Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation

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I. INTRODUCTION

The 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 the minority group may be disadvantaged by the exercise of community autonomy?\(^2\)

Certainly scholars on issues of 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 that may result in mutual innovation and change. Writing about New York’s use of a Get 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.\(^3\)

Ayelet Shachar, reviewing the extensive literature on multiculturalism and legal harmony, notes that:

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\(^*\) An earlier different version of this paper appeared in Singapore Journal of Legal Studies (December 2006).

\(^1\) Assistant Professor, University of Toronto, Faculty of Law. This paper is based on an earlier version published in the Singapore Journal of Legal Studies (2006). I am grateful for their support of my work and their permission to develop the piece into the form presented here. This study benefited from comments at the following symposia: The Ontario Bar Association, “Family Law: The Charter, Religious Values and Legal Practice,” November 3, 2005; York University’s Center for Feminist Research, “Racialized Gendered Identities,” November 18, 2005; The Munk Center (with the patronage of the Lieutenant Governor of Ontario), “Religion and Shared Citizenship,” February 10, 2005; University of Toronto Faculty of Law, Constitutional Roundtable, February 14, 2006; and National University of Singapore, Faculty of Law, “Law and Multiculturalism,” February 22, 2006. I would like to thank the participants at those events for their thoughts, comments, and criticisms. I also want to gratefully acknowledge and thank my colleagues at the University of Toronto whose generosity and support of this work was a source of inspiration and strength. In particular, I want to thank: Bruce Chapman, Rebecca Cook, 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 extend my thanks and gratitude to the staff of Bora Laskin Law Library, in particular research librarian Sooin Kim, who was instrumental in locating hard to find sources. I also want to thank Nafisah Chaudhary and Amy Smeltzer for their research and editorial 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.

\(^2\) 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).

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.  

To determine whether to allow Sharia arbitration in family law, the Ontario government appointed the Honorable Marion Boyd, former Attorney General of Ontario, to investigate the extent to which federal and provincial law could uphold the interests of their 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. Suggesting numerous changes to the arbitral system in Ontario, most of which involved increasing training, transparency, and accountability of arbitrators, Marion Boyd did not consider Sharia law, by its very essence, to undermine or vitiate a woman’s liberty or equality interest.

Boyd’s report, however, did not describe or otherwise provide much substantive description of what the Sharia is. Referring only to the use of “Islamic principles” to govern arbitral proceedings, Boyd did not 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 engaged in a heated debate about what Sharia law would demand in family law arbitration settings. They hostily debated the implications of using Sharia on 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. 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 has chosen to disallow religious arbitrations in family law, the issues that spurred the debate on Sharia arbitration have not disappeared. The concern for Muslim women’s rights in the family law context remains, especially now since imams can still perform Islamic divorce services under the rubric of mediation as opposed to legally enforced arbitration.

For those interested in legal pluralism in liberal rule of law systems such as in Canada, further investigation into the concept 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

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4 Shachar, Multicultural Jurisdictions.
5 Marion Boyd, “Dispute Resolution in Family Law: Protection Choice, Promoting Inclusion,” esp. 89-92. The report is online and can be downloaded from the Ontario Attorney General’s website: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/
6 For possible legislative and procedural mechanisms that Ontario could have used to regulate religious arbitration, see Boyd, “Dispute Resolution in Family Law,” 133-142.
7 For concerns about how allowing Sharia family law arbitration would lead to a slippery slope that would lead to the use of Islamic penal measures, see Rita Trichur, “Muslims Divided over whether Sharia Belongs in Ontario Arbitration Law,” Canadian Press Newswire, Toronto, August 22, 2004.
implemented. 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 what its values are. 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.”

In Parts II and III, I address the early history of Shari’a and how medieval legal doctrines were embedded within institutional frameworks that helped make the tradition meaningful and responsive to changing situations. In Part IV, I show how this early rule of law system was gradually dismantled, generally at the instigation of European colonial interests. Part V illustrates how post-colonial Muslims have uncritically adopted the representations of Shari’a handed to them by the former colonial powers; as subalterns they internalized the discourse of their colonial masters. In doing so, their representations of Shari’a today have more to do with contested forms of political identity, rather than with creating rule of law systems that are responsive to Islamic values. I conclude with a proposal suggesting how liberal governments can cooperate 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.

II. THE CONCEPT OF SHARIA

The conception of Sharia that prevailed in the Ontario debates was one that viewed the tradition as an inflexible and immutable code of religious rules, based on the Qur’an and traditions of the Prophet Muhammad. Various media outlets described the Sharia as a “code” of law that deterministically governs every aspect of a Muslim’s life. In letters to the editor, readers commented on their fear of the use of Sharia in Ontario, calling it an “archaic paternalistic

8 See Charter of Rights and Freedoms, Art. 27: “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”
The view of Sharia as a code, however, ignores the 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 7th century to the present, and which illustrates that legal rules were often the product of Muslim jurists’ analytical discretion in the context of a culture and institution of education, precedent, principles, and doctrines. The interpretive theory of Islamic law certainly espouses a commitment to the Qur’an and traditions of Prophet Muhammad (d. 632 CE) also called hadith. These “scriptural” sources provide an authoritative foundation for juristic analysis and interpretation. But by themselves, these sources do not constitute a legal system. The Qur’an contains 114 chapters, but only a small fraction of its verses can be characterized as “legal”. 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, as the embodiment of an earlier oral tradition, the hadith cannot always be relied upon as authentic statements of what the Prophet said, did, or decided. While both sources occupy an undeniable position of authority within Islamic jurisprudence, they alone do not constitute the Islamic legal tradition. The Sharia tradition is comprised of 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


14 For a discussion of the curricula that was characteristic of Islamic legal education in the medieval Muslim world, see George Makdisi, The Rise of Colleges: Institutions of Learning in Islam and the West (Edinburgh: Edinburgh University Press, 1981).

