

## CONCEIVING ISLAMIC LAW IN A PLURALIST SOCIETY: HISTORY, POLITICS AND MULTICULTURAL JURISPRUDENCE

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The oft-repeated idea of Sharia as a code of law, and thereby rigid and inflexible, reflects a concept of law arguably with a provenance stemming from the 18<sup>th</sup> and 19<sup>th</sup> centuries during the period of European colonization in Muslim lands. With the advent of European-style laws, legal institutions, and legal curricula, Sharia was reduced to an abstract body of doctrines disconnected from a historical or institutional context. This concept of Sharia has transformed its significance: no longer a rule of law tradition, it is often used to provide (over)determinate anchors in contests over political identity. As liberal societies grapple to find a place for religious communities such as Muslims, this paper suggests that governments and private parties cooperate to develop a Muslim civil society sector that facilitates debate within the religious community, and between the government and the religious community. Civil society can be used to empower competing voices within the Muslim community, undermine conceptions of religious absolutism, and foster a mutual accommodation between religious commitment and national values.

### I. INTRODUCTION

The February 2006 conference at NUS provided vast insights into how Muslims and Islamic law can be accommodated within a multicultural nation like Singapore. This insight is especially significant in light of the recent debate in Canada

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concerning the use of Shari'a arbitration in family law disputes. Ultimately, the government of Ontario rejected all religious law arbitration in family law matters. What was peculiar in the debate was the way in which Shari'a was conceptually understood. Even more interesting was how that same conception seemed to work for the leadership of the *Majlis Ugama Islam Singapura* (MUIS), which was engaged in administering Muslim marriages and the Shari'a court. MUIS was created pursuant to the 1966 Administration of Muslim Law Act, which also provided jurisdiction to its Shari'a courts to hear and adjudicate cases involving Muslims in family law disputes.<sup>1</sup> In the course of the conference, I asked the MUIS leadership the following question: to what extent was the law as applied by the Shari'a court based on medieval Shafi'i or Hanafi legal texts (*fiqh*)? Alternatively, did the court account for reformist critiques and allow flexibility in the law? The response I received was that the court must ensure that the law is clear and predictable to Muslims. Too much judicial discretion would undermine the Muslim member's expectation interests, let alone his or her faith in the law and the judicial system provided by MUIS. The question of gender equality was not a concern, and in fact, it is not constitutionally mandated in matters of personal status law. Article 12 of the *Constitution of the Republic of Singapore*<sup>2</sup> states (in full):

### Equal Protection

12. —(1) All persons are equal before the law and entitled to the equal protection of the law.

(2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens of Singapore on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding, or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

(3) This article does not invalidate or prohibit —

(a) any provision regulating personal law; or

(b) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion.

The equality provision does not expressly protect gender equality, and in fact, provides for exceptions to equality under article 12(3)(a), where discrimination may result from the application of personal status law, such as medieval rules of Islamic law.

What was striking in the discussion and exchange, was the underlying conception of Shari'a that the MUIS members had. Their conception paralleled the

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<sup>1</sup> *Administration of Muslim Law Act* (Cap. 3, 1999 Rev. Ed. Sing.), ss. 3, 35. A copy of the Act can be found at The Family Court of Singapore, online: Act 3 — Administration of Muslim Law Act <[http://www.familycourtofsgapore.gov.sg/principles/act3/acts\\_act3\\_frame.htm](http://www.familycourtofsgapore.gov.sg/principles/act3/acts_act3_frame.htm)>.

<sup>2</sup> 1999 Rev. Ed [ROSC].

one held by Canadians debating Shari'a family arbitration in Ontario, in significant ways. The concept of Shari'a that prevailed in the Ontario debates was one that viewed the tradition as an inflexible code of religious rules, based on the Qur'an and traditions of the Prophet Muhammad, and immune to change.<sup>3</sup> Various media outlets described the Shari'a as a "code" of law that deterministically governs every aspect of a Muslim's life.<sup>4</sup> In letters to the editor, readers commented on their fear of the use of Shari'a in Ontario, calling it an "archaic paternalistic code".<sup>5</sup> Whether one emphasizes predictability in the law, or argues that Shari'a is an inflexible code of religious law, the underlying concept is the same: Shari'a is a determinate code of rules, applied in an all or nothing fashion.

This article suggests that the underlying concept of Shari'a adopted by the leadership of MUIS and in the Canadian debate on Shari'a arbitration is fundamentally disconnected from the rule of law tradition that Islamic law once was. Rather, the reductive concept of Shari'a that prevails amongst Muslims and non-Muslims in Canada and Singapore has a historico-political provenance, originating with the period of colonialism in the Muslim world. To substantiate this argument, I will present a narrative of Islamic law, starting from the 10<sup>th</sup> century, when it became a well developed system of law, continuing through the Ottoman reform period and the era of colonization, when Islamic law was replaced with European-inspired codes. The replacement occurred not only in terms of the substance of the law, but also in the institutions that allowed the law to be taught and applied. This article will illustrate how Islamic law, during the independent movements of Muslim countries in the middle of the twentieth century, and the Islamization campaigns in latter half of that century, was reduced to highly determinate rules of law in specific areas like family law, and ultimately served political purposes by giving an Islamic substance to shifting notions of national identity. Muslims addressing Shari'a today do so in light of this colonial and post-colonial heritage. As subalterns adopting the colonial-inspired discourse, Muslims embrace a vision of Shari'a that is no longer a rule of law system, but rather a system of rules removed from their institutional and historical contexts, and used to justify certain conceptions of political and national identity.

In Parts II and III, I address the early history of Shari'a and how medieval legal doctrines were embedded within institutional frameworks that helped make the tradition meaningful and responsive to changing situations. In Part IV, I will show

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<sup>3</sup> For media accounts reporting this conception of Islamic law, see Trichur "Muslims Divided"; "Iranian activist fears Ontario passage of Shari'a law for family disputes" *Canadian Press Newswire* (22 January 2005); Allyson Jeffs "Iranian activist warns against the hammer of Shari'a law" *Edmonton Journal* (30 January 2005) A9. Syed Mumtaz Ali, one of the early proponents of the Shari'a tribunals, held that appearing before the Shari'a tribunals allowed Muslims to abide by the Qur'an and would be so central to one's faith that to avoid them would be blasphemy. "YWCA Toronto Takes Stand on Shari'a Law" *Canada News Wire* (21 December 2004) 1; Bob Harvey "Shari'a law debate divide Ontario's Muslims" *CanWest News* (17 January 2005) 1.

<sup>4</sup> Mark Mackinnon "For Muslims, investing by the book increasing, and increasingly profitable" *Globe and Mail* (18 November 2005) B10.

<sup>5</sup> Ken West, Letter to the Editor, *Globe and Mail* (9 September 2005) A16. See also the Very Rev. Lois Wilson, Letter to the Editor, *Globe and Mail* (2 September 2005) A16, in which Wilson calls the Shari'a an "ancient code".

how this early rule of law system was gradually dismantled, generally at the instigation of European colonial interests. Part V illustrates how post-colonial Muslims have uncritically adopted the representations of Shari'a handed to them by the former colonial powers; as subalterns they internalized the discourse of their colonial masters. In doing so, their representations of Shari'a today have more to do with contested forms of political identity, rather than with creating rule of law systems that are responsive to Islamic values. I conclude with a proposal suggesting how liberal governments can cooperate with Muslim civil society organizations to create spaces for Muslims to engage in critical thought about the accommodation of Islamic law, within national rule of law frameworks founded upon fundamental values of liberal states.

## II. THE HISTORICAL CONCEPT OF SHARI'A

The view of Shari'a as a highly determinate code of rules ignores the centuries of juristic literature that undermine any conceptualization of Shari'a as a narrowly constructed, unchanging code of law. Shari'a has a history whose normative foundations and development stretch from the 7<sup>th</sup> century to the present,<sup>6</sup> which illustrates that legal rules were often the product of Muslim jurists utilizing their analytical discretion in light of a culture and institutions of education, precedent, principles, and doctrines.<sup>7</sup> The interpretive theory of Islamic law certainly espouses a commitment to the Qur'an, and the traditions of Prophet Muhammad (d. 632 CE), also called *hadith*. These 'scriptural' sources provide an authoritative foundation for juristic analysis and interpretation. But these sources do not constitute a legal system by themselves. The Qur'an contains 114 chapters, but only a small fraction of its verses can be characterized as "legal".<sup>8</sup> Likewise, the traditions of Muhammad are often highly contextualized, and are especially meaningful once unpacked to display the substance provided by that context. Furthermore, as both Muslim jurists and Western scholars of Islam have noted, the *hadith*, as the embodiment of an earlier oral tradition, cannot always be relied upon as authentic statements of

<sup>6</sup> For an historical introduction to Islamic law, its origins and evolutions, see Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1954); N.J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964) [Coulson]; Christopher Melchert, *The Formation of the Sunni Schools of Law, 9<sup>th</sup>-10<sup>th</sup> Centuries, CE* (Leiden: Brill, 1997) [Melchert]; Yasin Dutton, *The Origins of Islamic Law: The Qur'an, the Muwatta', and Madinan 'Amal* (UK: Curzon Press, 1999); Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005) [Hallaq, *Origins and Evolution of Islamic Law*].

<sup>7</sup> For a discussion of the curricula that was characteristic of Islamic legal education in the medieval Muslim world, see George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh: Edinburgh University Press, 1981).

