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## The Myth and Reality of Shari'a Courts in Canada: A Delayed Opportunity for the Indigenization of Islamic Legal Rulings

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## ARTICLE

# THE MYTH AND REALITY OF “SHARI’A COURTS” IN CANADA: A DELAYED OPPORTUNITY FOR THE INDIGENIZATION OF ISLAMIC LEGAL RULINGS

FAISAL KUTTY\*

## INTRODUCTION

From 2003 to 2005, the Province of Ontario, Canada, was the setting for an internationally reported controversy about using Islamic legal principles in resolving disputes under the province’s Arbitration Act of 1991.<sup>1</sup> The debate did not die on September 11, 2005, when Premier Dalton McGuinty announced his decision to ostensibly<sup>2</sup> ban the use of religious laws in resolving family disputes.<sup>3</sup> The passage of the Family Statute Law Amendment Act, 2005,<sup>4</sup> formalizing Premier McGuinty’s decision, served

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1. Arbitration Act S.O. 1991, c.17 (Can.).

2. I concur with many observers that this announcement was more of a political exercise in “smoke and mirrors” and does not in fact prevent people from resolving disputes using religious principles. It merely contributed to the negative perception of Islam and Muslims and in this fashion serves as a hindrance to the acceptance of Islam and Muslims on an equal footing in Canadian society.

3. Colin Freeze & Karen Howlett, *McGuinty Government Rules Out Use of Sharia Law*, GLOBE & MAIL, Sept. 12, 2005.

4. Family Statute Law Amendment Act, S.O. 2006, c.1 (Can.).

only to fuel debates that have been raging in liberal democracies for some time.

Those opposed to arbitrating family disputes using religious principles under the Arbitration Act raised legitimate concerns about gender equality and minority rights within religious communities.<sup>5</sup> They questioned the role of religion in secular society and opposed what they saw as privatization of the legal system.<sup>6</sup> Proponents, however, contended that religious groups should be able to govern their lives according to their conscience within the parameters of law if the constitutional rights to freedom of religion and association are to have any real value. They further contended that the system was consistent with Canadian tradition of multicultural citizenship. Finally, proponents argued consenting and informed adults must be able to make religious choices, even if others do not see these as “correct” choices.

The issues, of course, transcend dispute resolution and tug at fundamental tensions surrounding multiculturalism and national identity: the separation of church and state, and the limits of accommodation and legal pluralism within a liberal democracy. The controversy offers up much for debate.

In this paper, I limit myself to arguing that the government of Ontario delayed an opportunity to contribute to the evolution of Islamic law by indigenizing Islamic legal rulings. Such a process would enable integration of its Muslim citizens into broader Canadian society by allowing them to maintain their identity and develop their practices in an “organic” manner.<sup>7</sup> In Part 1, I provide a brief background on the controversy. Part 2 summarizes former Attorney General Marion Boyd’s report on the issue commis-

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5. See, e.g., Ayelet Shachar, *Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, 50 MCGILL L.J. 49 (2005); see also MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION (2004), <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>.

6. See Natasha Bakht, *Family Arbitration Using Sharia Law: Examining Ontario’s Arbitration Act and its Impact on Women*, 1 MUSLIM WORLD J. HUM. RTS. 1 (2004) [hereinafter Bakht, *Family Arbitration*]; Natasha Bakht, *Arbitration, Religion and Family Law: Private Justice on the Backs of Women*, NATIONAL ASSOCIATION OF WOMEN AND THE LAW (2005), [http://www.nawl.ca/ns/en/documents/Pub\\_Rprt\\_ReligArb05\\_en.pdf](http://www.nawl.ca/ns/en/documents/Pub_Rprt_ReligArb05_en.pdf) [hereinafter Bakht, *Private Justice*].

7. There is often confusion between the term Shari’a and Islamic law or Islamic jurisprudence. I will be using Islamic law to refer to Islamic legal rules and will relate it to the broader concept of Shari’a. The two terms were used interchangeably and inaccurately in much of the discussion and debate around this issue. Muhammad Asad, a prominent Islamic thinker, narrows down the Shari’a to the *nusus*, the definitive ordinances of the Qur’an, which are expounded in positive legal terms. Muhammad Hashim Kamali, *Source, Nature and Objectives of Shari’ah*, 33 ISLAMIC Q. 215, 217 (1989). The Shari’a is therefore broader as explained later in the paper. While Islamic law in the narrow sense is limited to the laws, it is more comprehensive in terms of including even those rules and laws that have been derived using the sources and methodologies for deriving laws sanctioned by Islamic jurisprudence as well as all the quasi-Islamic laws in existence in Muslim countries as a result of colonization and secularization. See Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origins and Elements*, 7 J. ISLAMIC L. & CULTURE 27, 31–33 (2002). This paper limits the discussion of Islamic law to the private realm of personal relations and contractual matters in the area of family law.

sioned by the Ontario government. In Part 3, I provide an overview of the Muslim communities'<sup>8</sup> response to the proposal put forth by the Islamic Institute of Civil Justice (IICJ) and document my role as counsel to various community groups in this matter. In Part 4, I situate the debate within the context of the existing legal framework for family law in the province. In Part 5, I provide a basic primer on Islam and its legal system.

I then explore the indigenization potential provided by this opportunity in Part 6. More specifically, I argue that this controversy provided an opportunity for the ummah (Muslim community)<sup>9</sup> to internally struggle with its customs, practices, and principles.<sup>10</sup> This community-led, bottom-up model of Islamic reform, which Mashood Baderin has accurately labeled "the socio-cultural and harmonistic approach," is the most sustainable, peaceful, and legitimate route to develop new rulings and laws.<sup>11</sup>

The various schools and groupings within the ummah must be encouraged to grapple with the existing traditions of Islam and to work with its tool box of legal and political theory to start devising a more Canadian version of Islam and Islamic law.<sup>12</sup> The least we can do is to allow the communities as a whole to negotiate and work out their own norms, rather than attempt to impose values and judgments.<sup>13</sup>

I suggest that this organic bottom-up consensus-building approach to Islamic reform would be in line with the long established Islamic traditions of *tajdid* (renewal) and *islah* (reform).<sup>14</sup> As Tariq Ramadan argues, this reform must take a radical trajectory and consider the modern/Western context and human wisdom accumulated since the classical Islamic era.<sup>15</sup> The product of this process would not only have more relevance in the lives of

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8. There is no such thing as a homogenous or monolithic Muslim community. There are multiple communities with different ethnic, linguistic, cultural, and social practices and varying degrees of orthodoxy that make up the "Muslim community."

9. The *ummah* in this context would be the local Canadian or more specifically the Ontario *ummah*. This specification will be consistent with the Islamic tradition of geographically and contextually specific schools of jurisprudence. See Basheer M. Nafi, *The Rise of Islamic Reformist Thought and its Challenge to Traditional Islam*, in ISLAMIC THOUGHT IN THE TWENTIETH CENTURY 2–60 (Suha Taji-Farouki & Basheer M. Nafi eds., 2004), for a discussion of the differences arising from geography and other external influences.

10. By way of conclusion, I also argue that rather than ameliorating the potential issues within the community, the Premier's decision actually did nothing to address them and perpetuates the existence of unregulated and unsupervised mediations and arbitrations using religious principles.

11. See Mashood A. Baderin, *Islam and the Realization of Human Rights in the Muslim World: A Reflection on Two Essential Approaches and Two Divergent Perspectives*, 4 MUSLIM WORLD J. HUM. RTS. 1, 1–25 (2007) (although addressing a different context).

12. See, e.g., Anver M. Emon, *Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation*, 87 LA REVUE DU BARREAU CANADIEN 391 (2008).

13. Clearly we as a society would step in only when and if vulnerable segments of the group are exploited or abused. This decision must be evidence based and not speculative.

14. John O. Voll, *Renewal and Reform in Islamic History: Tajdid and Islah*, in VOICES OF RESURGENT ISLAM 32–47 (John L. Esposito ed., 1983).

15. TARIQ RAMADAN, *RADICAL REFORM: ISLAMIC ETHICS AND LIBERATION* 12–13 (2009).

contemporary Muslims, but it will also have greater legitimacy for its inherent consistency with Islamic doctrines and concepts. Indeed, this grounding in the universal and timeless values of Islam may better inoculate these reforms from the inevitable attacks from extremists and even some traditionalists, who will undoubtedly label them as Western impositions. Such a community-led process is also necessary to ensure that integration is a two-way process of accommodation between majority and minority communities. In Part 7, before concluding the paper, I situate the debate and potential for “indigenization” within the broader context of multicultural citizenship and legal pluralism.

#### PART 1 – BACKGROUND OF THE CONTROVERSY

The controversy erupted in the fall of 2003, when a small Muslim group led by a retired lawyer, Syed Mumtaz Ali,<sup>16</sup> announced the formation of the IICJ to provide a framework to resolve private disputes using Islamic legal principles.<sup>17</sup> The IICJ announcement left the false impression that the Ontario government had granted the IICJ some form of special dispensation or permission to establish a “*Shari’a* Court.”<sup>18</sup> Moreover, the IICJ’s careless pronouncements also suggested that participation may not have been voluntary.<sup>19</sup>

In reality, this was neither the establishment of a parallel religious court system in Ontario nor the lead chariot in the procession of political Islam. In fact, as the Attorney General’s Office reiterated at the time, no changes had been made to the province’s arbitration regime since its enactment. The existing Arbitration Act allowed parties to resolve their private disputes—commercial, ecclesiastical, or familial—through voluntary arbitration using any “rules of law.”<sup>20</sup>

Ontario has had a statute governing arbitrations dating back to the nineteenth century.<sup>21</sup> The current Arbitration Act, 1991, which was at the center of the controversy, came into existence in 1992.<sup>22</sup> This act came about when the province adopted the Uniform Arbitration Act, developed in

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16. Syed Mumtaz Ali was one of the first Muslim lawyers in Canada and the first to be sworn in on the Qur’an instead of the Bible. Noor Javed, *Syed Mumtaz Ali, 82: Lawyer Led Fight for Religious Arbitration*, TORONTO STAR, Jul. 21, 2009, <http://www.thestar.com/article/669288>. He passed away on July 16, 2009. *Id.*

17. Judy Van Rhijn, *First Steps Taken for Islamic Arbitration Board*, L. TIMES, Nov. 24, 2003, at 11.

18. *Id.*; see also BOYD, *supra* note 5, at 3.

19. BOYD, *supra* note 5, at 3.

20. Arbitration Act, S.O. 1991, c. 17, s. 32(1) (Can.).

21. BOYD, *supra* note 5, at 11.

22. Ontario was the first of seven provinces (Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Prince Edward Island, and Nova Scotia) that have now adopted the Uniform Arbitration Act, which was drafted in 1990 by the Uniform Law Conference of Canada. See *id.*, at 10–11; Law Reform Commission of Canada, Uniform Arbitration Act (1990), available at <http://ulcc.ca/en/us/arbitrat.pdf>.

1990 by the Uniform Law Conference of Canada. The Act allows parties to have their dispute settled by an agreed upon adjudicator. The process is based on contract law and parties are given a significant amount of freedom in its design.<sup>23</sup> Parties have full rights to choose what rules will govern the resolution of the dispute—be it religious, secular, Ontario law, the law of other jurisdictions, or any other mutually agreed upon rules.<sup>24</sup> While a party cannot unilaterally withdraw from the process after agreeing to arbitration, the process can be altered or terminated if both parties consent. As with any contractual arrangement, courts can stay any pending action while the matter is being arbitrated.<sup>25</sup> Courts will also issue arbitral awards, enforcing the decisions that result from the process.

As with almost all dispute resolution methods, arbitration must be jointly and voluntarily chosen by the parties to the dispute.<sup>26</sup> The only mandatory dispute resolution option is the court system; a party filing a claim or bringing an action or application through the courts can compel the other party to respond. Even in cases that proceed through the courts, the initiating party must take the first step by filing a claim or bringing the matter to a court. Generally, an affected party is under no obligation to enforce its rights, whether it be through the courts or otherwise.

It is important to note for our purposes that neither the Arbitration Act of 1991 nor its precursors implicitly or explicitly excluded family and inheritance disputes. Moreover, given that the IICJ was simply using existing Ontario legislation, the government had no positive role or duty in the process. Indeed, in line with the growing interest in Alternative Dispute Resolution (ADR), various other cultural and religious groups took advantage of the Act for years to offer an alternative to the antagonistic legal system without any uproar or controversy.<sup>27</sup>

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23. Arbitration Act, S.O. 1991, c. 17, s. 2 (Can.). The Act refers to the process as an arbitration agreement.

24. *Id.* at s. 32(1).

25. *Id.* at s. 7.

26. One argument is that women will be forced to submit to arbitration and this will be discussed in detail later in this paper.

27. Other communities have successfully implemented Alternative Dispute Resolution (ADR) initiatives. For instance, rabbinical courts (*Beth Din*) dealing with business and matrimonial issues of Jewish parties have been functioning for some time in Ontario. See Bakht, *Family Arbitration*, *supra* note 6, at 1; BOYD, *supra* note 5, at 55–59.

## PART 2 – THE MARION BOYD REPORT

In response to the mounting pressure from women's groups<sup>28</sup> and two secular Muslim groups,<sup>29</sup> the government formally asked former attorney general and women's rights advocate, Marion Boyd, to study the issue of whether religious laws should continue to be allowed in family law arbitrations. Boyd was categorical in her report (the "Boyd Report"): "The Arbitration Act should continue to allow disputes to be arbitrated using religious laws . . . ."<sup>30</sup> Her 191-page report attempted to address some of the legitimate concerns of those opposed to the proposal while trying to preserve the arbitration regime's integrity. Toward this end, Boyd concluded with forty-six well thought out recommendations, including:<sup>31</sup>

- Amendments to the Family Law Act and the Arbitration Act to ensure that the mediation and arbitration agreements are legally treated in the same manner as marriage contracts and separation agreements;<sup>32</sup>
- Calling for regulations to ensure proper record keeping, mandating written decisions, and training of arbitrators;<sup>33</sup>

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28. These include the National Organization of Immigrant and Visible Minority Women of Canada, the National Association of Women and the Law (NAWL), the YWCA Canada, and the Women's Legal Education and Action Fund (LEAF). *See, e.g.,* André Côté, *An Open Letter Opposing the Use of Arbitration & Faith-Based Tribunals in Family Law in Ontario*, 23 *Jurisfemme*, Spring 2005, at 1, available at <http://www.nawl.ca/en/newlibrarypage/jurisfemme/64-jfvolume23> 2005 (calling on the government to reject Boyd's recommendations).

29. Not all secular Muslim groups were opposed. The Canadian Council of Muslim Women (CCMW) and the Muslim Canadian Congress were the most vocal and media savvy and they were the main Muslim groups opposing the initiative fully. The CCMW organized a coalition of 100 organizations including those set out in footnote 28 to oppose religious arbitration. *See* Natasha Bakht, *Were Muslim Barbarians Really Knocking on the Gates of Ontario?: The Religious Arbitration Controversy—Another Perspective*, in 40TH ANNIV. ED. OTTAWA L. REV. 67, 67–82 (2006), available at [http://www.lawsite.ca/OLR\\_Barbarians-Arb\\_Article.pdf](http://www.lawsite.ca/OLR_Barbarians-Arb_Article.pdf) [hereinafter Bakht, *Muslim Barbarians*]. Interestingly, Bakht wrote reports for the coalition against faith-based arbitration and later reconsidered her position in this reconsidered paper. The CCMW's opposition was partly based on legitimate concerns and partly based on misunderstanding of the existing family law regime and scope of arbitration, as discussed in this paper. The Muslim Canadian Congress has a track record of being fiercely secular and has had a knee jerk objection to anything "Islamic." *See, e.g.,* MUSLIM CANADIAN CONGRESS, SO-CALLED SHARIA MORTGAGES ARE A DECEPTION (2008), <http://www.muslimcanadiancongress.org/20080129.html> (Islamic finance); MUSLIM CANADIAN CONGRESS, TOP EGYPTIAN CLERIC SAYS NIQAB HAS NOTHING TO DO WITH ISLAM (2009), <http://www.muslimcanadiancongress.org/20091008.html> (the veil or *niqab*); Tarek Fatah & Salma Siddiqui, *Tory Attempts to Secure Religious Minority Vote*, TORONTO STAR, June 15, 2007, available at <http://www.thestar.com/comment/article/225577> (funding of Islamic schools); MUSLIM CANADIAN CONGRESS, MUSLIM CANADIAN CONGRESS CONDEMNS ISLAMIC EXTREMISM (2006), <http://www.muslimcanadiancongress.org/20060619.html> (cash fundraising within the community). The vast majority of Muslim groups, both secular and traditional, were either silent or endorsed the idea of choice to varying degrees.

