# Sharia and Constraint:

# Practices, Policies, and Responses to Faith-based Arbitration in Ontario

By

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# AUTHOR'S DECLARATION

I hereby declare that I am the sole author of this thesis. This is a true copy of the thesis, including any required final revisions, as accepted by my examiners.
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# Abstract

In the fall of 2003 Syed Mumtaz Ali, leader of the Islamic Institute of Civil Justice located in Toronto Ontario announced in a media interview that his institute was in a new position to offer faith based arbitration to Muslims in Ontario in family law matters such as divorce, custody, and wills. This announcement precipitated a media storm. Participants in the public debate on faith based arbitration, or what came to be called the "sharia debate," worried that vulnerable people such as Muslim women and children might not receive fair treatment by faith based arbitrators. Although, these were legitimate concerns, I argue that much of the public discourse was deeply Islamophobic, and factually wrong in several respects. I argue that the media played an important role in advancing what I call imperial secularism and what others have called colonial feminism. Furthermore, no one knew what was taking place on the ground in Muslim communities with regard to alternative dispute resolution of family law matters generally. My fieldwork research revealed two unanticipated results. First, the vast majority of Muslim adherents seeking out alternative dispute resolution services related to family law matters were Muslim women rather than Muslim men. Second, the vast majority of Muslims seeking out these services were looking for a religious divorce in addition to a civil divorce so that they could remarry within their religious community. They were not on the whole seeking guidance on matters, for example, regarding custody, division of family assets, or support payment amounts upon divorce.

The Dalton McGuinty government ultimately decided to ban faith based arbitration, making its announcement on September 11, 2005. However, I argue that due to de facto legal pluralism there are several other avenues for making religious legal

traditions legally enforceable, for example, through faith based mediation, if the disputants agree to enter the results of a mediation into a separation agreement. I argue that this apparent oversight of the resulting policy is in part due to a public discourse that treated vulnerable people generally and Muslim women in particular paternalistically as "children" in need of rescue. I argue however that given the realities of Canada's Family Law Act, it is crucial to develop policy that recognizes vulnerable people as agents, facilitating agency rather than essentially denying it. Furthermore, my fieldwork suggests that many of the practices of Muslim faith mediation are much more reasonable than several participants in the public debate assumed, questioning the Islamophobic tone of the public debate. However, there are still risks in faith based mediation and the like, and for that reason I make several policy recommendations designed to facilitate the agency of vulnerable people to protect themselves.

Notably, Orthodox Jewish communities have been using faith based arbitration for several years. Therefore, I conducted research to see how the McGuinty government's decision affected them. The unanticipated result was that very little had changed in practice for Jewish communities precisely because of de facto legal pluralism.
I argue that the Islamophobic discourse of the public "sharia debate" and the limited policy formed following the debate are the result in part of imperial secularism and colonial feminism. Therefore, I argue that anti-imperial secularism and post-secular feminism should be developed within Canada's larger multicultural framework in order to promote improved public discourse and public policy that treats vulnerable people generally and Muslim women specifically as agents rather than as "children" in need of paternalistic rescue.

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(Note to Readers: This section will be better developed in the final version)

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# Chapter 1
# Introduction

In this dissertation I examine how a secular Canada, in the context of the policy goals of its laws on multiculturalism, accommodates the Canadian Charter guarantee of religious freedom of people who wish to practice faith based arbitration in Ontario, as well as what the limits of this accommodation are.[1] This project also explores the public policy implications with regard to the recent public debate, legislative outcome, and ongoing practical issues of faith-based (formal) arbitration and (informal) mediation with particular, though not exclusive, focus on Muslim communities, in Ontario. Consequently, this study will examine negotiations between the dominant society and the minority or minoritized[2] community; religious intolerance and discrimination; and diversity within the Muslim community itself. The primary research will include interviews and surveys of Muslim men and women, as well as interviews of various arbitration and mediation providers. In order to make a point of comparison, I also interview a number of Jewish providers of faith based arbitration. I attempt to position myself appropriately with regard to interviewing members of minoritized communities, because as an academic researcher I crossed boundaries of gender, race, religion, and class; however, the main thrust of the project remains a theoretical and practical exploration of the multicultural public policy and practice surrounding faith-based arbitration and mediation.

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[1] This project was funded by a Canada Graduate Scholarship from the Social Sciences and Humanities Research Council of Canada (SSHRC).

[2] The word "minoritized" points to the question of who creates the boundaries and knowledge of what constitutes "minority communities." Rather than simply being objectively given or produced internally by minorities themselves, communities are "minoritized", that is they are constituted through knowledge that is produced about them mainly by the dominant majority community. See Zine 2012; Cobb 2010; and Robinson 2003.

In my theoretical analysis I attempt to theorize the modern concept of religion as a located concept in order to theorize secularism in such a way that what I have called "imperial secularism" may be recognized and countered with anti-imperial secularism. Adding onto forms of critical multiculturalism that aim to resist dominance and establish genuine equality for minoritized groups, and in addition to anti-racist, feminist, and anti-colonial forms of multiculturalism, I add the requirement of an anti-imperialist secularism and post-secular feminism. In my analysis of the history and discourse of the so called "sharia debate" I argue that the prevalence of the stereotypical figure of the "imperiled Muslim woman," as coined by Sherene Razack, has led to policy that is designed to protect people who are imagined to be devoid of agency. I argue that this is a major shortcoming of policy resulting from the debate as vulnerable people generally and Muslim women specifically would benefit much more from policy that promotes and facilitates agency particularly given the realities of Ontario's family law. I criticize the stereotypes prevalent in the media debate on faith based arbitration as outlined by Razack, including what one might call, "uncivilized sharia," to signify the stereotypical assumption that sharia is inherently barbaric, unchangeable, and intrinsically misogynistic. I argue along with Razack that these stereotypes do not in fact effectively dismantle patriarchal inequity or violence either in Islamic or Western culture, but rather reinforce it in both. Therefore I argue for dismantling such stereotypes in the interests of dismantling patriarchal inequity and violence and opening up a new social discourse and practice in which Muslim women's agency can be more effectively acknowledged and respected in the context of either or both religious and secular spaces in Canada.

In my fieldwork I find that in practice the most pressing issue of the sharia debate for Muslim leaders and adherents in Ontario was not faith-based arbitration, but rather religious divorce. Furthermore, women are by far the most common seekers of these kinds of services. In other words, the government`s paternalistic decision to protect the vulnerable Muslim woman from uncivilized sharia ended up robbing many Muslim women of their agency, that is, the control over their ability to divorce and enter into new religiously sanctioned marriages. I make several policy suggestions based on these unanticipated findings. In conclusion, I argue that certain kinds of secularism can create real barriers to the free exercise of agency by vulnerable and religiously minoritized women, especially those who either may want to use faith based alternative dispute resolution services, or who stand to gain the most from the new protections the Arbitration Act now affords, but cannot.[3] Beginning with Ayelet Shachar's proposal for transformative accommodation with regard to the potential for and limits of plural (religious) legal accommodation in Canada, as well as Anver Emon's proposal to facilitate multicultural jurisprudence, I suggest that Shachar's proposal is ironically both closer to being realized and further from being achieved as a result of the "sharia debate" and policy decisions following. I argue that the proposals for institutional and legal pluralism resonate with Veit Bader's call for institutional pluralism and Lori Beaman's commitment to "deep equality." I point out that two substantial changes in policy are necessary in order to fully realize her vision of transformative accommodation. Taking up Emon's suggestion, I argue that publicly funding religious family-service civil society institutions at the price of government oversight, while it risks paternalism and

[3] See chapters 4 and 5 for further exploration of why this is the case.

imperialism, could at least be potentially facilitated immediately despite the fact that faith based arbitration may not be allowable in Ontario for some time (Emon 2007; 2011).

## 1.1 Faith Based Arbitration and the "Sharia Debate"[4]

In 2003, the Islamic Institute of Civil Justice announced that it was in a new position to offer legally binding faith based arbitration to Muslim adherents in family-law-related disputes such as divorce, separation agreements, and wills. This announcement precipitated nothing short of a media storm over "sharia" courts in Ontario. After much public debate, including a government commissioned inquiry into the issue led by Marion Boyd, on September 11, 2005 the government led by Dalton McGuinty announced their decision decided to end enforcement of arbitration agreements based on law coming from non-Canadian jurisdictions, effectively ending the practice of producing enforceable arbitration agreements based on religious laws as well.[5] My doctoral project explores how a secular Canada, in the context of the goals of its multicultural policies, accommodates the Canadian Charter guarantee of religious freedom for Canadians who wish to practice faith based arbitration in Ontario, and what the limits of this accommodation are. In this section I will trace a brief history of the so-

[4] I will discuss Sharia in more detail in chapter 5. At this point I will offer a definition of Sharia provided by Frederick M. Denny. "Literally, it means 'the way to the water hole' but also includes the meaning of 'the right path' to follow, and thus came to mean 'law.' Although it is correct to translate the word as simply 'law,' it is better to regard law in the strict, codified sense as only one dimension of Shari'a… it is also the right teaching, the right way to go in life, and the power that stands behind what is right… The Shari'a, as divine legislation, is not the same as fiqh, although it includes it. Fiqh means 'understanding' and fairly early came to be the main term for the 'science of jurisprudence'" (2011, 187-188).

[5] Dalton McGuinty at the time of the "sharia debate" was the premier of the Province of Ontario and leader of the Ontario Provincial Liberal Party. Ontario is the largest of Canada's ten provinces and three territories demographically and the second largest geographically. McGuinty's liberals enjoyed a majority government at this time, and the Liberal Party of Canada is generally situated in the centre of Canada's political spectrum.

called "sharia debate," and provide some background in order to understand the logistics of arbitration and family law in Canada generally.

The first media event of the "sharia debate" took place in the fall of 2003 when Judy Van Rhijn published an article in the *Law Times* based on an interview with Syed Mumtaz Ali, president of the Islamic Institute of Civil Justice (IICJ), about his plans to offer civil arbitrations rooted in sharia law. Mumtaz Ali's own statements suggested that there had been a recent change in Ontario's Arbitration Act to allow for Muslims to arbitrate civil disputes according to sharia. Several media articles uncritically assumed this to be true, suggesting incorrectly that this was a new development for Ontario law.[6] This was not the case. In fact, the legal option of arbitration, including faith based arbitration, has existed explicitly in Ontario's Arbitration Act since 1991. The Ontario Arbitration Act allows two disputants to chose any third party they mutually agree on to arbitrate a civil dispute. The arbitrator chosen then could conceivably be a religious arbitrator. Religious arbitrators could be asked to arbitrate family disputes involving divorce matters concerning spousal and child support, division of family assets, and custody of children, as well as business, employee, or consumer disputes. Jewish communities most notably, though not alone, have been utilizing this option for many years (Syrtash 1992, 98-108). Moreover, even outside of the Arbitration Act, all

[6] "Sharia law in Canada? Yes. The province of Ontario has authorized the use of sharia law in civil arbitrations." In Margaret Wente. 2004. "Life under sharia, in Canada?" GlobeandMail.com. Accessed Saturday, May 29, 2004. "Sharia tribunals are reported to be operating informally, but their decisions are not recognized under Ontario's Arbitration Act." In Michael Valpy and Karen Howlett. 2005. "Female MPP's concerns delay sharia decision." *GlobalandMail.com*. Accessed Thursday September 8, 2005. ". . . makes it impossible to understand what former Ontario Attorney General Marion Boyd was thinking when she recommended Jan. 17 that the province allow *sharia* tribunals to settle family disputes for Muslims." In Mona Eltahawy. 2005. "Ontario must say 'no' to Islamic law." *The Christian Science Monitor*. Accessed February 2, 2005. "A Canadian Islamic group is trying to prevent the word shariah from being included in Ontario's Arbitration Act." In Canadian Press. 2004. "Islamic group against Ontario use of Sharia law." CTV.ca. Accessed Sunday August 22, 2004. "The advent of traditional Islamic law, or *sharia*, to settle family disputes has set off an impassioned debate in Canada." In Ingrid Peritz. 2005. "Ebadi decries idea of Islamic law in Canada." GlobeandMail.com. Accessed Tuesday June 14, 2005.

Canadians were free to enter into various legally binding private agreements based on any legal system, religious or otherwise, they mutually agreed upon as long as they do not contravene criminal law or the Charter (Bunting 2009; Bakht 2006). Therefore, not only has faith based arbitration been practiced under the aegis of the Arbitration Act for several years, this openness to private resolution of civil disputes has been a feature of Ontario's Family Law Act for many more years than the current Arbitration Act has been in existence. Although the debate surrounding faith based arbitration raised legitimate concerns about contracting out legally enforceable decision making powers to a third person who may not produce equitable decisions, the widespread notion that religious tradition could not already play a part in Ontario family law generally or arbitration specifically was inaccurate. Contrary to popular perception, the IICJ was not asking for new concessions or accommodations. Rather, it was simply voicing its intention to participate in a legal option that had been open to all faith communities for several years.

As I mention above, this misconception likely has its genesis, at least in part, in Mumtaz Ali's own words. What Mumtaz Ali meant by 'new' was that the IICJ was newly organized to provide this service, and thus for the first time there was an organization with the necessary training and knowledge to produce legally enforceable arbitrations in line with the already existing requirements of the Arbitration Act.[7] Whereas Mumtaz Ali wanted to draw the attention of Ontario Muslims to this possibility of practicing faith based arbitration with government enforcement, to publicly celebrate Muslim institutional integration and participation in Canada, and perhaps to take credit for more than was his doing, much of the media reaction interpreted the 'newness' of this development as something quite different—and much more pernicious.

[7] Personal interview with a prominent representative of the Islamic Institute of Civil Justice.

Marion Boyd dedicates an entire section of her report to an explanation of the Arbitration Act. She strongly emphasizes the role of agency in both arbitration and mediation (Boyd 2004, 9-17). Alternative dispute resolution (ADR) generally refers to alternatives to the state court system. Boyd cites several alternative dispute resolution methods on a continuum of formal to informal stating,

> They may ignore [civil disputes] or walk away from them. They may resolve them directly between parties, by informal discussion or by formal negotiation or by arbitrary measures, like flipping a coin. They may involve other people not personally involved in their dispute, such as professional advisors for each disputant. The parties may get independent help in resolving the dispute, by asking advice of a neutral third party. They may ask a third party to be more or less actively and more or less formally involved in helping them come to an agreement, a process known as mediation. The disputants may also give up on the quest for an agreed resolution to the dispute, and choose instead to have a neutral third party decide the dispute. When this is done by agreement of the parties to the dispute, it is known as arbitration. (2004, 9)

Furthermore, she reminds Ontarians that none of these dispute resolution mechanisms are policed by the state, as "civil society functions independently of government" (2004, 10).[8] Only arbitrations properly performed, or any legal contracts such as a separation agreement signed following the informal resolution of a dispute, are enforceable by the courts. The Civil Justice Review process which took place in the mid-1990s established that most civil disputes are required to go to mandatory mediation before appearing in a

[8] Boyd includes an extensive discussion of the workings as well as the legal limits to arbitration in her report. See Boyd 2004, 13-17.

provincial court (Boyd 2004, 10). However, in the realm of family law, disputants can choose not to go to mediation if they wish.

However, arbitration differs from mediation, even mandatory mediation, in two important respects. The first concerns decision making power and the second concerns advisory versus non-advisory decisions. Generally speaking, mediation allows two disputants to retain their decision making powers. The mediator in this case works towards mutually agreeable solutions between the two disputants, and has no decision making power per se. An arbitration on the other hand is more like a court, with the arbitrator acting as judge. The arbitrator is given decision making power by the two disputants, usually because they cannot agree on a mutually acceptable solution. The arbitrator in this case makes a binding decision on behalf of both disputants. This would be a "non-advisory" arbitration, because the point is to make a final and binding decision rather than to further advise the disputants. However, it is important to understand that two disputants might ask an arbitrator to perform an "advisory" arbitration. The couple might be interested to see what the arbitrator's decision would be if he or she were given the power to decide on their behalf, without the decision being a binding one just yet. One imam I interviewed has performed such advisory arbitrations. In one such case after arbitrating a divorce case, the couple still could not agree to accept the advisory result and finally went to an Ontario court to have the matter settled in a binding manner (Imam Interview #14). Alternatively, the couple might have decided to enter the results of the advisory arbitration decision into a separation agreement, at which point the outcomes of the arbitration decision would become enforceable by the state. The same could be done with the outcomes of a mediation as well.

