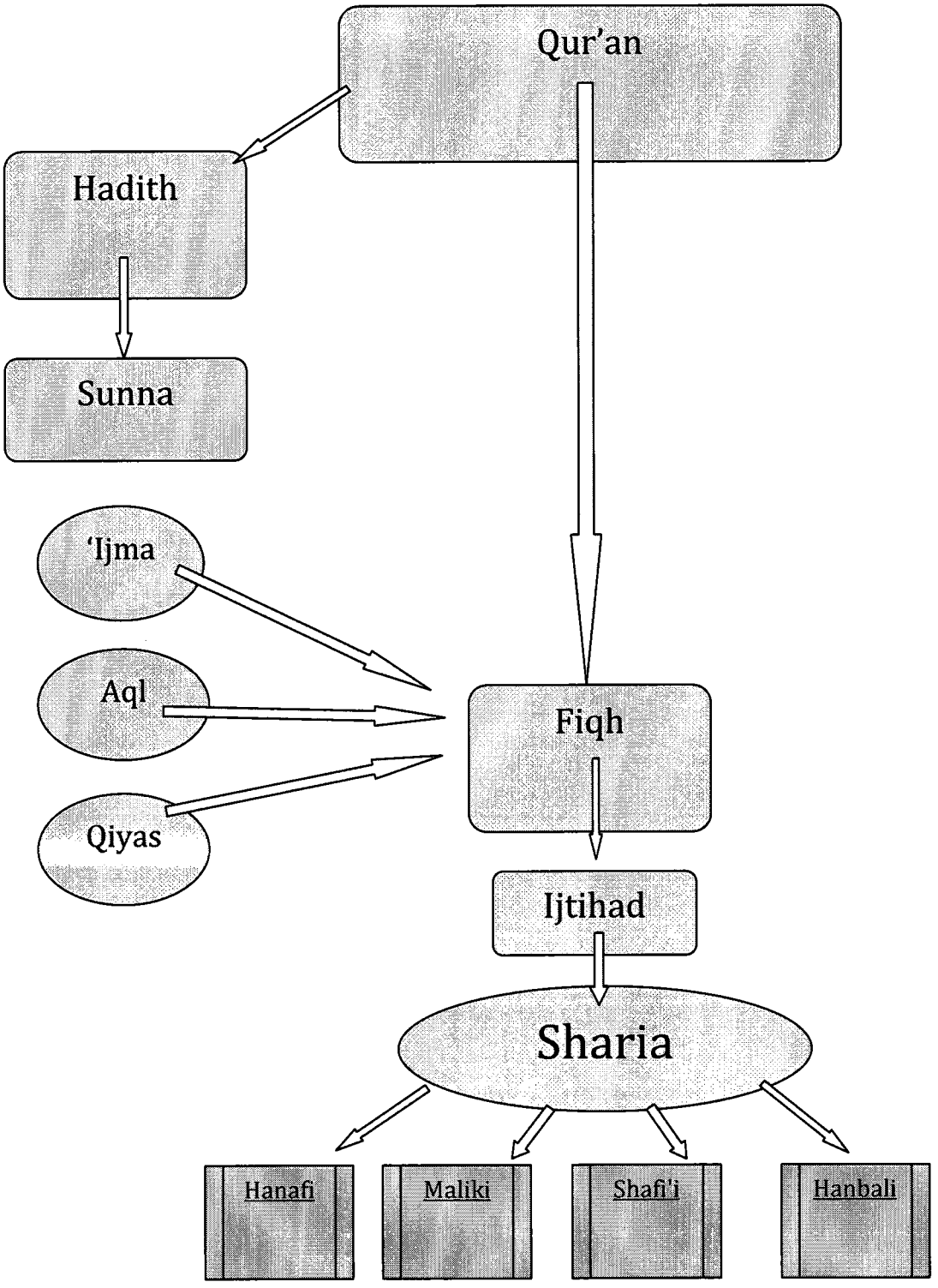
Religious Denomination	Scenario A	Scenario B	Scenario C	Scenario D	Scenario S
Total	8.0	13.0	12.9	19.1	19.3
Total Non-Christian	58.6	78.2	78.1	102.8	113.7
Muslim	111.5	145.2	145.0	186.8	207.8
Jewish	5.7	10.1	10.1	14.9	17.1
Buddhist	23.9	36.1	36.0	49.4	58.2
Hindu	69.7	92.3	92.2	122.6	133.5
Sikh	53.5	71.5	71.5	97.0	103.2
Other Non-Christian	21.3	28.8	28.7	38.1	39.7
Rest of the Population[2]	4.6	8.6	8.6	13.5	13.0