30. BOYD, *supra* note 5, at 3.

31. Boyd met with more than 200 people and reviewed over forty submissions. *See id.* at 145–56.

32. *See id.* at 133–34.

33. *Id.* at 134–37, 139–40.

- Imposing a duty on arbitrators to ensure that parties understand their rights and are participating voluntarily;<sup>34</sup>
- Providing for greater oversight and accountability, including empowering courts to set aside arbitral awards for various reasons including unconscionability, inadequate financial disclosure, or if a party did not understand the nature or consequences of the arbitration agreement;<sup>35</sup>
- Public education and community development;<sup>36</sup>
- Expanded appeal possibilities;<sup>37</sup> and
- Further policy analysis to determine whether additional safeguards are required.<sup>38</sup>

Many critics opposed the report, both from within and outside of the Muslim community.<sup>39</sup> A central critique was that there is no way to ascertain true consent, as Muslim women would be forced to submit to social pressure and accept unfair decisions.<sup>40</sup> This concern is valid, but what appeared lost in the debate was that such fears are not restricted to Muslims or arbitrations, *per se*. In fact, women and men, irrespective of their religion, face pressures in all facets of human interaction. These pressures exist even in the non-alternative legal setting, where the vast majority of cases are settled out of court and where, in many instances, parties compromise for less than their legal entitlements. Social pressure may be even more acute in many cases that are settled without the benefit of any legal advice or oversight. Indeed, many resolve their issues, including family matters, through paralegals, who in many cases act for both parties without any thought as to whether the parties appreciate what rights they are giving up. Moreover, many settle such matters themselves or simply walk away from disputes. None of the critics' concerns were unsolvable nor were they restricted exclusively to the arbitration context.<sup>41</sup>

From my perspective, Boyd's report merely affirmed the constitutional right to religious freedom, equal treatment under the law, multiculturalism, and ensured that the state was in compliance with its international obliga-

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34. *See id.* at 135–36.

35. *See id.* at 134, 140–41.

36. *Id.* at 138, 141.

37. *See id.* at 134–36.

38. *Id.* at 141–42.

39. The critics came from all camps and perspectives.

40. Another criticism that was leveled at Boyd's position was that a party will be able to waive independent legal advice (ILA) if they wish. Again this ignores the fact that as it stands now, nobody can be forced to obtain ILA for any legal matter—though this may be moot as this leaves it open for courts to set aside any agreements or arbitral decisions. Forcing ILA would be great for the legal profession but would seriously restrict the ability of people to bargain freely or settle issues without a lawyer and would clearly represent unnecessary intrusion by governments into the private domain, particularly given that an exploited or abused party has the theoretical option to have the matter set aside for lack of ILA. *See* BOYD, *supra* note 5.

41. In fact, some could have also been partly addressed by imposing duties on arbitrators and implementing some of Boyd's recommendations.



tions.<sup>42</sup> Indeed, Article 27 of the International Covenant on Civil and Political Rights imposes a positive duty on states to assist minorities in preserving their values by allowing them to enjoy their own culture and to profess and practice their own religion.<sup>43</sup> In my view, Boyd balanced the rights of those who wished to voluntarily resolve their private disputes using religious principles with the basic rights of vulnerable segments within these same religious communities.<sup>44</sup> Of course, this does not mean that family law arbitrations are without problems or issues. In fact, one of the positive results of the discussions was the acknowledgment that there were issues in the family law context—be it in arbitration or otherwise.<sup>45</sup> The issues of social pressure, lack of access to justice, imbalance in bargaining positions and power, and various other potential problems exist. For our purposes, it is important to recognize that they exist in the ADR as well as the non-ADR legal contexts.

### PART 3 – MUSLIM COMMUNITIES’ REACTION AND RESPONSE<sup>46</sup>

Among the province’s growing, diverse Muslim population, reactions to the proposed Islamic arbitration regime ranged from apathy, to fear that tribunal decisions may be biased against women, to wholehearted endorsement. Some thought of it as a panacea that would solve their alleged inability to live as “good” Muslims, while others saw wholesale government-sanctioned discrimination against Muslim women. The vast majority of Ontario Muslims, however, did not see arbitration as a critical issue for the community and only gave it passing interest.

A combination of misunderstanding, ignorance, and careless pronouncements from those on all sides of the issue, as well as inaccurate and biased media coverage, helped fuel a firestorm.<sup>47</sup> Many in the mainstream uncritically accepted the misunderstanding first promoted, most likely inadvertently, by the IICJ and later by the media that the government had approved new “Shari’a Courts” with coercive powers to force all Muslims to arbitrate using Islamic laws. Opponents from both within and outside the Muslim community, some who saw the initiative as “Muslim barbarians

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42. Technically, under the Canadian Constitution, this is the responsibility of the federal government, not the province of Ontario.

43. International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, accession by Canada May 19, 1976).

44. There are numerous criticisms of the Boyd report from the religious perspective as well, but given the existing climate this was the best compromise; a compromise that could certainly have been improved upon from both positions.

45. Much more focus and effort should have been directed toward these issues. See, e.g., Trevor C.W. Farrow, *Re-Framing the Sharia Arbitration Debate*, 15 CONST. F. 79 (2006).

46. See *supra* note 8.

47. See CATHERINE MORRIS, MEDIA’S MEDIATION AND OTHER MATTERS: FAITH-BASED DISPUTE RESOLUTION IN CANADA (2006), [http://www.cba.org/CBA/newsletters/pdf/ADR-Morris\\_presentation.pdf](http://www.cba.org/CBA/newsletters/pdf/ADR-Morris_presentation.pdf); James Thornback, *The Portrayal of Sharia in Ontario*, 10 APPEAL 1 (2005).

knocking on the gates of Ontario,"<sup>48</sup> mobilized their resources and reacted swiftly on a global level. They launched a "no-Shari'a" campaign, which confirmed the Islamophobia fears of some.<sup>49</sup> These fears were exacerbated by well-intentioned but misguided feminists who were coming to the aid of "Imperiled Muslim Women."<sup>50</sup>

I can appreciate that many were concerned about the exploitation of Muslim women. At times, however, public discourse fueled "moral panic"<sup>51</sup> and crossed into Islamophobia. For instance, in November 2004 I sat on a panel at the University of Toronto where some lawyers suggested that Muslim lawyers should not be able to participate in such arbitrations or to provide independent legal advice to Muslim women because Muslim lawyers may be biased and may participate in the abuse of women.<sup>52</sup>

In another instance, a non-Muslim lawyer who was a partner at a prominent Bay Street law firm was singled out by his firm because he had made representations in favor of allowing faith-based arbitration and because he had encouraged a female Muslim law student intern to write in support of the initiative in a major daily newspaper. The firm was concerned about the public relations harm of being associated with the "wrong" side of this controversial issue. The firm's response was one of the factors that motivated the lawyer to ultimately leave the firm.<sup>53</sup>

As the debate intensified, I was engaged by five of the largest national Muslim groups to advocate for the choice to engage in arbitration using Islamic legal principles, with some additional checks to ensure that the vulnerable were not coerced, exploited, or abused in the process. While virtually all national Muslim groups expressed similar concerns, those in favor of choice were painted by the same brush. In fact, those who spoke in favor of faith-based arbitration, however nuanced or conditional, were often seen

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48. Natasha Bakht, *Religious Arbitration in Canada: Protecting Women by Protecting Them from Religion*, 19 CAN. J. WOMEN & L. 119, 123 (2007) [hereinafter Bakht, *Religious Arbitration*].

49. Many in the community saw some of the opponents as singling out Muslims and Islam. Interestingly, one of the main opponents, Homa Arjomand, has given some credence to this by now focusing her energy on opposing Islamic education of children. See HOMA ARJOMAND, INTERNATIONAL DECLARATION, ISLAMIC SCHOOLS SHOULD BE BANNED, CHILDREN HAVE NO RELIGION, <http://new.petitiononline.com/nofaith/petition.html>.

50. See Sherene H. Razack, *The 'Sharia Law Debate' in Ontario: The Modernity/Premodernity Distinction in Legal Efforts to Protect Women from Culture*, 15 FEMINIST LEGAL STUD. 3, 10–12 (2007); see also Bakht, *Muslim Barbarians*, *supra* note 29.

51. Stanley Cohen first introduced the term when a "condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests [and] its nature is presented in a stylized and stereotypical fashion." STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* 1 (2002).

52. University of Toronto Student Affairs Office and the Faculty of Law Diversity Committee Symposium, *Keeping the Faith: Alternative Dispute Resolution in Ontario's Faith Communities* (Nov. 18, 2004); see also *supra* note 45.

53. Although engaged actively on this issue he has never really publicized this story. He spoke about it at one event that addressed the controversy.

as contributing to the exploitation and abuse of women.<sup>54</sup> Indeed, many in the Muslim community did not appreciate the widespread belief evident during the debate that Muslim women would necessarily be abused and exploited if the choice were available. As Mihad Fahmy, a Muslim woman lawyer who advocated in favor of faith-based arbitration wrote:

You may also have bought into the argument that Canadian-Muslim women will somehow be coerced into the proposed faith-based arbitration process. This, even though the same concern is not expressed with respect to Jewish and Christian women, some of whom already choose to settle family law and inheritance disputes according to the laws of their respective faiths. It is frustrating that such biases and stereotypes about Islam, and Muslim women in particular, have been driving the debate regarding religious-based arbitration.<sup>55</sup>

The hysteria reached a fevered pitch when Quebec Member of the National Assembly Fatima Houde-Peppin—a self-proclaimed secular Muslim—initiated and tabled a motion to ban Islamic tribunals.<sup>56</sup> The minor detail that makes this motion Islamophobic is that the province of Quebec's Civil Code specifically precludes the use of arbitration in the context of family law disputes.<sup>57</sup> As if to ensure that this was not lost on Muslims, the Quebec International Relations Minister, Monique Gagnon-Tremblay, reinforced the hate and fear by stating, "Muslims who want to come to Quebec and who do not respect women's rights, or rights, whatever they may be, in our civil code . . . [should] stay in their country and not come to Quebec, because it's unacceptable . . ." <sup>58</sup>

These Islamophobic announcements and reactions contributed to the involvement of many Muslims who were initially complacent or apathetic. In fact, national Muslim organizations such as the Islamic Society of North America (ISNA), the Islamic Circle of North America (ICNA), the Muslim Association of Canada (MAC), the Canadian Muslim Civil Liberties Association (CMCLA), and the Canadian Council on American Islamic Relations (CAIR-CAN) actively participated in the issue only after the discourse shifted to attacking Islam and singling out Muslims. CAIR-CAN was given a lead role in this initiative by the collective and I acted as lead counsel. In this capacity, I met with various parties and spoke on numerous panels,

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54. See, e.g., Bakht, *Muslim Barbarians*, *supra* note 29, at 3.

55. Mihad Fahmy, *Shariah Law Requires Tough, Open Debate*, LONDON FREE PRESS, Sept. 14, 2004, [http://www.caircan.ca/oped\\_more.php?id=1161\\_0\\_10\\_0\\_C](http://www.caircan.ca/oped_more.php?id=1161_0_10_0_C).

56. Rheel Seguin, *Quebec Squashes Idea of Islamic Tribunals*, GLOBE & MAIL, May 27, 2005, at A1.

57. Civil Code of Québec, S.Q. 1991, c. 64, art. 2639 (Can.) ("Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration.").

58. Mike De Souza, *Quebec Leaders Warn Ontario: Reject Sharia: Minister Wants Immigrants Who Support It Barred*, NAT'L POST, Mar. 11, 2005, at A8.

including one in April 2005 organized by a leading opponent of the initiative, the Canadian Council of Muslim Women (CCMW).<sup>59</sup> Some of the organizers were upset with me because I urged the attendees to read their own report, prepared by University of Ottawa law professor Natasha Bakht, and the Boyd Report so they could make an informed decision on this issue. Bakht's report set out the existing family law regime and the protections and appeal/judicial review options available in the traditional and ADR routes.<sup>60</sup> Boyd's in-depth investigation led Bakht to conclude that dispute arbitration in accordance with religious laws should continue, though the arbitration law needed to build in more safeguards to address some of the issues with arbitration in general. The emotions were high; at one point I was booed and heckled on stage during my presentation in front of 300 to 400 attendees.<sup>61</sup>

As the debate raged, a more formal meeting attended by representatives of each of the groups I acted for, a number of local mosques, and another national coalition group, the Coalition of Muslim Organizations (COMO), took place at the sixth annual MAC-ICNA joint convention held in Mississauga in September 2005.<sup>62</sup> These groups were particularly concerned about the paternalism and Islamophobia inherent in much of the discussion. I was invited to brief this larger group and a collective decision was made to become more active in the debate. One of the major suggestions was to have Muslim women take the lead. Unfortunately, it was too late in the game to make any real inroads.<sup>63</sup>

In the months leading up to the September 11, 2005 decision to dismantle all religiously-based family law arbitration, it appeared as though the government had no choice but to continue to allow religious arbitrations with the additional checks proposed by the Boyd Report. The coalition of the five Muslim organizations I worked for argued that faith-based arbitrations should continue as a protected and viable option, provided that they were voluntary, that all of Boyd's recommendations be adopted, and that the courts would only enforce decisions consistent with Canadian laws. In essence, arbitrations using religious principles should not be rejected out-

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59. Faisal Kutty, Panel Discussion at the Canadian Council of Muslim Women Symposium: Is There Room for Women's Equality Rights in Religious Arbitration (Apr. 9, 2005), <http://www.ccmw.com/documents/CCMWSymposiumReport2005.pdf>.

60. I concurred with most of her legal analysis but disagreed with her conclusion that outright prohibition of faith-based arbitration was the only solution.

61. Revealing the lack of knowledge about the issues involved, during question and answer one lawyer even asked me what was wrong with Ontario law. My answer was, of course, nothing. The initiative was simply attempting to use existing Ontario law. Interestingly, a number of women also came up after my presentation and said that they had totally misunderstood the issue and although they were CCMW members they did not agree with the position of the CCMW.

62. See 6TH ANNUAL ICNA-MAC CONFERENCE (Sept. 17-18, 2005), <http://melayu.canada.multiply.com/journal/item/32>. Marion Boyd spoke about her report at this conference.

63. A press conference was organized to express some of the concerns. See Marina Jimenez, *Debate Stirs Hatred, Sharia Activists Say*, GLOBE & MAIL, Sept. 15, 2005, at A6.

right, but should be evaluated in light of Ontario laws and common law principles.

Late in the summer of 2005, I received a call<sup>64</sup> from the Attorney General's Office during which the counsel canvassed with me whether, in my opinion, my clients and the segment of the community they represented would be satisfied if the government simply decided that arbitral awards and decisions would be treated in the same manner as domestic contracts (e.g., separation agreements, marriage contracts, etc.).<sup>65</sup> My unequivocal response was, yes, such a proposal would be acceptable as Muslims are asked to respect the laws of the land where they live provided there is no positive requirement to breach a religious obligation. This exchange left me under the erroneous impression that the premier was simply going to adopt the Boyd Report's recommendations and treat such decisions in the same manner as domestic contracts.<sup>66</sup> I even informed some of my clients of this imminent possibility.

This phone call took place just weeks before opponents descended on Queen's Park,<sup>67</sup> accompanied by a number of nationally prominent women's activists including June Callwood and Sally Armstrong, and urged the premier to ban faith-based arbitration,<sup>68</sup> which he did within the next few days. The government essentially caved in to public pressure.