There are several costs and benefits to using private forms of dispute resolution rather than the court system to resolve matters relating to family law. Privately crafted solutions to disputes generally appear to be more acceptable to disputants as they are frequently more enduring than court decisions have been (Boyd 2004, 10). There is much more flexibility privately for parties to creatively resolve their issues, whereas a court of law makes standard decisions based primarily on established statutes and court precedents. People indeed appear to more consistently honour privately resolved agreements because they have been able to shape the agreements to their particular situation, rather than having the judgment handed down from above (Boyd 2004, 10). Parties frequently also prefer the privacy of the process to the potential discomfort of having private details made public in the court system. Several people have found the very processes and schedule of private dispute resolution preferable because the courts can be rigid and inflexible, whereas private ordering leaves more room for flexibility in "time, procedure, and possible outcomes" (Boyd 2004, 10). The court system is often an adversarial, winner-takes-all environment, whereas private dispute resolution is often experienced as being more amenable to compromise and win-win solutions. Finally, several submissions to the Boyd commission stated that the speed and substantially lower expense of private ordering is often preferable to the highly expensive and at times excessively long court process (Boyd 2004, 10).[9]

[9] Although the Attorney General's Office website makes the point that if an arbitration comes to court for overturning or enforcement, sometimes in the end the process is just as lengthy and expensive as it would have been if the parties had gone to court in the first place, if not more so. See http://www.attorneygeneral.jus.gov.on.ca/english/family/arbitration/cost.asp

There are important limitations to the pubic court system as well, particularly when dealing with racialized[10], minoritized[11], and marginalized communities. Several critics have pointed out that the court system is not always necessarily the best environment for defending the equity and rights of women (Syed 2012; Macklin 2012; Razack 2002; 1998). This is particularly so for racialized women, and perhaps even more so for religionized[12] women of marginalized traditions such as Islam (Razack 2008). For these reasons even many feminists have found the assumption that the courts are unquestionably preferable to private dispute resolution, and faith based arbitration in particular, troubling at best. Furthermore, private ordering generally is flexible enough to be more accommodating to cultural, linguistic, and religious differences than the courts.

This is not to say however that there are not limitations to private ordering generally and faith based arbitration specifically. These are examined comprehensively by scholars who critique what they view as the increasing "privatization of justice" in Canadian legal culture (Goundry et al. 1998; Bakht 2005). These analysts fear the loss of important gains in gender equity made recently over the last thirty years in procedural and substantive default norms[13] through the *Family Law Act*. Screening for abuse and inequity in spousal relationships, acting in the best interests of children, guaranteeing reasonable support amounts for children and spouses, and requiring equal division of

[10] The term racialization brings to light the essentialized and socially constructed characteristics of the notion of "race". See also Murji & Solomos 2005; Das Gupta et al 2007; Webster 1992.
[11] Minoritization suggests that "minorities" are often constructed and characterized by dominant populations rather than by the communities themselves. See also Zine 2012; Cobb 2010; and Robinson 2003.
[12] I explain my use of this term in the theoretical section of the dissertation, chapter 2. I intend with this term to highlight for interrogation and analysis the specific constructed nature of the modern category of religion and the particular flows of power deployed through it, in much the same way that racialization does for race.
[13] Procedural law is the rules for hearing and determining the outcome of a matter before the courts designed to ensure consistent and just application of due process. Substantive law on the other hand is the written law that delineates specific rights and duties. The former establishes the procedures for applying the latter.

family resources are important examples of the recently gained benefits the public system affords that might be compromised in the context of private ordering of family matters.

To its credit, the McGuinty government has thoroughly addressed these issues by revising the Arbitration Act. The original Ontario *Arbitration Act, 1991* has been amended by two pieces of legislation: the *Family Statute Law Amendment Act* and a new *Regulation* under the *Arbitration Act, 1991*, which both came into effect April 30, 2007.[14] A number of changes have been made with the intent of better protecting vulnerable people generally and of limiting the state enforcement of faith based arbitrations specifically.

Arbitrators are now required to complete training specified on the website for the Ministry of the Attorney General of Ontario.[15] Furthermore, they are now required to provide a record of her or his arbitrations regularly to the Ministry of the Attorney General. The Ministry provides a standard form to be used for reporting arbitrations to the government.[16] The arbitrator is required to declare that he or she has treated the parties to the dispute fairly, and that she or he has acquired the requisite training approved by the Ministry. If the arbitrator is trained in screening for domestic abuse then she or he is required to screen separately for power imbalances and domestic violence. If not, the arbitrator is required to have someone other than herself or himself with the appropriate training perform the screening separately for power imbalances or domestic

[14] An Act to amend the Arbitration Act, 1991, the Child and Family Services Act and the Family Law Act in connection with family arbitration and related matters, and to amend the Children's Law Reform Act in connection with the matters to be considered by the court in dealing with applications for custody and access. http://www.e-laws.gov.on.ca/html/source/statutes/english/2006/elaws_src_s06001_e.htm accessed December 9, 2008; Arbitration Act, 1991 ONTARIO REGULATION 134/07 FAMILY ARBITRATION. http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_070134_e.htm accessed December 9, 2008; Website of the Ministry of the Attorney General Ontario, Family Arbitration. http://www.attorneygeneral.jus.gov.on.ca/english/family/arbitration/ accessed December 9, 2008.
[15] http://www.attorneygeneral.jus.gov.on.ca/english/family/arbitration/
[16] http://www.attorneygeneral.jus.gov.on.ca/english/family/arbitration/arbitrator-form.asp

violence.[17] Arbitrators are now also required to keep careful written records of an arbitration including,

1. the evidence presented and considered,

2. the arbitrator's notes taken during the hearing, if any, and

3. copies of

    i. the signed arbitration agreement,

    ii. the certificates of independent legal advice,

    iii. if the screening for power imbalances and domestic violence was conducted by someone other than the arbitrator, the report on the results of the screening, and

    iv. the award and the arbitrator's written reasons for it. O. Reg. 134/07, s. 4 (1).

Finally, one can no longer contract out of one's right to appeal an arbitration, and one cannot sign an agreement in advance binding that person to mandatory arbitration of a family dispute before the dispute has arisen.[18]

It is also important to point out another very significant change made to the Arbitration Act. The Arbitration Act appears to have been originally intended for commercial law use, leaving the matter of family law application unclear.[19] This ambiguity is now clarified through a newly established relationship between the

[17] See subsection 2 of the "Ontario Regulation 134/07 Family Arbitration" of the *Arbitration Act, 1991*.
[18] See section 3 of An Act to amend the Arbitration Act, 1991, the Child and Family Services Act and the Family Law Act in connection with family arbitration and related matters, and to amend the Children's Law Reform Act in connection with the matters to be considered by the court in dealing with applications for custody and access. http://www.e-laws.gov.on.ca/html/source/statutes/english/2006/elaws_src_s06001_e.htm
[19] However, although several commentators make this point, Marion Boyd argues that both the 1991 Arbitration Act as well as Ontario's old nineteenth century Arbitrations Act did apply equally to family law (Boyd 2004, 11).

*Arbitration Act*, the *Family Law Act*, and even the *Child and Family Services Act*. Arbitrations that deal with family law are now subject to the *Family Law Act* in that these are newly regarded as "family arbitrations" which are subject to the Family Law Act, which means that they are governed by all the rules outlined in the Family Law Act.[20] It appears that this alone would have been enough to address the potential for undermining the hard won equality enshrined in the Family Law Act. This means that even if arbitrators were asked to make a decision based on religious or other non-Canadian laws or principles, these could only be used insofar as they did not conflict with the Family Law Act.[21] This is an extremely important move in that previously there was no oversight or restrictions as to what legal system could be used to arbitrate a dispute. Therefore, laws and principles regarded as unfair and unequal by Canadian standards could be applied as easily as laws that might be quite acceptable according to Canadian family law. Furthermore, the *Child and Family Services Act* now includes the provision that an arbitrator is legally required to report suspected child abuse.[22]

In addition to these new protections for vulnerable people generally, a very specific change has been made affecting the status of non-Canadian legal traditions in arbitrations. The new legislation states that "family arbitrations based on non-Canadian

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[20] See section 1 of An Act to amend the Arbitration Act, 1991, the Child and Family Services Act and the Family Law Act in connection with family arbitration and related matters, and to amend the Children's Law Reform Act in connection with the matters to be considered by the court in dealing with applications for custody and access. http://www.e-laws.gov.on.ca/html/source/statutes/english/2006/elaws_src_s06001_e.htm

[21] Natasha Bakht notes that "religious arbitrators can simply conform to the regulations regarding training and record keeping and then perform *religious arbitrations* that are consistent with Canadian Family Law . . . the *Family Law Amendment Act* permits *religious arbitrations* that conform to Canadian Family Law" (Bakht 2007, 141-142). (My italics).

[22] See section point 2 under "Child and Family Services Act" of An Act to amend the Arbitration Act, 1991, the Child and Family Services Act and the Family Law Act in connection with family arbitration and related matters, and to amend the Children's Law Reform Act in connection with the matters to be considered by the court in dealing with applications for custody and access. http://www.e-laws.gov.on.ca/html/source/statutes/english/2006/elaws_src_s06001_e.htm

law and principles—including religious principles—will have no legal effect and will not be enforceable by the courts."[23] However, the Attorney General's Office website itself is clear that this does not mean that faith based mediation or advisory arbitration is restricted. The Attorney General's Office statement regarding faith based arbitration and mediation posted on its website is worth quoting in full,

> Nothing in Ontario law prevents people from turning to a religious official or someone knowledgeable in the principles of their religion to help them resolve their family dispute. . . *A religious official can conduct a family arbitration under Ontario law if that person is properly qualified to do so*. To be qualified one has to have completed the required training and otherwise conduct the arbitration under the statutes and regulations. An award from such an arbitration would then be enforceable like any other arbitration (Ontario Ministry of the Attorney General). (Italics mine)

Although there were considerable changes to the Act, I will show that there are several forms of faith based arbitration and potentially enforceable mediation that remain available to Ontarians. I argue it is vitally important to understand these complexities and nuances of the law in order to offer the best possible assistance and protection to vulnerable persons as autonomous agents.

In a sense, it is moot to discuss the advantages and disadvantages of private justice because the government has clearly opted for the continued use, even favoring, of private dispute resolution in family legal matters generally (Boyd 2004, 10). However, there is a great irony in the amendments to the Arbitration Act. Essentially all the issues raised regarding the limitations of the Arbitration Act have been rigorously addressed in the 2006 revisions, but at the same moment religious dispute resolution has been

[23] http://www.attorneygeneral.jus.gov.on.ca/english/family/arbitration/ accessed December 9, 2008.

substantively excluded (through continued denial of public funding for independent legal advice in arbitrations) and symbolically excluded (through public and governmental legislation and discourse). At the same time that dramatic new protections for vulnerable people are afforded under the Arbitration Act, those who might have benefited most from them remain essentially excluded.

## 1.2 Literature Review

By the time of the writing of this chapter in 2013 there has been a substantial amount of academic literature published on the faith based arbitration issue in Canada. The central observation I make of this body of literature is that surprisingly little of it is based on fieldwork research within Muslim communities themselves, lacuna that this dissertation seeks to address. Much of the existing literature is theoretical, based primarily on the media debate and the literature addressing, for example, women's studies, post-colonialism, racialization, Islam and Islamophobia generally. Furthermore, although there are a number of publications on faith based arbitration in Jewish communities previous to the "sharia debate" – mainly in the United States, but also in Canada – almost none of the research focused on the "sharia debate" focuses on Jewish communities in the context of the revised Arbitration Act, which has arguably influenced these communities most, because they have perhaps the most developed religious courts and made the most regular use of faith based arbitration of any community in Ontario.

### 1.2.1 Documenting The Faith Based Arbitration Debate

In one of the first and most thorough books on religion in Canadian family law before the Ontario sharia debate of 2004-2005, John Syrtash (1992) explores three main legal issues as they are addressed by diverse religious minority communities: child custody and access; alternative dispute resolution; and removing religious barriers to remarriage. He concludes that there has been an erosion of the rights of the custodial parent with regard to custody and access issues involving religion as a result of the new emphasis on the religious rights of the access parent gained under the Canadian Charter of Rights and Freedoms. Second, with regard to arbitration, Syrtash argues that recent case law suggests that the decisions of religious courts may well be enforceable in Canada, especially if the arbitration proceedings employed recognized practices such as independent legal advice. Finally, Syrtash argues that the progress achieved through remedial legislation on behalf of Jewish women (and potentially Muslim and other women in religious traditions in which men possess unequal power in granting the religious divorce) seeking to remarry within their tradition is a substantial encouraging development that suggests, along with the other developments cited in his work, that Canada is beginning to respect and accommodate "its own multicultural legal principles and minority religions and cultures when legislating or judicially determining disputes over marriage, divorce, custody and access to children, or child protection" (Syrtash 1992, 180). Syrtash presents research on the overlap between family law and religious communities in mainly Jewish, Catholic, Muslim and Aboriginal contexts.

A former Attorney General and women's rights advocate herself, Marion Boyd does an excellent job of summarizing the legal complexities of arbitration and mediation with an eye to women's equity issues. Boyd (2004, 2007) argues that the 1991 version of

the Arbitration Act does not adequately protect vulnerable people, including those who might elect faith based arbitration. She concludes her report on faith based arbitration with forty-six recommendations for changes to the Arbitration Act designed to better protect the interests of vulnerable people in the context of family law.[24] Boyd's report has been criticized by some for not taking seriously enough the issues of community pressures, coercion, and women's rights at risk in faith based arbitration. However, Boyd maintains that she attempted to further the protection of vulnerable people in faith based arbitration without crossing the line into paternalism and the infantilization of the vulnerable members of marginalized communities. Boyd's report deserves early mention because she was the one commissioned by the McGuinty government to investigate the issue once it erupted in the media. Boyd's is one of the few publications based on research gathered from religious communities who have or may use faith based arbitration in practice. Although she did not engage in fieldwork in the communities themselves, she solicited and received several submissions from stakeholders in numerous religious communities, as well as from other concerned citizens and organizations such as women's groups and legal organizations.

In response to Boyd's work, Alexandra Brown (2012) argues that even though the Boyd report failed to have its recommendations realized in policy, it ultimately succeeded in its latent functions of legitimizing the multicultural state in several ways. The construction and reception of the report also served to further the perception of state neutrality hiding any potential state complicity in the formation of, or failure to address, inequity. Nicholas Pengelley (2005) also assesses Boyd's recommendations arguing that based on international precedent, faith based arbitrations in conflict with civil litigation

[24] Though she has been criticized for not recommending mandatory independent legal advice (ILA).

are very likely to be overturned, and courts tend to favour those who are able to demonstrate undue duress or coercion to arbitrate. However, even though he applauds Boyd's recommendation that if independent legal advice is not requested that it must be explicitly rejected in writing, he is critical of Boyd for not making independent legal advice mandatory.

John D. Gregory, Anne Marie Predko, and Juliette Nicolet (2005) argue that the 1991 *Arbitration Act*, and perhaps even the *Family Law Act* should be amended to better protect women and vulnerable people generally. Also Earle Waugh and Humera Ibrahim (2002) argue that alternative Islamic dispute resolution of some manner will likely continue to be practiced and spread, and that therefore as the process matures, safeguards to protect equality rights of individuals need to be better built into alternative dispute resolution processes.

### 1.2.2 Legal and Equity Issues

The above publications document the debate and legal issues raised in the debate over faith based arbitration in a general way. Other authors have explored the legalities and equity issues raised by faith based arbitration and alternative dispute resolution in a much more thorough manner. In her early articles on faith based arbitration, Natasha Bakht (2004) focuses particularly on explaining the risks to vulnerable persons in the context of Ontario's Arbitration Act, recommending significant changes to the 1991Act. Bakht's early articles during the debate detail the legal intricacies of faith based arbitration specifically, and the dynamics of private and public justice generally, and as a legal scholar she is well qualified to explore these issues. Her later articles after the

debate take quite a different tack (Bakht 2006). In tandem with Sherene Razack and others, these articles criticize the othering of minoritized communities in the sharia debate, and although the amendments to the arbitration act are praised, she criticizes the McGuinty government for prohibiting faith based arbitration altogether, questioning the effectiveness of this policy decision for genuinely protecting vulnerable people given the realities of family law in Ontario. Another legal scholar, Anne Bunting (Bunting & Mokhtari 2009) relies on some limited fieldwork with Muslim women in order to offer a representation of Muslim women as complex agents, challenging the stereotypical media representation of Muslim woman as nearly helpless. At the same time, Bunting attempts to represent some of the pressures that Muslim women have experienced in their families and communities. Importantly, Bunting details the realities of de-facto legal pluralism in Canadian family law. It is also noteworthy that a number of Bunting's interviews were conducted prior to the public "sharia debate" as part of her ongoing research interests.

