

## ISLAMIC LAW AND THE CANADIAN MOSAIC: POLITICS, JURISPRUDENCE, AND MULTICULTURAL ACCOMMODATION

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*The Ontario Sharia debate in 2004–05 sparked controversy world-wide about the extent to which a religious community such as Muslims could find space in a liberal legal system such as Canada's. While Ontario may have rejected recommendations about how to accommodate religious groups within the sovereign legal system, the continued relevance of this fundamental issue remains a global concern. The outcry against Archbishop of Canterbury Rowan Williams, who argued for a degree of legal accommodation for British Muslims, is only one example among many. The Canadian debate has raised fundamental questions that have not and may not ever dissipate as long as liberal secular polities contend with questions of reasonable accommodation. This paper offers an analysis of the Ontario debate from the perspective of Islamic legal history, jurisprudence, and the role civil society can play in mediating the competing voices in such debates.*

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*En 2004 et 2005, le débat concernant l'instauration de la charia en Ontario a suscité une controverse à l'échelle internationale à propos de la place allouée aux communautés religieuses dans un système juridique libéral comme celui du Canada. Bien que l'Ontario ait rejeté les recommandations visant les moyens d'accueillir les groupes religieux au sein du système judiciaire de l'État, cette question fondamentale demeure une préoccupation à l'échelle mondiale. La levée de boucliers contre l'archevêque de Cantorbéry, Rowan Williams, qui s'était prononcé en faveur de mesures d'accommodements juridiques pour les musulmans britanniques, n'est qu'un exemple parmi tant d'autres. Le débat canadien a soulevé des questions fondamentales qui ne sont pas résolues et qui ne se résoudront peut-être pas tant et aussi longtemps que les États séculaires seront confrontés à des questions d'accommodement raisonnable. Cet article analyse le débat qui a lieu en Ontario sur ces questions du point de vue de l'histoire du droit islamique, de la jurisprudence et du rôle de la société civile en tant que médiateur des positions concurrentes dans de tels débats.*

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### 1. Introduction

The 2004–05 debate on the use of Sharia for family law arbitration in Ontario highlighted a few of the predicaments that arise when balancing commitments to individual rights and multiculturalism. In particular, to what extent can a liberal nation’s rule of law system tolerate a minority group exerting autonomy within a particular area of the law, especially when individuals within that minority group may be disadvantaged by the exercise of community autonomy?<sup>1</sup> Scholars studying multiculturalism and legal pluralism have offered models by which national rule of law systems can accommodate community autonomy while upholding individual liberties and interests. For instance, Suzanne Last Stone has argued for a model of “dialectical interaction” between two legal systems whose goal is mutual innovation and change. Writing about New York’s use of a *Ghet* law to assist Jewish women in obtaining religious divorces, Stone offers a dialogic model in which multiple norm-generating systems interact with one another to foster change and development.<sup>2</sup> Ayelet Shachar, reviewing the extensive literature on multiculturalism and legal pluralism, offers a model of transformative accommodation to balance the interests of cultural groups with those of the state in order to uphold the liberties of its citizenry.<sup>3</sup>

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University’s Center for Feminist Research, *Racialized Gendered Identities* (18 November 2005); The Munk Center (with the patronage of the Lieutenant Governor of Ontario), *Religion and Shared Citizenship* (10 February 2005); University of Toronto Faculty of Law, *Constitutional Roundtable* (14 February 2006); and National University of Singapore, Faculty of Law, *Law and Multiculturalism* (22 February 2006). I would like to thank the participants at those events for their thoughts, comments, and criticisms. I also want to gratefully acknowledge Bruce Chapman, Rebecca Cook, David Duff, Jean-Francois Gaudreault-DesBiens, Robert Gibbs, Andrew Green, Audrey Macklin, Denise Reaume, Arthur Ripstein, Kent Roach, Carol Rogerson, Ayelet Shachar, Lorne Sossin, Ernest Weinrib, and Lorraine Weinrib. I want to acknowledge the Hon. Marion Boyd for her commitment to justice in a multicultural society, for her courage in the face of criticism and, on a personal note, for her enthusiasm for my research. I want to thank the staff of the Bora Laskin Law Library, particularly research librarian Sooin Kim, who was instrumental in locating hard-to-find sources and Nafisah Chaudhary and Amy Smeltzer for their research assistance. All of these people helped me to make the article better, but are in no way responsible for any of its faults. All errors are the responsibility of the author.

<sup>1</sup> For a survey of literature addressing the predicament of vulnerable individuals within minority groups, see Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (Cambridge: Cambridge University Press, 2001).

<sup>2</sup> Suzanne Last Stone, “The Intervention of American Law in Jewish Divorce: A Pluralist Analysis” (2000) 34 *Isr. L.R.* 170 at 190.

<sup>3</sup> Shachar, *supra* note 2.

To determine whether to allow Sharia arbitration in family law, the Ontario government appointed the Honourable Marion Boyd, former Attorney General of Ontario, to investigate the extent to which federal and provincial law could uphold the interests of citizens while also respecting the use of religious law to arbitrate family disputes. Relying on Shachar's model of transformative accommodation, Boyd suggested that, within a reformed arbitral system, religious law (Sharia or otherwise) could be used in a way that both allows for accommodation of cultural autonomy, and does not violate the liberty interests of Canadian citizens under the *Charter of Rights and Freedoms*.<sup>4</sup> Suggesting numerous changes to the arbitral system in Ontario, most of which involved adding to the training, transparency, and accountability of arbitrators, Boyd did not consider that Sharia law would by its very essence undermine or vitiate a woman's liberty or equality interest.<sup>5</sup>

Boyd's report, however, did not describe or otherwise provide much substantive description of what Sharia is. Nor, referring only to the use of "Islamic principles" to govern arbitral proceedings, did Boyd define for Muslims or others what Islamic law is or should be. Rather, that was something left to Muslims to figure out for themselves. Not surprisingly, Muslim proponents and opponents of Sharia arbitration became embroiled in a heated debate about what Sharia law would demand in family law arbitration settings, hostilely arguing about what the implications of using Sharia might be for the liberty and equality interests of Muslim women in Canada. In fact, some argued that the introduction of Sharia in family law arbitrations would open the door to even greater reliance on Sharia, including in the criminal sphere.<sup>6</sup> Of interest in this study, though, is that those involved in the debate arguably espoused a particular, shared image of the Sharia that I argue has a recent historical provenance and is the product of a particular political history. Even though the Ontario government chose to disallow religious arbitrations in family law, the issues that spurred the debate about Sharia arbitration have not disappeared. The concern for Muslim women's rights in the family law context remains, especially since nothing prohibits *imams*

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<sup>4</sup> Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Toronto: Ministry of the Attorney General, 2004) at 89–92, online: Government of Ontario (Ministry of the Attorney General) <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>>.

<sup>5</sup> For possible legislative and procedural mechanisms that Ontario could have used to regulate religious arbitration, see *ibid.* at 133–42.

<sup>6</sup> For concerns that allowing Sharia family law arbitration would create a slippery slope leading to the use of Islamic penal measures, see Rita Trichur, "Muslims Divided over whether Sharia Belongs in Ontario Arbitration Law" *Canadian Press* (22 August 2004), online: Muslim Canadian Congress <<http://www.muslimcanadiancongress.org/20040822.pdf>>.

from offering Islamic divorce services under the rubric of *mediation* as opposed to legally enforced arbitration.

For those interested in legal pluralism within liberal rule of law systems like that of Canada, further investigation into the conception of Sharia that dominated the Canadian debate is essential if the meaning of a state's commitment to individual freedom and multiculturalism is to be fully understood and implemented.<sup>7</sup> Our understanding of what it means to uphold and preserve multiculturalism will often depend on how we understand, represent, and characterize the "Other." The substance and limits of one nation's multicultural commitments do not simply involve a forceful assertion of its values. Rather, to understand a nation's values and their limits, we need to properly understand the Other and how the Other fits into the existing national landscape of values and identities. Arguably, by relying on polemic and rhetoric to understand the Other, the possibility of true understanding, both of the self and the Other, is unlikely. As I have written elsewhere, "The more critical and honest we can be in learning about and understanding the Other, the better we can understand our own values and the limits of our multiculturalism."<sup>8</sup>

In Parts 2 and 3, I address the early history of Sharia and how medieval legal doctrines were embedded within institutional frameworks that helped make the tradition meaningful and responsive to changing situations. In Part 4, I show how this early rule of law system was gradually dismantled, generally at the instigation of self-interested European colonialists. Part 5 illustrates how, in the same way that Muslims as subalterns internalized the discourse of their colonial masters, post-colonial Muslims have uncritically adopted the representations of Sharia handed to them by the former colonial powers. In doing so, their representations of Sharia today have more to do with contested forms of political identity than with the creation of rule of law systems responsive to Islamic values. I conclude with a proposal that suggests how liberal governments can co-operate with Muslim civil society organizations to create spaces for Muslims to engage in critical thought about the accommodation of Islamic law within national rule of law frameworks founded upon fundamental values of liberal states.

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<sup>7</sup> See *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 27, which reads: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

<sup>8</sup> Anver M. Emon, "Minority Rights in a Multicultural Society" (2005) *Nexus* (University of Toronto Faculty of Law) 37 at 37.

## 2. The Concept of Sharia

The conception of Sharia that prevailed in the Ontario debates viewed the tradition as an inflexible and immutable code of religious rules, based on the Qur'an and traditions of the Prophet Muhammad.<sup>9</sup> Various media outlets described Sharia as a "code" of law that deterministically governs every aspect of a Muslim's life.<sup>10</sup> Readers wrote letters to editors expressing their fears about the use of Sharia in Ontario, calling it, for example, an "archaic paternalistic code."<sup>11</sup> The view of Sharia as a code, however, ignores centuries of juristic literature that challenges any conceptualization of Sharia as a determinate, narrowly constructed, unchanging code of law. Sharia has a history whose normative foundations and development stretch from the seventh century to the present,<sup>12</sup> and which illustrates that legal rules were often the product of Muslim jurists' analytical discretion within the cultural and institutional contexts that informed education, precedent, principles, and doctrines.<sup>13</sup>

The interpretive theory of Islamic law espouses a commitment to the Qur'an and traditions of the Prophet Muhammad (d. 632), also called *hadith*. Although these "scriptural" sources provide an authoritative foundation for juristic analysis and interpretation, they do not, by themselves, constitute a legal system. The Qur'an contains 114 chapters,

<sup>9</sup> For media accounts reporting this conception of Islamic law, see Trichur, *supra* note 6; "Iranian Activist Fears Ontario Passage of Sharia Law for Family Disputes" *Canadian Press* (22 January 2005); and Allyson Jeffs, "Iranian Activist Warns Against the Hammer of Sharia Law" *Edmonton Journal* (23 January 2005) A9. Syed Mumtaz Ali, one of the early proponents of the Sharia tribunals, held that appearing before the Sharia tribunals allows Muslims to abide by the Qur'an and is so central to one's faith that to avoid them would be blasphemy. See also "YWCA Toronto Takes Stand on Sharia Law" *Canada News Wire* (21 December 2004) 1; and Bob Harvey, "Sharia Law Debate Divides Ontario's Muslims" *CanWest News* (17 January 2005) 1.