Democracy, of course, does pose the threat of unbridled majoritarianism. In my experience, mass fears, hysteria, prejudices, and the ensuing "moral panic" contributed to the government's response as they tried to appease the majority. It is at such times that one would expect to rely on Constitutionalism, human rights, the principles of liberal democracy, and opposition parties to stand up in defense of minority rights or the rights of the unpopular. So it was surprising when both the New Democratic Party (NDP) and the Conservative Party (Tories) did not speak out in support of

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64. Telephone Call with Counsel from the Attorney General's Office (Summer 2005).

65. *Id.* Not surprisingly, the Canadian Jewish Congress (CJC) also argued that arbitral decisions should be treated in the same fashion as domestic contracts and that faith communities should be involved in the development of the legislation's regulations. See Faisal Kutty, *Faith-based Arbitrations in Ontario: A Lost Opportunity*, LAW. WKLY., Mar. 24, 2006, <http://faisalkutty.com/publications/the-lawyers-weekly/comment-faith-based-arbitrations-in-ontario-a-lost-opportunity/>. Both suggestions were rejected outright without any reasons. As CJC counsel Mark Freiman pointed out, the legislation and the process used to develop it appear to be based on the premise that women are intrinsically incapable of voluntarily choosing faith-based arbitration. "It assumes that faith-based approaches to arbitration are innately exploitative," Freeman noted. "This view is insulting to all women, and to the faiths to which Ontarians adhere." *Ontario Passes Law to Prohibit Religious Tribunals for Family Law Cases*, CANADIAN PRESS, Feb. 15, 2006, <http://www.1080.org/articles/20452/>.

66. See discussion *infra* Part 4.

67. CTV.ca News Staff, *Protesters March Against Sharia Law in Canada*, Sept. 9, 2005, [http://www.ctv.ca/CTVNews/TopStories/20050909/sharia\\_law\\_ontario\\_050908/](http://www.ctv.ca/CTVNews/TopStories/20050909/sharia_law_ontario_050908/).

68. Marina Jimenez, *Ontario Sharia Plan Protested*, GLOBE & MAIL, Sept. 9, 2005, at A5.

minority rights. In my meetings with Howard Hampton of the NDP<sup>69</sup> and John Tory of the Tories<sup>70</sup> on behalf of my clients, it became clear that both were reacting to widespread international opposition. In fact, they both indicated that they never received so much opposition from an international audience on any issue they had to grapple with in the context of governing Ontario. It became evident that explaining the progressive possibilities of Islamic law and the nuances of family law and the Arbitration Act would be drowned out by the anti-religion activists and well-intentioned, but misinformed (or under-informed) women's rights groups ostensibly trying to protect Muslim women from religion.<sup>71</sup> Both opposition parties in Ontario thus enabled the majority to take away a right available to Ontarians since 1992 without any concrete evidence of harm.<sup>72</sup> These members of provincial parliament (MPPs) acted on speculation and against the recommendations of the government's own report, perhaps a first in Ontario legislative history.

Since the pronouncement, "back-alley" arbitrations continue throughout the province, unregulated and unsupervised.<sup>73</sup> For instance, clients have approached me to complain about the Muslim Court of Arbitration (*Darul Qada*) because the institution has purportedly granted divorces and issued decisions without any authority.<sup>74</sup> It should be pointed out that divorce cannot be arbitrated. Nevertheless, in at least one such case brought to my attention, the person was Islamically divorced (against his will) from his wife after a brief conversation and some e-mail exchanges with the *Darul Qada*. The person never consented nor submitted the matter to the tribunal. The wife assumed she was divorced, while the husband struggled with the legal system. Such decisions not only impact the issue of religious divorces that fall outside the scope of the existing legal regime, but a religious deci-

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69. This meeting was also attended by the executive director of the Canadian Muslim Civil Liberties Association (CMCLA), Anwaar Syed, and the Toronto head of the Canadian Council on American Islamic Relations (CAIR-CAN), Maryam Dadabhoy.

70. The meeting was also attended by the chairman of the Islamic Council of Imams Canada, Imam Abdul Hai Patel, and Asma Warsi, a prominent woman activist in the community and editor-in-chief of *THE AMBITION*, a community newspaper.

71. I acknowledge there were some legitimate concerns, but all of them could have been dealt with as much as they would be dealt with in the legal context. I feel as though most of the feminist groups were duped (by anti-religion activists) or misinformed (by radical secularists) into calling for the prohibition of all religious arbitration through fear mongering based on the decontextualized, albeit legitimate, experiences of women who came from oppressive regimes. Decontextualized because they were speaking of oppression in dictatorships which did not operate within a liberal multicultural and constitutional framework and because the full spectrum of Shari'a-based laws were being applied in those jurisdictions. The discussion in our context was restricted to private law issues.

72. Prithi Yelaja & Robert Benzie, *McGuinty: No Sharia Law*, *TORONTO STAR*, Sept. 12, 2005, at A01.

73. See Bakht, *Religious Arbitration*, *supra* note 48; see also CANADIAN SOCIETY OF MUSLIMS, *THE MUSLIM COURT OF ARBITRATION*, <http://muslim-canada.org/DARLQADAMSHAH3.html>.

74. Correspondence and e-mail on file with author.

sion may in turn impact negotiations over, inter alia, such issues as custody of children and the *mahr*.<sup>75</sup>

I have also been approached by men and women who have had their matters settled or decided by individual imams and religious leaders. In my judgment, most of the resolutions were fair and took into consideration the needs and interests of the parties and the contemporary context. In a small minority of cases, however, one party or the other was forced to accept and live with decisions that were unjust because the decision was seen as divinely ordained or inspired.

Lack of knowledge about the Ontario legal regime, Islamic law, and their rights under both systems makes it very easy for people to be duped, coerced, and short-changed. The lack of transparency, accountability, regulation, and the complexity of the interaction and interplay between the two systems allow people to pick and choose aspects from the two systems that best suit their immediate objectives. Ultimately, this situation makes it relatively easy to leverage, manipulate, and abuse a party into extracting concessions and results in potentially more exploitive settlements.

Such decisions may continue even if faith-based arbitrations were legally permitted, nevertheless there would be alternatives available and some of these options may be regulated and supervised. Moreover, a regulated system could more efficiently and effectively interact with the state law system in a more harmonious way. As noted by Miranda Forsyth, such a planned legal pluralism can “ensure that the various legal systems in a particular jurisdiction operate in ways that support and enrich each other, rather than undermine and compete with each other.”<sup>76</sup>

#### PART 4 – EXISTING LEGAL FRAMEWORK FOR FAMILY LAW

Part of the confusion and hysteria over the course of the 2003–2005 debate arose from a lack of understanding of the regime governing family law in Ontario.<sup>77</sup> Family law issues in the province are governed by the Family Law Act<sup>78</sup> and the Divorce Act.<sup>79</sup> Consistent with the constitutional division of powers between the federal government and the provinces, as

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75. *Mahr* is the gift given by the groom to the bride in consideration of the marriage. In many instances a deferred *mahr* is used to ensure that a wife is financially protected in the event of divorce. This can often serve as a bargaining tool in the interaction and interplay between family law and Islamic family law rules in the Western jurisdictions, including Canada. See Pascale Fournier, *Flirting with God in Western Secular Courts: Mahr in the West*, 24 INT’L J.L. POL’Y & FAM. 67, 67–94 (2010).

76. Miranda Forsyth, *How to ‘Do’ Legal Pluralism 1* (July 2007) (unpublished working paper), <http://ssrn.com/abstract=993617>.

77. Of course the controversy was broader than family law and encompassed other personal areas as well. The main objections were raised in the family law context and this is the focus of this paper.

78. R.S.O. 1990, c. F-3 (Can.).

79. R.S.C. 1985, c. 3, s. 7 (Can). Divorce is not an issue that can arbitrated.

the name suggests, the federal Divorce Act governs divorces while the provincial Family Law Act addresses issues of property division, spousal support, child support, as well as child custody and access.<sup>80</sup> The legislative framework envisaged by the Family Law Act provides a default scheme in the case of a breakdown in the relationship. These default rules have evolved over time to reflect the changing mores of society and recognize the value of unpaid work provided by either spouse in enabling the other spouse to advance in his or her career. These rules also take into account that a partner may have forfeited or prejudiced his or her career growth by staying at home to care for children.<sup>81</sup>

Part IV of the Family Law Act also provides for parties to organize their affairs at various stages of the relationships through domestic contracts.<sup>82</sup> There are three types of domestic contracts: marriage contracts, cohabitation agreements, and separation agreements.<sup>83</sup> Common law contractual rules apply to the interpretation and enforceability of such contracts. Application may be made to a court for the setting aside of a domestic contract in one of the following three instances: (1) a party has failed to disclose to the other significant assets or debts that existed at the time the contract was entered into; (2) a party did not understand the nature or consequences of the contract; or (3) for general reasons at contract law such as undue influence, mistake, etc.<sup>84</sup> Courts therefore reserve the power to set aside agreements for a wide range of issues, in addition to their inherent *parens patriae* jurisdiction to act in the best interest of protected persons (including children).<sup>85</sup>

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80. There are also federal guidelines when it comes to support payments.

81. See also Audrey Macklin, Post-Neoliberal Multiculturalism: The Case of Faith-Based Arbitration, Paper Presented at the Annual Meeting of the Canadian Political Science Association (June 1–3, 2006), <http://www.cpsa-acsp.ca/papers-2006/Macklin.pdf>.

82. Family Law Act, R.S.O. 1990, c. F–3, ss. 51–60 (Can.).

83. *Id.* at s. 51.

84. *Id.* at s. 56(4).

85. See Bakht, *Family Arbitration*, *supra* note 6, at 5–7, for a detailed discussion of when and under what circumstances courts can intervene. The courts zealously guard their right to intervene for various reasons, particularly their *parens patriae* (“parent of the nation”) jurisdiction to ensure that the best interest of any children or others under guardianship are taken into account.

The *parens patriae* jurisdiction is . . . founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the “best interest” of the protected person, or again, for his or her “benefit” or “welfare.” While the Superior Court retains a residual jurisdiction to use the *parens patriae* power, it will not do so lightly. This jurisdiction is to be exercised to protect children and other vulnerable individuals, not their parents . . . . The courts have determined that *parens patriae* is available in two situations: to fill a legislative gap or on judicial review.

*M.D.R. v. Ontario (Deputy Registrar General)*, [2006] O.J. No. 2268, para. 80–81 (S.C.J.). It should also be noted that a court may set aside support provisions or a waiver of support in a contract, under the authority granted it in accordance with s. 33 of the Family Law Act. A court may exercise its authority under this section if: the waiver or the provision results in unconscionable circumstances; the waiver or provision means that the prospective recipient must instead de-



Those opposed to family matters being arbitrated were under the false perception that the default provisions automatically and mandatorily governed all relationship breakdowns that proceeded to be resolved by means other than arbitration. As aspirational or desirable as this may be, the reality is that even when matters proceed through lawyers or the legal system, parties usually do not pursue their maximum entitlements as set out in the legislation. Indeed, the system allows parties to opt out of much of the process and substance of the statutory regime. Parties can negotiate and settle issues of property, support (spousal and child), as well as custody and access using any of the numerous options available to resolve disputes or simply not deal with it at all and walk away.<sup>86</sup> Nobody, including the state, can force anyone to pursue the default provisions or legal entitlements under the family law regime or otherwise.<sup>87</sup> The only mandatory dispute resolution option is the court system in the sense that a party filing a claim or bringing an action or application through the courts can compel the other party to respond. Even in such situations, however, the initiating party must take the first step in filing the matter in court and serving the other party. Generally, an affected party is under no obligation to enforce its rights—whether it be through the courts or otherwise. In theory and contrary to perception, it is impossible to force someone to arbitrate against his or her will. In practice, people could be coerced and pressured to submit to ADR processes. This concern, of course, exists in both regulated and unregulated ADR. In fact, this reality strengthens the argument for government oversight and regulation of faith-based ADR.

With the exception of the no-settlement option, in any of the resolution options available to parties, they will negotiate and may compromise for less than the full legal entitlements or minimums established in legislation. They can also hold out and negotiate for more if they wish. The resulting settlements or agreements may or may not be formalized and may or may not be filed in court. Even when such agreements are filed in court as part of an uncontested divorce, for instance, the courts simply rubber stamp them; courts do not generally inquire into whether they are unfair, unconscionable, or violate public policy. There is no judicial oversight except

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pend on public assistance; or if there is a default in the support payment. Family Law Act, R.S.O. 1990, c. F-3, s. 33 (Can.).

86. They could do it themselves with or without the use of self-help kits, which are available on the internet and in stationary stores; use the services of a paralegal (who may or may not act for both parties) and settle it as an uncontested matter; settle the issues with the help of family, peers, or religious/community leaders; use the same lawyer to resolve these issues again as an uncontested matter; go to separate lawyers and even in this case most of the matters are settled through negotiation and compromise; they can use one of the ADR options; and lastly, decide not to resolve the matter at all and simply walk away.

87. A court can intervene for a number of reasons if requested to do so by way of an action, application for judicial review, or appeal. Suffice it to note that these same avenues and interventions would be available in the context of arbitral awards. See Bakht, *Family Arbitration*, *supra* note 6.

when a party (or public guardian if a minor is involved) decides to challenge the decision or bring it to the attention of the courts in an active manner. Such agreements and settlements are treated as legally binding and the parties move on without any state oversight or intrusion to protect the vulnerable or weaker party. In essence, within certain constraints, the parties are free to use the default provisions or they can bargain according to their own values, priorities, and preferences in ordering their affairs during their relationship or in resolving issues at the end of the relationship.

It was therefore surprising to hear opponents of faith-based arbitration and the Premier of Ontario use the expression "one law for all" in denying orthodox Muslims just this benefit.<sup>88</sup> In a position paper on the tribunal by the CCMW, CCMW president Alia Hogben wrote: "[We] see[ ] no compelling reason to live under any other form of law in Canada, as we want the same laws to apply to us as to other Canadian women. We like the Charter of Rights and Freedoms, which safeguard and protect our equality rights."<sup>89</sup> This statement leaves the inaccurate impression, however, that Ontario Muslims would be forced to refer matters to the tribunal and that this initiative was being carved out exclusively for Muslims. As Natasha Bakht, who wrote a report that various women's groups used in opposing faith-based arbitration, points out in a reconsidered article published after the controversy:

In fact, it is disingenuous to speak of "one law for all" when Ontario's family law permits parties to opt out of the default statutory regime such as the equal division of matrimonial property. Parties can, through negotiation, mediation or arbitration, based on the right to contract freely, agree to almost any resolution of their marital affairs . . . . [C]ouples' decisions to settle their family law affairs are generally left un-reviewed by the courts.<sup>90</sup>

If the right existed for people to opt out of the existing family law regime, why should religious Canadians be prevented from structuring settlements consistent with their values and beliefs, again subject to the usual contractual and common law protections and mechanisms for review?

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88. The Premier declared "There will be no Shariah law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians." Keith Leslie, *McGuinty Rejects Ontario's Use of Shariah and All Religious Arbitrations*, CANADIAN PRESS, Sept. 11, 2005, available at <http://www.nosharia.com/McGuinty%20rejects%20Ontario's%20use%20of%20Sharia%20Law%20and%20all%20religious%20arbitration.htm>.

89. *Position Statement on the Proposed Implementation of Sections of Muslim Law [Sharia] in Canada*, CAN. COUNCIL MUSLIM WOMEN (May 25, 2004), [http://www.ccmw.com/activities/act\\_arb\\_muslimlaw\\_sharia.html](http://www.ccmw.com/activities/act_arb_muslimlaw_sharia.html).

90. Bakht, *Muslim Barbarians*, *supra* note 29, at 15–16. Her first article essentially reviewed the problems with allowing faith-based arbitration. The article did acknowledge that these problems existed in the family law area irrespective of whether matters were being resolved through the legal system or through arbitration and whether or not religious principles were being used. The piece, however, concluded against allowing faith-based arbitrations based on the secular nature of society. Bakht, *Family Arbitration*, *supra* note 6.

The crucial point to note is that where parties do not proceed through the courts and resolve matters privately, which is the case in a significant number of disputes, a court may never see the contract, settlement, or award.<sup>91</sup> These very important and critical details were either ignored or downplayed by opponents of faith-based arbitration, leaving the impression that all family matters settled outside arbitration would fully comport with the provinces' family law regime.