Jean-François Gaudreault-DesBiens (2005), writing before the McGuinty Government decision of September 2005, argues that private justice that allows any law code to be used in arbitration unnecessarily leaves open room for injustice. Careful not to say all religions promote illiberal ends, he argues that leaving the door open for even a few fundamentalist arbitrators to potentially arbitrate unfair agreements is unconscionable. Following the McGuinty Government decision, Miriam S. Pal (2006) maintains that although arbitration is now prohibited, through mediation the potential remains for bringing religious tradition to bear on civil disputes. Pal also holds that the central issues of the sharia debate should not be thought of as limited to religious arbitration, but rather extended to the entire issue of the privatization of justice. Finally,

along with other authors, Pal expects this issue is not over. As the exponential growth of Canadian Muslim communities continues faith based arbitration specifically and religious private ordering generally will likely come to be an issue that Canadian legislators and legal professionals will need to address again in future.

The Canadian debate has had an impact on American thought regarding alternative dispute resolution as well. In contrast to those who argue that it is a good way to protect and facilitate religious freedom, Nicholas Walter (2012) argues that in both Canada and the United States, faith based arbitration inhibits religious freedom because one of the litigants may choose to change her or his religion after signing an agreement to arbitrate a matter religiously, or between the conclusion of an arbitration and its enforcement, but would still be legally bound to arbitrate religiously or abide by the decision of a religious tribunal that she or he no longer shared the religious beliefs of. Nicholas argues that courts should only enforce those faith based arbitration agreements that deal exclusively with religious matters that cannot otherwise be addressed in secular courts. On the other hand, Caryn Litt Wolfe (2006) uses the Canadian sharia debate to critique American practices of faith based arbitration. After providing a history of faith based arbitration in the United States and weighing the advantages and disadvantages, Wolfe concludes that although she agrees faith based arbitration should not be banned in America as it was in Ontario, it requires better oversight to protect the vulnerable, especially in the case of family law arbitrations.

### 1.2.3 Multiculturalism, Secularism, and Constitutional Democracy

In addition to publications that explore the history and detailed legal issues raised by the debate over faith based arbitration, several other authors address faith based arbitration through the theoretical lenses of multiculturalism, secularism, and constitutional democracy more generally. Avigail Eisenberg (2007) offers an analysis of multiculturalism in the context of faith based arbitration and the "sharia debate." She offers a program for genuinely assessing issues such as the "sharia debate" without, on the one hand dismissing the issue outright and therefore not taking diversity seriously, or on the other hand simply allowing minority communities to do as they please regardless of the consequences to vulnerable people. Taking a different approach, Naser Ghobadzadeh (2010) uses the "sharia debate" to argue that multiculturalism facilitates the development of Muslim women's agency. Through a comparison of the sharia debates in Canada and Australia, Ghobadzadeh argues that the sharia debate in Canada featured much more public participation of Muslim women than in Australia, and that the more developed policy and practice of multiculturalism in Canada explains this difference. Making a more negative evaluation of Ontario's actions in light of multiculturalism, Patricia Goff (2010) reminds us that people's identities are at stake in negotiations over diverse social imaginaries, as was the case in the sharia debate. Even though the final decision of the McGuinty government may have been the best for Ontario at the time, Goff suspects Canada did not in fact travel very far down the multicultural road, as she puts it, given the tenor of this debate.

Turning to the issues faith based arbitration raises for constitutional democracies, Lorraine Weinrib (2008) focuses on the importance and relevance of Canada's adoption of rights based democracy through the Canadian Charter for shaping public discourse in

the sharia debate. She argues that the process of adopting the Charter set the stage for the sharia debate in two ways: by providing a model for debate of constitutional principles, and second by establishing the principles of a rights based democracy within which the sharia debate took place, namely between the rights of religious minorities and the rights of women. Despite its limitations, Weinrib holds the sharia debate up as an example of the triumph of rights based democracy, highlighting the adoption of the direct and primary relationship of the individual to the state.

Finally, exploring notions of the secular, Jennifer Selby (2012) argues that the sharia debate highlights at least three developments in Canadian secularism.[25] First, Canadian secularism is Christo-centric rather than being neutral; second, the permeation of private and public spheres present in the debate illustrates "de-privatization" as argued by Jose Casanova (1994); and finally secularism as it manifested in the debate tended in practice to privilege a feminist politics that marginalizes women who operate from a position of embeddedness in religious communities.

### 1.2.4 Fieldwork Publications

Julie Macfarlane (2012) is the only researcher to date to embark on a major research endeavor to explore through fieldwork what in fact is being practiced regarding faith based arbitration and religious divorce in Ontario Muslim communities. With substantial funding, she has been able to interview some two hundred stakeholders in Muslim communities. Her findings parallel my own.[26] The majority of Muslims seeking

[25] Selby also describes some fieldwork she has conducted on the "Sharia Debate."
[26] However, this does not make my research redundant. First, Macfarlane agrees that this issue is so under-researched that there ought to be several studies done in order to establish representativeness and accuracy (personal communication). Second, my project is different from Macfarlane's in a number of ways. As a

out services from imams and other service providers are looking for religious divorces in addition to secular divorces, rather than advice regarding the kinds of issues that can be decided in faith based arbitration. Furthermore, in large part those people who do search out advice on issues such as division of assets and support payments receive advice from imams and other service providers that many secular Canadian service providers would likely deem fair in the context of Canadian legal norms. Therefore, although there are certainly concerns regarding inequity that may be better addressed, the voices of the "sharia debate" that represented anything that might transpire under faith based dispute resolution in Muslim communities as inherently unfair have widely missed the mark.

Pascale Fournier has written several articles of indirect relevance to the "sharia debate." Fournier has investigated practices of *talaq* or Muslim divorce in Toronto, Ottawa, and Montreal for their unequal practices as well as what Muslim women are doing to address those inequities (Fournier 2011). Fournier argues that the *mahr* (the dowry given to the Muslim wife by her husband upon marriage, and which under certain circumstances must be returned to him if she wishes to initiate a divorce) in practice can be used as a substantial tool of power and discipline for Muslim women (Fournier 2006). This image of Muslim husbands and wives in negotiated relations of power is considerably different from the image of couples negotiating family legal disputes represented in Marion Boyd's report which she argues presents "unchanging and predictable subjects and outcomes" (Fournier 2006, 677). Fournier further argues based on judicial cases deciding *mahr* and *muta* (temporary marriage practiced in some Shia

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legal studies scholar her theoretical tools issue mainly from that field. As a sociologist of religion and religious studies scholar I bring an analysis of secularism, multiculturalism, and Islamophobia to my material that she does not. Furthermore, I engaged in fieldwork among Jewish community members whereas Macfarlane focused exclusively on Muslim communities.

contexts but not allowable in Sunni communities) that Canadian and American judges deploy Orientalist stereotypes as they employ putatively universal norms which in fact are culturally located (Fournier 2001). Fournier calls for judges to interrogate these assumptions of normativity when adjudicating matters that involve cultural difference.

### 1.2.5 Media Representation: Islamophobia, Racism, and the Other

Several authors interrogate the stereotypes proliferated by media representation of the so called "sharia debate" critiquing it for uncritically facilitating Islamophobia and racism. In an extensive and systematic study of the mass media publications on the sharia debate, Anna Korteweg (2012) found two major types of representation of Muslim women's agency in the debate, each with particular consequences for how the larger issues were framed. First, the majority of media representations conceptualized Muslim women's agency as real only if women resisted Islamic tradition and opted for secular institutions. This approach was most often associated with stereotypically homogenized, racialized, and othering representations of Muslim communities generally. The second and less common approach represented Muslim women's agency as embedded within Muslim communities. This approach according to Korteweg was much better able to represent Muslim women as genuine agents negotiating complex intersecting fields of inequity, freedom, and marginalization.

Sherene Razack (2008) offers a thorough analysis of the discourse of the "sharia debate." She highlights the racialization, latent imperialism, and othering that permeated much of the discourse of the "sharia debate." She explores how the "modernity/ premodernity" distinction was used in the discourse as a kind of racializing colour line

between the (white) civilized secular western citizen and the (dark) barbaric religious and premodern other.[27] Ultimately Razack is not sure what could have been done differently policy-wise, as Muslim women seem to be caught between a rock and a hard place. On one side stands what seems to be a racist, Islamophobic, white-supremacist state and majority population and on the other a patriarchal religious community. Her main issue is with how the debate proceeded, suggesting that a much different discourse should have been used to achieve the same policy ends without the imperialist baggage. Jasmin Zine (2009) agrees with Razack's analysis and further argues that the Canadian approach to the "sharia debate" constitutes a kind of disciplining of Muslim communities. In the name or protecting the Muslim woman, Zine argues that the public discourse and policy arising out of the debate functioned more effectively to reinforce the paternalism of the state (Zine 2009, 152). In her most recent article, Zine furthers her analysis of the essentializing representations of gender employed by both forms of religious extremism and imperialism in the "sharia tribunal affair" (Zine 2012). Ironically, she sees several similarities in the way these opposed discourses both represented Muslim women as being in need of rescue and lacking agency. In other words, religious extremists and secular imperialists, though opposed to each other, both ultimately represented Muslim women as lacking agency and needing rescue. Zine shares with others the critique of the polarization of the debate that characterized religion as anti-woman and the secular state as feminist. Zine concludes with a call for a much more diverse discourse that allows for deeper discursive engagement with the issues raised in the sharia tribunal affair, critiquing the gendered and racializing discourses on either side of the dominant polarity.

[27] Razack sees Islamphobia as a substitute for racism, an alternative way to espress what is essentially racially motivated hostility. Zine sees racism as having a role in Islamophobia, but she does not reduce Islamophobia to racism.

In a similar vein, Itrath Syed (2012) criticizes three main tracks of the "sharia debate" discourse: the denationalizing of Muslims, the representation of Muslim women as infantilized, and the representation of sharia as fossilized.

Meena Sharify-Funk (2009) examines how the media both represented and also shaped Muslim communities by privileging the voices of two particular Muslim institutions, one conservative, and the other very liberal. Sharify-Funk argues that this controversy driven approach of the media represented Muslim communities as deeply polarized at the same time the media was reinforcing and deepening this polarization in the community. Katherine Bullock (2012) argues similarly that the mass media deeply influenced how the debate was represented publicly through the structural elements affecting the gathering of information for mass media dissemination, and other elements such as framing, labeling, and the construction of "balance" and "choice." Bullock argues that through these measures Muslims against faith based arbitration were over-represented and Muslims in favour of faith based arbitration, regardless of how qualified and thoughtful their support was, were misrepresented and marginalized.[28]

Trevor Farrow (2006) aims to clarify what he argues are three crucial misunderstandings spread through the media debate on faith based arbitration. He argues first that the central issue of the "sharia debate" was not simply about whether to allow or prohibit religious tribunals, rather it was about state enforcement of their agreements; second, this issue does not affect Ontario alone, and third, the issue should not be represented as exclusively or even primarily as a Muslim or even religious issue, but as the much larger issue of the privatization of the Canadian public civil justice system.

[28] Griefenhagen joins those who critique the discourse used to engage the issues during the "sharia debate". In particular he engages how the term "sharia" was used and represented in the debate, as well as how agency was represented in the debate (Griefenhagen 2005).

Cathy Huth (2008) also takes the media to task for misrepresenting the issue of faith based arbitration, in three key ways. She holds that the media incorrectly represented faith based arbitration as pushing outside the boundaries of multicultural policy, as undermining the Canadian state, and as destabilizing the principle of one law for all. Following an analysis of the media representation of Islam, the sharia debate, and arbitration generally, and an analysis of the relevant public policy issues, Catherine Morris also exhorts policy makers to consider carefully how to protect both religious freedom and vulnerable persons in public and private justice, especially in the context of polarized and inflammatory media coverage (Morris 2006).

Audrey Macklin (2012) challenges the assumed cultural neutrality and unencumbered agency of the "secular liberal subject" in the sharia debate, and how it is counterposed to the "encultured subject" who is imagined to be much more encumbered and even inhibited by his or her culture. While other authors focus on the construction of the encultured subject in the discourse of the sharia debate, Macklin takes a different approach by exploring the illusory aspects of the construction of the unencumbered liberal subject. First, she points out that the issues of risk to vulnerable people highlighted in the sharia debate are not unique to faith based arbitration but in fact are intrinsic to arbitration and private ordering generally. Second, using examples, Macklin illustrates that even secular agreements issuing from private ordering procedures that raise serious gender equality rights concerns can not only arise, but these agreements have even been enforced under judicial review. Therefore, to suggest that gender inequity in private ordering is primarily a religious issue and that secularism is the solution is misleading. James Thornback provides another similar analysis based on the media discourse of the

Sharia debate. Thornback observes that the majority of journalists still conceive of Islam as monolithic and opposed to the West, and that this conception leads to polarizing the issue around religion, either rejecting or defending Sharia, but largely ignoring the deeper issues raised about domestic law in Canada. Thornback argues that only those journalists who did not represent Islam as the other were able to address in a sober and reasoned manner the crucial concerns at stake in Ontario legal structures (Thornback 2005).

### 1.2.6 Legal Pluralism

In her well-known book *Multicultural Jurisdictions,* Ayelet Shachar (2001) is mainly concerned, with the possibilities for accommodating genuine legal diversity in multicultural countries such as Canada without compromising the rights of vulnerable people. Specifically on the sharia debate, Shachar uses the case study of faith based arbitration to argue that, because group pressure to use alternative dispute resolution in Muslim communities will be strong, added procedures should be included in faith based arbitration such as independent legal advice in order to protect individual equality rights (Shachar 2005). In later articles, Shachar argues that vulnerable minority group members should not be put in the position of choosing between a potentially patriarchal and inequitable religious community on the one hand, or a secular legal system that takes little or no account of cultural diversity on the other (Shachar 2008). Shachar proposes a system in which religious communities are encouraged to more deeply commit to operating in line with the norms of the (gender) equity of the secular system, and in which the secular courts are encouraged to more genuinely meet the needs of culturally diverse minorities in the context of the secular courts. Sheema Khan (2007) argues that

the sharia debate already illustrates the development of transformative accommodation at least in the sense of increased participation in public debate of Canadian Muslim communities who employed broad accessible discourses to persuade the larger society rather than parochial language designed only to convince community insiders. Even though faith based arbitration was prohibited, Canadian Muslims became better integrated into the discourses and activities of public engagement, and for Khan this represents an important sign of growth and maturation of Muslim Canadian communities.

Other authors offer ways to fine tune Shachar's proposal for transformative accommodation. Jehan Aslam (2006) argues that it was a mistake to prohibit faith based arbitration entirely. He argues rather that stronger forms of judicial oversight of arbitration be instituted to replace the "rubber-stamp procedural review that seems to be the current norm under the Arbitration Act" (Aslam 2006, 845). Assuming that anyone challenging an arbitral agreement did not have informed consent could be an effective way to easily overturn unequal agreements according to Aslam.[29] Similarly, Veit Bader (2009) argues for a midway solution between absolute secularism and absolute accommodation. He recommends what he calls "associational governance," which is intended to be an institutionally plural approach to addressing legal diversity similar to Shachar's joint governance model. Ultimately, Bader argues that what he calls the zero accommodation approach of the McGuinty government missed the opportunity to more effectively protect vulnerable people in the context of family law disputes.

[29] Critics might charge that this would make arbitration useless. However, in his defence I believe Aslam means that if a secular court finds the agreement to be unfair according to Canadian legal standards, it should be overturned, not simply overturned automatically if someone brings the agreement to court for judicial review.