<sup>10</sup> Mark Mackinnon, "For Muslims, Investing by the Book Increasing, and Increasingly Profitable" *Globe and Mail* (18 November 2005) B10.

<sup>11</sup> Ken West, "[Letter to the Editor] Shinaz and Sharia" *Globe and Mail* (9 September 2005) A16. See also the letter to the editor by The Very Rev. Lois Wilson, "Which Sharia?" *Globe and Mail* (2 September 2005) A16, in which Wilson calls the Sharia an "ancient code."

<sup>12</sup> For historical introductions to Islamic law, its origins and evolutions, see Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1993) [Schacht, *Introduction*]; Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1997); Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th–10th Centuries, C.E.* (Leiden: Brill, 1997); Yasin Dutton, *The Origins of Islamic Law: The Qur'an, the Muwatta' and Madinan 'Amal* (London: Curzon Press, 1999); and Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005).

<sup>13</sup> For discussion of the curricula characteristic of Islamic legal education in the

but only a small fraction of its verses can be characterized as “legal.”<sup>14</sup> Likewise, the traditions of Muhammad are often highly contextualized, and their meanings are informed by that context. Furthermore, as both Muslim jurists and Western scholars of Islam have noted, the *hadith*, as the embodiment of an earlier oral tradition, cannot always be relied upon as authentic statements of what the Prophet said, did, or decided.<sup>15</sup> While both the Qur’an and the *hadith* occupy an undeniable position of authority within Islamic jurisprudence, they alone do not constitute the Islamic legal tradition. The Sharia tradition comprises considerable juridical literature, much of which illustrates that jurists often went beyond scripture, utilizing their discretion in various ways to articulate the law. In the field of medieval legal theory, or *usul al-fiqh*, jurists developed various interpretive methodologies that balanced the need for authority, legitimacy, and discretion in a way that ensured a just outcome under the circumstances. Where scripture was otherwise silent, they extended scriptural rules through analogical reasoning (*qiyas*), balanced competing precedents in light of larger questions of justice (*istihsan*), and legislated pursuant to public policy interests (*maslaha mursala*). Muslim jurists did more than simply read the Qur’an and *hadith* as if they were transparent and determinately meaningful codes.<sup>16</sup> In other words, it is highly misleading to suggest that Islamic law is constituted by the Qur’an

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medieval Muslim world, see George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh: Edinburgh University Press, 1981).

<sup>14</sup> Various commentators have suggested that there are anywhere from 80 to 600 verses of the Qur’an whose content can be called legal. For instance, Mohammad Hashim Kamali, in *Principles of Islamic Jurisprudence*, 3d ed. (Cambridge: Islamic Texts Society, 2003) at 26, states that the Qur’an contains 350 legal verses. Abdullahi Ahmad An-Na’im, in *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse: Syracuse University Press, 1990) at 20, notes that some scholars consider just 500 or 600 of the over 6,000 verses in the Qur’an to be legally-oriented; however, of those, most deal with worship rituals, leaving only about 80 verses that deal with legal matters in a strict sense.

<sup>15</sup> Many authors address the oral tradition that culminated in the *hadith* literature, and provide alternative methods of understanding their historical import. Some, such as Joseph Schacht in *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1967), argue that the *hadith* are complete forgeries and cannot be relied upon for knowledge about what the Prophet Muhammad said or did during his life. Others, such as Fazlur Rahman, in *Islamic Methodologies in History* (Karachi: Central Institute of Islamic Research, 1965), suggest that the *hadith* tradition reflects the collective memory of Muslims about the Prophet, although some certainly reflect later historical political and theological controversies. Khaled Abou El Fadl, in *Speaking in God’s Name: Islamic Law, Authority and Women* (Oxford: Oneworld Publications, 2001), suggests that the *hadith* literature represents an “authorial enterprise” and that the challenge is to determine the extent and degree to which the Prophet’s voice has been preserved.

<sup>16</sup> For general treatments of the principles of legal analysis in Islamic law, see

and traditions of the Prophet without further recourse to techniques of juristic analysis that allowed the law to remain socially responsive but at the same time prevented the erosion of the legal tradition's authority.

Islamic law arose through a systematic process of juristic commentary and analysis that stretched over centuries. During this process, different interpretations of the law arose, leading to competing "interpretive communities"<sup>17</sup> of the law, or what are often called schools of law (*madhahib*, singular *madhhab*), all of which were historically deemed equally orthodox.<sup>18</sup> Over time, the number of interpretive legal communities, or *madhahib*, diminished to the extent that there are now four remaining Sunni legal schools and only three Shi'ite schools. The Sunni schools are the Hanafi, Maliki, Shafi'i and Hanbali schools. The Hanafi school is predominant in South Asia and Turkey, while the Maliki is most often found in North Africa. The Shafi'i school is dominant in Southeast Asia and Egypt, while the Hanbali school is found in the Gulf region. The Shi'ite schools are Ja'fari (mostly in Iran),<sup>19</sup> Isma'ili,<sup>20</sup> and Zaydi. Consequently, if one wants to determine a rule of Islamic law, one will often start with a text on substantive law rather than the Qur'an or traditions of the Prophet. One may also consult a summary of substantive law (*mukhtasar*) or an elaborate encyclopedia written by a jurist within the particular *madhhab* to which one belongs.<sup>21</sup> Furthermore, if one inquires into the historical development of doctrine around a given issue, one may find that the law and legal analysis manifest distinct shifts based on contexts yet to be determined by further research.<sup>22</sup>

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Kamali, *supra* note 14; Wael Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997) [Hallaq, *History*]; Bernard G. Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Din al-Amidi* (Salt Lake City: University of Utah Press, 1992); Bernard G. Weiss, *The Spirit of Islamic Law* (Athens: University of Georgia Press, 1998); and Muhammad Khalid Masud, *Islamic Legal Philosophy: A Study of Abu Ishaq al-Shatibi's Life and Thought* (Delhi: International Islamic Publishers, 1989).

<sup>17</sup> The phrase "interpretive community" is borrowed from the work of Stanley Fish, *Is There a Text in this Class? The Authority of Interpretive Communities* (Cambridge: Harvard University Press, 1980) at 14.

<sup>18</sup> For the history of the legal *madhhab*, see Melchert, *supra* note 13; Hallaq, *supra* note 13; and Makdisi, *supra* note 14.

<sup>19</sup> For an introduction to Shi'ite law, see Hossein Modarressi, *An Introduction to Shi'i Law: A Bibliographical Study* (London: Ithaca Press, 1984).

<sup>20</sup> On the Ismailis, see Farhad Daftary, *The Ismailis: Their History and Doctrines* (Cambridge: Cambridge University Press, 1990).

<sup>21</sup> For a bibliographic listing of medieval Arabic *fiqh* sources from the various Islamic legal schools, see John Makdisi, "Islamic Law Bibliography" (1986) 78 *Law Libr. J.* 103.

<sup>22</sup> For an example of how a diachronic analysis of *fiqh* can illustrate historical

For instance, under Islamic law a husband has the right to unilaterally divorce his wife through a procedure known as *talaq*; a wife, on the other hand, does not have this power, unless negotiated as a condition of her marriage contract (*'aqd al-nikah*).<sup>23</sup> Without such condition, she must petition a court to issue a divorce. A wife can seek either a for-cause divorce or a no-cause divorce. In a for-cause divorce, she alleges some fault on the part of her husband – such as failure to support, abuse, or impotence – and seeks a divorce while preserving her financial claims against her husband. In a no-cause or *khul'* divorce, a woman asserts no fault by her husband and, in order to be freed from the marriage, agrees to forgo any financial claim against him.<sup>24</sup> The difference between a husband's and a wife's right of divorce in this example is fundamentally a matter of the degree and scope of the power to assert one's liberty interests.

According to the Shafi'ite jurist Abu al-Hasan al-Mawardi (d. 1058), a husband's unilateral power to divorce is based on a Qur'anic verse which reads: "O Prophet, when you divorce women, divorce them at their prescribed periods."<sup>25</sup> One might ask why this verse should be read as giving a man (but not a woman) a substantive unilateral right to divorce his spouse, rather than as a mechanism prescribing the procedure a man should follow when divorcing his wife. Read as providing a procedural

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developments in Sharia analysis that seem to respond to changing social contexts, see the treatment on the notion of *'awrah* (one's private parts to be covered), and the rule on the head scarf in Abou El Fadl, *supra* note 16 at 255–60, nn. 106, 107, 123–129. For an illustration of how jurists have utilized their own discretion to construct and create rules of law, see Anver M. Emon, "Natural Law and Natural Rights in Islamic Law" (2004) 20 J.L. & Religion 351.

<sup>23</sup> One of the formalities of a valid Islamic marriage is that the parties have a marriage contract, which can be analogized to a premarital agreement. There is a lengthy juristic tradition of allowing parties to a marriage to negotiate certain provisions and create conditions in a marriage contract. One such condition is for the husband to grant his wife the power to unilaterally divorce herself. This procedure is known as *tafwid al-talaq*; see Haifaa A. Jawad, *The Rights of Women in Islam* (New York: St. Martin's Press, 1998) at 35–40; Lucy Carroll, *Talaq-i-Tafwid: The Muslim Woman's Contractual Access to Divorce* (1996), online: Women Living Under Muslim Laws <<http://www.wluml.org/english/pubsfulltxt.shtml?cmd%5B87%5D=i-87-2684>>. For a general discussion on marriage law and the marriage contract, see Susan Spector, "Introduction" in *Chapters on Marriage and Divorce* (Austin: University of Texas Press, 1993).

<sup>24</sup> For discussions on this distribution of rights scheme concerning the right of divorce, see Spector, *ibid.* at 27–39, 50–52; and Jawad, *ibid.* For a survey of how modern Muslim states deal with divorce rights schemes, see Abdullahi A. An-Na'im, ed., *Islamic Family Law in a Changing World: A Global Resource Book* (London: Zed Books, 2002).