Notwithstanding the foregoing, concerns about women not being able to knowingly consent, the unequal bargaining power in some cases, and the fear about privatization of justice are legitimate and must not be minimized. It is beyond the scope of this paper to dwell on the details of these objections, other than to state that the first two concerns exist in the non-ADR legal setting and society as a whole. With respect to the third issue, there is a clear trend in our society to explore options outside of the mainstream adversarial model. More importantly, all three issues do not necessarily imply or require that such tribunals must be banned. In fact, it merely reinforces the argument that procedures and practices must be developed and improved in both the ADR as well as the mainstream adversarial legal arena to ensure that women, and more generally the vulnerable, are protected.<sup>92</sup> There are alternative options between the two extremes of outright banning of faith-based arbitration and allowing it without any additional checks and balances. Indeed, as Jehan Aslam points out:

There is no reason to believe, however, that an arbitrator is incapable of creating a neutral forum and a process through which each party can present his or her case without fear of retribution from other parties. Efforts can be made to address social isolation by requiring that the arbitrator hearing a specific case ensure that parties are aware of their rights under both sets of laws [Canadian and Islamic].<sup>93</sup>

Such an approach will mean that religious norms and practices are evaluated on their own merits and constrained within the bounds of Ontario law.

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91. There may be an exception to this when it comes to child support, child custody and access issues, and spousal support. Courts may have to approve any child support arrangements, even if privately made, where a party sought a divorce through the courts. Courts may intervene when requested to by a party or theoretically on their own through their inherent *parens patriae* jurisdiction to intervene in settlements and agreements on behalf of protected persons. They may also intervene in spousal support agreements. Again, in both these cases, the court may intervene only when and if the matters are brought to court or come to the attention of the courts one way or another. The situation would not be any different in the context of arbitration. See Bakht, *Family Arbitration*, *supra* note 6.

92. See BOYD, *supra* note 5; see also Jehan Aslam, *Judicial Oversight of Islamic Family Law Arbitration in Ontario: Ensuring Meaningful Consent and Promoting Multicultural Citizenship*, 38 N.Y.U. J. INT'L L. & POL. 841, 852 (2006).

93. Aslam, *supra* note 92, at 852–53.

## PART 5 – ISLAM AND ITS LEGAL SYSTEM

Both sides of the debate realized the significance of the battle over the place of Islamic law and its relationship to state law in a Western liberal democratic context. Opponents speculated that a victory by the “fundamentalists” in Canada would give credence to those who stand behind Shari’a in Muslim countries to the detriment of women. This ignored the fact that only very limited aspects of Islamic laws would have been engaged in the proposed initiative—matters that were already subject to private contractual negotiations or where legislation provided for the right to opt out. Moreover, it also betrayed the evolutionary and context-specific nature of Islamic law.

An appreciation of the sources, major principles, depth, and dynamism of the Shari’a is imperative to understand how institutionalized faith-based arbitration in Ontario could have contributed to the indigenization process of Islamic law. Before embarking on an introduction to the Shari’a, it is helpful to briefly look at the ideological framework of Islam. The word Islam means submission to God.<sup>94</sup> It is derived from the word *salaam*, which means peace.<sup>95</sup> The Shari’a is the path to achieve this submission.<sup>96</sup> The Shari’a aims to fulfill both spiritual and material welfare, as Islam envisions no separation between the temporal and the spiritual:

In Islam it is reality which appears as Church looked at from one point of view and State from another. It is not true to say that Church and State are two sides or facets of the same thing. Islam is a single unanalyzable reality which is one or the other, as your point of view varies.<sup>97</sup>

The essence of the belief system is the absolute authority of God: “[t]here can be no doubt that the essence of Islamic civilization is Islam; or that the essence of Islam is *tawhid*, the act of affirming Allah to be the One, absolute, transcendent Creator, Lord and Master of all that is.”<sup>98</sup> The belief in the supremacy of God results in the inescapable conclusion that God’s creation must serve and fulfill His will. Therefore, in Islam God is the source of authority and the sole sovereign lawgiver.<sup>99</sup> The Shari’a is divine

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94. THE OXFORD DICTIONARY OF ISLAM 144 (John L. Esposito ed., 2003); GAI EATON, ISLAM AND THE DESTINY OF MAN 36 (1985); JOHN L. ESPOSITO, ISLAM: THE STRAIGHT PATH 14 (1988). See generally FAZLUR RAHMAN, ISLAM (1968).

95. THE OXFORD DICTIONARY OF ISLAM, *supra* note 94, at 274.

96. ESPOSITO, *supra* note 94, at 14.

97. MOHAMMED IQBAL, THE RECONSTRUCTION OF RELIGIOUS THOUGHT IN ISLAM 154 (1974).

98. Ismail R. al-Faruqi & Lois Lamya al-Faruqi, *The Essence of Islamic Civilization*, I-EPISTEMOLOGY.NET, <http://i-epistemology.net/ismail-faruqi/161-the-essence-of-islamic-civilization.html>. See ISMA’IL RAJI AL FARUQI, AL TAWHID: ITS IMPLICATIONS FOR THOUGHT AND LIFE (3rd ed. 1995), for a good introductory discussion on the supremacy of God or *tawhid*. See also THE OXFORD DICTIONARY OF ISLAM, *supra* note 94, at 317.

99. QUR’AN, *sura Qasas* 12:40 (“The command is for none but God. He hath commanded that ye worship none but Him.”); QUR’AN 7:54 (“Is it not His to create and to govern?”).

and eternal, not in letter but in spirit.<sup>100</sup> All human legislation must conform to the divine will as discerned from the Qur'an and *Sunnah* and understanding of *al dhawq al shar'i*, or intuitive knowledge of the purposes of the law.<sup>101</sup> God created human beings with the potential to ascertain the divine imperatives, as Islam teaches that humans are distinguished from God's other creations by the mere fact that humans can think rationally.<sup>102</sup>

In order to appreciate the depth and comprehensiveness of Shari'a, it is necessary to understand Islamic law's various sources and mechanisms for evolution as well as the history and evolution of Islamic thought. As Asaf Fyze noted:

Islamic law is not a systematic code, but a living and growing organism; nevertheless there is amongst its different schools a large measure of agreement, because the starting point and the basic principles are identical. The differences that exist are due to historical, political, economic and cultural reasons, and it is, therefore, obvious that this system cannot be studied without a proper regard to its historical development.<sup>103</sup>

Revelation provided both the principles and the mechanism for its renewal in order for the Shari'a to conform to changing human conditions. The fundamental principles of the law and the methodology for its development were instituted in Islam under divine instruction.<sup>104</sup>

During the Prophet Muhammad's lifetime, solutions to legal problems were settled by resorting to the Prophet, who relied on his inspired interpretation of the divine revelation or *data revelata*.<sup>105</sup> The Prophet also relied extensively on consultation with his companions and others in formulating legal opinions, among other things.<sup>106</sup> After the demise of the Prophet, his companions had to extrapolate, infer, and deduce legal prescriptions from their knowledge of the first principles of Islamic understanding of life and reality.<sup>107</sup> Twenty-seven companions of Prophet Muhammad distinguished

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100. Kamali, *supra* note 7, at 216–17, 230; AHMAD HASAN, THE EARLY DEVELOPMENT OF ISLAMIC JURISPRUDENCE 7 (1970) (“Abu Hanifah . . . distinguished *din* from *shari'ah* on the ground that *din* was never changed, whereas *shari'ah* continued to change through history.”).

101. See HASAN, *supra* note 100, at 34; THE OXFORD DICTIONARY OF ISLAM, *supra* note 94, at 287–88.

102. WING-TSIT CHAN ET AL., THE GREAT ASIAN RELIGIONS: AN ANTHOLOGY 309 (1969) (“Islam puts its trust in reason, the supreme faculty of knowledge with which man is endowed, as the only method possible for ever deciding the issue.”).

103. ASAF A.A. FYZEE, OUTLINES OF MUHAMMADAN LAW 1 (1964).

104. See generally MOHAMMAD HASHIM KAMALI, SHARIAH LAW: AN INTRODUCTION (2008).

105. ISMAIL R. AL FARUQI & LOIS LAMYA AL FARUQI, THE CULTURAL ATLAS OF ISLAM 274 (1986); FYZEE, *supra* note 103, at 31–32.

106. Fathi Osman, *Islam in a Modern State: Democracy and the Concept of Shura* (Occasional Paper Series, 2001), [http://www.usc.edu/schools/college/crcc/private/cmje/issues/more\\_issues/Islam\\_in\\_a\\_Modern\\_State\\_\\_Democracy\\_and\\_Shura.pdf](http://www.usc.edu/schools/college/crcc/private/cmje/issues/more_issues/Islam_in_a_Modern_State__Democracy_and_Shura.pdf).

107. HASAN, *supra* note 100, at xiv.

themselves as legal experts.<sup>108</sup> Included among them were the four caliphs in order of their rule, Abu Bakr al Siddiq, Umar Ibn al Khattab, Uthman Ibn Affan, and Ali Ibn Abu Talib as well as two of the Prophet's wives, Umm Salamah and 'A'ishah.<sup>109</sup> Umar, Ali, and 'A'ishah had a great impact on the development of Islamic law, since the two early schools of jurisprudence, the jurists of Medinah and Kufa (Iraq), derived their legal doctrines from their verdicts, among others.<sup>110</sup> Indeed, Abu Abu Salamah ibn Abd al-Rahman, one of the seven eminent jurists of Medinah in the second generation and a disciple of 'A'ishah said about her:

I have never seen anyone more knowledgeable about the Prophetic traditions than 'A'ishah; nor anyone who can surpass her in her grasp of *fiqh* (jurisprudence) and her ability to express herself on any issue that crops up. I have yet to meet someone who possesses such in-depth knowledge of every particular verse in the Qur'an as to the precise occasion of its revelation . . . .<sup>111</sup>

Similar testimonials have been reported about her outstanding expertise in *fiqh* from numerous scholars such as Ata and al-Zuhir, among others. Thanks to this, she was often consulted by caliphs, judges, and jurists, and the number of scholars who learned from her has been estimated to be over three hundred, including men and women.<sup>112</sup>

The practice of the Prophet's companions was to first consult the Qur'an, and then the *Sunnah*.<sup>113</sup> If these two primary sources were silent, they resorted to extrapolating and deducing from the first principles gleaned from the two divinely inspired sources.<sup>114</sup> Umar, the second caliph of Islam, instituted the body of legal opinions of some of the companions as a tertiary source that could be consulted by later jurists, or *fuqaha*.<sup>115</sup> It is clear that Islamic law has three distinguishable facets: revelation (the Qur'an and the

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108. *Id*; see also IBN AL-QAYYIM AL-JAWZIYYA & TAHA 'ABD AL-RA'UF SA'D, A'LAM AL-MUWAQQI'IN 'AN RABB AL-'ALAMIN 12-14 (1973). Ibn al-Qayyim mentions some 130 companions who had become well known in issuing rulings. Among these, seven had been recognized as being most prolific: 'Umar, 'Ali, 'Abd Allah ibn Mas'ud, 'A'ishah, Zayd ibn Thabit, Abd Allah ibn 'Abbas, and 'Abd Allah ibn 'Umar.

109. See Mohammad Hashim Kamali, *Law and Society: The Interplay of Revelation and Reason in the Shariah*, in THE OXFORD HISTORY OF ISLAM 107, 111-12 (John L. Esposito ed., 1999).

110. *Id.* at 112.

111. IBN HAJAR AL-'ASQALANI, TAQRIB AL-TAHDHIB, 12, 115 (1975); cf. SA'ID FAYIZ DUKHAYYIL & MUHAMMAD RAWWAS QAL'AH'JIL, MAWSU'AT FIQH UMM AL-MU'MININ 30 (1st ed. 1989).

112. 'ABD AL-MUN'IM AL-HAFANI, MAWSU'AT UMM AL-MU'MININ 'A'ISHAH BINT ABI BAKR 7-11 (1st ed. 2003).

113. See generally Kamali, *supra* note 109, at 111 (noting the method of the Companions).

114. See *id.* ("The Companions frequently resorted to personal reasoning and consultation in the determination of issues.").

115. FARUQI & FARUQI, *supra* note 105, at 275. *Fuqaha* (jurists) is the plural of *faqih*. Hafiz Nazeem Goolam, *Gender Equality in Islamic Family Law*, in UNDERSTANDING ISLAMIC LAW 122 (Hisham Ramadan ed., 2006).

*Sunnah*, which is also considered inspired), interpretation, and application.<sup>116</sup>

A century after the death of the Prophet, none of the companions were alive, leaving a vacuum in the legal field.<sup>117</sup> The earlier generation knew about the situational contexts and spirit of Islam and the Prophet's mission,<sup>118</sup> and they were thus in a position to legislate with these guidelines in mind. It was believed that later Muslims were going to be deprived of these advantages if these experiences were not recorded for posterity. The Qur'an, as will be discussed in the next section, had already been committed to writing. Therefore, the early Muslim jurists and scholars set out to canonize the *Sunnah* and invented *fiqh* to systematize the development of the law.<sup>119</sup> *Fiqh* is divided into two components: *usul al fiqh* and *furu' al fiqh*.<sup>120</sup> *Usul al fiqh* is the science of jurisprudence, covering the origins and sources from which the rules of human conduct are derived; it includes the philosophy of law, sources of rules, and the principles of legislation, interpretation, and application of the Qur'an and *Sunnah*.<sup>121</sup> *Furu' al fiqh* are the derivatives or the legal rules; these are subject to change.<sup>122</sup>

There evolved much scholarship in this area and numerous schools of jurisprudence developed; they began along geographical lines, in Medinah and Kufa (Iraq), but later evolved around individual scholars or jurists.<sup>123</sup> Due to historical and political factors, four schools of jurisprudence survived in the *Sunni* tradition.<sup>124</sup> The four schools of *Sunni* jurisprudence are named after their respective founders: the Hanafi school (Abu Hanifah, d. 767), the Maliki school (Malik ibn Anas, d. 795), the Shafi'i school

116. A. Z. HAMMAD, *ISLAMIC LAW: UNDERSTANDING JURISTIC DIFFERENCES* 10 (1992).

117. FARUQI & FARUQI, *supra* note 105, at 275.

118. See Kamali, *supra* note 109, at 111 (noting the Companions as "direct recipients" of the Prophet's teachings).

119. See generally *id.* at 110–16 (giving a brief history of *fiqh* and *Sunnah*).

120. Kamali, *supra* note 109, at 110; Irshad Abdal-Haqq, *Islamic Law: An Overview of its Origin and Elements*, 7 J. ISLAMIC L. & CULTURE 27, 50 (2002); see also Kamali, *supra* note 7, at 216.

121. See M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E. L. 135, 135–37 (2002); THE OXFORD DICTIONARY OF ISLAM, *supra* note 94, at 329. For a more detailed discussion, see Wael B. Hallaq, *Usul Al-Fiqh: Beyond Tradition*, 3 J. ISLAMIC STUD. 172 (1992).

122. Kamali, *supra* note 109, at 110.

123. According to the great Islamic philosopher and legal scholar Muhammad Iqbal, "[F]rom about the middle of the first century up to the beginning of the fourth not less than nineteen schools of law and legal opinion appeared in Islam. This fact alone is sufficient to show how incessantly our early doctors of law worked in order to meet the necessities of a growing civilization." IQBAL, *supra* note 97, at 165; see also Kamali, *supra* note 109, at 112–13.

124. Kamali, *supra* note 109, at 112–13. The two main branches of Islam are the *Sunni* and the *Shia* (or *Shiites*). The schism occurred after the arbitration between Ali ibn Abi Talib and Mu'awiyah ibn Abi Sufyan for the Caliphate. Fred M. Donner, *Muhammed and the Caliphate: Political History of the Islamic Empire up to the Mongol Conquest*, in THE OXFORD HISTORY OF ISLAM, *supra* note 109, at 1. The Shia insisted that the Caliphate had to remain in the family of the Prophet (represented by his cousin Ali), while the Sunni tradition did not insist on this.