In contrast, Laureve Blackstone (2005) argues that the McGuinty government was right to prohibit court enforceable religious arbitrations. She even goes a step beyond the McGuinty government arguing that family law should be prohibited from being adjudicated under the Arbitration Act altogether. However, she also recommends that the conversation regarding the recognition and limited accommodation of cultural and religious diversity in law not be preempted, but rather developed and engaged. Blackstone looks to England, Australia, and the United States for examples of alternatives to court enforceable faith based arbitration that still effect genuine engagement with legal diversity in the context of cultural and religious minorities.

### 1.2.7 Sharia Law

One of Anver Emon's greatest contributions to the debate is a rigorous history of Islamic law, its contextual and adaptive nature, and especially its transformation in the context of western colonialism and the modern nation state (Emon 2012; Emon 2007; Emon 2006). Emon points out that a good deal of the characteristics of what is now called "sharia law" that western commentators disapprove of, are ironically largely the result of western colonial changes to its practice that "froze" it in time, taking away its more flexible, contextual, and adaptive nature in the process. Furthermore, Emon offers suggestions for how a multicultural state might facilitate the development of diverse forms of sharia practice again, with an eye to protecting the rights of vulnerable people in the process.

In the same vein, Lynda Clarke (2012) outlines the complexity of "sharia law." However, while Emon documents the historical development and diversity of these

traditions, Clarke explores the meanings of "sharia law" employed and negotiated by Muslim minority communities in the West in more recent history. Clarke documents the politics and diversity of this discourse, as well as the ongoing struggle for authority in these debates within diverse Muslim communities.

### 1.2.8 Impact on Muslim Communities

A number of articles attempt to document the impact of the sharia debate on Muslim communities as stakeholders in the debate. Alia Hogben (2006), a prominent leader in the Canadian Council of Muslim Women (CCMW), describes her organization's involvement in the sharia debate, and its reasons for opposing faith based arbitration. The CCMW felt that the risk to vulnerable people presented by the then current form of the Arbitration Act was too high. Hogben however laments the way the discourse opposed multiculturalism and religious freedom over against women's equality rights, arguing that women's equality rights are embedded in both multiculturalism and religious freedom. The article concludes by documenting publications produced by the CCMW that provide practical information guides for Muslim women regarding Canadian and Muslim family law.

Faisal Kutty (2012) on the other hand notes what he regards as a missed opportunity for Muslim communities in Ontario. He argues, in light of the observation made by many scholars that the prohibition of faith based arbitration has not in fact prohibited the formation of state-enforceable family law contracts, that the McGuinty government's decision to prohibit faith based arbitration has missed the opportunity to facilitate the "organic bottom-up consensus-building approach to Islamic reform" that

could have taken place in the context of faith based arbitration service provision among Canadian Muslim communities.

Nevin Reda (2012) provides an analysis of the sharia debate as it progressed among Muslims rather than more generally in the public discourse. Although the "good Muslim/bad Muslim" dichotomy takes on a very different meaning in dominant western discourse on Islam, this dichotomy within the sharia debate among Muslims was made by the IICJ to mean good Muslims support faith based arbitration while bad Muslims oppose it. Reda challenges this polarization of the Muslim community in the sharia debate, offering several religious arguments for her position as a Muslim who opposes faith based arbitration. She maintains that a different, more diverse, conception of Muslim communities in Canada must be facilitated in order to improve the process and quality of future debates.

In conclusion, my literature review illustrates the importance of my dissertation research. Most of the work on the issue of the debate on faith based arbitration and the government's policy changes that followed is speculative and ideologically based. My project is one of very few that has attempted to find what Muslim communities are practicing on the ground, and what their responses to the debate on faith based arbitration were. Furthermore, no one has looked at the impact of the government's policy changes following the debate on faith based arbitration on Jewish communities of Ontario. My project will show that much of the discourse on the so-called "sharia debate" is misguided, not only in terms of how Muslim communities and practices were represented and framed, but also because it does not capture the real situation of vulnerable people. It was a debate rooted in ideological conceptualizations of freedom and justice as well as

cosmological ideas of good and evil rather than reality. Futhermore, policy that arose following the "sharia debate" too was framed in terms of "rescuing" vulnerable people rather than engaging them as people with agency. My research attempts to take into account the voices of Muslim and Jewish community members in a way that will inform policy in order to make it better suited to facilitating the agency of vulnerable people rather than in spite of their alleged absence of agency.

## 1.3 Chapter Overview

In **chapter two** I draw together several theoretical sources that I use to interpret my research, and I make a number of theoretical contributions. Building on the work of other postcolonial scholars (Asad 1993, 2003; Razack 2009), specifically their criticisms of the secular, I argue that a new notion of secularism is necessary to address the issue of what I have called "Imperial secularism," which I argue is a form of secularism that works to create a hierarchy in society along a continuum of secular and modern or dominant forms of religion to minoritized, marginalized, "unmodern," racialized, orientalized, and othered forms of religion. I argue that this kind of secularism must be countered with anti-imperialist forms of secularism that work toward non-othering forms of secularity that treat all religions equally.

In this chapter I coin the terms "religionization" and the "subnatural" rather than "religion" and the "supernatural" to define what it is social scientists of religion are studying. In other words I argue that religion be conceptualized and studied as a located

concept bound up with local power relations and cultural norms.[30] Rather than reaffirming the dominant status quo by accepting "the modern concept of religion" as a workable frame for analysis I suggest that the conceptual frame "religion" itself should be made the object of scholarly analysis in the spirit of the work of Talal Asad and others. Part of the aim of my contribution here is to effect a more descriptive and critical conceptualization of religion that will aid in forming an anti-imperial secularism that does not other religion normatively, but rather treats religions equally as cultural groups among other communities and groups contained and managed by the modern state. Finally, in the context of several theoretical and practical developments around multiculturalism, I make a modest contribution. Adding onto forms of critical multiculturalism that aim to resist dominance and establish genuine equality for minoritized groups, and in addition to anti-racist, feminist, and anti-colonial forms of multiculturalism, I add the requirement of an anti-imperialist secularism if genuine equality is to be fostered by multicultural policy and practice. Regarding the more specific multicultural issue of the limits of accommodating (religious) legal pluralism, after describing Ayelet Shachar's proposed "transformative accommodation" in this chapter I state that I will return to evaluate Shachar's proposed "transformative accommodation" in the conclusion of the dissertation.

**Chapter three** outlines the methodological approaches and challenges of this project. I begin by attempting to position this project in the context of western scholarship on others, which has too often been orientalist and served western economic and imperial interests. I attempt also to situate myself as a western researcher. I then document my research strategies and activities. I outline the challenges of this project

[30] See also McCutcheon 2003.

methodologically. I outline my sampling procedures as well as my research instruments and details of the data collection process for this project. And finally I outline my strategies for analyzing the data gathered in this project.

In **chapter four** I provide a brief history of the sharia debate in Ontario while also offering an analysis of the events based on Sherene Razack's insights. My central argument in this chapter is that because of the realities of Canada's modern legal system, which is fundamentally dependent on the exercise of human agency to be effective, the stereotypical figure of the "imperiled Muslim woman" (Razack 2009), devoid of agency as she is imagined in public discourse, cannot be protected by Canadian law. I do not make this point in order to make a moral argument. I make this as a technical legal argument in order to show that the policy arising from this discourse has been largely ineffectual on the ground. Therefore I argue that because of the influence of the stereotypical figure of the imperiled Muslim woman as outlined by Razack, and despite the laudable but limited protection that has been afforded through the revised Arbitration Act, ironically the deployment of the "imperiled Muslim woman" has produced more harm than protection for vulnerable Muslims.

An individual without agency cannot be protected, or rather cannot protect himself or herself, under the current family law regime of Canada generally and Ontario specifically.[31] Therefore I argue further, because the figure of the imperiled Muslim woman is imagined for several reasons to be virtually devoid of human agency, that she cannot be protected by the Ontarian family law regime. Policy and law based on the figure of the imperiled Muslim woman are designed to protect people who are imagined to have no agency. And for vulnerable people, there are at least two damaging results.

[31] See also Gill 2001; Chambers 2008; and Christman & Anderson eds. 2005.

First, I show that such policies cannot protect vulnerable people because the existing legal system is fundamentally designed to protect people largely only when they exercise their agency.[32] Despite the fact that faith based arbitration is technically no longer practicable in Ontario (and I clarify the extent to which that indeed is the case here), de facto legal pluralism in practice leaves vulnerable people open to many forms of legally enforceable contracts that might be based on religious law. Because the solution of the McGuinty government was simply to end all faith based arbitration, in part because vulnerable Muslim women were imagined as unable to exercise the agency necessary to access the protections of the legal system over against the "dangerous Muslim man," little further policy has been developed to assist vulnerable people that may find themselves presented with these other types of legal contracts.[33] Second, vulnerable people are much better protected I argue with policies and practices that support and facilitate their agency, rather than those that are based on the assumption of an absence of agency. For the most part agency-affirming policies have not been developed, and in the limited extent to which they have been developed they have remained largely hidden. I will conclude with a number of recommendations for agency-affirming or agency-facilitating

[32] Although generally speaking there are many laws, policies, and regulations designed to protect people even when they do not or cannot exercise agency, for example young children or mentally challenged persons, in the context of family law specifically several legal studies scholars have noted that the nature of family law in Canada, and the realities of de facto legal pluralism in the context of family law, make the exercise of agency crucial for enabling the protections that the Family Law Act affords (see Chapter 4). Combined with the fact of several remaining avenues for establishing legally enforceable family law contracts that can still be deeply shaped by religious law, this contrasts markedly with the public perception that the McGuinty Government's decision to end faith based arbitration fully protects vulnerable people from the potential dangers of faith based alternative dispute resolution.

[33] I am not saying that there were not legitimate concerns about family and community pressures to contract out of one's rightful default legal norms in Ontario Family Law in the context of faith based arbitration. What I am saying is that in order for the legal changes made to the Arbitration Act to effectively protect vulnerable people in the context of the realities of Ontario law, many more agency-affirming policies would need to be developed. Again, I will explore this in more detail below.

policies as well as methods for making existing agency-facilitating policies more visible to those who may benefit from them most.

After having explained in chapter four why the stereotypical figure of the "imperiled Muslim woman" cannot be protected by secular law, even under the revised Arbitration Act, I explore and critique in **chapter five** how this stereotype, as proliferated by the media during the debate, precludes the possibility of protective justice in the context of Muslim family law. One of the primary reasons that the "imperiled Muslim woman" cannot be protected is that she cannot, according to the stereotype, receive anything like justice at the hands of her community and religious tradition. This is because she is imperiled by what is imagined to be irredeemably patriarchal sharia law implemented at the hands of misogynistic Muslim men. I argue in this chapter that to the stereotypes of the "imperiled Muslim woman," "dangerous Muslim man" and "civilized European" that Razack identifies, we might add the stereotype of "uncivilized sharia" (Razack 2008).

**Chapter 5** explores this latter stereotype for its productive power[34] by examining the media discourse on the Sharia debate. I also attempt to critique this stereotype such that, on the one hand, inequitable interpretations of sharia may be left open to feminist critique without, on the other hand, falling back into the disparaging and imperialist stereotype of "uncivilized sharia." Based on Razack's argument regarding the three stereotypes she identifies (see chapter 4), I argue that the stereotype of "uncivilized sharia" also does not in fact effectively dismantle patriarchal inequity or violence in any case, either in Islamic culture or Western culture, but rather reinforces it (Razack 2008).

[34] Razack is referring here to Foucault's thesis that power is not simply repressive, it is also productive. In this instance the stereotypical image of the imperiled Muslim woman has been used to produce assumptions and reinforce relations that further western interests.

Dismantling the stereotype of "uncivilized sharia" is therefore I argue an important strategy for also dismantling patriarchy, gender inequity, and violence in both dominant and minoritized cultures.

This chapter also aims more generally to document, analyse, and critique the othering of Muslims and Islam in the context of the sharia debate as it proceeded in the media. I explore the media analyses of the public sharia debate of several authors here. I analyze how the interpretations of Islamic legal tradition put forth in the media differ dramatically from those of Muslims and academic scholars generally. Finally, I argue that the modern media is a fundamental instrument of secularization (as I have defined secularization in chapter three). Most importantly for my purposes, the media establish and maintain secularization as cultural hierarchy. This means that secularization is as much about protecting dominant cultural (secular and religious) interests and racializing and marginalizing religious others as it is about regulating religion fairly in an allegedly neutral secular public sphere. I use this media case study of the sharia debate to illustrate how these things are accomplished in the modern West.

I present in **chapter 6** the results of my fieldwork. Based on my empirical research with faith-based religious groups in southern Ontario from 2007-2009, I find that in practice the most pressing issue of the sharia debate for Muslim leaders and adherents in Ontario was not faith-based arbitration, but rather religious divorce.[35] Much of the so-called sharia debate focused on the plight of vulnerable people in the context of faith-based arbitration. The media generally and Muslim and non-Muslim feminists specifically expressed concern that Muslim women and children might not receive fair and equitable treatment in the event of a civil dispute (such as a contested will) or of a

[35] Portions of this section as well as chapter 5 have been previously published (Cutting 2012).

marriage breakdown (involving disputes over spousal support, child support, custody, or division of family resources) (see Boyd 2004). Much of the public "sharia debate" assumed that Muslim community leaders were fully aware of the Arbitration Act and intended to use it to make third party decisions on behalf of, for example, divorcing Muslim couples in ways that would be detrimental to Muslim women. However, my fieldwork findings suggest two unanticipated results. First, Muslim couples in the process of divorce did not seek out full arbitration agreements on the matter of divorce itself. Rather, the majority of Muslims approaching Muslim leaders for assistance with civil disputes were looking for a religious divorce in addition to a legal divorce. Second, Muslim women constitute the vast majority of those approaching Muslim leaders and other Muslim organizations for assistance in securing a religious divorce. I argue that for these reasons the 2006 policy change enacted by the McGuinty government has made little difference on the ground, and that the most pressing issue impacting Ontarian Muslim women's rights and wellbeing – the granting or withholding of religious divorce – has been ignored.

To consider the disparity between the prevalent discourse and Muslim religious arbitration in practice, the first part of this chapter reports my findings regarding the practices of Muslims with regard to private ordering of civil disputes within three organizations: the Islamic Institute for Civil Justice, the Darul Iftaa[36] and the Islamic Social Services and Resources Association. I briefly mention research on other similar Muslim dispute resolution service providers in Ontario. Based on my fieldwork research findings, I demonstrate that by far the most prevalent practices taking place among Muslim communities in Ontario are Muslim divorce and Muslim mediation. Arbitration

[36] Darul Iftaa literally translates as House of Advisory Council or Opinion.

is not a common practice.[37] Muslim women are the overwhelming majority of clients seeking this service. These findings challenge the negative representations of Muslim dispute resolution proliferated during the public debate. The second part of the chapter discusses the relevance and impact of this reality for public policy and practice.

My fieldwork research is based on informal semi-structured interviews with 30 Muslim men and women, including leaders, social workers, and adherents. Two Muslim organizations were kind enough to share brief anonymous case summaries of Muslim divorce/dispute resolution cases. I have received 21 such case summaries in total to date. I examined these fieldwork results for common themes and issues that cut across the majority of the interviewees and I construct my argument around representative examples from my fieldwork.

**Chapter 7** is the final concluding chapter of the dissertation. I begin with an evaluation of Ayelet Shachar's proposal for transformative accommodation with regard to the potential for and limits of (religious) legal accommodation in Canada (Shachar 2001). I support some of Shachar's suggestions, and based on my research offer some suggestions of my own. I also evaluate Anver Emon's proposal to facilitate what he calls multicultural jurisprudence. Second, I ask the question "is secularism bad for women?" My answer is that certain kinds of secularism, for example "imperial secularism," have been very bad for women, especially racialized and religionized others. I reiterate my argument that anti-imperial forms of secularism must be developed in response. Finally, I offer several concrete policy recommendations based on my research that I argue may

[37] As I document below, this is not simply because faith based arbitration was not available or allowed before or now. My research suggests that it is because there is simply no demand for it among Muslims or Muslim service providers, and most surprisingly, even by those organizations reported in the media to have been pursuing the practice of faith based arbitration.

address the policy gaps that persist since the conclusion of the "sharia debate," and continue to potentially place vulnerable people at unnecessary risk.