<sup>25</sup> Qur'an 65:1.



mechanism, the verse arguably grants, implicitly at least, a right of unilateral divorce to *both* men and women, while requiring men to utilize their power in a certain procedural manner. Historically, however, most jurists held the verse to substantively grant men a unilateral power of a divorce. The challenge for jurists was to provide a rationale for extending the substantive right of divorce only to men.<sup>26</sup> For example, al-Mawardi argued that since the duty to provide support and maintenance (*mu'una*) falls exclusively to the husband, he is entitled to certain special rights.<sup>27</sup> Second, and most troubling, al-Mawardi stated that the power of *talaq* is denied to a woman because her whims and desires overpower her (*shahwatuha taghlibuha*) and hence she may be hasty to pronounce a divorce at the first sign of marital discord; men, on the other hand, dominate their desires better than women and are therefore less likely to hastily invoke the *talaq* power.<sup>28</sup>

Certainly many readers, Muslim and otherwise, may find al-Mawardi's reasoning not only patriarchal but frankly offensive. The rationale provided for distributing the right of *talaq* to men and not women is hardly persuasive within a contemporary liberal democratic context where gender equality is generally an honoured and respected norm.<sup>29</sup> Consequently, one might suggest that the patriarchal tone of al-Mawardi's reading was elemental to a particular context that made this rule meaningful, but which no longer prevails. To do so need not necessitate countering the Qur'anic verse. Rather the Qur'anic verse noted above is arguably broad and ambiguous enough to tolerate multiple readings. As discussed below, however, the challenge of reforming Islamic law today is not as simple as arguing that a particular reading or rationale is logically unpersuasive from a jurisprudential perspective.

### 3. *Islamic Law and Institutions*

Historically, Islamic law was immersed not only within a cultural context, but also within an institutional context that transformed what may have been moral norms into enforced legal rules. The institutional frameworks for adjudication and enforcement were the means by which Sharia was applied to actual cases in controversy. Whether deciding rules of pleading, sentencing, or litigation, for instance, the way jurists determined and at times constructed rules, individual rights, and entitlements was significantly influenced by assumptions of institutions

<sup>26</sup> Al-Mawardi, *al-Hawi al-Kabir* 10:111.

<sup>27</sup> *Ibid.*, 10:114.

<sup>28</sup> *Ibid.*, 10:114.

<sup>29</sup> See, for instance, s. 15 of the Canadian *Charter of Rights and Freedoms*, *supra* note 7.

responsible for adjudication and enforcement.<sup>30</sup> The law was not simply created in an academic vacuum devoid of real-world implications. Rather, the existence of institutions of litigation and procedure contributed in part to the determination and meaningfulness of the law.

In fact, the procedural institutions of medieval adjudication were so important that resolving a particular controversy may not have been dependent upon some doctrinal, substantive determination of the law. For instance, the medieval Shafi'ite jurist Abu al-Ma'ali al-Juwayni (d. 1098) posed a hypothetical case about a Hanafi husband and a Shafi'i wife. Suppose the husband declares to his wife in a fit of anger that he divorces her. According to al-Juwayni, the Hanafis hold the pronouncement invalid and ineffective, whereas the Shafi'is consider it valid. Are the husband and wife still married? According to the husband they are married, but according to the wife they are divorced. If each party insists that his or her view is correct, and claims to be justified in doing so, which view should prevail? To resolve the dispute, the parties must resort to a rule of law process, namely adjudication. They will submit their case to a *qadi*, whose decision is based on his own analysis and binding on both parties. The *qadi*'s decision is authoritative, not because it accords with one specific legal rule or another, but because of the imperium tied to his institutional position within a Sharia rule of law system.<sup>31</sup>

In the eighteenth century, the institutional structures that gave real-world significance to Islamic law began to be dismantled or modified. As discussed below, pursuant to the Capitulation agreements with the

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<sup>30</sup> For examples of how jurists have created rules of pleading, litigation and sentencing in light of presumptions of an efficacious institutional framework, see my discussion of juristic discretion and rights in Anver M. Emon, *The Natural Law and Natural Rights Tradition in Islamic Law* (Ph.D. Dissertation, University of California at Los Angeles, 2005) [unpublished] c. 6; and Anver M. Emon, "Huquq Allah and Huquq al-'Ibad: A Legal Heuristic for a Natural Rights Regime" (2006) 13 *Islamic L. & Soc.* 325.

<sup>31</sup> Abu al-Ma'ali al-Juwayni, *Kitab al-Ijtihad min Kitab al-Talkhis* (Damascus: Dar al-Qalam, 1987) at 36–38. For a discussion of al-Juwayni's hypothetical, see Abou El Fadl, *supra* note 16 at 149–50. Elsewhere Abou El Fadl argues that in the hypothetical above, if the judge decides in favour of the husband, the wife should still resist as a form of conscientious objection; see e.g. Abou El Fadl, *The Authoritative and Authoritarian in Islamic Discourses: A Contemporary Case Study*, 3d ed. (Alexandria, Virginia: al-Saadawi Publications, 2002) at 60, n. 11. However this position seems to ignore the fact that Sharia as a rule of law system is more than an abstract doctrine of fundamental values that governs behavior. Rather, as suggested in this study, Sharia as a rule of law system implies the existence of institutions to which members of a society may grant authority either through certain social commitments or even through the very act of seeking the court to adjudicate disputes.

Ottoman Sultan, non-Muslim Europeans were exempted from the jurisdiction of Ottoman courts. In Egypt, the use of the Mixed Court to hear cases involving non-Muslim parties and interests further eroded the extent to which Sharia was applied. When Egypt adopted the Napoleonic Code in the late nineteenth century and created national courts to adjudicate it, Sharia courts and the law they applied began to lose relevance and institutional efficacy in resolving legal disputes. Today, the idea of Sharia as a rule of law system suffers from a discontinuity between the texts that embodied the juristic tradition and the application of those texts to day-to-day situations. Without the institutions of case-by-case adjudication, we are left with texts, containing the abstract doctrine of surviving interpretive communities of Islamic law, that reflect a cultural context long gone, and bear few if any institutional structures apt to mediate between text and context. Thus, when we speak of Islamic law today, we are not generally referring to institutions of justice, but rather to juristic doctrines reflecting the historicity of juristic subjectivity.

Certainly one might suggest that if the cultural context changes, so too should the law. But part of the problem with legal reform in Islamic law is that the progression of history has brought the demise of the institutional setting that made Sharia a rule of law system, rather than just doctrinal rules of law existing in the abstract. As doctrine in the abstract, it has been transformed from a rule of law system to a system of ideology. As suggested below, with colonialism, colonial resistance, post-colonial nation-building and Islamization programs, Muslims have often viewed Islamic legal doctrine (whether positively or negatively) in light of developing political ideologies of identity rather than as part of a rule of law system. As such, a change to Islamic rules of law is viewed as an attack on the political identity and ideology they are made to reflect and represent.

#### *4. Sharia in the Nineteenth and Twentieth Centuries*

Many in the Ontario Sharia debate seemed to believe steadfastly that Islamic law is so fundamentally rigid and different from Canadian law that no synthesis could be possible. Interestingly, this view mimics the findings of Orientalist scholars of Islamic law in the late nineteenth and early twentieth centuries who advised governments such as those of Britain and France about how best to understand Muslims for the purpose of managing and maintaining colonial power while keeping the indigenous peoples content. To understand Muslims and Muslim law, and perhaps to (re)present Islamic law to Muslims themselves, colonialists and their Orientalist advisors often reduced the Muslim experience to what was expressed in specific texts they deemed authoritative. The

colonial use of texts to understand Muslims and Islamic law led not only to the development of textual experts, but also to the phenomenon of the textual expert representing Muslim and Islamic law in strict accordance with the image presented in the text. As Edward Said has argued, texts can “create not only knowledge but also the very reality they appear to describe.”<sup>32</sup> By approaching Islamic law reductively as a text-based tradition, colonialists could attempt to “understand” the Muslim and Islamic experience by mere reference to text, while ignoring the significance of context and contingency that is often taken into account in working rule of law systems.<sup>33</sup> Deviation from the authentic text was considered dangerous and *ultra vires*, if not an aberration from the truth or true Islamic law.<sup>34</sup> As a text-based law, Islamic law could be viewed as an unchanging, inflexible religious code, which ultimately aided colonialists in both placating their Muslim subjects by playing up to their religious interests, and marginalizing the tradition in various legal sectors as contrary and incompatible with progress and modernization in the law.

*A) Anglo-Muhammadan Law: A Reductive Concept of Law*

Under the initial leadership of Warren Hastings, Governor General of India from 1773 to 1784, the British developed mechanisms by which they could both understand their Muslim subjects, as well as accommodate their religious preferences through the implementation of British-inspired Sharia courts. These courts ultimately created what has come to be called “Anglo-Muhammadan Law,” a body of law that fused Islamic legal principles with common law principles to provide a system of legal redress for Muslims living in British India concerning issues such as marriage, divorce, and inheritance.

As the court was often staffed by British judges, its first task was to determine authoritative and easily accessible sources of Islamic law. To understand the Sunni tradition, British judges in Anglo-Muhammadan courts relied on a translation of the four-part Hanafi legal text, *al-Hidaya*,

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<sup>32</sup> Edward Said, *Orientalism* (New York: Vintage Books, 1979) at 94 [emphasis in original].

<sup>33</sup> For illustrations of how legal substance and contextual analysis contributed to legal determinations in medieval Islamic law, see David Powers, *Law, Society, and Culture in the Maghrib, 1300–1500* (Cambridge: Cambridge University Press, 2002). For commentary on how even sophisticated textual approaches were subject to grave error in the British Indian context, see Michael R. Anderson, “Islamic Law and the Colonial Encounter in British India” in David Arnold and Peter Robb, eds., *Institutions and Ideologies: A SOAS South Asia Reader* (London: Curzon Press, 1993) at 65–185.

<sup>34</sup> For instances of this attitude, see the discussion below on Anglo-Mohammadan case law.

by al-Marghinani (d. 1197).<sup>35</sup> Notably, in the larger context of medieval Hanafi *fiqh* texts, *al-Hidaya* is a short manual of Hanafi law that does not consistently provide the underlying logic or reasoning for the rules of the school. Badr al-Din al-‘Ayni’s (d. 1451) multi-volume commentary on al-Marghinani’s work, *al-Binaya: Sharh al-Hidaya*, provides greater jurisprudential insight into the Hanafi legal tradition.<sup>36</sup> Al-‘Ayni’s work was not translated, however, and generally was not referred to in the Anglo-Muhammadan courts.<sup>37</sup> Rather, Anglo-Muhammadan judges were content to rely on Charles Hamilton’s flawed translation of *al-Hidaya*.<sup>38</sup> Notably, Hamilton did not translate directly from the original Arabic text. Instead, Hastings commissioned three Muslim clerics to translate the Arabic text into Persian, which Hamilton then translated into English in 1791.<sup>39</sup> This translated legal treatise provided the British with a textual foundation by which to understand and apply Islamic law, and thereby build relations with their Muslim subjects. In fact, in his dedication of the translated text to Warren Hastings, Hamilton states:

However humble the translator’s abilities, and however imperfect the execution of these volumes may be, yet the design itself does honour to the wisdom and benevolence by which it was suggested; and if I might be allowed to express a hope upon the subject, it is, that its future beneficial effects, in facilitating, the administration of Justice throughout our Asiatic territories, and uniting us still more closely with our Mussulman subjects, may reflect some additional lustre on your [Hastings’s] Administration.<sup>40</sup>

Originally, Hamilton’s translated text comprised four volumes. As a large and voluminous work that was often not easily available by the late nineteenth century, however, the translated *Hedaya* proved very costly for students at the Inns of Court in Britain who wanted to practise law in India and needed to purchase the text to qualify themselves for the English Bar. Consequently, in 1870, the editor of the second edition of the *Hedaya*, Standish Grove Grady, stated in his advertisement to the second edition:

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<sup>35</sup> Al-Marghinani, *al-Hidaya: Sharh Bidayat al-Mubtadi’*, ed. by Muhammad Darwish (Beirut: Dar al-Arqam, n.d.).