(Muhammad ibn Idris, d. 819), and the Hanbali school (Ahmad ibn Hanbal, d. 855).<sup>125</sup> The early era was a period of great intellectual progress. George Makdisi documents that the scholastic method of disputation and lecture was developed by Islamic jurists in the ninth century, a method which was later used in Bologna, Paris, Oxford, and elsewhere referred to as "readings" and "moots."<sup>126</sup>

#### A. Sources and Methodology of Islamic Law

##### 1. Qur'an

The Qur'an is composed of 114 *suwar* (chapters), 6,616 *ayat* (verses), and 77,934 words.<sup>127</sup> Most of the revelations to Prophet Muhammad had a situational context, referred to as *asbab al nuzul* (the situational causes of revelation).<sup>128</sup> Many orientalists proclaim that the Prophet produced the Qur'an himself, but at the same time, they do not deny that the existing text is unaltered. By unaltered, the orientalists mean that the Qur'an is written exactly as it was dictated to the Prophet's scribes.<sup>129</sup> William Muir concluded that "we may upon the strongest presumption affirm that every verse in the Kor'an is the genuine and unaltered composition of Mohammad himself."<sup>130</sup> Muslims, on the contrary, believe that the Qur'an is the actual verbatim revelation sent by God; it is a commonly known fact that Muhammad was illiterate and could not have composed the work himself.<sup>131</sup>

The Qur'an is believed to be the last revelation sent to mankind—it encompasses and reforms many of the earlier revelations sent to other prophets, including the Psalms of David, the Torah of Moses, and the Bible as revealed to Jesus.<sup>132</sup> Muslims see the Qur'an as the culmination of the evolutionary process of revelation.<sup>133</sup> The Qur'an is not a legal treatise, but rather lays down certain guidelines and general principles for the attainment

125. Vincent J. Cornell, *Fruit of the Tree of Knowledge: The Relationship Between Faith and Practice in Islam*, in THE OXFORD HISTORY OF ISLAM, *supra* note 109, at 94–95. This Article will focus on Sunni jurisprudence, as this is the prevalent system in most of the Islamic world, including the Middle East.

126. George Makdisi, *The Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court*, 34 CLEV. ST. REV. 3 (1985).

127. FARUQI & FARUQI, *supra* note 105, at 100.

128. See THE OXFORD DICTIONARY OF ISLAM, *supra* note 94, at 25 (defining *Asbab al-Nuzul*).

129. WILLIAM MUIR, THE LIFE OF MOHAMMAD xxvi–xxvii (1923).

130. *Id.* at xxviii.

131. Donner, *supra* note 124, at 6–7; see also Abdal-Haqq, *supra* note 120, at 40.

132. Donner, *supra* note 124, at 7.

133. Muslims believe that unlike the previous revelations sent from God, the text of the Qur'an has been preserved intact. At the time of the Prophet's death nearly 30,000 people had memorized the Qur'an (Muslims must recite the Qur'an from memory in their 5 daily prayers and other occasions). Moreover, being illiterate, the prophet had scribes write the revelations, which were compiled and distributed. One of the early copies still exists in Central Asia. See FARUQI & FARUQI, *supra*, note 99, at 100 ("Its grammar, syntax, idioms, literary forms—the media of expression and the constituents of literary beauty—all are still the same as they were in the Prophet's time.").



of an ideal civilized society.<sup>134</sup> Thus, the Qur'an, with the aid of the *Sunnah* (precedent set by Prophet Muhammad), *ijma* (community consensus), *qiyas* (analogical reasoning), *ijtihad* (independent reasoning or intellectual effort), and *urf* (custom) can be used as a basis upon which to build a body of law.<sup>135</sup> Only 350 verses of the Qur'an address legal issues; most of these were revealed in response to problems that were actually encountered (*al-ahkam al amaliyyah* or practical rulings pertaining to the conduct of the individuals).<sup>136</sup>

Islamic legal scholars are unanimous in the view that the Qur'an is the primary source of the Shari'a, although this statement does not occur frequently in the early Muslim jurists' writings.<sup>137</sup> Muslims believe that unlike revelation, humanity's understanding of Shari'a is fallible. Islamic scholars, therefore, do not feel that there is any contradiction between reason and revelation; reason exists to correct man's erroneous understanding of the *data revelata*.<sup>138</sup>

The additional sources and methodologies elaborated upon below assist in the interpretation of, and/or discovery of, the divine will.

## 2. *Sunnah*

The *Sunnah* refers to the normative behaviors, decisions, actions, and tacit approvals and disapprovals of the Prophet.<sup>139</sup> The *Sunnah* was heard, witnessed, memorized, recorded, and transmitted from generation to generation (as the Arabs had a great oral tradition).<sup>140</sup> Beginning in the third century, *Sunnah* were compiled into collections of traditions, known as *ahadith* (plural of *hadith*).<sup>141</sup> Over time, six of these collections became the most authoritative, or *sihah*, collections: al Bukhari (256/870), Muslim (251/865), Abu Dawud (275/888), al Tirmidhi (279/892), al Nasa'i (303/915), Ibn Majah (273/886).<sup>142</sup> The al Bukhari and Muslim remain the most

134. Donner, *supra* note 124, at 7.

135. Bassiouni & Badr, *supra* note 121, at 140–41; THE OXFORD DICTIONARY OF ISLAM, *supra* note 94, at 133–34, 254–55, 305, 328 (defining *Sunnah*, *Ijma*, *Qiyas*, *Ijtihad*, and *Urf*, respectively).

136. Kamali, *supra* note 109, at 119–20. Indeed, “less than 3 percent of the [Qur'an] deals with legal matters.” *Id.* at 119.

137. This is attributed to the fact that this was too evident to be stressed at the time. There is ample proof that the Qur'an was used as an authoritative source of Islamic law. See, e.g., Zafar Ishaq Ansari, *An Early Discussion on Islamic Jurisprudence: Some Notes on al-Raad 'ala Siyar al-Awza'i*, in ISLAMIC PERSPECTIVES: STUDIES IN HONOUR OF MAWLANA SAYYID ABUL A'LA MAWDUDI 147, 150 (Khurshid Ahmad & Zafar Ishaq Ansari eds., 1979); HASAN, *supra* note 100, at 12–20.

138. See FARUQI & FARUQI, *supra* note 105, at 265.

139. THE OXFORD DICTIONARY OF ISLAM, *supra* note 94, at 305.

140. FARUQI & FARUQI, *supra* note 105, at 114; Bassiouni & Badr, *supra* note 121, at 150–51.

141. FARUQI & FARUQI, *supra* note 105, at 114; Cornell, *supra* note 125, at 74.

142. FARUQI & FARUQI, *supra* note 105, at 114; Cornell, *supra* note 125, at 74–75.

respected of the six *sihah* texts.<sup>143</sup> The authenticity of the *sihah* is based on the scrutiny of references, the crosschecking of witnesses (employed by collectors), and the *isnad*.<sup>144</sup> The *isnad* is the credibility of the chain of authorities attesting to the accuracy of a particular tradition.<sup>145</sup> In the early years of Islam, scholarship also flourished in the study of *Sunnah* through *usul al hadith* (the science of *hadith*).<sup>146</sup> The aforementioned traditions elaborate on the principles laid down in the Qur'an.<sup>147</sup>

### 3. *Ijma, Qiyas, and Ijtihad*

*Qiyas* is reasoning by analogy to solve a new legal problem.<sup>148</sup> According to Wael Hallaq, *qiyas* encompasses the *a fortiori* argument in both its forms, the *a minori ad maius* and *a maiori ad minus*, *reductio ad absurdum*, and induction.<sup>149</sup> The only argument not included is the *argmentum e contrario*, which is considered a linguistic argument in *usul al fiqh*.<sup>150</sup>

*Ijtihad* is defined as the intellectual effort by a *mujtahid* (one who is qualified to do *ijtihad*, a jurisconsult) in deriving rules consistent with the first principles of Islam.<sup>151</sup> *Ijtihad* can refer to the use of *qiyas* to extend a

143. FARUQI & FARUQI, *supra* note 105, at 114; Cornell, *supra* note 125, at 74; THE OXFORD DICTIONARY OF ISLAM, *supra* note 94, at 273.

144. Bassiouni & Badr, *supra* note 121, at 151 (citing ABU ALI FARISI, JAWAHIR AL-USUL FI ILM HADITH AL-RASUL (1969)).

145. *Id.* (citing ABD ALLAH IBN QUTAYBA, TA'WIL MUKHTALAFAT AL-HADITH (1936)); THE OXFORD DICTIONARY OF ISLAM, *supra* note 94, at 151.

146. *See generally* Bassiouni & Badr, *supra* note 121, at 164–65 (citing MUHAMMAD IBN ALI SHAWKANI, KITAB IRSHAD AL-FUHUL ILA TAHQIQ AL-HAQQ MIN ILM AL-USUL (1909); ZAKARIYA AL-BIRRI, USUL AL-FIQH AL-ISLAMI (1980)) (stating that independent reasoning has become easier than in the past because the Qur'anic sciences and science of hadith flourished in the early years of Islam).

147. *Id.* at 152.

148. *See* Ahmad Hasan, *The Definition of Qiyas in Islamic Jurisprudence*, 19 ISLAMIC STUD. 1, 22 (1980) (explaining the various definitions of *qiyas*); *see also* Abdul Hamid A. Abusulayman, *Islamization of Knowledge: A New Approach Toward Reform of Contemporary Knowledge, in ISLAM: SOURCE AND PURPOSE OF KNOWLEDGE* 106 (1988) ("The effect of time and place and a method of *Qiyas*, which ensures arriving at conclusions that are not limited by time and place but are in keeping with the spirit of the Prophet's *Sunnah*."); Wael B. Hallaq, *Legal Reasoning in Islamic Law and the Common Law: Logic and Method*, 34 CLEV. ST. L. REV. 79 (1985) (discussing the role of logic, deduction, induction, and legal analogy in Islamic law); John Makdisi, *Legal Logic and Equity in Islamic Law*, 32 AM. J. COMP. L. 63 (1985) (discussing the nature of Islamic legal reasoning).

149. Hallaq, *supra* note 148, at 80.

150. *See id.* at 80 n.2. *See generally* Wael B. Hallaq, *Non-Analogical Arguments in Sunni Judicial Qiyas*, 36 ARABICA 286, 286–306 (1989).

151. *See* THE OXFORD DICTIONARY OF ISLAM, *supra* note 94, at 134, 214 (defining *ijtihad* and *mujtahid*, respectively); Bassiouni & Badr, *supra* note 121, at 173. Some scholars discuss *ijtihad* as part of *qiyas*, others discuss it as a separate category. *See* HASAN, *supra* note 100; Ansari, *supra* note 137; Abdul Ghafur Muslim, *Islamic Laws in Historical Perspective: An Investigation Into the Problems and Principles in the Field of Islamization*, 31 ISLAMIC Q. 71 (1987) ("It must be kept in mind, however, that if this mechanical application of *Qiyas* were to result in judgments which are unjust or against the public interest, or where the revealed sources are silent on some confronting issue then there may be a need to exert independent judgment, namely *Ijtihad*.").

rule or the act of independently taking account of the *maqasid al shari'a* (the higher purposes or objectives of the Shari'a).<sup>152</sup> The six *maqasid al Shari'a* are: preservation of life, property, family, religion, honor or dignity, and *al aql* (reason or rational knowledge).<sup>153</sup> To carry out these techniques it was imperative that jurists “be familiar with the broad purposes of the Law, so that when choices are to be made they will be able to choose interpretations which accord with the spirit of the Law.”<sup>154</sup>

In principle, the Shari'a permits legal rules to be changed and modified in accordance with changing circumstances.<sup>155</sup> Prominent Islamic jurist Ibn al-Qayyim al-Jawziyya, for instance, notes:

Whoever issues rulings to the people merely on the basis of what is transmitted in the compendia despite differences in their customs, usages, times, conditions and the special circumstances of their situations has gone astray and leads others astray. His crime against the religion is greater than the crime of a physician who gives people medical prescriptions without regard to the differences of their climes, norms, the times they live in, and their physical conditions but merely in accordance with what he finds written down in some medical book about people with similar anatomies. Such is an ignorant physician; the other is an ignorant jurisconsult but more detrimental.<sup>156</sup>

Muhammad Iqbal referred to *ijtihad* as “[t]he principle of movement in the structure of Islam.”<sup>157</sup> The justification for *qiyas* and *ijtihad* is found in the Qur'an and *Sunnah*.<sup>158</sup> Scholars have identified three ways *ijtihad* can operate: (1) with regard to speculative (*zanni*) textual rulings in the Qur'an and *Sunnah* due to meaning (*dalalah*) or transmission (*riwayah*), then *ijtihad* can be employed to determine the correct interpretation that is in harmony with the objectives and higher purposes of the law; (2) where there is

152. See Kamali, *supra* note 7, at 224 (stating the three capacities in which the *ijtihad* operates).

153. See *id.* at 229.

154. Bernard Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 AM. J. COMP. L. 199, 210 (1978).

155. See Kamali, *supra* note 7, at 223.

156. AL-JAWZIYYA & SA'D, *supra* note 108, at 202; cf. Muhammad Faruq Abdullah, *Creativity, Innovation, and Heresy in Islam*, in 5 VOICES OF ISLAM 13 (Vincent J. Cornell ed., 2007).

157. IQBAL, *supra* note 97, at 148.

158. THE HOLY QUR'AN 38:29 (Abdullah Yusuf Ali trans., 2d U.S. ed. 1988) (“[Here is] a Book which We have sent down unto thee, full of blessings, That they may meditate On its Signs, and that Men of understanding may Receive admonition.”). See also QUR'AN, *sura Qasas* 29:69 (“And those who strive In Our (Cause)—We will Certainly guide them To Our Paths: For verily God Is with those Who do right.”). The most authentic *Hadith* concerning *qiyas* and *ijtihad* is the appointment of Mu'adh ibn Jabal as a judge for Yemen. Prior to departure, he was asked, “[a]ccording to what will you judge?” Mu'adh responded, “[a]ccording to the book of God.” Again he was asked, “[a]nd, if you do not find it therein?” and Mu'adh responded “According to the *Sunnah* of the Prophet.” “And, if it is not therein?” Mu'adh replied, “[t]hen I will exert myself to from my own judgment.” Omer Ibn Hattab, the Caliph, approved of this response. MUHAMMAD IBN AL-SARAKHSI ET AL., 16 KITAB AL-MABSUT 69 (1906).

no *nass* (clear injunction) or *ijma* (consensus), then resort can be made to *ijtihad* with the guiding factor being the *maqasid al-Shari'a*—this is known as *ijtihad bi al ray* (*ijtihad* founded in opinion); and (3) with respect to existing rules of *fiqh*, which originated from analogical reasoning (*qiyas*), juristic preference (*istihsan*) and other forms of *ijtihad*, then the *mujtahid* may perform fresh *ijtihad* if these rulings no longer serve the higher objectives of the Shari'a in light of, inter alia, new social, economic, political, or cultural considerations.<sup>159</sup>

The Shari'a identifies three factors that must be kept in mind in pursuing the *maqasid al-Shari'a*, or objectives of the law.<sup>160</sup> These factors include: educating the individual (*tahdhib al-fard*) to inspire faith and instill the qualities of trustworthiness and righteousness; establishing justice (*'adl*), which is one of the major themes of the Qur'an; and considering the public interest (*maslahah*).<sup>161</sup>

*Ijma*, or consensus of the community, is a third source of Islamic law.<sup>162</sup> Once a fresh *ijtihad* or *qiyas* has been completed and a consensus develops around it (ratification by the community), then it becomes part of the *corpus juris* of Islamic law.<sup>163</sup> The *ijma* of an earlier generation is not binding on future generations.<sup>164</sup>

Other techniques and principles that one should be aware of when analyzing the Shari'a include: *Naskh* (a technique where verses of the Qur'an are abrogated or abrogation of one *Sunnah* by another *Sunnah* and cross-abrogation of Qur'an and *Sunnah*); *al tamassuk bil asl* (the rule that all beneficial actions are legitimate and all harmful ones illegitimate); *istishab al hal* (the presumption in evidence law that a state of affairs known to exist in the past is valid unless there is evidence challenging it); *al masalih al mursalah* (the rule that a benefit is deemed legitimate if the Shari'a is not

159. See Kamali, *supra* note 7, at 224 (stating the three capacities in which the *ijtihad* operates). The majority of scholars agree that if the text concerns religious observances (*ibadat*), then change is not possible. In cases where the text is about

worldly transactions, the majority of jurists have held that it is open to interpretation and *ijtihad*. . . . [T]he dominant view is that no change should be attempted. But even so, numerous instances can be found in the precedent of the Caliph 'Umar bin al Khattab, where such changes have been made even in cases of the presence of a clear text.

