Islamic Law in Canada:
Marriage and Divorce

Sevak Manjikian

Institute of Islamic Studies
McGill University
Montreal, Quebec
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Author: Sevak Manjikian
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Abstract

Islamic Law in Canada: Marriage and Divorce provides an analysis of how Canadian society and the Canadian judicial system have responded to the use of the Sharī'a to resolve issues relating to Islamic marriage and divorce in Canada. This dissertation explores two instances where Canadian society has been forced to address the role of the Sharī'a in Canada and its interaction with Canadian laws and values. The first involves the debate that took place in Ontario over the last decade concerning the use of Islamic arbitration in family matters. This public debate ultimately led to the rejection of faith-based arbitration in that province, a decision apparently consistent with traditional Canadian attitudes towards multiculturalism. The second area of interaction between Canadian and Islamic law is within the Canadian court system itself. In particular, Canadian judges are occasionally required to grapple with Islamic family law issues when rendering judgments on certain cases that appear before them. This dissertation will examine a number of such cases in order to illustrate how the Sharī'a has been addressed by Canadian judges. The overall aim of this work is to situate Islamic law within Canada's liberal framework. It is argued that although Canadians are amenable to certain levels of diversity, values that fall outside mainstream liberalism are not granted recognition. This dissertation will also demonstrate that the failure to legitimize Islamic arbitration represents a lost opportunity that would have broadened the scope of Canadian justice to include minority voices. The decision to reject faith-based arbitration will motivate some Muslims to seek justice from ad-hoc bodies of authority. Devoid of government oversight, these forms of underground Islamic justice may negatively affect certain members of Canada's Muslim community.

Auteur : Sevak Manjikian
Titre : La loi islamique au Canada: du mariage et du divorce
Département : L'Institut des études islamiques, Université McGill
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Résumé

La loi islamique au Canada: du mariage et du divorce analyse la façon dont la société canadienne et le système juridique ont réagi face à l'application de la sharī'a au Canada, ce dans le but de résoudre certains litiges reliés aux mariages et aux divorces musulmans. Cette dissertation examine deux instances particulières où la société canadienne se vu forcée de se questionner sur le rôle de la sharī'a au Canada, et ce, tant face aux lois canadiennes qu'avec les valeurs du pays. Le premier incident eu lieu en Ontario au cours des deniers années alors qu'il fut question d'utiliser l'arbitration islamique dans les litiges impliquant la famille. Un débat en découla, ultimement optant contre l'implication de la religion lors des cas d'arbitration dans cette province. Cette décision représentait en effet les attitudes canadiennes quelque peu conservatrices face à l'approche multiculturaliste.Le second cas où la sharī'a et le droit canadien ont interagit ensemble est au sein même du système judiciaire canadien. Les juges, tout particulièrement, doivent à certains moments considérer les principes islamiques du droit de la famille lorsqu'ils rendent un jugement au sein de membres de la communauté musulmane. Cette dissertation examinera donc certains cas particuliers où il fut clair que les juges Canadiens ont fait référence à la sharī'a dans leur jugement. Le but de ce travail est de situer la loi islamique dans le contexte d'un Canada libéral. Cette dissertation démontrera que, bien que les Canadiens soient ouverts aux changements et à la diversité, lorsque certaines valeurs sortent du contexte du libéralisme traditionnel, il y a une forte résistance. Du plus, la démonstration sera faite que le fait de ne pas avoir permis l'arbitration islamique au Canada ferme la porte à une plus grande ouverture du système juridique canadien tout en ne permettant pas aux minorités d'avoir une voix au sein de ce système. Cette décision, ultimement, pourrait encourager certains Musulmans à recourir à des instances qui seraient en marge de la légalité canadienne. Hors du control du gouvernement, ces instances pourraient en fait avoir un impact négatif sur la communauté musulmane canadienne.

Notes on Transliteration

Arabic Words in common use in the English language are not italicized. Proper Arabic names are not italicized and titles of articles and monographs appear in their original form. The transliteration system of this work is as follows.

ء Initial: unexpressed ء Medial and ‘ Final

A	ا	Ḍ	ض
B	ب	Ṭ	ط
T	ت	Ẓ	ظ
TH	ث	‘	ع
J	ج	Gh	غ
Ḥ	ح	F	ف
KH	خ	Q	ق
D	د	K	ك
DH	ذ	L	ل
R	ر	M	م
Z	ز	N	ن
S	س	H	ه
Sh	ش	W	و
Ṣ	ص	Y	ي

Vowels:

Short: A: ـَ I: ـِ U: ـُ

Long: Ā ا Ī ي Ū و

Diphthongs

AW أو

AY أي

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A number of individuals and institutions helped me in completing this work. First I would like to thank Professor Wael Hallaq who advised me throughout this project. Margo Plant, Mark Cohen and Nick Downton offered valuable assistance in editing portions of this work while Lyne Marie Larocque translated my abstract. My family offered me support to no end and it is because of their encouragement that this work was completed. Dawn Richards, Ann Yaxley, Kirsty McKinnon helped keep me sorted out in various administrative matters. Salwa Farahian, Steve Millier and Wayne St. Thomas were all a never-ending source of help at the library while Pat Burgher ensured that the Institute was in excellent shape. The Indonesian-Canada Islamic Higher Education Project and the Islamic Studies library assisted me through employment while the Institute of Islamic Studies provided me with various fellowships over the years. Finally, Vanier College granted me a paid leave that provided me with time to complete this dissertation.

Dedicated to Emelio
A good friend
May your wings carry you as high as the heavens

I beg to dream and differ from the hollow lies
This is the dawning of the rest of our lives
This is our lives on holiday.
"Holiday"
Billy Joe Armstrong

Islamic Law in Canada: Marriage and Divorce
Introduction

In light of Canada's need to augment its population through immigration, the demographic footprint of the nation is increasingly becoming more pluralistic. Within the population, many Canadians carry cultural and religious markers that are intrinsic to their pursuit of happiness. At times, these substantive characteristics are at odds with the majority's prevailing values and laws. Rules governing Islamic marriage (*nikāḥ*) and divorce (*ṭalāq*) represent a set of norms certain Muslim-Canadians wish to maintain in conjunction with mainstream Canadian values and attitudes.

Canadian society appears to be uncomfortable with the prospect of recognizing principles of Islamic law (Sharī'a) that include rules associated with marriage and divorce. This attitude was clearly evident during the recent debates over the proposed use of Islamic family arbitration that transpired in Ontario between 1991 and 2005. Although various religious groups had been using private arbitration to settle family matters in that province, a public uproar emerged following a Muslim group's announcement claiming that they would begin operating Islamic alternative dispute resolution (ADR) panels. The various fears that emerged (inspired to a large extent by Islamophobic rhetoric) led the Government of Ontario to outlaw all forms of faith-based family arbitration. Despite Ontario's rejection of Islamic arbitration, matters dealing with the Sharī'a occasionally appear before Canadian judges. Often, these cases require the courts to pass judgment on matters related to the Sharī'a. By analyzing how Canadians have addressed Islamic law in two specific instances, the Ontario debates over the use of Islamic arbitration and the appearance of Sharī'a cases in the courts, this

work will position Islamic law within the liberal and multicultural framework of Canadian society. Recognizing principles of Islamic law in Canadian courts represents an example of how the justice system can be broadened to accommodate minority voices. This will help draw individuals, who wish to settle their affairs via Islamic law, into mainstream legal institutions. However, the decision to ban Islamic family arbitration in Ontario represents a lost opportunity to integrate certain Muslims into the Canadian legal community. Moreover, the rejection may push some people into unofficial arbitration placing vulnerable members of society, particularly women, at risk due to the unregulated nature of these panels.

North American policy specialists and researchers have long assumed that immigrant groups would integrate into the prevailing secular society and fully identify with mainstream nation-state liberalism.[1] However, it is becoming apparent that identity politics, which includes religious convictions, are playing important roles in diasporic communities throughout the world. The demand on the part of certain segments of the Muslim community to have Islamic law recognized by the government belies the notion that everyone will uniformly accept the nation-state's model of citizenship. Moreover, society appears unwilling to cede greater recognition to cultural and religious groups for fear that the state's social fabric will unravel. However, the failure to recognize the substantive needs of various minority communities can lead to alienation. For instance, the riots by disaffected youth throughout France in 2005 demonstrate that alienation is not without its consequences. Although Canada's attitudes towards diversity are not as

[1] Richard Alba and Victor Nee, "Rethinking Assimilation Theory for a New Era of Immigration," *International Migration Review,* vol. 31 (1997): pp. 826-827.

rigid as the French project of assimilation, Canadian society cannot become complacent in its treatment of minority groups. In the past, an Anglo-Canadian cultural elite frequently portrayed diversity as a negative problem. Recently, Native and French Canadian communities have demanded greater recognition and autonomy. Their voices have effectively challenged the hegemony held by the English-Canadian political, military and economic elites. Today, members of immigrant groups and religious communities have joined this chorus bringing to light further challenges to the Canadian elite.

In a 1993 case that appeared before Justice J. Wright of the Manitoba Provincial Court, a 14-year-old Canadian female and her father sought permission from the courts to allow the girl to marry a Jordanian man of 27.[2] Both the prospective bride and groom were Muslims and argued that their faith permitted such a union. However, under Canada's *Marriage Act*, individuals who are below the age of majority cannot be married unless they obtain court approval.[3] In pleading the case, the applicants argued that Islamic law permits individuals who have reached the age of puberty to marry so long as there is parental consent, which in this particular case was provided by the girl's father. Under Islamic law, the capacity to marry is subject to a number of different interpretations. These differing interpretations are dependent on, but are not limited to, the location where the marriage is being convened, the sectarian affiliation of the individuals being married, and the particular legal school to which the couple belong.[4] Despite the arguments supporting the girl's desire to wed based on Islamic law, as well

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[2] A. (E.) (Next Friend of) v. Manitoba (Director of Child & Family Services): 1993 CarswellMan 290 (M.Q.B.).
[3] Canadian Marriage Act, R.S.O. 1990, c M. 3, section 5 (2).
[4] David Pearl and Werner Menski, *Muslim Family Law* (London: Sweet and Maxwell, 1998): pp. 141-143.

as the girl's father's wishes that she be married, the Manitoba judge refused the request. His reasons included the following: the need to uphold the provisions of the Canadian *Marriage Act*; uncertainty regarding the girl's consent to marry; the possibility that the marriage was one of convenience to provide the groom with quicker access to Canadian citizenship; and an evaluation of whether or not the marriage would be in the best interests of the 14-year-old girl.[5]

This case brings to light an important issue that Canadian society and the courts have been grappling with over the years: namely how to respect the cultural and religious identities of Canadians while ensuring that the 'law of the land' is respected. Justice Wright himself asserts that 'Canada is indeed a pluralistic society and the rights of all people are recognized and carefully protected.' He goes on to state that 'certain basic values and standards now exist that are the product of hundreds of years of development. Their aim is to protect all citizens and to provide the foundation upon which our successful Canadian democratic system is based. From time to time they may conflict with specific religious, moral or cultural practices and beliefs. Subject to reasonable compromise any such conflict must be resolved in favor of that general public interest.'[6] In his deliberations, the judge is attempting to balance Canada's respect for multiculturalism with the precepts of Canadian laws. By walking the fine line between recognizing principles of Islamic marriage and respecting existing legislation governing marriage, Justice Wright is engaging an issue that is fast becoming a hot topic in Canada - that of group-differentiated rights.

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[5] A. (E.) (Next Friend of) v. Manitoba, paragraph 8.
[6] Ibid., paragraph 12.

Group-Differentiated Rights

Group-differentiated rights are privileges demanded by specific communities that fall outside the familiar schedule of rights guaranteed to individuals in a country's constitution, bill of rights or national charter. These demands often emanate from immigrant groups and conservative religious communities who wish to maintain their distinctive ways of life and ensure that the majoritarian society recognize their differences. Examples include the demands concerning the right for Sikh men to forgo motorcycle and safety helmets in favor of turbans, Jewish men to wear skullcaps in the work place, and Muslim women to wear the headscarf (*ḥijāb*) in secular public institutions. If granted, these privileges would open the door for minorities living in multicultural societies to have equal access to employment and other opportunities that the majority enjoys without having to make significant sacrifices. However, many have raised the concern that permitting these and other group differentiated rights might create cultural ghettos that limit unity amongst all Canadians. But, if group-differentiated rights were deemed inappropriate, the ability of certain groups to enjoy the same opportunities as members of the majority would be put into question. Thus, when all citizens are treated in a uniform or 'color-blind' manner by not taking into consideration the substantive differences among them, some individuals would be disadvantaged while others, the majority, would not face similar challenges.

In France, for instance, Muslim women and girls who wear the *ḥijāb* are barred from attending public educational institutions of their choice. Because the French seek to create a citizenry that is culturally based on secularism (*laïcisation*), wearing religious symbols in public institutions is regarded as outside the norm. Some would argue that

equal opportunity is being hindered in France for those who wish to practice their faith in public while attending educational institutions to which the members of the majority have little difficulty gaining admission. In Canada, there is no such legislation, in large part because the level of acceptance of multiculturalism is quite high.[7] However, in the pursuit of justice, how far should a society go in recognizing group-specific rights? Should multiculturalism entail a form of tolerance that goes beyond laws that simply grant each citizen equal rights that are 'color-blind' to difference? Alternatively, should legislation be expanded to allow minority groups the right to maintain their distinctive ways of life that do not conform to liberal values articulated in societies such as Canada?[8] As this work progresses, I will point out the advantages and disadvantages of recognizing Islamic principles of marriage and divorce. Briefly, the main argument in support of the recognition of Islamic law in Canada and the formation of ADR panels is that they provide the Muslim community with important markers of cultural identity. The strongest argument made against group-differentiated rights is that they threaten

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[7] A recent survey, released by the Centre for Research and Information on Canada (CRIC) in July of 2004, found that Canadians are open to multiculturalism. According to the study, 96% of Canadians agreed with the statement "young Canadians today are fortunate to grow up surrounded by friends from all different races and religions." Furthermore, unlike France, which has banned religious clothing in school, Canadians are more open to the practice. The study found that 65% of Canadians rejected the idea of passing legislation banning things such as *ḥijābs* in the classroom. However optimistic these findings are, the study also found that there is a growing anti-Islamic sentiment in the country. The study found that 45% of Canadians claimed that anti-Islamic sentiment is rising amongst people they know. Finally the study discovered that 30% of Canadians would be less likely to vote for a party whose leader was a Muslim. See, Centre for Research and Information on Canada, "Canadians Reject Ban in Religious Symbols or Clothes in Schools" (2004):
http://www.cric.ca/pdf_re/new_canada_redux/new_canada_redux_summary.pdf.

[8] Naomi Klein has maintained that the kind of multiculturalism practiced in Britain, France and Canada 'has little to do with genuine equality. It is instead a Faustian bargain, struck between vote-seeking politicians and self-appointed community leaders, one that keeps ethnic minorities tucked away in state-funded peripheral ghettoes while the centres of public life remain largely unaffected by seismic shifts in the national ethnic makeup. Nothing exposes the shallowness of this alleged tolerance more than the speed with which Muslims deemed insufficiently "British" are being told to "get out" (to quote the Conservative MP Gerald Howarth).' See Naomi Klein, "Racism is the Terrorists' Greatest Recruitment

the cohesion of Canadian society by compartmentalizing certain segments of society into ghettos and thereby unravel the 'civic solidarity' needed to maintain a common culture that is based on liberal principles.[9]

Summary of Goals

The first and second chapters of this work offer a brief overview of Islamic law and highlight the way in which the Sharī'a developed and functioned. Special attention will be given to marriage and divorce. Although the discussion will be general and touch on various regions of the Muslim world, the two chapters will periodically focus greater attention on legal practices in Egypt. This country offers an excellent point from which to view Islamic law in part because of the availability of source material as well as the various changes that have affected Egyptian legislation over the years. By contrasting some pre-modern Egyptian legal practices with modern laws, we can better assess how the law actually interacts with society. The central aim of the first two chapters is to dislodge some of the popular notions regarding Islamic law held by Western audiences.

During the debates over the use of Islamic arbitration, the Sharī'a was regularly portrayed as a form of law incapable of change owing to its Divine origins. These reductive assumptions were not challenged in any meaningful way, thereby resulting in a very skewed image of what Islamic law was and what it currently represents. The first chapter will demonstrate that Islamic law is not only flexible, but also derived from human minds who frequently made changes in the way the law was expressed. This chapter will specifically analyze women's access to divorce and demonstrate that

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Tool," *Guardian Unlimited,* Saturday August (2005): http://www.guardian.co.uk/Columnists/Column/0,5673,1548480,00.html.

[9] Joseph Raz, "Multiculturalism: A Liberal Perspective," *Dissent,* Winter (1994): p. 77.

contrary to popular opinion, women had various means of initiating divorces in the pre-modern Islamic world. Furthermore, in challenging the notion that Islamic law is a chaotic and arbitrary legal system, the first chapter will demonstrate that the Sharī'a was applied in a systematic manner by highly trained individuals.

The second chapter of this work will briefly survey some of the current marriage and divorce legislation in use today in countries that apply Islamic family law. In doing so, it will point out that many laws governing marriage and divorce no longer follow the traditional methods of Sharī'a justice. Rather, the traditional methodology has been shattered and in its place has emerged various codified systems of law controlled by national governments. This has created a hybridized system of law whereby European legal principles frequently intermix with Islamic norms. These new codes of law have greatly affected issues dealing with marriage and divorce. In particular, this chapter will discuss how women's access to divorce in Egypt was reduced following the modern reforms. Those seeking to implement a system of Islamic family arbitration in Ontario, specifically the Institute of Islamic Civil Justice (IICJ), did not acknowledge the changes that have altered the practice of Islamic law throughout the world. Nor did the IICJ address the dynamism and flexibility inherent in pre-modern forms of Islamic jurisprudence. These two shortcomings raised serious questions as to the ability of the IICJ to offer Islamic arbitration.

The demands for recognition of the Sharī'a in Canada have been met with opposition from various individuals and groups, both Muslim and non-Muslim.[10] What

[10] One of the most vocal opponents of the implementation of Islamic arbitration in Canada comes from Margaret Wente, a former business columnist who writes opinion pieces for the *Globe and Mail.* According to her, permitting the use of Islamic law in Canada would violate the rights of women. In one of her editorials she maintains that '[i]mmigrant women are among the most vulnerable people in Canada.

is interesting is that these voices of caution come from within a liberal society that places a premium on individual choice and personal freedom. The philosophical principle of liberalism will be dealt with in more detail in the third chapter; for now it will suffice to say that the goals of liberalism are centered on personal freedoms as a measure of both societal and individual happiness. In this regard, liberals have great difficulty accepting conservative societies and cultures that place more emphasis on social conformity than on individual rights and freedoms. According to Bhihku Parekh, 'the modern state is suspicious of, and feels threatened by, well organized ethnic, religious and other communities lest they should mediate the relations between it and the citizen and set up rival foci of loyalty.'[11] Some liberals have even expressed a desire to alter the ways in which conservative societies function in the West in order to re-align these traditions within a liberal framework.[12] So, although liberal philosophy encompasses a certain level of freedom of choice, the philosophy also has a paradoxical undercurrent that seeks to assimilate non-liberal societies within its fold. By analyzing the views of a number of prominent liberal thinkers, the third chapter will highlight the philosophical context within which to view the level of acceptance Canadian society is willing to offer Islamic law.

Many don't speak English, are poorly educated, and are isolated from the broader culture. They may live here for decades without learning the language, and stay utterly dependent on their families. They have no idea of their rights under Canadian law.' See Margaret Wente, "Life under Sharia, in Canada?" *Globe and Mail,* May 29th (2004): p. A21.

[11] Bikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Cambridge: Harvard University Press, 2000): p. 182.

[12] Raz explains that a 'positive attitude to multiculturalism can be thought to lend support to the conservative strands in various communities. But to my mind this is a mistake. Cultures are bound to undergo changes within a multicultural society. The fact that members of cultural groups intermix to a considerable degree is bound to have its impact on the different groups in the society. The preservation of their culture is justified only in terms of its contribution to well-being. This requires an *adjustment* of each of the groups to the conditions of a relatively harmonious coexistence within one political society.' Italics added for emphasis. See Raz, "Multiculturalism," p. 77.

The fourth chapter of this work will discuss the principle of multiculturalism as it exists in Canada. An understanding of Canadian multiculturalism will help us assess whether the demands for the recognition of Islamic law fit the country's expectations. It will become apparent that Canada, from the mid-1700's onwards, has projected itself as a predominantly English society despite the existence of other groups that include the First Nations communities, French-Canadians and various European, African and Asian immigrants. Historically, an assimilationist approach, predicated on liberal assumptions has prevailed in the country as non-English groups were expected to integrate into Anglo-Canadian modes of life. It is fair to say that English-Canada has exercised hegemonic powers over minority groups via its control of economic, political and military power. Recently, various scholars have questioned the monopoly held by English Canada.[13] Despite the recent appearance of deconstructionalist Canadian scholarship, historical precedent and current attitudes towards multiculturalism in non-academic circles allow little room for the acceptance of Islamic law in Canada. By looking at the goals of official multiculturalism, as articulated by the federal government under Trudeau and enacted into law under the Mulroney government, it will become apparent that recognizing Islamic law in Canada goes beyond the realm of what the actual policy stands for in this country.

The fifth chapter will highlight some of the more recent theories surrounding multiculturalism that have opened the door to some recognition of cultural and religious needs. By discussing the ideas concerning the future of multiculturalism of two prominent Canadian thinkers, Charles Taylor and Will Kymlicka, it will become evident

[13] Richard J.F. Day, *Multiculturalism and the History of Canadian Diversity* (Toronto: University of

that the recognition of substantive needs amongst Canada's minority communities *can* be accommodated, to some extent, within the public sphere. For instance, although Canadian law is secular in orientation, religious matters are often decided in courts. This has created, according to one legal expert discussed in the fifth chapter, a de-facto system of legal pluralism. Broadening Canadian multiculturalism to include substantive needs of minority groups will help integrate segments of the Muslim population into the mainstream in a more cooperative manner and help alleviate problems associated with alienation. Towards this end, this chapter will highlight some of the theories put forward by Jürgen Habermas who has advocated the need for the increased participation of minority groups in legal affairs.

Although some theorists have pointed out the advantages of allowing religious groups the ability to apply their normative systems within their communities, public opinion in Canada appears to be against granting such privileges. The sixth chapter will discuss five issues related to the recent debate in Ontario over the use of Islamic arbitration. First, a brief description of ADR will be provided. Second, the chapter will review the Boyd Report, a study commissioned by the Government of Ontario which sought to weigh the advantages and disadvantages of Islamic arbitration. Although the report favored the broadening of the justice system to include Islamic ADR panels, the public remained wary of the proposal. Third, the chapter will demonstrate that the advocates of Islamic ADR, specifically the IICJ, did not have the adequate training required to deliver the kinds of services they advertised. Fourth, this chapter will demonstrate that groups and individuals who lobbied against the use of Islamic faith-

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Toronto Press, 2000).

based arbitration also displayed an ignorance of the Sharī'a. This lack of understanding frequently employed a discourse that was laden with Isalmophobic rhetoric. These attitudes ultimately curried favor with the Government of Ontario that cancelled the enforceability all forms of faith-based family arbitration including Islamic forms. Finally, the chapter will conclude that although the government will no longer recognize faith-based family arbitration, the practice will continue and may negatively harm those who participate in 'underground' forms of justice.

The seventh chapter of this work will point out three reasons why Islamic marriage and divorce law will have great difficulty gaining acceptance in the Canadian judicial system as well as within society in general. They include: 1) the legal violations in matters related to equality that occur when applying certain principles of the Sharī'a in Canada; 2) the procedural differences in approaches to marriage and divorce; and 3) the desire by the majoritarian community to maintain social cohesion through a unified code of law that is predicated on Western liberal values.

Finally, the eighth chapter of this work will analyze actual cases of marriage and divorce that have appeared before Canadian courts and describe the manner in which these conflicts have been resolved by local judges. The cases that will be discussed center on the validity of marriages and divorces, telephone marriages and divorces, polygamy, and unpaid dowers. By describing the decisions rendered in these cases, this dissertation will demonstrate that Canadian courts allow for the recognition of certain Islamic values pertaining to marriage and divorce that do not violate Canadian law while closing the door on those practices that fall outside the purview of Canadian legislation.

Postnational Challenge

With the rise in the demand for group-differentiated rights, a number of social commentators have begun to eulogize the modern nation-state that has evolved in the West following the triumphs of the Enlightenment. One manner used to describe the nation-state is the idea of a territory that possesses a common 'societal culture' which helps shape the society in which citizens actively participate.[14] Some fear that this societal culture is at risk if conservative Muslims living in Canada obtain group-differentiated rights. Habermas, has identified a number of factors that have led to the challenges facing modern nation-states today.[15] First, various forces of globalization, namely easy access to mass migration, have demographically transformed relatively homogenous societies into multi-ethnic societies. Second, according to Habermas, with easy access to mass communication, cultural communities in countries such as Canada are able to keep abreast of the goings on in their ancestral homelands. Canadian Muslims, for instance, have a vast array of sources such as the internet that keep them up-to-date with the Muslim world. The Islamic diaspora in Canada is able to maintain ties not only to various regions of the Muslim world but also to a religious tradition that is distinct from the Judeo-Christian worldview familiar to North American society. Communal feelings, primarily associated with identifying oneself with the world-wide Muslim community (*umma*), act as a unifying force for Muslims around the world. Thus, migration and telecommunication have placed some strains on the nation-state's

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[14] Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Toronto: Oxford University Press, 1998): p. 29.

[15] Jűrgen Habermas, "The European Nation-State-Its Achievements and its Limits: On the Past and Future of Sovereignty and Citizenship." in Gopal Balakrishnan, ed., *Mapping the Nations* (London: Verso, 1996): pp. 281-294.

role as *the* primary focal point of social organization and cultural identification. Whereas in the past access to one's culture was limited by time and space, today's advances in communication have allowed individuals to maintain a virtual association with their homelands. Thirdly, following Habermas' logic, pluralization in Western societies has witnessed groups, such as certain segments of the Muslim community in Canada, requesting rights and privileges that do not correspond to the traditional norms of these liberal societies. Some authors have labeled the demand for group-differentiated rights as the 'postnational challenge.'[16] The main concern with this line of thinking is that the religious claims made by some Muslims appear to be eroding the importance of the nation-state and the societal culture within the state.[17]

Along with the alleged demise in nation-state identification amongst immigrant populations exist the threat that liberal values such as freedom of choice, freedom of conscience, equality of the sexes and a separation of church and state will also erode. These concepts can be viewed as the cornerstones of a liberal society along with the principles of democracy, the rule of law, religious toleration and natural justice.[18] During the course of the 20th century, and especially following the Second World War, Western societies witnessed the triumph of individual freedoms as liberal values became enshrined in documents such as the United Nations' *Universal Declaration of Human Rights.*[19]

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[16] Ruud Koopmans and Paul Statham, "Challenging the Liberal Nation-State? Postnationalism, Multiculturalism, and the Collective Claims making of Migrants and Ethnic Minorities in Britain and Germany," *American Journal of Sociology,* vol.105 (1999): pp. 652-696.
[17] Yasemin Nuhoglu Soysal, "Towards a Postnational Model of Membership," in Gershon Shafir, ed., *The Citizenship Debates: A Reader* (Minneapolis: University of Minnesota Press, 1998): p. 210-211.
[18] Sebastian Poulter, *Ethnicity, Law and Human Rights* (London: Oxford University Press, 1998): p. 23.
[19] *Universal Declaration of Human Rights*, G.A. Res. 217 (III), UN GAOR, 3rd Sess., Supp. No. 13, UN Doc, A/810 (1948).

Some observers see Islam as a religion at odds with Western notions of liberalism and personal freedom.[20] This is partly the result of the fact that individual freedom within Islamic society holds a very different meaning than it does in the West. During the classical and medieval periods of Islamic history (roughly 630-1700), freedom (*ḥurriyya)* was a term used to describe an individual's status as a free person as opposed to that of a slave (*'abd*). Personal freedom, in the modern Western-liberal sense, was not a philosophical concern for Muslim subjects during this period; rather freedom for Islamic societies translated to the freedom to worship God and be ruled under Islamic law.[21] Those who oppose the recognition of Islamic law in Canada fear that if group-differentiated rights are recognized, the non-liberal traditions often associated with the Muslim world would gain tacit approval in Canada.

From time to time, the incongruence between the Western notion of equality between the sexes and Islamic gender relations plays itself out in the international forum. When the United Nations' *Convention on the Elimination of All Forms of Discrimination Against Women* was issued in 1981, a number of Muslim countries that signed the document did so only after voicing reservations concerning Article 16.[22] This article sought to eliminate matrimonial discrimination between the sexes. Egypt maintained that "[t]he shari'ah [sic].....restricts a wife's right to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of

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[20] For a review of Western literary views on Islamic civilization see Edward Said, *Orientalism* (New York: Vintage 1994).

[21] "*Ḥurriyya,*" in *Encyclopedia of Islam*, vol. 3 (Leiden: Brill, 2003): p. 589b.

[22] *Convention on the Elimination of All Forms of Discrimination Against Women,* G.A. Res. 34/180, UN GAOR, 34th Sess. Supp. (No. 46) at 193, U.N. Doc. A/34/46 (1981).

the husband."[23] The Egyptian delegation went on to say that certain provisions regarding equality in marriage 'conflict with shari'ah [sic] law based on the Holy Qur'an [sic] and *Sunna*.'[24] This sort of conflict is precisely what worries Western liberals who wish to uphold the principles of toleration, but have difficulty upholding certain unequal practices that are incorporated in the Sharī'a. However as will be pointed out in the second chapter, the modern gender role stratification that exists in countries such as Egypt is more a reflection of modern reforms rather than a reflection of traditional Islamic legal methodology.

Another area of concern for liberals seeking to preserve the Western nation-state is the maintenance of the separation between church and state. Despite historical fusions of the roles of church and state – in the province of Quebec the role the Catholic Church played in running social services in the early twentieth Century comes to mind here - present day delivery of education, welfare and health are now (theoretically at least) divorced from religion. For the most part, religion has been relegated to the private sphere and one's public persona is mostly experienced in a religious vacuum. Although the majority religion in Canada is Christianity, the government attempts to foster an ecumenical approach to religion by not endorsing any particular faith. The split between private and public life is a major feature of modern liberal democracies where it fosters a degree of anonymity. Thus, modern society is marked by a certain freedom from the prying eyes of neighbors and the communal standards that in the past would have influenced behavior. In contrast, under Islamic values, the required duties to God and

[23] Poulter, *Ethnicity, Law and Human Rights,* p. 220.
[24] Ibid.

community are such that many practicing Muslims would find it hypocritical to maintain a strict separation between their religion and the public life they pursue.[25] Thus when Muslims in Canada enter into a marriage they often do so under the auspices of local prayer leaders (*imāms*) who provide a religious foundation to the individual's public pronouncement of marriage. In matters relating to divorce, certain Muslims may wish to pursue Islamic formulas for the dissolution of their marriages. However, in the Canadian context, offering Muslims access to religiously prescribed divorce is seen as problematic because it provides a religious solution to a civil affair and therefore blurs the separation between church and state.

However troubled Western liberals are when it comes to various provisions within Islamic law, the Sharī'a remains a crucial conveyor of cultural identity for the world-wide Muslim community. The word 'sharī'a' itself means pathway and the projected destination on the road of life is Paradise. For millions of Muslims around the world, the pursuit of happiness therefore revolves around the Sharī'a. Abandoning this allegiance is akin to abandoning the promise of Heaven for certain devout Muslims. Despite the importance of the Sharī'a in the eyes of many Muslims, it is incorrect to simply assume that religion alone acts as the central catalyst for individual human behavior. Subscribing to such a deterministic view of religion serves to discount local customs as well as social, political and economic conditions that heavily influence the behavior of

[25] A good example of this principle in action is the notion of usury. In Medieval Europe usury was regarded as sin and avoided by practicing Catholics. Today's financial systems that operate in the West apply interest with little regard for religious sanction that exist within Christianity. The same admonition against taking interest is also found in Islam. Modern Muslim banking functions in such a way as to respect the religious sanctions against usury. In Canada, some Muslims have established cooperatives that offer mortgages that closely follow the traditional Islamic approach to finance. See Islamic Co-Operative Housing Corporation Ltd., "An Interest-Free Housing Scheme and a Good Investment Opportunity for Muslims," May (2006): http://www.isnacanada.com/ichc.htm.

individuals around the world. Homi Bhabha has correctly pointed out that 'cultural engagement, whether antagonistic or affiliative, are produced performatively. The representation of difference must not be hastily read as the reflection of pre-given ethnic or cultural traits set in the fixed tablet of tradition.'[26] Thus, when members of minority groups in the West articulate their personalities, their actions should be seen in a manner that seek 'to authorize cultural hybridities that emerge in moments of historical transformation.'[27] This characterization is appropriate in describing how Muslims living in Canada use various points of reference in piecing together their identities.

For some Muslims living in the West, the pressures associated with secular society enhance the Sharī'a's appeal. Thus, some Muslims view pre-marital sex, low-rise jeans, faltering family relations and the absurdity of reality TV as Western phenomena that threaten their well-being as devout Muslims. Maintaining an ethical world-view that is associated with the Sharī'a is one way in which to preserve the conservative values espoused by some Muslims. Moreover, the racist and discriminatory attacks some Muslims encounter may direct them to seek a more religiously organized world-view as a means of alleviating the alienation they may feel. The importance of the Sharī'a is further accentuated by the fact that in modern Muslim societies themselves, Western-styled laws in matters of criminal and commercial law have replaced traditional Islamic practices.[28] Thus, in a world of rapidly changing rules that frequently reflect pervasive

[26] Homi Bhabha, *The Location of Culture* (New York: Routledge, 1994): p. 3.
[27] Ibid.
[28] J.N.L. Anderson, *Law Reform in the Muslim World* (London: Athlone Press, 1976).

Western values, maintaining some elements of the Sharī'a is perceived as essential to cultural survival.

Issues such as these are frequently raised during discussions that revolve around the recognition of group-differentiated rights. Although there are a host of different topics that come under the banner of Islamic group-differentiated rights in Canada, the present work will limit itself to matters pertaining to Islamic marriage and divorce. In addressing this subject, I will not question whether non-liberal traditions such as Islamic rules governing marriage and divorce should be outlawed in Canada. Because Canadian liberalism affords individuals the right to make their own choices, the state cannot easily censure someone's desire to define their interpersonal relationships as they wish. With regards to marriage at least, a couple can enter into a contractual agreement prior to or after their exchange of vows that endorse certain Islamic values. So long as these anti- and pre-nuptial contracts do not contravene Canadian law, there is very little to stop a couple from entering into such an agreement. Canadian liberalism has evolved to a point where people engaged in illiberal practices are granted a certain measure of freedom to do as they see fit so long as they do not infringe on the rights of others. This justification for allowing illiberal religious practices is ironically rooted in a humanistic concern that gives ascendancy to personal freedoms, rather than in a theological concern for what God desires.[29]

[29] Raz, "Multiculturalism," p. 74.

The controversy arises when the demands for substantive norms are made by organizations representing different communities, since their desire to preserve a way of life for the community may infringe on the individual rights of others. Liberal values place rights in the hands of the individual, not with the group. Capturing the liberal point of view on this issue, Steven Rockerfeller explains that '[o]ur universal identity as human beings is our primary identity and is more fundamental than any particular identity, whether it be a matter of citizenship, gender, race, or ethnic origin.' Rockerfeller goes on to say that elevating 'ethnic identity, which is secondary, to a position equal in significance to or above, a person's universal identity is to weaken the foundations of liberalism and to open the door to intolerance.'[30] The force of this claim underlies a particular weakness in the liberal doctrine; namely, its attempt to appear neutral when, in fact, it is not. Rockerfeller's endorsement of a 'universal identity' is itself a product of a particular identity – that of the liberal world-view that seeks to impose its values on societies throughout the world. On the international scene, these efforts have been the focus of European colonialists who in the past sought to instill their values on non-Western societies. Today, new proponents of neo-imperialism, including Canadian's political, military, and economic elite, are carrying on this tradition abroad. However, the attempt to impose liberal values is not limited to foreign affairs alone. Due to the high levels of immigration from non-European lands, a hegemonic drive is currently afoot in Canada in an effort to homogenize the country's population. Throughout the course of this work, I will demonstrate how this attempt to neutralize diversity in favor of an Anglo-Canadian identity has transpired in Canada in

[30] Steven Rockerfeller, "Comment," in Amy Gutmann, ed., *Multiculturalism* (Princeton: Princeton

relation to the use of Islamic legal principles. For now, it is safe to say that many liberal-minded individuals have grave reservations about the prospects of using Islamic law as a tool in conflict resolution for Muslims living in Canada.

University Press, 1994): p. 88.

Chapter 1
Understanding Islamic Law

Recent Western media representations of the Muslim world have often focused on violent forms of punishment perpetrated against individuals under the banner of Islamic justice. These mainstream reports are often products of journalists who have limited legal training as well as a cursory understanding of the Muslim world.[1] The cruel forms of punishment associated with Islamic law have certainly contributed towards fostering negative attitudes against its appearance in Canadian arbitration. In proceeding with this study, an understanding of what Islamic law represents is in order to separate fact from fiction.

In the following pages, a brief survey of how Islamic law developed and functioned in pre-modern societies will be offered. Special attention will be given to matters relating to marriage and divorce. During the recent debates surrounding the use of Islamic arbitration in Ontario, opponents dismissed the Sharī'a as an inflexible God-given legal system. Meanwhile, other critics portrayed the Sharī'a as a chaotic code of law lacking in both structure and organization. This chapter will dispel these myths by demonstrating that the Sharī'a has constantly changed over time. Moreover it will point out that the Sharī'a, as practiced in certain medieval societies, was a highly organized legal system which employed specialized functionaries who interpreted law to meet the needs of their societies. Another misconception articulated by the opponents of Islamic faith-based arbitration maintained that societies governed by the Sharī'a are marked by

[1] Margaret Wente states that 'Sharia law is based on the Koran, which, according to Muslim belief, provides the divine rules for behavior.' This description is not a correct assessment of the Sharī'a; rather as

an overwhelming male-dominated conservatism which all but limits a woman's power in matters related to marriage and divorce. Although this notion may be supported in certain juridical literature, social practice found throughout the Muslim world suggests otherwise. As will be demonstrated below, gender in the Muslim world is far more complex than has been reported by Western Orientalist and popular literature.

Origins of Islamic Law: the Qur'ān and the Prophet

The term 'Islamic law,' used so frequently in both academic and non-academic literature, is a phrase fabricated by the Orientalist tradition. Nowhere in the Arabic language do we find such a term in usage until the 19th century.[2] Furthermore, the accuracy of Orientalist and Euro-centric scholarship has traditionally been lacking when pressed to provide an adequate description of Islamic law. This school of thought has long viewed Islamic legal institutions as whimsical and arbitrary. The general ignorance can be seen in the oft-quoted description of Islamic law offered by the British Lord Justice Goddard in 1940. When faced with a piece of imprudent legislation in his chambers, the British judge commented that the court was 'very much in the position of a *qāḍī* under a palm tree. There are no principles on which he is directed to act. He has to do the best he can in the circumstances, having no rules of law to guide him.'[3] Unfortunately, this simplistic view is the one which members of the media are most likely to parrot in their coverage of Islamic law - resulting in a rather skewed

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this chapter will demonstrate, other components also influence Islamic law. Wente, "Life under Sharia," p. A21.

[2] Haifaa Khalafallah, "The Elusive 'Islamic Law': Rethinking the Focus of Modern Scholarship," *Islam and Christian-Muslim Relations,* vol. 12 (2001): p. 144.

[3] Lord Justice Goddard in *Metropolitan Properties Co. Ltd v. Prudy,* 1940. Quoted by Noel Coulson in *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: University of Chicago Press, 1969): p. 40.

understanding of the Muslim world.[4] For the most part, this same view typified the level of discourse in Ontario during the debates over the use of Islamic arbitration.

The legal tradition historically found in the Muslim world was quite different from the one put forward by Lord Goddard. At its core, the Sharī'a encompasses legal, moral and behavioral norms which ultimately help guide Muslims in both religious and non-religious pursuits. Issues as mundane as hygiene and as important as the political legitimacy to rule over Muslim societies are both components of the Sharī'a. Activities which individuals and society participate in are classified as falling within the following range of characterizations: obligatory (*wājib)*, recommended (*mandūb*), permissible (*mubāḥ*), prohibited (*ḥarām*), and repugnant(*makrūh*). For instance, it is obligatory for Muslims to pray five times a day, recommended that Islamic leaders maintain roads properly, permissible for Muslim men to marry Christian or Jewish women, prohibited for Muslim women to marry Christian or Jewish Men, and repugnant (albeit permissible) for men to divorce women via triple repudiation. Ultimately, the Sharī'a points the way in which individuals living in the Muslim world should interact with society (*mu'amalāt*) as well as stipulating duties individuals owe God (*'ibādāt*)[5].

[4] Ray Conlogue argues in the *Literary Review of Canada* that Canadian newspapers have followed the lead of American media outlets in their portrayal of the Muslim world as a threat to Western society. The *National Post* and other Can-West newspapers such as the *Montreal Gazette* have frequently published opinion pieces by Daniel Pipes who is a firm believer that 'Muslims intend to start a revolution in the U.S.' At a time when the population needs a clear and serious understanding of the Muslim world, Conlogue argues that the print media have focused their efforts on titillating and frightening their audience in order to maximize their profits. See Ray Conlogue, "Skulking to the Right," *Literary Review of Canada,* May (2006): p. 19.

[5] Rules governing interpersonal relationships are referred to as *mu'āmlāt* and include social relations such as marriage and divorce. Meanwhile, the duties one owes to God are referred to within the corpus of Islamic law as *'ibādāt* and include such things as declaring a singular devotion to God (*shahāda*), prayer (*ṣalāt*), alms giving (*zakāt*), pilgrimage (*ḥajj*), and fasting (*ṣawm*).

The historic origins of the Sharī'a can be traced back to the life of the Prophet Muḥammad and the revelations he received that make up the text of the Qur'ān. Most people would agree that at its core, the text is a manifesto for change and reform.[6] The Qur'ān represents a break from the social dynamics of Arabia that positioned individuals within a relatively fixed social hierarchy based on family and clan affiliations. Throughout the text of the Qur'ān, people are urged to establish a more egalitarian social structure whereby individuals would have status based on their membership within the Muslim community as opposed to family and tribal connections.[7] Furthermore, the normative system made evident in the Qur'ān advocated a puritan shift away from the cultural practices of the pre-Islamic Arabs which, according to the poetry of the time, entailed an appetite for gambling, drinking and sexual gratification.[8]

The excesses in behavior of the pre-Islamic Arabs should not leave the reader with the mistaken view that the population of Arabia was 'primitive' in its outlook and isolated from the goings on in the Near-East. Quite to the contrary, pre-Islamic Arabia should be seen as part of the general culture of the region owing, in part, to the trade routes that linked the Arabian Peninsula to Syria, Egypt and Mesopotamia. Thus the legal traditions of Arabia prior to the arrival of the Qur'ān were, in some ways, similar

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[6] When reading the Qur'ān it is important to note that the document was revealed at a specific time and place. As such, the improvements and reforms in matters of personal status spelled out in the document need to seen in light of the existing realities of Arabia during the 7th century. Although by modern standards the normative reforms appear bare, they were quite revolutionary for the time, a fact born out by the immense opposition Muḥammad and his followers faced when attempting to implement the Qur'ān's programs.

[7] Wael Hallaq, *The Origins and Evolution of Islamic Law* (New York: Cambridge University Press, 2004): p. 22.

[8] Kamal Abu-Deep, "Towards a Structural Analysis of Pre-Islamic Poetry," *International Journal of Middle East Studies,* vol. 6 (1975): pp. 148-184.

to those found in other parts of the Near-East. Exacting blood money, for instance, was a legal procedure employed by both the tribal and sedentary Arabs during the pre-Islamic period.[9] When Muḥammad began preaching his message in Mecca, his goals, as inferred from his biography, appeared to be centered on improving the morality of the community in which he lived. He also sought to influence the Jews and Christians who inhabited various urban centers of Arabia and impress upon them his connection to the Abrahamic tradition.

Muḥammad's prophetic mission was not initially successful. The polytheistic Arabs of Mecca rejected his monotheistic message considering it to be a threat to their commercial, religious and social standard of living. In maintaining their control over Mecca, the leading clans of that city intimidated the fledgling Muslim community through violence. Seeking to shield his followers from danger, Muḥammad moved the Muslim community to the nearby city of Medina. That city had a Jewish and Christian population which refused to acknowledge Muḥammad's prophetic mission - though he was acknowledged as a powerful political figure. This dismissal started a process whereby Muḥammad began to distance the Muslim community from the other monotheistic faiths of Arabia. Muḥammad's primary mode of bringing about this split was to adopt a separate legal structure. Scholars point to the fifth *Surā* (chapter) of the Qur'ān, revealed to the Prophet during his time in Medina, as a clear sign of this legal paradigm shift.[10]

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[9] Hallaq, *Origins*, p. 18.
[10] Ibid., pp. 21-22.

What was revolutionary about the norms being proposed by Muḥammad was the new legal status granted to individuals. Prior to the Qur'ān's arrival, women, children and other 'peripheral' members of society were placed at a lower hierarchical stratum than people who belonged to the strongest tribe and curried favor with the nomadic and urban elite. The Qur'ān effectively challenged these predetermined roles by offering individuals equality within the Islamic community or *umma.*[11] Most noticeable amongst the new principles were regulations offering women personal and financial status unheard of at the time. Women were allotted property rights granting them control over their assets - this included the practice of granting women a portion of their family's inheritance over which they had exclusive control.

Along with these improvements were numerous references in the Qur'ān to marriage and divorce. These legal directives must be read in juxtaposition to the pre-Islamic practices found in Arabia. During Muḥammad's life, the tribal dynamics that governed marriage and divorce provided little legal status to women who were regarded as the possessions of the male members of the community. In this respect it was common for a girl or woman's guardian (*walī*) to force her into marriage without obtaining her consent.[12]

Although the Qur'ān did not do away with the overt patriarchy that existed in pre-Islamic Arabia, improvements were introduced concerning the status of women within

[11] The kind of equality granted to individuals in the Qur'ān is not one based on functionalist goals. Rather the equality promised is spiritual in orientation. Thus while men and women are encouraged to perform separate tasks, their spiritual reward, if those respective tasks are fulfilled, will be equal. See Qur'ān 33:35.

[12] There are exceptions to this rule, the most noteworthy being the Prophet Muḥammad's first wife Khadija, a wealthy widow who, because of her elevated position within society, chose to marry

the marital union. For instance, the Qur'ān introduced new rules specifying who could marry whom, a provision which would protect women who were sometimes forced into marrying family members in order to maintain wealth within the tribe or clan. In *Sūra* 4:26 of the Qur'ān one reads the following:

> Prohibited to you (For marriage) are: your mothers, daughters, sisters; father's sisters, mother's sisters; brother's daughters, sister's daughters; foster-mothers (who gave you suck), foster-sisters; your wives' mothers; your step-daughters under your guardianship, born of your wives to whom ye have gone in, - no prohibition if ye have not gone in; - (those who have been) wives of your sons proceeding from your loins; and two sisters in wedlock at one and the same time, except for what is past; for Allah is Oft-forgiving, Most Merciful.

The Qur'ān is replete with passages ushering in new ethics for society. Some of the guidelines are quite precise such as the one mentioned above, while others are less clear. For example, the rules governing the number of wives a man can take are discussed in the following passage:

> If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, Two or three or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess, that will be more suitable, to prevent you from doing injustice.[13]

Unlike the previous verse concerning whom a man may marry, this *Sūra* leaves the appropriateness of a polygamous marriage to the discretion of the husband, depending on his particular circumstances. Although taking on more than one wife is legally permissible according to the Qur'ān, the concern for treating each wife equally places

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Muḥammad without a guardian. See F.E. Peters, *Muhammad and the Origins of Islam* (New York: State University of New York Press, 1994): pp. 136-138.

[13] Qur'ān, 4:3.

moral injunctions on the practice by limiting polygamy to those men who are able - financially, physically or emotionally - to provide such equality.[14]

Another marital prescription made in the Qur'ān, expressed in language that is quite clear, is the principle concerning the reform of the bridal price known as the *mahr* or *ṣadāq*. In *Sūra* 4:4 one finds the following passage: 'And give the women (on marriage) their dower as a free gift'. Whereas in the past the *mahr* was deposited with the bride's family, the Qur'ān introduced the notion of providing the fund directly to the wife. Moreover, the emerging normative order made it very clear that a wife had financial independence. The *mahr* and other assets obtained by the wife during her marriage were hers to use as she saw fit - the husband had no rights to the wife's property.[15] The purpose of the *mahr* was to compensate a wife for her sexual accessibility to her husband. Furthermore, the contractual nature of the marriage agreement stipulated that in return for a wife's availability, the husband was required to provide her with support in the form of a shelter, food and clothing. Although these principles may appear stark for a twenty-first century audience, these rights were quite revolutionary for the seventh century and offered women legal rights previously unavailable.

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[14] Polygamy seems to be a pre-Islamic practice that was carried over into Muslim society. Another pre-Islamic practice concerning marriage and divorce that appears in the Muslim world is the institution of temporary marriage or *mut'a*. Today temporary marriages are still considered legal by the Shī'a who do not recognize the various *ḥadīths* that abrogate the practice. The Shī'a community maintains the observance of *Sūra* 4:24 which reads; 'Apart from these, you are permitted to desire your possessions (wives), honorably and not in the manner of fornication, and as for those of them that you have enjoyed give them their reward (dowry) in the measure prescribed by law...' The matter of temporary marriage is often considered to be the deepest legal fissure between the Sunnī and Shī'a branches of Islam. See Ignaz Goldziher, *Introduction to Islamic Theology and Law* (Princeton: Princeton University Press, 1981): pp. 208-209.

[15] Qur'ān, 4:19.

The Qur'ān also increased the status of women with respect to divorce (*ṭalāq*) by giving women the power to initiate a dissolution of the marriage, subject to the husband's willingness to come to a settlement. This form of divorce is referred to as a *khul'*. In *Sūra* 4:128, the Qur'ān states:

> If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best; even though men's souls are swayed by greed. But if ye do good and practice self-restraint, Allah is well-acquainted with all that ye do.

Although women who arranged for their husbands to divorce them would forfeit their dower, the practice whereby only men could initiate divorces had come to an end. During the pre-Islamic period of Arabia, men were able to invoke a divorce by simply uttering the statement '*anti ṭāliq*' (you are divorced) three times whereupon the woman would be irrevocably divorced. Although this method of divorce persisted, the Qur'ān instituted certain limits on the triple divorce. For instance, this kind of divorce is regarded as repugnant and is therefore to be avoided. Moreover, the Qur'ān introduced other innovations such as the waiting period (*'idda*) of three months following a man's declaration of divorce which would have to transpire before a divorce could come into full effect. The *'idda* allowed the man to reconsider his actions as well as allow for reconciliation between the couple. Furthermore, the *'idda* helped determine the parentage of any child born of the woman, thereby avoiding any ambiguity concerning a child's lineage.[16] Finally, during the *'idda* period, the husband was required to provide

[16] In the Qur'ān, one finds the following verse which defines the parameters for *'idda*: 'Divorced women shall wait concerning themselves for three monthly periods. Nor is it lawful for them to hide what Allah hath created in their wombs, if they have faith in Allah and the Last Day. And their husbands have the better right to take them back in that period, if they wish for reconciliation. And women shall have rights

financially for the divorced wife. Whereas in the past a divorced woman was left to fend for herself immediately following a divorce, Islamic regulations offered some, albeit measured, security. Although the norms introduced to the Arabs by Muḥammad did not constitute a complete 'system of law,' Qur'ānic regulations clearly pointed to a reformative spirit that challenged pre-Islamic society.[17] It is crucial to point out, at this juncture, that relying exclusively on the Qur'ān as a basis for understanding Muslim societies is problematic. To embark on such a hermeneutic would effectively reduce Islamic society to a static and ahistoric construct. Although the Qur'ān played a pivotal role in transforming pre-Islamic societies, various other factors contributed towards shaping the different societies that constitute the Muslim world.