Source: Statistics Canada Demography Division 2017 Projections - Catalogue no. 91-541-XIE

1. Excluding non-permanent residents.
2. Christian religions and no religious affiliation.

Appendix 4.0

Sample Chart Outlining Development of Sunni Islamic Law



Appendix 5.0

Select Recommendations from (2005) Boyd Report for FBA in Family Law

The following are proposed changes to the Arbitration Act and the Family Law Act to make them better suited for family and inheritance arbitrations.

1. Arbitration should continue to be an alternative dispute resolution option that is available in family and inheritance law cases, subject to the further recommendations of this Review.
2. The Arbitration Act should continue to allow disputes to be arbitrated using religious law, if the safeguards currently prescribed and recommended by this Review are observed.
3. Section 51 of the Family Law Act should be amended to add mediation agreements and arbitration agreements to the definition of "domestic contracts" to bring these agreements into the general protections of Part IV of the Act. Therefore these agreements would be required to be in writing, signed by the parties and witnessed.
4. When Part IV of the Family Law Act applies, a mediation agreement or arbitration agreement should be able to be set aside on the same grounds as other domestic contracts.

5. Part IV of the Family Law Act should be amended so that if a co-habitation agreement or marriage contract contains an arbitration agreement, that arbitration agreement is not binding unless it is reconfirmed in writing at the time of the dispute and before the arbitration occurs.

6. The reconfirmation in writing should not be required for an arbitration conducted:

    (a) under a separation agreement;
    (b) as a consequence of an award made in an arbitration that was itself agreed to contemporaneously; or
    (c) as a consequence of a judgment of a court.
    (a) the award does not reflect the best interests of any children affected by it;
    (b) a party to it did not have or waive independent legal advice;
    (c) the parties do not have a copy of the arbitration agreement, and a written decision including reasons; or
    (d) applicable, a party did not receive a statement of principles of faith-based arbitration.

7. Section 55 (2) of the Family Law Act should be amended to require prior court approval of a domestic contract entered into by a minor in Ontario.
8. Section 33 (4) of Part III of the Family Law Act, permitting the Court to set aside a domestic contract or paternity agreement for provision of support, should be amended to permit a court to set aside an arbitral award on the same grounds (unconscionability, person owed support is receiving social assistance, or the support is in arrears).

9. The Arbitration Act should be amended to permit a court to set aside an arbitral award in a family or inheritance matter if:

The parties should not be able to waive this provision.

10. The Arbitration Act or the Family Law Act should be amended to provide regulation-making powers for family law and inheritance arbitrations and to require the use of regulated forms and procedures.

11. The Child and Family Services Act s. 72 (5) should be amended to explicitly include mediators and arbitrators in the class of professionals who have an enforceable duty to report a child in need of protection.

12. Regulations in the Arbitration Act or the Family Law Act should require that arbitration agreements of family law and inheritance cases must be in writing and must set out:

    - a detailed list of issues that are submitted to arbitration;
    - whether the arbitration is binding or advisory;
    - the form of law, if not Ontario law, which will be used to decide the dispute, and in the case of religious law, which form of the religious law;
    - if the arbitration is under religious law, an acknowledgement that the party has received and reviewed the statement of principles of faith-based arbitration prior to signing the agreement;
    - explicit details of any waiver of any rights or remedies under the Arbitration Act;
    - an explicit statement that judicial remedies under s. 46 and the right to fair and equal treatment under s. 19 of the Arbitration Act cannot be waived;
    - an explicit statement recognizing that judicial oversight of children's issues cannot be waived and that s. 33 (4) of the Family Law Act continues to apply; and
    - an explicit statement that s. 56 of the Family Law Act applies to the agreement and cannot be waived and therefore a party can apply to set the agreement aside for additional reasons including if it is not in the best interests of any children affected by the agreement, there was not full and frank financial disclosure, or a party did not understand the nature or consequences of the agreement.