15 Various commentators suggest that there are anywhere from 80 to 600 verses of the Qur’an that have content that can be called legal. For instance, Mohammad Hashim Kamali, Principles of Islamic Jurisprudence, 3rd ed. (Cambridge: Islamic Texts Society, 2003), 26, states that the Qur’an contains 350 legal verses. Abdullahi Ahmad An-Na’im, Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law (Syracuse: Syracuse University Press, 1990), 20, notes that some scholars consider 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 about 80 verses that deal with legal matters in a strict sense.

16 Many authors address the oral tradition that culminated in the hadith literature, and provide alternative methods of understanding their historical import. Some such as Schacht argue that the hadith are complete forgeries and cannot be relied on for knowing anything about what the Prophet Muhammad said or did during his life. Joseph Schacht, The Origins of Muhammadan Jurisprudence (Oxford: Clarendon Press, 1967). Others such as Fazlur Rahman suggest that the hadith tradition reflects the collective memory of Muslims about the Prophet, although some certainly reflect later historical political and theological controversies. Fazlur Rahman, Islamic Methodologies in History (Karachi: Central Institute of Islamic Research, 1965). Khaled Abou El Fadl, Speaking in God’s Name: Islamic Law, Authority and Women (Oxford: Oneworld Publications, 2001), suggests that the hadith literature represents an “authorial enterprise” and the challenge is to determine the extent and degree to which the Prophet’s voice has been preserved.
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. 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 where scripture was otherwise silent (maslaha mursala). Muslim jurists did more than simply read the Qur’an and hadith as if they are codes and thereby transparently and determinately meaningful. In other words, it is highly misleading to suggest that Islamic law is constituted by the Qur’an and traditions of the Prophet without further recourse to techniques of juristic analysis that allowed the law to remain socially responsive without at the same time undermining 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” of the law or what are often called schools of law (madhahib, sing. madhab) – all of which were historically deemed equally orthodox. Over time, the number of interpretive legal communities or madhahib diminished, to the extent that there are now four remaining Sunni legal schools and 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; the Malikis are most often found in North Africa. The Shafi’is are dominant in Southeast Asia and Egypt, while the Hanbali school is found in the Gulf region. The Shi’ite schools are as follows: Ja’fari (mostly in Iran), Isma’ilis, and Zaydis. 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 consult a summary of substantive law (i.e. mukhtasar) or an elaborate encyclopedia written by a jurist within the particular madhhab to which one belongs. Furthermore, if one inquires into the historical development of doctrine around a given issue, one may find that the law and

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18 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).


legal analysis manifest distinct shifts that may be based on contexts yet to be determined by further research.23

For instance, under Islamic law a husband has the right to unilaterally divorce his wife through a procedure known as talaq, while the wife does not have this power, unless she negotiated to have this power included as a condition in her marriage contract (‘aqd al-nikah).24 If a wife has not done so, 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 (e.g. failure to support, abuse, 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 agrees to forgo any financial claim against her husband to be free from the marriage.25 The difference between a husband’s right of divorce and a wife’s right in this case is fundamentally a matter of the degree and scope of the power to assert one’s liberty interests.

23 The famous Muslim philosopher Averroes (Ibn Rushd, d. 1198) was also a highly regarded Maliki jurist. He wrote a text of Islamic law entitled Bidayat al-Mujtahid wa Nihayat al-Muqtasid, in which he relates the differing rules of law for the competing Sunni legal schools. What makes his work particularly impressive is that he also discusses the source of their disagreements, whether in terms of competing interpretations of Qur’an, hadith, or in some cases legal principles that operate within the law. For a translation of his masterful text, see Ibn Rushd, The Distinguished Jurist’s Primer, trans. Imran Nyazee, 2 vols. (Reading, UK: Garnet Publishing Ltd., 1996). For an example of how a diachronic analysis of fiqh can illustrate historical 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, Speaking in God’s Name, 255-260 n. 106, 107, 123-129. For an illustration of how jurists utilized their own discretion to construct and create rules of law, see Anver M. Emon, “Natural Law and Natural Rights in Islamic Law,” Journal of Law and Religion 20, no. 2 (2004-2005): 351-395. The idea that the meaningfulness of one’s norms is contingent on background factors too variegated and implicit to begin quantifying is one that has been adopted by communitarian theorists as well as hermeneutic philosophers to give a sense of limited determinacy to the use of discretion in the creation and construction of norms, legal or otherwise. Charles Taylor, Sources of the Self: the Making of the Modern Identity (Cambridge: Harvard University Press, 1989), for instance relies on the concept of “moral frameworks” that provide an individual a sense of meaningfulness and identity in his world. Hans-Georg Gadamer, Truth and Method, trans. Joel Weinsheimer and Donald G. Marshall, 2nd rev. ed. (Continuum International Publishing Group, 1989), when writing about the hermeneutic interaction between reader and text speaks of the reader’s historical horizon which must fuse with the text’s horizon in order to generate meaningfulness. In a similar vein, Jurgen Habermas, Between Facts and Norms, trans. William Rehg (Cambridge: MIT Press, 1998), writes about the implications of “life worlds” that provide a basis by which one finds meaning and normative value in the world.