Evolution of the Law: Emergence of *Ḥadīth*

With the death of the Prophet in 11/632, a gap in the leadership of the Muslim community appeared. This was mitigated to some extent by the election of Muḥammad's successors, the Caliphs, who acted as political and religious leaders for the emerging Muslim society. It was during the *Rāshidūn* that a clear precedent was set whereby law would be formulated on the basis of what was revealed in the Qur'ān as well as what the Prophet's example showed. The Prophet served as the embodiment of God's Will or the 'living Qur'ān.' When the third Caliph, 'Uthmān (r. 23-35/644-655),

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similar to the rights against them, according to what is equitable; but men have a degree (of advantage) over them.' Qur'ān, 2:228.

[17] Hallaq, *Origins*, p. 24.

produced a standardized text of the Qur'ān, the Muslim community had at its disposal a vulgate from which they could extract legal information.

As Islamic culture and political rule expanded beyond Arabia during the first century following the death of the Prophet, a scholarly class, the *fuqahā'*, actively participated in interpreting moral and ethical regulations for the community in order to provide religious guidance in accordance with God's Will. Their concern for formulating a legal doctrine emerged in part because they were uneasy with the Umayyad Caliphate's (41-132/661-750) attempts to interpret law and act as arbiters in religious matters.[18] In order to establish a law that was not influenced by political concerns, the scholars began seeking out sources beyond the Qur'ān from which to interpret matters of law. This search for legal knowledge (*ṭalab al-'ilm)* led back to Muḥammad's actions and words as a reference point.[19] These deeds and sayings, collected in oral and written format by the *fuqhahā'* made use of the Prophet's Companions' (*ṣaḥāba*) testimonies and provided the early Muslim community a model for legal, moral and ethical behavior.[20] The entirety of these traditions were known as the *ḥadīth.* In practical terms the *ḥadīth,* along with the Qur'ān were the authority on which legal opinions or *fatāwā* were based.

A number of the *ḥadīth* which emerged focused on matters pertaining to marriage and divorce. For instance, in one well-known *ḥadīth,* a scenario is presented wherein a

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[18] Ibid., p. 68.

[19] Members of pre-Islamic Arabian society who distinguished themselves for their behavior offered a *sunna,* or normative example, which was to be followed by their peers. This principle would transfer to Islamic society in the person of Muḥammad who acted as a role model for ethical and moral behavior. See Wael Hallaq, *A History of Islamic Legal Theories: an Introduction to Uṣūl al-fiqh* (New York: Cambridge University Press, 1999): pp. 10-11.

[20] In certain cases, the decisions the Prophet took in resolving matters derived from pre-Islamic principles. One such example is the manner in which surplus property (*faḍl al-māl*) is distributed as charity within the community. Ibid., p.13.

Companion of the Prophet of limited means, Sahl b. Sa'd al-Sā'idī, sought to marry a woman, but had little to offer her in the form of the *mahr* or bridal dowry. For this predicament, the Prophet had the following advice; guidance that was recorded in the *ḥadīth* collected by Muslim Abū al-Ḥasan b. al-Ḥajjāj al-Qusharyī:

> Do you know any part of the Qur'ān? He [Sahl b. Sa'd] then said: I know such and such *Sūras* (and he counted them). Then he [Muḥammad] said: Can you recite them by heart? He said: Yes, whereupon he (Muḥammad) said: Go, I have given her to you in marriage in exchange for the part of the Qur'ān which you memorized.[21]

As the need arose to have Islamic rulings cover different social scenarios, individual *ḥadīth* like the one quoted above began to appear throughout the Muslim world and would eventually number in the hundreds of thousands. With the growing corpus of the *ḥadīth* literature, questions arose concerning the authenticity of individual traditions. Through the process of confirming the chain of transmission (*isnād*) which traced the genealogical data of the individuals who recited each particular tradition back to the Prophet, an authentic or correct (*ṣaḥīḥ*) body of *ḥadīth* emerged by the end of the third/ninth century of Islamic civilization.

The standardization of *ḥadīth* literature was preceded by various other intellectual developments in the Islamic legal tradition. In the two centuries following the death of Muḥammad, individual jurists (*mujtahids*), living as far afield as the Hijaz, Egypt, Iraq and Syria, were formulating rulings (*aḥkām* sing. *ḥukm*) that were influenced by the Qur'ān and the emerging *ḥadīth.* However, during this time, the *aḥkām* produced by

[21] Abū al-Ḥasan b. al-Ḥajjāj al-Qushayrī Muslim, *Ṣaḥīḥ,* ed. Muḥammad Fu'ād 'Abd al-Bāqī, 5 vols. (Cairo: 'Īsa Bābī al-Ḥalabī, 1374-1375/1955-1956): 2:1401.

these early jurists were not uniquely based on these two textual sources; rather some jurists, often referred to as the folk of reason (*ahl al-ra'y*), employed discretionary reasoning or *ra'y* based on their own interpretative skills.[22] It is crucial to point out that the methods devised by these scholars did not emanate from the Qur'ān, rather they flowed from the minds of individuals who sought to live in accordance to their faith. Because of the fluid nature of legal hermeneutics being employed during this formative period, it was not uncommon for different jurists living in the same region to articulate divergent rulings on similar matters. These differences or *ikhtilāf* were partly a result of the use of *ra'y* by individual scholars along with regional differences that often shaped the biases of those scholars who interpreted the law. Over time, the use of independent reason as a source of law lost favor to the reliance on textual sources found in the growing corpus of *ḥadīth* literature.

The heightened reliance on sacred texts as a source of law did not necessarily mean that rational thought was entirely eliminated in the formation of Islamic law. One form of reasoning that survived throughout the classical and medieval periods was the use of *qiyās* an interpretive tool used in dealing with scenarios that were not explicitly covered in the Qur'ān or *ḥadīth*.[23] One of the earliest uses of *qiyās* was during the first/seventh century with respect to the matter of the *mahr*. Although the textual sources stipulated the moral obligation for Muslim grooms to provide their brides with a dower, practical questions arose as to what the minimum payment should be. Jurists living in the cities

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[22] Hallaq, *Origins,* pp. 74-78.
[23] Wael Hallaq, "Non-Anological Arguments in Sunni Juridical *Qiyās," Arabica,* vol. 36 (1989): pp. 286-306.

of Kufa in Iraq and Medina in the Hijaz (western Arabia) deduced, through analogy, that the loss of a woman's virginity was comparable to a loss of a limb. In this deductive reasoning process, jurists sought to decipher common attributes (*'illa*) found amongst different scenarios. By employing *qiyās,* the *mujtahids* were able to determine that the minimum amount to be paid to a bride should be equivalent to the minimum amount a convicted thief would have to steal before having his/her hand amputated.[24] Using this formula, jurists in Kufa determined that this minimum amount was ten *dirhams* while those in Medina put the number at three *dirhams.* The divergent figures highlight how different local customs affected the expression of the Sharī'a in different regions throughout the Muslim world.[25] This difference in jurisprudence is proof that Islamic law was not a monolithic construct but rather a dynamic system of law that paralleled local customs and the personal hermeneutics of disparate scholars.[26] Furthermore, owing to the fact that in the pre-modern Islamic world there existed no catholic or orthodox expression of Islamic law, the Sharī'a was built up by individual jurists who employed systematic methods of legal interpretation in the effort to articulate God's Will.[27] Concerns such as these seldom find their way into contemporary discussions in

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[24] Pearl and Menski, *Muslim Family,* pp. 179-180.

[25] Hallaq, *A History,* p. 16.

[26] The second/eighth century scholar, Muḥammad b. Idrīs al-Shāfi'ī, in his text *Kitāb Ikhtilāf al-'Irāqiyyīn* catalogues the different rulings articulated by two well know Iraqi jurists, al-Nu'mān b. Thābit Abū Ḥanīfa (d. 150/767) and Ibn Abī Laylā (d. 148/765). See Wael Hallaq, "From Regional to Personal Schools of Law? A Reevaluation," *Islamic Law and Society,* vol. 8 (2001): p. 6.

[27] Although the Qur'ān and the Sunna remain the basis for Islamic law, *mujtahids* had at their disposal various tools that allowed for a certain amount of flexibility in interpreting the law. One such legal device was the principle of *istiḥsān* or juristic preference used during the process of *qiyās.* This tool permitted jurists to weight the strengths and weaknesses of different *ratio decidendi* derived from the sacred texts before making a ruling. Recalling that the Qur'ān advocates justice and the promotion of good and the forbidding evil (*maṣlaḥa*) based on Qur'ān 2:185 'He desires for you ease, and He desires no hardships'), scenarios that are illegal in the sacred scriptures could be deemed appropriate in certain

the media relating to the Sharī'a. Rather terms such as 'medieval' are often employed to demonstrate how inflexible and rigid Islamic law has been. As we shall shortly see, this attitude is off the mark. In fact, medieval jurisprudence, as practiced in different parts of the Muslim world, represented an organized and systematic intellectual tradition.

Amongst the first to lay down a systematic approach towards legal interpretation was the second/eighth century jurist Muḥammad b. Idrīs al-Shāfi'ī who put forward his views in his text *al-Risāla*.[28] Al-Shāfi'ī's primary concern was curbing the excessive use of reason or *ra'y* in favor of the Qur'ān and *ḥadīth* in the formation of Islamic law.[29] In time, texts such as the *Risāla* came to be regarded as canonical amongst jurists who based their personal interpretations on information and methodologies gleaned from these texts.[30] By the third/ninth century, the personal nature of legal interpretation was beginning to give way to a more binding legal methodology grounded in an interpretive logic found in texts such as the *Risāla.* In honor of the interpretive logic espoused by the authors of these early texts, many of the emerging schools of law (*madhāhib*) were named after their so-called intellectual founders. These included the well known Sunnī schools such as the Ḥanafī, Mālikī and Shāfi'ī *madhāhib.* In order to protect the

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situations in order to protect and preserve life, private property, mind, religion and offspring. See Hallaq, *A History,* pp. 107-113.

[28] Muḥammad b. Idrīs al-Shāfi'ī, *al-Risāla*, ed. Muḥammad Sayyid Kīlānī, (Cairo: Muṣṭafā Bābī al-Ḥalibī, 1969). Contemporary scholarship often points to al-Shāfi'ī as the archetype of Islamic legal methodology. This view has come under some suspicion recently as new research has uncovered the fact that the *Risāla* did not garner a great deal of attention during the author's lifetime. Rather students who followed the works of al-Shāfi'ī, such as the jurist Ibn Surayj (d. 306/918), used the formulas articulated in the *Risāla* as a guide for their legal interpretation. See Hallaq, *A History,* p. 31-33.

[29] Ibid., p.32.

[30] Hallaq, "From Regional to Personal," p. 20.

methodological soundness of these schools and preserve the external modes of legal expression, juristic imitation (*taqlīd*) emerged by the third/ninth century. Thus a recognizable corpus of authoritative opinions (*ṣaḥīḥ*) emerged along with standardized legal methodology (*uṣūl al-fiqh*) for formulating law. Towards this end, scholars throughout the Muslim world would strive to interpret law (*ijtihād*) in a manner that was consistent with the methodology used by the school of law to which they belonged.

One notable feature of the Sharī'a which appeared during pre-modern times was the scholars' independence from government in the process of interpreting the law. Although governments may have funded the education of legal practitioners, technically they did not interfere with the formulation of law. Furthermore, what marked Islamic jurisprudence during this time was the 'individualistic character' of the law.[31] The result was a great diversity or *ikhtilāf* in the expression of the Sharī'a on certain matters such as marriage and divorce while, at the same time, a consensus (*ijmā'*) emerged regarding matrimonial rules and procedures. Thus, all schools of Islamic law will concur that a marriage is a contractual agreement whereby a husband and wife can lawfully engage in sexual relations. A marriage comes into effect once a contract (*nikāḥ*) is agreed upon by the marrying parties and witnessed by members of the community. Furthermore, the schools all agree that the primary purpose of an Islamic marriage was to legitimize sexual relations as well as foster procreation - though sexual gratification was, and still is, regarded as a complementary component of a marriage

[31] Ibid., p. 26.

union.[32] Furthermore, all schools of Islamic jurisprudence offer divorce as an option - albeit one of last resort which is considered to be *makrūh* or repugnant. Between these poles of consensus lies a vast field of diversity or *ikhtilāf* in the manner in which Islamic law has been practiced.

A detailed description of the differences that existed between each school of law in matters relating to marriage and divorce exceeds the scope of this work. Suffice it to say that the Islamic norms emerging subsequent to the death of the Prophet were highly divergent due to the fact that legal scholars employed different formulas of *ijtihād*.[33] For instance, in the Ḥanafī doctrine found in the Levant, women are capable of concluding their marriage contracts without the consent of their guardians (*walīs*). Meanwhile, according to the Mālikī school, based in Medina, women were required to have guardians approve of their marriages.[34]

In some cases, the differences in jurisprudence resulted from interpretations that did not strictly follow the official legal methodology put forward by the schools of law. Early Islamic marriage contracts in Egypt, for instance, clearly demonstrated how local customs prevailed over the official Mālikī doctrines being used in matters pertaining to the payment of the *mahr*.[35] This exchange of money is regarded as a transaction (*jins min al-ijāra*) in which the husband has effectively paid for the 'sexual enjoyment of his

[32] Vardit Rispler-Chaim, "Islamic Law of Marriage and Divorce and the Disabled Person: the Case of the Epileptic Wife," *Die Welt des Islams*, vol. 36 (1996): p. 92.
[33] Hallaq, "From Regional to Personal," p. 26.
[34] Ibid.
[35] Yossef Rapoport, "Matrimonial Gifts in Early Islamic Egypt," *Islamic Law and Society,* vol. 7 (2000): p. 6.

wife's body.'[36] According to the original Mālikī ruling, the *mahr* should be paid in full at the time of the marriage. Deferring payment of the dower was regarded as an innovation (*bid'a*) by Mālik b. Anas who commented that '[i]n the past, the entire *ṣadāq* [*mahr*] was payable upon demand. If any portion of it is deferred, I do not like its postponement for a long time.'[37] Despite the view of this foundational figure of jurisprudence, Egyptian marriage contracts dating back to the third/ninth centuries frequently stipulated that the *mahr* would be deferred. In a number of contracts, the remaining portion of the *mahr* was payable upon the dissolution of the marriage either by way of divorce or death. This practice of deferring the payment of the *mahr* has now become a universal feature of Islamic marriage contracts around the world despite the fact that it offended individuals like Mālik.[38] The fact that the practice of deferring the *mahr* was at odds with 'official' Mālikī doctrine as set out by the school's namesake is a reflection of the flexibility inherent in the Sharī'a as it was practiced in the past. In this particular case, the *ikhtilāf* reflected local customs in Egypt which existed during the formative period of Islamic jurisprudence. In fact, it was not only Muslims who deferred portions of their wedding dowers; members of the Jewish and Christian communities also employed this practice for the same reasons as their Muslim neighbors.[39]

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[36] Rispler-Chaim, "Islamic Law of Marriage and Divorce," p. 92.
[37] Quoted from Rapoport, "Matrimonial Gifts," p. 8.
[38] Ibid., p. 7. For information regarding the universal application of the deferred dower see *"Mahr"* in *Encyclopedia of Islam,* vol. 6, (Leiden: Brill): p. 79b.
[39] Ibid., p.11.

Despite these variable interpretations, the norms of all the different schools were always grounded in the Qur'ān and *ḥadīth*. Thus, although particulars in law may have differed based on the intermediary role played by jurists, their understanding of the law was ultimately inspired by the notion that the law which emerged would best fit God's Will. The idea that the Sharī'a represents a code of law etched in stone and handed to humankind by way of some fantastic miracle is utterly false. Rather, Islamic law represented a legal system where different jurists sought to provide individuals with legal and moral guidance based on their particular schools' methods of interpretation. Given the role as mediator, scholars often concluded their legal arguments with statements such as 'God knows best.'[40] Mālik, for instance, made such a conditional qualification by stating 'I am but a human being, I [sometimes perceive] wrongly and I [sometimes perceive] rightly. Examine my opinion. All that is in agreement with the book [the Qur'ān] and the Sunna then, follow it, and all that is not, abandon it.'[41] Clearly, what Mālik and the other *fuqahā'* who followed in his footsteps are stating is that the Sharī'a is an attempt to interpret God's Will and that their efforts are fallible and open to reinterpretation.

Islamic law in Practice

Before turning to the actual practice of Islamic marriage and divorce in the classical and medieval periods, a general comment on the role women played in Islamic societies is in order. The Orientalist tradition has long portrayed Muslim women as severely marginalized and lacking in power. Chandra Talpade Mohanty estimates that Western

[40] Khalafallah, "The Elusive 'Islamic Law'," p. 148.
[41] Ibid.

observers often place an undue emphasis on Islamic theology as an interpretive tool in understanding the role women had in Muslim world. Defining the social structure solely along religious lines serves to negate the actual social relations that existed in the Muslim world and contributes to the portrayal of Muslim women as a static group uniformly subjugated by faith.[42] Adding to this analysis are accounts pieced together by pre-modern European travelers who had very limited access to women's lives and spaces. Their descriptions also offer a narrow perspective on women.[43] A better understanding of the role women played in Muslim societies can be gleaned from reading a diverse array of material that includes court records, biographical works, chronicles, poetry, and popular literature. From these texts, scholars are now uncovering data suggesting that women occupied an active role in the public sphere despite the overall patriarchal social order.[44] However, despite this and other evidence, the standard stereotypical attitudes towards Islam and Muslim women persist.

For instance, due to the conservative nature of the tradition along with the notion that according to Islamic law divorce is repugnant, many have assumed that divorce was a rare phenomenon during the classical and medieval periods. Moreover, based on the perception that Islam is a male-dominated religion, it is further assumed that women have little say in pursuing and initiating divorces themselves. In a recent study

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[42] Chandra Talpade Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourses," *Feminist Review,* vol. 30, Autumn (1988): pp. 70-72.
[43] Dror Ze'evi, "Women in 17th-Century Jerusalem: Western and Indigenous Perspectives," *International Journal of Middle East Studies,* vol. 27, May (1995): pp 159-161. For a European women's accounts of Muslim women see Judy Mabro, *Veiled Half Truths* (London: I.B. Tarius, 1991).
[44] Amira El-Azhary Sonbol, "Rethinking Women and Islam," in Yvonne Yazbeck Haddad and John L. Esposito, eds., *Daughtrs of Abraham: Feminist Thought in Judaism, Christianity and Islam* (Gainesville: University Press of Florida, 2001): p. 114.

undertaken by Yossef Rapoport, these false presumptions are turned on their heads. In the scholar's study of marriage and divorce during the twilight of the Mamlūk Sultanate of Egypt (648-922/1250-1517), Rapoport demonstrates that instances of divorce were quite frequent and in many cases initiated by women.

Using the biographical dictionary compiled by the Egyptian scholar Muḥammad b. 'Abd al-Raḥmān al-Sakhāwī (d. 902/1497) as his primary source, Rapoport analyzed the lives of some 168 women from the 15th century who came from notable Cairene families. Astonishingly, a third of the women discussed by al-Sakhāwī were married more than once - some were married more than three times during their lives.[45] Interestingly, al-Sakhāwī points out that women were just as likely to initiate a divorce as their husbands.[46] These findings contradict commonly held perceptions of pre-modern Islamic societies in which women are often depicted as powerless to pursue divorce. Although family law was mostly slanted in favor of men who had the right to unilaterally sue for divorce, the affluent women discussed by al-Sakhāwī had at their disposal various means of successfully initiating divorces.[47]

One way women pursued divorces in Medieval Egypt was via an appeal to a judge (*qāḍī*) for a *faskh* or judicial divorce. However, in maintaining the patriarchy in society,

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[45] Yossef Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society* (Cambridge: Cambridge University Press, 2006): pp. 82-83.
[46] Ibid., p. 88
[47] It should be noted that despite the ability of women to seek alternative ways of obtaining divorces, Islamic legal culture was very much a patriarchal phenomenon. For instance, the ability husbands had to easily repudiate their wives served as a powerful coercive tool for some Muslim men. This patriarchy is reflected in the fact that some men would threaten their wives with divorce oaths in order to control their wives' behavior. These divorce oaths would come into effect once certain conditions set by the husbands were broken. See Rapoport, *Marriage, Money, and Divorce,* pp. 70-72.

judges rarely granted such divorces without the husband's approval. Furthermore, the conditions in order to obtain a *faskh* in Egypt at that time were quite narrow and were limited to a husband's abandonment of his wife. In order to circumvent this restriction, other means were available to women in order to obtain divorces. Rapoport reports that during the Mamlūk Sultanate, women often inserted clauses into their marriage contracts detailing their right to sue for a divorce if certain conditions were broken.[48] Thus, a woman could obtain a divorce from her husband if he embarked on a secondary marriage with another woman. Other conditions that would automatically cause a divorce included restrictions on the husband's consumption of alcohol, and his participation in extramarital affairs with concubines and slave-girls. For instance, in one particular anti-nuptial contract a man named Shihāb al-Dīn al-Raqqāwī promised his wife, 'Ā'isha bt. Ibn al-Ḥawrānī, that he would abstain from extramarital affairs while on business trips. These sorts of oaths, both written into marriage contracts or pledged afterwards, readily found their way into manuals of law.[49]

Another means by which women living during the later stages of the Mamlūk Sultanate exerted power was via the *maẓālim* courts. The *maẓālim* courts were administrative offices run by functionaries of the military that along with their official business also offered women married to soldiers a means of disciplining their husbands. In one particular case, an affluent woman whose husband had not consummated the

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[48] Ibid., p. 74.
[49] Ibid., p. 75.

marriage, approached a military court in order to have her husband reprimanded and threatened with a judicial divorce if he did not acquiesce to his wife's demands.[50] Presumably, the husband had a change of heart once the *naqībs* (military guards) knocked at his door. In another instance, a pre-pubescent girl was married to a soldier at the request of her guardian. It was written in the marriage contract that he would not have conjugal relations with the girl until she reached the age of majority. Tragically, the soldier did not follow through on his contractual obligations and repeatedly raped the girl. Shortly thereafter, he beat the girl in order to obtain a *khul'* divorce thereby absolving him from paying the deferred portion of the *mahr.* When the girl returned home to her family, her aunt appealed to the *dawādār* (the head of the *maẓālim* court) to punish the soldier, which he did. According to the chronicler Ibn al-Ṣayrafī, the soldier was flogged for his behavior and the *maẓālim* court pressured the chief Ḥanafī *qāḍī* to annul the divorce settlement and issue a new one, which he did. Finally, the soldier was forced to pay the girl four dinars in damages, a sum that represented a sizeable amount.[51]

This incident is certainly not indicative of how most divorces were settled in Mamlūk society. Usually couples divorced by way of a *khul'* – a procedure in which the wife asks the husband to release her from the marital bond. Although technically the wife forfeited the deferred portion of her *mahr* in asking to be released from the marital

[50] Ibid., p. 79.
[51] Ibid., p. 80.

union, Rapoport maintains that in many of the divorce cases detailed in the biographical literature, the break-ups were 'balanced affairs, in which women often had their say.'[52] One of the cases of divorce recorded by al-Sakhāwī is that of his own brother, Abū Bakr b. 'Abd al-Raḥmān al-Sakhāwī, whose wife insisted on a divorce due to her displeasure with her living arrangements. It appears that the overbearing al-Sakhāwī family did not suit his wife's liking and she insisted on moving away from the family compound. During the time in which they lived in a different part of Cairo, she frequently asked her husband to divorce her. Adding to the couple's woes was the fact that shortly thereafter the husband fell ill. Eventually he acquiesced to her demands for a divorce, and in return Abū Bakr was granted some financial compensation from his ex-wife. He died shortly thereafter.[53] Clearly, the blanket notion that women were powerless in initiating divorces throughout Islamic history should be revised to include these and other scenarios whereby women had various means at their disposal to assert themselves.

Apart from the fact that divorces were put into effect in a more cooperative manner, another piece of information to emerge from the biographical literature is the notion that most marital conflicts were settled *outside* of the purview of official bodies of law. Moreover, when a couple was in need of mediation and arbitration services, they were likely to turn to family members or neighbors rather than seek official help from government authorities. This is in line with the traditional Islamic system of justice whereby individuals are free to negotiate amongst themselves. *Khul'* agreements were

[52] Ibid. p. 70.
[53] Ibid., p. 85.

drawn up between the parties themselves and were seldom imposed by government or religious authorities. Owing to the communal nature of Islamic society, individuals are more likely to turn to relatives, friends and associates who form networks of relations as a source of conflict resolution.[54] All financial matters pertaining to the dissolution of the matrimonial home were concerns taken up by the parties involved. Thus, in most cases, courts were only accessed by divorced couples in order to register their divorces with authorities. The principle of not accessing official bodies is based on the notion that a Muslim is ultimately beholden to God alone, not a government bureaucracy. Thus in contracting a marriage or a divorce, individuals are not only making an oath in front of witnesses, they are also making the pledges in the presence of God. This principle is still in play today whereby many people, including some Muslims in Canada, simply avoid official bodies of law altogether and opt for ad-hoc forms of justice.

This being said, courts set up by the government, albeit functioning independently from government, did mediate complicated divorce cases that required some form of ruling on the part of a judge or *qāḍī*. A brief glimpse at a *fatwā* (legal opinion) from 12th century Spain reveals not only the organizational scope inherent in medieval Islamic societies but the systematic nature of Sharī'a procedure. Again, the purpose of this discussion is to counter the Orientalist notion that Islamic law was chaotic and arbitrary. In a *khul'* divorce that was put into effect on the 25th of Sha'bān 512 (11th December, 1118) and recorded in the court records of Lisbon, a woman by the name of

[54] Lawrence Rosen, "Justice in Islamic Culture and Law," in R.S. Khare, ed., *Perspectives on Islamic Law, Justice and Society* (Oxford: Rowman and Littlefied Publications, 1999): pp. 44-45.

Ru'yā b. Abū al-Walīd petitioned to have her husband, 'Ubaydallāh b. Muḥammad b. Aḥmad b. Ukāmin al-Azdī divorce her.[55] On the surface, this case represents a clear-cut example of a failed marriage that was terminated at the behest of the wife. However, this case is more complicated than it appears. In this particular case, the wedding dower, which was well endowed, included several houses and farmland outside the city of Lisbon. In a collection of *fatwās* entitled *Al-Mi'yār al-Mu'rib wa-al-Jāmi' al-Mughrib 'an fatāwā 'Ulamā' Ifrīqiya wa-al-Andalus wa-al-Magrib,* compiled by Aḥmad al-Wansharīsī, the same *khul'* case appears with a number of interesting twists. The complications associated with the divorce required a ruling from a judge who, in turn, consulted a higher-ranking *muftī* (legal expert or consultant) for further clarification as to how the case should be resolved.

It appears that the marriage between Ru'yā and her husband 'Ubaydallāh was one fraught with problems and broken promises. In an attempt to rid himself of his wife, 'Ubaydallāh beat his wife so as to encourage her to ask for a *khul'*. The reason the husband opted for this unfortunate tactic appears to be his unwillingness to forfeit the deferred portion of his wife's dower, which as mentioned above, was rather large. Fortunately, Ru'yā's father, Abū al-Walīd Yūnis b. 'Abd al-Razzāq, was a jurist who applied his knowledge of the Sharī'a in assisting his daughter gain her deferred *mahr*. His hopes lay in convincing a judge that his daughter's husband beat her in order to extract a *khul'* request. Prior to the signing of the *khul'*, Ru'yā's father, Abū al-Walīd, sought the services of two professional witnesses who documented the abuse in a

[55] David Powers, "Women and Divorce in the Islamic West: Three Cases," *Hawwa,* vol. 1 (2003): p. 31.

written statement. This type of dossier, referred to as a memorial document or *rasm istir'ā'*, was put together by Abū al-Walīd with the understanding that it would later be presented to a judge as evidence against the husband. The particular document in this case had declarations from neighbors and servants testifying to the frequent beatings suffered by Ru'yā. When the *khul'* was completed, Abū al-Walīd approached a judge with the *rasm istir'ā'* detailing the abuse suffered by his daughter with the hopes of having the judge rule in favor of allowing her to retain her *mahr*.

Frequently, *qāḍīs* who came across difficult cases would seek the advice of legal consultants who offered their opinions or *fatwās* in order to assist the courts. The legal establishment saw offering a decision without following established interpretive procedure as problematic. Moreover, unqualified individuals who gave legal advice were not well received because such rulings served to de-legitimize the work of licensed legal experts. In this particular case the judge in Lisbon wrote to the *muftī* in the neighboring city of Cordova seeking assistance. The *muftī* in question was Abū al-Walīd Muḥammada Ibn Rushd al-Jadd (d. 520/1126), grandfather of the famous Andalusian philosopher Averroes (d. 595/1198). Ibn Rushd responded with a *fatwā* maintaining that Ru'yā was indeed entitled to the deferred portion of her dower if the following conditions were met: 1) the trustworthiness of the witnesses who testified in the *rasm istir'ā'* was ascertained; 2) her sole motive for seeking a *khul'* was to extricate herself form an abusive relationship; and 3) she was indeed coerced into agreeing to a *khul'* based on the abuse she suffered. Unfortunately the case's final outcome is not

discussed in al-Wansharīsī's *fatwā* compilation, though it has been speculated that the judge ultimately ruled in favor of the wife receiving her full dower.[56]

Regardless of the outcome, our purpose for briefly looking at such a case is to demonstrate the organizational complexity of the Sharī'a as it was practiced in pre-modern times. A number of observations can be drawn. First, the legal system in place in Spain at the time was hierarchical. A judge in Lisbon who did not have the qualifications to address the particularities of a difficult case sought the council of a more qualified legal mind in Cordova. Second, letters between the two scholars traveled between the two cities courtesy of a postal service or *barīd* which frequently couriered legal questions and answers not only within a geographic region but across the Muslim world. Finally, and most important, the decision forwarded by Ibn Rushd would have been formulated using a systematic approach to the law as opposed to an opinion based on personal convictions, which the first judge in Lisbon could have simply offered. The Cordovan *muftī* was consulted because the judge in Lisbon did not have the appropriate license or *ijāza* certifying his ability to participate in *ijtihād* (creative interpretation) the case required. This particular case, transpiring during medieval times, belies the criticism leveled against Islamic law as being arbitrary and rigid.

Clearly, Muslim judges did not sit under palm trees concocting rulings off the tops of their heads as was characterized by Lord Goddard. Rather, the manner in which the Sharī'a was applied followed a systematic approach. Judges were required to make rulings based on interpretations *fuqahā'* had previously issued which were consistent

[56] Ibid,. p. 35.

with their particular school's legal methodology. Subsequently, these rulings were recorded in manuals of jurisprudence and agreed upon by a consensus (*ijmā'*) of scholars. When a clear precedent was unavailable in a particular case, judges sought the advice of *mujtahids,* such as Ibn Rushd, who provided answers based on their qualifications to issue *fatwās.* These *fatwās* would, in turn, be recorded in manuals of law - thereby providing future legal precedents from which to base rulings. Because certain jurists approached particular scenarios differently according to local customs or interpretive differences, the Islamic legal tradition was marked by a great deal of plurality. Ultimately, the plurality inherent within Islamic law allowed the legal system to be flexible and open to change.[57]

Contributing to this diversity was the fact that scholars, belonging to different schools of law or *madāhhib,* employed different techniques of legal hermeneutics. This inevitably produced further differences in the way law was expressed. These methods of interpretation revolved around issues of theology and the nature of a school's juristic character.[58] These characteristics were adhered to by jurists through a process known as *taqlīd,* a term which has until recently been translated as a form of blind adherence to existing legal interpretations. Recent scholarship is altering this notion and demonstrating that *taqlīd* is best seen as a form of loyalty to one's school of law. Thus interpretations that individual scholars produced were grounded in the logic that their school espoused. This should not be confused with the notion that scholars merely

[57] Wael Hallaq, "Can the Shari'a be Restored?" in Yvonne Yazbeck Haddad and Barbara Freyer Stowasser, eds., *Islamic Law and the Challenges of Modernity* (New York: Altamira Press, 2004): p. 28.
[58] Wael Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001): p. 109.

parroted the findings of previous scholars. Rather, in forming a legal opinion they paid special attention to the way in which their particular school interpreted law. This interpretive logic provided the foundational authority from which the law emanated. In other words, to regard Islamic law as only rooted in Divine origin is to miss the point that the Sharī'a was in fact a dynamic system of positive law employing human reason and methodology. This in turn led to the various differences in the way law was articulated given the geographic and cultural diversity in the Muslim world. All of this may or may not have taken place under palm trees given the temperate climate found throughout Muslim world - but to label this system as arbitrary and unchanging fails to acknowledge the intellectual dynamism and social relevance of medieval Islamic legal systems.

Chapter 2
Modern Islamic Law

This chapter will demonstrate that the different versions of Islamic law currently practiced throughout the world do not follow traditional forms of Sharī'a used during the pre-modern period. Owing to the influence of European-styled legal reform, Muslim nation-states have altered laws governing personal status creating hybridized legal systems that fuse together Islamic norms with statutory law. These reforms replaced a flexible system of law, detailed in the previous chapter, with a static legal code. The goal of this chapter is two-fold. First, it will offer a very general discussion of Islamic marriage and divorce law currently in use today in order to convey to the reader an overview of some of the legislation found in the Muslim world. Second, this chapter will shift its focus to modern Egypt's divorce laws in order to dislodge some commonly held assumptions surrounding the purported benefits of European-styled legal reform. What will become apparent is that existing modern personal status legislation used throughout the Muslim world no longer maintains the dynamism found in the past. Rather than improve the lives of women, for instance, the reforms have negatively affected their rights by codifying patriarchy. In practical terms, this limited the access women once had to divorce. These nuances in legal practice were seldom discussed during the debates over the use of Islamic arbitration in Ontario. Instead, both opponents and proponents of faith-based arbitration presented a narrow image of Islamic law.

When European involvement in the political and economic affairs of the Muslim world began in earnest during eighteenth century, it was not long before colonial powers

insisted on modifying Islamic legal systems to reflect a more European bias.[1] For instance, European interference with local laws and customs began as early as the eighteenth century when Warren Hastings (d. 1818), the British Governor General of India, appointed employees of the East India Company to oversee criminal justice in parts of the Sub-Continent.[2] Meanwhile, the *Ottoman Commercial Code* that was promulgated in 1850 was, for all intents and purposes, a literal borrowing of the existing French laws governing financial matters.[3]

One of the most striking outcomes of the European foray in the Ottoman Empire was the move towards the codification of Islamic law. When the Ottoman government codified existing Ḥanafī jurisprudence into a Western-styled legal code and promulgated them as the *Mejelle* of 1869, there were a series of repercussions which would change the face of Islamic jurisprudence forever. Unlike the previous centuries where the government remained aloof from the interpretation of Sharī'a, the Ottoman government now became directly involved in the process of enacting law. Accordingly, it opened secular schools of law that trained Western-styled lawyers and judges who were

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[1] The phenomenon of Western imperialists interfering with local laws in the Muslim world is an ongoing occurrence in places such as present-day Iraq. In Iraq, the United States of America is not only altering the nature of the political landscape, but is also reformulating matters as mundane as the traffic code. Operating from the Green Zone in Baghdad, an American Army Reserve lawyer, who practiced personal injury law in his civilian life, introduced a new set of traffic laws that very closely mirrored those rules and regulations currently available to the drivers of this lawyer's home state, Maryland. An associate of the enterprising Army Reserve lawyer characterized him as having the attitude that 'all the traffic police [in Iraq] were corrupt, and that no one in Iraq was educated enough to write the law or to understand the problem.' When this new Iraqi Traffic Code was presented to senior Iraqi officials in the post-Saddam Hussein government, it was duly rejected, in part because the American lawyer did not take into account the differences between Maryland's Common Law tradition and Iraq's existing Civil Code. For a complete discussion on this particular American adventure in the Muslim world see William Langewieshe, "Welcome to the Green Zone: the American Bubble in Baghdad," *The Atlantic Monthly,* November (2004): pp. 60-88.

[2] Anderson, *Law Reform,* p. 22.

[3] Ibid., p. 86.

delegated by the central government to apply the new codified jurisprudence. What is of great significance here is that the new batch of legal practitioners were not trained in traditional *uṣūl al-fiqh* and thus were divorced from the religious formulas for pronouncing *fatwās*.[4] Furthermore, the *mujtahids* whose *fatwās* were bound by *uṣūl al-fiqh* found themselves on the fringes of the legal world. In essence, the centuries-old methodologies of interpreting Islamic texts were demolished in favor of a more secular system of law.[5] The end result was that a legal system that was once fluid and decentralized was replaced by a codified law that was more rigid owing to the fact that it became difficult to instill local and regional flavors into the law.

At the same time as the traditional methods of interpreting the law were undergoing change in the Ottoman Empire, the central government introduced legal practices that diverged from traditional *uṣūl al-fiqh.* One such innovation was the use of *takhayyur* or amalgamation. By borrowing different provisions from various schools of law and combining them into a single code of law, the Ottomans were able to alter the Sharī'a in an attempt to meet the needs of contemporary society. For instance the traditional Ḥanafī doctrines, used throughout the Ottoman territories, made it difficult for women to dissolve their marriages of their own volition without their husbands' consent. In cases where women found themselves married to mentally incompetent, impotent, abusive or insane men, little recourse was available for pursuing a divorce.[6] Seeking to address such situations, the Ottomans amalgamated doctrines from the Ḥanbalī and

[4] Hallaq, *A History,* p. 261.
[5] Hallaq, "From Regional to Personal," p. 26.
[6] In such cases, jurists often ruled in favor of dissolving the marriage in order to maintain the best interests (*maṣlaḥa*) of the woman. Thus, although divorce was considered repugnant according to

Mālikī schools which had developed provisions that permitted women to initiate divorces by way of the *khul'*.[7] The 1917 *Ottoman Law of Family Rights* was replete with examples of selective incorporation of doctrines from different schools.

Although on the surface the use of this particular legal method appeared to correspond with traditional *uṣūl al-fiqh,* frequently the end results were off the mark. In the past, the *'ulamā'* would have raised their eyebrows at such judicial maneuverings; however, because they had been pushed aside by the Ottoman government, their voices no longer carried the weight they previously had. Although this particular code would only survive two years before being repealed, the reforms themselves would help shape family law in emerging Muslim nations in both the Arab world and beyond.

Following the First World War, and the dissolution of the Ottoman Empire, Kamal Atatürk (d.1938) continued the trend of favoring European legal practices by discarding Islamic law altogether (including laws of personal status) in favor of secular legal codes in Turkey. In the realm of family law, the 1926 *Turkish Civil Code* (inspired by the 1912 *Swiss Personal Status Code*) completely reconfigured personal status law along secular lines. Under this secular law, practices such as polygamy and a man's right to repudiate his wife using a triple divorce were no longer permitted in Turkey. Furthermore, wives were granted the right to terminate their marriages through the civil courts.[8] Although some commentators have assumed that the new laws put an end to the unequal status between husbands and wives,[9] in reality the borrowed European codes

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traditional Islamic law and custom, in certain instances it was advisable in order to maintain justice. See Hallaq, *A History,* pp. 112-113.

[7] Anderson, *Law Reform,* p. 39.

[8] Tughrul Ansay, *Introduction to Turkish Law* (Deventer: Kluwer, 1987): pp. 145-48.

[9] Bernard Lewis, *The Emergence of Modern Turkey* (New York: Oxford University Press, 1965): p. 267.

included a number of provisions that entrenched gender inequalities.[10] Under the new secular code, the husband was deemed to be the head of the family and could decide whether his wife would be permitted to work outside the home. Furthermore, the husband was charged with the obligation of supporting his wife, who in return owed obedience to her husband. These legal reforms served to codify gender inequality and limited women's participation in public life; a trend that appears to have reversed existing social practice. For instance, in his study of Ottoman court *sijills* (records) from the seventeenth century, Ze'evi demonstrates that Palestinian women were active participants in various commercial affairs and regularly brought complaints to the courts when they were aggrieved.[11] Under the newly reformed laws however, a husband could now deny his wife the opportunity to participate in commercial affairs outside the home.

Although other emerging Muslim nation-states did not emulate modern Turkey's wholesale secularization of laws governing personal status, various governments did follow the earlier Ottoman Empire's lead by codifying Islamic law as well as introducing novel methods of interpretation in an effort to modernize their legal systems. Various states dismantled traditional *uṣūl al-fiqh* in favor of statutory family status law that may have appeared Islamic but in reality diverged from authentic legal methodology. Meanwhile, in criminal and commercial affairs, Islamic laws were totally overhauled in favor of European-inspired legislation. Completely shedding the Islamic character of family status laws was not, however, an option owing to the importance many Muslims place on the Sharī'a in regulating their personal lives.

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[10] Ann Elizabeth Mayer, "Reform of Personal Status Laws in North Africa: A Problem of Islamic or Mediterranean Laws?" *Women Living Under Islamic Laws,* Occasional Papers, July (1996): p. 6.
[11] Ze'evi, "Women in 17th-Century Jerusalem," p. 166.

Islamic Marriage: Brief Overview

In what follows, I seek to describe some of the key principles of law associated with marriage and divorce in the Muslim world. Rather than focus exclusively on one particular region or school of law, I will select examples from various Muslim countries, ranging from North Africa to the Middle East and Asia, in order to reflect the diversity inherent in legal practices throughout the world. It should be mentioned that an exhaustive review of current Islamic marriage and divorce law is beyond the scope of this work. Embarking upon such a survey would be akin to covering European, South American, North American and Australian marriage and divorce legislation in one fell swoop. This brief review will be followed by a closer look at Egyptian legal reforms in order to pinpoint some shortcomings associated with modern legal reform. For now, let us turn our attention to some general perspectives of marriage and divorce legislation.

Similar to marriage practices found throughout the world, an Islamic marriage is initiated by an engagement between two individuals. In an Islamic marriage, the couple is betrothed (*khuṭba*) when the groom or his guardian, acting as a proxy, requests a woman's hand in marriage. Although the betrothal does not legitimize any sexual relations between the couple, it does grant them certain rights. For instance, the couple can request to meet in person either in a chaperoned environment or in seclusion.[12] Both fiancés have the right to inquire as to the financial and social status of their prospective spouse.[13] If the woman accepts the offer of betrothal, another man cannot approach the woman for her hand in marriage, except in circumstances where the betrothal has been

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[12] "*Khuṭba*," *Encyclopedia of Islam,* vol. V (Leiden: Brill, 2003): p.23a.
[13] Jamal J. Nasir, *The Islamic Law of Personal Status* (London: Graham and Trotman, 1990): p. 45. Also see Abdullahi An-Naim, *Islamic Family Law in a Changing World* (London: Zed Books, 2002).

called off.[14] In both classical and modern Islamic legislation, both parties possess the right to cancel the betrothal in order to avoid an unwanted marriage. Despite the fact that the betrothal is a promise to marry and not a legally binding contract, the concealment of pertinent information such as impotence and infertility can, in some jurisdictions, give rise to payments for damages. For instance, Egypt's Court of Cassation has summarized the duties and privileges associated with betrothals in the following way:

> Betrothal is only a preliminary step towards a marriage contract, a mere promise that is not binding on either party who are lawfully free to end it at anytime....if the promise to marry and the subsequent withdrawal therefrom [sic] are accompanied by other acts entirely independent thereof, of such a nature as to cause material or moral injury to one of the parties, such acts shall give rise to a lawful suit for damages against the party from whom they [the injury] emanate on the ground that such acts, apart from the mere breach of promise, shall constitute a tort that requires redress.[15]

There are certain restrictions concerning who can enter into a betrothal. Married women obviously cannot be approached for betrothal as well as divorced women who are passing through their waiting period (*'idda).* Widows, on the other hand, can be approached during their *'idda* period, but can only be offered an implicit betrothal such as 'I intend to marry a suitable wife' rather than an explicit betrothal such as 'I would like to marry you.'[16]

Following the betrothal period, the parties enter into a marriage contract or *nikāḥ.* Unlike the Christian notion of marriage where the union is regarded as a religious

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[14] Ibid.
[15] Cited from Nasir, *Islamic Law of Personal Status,* p. 47.
[16] Ibid., p. 46.

sacrament, an Islamic marriage is strictly a contractual agreement that specifically confers legal status on a couple and their future children.[17] In its simplest form, the Islamic *nikāḥ* is a document that announces to the community the couple's marital status. Yet in the modern world, the definition marriage has taken on another dimension. For instance, according to Article 4 of the Moroccan *Moudawana* marriage is defined in the following manner:

> Marriage is a legal contract by which a man and woman mutually consent to unite in a common and enduring conjugal life. Its purpose is fidelity, virtue and the creation of a stable family, under the supervision of both spouses.[18]

This definition reflects a Euro-centric outlook.

A marriage contract in the Muslim world is initiated when either the bride or the groom (or their respective guardians) proposes an offer (*ījāb*) of matrimony.[19] For a valid marriage (*ṣaḥīḥ*) to be in effect, the offer must be accepted (*qabūl*) by the other party.[20] Usually both parties are physically present at the marriage ceremony. However, it is possible to be married through letters or in some instances by way of the telephone. In such cases, a marriage is valid so long as the offer is accepted during the same meeting in which the proposal is initially read or heard, and provided that this is done in the presence of the requisite guardians and witnesses.[21]

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[17] Ibid., p. 45.
[18] Cited from Global Rights, "The Moroccan Family Code (*Moudawana*) of February 5, 2004: An unofficial English Translation of the original Arabic text" (2005): http://www.globalrights.org/site/DocServer/Moudawana-English_Translation.pdf?docID=3106.
[19] David Pearl, A *Textbook on Muslim Personal Law* (London: Croom Helm, 1987): p. 41.
[20] Asaf A. Fyzee, *Outlines of Muhammadan Law* (London: Oxford University Press, 1960): p. 74.
[21] Nasir, *Islamic Law of Personal Status,* p. 49.

An Islamic marriage contract requires the presence of two witnesses (*shahīd*).[22] Contemporary legislation in Syria reads that '[i]t is a condition for the validity of a marriage contract that it be witnessed by two men, or a man and two women, who are Muslim, sane and adult and shall hear [the] offer and acceptance and understand the intention thereof.'[23] Traditionally, as for the validation of evidence before a judge (*qāḍī*), witnesses to marriage had to be either a combination of two male or one male and two female Muslims or four females.[24] This disparity is based on the principle that one male witness can take the place of two female witnesses due to the traditional view that men are more capable as witnesses because they play a greater role in the public forum.

The marriage contract requires a clear indication on the part of the bride and the groom that they wish to marry. 'I have married myself to you' or 'I have consented' are often the phrases found in marriage contracts in the Muslim world.[25] Beyond the necessity of having clear consent, the actual substance of marriage contracts can vary greatly since couples may add certain conditions. For instance some contracts will include the amount of *mahr* the wife will receive and whether or not this amount is to be paid promptly (*mu'ajjal*) or deferred (*mu'ajjal*).[26] In some marriage contracts, no mention is made of the *mahr*. This does not necessarily imply that no dower is paid to

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[22] Unlike the different Sunnī schools of law, the Shī'ā Ithnā 'asharī school does not require witnesses to be present at the *nikāḥ* ceremony in order to validate the marriage. Rather their presence is a customary practice that is considered desirable.
[23] Cited from Nasir, *Islamic Law of Personal Status,* p. 56.
[24] Although this law is part of a modern code, it reflects a pre-modern sentiment. Namely, it fails to reflect the actual lives of current Syrian women who are beginning to attain important positions within government, business and military circles. Thus, due to the codification of patriarchal values within modern Syrian legislation, gender inequality persists in that country at the structural level.
[25] Ibid., p. 74.
[26] Ibid., p.114.

the bride; rather this omission is a matter of local custom.[27] In countries where polygamy is permitted, the bride can have the contract state whether or not she is amenable to the idea that her husband will take another wife.[28] This last point is a feature that was available to women in the pre-modern period as well. Finally, the marriage is considered binding for both parties once the contract is signed.[29]

Traditional interpretations of Islamic law as well as contemporary practice require that in order to validate a marriage, the bride and the groom must be represented by a guardian (*walī*). The guardian must be the agnate (a direct relative) of the couple entering into the marriage, or, in the absence of a suitable relative, a judge representing the local civil authority.[30] According to the traditional Ḥanbalī and Ḥanafī schools of law, the guardian can arrange a marriage for a pre-pubescent son or daughter.[31] If the guardian arranges such a marriage of a daughter who is a virgin (*bikr*), she has the right to disapprove of the union and thus cannot be compelled into the marriage. A virgin is deemed to have given her consent to the marriage through various signs such as silence, laughter or crying.[32]

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[27] Jamal J. Nasir, *The Status of Women Under Islamic Law and Under Modern Islamic Legislation* (London: Graham & Trotman, 1990): p. 46.

[28] The right that women have to set conditions in their marriage contracts has been codified in various legal systems throughout the Muslim world. For instance, the Jordanian *Personal Status Law* of 1976 states the following: '[i]f the wife stipulates a condition apt to secure her a lawful interest and not to infringe on a third party's right, e.g. not to be removed from her town, or to reserve to herself the right to divorce at will, or to live in a given locality, or for the husband not to marry another woman, the condition shall be valid and binding, and the failure to honor it shall give the wife the right to apply for cancellation without prejudice to any of her material rights.' Cited from Nasir, *Islamic Law of Personal Status,* p. 58.

[29] Nasir, *Islamic law of Personal Status,* p. 59.

[30] Ibid., p. 53.

[31] Pearl and Menski, *Muslim Family Law,* p. 142.

[32] Susan A. Spectorsky, *Chapters on Marriage and Divorce: Responses of Ibn Ḥanbal and Ibn Rāhwayh* (Austin: University of Texas Press, 1993): p. 9. Although forced marriages are forbidden or *ḥarām* they do occur. This fact is born out in the following passage from Ibn Ḥanbal's commentary on marriage. When asked about the validity of a marriage in which a father gives his daughter up for marriage without consulting her, Ibn Ḥanbal has the following to say. 'I do not like it, but if she is silent and is given in

Some countries have curbed the power guardians have in compelling a son or daughter into marriage. In Article 12/4 of the Moroccan *Personal Status Law*, it is prohibited for a guardian to 'compel his daughter who has reached puberty, even if she is a virgin, to marry without her permission and consent...'[33] Tunisian law forbids the *walī* from contracting a woman under seventeen and a man under the age of twenty into marriage.[34] This is a reversal of a long-standing Islamic norm which permitted the *walī* to contract a virginal daughter (*bikr*) without her consent in the Ḥanbalī and Ḥanifī schools of law.[35] Furthermore, in a number of countries, the guardian can no longer challenge or stop a marriage between two individuals who have attained the full capacity to marry. For instance, Iraqi Law 21/1979 states that 'no kin or stranger may prevent the marriage of anyone who has the legal capacity for marriage....'[36] In a recent case in Pakistan, a wealthy businessman, exercising his role as the *walī*, attempted to stop the marriage of his daughter to a college lecturer on the grounds that

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marriage, then rejects the marriage, she has no right to do that. If her father gives her in marriage without her consent, then it is a valid marriage. However I prefer that the father consult her.' Quoted from a compilation of Isḥāq b. Manṣūr al-Kausaj, cited from Spectorsky, *Chapters on Marriage and Divorce*, p. 143.

[33] Nasir, *Islamic Law of Personal Status*, p. 54.

[34] Ibid., p. 50.

[35] In the following question and response taken from a compilation of different legal views concerning marriage by Ibn Ḥanbal, we see an early opinion on the matter of child marriage. 'I asked my father about a man who gives his underage daughter in marriage, "Can she opt [to turn down the marriage] when she is of age?" He said, "She cannot exercise this option if her father gave her in marriage. If she could, then 'Ā'isha could have with regard to the Prophet, because the Prophet married her when she was six or seven years old, had intercourse with her when she was nine, and died when she was eighteen.' Cited from Spectorsky, *Chapters on Marriage and Divorce*, p. 97. A women in such a marriage can file for divorce in the Ḥanafī school of law. Known as the *khiyār-al-bulūgh* (the option of puberty), girls can have a *qāḍī* annul their marriage so long as they declare, in front of a number of witnesses, their desire to divorce their husband. This divorce procedure is initiated when the girl declares her intentions at the moment of her menarche (her first menstruation). For a full description of this form of divorce and how it was enacted see Mahmoud Yazbak, "Minor Marriages and Khiyār al-Bulūgh in Ottoman Palestine: A Note on Women's Strategies in a Patriarchal Society," *Islamic Law and Society*, vol. 8 (2002): pp. 386-409.