13. Regulations in the Arbitration Act or the Family Law Act should require arbitration agreements in family law and inheritance cases to contain either a certificate of independent legal advice or an explicit waiver of independent legal advice.
14. Regulations in the Arbitration Act or the Family Law Act should require mediators and arbitrators in family law and inheritance cases to be members of voluntary professional organizations, or fall into an excluded class defined by the regulation, in order to have their decisions enforced by Ontario courts.

15. Regulations under the Arbitration Act should define the concept of a fair and equal process in the context of family law or inheritance arbitrations.

16. Regulations in the Arbitration Act or the Family Law Act should require that arbitrators who apply religious law in family law and inheritance arbitrations develop a statement of principles of faith-based arbitration that explains the parties' rights and obligations and available processes under the particular form of religious law.

17. Regulations in the Arbitration Act or the Family Law Act should require religiously-based arbitrators to distribute their statement of principles of faith-based arbitrations to all prospective clients.

18. Regulations in the Arbitration Act or the Family Law Act should require mediators and arbitrators in family law and inheritance cases to screen the parties separately about issues of power imbalance and domestic violence, prior to entering into an arbitration agreement, using a standardized screening process.

19. Regulations under the Arbitration Act or the Family Law Act should require mediators and arbitrators in family law and inheritance cases to certify that they have screened the parties separately for domestic violence, that they have reviewed the certificates of Independent Legal Advice or the waiver of Independent Legal Advice, and are satisfied that each party is entering into the arbitration voluntarily and with knowledge of the nature and consequences of the arbitration agreement.

20. Regulations under the Arbitration Act or the Family Law Act should state that if the records required by Recommendations 37, 38 and 39 are not maintained, a party can apply to have an arbitral award set aside.

21. The certificate of Independent Legal Advice in family law and inheritance cases should state that the party has received advice about the Ontario and Canadian law applicable to his or her fact situation, the law of arbitration, and the remedies available to both parties under Ontario family and arbitration law.

22. Arbitration services which conduct family law and inheritance arbitrations should distribute the statement of principles of faith-based arbitrations required under Recommendations 16 and 17 to potential clients, in advance of the clients seeing a lawyer.

23. If religious law is chosen under the arbitration agreement in a family law or inheritance case, the Independent Legal Advice certificate should explicitly state that the lawyer reviewed the statement of principles of faith-based arbitration and the lawyer is satisfied that the person has sufficient information to understand the nature and consequences of choosing the religious law.

24. Waivers of Independent Legal Advice in family law and inheritance cases should state that the party has waived the right to receive advice about Canadian and Ontario family law and Ontario arbitration law, and if religious law is chosen should state that the party has received and reviewed the statement of principles of faith-based arbitration required by Recommendations 16 and 17.

25. The Government of Ontario should develop, in collaboration with community organizations and experts, a series of public education initiatives, aimed at creating awareness of the legal system, alternative dispute resolution options, and family law provisions.

26. The initiatives in Recommendation 25 should be linguistically and culturally designed to suit the diverse needs of different communities, as well as any

communications challenges faced by members of the community (e.g. blindness, deafness, etc.).

27. Any public education campaign that is developed should include, but not limit itself to, information on the following topics:

    - General rights and obligations under the law;
    - Family law issues;
    - Alternative forms of dispute resolution;
    - Arbitration Act;
    - Immigration law issues; and
    - Community supports.

28. Public legal information programs funded by the government of Ontario should include an overview of the options for resolving a family law dispute, including the arbitration process.

29. Public legal information programs in family law funded by the government of Ontario should be available to all community members who wish to attend, whether or not they have a matter before the court.

30. Family Law Information Centres should provide information that has been developed by and for specific ethno-cultural communities and in community languages about their rights and responsibilities under Ontario and Canadian law.

31. The Government of Ontario should work together with professional bodies to develop a standardized screening process for domestic violence for use in family law and inheritance mediations and arbitrations.

32. The Ministry of the Attorney General, the Law Society of Upper Canada and LawPro should strike a joint task force to examine the use of arbitration in family law and inheritance cases, to develop and deliver continuing education to lawyers about arbitration and Independent Legal Advice, and to examine the insurance and public compensation issues as they impact on the public interest.

33. The Government of Ontario should work with voluntary professional associations for mediators and arbitrators to provide training on issues of power imbalance in family law and inheritance cases, use of the prescribed screening process from Recommendation 18, and the process for an arbitrator to certify the material for a family law or inheritance case as required by Recommendation 19.