## Conclusion:

I will examine in this dissertation how a secular Canada, in the context of the policy goals of its multicultural law, accommodates the Canadian Charter guarantee of religious freedom of Ontarians who wish to practice faith based arbitration in Ontario, and what the limits of this accommodation are. There is only one other major fieldwork project I know of, Julie Macfarlane's, that extensively explores this issue on the ground. Because this issue has been so under-researched my project accomplishes, in tandem with Macfarlane's, important groundbreaking research that requires further research to be complete and representative. Given the paucity of fieldwork on this issue my work is far from redundant, but rather reinforces and confirms other new research in the area, while also accomplishing unique fieldwork and analysis. Based on my fieldwork findings that there remain several avenues for procuring legally enforceable contracts related directly to family law matters, and that the vast majority of people in Muslim communities seeking religious alternative dispute resolution services are women, I argue that in large part the McGuinty Government has missed the "policy boat." I argue that policies designed to facilitate Muslim women's agency must replace policies designed to protect people imagined to be largely devoid of agency in order to facilitate better protection of vulnerable people given the realities of Ontario's family law. I argue further that the sundry and pernicious stereotypes prevalent in the public debate must be dismantled in order to effectively oppose patriarchal inequity and violence. I offer several policy

recommendations designed to facilitate these aims here. It appears that a secular Canada in the context of the policy goals of its multicultural law has attempted in this instance to protect vulnerable people by eschewing to some extent accommodations of religious freedom as outlined in the Canadian Charter. I have argued that religiously influenced legally enforceable contracts are not so easily eschewed under Ontario Family Law. Therefore, the issue is rather that agency affirming policies designed to assist vulnerable people in activating and benefiting from the protections the family legal system offers is what is needed, rather than imagining that the reforms to Ontario's Arbitration Act, which are positive as far as they go, have completely addressed the issues raised in the debate on faith based arbitration. Although the so-called "sharia debate" ended in 2005 and the amendments to the Arbitration Act were finalized in 2006, this research project is still pertinent to ongoing issues of faith-based alternative dispute resolution practices in Ontario, Canada, and globally. For example, several states in the United States are passing laws to prevent the use of foreign laws in state courts as part of a spreading reaction to the potential use of Islamic law or sharia in legal matters (Masci and Lawton 2013). Regrettably, they appear to be repeating the mistakes I will be highlighting in the following chapters.

# Chapter 2
# Theory: Religion, Multiculturalism, and the Secular

My doctoral project explores how a secular Canada, in the context of the goals of its multicultural policies, accommodates the Canadian Charter guarantee of religious freedom for Canadians who wish to practice faith based arbitration in Ontario, and what the limits of this accommodation are. In order to answer this question I must establish the theoretical underpinnings of the concepts used in the question. In other words, what do we mean by secularism, multiculturalism, religion, and religious freedom, and who decides what the limits of accommodation are? How are these social realities related to one another? In this chapter I aim to theorize these concepts, and in some cases offer new conceptualizations intended to fill what I perceive to be gaps in the existing literature on these concepts and theories. I use these concepts and revised theories to express my conclusion that the "sharia debate" was an example of how Canadian secularism distorted public policy debates by positing abstract caricatures of a Muslim "other", specifically, the vulnerable, uneducated, Muslim woman and the predatory, dominating, irrational pre-modern Muslim man. Sherene Razack refers to these stereotypical figures as the "imperiled Muslim woman" and the "dangerous Muslim man"(2008). This specific form of secularism served to promote racism, sexism, anti-immigrant sentiment, Orientalism and Islamophobia. Sometimes, this form of secularism was deployed by several figures and organizations in the name of "imperial feminism" over against Islam and Muslims in Canada generally. This form of secularism operated through a discourse that did not refer to real women. Therefore I introduce original empirical evidence to show that these

media and public discourses have nothing to do with the real lives of Muslim Canadians and therefore are an abstract fabrication of an Orientalist imagination.

## 2.1 The Secular, Secularism, and Secularization

The notion of the secular is foundational to modernity generally and modern nation states in particular (Casanova 1994; Taylor 1998; Asad 2003). In order to understand how a "secular" Canada accommodates religious freedom it is necessary to understand the secular and secularization. Jose Casanova makes an important and useful distinction between the secular or secularization as a concept, and secularization as a sociological theory (Casanova 1994, 12). The notion of the secular began life as a concept created by the Western Christian church in the Middle Ages where it came to signify priests who worked out in the world as opposed to the religious clergy who had withdrawn from the world into the monasteries (Casanova 1994, 13).[38] Coming historically out of this context, the concept of secularization has two main meanings, one spatial and political, the other having to do with levels of adherence. Regarding the former, Casanova states, "Secularization as a concept refers to the actual historical process whereby this dualist system within "this world" and the sacramental structures of mediation between this world and the other world progressively break down until the entire medieval system of classification disappears, to be replaced by new systems of

[38] The secular also came to signify lands previously owned by the church that had been appropriated by non-Church agents -- mainly the state (or aristocracy) -- following the Protestant Reformation (Casanova 1994, 13). Therefore, it is important to understand that the idea of the secular began as a religious concept. When the Catholic Church dominated much of Western Europe during the Middle Ages, the spatial-political-conceptual world of this region was divided into at least two separate realms: the secular, and the religious.

spatial structuration of the spheres" (Casanova 1994, 15). Whereas previously one might say the secular was a realm within the dominant religious sphere, now the secular dominates the spatial-political terrain while religion is made to find its place within it. Politically speaking, now there is really only one world, whereas previously there were two discrete realms.

Secularization theory is a theory of the changing place of religion in modern society. According to this theory, *secularization* is generally thought to be a process generated by the changes brought about by modernization that tend to change the place of religion in society from one of relative dominance to one greatly reduced in power, scope and influence by comparison (Martin 1978: Berger 1990; Bruce 2002). The notion of the *secular* on the other hand is generally understood to be the conceptual opposite of religion, keeping in mind that the secular was itself a Christian concept historically. *Secularism* then is generally understood to be a political doctrine that aims to achieve varying levels of secularization in a given modern or modernizing society (Seljak 2005, 179).

I require a new understanding of secularization in order to explain what I have found in my research. Therefore, I will summarize the dominant understandings of secularization theory in the sociology of religion literature in order to identify where my nascent understandings of secularization fill in what I believe are gaps in the existing theory. One might think that I should define how I use the term religion before I theorize the secular or secularization. After all, does not religion come first historically, ruling over traditional groupings of people in an absolutist, non-rational, community-oriented, and pre-modern way? Does not the secular, modern world come quite late historically,

"freeing" the rational individual from traditional religions and restricting the powers of religion to a nascent private sphere so that people do not destroy each other because of religious bigotry? These discourses on religion and secular modernity are highly productive, in the Foucaudian sense, of the economic and political interests of modern societies and will be deeply questioned and deconstructed in this analysis. Therefore, the reason I theorize the secular before I define how I will use "religion" is that I accept the argument that how we define and understand religion today is thoroughly a modern construction (McCutcheon 1997, Smith 1982, Asad 1993). One then must first understand something about modern secular projects in order to understand how and why religion is constructed, defined, and circumscribed in just the way it is. I argue the modern category formation of "religion" is a product and tool of secularization. Thus I will explore the modern program and project of secularization before I analyse one of its key tools. I am not saying that the various cultural traditions such as Christianity, Islam, and Judaism that are now understood to be among the world's "religions" did not exist prior to modernity. I am saying that the particular way that these traditions have come to be contained by the label "religion" through certain historically specific defining acts, and the way these traditions are thought about, circumscribed, managed, regulated and, in certain cases, policed in modern societies is thoroughly modern, and did not exist in the same way previously.

### 2.1.1 Differentiation as Religionization

Talal Asad has provided a useful conceptualization of modernity over against those who would argue that modernity is not a verifiable object when he states that

"[m]odernity is a project—or rather a series of interlinked projects—that certain people in power seek to achieve. The project aims at institutionalizing a number of (sometimes conflicting, often evolving) principles: constitutionalism, moral autonomy, democracy, human rights, civil equality, industry, consumerism, freedom of the market [capitalism]—and secularism (Asad 2003, 13). Rendering modernity this way helps frame it in a manner that it can be studied through its particular projects and therefore opened to academic interrogation, rather than being dismissed as unverifiable and therefore illegitimate as an object of academic inquiry.

I argue in this section that the modern project of secularization is not one that simply works with the allegedly universal concrete categories "secular" and "religion". Rather, secularization is fundamentally a "religionizing" project. I coin the term "religionization" intending to invoke many of the same ideas that racialization was intended to convey about "race". The term racialization was intended to disrupt established and reified cultural ideas about "race" as a "real" thing.[39]. Since race is not a biologically supported notion, it is a socially and culturally constructed one, and that is what is suggested by replacing the term "race" with racialization. "Religionization" serves a parallel function in this paper.[40]

Similarly, by coining the term "religionization" I hope to disrupt some established notions about "religion". Scholars of religion have observed for many years now the

[39] Many academics now agree that although skin colour can be passed down genetically, race, which means that several other genetically inheritable traits, related to mental ability for example, are generally more similar among those with the same skin colour, and less similar among those with different skin colours, is a socio-culturally constructed notion, as this has been proven biologically to be false. In other words, although racialization is a social reality, race is not a biological reality (Omi and Winant 1993; Anthias and Yuval-Davis 1992; Goldberg 1993).

[40] However, the idea that religion is an invented category and that religion is a social construction is not new (McCutcheon 1997, Smith 1982, Asad 1993). Therefore "religionization" does not introduce new theory in the academic study of religion, but is meant rather to succinctly embody and communicate ideas that are not well understood in public consciousness and discourse.

problem of essentializing the category "religion" (Asad 1993; McCutcheon 1997; Wiebe 1999, Masuzawa 2005). Religionization certainly echoes those critiques. However, it suggests also that modern projects of conceptualizing, defining, and re-defining religion are continually maintaining and/or revising what the term "religion" means and does culturally. "Religion" is not simply a pre-existing given that modernity then privatizes, creating a neutral non-religious, or even ecumenical space; it is crafted culturally and constructed strategically. Modernity actively defines, maintains, and redefines the concept of "religion," deciding who or what is assigned to that category in order not only to contain, manage, and control these people and things, but also in order to actively "Other" religion in order to define itself as its opposite, the secular. Religion is the Other to the secular. Designating something as religious or not religious also becomes bound up in particular projects that create a cultural hierarchy between on the one hand secular and/or dominant forms of religion and on the other hand marginalized forms of religion. I argue below that this hierarchy construction and maintenance components of religionization are useful tools for what I call imperial secularism.[41]

Jose Casanova differentiates three elements of secularization: decline, privatization, and differentiation (Casanova 1994, 11-39). Decline is fairly self explanatory. This facet of secularization theory states that people will cease to think and act "religiously;" they will drop religious ideas for secular ones (Casanova 1994, 25). Privatization usually means that religion has become an individual private affair rather than a collective public issue (Casanova 1994, 35). Individuals now have the freedom and

[41] Talal Asad has shown that secularism is not only to be understood the way Charles Taylor does, as a benign and progressive project. Secularism in practice can also be used to accomplish the goals of powerful and dominant national interests, quite apart from the benign theoretical goals of secularism (Asad 2003). It is this latter form of secularism I point to with my term "imperial secularism."

power to choose their religion, or to choose to have none, and the secular state declares that one's religion is no prerequisite for state membership or human rights. Privatization is often presented in discourses on modernity as a kind of liberation, rather than also as a new kind of requirement enforced by the modern state. Furthermore, Asad points out that the notion of the privatization of religion is in fact unclear at several points, not because religious people are tying to infiltrate the public sphere, but because the very extent and comprehensive powers of the modern state over any and all "private" affairs makes it essentially impossible to separate religion from the workings of the state. This insight is relevant to this study in particular in that it uncovers several problems with Casanova's suggestion that the deprivatization of religion can be modern if only modern forms of religion are allowed to deprivatize. In fact, the state closely regulates the private lives of all subjects, regardless of the form of religion they practice (Casanova 1994, 211-234).[42] These are important concepts and critiques, but the notion of differentiation bears deeper consideration for my project than the first two parts of secularization theory as outlined by Casanova.

Differentiation in modern society begins with the increasing specialization of labour in increasingly complex modern economies. With the advent of modernity, modern factories increasingly demanded specialized workers for very specific and limited tasks. The specialization of skilled labour carried over into the construction of specialized autonomous spheres of public activity. Differentiation in secularization theory classically entails the gradual separation of religion from other increasingly autonomous realms, spheres, or institutions of modernity such as the state, economics, arts, medicine, education, and virtually every sphere of what is now regarded as "public life" (Casanova

[42] Although to be fair, Casanova distances himself from this claim later (Casanova 2008).

1994, 20-25). Now that this form of differentiation has become dominant, it is often difficult for moderns not to assume that these discrete spheres existed prior to modernity, and that now they are only more autonomous. I rather would agree with Talal Asad that the normative autonomous institutions and spheres we now know today discretely as the state, economy, science, religion, and others are not simply extensions of what came before, only liberated from each other. Rather, each of these "spheres" is in many ways a radically new construction, representing a revolutionary transformation from what came before, even if one can build a genealogy connecting the past to the present. Importantly here, "religion" as a modern conceptualization is very different than those meanings documented in genealogies of the term "religion" preceding modernity. Therefore, I argue that an under-used sense of the term "differentiation" should be reasserted here: differentiation as the processes of conceptualizing or defining an object not simply liberating an already existing conceptual object from other already existing conceptual objects. "The secular" requires an Other, "the religious." Both are co-created since they depend on each other. To question "the secular", one must immediately question "the religious". The process of continually defining and maintaining or reconceptualizing "religion" in modern societies is a primary task and strategy of secular and secularizing governments, economies, and cultures. The importance of this under-represented notion of differentiation for secularization theory should be asserted: differentiation means religionization, and it is intimately tied up with constructing hierarchies.

A further point about secularization theory bears making here. The majority of theories of secularization focus on how the modern state and economy (in other words modernity) impact on the religious subject, but normally only in an indirect way. In many

versions of the theory, secularization appears to be a process that is largely an unintentional and secondary consequence of modernization generally. For example, it is argued by Steve Bruce that a number of factors dislocate persons from the communities, social connections, economies, and systems of obligations that support an individual's inclination to be religious: plurality of religions, fragmentation of communities, individualization, and many others are all cited as events and realities of the "modern world" that indirectly, or at least secondarily erode traditional supports for and obligations to be religious, as well as felt needs for religions. What is missing from these theories is the notion that secularization is not simply a benign unwitting secondary affect of modernization, but rather a primary political project, strategy, practice, and discourse actively and consciously deployed to institute "western modernity" (Gorski et al 2008). Gorski et al speculate that the reason this most recent of meanings of secularization is also the most forgotten may be because, "as James Beckford rightly points out, . . . that many early sociologists 'were involved in political and practical schemes to clarify, obstruct or assist the decline of religion's significance' (Beckford 2003). By emphasizing grand, impersonal forces and processes ("science", "rationalization," etc.), the post-WWII generation of secularization theorists were not just conforming to then dominant ideas of science; they were also covering the tracks of their forebears (Swatos 1984, Vidich & Lyman 1985)" (Gorski et al. 2008, 15).

Modernity does not simply consist in "non-religious practices" that have adverse if unintended affects on religion. Rather, modernity creates, defines, and assigns the notion of "religion" in specific ways, not least of which involves the construction of religion as an Other to and subject of the modern secular state so that it may be managed

in certain ways. Therefore, the analysis of the secular and secularization in this project will not involve simply the examination of whether religious adherence is rising or falling in modern society. It will also not simply look at the actions of the state as attempts to shore up differentiation, as if the religious and the secular were assumed givens, and the lines between them simply needed to be reinforced. Rather, the analysis of the secular and secularization here will examine how religion and the secular are created, maintained or recreated and defined with regard to who is privileged and who marginalized through these constructions.

### 2.1.2 Imperial Secularism: Hierarchy Construction and Maintenance

There have already been several insights offered about what the "secular" was made to mean in the discourse of the Sharia debate (Razack 2008; Zine 2009; Syed 2012). These insights mostly build on the work of Asad, who has called for an anthropology of the secular (Asad 2003). Part of that project, as Asad has imagined it, reveals secularization to be a complex and revolutionary cultural shift rather than simply a reordering of boundaries between essentialized preexisting objects. Secularization is also deeply implicated in the history of western colonialism and imperialism. Political projects that deploy the secular often use this notion to other and colonize subject populations both at home and abroad. The secular comes to designate the dominant, and "religious" comes to designate the Other in need of modernity, despite the fact that much of so called secular (dominant) culture is also arguably deeply "religious." Sherene Razack observes in Asad's work the insight that the notion of the secular is used by modern nation states to establish the relations the state wants (Razack 2008; Asad 2003).