24 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. Haifaa A. Jawad, The Rights of Women in Islam (New York: St. Martin’s Press, 1998), 35-40; Lucy Carroll, Talaq-i-Tafwid: the Muslim Woman’s Contractual Access to Divorce (Women Living Under Muslim Law, 1996). For a general discussion on marriage law and the marriage contract, see Susan Spector sky, “Introduction,” in Chapters on Marriage and Divorce (Austin, Texas: University of Texas Press, 1993).

According to the Shafi’ite jurist Abu al-Hasan al-Mawardi (d. 1058), the 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.” One might ask why this verse should be read as giving men a substantive unilateral right to divorce their spouses to the exclusion of women, rather than as a mechanism prescribing the procedure a man should follow when divorcing his wife? Read as providing a procedural mechanism, the verse arguably grants implicitly the right of unilateral divorce to both men and women, while requiring men to utilize their power in a certain procedural manner. However, most jurists held the verse substantively grants 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. For example, al-Mawardi argued that since the duty to provide support and maintenance (mu’una) falls exclusively on the husband, he is entitled to certain special rights given this difference. 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. But men, he said, dominate their desires more than women, and are less likely to hastily invoke the talaq power at the first sign of discord.

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, given a contemporary liberal democratic context where gender equality is generally an honored and respected norm. Consequently, one might suggest that the patriarchal tone of al-Mawardi’s reading was elemental to a particular context that gave meaningfulness to this rule, 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. However, as discussed below, 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.

III. ISLAMIC LAW AND INSTITUTIONS

Historically, Islamic law was immersed not only within a cultural context, but also within an institutional context that transformed what might have been moral norms to 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

30. See, for instance Article 15 of the Canadian Charter, providing: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”
of institutions of adjudication and enforcement. 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 be dependent upon some doctrinal, substantive determination of the law. For instance, the medieval Shafi’i jurist Abu al-Ma’ali al-Juwayni (d. 1098) related a hypothetical 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 held that such a pronouncement is invalid and ineffective, whereas the Shafi’is considered it to be valid. Are the husband and wife still married? According to the husband they are married, but according to the wife they are divorced. Which view should prevail? Certainly the two parties can insist on their view and claim to be justified in doing so. But 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, based on his own analysis, is binding on both parties. The qadi’s decision is authoritative not because it accords with one specific legal rule or another; rather it is authoritative because of the imperium tied to his institutional position within a Sharia rule of law system.

Since the 18th century, the institutional structure that gave real-world significance to Islamic law began to be dismantled or modified. As discussed below, pursuant to the Capitulation agreements with the 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 19th 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. The idea of Sharia today 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 that contain the abstract doctrine of surviving interpretive communities of Islamic law that reflect a cultural context long gone, and with few if any institutional structures that can mediate between text and context.

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32 Abu al-Ma’ali al-Juwayni, Kitab al-Ijtihad min Kitab al-Talkhis (Damascus : Dar al-Qalam, 1987), 36-38. For a discussion of al-Juwayni’s hypothetical, see Khaled Abou El Fadl, Speaking in God’s Name: Islamic Law, Authority and Women (Oxford: Oneworld Publications, 2001), 149-150. Elsewhere Abou El Fadl argues that in the hypothetical above, if the judge decides in favor of the husband, the wife should still resist as a form of conscientious objection. Abou El Fadl, The Authoritative and Authoritarian in Islamic Discourses: A Contemporary Case Study, 3rd ed. (Alexandria, Virginia: al-Saadawi Publications, 2002), 60 n. 11. However this position seems to ignore the fact that Sharia as rule of law system is more than abstract doctrine of fundamental values that governs behavior. Rather, as suggested in this study, Sharia as 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.
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 has changed, then so too should the law. But part of the problem with legal reform in Islamic law is that with the progression of history came 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, to change Islamic rules of law is viewed as an attack on the political identity and ideology it is made to reflect and represent.

IV. “SHARIA” IN THE 19TH AND 20TH CENTURIES

In the Ontario Sharia debate, many seemed to believe steadfastly that Islamic law is so fundamentally rigid and different from Canadian law that no synthesis would be possible. Interestingly, this view mimics the findings of Orientalist scholars of Islamic law in the late 19th and early 20th centuries. Those scholars advised governments such as Britain and France on 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 that 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 the 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.”

33 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. Deviation from the authentic text was considered dangerous, ultra vires, if not an aberration from the truth, the true Islamic law. 35 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’ religious interests, and marginalizing the

34 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 Institutions and Ideologies: A SOAS South Asia Reader, ed. David Arnold and Peter Robb (Surrey, UK: Curzon Press, 1993), 165-185, 173.
35 For instances of this attitude, see the discussion below on Anglo-Mohammadan case law.
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 1773-1784, 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 in which Islamic legal principles were fused 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.