<sup>8</sup> Various commentators suggest that there are anywhere from 80 to 600 verses of the Qur'an which have content that can be called legal. For instance, Kamali states that the Qur'an contains 350 legal verses; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3<sup>rd</sup> ed. (Cambridge: Islamic Texts Society, 2003) at 26 [Kamali]. In Abdullahi Ahmad An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse: Syracuse University Press, 1990), An-Na'im notes (at 20) that some scholars consider 500 or 600 of the over 6,000 verses in the Qur'an to be legally oriented. However, of those verses, most deal with worship rituals, leaving about eighty (80) verses that deal with legal matters in a strict sense.

what the Prophet said, did, or decided.<sup>9</sup> While both sources assume an undeniable position of authority within Islamic jurisprudence, they alone do not constitute the Islamic legal tradition. The Shari'a tradition is comprised of considerable juridical literature, much of which illustrates that jurists often went beyond scripture, utilizing their discretion in various ways to articulate the law. In the field of medieval legal theory or *usul al-fiqh*, jurists developed various interpretive methodologies that balanced the need for authority, legitimacy and discretion in a way that ensured a just outcome under the circumstances. They extended scriptural rules through analogical reasoning (*qiyas*), balanced competing precedents in light of larger questions of justice (*istihsan*), and legislated pursuant to public policy interests where scripture was otherwise silent (*maslaha mursala*).<sup>10</sup> Muslim jurists did more than simply read the Qur'an and *hadith* as if they were codes and thereby transparently and determinately meaningful. In other words, it is highly misleading to suggest that Islamic law is constituted by the Qur'an and traditions of the Prophet, without further recourse to techniques of juristic analysis that allowed the law to remain socially responsive without at the same time undermining the legal tradition's authority.

Islamic law arose through a systematic process of juristic commentary and analysis that stretched over centuries. During this process, different interpretations of the law arose, leading to competing "interpretive communities"<sup>11</sup> of the law, often referred to as 'schools of law' (*madhahib*, sing. *madhhab*) — all of which were historically deemed equally orthodox.<sup>12</sup> Over time, the number of interpretive legal communities or *madhahib* diminished, to the extent that there are now four remaining Sunni legal schools and three Shi'a schools. The Sunni schools are the Hanafi, Maliki, Shafi'i and Hanbali schools. The Hanafi school is predominant in South Asia and Turkey; the Malikis are most often found in North

<sup>9</sup> There are many studies that address the oral tradition that culminated in the *hadith* literature, and which provide alternative methods of understanding their historical import. Some such as Schacht argued that the *hadith* are complete forgeries and cannot be relied on for knowing anything about what the Prophet Muhammad said or did during his life; Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1967). Others like Fazlur Rahman suggest that the *hadith* tradition reflects the collective memory of Muslims about the Prophet, although some certainly reflect later historical political and theological controversies; Fazlur Rahman, *Islamic Methodologies in History* (Karachi: Central Institute of Islamic Research, 1965). El Fadl suggests that the *hadith* literature represents an "authorial enterprise" and the challenge is to determine the extent and degree to which the Prophet's voice has been preserved; Khaled Abou El Fadl, in *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford: Oneworld Publications, 2001) [El Fadl].

<sup>10</sup> For general treatments of the principles of legal analysis in Islamic law, see Kamali, *supra* note 8; Wael Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997); Bernard G. Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Din al-Amidi* (Salt Lake City: University of Utah Press, 1992); *The Spirit of Islamic Law* (Athens, Georgia: University of Georgia Press, 1998); Muhammad Khalid Masud, *Islamic Legal Philosophy: A Study of Abu Ishaq al-Shatibi's Life and Thought* (Delhi: International Islamic Publishers, 1989).

<sup>11</sup> The phrase "interpretive community" is borrowed from the work of Stanley Fish, *Is There a Text in this Class? The Authority of Interpretive Communities* (Cambridge: Harvard University Press, 1980).

<sup>12</sup> For the history of the legal *madhhab*, see Melchert, *supra* note 6, and Hallaq, *Origins and Evolution of Islamic Law*, *supra* note 6. For the curriculum often taught at these legal schools, see George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh: Edinburgh University Press, 1981).

Africa. The Shafi'is are dominant in Southeast Asia and Egypt, while the Hanbali school is found in the Gulf region. The Shi'a schools are as follows: Ja'fari (mostly in Iran),<sup>13</sup> Isma'ilis,<sup>14</sup> and Zaydis. Consequently, if one wants to determine a rule of Islamic law, one will often start with a text on substantive law, rather than the Qur'an or traditions of the Prophet. One may consult a summary of substantive law (i.e. *mukhtasar*) or an elaborate compendium written by a jurist within a particular *madhhab*.<sup>15</sup> Furthermore, if one engages in a historical inquiry of doctrinal development around a given issue, one may find that the law manifests distinct shifts that may be based on contexts yet to be determined by further research.<sup>16</sup>

For instance, under Islamic law a husband has the right to unilaterally divorce his wife through a procedure known as *talaq*, while the wife does not have such a power of divorce. Certainly she can negotiate to have this power when she and her husband create their contract of marriage (*'aqd al-nikah*) and include it as a condition in her marital contract.<sup>17</sup> But if she does not negotiate for this power prior to the marriage, the law presumes that the husband has the unilateral power and the wife does not. If a wife wants to divorce him under these circumstances, she must petition a court to issue a divorce. A wife can seek either a 'for-cause' divorce or a 'no-cause' divorce. In a 'for-cause' divorce, she alleges some fault on the part of her husband (e.g. a failure to support, abuse, impotence) and seeks a divorce while preserving her financial claims against her husband. In a 'no-cause' or *khul'* divorce, a woman asserts no fault by her husband, and agrees to forgo

<sup>13</sup> For an introduction to Shi'ite law, see Hossein Modarressi, *An Introduction to Shi'ite Law: a bibliographical study* (London: Ithaca Press, 1984).

<sup>14</sup> On the Ismailis, see Farhad Daftary, *The Ismailis: Their History and Doctrines* (Cambridge: Cambridge University Press, 1990).

<sup>15</sup> For a bibliographic listing of medieval Arabic *fiqh* sources from the various Islamic legal schools, see John Makdisi, "Islamic law bibliography" (1986) 78 *Law Libr. J.* 103. The famous Muslim philosopher Averroes (Ibn Rushd, d. 1198) was also a highly regarded Maliki jurist. He wrote a text of Islamic law titled *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*, in which he relates the differing rules of law for the competing Sunni legal schools. What makes his work particularly impressive is that he also discusses the source of their disagreements, whether in terms of competing interpretations of the Qur'an, hadith, or in some cases, legal principles that operate within the law. For a translation of his masterful text, see Ibn Rushd, *The Distinguished Jurist's Primer*, trans. by Imran Nyazee, (Reading, UK: Garnet Publishing Ltd., 1996).

<sup>16</sup> For an example of how a diachronic analysis of *fiqh* can illustrate historical developments in Shari'a analysis that seem to respond to changing social contexts, see the treatment on the notion of *'awrah* (one's private parts to be covered), and the rule on the head scarf in El Fadl, *supra* note 9, at 255-260, nn. 106, 107, 123-129. For an illustration of how jurists utilized their own discretion to construct and create rules of law, see Anver M. Emon, "Natural Law and Natural Rights in Islamic Law" (2004-2005) 20 *J.L. & Religion* 351.

<sup>17</sup> One of the formalities of a valid Islamic marriage is that the parties have a marriage contract, which can be analogized to a premarital agreement. There is a lengthy juristic tradition of allowing parties to a marriage to negotiate certain provisions and create conditions in a marriage contract. One such condition is for the husband to grant his wife the power to unilaterally divorce herself. This procedure is known as *tafwid al-talaq*; Haifaa A. Jawad, *The Rights of Women in Islam* (New York: St. Martin's Press, 1998) at 35-40 [Jawad]; Lucy Carroll, *Talaq-i-Tafwid: the Muslim Woman's Contractual Access to Divorce* (London: Women Living Under Muslim Law, 1996). For a general discussion on marriage law and the marriage contract, see Susan Spector, "Introduction", in *Chapters on Marriage and Divorce* (Austin, Texas: University of Texas Press, 1993) [Spector].

any financial claim against her husband to be free from the marriage.<sup>18</sup> The difference between a husband's right of divorce and the wife's right in this case is fundamentally a matter of the degree and scope of the power to assert one's liberty interests.

According to the Shafi'ite jurist Abu al-Hasan al-Mawardi (d. 1058), the husband's unilateral power to divorce is based on a Qur'anic verse which reads: "O Prophet, when you divorce women, divorce them at their prescribed periods."<sup>19</sup> One might ask why men should be given the unilateral right to divorce their spouses to the exclusion of women; why not read this verse as a procedural mechanism rather than a grant of a substantive right? In other words, one could argue that the import of the verse is about the procedure a man should follow when divorcing his wife. The issue therefore is not about the creation of a substantive right, but rather concerns the procedural limits on men when they divorce their wives. Consequently, one may argue that the verse implicitly grants both men and women the right of unilateral divorce, while requiring men to utilize their power in a certain procedural manner. However, most Muslim jurists held that the verse substantively grants men a unilateral power of divorce. The challenge for jurists was to justify why the substantive right of divorce extended only to men and not to women.<sup>20</sup> For example, al-Mawardi argued that since the duty to provide support and maintenance (*mu'una*) falls exclusively on the husband, he is entitled to certain special rights given this difference.<sup>21</sup> Secondly, and more troubling, al-Mawardi stated that the power of *talaq* is denied to a woman because her whims and desires overpower her (*shahwatuha taghlibuha*), and hence she may be hasty to pronounce a divorce at the first sign of disagreement between the spouses. But men, he said, dominate their desires more than women, and are less likely to hastily invoke the *talaq* power at the first sign of discord.<sup>22</sup>

Certainly, contemporary Muslims and others may find al-Mawardi's reasoning not only patriarchal but frankly offensive. Given the equality provisions in both the Canadian *Charter of Rights and Freedoms*<sup>23</sup> and the *ROSC*, equality is a basic value that conflicts with al-Mawardi's rationale for a patently gender based distinction. Consequently, one might suggest that the patriarchal tone of al-Mawardi's reading was elemental to a particular context that gave meaning to this rule, but which no longer prevails today. To do so need not necessitate countering the above Qur'anic verse. Rather, this verse is arguably broad and ambiguous enough to tolerate multiple readings. However, as discussed below, the challenge of rethinking Islamic law today is not as simple as arguing that a particular reading or rationale is logically unpersuasive from a jurisprudential perspective.