<sup>36</sup> Al-‘Ayni, *al-Binaya Shah al-Hidaya*, ed. by Amin Salih Sha’ban (Beirut: Dar al-Kutub al-‘Ilmiyya, 2000).

<sup>37</sup> The Anglo-Muhammadan courts utilized very few Islamic sources in translation. For a discussion on the use of limited translations of Islamic texts in the Anglo-Muhammadan courts, see Anderson, *supra* note 33 at 205–23.

<sup>38</sup> *The Hedaya*, 2d ed. trans. by Charles Hamilton (Delhi: Islamic Book Trust, 1982).

<sup>39</sup> Anderson, *supra* note 33 at 174.

<sup>40</sup> *The Hedaya*, *supra* note 38 at iii [emphasis added].

As the First Edition, by Mr. Hamilton, has been some time out of print; its bulk (four quarto volumes) is not calculated to assist reference to its pages; and its price had increased in proportion to the difficulty of obtaining it, I felt it a duty to publish a new Edition, in order to bring it somewhat more within the reach of the students, not only with reference to its size, but its cost. ...A large portion of the work having become obsolete, in consequence of the abolition of slavery, and from other causes, I have expunged the Books containing those portions from the present Edition, they being more interesting to the antiquarian ... than useful to the student or practitioner, and their insertion would not only have increased the bulk of the volume, but its expense also.<sup>41</sup>

In other words, for reasons of cost and utility, Grady removed whole sections of Hamilton's version of *al-Hidaya*. The reduction in price may well have provided relief to students seeking admission to the English Bar and training for their legal exams. But Grady's hope was not solely about the financial wherewithal of law students. He continued:

Although the present Edition has been published with a view of assisting the student to prosecute his studies, yet the hope is entertained that the Judge, as well as the Practitioner, will find it useful, particularly in those provinces where the Mohammedan law demands a greater portion of the attention of the judicial, as well as that of the practitioner. It is hoped, also, that it may be found useful in promoting the study of the law in the several Universities in India, it being advisable to assimilate the curriculum in both countries as much as possible.<sup>42</sup>

The hope, therefore, was that Hamilton's translation of a Persian version of al-Marghinani's Arabic text, as edited and shortened in the second edition, would be a useful source for judges and practitioners adjudicating Islamic legal concerns of Muslims in India. That Muslims would be subjected to this doubly reductive conception of Islamic law, without reference to custom or context, was further emphasized in the *Muslim Personal Law (Shariat) Application Act (1937)*, in which the British enacted that Muslim personal law would apply to all Muslims throughout India, to the full and complete exclusion of customary practice. In fact, section 2 of the Act states that "[n]otwithstanding any customs or usage to the contrary" in matters involving inheritance, marriage, dissolution, financial maintenance, dower, gifts and other matters of personal status and finance, "the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law

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<sup>41</sup> Standish Grove Grady, "Advertisement to the Second Edition" in *The Hedaya*, *supra* note 38 at iv.

<sup>42</sup> *Ibid.*

(*Shariat*).<sup>43</sup> Nowhere in the Act does the government state how it defines Islamic law or “*Shariat*,” but given the prominent usage of texts such as Hamilton’s *Hedaya*, the brand of Islamic law proffered to Muslims as their own was reduced to a codified state of anaemia, deficient in the discretionary approaches needed to take non-textual factors into account.

This reductive approach is best illustrated in the way British judges adjudicated Islamic law in Anglo-Muhammadan courts. British judges often took a narrow view of what counted as proper and applicable Islamic law. For instance, in the 1903 case *Baker Ali Khan v. Anjuman Ara*, the decision written by Lord Arthur Wilson of the Judicial Committee of the Privy Council illustrates how hesitant British judges were to go beyond the confines of translated texts or to analyze and choose between conflicting Islamic precedent.<sup>44</sup> Yet despite their hesitancy, the same British judges did not seem troubled if they modified the dominant Islamic legal ruling when they felt the Islamic tradition made little meaningful sense in light of their own common law training. The *Baker Ali Khan* case involved a testatrix who created a charitable trust (*waqf*) by a will (*wasiyya*). The testatrix was the daughter of the former king of Oudh and a member of the Shi’ite faith. She had three great-grandchildren through her son, including one Baker Ali, a minor. Before she died, the testatrix had executed a document deemed to create a charitable trust (*waqf*) for religious purposes. Pursuant to the document Baker Ali and his guardian Sadik Ali were to be executors and trustees of the *waqf*. The other two great-grandchildren argued that all three were equally entitled to one-third of the testatrix’s estate, including that contained in the *waqf* document.

To decide the case, the Judicial Committee had to contend with an 1892 precedent decided by Mahmood J. of the Allahabad High Court in *Agha Ali Khan v. Altaf Hasan Khan*, in which the learned Muslim justice held that, under the Shi’ite law, one cannot create a *waqf* through a bequeathing instrument like the *wasiyya*.<sup>45</sup> He argued that, although valid

<sup>43</sup> Asaf Ali Asghar Fyzee, *The Muslim Personal Law (Shariat) Application Act, 1937*, reproduced in *Outlines of Muhammadan Law*, 3d ed. (Oxford: Oxford University Press, 1964) at 460–62.

<sup>44</sup> *Baker Ali Khan v. Anjuman Ara* (1903) 30 IA 94, reprinted in Asaf Ali Asghar Fyzee, *Cases in the Muhammadan Law of India, Pakistan and Bangladesh*, 2d ed. by Tahir Mahmood (New Delhi: Oxford University Press, 2005) at 4–16 [*Baker Ali Khan*].

<sup>45</sup> *Agha Ali Khan and another (Plaintiffs) v. Altaf Hasan Khan and another (Defendants)* (1892), 14 I.L.R. All. 429 [*Agha Ali Khan*]. For those not familiar with this citation, the source citation indicates that this case was decided in 1892 and is contained in the Indian Law Reports, Allahabad Series, volume 14 and begins on page 429. I would especially like to thank Sooin Kim, Research Librarian at the Bora Laskin

under Hanafi law of the Sunni tradition, such a *waqf* was invalid under Shi'ite law. Mahmood J. criticized early nineteenth century courts that had failed to apply Shi'ite law to Shi'ite parties, and had instead assumed that the Sunni law was identical to the Shi'ite law on this issue.<sup>46</sup> Mahmood J. said: "I seriously doubt whether in those days the *Shia* law was ever administered by the Courts of British India as the rule of decision, even when *Shias* were concerned."<sup>47</sup> He went on to state that the Privy Council began to apply Shi'ite law to cases involving Shi'ite Muslims only by the mid-nineteenth century.<sup>48</sup>

Having established the central relevance of Shi'ite law, Mahmood J. began to analyze the Shi'ite law on *waqf* and the extent to which a Shi'ite Muslim could grant a *waqf* through a testamentary bequest enforceable upon his death. Central to his discussion was a review of various Shi'ite legal sources. He started with an analysis of the "Sharáya-ul-Islám," written by al-Muhaqqiq Hilli (d. 1277 or 1278), an early Shi'ite text that was translated by Neil Baillie as *Imameea Law*.<sup>49</sup> The problem for the later *Baker Ali* court was that Mahmood J. also cited significant commentaries on Hilli's text, not translated into English,<sup>50</sup> including

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Law Library, Faculty of Law, University of Toronto, for locating this case in the I.L.R.

<sup>46</sup> *Agha Ali Khan, ibid.* at 449.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> For a reference indicating that Baillie's work is a translation of the Sharáyi-ul-Islám that Mahmood J. reviews, see *Agha Ali Khan, ibid.* at 447, where he quotes Baillie's translation and identifies it as being from Hilli's text. For the Arabic version of the text, see al-Muhaqqiq al-Hilli, *Shara'i' al-Islam fi Masa'il al-Halal wa al-Haram*, vols. 1 and 2 (Beirut: Markaz al-Rasul al-A'zam, 1998).

<sup>50</sup> The transliterated spelling of the texts is that used by Mahmood J. Where I provide bibliographic information for each source, the transliteration follows the International Journal of Middle East Studies style. Mahmood J. refers to another text that he calls *Durus* and considers to be a work of higher authority than the *Jámi-ul-Shattát*; see *Agha Ali Khan, supra* note 46 at 452. A bibliographic reference for this citation was not found during my research.



*Masálik-ul-Afhám*,<sup>51</sup> *Jawáhir-ul-Kalám*,<sup>52</sup> *Jámi-ul-Shattát*,<sup>53</sup> *Sharah Lumah Dimashkia*<sup>54</sup> and *Jámi-ul-Maqásid*.<sup>55</sup>

After analyzing these sources, Mahmood J. held that under the Shi'ite law, as opposed to the Sunni law, a *waqf* is considered a contract (*aqd*).<sup>56</sup> As a contract, it has various conditions precedent, offer and acceptance in particular, that must be satisfied before it will be considered valid. Under Shi'ite law, a *waqf* is not a unilateral disposition of property; rather it is a “contract *inter pares*,” requiring the two parties involved to make an *inter vivos* exchange. In other words, *seisin* of the *waqf* property must be delivered.<sup>57</sup> In cases where the *waqf* is for the benefit of the poor and mendicant, the requirement of acceptance is relaxed as no specific party can effectuate acceptance.<sup>58</sup> But in all other cases, there must be an actual exchange, or what Mahmood J.'s Arabic sources called *tanjíz*. Under this doctrine, any contract, *waqf*, or otherwise must take effect immediately and is not conditional upon some future event.<sup>59</sup> Citing various Shi'ite sources, Mahmood J. held that, since a *waqf* is a contract that requires offer and acceptance, and since a valid contract must meet the condition of *tanjíz*, a *waqf* created by a testamentary instrument that takes effect only upon one's death is invalid.

Mahmood J.'s decision was the leading case on the creation of *waqfs* by testamentary bequests in Shi'ite law until the Judicial Committee of the Privy Council decided *Baker Ali*, the facts of which are described above. The Judicial Committee were faced with a lower court decision written by a judge well-versed in Arabic and Shi'ite sources, who went beyond the sources translated into English. Despite his inclusion of both

<sup>51</sup> Zayn al-Din (b. 'Ali al-Shahid al-Thani), *Masalik al-Afham*; for bibliographical and manuscript information, see Hossein Modarressi, *An Introduction to Shi'i Law* (London: Ithaca Press, 1984) at 80–81.