[36] Nasir, *Islamic Law of Personal Status*, p. 54.

the groom was not her daughter's equal (*kafā'a*).[37] Despite the father's attempts, the judge ruled against his wishes.[38] Irrespective of the *walī's* ability to compel someone into a marriage, his participation is still required in order to validate the marriage contract in some countries.[39]

One of the components of an Islamic marriage is the *mahr.* The *mahr* or bridal gift is not a necessary condition for a valid marriage; rather it is a consequence of the marriage.[40] According to both Sunnī and Shī'a schools of law, it is the right of a Muslim bride to have a dower made available to her in full or through deferred payments. Although in pre-modern times the *mahr* was strictly seen as the financial component of the marriage contract, modern interpretations of this principle have shifted. Fyzee explains that the *mahr* is a 'settlement in favor of the wife, a provision for a rainy day and socially, it became a check on the capricious exercise by the husband of his almost unlimited power of divorce.'[41] In other word, full payment of the dower is seen as a deterrent against hastily conceived divorces on the part of the husband. Women who are repudiated by their husbands can claim any deferred portion of their dower, though this right can be denied in cases where the woman initiates the divorce via a *khul'*.

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[37] The principle of equality in marriage (*kafā'a*) stipulates that in order to establish a suitable union between the married couple, the groom or his family must be of the same or greater financial and social standing as the bride's family. However, there does not exist a stipulation requiring the bride to be of the same class as the groom's family. See Fyzee, *Outlines of Muhammadan Law*, pp. 91-92.
[38] *Hafiz Abdul Waheed v. Asma Jahangir,* K.L.R. 1997, Shariat Cases 121. Cited from Pearl and Mensiki, *Muslim Family Law,* pp. 154-55.
[39] Nasir, *Islamic Law of Personal Status,* p. 52.
[40] Ibid., p. 83.
[41] Fyzee, *Outlines of Muhammadan Law*, p. 111.

One of the most well-known features of Islamic marriage law is the matter of polygamy. As discussed above, the practice of polygamy has been subject to reform in various Muslim states. For instance, Tunisia interpreted provisions of the Sharī'a in a manner that was completely inconsistent with traditional *uṣūl* methods but maintained the veneer of an Islamic appearance. During the presidency of Habīb Bourghuiba (d. 2000), the 1956 Tunisian *Law of Personal Status* banned the practice of polygamy altogether. The practice of polygamy is sanctioned in verse 4:3 of the Qur'ān which provides that men could 'Marry of the women, who seem good to you, two three or four; and if ye fear that ye cannot do justice then only one...'[42] Focusing on the latter portion of the *Sūra*, the Tunisian reformers maintained that only the Prophet could do justice to more than one wife and concluded that the practice of polygamy was not a right available to Muslim men generally.[43] Apart from Turkey and Tunisia, few Muslim countries have considered imposing an outright ban on the practice. Rather, most countries have curbed the institution through indirect means. In countries such as Jordan, Syria, and Iraq, husbands must apply to the courts for permission to take on subsequent wives.[44] Under Indonesian law, the courts may permit a man to take on additional wives based on the following grounds:

(i) his wife cannot carry out her conjugal duties, or
(ii) his wife becomes crippled or terminally ill, or
(iii) his wife cannot give him children, and
    (a) his present wife or wives give him permission,

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[42] Qur'ān, 4:3.
[43] Anderson suspects that the primary reason for banning the practice in Tunisia was based on Bourghuiba's view that institutions such as polygamy, once deemed socially relative 'were now offensive to civilized conscience today.' See Anderson, *Law Reform,* p. 63.
[44] Iraqi law, prior to the 2003 American invasion, maintains that a judge has the discretion to decide whether or not a husband can marry subsequent wives based on whether or not he is 'financially capable of supporting more than one wife' and if 'there is a legitimate interest' in pursuing a polygamous relationship. Cited from Nasir, *Islamic Law of Personal Status,* p. 67.

(b) his ability to support all his wives and children is certain, and
(c) his ability to be fair to all his wives and children is certain.[45]

In Morocco, a husband must inform both his current wife and subsequent wives that he intends to enter into a polygamous relationship.[46] Meanwhile, women in countries such as Jordan and Syria have the option of stipulating in their marriage contract whether or not they are willing to permit their husbands to take on additional wives.[47] If the husband takes on an additional wife, the first wife can sue for divorce.

Islamic Divorce: Brief Overview

An Islamic divorce is initiated in the following ways: 1) by the husband via the *ṭalāq;* 2) mutual consent of the spouses by way of a *mubāra'a;* and 3) by judicial order or *faskh.* Women can request that their husbands divorce them via a *ṭalāq*: this process is known as a *khul'*. However, requesting this type of divorced does not necessarily mean that the wife's wishes will be met in light of the role the husband plays in deciding whether or not to fulfill the request. Today, various forms of these divorce practices have been codified throughout the Muslim world.

There are three variants of the *ṭalāq* which include the most correct (*aḥsan*), the correct (*ḥasan*), and the sinful (*bid'a*) forms. The most correct form of *ṭalāq* begins when a husband, who is free from rage and sober, informs his wife of his desire to divorce by uttering a single *ṭalāq* statement.[48] This statement can be delivered by word of mouth or in writing. In both cases the intention must be explicit and should contain

[45] Cited from Pearl and Menski, *Muslim Family Law,* p. 245.
[46] Cited from Nasir, *Islamic Law of Personal Status,* p. 68.
[47] Ibid.
[48] Most schools do not deem a divorce uttered under coercion as valid, though the Ḥanafīs do consider a divorce uttered under a state of coercion as valid. See Nasir, *Islamic Law of Personal Status,* p. 108.

the word '*ṭalāq*.' In order to put the *aḥsan* divorce into effect, the declaration of *ṭalāq* should be invoked between a woman's menstrual period (*ṭuhr*). The declaration of divorce is then followed by a waiting period (*'idda*) of three menstrual cycles (*qurū'*) during which time the couple avoids all sexual relations. The *'idda* has a cautionary purpose in that it acts as a means of verifying the parentage of any child the woman may be carrying. Having uttered the *aḥsan* formula of divorce, the husband can revoke his initial divorce so long as he does so during the *'idda* period. The decision to resume the marriage is signaled either by word of mouth or through the resumption of sexual activity between the couple. In either case, it is the prerogative of the husband to initiate the marital rapprochement. If, after three consecutive menstrual cycles, the husband has not revoked his initial *ṭalāq*, the couple are considered to be divorced. The *aḥsan* divorce is described as the 'little method' (*ṣaghīr*) due to the fact that if, after the divorce is finalized, the couple wish to re-marry, they are free to do so.

A *ṭalāq* can be pronounced in another manner which is also acceptable, albeit less than the previous example. The *ḥasan* divorce occurs when the husband makes three separate pronouncements of his intention to divorce as opposed to the single declaration discussed above. The first two pronouncements are made in between three successive menstrual cycles in order to allow the husband time to reconcile with his wife as well as to ascertain the parentage of any unborn child during the *'idda* period. Upon the completion of the *'idda*, the husband reaffirms his intention to divorce a third and final time. Following this last declaration, the divorce is considered to be irrevocable. Thus the *ḥasan* form of divorce is similar to the *aḥsan* divorce in that both are revocable to a point and both make use of a waiting period. What differentiates the two forms is the

fact that the *ḥasan* divorce is considered to have a greater (*kabīr*) finality given the husband's triple declaration of divorce. In practical terms, this means that the couple cannot remarry until the woman marries another man and is subsequently divorced or pursues a divorce on her own. Only after this intermediary stage takes place can the couple re-marry.[49]

Another form of divorce, this one less acceptable, is the so-called 'triple *ṭalāq*' based on innovations (*bid'a*) that are extra-Qur'ānic in origin. The main difference between the *ṭalāqu'l-bid'a* and the more acceptable forms of divorce discussed above is the immediate irrevocability of the triple *ṭalāq*. In this regard it falls outside the acceptable provisions of the Sharī'a and is thus regarded as sinful.[50] Although there are ethical problems associated with this form of divorce, the triple *ṭalāq* is occasionally invoked in parts of the Muslim world. The divorce comes into effect at the *precise* moment at which a husband declares his intentions. The divorce is initiated by uttering a phrase such as; 'I divorce you, I divorce you, I divorce you!'[51] Following this declaration, the marriage is terminated irrevocably and the wife receives her full dower.[52] Once the divorce has been uttered, the wife passes through a period of *'idda*, in order to ascertain the parentage of any child she may be carrying. Unlike in the two previous instances of divorce, the husband is not permitted to revoke the divorce during the *'idda* period. Finally, if the couple wishes to remarry, either during or after the *'idda* period, the woman must first marry another man and then go through another divorce before

[49] Fayzee, *Outlines of Muhammadan Law*, pp. 129-130.
[50] Pearl and Menski, *Muslim Family Law*, p. 282.
[51] Fayzee, *Outlines of Muhammadan Law*, p. 130.
[52] Recently a Malaysian man divorced his wife by way of a text message (Short Message System or SMS) sent via a cell phone. The judge who presided over this case determined that the electronic message had

returning to the previous husband. In an attempt to curb this form of divorce, various countries have adopted the Shī'a practice of disallowing the triple *ṭalāq*. For instance, Article 3 of the Egyptian Law No. 25, promulgated in 1929, states that '[a] repudiation in which a number is implied whether verbally or by a gesture shall be counted as one.'[53] Similar provisions have also been adopted in countries such as Jordan, Iraq, Kuwait, Algeria, Sudan, Yemen, Syria and Oman.[54]

Women can initiate a *ṭalāq* by requesting a *khul'* from their husbands.[55] This form of divorce is quite common in the modern Muslim world, belying the commonly held notion that women have no say in divorce. The foundation of this form of divorce is spelled out in the Qur'ān where it states, in reference to a woman seeking to break her marriage contract, that 'it is no sin for either of them if the woman ransom[s] herself.'[56] As the above passage suggests, a woman seeking a divorce may be required, if the husband so chooses, to forfeit her dower and any other financial benefits promised to her in the marriage contract.[57]

Despite the fact that the wife initiates the divorce, it is up to the husband to either accept or reject the demand to dissolve the marriage.[58] So, although women have the ability to request a divorce, they do not have equal access to bringing a divorce into fruition as the husband has the ultimate power in accepting or rejecting the wife's

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the same intent as a more traditional letter demanding a divorce and thus was valid. See, Balan Moses et al., "Divorce Declaration through SMS Valid, Rules Court," *New Straits Times,* July 26 (2003): p. 8.
[53] Cited from Nasir, *Islamic Law of Personal Status,* p. 111.
[54] Ibid.
[55] The traditional Ḥanafī school of law does not provide women with the right to initiate a divorce through the *khul'*. See Pearl and Menski, *Muslim Family Law,* p. 283.
[56] Qur'ān, 2:229.
[57] Fayzee, *Outlines of Muhammadan Law,* p. 140.
[58] Pearl and Menski, *Muslim Family Law,* p. 284.

wishes. In cases where both parties agree to mutually end their marriage by way of a *mubāra'a,* the wife is not obliged to forfeit any dower that is owed to her, nor is she required to 'ransom' herself from her husband as in the case of the *khul'* divorce.[59]

Although most forms of Muslim divorce have traditionally been carried out outside the courts, a Muslim couple can in fact seek divorce by way of a judicial rescission or *faskh.* The most noteworthy example of this form of divorce is the *li'ān* or mutual imprecation. In cases where a husband suspects that his wife has committed an act of adultery or *zinā,* he can petition the courts to grant him a divorce. The reasons he would choose this avenue and not simply utter a *ṭalāq* formula are based on the harsh punishments associated with uttering false accusations and the even more severe punishments linked to adultery. Although adultery is no longer a capital crime in most Muslim states, the social stigma associated with this act remains and thus individuals may opt for this form of divorce to avoid such criticism. Another form of *faskh* divorce is one that is initiated by a wife who faces various hardships such as desertion or abuse at the hands of a husband. However, owing to the diversity inherent within the Sharī'a, this form of divorce was traditionally closed to members of the Ḥanafī and Shāfi'ī schools.[60] Meanwhile, women from the Mālikī and Ḥanbalī schools could petition the courts for a divorce and, if successful, could receive a court-granted *faskh* along with their full dower.

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[59] Ibid., pp. 284-285.

[60] These schools of law have dissented due to their belief that divorce is a reprehensible act and should be avoided altogether. Rather than allow for divorce, these schools advocate reconciliation between the two parties. Any divorce, if ultimately enacted, must be in the form of a *ṭalāq* or *khul'*.

Apart from the *faskh*, most traditional forms of Islamic divorce do not require the intercession of the courts. However, this phenomenon has changed in recent times following the reforms to Islamic law which began during the nineteenth century and continue to this day. The increased role of the courts is due, in part, to the desire to curb certain excesses such as the use of the irrevocable triple *ṭalāq* by men. Thus in countries such as Tunisia, Algeria, Jordan and Iran, *ṭalāq* divorces uttered outside court chambers are not considered valid. However, demonstrating the diversity inherent within Islamic law, Saudi Arabia still recognizes this form of divorce as valid. It should be noted that the bureaucratization of the law and the requirement to register divorces with state authorities has not been uniformly applied and followed in some Muslim societies. In Pakistan, for instance, Article 7 of the *Muslim Family Law Ordinance* maintains that all divorces must be registered with courts. This requirement, however, is a purely civil matter and is not part of the Sharī'a proper. Thus, although one will not be in violation of the Sharī'a for not reporting a divorce, one may find themselves spending three months in prison or paying a fine of up to 1,000 rupees upon failure to register a divorce.[61] Owing to the increased Islamization of Pakistani society, the provisions that require the registration of marriages and divorces in that country have come under scrutiny as a result of their extra-Sharī'a origins. Today, Pakistani case law clearly demonstrates that men in that country not only continue to pronounce the unilateral and irrevocable *ṭalāq,* but also fail to register these divorces with the civil authorities.[62]

[61] Pearl and Menski, *Muslim Family Law,* pp. 338-344.
[62] Ibid. p. 360.

This very brief review of marriage and divorce legislation brings to light the scope of Islamic law in use throughout the world today. Unlike its classical and medieval predecessors, current legislation in the Muslim world is predicated on the nation-state model of justice whereby the central government seeks exclusive control over legal affairs. This has resulted in a loss of judicial autonomy previously employed by judges during the pre-modern periods and, as we shall see, has resulted in a reduction of women's rights vis-à-vis their access to divorce.

Modern Legal Reform in the Muslim World

Like other emerging nation states that appeared after the fall of the Ottoman Empire, Egypt also enacted a hybridized legal system that borrowed provisions from French Civil law in matters relating to commercial and criminal codes while maintaining certain Sharī'a principles for family matters.[63] To the casual observer, these reforms appeared to simplify the legal process and grant women new rights. In reality, this was not the case. According to Amira El-Azhary Sonbol, a professor at Georgetown University, women actually 'experienced a marked deterioration in gender relations under what can only be called state patriarchy since the government extended its authority over all matters of family, gender and personal relations.'[64] For instance, Egypt enacted a law stipulating a woman's obedience to her husband. This law, the *bayt al-ta'ah* (house of obedience), now made it permissible to incarcerate a wife in the

[63] Amira Mashhour, "Islamic Law and Gender Equality-Could there be a Common Ground?: a Study of Divorce and Polygamy in Sharia Law in Contemporary Legislation in Tunisia and Egypt," *Human Rights Quarterly,* vol. 27 (2005): p. 578.
[64] Sonbol, "Rethinking Women," p. 113.

family home if it was felt that she was misbehaving by either a husband or a judge.[65] The rationale in formulating laws of this kind did not originate from Middle Eastern cultural sources alone; rather these laws reflected the principles articulated in France's *Napoleonic Code* which characterized the role of women as one associated with 'virtue, reproduction and family.'[66]

These Euro-centric gender roles reduced the ability of Egyptian women to access divorce. During the Mamlūk and Ottoman periods, court records regularly demonstrate that certain women who suffered from spousal abuse (*ḍarar*), obtained divorces from judges.[67] These divorces were granted despite that fact that under traditional Ḥanafī doctrine, women could not easily request *faskh* divorces in such cases due to the fact that within the text of the Qur'ān, husbands are permitted to punish their wives within certain limits (*ta'dīb*).[68] However, the reported divorces taking place in pre-modern Egypt suggest that judges were using their own discretion in granting women divorces based on the societal needs at the time. In fact, during the pre-modern period, Ḥanafī *qāḍīs* would invite judges from other schools of law that had more accessible divorce doctrines to preside over certain cases in order to facilitate the proceedings.[69] However, the new codified laws stripped judges of this discretionary power and focused their attention on applying the letter of the law.

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[65] Ibid., p. 114.
[66] Bonnie C. Smith, *Changing Lives: Women in European History Since 1700* (Toronto: D.C.Heath, 1989): pp. 120-122.
[67] Sonbol, "Rethinking Women," pp. 114-115.
[68] Immanuel Naveh, "The Tort of Injury and Dissolution of Marriage at the Wife's Initiative in Egyptian *Maḥkamat al-Naqḍ* Rulings," *Islamic Law and Society,* vol. 9 (2001): p. 22.
[69] Judith Tucker, "Revisiting Reform: Women and the Ottoman Law of Family Rights, 1917," *Arab Studies,* vol. 4 (1996): p. 13.

This does not mean that women did not have the legal option to seek judicial divorce in Egypt. For instance, the 1929 *Decrees Concerning Provisions in Personal Status* adopted doctrine found in Mālikī law which allowed women to access *faskh* divorces. According to the new law, "[i]f a wife alleges that her husband is abusing her in such a way as to make it impossible for people of their class to continue with the matrimonial relationship, she may ask the *qāḍī* to dissolve the marriage, whereupon the *qāḍī* shall grant her an irrevocable divorce, provided the abuse is established and reconciliation appears to be impossible…'[70]

Although the new law codified a woman's ability to apply for a divorce, in reality not all women were able to exercise this right. The centralized court system and its bureaucratic procedures required individuals to hire lawyers to represent them in court. This, in turn, made the costs associated with court attendance prohibitive for many women.[71] Furthermore, because of the laws of obedience, courts often justified a husband's physical abuse over his wife due to the perception that she lacked discipline.[72] The result was that numerous women who applied for divorces were frequently denied their requests based on patriarchal principles that were now codified into Egyptian law. However, when, and if, these cases were appealed to the *Maḥkamat al-Naqḍ*, the highest court of the land, the lower court rulings were consistently overturned.[73] It goes without saying that appealing lower court decisions entailed financial costs few could afford. It should be noted that although women had the right to seek divorce under the newly

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[70] Cited from Naveh, "The Tort of Injury," p. 22.
[71] Sonbol, "Rethinking Women," p. 115.
[72] Mashhour, "Islamic Law and Gender," p. 583.
[73] Ibid.

reformed laws, a judge acted as the final arbiter in granting the divorce. Meanwhile men retained their exclusive capacity to declare unilateral divorce. In this regard, the modernization of Egyptian law did not improve a woman's overall ability to seek divorce. On the contrary, devoid of the flexibility inherent in the traditional practice of Islamic law, women faced various obstacles in pursuing divorce - a trend that would continue throughout much of the twentieth century. In fact, by the 1990's some divorce cases were taking more than ten years to settle.[74]

Throughout this time, the Egyptian government attempted to offer women greater access to divorce, particularly in cases dealing with polygamy. However, with the growing revival of an Islamist discourse in Egypt following the 1967 war, these attempts were sidetracked. Conservative groups, such as the Egyptian Muslim Brotherhood, did not endorse the government's tampering with principles of law, such as polygamy, that were entrenched within the text of the Qur'ān. The debates that transpired in Egypt over how family law would change point to the existing tensions between religious and secular camps in that country. Inspired by feminist and secular discourse, a number of influential Egyptian women sought to amend the country's laws so as to completely ban polygamy and allow women access to divorce if their husbands took on additional wives. Among these women was Dr. 'Ā'isha Rātib, an Egyptian professor of law who would later become that country's Minister of Social Affairs. During the polygamy debates, voices opposing secular reforms emanated from high ranking religious scholars at Cairo's al-Azhar University - one of the Arab world's most

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[74] Mashour, "Islamic Law and Gender," p. 583.

prestigious Islamic educational institutions. Among those who wished to curtail the reforms that did not conform to traditional *uṣūl al-fiqh* was Dr. 'Abd al-Ḥalīm Maḥmūd, the university's highest ranking official or Shaykh al-Azhar. While some segments of Egyptian society were demanding reforms to statutory law, others, namely individuals representing conservative religious voices, demanded a complete return to Islamic law (*taṭbīq al-Sharī'a*).[75] This was to be expected given Egypt's long history of adhering to Ḥanafī doctrine that had been radically altered. Dr. Maḥmūd thus became a spokesman for a return to a more traditional legal system which would not only limit the ability for women to sue for divorce but would also reinstate traditional Islamic punishments (*ḥudūd*) for theft, unlawful intercourse, and apostasy.[76] Needless to say, polygamy was not something the conservative camp wished to see eliminated from Egyptian society owing to its appearance in the Qur'ān and acceptance within Ḥanafī doctrine.

When Egyptian President Anwar al-Sādāt (d. 1981) implemented his wide ranging liberalization policies (*al-Infitāḥ al-Iqtiṣādī*) in economic and social spheres, he also suggested that reforms to personal status laws could be expected. Despite the calls against such reforms from conservative religious figures, Sādāt promulgated Law no. 44 in 1979 which stipulated that polygamous marriages were harmful and thus were *automatic* grounds for women to sue for divorce.[77] His criticism of what had been a standard, albeit marginally practiced component of traditional Islamic family law, put him out of favor with groups such as the Muslim Brotherhood who were already opposing Sādāt's secularizing tendencies. Ṣādāt's attempts to re-shape Egypt's cultural

[75] Naveh, "The Tort of Injury," p. 28.
[76] Ibid., p. 28.
[77] Ibid., p. 29.

and economic practices may have ultimately cost him his life as he was assassinated by Islamic radicals in 1981.

Seeking to quell the growing discontent in Egypt, the High Constitutional Court of Egypt eventually deemed Sādāt's reforms unconstitutional in 1985. The court maintained that the reforms did not constitute a national emergency - and thus could not be enacted into law without the input of the country's National Assembly. In the attempt to satisfy religious opposition from groups such as the Brotherhood, European parliamentary procedure was invoked to end Sādāt's legal reforms. This demonstrates how far removed the Sharī'a had drifted away from traditional *uṣūl al-fiqh.* Sādāt's Law no. 44 was replaced with Law no. 100 issued by a committee within the Egyptian People's Assembly for Matters of Religion, Society, and *Waqf* in 1985. This new law served to limit women's automatic access to divorce when their husbands took on subsequent wives. Under the new legislation, a husband was required to obtain consent from his first wife prior to taking on a second wife. If the first wife denied her husband consent to marry an additional wife, she could sue for divorce. However, as was the case with the 1929 *Decrees Concerning Provisions in Personal Status*, it remained up to the court's discretion whether or not to allow the divorce proceedings to come to fruition.[78]

Law no. 100 did not meet the needs of Egyptian women who increasingly were seeking to divorce men who had taken on additional wives. Due to the barriers that the new law placed in front of women seeking judicial divorces, an enormous backlog of cases appeared in the Egyptian court system. Seeking to relieve the courts of this backlog as well as re-open the possibility of making divorce available to women who's

[78] Ibid., p. 31.

husbands took on subsequent wives, the Egyptian government of Ḥusnī Mubārak issued a new law governing personal status in 2000. Law no. 1, often referred to as the '*khul*' law', stipulated that women could now obtain court-granted divorces without their husbands' consent so long as they agreed to return the *mahr* or dower.[79] Although certain Muslim authorities such as al-Azhar University were now on board with the government's reforms, religious conservatives such as the Brotherhood remain opposed to the new law because it is seen as a violation of traditional Islamic principles.[80]

The modernization and codification of Islamic laws in Egypt demonstrates the difficulty inherent in reforming Islamic law outside traditional *uṣūl* techniques. Clearly, such reforms are necessary in meeting the challenges of modernity, but equally important are the ways in which the reforms are carried out. Because jurisprudence is now controlled by the nation-state and no longer the enclave of religious scholars, reforms will suffer from charges of illegitimacy from those representing an Islamist discourse.

Modernity has brought significant substantive and procedural changes to Islamic legal practice. As a result, it is fair to say that the modern Muslim world is now marked by a new form of legal hermeneutics or quasi-*ijtihād.* Hallaq maintains that the newly evolving practice of legal interpretation 'suffers from a methodological flaw'[81] which in turn creates problems of legitimacy. Moreover, the new laws have, in some cases, limited women's empowerment while entrenching patriarchy. The project to create a

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[79] Mashhour, "Islamic Law and Gender," p. 583.
[80] Ibid.
[81] Hallaq, *A History,* p. 211.

viable system of Islamic arbitration in Canada is problematic on a theoretical level due to the fact that traditional forms of Sharī'a are not readily available in the Muslim world today. In fact, Muslim-Canadians who seek to use Islamic legal principles in arbitration have, on the whole, failed to acknowledge the changes that have altered the Sharī'a during the course of the last century. This shortcoming raises questions as to the authenticity of their project. Moreover, as will be demonstrated in more detail in the sixth chapter, these same individuals had limited or no training to effectively participate in such legal matters. Although the demand to have Islamic arbitration recognized in Canada appears to some devout Muslims as authentic; in reality the move strays farther away from the Sharī'a.

With the codification of law, beginning in the Ottomans Empire, the way in which the Sharī'a was articulated ceased to follow its traditional trajectory. In its place emerged a hybridized legal system that had the veneer of the former Sharī'a but not its methods. This has created numerous tensions and charges of illegitimacy by members of the religious community seeking to re-install Islamic virtues in countries such as Egypt. The dynamism that existed in the past (which granted women some forms of empowerment) is, for the most part, gone in favor of statutory laws that are static and often fail to reflect the actual needs of a given society. Any suggestion that Canadian forms of Islamic arbitration will follow Sharī'a principles thus has to be qualified with the fact that, although the arbitration may be influenced by Islam, it cannot adhere to bygone forms of applied traditional Islamic law.

Chapter 3
Liberal Universalism

Understanding how Islamic law will be viewed in Canada requires insight in liberal perceptions of diversity. Liberal philosophy has greatly influenced Canadian policy makers and the laws they have put forward that deal with diversity and multiculturalism. This chapter will demonstrate that the freedoms offered to the individual are not unlimited. Rather, there are limits to freedom within liberal societies when individuals wish to govern themselves under religious law. The underlying reality of the freedoms offered under the liberal banner is the following: although the philosophy is open to pluralism, it also carries an inherent universalism that seeks to nullify the diversity threatening societal unity. In other words, liberalism inherently embodies the attitude that different peoples will be tolerated so long as they follow the same world-view. This chapter will trace this tendency as articulated by various liberal thinkers in order to demonstrate that the use of Islamic law in Canada is untenable given the current liberal agenda operating the country.

Liberalism, or more specifically political liberalism, is a philosophical movement that emerged out of the Enlightenment. One of its principal goals at that time was the transformation of eighteenth century European society from one fixed on foundational principles such as religion and the rule of the nobility to one that sought greater freedom for individuals in their pursuits of happiness. Although classical liberalism did not have as its goal the elimination of religion altogether, early liberal thinkers sought to limit its effects on society.

Classical Liberalism

Canadian liberalism is derived from European thinkers such as John Locke (d. 1704) who advocated the notion that God created individuals as rational beings who would come together and form governments that would utilize legislative assemblies that would in turn issue positive law. For Locke, a well-run society consisted of a federal system with legislatures, a judiciary, and adequate checks and balances to preserve individual liberty and thereby facilitate the creation of wealth. The kind of society Locke advocated was heavily reliant on rational discourse, valued private property, and unified structures of authority within territorial boarders.[1] These characteristics were emerging in Europe during Locke's lifetime. However, these principles were not necessarily exported to societies that were being colonized by Europeans such as Canada. Although Locke assumed that all humans were equal, the absence of liberal characteristics in foreign societies marked their developmental inferiority and opened the door for Europeans to impose their values on non-European locals.[2]

Respect for diversity was not an issue to be seriously considered by European settlers during the 'discovery' of the New World. Rather, apart from the struggle to survive, the settler's main preoccupation would be applying the universalizing tendencies of both Christianity and mercantilism. Locke himself endorsed this dual

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[1] John Locke, *The Second Treatise of Civil Government,* in C.B. Macpherson, ed. (Indianapolis: Hackett Publishing, 1980).

[2] Europeans frequently de-humanized the Native populations of the Americas during the colonial period. Writing in 1675, Captain Wait Winthrop, an English officer, penned the following lines of poetry describing the Aboriginal people of New England. 'A swarm of Flies, they may arise, a Nation to Annoy, Yea Rats and Mice, or Swarms of Lice a Nation may destroy.' See Douglas Edward Leach, "A Puritan View of the Indians," in Frank Chalk and Kurt Jonassohn eds., *The History and Sociology of Genocide: Analysis and Case Studies* (New Haven: Yale University Press, 1990): p. 194.

thrust of English colonialism in North America. He did not regard the Aboriginal peoples of North America as having the industry, reason and general level of civility that the English colonizers possessed.[3] Civilizations that did not meet the emerging European standards were deemed to be inferior and in need of assistance in the form of colonization. For Locke, and those who adhered to the principles of colonial expansion, the Native populations of North America were not deemed to have fully developed their rational, political and economic potential. English colonialists were, however, on hand to guide the Natives to the light of reason and industry.[4] Ironically, Locke, who was attempting to rid Europe of Christian 'perfectionism,' had little difficulty exporting his brand of moral perfectionism to the New World. English 'civilization' was to be a boon for Natives who would ultimately benefit from the gift of rationality and industry bestowed upon them by the English. In this regard, diversity, according to Locke, was desirable once different peoples created similar institutions of government and economy. However, there remained one caveat, although European values would be installed in foreign lands, native inhabitants of those newly colonized regions would not have equal footing along side the conquering elite.

Another English thinker who promoted liberal values over those of other cultures was J. S. Mill. According to Mill, the sum total of an individual's happiness would translate into general happiness for the entire community, resulting in a healthy, balanced and well-ordered polity. In a society that positioned individual happiness as a

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[3] Locke, *The Second Treatise,* chapter 5 paragraph 25.

[4] Locke makes his favoritism of the English over Native ways of life in America very clear in the following quotation concerning farming. 'I aske whether in the wild woods and uncultivated waste of America...without any improvement, tillage or husbandry, a thousand acres will yield the needy and

noble goal, a great deal of importance would be placed on individual choice as a means of bringing about this state of being. In practical terms, a society that permitted individuals to develop along their own paths would foster diversity which would make life more aesthetically pleasing, while at the same time stimulate creativity and knowledge. On a political level, governments in emerging liberal societies would accord the citizen the requisite freedom and liberties required to achieve their goals by not interfering in their choices and by not forcing them to abide by a particular way of life.

Like Locke, Mill endorsed a certain universalizing version of liberalism. Envisioning diverse peoples living together but sharing one world-view Mill explains that:

> Nobody can suppose that it is not more beneficial to a Breton, or a Basque of French Navarre to be brought into the current of ideas and feelings of a highly civilized people - to be a member of the French nationality, admitted on equal terms to all the privileges of French citizenship, sharing the advantages of French protection, and the dignity and prestige of French power – than to sulk on his own rocks, the half-savage relic of past times, revolving in his own little mental orbit, without participation or interest in the general movement of the world.[5]

Mill also applied this unitary vision to colonial matters. For instance, he saw in European societies such as France and England 'superior people' who were burdened with the task of civilizing the peoples of Africa and Asia.[6] This ethnocentric equation, otherwise known as the so-called 'white-man's burden', was the philosophical cornerstone of British as well as French colonialism.

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wretched inhabitants as many conveniences of life as ten acres of equally fertile land doe in Devonshire where they are well cultivated.' See Locke, *Two Treatise,* Chapter 2, paragraph 37.

[5] John Stuart Mill, *Considerations on Representative Governments* (Pennsylvania: The Pennsylvania State University, 2004): http://www2.hn.psu.edu/faculty/jmanis/jsmill/considerations.pdf.p. 200.

[6] Parekh, *Rethinking Multiculturalism,* p. 45.

This universalizing tendency was also present in Mill's view on colonial matters in Canada. His personal endorsement of Lord Durham's report (1838) reflects his attitude that diverse peoples can exist together, albeit ascribing to one way of life. The Durham Report, which came out following the French Canadian Patriot Rebellions of Lower Canada in 1837, attempted to settle the growing disputes between French Canadians in Lower Canada and their English neighbors in Upper Canada. Lord Durham's proposed solution was to do away with cultural diversity by assimilating French Canadians into a united Canada that would reflect English values and institutions.[7] Therefore, French Canadians were free to act in whatever manner they wished, so long as they did so within a society ruled under British standards. For early liberals such as Mill, some cultures should be respected, preserved and promoted while those deemed non-liberal, irrational, threatening or just different should be assimilated. Whereas individuals were equal, cultures were not. This pattern of liberalism, which on the surface promotes a certain measure of freedom and autonomy, seeks to assimilate difference in matters of culture. This type of aggressive liberalism would reproduce itself in Canada owing to the country's colonial lineage.

Throughout the course of European history, major currents such as colonialism have had certain liberal undertones behind them. The 'white-man's burden' was partly a liberal project focused on spreading European civilization and institutions to non-European peoples while reaping economic benefits from far-off colonies. Part and parcel of this project was implanting European-inspired legal systems into the colonies. For

[7] Graeme Wynn, "On the Margins of Empire:1760-1840," in Craig Brown ed., *The Illustrated History of Canada* (Toronto: Lester Publishing, 1996): p. 213.

instance, in India during the British Raj, British courts altered many of the local commercial and criminal laws while outlawing practices such as slavery that were deemed repugnant to English sensibilities.[8] The question here is not whether or not slavery should be abolished; it must be eliminated at all costs. The point of interest for the present discussion is the manner in which the British colonial authorities eliminated local practices: British models of justice were simply imported into India as models of correct procedure. Holding the reigns of power, and seeking to create a justice system based on the British model, colonial administrators succeeded in distorting local customs pertaining to legal matters in accordance with British tradition, rather than permitting local institutions the benefit of internal and authentic change. The message was clear: although colonialism dealt with diverse peoples, there would nevertheless be an attempt to impose *one* overarching political system that would ultimately govern social diversity in places such as British-controlled India. Although liberalism was not at the forefront of the colonial adventure (this honor went to commerce), liberalism had a direct role in the prevailing philosophy at the time. Throughout this history, the universalizing tendencies of liberalism were always prevalent. Non-European and traditional societies which had different ways of organizing, governing and defining themselves were deemed to be inferior and ultimately in need of liberalizing tendencies.

[8] Michael R. Anderson, "Islamic Law and the Colonial Encounter in British India," in David Arnold and Peter Robb eds., *Institutions and Ideologies: a SOAS South Asia Reader* (London: Curzon Press, 1993): p. 171.

Contemporary Liberalism

Although shedding the overt ethnocentrism that frequently appeared in classical liberalism, contemporary liberals such as John Rawls (d. 2002) also carry the same universalizing tendencies. The importance of Rawls in understanding modern liberalism cannot be understated. Two of his books, *A Theory of Justice* (1971) and *Political Liberalism* (1993) have set the tone of modern political philosophy for the last thirty years and continue to set the standard for discussions on liberalism. Like his classical predecessors, Rawls also carries a universalizing strain in his thought process. However, Rawls distinguishes his brand of moral perfectionism from that of his classical counterparts by taking into account the inherent diversity of modern multicultural societies. Before discussing this point however, let us first unpack the main message of Rawls.

In *A Theory of Justice*, Rawls attempts to focus the debate away from the simple acceptance of plurality to the actual means of promoting justice within heterogeneous societies.[9] For Rawls, a *neutral* social contract or constitution will ensure that individuals have equal and fair access to the various opportunities and benefits of a given society. Moreover, this contract will be amenable to the diversity inherent within a heterogeneous society because it will not carry any substantive notions of the good life that could inadvertently benefit one group over another.[10] Individuals will obviously have some intrinsic characteristic such as religious belief or a philosophical world-view

[9] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971): pp. 3-4.

[10] Iris Young has pointed out very forcefully that the 'color-blind' system of governance endorsed by liberals such as Rawls is a myth. Because of the dynamics of power, majority groups will impose their world-views on all segments of society. See Iris Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990): p. 18.

that will influence their private lives, but these substantive views will not curry favor within government programs or institutions. Thus, Rawls' brand of justice is 'color-blind' to difference, a philosophical position central to his *Theory of Justice.* In the pursuit of a just society, Rawls envisions that a *veil of ignorance* will influence the decision-making processes of society. Thus when legislation is put forward or is enforced it will not reflect any particular bias or group.[11] However impossible this goal might actually be, Rawls seeks to create a neutral society that will run on constitutional guarantees of equality that would ultimately bring about justice for all. Conservative Muslims wishing to use Sharī'a to govern their lives would find very little support within Rawls' early theory of justice because of the emphasis placed on a 'color-blind' approach to justice.

In *A Theory of Justice,* Rawls presumes that everyone in a liberal society will simply *accept* liberal positions at face value and put to rest demands for substantive concerns in the public forum. Thus cultural and religious concerns would remain private matters. The main objection voiced against Rawls' brand of justice is that he presupposes that the individual accepts the principles associated with Western-liberalism; namely the ideal of universal freedom, equality and the respect for diversity. This last point needs some elaboration however. Although liberal societies attempt to respect diversity to varying degrees, very few are willing to fully recognize ways of life that fall outside the liberal tradition. Moreover, no allowance is made for those who may not actually adhere fully to liberal principles. Given the conservative nature of the Sharī'a, a practicing

[11] According to Rawls, 'institutions are just when no arbitrary distinctions are made between persons in assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life.' Rawls, *A Theory of Justice,* p. 5.

Muslim who seeks to abide by this law may not fully identify with all the goals of a liberal society. Rawls ignores this reality and simply positions everyone within the liberal framework.[12]

Seeking to address his critics, Rawls put forth a second version of his theory of justice in monograph he published in 1993, entitled *Political Liberalism.* Rawls begins his new inquiry by stating that the chief concern of political philosophy is establishing a theory of justice in a society that is 'profoundly divided by reasonable religious, philosophical, and moral doctrines.'[13] In this reformulated theory of justice Rawls positions liberal democratic values within the moral world-view of a diverse citizenry; one that includes conservative religious groups. In this manner, practicing Muslims will ascribe to liberal values *within* their religious tradition, and in so doing will endorse the political values of liberalism through their faith. Rawls refers to this philosophical turn of hand as an *overlapping consensus* which he claims occurs when 'a diversity of conflicting comprehensive doctrines endorse the same political conception....'[14] Whether or not there is a contiguity between the individual's substantive goals (i.e. Islam) and liberal values does not concern Rawls. He assumes that individuals living within democratic societies will naturally accept the aims of liberalism, or will eventually come to accept them. Those who do not accept the liberal agenda are being unreasonable and should not be permitted to shape the political values of a democratic society. It is at this point that Rawls' liberalism takes on some of the characteristics of

[12] Ed Wingenbach, "Unjust Context: The Priority of Stability in Rawls' Contextualized Theory of Justice," *American Journal of Political Science,* vol. 43 (1999): p. 214.
[13] John Rawls, *Political Liberalism* (Cambridge: Harvard University Press, 1993): p. 4.
[14] Quoted from Wingenbach, "Unjust Context," p. 217.

the 'perfectionist' liberalism found in Locke and Mill. Stating that individuals who remain opposed to liberal values are threats to the stability of society, Rawls maintains, in a footnote, that they should be contained like 'war and disease.'[15]

One of the mechanisms Rawls proposes to instill liberal values in society is through educational institutions. Ironically, although he insists on civic neutrality, Rawls points out that the educational curriculum should foster liberalism.[16] In this manner, Rawls endorses a pedagogical system that seeks to convert group-oriented individuals into autonomous persons. Over time, these people will influence their religious groups as they incorporate the liberal ethos and thereby help preserve the basic structure of society. It seems that Rawls is effectively repeating a line of thinking articulated by classical liberal thinkers who preceded him: a plurality of views (or people) are acceptable so long as the views have internalized liberal (or European) attitudes. In so doing, Rawls seems to suggest that society's political values are fixed on liberal goals and no longer fluid and open to change.[17] Where Rawls differs from early liberal thinkers is in his desire to establish equality between individuals of diverse backgrounds.

Rawls' endorsement of liberal values at the expense of groups who wish to maintain non-liberal agendas is very subtle. By stressing the neutrality of the state he disguises the tendency for liberal societies to impose their world-views on non-liberals. Some contemporary liberals have challenged this muted 'anti-perfectionist' view by maintaining that a society should not define itself as neutral in its approach to diverse

[15] Rawls, *Political Liberalism*, p. 64, n. 19.
[16] Ibid., p. 156.
[17] Ibid., p.152.

versions of the good life. The American philosopher, William A. Galston, believes that tolerance should not automatically mean that every life-plan is considered to be 'equally good, hence beyond rational scrutiny and criticism.'[18] In defending the importance of civic unity, Galston feels that liberal values should take precedence in society and 'shape the character of every aspect of the community.'[19] Galston is seeking to preserve and protect liberal virtues in society over and above other competing forms of life such as religious conservatism. He states that liberalism 'embraces a view of the human good that favors certain ways of life and tilts against others.'[20] However, by his account, he does not wish to limit the personal choices of conservative religious people or institutions. Addressing the Catholic community in America in particular, Galston maintains that they should reject liberalism if they so choose, but must not impose their conservatism on others. He states that 'Catholics may be affronted by a legal code that permits acts they view as abominable. But in circumstances of deep moral diversity, the alternative to enduring these affronts is even worse.'[21] He is confident in providing conservative religious groups a measure of autonomy because, in his estimation, society has clearly defined itself as liberal in orientation. Furthermore, by permitting conservative groups the freedom to flourish in society, Galston endorses the liberal values of toleration and individual autonomy.

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[18] William A. Galston, "Liberal Virtues," *American Political Science Review,* vol. 82 (1988): p. 1282.
[19] William A. Galston, *Liberal Purposes: Goods, Values, and Diversity in the Liberal State* (New York: Cambridge University Press, 1991): p. 292.
[20] Ibid., p. 3.
[21] William A. Galston, "Contending with Liberalism: Some Advice for Catholics," *Commonweal,* vol. 127 (2001): p. 15.

Despite this confidence, Galston puts forward the idea that liberal values will not simply perpetuate themselves without some sort of government intervention. By shying away from the Rawlsian ethic of civic neutrality, Galston maintains that governmental bodies and institutions, including educational systems, should constantly seek to preserve liberal values. He states that 'very few individuals will come to embrace the core commitments of liberal societies through a process of rational inquiry. If children are to be brought up to accept these commitments as valid and binding, it can only be through a process that is more rhetorical than rational.'[22] For him, the goal of education is the 'formation of individuals who can effectively conduct their lives within...their political community.'[23] By promoting liberal principles through public channels such as education, Galston seeks to ensure that children do not grow up without some communal identity that is grounded in liberal values. In maintaining this (albeit minimalistic) 'perfectionist' stance, Galston seems to balance society's need to foster liberal values of individual freedom with groups who wish to take a more dogmatic approach toward achieving the good life. Although he does not deny his universalistic position, it is muted to the point of permitting conservative religious groups the freedom to profess their faith, albeit within a society that clearly advocates a liberal perspective. What is crucial for Galston is the maintenance of the society's liberal character, which he believes can only be safeguarded when the citizenry adheres to a certain unity in their political outlook fostered through such things as a liberal education.

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[22] Galston, *Liberal Purposes,* p. 243-244.
[23] Ibid., p. 243.

The Canadian philosopher, Will Kymlicka, has recently put forth a theory promoting liberal values in multicultural states. In discussing the challenges that multicultural societies represent for liberal philosophy, Kymlicka argues for the imposition of liberal values on groups who harbor conservative world-views, particularly recent immigrants.[24] Liberal societies such as Canada will face two types of demands for group-differentiated rights from conservative religious groups: demands for *internal restrictions* and demands for *external protections.*[25] Kymlicka explains that some groups will seek to limit the freedom of their members by replicating specific gender roles and by instituting prohibitions against blasphemy on their own members. Imposing conservative women's roles and participating in the public outcry against Salman Rushdie's *Satanic Verses* are examples of how some Muslims will make demands that Kymlicka labels as *internal restrictions.*[26] Kymlicka does not believe that these group-differentiated claims should benefit from societal recognition. Conversely, in recognition of the importance religion plays in shaping the individual, Kymlicka insists that group-differentiated rights designed to protect vulnerable cultures should be permitted; he labels these rights as *external protections.*[27] In this regard, Kymlicka is in favor of allowing Muslim women to wear the *ḥijāb* in public because to deny her that

[24] Interestingly, Kymlicka makes distinctions among conservative groups such as Hutterites, Hassidic Jews and Muslims in Canada. Whereas all three groups are said to carry a certain measure of internal conservatism and illiberal attitudes, the Canadian government has set a precedent for allowing the Hutterites and the Hassidic Jews their cultural particularities but has not extended to the Muslims, a more recent immigrant community. See Kymlicka *Multicultural Citizenship: a Liberal Theory of Minority Rights* (New York: Clarendon Press, 1995): pp. 161-163.
[25] Ibid., p. 35.
[26] Ibid., p. 43.
[27] Ibid., p. 35.

right would also inflict undue pressures on her ability to lead a public life as a Muslim woman.[28]

While recognizing the need to establish certain protective measures for vulnerable cultural groups, Kymlicka also promotes the notion that these same groups should adopt liberal values. For instance, he explains that individuals should be encouraged to question the traditionalism of their faiths by being made aware of different cultural options open to them in a liberal society. Kymlicka does not endorse the forced transformation of illiberal groups; rather he would 'liberalize them' by way of education.[29] Kymlicka states that it is *not* 'wrong for liberal states to insist that immigration entails accepting the legitimacy of state enforcement of liberal principles, so long as immigrants know this in advance, and nonetheless voluntarily choose to come.' [30] Although Kymlicka points out that his brand of liberalism does not seek to impose itself abroad in the manner of his classical predecessors, he does see a need to protect the liberal values that are found in democratic societies such as Canada.

Charles Taylor has aptly described liberalism as a 'fighting creed.'[31] On the international scene, liberal victories have recently seen the demise of Communism in Europe as well as in the former Soviet Union. Meanwhile the mission that ousted Saddam Hussein was portrayed to the British and American pubic as a liberal cause in the pursuit of freedom and democracy.[32] Today, vocal supporters of this brand of

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[28] Ibid.
[29] Ibid., p. 94.
[30] Ibid., p. 170.
[31] Charles Taylor, "The Politics of Recognition," in Amy Gutmann, ed., *Multiculturalism: Examining the Politics of Recognition* (New Jersey: Princeton University Press, 1994): p. 62.
[32] For a concise argument in support of exporting liberal values abroad see Michael Ignatieff, *The Lesser Evil : Political Ethics in an Age of Terror* (Princeton: Princeton University Press, 2004).

aggressive liberalism includes the current government of Prime Minster Stephen Harper, who is collaborating with the American administration in their attempt to democratize the Middle East and Afghanistan.[33] Meanwhile, on the local Canadian scene, liberals are uncomfortable with people and groups that reject the basic tenets of individualism, liberty, and free agency in favor of religious conservatism and limited political freedom.[34] Nowhere is this discomfort more evident than in multicultural societies where members of conservative religious groups hold on to their communal values and regard the march of liberalism as a threat to their way of life. Just as on the international scene, liberals seek to incorporate conservative religious groups living in the West into their fold. Commenting on Muslims living in Europe, one observer explains that 'the logic of liberalism does not allow for a free and reasoned critique or rejection of the liberal order and its underlying axioms. Only free and rational agents deserve the political rights associated with liberalism; irrational actors require liberation from their irrational tutelage.'[35]

Thus, not only do some Muslim groups appear to threaten liberal values, but they also threaten the unity of states within which they live because of their strong communal bonds which are predicated by faith. By demanding group-differentiated rights, some Muslims are ostensibly demanding special status within the liberal nation-

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[33] For a revealing look at how the George W. Bush administration blundered into Iraq in search of weapons of mass destruction while ignoring the reasoned advice of policy analysts and members of the military see James Fallows, *Blind into Baghdad* (Vintage: New York, 2006).

[34] Kymlicka, *Multicultural Citizenship,* p. 152. In the United States, however, Christian discourse is quite strong in guiding public policies, especially under the presidency of George W. Bush. Recently, the American federal government provided charitable organizations closely affiliated with religious groups $60 million. See Paul Harris, "Bush says God Chose him to Lead his Nation," *The Observer,* November 2nd (2003): http://observer.guardian.co.uk/international/story/0,6903,1075950,00.html.

[35] Peter O'Brien, "Islam vs. Liberalism in Europe," *The American Journal of Islamic Social Sciences,* Fall (1993): p. 377.

state. One American scholar has commented that policies that seek to endorse group-differentiated rights act 'like a corrosive on metal, eating away at the ties of connectedness that bind us together as a nation.'[36] The concern is that deep divisions within a population will threaten the societal stability that liberals have fought so hard to establish. A society unified on similar goals is seen as a precondition for a working liberal society since it provides a public forum where people can come together and discuss their differences in a common language of citizenship. The Canadian political scientist Margaret Moore goes so far as to explain that '[t]here is no public interest in preserving diversity; diversity is not an intrinsic good in itself, which should be protected. Indeed, encouraging too much institutional separateness may have the effect of jeopardizing our shared political identity and common political institutions.'[37]

The demand for societal unity on the part of some academics is a reaction to the new multicultural realities found in Western societies and the fear that this diversity will fragment society.[38] Commenting in the early 1980's, Nathan Glazer, a right-wing American sociologist,[39] endorsed a number of strategies aimed at ensuring societal unity amidst fears that cultural communities were demanding greater recognition based on their communal identities. One such proposal was that immigrants should learn English

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[36] Cynthia Ward, "The Limits of 'Liberal Republicanism': Why Group-Based Remedies and Republican Citizenship Don't Mix," *Columbia Law Review,* vol. 91 (1991): p. 598.
[37] Margaret Moore, "Liberal Nationalism and Multiculturalism," in Ronald Beiner and Wayne Norman, eds., *Canadian Political Philosophy* (New York: Oxford University Press, 2001): p. 190.
[38] Will Kymlicka maintains that an ethnic revival took place during the 1960's and1970's which saw a number of groups in the United States such as the Puerto Ricans, Hawaiians and African Americans demand recognition from the government in the form of land claims, employment equity, and linguistic rights. In Canada this was paralleled by a heightened sense of nationalism on the part of the Quebecois who demanded sovereignty. See Will Kymlicka, *Multicultural Citizenship,* pp. 12-13 and pp. 61-69.
[39] Nathan Glazer served as the editor of the right-leaning journal *Public Interest.*

in order to 'become Americanized as quickly as possible.'[40] Another American, Michael Walzer, a left-leaning political theorist,[41] proposed that immigrants who had chosen to migrate to the United States were 'more susceptible to cultural change' and should therefore integrate into the prevailing social milieu.[42]

What these authors are implicitly saying is that immigrants should integrate into mainstream society and abandon certain cultural aspirations that would otherwise threaten the American identity.[43] These points of view are not limited to the United States. Canadian academics and politicians have also expressed similar opinions. Writing in the early 1990's, the late Reginald Bibby, a Canadian historian of religion, expressed that too much pluralism would, in effect, dilute cultural identity in Canada and produce what he calls 'mosaic madness.' Referring to the Canadian vision of multiculturalism that is often represented as a mosaic of different groups living together in harmony, Bibby questions how such ghettoization would combine to promote national unity. Quoting him at length captures some of the fears expressed by those who bristle at providing too much recognition to minority groups.

> When a country like Canada enshrines pluralism through policies such as multiculturalism and bilingualism and the guaranteeing of individual rights, the outcome is coexistence - no more, no less. It is a good start in building a society out of diverse peoples. But, there's a danger. If there is no subsequent vision, no national goals, no explicit sense of coexisting for some purpose, pluralism becomes an uninspiring end in itself. Rather than coexistence being the foundation that enables a diverse nation to pursue the best kind of existence possible, coexistence degenerates into a

[40] Nathan Glazer, *Ethnic Dilemmas: 1964-1982* (Cambridge: Harvard University Press, 1983): p. 149.
[41] Michael Walzer served as the editor for the left-wing journal *Dissent.*
[42] Quoted from Kymlicka, "*Multicultural Citizenship,*" p. 63.
[43] Ibid., p. 67.