<sup>18</sup> For discussions on this scheme of distribution of rights, concerning the right of divorce, see Spector, *ibid.* at 27-39 and 50-52; Jawad, *ibid.* For a survey of how modern Muslim states deal with divorce rights schemes, see Abdullahi A. An-Na'im, ed., *Islamic Family Law in a Changing World: A Global Resource Book* (London: Zed Books, 2002).

<sup>19</sup> Qur'an 65:1.

<sup>20</sup> Al-Mawardi, *al-Hawi al-Kabir*, ed. by 'Ali Muhammad Mu'awwad & 'Adil Ahmad 'Abd al-Mawjud (Beirut: Dar al-Kutub al-'Ilmiyya, 1994), 10:111 [Al-Mawardi].

<sup>21</sup> Al-Mawardi, *ibid.* at 10:114.

<sup>22</sup> *Ibid.*

<sup>23</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 [*Charter*].

## III. ISLAMIC LAW AND INSTITUTIONS

Historically, Islamic law was immersed not only within a cultural context, but also within an institutional context that transformed what might have been moral norms into enforceable legal rules. The institutional frameworks for adjudication and enforcement gave Shari'a a real impact in the world — an impact which jurists had to constantly negotiate in the light of actual cases in controversy.<sup>24</sup> Whether deciding rules of pleading, sentencing, or litigation, for instance, the way jurists determined and at times constructed rules, individual rights and entitlements was significantly influenced by assumptions of institutions of adjudication and enforcement that gave palpable effect to their juristic determinations.<sup>25</sup> The law was not simply created in an academic vacuum devoid of real world implications. Rather, the existence of institutions of litigation and procedure contributed in part to the determination and meaningfulness of the law.

In fact, the procedural institutions of medieval adjudication were so important that the resolution of a particular controversy may not have been dependent upon some doctrinal, substantive determination of the law. For instance, the medieval Shafi'i jurist Abu al-Ma'ali al-Juwayni (d. 1098) related a hypothetical about a husband and a wife. Suppose the husband, who belongs to the Hanafi school, states in a fit of anger that he divorces his wife. The wife, on the other hand, belongs to the Shafi'i *madhhab*. According to al-Juwayni, the Hanafis held that a pronouncement of divorce in a fit of rage is invalid and ineffective, whereas the Shafi'is considered such a statement to be valid. Al-Juwayni asked the question whether the husband and wife were still married. According to the husband, they are married, but according to the wife, they are divorced. Which view should prevail? Certainly, the two parties could insist on their view and claim to be justified in doing so. But to resolve the dispute, the parties must resort to a rule of law process. This process, namely, adjudication, would resolve the dispute between them. They would submit their case to a *qadi*, who would decide the dispute. Whatever the *qadi* decided would govern the two parties. According to al-Juwayni, the *qadi* would decide the case pursuant to his own analysis, and his decision is binding. What matters here is not the particular substantive basis for the *qadi's* ruling; rather, the procedural element involved is what controls the outcome of the case. For al-Juwayni, the emphasis here is not on substantive doctrine or the particular views of the parties. Instead, he focuses on upholding the integrity of Shari'a as a *rule of law system* (as opposed to being mere rules of law) in which judges decide disputes in a way that is given meaningfulness and efficacy through the imperium of adjudicatory institutions. The *qadi's* decision is authoritative, not because it accords with one specific legal rule or another; rather it is authoritative and

<sup>24</sup> For a historical review of how Muslim judges resolved cases in light of both doctrine and context, see Leslie Peirce, *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (Berkeley: University of California Press, 2003).

<sup>25</sup> For examples of how jurists created rules of pleading, litigation and sentencing in light of presumptions of an efficacious institutional framework, see my discussion of juristic discretion and rights in Anver M. Emon, *The Natural Law and Natural Rights Tradition in Islamic Law* (Ph.D. dissertation, UCLA, 2005), at chapter 6; "Huquq Allah and Huquq al-'Ibad: A Legal Heuristic for a Natural Rights Regime" (2006) 13(3) *Islamic L. & Soc* (forthcoming).



just as a matter of his institutional position within a larger rule of law institutional context.<sup>26</sup>

Certainly, in this modern day and age, cultural contexts have changed. However, starting from the 18th century, the institutional structure that gave real-world significance to Islamic law began to be dismantled or modified. As discussed later, pursuant to the Capitulation agreements with the Ottoman Sultan, non-Muslim Europeans were exempted from the jurisdiction of the Ottoman courts. In Egypt, the use of the Mixed Courts in the late 19<sup>th</sup> century to hear cases involving non-Muslim parties and interests, further eroded the extent to which Shari'a was applied. When Egypt thereafter adopted the Mixed Court's code, based in large part on the Code Napoleon, and created national courts to adjudicate that code, Shari'a courts and the law they applied began to lose ground, both in terms of doctrinal relevance and institutional efficacy. The breakdown of mechanisms manifesting juristic thought into real world effects, has arguably lead to a discontinuity between legal texts and the application of those texts to day-to-day situations. Without the institutions of case-by-case adjudication, we are left with texts that contain the abstract doctrine of interpretive communities immersed in a cultural context long gone. When we speak of Islamic law today, we are not referring to institutions of justice for the most part. Rather, Islamic law comprises of juristic doctrines insulated from the contingency of circumstance and adjudicatory discretion.

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

#### IV. SHARI'A IN THE 19TH AND 20TH CENTURIES

In the Ontario Shari'a debate, many seemed to steadfastly believe that Islamic law is so fundamentally rigid and different from Canadian law, that no synthesis would be possible. Interestingly, this view mimics the findings of Orientalist scholars of

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<sup>26</sup> Abu al-Ma'ali al-Juwayni, *Kitab al-Ijtihad min Kitab al-Talkhis* (Damascus : Dar al-Qalam, 1987), at 36-38. For a discussion of al-Juwayni's hypothetical, see El Fadl, *supra* note 9, at 149-150. Elsewhere, Abou El Fadl argues that in the above hypothetical, if the judge decided in favor of the husband, the wife should still resist as a form of conscientious objection; Abou El Fadl, *The Authoritative and Authoritarian in Islamic Discourses: A Contemporary Case Study*, 3<sup>rd</sup> ed. (Alexandria, Virginia: al-Saadawi Publications, 2002), at 60, n. 11. However, this position seems to ignore the fact that Shari'a as rule of law system is more than an abstract doctrine of fundamental values that governs behavior. Rather, as suggested in this study, Shari'a, as a rule of law system, implies the existence of institutions to which members of a society may grant authority, either through certain social commitments, or even through the very act of seeking out the courts to adjudicate disputes.

Islamic law in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. Those scholars advised governments like Britain and France on how best to understand Muslims for the purpose of managing and maintaining colonial power, while keeping the indigenous peoples content. To understand Muslims and Muslim law, and effectively representing Muslims to themselves, colonialists and their Orientalist advisors often reduced the Muslim experience to what was expressed in specific texts that they deemed authoritative. The colonial use of texts to understand Muslims and Islamic law led not only to the development of textual experts, but also the phenomenon of the textual expert representing Muslim and Islamic law in strict accordance with the image presented in the text. As Edward Said has argued, texts can “create not only knowledge but also the very reality they appear to describe.”<sup>27</sup> By approaching Islamic law reductively as a text-based tradition, colonialists could attempt to ‘understand’ the Muslim and Islamic experience by mere reference to texts, while ignoring the significance of context and contingency that is often taken into account in working rule of law systems.<sup>28</sup> Deviation from the authentic text was considered dangerous, *ultra vires*, if not an aberration from the truth, the true Islamic law.<sup>29</sup> But by viewing Islamic law as a text-based law, colonialists contributed to the view that Islamic law is an unchanging, inflexible religious code. This view certainly helped colonialists to placate their Muslim subjects’ interests in having Islamic law applied. But it also provided an excuse for colonialists to marginalize the tradition in various legal sectors as contrary and incompatible with modernity.

#### A. Anglo-Muhammadan Law: A Reductive Concept of Law

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

Often staffed by British judges, the first task of this court was to determine authoritative sources of Islamic law that they could easily access. To understand the Sunni tradition, British judges in Anglo-Muhammadan courts relied on a translation of a specific Hanafi legal text, namely al-Marghinani’s (d. 1197) *al-Hidaya*, originally written in four parts.<sup>30</sup> Notably, in the larger context of medieval Hanafi *fiqh* texts,

<sup>27</sup> Edward Said, *Orientalism* (London: Vintage Books, 1978), at 94 [emphasis in original].