34. The guidelines of voluntary professional associations for training, conduct and competence of mediators and arbitrators should clearly explain their professional duty to report children in need of protection.

35. Voluntary professional associations for mediators and arbitrators should require that, in family law and inheritance cases, if mediators practice arbitration during mediation sessions, the agreement to arbitrate must precede the commencement of the mediation, and all the obligations of arbitrators under Recommendations 16, 17, 18 and 19 must be met before the commencement of any arbitration.

36. The Ministry of the Attorney General should work with professional organizations to review existing codes of professional conduct and assess whether they apply when a member of a profession conducts an arbitration or mediation.

37. Decisions of arbitrators in family law and inheritance cases should be delivered to the parties in writing and include a copy of the arbitration agreement, and any attachments required by the regulations. Decisions should include written reasons.

38. The arbitrator in family law and inheritance cases should maintain copies of the decision for a period of at least 10 years.

39. Arbitrators should be required to keep a record of each arbitration in family law and inheritance cases including the names of the parties and their representatives (if any), the arbitration agreement, the certificates or waivers of Independent Legal Advice, any documents filed by the parties, a summary of the facts of the case and the written decision. Copies of these files should be made available to the parties upon request. If an arbitrator does not maintain these files, or make the file available when requested, the arbitral decision may be set aside.

40. Arbitrators of family and inheritance matters should be required to report annually to the Ministry of the Attorney General, the following aggregated and non-identifying information:

    - Number of arbitrations conducted;
    - Number of appeals or motions to set aside and the outcome, if known (e.g. pending, award set aside, court refers back to arbitrator, etc.); and
    - Any complaints or disciplinary actions they are aware of that have been taken against them during that year by their professional body or the courts.

41. Arbitrators in family law and inheritance cases should be required to provide the Government of Ontario with summaries of each decision, free of identifying information, and the Government should make these summaries available upon request for research, evaluation and consumer protection purposes. If in the future arbitrators become a self-regulating profession, the inventory of summaries of decisions should be transferred to the regulatory body for that profession.

42. Voluntary registration organizations should consider failure to make decisions available and file decisions in accordance with Recommendations 40 and 41 grounds for the deregistration of the arbitrator.

43. The Government of Ontario should encourage and fund community organizations who run arbitration services to develop information materials about rights and obligations under religious law.

44. The Government of Ontario should encourage and fund community organizations to work with experienced public legal education providers and the legal community to research and develop effective public information materials which explain rights under Ontario and Canadian law in a way that is likely to be comprehensible to people of diverse backgrounds and culture.

45. The Ministry of the Attorney General should set a long term goal of professional self-regulation of mediators and arbitrators who deal with family law and inheritance

cases. The Ministry should work with professional organizations including the Law Society of Upper Canada and voluntary mediation and arbitration organizations to develop a consultation process which will lead to guidelines for conduct and competency for these professionals.

46. The Ministry of the Attorney General should conduct further policy analysis of the legality and desirability of providing a higher level of court oversight to settlements of family and inheritance cases based on religious principles than is available to non-religiously based settlements under Part IV of the Family Law Act in addition to the several additional grounds set out in these recommendations under which arbitral awards may be challenged.

(Adapted From Boyd, 2005:134-143).

Appendix 6.0

Arbitration of Family Law Matters and Religious Law in Canada's Common Law Provinces

ALBERTA

- The current Arbitration Act of Alberta permits parties to employ religious principles if both parties agree to it. Currently, nothing in the Arbitration Act restricts the arbitration of family law matters.

BRITISH COLUMBIA

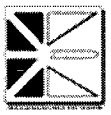
- B.C.'s current Commercial Arbitration Act does not seem to overtly prohibit the arbitration of family law matters. Section 23 of the Commercial Arbitration Act allows for the use of religious arbitration but the extent to which this act applies to family law matters remains uncertain.

MANITOBA

- Because in Manitoba the provincial Arbitration Act or the province's family law statutes do not mention the use of arbitration in Family law matters, arbitration of family law is implicitly allowable. Section 32(1) of the Arbitration Act allows parties to select a jurisdiction of their liking, which includes religious law.

NEW BRUNSWICK

- Under the Arbitration Act, parties can specify what rule of law they wish to employ in the arbitration of their case, thereby allowing for religious arbitration of matters. At the moment, there is no way of confirming whether or not religious arbitration is taking place in New Brunswick.