*Id.*

160. Kamali, *supra* note 7, at 225.

161. *Id.* at 225–31. There are at least fifty-three instances where the Qur'an commands *adl* or justice. *Id.* at 227.

162. THE OXFORD DICTIONARY OF ISLAM, *supra* note 94, at 133; see generally Bernard K. Freamon, *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1, 23–24, 63 (1998) (describing *ijma* and the scholarly debate surrounding it).

163. THE OXFORD DICTIONARY OF ISLAM, *supra* note 94, at 133. There is great debate as to whose consensus will make *ijtihad* or *qiyas* into law. Some scholars contend it is only the consensus of the jurists, while others contend it is the consensus of the community. See *id.*; IQBAL, *supra* note 97, at 162; Abdulwahab Saleh Babear, *The Role of the Ulama in Modern Islamic Society: A Historical Perspective*, 37 ISLAMIC Q. 80, 85 (1993).

164. See IMRAN ASHAN KHAN NYAZEE, ISLAMIC JURISPRUDENCE 182–94 (2000), for a detailed discussion about the types of *ijma* and whether or not they are binding.

known to have established or denied it); *al dhara'i'* (the rule that the legitimacy of means is directly affected by the benefit or harm implicit in the final end it seeks to achieve); *al istiqra al naqis* (the rule that a universal law can originate from a particular law through ascending generalization, if no exception is known to challenge the generalization); *al istihsan* (the rule that a weaker *qiyas* may be preferred to a stronger one if the former better fulfils the objectives of the Shari'a); and *al urf wal adah* (the rule that custom and established practice may be legitimate sources of law, as long as they do not contradict the Shari'a). *Urf*, or custom, is of particular significance in this context as many of the rules of international commercial arbitration have evolved to the level of custom. All schools of Islamic jurisprudence accept *urf* as a supplementary source of rules of law.<sup>165</sup> According to Islamic legal scholar Husayn H. Hassan, "what is established by custom is like what is stipulated (among contractual parties)."<sup>166</sup> This being said, custom cannot change a mandatory rule of the Shari'a.<sup>167</sup>

The foregoing is neither exhaustive, nor are the definitions comprehensive. The above introduction, however, is sufficient for gaining a basic understanding of Islamic rules and laws and its evolutionary nature. In fact, one of the difficulties in determining what makes up Islamic law is the fact that there has been strong resistance to codification of the law, which is derived from the Shari'a's fundamental character as an evolutionary system.<sup>168</sup>

#### PART 6 – OPPORTUNITY FOR THE INDIGENIZATION OF ISLAMIC LEGAL RULINGS

The distinction must be made between Shari'a and many of the technical legal rules derived from the Qur'an and *Sunnah* through *fiqh*.<sup>169</sup> A *faqih*,<sup>170</sup> or jurist, derived these rules and thus the decision is not eternal

165. Bassiouni and Badr, *supra* note 121, at 157–58.

166. *Id.* at 158 (citing HUSAYN H. HASSAN, AL-MADKHAL LI DIRASAT AL-FIQH AL ISLAMI 146, 213–17 (1981)).

167. *Id.*

168. See KHALED ABOU EL FADL, SPEAKING IN GOD'S NAME: ISLAMIC LAW, AUTHORITY AND WOMEN 97 (2001) (discussing the inseparable nature of the *Sunnah* or *hadith* from the creative practice of the juristic community).

169. Kamali, *supra* note 7, at 216.

170. Muslim, *supra* note 151, at 69 ("A *Faqih* means a jurist; an expert in the field of law, who possesses outstanding knowledge of revealed sources and methodology, and the intelligence to make use of the basic sources through independent reasoning and the principles provided by the *Shari'a*"); see also FARUQI & FARUQI, *supra* note 105, at 34 ("The great jurists of Islam—Shafi'i, Abu Hanifah, Malik and Ahmad ibn Hanbal—all understood the compound term *usul al fiqh*—not as the general principles of Islamic law, but the first principles of Islamic understanding of life and reality. . . . The *faqih*s of the classical period were real encyclopedists, masters of practically all the disciplines from literature and law to astronomy and medicine. They were themselves professional men who knew Islam not only as law . . .").

and is open to reinterpretation in light of, inter alia, new social, economic, educational, and political circumstances.<sup>171</sup> As Noah Feldman points out:

Shariah, properly understood, is not just a set of legal rules. To believing Muslims, it is something deeper and higher, infused with moral and metaphysical purpose. At its core, Shariah represents the idea that all human beings—and all human governments—are subject to justice under the law.

In fact, “Shariah” is not the word traditionally used in Arabic to refer to the processes of Islamic legal reasoning or the rulings produced through it: that word is *fiqh*, meaning something like Islamic jurisprudence. The word “Shariah” connotes a connection to the divine, a set of unchanging beliefs and principles that order life in accordance with God’s will.<sup>172</sup>

The Islamic legal tradition differs from the Western legal tradition in many respects, including the derivation of its legitimacy, sources, and methodology for evolution or reform.<sup>173</sup> There are, however, some similarities. Like most Western legal systems, the Islamic legal system is a positive system of law and not merely religious law. Additionally, both systems apply judge-made law using the case law method in their own peculiar ways.<sup>174</sup> Both systems also allow the governing authority to make legislation to run the affairs of the state.<sup>175</sup>

Islamic law is characterized by a strong tradition of internal legal pluralism. This is evident from the fact that numerous schools of jurisprudence (with varying degrees of flexibility) existed throughout history.<sup>176</sup> Five prominent schools (whose *fiqh* rulings continue to change) emerged, including the *Hanafi*, *Maliki*, *Shafi*, and *Hanbali* schools in the *Sunni* tradition and the *Ja’fari* school in the *Shia* tradition.<sup>177</sup> This pluralism is also evident in legal adaptation to practices and customs. Islamic legal interpretations in the Middle East differ from those in South Asia, Indonesia, or Bosnia; diversity is the norm.

Despite this nuance—complexity and changeability in Islamic jurisprudence—and despite the fact that faith-based arbitration in Ontario would only apply to a very small area of jurisprudence, the term “Shari’a Courts” was inaccurately used to characterize what was being sought in Ontario. In popular usage, this term raised the specter of stoning women, capital pun-

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171. Kamali, *supra* note 7, at 216, 224.

172. Noah Feldman, *Why Shariah?*, N.Y. TIMES MAG., Mar. 16, 2008, at 46.

173. See J. SCHACT, *THE ORIGINS OF MUHAMMADAN JURISPRUDENCE* (1959).

174. See 34 CLEV. ST. L. REV. 1, which published lectures from the Conference on Comparative Links between Islamic Law and the Common Law.

175. Bassiouni & Badr, *supra* note 121.

176. See MOHAMED HASHIM KAMALI, *THE PRINCIPLES OF ISLAMIC JURISPRUDENCE* (1991).

177. See, e.g., FARUQI & FARUQI, *supra* note 105, at 264–79.

ishment, and other such fears.<sup>178</sup> A significant contributing factor to this fear is the Shari'a-based laws and practices in certain Muslim countries. Arguments for faith-based arbitration became unwinnable no matter how nuanced or qualified once the term Shari'a was associated with the issue. As Tariq Modood accurately noted in the British context:

Part of the problem is language. The mere fact of saying something positive about "*sharia*" leads to knee-jerk hostility amongst many people, just as the term "secularism" regrettably is understood by some Muslims as a policy of atheism, colonialism or postcolonial despotism. The use of either of these terms can lead to the closing of minds, however reasonable and qualified what is being said.<sup>179</sup>

During one panel discussion in April 2004, for instance, all my nuanced legal arguments were shoved aside the moment other panelists brought up the specter of women being stoned in the streets and thieves' hands being cut off.<sup>180</sup> Neither matter would be subject to arbitration under Islamic or Canadian law.<sup>181</sup> In fact, a tribunal would have no jurisdiction to entertain such matters. Even if such decisions were made by an arbitral tribunal, they would be unenforceable and members of the tribunal and those carrying out such rulings would be subject to criminal and civil sanctions. These fine details fall on deaf ears when hysteria, fear, and emotions take over.

It was also inaccurate to characterize these tribunals as full-fledged Islamic law courts, because such a characterization would include public law issues as well as the full spectrum of private law issues—the bulk of which cannot be the subject of arbitration or private resolution. The tribunals would have simply used Islamic legal principles to resolve a very specific and limited set of civil disputes, which may be the subject of arbitration under the limited jurisdiction of the Arbitration Act. What would have evolved out of the proposals by the IICJ or the institutionalization of the application of Islamic legal principles in arbitration should be more accurately characterized as a form of Muslim dispute resolution consistent

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178. Sherman A. Jackson, *What is Sharia and Why Does it Matter?*, THE HUFFINGTON POST (Sept. 11, 2010, 8:16 PM), [http://www.huffingtonpost.com/sherman-a.jackson/what-is-sharia-and-why-d\\_b\\_710976.html](http://www.huffingtonpost.com/sherman-a.jackson/what-is-sharia-and-why-d_b_710976.html).

179. Tariq Modood, *Multicultural Citizenship and the Anti-Sharia Storm*, OPENDEMOCRACY (Feb. 14, 2008), [http://www.opendemocracy.net/article/faith\\_ideas/europe\\_islam/anti\\_sharia\\_storm](http://www.opendemocracy.net/article/faith_ideas/europe_islam/anti_sharia_storm).

180. Noor Cultural Center, *Islamic Law and Faith-Based Arbitration: An Overview* (Apr. 16, 2004). At this event, a group of secular "fundamentalists" (Muslims and non-Muslims) heckled me and asked me to go back home if I wanted Shari'a. They only calmed down when the organizers intervened and I retorted to their heckling by suggesting that they were acting like the "Secular Taliban."

181. See BOYD, *supra* note 5, at 14; see also Zeyad Alqurashi, *Arbitration Under the Islamic Sharia*, 1 TRANSNAT'L DISP. MGMT. 1 (2004).

with Canadian laws and within the flexibility of Islamic normative practices.

The core Islamic teachings of equality, compassion, justice, freedom, and generosity could have been brought to the fore again by using interpretations that are consistent with the spirit of Islam and present realities.<sup>182</sup> If Islamic dispute resolution is a simple exercise of grafting the Western paradigm onto the existing Islamic rules, then it will not be fair or just.<sup>183</sup> Some of the classical and imported rules, practices, and customs would not advance the cause of justice. The status quo in terms of *fiqh* rules and rulings—characterized far too often with abuse of women and minorities—is partly the product of rigid interpretations shaped by tribal and cultural norms.

Yet, the purported blanket prohibition of religious arbitration undermines the work of Islamic feminists and other reformers who argue for the progressive possibilities inherent in renewed interpretations of Islamic law.<sup>184</sup> As noted by Bakht, many feminist groups' and activists' blanket opposition to Islamic law has reinforced the idea that religion is bound to patriarchal tradition, unchangeable, and ultimately dangerous for women. Moreover, as Bakht poignantly points out, "By setting up the secular against the religious, Canadian feminists perpetuated the dichotomy between the modern, enlightened West and pre-modern, backward Islam."<sup>185</sup>

This formal arbitration initiative provided an opportunity to shed some of the cultural baggage and revisit some of the patriarchally misinterpreted and/or context specific rulings by refocusing on the Qur'an's emphasis on gender equality.<sup>186</sup> Islamic feminist Riffat Hassan, for instance, argues that while Islamic society continues to treat women as unequal to men, the proper reading of the Qur'an leads to a very different conclusion:

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182. See Ziba Mir-Hosseini, *The Construction of Gender in Islamic Legal Thought and Strategies for Reform*, 1 HAWWA: J. WOMEN MIDDLE E. & ISLAMIC WORLD 1 (2003).

183. "Islamic law is being exploited in many countries to oppress women and minorities," says Anwaar Syed of the Canadian Muslim Civil Liberties Association. "If the tribunal wishes to institute that kind of interpretation then they will be hard pressed to find support within the community." Faisal Kutty, *Canada's Islamic Dispute Resolution Initiative Faces Strong Opposition*, WASH. REP. ON MIDDLE E. AFF. 70–71 (May 2004). While cautious about the initiative put forward by the Institute, Syed's group is in favor of formalizing ADR within the community to resolve disputes amicably.

184. There is a difference between Islamic feminists and Muslim feminists. Asma Barlas, *The Qur'an, Sexual Equality, and Feminism*, Presentation at the University of Toronto (Jan. 12, 2004), [http://www.asma-barlas.com/TALKS/20040112\\_UToronto.pdf](http://www.asma-barlas.com/TALKS/20040112_UToronto.pdf). Islamic feminists derive their conceptions of gender equality from the Qur'an, while Muslim feminists "almost universally consider Islam oppressive because they view God 'himself' as being misogynistic." *Id.*

185. See Bakht, *Muslim Barbarians*, *supra* note 29.

186. See, e.g., ASMA BARLAS, "BELIEVING WOMEN" IN ISLAM: UNREADING PATRIARCHAL INTERPRETATIONS OF THE QUR'AN (2002); Asma Barlas, *Amina Wadud's Hermeneutics of the Qur'an: Women Rereading Sacred Texts*, in CONTEMPORARY MUSLIM INTELLECTUALS AND THE QURAN: MODERNIST AND POST MODERNIST APPROACHES (Suha Taji-Faruqi ed., 2004).



Having spent seven years in study of the Qur'anic passages relating to women, I am convinced that the Qur'an is not biased against women and does not discriminate against them. On the contrary, because of its protective attitude toward all downtrodden and oppressed classes, it appears to be weighted in many ways in favor of women.<sup>187</sup>

This was also an opportunity to take into consideration, inter alia, the modern context, new customs and practices, and the accumulated wisdom of human knowledge since the days of the classical Islamic rulings.

This "indigenization" would be consistent with the long-established Islamic traditions *tajdid* (renewal) and *islah* (reform), which reflect "a continuing tradition of revitalization of Islamic faith and practice within the historic communities of Muslims."<sup>188</sup> These concepts imply, among other things, a return to the authentic sources of Islamic law, the Qur'an and the *Sunnah*, for guidance in present practice; "the assertion of the right of independent analysis (*ijtihad*) of the Qur'an and the *Sunnah* in this application," rather than reliance on and application of the opinions of past jurists (*taqlid*); and finally, a reassertion of the "authenticity and uniqueness" of the Qur'anic message, a universal experience applicable to all times and places.<sup>189</sup>

Through these methods, renewers (*mujaddidun*) and reformers (*muslihun*) revisit the sources anew in light of present circumstances and reinterpret the universal and timeless Islamic ideals in light of present realities and prevailing ideas.<sup>190</sup> Through *tajdid*, scholars embark on a "renewal of the reading, understanding, and consequently, the implementations of texts in light of the various historicocultural contexts in which Muslim communities or societies exist," while *islah* accordingly encourages "reforming the human, spiritual, social, or political context" in light of these readings.<sup>191</sup>

The "indigenization" would also be in tune with the tradition of *ijtihad*. As Basheer Nafi notes:

At the heart of the reformists' call for *ijtihad* is their belief in the notion of *ta'lil*, or the intelligibility of God's injunction. For long a matter of heated debate between scholars of Islamic legal theory (*usul al-fiqh*), the reformists, like their salafi ancestors, believed that the wisdom behind the divine *nass/hukm* (text/injunction) is amenable to human reason, and is thus open to interpretations . . . . Equally informed by the 'ultimate purposes of the sharia theory, formulated by the Andalusian scholar Abu Ishaq al-

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187. Riffat Hassan, *On Human Rights and the Qur'anic Perspective*, 19 J. ECUMENICAL STUD. 51, 63 (1992).

188. Voll, *supra* note 14, at 32.

189. *Id.* at 35.

190. RAMADAN, *supra* note 15, at 12-13.

191. *Id.* at 13.