<sup>28</sup> For illustrations of how legal substance and contextual analysis contributed to legal determinations in medieval Islamic law, see David Powers, *Law, Society, and Culture in the Maghrib, 1300-1500* (Cambridge: Cambridge University Press, 2002). For a commentary on how even sophisticated textual approaches were subject to grave error in the British Indian context, see Michael R. Anderson, “Islamic Law and the Colonial Encounter in British India” in David Arnold & Peter Robb, eds., *Institutions and Ideologies: A SOAS South Asia Reader* (Surrey, UK: Curzon Press, 1993) 165, at 173.

<sup>29</sup> For instances of this attitude, see the following discussion on Anglo-Mohammadan case law, at Part IV.A, below.

<sup>30</sup> Al-Marghinani, *al-Hidaya: Sharh Bidayat al-Mubtadi*, ed. by Muhammad Darwish (Beirut: Dar al-Arqam, n.d.).

*al-Hidaya* is a short manual of Hanafi law that does not consistently provide the underlying logic or reasoning for the rules of the school. Another Hanafi text is Badr al-Din al-‘Ayni’s (d. 1451) *al-Binaya: Sharh al-Hidaya*,<sup>31</sup> which is a multivolume commentary on al-Marghinani’s work and provides greater jurisprudential insight into the tradition. However, al-‘Ayni’s work was not translated, and was not generally used in the Anglo-Muhammadan courts.<sup>32</sup> Rather, Anglo-Muhammadan judges were content to rely on Charles Hamilton’s often mistaken translation of *al-Hidaya*.<sup>33</sup> Notably, al-Marghinani’s original text was written in Arabic. However, Hamilton did not translate directly from the Arabic version. Instead, Hastings commissioned three Muslim clerics to translate the Arabic text into Persian, and subsequently had Hamilton translate it into English in 1791.<sup>34</sup> This translated legal treatise provided a textual foundation for the British to understand and apply Islamic law, and thereby build relations with their Muslim subjects. In fact, in his dedication of the translated text to Warren Hastings, Hamilton states:

However humble the translator’s abilities, and however imperfect the execution of these volumes may be, yet the design itself does honour to the wisdom and benevolence by which it was suggested; and if I might be allowed to express a hope upon the subject, it is, that its future beneficial effects, in facilitating, the administration of Justice throughout our Asiatic territories and *uniting us still more closely with Our Mussulman subjects*, may have some additional luster to your [Hastings’] Administration.<sup>35</sup>

Originally, Hamilton’s translated text comprised four volumes. However, as a large and voluminous work that was often not easily available during the late 19<sup>th</sup> century, the translated *Hedaya* proved very costly for students at the Inns of Court in Britain who wanted to practice law in India, and needed to purchase the text to qualify themselves for the English Bar. Consequently, in 1870, the editor of the second edition of the *Hedaya*, Standish Grove Grady, stated in his advertisement to the updated work:

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

<sup>31</sup> Al-‘Ayni, *al-Binaya Shah al-Hidaya*, ed. by Amin Salih Sha’ban (Beirut: Dar al-Kutub al-‘Ilmiyya, 2000).

<sup>32</sup> The Anglo-Muhammadan courts utilized very few translated Islamic sources. For a discussion on the use of limited translations of Islamic texts in the Anglo-Muhammadan courts, see Michael R. Anderson, “Islamic Law and the Colonial Encounter in British India” in Chibli Mallat & Jane Connors, eds., *Islamic Family Law* (London: Graham and Trotman, 1989), at 205-223, and 213-214 [Anderson, “Islamic Law and the Colonial Encounter”].

<sup>33</sup> *The Hedaya*, 2<sup>nd</sup> ed. by Standish Grove Grady, trans. by Charles Hamilton (Delhi: Islamic Book Trust, 1870) [Hamilton].

<sup>34</sup> Anderson, “Islamic Law and the Colonial Encounter,” *supra* note 32 at 174.

<sup>35</sup> Hamilton, *supra* note 33, at iii [emphasis added].

to the student or practitioner, and their insertion would not only have increased the bulk of the volume, but its expense also.”<sup>36</sup>

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

Although the present Edition has been published with a view of assisting the student to prosecute his studies, yet the hope is entertained that the Judge, as well as the Practitioner, will find it useful, particularly in those provinces where the Mahommedan law demands a greater portion of the attention of the judiciary, as well as that of the practitioner. It is hoped, also, that it may be found useful in promoting the study of the law in the several Universities in India, it being advisable to assimilate the curriculum in both countries as much as possible.<sup>37</sup>

The hope, therefore, was that Hamilton’s translation of a Persian version of al-Marghinani’s Arabic text, as edited and shortened in the second edition, would be a useful source for judges and practitioners in India, who were adjudicating Islamic law. That Muslims would be subjected to this doubly reductive conception of Islamic law, without reference to custom or context, was further emphasized in the *Muslim Personal Law (Shari’at) Application Act 1937*, in which the British stipulated that Muslim personal law would apply to all Muslims throughout India, to the full and complete exclusion of customary practice. In fact, Section 2 of this statute stated that “Notwithstanding any custom or usage to the contrary” in matters involving inheritance, marriage, dissolution, financial maintenance, dower, gifts and other matters of personal status and finance, “the rule of decision in cases where the parties are Muslim shall be the Muslim Personal Law (*Shari’at*).”<sup>38</sup> Nowhere in the *Muslim Personal Law Application Act* did the government state how it defined Islamic law or ‘Shari’at’. But given the prominent usage of texts like Hamilton’s *Hedaya*, the notion of Islamic law used to represent to Muslims their own law, was very much reduced to code-like notions of the law, without recourse to discretionary approaches that may have taken non-textual factors into account.

This reductive view is best illustrated in the way British judges adjudicated Islamic law in Anglo-Muhammadan courts. As noted later, British judges often took a very narrow view of what counted as proper and applicable Islamic law. For instance, in the 1903 case of *Baker Ali Khan v. Anjuman Ara*, the decision written by Arthur Wilson of the Judicial Committee of the Privy Council illustrates how British judges, hesitant to go beyond the confines of translated texts, used their office to define and

<sup>36</sup> Standish Grove Grady, “Advertisement to the Second Edition,” in Hamilton, *supra* note 33, at iv.

<sup>37</sup> *Ibid.*

<sup>38</sup> *The Muslim Personal Law (Shari’at) Application Act 1937*, Act No. XXVI of 1937 [*Muslim Personal Law Application Act*], reproduced in *Outlines of Muhammadan Law*, Asaf A.A. Fyzee, 3<sup>rd</sup> ed. (Oxford: Oxford University Press, 1964), 460-462 at 460 [Fyzee].

represent authentic Islamic law for Muslims.<sup>39</sup> Furthermore, these same British judges did not seem troubled in modifying the dominant Islamic legal ruling when they felt that the Islamic tradition made little meaningful sense. The *Baker Ali Khan* case involved a testatrix who created a charitable trust (*waqf*) by a will (*wasiyya*). The testatrix was the daughter of the former king of Oudh, and a member of the Shi'a faith. The testatrix had three great-grandchildren through her son, one of whom was named Baker Ali, a minor. Prior to her death, the testatrix executed a document deemed to create a charitable trust (*waqf*) for religious purposes. Pursuant to the document, Sadik Ali and Baker Ali were to be executors and trustees of the *waqf*, Sadik Ali acting as guardian for Baker Ali in the meantime during his minority. The other two great-grandchildren argued that all three were equally entitled to one-third of the testatrix's estate, and consequently argued that they were entitled to two-thirds of the estate contained within the *waqf* document.

To decide the case, the Privy Council judges had to contend with an earlier 1892 precedent decided by Mahmood J. of the Allahabad High Court in *Agha Ali Khan v. Altaf Hasan Khan*, in which the learned Muslim justice held that under the Shi'a law, one cannot create a *waqf* through a bequesting instrument like the *wasiyya*.<sup>40</sup> Mahmood J. argued that such a *waqf* was invalid under Shi'a law, although valid under Hanafi law of the Sunni tradition. To support his argument, Mahmood J. first criticized earlier courts that failed to apply Shi'a law to Shi'a parties, and instead assumed that the Sunni and Shi'a law on this issue were identical.<sup>41</sup> Complaining about this phenomenon, which occurred particularly in the early 19<sup>th</sup> century, Mahmood J. stated: "I seriously doubt whether in those days the *Shia* law was ever administered by the Courts of British India as the rule of decision, even when *Shias* were concerned."<sup>42</sup> According to Mahmood J., it was not until the mid-19<sup>th</sup> century when the Privy Council began to recognize and enforce Shi'a law where Shi'a Muslims were concerned.<sup>43</sup>

Having established the central relevance of Shi'a law, Mahmood J. analyzed the Shi'a law on *waqf* and the extent to which a Shi'a Muslim could grant a *waqf* through a testamentary bequest enforceable upon his death. Central to his discussion was a review of various Shi'a legal sources. He began with an analysis of the "Sharāya-ul-Islām" written by al-Muhaqqiq Hilli (d. 1277 or 1278), an early Shi'a text that was translated by Neil Baillie as the *Imameea Law*.<sup>44</sup> The problem for the later *Baker Ali* court was that Mahmood J. went further and cited various *subsequent commentaries*

<sup>39</sup> *Baker Ali Khan v. Anjuman Ara* (1903), 30 I.A. 94 (P.C.) [*Baker Ali Khan*], in Asaf A.A. Fyzee, *Cases in the Muhammadan Law of India, Pakistan and Bangladesh*, 2<sup>nd</sup> ed. by Tahir Mahmood (New Delhi: Oxford University Press, 2005), at 4-16.