> national preoccupation. Pluralism ceases to have a cause. The result: mosaic madness.[44]

As we have seen, liberalism has had a universalizing component that seeks to transform non-liberal societies and individuals into liberal ones. Liberalism is not simply a benign force open to all forms of cultural expressions and diversity. Rather, liberalism seeks to promote pluralism and choice over and above conservative group-oriented goals. This line of thinking can be traced back to classical thinkers such as Mill who advocated equality of peoples while insisting that they follow one particular world-view. Modern liberals such as Rawls, Galston, and Kymlicka follow this transformative logic, albeit within the context of multicultural societies that are more open to diversity. With this in mind, it is fair to say that the use of Islamic law in Canada will face a great deal of opposition from individuals seeking to maintain and protect the liberal values in the country.

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[44] Reginald Bibby, *Mosaic Madness: the Poverty and Potential of Life in Canada* (Toronto: Stoddart, 1990): pp. 103-104.

Chapter 4
Canadian Multiculturalism

Writing in the eighteenth century, David Hume (d. 1776) explained that '[w]here a number of men are united into one political body, the occasions of their intercourse must be so frequent, for defense, commerce, and government, that, together with the same speech or language, they must acquire a resemblance in their manners, and have a common or national character....'[1] Canada's attitude towards cultural difference has followed Hume's observation by way of assimilating and integrating minority groups into the prevailing societal culture.[2] The dominant Canadian culture during the last 200 years has been an Anglophone one based primarily on a British model. Along with Canada's maintenance of the British Crown and use of the English language throughout most of the country, institutions such as the Westminster-styled legislatures common across the country, typify the dominance of the English model.[3] Despite the triumph of English-Canadian culture, various concessions have been made towards recognizing French and more recently Native identity as a means of securing various political goals.

This chapter will address a number of instances that point to a universalizing trend within Canadian cultural dynamics. It will demonstrate that, very much like the tenor of

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[1] David Hume, *Essays, Moral, Political, and Literary,* Eugene F. Miller, ed. (Library of Liberty, 2004): http://www.econlib.org/library/LFBooks/ Hume/hmMPL21.html. Mirroring this line of thinking the contemporary thinker Earnest Gellner explains that such a common culture would facilitate the functioning of an industrial society because such unity provides 'the necessary shared medium, the life-blood or perhaps rather the minimal shared atmosphere, within which alone the members of the society can breathe and survive and produce.' See Earnest Gellner, *Nations and Nationalism* (Oxford: Blackwell, 1983): p. 38.

[2] Societal culture is the prevailing patterns of life that governs a given society. These include institutions such as government, language, and customs. See Will Kymlicka, *Multicultural Citizenship*, p. 76.

[3] There has always existed a certain amount of insecurity within certain segments of English Canada because of its position within the North American continent. Some English Canadians have at times been reluctant to see themselves as anything other than British for fear of losing their political independence and cultural identity to the United States. See John Boyko, *Last Steps to Freedom: The Evolution of Canadian Racism* (Winnipeg: Watson and Dwyer Publishing, 1995): pp. 10-11.

liberal philosophy discussed earlier, Anlgo-Canadian values have a universalizing tendency and have trumped other cultures in Canada. Although this survey is by no means exhaustive, it will offer an understanding of the context within which the Canadian majority has coped with the presence of minority groups and their cultural particularities. What will become evident in the following pages is the reluctance on the part of English-Canadian society to accommodate alternative cultural groups and cultural practices. The demand for the use of Islamic law in Canada is a recent cultural challenge Canadian society faces. Its future recognition will ultimately emerge within the historical context that has shown itself to be quite skeptical of difference and cultural diversity.

Establishing a simple definition of multiculturalism is difficult, for it has come to mean different things to many different people. At a very simple level, multiculturalism can point to a demographic reality whereby different cultural groups occupy a common region or territory. Rainer Bauböck, an Austrian political scientist, provides an excellent definition of the term as used in complex modern liberal societies. He claims that multiculturalism:

> assigns positive value to a plurality of cultures within society, demands respect for cultural difference, refutes the possibility or desirability of a strict separation between private and public cultural practices, supports a policy of public recognition beyond mere tolerance and rejects claims of (moral) superiority for specific cultural traditions as well as relations of domination, exploitation and forced assimilation between cultural groups.[4]

[4] Rainer Bauböck, "Cultural Minority Rights for Immigrants," *International Migration Review,* vol. 30 (1996): p. 205.

It would be a mistake to assume that this view reflects the longstanding attitudes taken by Canadians over the years. Rather, the history of Canadian diversity can be characterized as an asymmetrical power relationship between the English economic, political, and military elite and other groups such as the Native, French, and immigrant populations.

Canada's history of multiculturalism has been a lengthy one, stretching as far back as the period before the arrival of the European colonialists. The first major migration of people to Canada began roughly 28,000 years ago when the ancestors of Canada's First Nations people crossed the Bering land bridge that once connected Asia to North America. Despite the existence of a great deal of diversity amongst these ancient Native populations, our focus here will begin with the arrival of the Europeans. Beginning in the seventeenth century and lasting well into the 20th century, Canada has portrayed itself as a European outpost dominated first by the French and then later by the English. The bicultural identities, or the so-called 'two solitudes,'[5] were at times augmented with Scandinavian, and Eastern and Southern European settlers. The European presence in Canada came at the expense of the local indigenous population who were pushed off their lands or forced to assimilate into White settler society. Today the influx of immigrants from Asia and Africa has supplanted Europe as the primary source for migrants into Canada. Since 1901 until the present, Canada has admitted roughly 13.4

[5] This phrase was popularized by one of Canada's most distinguished authors, Hugh MacLennan, (d. 1990). MacLennan's 1945 novel, *Two Solitudes* explores the interrelationships between Canada's French and English communities. The main thesis of the book is that members of the two 'founding' cultures were not bound by their culture; rather the difference they had could be overcome through the similarities they shared. This novel is considered to be one of the defining pieces of literature in the Canadian cannon. See, Hugh MacLennan, *Two Solitudes* (Toronto: McClelland & Steward, 2003).

million immigrants into the country.[6] Prior to 1961 however, only 3% of those who entered the country originated from Asia due to the very restrictive immigration policies that acted as barriers against Asian migrants. Recent census figures, taken between the years 1991 and 2001, point to a major shift that has occurred in Canadian immigration policy. According to this data, 58% of immigrants originated from Asia while the percentage of immigrants to Canada from Europe has decreased to 20%.[7]

The first reliable statistics pointing to the number of Muslims in Canada appeared in 1871 when the national census recorded thirteen Muslims living in the country.[8] Later, the 1931 census recorded 645 Muslims.[9] Prior to 1961, Muslims made up only 0.2% of the total immigrants who came to Canada. However, by 2001, the number of Muslims in the country had risen significantly. Between the years 1991 and 2001, the Muslim population increased from 253,260 to 579,640 respectively.[10] Statistically, by 2001, Muslims accounted for 15% of all immigrants entering the country.[11]

Although it is tempting to categorize the Muslim population in Canada with a single stroke, it should be clear that the origins of Muslim migrants into Canada have been varied. Different eras of immigration attracted individuals from diverse regions of the Muslim world. For instance, Muslim immigrants who entered the country prior to the

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[6]Statistics Canada, "Canada's Ethnocultural Portrait: The Changing Mosaic," January (2003): http://www12.statcan.ca/english/census01/products/analytic/companion/etoimm/pdf/96F0030XIE2001008.pdf.

[7] Ibid.

[8] Daood Hassan Hamdani, "Canadian Muslims on the Eve of the Twenty-First Century," *Journal of Muslim Minority Affairs*, vol. 19 (1999): p. 204.

[9] Baha Abu-Laban, "The Canadian Muslim Community: The Need for a New Survival Strategy," E.H. Waugh, B. Abu-Laban and R. B. Qureshi, eds., *The Muslim Community in North America* (Edmonton: University of Alberta Press, 1983): p. 90.

[10]Statistics Canada, "2001 Census: Analysis Series: Religions in Canada," May (2003): http://www12.statcan.ca/english/census01/Products/Analytic/companion/rel/pdf/96F0030XIE2001015.pdf.

[11] Ibid.

Second World War arrived mostly from the Mediterranean regions of Syria, Turkey and the Balkans.[12] These immigrants mostly originated from rural backgrounds and quite often lacked any formal education. Many of these individuals would find employment in North America as factory workers or as door-to-door peddlers of buttons, yarn and other household goods.[13] The relatively small number of Muslim immigrants to Canada during the nineteenth and early twentieth centuries was a reflection of a number of different factors. The Ottoman government, for instance, imposed travel restrictions on Muslim emigration during the latter half of the nineteenth century.[14] Meanwhile the Canadian closed-door immigration policies imposed by the government limited the number of Muslims arriving into the country.

When immigration policies were revised following the Second World War, greater numbers of non-European immigrants, including Muslims from countries such as Egypt, India and Pakistan, began to arrive.[15] Although Muslim Canadians share the same religion, the group as a whole carries a number of significant complexities. Religiously, Canada's Muslim population includes individuals from the Sunnī, Shī'a and Ismā'īlī communities, just to name a few. Meanwhile, the different countries and regions from which these denominations come from further complicate the sectarian diversity. Suffice it to say, although often portrayed in the media as a unified group, Canadian Muslims, like any group, represent a complex society.

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[12] For more information regarding the early Muslim migration to North America see, Kemal H. Karpat, "The Ottoman Emigration to America, 1860-1914," *International Journal of Middle East Studies,* vol. 17 (1985): pp. 175-209.
[13] Ibid., p.180.
[14] Ibid., p.182.
[15] Daood Hassan Hamdani, "Muslims and Christian Life in Canada," *Journal of Muslim Minority Affairs,* vol. 1 (1979): pp. 52-53.

Multiculturalism: Asymmetry and Domination

As mentioned above, Canadian identity politics can be categorized as an asymmetrical relationship between different cultural groups. Michael Foucault has written extensively on the relationships between different social actors in modern society.[16] For Foucault, elites categorize subjects by *projecting* onto them an identity along with parameters, such as laws, within which the subjects can relate to the powerful. Coupled with this view is Foucault's notion that elites define subjects to *control* them in order to use their labor.[17] For over 200 hundred years, Anglo-Canadian attitudes towards diversity have followed a clear pattern that closely resembles Foucault's theory. Namely, the English have categorized different groups in order to fulfill their vital economic interests.[18] It should come as no surprise that calls for greater immigration today are often coupled with demands for maintaining a sustainable work force in Canada.

English Canada's military, economic and political power enabled it to establish hegemonic control over the groups that lived in the country such as the Natives and the French. During the nineteenth century, this control was a matter of pride and national destiny. Speaking before the Mechanics' Institute of Ottawa in 1864, the reverend A.M. Dawson did not hide the prevailing colonial tendencies when he claimed that 'every people, when they reached a certain degree of power and renown, ought to aim at

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[16] Michael Foucault, "The Subject and Power," in Paul Rabinow and Nikolas Rose, eds., *The Essential Foucault* (New York: The New Press, 2003): pp. 126-144. Edward Said has applied the basic premise of Foucault's thoughts to the relationship that has evolved between the West and the Muslim world. See Said, *Orientalism.*

[17] Foucault, "Subject and Power," p. 130.

[18] See Bernard S. Cohn, *Colonialism and its forms of Knowledge: the British in India* (Princeton: Princeton University Press, 1996).

possessing colonial dependencies.'[19] In this light, power brokers throughout Canadian history have attempted to either exterminate,[20] segregate or assimilate individuals and groups who did not fit into the seemingly fixed notion of what it meant to be a 'canonical Canadian'.[21]

The British colonial involvement in North America dates back to the seventeenth century when the Christian Pilgrims settled the coast of what is now called 'New England'. Groups such as the Christian Puritans arrived in the New World in search of both economic sustainability and spiritual fulfillment. Meanwhile, seeking to expand its overseas Empire, the British Crown facilitated the Puritans by subsidizing their journeys. Along with the British, other commercial and military empires such as Spain, France, Holland and Russia, were also vying for territory throughout the Americas in a bid to expand their own respective economies. Although Native communities had lived throughout the regions now claimed by the Europeans for centuries, their presence was of little concern to the explorers who took possession of the land under a continental law known as *vacuum domicilium*. The basis of this law is articulated in the following quotation from 1629 attributed to John Winthrop, an early English settler. 'As for the Natives in New England, they inclose noe Land, neither have they any settled habytation, nor any tame Cattle to improve the Land by, and soe have noe other but a Naturall Right to those Countries, soe as if we leave them sufficient fore their use, we

[19] Day, *Multiculturalism,* p. 116.
[20] British settlers greatly contributed towards the extinction of the Beothuck peoples of Newfoundland who died mostly at the hands of disease and aggressive settlement tactics utilized by English colonialists. Although a number of proclamations were issued between 1769 and 1776 against the killing of Natives "without the least provocation," no one was ever tried or brought to justice for the abuse groups such as the Beothuck suffered. See J.R. Millar, *Skyscrapers Hide the Heavens* (Toronto: University of Toronto Press, 2000): pp. 113-114.
[21] Day, *Multiculturalism,* p. 144.

may lawfully take the rest, there being more than enough for them and us.'[22] This law stipulated that land not inhabited by 'civilized' individuals could be claimed as colonial possessions of European powers that had 'discovered' them. As Europeans came into contact with civilizations such as the Aztecs of South America and the Iroquois Confederacy of North America, they were quick to label these groups as 'uncivilized' as a means of taking possession of their territory. Natives suffered an enormous loss not only in terms of territory, but also in terms of life during these first encounters with Europeans. Although there were frequent military exchanges between the two communities, the presence of European-bred disease ultimately conspired to decimate the Native populations of North, Central and South America.[23]

Meanwhile, the Continental wars and feuds that dominated the European scene during the seventeenth and eighteenth centuries also played themselves out in the New World as colonial powers competed against each for territory and resources. Often forming strategic alliances with local Native communities, different European powers attempted to offset each other's commercial interests through open warfare. For instance, the British who had seized the coastal regions New England were weary of French settlers inhabiting the coastline of Nova Scotia as well as along the St. Laurence River Valley. When the British defeated the French army in 1710 at Port Royal, Nova Scotia, the English were faced with the prospect of governing the French speaking

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[22] Quoted from Gary Nash, "Cultures Meet in the Seventeenth-Century New England," in Frank Chalk and Kurt Jonassohn, eds., *The History and Sociology of Genocide: Analyses and Case Studies* (New Haven: Yale University Press, 1990): p. 186.

[23] For an excellent analysis of the effects European contact had on Native society in North and South America see Alfred W. Crosby Jr., *The Columbian Exchange: Biological and Cultural Consequences of 1492* (Westport: Greenwood Press, 1972).

Acadian population. One of the first suggestions as to how to cope with the Acadian population was to deport them en masse. A British member of the delegation at the Council of Victors following the Battle of Port Royal proposed that '[a]ll French must be deported outside the country, save those who adopt Protestantism.'[24] This policy option was initially ignored. Under the terms of surrender established in the Treaty of Utrecht of 1713, Acadians were granted status as British subjects. But, despite the oaths of loyalty to which Acadians swore to, English colonialists were forever suspicious of their Catholic subjects. Unlike Native Beothuck of Newfoundland, who were classified as 'barbarous' by the English settlers and killed in large numbers during the eighteenth century, the Acadians could not be eliminated in the same manner. The Acadian's Christian heritage and the anger such an act would have provoked with the French government served to deter the British. However, forty-five years after the proposal to deport the Acadians was initially discussed, this policy was put into effect. In what would be labeled by today's standards as 'ethnic cleansing,' British soldiers rounded up approximately 1,600 Acadians of Nova Scotia in 1755 and placed them on ships bound for the Thirteen Colonies where they were dispersed amongst the American population.[25] This event and others like it directed at the Native community would mark a trend repeated throughout Canadian history whereby the political, military and cultural elite attempted to shape the country's demographic character by force.

[24] Quoted from Day, *Multiculturalism,* p. 103.
[25] Desmond Morton, *A Short History of Canada* (Toronto: McClelland and Stewart, 2001): p. 64.

Post-War Multiculturalism

A modern example of designing a Canadian identity by way of exclusion was the internment and deportation of 'undesirables'. During the First World War, 8,000 individuals of Austro-Hungarian decent were held in internment camps throughout the country. Meanwhile 145 individuals, described as 'Turks,' were interned in various locations according to John Porter, the American Consul General in Ottawa.[26] The practice of detaining 'undesirables' from the Canadian landscape would once again appear during the Second World War. Following the Japanese surprise attack on Pearl Harbor, 22,000 Japanese-Canadians, including thousands who were born in Canada, were stripped of their property as well as their legal rights and placed in internment camps throughout the country out of fear that they represented a fifth column for the Japanese Army. At the conclusion of the Second World War, the government attempted to deport the Japanese despite the fact that many had known no other home other than Canada.[27] Prime Minister Mackenzie King and his Liberal colleagues used the issue of Japanese deportation as an election promise in order to attract the voters of British Columbia during the 1945 elections. Mirroring this view, the Veterans Affairs Minister, Ian Mackenzie, threatened to resign from government altogether by stating that '[i]f the Japs[sic] are in, I'm out.'[28] Although officials in the federal government and various civil society groups were in favor of deporting the Japanese, a growing

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[26] See Lubomyr Y. Luciuk and Borys Sydoruk, *In My Charge: the Canadian Internment Camp Photographs of Sergeant William Buck* (Kingston: Kashtan Press, 1997). Also see, D.J. Carter, *Behind Canadian Barbed Wire: Alien, Refugee and Prisoner of War Camps in Canada 1914-1916* (Calgary: Tumbleweed Press, 1980).

[27] Ken Adachi, *The Enemy that Never Was: a History of Japanese Canadians* (Toronto: McClelland and Stewart, 1991).

[28] Desmond Morton and J.L. Granastein, *Victory: 1945: Canadians from War to Peace* (Toronto: Harper Collins, 1995): p. 209.

number of Canadians objected to this plan. One opponent was an Ojibwa veteran who explained at a Legion meeting that '[w]hen it comes down to brass tacks, everybody here is a foreigner except me. The Legion must never associate itself with racial prejudice.'[29] In the end, despite protests from various sectors of the Canadian population, close to 4,000 Japanese were deported to Japan for no other reason than their identity.

Numerous other examples can be cited detailing the discrimination against groups such as Chinese workers, Jewish émigrés and Sikh migrants. For now, it will suffice to say that lasting well into the latter half of the twentieth century, the prevailing image projected by Canadian cultural and political elites was that of a mono-cultural state based on the British-Anglo-Saxon model.[30] A *Globe and Mail* editorial from 1937 articulates this view in stating 'that immigration should be preponderantly British is undeniable, but those of other nations who come here to improve their lot by taking advantage of our resources should recognize their obligation to respect and not merely tolerate, those who provide them the opportunity.'[31] Throughout much of Canada's history, non-canonical members of society were defined as 'problems' in need of some form of 'management' in order to align them with the prevailing image of the country.[32] In this respect, policies such as assimilation were used against Natives and recent immigrants, while exclusion and expulsion were used against Chinese, Japanese and Jews. According to two contemporary scholars of Canadian diversity, 'any cultural

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[29] Ibid.
[30] Day, *Multiculturalism*, p. 178.
[31] *Globe and Mail*, "Tolerance of the Majority," June 30th (1937): p. A1.
[32] Day, *Multiculturalism*, p. 5.

attribute that wandered too far from the principles of God, King and Empire were dismissed as incompatible with national identity or loyalty to the Dominion.'[33]

The paradox of this ethnocentric world-view was that Canada required a steady influx of immigrants to maintain its economic viability. As immigration from Britain continued to wane following the Second World War, the *Immigration Act* of 1947 was enacted in order to allow European groups, previously denied entry into Canada, easier access into the country. The primary motivation for this policy shift was to bolster the country's economy with workers from Eastern and Southern Europe. However, in the same piece of legislation, Canada continued to restrict the arrival of large numbers of Asians into the country. Speaking in the House of Commons, Prime Minister Mackenzie King felt that although certain immigrants would be admitted, the country should stand on guard against Asian immigration in order to preserve the 'fundamental composition' of the country.[34] King also maintained that, 'Canada is perfectly within her rights in selecting the persons whom we regard as desirable future citizens. It is not a "fundamental human right" for any alien to enter Canada. It is a privilege.'[35] Among the people who received this privilege were post-war refugees or 'Displaced Persons' from Ukrainian, Russian, Hungarian, Polish, Latvian, Lithuanian, Estonian, Czech, Slovak, Rumanian, Serbian and Croatian backgrounds.

Before the Second World War, politicians, clergymen and newspaper editorials might have challenged the arrival of these non-British immigrants, but Canadians

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[33] Augie Fleras and Jean Leonard Elliot, *Engaging Diversity: Multiculturalism in Canada* (Toronto: Nelson Thompson Learning, 2002): p. 61.
[34] William L. Mackenzie King, *Official Report of Debates* (Ottawa: Government of Canada May 1, 1947): p. 2645.
[35] Ibid.

seemed to keep their intolerance and ethnocentrism in check. According to Canadian historian Desmond Morton, one of the most important reasons for this moderation was the increased level of affluence Canada enjoyed during the post-war years. Jobs were no longer scarce and the competition for employment no longer pitted English Canadians against the newly arriving immigrants. In this fashion, according to Morton, economic growth 'anaesthetized open protest' against the new arrivals.[36] Yet, it would be a mistake to assume that all Canadians had completely lost their taste for discrimination. In a 1973 study that analyzed immigrants who settled in Alberta between 1946 and 1970, figures show that 64% of Jews, 58% of Asians, 52% of Yugoslavs, 52% of Italians and Austrians and 44% of Ukrainians faced some form of discrimination.[37] Finally, the link between tolerance and affluence is tenuous because of the fact that financial security cannot be guaranteed. This fact leaves Morton as well as others, including a government report issued by the Multiculturalism Directorate in 1974, to predict that tolerance towards Canada's immigrant population would wither if economic conditions turned for the worse.[38]

Other factors contributed towards greater levels of tolerance in Canada following the Second World War. At the national level, the federal government issued the *Canadian Citizenship Act* in 1947, an act that granted citizenship to both locally born residents and immigrants alike.[39] This act 'signaled Canada's intention to stop

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[36] Desmond Morton, "Strains of Affluence," in Craig Brown, ed., *The Illustrated History of Canada* (Toronto: Lester Publishing, 1996): p. 483.
[37] Wsevolod W. Isajiw, *Understanding Diversity :Ethnicity and Race in the Canadian Context* (Toronto: Thompson Educational Publishing, 1999): p. 113.
[38] Morton, "Strains of Affluence," p. 483. See also Isajiw, *Understanding Diversity,* p. 347.
[39] *Citizenship Act*, R.S.C., January 1947.

identifying so closely to its mother country, the United Kingdom...'[40] Canada would thereby begin a process of re-defining its identity by acknowledging the country's demographic diversity. Whereas in the past, Ukrainian, Russian and Italian Canadians were defined as 'British subjects' who could never become fully 'British' because of their cultural lineage, the *Citizenship Act*, on a symbolic level at least, removed this barrier and offered equality based on a newly branded Canadian citizenship for all those who qualified.

Trudeau's Multiculturalism

The emergence of human rights discourse both in Canada and abroad also helped alleviate some of the open antagonisms directed towards non-Anglo-Canadians that had existed at the governmental level. For instance, with the signing of the *Universal Declaration of Human Rights* in 1948, the country was obliged to curtail official policies that discriminated against various minorities. As non-British immigrants arrived in Canada, the danger existed that a multi-tiered citizenry would evolve in such a way as to position Anglo-Canadians atop a hierarchy of different peoples. Seeking to avoid this problem, lawmakers at both the provincial and federal levels of government passed various fair practices acts during the 1950's and 1960's in an attempt to abolish open discrimination in public spaces and curtail the development of a citizenry organized along hierarchical lines.[41] In addition to these laws, the 1960 *Canadian Bill of Rights*

[40] Fleras and Elliot, *Engaging Diversity*, p. 61.
[41] One such act was the *Racial Discrimination Act* that was issued in 1944. This law attempted to curb instances of discrimination based on race or creed by making it illegal to publish and display signs that promote discrimination. See, *Racial Discrimination Act, Statutes of Ontario,* 1944, Chapter 51.

provided all citizens with an American-styled legal system based on individual rights.[42] Combined with the *Citizenship Act,* these various pieces of legislation attempted to provide Canadians, regardless of their cultural backgrounds, equal status under the law.

Perhaps the most noteworthy trend that fostered a less aggressive view of diversity in Canada was the public affirmation that the country was a 'multicultural state'.[43] This realization was made public in the *Fourth Volume of the Royal Commission on Bilingualism and Biculturalism* (hereafter the B&B Commission).[44] The B&B Commission, convened in 1963 under Prime Minster Lester B. Pearson, released its final report in 1969 during Pierre Elliott Trudeau's leadership. The principal goal of the B&B Commission was to pacify Quebecois nationalism that was on the rise during the 'Quiet Revolution.'[45] In declaring the country bicultural and bilingual along English and French lines, it was hoped that the nationalist movement in Quebec would be stifled.

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[42] *Canadian Bill of Rights*, 1960, c.44. Meanwhile the Ontario *Fair Employment Practices Act* claimed the following in an attempt to limit discrimination. 'Whereas it is contrary to public policy in Ontario to discriminate against men and women in respect of their employment because of race, creed, colour, nationality, ancestry or place of origin, whereas it is desirable to enact a measure designed to promote observance of this principle and whereas to do so is in accord with the *Universal Declaration of Human Rights* as proclaimed by the United Nations." See, *Fair Employment Practices Act, 1951* (S.). 1951, ch. 24.

[43] Colin M. Coates argues that multiculturalism has been in evidence in Canada as far back as the seventeenth century. According to Coates, local Natives tolerated the differences between themselves and the French while at the same time assimilated the French into their local practices. See Colin M. Coates, "Multiculturalism in Colonial Society: Canadian Examples From the 17th and 18th Centuries," in Barbara Saunders & David Haljan, eds., *Whither Multiculturalism: a Politics of Dissensus* (Leuven: Leuven University Press, 2003).

[44] The description of Canada as a multicultural society was not a humanitarian gesture seeking to address the wrongs of the past perpetrated by the English against other cultural groups in the country. Rather, defining Canada as a multicultural state was more of a pragmatic gesture in response to the various political issues that faced the country in the 1960's. These included the large influx of immigrants coming to Canada, growing racial tensions, the demand for cultural recognition by Eastern European decedents in Western Canada, and the growing nationalist movement in Quebec. See K.V. Ujimoto, "Studies of Ethnic, Identity, Ethnic Relations and Citizenship," in P.S. Li, ed., *Race and Ethnic Relations in Canada* (Toronto: Oxford University Press, 1999): p. 278.

[45] Canada, *Report of the Royal Commission on Bilingualism and Biculturalism*, vol. 4 (Ottawa: Queen's Printer, 1967). Also see Day, *Multiculturalism,* p. 180.

The report issued by the B&B Commission is another example of how political elites have redefined the cultural landscape in Canada in order to gain some tangible benefits, in this case maintaining Canada's unity.

In declaring the country bilingual and bicultural, the Commission found that it could not comfortably address the issue of Canadian identity without recognizing the existence of *other* cultures such as the Ukrainians and Germans in Western Canada. These groups, represented by their cultural associations, pressed for greater recognition of their respective languages and cultures during the Commission's hearings.[46] Although the Commission did not acquiesce to their demands, it was willing to highlight the contributions these groups, along with others, had made in developing the Canadian state. In so doing, the B&B Commission declared the country's demographic footprint to be multicultural. Moreover, the Commission made it clear that all Canadians could participate on the national political stage as equal partners with the French and English.[47]

Beyond the polite tenor of the Commission's findings, ethnic and cultural groups were still defined as negative challenges to Canadian unity and identity. In order to manage the problem of multiculturalism, the Commission recommended that more effort be directed towards language training in either official language so as to hasten integration into the mainstream. Furthermore, the cultural particularities non-canonical Canadians maintained were to be observed on a personal level 'once [immigrants] have

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[46] Isajiw, *Understanding Diversity,* p. 246.
[47] Karl Peter, "The Myth of Multiculturalism and other Political Fables," in Jorgen Dahlie and Tissa Fernando, eds., *Ethnicity, Power and Politics in Canada* (Toronto: Methuen, 1981): p. 64.

been integrated into Canadian life.'[48] These sentiments, which came out of the B&B Commission, would be legislated into law in the 1969 *Official Languages Act.* The thrust of this legislation was not so much the promotion of diversity but rather '...the preservation of *human rights*, the development of Canadian *identity*, the reinforcement of Canadian *unity*, the improvement of citizenship participation and the encouragement of cultural diversification within a bilingual framework.'[49] This legislation clearly demonstrates Foucault's logic of a cultural and political elite defining and appropriating meaning in order to secure tangible gains. In this instance, Canadian identity would be expressed within a bicultural/bilingual framework while other cultures that fell outside this duality would play subordinate roles in shaping the Canadian cultural landscape.

Predictably, various cultural groups were not happy with these findings and would have preferred further recognition beyond the claim that Canada was a multicultural society. Under the leadership of Trudeau, these demands would be ignored. Trudeau, who has been characterized as the 'most deeply ideological of the Canadian prime ministers' was influenced by a brand of philosophical liberalism that promoted individual liberty above the rights of communities.[50] Trudeau's main concern during his tenure as Prime Minster was holding the country together. Communal demands ultimately represented threats to both individual liberty and Canadian unity. However, Trudeau had the political savvy to recognize that the country's promotion of a bilingual/bicultural identity could no longer hold a multicultural society together. The

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[48] Canada, *Report of the Royal Commission on Bilingualism*, p. 12.
[49] *Official Languages Act,* 1969 (17-19 Eliz II, c. 54). Italics added for emphasis.
[50] Kevin J. Christiano, *Reason Before Passion* (Toronto: ECW Press, 1994): pp. 98-99.

solution Trudeau devised to manage this predicament was to construct a completely new Canadian identity from the top down.

In re-crafting a new Canadian identity, Trudeau defined the national character as one based on tolerance. Addressing an audience gathered outside Parliament Hill on Canada Day in 1969, he spelled out his vision of Canada. According to him '[t]oleration and moderation are found in this country perhaps in larger measure than anywhere else; against them we can judge our stature as a country and as a people.'[51] Clearly, this line of thinking was at odds with Canadian government policy that had recently proposed the deportation of 'undesirable' Japanese-Canadians. This fact did not matter to Trudeau as the country was now on the road towards formulating a new identity. Trudeau put these sentiments into a formalized policy when his government issued its new multicultural policy in 1971.

Speaking before Parliament that same year, Trudeau introduced a new cultural paradigm for Canadians by explaining that 'there cannot be one cultural policy for Canadians of British and French origin, another for the original peoples and yet a third for all others. For although there are two official languages, there is *no official culture*, nor does any ethnic group take precedence over any other. No citizen or group of citizens is other than Canadian, and all should be treated fairly.'[52] Although the motives appear noble, the historical foundations upon which these claims rested were meager. However, historical accuracy was not the priority in this instance; rather

[51] Pierre Trudeau, Canada Day Speech, 1969. Quoted from Christiano, *Reason Before Passion,* p. 117.
[52] Pierre Elliot Trudeau, "Canadian Culture," speech delivered in the House of Commons Friday October 8th 1971, in *House of Commons Debates: Official Report,* 3rd session 28th Parliament, 20 Elizabeth II, vol. 8, (1971): p. 8545. Italics added for emphasis.

maintaining Canadian unity in light of vast cultural differences was the focus of the Prime Minister's concerns. In this light, English and French Canadians were encouraged to dismantle the prejudices they had traditionally harbored towards each other and revel in their mutual admiration based on tolerance. Meanwhile, members of different cultural communities were encouraged to shed their cultural practices which 'inhibited adaptation and involvement' with the mainstream and integrate into the Canadian mainstream which was now redefined as tolerant.[53] Thus, the main goal of Trudeau's multicultural policy was to 'neutralize' ethnicity and re-define a Canadian identity based on the tolerance of diversity.[54] However, in maintaining the position of French and English as 'official' languages, these two groups would continue to define Canadian identity while other cultures would be managed within the prevailing framework.

Cultural Homogeneity

Himani Bannerji, a professor at York Univeristy, has concluded that this vision of Canada is far from inclusive. Rather, according to her, Canada manintains a colonial mindset by catagorizing visible minorities as cultural dependants who in turn view the country as a 'post-conquest capitalist state, economically dependent on an imperialist United States and politically implicated in English and US imperialist enterprises, with some designs of its own.'[55] Bannerji further explains that a unified Canadian identity 'loses its transcendent inclusivity and emerges instead as a device and a legitimation for a highly particularised ideological form of domination. Canada then becomes mainly an

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[53] Fleras and Elliot, *Engaging Diversity*, p. 63.
[54] Ibid., p. 68.
[55] Himani Bannerji, "The Dark Side of the Nation: Politics of Multiculturalism and the State of "Canada"," *Journal of Canadian Studies*, Fall (1996): p. 105.

English Canada, historicized into particularities of its actual conquerors and their social and state formations. Colonialism remains as a vital formational and definitional issue.'[56]

The 1988 *Multiculturalism Act*,[57] issued under the Mulroney government, reiterated much of what Trudeau's policy initiatives had attempted to do 17 years earlier. However, between 1971 and 1988, Canada's population changed as more non-European immigrants entered the country. The *Multiculturalism Act* reflected this demographic shift by emphasizing the need to dismantle structural barriers that often impeded the full participation of non-European immigrants in Canadian government and society. For instance, within all federal government agencies, departments were now required to hire and advance members of different ethnic and racial groups.[58] Meanwhile, Heritage Canada, the ministry responsible for administering the multiculturalism policy, re-focused a bulk of its funding away from *celebrating* identity towards that of fostering *inclusiveness*. In the 1993-1994 Federal Budget for instance, of the $25.5 million allocated to Heritage Canada's multiculturalism portfolio, $13.3 million was spent on language training designed to integrate new Canadians while only $5.5 million were earmarked for the promotion of different cultures and languages.[59]

The policy incentives and legislation that followed the B&B Commission's findings as well as the 1988 *Multiculturalism Act* have, to some extent, fostered feelings of tolerance among Canadians. Writing on the subject of defining the country's national

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[56] Ibid.
[57] *Multiculturalism Act,* 1988, 35-36-37 Elizabeth II.
[58] Isajiw, *Understanding Divesity,* p. 248.
[59] Fleras and Elliot, *Engaging Diversity,* p.66.

identity, G.B. Madison, professor emeritus at McMaster University, has surmised that Canada's philosophy is one based on '*tolerance, restraint,* and *mutual respect*'.[60] Yet this new-found philosophy does not necessarily mean that Canadians are open to the recognition of group-differentiated rights.[61] Although the country is now regarded around the world as a strong advocate of multiculturalism, recent developments in Canadian cultural dynamics clearly demonstrate that there are certain limits to tolerance.

Yasmeen Abu-Laban and Davia Stasiulus point out that since the mid-1980's academics, journalists and a Canadian Government Commission of Inquiry have all questioned the merits of multiculturalism when it seeks to celebrate diversity at the expense of promoting Canadian unity.[62] The 1991 Citizens' Forum on Canada's Future (hereafter the Spicer Commission), found that Canadians in general accepted the demographic face of multiculturalism. However, the Spicer Commission also discovered that Canadians were reluctant to endorse a form of pluralism that allowed individuals to live out their cultural particularities both in private *and* in public. According to the Spicer Report, '[t]he key goal of multiculturalism should be to welcome all Canadians to an evolving mainstream - and thus encourage real respect for diversity.'[63] In carrying out this ideology, the Commission recommended that all

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[60] G.B. Madison, *Is There a Canadian Philosophy?* (Ottawa: University of Ottawa Press, 2000): p. 16. Italics original.

[61] One of the strongest critic of official forms of multiculturalism emanates from novelist and University of Laval English professor, Neil Bissoondath. Bissoondath rejects group specific rights and privileges and advocates full integration into the Canadian mainstream. See Neil Bissoondath, *Selling Illusions: The Cult of Multiculturalism in Canada* (Toronto: Penguin Books, 1994).

[62] Yasmeen Abu-Laban and Davia Stasiulus, "Ethnic Pluralism under Siege: Popular and Partisan Opposition to Multiculturalism," *Canadian Public Policy,* vol.18 (1992): p. 365.

[63] Canada, *Citizens' Forum on Canada's Future: Report to the People and Government of Canada* (Ottawa: Minister of Supply and Service Canada, 1991): p. 129.

'federal government funding for multiculturalism activities other than those serving immigrant orientation, reduction of racial discrimination and promotion of equality should be eliminated and the public funds saved be applied to these areas.'[64] In other words, although immigrants would be encouraged to participate in their particular cultural activities, the Spicer Commission recommended that they receive no government funding for such activities. Abu-Laban and Stasiulus maintain that in this light, multiculturalism is simply a 'homogenizing' tool used by the Canadian establishment to integrate non-canonical individuals into the mainstream.[65] Although the report does not clearly state what the mainstream represents, the frequent references to VIA Rail, the CBC and the Royal Canadian Mounted Police suggest that the mainstream is a reflection of Anglo-Canadian society. The findings of the Spicer Commission ultimately served to de-legitimize real diversity as it argued that 'only when individuals have commonalities' will respect for diversity become a reality.[66] This view, which seeks to promote unity by stifling cultural differences, has become the prevailing vision of multiculturalism in Canada today. These unifying tendencies also appear to be a throwback to classical liberal goals of fostering equality by negating differences.

Amongst the most articulate observers of Canadian multiculturalism is Richard J.F. Day who draws a direct line between old patterns of assimilation and current policies that seek to integrate different Canadians into the mainstream. Day is under no illusion that Canada is attempting to create an image of itself beyond that of the British model

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[64] Ibid.
[65] Abu-Laban and Stasiulus, "Ethnic Pluralism," p. 370.
[66] Ibid., p. 371.

under which it evolved. According to his perspective, Canada "is *presently* articulated, through a history of violent relations of power, more strongly with a set of British institutions, customs, and language, than it is with any other [culture]."[67]

Following the 9/11 attacks, Muslim communities in Canada faced a series of challenges that have exceeded the homogenizing policies of the past. Pnina Werbner, a British Anthropologist who studies the Pakistani community in that country, has forwarded the notion that Muslims living in the West have become the latest incarnation of the societal 'folk-devil', a position previously occupied by the European Jew. What makes this characterization all the more frightening is Werbner's assertion that this view is not limited to isolated bigots and racists. Rather, she states that the hatred of Muslims has spread across different classes within society and includes the 'intellectual elites, and the consumerist masses' who have generally adopted an Islamophobic perspective.[68] Various Western governments have also implicitly participated in this characterization by issuing anti-terror legislation that has placed an enormous burden on Muslim populations through various profiling policies.[69] Canada's Bill C-36 (hereafter the *Anti-Terrorism Act*)[70] provides police and government agencies greater power to restrict the movement and overall rights of individuals and groups

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[67] Day, *Multiculturalism,* p. 223.
[68] Pnina Werbner, "Islamophobia: Incitement to Religious Hatred – Legislating for a New Fear?" *Anthropology Today,* vol. 21, February (2005): pp. 8-9.
[69] According to Kent Roach, a professor of law at the University of Toronto, '[p]rofiling is a strategy that is both over and under inclusive and alienates communities that may assist authorities in identifying terrorists.' See, Thomas Gabor, "The Views of Canadian Scholars on the Impact of the Anti-Terrorism Act," Department of Justice Canada, March 31st (2004): http://www.justice.gc.ca/en/ps/rs/rep/2005/rr05-1/rr05-1_a_05.html.
[70] Bill C-36, *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism,* 1st Session, 37th Parl., 2001.

suspected of terror activities.[71] Abu-Laban reminds us that the *Anti-Terrorism Act* is not unique, other pieces of legislation, such as the laws permitting the internment of 'enemy aliens' during the First and Second World Wars also targeted the 'alien from within.'[72] If Werbner's claim, that Muslims have now become 'folk-devils', is true, the prospect of integrating certain members of the Muslim-Canadian community into the mainstream will be even more difficult in light of the current atmosphere of fear and mistrust.

Modern political elites have attempted to articulate a shared identity in order to bring together disparate segments of the population and foster economic and political goals.[73] The political scientist Eric Hobsbawm has pointed out that new forms of 'civic religion' based on nationalism have replaced the traditional identity found in societies ruled under the authority of dynastic and religious rule.[74] At times, the actual societal ties have been few and far between. The manner in which Canada became a nation following Confederation is an excellent case in point. The 'Laurentian Thesis' put

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[71] In October of 2006, one of the central provisions of the *Anti-Terrorism Act* was struck down by Ontario Justice Douglas Rutherford. Article 83.01:Section i(A) defined terrorism as an act that is committed 'in whole or in part for a political, religious or ideological purpose, objective or cause...' According to Justice Rutherford, this article represents 'an essential element that is not only novel in Canadian law, but the impact of which constitutes an infringement of certain fundamental freedoms . . . including those of religion, thought, belief, opinion, expression and association.' See, Canadian Press, "Judge Strikes Down Parto of Anti-Terror Law," *Globe and Mail,* October 24th (2006): http://www.theglobeandmail.com/servlet/story/RTGAM.20061024.wterrorlaw1024/BNStory/National/home. Also see, *R. v. Mohammed Momin Khawaja* (14 September 2006), Toronto East Region 04-G30282 (Ont. Sup. Ct. J.).

[72] Yasmeen Abu-Laban, "Liberalism, Multiculturalism and the Problems of Essentialism," *Citizenship Studies,* vol. 6 (2002): p. 476.

[73] Margaret Archer maintains that the need to promote a unified culture as defined by elites 'precluded any theory of cultural development springing from internal dynamics.' The net result of this omission is an 'official' cultural identity that often fails to reflect social reality. See Margaret Archer, *Culture and Agency: the Place of Culture in Social Theory* (Cambridge: Cambridge University Press, 1996): p. 6.

[74] Eric Hobsbawm, *Nations and Nationalism Since 1870: Programme, Myth, and Reality* (Cambridge: Cambridge University Press, 1990): pp. 84-85.

forward by the late University of Toronto professor Donald Creighton, points out that the country's foundation was not predicated on a common culture based on language, ethnicity, religion or identity. Rather, the rationale for piecing together separate Canadian provinces was based on a tangible need to offset American economic, political and military strength.[75] In her study on early Canadian nation building, Suzanne Zeller furthers this assertion by explaining that Confederation was an economic and political union motivated by the availability of new technologies such as rail travel, which allowed for the domination of the harsh Canadian environment by a merchant class seeking wealth.[76] In realizing these goals, Native populations were either assimilated or were forced off their land, while specific groups of immigrants were invited into the country and used for their labor while others were excluded altogether. Meanwhile, groups such as the Japanese, who were considered to be threatening following the Second World War, were deported. Today, new legislation such as the *Anti-Terrorism Act* is repeating the same principles that have become hallmarks of Canadian multicultural policies.

Throughout much of Canada's history, cultural diversity has appeared as a negative challenge to the economic, political and military goals established by the English elite. In order to mold a common cultural front, various strategies such as deportation, internment and assimilation were employed in Canada. Until recently, Canadian attitudes towards diversity have been fueled by ethnocentrism and chauvinism. With

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[75] D.G. Creighton, *The Commercial Empire of the St. Lawrence, 1760-1850* (Toronto: The Ryerson Press, 1937).
[76] Suzanne Zeller, *Inventing Canada: Early Victorian Science and the Idea of a Transcontinental Nation* (Toronto: University of Toronto Press, 1987).

the introduction of Official Multiculturalism, overt acts of discrimination and intolerance have been replaced by more subtle modes of coping with diversity. Rather than openly celebrate Anglo-Canadian culture to the exclusion of all others, multiculturalism has promoted all cultures within a bicultural framework that has propelled French culture to a new heightened status in order to avoid the break-up of the country. Meanwhile other cultures have been asked to fit into the prevailing society by way of integration. Today, the primary goal of multiculturalism is not the celebration of diverse cultures; rather it is ensuring that all Canadians can access opportunities within a society that is primarily defined by an Anglo-oriented culture. In this regard, Islamic law will have great difficulty being accepted in Canada.

Chapter 5
The New Multiculturalism

The previous two chapters have demonstrated that both liberalism and the nation-state have maintained certain homogenizing tendencies concerning diverse cultures and identities. A recent Statistics Canada study projects that the country's visible minority population will number 20% of the overall population by the year 2017. The same study points out that Canada's white population will experience minimal growth as its birth rate declines.[1] In light of these projections, it is becoming evident that modeling society along Eurocentric bicultural and bilingual models will increasingly be difficult in a population whose ethnic backgrounds are non-European. Recent discussions in multicultural theory are beginning to address these demographic shifts in Canada by questioning the traditional demands for homogeneity and full cultural convergence. This chapter will highlight some of the new multicultural theories that seek to expand the scope of cultural recognition. The ideas are not attempts to do away with the existing social system; rather what these new multicultural theories are trying to accomplish is include, in the public forum, cultural voices that have previously been ignored or suppressed.

The goal of this chapter is fourfold. First, it will assess the Islamic views concerning the residency of Muslims in countries where Islamic law does not govern society. Second, this chapter will introduce the notion that Canadian judges are currently *recognizing* principles of Islamic law in their chambers. This is inevitable given the

[1] Statistics Canada, "Study: Canada's Visible Minority Population in 2017," *The Daily*, March 22nd (2005):http://www.statcan.ca/Daily/English/050322/d050322b.htm.

large Muslim community in Canada. Third, this chapter will put forward a number of philosophical justifications that support the broadening of multiculturalism in liberal countries such as Canada. Towards this end, the work of Taylor and Kymlicka will be analyzed. These two Canadian thinkers have pursued the politics of cultural recognition and have greatly contributed to the field of multiculturalism by encouraging liberals to expand their acceptance of diversity in ways that go beyond the mere tolerance of difference. However, despite their calls for greater recognition, both Taylor and Kymlicka have certain limitations in their approach: namely their essentialist line of thinking and their privileging of Western society over non-Western cultures. Finally, this chapter will propose a new way of addressing diversity based on Habermas' theories of communicative democracy. His views will address some of the shortcomings found in Taylor and Kymlicka's work: specifically how to adopt a perspective on diversity that is not overtly paternalistic. One such approach is the formation of a legal system based on a joint governance model of justice as a way to mediate interpersonal conflicts within cultural groups. The attempt by the IICJ to establish ADR panels in Ontario represents an example of the joint governance approach model. This chapter will point out that, although such a system will serve the interests of certain segments of the Muslim community, there are a number of safeguards that need to be built into such a system in order to protect the rights of vulnerable members of society.

According to Weber's classic view, a nation-state endeavors to consolidate its territorial integrity, cultural identity, and political legitimacy in its quest for security

and economic productivity.[2] However, various globalizing phenomenon such as immigration, telecommunication and rapid transportation are increasingly challenging this model of state formation. As assimilative models of immigrant acculturation give way to multicultural policies that promote diversity, the demands for a unitary citizenry will inevitably undergo some alteration. For instance, Rawls' suggestion that 'background culture' remain in the private sphere is increasingly losing its hold as a viable option within liberal multicultural states as more individuals link their substantive lifestyles to their public personas. If culture is to play a greater role in the daily lives of the state's citizenry, institutions such as the law will have to meet the challenges of personal identity. Amy Gutmann sums up this concern by explaining that '[r]ecognizing and treating members of some groups as equals now seems to require public institutions to acknowledge rather than ignore cultural particularities, at least for those people whose self-understanding depends on the vitality of their culture.'[3]

Muslim Residency in Non-Muslim Territory

In light of the fact that some Muslims wish to maintain their devotion to religious law, it is useful to ascertain some of the Islamic positions concerning the legality of living in societies where the Sharī'a is not the primary normative order. In answering this question, a number of different legal experts (*mujtahids*), *imāms,* and

[2] For a recent analysis of Max Weber's political thought see Steven Pfaff, "Nationalism, Charisma, and Plebiscitary Leadership: the Problem of Democratization in Max Weber's Political Sociology," *Sociological Inquiry,* vol. 72 (2002): pp. 81-107.
[3] Amy Gutmann, ed., *Multiculturalism: Examining the Politics of Recognition* (New Jersey, Princeton University Press, 1994): p. 5.

commentators, spanning both time and place will be discussed. Given the scope of geography and time, their views on this matter have not produced a uniform consensus.

A number of Islamic sources maintain a strong preference for living within the bounds of Islamic law. For instance the Qur'ān maintains that 'Those who do not judge by God's revelations are infidels indeed.'[4] Furthermore, prophetic traditions or (*ḥadīth*) encourage Muslims to avoid living in lands where Islam is not present as a societal force. For instance, one *ḥadīth* maintains that '[w]hoever associates with an infidel and lives with them, he is like him.'[5] These strict invocations against living outside Muslim territories reflect an Islamic worldview that has split the world into two spheres, the land of peace where Islam governs and regions where Islam is not present as a governing force. Those territories governed by Muslims who apply Sharī'a have traditionally been referred to as *dār al-Islām,* literally meaning the 'land of peace,' while those territories that fall outside the Muslim sphere of influence are referred to as *dār al-ḥarb* or the 'land of war.'

Although in theory the dichotomy appears strict, in reality a more fluid approach has defined the actual manner in which Muslims themselves have approached the prohibition against residency in non-Islamic territory. For instance, during the lifetime of the Prophet, Muslims fleeing religious persecution by some of the residents of Mecca in 615 C.E., at the behest of the Prophet, traveled in search for sanctuary to Abyssinia, a region controlled by a Christian king. In commercial affairs, Muslim merchants

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[4] Qur'ān, 5:44.

[5] Abū Zakariyyā Al-Nawawī, *al-Majmū': Sharḥ al-Muhadhdhab* quoted from Khaled Abou El-Fadl, "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries," *Journal of Islamic Law and Society,* vol. 22 (1994): p. 144.

frequently traveled to non-Muslim territories and associated with non-Muslims on a regular basis in order to ply their trade. Thus, the prohibition against traveling and residing within non-Islamic societies is ambiguous, a fact reflected in the differing opinions produced by various Muslim commentators.

For instance, the classical legal scholar, al-Shāfiʿī, deemed it appropriate for Muslims to travel and reside in *dār al-ḥarb*. This view reflects the practical necessities that saw merchants travel to neighboring regions beyond *dār al-Islām*. He explains that 'He [the Prophet] has not exempted any of his people from any of his decrees, and he did not permit them anything that was forbidden in *dār al-ḥarb*.'[6] This statement is notable for a number of reasons. First, according to al-Shāfiʿī, Muslims are permitted to live, work, and travel to territories outside the Muslim world. Second, although the laws governing different parts of *dār al-ḥarb* may not correspond to Islamic law, Muslims should not expect any extraterritorial privileges, rather should obey the laws in the non-Islamic territories so long as they remain within the realm of the Sharīʿa. These views have led many jurists to conclude that so long as individuals were permitted to pray and govern themselves according to the Sharīʿa they could maintain their residence in non-Muslim territories.[7]

Opposite views concerning the appropriateness of residing beyond the borders of *dār al-Islām* emerged as well. The Mālikī jurist, Abū Saʿīd Saḥnūn (d.240/854), recommends that because Muslims would be subject to non-Muslim laws they should

[6] Abū 'Abd Allāh al-Shāfiʿī quoted from El-Fadl, "Islamic Law and Muslim Minorities," p. 174.
[7] Ibid., p. 175.

avoid traveling to non-Islamic territories altogether.[8] Along these lines, Ibn Ḥazm (d. 456/1064), an Andalusian scholar remembered for his strict literalist (*ẓāhir*) reading of sacred texts, deemed it impermissible for Muslims to travel to non-Islamic territory on trading missions because they may become subject to non-Islamic laws.[9] The personal biases of these scholars were likely shaped by regional influences that also played a role in the formation of Islamic jurisprudence. For instance, Ibn Ḥazm and Saḥnūn lived on the western peripheries of Islamic territory. Their distance from the centers of Islamic civilization such as Mecca, Baghdad, Cairo and Damascus may have contributed to their uncompromising views. Ibn Ḥazm, for instance, lived in Islamic Spain which, during his lifetime, was constantly under threat from Christian powers.[10] As territory fell to non-Islamic forces, continued residence in *dār al-ḥarb* was viewed by scholars like him as a political choice in favor of the Christian Reconquistadors.[11] Some jurists living in Al-Andalus went so far as to argue that Muslims living in *dār al-ḥarb* carried the status of rebels (*muḥāribūn*).[12] The calls for Muslims to follow the Sharī'a in countries such as Canada can be, in some respect, attributed to the legal opinions that emanated from these particular thinkers who took a more dogmatic position.