<sup>52</sup> For a 43-volume edition of this text, see Muhammad Hasan al-Najafi, *Jawahir al-Kalam fi Sharh Shara'i' al-Islam* (Beirut: Dar Ihya' al-Turath al-'Arabi, n.d.).

<sup>53</sup> Mahmood J. states that he used the Tehran edition of *Jámi-ul-Shattát*, that it is in print and widely available. Consequently he chose not to quote extensively from the text. For a copy of the text, see Abu al-Qasim (b. Muhammad Hasan Qummi, d. 1816), *Jami' al-Shattat* (Tehran: Danishkadah Huquq va 'Ulum-i-Siyasi-I Danishgah-I Tihran, 2000) 3 vols.

<sup>54</sup> For a 10-volume edition of this text, see Muhammad (b. Jamal al-Din Makki al-'Amili), *Sharah Lumah Dimashkia* (Beirut: Dar Ihya' al-Turath al-Arabi, n.d.).

<sup>55</sup> 'Ali b. al-Husayn al-Karaki, *Jami' al-Maqasid fi Sharh al-Qawa'id* (Beirut: Mu'assasat Al al-Bayt li Ihya' al-Turath, 1991) 13 vols.

<sup>56</sup> *Agha Ali Khan*, *supra* note 45 at 450.

<sup>57</sup> *Ibid.* at 450–56.

<sup>58</sup> *Ibid.* at 453–54.

<sup>59</sup> *Ibid.* at 455–57.

the Arabic versions and their English translations in the opinion, Mahmood J.'s ruling raised concerns for the Judicial Committee about how to define authoritative sources of Islamic law and delineate the bounds of judicial activity and interpretation amidst an inherited tradition of religious law.

Arguing against Mahmood J.'s decision, the Judicial Committee attacked his reliance on the untranslated Arabic sources. In his opinion, Lord Wilson noted that Mahmood J.'s decision that a Shi'ite cannot make a *waqf* by will was not based on "any positive statement by any of the recognised authorities on Shiah law, but in the reasoning of Mahmood J. upon a number of more or less ambiguous texts."<sup>60</sup> For the Law Lords of the Judicial Committee, while Mahmood J. was indeed a well-respected jurist and an expert of Islamic law, his analysis relied on ancient texts that presented far too much indeterminacy in the law and thus should not have been consulted. It did not matter that the sources themselves were (and still are) significant within the Shi'ite tradition, or that they reflected a general agreement on the conception of a *waqf* as a contract requiring offer, acceptance, and an *inter vivos* transfer. Despite Mahmood J.'s reasoning, translation of texts, and inclusion of the original Arabic versions in the footnotes, the Law Lords decided that the untranslated sources led to more ambiguities than determinate answers.

As a general principle, the Law Lords believed prudence and caution required recognition of the dangers of "relying upon ancient texts of the [Mahomedan] law, and even precepts of the Prophet himself, of taking them literally, and deducing from them new rules of law."<sup>61</sup> For the Law Lords, there was a very real danger of straying too far from the "authentic" tradition of Sharia:

Whether reliance be placed upon fresh texts newly brought to light, or upon fresh logical inferences newly drawn from old and undisputed texts, [t]heir Lordships think it would be extremely dangerous to accept as a general principle that new rules of law are to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however authoritative, when the ancient doctors of the law have not themselves drawn those conclusions.<sup>62</sup>

The Judicial Committee regarded expanding analysis of Islamic law to older texts as minatory, despite the authority of those texts within the Shi'ite tradition.

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<sup>60</sup> *Baker Ali Khan*, *supra* note 44 at 14.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

The contest between Mahmood J. and the Judicial Committee seemed to centre on defining authoritative sources, and whether qualification was limited to sources translated into English. The Law Lords were content to rely on the “more important of those [Shi’ite] texts [which] have long been accessible to all lawyers.”<sup>63</sup> But accessibility here has more to do with translation than with the significance of texts to the legal tradition being analyzed. Certainly the *Sharáya-ul-Islám* is an important Shi’ite text; but for the British judges, it was also accessible because it was translated into English. According to Mahmood J., another Shi’ite text, *Jámi-ul-Shattát*, was also widely accessible. But the latter text was not translated into English.<sup>64</sup> For British judges to rely on untranslated texts of Islamic law would clearly have introduced administrative problems of accessibility given that not all lawyers practising in Anglo-Muhammadan courts necessarily knew Arabic, let alone Persian.

The Law Lords were also concerned about the extent to which one should interpret from the early sources to find legal resolution in contemporary disputes. They criticized Mahmood J. for utilizing too much discretionary analysis in his critical reading of the “ancient” texts. While they recognized that Mahmood J.’s analysis of those texts on some issues may have been directly relevant to the case at hand, they were concerned that the texts themselves presented no unanimity. From the analysis above, however, it seems that Mahmood J. was convinced that the texts demonstrated that *awqaf* (sing. *waqf*) created by testamentary bequests were invalid because of the lack of immediate acceptance by the beneficiary pursuant to basic principles of Islamic contract law. But the Judicial Committee was not interested in how *awqaf* could be contracts under Shi’ite law, and thereby subject to certain rules of formation. Instead the Law Lords argued that Mahmood J. exceeded the bounds of judicial analysis by excessive interpretation of the early texts.<sup>65</sup>

Particularly remarkable about the Judicial Committee’s judgment was that, although Shi’ite precedent invalidated a *waqf* created by a testamentary bequest, the Court held nevertheless that a Shi’ite could use a will to create a *waqf*. The Law Lords argued, using common law logical analysis, that a Shi’ite could make an *inter vivos* gift, whether as a *waqf* or not. A Shi’ite could also make a gift by will. Logically, they argued, a Shi’ite should also be able to make a *waqf* by will. Completely ignoring the Shi’ite jurisprudence that a *waqf* is a contract, the Judicial Committee recharacterized the *waqf* as a gift and, moreover, used the case as an

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<sup>63</sup> *Ibid.* at 14–15.

<sup>64</sup> *Agha Ali Khan*, *supra* note 45 at 451.

<sup>65</sup> *Baker Ali Khan*, *supra* note 44 at 15.

opportunity to reduce the scope of Islamic law and the extent to which competing sources could be investigated for conflicting precedent.

The effect of the *Baker Ali* decision was not only to create a doctrine of limited interpretation, but also to fundamentally affect the way Muslims conceptualized and understood their own religious tradition. For example, later South-Asian Muslim commentators on Islamic law, such as the much-respected Asaf A. A. Fyzee, relied on the *Baker Ali Khan* case to argue against innovative Islamic legal thinking, and to endorse a theory of law that adhered to existing sources and shied away from interpretivism. He wrote:

The law has been studied, analysed, codified, and commented upon for fourteen centuries, and each country and each madhhab (school or sub-school) has its own appropriate and authoritative texts. Under these circumstances it is undesirable for the present-day Courts to put their own construction on the Koran and hadith where the opinions of text-writers are clear and definite.<sup>66</sup>

As subalterns under colonial rule, even Muslim Indians seemed to adopt colonial discourses of Islamic law, reducing the tradition to a doctrine of prior precedent while denying the possibility of innovative analysis and reasoning.

#### *B) Dismantled Institutions and Diminished Jurisdiction*

From a colonial perspective, Islamic law was a tool of administration and control; but it was also, at times, an obstacle course that had to be traversed to facilitate colonial interests. To secure strong economic ties with the Ottoman Empire, Western powers often negotiated “Capitulation” agreements with the sultan by which both parties secured an acceptable trading relationship while preserving their own domestic interests. Importantly, under such agreements, European foreigners were immune from the jurisdiction of the Ottoman courts of law.<sup>67</sup> Their cases were adjudicated by consuls representing the different European countries. Commercial disputes between foreigners and natives were heard before special tribunals including both foreign and Ottoman judges, or adjudged by ordinary Ottoman courts generally with the presence of a consular official.<sup>68</sup> As local leaders looked to Europe for financial investment and deeper economic relations, they were asked to grant foreigners greater immunity from the application of Sharia law,

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<sup>66</sup> Fyzee, *supra* note 44 at 78.

<sup>67</sup> Jasper Y. Brinton, *The Mixed Courts of Egypt*, rev. ed. (New Haven: Yale University Press, 1968) at 4.

<sup>68</sup> *Ibid.*

thereby expanding consular jurisdiction to manage the legal affairs of foreigners.

From the chaos of venues that arose with consular jurisdiction emerged the Mixed Court, established in Egypt to adjudicate cases that involved a foreign party or implicated a foreign interest (even, in the latter case, if both parties were native Egyptians). Gradually, the Mixed Court acquired greater jurisdiction.<sup>69</sup> Furthermore, in 1883 the Egyptian government adopted the Napoleonic Code as its civil law and created national courts to administer it. The culmination was three Egyptian court systems: the Mixed Courts, the secular National Courts, and the Sharia courts.<sup>70</sup>

Meanwhile, in places like Algeria in the nineteenth century, French colonial officials were concerned that any official support of Islam, in particular its law and legal institutions, might foment active opposition to the colonial regime. Indeed, Islam had “played an important role in mobilization against European colonial rule in nearly all Muslim countries,” and administrators reasoned that to support the prevailing Islamic legal systems would undermine the colonial venture.<sup>71</sup> Furthermore, colonial officials needed to restructure the prevailing traditions to create an active and orderly commercial market favourable to colonial entrepreneurs.

In Algeria, much of the land was tied up in family *waqfs* or trusts that were held in perpetuity under Islamic law. This Islamic legal arrangement undermined French interests in buying and cultivating land for industrial purposes, and ultimately in creating a land market of freely alienable property. The Islamic *waqf* structure, however, ensured that property would remain in a family’s possession without being dismantled into smaller fragments by the Islamic laws of inheritance. To challenge the continuity of these family *waqfs*, the French government designed broad legislation that would bring all property rights under a single regime. At the same time, many Orientalist scholars argued that the Algerian adoption of the family *waqf* was in fact un-Islamic. The colonialist strategy comprised two main tactics: first, to marginalize Islamic law by imposing its own legal orders; and, second, to install its own version of Islamic law by blinding Muslims to the truths of their own legal tradition.

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<sup>69</sup> For a history of the Mixed Courts of Egypt, see *ibid.*

<sup>70</sup> For a discussion of the gradual demise of Sharia courts in Egypt, see Nathan Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge: Cambridge University Press, 1997).

<sup>71</sup> Allan Christelow, *Muslim Law Courts and the French Colonial State in Algeria* (Princeton: Princeton University Press, 1985) at 6-7.