Shatibi (d. 790/1388), the reformist call for *ijtihad* became a modern-Islamic celebration of reason and rationality.<sup>192</sup>

These transformative and evolutionary concepts would be instrumental to Islamic scholars attempting to formulate "indigenous" Islamic legal approaches to issues in the Canadian context, according to a renewed reading of the sources in light of contemporary contexts.<sup>193</sup> Such reform attempts are already evident in the *fatawa* (legal rulings) being issued in Western contexts.<sup>194</sup> Illustrative of the context-specific changes are two relatively high profile *fatawa* with respect to the recreation of the bust of the prophet Mohamed in the U.S. Supreme Court and the involvement of Muslim citizens in the U.S. Army. In both cases, Shaikh Taha Jabir Alwani of the Fiqh Council of North America issued *fatawa* approving them given the context and based on his reading of existing jurisprudence and analysis of the sources.<sup>195</sup> Adhering strictly to the classical rulings by exercising taqlid (the Islamic equivalent of *stare decisis*) would not have resulted in such *fatawa*.

With respect to women, it has convincingly been argued that the Qur'an and *Sunnah* elevated the historical status of women.<sup>196</sup> Over time many of the progressive gains have not kept pace and in some situations appear to have regressed. Nevertheless, since the classical era there have been scholars attempting to improve the lot of women. At the turn of the twentieth century, mainstream scholars such as Muhammad Abduh and his student Qasim Amin began to argue for the improvement of women's rights in Islam.<sup>197</sup> Religious feminists and reformers have since increasingly asserted that traditions and legal rulings can evolve to reflect contemporary understanding and customs.<sup>198</sup> They have argued that the two primary

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192. Basheer M. Nafi, *The Rise of Islamic Reformist Thought and its Challenge to Traditional Islam*, in ISLAMIC THOUGHT IN THE TWENTIETH CENTURY 28, 43 (Suha Taji-Farouki & Basheer M. Nafi eds., 2004).

193. Emon, *supra* note 12, at 391. Emon envisages a "marketplace" of Islamic law with new rules developing. This is not something totally new (except of course in terms of the setting being in the Canadian context) as it is the revival of the Islamic tradition as evident from the existence of numerous classical schools of Islamic jurisprudence.

194. There has been a proliferation of dozens, if not hundreds, of websites in Europe and North America, which cater to Western Muslims by issuing rulings that are more relevant to the social, political, and economic realities they find themselves in.

195. Taha Jaber al-Alwani, *Fatwa Concerning the United States Supreme Court Frieze*, 15 J.L. & Religion 1 (2000); Ali Farkhunda, *American Muslim Military Participation in the War*, THE ISLAMIC CENTER OF GREATER TOLEDO (Oct. 11, 2001), <http://www.icgt.org/SpecialArticles/MuslimsInMilitary.htm>.

196. ABD AL-HALIM MUHAMMAD ABU SHUQQAH, *TAHRIR AL-MAR'AH FI ASR AL-RISALAH* (1991).

197. QASIM AMIN, *THE LIBERATION OF WOMEN AND THE NEW WOMAN* (Samiha Sidhom Peterson trans., 1992). See BARBARA FREYER STOWASSER, *WOMEN IN THE QUR'AN, TRADITIONS, AND INTERPRETATION* (1996), for a synopsis of Muhammad Abduh's views on women.

198. See Mir-Hosseini, *supra* note 182, at 26; see also LEILA AHMED, *WOMEN AND GENDER IN ISLAM* (1992); BARLAS, *supra* note 186; STOWASSER, *supra* note 197; AMINA WADUD, *QUR'AN AND WOMAN REREADING THE SACRED TEXT FROM A WOMAN'S PERSPECTIVE* (1999); Hassan, *supra* note 187.

sources of Islam provide much support and evidence for empowering women and improving their status in society. This interpretation would entail rethinking many of the prevailing notions and norms. Indeed, many scholars, including Islamic feminists such as Ziba Mir-Hosseini, Asma Barlas, Riffat Hassan, Amina Wadud, and Leila Ahmed, among others, have already proposed such reforms in the Islamic legal context.<sup>199</sup>

Arguably, Islamic feminists and modernist reformers may have limited legitimacy in the eyes of many in the community. Fortunately, it is not only Islamic feminists and reformers that are now advancing such arguments.<sup>200</sup> More recently, mainstream popular scholars with significant followings have started to emphasize the need to make Islam more relevant to contemporary times, particularly when it comes to women.<sup>201</sup> One who has captured the attention of many Western-educated Muslims is Tariq Ramadan, a leading European Islamic reformer.<sup>202</sup> Ramadan is the son of Said Ramadan, one of the most prominent Islamist intellectuals of this century. His grandfather, Hassan al Banna, was one of the founders of Ikhwan al Muslimeen (Muslim Brotherhood). This pedigree guarantees him a level of legitimacy and credibility not enjoyed by many other reformers.

Ramadan proposes a model for renewal-reform that could potentially apply to the Canadian situation.<sup>203</sup> Ramadan conceives of a new approach, in which the scholars of the Islamic texts (*ulama an-nusus*), who specialize in the “text sciences” (Qur’anic exegeses, *hadith* sciences, and *usul al-fiqh*), work together with “scholars of the context” (*ulama al-waqi*) who are versed in the “context sciences” (the human, social, scientific, and other sciences), in order to create informed Islamic legal rulings through collaboration.<sup>204</sup> *Fatawa* issued in this manner would have the benefit of the wisdom of textual scholars as well as relevant experts.<sup>205</sup> While not necessarily

199. See AHMED, *supra* note 198; BARLAS, *supra* note 186; STOWASSER, *supra* note 197; WADUD, *supra* note 199; HASSAN, *supra* note 187; MIR-HOSSEINI, *supra* note 182, at 26.

200. See, e.g., FADL, *supra* note 168; HASAN AL-TURABI, WOMEN IN ISLAM AND MUSLIM SOCIETY (1973) as republished at <http://www.soundvision.com/Info/women/turabi.asp>; Mohammad Fadel, *Two Women, One Man: Knowledge, Power and Gender in Medieval Sunni Legal Thought*, 29 INT’L J. MIDDLE E. STUD. 185, 185–204 (1997).

201. See, e.g., YUSUF AL-QARADAWY, THE STATUS OF WOMEN IN ISLAM (2002), available at [http://www.witness-pioneer.org/vil/Books/Q\\_WI/default.htm](http://www.witness-pioneer.org/vil/Books/Q_WI/default.htm) (challenging some of the restrictions imposed on women). Hamza Yusuf is a prominent North American scholar with a broad following has not written a significant dedicated work on this subject. His various speeches, short articles, lectures and sermons advance a progressive vision when it comes to women. He founded Zaytuna College to educate and train future religious leaders. ZAYTUNA COLLEGE, <http://www.zaytunacollege.org/> (last visited Dec. 7, 2010).

202. Nicholas Le Quesne, *Trying to Bridge A Great Divide*, TIME MAG., Dec. 11, 2000, [http://www.time.com/time/innovators/spirituality/profile\\_ramadan.html](http://www.time.com/time/innovators/spirituality/profile_ramadan.html); Andrew March, *Who’s Afraid of Tariq Ramadan?*, AM. PROSPECT, June 1, 2010, at 34, available at [http://www.prospect.org/cs/articles?article=whos\\_afraid\\_of\\_tariq\\_ramadan](http://www.prospect.org/cs/articles?article=whos_afraid_of_tariq_ramadan).

203. RAMADAN, *supra* note 15.

204. *Id.* at 129.

205. *Id.* at 130–31.

a novel approach, Ramadan has reconceptualized the relationship between these two groups from a hierarchical one, to one of equality.<sup>206</sup> Ramadan argues that both sets of scholars are equally important in the creation of "an applied Islamic ethics in the various fields of knowledge" in furtherance of his expanded list of *maqasid* (higher objectives).<sup>207</sup> He writes:

If Islam is a universal Message, appropriate to all places over all times, then this should be shown, proved and expressed through a permanent reflection going and coming from the sources to reality and from reality to the sources. This process should be witnessed in every time, everywhere so that the application of the Islamic law remains faithful to the *maqasid al-shari'a*.<sup>208</sup>

As Andrew March points out, Ramadan replaces the traditional *maqasid* framework with a multi-tiered, multi-dimensional scheme, which effectively expands the *maqasid* from five to forty-one.<sup>209</sup> By acknowledging what is immutable and what is open to change in both the texts and the context, scholars can embark on *tajdid* and *islah* by engaging in "critical reading, interpretations, and strategies," and come together to create a "common (collaborative, specialized) *ijtihad* of applied ethics."<sup>210</sup> The result, of course, will be a new or reformed set of normative rules, practices, and principles to guide human action and relationships.<sup>211</sup>

In the context of the Ontario faith-based arbitration debate, Ramadan's model would have been quite useful. He calls for a complete rethinking of Islamic laws from within, by recasting the existing conceptual tools and formalizing a more comprehensive dialectic between religious scholars and scholars of context. Indeed, a collaborative effort by Islamic and Canadian legal scholars, as well as other experts in the development of Canadian Islamic jurisprudence, may have alleviated many of the fears—identifying dangers, both real and perceived—elicited by the ambiguous concept of "Shari'a." Interestingly, as part of their recommendations to Marion Boyd, the Islamic Council of Imams—Canada called for the establishment of such an integrated board of Islamic and Canadian legal scholars for the purpose of reviewing decisions made in the context of faith-based arbitration.<sup>212</sup> There were few calls, however, in the way of establishing a cooperative model through which Canadian-Islamic jurisprudence could begin developing with the input of both textual and contextual scholars.

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206. *Id.* at 129, 134–44.

207. *Id.* at 130.

208. TARIQ RAMADAN, *TO BE A EUROPEAN MUSLIM: A STUDY OF ISLAMIC SOURCES IN THE EUROPEAN CONTEXT* 93 (1999).

209. Andrew March, *Law as a Vanishing Mediator in the Theological Ethics of Tariq Ramadan*, *EUR. J. POL. THEORY* (forthcoming 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1478910](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478910).

210. RAMADAN, *supra* note 15, at 145.

211. *Id.*

212. BOYD, *supra* note 5, at 127.

As the Canadian Muslim community continues to establish itself in Canada, it is likely that an indigenized body of Islamic law will develop.<sup>213</sup> The Canadian Muslim community as a whole is relatively young, and many in the wider group are relative newcomers to Canada.<sup>214</sup> There is at present, however, a “wealth of talent, knowledge and leadership available within the Muslim community” that must be called upon.<sup>215</sup> A constructive and creative Canadian Muslim identity is already evolving. Encouraging this same creative approach in the application of Islamic law in the private sphere, while integrating both Muslim and Canadian ideals, would contribute greatly to the development of an indigenized Islamic jurisprudence. Consistent with the tradition of internal Islamic legal pluralism, this body of jurisprudence would reflect a broad array of views and approaches in a Canadian context. In other words, the multiplicity of interpretations and schools of thought as they exist on the ground today would continue to evolve, be formalized, and be tempered in accommodation.

This may sound purely theoretical. Over the past fifteen years, I have been fortunate enough to be involved in this evolution. I have worked with clients and their Islamic scholar of choice to craft legal solutions that are consistent with both systems of law. In the process, existing Islamic rules have been changed or transformed, even without the benefit of the radical trajectory proposed by Ramadan. In the inheritance area, for instance, scholars have rendered *fatwas* equalizing the shares to be given to daughters and sons.<sup>216</sup> The rationale provided was that the unequal distribution was ostensibly based on a son being held responsible to care for his mom and sisters. Such rights would be enforceable in an Islamic jurisdiction, and since this arrangement would not be enforceable in the Canadian context, the scholars have provided this dispensation to reflect contextual realities. Moreover, they have pointed to the fact that the Prophet explicitly ordered that children be treated equally in the context of favors and gifts.<sup>217</sup> Scholars highlight this to evince that the Prophet did not mandate any discriminatory treatment. Such creative reforms are being repeated throughout North America thanks in part to institutions such as the International Institute of Islamic Thought,<sup>218</sup> the Fiqh Council of North America, and even some

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213. There is evidence it is already developing but there is no structure, organization, or formality to the process.

214. See generally 2001 Canadian Census Statistics on Religion, Immigrant Status, and Period of Immigration, STATISTICS CANADA, <http://www12.statcan.gc.ca/english/census01/shared/redirectproduct.cfm?ips=97F0022XIE2001004> (last modified Mar. 9, 2010).

215. BOYD, *supra* note 5, at 131.

216. Classical and even more contemporary Islamic inheritance rules insisted on a daughter receiving half the shares of a son. Now some scholars even suggest that given the present realities, the family should sit together and collectively decide to distribute equally.

217. Num'an b. Bashir narrated that the Prophet (peace be upon him) said, “Treat all your children justly and equally; treat all your children justly and equally.” Abu Dawud Sulayman ibn al-Ash'ath al-Sijsthani, Sunan Abu Dawud (1983).

218. INT'L INST. OF ISLAMIC THOUGHT, <http://www.iiit.org/> (last visited Dec. 28, 2010).

local mosques.<sup>219</sup> The Fiqh Council, for instance, is a group of Islamic scholars developing contemporary fiqh that is culturally, politically, and socially relevant to the North American or Western contexts.<sup>220</sup> The evolutionary and context-specific nature of Islamic law is evident in many of the rulings emanating from such institutions in the North American context.

#### PART 7 – MULTICULTURALISM AND LEGAL PLURALISM

The faith-based arbitration controversy in Ontario is a compelling case study in multiculturalism and legal pluralism. Multiculturalism is essentially the idea that a diversity of cultures can coexist within a single national state.<sup>221</sup> Legal pluralism is the notion that individuals and groups are bound by and respect a plurality of legal orders within that state.<sup>222</sup> A multicultural society inherently accepts the idea that the various subgroups within society will celebrate their differences in all areas including the legal arena. Indeed, I believe this is the essence of multicultural citizenship and stands in stark contrast to the cultural assimilation traditionally demanded of migrants and minorities.

Many nations around the world have officially adopted multiculturalism.<sup>223</sup> Several Western nations adopted it as official policy beginning in the 1970s.<sup>224</sup> Canada was part of this group.<sup>225</sup> The main impetus was Canada's increasing cultural diversity. Since then multicultural theorists have struggled with attempts to accommodate and extend self-governance rights to minority groups.

The nature and limits of accommodation within liberal democracies have been the subject of considerable scholarship over the last few decades.<sup>226</sup> The primary focus of pioneering theorists such as Charles Taylor and Will Kymlicka has been the legal accommodation claims of minorities.<sup>227</sup> A detailed discussion of the various models and their strengths and weaknesses are beyond the scope of this paper, but a very brief synopsis of

219. FIQH COUNCIL OF N. AM., <http://www.fiqhcouncil.org/> (last visited Nov. 28, 2010).

220. There is much work being done in this area. Tariq Ramadan, Hamza Yousuf, Muzzamil Siddiqui, and Taha Jabir Al Alwani are some of the leading voices. See THE CORDOBA INITIATIVE, <http://www.cordobainitiative.org/?q=content/shariah-index-project> (last visited Dec. 28, 2010).

221. See generally TARIQ MODOOD, MULTICULTURALISM (2007); CHARLES TAYLOR ET AL., MULTICULTURALISM (1994); Faisal Bhabha, *Between Exclusion and Assimilation: Experimentalizing Multiculturalism*, 54 MCGILL L.J. 45, 51 (2009).

222. John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM 1, 38 (1986); Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869 (1988).

223. Bhabha, *supra* note 221, at 51.

224. *Id.*

225. *Id.*

226. See, e.g., WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE (1989); ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES (Richard A. Shweder et al. eds., 2002).

227. KYMLICKA, *supra* note 226; TAYLOR, *supra* note 221.

their main themes is required to provide context for how the debate relates to issues of multicultural citizenship and legal pluralism.