However, although fascinating for comparative effect, the legal opinions produced by classical and medieval legal experts are untenable in contemporary times. Today, the migration of millions of Muslims into secular Western nations has blurred the

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[8] Abū Sa'id Saḥnūn, *al-Mudawwana al-Kubrā*, quoted from El-Fadl, "Islamic Law and Muslim Minorities," p. 146.
[9] Ibid., p. 149.
[10] For a history of Islamic Spain see Anwar Chejne, *Muslim Spain: Its History and Culture* (Minneapolis: the University of Minnesota Press, 1974).
[11] El Fadl, "Islamic Law and Muslim Minorities," p. 163.
[12] Ibid., p. 169.

distinctions between *dār al-ḥarb* and *dār al-Islām*, a dichotomy that no longer holds in modern international relations. Recognizing this fact, numerous contemporary scholars have put forth positions concerning the legality of Muslims living in non-Islamic countries. The contemporary Moroccan scholar, 'Abd al-'Azīz Ibn al-Siddīq, maintains that it is indeed permissible to live beyond traditional Islamic territories. He bases his view on the religious freedoms offered to Muslims in Western societies. According to al-Siddīq, these nations have 'become Islamic countries fulfilling all the Islamic characteristics by which a resident living there becomes the resident of an Islamic country in accordance with the terminology of the legal scholars of Islam.'[13] Other scholars also have come to similar conclusions. The Egyptian scholar, Yūsuf al-Qardāwī, points out that becoming a naturalized citizen of a Western country is advisable because of one's ability to actively participate in the political debates within those countries as equals.[14] Meanwhile, Dr. Syed Mutawalli Darsh, an Islamic scholar trained at Al-Azhar University, explains that it is justifiable for a Muslim to take an oath of allegiance to the Queen of England. According to him such an oath:

> is simply putting in legal terms the real situation of the Muslims, that is, to be law abiding, peaceful, and to live in a decent respectable manner, since the Queen represents these basic moral qualities which are supposed to be the fabric of the society in which we live. So when people take the Oath of Allegiance to the Queen, they are promising to act according to the laws of the country, as happens when people are granted British nationality. There is no way for a person seeking British citizenship to avoid being loyal to the Crown and the land.[15]

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[13] 'Abd al-'Azīz ibn al-Siddīq, quoted from Wasif Shadid and Sjoerd van Koningsveld "Loyalty to a non-Muslim Government: an Analysis of Islamic Normative Discussions and of the Views of some Contemporary Islamicists," in Wasif Shadid and Sjoerd van Koningsveld, eds., *Political Participation and Identities of Muslims in non-Muslim States* (Kampen: Kok Pharos, 1996): p. 91.

[14] Ibid., p. 94.

[15] Dr. Syed Mutawalli Darsh quoted in Shadid and Koningsveld, "Loyalty to a non-Muslim Government," p. 94.

Finally, this line of thinking is also echoed in a *fatwā* issued by one of the highest-ranking Islamic officials in Egypt, the late Shaykh al-Azhar, 'Alī Jādd al-Haqq (d. 1996). This religious figure has maintained that Muslims should actively participate in Western countries based on a Qur'ānic verse that reads as follows: 'Allah forbiddeth you not that he should deal benevolently and equitably with those who fought not against you on account of religion nor drove you out from your homes; verily Allah loveth the equitable.'[16] Furthermore, al-Haqq goes on to remind Muslims that the early Islamic community in Medina entered into a political community with tribes in that city that included Jewish and Christian groups.[17] In this manner, al-Haqq opens the door for various social and professional exchanges between Muslims and non-Muslims living in close proximity to one another outside the Muslim world.[18]

Despite this trend to deemphasize the strict dichotomy between *dār al-Islām* and *dār al-ḥarb,* some contemporary Islamic figures have put forward opinions questioning the status of Muslims living in non-Islamic societies. The Moroccan born *imām,* 'Abd Allāh al-Ṭā'i' al-Khamlīshī, who currently lives in Amsterdam, maintains that Muslims living in the West are not able to practice their faith freely because they are subject to secular laws that govern their personal status. Al-Khamlīshī further maintains that those Muslims who choose to become naturalized citizens of Western countries are

[16] Qur'ān, 60:5-8.
[17] Shadid and Koningsveld, "Religious Authorities of Muslims in the West: their Views on Political Participation," in Wasif Shadid and Sjoerd van Koningsveld, eds., *Intercultural Relations and Religious Authorities: Muslims in the European Union* (Leuven: Peeters, 2002): p. 156.
[18] Shadid and Koningsveld, "Loyalty to a non-Muslim Government," p. 95.

committing acts of treason to both their religion and to their country of origin.[19] Others have taken similar uncompromising positions, such as the Syrian born *imām*, 'Umar Bakrī Muḥammad, who until recently lived in Britain but has now been banished to Lebanon.[20] According to Bakrī, Muslims living in the West should begin working towards the creation of Islamic rule in the countries in which they currently reside. In an interview given to the London-based Arabic-language newspaper *al-Ḥayāt,* Bakrī made the following statement:

> God willing, we will transform the West into Dar Al-Islam [sic] by means of invasion from without. If an Islamic state arises and invades [the West] we will be its army and its soldiers from within. If not, [we will change the West] through ideological invasion from here, without war and killing. [21]

Bakrī's rationale is partly based on his view that there should exist a strict dichotomy between *dār al-ḥarb* and *dār al-Islām.* For Bakrī, integration into Western society is not a viable option for Muslims; rather, converting the Western states into Islamic nations appears to be his goal.

The lack of a centralized and universal ecclesiastic authority in the Islamic world, both in the past and today, permits this wide divergence of opinions concerning the legality of living in non-Muslim territory. It is crucial to point out that some of the individuals cited above, namely Al-Khamīshī and Bakrī, have little training in traditional Islamic jurisprudence. Rather, they are prayer leaders or *imāms* who have

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[19] Ibid., pp. 98-99.
[20] Audrey Gillan and Duncan Campbell, "Many faces of Bakri: Enemy of West, Press Bogeyman and Scholar," *Guardian Unlimited,* August 13 (2005): http://politics.guardian.co.uk/homeaffairs/story/0,11026,1548409,00.html.
[21] Middle East Media Research Institute, "Islamist Leaders in London Interviewed," Special Dispatch Series, no. 410 (2002): http://memri.org/bin/articles.cgi?Page=archives&Area=sd&ID=SP41002.

traditionally not participated in legal discourse. However, with the demise of traditional Islamic jurisprudence as a result of modernization throughout the Muslim world, there is little stopping these individuals and others like them from putting forward their ideals and labeling them as 'Islamic.' These opinions ultimately reflect a politicized voice of Islam that is addressing the West's continued imperialistic designs in the Muslim world, an involvement that has brought about a great deal of social displacement, violence, destruction and upheaval to Muslims and non-Muslims alike. Their views appeal to those individuals who seek to further the divide between the Muslim world and the West. However, as mentioned above, the existing realities of global migration and trade have blurred the distinctions between the Muslim world and the West. Although their opinions may garner a great deal of media attention, the programs they have in mind are unlikely to succeed. Meanwhile, those opinions that emanate from individuals such as al-Qardāwī, al-Ḥaqq, and al-Siddīq, individuals who have a greater understanding of *ḥadīth* scholarship or are associated with systematic jurisprudence, represent a more pragmatic approach to the question of Muslims living in the West. Although the circumstances surrounding their views are different from the concerns classical and medieval jurists faced, the conclusions they have reached are similar: namely so long as individuals are permitted to maintain their faith - residency in non-Islamic territory is permissible. This conclusion is certainly at play in Canada where many Muslims reside and flourish while maintaining their faith under the Canadian *Charter.*

De-facto Legal Pluralism: Islamic law in Canadian Courts

The presence of a large Muslim population in Canada is reflected in the fact that Canadian judges are currently addressing cases that deal specifically with Islamic concerns. Denise Réaume, a professor of law at the University of Toronto, points out that a de-facto system of legal pluralism currently exists in Canada whereby different normative orders interact with local laws on a regular basis.[22] Many of these cases arise in the context of family law and often deal with issues such as inheritance, child custody, marriage and divorce.[23] Rather than discounting the cultural concerns of such cases, Réaume encourages the interaction of different normative orders within the Canadian context as a means of promoting a greater sense of cultural recognition and justice. Underscoring Réaume's view is her concern for providing greater autonomy to members of cultural and religious communities. She claims that '[r]ecognizing some autonomy for minority groups would mean that disputes between members are resolved according to the group's *own norms*, rather than by reference to some external body of wisdom such as the law.'[24] In supporting this position, Réaume proposes two methodological approaches for handling different normative orders within the Canadian legal context. They involve the use of 1) content-neutral legal tools in determining the outcome of a case and 2) the interpretation of abstract legal concepts from different

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[22] Denise Réaume, "The Legal Enforcement of Social Norms: Techniques and Principles," in Alan C. Cairns et. al., *Citizenship Diversity and Pluralism* (Montreal and Kingston: McGill-Queen's University-Press, 1999): p. 179.
[23] John Tibor Syrtash, *Religion and Culture in Canadian Family Law* (Toronto: Butterworths, 1992).
[24] Réaume, "Legal Enforcement," p. 178. Emphasis added. Although Réaume's idea resembles Alternative Dispute Resolution (ADR), it is different in that the *existing* civil courts will serve as the forum within

legal systems in order to permit some culturally specific adjudication. In each case, Canadian courts will recognize certain principles of law that fall outside the existing legal system.

Turning first to content-neutral legal tools, Réaume demonstrates how the internal rules governing cultural and religious communities and the disputes that may arise from these regulations can, in some cases, easily fit into Canada's existing laws governing contracts and trusts.[25] This precedent is evident in *Ayache Estate v. Muslim Association of Calgary.*[26] This case deals with Muslim burial ceremonies and the Islamic prohibition against reproducing animate objects. In a 1997 automobile accident, Fatima Ayache of Alberta was killed. The individual in question was a Muslim but was not an active participant in the religion according to the judgment of Justice Hess.[27] Shortly following her death, the deceased's adult children, Michael Anthony Brennan and Ahmand Abdoul Rahman (both serving as executors of the estate) asked their uncle, Hussien Ayache, to arrange for their mother's burial at a Muslim cemetery. The burial took place on March 17th at the Muslim cemetery in Cochrane, Alberta, a site administered by the Muslim Association of Calgary. Prior to the burial, the plaintiffs' uncle signed a contract which stated that "[t]he family of the deceased will not be allowed to have any pictures or statues on the headstone or the grave.'[28] This rule is in accordance with the traditional Islamic practice of utilizing unmarked graves as a means

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which the disputes are settled. In the religious based ADR format, such as the one proposed by the Islamic Institute of Civil Justice of Ontario, conflicts would be mediated outside the civil court structure.

[25] Réaume, "Legal Enforcement," pp. 180-183.

[26] *Ayache Estate v. Muslim Assn. of Calgary* (2000), ABPC 101. (Prov. Ct.).

[27] Ibid., paragraph 4.

[28] Ibid., paragraph 5.

of deterring the worship of ancestors.[29] Despite the wording of the contract, the plaintiffs ordered and subsequently placed a headstone at the gravesite that included an image of the deceased. This provoked the defendants, the Muslim Association of Calgary, to contact the Ayache family and ask that the image of Fatima Ayache be removed. Failing to do so, the cemetery would proceed with the removal of the image and forward all costs to the Ayache family.

When the plaintiffs did not respond or take the necessary action, the Muslim Association of Calgary proceeded to alter the headstone in order to make it conform to the contract signed by Hussien Ayache. Shortly thereafter, the Ayache family proceeded to disinter the grave and re-inter the deceased at another cemetery. The cost of this procedure was $3,017.40 the amount for which the plaintiffs were suing the Muslim Association of Calgary. Along with this sum, the suit included an additional $4,482.60 for emotional and nervous shock suffered by various members of the Ayache family.

In his decision, Justice Hess ruled against the Ayache family citing that the contract clearly stated the prohibition against placing any animate images in the Muslim cemetery. According to the judge, '[t]he decision taken by the plaintiffs to disinter and re-inter the deceased and restore the likeness of the deceased on the headstone was not

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[29] The Islamic prohibition against representational art (*taṣwīr*) is based on the principle that God alone engages in the act of creation (*khalḳ*). In this regard God is sometimes described as a *Muṣawwir* (artist/creator), the same term that is used to describe a painter or draughtsperson. There exists a close correlation between the word *ṣawwara* (to draw) and the words *khalḳ* (to create) and *bar'a* (to create). A number of *ḥadīth* link the act of God's creation with the act of producing art. Therefore, individuals who create art based on living beings possessing souls (*rūḥ*) are seen as people imitating God. The prohibition against the reproduction of living creatures in Islamic civilization is often overstated. Numismatics dating to the Umayyad Dynasty were often adorned with images of the Caliph, a practice borrowed from Byzantine coins which carried depictions of the Emperor. Also amongst the Umayyads, private residences were often decorated with images of hunting scenes painted by non-Muslim artisans who were probably Greek in origin. See "*Taṣwīr,*" in *Encyclopedia of Islam,* Vol. X (Leiden: Brill, 2003): p. 361b-

as a result of anything done by the defendant [Muslim Association of Calgary] in breach of the terms of its contract with the plaintiffs and consequently the defendant is not responsible for the costs incurred by the plaintiffs....'.[30] The judge further suggests that any grievance on the part of the Ayche family be directed against the uncle who made the initial funeral arrangements. This case demonstrates a clear example of a breach of contract whereby a Canadian judge merely has to follow existing content-neutral legal tools in determining the outcome of the case.

Not all cases related to the Sharī'a appearing before Canadian courts are as clear-cut. In *Jalal v. Canada* a number of complications required some understanding of Islamic family law as well as an awareness of the judicial practices of a foreign country.[31] In this case, Younas Jalal, a Canadian of Pakistani origin, was seeking to sponsor his adoptive Pakistani child into Canada. His request was disallowed when Canadian officials questioned the validity of the child's Pakistani adoption procedure. They came to this decision based on their understanding of Pakistani law. Under Pakistani family law, which is based on Islamic principles of personal status, there are no provisions governing adoption (*tabannī*).[32] Meanwhile Canadian law stipulates that individuals who are in the process of adopting foreign-born children must first adopt them in their

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366a. See also Richard Ettinghusen and Oleg Grabar *The Art and Architecture of Islam: 650-1250* (London: Penguin Books, 1987).

[30] *Ayache Estate v. Muslim Assn. of Calgary*, paragraph 17.

[31] *Jalal v. Canada (Minister of Citizenship & Immigration)* (1995) 39 Imm. L.R. (2d) 146, (Immigration & Refugee Board (Appeal Division)),

[32] The *Qur'ān* abrogates the pre-Islamic practice of adoption. The basis for this prohibition is found in verse 33:4 which reads, 'God did not give any man two hearts in his chest. Nor did He turn your wives whom you estrange (according to your custom) into your mothers. Nor did He turn your adopted children into genetic offspring. All these are mere utterances that you have invented. God speaks the truth, and He guides in the (right) path.' For further detail on adoption in reference to Pakistani law, see Pearl and Menski, *Muslim Family Law,* pp. 408-409.

country of origin. Only after a child is legally adopted in their country of origin can the Canadian family apply for the child's Canadian status.[33] Because of the lack of legislation governing the adoption of children in Pakistan, the parents in question had obtained a declaratory statement from a Civil court judge in Pakistan endorsing the transfer of parental rights. However, owing to the ad-hoc nature of this procedure, the Canadian Immigration and Refugee Board maintained its refusal to admit the child into the country as a landed immigrant. Complicating matters further was the fact that both the child in question and his adoptive parents were members of Pakistan's small Christian community. Although Islamic law forbids adoption, this prohibition does not apply to non-Muslims living under Islamic rule.

Seeking to establish whether the adoption of a Christian child was valid under Pakistani law, the Canadian judge turned to an expert legal witness. The witness in question was a McGill University professor, Wael Hallaq. During the course of his testimony, Hallaq explained that under Islamic law, adoption is indeed forbidden; however, because the individuals involved in the case were Christians, they did not fall under the Sharī'a in matters relating to the provisions against adoption. As Justice Blumer states, '[a]ccording to Professor Hallaq, it is [a]...basic tenet of the "Shariat" that non-Muslims are not bound by this prohibition and Christians and Jews in Muslim countries may adopt subject to their respective ecclesiastical authorities.'[34]

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[33] *Immigration Act,* R.C.S. 1985, c. I-2.
[34] *Jalal v. Canada,* para. 11.

Unlike the previous case involving a contractual matter whereby the judge relied exclusively on existing neutral legal mechanisms to formulate a decision, the latter case required some interpretative skills on behalf of the presiding judge. Instead of following the letter of the law, where the child should have been denied immigration status, the judge deferred to the nuances of Islamic legal practice with the help of an expert witness and allowed the child entry into Canada. This scenario exemplifies the ideas brought forward by Réaume earlier. In recognizing the validity of Islamic law in the case, the judge did not simply defer to the conventional principles of Canadian law. Rather, in rendering a decision, the judge recognized certain cultural norms as a means of bringing about justice.

The recognition of Islamic principles in Canadian law provides a clear indication that legal pluralism involving Islamic law is an operational phenomenon in the country. What is not clear, however, is the ethical dimension of this emerging legal reality. For instance, why should Canadian society tolerate principles of Islamic law within the secular legal process? How will Islamic law, which privileges community identification, operate within a society that is oriented around individual rights? Islamic society and law have different conceptions of the status of women than those found in Western constitutional law. Given these differences, what will be the status of Muslim women within a formal system of law that recognizes principles of Sharī'a? Finally, how should Muslim individuals who break with Islamic tradition or 'dissenters' be treated by the Muslim community if they are given a voice in representing Muslims in Canada? These are a few of the concerns that need to be addressed when incorporating matters of Islamic law within Western constitutional law. The remainder of this chapter will

analyze a number of positions that will attempt to answer these matters. My goal is to endorse a philosophical position that is not paternalistic towards Muslims who wish to address some of their concerns within the framework of the Sharī'a, while at the same time upholding the standards of equality and individual rights that underscore Canadian law and society.

Taylor and Kymlicka: Recognizing Difference in Canada

In traditionally liberal societies such as Canada, there is a need to revise theories of multiculturalism in order to reflect the diverse realities of the population. The Canadian philosopher, Charles Taylor, provides some interesting recommendations towards the politics of recognition. Focusing on liberal democracies in general and the Canadian landscape in particular, Taylor argues that when "we recognize the equal value of different cultures....we not only let them survive, but we acknowledge their *worth*."[35] His view of providing worth to different elements of Canadian society stems from his reading of liberal democracy and its trajectory throughout post-Enlightenment history.

In hierarchical societies such as those of pre-Enlightenment Europe, dignity and recognition were primarily based on honor. Taylor explains that 'one's personal glory must be another's shame, or at least obscurity.'[36] In this light, public honor was reserved for a very small minority of the population (usually the nobility), while the vast majority of the public toiled in obscurity. With the Enlightenment, philosophers such as Rousseau sought to introduce some principles of equality by emphasizing a 'general

[35] Taylor, "Politics of Recognition," p. 64.
[36] Ibid., p. 48.

will' as a way of implementing universal justice. Rousseau's Social Contract would usher in a new paradigm whereby principles of equality and respect were made available to a broader spectrum of the population. However liberating this model may have appeared, it presupposed a certain level of homogeneity within the population.[37] As we saw in the third chapter, early liberal thinkers assumed that societal uniformity was one of the components required for securing equality and unity. Hegel would sum up this orientation by claiming that such a society was predicated on a '"we" that is an "I", and an "I" that is a "we."'[38] This social reality is impossible to imagine in contemporary societies such as Canada's where the population is not only diverse but the country actively maintains a multicultural policy that promotes plurality as a positive goal.

Taylor points out that '[d]emocracy has ushered in a politics of equal recognition, which has taken various forms over the years, and has now returned in the form of demands for the equal status of cultures and genders.'[39] This idea offers a partial answer as to why Canadian society should recognize some cultural particularities found amongst certain segments of the population. Taylor views democracy as an evolutionary phenomenon that has undergone a number of paradigmatic shifts over the years. As such, he feels that the current expression of democracy should be open to

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[37] The promotion of a general will amongst a unified and homogeneous citizenry carries with it some inherent dangers. Namely, it does not address the needs of those members of society who choose to remain aloof from the 'general will'. These individuals have at various times faced an 'overwhelming moral authority' that forced them to conform to the popular will. The most notorious example of this moral authority was in Robespierre's 'republic of virtue' that soon became a 'republic of terror' demanding conformity during the course of the French Revolution. See, Raymond Geuss, *History and Illusion in Politics* (New York: Cambridge University Press, 2001): p. 73.

[38] Friedrich Hegel, *Phenomenology of Spirit,* A.V. Miller, trans. (Oxford: Oxford University Press, 1977): p. 110.

[39] Taylor, "Politics of Recognition," p. 27.

cultural recognition. With greater cultural recognition, he believes that liberal societies will provide individuals the ability to construct an authentic identity. In this manner, individuals will create personalities that encompass their substantive needs. In Taylor's words, '[b]eing true to myself means being true to my own originality, which is something only I can articulate and discover. In articulating it, I am also defining myself. I am realizing a potentiality that is the property of my own.'[40]

Acquiring identity, however, is not accomplished in the absence of the majority culture. Rather the process according to Taylor is *dialogical*, meaning that a number of institutional variables must combine in order to shape an individual's identity.[41] By extension, if identity is shaped by the interplay of institutions that include schools, governmental agencies, and businesses then, Taylor insists, there is a need to have one's culture *recognized* by these very institutions.[42] Herein lies the crux of Taylor's argument and the basis as to why Canadian society should recognize minority groups and their cultural particularities; the recognition granted to minority cultures by public institutions in modern societies is often lacking due to the failure of these institutions to acknowledge people's substantive needs. This can subsequently cause adverse effects for members of minority groups such as alienation. Taylor explains '[e]qual recognition is not just the appropriate mode for a healthy democratic society. Its refusal can inflict

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[40] Ibid., p. 31.
[41] Ibid., p. 32.
[42] The idea that an individual develops through the interplay of different social factors is one of Charles Taylor's greatest contributions to contemporary philosophy. In his text *Sources of the Self,* Taylor asserts that 'I am a self only in relation to certain interlocutors; in one way in relation to those conversation partners which are essential to my achieving self-definition; in another in relation to those who are now crucial to my continuing grasp of languages of self-understanding-and, of course, these classes may overlap. A self exists only within what I call 'web of interlocution.' See Charles Taylor, *Sources of the Self* (Cambridge: Harvard University Press, 1989): p. 36.

damage on those who are denied it...'[43] The result of not recognizing cultural traditions that help shape an individual's identity is a form of oppression. In order to avoid this situation, Taylor proposes that the majority should begin recognizing minority cultures in order to help the latter enjoy a feeling of self-worth. In such an atmosphere, minorities will not find themselves stifled under the yoke of the dominant culture; rather, by recognizing an individual's substantive needs the majority will 'recognize the equal value of different cultures...'[44]

However appealing his ideas may seem on the surface, Taylor's recommendations for greater cultural recognition leave some important questions unanswered. Although Taylor's views are based on the liberal school of thought, he approaches the question of multiculturalism from a communitarian perspective. The recognition granted to minority culture will focus primarily on *group* identity rather than on an individual's specific concerns. Furthermore, because communitarians seek to promote the 'common good' as a way of maintaining the survival of a minority culture, the range of options *individuals* can pursue in shaping their personalities is sometimes restricted.[45] Language laws in Quebec, which promote French, are good examples of the 'communal good' outweighing individual choice in the pursuit of group interests. These laws stipulate that parents of French and immigrant children cannot enroll their children in English elementary and secondary school. Although English public schools exist, only children whose parents attended English schools can qualify to register in these institutions.

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[43] Taylor, "Politics of Recognition," p. 36.
[44] Ibid., p. 64.
[45] Kymlicka, *Multicultural Citizenship*, p. 92.

These restrictions are in place in order to preserve the French culture in Canada by ensuring that French remain the predominant language of instruction in the province. However, in promoting the 'common good,' certain individuals will have their choices limited if they wish to educate their children in English.

Taylor's communitarian perspective, which privileges the group over the individual, raises some questions regarding personal liberty and individual autonomy. The controversy surrounding the Canadian-Muslim-feminist, Irshad Manji, who is openly gay, is an interesting case that demonstrates how group rights may *impinge* upon an individual's freedom and autonomy. Manji is free to express her sexual orientation in a liberal environment; however she has faced a great deal of criticism from some Muslim community groups in Canada and the United States for her lifestyle choices. When society privileges the group over the individual, people like Manji face the danger of being marginalized by the very groups they wish to identify themselves with and build their personalities around.

According to Dr. Muzammil Siddiqi of the Islamic Society of North America (ISNA), '[h]omosexuality is sinful and shameful. In Islamic terminology it is called *"Al-Fahsha"* [sic] or an atrocious and obscene act....[t]hose who insist on this lifestyle, consider it legitimate and feel "gay pride", we should not associate with them and should not take them as friends. We should certainly avoid those people.'[46] Speaking on behalf of a prominent Islamic organization in North America, Siddiqi is quite clear in his

[46] Muzammil Siddiqi, "Islamic Manners in Dealing with Homosexuals," Islamonline.net, June (2003): http://www.islamonline.net/fatwa/english/FatwaDisplay.asp?hFatwaID=2753.

admonition of homosexuality. In expressing his views, he is asking that Muslims disassociate themselves from fellow Muslims who are gay. This begs the question as to the status of gay Muslims and their place within the Muslim community. Moreover, if communal rights take precedence over individual rights, how should gay Muslims identify themselves with the greater Muslim community and visa versa? More to the point, is individual choice, guaranteed within a liberal society, being served when society places a premium on recognizing group-centered rights as Taylor would suggest?

In her book, *The Trouble with Islam:* A Wake-*Up Call for Honesty and Change,* Manji urges Muslims around the world to engage in *ijtihād* in order to modernize their faith in such a way as to accept homosexuality.[47] Upon the publication of her book, voices representing well-known Muslim organizations in Canada and abroad expressed their displeasure with Manji's thesis. Muhammad Elmasry, although not voicing his displeasure directly at Manji, had the following to say about individuals who take up causes such as the one Manji has assumed.

> Most self-hating Muslims claim to practice their faith. They call themselves liberal, moderate, and contemporary. In themselves, these traits are neutral, but in reality they contribute to distancing the self-haters from their religion, masking deeper issues. Self-hating Muslims secretly (or not so secretly) despise their religion and curse the day their parents gave them Muslim names. Yet most lack the courage to change either name or faith, or leave the communities in which they grew up. Instead, they try to accommodate their ambivalence by being very selective, or even minimal, in their Islamic practices; and if asked for an opinion, will indicate that Islam should be reformed to suit their own

[47] Irshad Manji, *The Trouble with Islam: a Wake-Up Call for Honesty and Change* (Toronto: Random House, 2003).

> increasingly tenuous beliefs. Often, they are not satisfied to leave other Muslims to live their Islam in more traditional ways.[48]

Like Manji, Elmasry is certainly free to express his views on the matter of so-called 'self-hating' Muslims. What differentiates his opinion from Manji's is that he made these comments not as a private citizen but as the president of the Canadian Islamic Congress (CIC), a recognized Muslim organization in Canada. His strongly worded condemnation against 'self-hating' Muslims highlights the problems associated with Taylor's approach towards recognition. Reliance on groups to define the identity of individuals can, in some instances, silence voices of dissent or at least question their efficacy. Thus, if society were to privilege the group over the individual, Manji's homosexuality and her voice of dissent could be regarded as problematic.

Seyla Benhabib cogently points out that when Taylor calls for society to recognize different cultures he fails to distinguish '*which* webs of interlocution should be normatively privileged, and under *which* circumstances and *by whom.*'[49] If society were to place greater emphasis on recognizing the CIC as a representative body of the Muslim community along with its president's views concerning 'self-hating' Muslims, one could take on the mistaken assumption that Islam is not open to internal dissent and that there exists a 'party line' which is toed by all Muslims. Furthermore, if one were to privilege ISNA's views on homosexuality, Manji's choices take on the appearance of heresy. Although homosexuality is regarded as outside the purview of the Sharī'a in the

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[48] Mohamed Elmasry, "Born Agains and Self-Haters: Muslims Have them too," September (2003): http://world.mediamonitors.net/content/view/full/794/.
[49] Seyla Benhabib, *The Claims of Culture* (Princeton: Princeton University Press, 2002): p. 56.

Muslim world, it is part of the mainstream in countries such as Canada.[50] For instance, same sex marriages are permitted in Canada as a number of provinces and territories are currently solemnizing same-sex unions. Despite the growing acceptance of homosexuality in Canada, a danger exists for individuals who choose lifestyles that are contrary to the aims of their particular religious group within which they seek to identify themselves. Dissenters, like Manji, may find themselves in a state of limbo concerning their own personal identity in relation to the group. This may drive people away from the very groups they seek to identify with.

Beyond Benhabib's criticisms, Taylor's group-based approach towards cultural recognition also suffers from an essentialist perspective in that he fails to address the inherent divisions within any group or society. For instance, referring specifically to Islam, Taylor draws a very broad conclusion in stating that within 'mainstream Islam, there is no question of separating politics and religion the way we have come to expect in Western liberal society.'[51] In Taylor's estimation, the entire scope of mainstream Islamic society (whatever that may be) is represented by some kind of monolithic construct devoid of internal fissures and complexities. Furthermore, because 'mainstream Islam' falls outside the expectations of Western liberal society in matters

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[50] For information concerning homosexuality in the Middle East see Joseph Massad, "Re-Orienting Desire: The Gay International and the Arab World," *Public Culture*, vol. 14 (2002): pp. 361-385. This article argues that various North American and European advocacy groups are ascribing a particular identity, in this case Western-styled homosexuality, on Middle Eastern men who engage in same-sex encounters. Massad argues that in their attempt to 'liberate' gay men in the Middle East, the advocacy groups are repeating a long-standing colonialist practice of re-defining non-European social practices. In doing so, the these groups not only fail to understand the nature of same-sex relationships in the Middle East but also contribute to the universalizing project Western liberals have been pursuing in the Muslim world.

[51] Taylor, "Politics of Recognition," p. 62.

relating to the separation of church and state, it is perceived as problematic.[52] The European Orientalist tradition has a long history of viewing the Muslim world as exotic and 'other'; Taylor's depiction of the Muslim world appears to be a throwback to this line of thinking. In his formulation, the Islamic practice of combining state and religion is not part of the 'we' Taylor defines as Western and liberal. Hence, any recognition the Muslim community gains from the majority may be predicated on the belief that Islamic culture is fundamentally at odds with the basic values associated with liberalism and Western society. Furthermore, any individual who defines him/herself as a Muslim will be associated with a group that falls outside the liberal mainstream. If we assume that these individuals are dissenting from 'mainstream' Islam or happen to be homosexual, not only will they be seen as 'outsiders' within the Western world-view, but they could also be viewed as non-conforming heretics by members of the majority - further calling into question an individual's self-worth.

Taylor's concern for recognizing culture began with the premise of promoting the value of cultures so that individuals who identified with these groups could shape authentic personalities based on culture. As such, an emphasis on group culture is promoted so as to protect minority groups from being overrun by the majority's culture. Taylor's formulation, however, does not take into account those individuals who are at odds with their own cultures. The problems associated with positioning group rights over and above individual concerns ultimately detract from Taylor's important contribution towards the recognition of minority cultures within liberal societies.

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[52] Ibid.

The questions associated with privileging group rights over individual rights are addressed in Will Kymlicka's work on multiculturalism. Liberalism, according to Kymlicka, should be focused primarily on maintaining personal autonomy regardless of group pressures to conform.[53] For Kymlicka, an individual living in a liberal society should pursue a good life that is primarily developed from within.[54] Furthermore, lifestyle choices made by individuals must be reversible without any group or societal sanction.[55] In his words, the 'defining feature of liberalism is that it...allows people to choose a conception of the good life, and then allows them to reconsider that decision, and adopt a new and hopefully better plan of life.'[56] What distinguishes Kymlicka's views from Taylor's perspective is the notion that the individual comes before the group and that sacrificing individual autonomy to a group's authority is unwarranted. This does not imply that group identity is of no concern; Kymlicka advocates group-differentiated rights in certain situations. In his estimation, cultural groups play a functionalist role because they provide people 'access to a range of meaningful options' which in turn shapes their personalities.[57] So, like Taylor, Kymlicka sees the promotion of diverse cultures as important in liberal society. Unlike Taylor, however, Kymlicka views culture as playing a subordinate role to the individual. Moreover, Kymlicka maintains that *some* cultures deserve group-differentiated rights in order to make available to the public the raw material individuals will use to piece together their

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[53] Kymlicka, *Multicultural Citizenship,* p. 34.
[54] Ibid., p. 81.
[55] Will Kymlicka, *Liberalism, Community, and Culture* (New York: Clarendon Press, 1991): p. 37.
[56] Kymlicka, *Multicultural Citizenship,* p. 80.
[57] Ibid., p. 83.

individual personalities. In this light, Kymlicka poses the following question: 'can liberals accept the demands for group-differentiated rights by ethnic and national minorities?'[58] In answering this question within the Canadian context, Kymlicka establishes a three-layered hierarchy of cultures. Within his formula, some cultures are granted group-differentiated rights (Anglophone, Francophone and Native cultures) while others, namely immigrant cultures, cannot be fully privileged in this regard.

The first category of culture Kymlicka lists in his typology is societal culture. He defines societal cultures as having the following attributes: a standard language used in economic, political and educational institutions; a high level of collective identity amongst the citizenry; and the existence of equal opportunities for acquiring societal benefits ranging from educational development to economic growth.[59] As demonstrated in the previous chapter, Anglophone culture is the societal culture in Canada as it carries all of these attributes. The other cultures that exist in Canada are required to integrate themselves into this prevailing framework.[60] Kymlicka places a great deal of emphasis on societal culture and seeks to ensure its survivability. He backs up this assertion by quoting Ronald Dworkin, who explains that, '[w]e inherited a cultural structure, and we have some duty, out of simple justice to leave that structure at least as rich as we found it.'[61] In quoting Dworkin, Kymlicka is suggesting that in order for Canadian culture to survive (presumably in its Anglophone form) it needs to emphasize those characteristics

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[58] Ibid., p. 34.
[59] Ibid., pp. 76-78.
[60] Kymlicka, *Finding our Way,* pp. 40-59.
[61] Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985): pp. 232-233.

that are English in orientation while at the same time limit those characteristics found in other cultures. In the sixth chapter, we shall see that Ontario's ban on religious arbitration falls in line with this type of thinking.

The other cultural groups that Kymlicka distinguishes from societal cultures are national minorities and immigrant cultures. In Canada, French-Canadian and Native cultures constitute national minorities which previously operated on a more independent basis but now live within the framework of Anglophone culture. Despite the attempts by English Canada at assimilating the Native and French-Canadian communities, as discussed in the previous chapter, both groups have survived and are considered viable components of the Canadian identity. Their survival is partly due to the existence of various institutions such as language and religion that, according to Kymlicka, have 'defined the range of socially meaningful options for their members.'[62] In this regard, Kymlicka feels that Native and Francophone societies should be accorded certain group-differentiated rights due to the 'determination they have shown in maintaining their existence as distinct cultures, despite ... enormous economic and political pressures.'[63]

The third group Kymlicka discusses in his list of cultures are the various immigrant communities found throughout Canada. When answering the question as to whether or not groups such as the Muslim community should receive recognition for their substantive needs, Kymlicka states that they *cannot* recreate the societal culture found in their former homes. His view is based on the fact that 'they have left behind the set

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[62] Kymlicka, *Multicultural Citizenship*, p. 79.
[63] Ibid.

of institutionalized practices, conducted in their mother tongue, which actually provided culturally significant ways of life to people in their original homeland.'[64] The reasons he cites for not recognizing institutions such as a parallel system of Islamic law is that those who wish to promote such structures are ultimately seeking to protect communal practices from post-industrial hybridization and relativism. Furthermore, these groups also seek to limit any 'internal dissent' that would alter traditional practices.[65] Irshad Manji's sexual orientation and calls for a new *ijtihād* are examples of such challenges traditional group-oriented religions may wish to avoid or suppress.[66]

Rather than establish a parallel 'societal culture' within their adopted homes, Kymlicka maintains that immigrants should contribute 'new options' to mainstream society.[67] These new options would include such things as food, dress, and various esoteric principles from which members of the general society would pick in order to shape their own personal identities which in Canada are ultimately predicated on Anglophone and Francophone cultures. In other words, minority culture would play a purely functionalist and supportive role in providing individuals with life choices from which to shape their personality. This line of thinking follows the logic of the B&B

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[64] Ibid., p. 77.
[65] Ibid., p. 42.
[66] Kymlicka's approach to 'illiberal' states and cultures is cogent and should be discussed. He rightly claims that it is misleading to assume that there are 'liberal' and 'illiberal' societies. Rather many societies-take for instance Islamic Civilization and Christian Civilization- have elements that can be interpreted as 'liberal'; Islam's focus on social justice and Christianity's focus on love are two such principles. These two societies also have practices that be interpreted as 'illiberal'; the lack gender parity in some forms of Islamic divorce and the history of colonialism in Christendom are two examples. Kymlicka is of the opinion that 'existing liberal nations had illiberal pasts, and their liberalization required a prolonged process of institutional reform. To assume that any culture is inherently illiberal, and incapable of reform, is ethnocentric and ahistorical.' See Kymlicka, *Multicultural Citizenship,* p. 94.
[67] Ibid., pp. 78-79.

Commission whereby immigrant culture would play 'second fiddle' to English and French institutional culture.

Having stated the case for *not* granting group-differentiated rights to immigrant communities, Kymlicka nevertheless creates an opening that would accommodate certain needs minority-communities may have. One such accommodation is the extension of business hours on Sundays; this would allow Jewish and Muslim businesspeople access to the same earning potential as those who do not observe the Sabbath.[68] So long as these measures are granted in order to rectify existing inequalities minority groups face due to the pervasive power of the societal culture, Kymlicka feels that some group-differentiated rights are warranted.[69]

Despite these concessions, certain questions emerge in Kymlicka's approach towards group-differentiated rights, namely his privileging of societal cultures and national minorities over immigrant groups. His view that only societal culture 'provides its members with meaningful ways of life across the full range of human activities...' is overstated as it denies minority cultures the same privileges associated with a societal culture.[70] For instance, Kymlicka presumes that it is only within the parameters of societal cultures that individuals have at their disposal internal mechanisms for change. Immigrant cultures (because they lack the institutional depth) are ultimately dependent on societal culture for these reformative tools. Another look at Irshad Manji

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[68] Ibid., p. 97.
[69] Ibid., p. 120.
[70] Will Kymlicka and Ian Shapiro, eds., *Ethnicity and Group Rights* (New York: New York University Press, 1997): p. 75.

demonstrates how this conclusion is problematic and far too limiting. One of Manji's main theses throughout her text is the use of *ijtihād* as an instigator for Islamic reform throughout the worldwide Muslim community. Though there may not be deep-rooted Islamic institutions available in countries such as Canada to implement the sort of change Manji is demanding, Kymlicka's assertion ultimately robs her and other Muslims who wish to challenge their faith of the right to 'subvert the terms of their own culture.'[71] By implication, Kymlicka feels that any reforms to their religion conducted by Muslim-Canadians could only gain inspiration from Western societal culture. In other words, reforms that would be enacted in traditions such as Islam would follow a logic derived not from the religion's actual sources but from secular-liberalism. This kind of reform may work for liberal-minded individuals but would gain very little acceptance by certain members of the Muslim community who bristle at altering their faith via a Western-inspired logic. Moreover, Western styled reforms do not necessarily create better living arrangements for non-Western societies. As demonstrated in the second chapter, Western-style reforms in the Muslim world have diminished women's overall access to divorce in countries such as Egypt. Benhabib is correct to point out that 'Kymlicka's understanding of culture is remarkably static and preservationist.'[72] His assumption that non-liberal groups living in Canada should accommodate liberal principles underlines his hegemonic world-view. Thus, Kymlicka's impression of multiculturalism seems to be one that re-articulates the traditional modes of dealing

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[71] Benhabib, *Claims of Culture,* p. 66.
[72] Ibid., p. 67.

with diversity in Canada, privileging 'in' groups (Anglo and now Francophone Canadians) and classifying and managing 'out' groups such as the Muslim-Canadian community into subordinate roles.[73] This line of thinking negates the possibility that Muslims, or other non-majority communities, can contribute to the overall formation of Canadian culture.

Despite the gaps in their respective theories, both Taylor and Kymlicka have had an immense impact on the debates surrounding minority rights in liberal societies. Although they fall into an essentialist line of thinking in relation to culture, both regard *access* to culture as a crucial component in the development of an individual's personality and self worth. However, the manner in which the two thinkers provide access to culture carries a certain paternalism that is clearly seen in Taylor's privileging of 'mainstream' society and Kymlicka's hierarchical list of cultures. Both thinkers inevitably echo many of the demands for social conformity found amongst previous liberal thinkers and nation-state institutions. Given the growing plurality found in Western liberal societies, a new approach needs to be pursued in which different voices engage in the public forum as active members.

Abu-Laban cogently points out that in developing a new multiculturalism, liberal societies need to acknowledge their essentialist line of thinking which has excluded non-majoritarian people in the West while colonizing non-European societies abroad in their pursuit of wealth and prestige.[74] Once this is acknowledged, a new form of

[73] According to Day, who echoes Benhabib's criticism, Kymlicka's brand of multiculturalism 'does not take us beyond "actually existing" multiculturalism as state policy.' See Day, *Multiculturalism*, p. 216.
[74] Abu-Laban, "Liberalism,"pp. 466-467.

multiculturalism can emerge – one that affords recognition to minorities by drawing them into the public sphere as active and equal partners rather than as dependents. This will, in turn, help alleviate the problems associated with alienation. Henry Louis Gates, a professor of African-American studies, offers a vivid depiction of the new multiculturalism that acknowledges the hybrid dynamics of North American culture. According to him, 'multiculturalism depends on bringing these subterranean cultures – that which has been buried, that which has been denied, that which has been repressed – to the surface and redefining our common culture...'[75]

The movement of immigrants, asylum seekers, and refugees into the West has challenged the traditional model of the unified nation-state vision. In most cases, non-Western individuals who have migrated to countries such as Canada do not wish to recreate their personal identity along Western models. Rather they leave their homes in order to fulfill certain economic and political goals.[76] In this light, host societies can no longer expect immigrants to assimilate fully into the predominant culture.[77] Poulter, mirroring Guttman's earlier statement, explains that 'the task of the modern multicultural state is to achieve the correct balance between the loyalties of a common appreciation of citizenship based around a set of shared core values, on the one hand, and the claims derived from the separate cultural identities of ethnic minorities, on the other hand.'[78] An assimilationist model for immigrant integration cannot function in Canada. However, a revolutionary change in the way liberal societies organize

[75] Henry Louis Gates quoted in Abu-Laban, "Liberalism," p. 466.
[76] Bauböck, "Cultural Minority Rights for Immigrants," p. 220.
[77] Benhabib, *The Claims of Culture,* p. 181.
[78] Poulter, *Ethnicity Law and Human Rights,* p. 34.

themselves will also fail to meet the needs of Canadian society. Rather, a compromise needs to be struck between traditional Canadian powerbrokers and communities who wish to position themselves within the mainstream as active participants as opposed to ethnic, cultural and religious novelties.

Habermas: Communicative Ethics

The German philosopher Jürgen Habermas has in mind a theory of communicative ethics that seeks to create a more balanced system of governance that would better accommodate multicultural concerns that now appear in plural societies such as Canada's. Throughout most of his career, Habermas has attempted to propose a theory of deliberative democracy whereby different groups come together in a neutral environment in order to hammer out their differences in a public forum 'free from domination.'[79] Much of Habermas' philosophy is focused on the interactions between civil society and administrative bodies of governments. Unlike the Rawlsian method of separating 'background culture' from the 'public sphere', Habermas seeks to fuse the two worlds together in a more cooperative relationship whereby minority cultures receive a form of recognition that goes beyond mere tolerance. In Habermas' proposed theory of deliberative democracy, groups who were previously denied access to the public forum would become active partners in shaping society. The rationale behind Habermas' endorsement of deliberative democracy is his assertion that a single metaphysical, moral and normative framework can no longer guide complex societies

[79] Jürgen Habermas, *Knowledge and Human Interests,* Jeremy Shapiro, trans. (Boston: Beacon Press, 1971): p. 284.

such as those that exist in the West.[80] In light of the demands made by groups who wish to have their substantive norms made available to them in the public sphere, Habermas endorses a communicative ethic based on the principles of reciprocity, mutual recognition and respect.[81] In striving for this goal, Habermas describes the communicative ethic as 'a guide for reconstructing the network of discourses that...provides the matrix from which democratic authority emerges.'[82] The dialogue that would emerge from this 'matrix' would have the effect of creating a more participatory society because of the different voices involved in the public forum. Ultimately, Habermas seeks to promote a normative order that is 'open and flexible to change and more encompassing in its prescription of justice.'[83]

One forum Habermas points to as a potential bridge between different groups is the realm of law. Within this domain, the various components of civil society (which include cultural groups like the Muslim community) and government can mediate their concerns together and create a normative order that, on some level, recognizes the diversity.[84] Such a system of cooperation would be predicated on a *deontological* approach thereby increasing the legitimacy of legal system by including voices that have

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[80] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, William Rehg, trans. (Cambridge: MIT Press, 1996): p. 7.
[81] Jürgen Habermas, *Moral Consciousness and Communicative Action,* Christian Lenhardt and Shierry Weber Nicholson, trans. (Cambridge: MIT Press, 1990): p. 130.
[82] Habermas, *Between Fact and Norm,* p. 5.
[83] Ibid.
[84] According to Habermas, 'the constitutional state does not represent a finished structure, but a delicate and sensitive-above all, fallible and revisable-enterprise whose purpose is to realize the system of rights *anew* in changing circumstances, that is to interpret the system of rights better, to institutionalize it more appropriately, and draw out its contents more radically. This is the perspective of citizens who are actively engaged in realizing the system of rights.' See, Habermas, *Between Fact and Norm,* p. 384.

traditionally not been part of the law.[85] In other words, Habermas endorses a move away from archaic government institutions that offer only binary yes/no solutions to various complex legal concerns. Moreover, he would argue against a normative order that is fixed on a particular metaphysical truth. Rather, Habermas calls for a more complete system of justice that utilizes a multi-track approach whereby different groups are represented in the process of procedural law. The advantage of the communicative discourse approach towards consensus building is that there is an attempt to formulate *some* reciprocity between various members of society.

Whereas in the past, Anglo-Canadian culture and Judeo-Christian identity defined Canadian morality and law, a communicative logic would not limit society's adherence to this narrow cultural model. Although no normative order is free from cultural bias, Habermas' approach seeks to distance the law, as much as possible, from any *one* particular cultural world-view by grounding the normative order within a procedural logic that is culturally neutral.[86] Thus, any negative ruling on controversial issues such as polygamy would not be a reflection of pre-existing cultural norms trumping a minority group's desires and needs. Rather, the negative sanction would result from the application of procedural law, which, following Habermas' logic, would have been articulated in a culturally neutral environment. Whereas in the past, Judeo-Christian

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[85] Ibid., pp. 152-153.

[86] Raymond Geuss cogently explains that neutrality is an unattainable goal-even amongst those who claim to be acting in an unbiased manner. Commenting specifically on Habermas' attempt to create a neutral system of law, Geuss explains that 'Habermas' position saddles one with an archaic and inherently implausible Kantian transcendentalism. There is nothing to be gained in trying to pursue liberalism through the concept of neutrality.' See Geuss, *History and Illusion in Politics*, p. 80. Though Geuss is quite right in pointing out the weakness of attempting to pursue a neutral form of liberalism, my interest in Habermas is not based on his neutrality. Rather it is based on his goal of attempting to formulate a

values motivated the Canadian prohibitions against polygamy, today's sanctions are primarily a result of specific *Charter* violations such as Section 15 which covers the principles of equality and individual dignity.[87] A weakness in this approach is that the *Charter* is in fact an articulation of Western political values; divorcing these principles from a particular culture is impossible.

This weakness demonstrates that Habermas is not a radical thinker.[88] His endorsement of the communicative approach towards 'will-formation' does not represent a wholesale rewriting of existing systems of law so that they meet all the needs of diverse liberal democratic states.[89] Rather he is advocating a series of reforms based on existing procedures that will *draw in* marginalized voices and minority groups as active participants in the legal process.[90]

The lynchpin of Habermas' vision is the consistent application of procedural law and the maintenance of impartiality in carrying out the law. He explains that a system of

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system of law that is as free as possible from domination thereby engendering greater legitimacy for the overall legal system.

[87] Nicholas Bala, "Controversy over Couples in Canada: The Evolution of Marriage and other Adult Interdependent Relationships," *Queen's Law Journal,* vol. 29 (2003): p. 96.

[88] William E. Scheuerman points out that although Habermas claims to be a radical theorist, his work, *Between Fact and Norm,* maintains a defeatist tone with respect to the *actual* power and influence civil society can yield in light of strong administrative powers in government. In his critique of Habermas, Scheuerman explains that 'Habermas tends to emphasize the virtues of a deliberative civil society; at the same time, he is willing to admit that civil society inevitably has little real impact on state action during the course of "normal" democratic politics.' See William E. Scheuerman, "Between Radicalism and Resignation," in René Von Schomberg and Kenneth Baynes, eds., *Discourse and Democracy: Essays on Habermas's Between Fact and Norms* (New York: State University of New York Press, 2002): p. 76.

[89] Habermas, *Between Fact and Norm,* p. 178.

[90] In Habermas' books *The Theory of Communicative Action Volume I and II,* he explains that modern society is greatly shaped by a capitalist agenda wielded by the corporate world along with the administrative power of central governments. Together these two bodies have 'colonized the lifeworlds' of private citizens who have become increasingly powerless in affecting the direction of their lives. Habermas sees the various identity groups pushing for recognition of their differences as communities who are resisting the further colonization of their worlds by administrative and corporate bodies. See Jürgen Habermas, *The Theory of Communicative Action: Volume. I,* Thomas McCarthy, trans. (Boston:

law applied in a multicultural society will fall apart 'if notions of substantial ethical life slowly creep into the interpretation and practice of formal requirements.'[91] Furthermore, Habermas feels that legitimate laws are 'rationally accepted' by all members of society.[92] In this manner, procedural law gains its legitimacy because every segment of the population maintains a set of 'identical reasons' for adhering to the law.[93] In concrete terms this means that Muslim women and girls' right to wear the *ḥijāb* in Canada is not based on metaphysical notions of what society 'ought' or 'ought not' do. Rather, permitting the veil in Canada is based on a number of procedural concerns found in the *Charter* that include the freedom of religious expression, dignity and equality.[94] Permitting double standards or inconsistencies in the application of the law would violate the procedural integrity of the law and would bring into question the legitimacy of the legal system.[95]

Beacon Press, 1985): pp. 239-240. See also, Jürgen Habermas, *The Theory of Communicative Action: Volume II,* Thomas McCarthy, trans. (Boston: Beacon Press, 1989): pp. 576-579.

[91] Jürgen Habermas, "Religious Tolerance-The Pacemaker for Cultural Rights," *Philosophy,* vol. 79 (2004): p. 14.

[92] Habermas, *Between Fact and Norm,* p. 135.

[93] Ibid., p. 344.

[94] Habermas explains that laws 'count as valid relative to the historical, culturally molded identity of a legal community, and hence relative to the value-orientations, goals and interest positions of its members.' See Habermas, *Between Fact and Norm,* p. 156.

[95] Although communicative democracy seeks to limit the monopoly of power held by governmental agencies, the procedures used by civil society are not as neutral as Habermas suggests. Nancy Fraser cogently points out that 'where societal inequalities persist, deliberative processes in public spheres will tend to operate to the advantage of dominant groups and to the disadvantage of subordinates.' See Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," in *Habermas and the Public Sphere*, Craig Calhoun, ed. (Cambridge: MIT Press, 1992): p. 122-123.