<sup>40</sup> *Agha Ali Khan and another (Plaintiffs) v. Altaf Hasan Khan and another (Defendants)* (1892), 14 I.L.R. All. 429 [*Agha Ali Khan*]. For those not familiar with legal citation, the source citation indicates that this case was decided in 1892, and is contained in the Indian Law Reports, Allahabad Series, volume 14, and starts at page no. 429. I would especially like to thank Sooin Kim, Research Librarian at the Bora Laskin Law Library, Faculty of Law, University of Toronto, for locating this case in the I.L.R.

<sup>41</sup> *Agha Ali Khan*, *ibid.* at 449.

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

<sup>43</sup> *Ibid.*

<sup>44</sup> For a reference indicating that Baillie's work was a translation of the "Sharāyi-ul-Islām", which Mahmood J. reviewed, see *Agha Ali Khan*, *supra* note 40 at 447, where he quotes Baillie's translation and identifies it as being from Hilli's text. For the Arabic version of the text, see al-Muhaqqiq al-Hilli, *Shara' i' al-Islam fi Masa'il al-Halal wa al-Haram* (Beirut: Markaz al-Rasul al-A'zam, 1998).

on Hilli's text that were not translated into English. The additional Arabic texts Mahmood J. cited were:<sup>45</sup>

- *Masálik-ul-Afhám*<sup>46</sup>
- *Jawáhir-ul-Kalám*<sup>47</sup>
- *Jámi-ul-Shattát*.<sup>48</sup>
- *Sharah Lumah Dimashkia*<sup>49</sup>
- *Jámi-ul-Maqásid*.<sup>50</sup>

On his analysis of these sources, Mahmood J. argued that under Shi'a law, as opposed to Sunni law, a *waqf* is considered a contract (*aqd*).<sup>51</sup> As a contract, it has various conditions precedent that must be satisfied before it can be considered valid, in particular, offer and acceptance. Under Shi'ite law, a *waqf* is not a unilateral disposition of property; rather, it is a "contract *inter pares*" and requires the two parties involved to make an *inter vivos* exchange; in other words *seisin* of the *waqf* property must be delivered.<sup>52</sup> Certainly, there are exceptions to the requirement of an *inter vivos* transfer. In cases where the *waqf* is for the benefit of the poor and mendicant, the requirement of acceptance is relaxed, as there is no specific party that can effectuate acceptance.<sup>53</sup> But in all other cases, there must be an actual exchange, or what Mahmood J.'s Arabic sources called *tanjíz*. Under this doctrine, any contract, *waqf* or otherwise, must take effect immediately and not be conditioned upon some future event.<sup>54</sup> Citing various Shi'a sources, Mahmood J. argued that since a *waqf* is a contract that requires offer and acceptance, and that a valid contract must meet the condition of *tanjíz*, the creation of a *waqf* using a testamentary instrument that takes effect only upon one's death renders the *waqf* invalid.

Mahmood J.'s decision in *Agha Ali Khan* was the leading case until the Judicial Committee of the Privy Council decided *Baker Ali*, the facts of which were described above. They were faced with a lower court decision written by a judge who was well versed in Arabic, in the Shi'a sources, and went beyond the sources translated

<sup>45</sup> The transliterated spelling of the texts above is that used by Mahmood J. Where I provide bibliographic information for each source, the transliteration follows the IJMES style. Mahmood J. refers to another text that he calls *Durus*, which he considers to be a work of higher authority than the *Jámi-ul-Shattát*; *Agha Ali Khan*, *supra* note 40 at 452. A bibliographic reference for this cite was not found in my initial research.

<sup>46</sup> Zayn al-Din b. 'Ali al-Shahid al-Thani, *Masalik al-Afham* — for bibliographical and manuscript information, see Hossein Modarressi, *An Introduction to Shi'i Law* (London : Ithaca Press, 1984), at 80-81.

<sup>47</sup> For a 43-volume edition of this text, see Muhammad Hasan al-Najafi, *Jawahir al-Kalam fi Sharh Shara'i al-Islam* (Beirut: Dar Ihya' al-Turath al-'Arabi, n.d.).

<sup>48</sup> Mahmood J. stated that he used the Tehran edition of *Jámi-ul-Shattát*, that it was in print and widely available. Consequently, he chose not to quote extensively from the text. For a copy of the text, see Abu al-Qasim b. Muhammad Hasan Qummi (d. 1816), *Jami' al-Shattat* (Tehran: Danishkadah Huquq va 'Ulum-i-Siyasi-I Danishgah-I Tihnan, 2000-2001).

<sup>49</sup> For a 10-volume edition of this text, see Muhammad b. Jamal al-Din Makki al-'Amili, *Sharh al-Lum'a al-Dimashqiyya* (Beirut: Dar Ihya' al-Turath al-Arabi, n.d.).

<sup>50</sup> 'Ali b. al-Husayn al-Karaki, *Jami' al-Maqasid fi Sharh al-Qawa'id* (Beirut: Mu'assasat Al al-Bayt li Ihya' al-Turath, 1991).

<sup>51</sup> *Agha Ali Khan*, *supra* note 40 at 450.

<sup>52</sup> *Agha Ali Khan*, *ibid.* at 450-456.

<sup>53</sup> *Agha Ali Khan*, *ibid.* at 453-454.

<sup>54</sup> *Agha Ali Khan*, *ibid.* at 455-457.

into English. In fact, throughout Mahmood J.'s opinion, where he translated Arabic sources, he provided the original Arabic text in the footnotes.

To argue against Mahmood J.'s holding, the Privy Council attacked his reliance on the untranslated Arabic sources. In his opinion for the Privy Council, Wilson noted that Mahmood J.'s decision that a Shi'a cannot make a *waqf* by will, was not based on "any positive statement by any of the recognized authorities on Shiah law, but in the reasoning of Mahmood, J. upon a number of more or less ambiguous texts."<sup>55</sup> Ironically, many of the Arabic sources Mahmood J. relied upon were later commentaries on the Shi'a text, translated into English and relied upon by British judges. Nevertheless, according to the justices of the Privy Council, while Mahmood, J. was indeed a well respected jurist and expert in Islamic law, his analysis relied on "ancient texts" that presented far too much indeterminacy in the law, and which should not have been consulted. It did not matter that the sources themselves were significant within the Shi'a tradition, or that they seemed to reach a consensus on the conception of a *waqf* as a contract requiring offer, acceptance, and an *inter vivos* transfer. Despite Mahmood J.'s argument, his translation of these sources, and his reproduction of the Arabic text in the footnotes, the British judges argued that the untranslated sources led to more questions and ambiguities than determinate answers.

As a general principle, the British judges believed that prudence and caution required that one recognize the dangers of "relying upon ancient texts of the Mahomedan law, and even precepts of the Prophet himself, of taking them literally, and deducing from them new rules of law."<sup>56</sup> For the justices, there was a very real danger of straying too far from the "authentic" tradition of Shari'a:

[W]hether reliance be placed upon fresh texts newly brought to light, or upon fresh logical inferences newly drawn from old and undisputed texts. Their Lordships think it would be extremely dangerous to accept as a general principle that new rules of law are to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however authoritative, when the ancient doctors of the law have not themselves drawn those conclusions.<sup>57</sup>

The justices of the Privy Council considered dangerous the idea of expanding an analysis of Islamic law to incorporate additional sources, despite their authority within the Shi'a tradition. The contest between Mahmood J. and the Privy Council seemed to center on how one constructs the notion of an authoritative source, and whether one must limit the list of authoritative sources to those sources that have been translated into English. Their Lordships were content to rely on the "more important of those [Shi'a] texts which have long been accessible to all lawyers."<sup>58</sup> But accessible in what sense? According to Mahmood J., the *Jámi-ul-Shattát* was widely available to the public, although not translated into English.<sup>59</sup> The *Sharáya-ul-Islám* remains an important Shi'ite text; but the difference was that the latter was translated into English. Certainly, administrative problems of accessibility would

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<sup>55</sup> Baker Ali Khan, *supra* note 39 at 14.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> Baker Ali Khan, *supra* note 39 at 14-15.

<sup>59</sup> Agha Ali Khan, *supra* note 40 at 451.

have been introduced, were British judges to rely on untranslated texts of Islamic law, given that not all lawyers practicing in Anglo-Muhammadan courts necessarily knew Arabic, let alone Persian.

Their Lordships further criticized Mahmood, J. for utilizing too much discretionary analysis in his critical reading of the “ancient” texts. While they recognized that Mahmood J.’s analysis of those texts on some issues may have been directly relevant to the case at hand, they were concerned that the texts themselves presented no unanimity. However, from the analysis above, it seems that Mahmood J. was convinced that the texts required that *awqaf* (sing. *waqf*) created by testamentary bequests are invalid because of the lack of immediate acceptance by the beneficiary pursuant to basic principles of Islamic contract law. But the Judicial Committee did not seem interested in how *awqaf* are contracts under Shi’ite law, and thereby subject to rules of formation such as offer and acceptance.<sup>60</sup>

But what was particularly remarkable about the Privy Council’s judgment, was that not only did it critique Mahmood J.’s approach, but it also completely ignored the doctrine of *waqf* in Shi’a law. The Privy Council held that a Shi’a can indeed use a will to create a charitable trust. They argued by logical deduction that a Shi’ite could make an inter vivos gift, whether as a *waqf* or not. Furthermore, a Shi’a could also make a gift by will. Logically, a Shi’a should also be able to make a *waqf* by will. Completely ignoring Shi’a jurisprudence that a *waqf* is a contract, the Judicial Committee recharacterized the *waqf* as a gift, thereby harmonizing it with Hanafi law. But even more, not only did the decision dissolve the difference between Shi’a and Hanafi law, it also reduced the scope of Islamic legal analysis.