A majority of theorists favor a multicultural citizenship regime that respects group-based differences.<sup>228</sup> It is argued that this “rule-and-exemption” model of multicultural citizenship is best suited to creating a more just society by expanding the more limited, traditional understanding of citizenship. The trouble with most of the models is their over emphasis or exclusive reliance on liberal values. Most of the leading theorists accept the fundamental truth of Rawls when he argues that, when given the choice, all reasonable people will choose to be liberal or they will eventually “evolve” to the liberal choice. In fact, Kymlicka, who is considered a leading theorist, goes as far as to defend minority groups “only if, and in so far as, they are themselves governed by liberal principles.”<sup>229</sup> This of course goes against the liberal democratic notion of individual freedom and the latitude to make decisions about one’s own life. Indeed, as Jeff Spinner-Halev and Jacob Levy argue, if liberty is to be meaningful, the liberal state must protect the freedom of religious communities to govern their lives according to their deeply held views.<sup>230</sup>

Scholars have identified two broad themes in critiques of multiculturalism.<sup>231</sup> The internal (feminist and minorities within minorities) and external critiques (main ones rely on alternative conceptualizations of political membership, liberalism, civic-republicanism, and ethnoculturalism) have become more pronounced over the years.<sup>232</sup> The internal critiques are more relevant to the arbitration controversy. While disputes over the scope/limits and the critiques are not unique to gender, the most recent debates including the faith-based arbitration debate all highlight a new brand of secular-religious quandary around women, gender, and family.

The most ardent feminist critique applicable to the situation under discussion is evident in the work of Susan Moller Okin, who answered her own question “Is Multiculturalism Bad for Women?” in the affirmative.<sup>233</sup> Other internal critiques applicable to the faith-based arbitration revolve around problems encountered by some minorities within minorities—for example, women and dissenters—which Ayelet Shachar terms the “paradox

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228. Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM AND THE POLITICS OF RECOGNITION* 38 (Amy Gutmann ed., 1994).

229. WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 153 (1995).

230. Avigail Eisenberg & Jeff Spinner-Halev, *Introduction* to *MINORITIES WITHIN MINORITIES: EQUALITY, RIGHTS AND DIVERSITY* 1, 11 (Avigail Eisenberg & Jeff Spinner-Halev eds., 2005).

231. Ayelet Shachar, *Two Critiques of Multiculturalism*, 23 *CARDOZO L. REV.* 253 (2001).

232. Shachar, *supra* note 5, at 86.

233. Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* (Joshua Cohen et al. eds., 1999).

of multicultural vulnerability."<sup>234</sup> The argument here is that in accommodating minorities, dissenters and some women may be subject to discrimination and oppression through forced conformity to group views and practices. In some situations, they may be excommunicated (formally or informally) or may be forced to "voluntarily" exit the group to escape. The paradox and questions raise legitimate concerns, but devaluing the significance of religion and emphasizing the primacy of liberal values also results in oppression—oppression of the more "religious" or "orthodox" subgroups within a minority group.

I agree that there is a "paradox of multicultural vulnerability" when it comes to some women, dissenters, and liberals within the group, but conservatives or illiberal moderates within the group face what I call the "paradox of liberal vulnerability." In the faith-based arbitration debate, the minority (secular Muslims and even some non-secular Muslims who did not want the choice) oppressed a subgroup who wanted to order their lives in accordance with their faith. The secular or less orthodox minority could opt out and, in fact, had the choice to not participate or accept the jurisdiction of these tribunals.<sup>235</sup> Religious individuals, similarly, had the right to opt in or accede to its jurisdiction. In this case, the liberals (including some secular Muslim women) set the agenda and effectively denied arguably more religious women and even Islamic feminists the opportunity to order their lives in accordance with their deeply held beliefs.

Over time, scholars have begun to realize that while a state may impose its own law, various other systems of laws continue to exist and compete with the state law system.<sup>236</sup> In essence, legal pluralism is the norm, not legal centralism. As with any controversial term, definitions of legal pluralism abound. John Griffiths, one of the key developers of the theory, defines a situation of legal pluralism as

one in which law and legal institutions are not all subsumable within one "system" but have their sources in the self-regulatory activities . . . which may support, complement, ignore or frustrate one another, so that the "law" which is actually effective on the "ground floor" of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism, and the like.<sup>237</sup>

This contrasts sharply with legal centralism, which assumes that the state is the only source of law.<sup>238</sup> Many involved in the Ontario arbitration debate

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234. Shachar, *supra* note 5; *see also* AYELET SCHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 64 (2001).

235. Shachar, *supra* note 5, at 62.

236. *See* Griffiths, *supra* note 222, at 38–39; Merry, *supra* note 222, at 2; Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 375 (2008).

237. Griffiths, *supra* note 222, at 39.

238. *Id.* at 3.



uncritically accepted the assumption of exclusive state control over law inherent in legal centralism. In reality, legal pluralism is predominant in virtually all societies. The most widely used conception of plural legal systems is Sally Falk Moore's notion of the semi-autonomous social field.<sup>239</sup> These semi-autonomous social fields each have rulemaking powers and people abide by these rules in areas ranging from classrooms to sports fields to places of worship.<sup>240</sup>

The evolutionary nature of Islamic law and the multicultural and pluralistic nature of Canadian society provided an opportunity to acknowledge and accept this reality, and to devise a practical model of legal pluralism that could have facilitated a harmonious relationship between Islamic law and Ontario law (state law). Indeed, as Moore points out, the different legal orders exist in relation to each other and, hence, affect the way that each is able to operate.<sup>241</sup> There were a range of possible relationships that could have been devised between Islamic law and state law in the faith-based arbitration controversy.<sup>242</sup>

Forsyth, for instance, details a typology of seven potential models of "how to 'do' legal pluralism." They range from informal to formal, and include: (1) repression of non-state justice system by the state justice system; (2) no formal recognition but tacit acceptance by the state of the non-state justice system; (3) no formal recognition but active encouragement of non-state justice system by the state; (4) limited formal recognition by the state of the exercise of jurisdictions by a non-state system; (5) formal recognition of exclusive jurisdiction in a defined area; (6) state recognition of the right of non-state justice system to exercise jurisdiction and lend its coercive powers; and (7) complete incorporation of the non-state justice system by the state.<sup>243</sup> The level of formality and self-governance will determine what will be acceptable from each of the perspectives—society as a whole, the state, and the respective communities whose norms and scope of self-governance are under negotiation or discussion. Ontario policy makers had much to play with in crafting a solution to the quandary they faced from 2003 to 2005. In fact, various stakeholders did advance different ways of "how to 'do' legal pluralism," to borrow a phrase coined by Forsyth.<sup>244</sup> The government seems to have opted for the second model, which effectively preserved the status quo. This, of course, did not address any of the legitimate concerns raised, nor did it respect the rights of those who wished to

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239. See generally Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 *LAW & SOC'Y REV.* 719 (1973).

240. *Id.*

241. *Id.*

242. Forsyth, *supra* note 76, at 5–8.

243. *Id.*

244. *Id.* at 1.

live their vision of the good life in accordance with their core beliefs, as promised to them by the project of liberal democracy.

I would concur with Chandran Kukathas and Jeff Spinner-Halev that the state, in a multicultural citizenship model, should grant greater self-governance powers, particularly over issues central to their identity and preservation.<sup>245</sup> This would be consistent with the reality of legal pluralism that is evident on the ground. The state should only intervene when it harms its members or the outside community. Such an intervention would only be possible and effective if there was formal institutionalization of the practice and interaction between the state and non-state systems.

A more robust multicultural model taking cognizance of the reality of legal pluralism would have facilitated the indigenization process of Islamic law. Such an indigenization would have been in line with the essence of multiculturalism and legal pluralism. Moreover, this would have been one of the best ways to ensure that the minority community evolves itself using its own internal mechanisms and through respectful engagement and interaction with the mainstream community. This would be consistent with Miranda Forsyth's notion of "planned legal pluralism," which would "ensure that the various legal systems in a particular jurisdiction operate in ways that support and enrich each other, rather than undermine and compete with each other."<sup>246</sup> This is not a farfetched theoretical dream, as the evolutionary and context-specific nature of Islamic law makes it conducive to this dialectical model within the broader state legal system.

As scholars have documented, it is not possible to suppress these semi-autonomous social fields entirely within a society.<sup>247</sup> The faith-based arbitration provided Ontario with a timely opportunity to develop and experiment with models of legal pluralism that could have balanced the competing rights in a manner that attempted to respect all parties and protect the vulnerable. It was also occasion to explore how Islamic law and liberal democracy can coexist and complement each other within a liberal multicultural framework.

#### CONCLUSION

The family law arbitration controversy brought to the fore a highly charged emotional debate that has been raging silently in multicultural democracies like Canada. As demonstrated in this paper, the issues transcended dispute resolution and tugged at fundamental tensions surrounding multiculturalism and national identity, the separation of church and state, the limits of accommodation, and legal pluralism within a liberal democracy. Proponents of faith-based arbitrations argue that religious values can

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245. Eisenberg & Spinner-Halev, *supra* note 230, at 10–11.

246. Forsyth, *supra* note 76, at 1.

247. *See, e.g., id.* at 3.

be a major part of a person's identity and can therefore influence one's attitude and approach to conflict resolution. These proponents contend that they should be able to govern their lives according to their conscience within the parameters of law, if the constitutional right to freedom of religion is to have any real value. As CAIR-CAN argued:

Supporting the creation of Islamic family law tribunals, along with those of other faith groups, is a form of accommodating the needs of religious minorities within a multicultural society. Moreover, giving members of religious minority groups the option of resolving civil disputes according to their own religious doctrine within a framework that is respectful of both Canadian law and the *Charter of Rights and Freedoms* is consistent with the *Charter's* own guarantee of freedom of religion contained in section 2(a).<sup>248</sup>

Consenting and informed adults must be able to make religious choices even if others do not believe these are "correct" choices. As Ronald Dworkin says about faith (albeit not in the context of this controversy):

We can't ask people to set aside their most profound convictions about the truth of deep moral and ethical issues when we are also asking them to make decisions . . . that are for most people the most basic and fundamental moral and ethical decisions they will in their lifetime be called upon to make.<sup>249</sup>

In this paper I have demonstrated that Islamic legal doctrine is replete with creative methodologies of reinterpretation that can serve as rich sources for more gender-friendly practices. This interpretation lends support to the idea that a tolerable liberalism or a quasi-sovereignty route may be better models if we are to foster respectful coexistence.<sup>250</sup> I have also argued that the inherent dynamism of Islamic jurisprudence, combined with planned legal pluralism and a more inclusive notion of multicultural citizenship, is the best way to balance some of the fundamental tensions. The clear advantages of such an approach are: more constructive forms of engagement between majority and minority cultures; avoiding the double standards highlighted in the faith-based controversy by giving deliberative priority to accommodation; and contributing to peace and coexistence by making space rather than suppressing people's core beliefs and values. Indeed, as Lucas Swaine argues, the belief among religious minorities that the liberal

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248. CANADIAN COUNCIL ON AMERICAN-ISLAMIC RELATIONS, REVIEW OF ONTARIO'S ARBITRATION PROCESS AND ARBITRATION ACT (Aug. 10, 2004), available at <http://www.caircan.ca/downloads/sst-10082004.pdf>.

249. Elizabeth Katz, *Dworkin Explores Secular, Religious Models for Society*, UNIV. VA. SCH. L. (Apr. 19, 2006), [http://www.law.virginia.edu/html/news/2006\\_spr/dworkin.htm](http://www.law.virginia.edu/html/news/2006_spr/dworkin.htm).

250. See, e.g., Lucas Swaine, *THE LIBERAL CONSCIENCE: POLITICS AND PRINCIPLE IN A WORLD OF RELIGIOUS PLURALISM* (2006); Melissa S. Williams, *Tolerable Liberalism*, in *MINORITIES WITHIN MINORITIES*, *supra* note 230, at 19–40.

state aims to undermine them leads to unnecessary distrust and potentially even clashes.<sup>251</sup>

The prevailing approach of imposing secular values in the name of human rights simply fails to understand and appreciate the fundamental role accorded to religious beliefs and the practices of many. I would concur with Charles Taylor and other Communitarians that social and communal arrangements and institutions are crucial to the development of self-meaning and identity.<sup>252</sup> In fact, those who were in favor of making this option available counter that if people of faith, Muslims included, are not allowed to exercise their religious rights within the confines of Canadian law and are not treated or seen to be treated the same as others, distrust, alienation, and marginalization felt by some in the community will continue to grow.

At the same time, the legitimate concerns raised by secular feminist groups and, contrary to perception, supported by mainstream Muslim groups, should not be trivialized or minimized. There is some basis to the fear that women may feel pressured into submitting their disputes to an Islamic arbitration tribunal that may be less protective of their rights.<sup>253</sup> This understanding, however, ignores the fact that social pressure is a reality in both religious and secular contexts. Moreover, this belief and its paternalistic imposition on Muslim women fails to validate or recognize that for some women the desire to decide their dispute in accordance to their core values and principles may take precedence over any secular understanding of the right choice. As Homa Fahmy of the Federation of Muslim Women noted, "The fact that I've been [characterized as being] unable to make a sound judgment in this matter, I find deeply offensive."<sup>254</sup>

Secular feminists were misguided when they unequivocally accepted the assumption that women, in particular Muslim women in the context of religious arbitration, could only be saved by secularism. As noted in the foregoing discussion about Islamic law, it is not necessarily the case that religion must restrict women's rights. Indeed, this undermines the work of religious women who have sought to push the boundaries and explore the progressive possibilities of Islamic law.

Given an ostensible commitment to equality and religious freedom in the Canadian Charter of Rights and Freedoms,<sup>255</sup> it is hypocritical to advocate secular ways as the only means of protecting the vulnerable. In the case under discussion, the hypocrisy was glaring given that the legal system itself allows and encourages private dispute resolution and allows for the

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251. Swaine, *supra* note 250.

252. Shachar, *supra* note 5, at 55.

253. Though a party must voluntarily consent to arbitration, feminists question whether "real" choice is ever possible. *Id.* at 62–63.

254. Melissa Leong, *Muslim Groups Promise Liberals a Fight on Sharia*, NAT'L POST, Sept. 15, 2005, at A12.

255. Bhabha, *supra* note 221, at 49.

opting out of the statutory family law regime without any active court oversight or sanction.

I concur with many observers who have concluded that the real losers in the Ontario decision are women,<sup>256</sup> especially those women who wish to live a faith-based life, as they interpret it.<sup>257</sup> A paternalistic attitude toward Muslims did not and will not solve the issue of social pressure; in fact, it will alienate many. As Boyd points out, denying Muslims the option of using religious-based ADR not only limits their options, but it also “push[es] the practice of religious arbitrations outside the legal system altogether, thus limiting the court’s ability to intervene to correct problems.”<sup>258</sup> ADR already exists within the Muslim community, as it does in the broader community. People are abiding by decisions as if they were the word of God and therefore binding.<sup>259</sup> Formalizing the process would have opened the door toward greater transparency and accountability. As long as there are proper procedures and rules of conduct in place, there is nothing preventing the community from instituting a dynamic and less disruptive alternative to the adversarial court system. Indeed, this could have created a safe space between the patriarchy and oppression based on certain interpretations of religious laws and the paternalism and racism from the broader mainstream community.

As the *Globe and Mail* editorialized at the time, “the Islamic tribunal may yet send a message that Muslims can be who they are and still be as Canadian as anyone else.”<sup>260</sup> Indeed, a sober *ex post facto* rational review of the issue will reveal that exploring ways to accommodate Islamic laws within a more inclusive model of legal pluralism would provide a great opportunity to contribute to the evolution of Islamic law by pushing its progressive possibilities, indigenize Islam in Canada, and thereby help in the integration of Muslims.

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256. The alleged troubles encountered by Muslim women continue given that private dispute resolution can still take place without any accountability or transparency.

257. Those Muslims who wish to use the option would simply be following a long-established practice within the Muslim tradition of arbitration (known as *tahkim*). Indeed, the Qur’an specifically refers to arbitration in the context of matrimonial disputes: “If you fear a breach between twain, then appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, God will cause their reconciliation: For God hath full knowledge, and is acquainted with all things.” THE HOLY QUR’AN 4:35 (Abdullah Yusuf Ali trans., 2d U.S. ed. 1988).

258. BOYD, *supra* note 5, at 139.

259. Back alley mediations and arbitrations continue and women are abiding by decisions that may be unfair and even exploitative because they are packaged as being from God.

260. Editorial, *An Islamic Court? Here? Why not?*, GLOBE & MAIL, Aug. 28, 2004, at A14.