This notion is very different from that of Charles Taylor who argues that "secularism secures the power of the [benign] state as neutral arbiter" between dissenting religious and other types of political and cultural factions (Razack 2008, 161). Asad and Razack suggest rather that the (secular) state comes to represent the dominant community, and that one powerful way to justify certain types of control and othering of minoritized populations is to designate them "religious" minorities, and their "problems" "religious" in nature. The cultural construction and maintenance of this hierarchy of dominant secular (together with privileged forms and types of "religion") over minoritized forms and types of "religion" I argue should be regarded as an important component of secularization theory.

It is important to explore what the notion of the secular in this sense secures and achieves for dominant national populations and several dominant developed countries, what Razack would designate the family of white, western nation-states (2008, 160). For example, Asad observes that the banning of the headscarf in France achieved much more than simply the reassertion of the separation of church and state, and allegedly the potential protection of Muslim women's agency (Asad 2004 as discussed in Razack 2008). In many ways this public debate and final legal act was much more productive of reinforcing who does and does not belong to the nation, further racializing and Othering immigrant religious minorities in France, and justifying their political and economic marginalization and over-policing. My aim is to theorize these insights regarding this Othering and hierarchy work of discourses of the secular and the religious directly into secularization theory more generally, because I think they have a much wider applicability. I coin here the phrase "imperial secularism" in order to designate

theoretically how the "secular" is made to mean and accomplish things that serve imperial and dominant national interests in certain (and several) historical contexts. I do not argue here that imperial secularism is the only form of secularism, or that hierarchy construction and maintenance is its only function. There are different types and components of secularism as noted above in Casanova's work. The concept of imperial secularism is meant to add to the theoretical field of secularization theory, not replace all that has gone before.

I derive the phrase "imperial secularism" from the phrase "colonial feminism" used to designate a form of feminism that historically has been used to justify military intervention and colonial control of Other's lands and resources.[43] As mentioned before, the state uses the project of secularization to establish the relations it wants (Razack 2008, 148, 161). This does not of course mean simply that benign states always work to protect religious minorities against persecution, citizens against religious establishment by enforcing religious freedom, and individual (especially women's) rights over against communal rights and actions. It means rather that in the name of aiming at these rather benign goals, other more patriarchal and imperialist ends might also be achieved, in the same way that several feminists have observed "colonial feminism" was used in the service of neo-colonial interests in Afghanistan to far more affect than substantially improving the plight of Afghan women (Khan 2008). In the same way that women's

[43] For example, Shahnaz Khan concludes her article on Afghanistan, "I began this discussion with the suggestion that the desire for rescue of the Third World woman is a form of colonial feminism through which accounts of Afghan women's de-contextualized lives produce a discourse that suggests that timeless tradition, religion and the Taliban are the cause of their oppression. I have pointed out that identifying local patriarchies as the *sole* cause of women's oppression rationalizes military missions" (Khan 2008, 132. Italics mine). See also Leila Ahmed. 1992. *Women and Gender in Islam*. New Haven Connecticut :Yale UP; Frantz Fanon. 1965. *A Dying Colonialism*. New York: Grove Press (Both cited in Khan 2008); and Lamia Ben Youssef Zayzafoon. 2005. *The Production of the Muslim Woman: Negotiating Text, History, and Ideology*. Lanham, Maryland: Lexington Books.

rights can be used to justify wars on Others that in fact destroy and disadvantage women deeply, secularism can also be used to oppress religious minorities, justify over-policing religionized Others, and disregard genuine consideration of Muslim women's plight and agency rather than facilitating Muslim women's agency and improving their material and social conditions (Khan 2008).[44]

This means that promoting secularism is often as much about protecting dominant cultural interests and racializing and marginalizing religious Others, as it is about regulating religion in an allegedly neutral secular public sphere. In the same way that "gender" is not a neutral category, but has historically always referred to a culturally enforced hierarchy between masculine and feminine, so too the secular historically has not been a neutral category, but has in practice referred to a space that is stratified in hierarchies amongst secularism, dominant privileged religions and forms of religion and marginalized religions—despite modern claims to neutrality. Therefore, an essential component of secularization historically, that I have termed "imperial secularism", consists in installing a cultural hierarchy at odds with the aims of building and ensuring an egalitarian public sphere by means of a neutral state. In sum, an important component of secularization historically that lingers even today has been hierarchy construction and maintenance between dominant and marginalized social groups, a key component and strategy of the project of imperial secularism.

[44] "There is another option for the First World woman who wishes to express solidarity with Afghan women. She can interrogate her own situatedness and examine the ways in which her own elected representatives might have contributed to the condition of Afghan women's lives. Foreign forces, as I have underlined, have had a major role in creating the Afghan tragedy, and many of these forces answer to First-World elected representatives. Only a self-critical analysis which examines the complexities of local arrangements and their interaction with transnational forces can take us away from military rescue missions supported by sometimes well-meaning but myopic feminists." (Khan 2008, 132). I make here a similar argument regarding the Sharia debate.

Building on the analogy of feminism will help to explain further what I mean by the construction and maintenance of hierarchies. There is an important parallel between constructing hierarchies and the insights of third-wave feminism (Gillis et al. 2007; Jushka 2001). The Othering process in gender hierarchy, according to third wave feminism, is understood as not being limited to that between men and women; the concept is extended to processes of racialization, imperialism, class differences, that is, Othering that creates a hierarchy among women between white, colonial, economically privileged women and Other women. I argue that there also exists, in part as a result of imperial secularism, a hierarchy of religions in the "secular" modern state along a continuum of privileged to Othered generated through racialization, histories of colonialism, class differences and other factors.

Furthermore, my argument has been that secularism as hierarchy construction and maintenance that serves dominant interests is not simply an occasional unfortunate accretion onto an otherwise benign and neutral secularism proper, but rather has been intrinsic and essential to modernity generally and secularism specifically from its inception, bound up as it was and is with colonialism and imperialism. This argument parallels post-colonial anti-racist arguments that understand racism to be not simply an unfortunate blemish on or aberration of western modernity but, in fact, absolutely central to modernity and modernization from its historical inception to the present day (Miles & Brown 2003; Eke 1997; Said 1978). The beginnings of a solution is to work towards anti-racist, anti-Orientalist, and anti-imperial forms of secularization against imperial secularism, in the same way that anti-racist, anti-colonial feminism is suggested to be the

way to at least begin correcting the damage and blind spots of colonial feminism[45] (Khan 2008). I will have more to say about how to aim at this in the concluding chapter.

The construction and maintenance of hierarchies does not simply mean that modern religion or religion that is deemed to be appropriate to modernity is now the only acceptable form of religion in the modern nation state: privatized, individualized, disestablished, and the like (Casanova 1994), although the privileging of certain forms of religion such as these, and the marginalization of other forms of religion is a very important part of it. Constructing hierarchies also means that on the one hand some religions mainly belonging to dominant populations in a given context are privileged either by being taken for granted as culturally normative, thus largely invisible, and therefore even "secular" or simply belonging to the nation, and on the other hand religionized others designated as not belonging to the nation or dominant culture are marginalized, sometimes strategically, in various ways. Some religions (read Islam in the West) are deemed in this discourse to be more "religious" than others, while some religions (read modern, liberal Christianity in the West) are regarded as more "western", secular, or culturally appropriate than others.

Orientalism therefore is an important element of imperial secularism (Said 1978). The racialization of religion is also an important component of constructing hierarchies of religion in secular states (Joshi 2006). Furthermore, the culturalization of problems of patriarchy, inequity, and violence in immigrant communities, while the same problems are individualized in the majority community, also plays an important role in fashioning hierarchies of religion (Zine 2009; Narayan 2006; Grewal 2009). There are more than likely other strategies used by imperial secularism to achieve hierarchies; I have only

[45] I will add to this what I call post-secular feminism, to be discussed below.

mentioned four (non-exclusive) strategies thus far here: colonial feminism, Orientalism, racialization of religion, and culturalization of deviance/inequity. Secularization therefore is not always just about the separation of religion from the state and the privileging of "modern" privatized, individualized, and disestablished forms of religion. It has also involved the installation of some religions as more modern and therefore privileged and more representative of the nation than "Others." However, in conclusion, the construction and maintenance of hierarchies is not necessarily intrinsically and unavoidably a part of all possible or actual secularization projects, though I argue that unfortunately it is remarkably widespread in practice. For example, Tariq Modood's (2005) call for a moderate secularism in place of what he calls radical secularism would appear to foster a form of secularism much less susceptible to hierarchy formation than historic western state formations have produced.

Secularization as (in part) hierarchy construction and maintenance also in part helps to explain the continued widespread existence of dominant religions, and the fact of their religious dominance even in public life, in highly modern nation states. Almost without exception, even in the most "secular" of nation-states, even though formal legal limits and relative disestablishment has occurred, there remain extensive and marked instances of the dominant religion(s) of "the nation" enjoying widespread cultural privilege in both private and public spaces (Blumenfield et al 2008; Clark 2006; Casanova 2008). Perhaps part of the reason secularization has not more fully marginalized the presence of religion generally, and dominant religions in particular, out of the public sphere is because imperial secularism functions to privilege the dominant national community.

An important caveat bears making here. I do not want to reinforce the same division that I am in fact critiquing between the notions of "secularism" and "secularization". I have been arguing that on the one hand much secularization theory presents secularization as nearly an inadvertent result of modernization generally. Secularism on the other hand has come to mean an ideology and intent to secularize in a specific way: that is to exclude as much as possible all religion from public life (Seljak 2005, 179). In other words, secularization just happens, but secularism is an intentional project. I am arguing that an important aspect of secularization theory that needs to be recovered and reexamined is the notion of secularization as the result of an intentional project sought by those who "aim at modernity" (Asad 2003, 13). Therefore, I would extend the notion of secularism to include all those who aim at modernity by pursuing the secularization of societies, and more importantly claim that secularism is an important component of secularization theory and therefore an essential explanation of secularization. In conclusion, I affirm that "imperial secularism" achieved primarily through constructing and maintaining hierarchies is an important component of secularization and discourses of the secular. Furthermore, intentional projects and human agency, imperial or otherwise, are central to secularization.

## 2.2 Definition of Religion

In order to proceed upon a project that studies religions, one must define what one is studying. This is particularly important theoretically to me for this project because, as I have argued above in concert with scholars such as Talal Asad, "religion" itself is a culturally located concept with a genealogy, rather than an observable universal category.

All "essentialist" definitions of religion are bound to fail. Therefore, the definition I offer below attempts to outline how the modern concept of religion has been constructed, rather than affirming that there is indeed an object out there that can be called "religion." The usefulness of this working definition is that it helps to locate the data of "religion" in the context of modern constructions of that category while at the same time being critically aware of and questioning how the modern category of "religion" is constructed. Furthermore, I am arguing that the particular crafting and assigning of the concept of religion in modernity is not only unique in the history of the term "religion," but also its meaning and productive power are at times strategically constructed and reconstructed to achieve particular interests.

As I have already stated, the productive power of "religion" (and secularizing projects that employ this modern tool) may be aimed at benign goals: equality, freedom of religion, and protection of individual agency, though even these things are a part of a completely new way of being in the world that modern projects have constructed. However, the discourse on "religion" (how and to whom it is assigned) can also be deployed in ways that are more effective at benefiting the dominant and marginalizing the minoritized. I have included a new definition of religion in this chapter because I believe it begins to locate some of the hierarchy construction and maintenance of the secular, which of course defines itself in opposition to the religious. This is an important component of what I have here called religionization.

Is religion definable? No, and yes. Bill Arnal concludes his opening chapter on the definition of religion published in the *Guide to the Study of Religion* stating the impossibility of defining religion, and yet affirming the need to theorize the modern

concept of religion as a located historical project (Arnal 2000). The latter is what I attempt to work toward here.

Talal Asad, and Bill Arnal who builds on him, are correct to argue that religion as transhistorical essence is not definable (Asad 1993, Arnal 2000). There is no kernel cultural characteristic, or family of characteristics, that can justify by definition, across times and cultures, the grouping together of what we think of in modernity as religious traditions and groups and the exclusion of other cultural traditions and groups. However, I do believe we can better define and describe how modernity has created and defined the modern category of religion.[46] This will not help us to consolidate the category, but rather understand in part how the category is produced and what it produces. Here I am taking "religion" to be a manufactured category (McCutcheon, 2003) that has been made to play an important part in the modern project of "secularization." This modern construct I argue is definable, and that is what I will attempt to move towards in part here.

Asad notes that the modern concept of religion began to take the shape that is recognizable to us today in the seventeenth century in opposition to "a new kind of state, a new kind of science, and a new kind of legal and moral subject" (Asad 1993, 43). I am especially interested in the modern conceptualizing of religion over against the new modern kind of science specifically here. An assessment of several recent publications on the definition of religion reveals that the vast majority of substantive and exclusive definitions of religion depend on a characteristic termed the "supernatural", or the superempirical, unverifiable, or unfalsifiable (Idinopulos & Wilson Eds. 1998; Arnal 2000). Although there are other strategies for defining religion, the underlying modern

[46] I do this in the same way that anti-racist scholars no longer attempt to define race as if it is a real thing, but rather define it in part as a social contruction, and explore how the category "race" is constructed as a social reality rather than reifying it.

concept of religion is generally more dependant for its rationale on some notion of the supernatural than on more recent scholarly and notoriously broad functional and family resemblance definitions that too easily include many cultural things that are not thought of normally as being religious.

Definitions of religion as a type of culture that involves some kind of relationship to the supernatural, unverifiable, or unfalsifiable are definitions that depend upon an allegedly cross-cultural (universal) epistemological division of the world into knowable and unknowable realms, and that not only is this division normative, culturally located and therefore ultimately untenable as a definition of culture, it also reveals something about the modern concept of religion that needs to be better theorized and studied.

### 2.2.1 The Sociology of Science: An "Objective" View of Science and Religion as Culture

Even if the notion of the "supernatural" was coherent, supernatural definitions of religion are simply not *objective*. I am not advocating a naïve positivist objectivism, but the notion of the supernatural does not even, or perhaps especially, satisfy the basic requirements of even a historicized, critical, and located objectivism. Taking an objective view of religions that does not take a position on the truth claims of religious groups is not new (Platvoet 1990, 186). However, studies of the implications of objectivity for definitions and theorizations of the modern concept of religion are in need of further exploration. In other words, definitions of religion that depend on the notion of the supernatural already judge the truth claims of religious groups, *by definition*.

Definitions of religion that rely on the notion of the supernatural rely on a culturally located and normative position on what counts as knowledge, or rather what is knowable, that is then deployed as if it were *culturally* universal. In opposition to this practice I argue that what is deemed knowable and unknowable to modern scientific knowledge projects is not in fact *culturally* universal, and therefore when used as a basis for defining an entire and diverse category of culture, "religion" amounts to a normative deployment of a single cultural set of (modern) epistemological assumptions across time and space rather than being a category that is based on "objective" description of cultural traditions that may be in complex epistemic relation (and perhaps tension) with each other. In other words, I understand "religion" as intended to designate a type of *culture* among other types of culture, not a type of knowledge among other types of knowledge.

The modern concept of religion, through the notion of the supernatural, has attempted to lump together a family of traditions that refer to things that modern science has declared unknowable or even untrue by modern means of knowing. This is hardly an objective stance. Culturally, it is very explicitly the deployment of one culture's epistemic norm across all cultures as definitive of modern and not modern, of scientific and religious.