The *Baker Ali* decision fundamentally affected the way Muslims themselves conceptualized and understood their own religious tradition. For example, later South-Asian Muslim commentators on Islamic law, such as the much respected Asaf A.A. Fyzee, relied on the *Baker Ali Khan* case to argue against innovative legal thinking, and instead endorsed a theory of law that adhered to existing sources and shied away from interpretivism. As Fyzee states:

The law has been studied, analysed, codified, and commented upon for fourteen centuries, and each country and each *madhhab* (school or sub-school) has its own appropriate and authoritative texts. Under these circumstances it is undesirable for present-day Courts to put their own construction on the Koran and *hadith* where the opinions of text-writers are clear and definite.<sup>61</sup>

Even Indian Muslims, as subalterns under colonial rule, adopted colonial discourses on Islamic law, and reduced the tradition to a doctrine of prior precedent, while denying the possibility of innovative analysis and reasoning.

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

From a colonial perspective, Islamic law was not only a tool of administration and control, but at times, it was a potential obstacle that had to be removed in order to facilitate colonial interests. When Western powers developed strong economic

<sup>60</sup> *Baker Ali Khan*, *supra* note 39 at 15.

<sup>61</sup> Fyzee, *supra* note 38 at 78.



ties with the Ottoman Empire, they often negotiated “Capitulation” agreements with the Sultan, by which both parties secured an acceptable trading relationship, while preserving their own domestic interests. Importantly, under such Capitulation agreements, European foreigners in the Ottoman Empire were immune from the jurisdiction of the Ottoman courts of law.<sup>62</sup> Rather, consuls representing the different European countries exercised jurisdiction in cases where a non-native was involved, particularly in matters involving crime and family disputes. In commercial disputes between foreigners and natives, claims were heard before special tribunals adjudicated by both foreign and Ottoman judges, or even before ordinary Ottoman courts, but generally in the presence of a consular official.<sup>63</sup> As local leaders looked to Europe for financial investment and deeper economic relations, they were asked to grant foreigners greater immunities from the application of Shari’a law, thereby expanding consular jurisdiction to manage the legal affairs of foreigners.

The problem with having consular officials assume jurisdiction, was that it created a chaos of venues. Consequently, in Egypt, the Mixed Court was established. This court heard any case involving foreign interests. This meant that it could hear cases where one of the parties was a foreigner, or where a foreign interest was implicated, even if both parties were native Egyptians. Gradually, the Mixed Court began to accumulate greater jurisdiction.<sup>64</sup> Furthermore, the Egyptian government in 1883 adopted the code of the Mixed Courts, based on the Code Napoleon, as its civil law, and created national courts to administer that law. Consequently, Egypt had three court systems, the Mixed Courts, the secular National Courts, and the religious Shari’a courts that were gradually losing jurisdiction.<sup>65</sup>

Furthermore, in places like 19<sup>th</sup> century Algeria, French colonial officials were concerned that any official support of Islam, in particular, respect for its law and legal institutions, might foment active opposition to the colonial regime. During the colonial period, Islam had “played an important role in mobilization against European colonial rule in nearly all Muslim countries.”<sup>66</sup> Colonial administrators thereby reasoned that to support the prevailing Islamic legal systems would undermine the colonial venture. Furthermore, for colonial officials to create an active and orderly market in their new possessions, they restructured the customary traditions that prevailed, to create conditions favorable to commercial market participants.

In Algeria, for example, much of the land was tied up in family *waqfs* or trusts that were made in perpetuity. This Islamic legal arrangement undermined French interests in buying and cultivating land for industrial purposes, and ultimately in creating a land market of freely alienable property. The Islamic *waqf* structure ensured that property would remain in a family’s possession without being dismantled into smaller fragments by the Islamic laws of inheritance. To challenge the continuity of these family *waqfs*, the French government legislated broadly to bring all property rights under a single legislative regime designed by the French government. Furthermore,

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<sup>62</sup> Jasper Y. Brinton, *The Mixed Courts of Egypt*, rev. ed. (New Haven: Yale University Press, 1968) at 4 [Brinton].

<sup>63</sup> *Ibid.*

<sup>64</sup> For a history of the Mixed Courts of Egypt, see Brinton, *supra* note 62.

<sup>65</sup> For a discussion of the gradual demise of Shari’a courts in Egypt, see Nathan Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge: Cambridge University Press, 1997) [Brown].

<sup>66</sup> Allan Christelow, *Muslim Law Courts and the French Colonial State in Algeria* (Princeton: Princeton University Press, 1985) at 6-7 [Christelow].

many Orientalist scholars argued that the Algerian adoption of the family *waqf* was in fact unIslamic. Two strategies were pursued by the colonialists in their efforts to dismantle the Islamic legal system: the first was to marginalize Islamic law by recourse to imposed legal orders, and the second was to reinterpret Islamic law for Muslims, as if they were unable to see the truth of their own tradition. In doing so, however, the colonialists relied on such a text-oriented approach to Islamic law that they ignored the underlying cultural and customary practices that were incorporated within a local Islamic milieu and gave the legal tradition considerable life force.<sup>67</sup>

To the colonial powers, Islamic law was an obstacle to orderly legal and market systems, and was viewed as an impediment to progress and modernity. In much of the Muslim world at this time,

[m]odern scientific and technical culture...came to the Muslim world in the nineteenth century as an essentially European import. Often one found that either foreigners or local non-Muslim minority groups had privileged access to modern education and the modern sector of the economy, while the Muslims, although they were politically dominant, were mainly confined to traditional education, to the traditional sector of the urban economy, and to landed wealth. For a Muslim, gaining a position in the modern economic or technical spheres thus involved a departure from traditional roles, as well as competition with foreign or minority groups, who in many cases could manage to be modern without great sacrifice to their social identity.<sup>68</sup>

In time, colonial officials and native collaborators considered the Shari'a as not only fixed and rigid, but also an obstacle to progress, modernity, and civilization. They justified their efforts to marginalize the jurisdiction of Islamic law as necessary to bring 'civilization' to the Muslims.

In the late 19<sup>th</sup> century, the Ottoman Empire initiated a series of legal reforms that involved adopting and mimicking European legal codes as substitutes for Islamic legal traditions.<sup>69</sup> In many ways, this indigenous response to colonial advancement and legal imposition can be viewed as a subaltern resistance against colonial domination. In offering their own interpretations and codifications of Islamic law, Muslim elite members challenged the occupier's treatment of Islamic law. But in doing so, the indigenous response attempted to fit Islamic law into a European mold.<sup>70</sup> Medieval Islamic law was characterized by a multiplicity of opinions, different doctrinal schools, and competing theories of interpretive analysis. In the Ottoman reform period, this complex substantive and theoretical diversity was reduced by a selective process of codification. For instance, when Muslims began to codify Islamic law, such as when the Ottomans drafted the first Islamic code, called the *Majalla*, they had

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<sup>67</sup> David S. Powers, "Orientalism, Colonialism, and Legal History: The Attach on Muslim Family Endowments in Algeria and India" (1989) 31 Comparative Studies in Society and History 535.

<sup>68</sup> Christelow, *supra* note 66 at 14-15.

<sup>69</sup> The reforms emanating from this period are collectively known as the 'Tanzimat'. For a history of the reforms of this period, see Herbert J. Liebesny, *The Law of the Near & Middle East: Readings, Cases and Materials* (Albany: State University of New York Press, 1975), at 46-117.

<sup>70</sup> For a brief study of how subaltern communities might fit their indigenous customs or laws within models or frameworks that put their respective traditions in at least the same form as the imposed laws of the colonialists, see Sally Engle Merry, "Law and Colonialism" (1991) 25 Law & Soc'y Rev 89.

to decide which rules would dominate.<sup>71</sup> Would they create a Hanafi, Maliki, Hanbali, or Shafi'i code for those countries that were mostly Sunni? And what would they do about their Shi'a population? Often, these reformers would pick and choose from different doctrinal schools to reach what they felt was the best outcome. This process of selection (*takhayyur*) and harmonization of conflicting aspects of medieval opinions (*talfiq*) allowed reformers to present a version of Islamic law that paralleled in form and structure the European model of law; but in doing so, they reduced Islamic law to a set of over-determined legal assertions divorced from the historical, institutional, and jurisprudential context that contributed to its flexibility.<sup>72</sup> As another example, Egypt, in 1949, adopted a civil code borrowed mostly from the French Civil Code, yet incorporating some elements of Islamic law. Yet a few years later, in 1955, Shari'a courts in that country were marginalized to the point of being disbanded.<sup>73</sup> One exception to this diminishment of Shari'a, was in the area of family law. Both colonial administrators and Muslim nationalist assemblies preserved Islamic family law in codified form while modernizing other legal areas such as commercial law. This reduction in jurisdiction and application arguably placated Islamists, who felt threatened by modernization and considered the preservation of traditional Islamic family law as necessary to maintain an Islamic identity in the face of encroaching modernity.<sup>74</sup> This phenomenon is widespread across the Muslim world, where colonial powers exerted force. The effect this had on the conception of Shari'a, and in particular, the Muslim understanding of Shari'a, was profound. The colonial treatment of Islamic law, whether in terms of redefining it or reducing its scope, rendered Shari'a reified and static in application and in conceptual coherence.<sup>75</sup>

<sup>71</sup> For an English translation of the *Majalla*, see *The Mejelle: Being an English Translation of Majallah El-Ahkam-I-Adliya and a Complete Code on Islamic Civil Law*, trans. by C.R. Tyser et al. (Kuala Lumpur: The Other Press, 2001).