In doing so, the colonialists relied on a text-oriented approach to Islamic law and ignored the underlying local Islamic cultural and customary practices that gave the legal tradition considerable life force.<sup>72</sup>

For colonial powers, Islamic law was considered an obstacle to orderly legal and market systems. In much of the Muslim world at this time:

[m]odern scientific and technical culture ... came to the Muslim world in the nineteenth century as an essentially European import. Often one found that either foreigners or local non-Muslim minority groups had privileged access to modern education and the modern sector of the economy, while the Muslims, although they were politically dominant, were mainly confined to traditional education, to the traditional sector of the urban economy, and to landed wealth. For a Muslim, gaining a position in the modern economic or technical spheres thus involved a departure from traditional roles, as well as competition with foreign or minority groups, who in many cases could manage to be modern without great sacrifice to their social identity.<sup>73</sup>

In time, colonial officials and native collaborators alike considered the Sharia not only fixed and rigid, but also an impediment to progress, modernity, and civilization. They justified their efforts to marginalize the jurisdiction of Islamic law as necessary to bring “civilization” to the Muslims.

In the late nineteenth century, the Ottoman Empire initiated a series of legal reforms that involved adopting and mimicking European legal codes as substitutes for Islamic legal traditions.<sup>74</sup> In many ways, this indigenous response to colonial advancement and legal imposition can be viewed as a subaltern resistance against colonial domination. In offering their own interpretations and codifications of Islamic law, Muslim elite members challenged the occupier’s treatment of Islamic law, but only by attempting to fit Islamic law into a European mould.<sup>75</sup> Medieval Islamic

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<sup>72</sup> David S. Powers, “Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India” (1989) 31 *Comp. Stud. in Soc’y & Hist.* 535.

<sup>73</sup> Christelow, *supra* note 71 at 14–15.

<sup>74</sup> The reforms emanating from this period are called, collectively, the Tanzimat. For a history of the reforms in this period, see Herbert J. Liebesny, *The Law of the Near & Middle East: Readings, Cases and Materials* (Albany: State University of New York Press, 1975) at 46–117.

<sup>75</sup> For a brief study of how subaltern communities might fit their indigenous custom or law within models or frameworks that put their respective traditions in at least the same form as the imposed law of the colonialist, see Sally Engle Merry, “Law and Colonialism” (1991) 25 *Law & Soc’y Rev.* 889.

law had been characterized by a multiplicity of opinions, different doctrinal schools, and competing theories of interpretive analysis. During the Ottoman reform period, however, this complex substantive and theoretical diversity was reduced through a process of selective codification. For instance, when Muslims began to codify Islamic law (such as when the Ottomans drafted the first Islamic code, *The Majalla*<sup>76</sup>), they had to decide which rules would dominate. Would they create a Hanafi, Maliki, Hanbali, or Shafi'i code for those countries that were mostly Sunni? And what would they do about their Shi'ite population? Often, these reformers would pick and choose from different doctrinal schools to reach what they felt was the best outcome. This process of selection (*takhayyur*) and harmonization (*talfiq*) of conflicting aspects of medieval opinions allowed reformers to present a version of Islamic law that paralleled the European model in form and structure; but, in doing so, they reduced Islamic law to a set of positivist legal assertions divorced from the historical, institutional, and jurisprudential contexts that had contributed to its flexibility.<sup>77</sup> As another example, in 1949, Egypt adopted a civil code, borrowed mostly from the French Civil Code, which also incorporated minimal elements of Islamic law. Subsequently, in 1955, the Sharia courts were disbanded in that country.<sup>78</sup> One exception to the dislocation of Sharia, however, was in the area of family law. Although both colonial administrators and Muslim nationalist assemblies modernized other legal areas such as commercial law, they preserved Islamic family law in codified form. Such selectivity in jurisdiction and application arguably placated Islamists who felt threatened by modernization, and who considered the preservation of traditional Islamic family law necessary to maintaining an Islamic identity in the face of an encroaching modernity.<sup>79</sup> This phenomenon was

<sup>76</sup> For an English translation of the *Majalla*, see *The Mejlle: Being an English Translation of Majallah El-Ahkam-I-Adliya and a Complete Code on Islamic Civil Law*, trans. by Charles R. Tyser, D. G. Demetriades and Ismail Haqqi Effendi (Kuala Lumpur: The Other Press, 2001).

<sup>77</sup> On the process of doctrinal selectivity and its effect on the nature of Sharia, see Wael Hallaq, "Can the Shari'a Be Restored?" in Yvonne Yazbeck Haddad and Barbara Freyer Stowasser, eds., *Islamic Law and the Challenge of Modernity* (New York: Altamira Press, 2004) 21; and Hallaq, *History*, *supra* note 16 at 210.

<sup>78</sup> For an historical account detailing the move from Islamic to secular law in Egypt, see Brown, *supra* note 70 at 61–92.

<sup>79</sup> Locating an authentic past respecting the bodies of women within the family has been used to construct modern national identities in post-colonial societies where the past provides an authentic basis for the national identity of new states immersed in a modern world. For an excellent analysis of women, family and nationalism, see Anne McClintock, "Family Feuds: Gender, Nationalism and the Family" (1993) 44 *Fem. Rev.* 61. One exception to this colonially-inspired narrative about the narrowing of Sharia is the case of Saudi Arabia. Colonial powers did not seem to exert much control

widespread across the Muslim world where colonial powers exerted force, and had a profound effect on the Muslim and European understanding of Sharia. In redefining Sharia, reducing its scope, and considering it without reference to history, institution, or context, colonial powers reified the way Sharia was applied and, indeed, understood by European powers and Muslims themselves.<sup>80</sup>

### 5. *The Muslim Response: From Reified Sharia to Identity Politics*

As Muslim nations became independent and embraced Islamization campaigns in the 1970s, the assertion of Islamic law in its traditional form began anew. Faced with the challenges of modernity and increasing globalization, Muslims in these countries asked themselves how far they could modernize without compromising their Islamic commitments. For those Muslims who associated modernization with the hegemonic “Other” and saw it as a challenge to Islamic identity, the historical Sharia in code-like form provided a symbolic and determinate anchor for delineating a monist vision of “Islamic identity.” The reductive reading of Islamic law by colonial administrators has affected the way those living in the twenty-first century understand and conceptualize the Islamic tradition.

The idea of Islamic law as fixed, unchanging, and closed to *de novo* analysis operates among Muslims as a device to assert political, cultural, and religious identity<sup>81</sup> For instance, in an attempt to situate the development of Islamic law historically, the late Orientalist scholar of Islamic law, Noel Coulson, argued that in its traditional form Muslim jurisprudence:

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over Saudi Arabia and consequently the colonial narrative does not universally apply across the Muslim world. I would suggest, however, that the narrative about the reduction of Sharia is not dependent on colonization; rather the colonial topos is only part of that narrative, which fundamentally involves a relationship between power, law, and the formation of political/nationalist identities.

<sup>80</sup> For a discussion of the impact the reified and static version of Islamic law had on Muslims under colonial occupation, see the excellent study by Scott Alan Kugle, “Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia” (2001) 35 *Mod. Asian Stud.* 257.

<sup>81</sup> There are many who have argued that the restriction on interpretation in Islamic law occurred much earlier and was imposed by Muslims themselves. This “moment” in history when jurists decided that all interpretation would end is termed the “closing of the doors of *ijtihad*.” For arguments of those who espouse this view, see e.g. Schacht, *Introduction*, *supra* note 12; and Coulson, *supra* note 12. But see Wael Hallaq, “Was the Gate of *Ijtihad* Closed?” (1984) 16 *Int’l J. Mid. E. Stud.* 3, who has argued persuasively that the doors of *ijtihad* were never in fact closed, and legal interpretation continued unabated. See also Shaista Ali-Karamali and Fiona Dunne, “The *Ijtihad*



provides a[n] ... extreme example of a legal science divorced from historical considerations. Law, in classical Muslim theory, is the revealed will of God, a divinely ordained system preceding and not preceded by the Muslim state, controlling and not controlled by Muslim society. ... Since direct access to revelation of the divine will had ceased upon the death of the Prophet Muhammad, the Shari'a, having once achieved perfection of expression, was in principle static and immutable.<sup>82</sup>

For Coulson, Islamic law, in its ideal form, is the embodiment of God's will. That will is captured forever in scripture – scripture that precedes the Muslim state and governs it and its actions. The function of the jurist in Islamic law is not to construct or fashion laws, but rather to discover the divine law: “The role of the individual jurist is measured by the purely subjective standard of its intrinsic worth in the process of *discovery of the divine command*.”<sup>83</sup> Islamic law does not grow and develop through a jurisprudentially legitimized use of critical analysis; instead it remains frozen in the form of inherited scriptural texts provided by God's divine will. For Coulson, Sharia provides a unifying standard to which Muslims adhere, and stands against “the variety of legal systems which would be the inevitable result if law were the product of human reason based upon the local circumstances and the particular needs of a given community.”<sup>84</sup> With this image of Islamic law, Coulson considers the Sharia tantamount to natural law (*ius naturae*) as against all other humanly contrived legal systems.<sup>85</sup> But by natural law he means a universal standard, rather than a system of law that accounts for historical contingencies. His conception of the classical theory of Islamic law is not one that grants legitimacy to unaided reason and the needs of society as building blocks of the law:

Law, therefore, does not grow out of, and is not moulded by, society as is the case with Western systems. Human thought, unaided, cannot discern the true values and standards of conduct; such knowledge can only be attained through divine revelation, and acts are good or evil exclusively because God has attributed this quality to them. In the Islamic concept, law precedes and moulds society; to its eternally valid dictates the structure of State and society must, ideally, conform.<sup>86</sup>

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Controversy” (1994) 9 Arab L.Q. 238. This fundamentally historical and jurisprudential debate is completely ignored by self-proclaimed Canadian Muslim reformists like Irshad Manji who want to reopen the gates of *ijtihad*; see e.g. Irshad Manji, *The Trouble with Islam Today: A Muslim's Call for Reform in Her Faith* (New York: St. Martin's Press, 2004).

<sup>82</sup> Coulson, *supra* note 12 at 1–2 [emphasis added].

<sup>83</sup> *Ibid.* at 2 [emphasis added].

<sup>84</sup> *Ibid.* at 5.

<sup>85</sup> *Ibid.* at 6.

<sup>86</sup> *Ibid.* at 85. Notably, medieval Muslim jurists debated whether moral notions

Naturally, this conception of Islamic law does not allow for considerable discretionary judgment, legal innovation, or legal change.