Opening the Door for Islamic ADR

A practical example of Habermas' call for an intersection between civil society and governmental authority is the formation of multicultural arbitration boards that address specific cultural needs while maintaining the procedural soundness of existing laws. The IICJ's proposal to offer ADR services in matters of Islamic family law in the province of Ontario was an example of a joint governance model of arbitration; albeit one fraught with inherent weaknesses as will be demonstrated in sixth chapter. If faith-based arbitration would have been permitted, it could have resembled the type of multicultural jurisdictional body advocated by scholars such as Ayelet Shachar.[96] Shachar, a law professor at the University of Toronto, explains that many individuals, especially recent immigrants and those who have strong ties to their socio-cultural roots, maintain *'simultaneous belongings'* to their particular identities as well as to the general culture within which they reside.[97] In this regard, the demands made by Muslim groups to have Islamic law recognized in Canada were not necessarily calls for the formation of separate religious ghettos, rather they were demands to have Islamic values taken seriously by the mainstream legal community.

In proposing a joint governance approach in matters of personal status, Shachar is fulfilling Habermas' dual-track approach in matters of will-formation. Yet she proceeds with caution on certain matters. Although a joint governance model would have

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[96] Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001).
[97] Ayelet Shachar, "Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation," *The Journal of Political Philosophy,* vol. 6 (1998): p. 296.

permitted the Muslim community to officiate marriages and arbitrate divorces, certain restrictions would have to be in place according to Shachar. For instance, owing to the need to protect vulnerable members of society, namely women and children, Shachar's system would leave matters relating to the redistribution of wealth and custodial rights of children in the hands of existing government legislation.[98] Shachar cogently points out that it is often conservative voices, emanating predominantly from men, who define and/or interpret the laws of personal status in various religious groups. These laws not only act as a means of demarcating the boundaries between a religious community and the general population, but also act as tools to control the sexuality of women within the group. As she states, "[i]ntra-group policing of women, if encoded in the group's essential traditions, is achieved partially via the implementation of personal status laws which clearly define how, when and with whom women can give birth to children so as to ensure that those children become legitimate members of the community.'[99]

Permitting a religious community in Canada to implement a heightened level of control over its membership could produce *Charter* violations in the form of a loss in one's personal autonomy. Shachar's solution to this potential problem is eliding traditional rules of personal status with arbitration boards that are guided by procedural norms and constitutional guarantees available to the public. By following procedural law, religious groups would not have '*carte blanche*' in subordinating the rights of

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[98] Shachar, *Multicultural Jurisdictions*, p. 120-121.
[99] Shachar, "Group Identity," p. 293.

vulnerable members.[100] Thus, if cultural norms necessitate certain roles for women such as the wearing of the *ḥijāb*, these practices could only persist as a matter of a woman's own choice. Although some individuals may cringe at the idea, the *Charter* effectively permits the individual the option to live a conservative religious life through provisions that offer people the freedom to maintain convictions they personally deem appropriate.

What differentiates a liberal society from a more conservative one is that choices such as the decision to wear the veil can be reversed over time if the individual so wishes. Although there may be sanctions from within the individual's peer group, the larger society will simply assume the individual is exercising her freedom of choice. Finally, Shachar sees another advantage in utilizing the joint governance model for dispute resolution. Rather than permit traditional practices to go unchallenged in matters relating to personal status, Shachar claims that joint arbitration boards in a liberal environment can create 'a catalyst for internal change' within the traditional cultural groups themselves.[101] What would not be acceptable under Shachar's joint governance approach is a procedurally sanctioned legal system whereby Muslim women, for instance, are *forced* into certain scenarios that limit their rights based on a religious heritage they happen to be born or converted into.

While agreeing in principle with the formation of joint governance courts, Benhabib offers a number of suggestions that, in her mind, strengthen Shachar's model. Primarily, Benhabib maintains that, despite Shachar's protections for vulnerable members of

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[100] Ibid., p. 297.
[101] Shachar, *Multicultural Jurisdictions*, p. 118.

society, accommodating cultural communities through the formation of multicultural courts would still run the risk of limiting people's access to the law as equals.[102] The Canadian Council of Muslim Women (CCMW) has pointed to this very concern. This group of women maintains that there is no:

> compelling reason to live under any other form of law in Canada and we want the same laws to apply to us as to other Canadian women. We prefer to live under Canadian laws, governed by the Charter of Rights and Freedoms, which safeguard and protect our equality rights.... We are also concerned that, in deference to their religious beliefs, some Canadian Muslim women may be persuaded to use the Shariah [sic] option, rather than seeking protection under the law of the land.[103]

These concerns are extremely important and cannot be discounted. Nevertheless, the CCMW's views follow a binary yes/no line of thinking that multicultural societies can no longer realistically maintain. Furthermore, in opposing the formation of Islamic arbitration, the CCMW is effectively denying members of the Muslim community access to legal formulations certain individuals may deem important and legitimate to their personal understanding of self-worth. In other words, in speaking out strongly against Islamic arbitration they would effectively deny individuals life choices and cultural recognition they regard as important.

In an effort to protect vulnerable members of society, Benhabib advances three propositions she hopes will best respond to traditional cultural claims within liberal

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[102] Benhabib, *Claims of Culture,* p. 128.

[103] Alia Hogben, "Position Statement on the Proposed Implementation of Sections of Muslim Law [Shariah] in Canada," (Kingston: Canadian Council of Muslim Women, 2004): http://www.ccmw.com/Position%20Papers/Position_Sharia_Law.htm. See also Clarke, Linda and Pam Cross, *Muslim and Canadian Family Laws: A comparative Primer* (Toronto: Canadian Council of Muslim Women, 2006).

societies.[104] They are as follows: egalitarian reciprocity, voluntary self-ascription to a particular group, and freedom to exit a group that an individual has previously joined. Egalitarian reciprocity ensures that members of minority groups receive the same schedule of rights and privileges to which members of the majority have access. Benhabib is adamant that an individual's identity should not preclude him/her from equality before the law.[105] This provision would address some of the concerns groups such as the CCMW have brought forward. One of the fears this group maintains is that Muslim women will be forced into forfeiting certain *Charter* rights when they submit to Islamic arbitration. Thus for Benhabib, 'minorities must not, in virtue of their membership status, be entitled to lesser degrees of civil, political, economic and cultural rights than members of the majority.'[106] Second, Benhabib maintains that individuals should not be automatically labeled as members of a particular group based on their birth within that culture or religious group. Rather they should have the right to voluntary self-ascription, meaning the individual alone should determine whether he or she is a member of a particular group.[107] Rather than fall into the essentialist trap and assume that all Muslims are alike, we should remind ourselves that many individuals have 'simultaneous belongings' and thus may maintain certain Islamic cultural traits while abandoning others in favor of non-Islamic world-views. Limiting individuals who

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[104] David Peritz, "Toward a Deliberative and Democratic Response to Multicultural Policies: Post Rawlsian Reflections on Benhabib's *The Claims of Culture,"* Constellations, vol. 11 (2004): pp. 281-282.
[105] Benhabib points out that in Canada, Native women who marry outside of their community face the possibility of forfeiting their residency privileges on land that owned by Band Councils. The same restriction is not present amongst men who choose to marry individuals outside of their communities. This asymmetrical scenario is contrary to the Canadian *Charter.* See Benhabib, *Claims of Culture,* p. 54.
[106] Ibid., p. 131.
[107] Ibid.

are born into the Muslim community to Islamic law alone negates the complexity of their personal identity and the changing nature of one's personal development afforded to them in a liberal society. Finally, individuals should have the right to exit any group that they previously identified with and be able to join another group if they so choose.[108] If leaving a group entails the loss of informal or formal rights, the state should then be entrusted with regulating the costs of parting ways from that group under provisions that respect equality and fairness.[109] These three points are some of the principles that ensure individuals choosing to embark on culturally specific or religious lifestyles will have access to the same rights and privileges all members of society are granted.[110] The basis of Benhabib's philosophy is her view that individuals are 'self-interpreting and self-defining beings whose activities and deeds are constituted through culturally informed narratives.'[111] Her aim, like that of Habermas, is to create a normative order that recognizes the individual's substantive needs while balancing them with the values found in a liberal society. Rather than offer individuals the freedom to pursue their life-choices and then rebuff certain lifestyles that emanate from non-Western societies, a joint governance model offers individuals *some* access to substantive roles while respecting minimal standards found in liberal societies.

One of the advantages of pursuing a joint governance approach in multicultural dispute resolution is that it breaks down the isolation between different cultural groups. This interconnection of communities ensures that society will be attuned to the cultural

[108] Ibid., pp. 131-132.
[109] Ibid., p. 132.
[110] Ibid., p. 129.
[111] Ibid., p. 132.

particularities that exist within the population while at the same time informing cultural groups of the importance of maintaining constitutional rights that uphold the general society. Discounting Islamic law from the lives of individuals who wish to live in accordance with their religion is too paternalistic an alternative given the importance individual autonomy is afforded in Western democracies. Furthermore, it could push some Muslims into underground tribunals in matters related to personal status. Such an informal and unregulated system could be susceptible to the various abuses that the CCMW fears. Finally, discounting any role of Islamic law in Canada may diminish the state's legitimacy in the eyes of certain Muslim citizens who may alienate themselves from the mainstream and increasingly turn to unofficial justice as a means of regulating their affairs.

It is important to note that in operating a joint governance model of dispute resolution, not everyone's concerns will be resolved. In fact, there will be those who leave the table unsatisfied at the decisions rendered. For instance, there are certain provisions within Islamic law that would never meet the minimal standards of Canadian justice and would be disallowed; polygamous marriage comes to mind here. However, the fact that some disputes will never be settled should not be viewed as a shortcoming. Rather, this disagreement should be seen as a reflection of the complexities inherent in any given multicultural society. Expecting complete cultural convergence on issues of identity is just as impossible as creating a false sense of unitary consciousness amongst a diverse population.[112] At best, one can expect a 'multicultural cold war' in which

[112] Ibid., p. 137.

'there may be peace but no reconciliation.'[113] In this regard, rather than focus on the exotic nature of a group such as the Muslims of Canada, a procedural approach to law that recognizes the Muslim community's normative order will help foster a real sense of tolerance amongst the population.[114]

Coordinating diverse societies is a delicate matter. Whereas in the past chauvinism was the primary means of dealing with non-majoritarian groups, today's multicultural policies require a great deal of thought and insight. Inevitably, there will persist a certain level of asymmetry between powerful cultural elites and minority groups. Yet it is crucial for our purposes to return to the original position scholars such as Habermas are trying to achieve; namely, creating a dialogue as free as possible from domination through a communicative ethic. In this light, procedural law, once divorced from the cultural foundations of society and free from double standards that weigh against minority groups, can provide a forum within which to mediate culturally specific needs amongst a diverse population. Despite the benefits associated with a joint governance model of justice, the opportunity to establish such a system of law did not come to fruition in Ontario. Rather, various groups and individuals rebuffed Islamic arbitration as a dangerous and ghettoizing phenomenon. However, as will be demonstrated in the following chapter, the failure to draw in certain Muslims into the mainstream legal world may well create the very cultural ghettos groups such as the CCMW warned against.

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[113] Ibid., p. 129.
[114] Ibid., p. 142.

Chapter 6
Islamic Arbitration in Ontario

The previous chapter offered a number of philosophical justifications supporting the formation of joint governance models of law. This chapter will bring to light the recent debate that took place in Ontario between 1991 and 2005 over the use of Islamic arbitration. The legitimization of Islamic arbitration would have helped integrate certain segments of the Muslim community into the mainstream legal system. However, rather than deciding to pursue this direction, the Government of Ontario instituted a complete ban on all faith-based family arbitration following the public outcry that emerged over the possible use of Islamic ADR in that province.

The decision to ban faith-based arbitration was marked by a narrative of misinformation and Islamophobia. This discourse, taking place under the shadow of the 9/11 attacks, cast the Sharī'a, along with those supporting its use in arbitration, as dangerous and illiberal. The manner in which the debate transpired certainly influenced the government's decision to ban faith-based arbitration. However, other factors were yet to seal its fate. This chapter will demonstrate that those who sought to implement Islamic arbitration were partly responsible for the ban. One group in particular, the IICJ, lacked the formal training and institutional authority required to preside over the kind of ADR panels they proposed. Moreover, the group failed to clearly articulate its goals, creating the illusion that the IICJ sought to apply Sharī'a in Canada. Despite the fait accompli of the judicial ban, this chapter will ultimately suggest that the practice of Islamic private arbitration will most likely continue on an ad hoc basis – resulting in

possible abuses to individuals who will not stand to benefit from government oversight in their search for justice.

Understanding ADR

Before analyzing the debates, a discussion weighing the benefits and pitfalls of arbitration is in order. ADR panels have become fixtures in various Western legal systems during the course of the past 30 years. These panels are non-judicial bodies that seek to solve issues ranging from commercial to family disputes. Unlike mediation, which is not enforceable, arbitration carries the force of the law. In Ontario, the law that governs ADR is the *Arbitration Act.*[1] This law stipulates that individuals, of their own choosing, can submit themselves for arbitration.[2] The arbiter, selected by mutual agreement, remains neutral throughout the proceedings,[3] and decisions reached by the arbiter are binding.[4] If one party fails to live up to the arbitral agreement or award, the aggrieved party can apply to the courts to have the decision enforced. Rulings can be overturned if it can be proven that the arbiter acted in a way that was partial to one of the disputants, or if it is demonstrated that the arbiter 'did not possess the qualifications that the parties have agreed are necessary.'[5] The arbitration panels themselves can apply whatever set of rules the participants have agreed to use; thus laws from other countries, religious laws, or rules specific to private organizations, can all be applied

[1] *Arbitration Act*, S.O. 1991, p.17.
[2] Ibid., sec 48.
[3] Ibid., sec. 11.
[4] Ibid., sec. 37.
[5] Ibid., sec. 13.

during the arbitration process.[6] Finally, any decision made in arbitration must conform to Canadian law.[7] And so although Sharī'a principles can be used to settle conflicts, the decisions cannot violate existing provincial or federal legislation.

ADR panels do not seek to supplant the existing normative order – rather, they attempt to broaden the scope of justice by including the 'cultural, economic and psychological features' inherent in complex, multi-layered, and plural societies.[8] For instance, immigrant populations living in Western societies often show some reluctance to appear before the courts due to their perception that government agencies do not fully understand the culturally motivated disputes they may be having.[9] This creates the possibility of individuals seeking non-official modes of justice in the form of underground tribunals offered by members of their own religious or cultural communities. ADR panels can help alleviate the problem of unregulated justice by attuning the procedural norms of the justice system to the particular cultural or religious needs of a given minority community. Furthermore, the panels serve as alternatives to traditional court based adjudication, which often takes much longer to settle, is likely to be confrontational, and is generally considerably more expensive.

According to Professor Garry Watson of the Osgoode Law School at York University, various jurisdictions throughout Canada are now encouraging parties to negotiate their concerns outside the courts. According to Watson, Canadian law has

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[6] Ibid., sec. 32.
[7] Ibid., sec. 31.
[8] Mauro Cappelletti, "Alternative Dispute Resolution Process within the Framework of the World-Wide Access-to-Justice Movement," *The Modern Law Review*, vol. 56 (1993): p. 283.
[9] Mohamed M. Keshavjee, "Multiculturalism and the Challenges it Poses to Legal Education and Alternative Dispute Resolution: the Situation of British Muslims," speech delivered at the Department of Peace Studies, University of Bradford, May (2004): http://www.iis.ac.uk/SiteAssets/pdf/multiculturalism.pdf, p. 8.

introduced the principle of ADR into the official legal system by employing 'judicial mediation' during pre-trial conferencing in cases involving disputants in commercial matters. Meanwhile, in issues relating to family law, Watson points out that the courts prefer that disputants should seek arbitration and mediation rather than bring their concerns into the adversarial arena of the courts.[10] According to Marion Boyd, author of the 2004 Ontario government report looking into the use of Islamic arbitration, decisions made through ADR prove to be more 'durable,' in part because the process used to settle the disputes are familiar to the participants involved.[11] Since the passing of the 1991 Ontario *Arbitration Act*, adopted while Boyd was acting as that province's Attorney General, the popularity of extra-judicial conflict resolution has increased.[12]

From an Islamic perspective, mediation and arbitration in marital strife are both longstanding practices.[13] The Qur'ān, for instance, advises that '[i]f a couple fears separation, you shall appoint an arbitrator from his family and an arbitrator from her family; if they decide to reconcile, God will help them get together.'[14] Scholars have pointed out that because Islamic societies are communal in orientation and have a 'culture of relatedness' it is natural for family members to help settle disputes rather than to seek government intervention.[15] Turning to family and friends to settle disputes will in all likelihood remain an essential means of recourse within the Muslim

[10] Cappelletti, "Alternative Dispute Resolution," p. 291.
[11] Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Attorney General, Ontario: 2004): http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf, p. 11.
[12] Cappelletti, "Alternative Dispute Resolution," p. 291.
[13] Amr Abdalla, "Principles of Islamic Interpersonal Conflict Intervention: a Search within Islam and Western Literature," *Journal of Law and Religion,* vol. 15 (2000-2001): p. 174.
[14] Qur'ān, 4:35.
[15] Abdalla, "Principles," p. 175.

community in Canada because it represents a form of justice very much in line with the kind of conflict resolution in use today throughout the Muslim world.

Although there are compelling reasons for supporting the use of ADR, some have questioned the efficacy of the panels in certain situations. Since the power imbalances inherent in Muslim societies appear to be patriarchal (especially in the juridical literature), feminist groups have cautioned against the use of ADR panels, claiming there exists no 'equality of arms between the litigants.'[16] For instance, Carrie Menkel-Meadow maintains that 'people of disparate power will abuse each other in informal processes.'[17] Some of the most vocal opponents of the use of Islamic arbitration panels in Ontario echoed these concerns by underscoring the unequal status men and women enjoy under the Sharī'a. For instance, on a radio show broadcast in Australia, Alia Hogben, the Executive Director of the CCMW, maintained that the Sharī'a 'does not have as one of its fundamental principles the equality of women...'[18] This reductive commentary fails to acknowledge the complexities inherent in gender relations found throughout the Muslim world. As discussed in the first chapter of this work, Muslim women were not devoid of legal and economic power, nor were they powerless in matters of divorce. Rather, as recent scholarship demonstrates, women have access to avenues of power and influence that are regularly overlooked by Westerners. Hogben has chosen to ignore this growing body of evidence by offering a static image of Muslim society. In broadcasting this view, she appears to be following a rhetorical pattern

[16] Cappelletti, "Alternative Dispute Resolution," p. 290.
[17] Carrie Menkel-Meadow, "Dispute Resolution: the Periphery Becomes the Core (Review Essay)," *Judicature,* vol. 69 (1986): p. 302.
[18] David Rutledge, "The Religion Report," Australian Radio National, February 2nd (2005): http://www.abc.net.au/rn/talks/8.30/relrpt/stories/s1293962.htm.

employed by European colonialists who sought in the past to 'identify bodies of Asian and African women, both in the North and in the South, as bodies to be saved by benevolent and more civilized Europeans.'[19]

Others critics of ADR have argued that some turn to arbitration in order to avoid official legal channels altogether for fear that the courts will not be likely to address their particular substantive concerns. According to Chief Judge Harry T. Edwards of the United States Court of Appeals for the District of Columbia, the 'poor and oppressed in society are in fact principally motivated by the desire to limit the work of the courts in areas affecting minority interests, civil rights and civil liberties.'[20] This kind of scenario has come to fruition for some members of Canada's Muslim community, as individuals have turned to unofficial bodies of authority in search of marriage and divorce services. The reasons why individuals access these underground services may vary; some seek them in order to meet certain religious and cultural norms, while others have more self-serving reasons, such as gaining favorable financial settlements. This matter will be discussed in greater detail later on in this chapter as well as in the eighth chapter. For now, it is fair to say that accessing underground arbitration offers individuals a form of 'second class' justice due to the poor quality of services provided at these unofficial tribunals.[21]

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[19] Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998): p. 6-7.
[20] Harry T. Edwards, "Alternative Dispute Resolution: Panacea or Anathema," *Harvard Law Review,* vol. 99 (1986): p. 669.
[21] Cappelletti, "Alternative Dispute Resolution," p. 291.

Islamic Arbitration in Canada

The attempt to implement a *formalized* system of Islamic ADR in Canada began in 1991 when Syed Mumtaz Ali, president of the Canadian Society of Muslims (hearafter CSM), floated the idea in a publication entitled 'Oh! Canada - Whose Land? Whose Dream?'[22] As stated in this document, a formalized system of ADR would include such features as the right of Muslim officials to solemnize divorces. Currently this task is delegated to the federal government, which applies the *Divorce Act* throughout Canada. Under Ali's proposed system, amendments would have to be made to federal and provincial laws in order to grant greater powers to certain Islamic institutions within the Canadian Muslim community. In another proposal, Ali suggested that the provinces should adopt laws similar to those found in the Caribbean nation of Trinidad and Tobago. There, the *Muslim Marriage and Divorce Act* provides a parallel system of justice, which deals exclusively with that country's Muslim population.[23] According to Ali, such measures are crucial for Muslim-Canadians striving to live in accordance with their faith. In his words, 'Muslims are informed in the Qur'an [sic] that one cannot consider oneself a Muslim...unless one adheres to the guidelines, counsels, principles, beliefs and practices that are related to human beings through the Qur'an [sic] and the Prophet Muhammad (p.b.u.h.).'[24] Ali believes that existing Canadian laws are thwarting these particular religious goals. In one of his numerous online publications, he

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[22] Syed Mumtaz Ali, "Oh! Canada - Whose land? Whose Dream?" The Canadian Society of Muslims (1991): www.http://muslim-canada.org/ocanada.pdf.
[23] Syed Mumtaz Ali, "The Review of the Ontario Civil Justice System: the Reconstruction of the Canadian Constitution and the Case for Muslim Personal/Family Law: a Submission to the Ontario Civil Justice Review Task Force," The Canadian Society of Muslims (1994): http://muslim-canada.org/submission.pdf, p. 43.
[24] Ibid.

maintains that Muslims are being denied the right to follow their faith by governments intent on using 'a variety of strategies, diversionary tactics and Machiavellian manipulations to camouflage their religious prejudices....'[25] Apart from a few newspaper articles discussing Ali's 1991 proposals, his demands did not gather much attention.

Interestingly, Ontario's laws governing arbitration have actually been in place since the nineteenth century and have permitted individuals to settle their disputes outside the courts so long as both parties voluntarily agree to the procedure, and that the decisions rendered in arbitration do not conflict with Canadian laws. For instance, the Jewish Court of Ontario (*beit dīn*) is a tribunal run by rabbis who have been ordained as judges or *dayānṣ,* capable of rendering rulings in accordance with Jewish law. This court is in place to provide Orthodox and Conservative Jews a venue to settle their commercial and family disputes.[26]

Various Muslim groups in Ontario have also been using Islamic arbitration for some time now. The Ismā'īlī community operates five regional Conciliation and Arbitration Boards throughout Canada and has heard 769 cases nationwide between the years 1998 and 2003. Twenty-nine percent of these cases dealt with commercial matters while the majority of the cases, sixty-three percent, were related to marriage and divorce.[27] The arbitration services offered by this community are governed by a twelve-page document that lists the rights and responsibilities of each of the participants involved.[28] These

[25] Ibid.
[26] Boyd, *Dispute Resolution,* p. 55.
[27] Ibid., p. 59.
[28] Ibid., pp. 163-175.

include statements affirming that the arbiters are trained, and reminders to the disputants that the process they are about to embark upon is voluntary.[29] Ismā'īlī arbitrators in Canada have at their disposal a British training program that teaches them how to operate the panels.[30] The training is conducted by the Institute of Ismā'īlī Studies, the School of Oriental and African Studies, and the National Family Mediation Centre of Dispute Resolution.[31] Members of the panels in Canada are all volunteers who serve three-year terms and come from various professional backgrounds.[32] Expertise in Shī'a jurisprudence is not a requirement; rather, high standing within the community is the qualification that is most sought.

It should be noted that although the Ismā'īlī community is a Muslim group the arbitration panels they operate in Canada do not apply Islamic law. Rather, the decisions made by the arbitration panels seek to provide resolutions to various disputes 'in a fair and equitable manner within the confines of the law of the land.'[33] The aim of this form of arbitration in cases of divorce, for instance, is to maintain the communal standing of individual members within the greater Ismā'īlī community, and not to ostracize them from the group during bitter family conflicts. Thus, the primary goal of arbitration, in this community, appears to be restorative, not punitive.[34] Moreover,

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[29] Ibid., p. 59.
[30] Mohamed M. Keshavjee, "Reflective Learning From The Training Programmes Of The Ismaili Muslim Conciliation And Arbitration Boards, Globally," paper presented at the 5th International Conference of the World Mediation Forum in Crans-Montana, Switzerland, September 8th (2005): http://www.iis.ac.uk/view_article.asp?ContentID=106246.
[31] Mohamed M. Keshavjee, "Arbitration and Mediation in the Shi'a Imami Ismaili Muslim Community," paper presented at the 4th International Conference of the World Mediation Forum, Buenos Aires, Argentina, May 10th (2003): http://www.iis.ac.uk/view_article.asp?ContentID=101192.
[32] Boyd, *Dispute Resolution,* p. 58.
[33] Ibid., p. 60.
[34] Earle Waugh, "Storm over Shari'a Courts in Canada: Responses to Shari'a Arbitration in Ontario," speech given at the 9th International Metropolis Conference in Geneva, Switzerland, September 27-

referring to the panels as Sharī'a bodies is inaccurate. At best, the tribunals can be seen as conflict resolution bodies that happen to be staffed by Muslims. This line of thinking corresponds to the policy adopted by one of Canada's largest Muslim advocacy groups, the Canadian Council on American Islamic Relations-Canada (hereafter, CAIR-CAN), which has expressed its unease with the use of the term 'sharī'a' in relation to an arbitration panel because 'such a tribunal is not a full-fledged Islamic court...' The group goes on to explain that '[t]he tribunal will, more appropriately, be a form of Muslim dispute resolution, consistent with Canadian law and the Charter within the flexibility of Islamic normative principles.'[35] As will be demonstrated below, the IICJ failed to make clear to the public the distinction between Islamic arbitration and the application of Sharī'a in Canada.

In 2003, the CSM, a neo-conservative Islamic group, found itself at the center of a heated debate following its announcement that it had established the IICJ. According to Ali, the individual who first proposed separate Islamic laws for Canadian-Muslims and who is now the IICJ's principal spokesperson, the group would begin the process of establishing arbitration panels in Ontario, which would be designed to apply Islamic law. Following through on this claim, the group incorporated itself in January of 2004 under the name of 'Darul Qada - the Islamic Court of Arbitration,' and began seeking clients whose concerns they would arbitrate using the principles of Sharī'a. In stating these goals the group failed to take into account the intricate nuances associated with the doctrinal, sectarian, and methodological complexities inherent in the expression of

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October 1st (2004): http://pcerii.metropolis.net/events/events_content/StormoverShari%60aCourtsinCanada.pdf, p. 4.

[35] Ibid., p. 45.

Islamic law.[36] These shortcomings were amongst the various signs indicating that the IICJ's promise to offer Islamic law to its clients was overstated.

The Institute of Islamic Civil Justice

Before delving into the structural problems associated with the IICJ's proposal an understanding of the group's motivations are in order. The IICJ, and its parent organization, the CSM, are communal-religious groups that do not fully identify with Canadian society. Specifically, these groups appear to be at odds with the uniform culture and homogeneous constitution of the nation-state model. S.N. Eisenstadt, a professor at the Hebrew University, has pointed out that certain Muslim diaspora movements in North America and Europe are seeking to resurrect and reconstruct an identity that has been 'subdued' by modernity, while re-defining their links to the states in which they reside.[37] In other words, they do not wish to assimilate fully into the majority; rather, they seek recognition (from the mainstream) of their particular cultural and religious affiliations. Although they appear to be harkening back to a bygone era, Eisenstadt maintains that these groups are very modern in orientation – specifically, in their desire to 'reappropriate modernity and redefine the discourse of modernity in their own terms.'[38] For these groups, Western culture is not *the* sole conveyer of modernity,

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[36] In an interview conducted by Rabia Mills, which appears on the Canadian Society of Muslim web page, Ali conveys the notion that diversity in Islamic law is not a complex matter. He explains that 'arbitrators would arrive at their decisions based upon applying whatever school of Law the individual happens to follow. There are four schools of Sunni thought, for example. If the parties involved belong to one of those schools, then the law of that particular school would be applied. Similarly, if the parties involved belong to the Shia sect, then the Shia Law would be applied. *It is just as simple as that!*' See, Rabia Mills, "Interview: A Review of the Muslim Personal/Family Law Campaign," August (1995): http://muslim-canada.org/pfl.htm. Italics added for emphasis.

[37] S.N. Eisenstadt, "The Resurgence of Religious Movements in Processes of Globalization: Beyond End of History or Clash of Civilization," *International Journal on Multicultural Societies*, vol. 2 (2002): p. 6.

[38] Ibid., p. 9.

and thus groups such as the IICJ entertain views that challenge some of the central tenets of liberalism. Eisenstadt states that these groups 'ground their denial of, and opposition to, the premises of the Enlightenment in the universalistic premises of their respective religions or civilizations, *as newly interpreted by them.*'[39] This last point is vital in understanding the motivations of groups such as the IICJ. In its efforts to redefine modernity, the IICJ has overlooked the complexities inherent within Islamic law. Rather, it has put forward two systems of jurisprudence that are diametrically opposed to one another.

First, the IICJ has forwarded a traditionalist, yet narrow, approach to Sharī'a by stating that Islamic personal status is 'rooted in and derived from the two most basic sources of Islamic law - namely, the holy Qur'an [sic] and the Sunnah [sic] of the Prophet (pbuh).'[40] Although this is not a mistaken position, this view simply ignores hundreds of years of legal development wherein jurists shaped and articulated the law in an attempt to reflect the social circumstances that surrounded them. By limiting the scope and depth of Islamic legal methodology to these foundational sources, the IICJ fails to acknowledge the flexibility inherent in the Sharī'a. Like other revivalist movements active in the Muslim world today, the IICJ appears to be addressing modernity in an idealized manner.

For instance, Kecia Ali cogently demonstrates how neo-conservative Muslims living in North America frequently rely on texts produced by the Saudi Arabian government, or those endorsed by the Pakistani group Jamaat-i-Islami, which run counter to the letter

[39] Ibid., p. 10. Italics added for emphasis.
[40] Mills, "Interview."

and spirit of traditional Islamic jurisprudence. These texts include Muhammad Abdul-Rauf's monograph, *Marriage in Islam: a Manual,* a text that is frequently quoted by the CSM and the IICJ on their respective web pages.[41] One example will suffice to demonstrate just how sharp the divergence is between the neo-conservative doctrine and traditional Islamic jurisprudence. As noted in the first chapter, classical and medieval jurists viewed the marriage contract as a means of legitimizing sexual relations between men and women. Contemporary jurists have arrived at a different understanding of marriage, which focuses more on gender role stratification. Abdul-Rauf's text maintains that women are in charge of household management and associated tasks such as 'meal preparation, house-cleaning and laundry.'[42] In pre-modern times, these duties were not the main focus of the marriage contract, nor were they legally expected. According to Kecia Ali, the neo-conservative approach to marriage has not only diverged from traditional jurisprudence, but has also unduly affected women by relegating their role in society to that of a homemaker.[43] Moreover, owing to the legal codification of patriarchy in societies such as Egypt, these expectations are now entrenched in statutory law. Thus, when the IICJ forwarded its arbitration program, predicated on a very restrictive understanding of gender, the group appeared to be endorsing a vision of Islam

[41] Muhammad Abudl-Rauf, *Marriage in Islam: a Manual* (Alexandria, Al-Saadawi, 2000). See also, Syed Mumtaz Ali and Rabia Mills, "Sex in Islam: its Role and Purpose," Muslim Society of Canada (accessed October 1st, 2006): http://muslim-canada.org/sex.htm.
[42] Abdul-Rauf, *Marriage in Islam,* p. 55.
[43] Kecia Ali, "Progressive Muslims and Islamic Jurisprudence: the Necessity for Critical Engagement with Marriage and Divorce Law," in Omid Safi, ed., *Progressive Muslims: on Justice, Gender and Pluralism* (Oxford: One World, 2003): p. 175.

that was unduly conservative, and which arbitrarily limited the role of women in society.

The second legal system the IICJ put forward was based on the Anglo-Mohammedan legislation used in India during the British colonial period. The choice of this system of law represents a clear shift from the approach discussed above. Whereas the former represents a neo-conservative ideology, the latter seems to suggest an acceptance of a specifically Western hegemony. Ali explains, 'it is expected that the Muslim law and associated Case law created through the old Anglo-Mohammedan Law precedents would be the model for Personal Law cases initially, but any other could also be relied upon if the parties so desire.'[44] Clearly, there are serious shortcomings in such a statement, the least of which is the fact that many have questioned the Islamic authenticity of Anglo-Mohammedan law. This is because of its break with traditional *uṣūl al-fiqh,* owing to the fact that British colonial functionaries helped draft the law. Moreover, the use of this code in Canada presupposes that a majority of Muslims wish to be governed under this single code of law. This notion is hard to accept given the vast demographic diversity within Canada's Muslim community. Although the use of traditional sources of law such as the Qur'ān and the traditions of the Prophet, along with the Anglo-Mohammedan code, appears paradoxical this logic closely follows Eisenstadt's characterization of conservative communal-religious groups. The IICJ is *not* attempting to revive pre-modern forms of Islamic justice; rather, it seeks to promote its own *particular* understanding of Islamic law as a means of challenging the

[44] Canadian Society of Muslims, "Darul-Qada: Beginnings of Muslim Civil Justice System in Canada," in *News Bulletin,* April (2003): http://muslim-canada.org/news03.html.

mainstream. However, in light of the fact that the IICJ proposed two diametrically opposed systems of law, it is fair to say that their efforts suffer from certain methodological and structural shortcomings.

For instance, in a web-based document, the IICJ has maintained that in settling family disputes, their arbiters would use 'any school, e.g. Shiah or Sunni (Hanafi, Shafi'i, Hambali, or Maliki) [sic]....'[45] Traditionally, an individual jurisconsult (*muftī*) operating in the Islamic world worked exclusively within the bounds of the particular school of law from which he received his training. If jurists were to diverge from their own school of law and borrow ideas from another school, the opinions they produced would be considered suspicious and they might even be deemed void altogether.[46] The claim, made by the IICJ, that Muslim arbitration boards operating in Canada can provide rulings based on the different Sunnī and Shī'a schools of law is difficult to imagine given the expertise required to work in such a legal setting.[47] Understandably, this fear was reinforced by another web-based document that lists Azim Hosein as one of the group's arbiters. Mr. Hosein has no formal training whatsoever in Islamic law. Rather, his qualifications include a B.Sc. in Microbiology and a BioMed. Sc. (Food), while he has experience as a business executive and is certified as a Hazard Analyst

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[45] Syed Mumtaz Ali, "Establishing an Institute of Islamic Justice: Darul Qada," *News Bulletin*, October (2002): http://muslim-canada.org/news02.html.

[46] Hallaq, *History of Islamic Legal Theories*, p. 209.

[47] The following quote explains the selection criteria the group has in mind when staffing their arbitration panel. Note the vagueness of the qualifications required; specifically, no mention is made of actual positions such as a *muftī* (jurisconsult), an Islamic professional qualified to carry out the tasks set out by the group. Furthermore the quote also seems to suggest that members of the Ontario Bar Association can function as Islamic arbiters. 'Ideally, a panel of specialists would be necessary. Such a roster would represent the cream of the crop of competence and expertise. They would consist of persons selected from (a) the bar (i.e., lawyers or retired judges) with required qualifications and experience at the bar or the bench; (b) religious scholars from the Muslim community with proper qualifications and accreditation; and (c) private arbitrators accredited by the governing licensing organization--or even one sole arbitrator if he or she has the qualifications of all three categories.' See, Mills, "Interview."

Critical Control Point (H.A.C.C.P.) Specialist.[48] Mr. Hosein's professional accreditation suggests that he is, perhaps, a food inspector and not a legal specialist.[49] Thus the IICJ, in seeking to provide Islamic arbitration, may inadvertently contravene Islamic legal principles on a number of grounds. In this particular instance, the group appears to be providing their clientele with unqualified and unaccredited legal counsel.[50]

On a practical level, the lack of accredited experts presents a major barrier to the creation of an Islamic arbitration system in Canada. Frequently, the Muslim community will put forward *imāms* as legal spokespersons. The nomination of these individuals as legal functionaries poses a number of problems, not least of which is the lack of a recognized system of accreditation to certify such religious figures in Canada. According to Faisal and Ahmed Kutty, two prominent members of Toronto's Muslim community, the lack of trained individuals is a major stumbling block in the formation of an effective Islamic arbitration system in Canada.[51] They explain, in an article they co-wrote, that 'today, anyone can get away with making rulings so long as they have the

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[48] Canadian Society of Muslims, "An Essential Islamic Service in Canada: Muslim Marriage, Mediation and Arbitration," (accessed September 12, 2006): http://muslim-canada.org/brochure.htm.

[49] According to Agriculture Canada, 'Hazard Analysis Critical Control Point (HACCP) was conceived in the 1960s when the US National Aeronautics and Space Administration (NASA) asked Pillsbury to design and manufacture the first foods for space flights. Since then, HACCP has been recognized internationally as a logical tool for adapting traditional inspection methods to a modern, science-based, food safety system.' See, Canadian Food Inspection Agency, "Food Safety Enhancement Program Manual," July (2006): http://www.inspection.gc.ca/english/fssa/polstrat/haccp/manue/ch1e.shtml#1.1.

[50] The following passage from the Canadian Muslim Society's web page seemingly invalidates Mr. Hosein's participation on the group's arbitration board. 'For some reason, it is assumed that any Tom, Dick or Harry with no expertise or qualifications in Canadian and Muslim law can become an arbitrator and start dispensing justice (or injustice!) The fact is that the Institute has managed to have a good number of its executives take and successfully complete the ADR Institute of Canada's approved courses in arbitration law and its process.' It is important to note that the exams offered by the ADR Institute of Canada have no Islamic component – a fact omitted from the previous statement. See, Syed Mumtaz Ali, "An update on the Islamic Institute of Civil Justice," *News Bulletin* August (2004): http://muslim-canada.org/news04.html.

[51] Faisal Kutty and Ahmad Kutty, "Shariah Courts in Canada: Myth and Reality," *The Ambition,* April (2004): p.8. Ahmad Kutty has Masters from McGill University specializing in Islamic law while his son,

appearance of piety and a group of followers. There are numerous institutions across the country [Canada] churning out graduates as alims (scholars), faqihs (jurists) or muftis (Juris-consults) [sic] without fully imparting the subtleties of Islamic jurisprudence.'[52]

Apart from the IICJ's apparent lack of expertise in Islamic law, what has also raised the ire of various groups, both Muslim and non-Muslim alike, are the brazen and at times contradictory claims made by the IICJ on behalf of the *entire* Muslim-Canadian community. Quoting at length from one of Ali's comments will demonstrate why many have opposed his organization's proposals.

> Sharia [sic] is a part of our life. If we proclaim to be a Muslim, we must live our life according to the injunctions of Allah [God] and His Prophet. Let's take the example of marriage. You cannot have an Islamic marriage without applying Sharia [sic]. Similarly, if there is a fear that a matrimonial dispute is about to occur, the Qur'an [sic] clearly states that you must try to solve it by having two arbitrators, one from each side. This is the command that in order to be a Muslim, you must surrender to the command of Allah. If you don't, then you are *not a good Muslim.*[53]

In this statement, Ali is suggesting that *all* Muslims should submit to Islamic arbitration in order for them to be considered as 'good Muslims.' However, with the Islamic authenticity of their proposed ADR panels in question, it is somewhat dubious to profess such statements when in fact no formal system of Sharī'a is actually being offered by the IICJ. Furthermore, given that most Muslim countries do not actually operate under the traditional forms of Sharī'a, it seems that the demand for Muslim-Canadians to follow Islamic law is also somewhat overstated.

Faisal Kutty, is a Toronto area Lawyer and freelance writer whose work appears in the *Toronto Star.* Faisal Kutty also acts as CAIR-CAN's legal counsel.

[52] Ibid.

[53] Canadian Society of Muslims, "Ali's Interview with '*The Ambition*'," May (2004): http://muslim-canada.org/ambitioninterview.html. Italics added for emphasis.

Ali's use of the term 'sharī'a' in conjunction with arbitration also served to further confuse the issue when one considers that arbitration represents a procedural system that falls under the jurisdiction of Canadian law. Thus any decision made in arbitration cannot contravene Canadian law. For instance, the divorce proceedings taking place during Islamic arbitration must conform to Canada's *Divorce Act.* In fairness, Ali has stated that 'only those provisions of the *Shariah* [sic] that do not conflict with Canadian law/values will be applied for arbitration of disputes in Canada.'[54] However, his overall message is mixed given Ali's previous statement that insists that Muslims 'must surrender to the command of Allah.' According to one observer, these contradictory pronouncements led many people to believe that the Government of Ontario had 'surreptitiously colluded with the IICJ and, without consultation, allowed one particular Islamic group to set up a parallel legal system.'[55]

The Boyd Report

Seeking to ease the controversy aroused by the IICJ that has emerged both in Canada and abroad, the Government of Ontario, under Premier Dalton McGuinty, commissioned Marion Boyd to ascertain whether the use of religious arbitration and specifically, Islamic arbitration, were viable options. In formulating a position, Boyd welcomed submissions from interested parties to assist in completing a report that was released in December of 2004, entitled *Dispute Resolution in Family Law: Protecting*

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[54] Ali, "An Update."

[55] Marion Boyd, "Arbitration in Family Law: Difficult Choices," *Inroads*, Winter/Spring (2006): p. 59. The following piece of information appeared on a BBC web page suggesting that Sharī'a law would be used in Ontario. According to the report, 'Islamic law could be used to settle civil and marital disputes under a proposal made by former Ontario Attorney General Marion Boyd.' BBC News, "Sharia Move in Canada Draws Anger," September 8th (2005): http://news.bbc.co.uk/2/hi/americas/4226758.stm.

Choice, Promoting Inclusion. The submissions spoke to the various advantages and disadvantages of using faith-based arbitration.

Support for the use of faith-based arbitration focused on a wide range of concerns. One issue that resonated with a number of family law lawyers was the specific expertise to be found in private arbitration as opposed to the public court system. Philip Epstein, a Toronto area lawyer who specializes in family arbitration and mediation, asserted that individuals who access his services will get an expert in the field who can provide solutions difficult to come by in a court of law. Whereas a judge may be rotated in and out of the family law courts, arbiters like Epstein are specialists who use the 'most up-to-date approach to the resolution of problems.'[56] Furthermore, he maintains that his clients appreciate the speed and the lower costs associated with his form of dispute resolution.[57]

Religious groups such as the Christian Legal Fellowship have highlighted the importance religion plays in people's public lives. In their submission to the Boyd Report, the group maintained that in 'choosing to utilize a system of religious arbitration, the parties are doing two things: adhering to their faith; and resolving the dispute on the basis of their religious law, rather than the secular civil law.'[58] The group goes on to state that 'it is more important to the individual that the dispute is resolved Biblically than that the outcome be in his or her favour.'[59] Clearly, this line of thinking is outside of the normal logic used in the adversarial court system whereby victory is the

[56] Boyd, *Dispute Resolution,* p. 36.
[57] Ibid.
[58] Ibid., p. 56.
[59] Ibid.

primary goal. Masjid al-Noor, a Toronto area mosque, recognized by the Ontario courts for its arbitration services, offered some further arguments in support of faith-based arbitration. According to the group, some Muslims are not comfortable resolving their disputes in the secular justice system, which they label as 'unauthorized.'[60] Thus there is a risk that these individuals will either avoid the courts altogether, or will settle their affairs themselves using underground forms of justice.

Along with these submissions were those which cautioned against the use of faith-based ADR. The Muslim Canadian Congress (MCC), an advocacy group for progressive Muslims, maintained that the use of arbitration for settling family disputes was unconstitutional. According to their submission to the Boyd Report the rule of law would be negated if individuals were allowed to settle their disputes via private arbitration.[61] And allowing other forms of justice to intervene in these matters would amount to the creation of a parallel system of justice. The CCMW made a similar constitutional argument in their submission to the report. According to their submission, the *Arbitration Act* allows for different forms of law to be applied, including Islamic law, which would severely disadvantage women because it does not have the same principles of equality espoused in the Canadian *Family Law Act* or the *Divorce Act*.[62] It should be pointed out that both these criticisms failed to take into account the limits of arbitration; namely, the notion that decisions handed out at the tribunals must conform to Canadian law.

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[60] Ibid., p. 65.
[61] Ibid., p. 30.
[62] Ibid., p. 31.

In issuing her final report, Boyd sought to test some of the criticisms leveled against faith-based family arbitration with the *Charter.* Her analysis demonstrated that although shortcomings were found in the arbitration process, using ADR was *not* contrary to the spirit of the *Charter.* Her reasoning was based on the fact that entering into arbitration is a private matter, embarked upon by two individuals.[63] Although the government has set up specific procedures through the *Arbitration Act,* it does not actually compel people to employ arbitration, nor does it appoint the arbiter in the case. Thus, according to Boyd, there is significant distance between the parties involved and the government.[64] According to her, '[a]greeing to be bound by an arbitrator's decision falls into the category of an action that is private and therefore, in my view, is not subject to *Charter* scrutiny.'[65]

As to the fact that the agreements reached by the parties may not be based on principles of equality following the *Divorce Act,* Boyd is adamant that individuals are free to enter into unequal divorce settlements, if they so choose.[66] In fact Boyd explains that 'nothing in the *Charter* requires disputants to resolve their property disputes on a 50/50 basis or that private legal arrangements arrive at an equal result.'[67] She cites three recent cases heard by the Supreme Court that affirm that people could conclude

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[63] The International Center for Human Rights and Democratic Development has criticized this view in stating that the freedom to enter into arbitration does not grant women a real choice because their decision to enter into arbitration can be negated by social and economic disadvantages. In this regard, legitimizing arbitration 'may in fact facilitate coercion, threatening women's constitutionally protected equality rights.' See, Karin Baql, *Behind Closed Doors: How Faith-Based Arbitration Shuts Out Women's Rights in Canada and Abroad* (Montreal: International Center For Human Rights and Democratic Development): http://www.dd-rd.ca/site/_PDF/publications/women/arbrfaith.pdf, p. 4.
[64] Boyd, *Dispute Resolution,* p. 71.
[65] Ibid., p. 72.
[66] Ibid.
[67] Ibid., p. 73.

such arrangements.[68] According to the Boyd Report, the one area where the *Charter* actually pertains in the matter of arbitration is in the equal rights it provides both men and women to pursue ADR.[69]

Boyd's understanding of the *Charter* is based on its stated goals, that of protecting the individual from the abuses of the state. Meanwhile, many of the critics who opposed faith-based arbitration made it clear that they wished to impose more state control over people's lives by limiting the use of faith-based arbitration. In a rebuttal to individuals who have taken issue with religious arbitration, Boyd states that '[j]ust because we may disagree with the manner in which this alternative is used by some individuals does not mean we are allowed to deprive them of the right to use it...'[70]

Such a stance, in her view, is far too paternalistic.[71] According to Boyd, granting the government the power to restrict people's choices is clearly the sort of infringement the *Charter* seeks to avoid. As Boyd herself states: '[i]t is not clear to me that we should aspire to the level of state intrusion in our lives that is implied by the application of the *Charter* to privately ordered relationships.'[72] Based on these arguments, Boyd found that faith-based arbitration, including Islamic forms, were consistent with the *Charter* and thus, in her view, should continue to be used in the province of Ontario.[73] However, she did recognize that certain shortcomings when using arbitration in family matters needed to be addressed. Therefore, in her advocacy of arbitration, Boyd

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[68] *N.S. (AG) v. Walsh* [2002] 4 S.C.R. 325; *Miglin v. Miglin* [2003] 1 S.C.R. 303; *Hartshorne v. Hartshorne* [2004] 1 S.C.R. 550.
[69] Boyd, *Dispute Resolution,* p. 73.
[70] Ibid., p. 75.
[71] Ibid.
[72] Ibid., p. 76.
[73] Ibid., p. 133.

recommended that safeguards should be established before progressing further with private faith-based ADR.

In sum, Boyd put forward 46 recommendations that sought to enhance the process of arbitration.[74] Among the recommendations were legislative amendments that would ensure that those embarking on arbitration were made fully aware of the voluntary nature of their acts. Boyd also recommended that individuals seeking arbitration do so with independent legal counsel. Moreover, she suggested that arbiters be given training to ascertain whether people were coerced into private arbitration, as well as to detect whether a couple coming before them appeared to be in an abusive relationship. She further proposed programs bringing together government and cultural/religious communities in order to foster greater mutual understanding. The thrust of this particular effort would be to teach individuals the main principles of Canadian law as well as the options available to them under the *Arbitration Act.* Boyd also recommended that in order to provide effective government oversight, a standardized practice of keeping records of past arbitration hearings should be adhered to, thereby making it mandatory to submit to the province for review the outcomes of the panels. Finally, in order to safeguard those who use faith-based arbitration, Boyd suggested that the Government of Ontario should enact legislation that would effectively overturn harmful decisions that were rendered in bad faith.

Islamophobia and the Sharī'a Debate in Ontario

Prior to the release of the Boyd Report in December of 2004 and continuing immediately thereafter, various groups and individuals embarked on a media campaign

[74] Ibid., pp. 133-142.

criticizing the use of faith-based arbitration. The tone of the media blitz was marked by regular instances of Islamophobia on the part of those who stood against faith-based arbitration. The overall effect of the campaign led to public misinformation as to what Islamic law was and how it would function in the arbitration process. Before delving into some of the specifics of the debate, a definition of Islamophobia is in order. Although the term Islamophobia has been in use since the early 1990's, the Runneymede Trust, an independent British social policy agency that tracks issues related to cultural diversity, has offered a clear definition of the word. In a 1997 study, put together by a 20-person panel that included academics and representatives of various British Muslim organizations, the Runneymede Trust defined Islamophobia as an 'unfounded hostility towards Islam.'[75] The group further maintained that there exist two general perspectives Western audiences entertain when relating to Islam, which the Runneymede Trust labeled as 'open' and 'closed.' An 'open' perspective holds that Islam is diverse, interacts with other world traditions, is open to change and is regarded as a genuine religion, 'practiced sincerely by it adherents.'[76] An Islamophobic or 'closed' understanding maintains that Islam is monolithic, static, and impervious to change. A 'closed' perspective also holds that the tradition is incapable of coping with modernity and regularly resorts to violence as a means of offsetting change. The latter characterization of Islam is one that closely resembles the Orientalist discourse that has characterized academic (to a certain extent) and non-academic literature in the West. Individuals who have an Islamophobic perspective view the religion, as well as Islamic

[75] Runneymede Trust, "Islamophobia: a Challenge for us All," November (1997): http://www.runnymedetrust.org/publications/pdfs/islamophobia.pdf.
[76] Ibid.

societies, as inferior to Western culture and institutions. According to the Runneymede Trust, Islamophobia produces a hostility that serves to exclude Muslims from the mainstream, creating an atmosphere where negative views towards Islam are regarded as acceptable and normal.[77] During the media debates over the use of Islamic arbitration, both non-Muslims and Muslims alike regularly articulated Islamophobic arguments as a means of de-legitimizing Islamic ADR.

For instance, Natasha Fatah, a producer with the CBC, asked 'whose version of Shariah [sic] law are we going to accept? Afghanistan's? Where women are shrouded their whole lives. Saudi Arabia's? Where they cut off your body parts if you get caught stealing. Nigeria's? Where they'll stone you to death for committing adultery. These are extreme examples but they are the reality.'[78] This kind of statement, typical of the debate, served only to trivialize the issue by invoking the specter of violence. In a repeat of the Orientalist discourse, Fatah invokes violence as a way of discrediting certain sectors of the Muslim population in Canada who seek to use faith-based arbitration. Others have also chosen to deploy a tactic similar to this. Perhaps the most notable instance was a statement made by Sheila Copps, a former Member of Parliament. According to Copps, mixing 'religion and the law' would produce a 'Molotov cocktail that could blow up at any time.'[79]

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[77] Ibid.
[78] Natasha Fatah, "One Law for All," *CBC News Analysis and Viewpoint*, April 1st (2004): http://www.cbc.ca/news/viewpoint/vp_fatah/20040401.html.
[79] Sheila Copps, "Sharia Law is a Danger to Women," *National Post*, December 24th (2004): p. A22.