I argue further that because the modern concept of religion takes modern science to be normative; in many cases the notion of the supernatural simply dismisses some important aspects of so called "religious phenomena" by definition. What can an objective science of culture mean by saying religions refer to the unverifiable when a number of Christians, for example, continue to invoke the argument from design as verifiable proof of God's existence, or invite us to test the empirical effectiveness of God

in our lives through personal transformation and even healing of our bodies. And incidentally, I should also point out that defining religion as referring to the unverifiable cannot make sense of atheists either, like Richard Dawkin's for example, who essentially claim that God is *verifiably non-existent*. I'm sure he would be happy to find out that he is wrong *by definition*, because the supernatural declares both the existence and non-existence of such things to be *unverifiable*. I am not unaware that modern scientists are unimpressed by religious proofs for God. I argue rather that an objective study of culture should first describe these cultural phenomena simply as productions that authorize different cultural knowledges and second, to explain any epistemic tensions between them as socially located struggles over cultural resources and power. This does not mean that the *methodology* of scientists of culture must include theology; it simply means our modern scientific methodology does not require us to define culture normatively (as I am saying the "supernatural" has done in the past) any more than it requires us to judge the truth claims of the people we study. Scholars of religion should take a critical point of view that doesn't take a position on what counts as knowledge for the cultural phenomena we study, and *that critically aware objectivity must be reflected in our definitions of cultural phenomena*, which I argue is blatantly missing if the notion of the supernatural is employed.[47]

### 2.2.2 The Subnatural

[47] I am not advocating a naïve positivist objectivism, but rather that the notion of the supernatural does not even, or perhaps especially, satisfy the basic requirements of even a historicized, critical, and located objectivism. I am not arguing to replace one naïve objecitivism with another (i.e. the supernatural with the subnatural). I am saying that the supernatural is so culturally located it cannot even be employed as a historicized, critical, and located objective description. What I offer to replace it is I argue more "objective" (that is in a limited, historicized, critical, and located way) precisely because by its very definition it explicitly points to socio-cultural constructions (i.e. cultural epistemic hierarchies) rather than a supposedly universally and cross-culturally observable distinction between "natural" and "supernatural."

I propose that a useful definition of the *modern concept* of religion is not that "religion" is culture that refers to phenomena that are epistemologically unverifiable but rather that religions are cultures that refer to phenomena that are epistemologically *marginalized* in relation to "modern knowledge". Religion does not refer to unverifiable knowledge, but to marginalized knowledge. Religion is not defined by its relation to unverifiable phenomena, but to epistemologically marginalized phenomena in the context of modernity.

To signal this change I am coining the neologism, the *subnatural*. The modern concept of religion is one that defines religions as cultures that refer not to supernatural things but rather to subnatural things. Whereas the supernatural is a term that assumes the universal cultural normativity of modern science, the term *subnatural* suggests that science is a located, though admittedly powerful, even hegemonic, cultural force that marginalizes other cultural groups in terms of their power to produce socially legitimized knowledge in modern societies. These marginal cultural groups then take up positions of epistemic tension relative to modern science, not least of which include a family of cultural groups lumped together by most modern concepts of religion. The notion of the subnatural suggests the cultural locatedness of both dominant and marginalized knowledges. I believe this is a major advantage over the notion of the supernatural, which suggests that what modern scientists and secular people believe is unverifiable or unfalsifiable is culturally universal. It is also superior because the notion of the supernatural suggests that religion enjoys a kind of privilege in modern society by being "above" the natural (super-natural), when in fact it is precisely the notion of epistemological unverifiability and unfalsifiability conveyed in assigning "supernatural"

to a phenomenon that marginalizes it epistemically. Those things designated as "religious" do enjoy certain privileges in modern societies such as tax exemptions, constitutional rights to freedom of practice, and even social and cultural legitimation of various sorts. However, the cost of these benefits is epistemological marginalization, which then serves as the state's justification for privatization and even degrees of exclusion of "religion" from the public spheres because of the use of non-universal reasoning (Cooke 2007). The subnatural on the other hand suggests what is more properly the case, many of the political and cultural privileges religions enjoy in modern societies come at the cost of acquiescing to the modern assumption that religious knowledge is local, as compared to the superior, universal, and far more culturally privileged knowledge that can present itself as directly accessing the "natural".

There are other relevant aspects of culture that have been definitive of religion. Asad, as I noted, mentions not just a new kind of science, but a new kind of state, and a new kind of legal and moral subject. Furthermore, it is also clear that not all marginal knowledges in modernity are thought of as religious. Perhaps the modern concept of religion is better defined as one that deploys a specific configuration of marginalization (epistemically) *and privilege*: politically and otherwise culturally. There are of course other forms of culture that are marginalized epistemically, but religious culture is uniquely marginalized (epistemically) and privileged (socially and politically) in the modern nation state.[48] However, again my point is not to offer a more coherent definition of religion in place of previous ones in order to bolster the concept. My aim is to more

[48] For example, traditional medical cures such as bloodletting may now be marginalized epistemically, but religions generally receive a higher social status, respect, and honour (especially "legitimate" ones) in addition to political benefits such as tax exemption and constitutionally protected rights (i.e. to religious freedom), which anyone attempting to employ bloodletting today will not.

accurately theorize and label how and what it is that modernity is accomplishing through the concept of "religion" in order to position it and study its effects. Therefore, I study Islam and Judaism as religions in this dissertation because that is how dominant society has categorized members of these communities. Members of certain groups who can be categorized in a variety of ways (by gender, race, class, profession, etc.) are seen as Muslims and Jews first and foremost, i.e., they have been religionized.

### 2.2.3 What Does the Subnatural Do?

The concept of the subnatural is intended first and foremost to explicitly divulge, locate, and theorize the underlying epistemological assumptions of the modern concept of religion. The traditional notion of the supernatural suggests that science can ascertain what is empirically verifiable or unverifiable for all cultures. In opposition to this, the subnatural suggests that no such transparent universally consistent claim about what is and is not empirical exists seamlessly across all cultures. Rather, the subnatural suggests that the modern concept of religion is produced partly through cultural dominance of knowledge production, rather than being an innocent, observable, and unbiased category of culture that is useful for the social sciences. The "subnatural" suggests that the notion and productive power of the modern concept of religion itself requires explanation, rather than simply that particular traditions (religions) require explanation simply because they embrace "alternative" knowledges than those produced by "secular" modernity. There are parallels to my approach here in other disciplines. Charles S. Maier argues that the economist "interrogates economic doctrines to disclose their sociological and political premises....in sum, [he or she] regards economic ideas and behavior not as frameworks

for analysis, but as beliefs and actions that must themselves be explained" (Mayer 1987, 6). This is an excellent example from another discipline of the defining concepts in a field becoming objects of analysis rather than the invisible and unquestioned frames of analysis.

Secondly, the subnatural is meant to highlight the unworkability of the modern concept of religion. My analysis furthers arguments that precede it that state that "religion" is indefinable, that is unsupportable by definitions that attempt to justify it observably and rationally. However, the subnatural is also an attempt that invites further attempts to define the modern concept of religion, that is, as a located, cultural project of modernity, rather than a workable cross-cultural conceptual category for humanists and social scientists. This is not meant to make the concept universally workable across time and space. It is meant to unveil its chronological and spatial limits as well as its (invisible) inner workings and assumptions in order to render this in fact very limited (and ultimately incoherent) concept more open to analysis and study.

Thirdly, the subnatural suggests that located analysis of epistemological positions and tensions within and between cultural phenomena, religious or otherwise, are worthy of investigation, description, and locative analysis. What counts as knowledge, or what counts even is *knowable*, is not uniform across and within cultures, and therefore merits academic attention.

Finally, as any good definition should, the subnatural has implications for theories and explanations of "religions". I argue that the subnatural suggests first that so called "religions" are in part created (i.e. construed as "religious") by the epistemic marginalization accomplished in part by the modern concept of religion, rather than

simply being "essentially" religious by embracing "unverifiable phenomena", as if dominant knowledge productions are the stick by which social scientists should measure all other cultural knowledges, when in fact dominant knowledge production itself must be explained by social scientists. In other words, "religion" continues to exist in the modern world in part because of modern religionization. Moreover, the subnatural suggests that the epistemic tensions and negotiations between so-called religions and modernity persist because religions are responding to their relatively recent repositioning as epistemically marginal by modern projects and institutions through a process of negotiating the appropriation or rejection of epistemic cultural capital. In other words they are not simply resisting or embracing "reality"; they are resisting or appropriating a particular (dominant) way of "living in the world".[49]

### 2.2.4 Conclusion

The supernatural to date, I argue, has been largely an emic (insider) category of (scientific) modernity based on normative cultural assumptions about modern science. In response, I have endeavored here to construct an etic category outside of the normative assumptions of modernity (or at least critically aware of them) that more accurately apprehends the social struggles over epistemic cultural legitimacy that are going on in and through the modern concept of religion, and as they are played out in the culture of modern projects.

As Arnal has argued, even though the many definitions of religion to date are ultimately incoherent and fail, it is still left to social scientists and humanists of religion to unpack the modern concept of religion, not least because it remains very powerful,

[49] "Modernity is not primarily a matter of cognizing the real but of living-in-the-world" (Asad 2003, 14).

widespread, and apparently central to modern, that is in part secularizing, projects. Therefore, building on Asad (and Arnal's) project of continuing to theorize the modern concept of religion, I submit the subnatural as a definition and re-theorization of assumptions behind the modern concept of religion. Religion in part is a modern concept that is defined by cultural ideas and practices that establish a relationship with what is regarded in modern scientific society as the subnatural.

In this subsection on the definition of religion I have attempted to accomplish two things. First, I am trying to define the phenomena I study in order to justify studying the particular groups I explore as religious groups. Second, the way I have defined religion as a particular socially constructed hierarchy mirrors the way that Islam was located (marginalized) in a cultural hierarchy through the so-called sharia debate. In other words, religionization, based in part on what I have termed the subnatural, is a crucial tool of imperial secularism. I will be locating and criticizing imperial secularism (and the tools it uses, such as religionization, racialization, orientalism) throughout the following chapters.

## 2.3 Multiculturalism

Now that a theoretical position on the secular and secularization has been established, and now that the modern concept of religion has been theorized for the purposes of this project, in this context I will turn to the theoretical issues of what multicultural public policy towards religion(s) can mean in a secular state such as Canada generally, and for the "Sharia debate" specifically. My contributions regarding multicultural theory build on important forbears that I will document here before

forwarding my own contribution to multicultural theory. My basic argument in this section is that in order for multiculturalism to be effective in Canada, it must address the issue of what I have called imperial secularism. Imperial secularism must be countered with anti-imperial secularism, and this will help achieve the policy goals of Canadian multiculturalism in the arena of combating religious discrimination, accommodating religious diversity, and protecting religious freedom without compromising individual rights.

### 2.3.1 Multiculturalism in Canada

In many modern liberal and secular states the primary political arguments available for debates on faith based arbitration would likely centre, as they did in Ontario, mainly around freedom of religion in favor of faith based arbitration on the one hand and constitutionally protected individual equality rights against faith based arbitration on the other (Canadian Diversity 2010).[50] Multicultural arguments might be deployed in favour of faith based arbitration in the United States as a political discourse, but it would have no weight as an official policy (Goldberg 1994). Moreover multicultural arguments would likely be counterproductive in a state such as France. However, in Canada multiculturalism is not only an official policy, it is also law, and therefore it played a role in the "Sharia debate" in Ontario that it may not have in other modern states.

There are several ways to conceive of multiculturalism, therefore clarifying the term here will be helpful. Augie Fleras and Jean Lock Kunz (2001) distinguish at least five ways to understand multiculturalism. First, multiculturalism might simply refer to the demographic fact of diversity in a given state. Thus, France might be characterized as

[50] See also Canadian Diversity: Balancing Competing Human Rights (2010).

multicultural in the sense of being culturally diverse, but it is decidedly not multicultural in terms of its national policy, though arguably accommodating at the local level is common. Second, multiculturalism may be thought of as an ideology or as a general prescription of the way things should be. This can be distinguished from official or governmental implementation of multiculturalism. Perhaps the United States provides one of the best examples of this, because multiculturalism developed there as an ideology of equality issuing from race relations discourse as a general political demand for racial and ethnic equality, though it has never been an official policy or law (Goldberg 1994). Third, multiculturalism may also be a policy. Governments may outline and assent to policies or establish laws that aim to facilitate social and cultural equality and diversity. Fourth, multiculturalism as practice may be discernible from other forms of multiculturalism as well. It is conceivable that a state may embrace multiculturalism as official policy, but only in word and not in deed. Moreover, governments and citizens may engage in multicultural practices on their own initiative without having been prompted by an official policy. Fifth, multiculturalism acts as a critical discourse. An important critique of multiculturalism as ideology, policy, or practice is that it only accommodates very shallow and "visible" signs of diversity without effectively challenging underlying racial, ethnic, gender, or economic inequities. Critical multiculturalism seeks to resist the status quo on all of these levels and to affect genuine political, economic, and social equality and respect.

Pierre Elliott Trudeau famously introduced the policy of multiculturalism in Canada in 1971 (Biles and Ibrahim 2005). However, multiculturalism was made law only in 1988 (*Canadian Multiculturalism Act* 1988). Therefore, multiculturalism as a

discursive political resource in the debate over faith based arbitration is not simply a fact of cultural diversity or a discourse of recognition; it has both the force of official government policy and law behind it. However, whether the policy and law of multiculturalism in Canada has been put into practice adequately in order to genuinely achieve socio-economic equity remains an open question.

Multicultural policy in Canada brings religions into the political and legal spheres in a way that both complements and goes beyond Charter guarantees to freedom of religion. Whereas the constitutional guarantees enshrined in Canada's Charter of Rights and Freedoms are expressed largely in liberal, individualist terms,[51] the Multiculturalism Act strongly suggests the political and legal recognition of group rights, including religious groups.[52] However, John Biles and Humera Ibrahim argue that despite the importance of religion to Canadian society and policy, religion has been largely marginalized in multicultural discourse in Canada (Biles and Ibrahim 2005, 164). Furthermore, the debate over faith based arbitration was characterized by many participants as a conflict between multicultural group rights for religious communities on the one hand (in favour of faith based arbitration), and individual rights to equality (especially gender equality) against faith based arbitration on the other. Multiculturalism was once again lambasted in the public debate as at best having failed to successfully integrate immigrant communities, and at worst sacrificing women's rights to the group rights of allegedly illiberal communities.

[51] However, Section 27 of the Canadian Charter of Rights and Freedoms is meant to guide interpretation of the Charter in light of Canada's multicultural policy, although Section 27 is not explicitly a right to multiculturalism per se.

[52] "AND WHEREAS the Government of Canada recognizes the diversity of Canadians as regards race, national or ethnic origin, colour and religion as a fundamental characteristic of Canadian society and is committed to a policy of multiculturalism ... [emphasis added]" (as quoted in Biles and Ibrahim 2005).

I will examine and critique in more detail the way that multiculturalism was used discursively in the public debate on faith based arbitration in chapter five. However, for the theoretical purposes of answering my thesis question, I am not using multiculturalism here to argue either in favour of or against faith based arbitration . Rather I am exploring how a multicultural and secular Canada addresses the issue of faith based arbitration and religious freedom. Secularism is an important factor related to multiculturalism here as well. Secularism is especially interesting in Canada because there is no formal constitutional separation of Church and State as in the United States, although many Canadians imagine that there is. A dramatic example illustrating just how different Canada is from America is the fact that our constitution enshrines constitutional guarantees to public funding for Roman Catholic schools in several provinces that remains in effect to this day (Seljak 2005). Therefore, even though Canada understands itself to be a secular state, it is very different from the United States, where such an arrangement would be impossible.

### 2.3.2 Multicultural Theory and Practice

The theoretical justifications for multiculturalism are varied and contested. Although I make a very specific argument regarding how multicultural policy and practice needs to be modified toward a more critical multiculturalism that explicitly includes anti-imperial secularism in its aims, it is also important to briefly explore a number of the recent theoretical supports and critiques of multiculturalism in modern societies, because I make my argument in the context of several theoretical arguments in favour of multiculturalism generally.

Not only is Canada known internationally as a model multicultural state, but a number of important international scholars of multicultural theory have been Canadian as well, namely Charles Taylor and Will Kymlicka (Kymlicka 1995; Taylor 1994). Charles Taylor is well known for his arguments in "The Politics of Recognition" (1994). Taylor argues that recognition is not simply a privilege but also a right because mis-recognition can do real damage to persons and communities. Taylor argues further that in order for recognition to be genuine it must be intentional and strategic. To that end, Taylor recommends among other things (non-confessional) education about historic religious traditions (Taylor 1994, 72). Taylor's argument however has been powerfully critiqued because the recognition he advocates amounts to a one-way recognition of a minoritized "them" by the majority "us" which simply consolidates the position of the dominant culture and marks out Others as being in need of the gift of "our" recognition (Day 2000). Therefore, although Taylor's approach justifies recognition, and therefore multicultural engagement with diversity ethically and morally, his recommendation for engaging diversity reaffirms dominance and does very little to achieve the aims of critical multiculturalism.