Coulson was writing as an observer and scholar of Islamic law. For Muslims contending with post-colonial controversies over political identity, however, the idea of changing or modernizing Islamic law in a way that does not adhere strictly to the textual tradition is perceived as surrendering to the cultural hegemony of the West and the values it enshrines. For example, in 2000, Morocco's socialist prime minister Abderrahman Youssoufi proposed reforms to the nation's personal status law (*Moudawwana*) which governs issues such as marriage, divorce and other family law related matters. Under the original *Moudawwana*, promulgated in 1958, women were declared legally inferior to men.<sup>87</sup> When Youssoufi proposed his reforms, hundreds of thousands of supporters rallied in Rabat. However, as Ilhem Rachidi reported, "Islamists organized a counterprotest the same day in Casablanca, with at least as many marchers denouncing what they called the Western nature of the project."<sup>88</sup> To promote the reforms while undermining Islamist opposition, King Mohammad VI invoked his authority as supreme religious commander (*amir al-mu'minin*) to create a council of religious scholars and other academics to ensure that the reforms did not violate Islamic law principles. Subsequent to this action, Islamist parties such as the Justice and Development Party (PJD) have heralded the reforms as consistent with Islamic law and have embraced the reformative endeavours. It is not clear, however, to what extent the PJD truly believed in the Islamicity of the program. It is suspected that the PJD tempered its rhetoric out of respect for the king's religious authority as *amir al-mu'minin*, and out of concern over allegations that it played a role in the May 2003 Casablanca bombings.<sup>89</sup> As suggested by both the Saudi and Moroccan examples, the challenge posed by reform and modernization is very much tied to political questions of identity in a post-colonial struggle for independence and autonomy, despite continued Western influence in the region.

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like good and bad preceded God's determination, or whether something is good or bad because God legislates it as such. This philosophical debate was fundamentally about the ability of humans to use their reason and discretion to create norms of a moral and legal nature. For a general discussion of this medieval debate, see Kevin Reinhart, *Before Revelation: The Boundaries of Muslim Moral Thought* (Albany: State University of New York Press, 1995).

<sup>87</sup> Ilhem Rachidi, "After Struggle, New Equality for Moroccan Women" *Christian Science Monitor* (24 October 2003) 9.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

The foregoing example illustrates how Islamic law can be used in political strategies to support regimes and to construct national, cultural and religious identities in a post-colonial context in which Western hegemony – whether in physical, economic, or cultural terms – is considered a threat to Islamic identity. Islamic law, reduced to a code like system of rules, is arguably believed to be the basis for that identity, and any reform of it will be viewed as a threat to a political identity often defined in opposition to Western liberal values.

#### 6. Ontario's Sharia Debate: The Politics of the Discourse

During public debates about the use of Sharia to arbitrate family law disputes in Ontario, Muslim groups supporting the use of Sharia often relied upon notions of the tradition that were reductive and in effect mimicked the conceptions used and proffered by colonial powers in India, North Africa and the Ottoman regions. Arguably, they relied on a concept of Islamic law that is not new, but rather is the product of a political history of reductivism, essentialism and colonial aggression. For instance, in promoting the use of Sharia in family law arbitrations, the website for Syed Mumtaz Ali's organization, the Islamic Institute for Civil Justice, stated that one can either opt to arbitrate under Islamic law or follow Ontario civil law. If a Muslim chooses to follow Ontario law, however, the site cautions, "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."<sup>90</sup> In its submission to Marion Boyd, who consulted various parties prior to drafting her report, the Council on American-Islamic Relations Canada (CAIR-CAN) defined Sharia as "a religious code for living covering all aspects of a Muslim's life from prayers, to financial dealings, to family relations, to caring for the poor."<sup>91</sup> In other words, those who proposed and supported the use of Sharia relied on a conception of the tradition as a deterministically-structured comprehensive code.

Many who opposed the use of Sharia in arbitration seemed keenly aware of its historical diversity. They asserted, however, that Islamic law is so radically indeterminate that it is vulnerable to political control and

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<sup>90</sup> Interview of Syed Mumtaz Ali, President, Canadian Society of Muslims by Rabia Mills (August 1995) online: The Canadian Society of Muslims <[http:// muslim-canada.org/pfl.htm#1](http://muslim-canada.org/pfl.htm#1)> [emphasis added]; see discussion under Question 5. A copy of the webpage is on file with the author.

<sup>91</sup> Canadian Council on American-Islamic Relations (CAIR-CAN), *Review of Ontario's Arbitration Process and Arbitration Act: Written Submissions to Marion Boyd* (10 August 2004), online: CAIR-CAN <[http://www.caircan.ca/ downloads/sst-10082004.pdf](http://www.caircan.ca/downloads/sst-10082004.pdf)> at 1–7. A copy of the webpage is on file with the author.

manipulation. They argued that Islamic law is a tool used by Islamists and autocratic governments to establish political control and legitimacy that poses a danger to cherished liberal values. For instance, Alia Hogben, president of the Canadian Council of Muslim Women, wrote that Muslims who promote the use of Sharia arbitration use the issue to argue “that we need identity markers to remain Muslim” in a multicultural Canadian context.<sup>92</sup> In other words, Islamic law becomes the means by which a minority group in a pluralistic country can maintain its identity, religious and otherwise. Then again, Homa Arjomand, originally from Iran and a vocal opponent of Sharia arbitration, argued that the proposal for Sharia arbitration has nothing to do with Islam *per se*. Rather, “[i]t has something to do with political Islam.”<sup>93</sup>

There was little effort by either opponents or proponents of Islamic law to think of Islamic law historically, methodologically, or as a rule of law system. Generally, views were based on relatively synchronic, colonial, and post-colonial paradigms of Islamic law without serious reference to Sharia as a rule of law system sensitive to doctrine, institution, and context. Like the colonialists and administrators of the British Empire, Muslims debating about Sharia in Ontario did not seem interested in the history, jurisprudence, or diachronic development of Islamic law. They simply saw it as an all-or-nothing system of de-contextualized rules, which for some were amenable to *Charter* values, but for others directly contravened human rights norms. And yet among the commentators, there was little detailed legal discussion about the kind of jurisprudence that might lead to mutual accommodation of Sharia and *Charter* values.

The debate on Sharia in Ontario never actually addressed Sharia as a rule of law system or recognized the potential for legal change in a way consistent with Sharia values. Muslim proponents and opponents of Sharia alike were often those who had left countries like Pakistan and Iran, where the concept of Sharia is embedded in the political discourses of post-colonial nation state identity. Some simply held that Sharia law is so diverse and inconsistent that to make reference to it at all would lead to an unworkable system of law and justice.<sup>94</sup> There was little effort by opponents to offer alternative paradigms of jurisprudence, to understand

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<sup>92</sup> Alia Hogben, “Should Ontario Allow Sharia Law? NO. The Laws of the Land Must Protect All of Us, Irrespective of Gender or Religion” *Toronto Star* (1 June 2004) A19.

<sup>93</sup> Jeffs, *supra* note 9 (interviewing Homa Arjomand).

<sup>94</sup> See the discussion in Tarannum Kamalani and Nicholas Keung, “Muslim Group Opposes Sharia Law: Argues it Does not Protect Women; Islamic Body Presents Case to Boyd” *Toronto Star* (28 August 2004) A2.

the strengths and weaknesses of family law in Ontario, or to balance multiculturalism with liberal values of equality.<sup>95</sup> Likewise, proponents of Sharia arbitration provided no jurisprudential treatment or systematic analysis as to how medieval Islamic legal doctrine, preserved over centuries, could be reconsidered, restructured, and made to accommodate competing Canadian legal and cultural values.

Some may deny that Sharia can accommodate liberal values, but Tunisia's approach to Islamic law provides evidence to the contrary. Attempting a balance between liberal and Islamic values, Tunisia has adopted provisions in its family law code that conflict with historical Sharia, but which the country nonetheless has justified on Islamic grounds. Most notable is Tunisia's ban on polygamy. Islamic law allows a man to marry four women concurrently. Tunisia nevertheless banned polygamy on Islamic grounds by relying on a Qur'anic verse that provides: "You will never be able to be just among women even if you desired to do so."<sup>96</sup> The verse is read as providing a moral trajectory away from polygamy toward monogamy as an ethical value underlying Islamic marriage. Muslim reformers such as the late Fazlur Rahman also adopted this reading of the Qur'an to counter the licence for polygamy within an Islamic framework.<sup>97</sup> Furthermore, Tunisia requires a divorcing couple to pursue their divorce by petitioning the courts.<sup>98</sup> By requiring divorcing couples to utilize the judicial machinery of the state, Tunisia has effectively undermined a husband's substantive right to unilaterally divorce his wife under Islamic law.

### *7. Conclusion: A Proposal for Accommodation*

The characterization of Sharia by all parties in the Ontario debate was not entirely new. Rather it paralleled the rhetoric on Sharia that has existed in the Muslim world since the era of European colonization and Muslim state formation, and is now embraced both by Muslim fundamentalists as a critique against modernity, and by secular Muslims who consider Sharia to be an obstacle to liberal equality. Regardless of which position one took in the debate, the concept of Sharia was of a rigid code of

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<sup>95</sup> See e.g. the following media accounts: Jeffs, *supra* note 9; Bob Harvey "Sharia Law Debate Divides Ontario's Muslims" *CanWest News* (17 January 2005) 1 (referring to Alia Hogben, executive director of the Canadian Council of Muslim Women, who wants nothing to do with Muslim courts and Sharia law).

<sup>96</sup> Qur'an, 4:129.

<sup>97</sup> See Fazlur Rahman, *Major Themes of the Qur'an* (N.p.: Biblioteca Islamica, 1989).

<sup>98</sup> *Knowing Our Rights: Women, Family Laws and Customs in the Muslim World* (N.p.: Women Living Under Muslim Laws, 2003) at 245.

abstract rules.<sup>99</sup> This particular view dominated the discourse in Ontario, and arguably influenced the government's decision to apply one law for all Ontarians to ensure individual liberties and protections.

Yet, even though religious arbitration may have no legal force in Ontario, mediation remains a viable method for those wishing to use religiously-based dispute resolution mechanisms.<sup>100</sup> The option to mediate marital disputes, based on the rights of the parties to contract freely, suggests that nothing has fundamentally changed for Muslim women whose vulnerability to bad faith husbands and patriarchal imams was the central concern of opponents to Sharia arbitration. Muslim women under pressure to conform to their religious community's standards remain vulnerable to pressure to have their marital disputes mediated in accord with what is represented to them as Islamic law. If opponents of Sharia arbitration aimed to eliminate a Muslim woman's vulnerability, they failed in their campaign.