Often staffed by British judges, the first task of this court was to determine authoritative sources of Islamic law that they could easily access. To understand the Sunni tradition, British judges in Anglo-Muhammadan courts relied on a translation of the four-part Hanafi legal text al-Hidaya by al-Marghinani (d. 1197). 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. However, al-‘Ayni’s work was not translated and generally was not referred to in the Anglo-Muhammadan courts. Rather, Anglo-Muhammadan judges were content to rely on Charles Hamilton’s flawed translation of al-Hidaya. 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. This translated legal treatise provided a textual foundation for the British 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 have some additional luster to your [Hastings’] Administration.\footnote{Hamilton, The Hedaya, iii (emphasis added).}

Originally, Hamilton’s translated text comprised four volumes. However, as a large and voluminous work that was often not easily available by the late 19th century, the translated Hedaya proved very costly for students at the Inns of Court in Britain who wanted to practice 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:

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.\footnote{Standish Grove Grady, “Advertisement to the Second Edition,” in The Hedaya, trans. Hamilton, iv.}

In other words, for reasons of cost and utility, Grady removed whole sections of Hamilton’s version of al-Hidaya. Certainly, students training for their legal exams and seeking admission to the English Bar might find the reduction in price a relief. But Grady’s hope was not solely about the financial wherewithal of law students. He continues:

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 Mahommedan 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.\footnote{Id.}

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 in India adjudicating Islamic legal concerns for Muslims. 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 custom 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 Muslim shall be the Muslim Personal Law (Shariat).”

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 notion of Islamic law used to represent to Muslims their own law was reduced to code-like notions of the law, without recourse to discretionary approaches that may take non-textual factors into account.

This reductive view 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 Arthur Wilson of the Judicial Committee of the Privy Council illustrates how hesitant British judges were in going beyond the confines of translated texts and in analyzing and choosing between conflicting Islamic precedent. Yet despite that hesitation, these same British judges did not seem troubled if they modified the dominant Islamic legal ruling where 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 within the *waqf* document.

To decide the case, the Privy Council judges 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 bequesting instrument like the wasiyya. He argued that such a *waqf* was invalid under Shi’ite law, although valid under Hanafi law of the Sunni tradition. Mahmood J. criticized early 19th century courts that had failed to apply Shi’ite law to Shi’ite parties, instead assuming that the Sunni and Shi’ite law on this issue were identical.

Mahmood J. said: “I seriously doubt whether in those days the Shia law was

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46 *Agha Ali Khan and another (Plaintiffs) v. Altaf Hasan Khan and another (Defendants)*, ILR 14 All. 429-497 (1892). For those not familiar with legal 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 starts no page 429. I would especially like to thank Sooin Kim, Research Librarian at the Bora Laskin Law Library, Faculty of Law, University of Toronto, for locating this case in the ILR.
47 *Agha Ali Khan*, ILR 14 All at 449.
ever administered by the Courts of British India as the rule of decision, even when Shias were concerned.”

Mahmood J. stated that the Privy Council began to apply Shi’ite law to Shi’ite Muslims only by the mid-19th century.

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 is 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. The problem for the later Baker Ali court was that Mahmood J. also cited the following significant commentaries on Hilli’s text not translated into English:

- Masálik-ul-Afhám
- Jawáhir-ul-Kalám
- Jámi-ul-Shattát
- Sharah Lumah Dimashkia
- Jámi-ul-Maqásid

After analyzing these sources, Mahmood J. argued that under the Shi’ite law, as opposed to the Sunni law, a waqf is a considered a contract (aqd). As a contract, it has various conditions precedent that must be satisfied before it can be considered valid, in particular offer and acceptance. 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.

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48 Agha Ali Khan, ILR 14 All at 449.
49 Agha Ali Khan, ILR 14 All at 449.
50 For a reference indicating that Baillie’s work is a translation of the Sharáyi-ul-Islám that Mahmood J. reviews, see Agha Ali Khan, ILR 14 All 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, 2 vols. (Beirut: Markaz al-Rasul al-A'zam, 1998).
51 The transliterated spelling of the texts is that used by Mahmood J. Where I provide bibliographic information for each source, the transliteration follows the IJMES 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. Agha Ali Khan, ILR 14 All at 452. A bibliographic reference for this cite was not found during my research.
53 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.).
54 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, 3 vols. (Tehran: Danishkadah Huqeq va Ulum-i-Siyasi-I Danishgah-I Tihran, 2000-2001).
55 For a 10 volume edition of this text, see Muhammad b. Jamal al-Din Makki al-'Amili (Beirut: Dar Ihya’ al-Turath al-'Arabi, n.d.).
57 Agha Ali Khan, ILR 14 All at 450.
58 Agha Ali Khan, ILR 14 All at 450-456.
for the benefit of the poor and mendicant, the requirement of acceptance is relaxed as no specific party can effectuate acceptance.\footnote{Agha Ali Khan, ILR 14 All at 453-454.} But in all other cases, there must be an actual exchange, or what Mahmood J.’s Arabic sources call \textit{tanjíz}. Under this doctrine, any contract, \textit{waqf} or otherwise, must take effect immediately and not be conditional upon some future event.\footnote{Agha Ali Khan, ILR 14 All at 455-457.} Citing various Shi’ite sources, Mahmood J. argues that since a \textit{waqf} is a contract that requires offer and acceptance, and since a valid contract must meet the condition of \textit{tanjíz}, a \textit{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 \textit{waqfs} by testamentary bequests in Shi’ite law until the Judicial Committee of the Privy Council decided \textit{Baker Ali}, the facts of which were described above. They were faced with a lower court decision written by a judge well-versed in Arabic and in the Shi’ite sources, and who went beyond the sources translated into English. Despite including both the Arabic and English translation in the opinion, Mahmood J.’s ruling raised concerns for the Privy Council 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.