NEWFOUNDLAND/LABRADOR

- The Arbitration Act of Newfoundland and Labrador does not include a choice of law specification. As such, arbitrations must follow the laws of Newfoundland/Labrador, or the law of Canada where deemed appropriate. Since common law, however, accommodates diverse principles, there is nothing excluding the use of religious principles in arbitration.

NORTHWEST TERRITORIES

- The Arbitration Act of the Northwest Territories seemingly does not allow for religious arbitration in matters of family law, since the Act does not accord any choice of law provisions.

NOVA SCOTIA

- The use of arbitration in family law matters is permitted, as per the Matrimonial Property Act (that provides for the use of arbitration) and the Commercial Arbitration Act (that does not prohibit the use of arbitration in family law matters). The Commercial Arbitration Act allows for a choice of law provision, and as such, religious arbitration in the province is, by default, permissible.

NUNAVUT

- As per the Arbitration Act and the Family Law Act, arbitration in family law is not prohibited. Because, however, there is no provision specifying choice of law, religious arbitration in these matters is not permissible.

ONTARIO

- Family arbitrations in Ontario must comply with the family law system in Ontario, or another Canadian jurisdiction. In spite of new changes

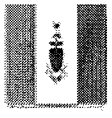
prohibiting the use of religious arbitration in Ontario, however, arbitrators still can adapt religious laws to conform to family law jurisdictions in Canada and carry out binding arbitrations.

PRINCE EDWARD ISLAND

- PEI's Arbitration Act does not rule out the arbitration of family law matters. Only family law statutes of PEI and the law of Canada, however, are applicable to arbitrations of family law matters.

SASKATCHEWAN

- Neither the Arbitration Act nor any of the family law acts of Saskatchewan prohibits the use of family law matters in Arbitration. As such, family law arbitration is permitted. Moreover, the choice of law provision in the Arbitration Act allows for the possibility of religious arbitration in family law matters.



YUKON

- The Arbitration Act is consistent with the Family Property Support Act in the Yukon, and as such arbitration of family law matters is permissible. Because, however, there is no choice of law provision, religious arbitration is not really a viable option.

Source: Adapted from Dondy-Kaplan and Bakht, 2006

Appendix 7.0

Islamic Law Glossary

Allāh - God (in monotheistic understanding of the word); the only entity worthy of worship

Bid'ah - innovation in religion, i.e. conceiving new methods of worship

Caliph - literally successor; refers to the successor of the Prophet Muhammad, the ruler of an Islamic theocratic monarchy

Dar al-Islam - the abode, or land, of Islam

Dīn - the way of life based on Islamic revelation; the sum total of a Muslim's faith and practice

Faqih - a person who is an expert on Islamic jurisprudence (law), fiqh

Fard - something which is obligatory on a Muslim. It is sometimes used in reference to the obligatory part of salat

Faskh - a judicial divorce

Fatwa - considered opinion given by a qualified scholar, a mufti (jurisconsult), or a mujtahid (one who is competent enough to conduct ijtihad) concerning a legal/religious issue; a religious edict

Fiqh - Islamic law as developed by Muslim jurists. The term is often used synonymously with Sharia; the main difference being that Sharia bears a closer link with divine revelation, whereas fiqh mainly consists of the works of religious scholars and jurists

Fuqaha - plural form of faqih

Hadana – child custody

Hadd - (plural hudud) literally. limit, prescribed penalty

Hadith - plural ahādīth, literally "speech"; recorded saying or tradition of the Prophet Muhammad validated by isnad; with sira these comprise the sunnah and reveal shariah

Halal - something that is lawful and permitted in Islam

Hanafi - one of the four schools of law (Madhhabs) or jurisprudence (Fiqh) within Sunni Islam. The Hanafi madhhab is named after its founder, Abu Hanifa an Nu'man ibn Thābit

Hanbali - is one of the four schools (Madh'habs) of Fiqh or religious law within Sunni Islam (the other three being Hanafi, Maliki and Shafi`i)

Haram - something that is unlawful or prohibited in Islam

Hudud - the limits ordained by Allah. This includes the punishment for crimes

Hukm - (plural ahkam) as in hukm shar'i: law, value, or ruling of Shari'ah

'Idda - waiting period, typically following a divorce and commonly for a period of three months (or three menstrual cycles)

'Illah - effective cause, or ratio legis, of a particular ruling

`Ilm - all varieties of knowledge, usually a synonym for science

Ijma' - consensus of opinion

Ijtihad - literally. 'exertion', and technically the effort a jurist makes in order to deduce the law, which is not self-evident, from its sources

Ikhtilaf - juristic disagreement

Islam - submission to God". The Arabic root word for Islam means submission, obedience, peace, and purity.