Few who were vocal in the debate seemed to fully understand the nature of family law adjudication in Ontario, or the extent to which the relevant family law codes allow parties to resolve matters privately. Additionally, opponents of Sharia arbitration were sceptical of Boyd's suggestions to amend the arbitration legislation to ensure greater responsibility, transparency, and accountability of arbitrators and the arbitral process. Yet when Michael Bryant, Attorney General for Ontario, announced the amendment to Ontario's *Arbitration Act*,<sup>101</sup> many of its provisions reflected Boyd's reform proposals concerning the training of arbitrators, and the transparency and accountability of their decisions.<sup>102</sup> In retrospect, it seems that the debate in Ontario did not result in a ban on private resolution of family disputes. People can still arbitrate and mediate divorces under the proposed amendments within the context of

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<sup>99</sup> In her discussion of the arbitration debate, Natasha Bakht, writing for Canadian women's groups such as the Canadian Council of Muslim Women, adopts uncritically the stereotype of Islamic law as a code. Citing the view of Syed Mumtaz Ali, she says that Sharia is meant to be a universal system that governs every aspect of a Muslim's life. And while she recognizes the complexity of the tradition, she expressly refuses to investigate its history, development, and theoretical contours; see Natasha Bakht, "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women" (2004) 1 *Muslim World J.H.R.* 1 at nn. 79–81 (and accompanying text).

<sup>100</sup> See Ontario's *Family Law Act*, R.S.O. 1990, c. F.3., s. 52.

<sup>101</sup> S.O. 1991, c. 17.

<sup>102</sup> See Ministry of the Attorney General, *Background: The Family Statute Law Amendment Act, 2005* (15 November 2005), online: <<http://www.attorneygeneral.jus.gov.on.ca/english/news/2005/20051115-arbitration-bg-EN.pdf>> at 2 (on file with the author).

provincial and federal family law. Rather, the rejection of religious family dispute arbitration in Ontario was based upon a vocal and vociferous debate about Sharia specifically, and its ability to change and to accommodate the values and aspirations of Canadian citizens. Before members of a liberal democratic polity can truly understand what the values of liberty, equality and multiculturalism can and cannot accommodate, however, they must also make an effort to understand the Other that seeks accommodation.

Admittedly, Sharia has been codified in a form that limits the extent of substantive change and adaptation. Likewise, there are few critical centres and institutions that exist to study and analyze the Sharia; those that do have often been co-opted by state governments to shore up their own legitimacy before a rising tide of Islamic movements.<sup>103</sup> But to see the tradition exclusively as reified is to re-emphasize certain conceptions of Sharia that were products of varied political forces. The fact that few considered Sharia in terms of a rule of law system is largely a function of the political history discussed above, and its effect on transforming Sharia into a building block of identity construction.

The foregoing analysis is meant to set the stage for an institutional model that links government and civil society in a way that balances respect for religious commitments and liberal democratic values. Although this debate has perhaps run its course in Ontario,<sup>104</sup> it remains a vibrant issue for jurisdictions elsewhere around the world. Hence, the question remains highly relevant, as we begin to contend with religious groups seeking space within the sovereign framework of a state and its rule of law. The model I present borrows from the doctrinal pluralism and legal institutions that at one time allowed Sharia to be a dynamic and diverse rule of law system. I suggest that in liberal democratic states where Muslims wish to observe Sharia values in the area of family relations, the government can regulate non-profit Muslim family service

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<sup>103</sup> For instance, in the medieval period, the *mufti* often occupied a position of authority and preeminence in towns, and was consulted by laypersons and judges alike for his legal opinions. During the Ottoman period, and later with the rise of new nation states, however, the office of the *mufti* fell within the larger structures of government. Consequently, currently-appointed state *muftis* are often viewed with skepticism given their connection to the government and the pressures they are presumed to face support of government policy. For a discussion of state *muftis*, which upholds the view that their independence is quite limited, see Jakob Skovgaard-Petersen, "A Typology of State *Muftis*" in Haddad and Stowasser, *supra* note 78 at 81–98.

<sup>104</sup> Whether the Ontario debate actually resolved the issue of religious arbitrations is unclear. See Natasha Bakht, "Were Muslim Barbarians Really Knocking on the Gates of Ontario? The Religious Arbitration Controversy—Another Perspective" (2006) 40 *Ottawa L. Rev.* 67.

organizations that offer arbitration services for a fee. By utilizing existing legislation and the power of judicial review, the government can create venues for Muslims to create their own civil institutions through which they can critically evaluate the historical Sharia doctrine, determine how it fits within the state's legal system, and arbitrate family disputes in light of their *de novo* analysis of Sharia.

Because arbitration decrees are legally enforceable in ways that mediated settlements are not, the state's legitimate interest in regulating arbitrations justifies its use of legislative power to regulate family dispute arbitration services, whether religious or not. Using existing legislation, the state can provide incentives to facilitate the development of non-profit and charitable organizations, such as granting tax exemptions to an organization for providing its services, or tax credits or deductions for donations from members of the public. Of course, organizations seeking to arbitrate family disputes may be required to organize as a tax-exempt organization in order to emphasize their commitment to community service.<sup>105</sup>

To ensure that an organization both reflects and serves community interests, the government can require an annual audit to ensure that a family service organization receives its financial support from an actual community of users, whose diversity and scope justifies that organization's existence. To avoid the possibility that a single party may use its financial power to monopolize or dominate the discourse, other legislative requirements might include a cap on any single private donation, or gradually decreasing tax relief as a donation amount increases. Furthermore, the government can require arbitrators to receive training and certification to ensure that the arbitral process is transparent and accountable. Finally, government legislation can and must preserve the parties' right to appeal the arbitral decree in a court of first instance. The appeal process would operate as the field of dialogue where state values and the values of a religious community, for instance, are balanced. Of course, the judicial standard of review will differ depending on the national, cultural, and constitutional context. There is no set formula that can be applied uniformly across different nation states, constitutional orders, and cultural contexts. It should be noted, however, that the real test of the dialogue will lie in how thickly or thinly the judiciary defines the standard of review. The thicker the standard of review, the more the state will meddle with religious communities and perhaps be seen as imposing its values on them. The thinner the standard,

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<sup>105</sup> I want to thank my colleague David Duff for sharing his thoughts on the nuances of institutional design, and the capacity and limits of tax legislation to affect economic behavior.



the more religious communities will enjoy autonomy within the state, but possibly to the detriment of the state's core values.

There may be some Muslims who believe that to have their vision of Islamic law subjected to the state's standards of judicial review will unduly interfere with their religious freedom. These Muslims are not compelled to form or seek the services of a state-regulated family service organization. If they wish to resolve family disputes on their own terms, they are free to use private mediation; but they will not enjoy the benefit the state confers through arbitral decrees. The state bestows a benefit by allowing arbitration because of the presumed efficiency arbitral decrees offer to the parties. Mediated settlements are arguably less efficient than arbitrated ones because the former are not automatically legally enforceable, but instead require the parties to petition the court for review and enforcement.<sup>106</sup> The efficiency of arbitration theoretically would provide an incentive for Muslims to create family service organizations and thereby enter into dialogue with the state. Those opting-out of the arbitration regime would not enjoy the benefit, nor would they engage in the dialogue. Yet, they might reconsider their position should another family service organization develop an approach to Islamic family law that appeals to their values, is economically efficient, and does not violate the prevailing standards of judicial review.

Arguably, this proposal would allow multiple voices to express competing visions of Islamic commitments in a liberal polity. Imagine a political spectrum of Muslim family service organizations. Those on the left might critically engage the Islamic legal tradition, concluding, for instance, that the Sharia can accommodate same-sex marriage and divorce and offer those services to gay and lesbian Muslims. Those on the right might instead follow a more traditional or even patriarchal Sharia law regime. Other Muslim family service organizations might advocate

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<sup>106</sup> I recognize that the efficiency of one method over another is subject to various disputes, a discussion of which goes beyond the scope of this article. While both mediation and arbitration offer efficient modes of dispute resolution, I focus on arbitration as an institution in the interest of integrating the experience of religious autonomy with one's participation in the institutional framework of the state in a way that enhances the dialogic potential between the state and its citizens.

<sup>107</sup> To use "market" and "Islam" in the same sentence might strike some as odd if not inappropriate. The idea here, though, is not to reduce religious practice and belief to some vulgar capitalist free market system. Rather the "market" is a metaphor used to understand how institutional development of a civil society sector can avoid current pitfalls by ensuring a regulatory design meant to foster an open Muslim society through various incentive structures that also protect against monopolistic control. For a study of the religious marketplace, see Rex Ahdar, "The Idea of 'Religious Markets'" (2006) 2 *Int'l J.L. Context* 49.

positions between these poles. Ultimately, Muslims who desire religiously-based family law services would have different organizations to choose from, thereby giving them a choice between competing visions of Islamic law. By advertising their services, reaching out to the community, disclosing their philosophical approaches to Islamic law, and effectively “competing for market-share,” the family service organizations would contribute to a “marketplace” of Islamic legal ideas.<sup>107</sup> Furthermore, if one of the parties to arbitration considers the arbitral decree unfair or unjust given the liberal values of the state, he or she could appeal the decision to the courts. The Islamic legal philosophy adopted by the family service organization could then be presented in dialogue with the state and its values. Just as the courts would develop a doctrine of review over time, the family service centres and the government would gradually develop a mutually-shared understanding of how to observe religious values within a liberal state.

In the process of regulating Muslim civil society, the government would consequently provide an equal playing field for diverse voices in the Muslim community to articulate competing visions of Sharia. With a critical mass of family service groups, service providers would compete for customers by advertising their services. In doing so, they would engage in deliberative discourse about the role of Islamic values in a liberal pluralist state, and would inform and educate the Muslim consumer about the different organizations’ respective presumptions, first principles, and critical analyses of Sharia as a rule of law system. This competition would not be geared toward determining a new orthodoxy using market principles. Rather, it would be meant to move the current Islamist debate away from authoritarian, absolutist claims.

Admittedly, this model for dialogue among Muslims, and between Muslims and the state, relies on fundamental assumptions about the nature of faith and Islamic law. The first assumption is that one can be a rational actor within the context of faith-based commitments. In other words, faith does not preclude one from using economic efficiency to evaluate and select among alternative religious commitments. The second assumption is that no specific Islamic legal view has ontological priority over any other. A corollary to the second presumption is that no Islamic legal position enjoys absolute protection from falling into disuse. Indeed, Islamic legal history is full of examples of how different legal schools and opinions met their demise for reasons ranging from lack of substantive persuasiveness to historical factors involving the economics and politics of patronage.<sup>108</sup>

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<sup>108</sup> See Makdisi, *supra* note 13; and Richard Bulliet, *Patricians of Nishapur: A Study in Medieval Islamic Social History* (Cambridge: Harvard University Press, 1972).

By creating space for deliberation via private sector assistance and government regulation, the long-term hope is that Muslim family service groups will be able to provide a spectrum of choices for Muslim consumers who desire an Islamically-inspired dispute resolution service as an alternative to costly civil litigation. In the process, it is hoped that the civil society groups will engage in a dialogic process concerning the substance and form of Sharia in light of competing and complex notions of political, social, and cultural identity. With a regulated and operational “marketplace” of ideas about Islamic law, the ultimate victor will not be one group over another, but rather the Muslim consumer who will have a chance to make a choice.