To argue against Mahmood J.’s decision, the Judicial Committee attacked his reliance on the untranslated Arabic sources. In his opinion for the Judicial Committee, Wilson noted that Mahmood J.’s decision that a Shi’ite cannot make a \textit{waqf} by will was not based on “any positive statement by any of the recognized authorities on Shiah law, but in the reasoning of Mahmood, J. upon a number of more or less ambiguous texts.”\footnote{Baker Ali Khan, at 14.} For the justices of the Judicial Committee, while Mahmood, J. was indeed a well-respected jurist and expert of Islamic law, his analysis relied on ancient texts that presented far too much indeterminacy in the law and 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 \textit{waqf} as a contract requiring offer, acceptance, and an \textit{inter vivos} transfer. Despite Mahmood J.’s argument, translation of texts, and inclusion of the original Arabic in the footnotes, the British judges argued that the untranslated sources led to more ambiguities than determinate answers.

As a general principle, the British judges 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.”\footnote{Baker Ali Khan, at 14.} For the justices, 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. Their 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.\(^{63}\)

The idea of expanding analysis of Islamic law to older texts threatened the
justices of the Privy Council, despite the authority of those texts within the
Shi’ite tradition.

The contest between Mahmood J. and the Judicial Committee seemed to
centre on defining authoritative sources, and whether one must limit them to
those sources that have been translated into English. The Privy Court Lords
were content to rely on the “more important of those [Shi’ite] texts which have
long been accessible to all lawyers.”\(^{64}\) But accessibility here has more to do
with translation than with the significance of texts to the legal tradition being
analyzed. Certainly the *Sharâya-ul-Islâm* 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, *Jâmi-ul-Shattât*, was also widely
accessible. But the latter text was not translated into English.\(^{65}\) Certainly for
British judges to rely on untranslated texts of Islamic law would have
introduced administrative problems of accessibility given that not all lawyers
practicing in Anglo-Muhammadan courts necessarily knew Arabic, let alone
Persian.

The Lords of the Privy Council 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 might be
directly relevant to the case at hand, they were concerned that the texts
themselves presented no unanimity. However, from the analysis above, 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* are
contracts under Shi’ite law, and thereby subject to certain rules of formation.
Instead they argued Mahmood J. exceeded the bounds of judicial analysis by
excessive interpretation of the early texts.\(^{66}\)

But what was particularly remarkable about the Judicial Committee’s
judgment was that although Shi’ite precedent invalidated a *waqf* created by a
testamentary bequest, the Committee nevertheless held that a Shi’ite could
indeed use a will to create a *waqf*. They argued, using Common Law logical
analysis, that a Shi’ite can make an *inter vivos* gift, whether as a *waqf* or not. A
Shi’ite can 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. But even more, it used this case as an opportunity to reduce
the scope of Islamic law and the extent to which one could investigate
competing sources for conflicting precedent.

\(^{63}\) Baker Ali Khan, at 14.
\(^{64}\) Baker Ali Khan, at 14-15.
\(^{65}\) Agha Ali Khan, ILR 14 All at 451.
\(^{66}\) Baker Ali Khan, at 15.
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 themselves 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 present-day Courts to put their own construction on the Koran and hadith where the opinions of text-writers are clear and definite.”

Even Muslim Indians, as subalterns under colonial rule, seemed to adopt colonial discourses of Islamic law and reduced 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 not only a tool of administration and control, but at times could be an obstacle that had to be removed in order to facilitate colonial interests. When Western powers developed strong economic ties with the Ottoman Empire, they 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. Their cases were adjudicated by consuls representing the different European countries. Commercial disputes between foreigners and natives were heard before special tribunals adjudicated by both foreign and Ottoman judges, or were heard before ordinary Ottoman courts generally with the presence of a consular official. As local leaders looked to Europe for financial investment and deeper economic relations, they were asked to grant foreigners greater immunities from the application of Sharia law, thereby expanding consular jurisdiction in managing the legal affairs of foreigners.

From the chaos of venues that arose with consular jurisdiction, the Mixed Court was established in Egypt to adjudicate cases involving foreign interests, i.e. where one of the parties was a foreigner or where a foreign interest was implicated even if both parties were native Egyptians. Gradually, the Mixed Court acquired greater jurisdiction. Furthermore, the Egyptian government in 1883 adopted the Napoleonic Code as its civil law and created national courts to administer that Code. The result was three Egyptian court systems: the Mixed Courts, the secular National Courts, and the Sharia courts.

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67 Asaf A.A. Fyzee, Outlines of Muhammadan Law, 78.
71 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).
Furthermore, in places like Algeria in the 19th 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. In the colonial period, 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. Furthermore, in order to create an active and orderly market in their new possessions, colonial officials restructured the prevailing traditions to create an active commercial market with favorable implications for 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. However the Islamic waqf structure 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 legislated broadly to bring all property rights under a single legislative regime designed by the French government. Furthermore, many Orientalist scholars argued that the Algerian adoption of the family waqf was in fact unIslamic. The colonial efforts pursued two tactics: to marginalize Islamic law by recourse to imposed legal orders, and to reinterpret Islamic law for the Muslims who seemed unable to see the truth of their own tradition. In doing so, however, 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.