Isnād - chain of transmitters of any given hadith

Istishab - accompanying circumstances to be taken into consideration

Istihsan - to deem something good, juristic preference

Khul - a negotiated divorce, also referred to as *mubarat*

Madh'hab - (pl. Madhahib) school of religious jurisprudence, school of thought

Mahr - a 'dowry' given by the man to the woman he is about to marry. It is part of the Muslim marriage contract. It can never be demanded back under any circumstances

Makruh - abominable, reprehensible

Maliki - is one of the four schools of fiqh or religious law within Sunni Islam. It is the third largest of the four schools

Muftī - an Islamic scholar who is an interpreter or expounder of Islamic law (Sharia), capable of issuing fatwas

Mujtahid - a scholar who uses reason for the purpose of forming an opinion or making a ruling on a religious issue. Plural: Mujtahidun.

Mullah - Islamic clergy. Ideally, they should have studied the Qur'an, Islamic traditions (hadith), and Islamic law (fiqh).

Mutashabihat - (singular. mutashabih) Ambiguous, obscure, difficult to understand; the ambiguous passages in the Qur'an

Nafaqah - Maintenance

Nass - a clear injunction, an explicit textual ruling

Qadah - plural form of qadi

Qadi – Judge

Qiyas - analogical reasoning aimed at extending a given ruling of the Quran and Sunnahto a new case, on grounds of an effective cause common to both the new and the original case

Qur'ān - Muslims believe the Qur'an to be the literal word of God and the culmination of God's revelation to mankind, revealed to Muhammad in the year AD 610.

Ra'y - considered personal opinion, often used in contradistinction to nass (see above)

Sahih - "sound in isnad." A technical attribute applied to the "isnad" of a hadith.

Shāfi'ī - one of the four schools of fiqh, or religious law, within Sunni Islam. The Shāfi'ī school of fiqh is named after its founder, Imām ash-Shāfi'ī. The other three schools of law are Hanafi, Maliki and Hanbali.

Sharia - Islamic law as contained in the divine guidance of the Qur'an and Sunnah. 'Islamic law' is the nearest English translation of Sharia, yet the latter is not confined specifically to legal subject matter and extends to the much wider areas of moral and religious guidance

Sirah - life or biography of the Muhammad; his moral example - with hadith this comprises the sunnah

Siyasah Shari'ah - Shariah-oriented policy; often refers to discretionary decisions taken by the Head of State or qadi in pursuit of public good, in response to emergency situations, or in cases where a strict application of the established law would lead to undesirable results

Sunnah - the "path" or "example" of the Prophet Muhammad, i.e., what the Prophet did or said or agreed to during his life

Sunni - the largest denomination of Islam. The word Sunni comes from the word

Sura - chapter; the Qur'an is composed of 114 suras

Talaq - divorce initiated by the husband

Tafsīr - exegesis, particularly such commentary on the Qur'an

Taqlīd - to follow the scholarly opinion of one of the four Imams of Islamic Jurisprudence.

Tarjih - preference (of one legal opinion over others).

Tawfid - the delegated right of divorce

Tawhīd - monotheism; affirmation of the oneness or unity of Allah. Muslims regard this as the first part of the Pillar of Islam

'Ulamā' - the leaders of Islamic society, including teachers, Imams and judges. Singular alim

Ummah - the global community of all Muslim believers

Usul - principles, origins

Usul al-Fiqh - the study of the origins and practice of Islamic jurisprudence (fiqh)

Ulama - the learned, knowledgeable scholars of Islam. Plural form of alim

'urf - custom.

Wajib - obligatory, often synonymous with fard

Definitions adapted from Esposito, J. The Oxford Dictionary of Islam. Oxford: Oxford University Press, 2003, and The Muslims Internet Directory (http://www.2muslims.com/cgi-bin/dictionary/csvread.pl?letter=M)