<sup>72</sup> On the process of doctrinal selectivity and its effect on the nature of Shari'a, see Wael Hallaq, "Can the Shari'a Be Restored?" in Yvonne Yazbeck Haddad & Barbara Freyer Stowasser, eds., *Islamic Law and the Challenge of Modernity* (New York: Altamira Press, 2004), 21-54 [Haddad & Stowasser]; *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997) at 210.

<sup>73</sup> For a historical account detailing the move from Islamic law to secular law in Egypt, see Brown, *supra* note 65, especially at 61-92.

<sup>74</sup> Upholding an authentic past, by regulating women within traditional family paradigms, has been used to construct modern national identities in post-colonial societies, where the past provides an authentic basis for the national identity of new states immersed in a modern world. Traditional family law regimes may be used to bring the values of the past into the present national consciousness, to provide a sense of identity in opposition to the norms perceived to emanate from the colonizing world. For an excellent analysis of women, family and nationalism, see Anne McClintock, "Family Feuds: Gender, Nationalism and the Family" (1993) 44 *Feminist Review* 61. One exception to this colonial-inspired narrative about the narrowing of Shari'a, is the case of Saudi Arabia. The colonial powers did not seem to exert much control over Saudi Arabia, and consequently, the colonial narrative does not universally apply across the Muslim world. However, I would suggest that the narrative about the reduction of Shari'a is not dependent on colonization as its only topos. Rather, the colonial topos is only part of the narrative, which fundamentally involves a relationship between power, law, and the formation of political/nationalist identities. For instance, colonists used a reductive but determinate notion of Islamic law to bolster their legitimacy and ensure administrative efficiency, while also marginalizing the tradition when necessary to attain colonial goals. Likewise, the Saud family's use of Wahhabism as an ideological narrative that trumped tribal loyalties in the Najd, has also allowed the Saudi state to utilize a reductive, often literalist approach to Islamic law to bolster its own political legitimacy and authority.

<sup>75</sup> For a discussion of the impact the reified and static version of Islamic law had on Muslims under colonial occupation, see the excellent study by Scott Alan Kugle, "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia" (2001) 35 *Modern Asian Studies* 257.

## V. THE MUSLIM RESPONSE: FROM REIFIED SHARI'A TO IDENTITY POLITICS

As Muslim nations became independent and embraced Islamization campaigns in the 1970s, the assertion of Islamic law in its traditional form began anew. Faced with the challenges of modernity introduced to the region, by European colonization, and now, by increasing globalization, Muslims in these countries asked themselves how far they could modernize, without losing their Islamic values. Reform and modernization, from the perspective of a postcolonial mindset, were understood to bring with them a challenge to Islamic identity in these regions. For Muslims concerned about modernization, the Shari'a as reduced to code-like form, especially in the area of family law, provided a determinate anchor for delineating a monist vision of 'Islamic identity' in the face of encroaching 'modern' values of the hegemonic 'Other'. The idea of Islamic law as fixed, unchanging, and closed to *de novo analysis* now operates among Muslims as a device to preserve cultural and religious identity.<sup>76</sup> The reductive reading of Islamic law by colonial administrators, which limited its scope to specific texts and denied affirmations of contingencies and discretion, has affected the way in which those living in the 21st century understand and conceptualize the tradition.

For instance, in an attempt to situate the development of Islamic law historically, the late Orientalist scholar of Islamic law, Noel Coulson, argued that in its traditional form, Muslim jurisprudence

provides a[n]...extreme example of a legal science divorced from historical considerations. *Law, in classical Muslim theory, is the revealed will of God, a divinely ordained system preceding and not preceded by the Muslim state, controlling and not controlled by Muslim society ...* Since direct access to revelation of the divine will had ceased upon the death of the Prophet Muhammad, the Shari'a, having once achieved perfection of expression, was in principle static and immutable.<sup>77</sup>

For Coulson, Islamic law, in its ideal form, is the embodiment of God's will. That will is captured forever in scripture — scripture that precedes the Muslim state and governs it and its actions. The role of the jurist in Islamic law is not to construct or fashion laws, but rather to discover the divine law. "The role of the individual jurist is measured by the purely subjective standard of its intrinsic worth in the process of *discovery of the divine command*."<sup>78</sup> To Coulson, Shari'a provides a unifying

<sup>76</sup> There are many who have argued that the restriction on interpretation in Islamic law occurred much earlier and was imposed by Muslims themselves. This 'moment' in history, when jurists decided that all interpretation would end, is termed the 'closing of the doors of *ijtihad*'. For those who espouse this view, see Joseph Schacht, *An Introduction to Islamic Law* (London: Oxford University Press, 1964); Coulson, *supra* note 6. However, Wael Hallaq has argued persuasively that the doors of *ijtihad* were never in fact closed, and legal interpretation continued unabated; Wael Hallaq, "Was the Gate of *Ijtihad* Closed?" *International Journal of Middle East Studies* 16, no. 1 (1984): 3-41. See also Shaista Ali-Karamali & Fiona Dunne, "The *Ijtihad* Controversy" (2004) 9 *Arab L.Q.* 238. This fundamentally historical and jurisprudential debate is completely ignored by self-proclaimed Canadian Muslim reformists like Irshad Manji, who want to reopen the gates of *ijtihad*; Irshad Manji, *The Trouble with Islam Today: A Muslim's Call for Reform in Her Faith* (New York: St. Martin's Press, 2004).

<sup>77</sup> Coulson, *ibid.* at 1-2 [emphasis added].

<sup>78</sup> Coulson, *ibid.* at 2 [emphasis added].

standard to which Muslims adhere, and stands against “the variety of legal systems which would be the inevitable result if law were the product of human reason based upon the local circumstances and the particular needs of a given community.”<sup>79</sup> Coulson’s concept of Islamic law is not one that grants legitimacy to unaided reason and the needs of society as building blocks of the law.

Law, therefore, does not grow out of, and is not moulded by, society as is the case with Western systems. Human thought, unaided, cannot discern the true values and standards of conduct; such knowledge can only be attained through divine revelation, and acts are good or evil exclusively because God has attributed this quality to them. In the Islamic concept, law precedes and moulds society; to its eternally valid dictates the structure of State and society must, ideally, conform.<sup>80</sup>

This conception of Islamic law is not one that allows for considerable discretionary judgment, legal innovation, or legal change.

Coulson was writing as an observer and scholar of Islamic law. But for Muslims contending with post-colonial controversies over political identity, the idea of changing or modernizing Islamic law in a way that does not adhere strictly to the textual tradition, is perceived as surrendering to the cultural hegemony of the West and the values it enshrines. For instance, the Islamist concept of Shari’a as unchanging and inflexible rules of God has been understood by some scholars such as Roxanne Euben to be a response to the onset of liberal modernity. The reductive, reified, and determinate concept of Shari’a provides a foundation for defining identity through tradition, and thereby counters the atomistic notion of the liberal individual disconnected from tradition and community.<sup>81</sup>

For example, in 2000, Morocco’s socialist prime minister, Abderrahman Yousoufi, proposed reforms to the nation’s personal status law (*Moudawwana*), which governed issues such as marriage, divorce and other family law related matters. Under the original *Moudawwana*, promulgated in 1958, women were declared legally inferior to men.<sup>82</sup> When Yousoufi proposed his reforms, hundreds of thousands of supporters rallied in Rabat. However, as Ilhem Rachidi reports, “Islamists organized a counterprotest the same day in Casablanca, with at least as many marchers

<sup>79</sup> Coulson, *ibid.* at 5.

<sup>80</sup> Coulson, *ibid.* at 85. Notably, medieval Muslim jurists debated over whether moral notions like good and bad preceded God’s determination, or whether something was good or bad because God legislated it as such. This philosophical debate was fundamentally about the ability of humans to use their reason and discretion to create norms of a moral and legal nature. For a general discussion of this medieval debate, see Kevin Reinhart, *Before Revelation : The Boundaries of Muslim Moral Thought* (Albany: State University of New York Press, 1995).

<sup>81</sup> The fundamentalist conception of Shari’a as unchanging and inflexible, as a rigid system of God’s law, has been understood by some as a response to the onset of modernity and the values that for which it stands. In other words, the prevailing conception of Shari’a operates to counter the modern idea of individual self-identity disconnected from tradition and community. See Roxanne Euben, *Enemy in the Mirror* (Princeton: Princeton University Press, 2004). For similar Western critiques of liberal atomism, see Alisdair MacIntyre, *After Virtue*, 2<sup>nd</sup> ed. (Indiana: University of Notre Dame Press, 1984); Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge: Cambridge University Press, 1989).