For colonial powers, Islamic law was considered an obstacle to orderly legal and market systems, and an impediment to progress and modernity. 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.

In time, colonial officials and native collaborators considered the Sharia not only fixed and rigid, but also an obstacle to progress, modernity, and

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74 Christelow, Muslim Law Courts, 14-15.
civilization. They justified their efforts to marginalize the jurisdiction of Islamic law as necessary to bring “civilization” to the Muslims.

In the late 19th century, the Ottoman Empire initiated a series of legal reforms that involved adopting and mimicking European legal codes as substitutes for Islamic legal traditions. 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 mold. Medieval Islamic law was characterized by a multiplicity of opinions, different doctrinal schools, and competing theories of interpretive analysis. In the Ottoman reform period, this complex substantive and theoretical diversity was reduced through a selective process of codification. For instance, when Muslims began to codify Islamic law, such as when the Ottomans drafted the first Islamic code The Majalla, 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 of law 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 context that contributed to its flexibility. As another example, in 1949 Egypt adopted a civil code borrowed mostly from the French Civil Code, and which also incorporated minimal elements of Islamic law. Subsequently, in 1955 the Sharia courts were disbanded in the country. One exception to this dislocation of Sharia was in the area of family law. Both colonial administrators and Muslim nationalist assemblies preserved Islamic family law in codified form while modernizing other legal areas such as commercial law. This reduction in jurisdiction and application arguably placated Islamists who felt threatened by modernization and considered the preservation of traditional Islamic family law to be necessary to maintain an Islamic identity in the face of an encroaching modernity. This

75 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), 46-117.
76 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,” Law and Society Review 25, no. 4 (1991): 89-922.
79 For a historical account detailing the move from Islamic to secular law in Egypt, see Brown, The Rule of Law in the Arab World, esp. 61-92.
80 Locating an authentic past on the bodies of women within the family has been used to construct modern national identities in post-colonial societies where the past provides an
phenomenon was 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 even understood by European powers and Muslims themselves.  

V. 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 saw modernization as associated with the hegemonic “Other” and as challenging Islamic identity, the historical Sharia in code-like form provided a symbolic and determinate anchor for delineating a monist vision of “Islamic identity”. 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.  

The reductive reading of Islamic law by colonial authentic basis for the national identity of new states immersed in a modern world. Traditional family law regimes may be used to bring the values of the past into the present national consciousness to provide a sense of identity in opposition to the norms perceived to emanate from the colonizing world. For an excellent analysis of women, family and nationalism, see Anne McClintock. “Family Feuds: Gender, Nationalism and the Family.” Feminist Review 44 (1993): 61-80. One exception to this colonial inspired narrative about the narrowing of Shari’a is the case of Saudi Arabia. Colonial powers did not seem to exert much control over Saudi Arabia, and consequently the colonial narrative does not universally apply across the Muslim world. However, I would suggest that the narrative about the reduction of Sharia is not dependent on colonization as its only topos. Rather the colonial topos is only part of the narrative, which fundamentally involves a relationship between power, law, and the formation of political/nationalist identities. For instance, colonists used a reductive but determinate notion of Islamic law to bolster their legitimacy and ensure administrative efficiency, while also marginalizing the tradition when necessary to attain colonial goals. Likewise, the Saud family’s use of Wahhabism as an ideological narrative that trumped tribal loyalties in the Najd, has also allowed the Saudi state to utilize a reductive, often literalist approach to Islamic law to bolster its own political legitimacy and authority.

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,” Modern Asian Studies 35, no. 2 (2001): 257-313.

There are many who have argued that the restriction on interpretation in Islamic law occurred much earlier and 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 those who espouse this view, see Joseph Schacht, An Introduction to Islamic Law (London: Oxford University Press, 1964); Noel J. Coulson, A History of Islamic Law (Edinburgh: Edinburgh University Press, 1964). However, Wael Hallaq has argued persuasively that the doors of ijtihad were never in fact closed, and legal interpretation continued unabated. Wael Hallaq, “Was the Gate of Ijtihad Closed?” International Journal of Middle East Studies 16, no. 1 (1984): 3-41. See also Shaista Ali-Karamali and Fiona Dunne, “The Ijithad Controversy,” Arab Law Quarterly 9, no. 3 (1994): 238-257. 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. Irshad Manji, The Trouble with Islam Today: A Muslim’s Call for Reform in Her Faith (St. Martin’s Press, 2004).
administrators as fixed and unchanging has affected the way in which those living in the 21st century understand and conceptualize the Islamic tradition.