The International Center For Human Rights and Democratic Development (hereafter, Rights and Democracy), a non-partisan body set up by the Canadian federal government, came out strongly against the Boyd Report. Many of the criticisms Rights and Democracy expressed concerning the report were Islamophobic in nature. For instance, in a pamphlet published by the group entitled, *Behind Closed Doors: How Faith-Based Arbitration Shuts out Women's Rights in Canada and Abroad,* the author states that although 'the application of religious laws does not automatically mean that women's rights will be trampled on, in practice, they often are.'[80] No attempt was made to balance this statement - leaving the reader to assume that Islamic law has been misogynist throughout its history and will continue to be so in the future. Implicitly, Rights and Democracy is suggesting that gender relations emerging from the Muslim world are distinct in nature, and therefore incompatible with Western values. This view is typical of the closed perspective on Islam. Moreover, the rationale employed by Rights and Democracy is reductive; it appears to paint religion, particularly Islam, as the sole source of inequality for women while neglecting to mention that other sectors in Western society, such as business, education and government organizations, have also employed systemic forms of inequality.

The pamphlet's front-cover, depicting a frightened woman cowering behind a door, contributed to the kind of fear mongering that characterized the debate over the use of faith-based arbitration. The text of the pamphlet displayed a subtle kind of ethnocentrism in its tacit approval of Jewish and Ismā'īlī faith-based arbitration, while

[80] Baql, "Behind Closed Doors," p. 4.

denying the same privileges to the Muslim community. In making this assertion, Rights and Democracy failed to mention that the Ismā'īlī community is in fact a Muslim group. Also troubling, was the fact that in their rush to discredit Islamic arbitration, Rights and Democracy get certain facts wrong. In its support for Jewish and Ismā'īlī arbitration, the pamphlet maintained that 'the vast majority of cases handled by both [groups] are commercial disputes.'[81] As discussed above, the Boyd Report maintained that twenty-nine percent of the cases dealt with by the Ismā'īlī arbitration panels focused on commercial matters while sixty-three percent of the cases heard dealt with issues related to marriage and divorce. This kind of misinformation is very perplexing given the fact that Rights and Democracy is an organization set up by the federal government and thus capable of garnering for itself a great deal of credibility in the eyes of many.

Meanwhile, Rights and Democracy's understanding of Sharī'a is fundamentally flawed. In the pamphlet, they maintain that the Sharī'a is based on 'the Qur'ān and thousands of sayings of the Prophet Mohammed, collected more than two centuries after his death.'[82] In this statement, no account is made of the dynamism and flexibility regularly deployed by Muslim jurists during the pre-modern period. Rather, by stating that the Sharī'a represents a legal code that emerged more than a thousand years ago, the group provides an essentialist perspective that is akin to using classical Greek history to make generalizations about modern Greece. This perspective also fails to acknowledge that Islamic law became less flexible when it was codified in order to

[81] Ibid., p. 5.
[82] Ibid.

resemble modern European legal systems. Moreover, in line with the general Islamophobic trends found in the West, Rights and Democracy simply sought to portray the Sharī'a as a disorganized body of law. In their words, Islamic law 'can include codified and uncodified state laws and informal customary practices which vary according to the cultural, social and political context.'[83] This last statement suggests that the Sharī'a is in need of reform due to its seemingly chaotic nature. What Rights and Democracy fails to acknowledge is that this state of affairs is not unusual and that many legal traditions, including that of Common Law in Canada, operate under similar circumstances. It should be noted that *Behind Closed Doors* was put together with the help of individuals such as Alia Hogben of the CCMW, an individual who was quite vocal in her opposition to faith-based arbitration. Her voice and that of the group she represents certainly makes a valuable contribution to the overall debate. However, it appears that in establishing its position, no attempt was made by Rights and Democracy to consult with individuals or groups who supported the use of faith-based arbitration.[84]

Rights and Democracy's narrow perspective on faith-based arbitration appears to be out of step with its own declared goals. According to its mandate, the group seeks 'to support the participation of civil society and reinforce norms and mechanisms for the protection of human rights to influence governmental and intergovernmental bodies.'[85]

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[83] Ibid.
[84] Ibid. p. 2
[85] International Centre for Human Rights and Democratic Development, "What We Do," (Accessed September 12th 2006): http://www.dd-rd.ca/site/what_we_do/index.php?lang=en.

However, in its outright dismissal of the arbitration process, together with its skepticism concerning Islamic law, it appears to be ignoring an entire segment of Canadian civil-society; namely, the grouping that espouses a religious agenda. Yet, despite this, it selectively recognizes groups such as the CCMW that support its ideology on this matter, and although the group claims to be non-partisan, in reality, Rights and Democracy is clearly biased towards a discourse influenced by Islamophobia, and directed at the neo-imperialistic goals currently favored by the Canadian government, as evidenced in its military participation in Afghanistan.[86] Voices that called for the use of Islamic arbitration were not only disregarded, but Rights and Democracy took to labeling advocates of religious arbitration as 'fundamentalist.' According to their pamphlet, '[f]undamentalism is not a religious movement - it is a political one that seeks control over public and private life.'[87] This last statement not only denies the religious convictions of certain Muslims, who wish to establish faith-based arbitration, but also associates them with the specter of totalitarianism and discredits their contribution to a liberal society. In adopting the colonialist mindset, so pervasive in Canadian history, Rights and Democracy is attempting to manage the

[86] In a book published by Rights and Democracy and Women Living Under Muslim Laws, the authors put forward a neo-imperialist perspective. Specifically, in stating that human rights activists should 'argue for the provision of the CEDAW [Convention on the Elimination of All Forms of Discrimination Against Women], it should supersede national laws that do not meet even the minimal requirements of the Convention.' Societies should certainly make the transition to more equitable forms of gender relations. However, in order for these changes to be seen as authentic and effective, the move towards gender parity should originate from within the local cultures themselves, as opposed to being imposed on them by non-local forces. See, Jan Bauer and Anissa Hélie, *Documenting Women's Rights Violations by Non-State Actors.* (Canada: International Center for Human Rights and Development and Women Living Under Muslim Laws, 2006): p. 36.

[87] Baql, "Behind Closed Doors," p. 5.

diversity they see in their own midst by portraying Islamic law as outdated, inflexible, and misogynist.

Other critics of faith-based arbitration also adopted the Islamophobic doctrine in making the case against faith-based arbitration. According to some of these opponents, the call for faith-based arbitration was a dangerous ploy that sought to implement 'sharia [sic] by stealth.'[88] Tarek Fatah, a spokesperson for the MCC, writing in the *Toronto Star*, suggested that allowing Muslim groups to embark on arbitration would permit 'the extreme ideological agenda' of certain Muslim-Canadians to implement a value system that is 'antithetical to the Constitution and Canadian values.'[89] This statement, similar to those made by Rights and Democracy, suggests that Islamic values are incompatible with Canadian norms. This Islamophobic tone was also articulated by one of the most vocal voices against the use of religious arbitration, Homa Arjomand, the coordinator of the International Campaign against Sharia Court in Canada (hereafter, The International Campaign). According to Arjomand, the attempt to implement Islamic arbitration in Canada is 'part of a global move and it is a serious threat. It is pushed forward by the leaders of political Islam. They need validation, recognition and power from the governments of the West.'[90] In making this claim, there is no attempt to identify the proponents of 'political Islam.' Regardless of this omission,

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[88] Rita Trichur, "Muslims Divided over whether Shariah Belongs in Ontario Arbitration Law," *Canada.com News,* August 22nd (2004): http://www.muslimcanadiancongress.org/20040822.pdfsearch=%22shariah%20by%20stealth%22.

[89] Tarek Fatah, "Don't Succumb to Imams, Rabbis and Priests," *Toronto Star,* June 22nd (2005): p. A.15.

[90] Homa Arjomand, "Speech at the Second Annual International Demonstration against Sharia/ Faith Based Courts in Canada," Toronto, September 8th (2005): http://www.nosharia.com/Speech%20Sep805final.htm.

Arjomand believes that there is a direct link between government recognition of religion and instances of terror perpetrated by extremists. Throughout her time spent in the media spotlight, Arjomand displayed a uniform distaste for Islam and for its role in the public domain. Quoting her at length captures this bias:

> Religion is penetrating our justice and education systems. There are attempts to replace the teaching of evolution with nonscientific and untested religious interpretations of the world. Two months ago, the Agha Khan, the leader of a religious sect, received 30 million dollars from Prime Minister Paul Martin to promote religion and backward culture. In election campaigns, candidates appeal to religious leaders for votes instead of to citizens. Given the above, how can anyone still wonder why terrorism is growing?[91]

Although the dramatic rise in violence perpetrated under the banner of religion is certainly a concern for societies around the world, Arjomand's linking of terrorism and the Agha Khan Foundation is especially problematic. The centre she refers to is an organization whose mission is to 'promote pluralism as a fundamental human value and a foundation for good governance, peace and human development.'[92] Arjomand consistently warned against the danger of allowing religion to make further inroads into Canadian society. In her view, Muslim women who have recently immigrated to Canada do not know their rights under Ontario's family law system. According to Arjomand, it is often these women who are forced by their families into Islamic arbitration. Speaking from her experience as a translator for abused women in Toronto, Arjomand maintains that when forced into religious arbitration, the tribunals will 'give them no choice but to

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[91] Arjomand, "Secularism Now: Modern and Progressive Social and Cultural Norms," June 24th (2005): http://www.nosharia.com/Secularism%20Now.htm.

[92] Office of the Prime Minster, "Government of Canada Welcomes the Establishment of the Global Centre for Pluralism in Ottawa," April 18 (2005): http://www.news.gc.ca/cfmx/view/en/index.jsp?articleid=139129&keyword=pluralism+&keyword=pluralism+&.

be obedient or attempt suicide.'[93] In the current political climate of terror and insecurity, linking Muslims and suicide is an effective rhetorical device. These sorts of statements are not only difficult to corroborate, but feed on society's fears by linking religious convictions with extremism. In a repetition of some of the most flagrant excesses of Orientalist ideology, individuals such as Fatah and Arjomand cast Islam as an exotic and violent tradition and, by extension, portrayed the Sharī'a as an outdated legal system.[94]

Support for Islamic ADR

Amid the voices that stood in opposition to faith-based arbitration were the organizations and individuals who supported the continued use and expansion of religious ADR. The *Globe and Mail's* editorial board, for instance, countered numerous opinion pieces published in its own paper, in maintaining that banning faith-based arbitration was a threat to people's freedom of religion under the *Charter.* Furthermore, it stated that denying individuals the ability to address their concerns via faith was both impractical and dangerous. The editorial board argued that some people place a great deal of importance on religious ceremonies when they get married and wish to see their marriages dissolved according to their faith. The *Globe* also pointed out that these individuals would not only continue to use faith-based arbitration in these matters, but would do so while signaling a readiness to 'willingly give up their rights.'[95] However, unlike a *regulated* system, which would conceive of faith-based arbitration as being

[93] Boyd, *Dispute Resolution,* p. 54.
[94] Ironically, one of the most vocal proponents of faith-based arbitration, Mubin Shaikh, an arbiter himself, was also a paid informant for the Canadian Security and Information Service (CSIS). Shaikh came into the national spotlight for helping to secure the arrest of 17 Ontario men who were allegedly plotting to execute a number of terror plots in the province. See Sonya Fatah and Greg McArthur, "The Making of a Terror Mole," *Globe and Mail,* July 14th (2006): p. A1.
[95] *Globe and Mail,* "Muslim Arbitration: Don't Ban, Supervise," September 9th (2005): p. A. 16.

accountable, as suggested by the Boyd Report, non-regulated arbitration panels might in fact offer rulings that are contrary to Canadian values, and could severely harm the interests of vulnerable members of society. The editorial board maintained that '[b]ringing Muslim tribunals under the Arbitration Act is a way of demanding fairness and adherence to Canadian norms, in return for inclusion.'[96] Finally, the *Globe* pointed out that a 'creeping fundamentalism among the secular' was influencing the government's decision as to whether to allow for the continued use of faith-based family arbitration.[97]

Another supporter of religious ADR was Anver Emon, an Assistant Professor at the University of Toronto.[98] Mirroring the concerns of the Boyd Report, Emon feared that unregulated arbitration panels would offer no safeguards to women who chose or were forced into using services that he labeled as 'informal back-ally mediations.'[99] His wording here is very significant. By invoking language used by pro-abortion activists in the past, namely the phrase 'back-ally,' Emon appears to be reaching out to progressive minded individuals by reminding them of the dangers of unofficial and unregulated medicine. Often, individuals who espouse a progressive worldview alienate religion from public discourse owing to their perception that faith interferes with individual

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[96] Ibid.
[97] Ibid.
[98] According to Homa Arjomand, the hiring of Emon and another professor, Mohammad Fadel, to teach courses in Islamic law at the University of Toronto was a 'green light for sharia [sic]' to operate within Ontario. Alia Hogben also voiced concern over the hiring of these two academics, believing that such a move could in fact 'make inroads' toward the use of Islamic arbitration. See Boyd Erman, "Islamic Law Course Hears Opening Arguments," *Globe and Mail,* August 6th (2005): p. M3.
[99] Anver Emon, "A Mistake to Ban Sharia," *Globe and Mail,* September 13th (2005): p. A.21.

autonomy and liberty.[100] However, the narrowness of this way of thinking serves to endanger the women who seek religious arbitration. Emon maintains that by closing the door on a recognized form of arbitration, individuals may have access to unofficial arbitration services instead. Therefore, according to Emon, women could fall prey 'to the machinations of bad-faith husbands, uneducated imams [sic], and patriarchal traditions if they wish to remain a part of their community.'[101] Allowing for faith-based arbitration in a regulated format would not only offer certain safeguards but could even create an opportunity for Muslims living in Canada to take up the time-honored tradition of reformulating the Sharī'a, which would reflect 'the spirit of Islamic law and the values they hold as Canadians.'[102] For the most part, this kind of discourse was greatly lacking in the debates that surrounded arbitration. Rather, Emon pointed out that the media campaign in Ontario was one characterized by 'anti-sharia [sic] activists who reduced the discourse to Islamophobic political sloganeering.'[103]

CAIR-CAN also offered a more nuanced position on the matter, which avoided the pervasive Islamophobia that characterized much of the debate. For instance, the issue of the qualifications of the arbiters was a point CAIR-CAN frequently raised. In its submission to the Boyd Report, the group strongly advocated for the use of accredited arbiters who were trained in Islamic legal discourse but, even more importantly, in

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[100] Kenneth D. Wald, Adam L. Silverman and Kevin S. Fridy, "Making Sense of Religion in Political Life," *Annual Review of Political Science,* vol. 8, June (2005): pp. 121-143.
[101] Emon, "A Mistake to Ban" p. A. 21.
[102] Ibid.
[103] Ibid.

Canadian law.[104] The demand for such arbiters was to avoid what Sheema Khan, the group's spokesperson, characterized as 'too many unqualified, ignorant imams [sic] making *back-alley* pronouncements on the lives of women, men and children.'[105] Furthermore, CAIR-CAN had no illusions that Muslims would stop using faith-based arbitration; rather, it was quite adamant that the practice would continue. Recognizing that some 'Muslim women are ignorant about their own rights within Islam, schooled instead in cultural misogyny,' their position was one of reforming the unregulated system of underground arbitration by way of legitimizing the process through government oversight.[106] On the whole, the Boyd Report accepted this view; but apart from a few notable exceptions, such as the *Globe and Mail's* editorial board, it was mostly ignored. Finally, in lamenting the unsavory nature of the debate, Khan pointed out that 'sharia –phobia [sic] has skewed the debate over Ontario faith-based arbitration to such a frenzied level that lies were perpetuated as facts, paranoia as patriotism. Just as the neo-conservative lobby peddled the bogus threat of Iraqi WMDs [weapons of mass destruction], our own neo-secularists (including several Muslims) brazenly peddled Muslim family law as an existential threat to Western liberal democracy. As in the case

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[104] Canadian Council on American Islamic Relations-Canada, "Review of Ontario's Arbitration Process and *Arbitration Act,*" August 10 (2004): http://www.cairan.ca/downloads/sst-10082004.pdf, p.6.
[105] Sheema Khan, "The Sharia Debate Deserves a Proper Hearing," *Globe and Mail,* September 16th (2005): p. A.20. Italics added for emphasis.
[106] Ibid.

with Iraq, the audience was a fearful public ready to accept its own biases coupled with sensational media accounts.'[107]

Throughout the debate, the majority of the public appeared to be pitted against the use of Islamic arbitration. A joint Environics/CROP poll, conducted during the latter half of September 2005, found that sixty-three percent of Canadians opposed the use of Islamic arbitration. Although some have charged that a double standard was in effect in regard to Islamic arbitration,[108] the same Enviroics/CROP poll found that sixty-three percent of those polled voiced their opposition against *all* forms of faith-based arbitration.[109] In the end, the Boyd Report, despite its advocacy of faith-based arbitration, hinted that the government would adopt a 'paternalistic' stance on the matter.[110] Speaking on the issue of where the government should draw the line in limiting its powers, Boyd concluded that this line 'is constantly in flux, its location the result of the ongoing dialogue between the government, the public and the courts.'[111]

Banning Family Faith Based ADR and its Effects

Following the public outcry that erupted in Ontario over the use of religious arbitration, Premier McGuinty decided to impose an outright ban on *all* forms of family religious arbitration. On September 11th 2005, McGuinty phoned a representative of the Canadian Press and stated that 'I've come to the conclusion that the debate has gone on

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[107] Ibid.
[108] Mohamad Elmasry, "Why was Shariah not Treated like Halachah?" *Canadian Islamic Congress Opinions and Editorials*, September 30th (2005): http://www.canadianislamiccongress.com/ar/opeds.php?id=2531.
[109] Norma Greenaway, "63 Percent Oppose Faith-Based Arbitration," *Ottawa Citizen,* October 31st (2005): p. A.3.
[110] Boyd, *Dispute Resolution,* p. 76.
[111] Ibid.

long enough. There will be no sharia [sic] law in Ontario.'[112] McGuinty went on to say that '[t]here will be no religious arbitration in Ontario,' rather '[t]here will be one law for all Ontarians.'[113] Shortly thereafter, his government began the process of executing legislative changes to the *Arbitration Act* that effectively barred the use of faith-based arbitration in all family matters.[114] These changes, which were put forward in the *Family Statute Law Amendment Act* of 2005, stipulated that all family disputes be settled 'only under Canadian law' and that 'resolutions based on other laws and principles – including religious principles – would have no legal effect and would amount to advice only.'[115] Despite this ban, binding religious arbitration is still permitted so long as the matters in question are not related to family law. The move to outlaw family based arbitration confirms Kymlicka's assertion that liberal society will not accept certain group-differentiated rights for cultural and religious communities. Furthermore, as Abu-Laban and Stasiulus contend, Canadian multiculturalism is one that seeks to de-legitimize real diversity in favor of creating a homogenized citizenry. This should not come as a surprise, as the move to ban faith-based arbitration falls in line with Trudeau's vision of multiculturalism – a unifying policy designed to bind

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[112] Colin Freeze and Karen Howlett, "McGuinty Government Rules out use of Sharia Law," *Globe and Mail,* September 12 (2005): p. A1. This statement lends itself to the general confusion surrounding the matter. Islamic arbitration would not apply Sharī'a law, a point seemingly missed by the Premier.
[113] Ibid.
[114] *Arbitration Act*, sec. 32 (3) and (4).
[115] Ontario Ministry of the Attorney General, "Backgrounder: the Family Statute Law Amendment Act, 2005," November 15 (2005): http://www.attorneygeneral.jus.gov.on.ca/english/news/2005/20051115-arbitration-bg-EN.pdf.

diverse elements of Canadian society closer together by downplaying their substantive concerns and differences.

Although the decision delighted groups such as the MCC, CCMW, and the International Campaign, the move could potentially put certain Muslim women in danger. Underground arbitration and mediation performed by unqualified arbiters is not only currently taking place, but will in all likelihood continue. The rulings made in these panels, which are not open to public scrutiny or any system of public monitoring, could very well produce decisions that would limit certain benefits women are entitled to under Canadian law. Because of the closed nature of these underground hearings, it is impossible to estimate how often they occur or the nature of their rulings. However, the following case, detailed in the pages of the *Globe and Mail,* may shed some light on the dangers of unregulated 'back-alley' Islamic conflict resolution currently taking place in Canada.[116]

In this particular case, an Ontario woman who the *Globe* identified as Shinaz (her real name was concealed) obtained a civil divorce from the Province of Ontario after her husband had abandoned her and returned to his native South Asia to marry another woman. Shinaz and her ex-husband, who had one child together, frequently argued during their marriage and there was at least one incident of reported conjugal violence prior to his departure. Four years following their official divorce, Shinaz, hoping to re-marry within the Muslim community, sought a religious divorce from a local mosque. The type of divorce she was requesting was a *faskh,* whereby the wife requests a court-

[116] Marina Jiménez, "A Muslim Woman's Sharia Ordeal," *Globe and Mail,* August 9th (2005): p. A.1

granted divorce from a judge. This divorce would however be purely symbolic given that she had previously obtained an Ontario civil divorce.

Under the guidance of the mosque's *imām*, she was initially advised to offer her ex-husband '$100,000 and all her gold jewelry' in return for his granting of the divorce. Although the sum was eventually reduced to $5,000, Shinaz agreed to the *imām's* recommendation that she 'must give a little to get something.'[117] In this case the 'judge' was an *imām*, who, for whatever reason, appeared to be extorting money and jewelry from Shinaz on behalf of her former husband. What is also troubling in this case is that the same *imām* advised her to give up her right to alimony payments (her husband owned a business in South Asia) as well as the child support payments she was entitled to and granted under Canadian law. Assuming that the *Globe and Mail* was correctly reporting on the matter, this case clearly demonstrates the dangers of obtaining unregulated and unqualified advice from an *imām*.

Although Shinaz had access to legal council in obtaining her Ontario civil divorce, she appears to have gone to the mosque without the aid of a lawyer. Rather, she relied exclusively on the assistance of her male relatives in negotiating the terms of the divorce with the *imām*. It is difficult to imagine a lawyer, representing their client's interests, forfeiting alimony payments and child support in this particular case. If the Ontario government had accepted the recommendations of the Boyd report, such a scenario may not have occurred, in part because Shinaz would have had the assistance of a lawyer during her arbitration process. Moreover, under the recommendations of the

[117] Ibid.

Boyd Report, the *imām* would have received a minimum amount of training informing him of the rights and duties inherent in Canadian divorce settlements.

The Ontario government's decision to ban faith-based arbitration may have preserved the basis of that province's adherence to secular and liberal principles, but to argue that women's interests would accordingly be preserved would be to fall prey to the notion that unofficial arbitration will disappear altogether. On the contrary, some individuals will continue to seek Islamic arbitration owing to its traditional role within the Muslim world, and in accordance with their view that the secular legal system lacks the legitimacy to deal with their particular concerns. However, by taking matters into their own hands and seeking out underground forms of arbitration, participants may in fact deny themselves certain rights and privileges they are entitled to under Canadian law.

Aly Hindy, the outspoken *imām* at the Salaheddin Mosque of Toronto, has made it abundantly clear that he will knowingly participate in activities that are contrary to Canadian law. In an interview he gave to *Chatelaine* magazine, he claims that '[t]he Qur'an [sic] says a man is limited to four wives. Canadian Law doesn't allow it - God does, so I marry them myself...If your wife doesn't like sex, you can take another wife.'[118] Ontario's ban on religious arbitration only covers the enforceability of decisions made in ADR panels. Although binding arbitration is no longer permitted in family matters, individuals can still access arbiters and mediators. In other words, there is no way of stopping individuals from seeking the advice offered by Aly Hindy. Nor is there a way of recording, regulating and canceling decisions that contravene Canadian

[118] Sally Armstrong, "Criminal Justice," *Chatelaine*, November (2004): p. 152.

laws and values. With no available form of government monitoring, and no effective means of registering any decisions that are made, the government of Ontario has effectively jettisoned the protection of women's interests in order to score political points with the electorate. This capitulation to societal pressures occurred in the wake of a media debate characterized by high levels of fear mongering, paranoia, sensationalism and Islamophobia. In this context, the integrative potential of a joint-governance model of justice was thwarted.

The contemporary Italian philosopher Giorgio Agamben has pointed out that certain individuals in Western societies are ostracized from the general population and denied rights that other citizens automatically enjoy. According to him, these individuals become '*homo sacer*,' a term he borrows from Roman law, which designates someone who, although recognized by the state, is not *protected* by the laws of the state. In Agamben's words, '[h]e who has been banned is not, in fact, simply set outside the law and made indifferent to it but rather *abandoned* by it, that is exposed and threatened on the threshold in which life and law, outside and inside, become indistinguishable. It is literally impossible to say whether the one [who] has been banned is outside or inside the juridical order.'[119] Agamben characterizes individuals held in refugee detention centers throughout Europe, as well as the 'enemy combatants' held by the American government, as *homo sacer*, individuals who are recognized by the law, yet not protected by it. Many of these people happen to be Muslims. Certain Muslims in

[119] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998): pp. 28-29.

Canada, who (for whatever reason) seek Islamic arbitration, have now been abandoned by the state. By subjecting themselves to unofficial forms of arbitration, which may be detrimental to their interests, they qualify as Canada's *homo sacer*. By its calculated act of omission, the Ontario government, to the delight of many, has left these individuals at the mercy of untrained *imāms* while their bizarre rulings fly in the face of Canadian law. Rather than endorse a joint governance model of justice, whereby the state brings into its fold its minority concerns, the politicians, fearful of a public backlash, have opted for the arbitrary decision of banning all forms of religious family arbitration.

Underlying the debates against the use of Islamic arbitration is the notion that Western society should be guided exclusively by the ideals of secular liberalism. When the critics of faith-based arbitration portrayed the Sharī'a as illogical, irrational and inflexible, they knowingly or unknowingly placed themselves within an Islamophobic discourse that has always been very much in line with traditional liberal attitudes towards diversity. As we have seen, liberalism is not a neutral project; rather, as Taylor pointed out, it is a 'fighting creed.' Since the time of the Enlightenment, liberalism has sought to foster 'personal autonomy, rational deliberation and civility.'[120] However, at its core, liberalism remains wedded to the idea of eliminating substantive differences in order to bring about these goals. Stanley Fish has questioned the neutrality of liberal societies. For Fish, liberalism is a form of *faith,* which has 'managed, by the very partisan means it claims to transcend, to grab the moral high ground, and to grab it from

[120] Stanley Fish, "Stanley Fish Replies to Richard John Neuhaus," *First Things,* February (1996): p. 39.

a discourse – the discourse of religion – that held it for centuries.'[121] This new religion does not rely on a God or gods as its source of authority; rather, the primary mover for liberalism is human reason, putting it (seemingly) at odds with religious faith. According to Fish, liberalism 'can only "cherish" religion as something under its protection; to take it seriously would be to regard it as it demands to be regarded, as a claimant to the adjudicative authority already deeded in liberal thought and reason.'[122] This rationale seems to have been at play in the decision to ban faith-based family arbitration in Ontario.

The proponents of Islamic faith-based arbitration, especially the IICJ, were clearly unprepared to provide the effective services that they had advertised, as evidenced by the lack of accredited experts amongst their ranks, as well as by the contradictory messages they put forward in their literature. It is fair to say that although, on principle, the use of Islamic faith-based arbitration appears to be a valid concern, practically speaking the institutional scope and depth required to put such a program in place is currently lacking. Meanwhile, Ontario's ban will not deter individuals from seeking faith-based arbitration via unofficial channels. Rather, the ban will simply leave individuals vulnerable to unregulated arbitration. Although the Boyd Report made it clear that this scenario would harm women in particular, the government and the public, inspired by Islamophobic, media-fueled rhetoric, demanded an all too predictable

[121] Stanley Fish, *There is no such thing as Free Speech* (New York: Oxford University Press, 1994): p. 138.
[122] Ibid., p. 135.

recourse to a form of multiculturalism that seeks to silence real diversity and substantive differences in favor of cultural homogeneity.

Chapter 7
Islamic Marriage and Divorce in Canada

Despite the failure to implement Islamic arbitration panels in Ontario, cases dealing with the Sharī'a have, and will continue to, appear before Canadian courts. They include, but are not limited to matters relating to the capacity to marry, the *mahr,* the validity of an Islamic marriage contract, and divorce. This chapter will argue that applying Islamic law in Canada is functionally difficult. What will become evident throughout this survey is that the provisions found in the Muslim world concerning marriage and divorce frequently violate Canadian law on structural and procedural grounds.

Before assessing why many of these laws cannot be accepted in Canada, it should be noted that marriages and divorces that have been confirmed in foreign countries will be recognized in certain cases following formulas established by conflict of law provisions within private international law.[1] For instance, in Subsection 1 (2) of the Ontario *Family Law Act,* a polygamous spouse is defined as someone who is in 'a marriage that is actually or *potentially polygamous,* if it was celebrated in a jurisdiction whose system of law recognizes it as valid.'[2] This permits a polygamous partner living in Ontario access to the same rights enjoyed by non-polygamous individuals in matters such as divorce, child custody, and inheritance. Despite these rights, under Section 293 of Canada's *Criminal Code,* it remains illegal to *enter* into a polygamous marriage in the

[1] The manner in which marriage and divorce in Canada is regulated deserves some comment. Because of the federal structure of the country, legislation covering marital affairs is split between the provinces and the federal government. The celebration of marriage is a provincial concern as each province has its own legislation that covers who can be married and who can solemnize marriage ceremonies. Meanwhile, substantive legislation governing divorce is controlled by the federal government. Payne and Payne, *Canadian Family Law*, pp. 19-23.

[2] Italics added for emphasis.

country due to the bigamous nature of the act. Thus, although some principles of Islamic marriage and divorce can be *recognized* in Canada if they were solemnized in a foreign jurisdiction, initiating practices such as polygamy and *ṭalāq* divorces would violate Canadian law.

In what follows, some Islamic regulations governing marriage and divorce will be compared to examples from Canadian law. Far from exhaustive, this survey seeks to demonstrate some of the differences between the two systems. These disparities include the following: 1) the legal violations pertaining to matters of equality that would occur when applying certain principles of the Sharī'a in Canada; 2) the procedural differences in approaches to marriage and divorce; and 3) the desire by members of Canada's cultural elite to maintain social cohesion through a unified code of law that is predicated on liberal values. For matters of simplicity, three Canadian legal systems will be used in the following comparison. They include Quebec's *Civil Code*, the federal government's *Divorce Act*, and Ontario's *Marriage Act*. As well, some United Nations conventions concerning equality and marriage will be discussed to further shed light on Canada's position at the international level.

Violations of Equality

The most obvious difference between the Islamic and Canadian systems of personal status law revolves around matters of equality between the sexes and the rights of children. For instance, although the Qur'ān provided women in seventh century Arabia with new-found status, the text clearly prioritizes men over women.[3] For instance in one

[3] Leila Ahmed has argued that there is a fissure between the spirit of the Qur'ān and the manner in which male jurists in the early period of Islamic history applied family law. While the former advocates a form of spiritual equality, the latter have maintained the cultural inequalities that were prevalent during pre-

verse, the Qur'ān states that 'Women have rights similar to those [men] over them; while men stand above them.'[4] It is important to point out that while this verse suggests a clear gender division, social history has demonstrated that the distinction between the sexes was more fluid than the text of the Qur'ān would suggest. However, when Islamic law was codified during the modern period, the social nuances which gave women certain privileges were replaced by rigid legislation that reflected a literal interpretation of the Qur'ān. For instance, the relative ease with which women living in seventeenth century Egypt had in accessing divorce vanished following the codification of Islamic family law in Egypt. Thus, owing to verses such as the one quoted above, women's roles have become fixed at levels subordinate to men.

This being said, not all countries with large Muslim populations have maintained structural inequalities in relation to gender. In the 2001 reforms of Turkey's *Civil Code,* the original provisions set out in 1926 which maintained that the husband was 'the head of the household' (Article 152) has been amended by Article 186, which states that 'the spouses shall manage the household together.' These reforms have come about in Turkey due to a number of factors, least of which was Turkey's process of secularization. Furthermore, the active participation of a highly motivated feminist movement that has been pushing for full equality since the 1960's as well as the move to harmonize Turkey's laws with those of the Continent in anticipation of the country's

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Islamic history. According to Ahmed, the male-dominated jurists, or 'establishment Islam' as she calls them, represent a form of religion that is 'authoritarian, implacably andocentric, and hostile to women.' See Leila Ahmed, *Women and Gender in Islam* (New Haven: Yale University Press, 1992): p. 225.

[4] It should be noted that values emanating from the West that call for full parity between men and women are not always welcome by some neo-conservative Muslim women. These Muslim women articulate the demands for rights using the discourse of a more literalist interpretation of the Qur'ān while others call for a full reinterpretation of the faith in order to provide a basis for full equality based on the Western

entry into the European Union have also contributed towards the equal status of men and women in Turkey.[5]

Other Muslim countries have not adopted such principles despite signing international treaties such as the 1981 *Convention on the Elimination of All Forms of Discrimination Against Women.* For instance, although Morocco has signed this document, that country's definition of marriage, as discussed earlier, declares that a family is 'under the patronage of the husband.' Furthermore, the Tunisian *Code of Personal Status*, which recently underwent a number of reforms in 1993, declares in Article 23 that '[l]e *mari, en tant que chef de famille*, doit subvenir aux besoins de l'épouse et des enfants dans la mesure de ses moyens et selon leur état dans le cadre des composantes de la pension alimentaire.' In Canada, such clear statements prioritizing men over women would constitute violations of Section 15 of the *Charter* which determines that '[e]very individual is equal before and under the law...' In Quebec, Article 392 of the *Civil Code* states that 'spouses have the same rights and obligations in marriage.' Similarly, Article 393 of the same code maintains that, 'both spouses together take in hand the moral and material direction of the family, exercise parental authority and assume the tasks resulting therefrom.'

Gender inequalities are also found in other provisions related to Muslim marriage and divorce in use in various Muslim societies. For instance, in many Muslim jurisdictions, the number of witnesses that are required to be present at a marriage

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model. See Rebecca Foley, 'Muslim Women's Challenges to Islamic Law: the case of Malaysia' *International Feminist Journal of Politics,* March (2004): p. 59.

[5] Margo Badran, 'Two Heads are Better than One,' *Al-Ahram Weekly Online,* 7th-13th March (2002): http://weekly.ahram.org.eg/2002/576/fe4.htm. These reforms in the law do not always trickle down into the public sphere. For a review of the state of women's rights in Turkey see Deniz Kandiyoti,

ceremony is determined by their sex. Meanwhile, traditional Islamic law allows Muslim men to marry Jews and Christians, while the same right is not extended to Muslim women. The principle for upholding this unequal schedule of rights is the notion that religion is passed on through the lineage of the father. Therefore, to avoid losing offspring to other religions, Muslim women are denied the right to marry outside their faith. Furthermore, while the option of polygamy is made available to men in some Muslim societies, women cannot marry more than one man at a time. Meanwhile, women undergoing divorce are required to remain chaste during the *'idda* period, while their husbands are free to engage in sexual activity. Finally, the notion that women can not declare a unilateral *ṭalāq* while men can, clearly demonstrates a differentiation of male and female roles within Islamic laws of personal status in various states that practice modern forms of Islamic family law.

Beyond the obvious disparities associated with different conceptions of rights between men and women, Islamic and Canadian laws differ on the rights of children. As discussed earlier, many Muslim countries such as Syria, Tunisia and Morocco have stipulated a particular age at which an individual is free to enter into a marriage without needing consent. Such provisions are certainly in line with Canadian laws. However, in some regions of the Muslim world, arranged marriages of minors not only occur, but also are valid so long as consummation takes place after the child reaches puberty. Although a guardian or *walī* can compel either a boy or a girl to marry, in most cases

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"Emancipated but Unliberated? Reflections on the Turkish Case." *Feminist Studies,* vol. 13 (1987): pp. 317-338.

this practice affects girls.[6] For instance, both Bangladesh and Pakistan permit guardians to contract their daughters into marriage without their child's consent. However, according to Section 2 (vii) of the Pakistani *Dissolution of Muslim Marriages Act,* these girls can seek annulments before the courts through the so-called 'option of puberty' if they have not voluntarily consummated their union with their husband.[7] Canadian law, as well as international treaties signed by Canada do not sanction marriages of this kind. For instance, in Quebec's *Civil Code*, Article 10 states that '[e]very person is inviolable and is entitled to the integrity of his person. Except in cases provided for by law, no one may interfere with his person without his free and enlightened consent.' On the international scene, Canada has agreed not to permit arranged under-aged marriages based on Canada's signing of the 1965 United Nations *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage.* Principle 1(a) of this document states that '[n]o marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person, after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.'[8] Finally, the 1981 *Convention on the Elimination of All Forms of Discrimination Against Women* clearly states in Article 16 (1.b) that men and women equally have the right to 'choose a spouse and to enter into marriage only with their free and full consent.' Thus the different roles ascribed to men,

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[6] Poulter, *Ethnicity Law and Human Rights,* p. 218.

[7] Case law from the Subcontinent shows that judges are willing to grant annulments for these marriages even if consummation has occurred. For instance in cases where it can be proven that consummation was forced on the woman, courts have often voided the marriage. See Sara Hossain and Suzanne Turner, 'Abduction for Forced Marriage- Rights and Remedies in Bangladesh and Pakistan,' *International Family Law,* vol. 15 (2001): p. 17.

[8] *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage,* G.A. res. 2018 (XX), 20 U.N. GAOR Supp. (No. 14) at 36, U.N. Doc. A/60141 (1965).

women and children make the application of Sharī'a in Canada a difficult proposition given the structural violations such activities would provoke in the law.

Procedural Violations

Procedural differences between the two legal systems also stand in the way of the use of Islamic law in Canada. As discussed earlier, marriage by proxy is a feature found within the Islamic tradition. Meanwhile in all Canadian jurisdictions both members of a couple are required to be present at the time of the marriage. For instance, Article 365 of the *Civil Code* of Quebec states that '[m]arriage shall be contracted openly, in the presence of two witnesses and before a competent officiant.' Later in Article 374 of the *Civil Code*, officiants are asked to confirm 'from each of the intended spouses personally, a declaration of their wish to take each other as husband and wife. He then declares them united in marriage.' Meanwhile, Section 25 of the *Ontario Marriage Act* states that '[e]very marriage shall be solemnized in the presence of the parties and at least two witnesses who shall affix their names as witnesses to the entry in the register....'[9]

In matters relating to divorce, procedures for dissolving a marriage found within the Sharī'a will also have great difficulty finding acceptance in Canada. For instance, the principles, found in some Muslim countries today, that allow men to initiate a divorce without registering it with the civil authorities would contravene Canadian law. Section 3 (1) of the Canadian *Divorce Act* states that '[a] court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in

[9] *Marriage Act*, R.S.O. 1990, c. M.3, section 25.

the province for at least one year immediately preceding the commencement of the proceeding.' Meanwhile, Section (7) of the same act maintains that 'The jurisdiction conferred on a court by this Act to grant a divorce shall be exercised only by a judge of the court without a jury.' [10]

In a traditional Islamic *ṭalāq* divorce, the wife is able to claim the un-paid portion of her *mahr*. However, in cases where the woman exercises her right to a *khul',* this sum may be forfeited at the husband's behest in order to put the divorce into effect. Such a procedure entailing a financial sacrifice by the woman would not be acceptable in Canada on a number of grounds, the least of which is the fact that the Canadian *Divorce Act* gives the courts the power to determine the amount of compensation following the dissolution of a marriage. According to Section 15.2 (1) of the federal *Divorce Act,* '[a] court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.'[11]

Maintaining Social Cohesion

Another reason that principles of Islamic law would have difficulty finding acceptance in Canada is that the Sharī'a represents a threat to the formation of a cohesive Canadian society held together under a unified legal system based on liberal values.[12] In this regard, the province of Quebec has recently taken dramatic steps

[10] *Divorce Act*, R.S., 1985, c. 3 (2nd Supp.).
[11] Ibid.
[12] Poulter, *Ethnicity Law and Human Rights*, p. 211.

towards curtailing any appearance of Islamic law within that province. In a vote taken in the National Assembly in May of 2005, the house unanimously passed a motion forbidding the use of Sharī'a in Quebec. This vote re-confirmed a preexisting ban on ADR in matters related to personal status that is covered in article 2639 of the *Civil Code.*[13] One of the reasons cited by members of the provincial legislature for curtailing any use of Islamic law in Quebec was the fear that by endorsing such a system, Muslims would find themselves segregated from the general population.[14] According to one Liberal member of the legislature who was instrumental in pushing through the vote, Fatima Houda-Pepin, '[t]he application of sharia [sic] in Canada is part of a strategy to isolate the Muslim community, so it will submit to an archaic vision of Islam.' She further maintained that '[t]hese demands are being pushed by groups in the minority that are using the Charter of Rights to attack the foundation of our democratic institutions."[15] Interestingly, like her counterparts in Ontario, Houda-Pepin's understanding of Islamic law was deeply flawed, a fact born out in the speech she delivered in the National Assembly prior to the vote.[16] In her opinion the Sharī'a

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[13] According to Section 2639 of the *Civil Code,* '[d]isputes over the status and capacity of persons, family matters, or other matters of public order may not be submitted to arbitration.' *Civil Code of Quebec,* S.Q. 1991, c 64. (C.C.Q.).

[14] Fatima Houda-Pepin, "Tribunal islamique – Implantation – Motion sans préavis," Assemblée National, Cahier no. 156, May 26th (2005): pp. 8716-8718.

[15] Canadian Press, "Quebec Rejects the Sharia System," *Globe and Mail,* May 26th (2005): http://www.theglobeandmail.com/servlet/story/RTGAM.20050526.wsharia0526/EmailBNStory/National/.

[16] Houda-Pepin's speech, repeats some of the Islamophobia that characterized the debate over the use of Islamic arbitration in Ontario. For instance, when she informs her colleagues that 'victims of shari'a have a human face, the face of Muslim women,' Houda-Pepin is effectively casting the entire history of Islamic jurisprudence in a negative light. Moreover, like the Ontario opponents of Islamic arbitration, she succumbs to fear-mongering tactics. For instance, she warned the National Assembly that '[i]mplementing shari'a in Canada is a power grab aimed at undermining one of the cornerstones of our democracy: our justice system.' In light of the fact that the Boyd Report made it very clear that Islamic law would only function on a symbolic level and that Canadian law would take precedence, Houda-Pepin overstates the manner in which the Sharī'a will function in arbitration. Fatima Houda-Pepin, "Can Canada Afford Two Justice Systems?" *Inroads,* vol. 18, Winter/Spring (2006): pp. 66-67.

represents a 'loi qui a été élaborée entre le VIIIe et le XIIe siècle et qui porte sur des matières civiles, pénales, criminelles et internationales.'[17]

Meanwhile, other reasons exist which preclude the full recognition of Islamic Law in Canada. Unequal provisions found in the Sharī'a will not garner recognition when one considers that the state is entitled to limit certain religious practices in order to safeguard equality. Thus, although the Canadian *Charter* offers individuals freedom of religion, these freedoms are *qualified freedoms* that, according to Section 1 of the Charter, are 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' On the global front, the 1966 United Nations' *International Covenant on Civil and Political Rights*, to which Canada is a signatory, makes access to religion a fundamental right.[18] In Article 27 of the Covenant it states '[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.' However, much like the Canadian *Charter,* these rights offered in the *Covenant* are qualified and cannot infringe on the unqualified privileges of equality. Thus, Article 23(4) of the *Covenant* maintains that states 'shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.'

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[17] Houda-Pepin, "Tribunal islamique" p. 8716.
[18] *International Covenant on Civil and Political Rights,* G.A. Res. 2200A (XXI), UN GAOR, 21nd Sess. Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (1976).

Thus, practices such as Muslim unilateral divorces and polygamy not only deny equality under the law, but also act as challenges to the dominant culture's world-view. In any society, family laws represent one of the paramount structures that govern life and organize society. Different conceptions of family law would effectively hinder the formation of a unified society in this regard. In a country that relies heavily on a steady stream of immigrants, Canadian policy makers are not at ease to forfeit family law to religious groups for fear of segregating segments of the population. The Quebec Minster of Justice, Jacques P. Dupuis, recently commented on this matter in an opinion piece he published in *Le Devoir*. In the article he claims that 'je tiens à réitérer que le principe d'égalité de tous devant la loi est fondamental dans les valeurs du Québec et qu'il n'est pas question de toucher à ce principe d'aucune façon. Le Code civil s'applique à tous les résidants du Québec, quelle que soit leur appartenance religieuse, et aucun système d'arbitrage ne sera toléré dans les matières qui concernent la famille et l'ordre public.'[19]

Although there are a number of reasons to curb the use of Islamic law in Canada, shutting the door completely on the Sharī'a is analogous to the pattern of cultural chauvinism displayed throughout much of Canada's history. Given the advances in philosophical theories of multiculturalism, ignoring Islamic law represents a lost opportunity to create the 'simultaneous belongings' Shachar discussed in the fifth chapter. By offering a simple binary yes/no response, such as Quebec's refusal to accept any form of Islamic arbitration in that province, society is forced to accept a singular

[19] Jacques P. Dupuis, "Tribunaux religieux - pas question de modifier le code civil du Québec," *Le Devoir* 15th-16th January (2005): http://www.ledevoir.com/2005/01/15/72628.html.

model of justice that is predicated on the majority culture's discretion. For those who place a greater emphasis on culture and religion, such a monolithic legal system would carry certain burdens. This may in turn convince these individuals to avoid the civil authorities altogether and pursue unsanctioned avenues towards resolving matters of personal status.[20] Clearly, given the importance Canadian society places on the *Charter,* certain elements of the Sharī'a cannot be sanctioned. However, as discussed in the previous chapter, a joint model of justice is not one that seeks complete convergence on all matters of law. Rather, using the principles articulated by thinkers such as Habermas, an effective dialogue between the government and minority groups could act as a bridge and better reflect the multicultural dynamics inherent in society. This possibility however has faced a serious set-back following the decision to outlaw faith-based family arbitration in Ontario and Quebec.

The above discussion has shed some light on the incompatibility of Islamic law within the Canadian system. Firstly, procedural matters that permit proxy weddings and child marriage in the Muslim world would not gain favor within the Canadian legal community. Second, the fact that many of the structural differences are predicated on principles of inequality will create *Charter* violations Canadian society is unwilling to

[20] The Islamic Council of Imams-Canada, a group based in Toronto, currently offers advice on their web page for initiating a *faskh.* In a document entitled 'Faskh Guidelines (Marriage Cancellation)', the group acknowledges that no Sharī'a courts currently operate in Canada and therefore advises individuals to seek their *faskhs* 'in the presence of at least two Imams.' This advice is problematic because, as discussed earlier, a *faskh* is a divorce that is granted by the courts. The web page appears to suggest that two *imāms* can act as a Sharī'a court, a highly misleading statement given the traditional role played by *imāms* and the limited training they have in matters related to Islamic and Canadian law. Furthermore, the web page all but admits that Muslim marriages are taking place in Canada without being registered in the courts. The group explains that '[i]n the event of a marriage without a License or Bann, the above guidelines apply for Faskh....' Quoted from The Islamic Council of Imams-Canada, "Faskh Guidelines (Marriage Cancellation)" (2002): http://www.islamcan.com/websites/imamcouncil/faskh.shtml#faskhapp.

accept. Finally, the notion that Islamic law challenges social cohesion by dividing society into legal ghettos poses serious problems given the state's goal of maintaining the unity of the Canadian population through its multiculturalism policy. Although these barriers exist, Islamic law is recognized in the Canadian court system. Occasionally, Muslims approach the courts with matters relating to the Sharī'a. The last chapter of this work will trace a selection of these cases and analyze how Canadian judges have coped with the Sharī'a in rendering their decisions.

Chapter 8
Islamic Law in Canadian Courts

As discussed in previous chapters, a number of cases involving issues of Islamic marriage and divorce have recently come before the Canadian courts. This is a sign that within certain segments of the Canadian justice system some provision can be made to accommodate Sharī'a. Although many Sharī'a practices are not recognized by the courts, some Islamic provisions that do not conflict with Canadian laws have been respected. This chapter will uncover six phenomena that surround cases dealing with Islamic marriage, divorce and the payment of the dower or *mahr*. Obviously, this survey cannot be exhaustive; rather, the cases presented here will offer a glimpse at how Canadian Muslims and Canadian judges deal with matters relating to the Sharī'a when they appear in the courts.

There are six points of interest that will emerge from this study. First, Islamic practices that violate Canadian law are never enforced by Canadian courts. Thus, cases dealing with polygamy, and divorce settlements that violate Canadian laws do not garner any support from the justice system. Second, a number of cases will demonstrate the problems associated with entering into unofficial Islamic ceremonies solemnizing marriage and divorce. Third, cases that deal with matters relating to the Sharī'a have received inconsistent treatment by Canadian judges. As will be demonstrated below, certain Islamic practices will be honored by some courts and disallowed by others. Fourth, inconsistencies in matters dealing with the Sharī'a are not limited to discrepancies between judges; in a few cases, expert witnesses have offered conflicting or incomplete points of view on practical matters of Islamic law. Fifth, the cases that

will be discussed below reveal that Muslims-Canadian resort to Islamic law in marriage and divorce for a number of reasons that include cultural familiarity, adherence to religious faith and personal gain. Finally, many Muslims-Canadian have adopted a hybridized approach to personal status. In many cases, it will become apparent that while Canadian civil practices are respected and observed, the parties involved in marriage and divorce refer to Islamic tradition for guidance. In bringing these points to light, this chapter will first discuss the cases individually and then offer some analysis. Before turning to how judges have coped with issues of Islamic law, however, it should be pointed out that the actions discussed below on the part of those who bring Sharī'a cases to the courts should not automatically be considered indicative of Islamic behavior. Rather, Bhabha's concept of hybridized personality should be recalled. According to Bhabha, understanding the reasons why individuals act in certain ways should be grounded in the 'enunciatory present' that includes different variables such as religion, economic background and social standing.[1] These factors are all in play, to varying degrees, when individuals bring issues related to the Sharī'a to the courts.

Cases: Marriage

In matters regarding marriage, judges are unwilling to recognize certain principles of Islamic law either because they violate equality rights or because they involve ad-hoc ceremonies which do not qualify as actual 'marriages' according to Canadian law. For instance, in *R. v. Moustafa*, Ashraf Moustafa, an Egyptian man living in Ontario, was accused of bigamy when his first wife discovered that her husband had married another

[1] Homi Bhabha, *Location of Culture*, p. 178.

woman.[2] The defendant arrived in Canada as a tourist in September of 1989 and married his first wife, Debbie Moustafa-Nichol in September of 1990 following a two-week courtship. According to Mr. Moustafa it was 'love at first sight' which precipitated his marriage proposal to Ms. Moustafa-Nichol.[3] However, the police officer in charge of the case was of the opinion that the marriage was one of convenience in order to hasten the defendant's Canadian residency status.[4] Although the couple was married, they did not reside together. According to the judge's report, these living arrangements were the result of financial difficulties encountered by Mr. Moustafa and his inability to find a well-paying job.

Five months after marrying his first wife, Mr. Moustafa exchanged vows with a second woman in February of 1991. In March of that year, friends of Debbie Moustafa-Nichol informed her of the second marriage. As Ms. Moustafa-Nichol was carrying the unborn child of Mr. Moustafa and wishing to preserve her marriage with him, she informed the police of her husband's subsequent marriage whereupon he was arrested and incarcerated for thirty-one days while awaiting trial. In rendering his decision, Justice Cadsby did not take into consideration any religious or multicultural justifications for the defendant's bigamous behavior. Rather, he simply voided the second marriage in keeping with Canadian laws regarding bigamy and sentenced Mr. Moustafa to time served and three years probation.[5] This case offers a clear-cut example of a judge simply applying the criminal code and its sanctions against any form

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[2] *R. v. Moustafa* (Ont. Ct. J. (Prov. Div.)), 1991 CarswellOnt 1438.
[3] Ibid., paragraph 6.
[4] Ibid., paragraph 8.
[5] Ibid., paragraph 12.

of polygamy. What is more difficult is contending with cases that involve unofficial and unregistered Islamic marriage ceremonies that take place in Canada on an ad-hoc basis.