<sup>82</sup> Ilhem Rachidi “After struggle, new equality for Moroccan women” *Christian Science Monitor* (24 October 2003) 9.

denouncing what they called the Western nature of the project.”<sup>83</sup> To promote the reforms, while undermining Islamist opposition, King Mohammad VI invoked his authority as supreme religious commander (*amir al-mu'minin*), and created a council of religious scholars and other academics to ensure that the reforms did not violate Islamic law principles. Subsequent to this action, Islamist parties like the Justice and Development Party (PJD) heralded the reforms as consistent with Islamic law and have embraced the reformative endeavors. However, it is not clear to what extent the PJD truly believed in the Islamicity of the program. It is suspected that the PJD tempered its rhetoric out of respect for the king's religious authority as *amir al-mu'minin*, and because of the May 2003 bombings in Casablanca, which many blamed the PJD for inspiring.<sup>84</sup> The Moroccan example illustrates how the challenge posed by legal reform is tied to political questions of identity and nationalism in a post-colonial setting.

#### VI. CONCLUSION: ACCOMMODATING SHARIA IN A MULTICULTURAL SETTING

The Muslim characterization of Shari'a that seems predominant today across the globe is not entirely new. Whether in Ontario or Singapore, Muslims reiterate the rhetoric on Shari'a that has existed in the Muslim world since the era of European colonization and Muslim state formation. This concept of Shari'a is embraced and utilized by Muslim fundamentalists as a critique against modernity. Alternatively, for secular Muslims who embrace modern liberalism, Shari'a is considered an obstacle to the full realization of egalitarianism and equality between and among individuals. But for both camps, arguably arising from a subaltern position, Shari'a is reduced to a mere shell of code-like rules without historical or theoretical nuance.<sup>85</sup> This concept of Shari'a raises serious concerns for multicultural states that wish to accommodate minority communities without also sacrificing closely held national values.

But what those national values mean, in light of our commitments to multiculturalism, will often depend on how we define the other to be included in or excluded from our political society. To truly understand the scope of one's commitment to multiculturalism requires due diligence in investigating and discovering who the 'other' is before boundaries of exclusion can be drawn. Consequently, the extent to which a liberal multicultural society can recognize the distinctiveness of Muslims and their embrace of Shari'a, depends on what both Muslims and non-Muslims understand Shari'a to be. Certainly, there is merit to the concept of Shari'a as being reduced to rules of law, devoid of institutional systems of analysis and application, and politicized in a post-colonial quest for identity. Without doubt, Shari'a has been codified in a form that limits the extent of substantive

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<sup>83</sup> *Ibid.*

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

<sup>85</sup> In her discussion of the arbitration debate, Natasha Bakht, writing for Canadian women's groups such as the Canadian Council of Muslim Women, adopted uncritically the stereotype of Islamic law as a code. Citing the view of Syed Mumtaz Ali, she wrote on how Shari'a is meant to be a universal system that governs every aspect of a Muslim's life. And while she recognized the complexity of the tradition, she expressly refused to investigate its history, development, and theoretical contours; Natasha Bakht, "Family Arbitration Using Shari'a Law: Examining Ontario's Arbitration Act and its Impact on Women" (2004) 1 Muslim World Journal of Human Rights at 15, n. 79-81.

change and adaptation. Likewise, critical centers and institutions that study and analyze the Shari'a are few, or have been co-opted by state governments to promote their own legitimacy before a rising tide of Islamic movements.<sup>86</sup> Shari'a has become embedded within larger nationalist struggles, autocratic ploys for legitimacy, and fundamentalist visions of authenticity. But to conceive the tradition in that way alone, only reemphasizes a certain concept of the tradition, that is the product of political forces which have little to do with Shari'a as a *rule of law system*.

This analysis, though, is not intended to leave the reader without offering a possible outlet for alternative avenues for expressing creative ideas about Islamic law and its role in a multicultural setting. Rather, I suggest that whether in Singapore, Canada, or other countries contending with the intersection of multiculturalism and legal pluralism, the government and private sector can facilitate the development of a Muslim family-service civil society. Certainly, as some have suggested, civil society is not an absolute good, and is not always the answer to concerns about democracy, liberal values and gender equity.<sup>87</sup> But a government-regulated civil society sector that addresses the social and religious needs of Muslims, may lead to greater accommodation of Muslim minorities within multicultural societies. Certainly, Singapore has adopted this model by legislating the existence of MUIS. But in doing so, it has also given MUIS a monopoly over the administration and, most importantly, the definition of Islam and Islamic law for Singaporeans.

The proposal which I am suggesting, draws upon the doctrinal pluralism and institutional framework that allowed Shari'a to be a rule of law system at one time. With the dismantling of institutions of training and adjudication, I argue that one cannot simply embrace medieval legal doctrine in the abstract. There is a vast literature on the role institutional contexts play in defining, restraining and otherwise directing the scope of legal interpretation in which a judge can engage. According to Cass Sunstein and Adrian Vermeule, this "institutional turn" suggests that the reality of adjudication is that not all judges are of equal competence, and not all should adopt a highly interpretivist account of the law given their own limited competencies.<sup>88</sup> This article in no way attempts to survey that extensive literature, but rather emphasizes that law without an institutional infrastructure is abstract doctrine. To operate from abstract doctrine alone is to ignore how institutions create the space for law to take effect, and fundamentally affect the way that doctrine is applied to a thick set of facts. If Shari'a is to reflect underlying sociological factors such as institutions of both learning and adjudication, then one cannot reasonably define or conceptualize Shari'a without invoking an institutional structure to give Shari'a doctrines substance and meaningful force. Yet one must also take care not to empower a single institution

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<sup>86</sup> For instance, in the medieval period, the *mufti* often occupied a position of authority and preeminence in towns, and was consulted by lay and judges alike for his legal opinions. However, during the Ottoman period, and later, with the rise of new nation states, the office of the *mufti* soon fell within the larger structures of government. Consequently, in the present day, appointed state *muftis* are often viewed with skepticism, given their connection to the government, and the pressures upon them to support government policy, which they are presumed to face. For a discussion on state *muftis*, which supports the view that their independence is quite limited, see Jakob Skovgaard-Petersen, "A Typology of State *Muftis*" in Haddad & Stowasser, at 81-98.

<sup>87</sup> Thomas Carothers, "Civil Society" *Foreign Policy* 117 (Winter 1999-2000) 18 at 18-24, 26-29.

<sup>88</sup> Cass Sunstein & Adrian Vermeule, "Interpretation and Institutions" (2002-2003) 101 *Mich. L. Rev.* 885.

so much as to quash deliberative discourse about the meaning and significance of Shari'a in a changing world.

Relying on the history of institutions and doctrinal pluralism in Islam, governments and private parties can support the development of non-profit Muslim social service organizations that critically re-engage the Shari'a and the contextual settings in which these organizations offer their services. Muslims from the left to the right can create their own social service organizations and provide mediation or adjudication services for Muslims in the light of critical reevaluations of the historical Shari'a doctrine. In doing so, they will be contributing to the construction of a 'marketplace' of Islamic legal ideas.<sup>89</sup> If the government regulates these organizations for accountability, transparency, and accommodation of basic constitutional values, it can facilitate a dialogue between the government and local Muslims about the relationship between one's commitments as a Muslim and as a member of the nation-state. For instance, the state can create tax auditing procedures to ensure that the financial support for each centre represents a community of interest, rather than a single donor trying to unduly influence the debate unilaterally. It can make all arbitral decisions appealable in a civil court on constitutional or *Charter* grounds. Arbitrators can be subjected to training, certification, licensing, and oversight to ensure the quality of their competence and the transparency of their qualifications. By encouraging and regulating Muslim civil society, the government can manifest its accommodation of religious groups within the larger context of state goals and aspirations.

By creating and regulating institutions of Muslim civil society, the government will provide an equal playing field for diverse voices in the Muslim community to articulate competing visions of Shari'a values. No single Muslim voice will be empowered by the state; rather, the state will provide an equal playing field for all voices to be heard, thereby contributing to debate and dialogue between competing civil society groups. Effectively, each Muslim service organization will offer its services according to its value system and interpretation of the legal tradition. Some may be left-progressive, going so far as to provide marriage services for gay and lesbian Muslim couples, while others may be ideologically conservative, denying room for gays and lesbians, and perhaps even maintaining medieval rules that perpetuate a patriarchal model of rights between men and women. Between these two possible poles will be other groups occupying various positions. Importantly, these groups operate under the umbrella of national constitutional values that impel an accommodationist analysis, not only among Muslims, but between Muslims and representatives of the State.

With a critical mass of family service groups, service providers will compete for customers by advertising their services. In doing so, they will engage in a deliberative discourse with each other, and educate the Muslim consumer about the different organizations' respective presumptions, first principles, and critical analyses of Shari'a

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<sup>89</sup> To use 'market' and 'Islam' in the same sentence might strike some as odd, if not inappropriate. The idea here, though, is not to reduce religious practice and belief to some vulgar capitalist free market system. Rather, the 'market' is a metaphor used to understand how institutional development of a civil society sector can avoid current pitfalls, by ensuring a regulatory design meant to foster an open Muslim society, through various incentive structures that also protect against monopolistic control. For a study on the 'religious marketplace', see Rex Ahdar, "The idea of 'religious markets'" (2006) 2 *International Journal of Law in Context* 49.



as a rule of law system. This competition is not geared toward determining a new orthodoxy using market principles. Rather, it is meant to move the current Islamist debate away from claims of absolutism, and instead create a space for alternative voices. With a space to articulate competing visions, Muslim service groups will provide a spectrum of choices for the Muslim client who seeks resolution of a family crisis in light of his or her commitments to Islam. With a regulated and operational Islamic civil society, the ultimate victor will not be one group or ideology over another. Rather, the victor will be the Muslim consumer, who will have something he or she has not had for quite some time — a choice.