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 provides an 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.83

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 role 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.”84 Islamic law does not grow and develop through a jurisprudentially legitimized use of critical analysis; instead it stagnates in the form of inherited scriptural texts provided by God’s divine will. Shari’a provides for Coulson 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.”85 With this image of Islamic law, Coulson considers the Shari’a tantamount to a ius naturae or natural law as against all other humanly contrived legal systems.86 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.87

\[\text{\textsuperscript{83}}\text{Coulson, A History of Islamic Law, 1-2, emphasis added.}\]
\[\text{\textsuperscript{84}}\text{Coulson, A History of Islamic Law, 2, emphasis added.}\]
\[\text{\textsuperscript{85}}\text{Coulson, A History of Islamic Law, 5.}\]
\[\text{\textsuperscript{86}}\text{Coulson, A History of Islamic Law, 6.}\]
\[\text{\textsuperscript{87}}\text{Coulson, A History of Islamic Law, 85. Notably, medieval Muslim jurists debated whether moral notions like good and bad preceded God’s determination, or whether something is good or bad because God legislates it as such. This philosophical debate was fundamentally about the ability of humans to use their reason and discretion to create norms of a moral and legal nature. For a general discussion of this medieval debate, see Kevin Reinhart, Before Revelation : The Boundaries of Muslim Moral Thought (Albany : State University of New York Press, 1995).}\]
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. But for Muslims contending with post-colonial controversies over political identity, 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 instance, the Islamist conception of Sharia as unchanging and inflexible rules of God has been understood by some scholars, such as Roxanne Euben, to be a response to the onset of liberal modernity. The reductive and reified conception of Sharia, with its determinacy, provides a foundation for defining notions of identity through tradition, and thereby counters the atomistic notion of the liberal individual disconnected from tradition and community.88

As an example, in 2000 Morocco’s socialist prime minister Abderrahman Youssoufi proposed reforms to the nation’s personal status law (Moudawwana), which governed 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.89 When Youssoufi proposed his reforms, hundreds of thousands of supporters rallied in Rabat. However, as Ilhem Rachidi reports, “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.”90 To promote the reforms, while undermining Islamist opposition, King Mohammad VI invoked his authority as supreme religious commander (amir al-mu’minin) and created 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 reformatory endeavors. However, it is not clear 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 its suspected role in the May 2003 Casablanca bombings.91 As suggested by both the Saudi and the 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.

This single example illustrates how Islamic law is 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.

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88 The fundamentalist conception of Sharia as unchanging and inflexible, as a rigid system of God’s law, has been understood by some as a response to the onset of modernity and the values that for which it stands. In other words, the prevailing conception of Sharia operates to counter the modern idea of individual self-identity disconnected from tradition and community. See Roxanne Euben, *Enemy in the Mirror* (Princeton: Princeton University Press, 2004). For similar Western critiques of liberal atomism, see Alisdair MacIntyre, *After Virtue*, 2nd ed. (Indiana: University of Notre Dame Press, 1984); Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge: Cambridge University Press, 1989).


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.

VI ONTARIO’S SHARIA DEBATE: THE POLITICS OF THE DISCOURSE

In the 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, states that one can either opt to arbitrate under Islamic law or follow Ontario civil law. But if a Muslim chooses to follow Ontario law, “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.”

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.” In other words, those proposing and supporting the use of Sharia relied on a conception of the tradition in which it is deterministically structured as a comprehensive code.

Many who opposed the use of Sharia arbitration seemed keenly aware of its historical diversity. However they asserted that Islamic law is so radically indeterminate that it is vulnerable to political control and manipulation. They argued that Islamic law is a tool used by Islamists and autocratic governments to establish political control and legitimacy, and poses a danger to cherished liberal values. For instance, Alia Hogben, president of the Canadian Council of Muslim Women, wrote that those Muslims who promote the use of Sharia arbitration were using the issue to argue “that we need identity markers to remain Muslim” in a multicultural Canadian context. In other words, Islamic law becomes the means by which a minority group in a pluralistic country can maintain their identity, religious and otherwise. 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. Rather, “[i]t has something to do with political Islam.”

But whether one was an opponent or proponent of Islamic law, there was little effort by either party to think of Islamic law historically, methodologically, or as a rule of law system. The 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 colonists 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 on Sharia, there was little detailed legal discussion about the kind of jurisprudence that could lead to a 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 that is consistent with Sharia values. Muslim proponents and opponents of Sharia were often those who 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.\(^{96}\) There was little effort by opponents to offer alternative paradigms of jurisprudence, to understand the strengths and weaknesses of family law in Ontario, or to balance multiculturalism with liberal values of equality.\(^{97}\)

Likewise, proponents of Sharia arbitration provided no systematic analysis or jurisprudential treatment of 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 Sharia can accommodate liberal values, but a reference to Tunisia’s approach to Islamic law provides evidence to the contrary. Attempting a balance between liberal and Islamic values, Tunisia adopted provisions in its family law code that conflict with historical Sharia, but which the country nonetheless justifies on Islamic grounds. Most notable is Tunisia’s ban on polygamy. Islamic law allows a man to marry four women concurrently. However, Tunisia 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.”\(^{98}\) 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 license for polygamy within an Islamic framework.\(^{99}\) Furthermore, Tunisia requires a divorcing couple to pursue their divorce by petitioning the courts.\(^{100}\) By requiring divorcing couples to utilize the judicial machinery of the state, Tunisia has

\(^{96}\) See the discussion in Tarannum Kamlani and Nicholas Keung, “Muslim group opposes sharia law; Argues it does not protect women; Islamic body presents case to Boyd,” *Toronto Star* (Ontario ed.), August 28, 2004, A2.

\(^{97}\) See for instance the following media accounts: Jeffs, “Iranian Activist”; Bob Harvey “Sharia law debate divides Ontario’s Muslims,” *CanWest News* (Ontario), January 17, 2005, p. 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).

\(^{98}\) Qur’an, 4:129.