Due to the fact that a traditional Islamic marriage is a contract between two parties and requires no official sanctioning, some members of the Muslim community in Canada, for various reasons, have participated in marriages without informing civil authorities. In the Ontario case of *Islam v. Islam*, a Muslim woman, Munni Islam, arranged for a marriage ceremony to take place in her home between her daughter, Lumis Islam, and her non-Muslim boyfriend, John Serpa, in order to curtail the scandalous rumors surrounding their relationship.[6] Present during the Islamic marriage were a number of friends and family members as well as an *imām* who conducted the service. Justice Conant explains: 'three witnesses attested that at the gathering at the house of Munni they observed a priest or holy leader perform a Nikkah [sic] or solemnization of marriage between Lumis and John; and that was done, from what they understood, by the leader asking the boy if he accepts the girl and the girl if she accepts the boy, which each said they did. Each of these witnesses understood, on their testimony, that John had converted to the Muslim faith.'[7]

This marriage would likely have gone unnoticed had it not been brought before the courts when Hilal Islam, the daughter's father who had previously divorced his wife Munni, stopped remitting child support upon hearing of the marriage ceremony. This prompted Ms. Islam to petition the courts to force her former husband to resume his payments of $200 a month in child support. His reasons for no longer providing the

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[6] *Islam v. Islam* (Ont. Ct. J. (General Division)), 1990 CarswellOnt 1301.
[7] Ibid., paragraph 10.

child support were based on his 1985 divorce agreement with his former wife that stipulated that payments would continue until Lumis left school before the age of 18, turned 21, married or died.[8] Thus, upon hearing that Lumis had married, Mr. Islam understood that he no longer was required to offer financial support for his daughter.

In deciding this case, Justice Conant was required to rule on the validity of the Islamic marriage that took place in the private residence of Ms. Islam. In arriving at his decision, Justice Conant turned to a number of expert witnesses, including an *imām* named Mr. Kabir, who testified that the nuptials did not meet the requirements of an Islamic marriage ceremony. According to the witness, in order for a proper Islamic marriage to be solemnized, the ceremony must be conducted in a language understood by both participants, the consent of the bride's father or *walī* is required, and the marriage must be performed before a 'duly authorized Islamic officer.'[9] Although a number of Muslim countries now require that a *nikāḥ* take place before civil authorities, some Muslim countries do not require an official presence at the ceremony. Furthermore, traditional Sharī'a practices never required any official sanction to solemnize a wedding. So, although the expert witness was correct in pointing out some of the requirements of an Islamic marriage, it is debatable whether an Islamic official must be present in order for the marriage to be valid under the Sharī'a. As demonstrated in a previous chapter, marriages and divorces that take place in the absence of civil authorities are in fact recognized in countries such as Pakistan due to their acceptability within the traditional Sharī'a.

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[8] Ibid., paragraph 2.
[9] Ibid., paragraph 12.

Based on the evidence before him, which unbeknownst to him did not convey the subtleties or variety of current day Sharī'a practice, the judge ruled that the ceremony in this particular case did not qualify as a marriage. Justice Conant states: 'I am satisfied that none of the noted conditions just listed were met; and that even if there had been words of acceptance, as evidenced by the three witnesses....that even so, there was not a proper Islamic marriage.'[10] Thus, he ordered the father to resume paying the child support payments. What is interesting in this case is that the judge did not appear to use Canadian law as a benchmark for determining the validity of the marriage. Nowhere in the judgment is there any mention that the couple did or did not obtain a marriage license as is required in the province of Ontario. Rather, in assessing whether or not the marriage was valid, Justice Conant was content to defer to the expert witnesses who claimed that the marriage did not qualify as an Islamic *nikāḥ* since an Islamic official was not present during the ceremony.

In *Ali v. R.*, another case involving an unofficial Islamic marriage, a Somali man, Ali Enow Ali, was appealing a decision rendered by the Tax Court of Canada disallowing a claim he had made for a tax deduction.[11] Mr. Ali was claiming $6,000 on his tax return based on spousal support payments he made to his wife, Sacdiyo Adan Ahmned based on paragraph 118(1)(*a*) of the *Income Tax Act*.[12] During the legal proceedings, it became apparent that Mr. Ali had never lived with or met with his wife in person. Rather his marriage to her was arranged by his mother and celebrated over

[10] Ibid., paragraph 13.
[11] *Ali v. R.* (Tax Court of Canada), [2001] 2 C.T.C. 2655.
[12] *Income Tax Act* (R.S.C. 1985, c. 1 (5th Supp.)).

the telephone in the style of an Islamic marriage. Although this practice may strike a Western audience as unusual, this kind of arranged marriage and alternative living arrangement is common for members of immigrant communities. According to Mr. Ali, the couple was married in 1994 while the groom was in Toronto and the bride was living in a Kenyan refugee camp as a result of the civil turmoil taking place in Somalia at the time.

When the claimed tax deductions came before the Minister of National Revenue, the Minister accepted that Mr. Ali was indeed married to Ms. Ahmned based on a certificate originating from an official in Somalia testifying to the legality of the marriage.[13] The judge hearing the appeal did not question the validity of the marriage. However, Mr. Ali's appeal to deduct $6,000 from his 1996-1997 taxes failed due to the lack of financial evidence supporting his claim that he had indeed remitted that amount to his wife who continued to reside in Africa. Based on bank statements produced by Mr. Ali, the judge determined that only $2,000 had been withdrawn for the alleged support payments. Accordingly, this was the amount of deductions permitted.[14] This case is interesting in that an Islamic marriage ceremony that took place over the phone was recognized by Canadian officials on the grounds that Somali officials had attested to its validity in a manner consistent with the recognition of marriage provisions under private international law.[15]

In a related case, *Ahmed v. R.,* which took place one year earlier, a Somali immigrant named Sadaq Ahmed (who, as it turns out, was an acquaintance of Mr. Ali), found

[13] Ibid., paragraph 2.
[14] Ibid., paragraph 8.
[15] Ibid., paragraph 2.

himself in a similar situation to the one discussed above.[16] Like Mr. Ali, Mr. Ahmed also married a Somali refugee living in a Kenyan refugee camp over the phone in 1995 and was also claiming tax deductions for funds he claimed to have sent to his wife. In 1998, Mr. Ahmed divorced his wife by telephone by issuing a *ṭalāq*. Neither the marriage nor the divorce were registered with civil authorities in Canada, Somalia, or Kenya. During the two-year period during which Mr. Ahmed maintained that he was married to Ms. Yusuf, he claimed to have sent a total of $10,760 to his wife. The case appeared before the courts because Mr. Ahmed was appealing a decision made by the Minister of National Revenue to deny his claims to deduct this amount as alimony payments.[17]

What distinguishes this case from the previous one is the fact that the presiding judge, Justice Morgan, questioned the validity of the marriage and divorce as well as the credibility of Mr. Ahmed.[18] During the course of the hearing, it became clear that the appellant was providing the court with contradictory information. For instance, in an affidavit signed by his wife and notarized by a notary public in Nairobi, Ms. Yusuf claimed that she was still married to Mr. Ahmed sixteen months after he had claimed to have divorced her.[19] Furthermore, the same document maintained that Mr. Ahmed would be sponsoring Ms. Yusuf's application to gain entry into Canada. Despite the affidavit stating that the two were married, the judge was not willing to accept the validity of the marriage.

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[16] *Ahmed v. R.* [2000] 3 C.T.C. 2517.
[17] Ibid., paragraph 1.
[18] Ibid., paragraph 3.
[19] Ibid., paragraph 16.

In support of his case, Mr. Ahmed summoned the expert testimony of an *imām* named Aslam Nakhuda who is currently a prayer leader at the Makki Masjid in Brampton, Ontario. According to this expert witness's testimony, an Islamic marriage can take place without the presence of an officiating party. All that is required to solemnize a marriage is, 'for the man and woman (if they were both of the Islamic faith) to be together in the presence of two Islamic witnesses.' Furthermore, according to the *imām,* a marriage could be solemnized over the telephone so long as both parties had witnesses on either ends of the line.[20]

What the *imām* did not mention was that under Somali law, a wedding must be registered with civil authorities within 15 days for urban residents and 40 days for rural residents.[21] In the previous case involving Mr. Ali, the marriage must have been registered with Somali officials since they issued a certificate testifying to the legality of the marriage. Based on that document, both the Ministry of National Revenue and Justice Conant recognized the telephone marriage of Mr. Ali. In Mr. Ahmed's case, however, no certificate was produced as both the appellant and his wife failed to register their marriage and divorce. Thus, on account of the ad-hoc nature of these ceremonies, the judge refused to recognize the marriage and did not award the appellant the right to deduct the funds he claimed on his tax return. In Justice Morgan's words, Mr. Ahmed 'took no steps under the laws of Ontario to register his marriage or to certify that he had been married. There was nothing under the laws of Ontario which would have caused any court in Ontario to think that there would be a tribunal which could issue a decree,

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[20] Ibid., paragraph 8.
[21] Emory University School of Law, "Somalia,"(2002): http://www.law.emory.edu/IFL/legal/Somalia.htm.

order or judgment affecting the Appellant's marriage. In the absence of any such decree, order or judgment or a separation agreement, there is no right to deduct these amounts at all....'[22]

Justice Morgan went one step further in discrediting Mr. Ahmed's claim when he asked to have the witnesses of the telephone marriage brought before him. When asked to produce the witnesses that were present at his marriage ceremony, Mr. Ahmed offered the name of his friend Ali Enow Ali and another man whose name was not recorded in the judgment. The whereabouts of both witnesses were unknown to Mr. Ahmed, and thus they could not testify whether or not he had in fact been married according to the Muslim tradition.

Cases: Divorce

Cases dealing with Islamic divorce frequently appear before Canadian courts. In *Bazi v. Deschamps* we see the pitfalls involved in obtaining a religious divorce outside the ambit of the Canadian *Divorce Act.*[23] In this case, Abdul Mosen Mohammad Bazzi of Windsor, Ontario, divorced his wife of twenty-one years in 1994 after the couple separated in 1990. A religious divorce was initiated in a Windsor area mosque in August of 1994 but a civil divorce was never registered with the authorities pursuant to the requirements of the *Divorce Act.* On the 21st of September of 1994, Mr. Bazzi and Ella Blanche Deschamps applied and received an Ontario marriage license and were subsequently married three days later at the same Windsor mosque that had issued the religious divorce.[24] Although the ceremony was conducted by a mosque official who

[22] *Ahmed v. R.*, paragraph 25.
[23] *Bazi v.* Dechamps (1995), O.J. No. 2461 (Ont. Ct. J.(Gen. Div.)).
[24] Ibid., paragraph 3.

was registered with the Government of Ontario to solemnize marriages, this case appeared before the courts due to the unregistered Islamic divorce proceeding in which Mr. Bazzi had participated. This unregistered divorce placed Mr. Bazzi in a polygamous relationship.

In reviewing the facts of the case, Justice Cusinato determined that the marriage between Ms. Deschamps and Mr. Bazzi was void *ab initio* because the unregistered mosque divorce was not officially recognized. In arguing his case, Mr. Bazzi appealed to Section 22 (1) of the *Divorce Act* that allows for the recognition of foreign divorces.[25] Mr. Bazzi was of the opinion that his mosque divorce would be recognized in Lebanon, the country in which he married his first wife. Justice Cusinato rejected this argument on the grounds that the Lebanese government would not have recognized the mosque divorce in this case since it fell outside that country's jurisdiction.[26] The assumption on Mr. Bazzi's part that a mosque-granted divorce would be sufficient to terminate his first marriage was therefore erroneous. Also, Mr. Bazzi did not take into account the fact that under current Lebanese law and traditional Sharī'a procedures, divorces are not granted by a mosque or an *imām.* Rather, as discussed in a previous chapter, a judge or *qāḍī* is delegated to perform this task according to the Sharī'a, while current Lebanese law requires individuals to approach the civil courts for a divorce. Although this case was relatively clear-cut, not all cases involving Islamic divorce in Canada are as easy to resolve.

In another divorce case, *Elkaswani v. Elkaswani,* a number of complications

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[25] Ibid., paragraph 4.
[26] Ibid.

emerged based on the cultural and religious assumptions held by Mohamed Salah Saleh Elkaswani during his bid to divorce his wife Camilia Mohamed Elkaswani.[27] The divorce principles that Mr. Elkaswani invoked prompted Justice Wilson, the presiding judge, to comment that the case 'involves a clash of cultures' between Islamic and Canadian laws.[28] According to Mr. Elkaswani, a newly divorced wife would be 'required to leave the matrimonial home with only her own clothes. She has no rights with respect to property of the husband, including the former matrimonial home, nor does he have an ongoing obligation to maintain her, unless there are children under the age of seven years.'[29] This case revolved around the question of whether or not Ms. Elkaswani had any claim to the matrimonial home. Complicating matters further was the fact that the only real financial asset the couple owned was their home. During the course of the couple's prolonged five-year divorce process, Mr. Elkaswani transferred the ownership of the house to his brother who subsequently attempted to evict Ms. Elkaswani once the divorce was made official under Canadian law. It is noteworthy to point out that one of Ms. Elkaswani's sources of revenue came from her catering business which she ran from the kitchen of her home; losing this space would put her under some financial burden. Thus, Ms. Elkaswani brought the case before the courts in the hopes of challenging the attempts to evict her as well as secure some form of financial compensation from her ex-husband. This case offers an interesting glimpse of how personal interpretations of the Sharī'a come into conflict with official Canadian law when both systems are used concurrently. Moreover, this case clearly demonstrates how women in particular can be

[27] *Elkaswani v. Elkaswani,* [2004] B.C.J. No. 745 (Sup. Ct.).
[28] Ibid., paragraph 1.
[29] Ibid., paragraph 3.

disadvantaged when their husbands invoke what they believe to be principles of Islamic law in settling marital disputes.

Mr. and Ms. Elkaswani were married in Lebanon in 1967 in an Islamic marriage ceremony that included the signing of a *nikāḥ* contract. In this contract the couple agreed to a *mahr* of 3,000 Lebanese pounds of which 1,500 was paid and the remainder was deferred.[30] For reasons not mentioned in the judgment, neither party wanted to honor this agreement. According to the judge's report, the couple's marriage began to fail in 1995. This precipitated Mr. Elkaswani to declare his first *ṭalāq* declaration. At this time, the couple began living in separate quarters of the home with Mr. Elkaswani occupying the first floor and Ms. Elkaswani residing on the second floor while operating her business from the first floor kitchen.

Although the couple did not take any steps to register this divorce procedure with Canadian civil authorities at that time, they did inform their families in the Middle East of their emerging marital breakdown. This news prompted Mr. Elkaswani's brother, Mustafa Saleh Hussein Kiswani to come to Canada in an attempt to reconcile the couple's marriage.[31] As discussed in previous chapters, this style of family-based mediation is a predominant feature that appears frequently in marital disputes throughout the Muslim world. It was during this attempt at reconciliation that Mr. Elkaswani transferred the ownership of the home to his brother, Mr. Kiswani without informing his wife. Although the home's ownership changed hands, both Mr. and Ms.

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[30] Ibid., paragraph 18.
[31] Ibid, paragraph 39. This action follows the Qur'ānic advice to reconcile a couple's disharmony with outside mediation before finalizing a divorce.

Elkaswani continued to live in the house, albeit on separate floors. When the attempt to bridge the differences between the Elkaswanis failed in November of 1996, Mr. Elkaswani uttered his second *ṭalāq*. Although the two divorce statements did not carry any official weight, a civil divorce was filed and came into effect in October of 2000. Once the divorce was granted by the courts, Mr. Elkaswani uttered his third and final *ṭalāq*. Despite the fact that the couple were now officially divorced according to Canadian law as well as under Mr. Elkaswani's incorrect interpretation of Islamic law, they continued with their living arrangements in the home, now owned by Mr. Kiswani.

The home in question was one built by Mr. Elkaswani with money borrowed from his brother Mr. Kiswani. Upon arriving in Canada, and unable to find work as a refrigeration and air conditioning technician, Mr. Elkaswani decided to try his hand in the real estate market by building and selling houses. Mr. Elkaswani's wife, along with his seven children, would live on-site while assisting in the construction of the homes they planned to sell. This plan did not succeed given that only one house was ever built, and it was never sold but rather served as the primary residence of the Elkaswani family. Between 1988 and 1996, Mr. Kiswani gave his brother an estimated $146,965 for the building and upkeep of the home.[32] When transferring the ownership of this home to his bother in November of 1996, Mr. Elkaswani did not consult with his wife on this matter. According to the judge's report, Mr. Elkaswani did not confer with his wife because it was his belief that Muslim women should not be privy to the details of the family finances and income.[33] Although the judge has remarked that this was a religiously

[32] Ibid., paragraph 41.
[33] Ibid., paragraph 5.

motivated decision, it is impossible to ascertain whether Mr. Elkaswani's refusal to discuss this matter was actually based on his understanding of religion, or whether other factors were involved in this decision that were not recorded in the judgment. Whatever his motivation, there is no disputing the fact that Mr. Elkaswani kept this financial information from his wife. In court, he claimed that the transfer constituted repayment for the money his brother had invested in the building over the years. Thus he argued that this money was in the nature of a loan rather than a gift. Once the divorce was finalized, Mr. Kiswani began to charge Ms. Elkaswani a monthly rent of $700. When she defaulted on her rent payments, both Mr. Kiswani and Mr. Elkaswani sought to have her evicted. In deciding this case, Justice Wilson was asked to determine whether the matrimonial home was a family asset, which would enable Ms. Elkaswani to have some claims over the house, or whether the property belonged to Mr. Kiswani, giving her no claims on the home whatsoever.

What is interesting in this case is that Mr. Elkaswani appears to be using a hybridized approach in his divorce by turning to both Canadian and Islamic law. Despite applying for a Canadian divorce, Mr. Elkaswani hoped to escape any financial obligations to his wife by invoking Islamic law. However, his use of Islamic law was flawed on two counts. First, the decision not to pay his wife the *mahr* is inconsistent with Mr. Elkaswani's religious convictions. Payment of this sum is part of the Sharī'a and failure to pay the dower constitutes a violation of law. The second flaw in the manner in which Mr. Elkaswani applied Islamic law is in the time he allowed to pass between each of the *ṭalāq* statements he made. Rather than declare his *ṭalāq* statements in three successive months or uttering a irrevocable *ṭalāq* which would have

immediately put the divorce into effect, Mr. Elkaswani allowed five years to pass between the first and last declaration of divorce.

In deciding the case, Justice Wilson ruled that the transfer of ownership of the matrimonial home did not take into consideration Ms. Elkaswani's rights to the home. He therefore overturned the agreement between the brothers. Justice Wilson decided that the funds transferred from Mustafa Kiswani to his brother Muhammad Elkaswani did not constitute a financial loan in the traditional sense. The judge explains that 'although Mohammed [sic] may have had a moral obligation to repay Mustafa, I do not accept that he had a legal one. The funds advanced were by way of an investment in the business; Mustafa accepted that if the business was not successful, his funds would not be returned.'[34] Moreover Justice Wilson goes on to add that 'when there is a disposition of property in suspicious circumstances between family members, on the part of both the transferor and the transferee, I also find that Mustafa cannot be considered to be a "purchaser in good faith...".' Thus the judge concluded that the transfer was invalid.[35] The judge was relying on Section 66 of the British Columbia *Family Relations Act* which maintains that when someone transfers property to a third person 'for the purpose of defeating a claim to an interest in the property the other spouse may then or in the future have [the courts] vest all or a portion of the property in, or in trust for, the other spouse.'[36]

Justice Wilson decided that Ms. Elkaswani and Mr. Elkaswani would share the home, the parties occupying their own separate quarters and paying their share of the

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[34] Ibid., paragraph 56.
[35] Ibid.
[36] *Family Relations Act,* R.S.B.C. 1996, c. 128.

home's expenses.[37] This decision also included a provision for Ms. Elkaswani to use the kitchen in order to further her economic prospects. A restraining order was placed on Mr. Elkaswani since in the judge's opinion, 'he does appear to have a considerable amount of anger regarding Camilia's claims, which may well be increased as a result of this judgment.'[38] Finally, in an interesting turn of events, Justice Wilson incorporated principles of Islamic law when pronouncing on the matter of the money Mustafa provided his brother for the building of his home. If the home is eventually sold, Mustafa would be entitled to claim $140,525 of the sale price. In keeping with Islamic law, Justice Wilson specified that 'in view of Mustafa's evidence that he does not collect interest, as contrary to his religious beliefs, there will be no such provision.'[39] Clearly, the judge is ascribing to the Islamic regulation forbidding usury (*ribā*) in determining how assets will be distributed following the sale of the home.

Al-Hashemy v. Abu Gheddah, the final case of divorce analyzed here, involves a couple who divorced over the phone while the husband was in Saskatchewan and the wife was in Saudi Arabia.[40] Raghed Mohammad Adel Al-Hashemy married Aiman Abdufattah Mahammad Abu Gheddah in an Islamic marriage ceremony in 1984 while the two were living in Saudi Arabia.[41] In pursuing his medical education as a cardiologist, Dr. Abu Gheddah relocated to Saskatchewan with his wife and eventually settled in that province where the couple raised their two children.

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[37] *Elkaswani v. Elkaswani*, paragraph 67.
[38] Ibid., paragraph 66.
[39] Ibid., paragraph 60.
[40] *Al-Hashemy v. Abu Gheddah*) (1994), 121 Sask. R. 62. (Ct. of Queen's Bench).
[41] Ibid., paragraph 4.

For reasons that remain unclear, Ms. Hashemy traveled to Saudi Arabia with her two children in October of 1991. According to Ms. Hashemy, she and her two children were sent there by her husband and were not allowed to return to Canada because Dr. Abu Gheddah refused to sign her exit visa.[42] Saudi law requires that all dependents, including wives, must have the permission of their guardians or husbands to travel outside the country. Unable to secure Dr. Abu Gheddah's permission to leave the country, Ms. Hashemy claimed that she and her children were virtual prisoners in that country. In December of 1991, Dr. Abu Gheddah phoned his wife and uttered an irrevocable *ṭalāq*.[43] Under Saudi law, Ms. Hashemy would only be entitled to her *mahr* given the nature of the divorce put into effect by her husband.

Ms. Hashemy approached the Canadian courts in order to secure certain privileges to which she was entitled based on her Canadian citizenship. These included spousal support, child maintenance and custody of their daughter, Dalal Aboguddah. What is remarkable about this case is that Ms. Hashemy was also demanding that her ex-husband sign her Saudi exit visa in order to allow her to return to Canada. Although it is not clear in the judgment, it appears that the proceedings took place while she was in Saudi Arabia and her former husband was in Canada. Dr. Abu Gheddah sought to have Ms. Hashemy's claims dismissed on the grounds that a Saudi divorce had already been issued, and thus Canadian courts did not have jurisdiction to deal with this matter as per his understanding of private international law.[44]

In determining whether Canadian courts had jurisdiction in this case, Justice Osborn

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[42] Ibid., paragraph 5.
[43] Ibid., paragraph 7.
[44] Ibid., paragraph 3.

referred to Section 3(1) of the Canadian *Divorce Act.* This section reads as follows: '[a] court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding.'[45] In rendering his decision, Justice Osborn maintained that Dr. Abu Gheddah was indeed a resident of Saskatchewan for one year prior to his divorce proceedings. Thus, on this basis, it was determined that the court had jurisdiction to hear the case.[46] For additional support, Justice Osborn turned to Saskatchewan's *Children's Law Act* that states in Section 15(1) that 'the court has jurisdiction where: (a) the child is habitually resident in Saskatchewan at the commencement of the application for the order...'.[47] Based on the fact that prior to traveling to Saudi Arabia, the child was a resident of Saskatchewan for most of her life and that the child and her mother could not leave Saudi Arabia, the judge determined that the Canadian court did have jurisdiction in the case as both child and mother were residents of that province. Justice Osborn ordered Dr. Abu Gheddah to sign Ms. Hashemy's Saudi exit visa as well as pay $5,000 for her return trip to Canada. Furthermore, Dr. Abu Gheddah was ordered to pay Ms. Hashemy $1,270 monthly in interim spousal support and $1,129 monthly in interim child support respectively until the case could be heard on its merits.[48] The parties presumably settled out of court in the end, since the case received no further treatment by the courts.

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[45] *Divorce Act,* R.S.C. 1985 (2nd Supplement), c. 3, s. 3(1).
[46] *Al-Hashemy v. Abu Gheddah,* paragraph 8.
[47] Children's Law Act, 1997, S.S. 1997, c. C-8.2.
[48] *Al-Hashemy v. Abu Gheddah,* paragraph 17.

Cases: *Mahr*

The last series of cases that will be analyzed here concerns the payment of the dower or *mahr* which, as we recall, is a gift given to Muslim, Christian and Jewish wives either at the start of their marriage or deferred for a later date. In the British Columbia case of *Amlani v. Hirani* an Ismāʿīlī couple who had participated in separate civil and Islamic marriage ceremonies were disputing the payment of the *mahr* following their divorce.[49] Al Ayaz Mitha Amlani was disputing the claim his former wife, Amynah Alauddin Hirani, was making against him for failure to pay her dower upon the breakdown of their marriage of four years. Specifically, Mr. Amlani argued that the Islamic marriage contract that the pair signed in 1998, ten months following their civil union, did not qualify as an official marriage contract.[50]

In hearing the case, Justice Prowse first determined that a *mahr* was an agreed upon sum of money to be paid to the wife either during the marriage or upon its dissolution.[51] Based on the evidence which was presented to him, namely the copy of the *nikāḥ* or Islamic marriage contract the couple signed, the judge was also able to conclude that Mr. Amlani had indeed agreed to pay Ms. Hirani $51,000 as a dower.[52] According to the actual wording of the marriage contract, Mr. Amlani would 'pay the agreed sum of money by way of Maher [sic]... without prejudice to and not in substitution of all of my obligations provided for by the laws of the land.'[53] The contract, signed in front of a group of witnesses and officiated by Ismāʿīlī functionaries, stated that the couple, 'who

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[49] *Amlani v. Hirani*, [2000] B.C.J. No. 2357 (Sup. Ct.).
[50] Ibid, paragraph 2.
[51] Ibid, paragraph 34.
[52] Ibid., paragraph 38.
[53] Ibid., paragraph 30.

of their own free will and volition have signed the foregoing Marriage Contract in our presence, are hereby declared married in accordance with the Shia Imami Ismaili Tariqa [sic]. The said Contract has been signed by the said parties in our presence after they have accepted all the conditions therein.'[54]

In determining whether the *nikāḥ* signed by the couple constituted an actual marriage contract, Justice Prowse referred to Section 61(2) of the *Family Relations Act.* This law describes a marriage contract as 'an agreement entered into by a man and a woman before or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later.' The purpose of a marriage contract according to this law is for the '(a) [m]anagement of family assets or other property during marriage, or (b) [o]wnership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.' Justice Prowse found that the agreement entered into by the parties during their Islamic marriage ceremony was in fact a marriage contract based on the Section 61 (2) of the *Family Relations Act.* The *nikāḥ* was considered an ante-nuptial agreement, similar in nature to a pre-nuptial agreement, and was binding on both parties. Justice Prowse further determined that the *mahr* was in fact payable upon the dissolution of the marriage based on its constituting 'other property' stipulated in subsection (b) of the *Family Relations Act.* Thus, Mr. Amlani's appeal to the courts to prevent the *mahr* from being recognized as a binding component of his marriage contract was denied.[55]

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[54] Ibid., paragraph 19.
[55] Ibid. paragraph 37.

Although the previous case demonstrates a willingness on the part of a judge to consider an Islamic marriage and any funds designated as a *mahr* as a valid contract under the law, not all cases have been judged in this manner. In *Memisoglu v. Memiche,* a couple married for 22 months was involved in a heated court dispute concerning the division of property and assets following the breakdown of their marriage.[56] The couple, married in Turkey in 1991, decided to separate and then divorce in the Summer of 1993 while they were residents of New Brunswick. The couple originally met in Istanbul and married after a short courtship that consisted of ten chaperoned meetings. During the courtship, they discussed how Ms. Memisoglu would study for her Master's degree at the McGill Institute of Islamic Studies in Montreal, Quebec. Dr. Memiche supported this decision, although it seems that he was 'under the vague impression that she could somehow study at home [in New Brunswick] - and then go on to write exams' at McGill.[57] The marriage was terminated at Dr. Memiche's request when Ms. Memisoglu, in the company of her family, traveled to the United States and then to Montreal in order to begin her studies.[58]

In the case that was brought before Justice Boisvert, Ms. Memisoglu was petitioning her former husband for $673,547 in marital property and a total of $145,000 in monthly spousal support to be awarded for a 29 month period.[59] In addition to various properties, financial assets and goods, Ms. Memisoglu sought the payment of her *mahr.* Based on the unwritten pre-marital agreement made between the couple

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[56] *Memisoglu v. Memiche,* 1994 N.B.J. No. 463 (Ct. Q. B.).
[57] Ibid., paragraph 8.
[58] Ibid., paragraph 20.
[59] Ibid., paragraph 78.

during their Turkish courtship, a dower of 50 gold coins, valued at $100, would be paid to Ms. Memisoglu.[60] For reasons not discussed in the judgment, this amount was never paid.[61] Dr. Memiche maintained that the promise to pay the *mahr* is a part of Turkish folklore and that nothing within modern Turkish law makes such a payment binding.[62] To some extent this is true; Turkey's use of a secular legal code makes the payment of a dower a matter of personal choice enforceable with a written contract. Thus it is not an essential requirement of a marriage as per a traditional Islamic marriage. Justice Boisvert concluded that the question of the unpaid dower did not 'fall within the parameters of the *Marital Property Act.*'[63] He further maintained that Ms. Memisoglu should take up the matter of the unpaid dower with Turkish courts if she wished to pursue the matter further. Justice Boisvert did not recognize the *mahr* because, unlike the previous case, no documentation was brought before the courts suggesting that a contract between the two parties had ever been signed. An oral contract between the parties might be enforceable in certain circumstances. If there were witnesses, and there probably were since their meetings were chaperoned, there may have been sufficient evidence to enforce the contract (the witnesses would have to provide an affidavit or come to testify). Ms. Memisoglu would have to have brought evidence of this, but the $100 dower probably wasn't worth the effort. This case is interesting given that the presiding judge did not give any credence to the religious component of the marriage contract.

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[60] This figure is the one that is reported in the judgment, though its accuracy is suspect.
[61] Ibid., paragraph 53.
[62] Ibid., paragraph 54.
[63] Ibid., paragraph 55.

In *Kaddoura v. Hammoud,* the last case that will be analyzed in this chapter, a couple, married for 18 months, appeared before the courts in a matter relating to an unpaid *mahr.*[64] Mr. Kaddoura petitioned the court for divorce and Manira Hammoud, his former wife, counter petitioned the payment of the $30,000 promised to her as part of her dower. Only the counter petition was at issue in the present case. In her counter-petition, Ms. Hammoud was also seeking $50,000 from her former husband for 'exemplary damages for breakdown of the marriage.'[65] It seems that the couple were often at odds with one another during their short marriage and in one incident Mr. Kaddoura had 'come close to physical violence' but did not carry out any such act.[66] Justice Rutherford of the Ontario Court of Justice dismissed the claim for exemplary damages, finding that both parties were responsible for the marital breakdown owing to their 'incompatible personalities.'[67]

Turning to the matter of the unpaid dower, Justice Rutherford was required to determine whether the *mahr* was enforceable by the civil courts as a marriage contract. The couple had been married in an Ottawa-area mosque in a ceremony that was conducted by an *imām* who was duly registered to solemnize marriages.[68] Two expert witnesses were brought in support of Ms. Hammoud's counter petition: Dr. Jamal Mannaa Alisolaiman, an Ottawa area *imām,* and Mufti Abdul Majitkhan, the Director of the Institute of Islamic Learning in Ajax, Ontario. These two witnesses testified to the effect that an Islamic marriage is dependent on 'three fundamental elements': the

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[64] *Kaddoura v. Hammoud* (1998) 168 D.L.R. (4th) 503 (Ont. Ct. J. (Gen. Div.)).
[65] Ibid., paragraph 6.
[66] Ibid., paragraph 3.
[67] Ibid., paragraph 7.
[68] Ibid., paragraph 18.

couple's capacity to marry, their willingness and consent to marry, and that a *mahr* be agreed upon and paid at least in part.[69] The two witnesses also testified that Muslim women have an unequivocal right to receive the *mahr* following a *ṭalāq* divorce.[70]

The Ottawa wedding ceremony between Mr. Kaddoura and Ms. Hammoud was conducted in both English and Arabic and included the signing of an Ontario marriage license as well as an Islamic marriage contract. The Islamic marriage contract, written in Arabic, provided for a $35,000 *mahr*. At the time of the wedding Mr. Kaddoura had paid $5,000, the remainder being deferred for payment at a later date.[71] The couple used the $5,000 to fund their honeymoon to Jamaica. According to Mr. Kaddoura's testimony, he never expected to pay the deferred portion of the *mahr* based on his belief that it constituted an Islamic custom and was not part of the civil process.[72] Ms. Hammoud, for her part, asserted that their Muslim marriage contract was indeed a component of the overall marriage contract according to Section 52 (1) of the *Family Law Act*. This section provides that '[t]wo persons who are married to each other or intend to marry may enter into an agreement in which they agree on their respective rights and obligations under the marriage or on separation, on the annulment or dissolution of the marriage or on death...'[73]

Justice Rutherford held that the *mahr* constituted a purely religious issue and thus was not a matter that should be decided by the civil courts.[74] Justice Rutherford

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[69] Ibid., paragraph 12.
[70] Ibid., paragraphs 13-14.
[71] Ibid., paragraph 19.
[72] Ibid,. paragraph 16.
[73] *Family Law Act,* R.S.O. 1990, Chapter F.3
[74] Ibid., paragraph 29.

explained:'[b]ecause Mahr [sic] is a religious matter, the resolution of any dispute relating to it or the consequences of failing to honor the obligation are also religious in their content and context.'[75] He compared the enforceability of the *mahr* to the notion of forcing a couple married under the auspices of the Church to love, honor or cherish one another.[76] Accordingly, Justice Rutherford reasoned that the only body that should rule on a case dealing with the *mahr* was an 'Islamic authority' who could appreciate the 'principles derived from the Holy Qur'an [sic], the words of the Prophet and from the religious jurisprudence.'[77] In the Canadian context this proposition is somewhat problematic. Although some forms of Islamic conflict resolution exist in Canada, they lack effective enforceability given that religious tribunals have no official powers of compulsion in cases where a husband is ordered to pay the *mahr.* The inconsistent treatment of this issue by Canadian courts is also problematic. In the case of *Amlani v. Hirani,* discussed above, it was determined that the *mahr* could be considered as part of a marriage contract and thus could be dealt with in a civil court. In this particular case, however, it is not considered a valid contract.

Six Observations

After discussing these cases of marriage, divorce and the payment of the *mahr,* a number of observations can be presented concerning the manner in which Islamic law is dealt with in Canadian courts. First, where Canadian and Islamic laws come into conflict, courts are unwilling to enforce Islamic law principles. This is the case, for

[75] *Kaddoura v. Hammoud,* paragraph 25.
[76] Ibid., paragraph 25.
[77] Ibid., paragraph 27.

example, when polygamy and unfair divorce settlements are concerned. Furthermore, in cases that deal with inter-jurisdictional issues, Canadian courts are inclined to assure jurisdiction if the parties have a sufficient connection to Canada. In this manner, even if the parties have a significant connection to another jurisdiction, Canadian laws will govern them as long as the criteria establishing their links to Canada set out in the legislation are met. For instance, in *Al-Hashemy v. Abu Gheddah,* although Dr. Abu Gheddah had obtained a valid Saudi divorce, Canadian laws were applied since both he and Ms. Al-Hashemy had resided in Saskatchewan and were thus governed by the provisions of the federal *Divorce Act.* This approach ensures that all those who have sufficient connection to Canadian jurisdiction will benefit from the protections offered by its laws. The fact that Canadian laws prevail should not be interpreted as a victory of liberalism over Islam or Canadian law trumping Saudi law. Rather, the decision to award Ms. Al-Hashemy spousal and child support was based on principles of private international law relating to the jurisdiction of the Canadian courts.

A second interesting observation emerging from the above survey is that the use of unofficial and ad-hoc Islamic ceremonies to solemnize marriages and divorces carries certain risks. Specifically, benefits available to individuals who have recognized civil unions and separations can be denied to those who have unregistered marriages and divorces. In *Bazzi v. Deschamps,* Mr. Bazzi's second marriage was annulled as a result of the unofficial divorce he obtained from a Windsor area mosque. Similarly, in *Ahmed v. R.* the appellant was denied the deduction he was claiming on his tax return for spousal support payments because his alleged marriage and divorce were not registered with any civil authority in Canada or elsewhere.

A third point of interest is the inconsistent treatment that Sharī'a law issues are given by the Canadian courts. For instance, in *Amlani v. Hirani*, the judge was willing to accept the *mahr* as a valid part of the marriage contract. In contrast, the judge in *Kaddoura v. Hammoud,* refused to enforce the *mahr* as a marriage contract on the grounds that the court did not have jurisdiction to deal with religious disputes. In both cases there was a written contract and there were no factual differences between the cases. The presiding judges simply differed in their conclusions as to the enforceability of such a contract. The latter case demonstrates the risks of refusing to acknowledge Islamic law principles in the Canadian context. While many commentators have warned of the dangers that will be perpetrated against Muslim women if religious law is validated in Canada, this case demonstrates how a woman was denied a financial benefit that was promised to her in an Islamic marriage contract. Arguably, inconsistencies of this kind could be a result of the unfamiliar territory judges have to venture into when dealing with Islamic law. Presumably, as more cases dealing with Islamic law appear before the courts, precedents will emerge which will in turn lead to greater consistency.

Inconsistencies in matters dealing with the Sharī'a in Canadian courts are not limited to the judicial treatment of these cases. A related observation emerging from this review concerns the contradictory information provided to the courts by expert witnesses. For instance, in the matter of what constitutes a valid Islamic marriage, a number of witnesses offered divergent views. In *Ahmed v. R.,* Aslam Nakhuda, an *imām* who was serving as an expert witness, claimed that an Islamic marriage requires no official presence whatsoever. Rather, all that was required for the marriage to be valid was a willing couple who were of the Muslim faith and the presence of the

requisite number of witnesses. This testimony is incomplete given that a valid Islamic marriage can exist when a Muslim man marries Jewish or Christian women. This matter aside, we can see the inconsistencies that arise during the testimony of different expert witnesses when we compare Mr. Nakhuda's view with another expert who appeared before the court in *Islam v. Islam.* During the course of that hearing, Mr. Kabir maintained that a proper *nikāḥ* requires some official Islamic presence. Clearly, these two views contradict one another on the matter of whether or not an official presence is required in solemnizing an Islamic marriage.

The discrepancy in these testimonies is perhaps a result of the diversity inherent in Islamic law. It could also be due to the fact that *imāms* and other so-called experts may lack sufficient training in Islamic law. Finally, as we have seen, some countries have implemented reforms that necessitate official sanction and notification of marriages while other countries have not taken this step, or do not apply these requirements rigorously. These witnesses may be presenting ideas derived from modern Islamic practices found in the specific countries with which they are familiar. The inconsistencies in what constitutes a valid Islamic marriage represent one of the challenges associated with the use of Islamic law in Canada. Namely, divergent conceptions of the Sharī'a held by different experts who are brought before the courts make it difficult for judges to discern what is part of the Sharī'a and what is not.

The fifth observation that emerges from this study is that people will invoke Islamic law for various reasons. Although it is difficult to assess an individual's motivation for using Islamic law, some cases discussed above offer hints as to why individuals turned to the Sharī'a in regulating their personal affairs. In *Elkaswani v. Elkaswani* a clear

indication is given in the judge's report stating that Mr. Elkaswani wished to use Islamic law because of his strict adherence to the faith. Justice Wilson explains that Mr. Elkaswani 'wished to retain the traditional Muslim ways, and opposed Camilia [his wife] adopting Canadian ways.'[78] Interestingly, in his quest to follow Islamic law, Mr. Elkaswani invoked incorrect interpretations of the Sharī'a. In other cases, custom and tradition appear to dictate the motivations for the use of the Sharī'a. In all of the cases dealing with the *mahr,* the appearance of the dower in the marriage contract is part of a typical Islamic marriage ceremony. In these instances, the *mahr* has been described as a customary formality used in finalizing a marriage. Finally, self-interest seems to have motivated some individuals to invoke Islamic laws to resolve their personal affairs. This was clearly the case in *Al-Hashemy v. Abu Gheddah* where the husband was shirking his duties to provide his wife and child with financial support by hiding behind the veil of an Islamic divorce put into effect while she was stranded in Saudi Arabia. In the *mahr* dispute in *Kaddoura v. Hammoud,* Justice Rutherford comments that although the pair 'are Muslim as far as religion and religious home-background is concerned', their Islamic identity, he also goes on to suggest, is not that integral to their lives; he states that 'neither is what might be called "orthodox" Muslim.'[79] Thus we can speculate that Ms. Hammoud's motivation for claiming her dower was not based on religious convictions but rather on a desire for her husband to fulfill his financial obligations towards her, as provided in their marriage contract.

The final observation to come out of this survey is that a hybrid system of law is

[78] *Elkaswani v. Elkaswani,* paragraph 37.
[79] *Kaddoura v. Hammoud,* paragraph 7.

emerging whereby Canadian law is being complemented with elements of the Sharī'a. For instance, in Canada, a typical Islamic marriage conducted by a recognized *imām* will incorporate both civil and religious rituals in solemnizing the union. More likely than not, an Islamic marriage contract will include some mention of a *mahr.* This is evident in *Kaddoura v. Hammoud* where the couple agreed to a $35,000 dower as part of their marriage contract. As Islam continues to flourish in Canada, it is conceivable that many within this community will continue to use both Canadian and Islamic personal status laws in regulating their affairs. Ignoring the use of Islamic law in Canada is extremely shortsighted. Quebec and Ontario's move to outlaw Islamic arbitration can certainly be seen as secular-liberal victories against individuals who wish to govern their lives according to non-mainstream convictions. The effects of these decisions may have grave consequences as people turn away from civil law altogether and seek 'underground' justice. Furthermore, governments who neglect the spiritual realities of segments of their populations run the risk of delegitimizing themselves in the eyes of certain members of these religious communities. Rather than push Islamic arbitration out of the official justice system, governments should draw in these voices and regulate their decisions so that they meet principles of equality found in the *Charter.*

The dangers of unregulated Sharī'a procedures are clearly illustrated by the facts in *Elkaswani v. Elkaswani* where the husband attempted to deny his wife a portion of their matrimonial home on account of his convictions. Similarily, *Al-Hashemy v. Abu Gheddah* offers a glimpse of how one individual used Islamic law in order to avoid paying his wife alimony and child support, all the while stranding his wife and child in a foreign country. Mr. Bazzi's confusion regarding the procedures involved in issuing a

valid divorce in *Bazzi v. Deschamps* offers an indication that Muslims in Canada require some capable legal expertise in addressing their need to use Islamic law alongside the civil system. All these cases demonstrate that the intervention of the Canadian courts can be important to protect the parties involved. Furthermore, it has been demonstrated that *imāms* and other individuals who take up the task of interpreting Islamic law do not always have the qualification to do so. Thus in addressing people's needs for Islamic law, these unqualified individuals may offer incomplete or incorrect rulings. Ultimately, if forced to accept underground justice, vulnerable members of society may be subject to a form of Islamic law that falls outside Canadian law as well as the Sharī'a.

Permitting members of the Muslim community to settle their family disputes outside the spectrum of the law may lead to injustices for women like Camilia Elkaswani and Raghad Al-Hashimi. In both cases, the judges correctly determined that denying these women the benefits of a Canadian divorce would be unfair. If these cases never appeared before the courts, their husbands' wishes to deny them any financial compensation may well have come to fruition. Given the emergence of a hybrid system of law in Canada, it is too simplistic to discount the Sharī'a completely on account of its religious nature. Rather, creating a dual track approach to justice, as suggested by Habermas and others, may have better served those individuals who wish to maintain their religious convictions within a secular legal system. Unfortunately, following the recent debates in Ontario and Quebec, such a move seems very unlikely at present.

Conclusion

Diversity has posed a constant challenge to Canada. The strategies employed by the predominantly Anglo-Canadian elite in addressing ethnocultural communities have shifted from policies of assimilation to those of integration. The overt nativism of the past has given way to a measure of tolerance designed to create a unified society based on liberal-democratic goals. Yet traditional means of coping with diversity may no longer be responding to the rapidly changing dynamics of Canada's population. In particular, the desire on the part of some segments of Canada's Muslim population to utilize elements of the Sharī'a in matters related to marriage and divorce presents a challenge to the traditional framework of dealing with diversity.

Over the course of the past 30 years, Canada has become home to millions of non-European immigrants, refugees and their offspring. Not all of these individuals will fully buy into the Canadian mainstream predicated on Anglo based hegemony. When Canada's multiculturalism policy was hatched some thirty-five years ago, non-European minority groups had limited access to their ancestral homelands. To some extent, the distance between Muslim immigrants and their places of origin helped integrate these individuals into Canadian society. Today, the digital age has shattered this integrative tool. For example, pirate satellite providers offer members of the Iranian-Canadian community channels ranging from religious programming originating from the city of Qom to stations featuring the latest Persian hip-hop coming out of Los Angeles. Meanwhile, Muslim-Canadians who have concerns related to marriage and divorce can visit internet sites such as Islamoneline.net and seek advice from legal scholars from

around the world. Those individuals who have yet to find spouses can surf the numerous Muslim nuptial web pages and meet potential partners online. Modern technology has served to increase the links that Muslim-Canadians maintain with Muslim communities world-wide. This phenomenon, combined with local social networks bound together through cultural centers, mosques, schools and businesses, have enabled some Muslim-Canadians to lead lives that, more than ever before, are focused exclusively within their own communities. Although remaining aloof from the mainstream is not a particularly new phenomenon in North American society (Montreal's Hasidim come to mind here), advances in telecommunications and travel afford individuals deeper ties to counter-cultural ideas, lifestyles and values.

The call for the recognition of Islamic law in Canada represents a litmus test for assessing how Canadian society is currently meeting these post-national challenges. This dissertation has demonstrated that the court system has had the opportunity to address Islamic law issues to some extent. When cases involving Islamic law appear before the courts, judges are required to acknowledge, and in some instance, make rulings on matters related to the Sharī'a. The cases examined in this work highlight that Islamic law principles are generally invoked due to the desire of certain Muslims to abide by religious law or custom. In a minority of the cases, however, it appears that Islamic law is used as a means to obtain personal gain. In every case discussed in this work, Sharī'a principles that were found to violate equality rights or other fundamental elements of Canadian law, such as the prohibition of bigamy, were not permitted. In cases that involved unofficial or ad-hoc marriage or divorce ceremonies, we have seen that the individuals involved often forfeited benefits that would have been available to

them under Canadian law. Furthermore, our survey of cases has uncovered some inconsistencies in the manner Canadian judges ruled on issues such as the *mahr*. In one judgment the dower was regarded as a contract, while in another case it was seen as a religious duty that was unenforceable. Inconsistencies in the application of Islamic law were also found amongst individuals who served as expert witnesses before the courts; these experts frequently gave conflicting statements concerning the procedures involved in Islamic marriage and divorce. Ultimately, this study has demonstrated that a grass-roots hybrid system of law, combining Islamic and Canadian practices, is emerging. This reality brings to light the need for the legislative branch of government to appropriately address the growing presence of Islamic law within Canadian courts and within Canadian society as a whole.

One way in which Western governments can respond to the substantive needs of its population is to offer citizens a joint-governance model of conflict resolution. Such a model is in keeping with the theories articulated by Habermas, Sachar and Benhabib who endorse this strategy in a bid to ensure that legal systems remains flexible and adequately reflect the changing needs of society. However, if recent decisions taken in Ontario and Quebec to ban faith-based family arbitration are any indication, elected officials have missed a significant opportunity to address the emerging demographic challenge posed by multicultural populations. Rather than endorse a joint governance model of justice that would include a recognized form of Islamic family arbitration, the Quebec National Assembly and the Premier of Ontario chose to follow a static and 'color-blind' approach to justice. The unanimous vote taken in the Quebec National Assembly was an especially cynical measure considering that an existing provision

within the *Civil Code* (article 2639) already bans the use of arbitration in all family matters. Given its redundancy, this vote served no other purpose but to single out the Muslim community and chastise their attempts to legitimize arbitration panels within the Canadian justice system.

Slamming the gate on Islamic arbitration in Canada will ultimately have negative consequences for the Muslim community. A joint-governance model of law would have helped draw unheard and previously marginalized voices into the mainstream justice system. The fact that the government will no longer recognize faith based family arbitration agreements will not deter certain individuals from submitting to unofficial forms of faith-based ADR. As demonstrated in this work, the quality of justice offered by these underground panels is often suspect owing to the presence of untrained individuals serving as arbiters. Because this form of conflict resolution now falls outside the government's oversight capacity, the abuses of justice that occur during these proceedings will mostly go unnoticed and unchecked. Furthermore, the de-facto exclusion of certain segments of the Muslim community from the mainstream legal system will serve to further alienate this group and may well lead to the formation of the types of ghettos the opponents of faith-based arbitration warned against.

Ironically, the IICJ, the principal group advocating for the use of faith-based arbitration, was not seeking isolation from the mainstream - rather they were seeking to integrate themselves within society on their own terms. The panels they were attempting to establish in Ontario would have operated within *pre-existing* legal processes governed by the *Arbitration Act*. Moreover, the implementation of the recommendations made in

the Boyd Report would have enabled additional government controls such as the power to override arbitral awards that were made in bad faith.

Despite the integrative potential such a joint system of justice would have produced, there existed a number of shortcomings in the proposals put forward by the IICJ that called into question their ability to offer the services they advertised. The most glaring problem was a lack of expertise in the practice of Islamic law. Successfully applying provisions of the Sharī'a in Canada will require a cadre of specialists trained in specific Islamic schools of law as well as in Canadian jurisprudence. At present, these individuals are in short supply, leaving the articulation of Islamic law in the hands of untrained members of the Muslim community who sometimes follow incoherent interpretations of the Sharī'a.

Rather than highlight this particular shortcoming, opponents of faith-based arbitration chose instead to embark on a fear-mongering campaign that shed little light on the dynamics of Islamic law or how it could be applied in a joint-governance model of justice. Rather, Islamophobic rhetoric was employed as a means of discrediting faith-based arbitration. This tactic follows traditional patterns of cultural chauvinism that have typified liberalism in general, and Canadian attitudes towards diversity in particular. Cultural practices that fall outside the mainstream are considered threats to social cohesion and are labeled and dealt with as such. This line of thinking served to demonize the Muslim community by amplifying negative stereotypes currently in vogue amongst Western audiences.

The reductive logic of the debates over Islamic ADR failed to take into account the checks and balances that Canadian procedural and constitutional law would have

imposed on the decisions rendered by these arbitration panels. Limits would have been imposed on the ADR process that would have kept any excess of power in check. Moreover, the legal issues that would have been subject to arbitration are very limited in scope – meaning cases that dealt with child custody for instance could not be settled via arbitration. Given these limits, arbitration would have established a symbolic system of conflict resolution that would nevertheless have permitted members of the Muslim community to access cultural and religious norms they regard as important to their cultural and religious identity. Such a compromise would have no doubt left some individuals dissatisfied. Conservative members of religious communities would see Divine law being cut short, while those wanting to separate religion from the public forum would feel threatened by the infiltration of Islamic principles into the ostensibly secular matters of the state. A certain amount of dissatisfaction is, however, part and parcel of any system of justice which attempts to cater to a heterogeneous liberal democracy. An expectation of complete cultural convergence is untenable given the diversity inherent in multicultural societies. The opening years of the twenty-first century clearly suggests that religious belief and adherence to non-mainstream culture are not waning in Western democracies; rather these forces are playing an increasing role in the public forum. In failing to grant a measure of legitimacy to religious influences in dispute resolution, the Canadian government is not responding to the substantive concerns of a large segment of the population. In the long run, this lack of integration risks undermining the legitimacy of the Canadian judicial system in the eyes of the population governed by it.

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