\(^{100}\) *Knowing Our Rights: Women, Family Laws and Customs in the Muslim World* (Women Living Under Muslim Laws, 2003), 245
effectively undermined the husband’s substantive right to unilaterally divorce his wife under Islamic law.

VII. 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 abstract rules. 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. 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 being pressured have their marital disputes mediated in accord with what is presented 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 skeptical of Boyd’s suggestions to amend the arbitration act 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 the arbitration act, many of its provisions reflected Boyd’s reform proposals concerning the training of arbitrators, and the transparency and accountability of their decisions. 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 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,

101 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 writes how Sharia is meant to be a universal system that governs every aspect of a Muslim’s life. And while she recognized the complexity of the tradition, she expressly refuses to investigate its history, development, and theoretical contours. Natasha Bakht, “Family Arbitration Using Sharia Law: Examining Ontario’s Arbitration Act and its Impact on Women,” *Muslim World Journal of Human Rights* 1, no. 1 (2004), n. 79-81 and accompanying text.

102 See Ontario’s *Family Law Act*, s. 52.

and its ability to change and to accommodate the values and aspirations of Canadian citizens. But before members of a liberal democratic polity such as Canada can truly understand what the values of liberty, equality and multiculturalism can and cannot accommodate, 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 to study and analyze the Sharia; those that do exist often have been co-opted by state governments to promote their own legitimacy before a rising tide of Islamic movements. But to see the tradition exclusively as reified is to reemphasize 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.

This 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. 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 create a legal regime that facilitates and regulates the development of non-profit Muslim family service organizations. By utilizing various legislative regimes such as corporations law and tax law, and by using the power of judicial review, the government can create venues for Muslims to create their own civil society 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 has a legitimate interest in regulating arbitrations that justifies its use of legislative power to create a specific type of corporation that offers family dispute arbitration services, whether religious or not. It would be non-profit to ensure an underlying commitment to community service rather than profit-maximization. Its legislated corporate structure and standing would emphasize the government’s commitment to this particular form of civil society. In other words, by legislating a particular corporate regime of family service centres, the state adopts a positive, hands-on engagement with civil society, while also taking a value neutral position on the substantive content each centre adopts. Additionally, this particular corporate form should be subjected to specific tax code regulations that require an annual auditing to ensure that the family service organization receives its financial support from an actual

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104 For instance, in the medieval period, the *mufti* often occupied a position of authority and preeminence in towns, and was consulted by lay and judges alike for his legal opinions. However, during the Ottoman period, and later with the rise of new nation states, the office of the *mufti* soon 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 to support government policy. For a discussion on state *muftis*, which upholds the view that their independence is quite limited, see Jakob Skovgaard-Petersen, “A Typology of State Muftis,” in *Islamic Law and the Challenge of Modernity*, eds. Yvonne Yazbeck Haddad and Barbara Freyer Stowasser (Walnut Creek, California: Altamira Press, 2004), 81-98.
community of users, whose diversity and scope justifies the organization’s existence. The tax regime should also cap the maximum donation by any single donor so that no single party could use financial power to dominate the discourse, and further to ensure that the majority of the organization’s funding comes from a diverse group of people that reflect a breadth of support for the organization and its existence. Additionally, the government should create regulatory measures to ensure that arbitrators are properly trained and that arbitral processes are subject to checks for transparency and accountability. Finally, government legislation 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. The judicial standard of review certainly will differ depending on the national, cultural and constitutional context. There is no set formula that could be applied uniformly across different nation states, constitutional orders, and cultural context. However it should be noted 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 religious communities. The thinner the standard, the more religious communities will enjoy autonomy within the state, but possibly to the detriment of the state’s liberal values.

This civil society regime would allow multiple voices to express competing visions of Islamic commitments in liberal polities. Imagine a political spectrum of Muslim family service organizations. Those on the left might critically engage the Islamic legal tradition, concluding, hypothetically that 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 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 marketshare”, the family service organizations will contribute to a “marketplace” of Islamic legal ideas. Furthermore, if one of the parties to the arbitration considers the arbitral decree unfair or unjust given the liberal values of the state, he or she can appeal the decision to the courts. The Islamic legal philosophy adopted by the family service organization will then be presented in dialogue with the state and its values. As the courts develop a doctrine of review over time, the family service centres and the government will gradually develop a mutually shared understanding of how to observe religious values within a liberal state.

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 on the religious marketplace, see Rex Ahdar, “The idea of ‘religious markets’,” International Journal of Law in Context 2, no. 1 (2006): 49-65.
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 can 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 efficiency arbitration decrees offer to the parties. Mediated settlements are 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. The efficiency of arbitration would provide an incentive for Muslims to create family service organizations and thereby enter into dialogue with the state. Those who opt out of the arbitration regime would not enjoy the benefit, but also would not engage in the dialogue. They might reconsider their position if another family service organization develops an approach to Islamic family law that appeals to their values, is economically efficient and does not violate the prevailing standards of judicial review.

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 a 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 between Muslims with each other and with 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 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. Islamic legal history is full of examples of how different legal schools and opinions met their demise for reasons ranging from their lack of substantive persuasiveness to historical factors involving the economics and politics of patronage.106

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, 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 “market place” of Islamic law ideas, the ultimate victor will not be one group over another, but rather the Muslim consumer who will have a chance to make a choice.