Talal Asad makes a similar argument, though it is much extended, but his suggestion of a direction is more productive than Day's. After critiquing Taylor, Richard Day simply falls back on procedural liberalism to address issues of diversity more fairly, he believes, without collectively as the majority culture looking down on minorities (2000, 209-228). However this completely ignores the arguments of Taylor and Kymlicka among others who have extensively critiqued the myth of liberal neutrality. It is the inevitable dominance of the majority that liberalism always authorizes through

individualism and democracy that Taylor was attempting to address in the first place. Asad on the other hand suggests rather that instead of relying on dominant recognition of minoritized populations, which appears destined to fail for several reasons, that modern states rather consider the problem of how to facilitate a decentered political reality through what John Milbank has called overlapping and heterogeneous complex space and complex time "in which everyone may live as a minority among minorities" (Asad 2003, 178; Milbank 1993). This is similar to William Connolly's (1996) call for decentered pluralism, but Asad thinks that Milbank's conception is amenable to facilitating more genuinely diverse spaces and times than approaching the issue by facilitating genuine diversity across states. How to achieve such a state remains an open question, but I believe the decentering impulse points in the right direction. Anything less seems only to reaffirm majority dominance in one form or another.

Whereas Taylor has made a moral and ethical argument for the recognition of diversity in liberal states, Kymlicka's contribution is to attempt to argue for multicultural citizenship squarely in the context of liberal political theory. This is a substantial achievement given that the best liberalism has been able to do previous is offer minimal recognition and accommodation to minoritized peoples based on democratic majority will or individual initiatives, which arguably have not been very successful on the whole (Modood 2007; Seljak 2005). Kymlicka recognizes and critiques the myth of liberal neutrality, and argues therefore that liberal states must recognize group rights. However, his arguments are directed mainly towards recognizing group rights for national minorities and indigenous peoples rather than immigrant minorities. Furthermore, even with the help of Kymlicka's arguments, critics such as Ashwani Peetush (2002) have

argued that liberalism is not very open to even dialoguing about diversity generally because there is no reason – in principle – for liberalism to do so. Peetush even shows how Kymlicka's discourse in his political theory is latently Orientalist and othering as well. Indeed, the problem of justifying the recognition of (minority) group rights and needs in the context of liberalism, which normally only authorizes sovereign individuals, seems to be one of the major challenges to theorizing multicultural policy in the context of liberalism.

Given the difficulty of recognizing multicultural group rights in the context of liberalism, some theorists have tended to focus on facilitating friendliness to diversity more informally, through deliberative democracy in the context of the civil sphere (Bouchard & Taylor 2008). Regarding religion specifically in the context of the civil sphere, Jurgen Habermas has declared that we are now in a post-secular age (Habermas et al 2010). This means that the experiences of secular modernity have convinced Habermas and others that religion can no longer be completely separated from political life as was imagined in earlier versions of secularism. Rather, political philosophers must find room for religion to be included in the civil sphere in a way that does not again lead back to forms of religious oppression.

Habermas thinks religion can be incorporated into political life informally in the civil sphere through dialogue, conversation, and discourse (Habermas et al 2010). Maeve Cooke points out that Habermas is unlike Rawls in that he believes that truth at some level is at stake in "political legitimation" (Cooke 2007, 224). For this reason, Habermas advises that any reasoning offered in the civil sphere must be post-metaphysical. One does not have to judge another's conception of the good according to Habermas, but one

does have to offer reasons not based on otherworldly transcendence. Cooke critiques Habermas in an interesting way here, arguing that his requirements of the public sphere are too restrictive.[53] Habermas' position "leads to a model of law and politics that impairs the conditions of political legitimacy for citizens who understand political validity in 'otherworldly' terms (be these religious or non-religious), thus weakening their motivation to live together peacefully with others in a democratic political order" (Cooke 2007, 226-227). In order to avoid the pitfalls of potential religious oppression, Cooke recommends rather the requirement of what she calls "non-authoritarian thinking". Carefully laying out in detail what she means by this, it is potentially a way of limiting the harms that may be done in the name of otherworldly referents without excluding otherworldly referents altogether. Appealing to otherworldly referents may then be persuasive to those who share in the epistemic assumptions of such referents, but thus limited they might not then easily lead to authoritarian thinking that shuts down deliberative public debate.

Taylor too, in the interests of accommodating the voices of diverse groups in modern liberal democracies, advocates for an expanded conception of dialogue that includes religious groups in the secular civil sphere. To this end, he reconceives secularism in terms of an "overlapping consensus", building on Rawls' conception. This means that although there will have to be core foreground political principles that everyone in a state must assent to, there may be any number of "background justifications" that citizens subscribe to that justify support for those common principles, including "religious background justifications" (Taylor 1998). However, this still leaves

[53] Habermas (2008) changed his position recently to be more in line with Cooke's thinking. However, this debate illustrates current issues being negotiated in the Academy which have by no means yet achieved consensus.

the problem of coming to agreement on the core political principles from so many background positions. Taylor believes that core political principles can emerge through persuasion and negotiation of an overlapping consensus (Taylor 1998). Although they are theorizing somewhat differently, both Habermas and Taylor are arguing that the way forward to including cultural and religious diversity in political life is through open dialogue, persuasion, and negotiation at the level of civil society. However, as Asad argues, the state is not simply a benign and neutral entity. In several and sundry circumstances the state will intervene in the lives of citizens through dialogue-ending legal judgments (Asad 2003, 6). Moreover, where civil society dialogue meets power, matters are more difficult and complex than mere negotiation. On the one hand, as Lori Beaman (2012) has argued, people belonging to minoritized groups may not have the power to be heard or to withstand the potentially unjust pressures of majority civil society. In some of these circumstances even "non-authoritarian" dialogue and persuasion may fall short of justice, and legal discourse and judgment may be required to protect the legitimate interests and rights of minoritized populations (Beaman 2012). On the other hand, and more problematically I think, quite aside from authoritarian thinking, not only might civil discourse be deeply unjust, intolerant, and othering toward certain minoritized populations, but also the state legal apparatus may become deeply unjust toward them as well. Sherene Razack for example has documented that even basic citizen rights are put in peril by such government policies as "extraordinary rendition, security certificates and secret evidence and trials" (Zine 2009, 151; Razack 2008). Therefore, although opening up dialogue at the civil society level seems a productive idea as far as it goes, it leaves

untouched perhaps some of the most important issues facing minoritized communities in modern and especially western liberal democracies currently.

Finally, British scholars too have made important contributions to multicultural theory. Bhikhu Parekh (2002) attempts to extend liberal justifications for multiculturalism, while Tariq Modood (2007) approaches multiculturalism more as a sociological reality that must be addressed than a theoretical argument to be revised. Parekh (2002) argues not by working with the existing logic of liberalism to justify multiculturalism, but rather by reconceiving the liberal conception of human nature and culture. Through a brief history of liberal ideas regarding diversity, Parekh argues that liberals tend to begin either from an assumption about human nature or about culture. He argues that the way both have been framed is limited and limiting for liberal approaches to diversity. He attempts to bridge these two beginning points by theorizing human nature in a way that takes culture into account. Therefore, although a universal notion of human nature is here in part constituted by a minimal understanding of what humans share as a species, it also includes how they are formed socially and what resources they gain from the cultural communities that form them, in addition thirdly to the ability of self-transformation and cultural transformation enabled by the human capacity for reflection. Parekh argues that conceiving of human nature as inextricably formed and contextualized by culture puts into action different notions of understanding and accommodating difference than, for example, what the myth of liberal neutrality would authorize on the basis of universal individual human nature. From this revised liberal point of view Parekh is able to make a number of new claims about the value of cultural diversity in liberal multicultural society, and is able to justify a number of recommendations for how to

accommodate and engage cultural diversity in a multicultural state. These recommendations include not only open dialogue at the level of civil society, but also more formal actions through various apparatuses and institutions of the state and political society (Parekh 2002).

Tariq Modood on the other hand approaches multiculturalism less from a theoretical view point and more from a practical sociological angle (Modood 2007). He argues rather that multiculturalism should be built from the bottom up, from the conditions and realities of plurality in modern societies, rather than theoretically from the top down. Modood substitutes notions of difference and identity in place of "culture" which he feels too easily essentializes groups. Identity, according to Modood, allows for the notion of plural individuals, rather than suggesting that all individuals that belong to a culture, especially a minoritized one, exclusively identify with and fit that culture. Modood agrees with Taylor that misrecognition of one's identity is a form of oppression, and therefore should be considered a matter of national belonging and citizenship. He argues that in order for equality to be effected, justice must be meted out in variable ways, because diverse peoples are in diverse situations, and applying the same law across the board without taking those differences into account will simply reinforce dominance rather than challenge it. Furthermore, Modood is against what he calls ideological or radical secularism which tends to ban religious groups but not other identity groups from the public sphere unfairly. He advocates then for what he calls institutional or moderate secularism which maintains a certain necessary separation between church and state without unfairly limiting religious groups in the civil sphere (Modood 2007). Although Modood is doubtful about the potential for liberalism alone to deeply address diversity,

he acknowledges that multiculturalism cannot get off the ground without liberalism, and ultimately the recommendations he makes seem to remain dependent on and couched within a liberal context. Therefore, although he makes some valuable contributions to a program of multicultural national identity and citizenship that is more genuinely diverse without trying to defend liberalism theoretically, his ideas ultimately rest on the realities of a liberal-democratic state.

Regardless of this limitation, Modood has made a number of substantial contributions. He has argued for the acknowledgment of the existence of cultural racism generally, and Islamophobia in particular (Modood 2005). Modood has argued that religious identity has become a field of identity in which struggles for equity have arisen. This multicultural sociological reality has operated from the ground up, and parallels other previously "privatized" forms of identity that have sought political recognition for the purposes of striving for social equality such as feminism and sexual diversity. Given the growing political recognition of these forms of idenity, Modood argues that a form of state secularism that enforces the privatization of religion is unjustifiably unequal (Modood 2005). Consequently, moderate secularism must conceive of "separation" not as absolute separation, but rather as discreet distinctions between entities that inevitably connect at sundry points. Given the sociological realities of these multicultural practices, Modood then advocates for the conscious development of a plural national identity that takes religions seriously, rather than understanding multiculturalism and nationalism to be inherently mutually antagonistic (Modood 2005).

One of the most prominent and important critiques of multiculturalism is that it is too shallow to address the real underlying problems of diversity that issue from social

inequity and the oppression of minoritized groups. I have already referred to critical multiculturalism above, and there are several important strains of critical multiculturalism that have been developed. Racial inequality causes serious problems for the aims of multiculturalism not always addressed in the context of multicultural theory or practice (Bannerji 2000; Razack 2002, 1998). Issues of gender have been central to critiques of multiculturalism as well, especially where group rights are understood to be potentially undermining the individual rights of women in minoritized communities (Bannerji 2000; Okin 1999). Therefore, feminism and anti-racism are essential components of a critical multiculturalism that aims to affect equality rather than simply surface accommodation that reaffirms dominance and keeps the minoritized marginalized in crucial ways. There are other important forms of oppression as well, for example relating to class and just distribution of wealth as well as sexual identity and orientation. Addressing religious discrimination is an emerging body of scholarship that critical multiculturalism must appropriate in addition to these other forms of oppression and discrimination (Mooney Cotter 2009; Ghanea 2003; Addison 2007). Addressing religious discrimination is central to this dissertation project as well.

Making the connection between multiculturalism and secularism is crucial to answering how a secular Canada, in the context of the goals of its multicultural policies, accommodates religious freedom for Canadians who wish to practice faith based arbitration in Ontario and what the limits of this accommodation are. I believe the distinction between imperial secularism and anti-imperial secularism is particularly useful for distinguishing between types of secularism, because even those who distinguish between secularism of different types, such as ideological and institutional

secularism as Modood suggests, leave out that secularism itself can be imperialist or colonial. Even an institutional secularism as delimited by Modood, which arguably already exists in Canada, can be imperial in practice, and I argue that anti-imperial secularism must be developed and aimed at in order to address the issues of inequity and marginalization explored in this exploration of faith based arbitration. I argue that the different typologies of secularism that have been fashioned to date on the whole only differentiate between those that are friendly to religion in the public sphere, and those that are (unnecessarily) exclusive of religious subjectivity. Most still understand secularism itself to be a good at core, and only potentially in need of adjusting to the political aims of increasingly diverse modern states. I argue however that forms of secularism themselves can be carriers of oppression such as racism, colonialism, hierarchy construction and maintenance, and sundry forms of Othering.[54] For this reason I argue it is essential to understand "imperial secularism" as a potential for oppression that must be challenged and resisted. It is for similar reasons that the notion of "colonial feminism" was developed to challenge assumptions that anything done in the name of feminism is necessarily a good, and to reveal that deeply oppressive ends may be accomplished through certain forms of feminism that must be challenged and resisted. In opposition to colonial feminism, which almost always assumes that secularism is good

[54] I am not saying anything that Modood would fundamentally disagree with or that dramatically adds to his work. However, I believe that thinking about these problems in terms of imperial and anti-imperial secularism helps to further extend the aim of achieving equality into issues such as the sharia debate in a way that is not yet widespread in the academy.

for women, I posit what I call "post-secular feminism."[55] Only a multicultural approach that takes into account these realities can produce a genuinely equitable society.[56]

## Conclusion

My doctoral project explores how a secular Canada, in the context of the goals of its multicultural policies, accommodates the Canadian Charter guarantee of religious freedom for Canadians who wish to practice faith based arbitration in Ontario, and what the limits of this accommodation are. I have argued that a new notion of secularism must be understood in order to answer this question. "Imperial secularism" is a form of secularism that works to establish and maintain hierarchies in society along a continuum of secular and modern or dominant forms of religion to minoritized, marginalized, "unmodern", racialized, Orientalized, and Othered forms of religion. This kind of secularism must be countered with anti-imperialist forms of secularism that work toward non-othering forms of secularity that treat all religions equally. Part of the marginalizing work of imperial secularism is accomplished through an aspect of differentiation, that is the very definition of religion that I argue generally assumes the normative and culturally located notion of the supernatural to be adequate to deploy across all cultures to justify a universal and trans-temporal modern concept of "religion." I have suggested using the terms religionization and the subnatural rather than religion and the supernatural to define what it is social scientists are studying, that is, religion as a located concept bound up with local power relations and cultural norms. Rather than reaffirming the dominant

[55] Both anti-imperial secularism and post-secular feminism will be discussed in more detail in the concluding chapter.
[56] In the conclusion I will discuss more in depth the theoretical and practical implications of my findings for multiculturalism and law in Canada.

status quo by accepting the modern concept as a workable frame for analysis I suggest that the conceptual frame "religion" itself should be made the object of scholarly analysis in the spirit of the work of Talal Asad and others. A further implication is that a more descriptive and critical conceptualization of religion will aid in forming an anti-imperial secularism that does not Other religion normatively, but rather treats religions equally as cultural groups among other communities and groups contained and managed by the modern state. Finally, in the context of several theoretical and practical developments around multiculturalism, I make a modest contribution. Adding onto forms of critical multiculturalism that aim to resist dominance and establish genuine equality for minoritized groups, and in addition to anti-racist, feminist, and anti-colonial forms of multiculturalism, I add the requirement for an anti-imperialist secularism if genuine equality is to be fostered by multicultural policy and practice. Regarding the more specific multicultural proposal to accommodate legal pluralism, I will engage in an evaluation of Ayelet Shachar's proposed "transformative accommodation" along with a fuller discussion of the implications of anti-imperial secularism for Canadian multiculturalism generally, and the sharia debate specifically, in the conclusion of this dissertation.

# Chapter 3
# Research Method

This chapter will outline the methodological approaches and challenges of this project. The thesis question this dissertation seeks to answer is: how does a secular Canada, in the context of the goals of its multicultural policies, accommodate the Canadian Charter guarantee of religious freedom for Canadians who wish to practice faith-based arbitration in Ontario, and what are the limits of this accommodation? I begin this chapter by attempting to position this project in the context of western scholarship on others, which has too often been Orientalist and served imperial interests. I attempt also to situate myself as a western researcher. I then document my research strategies and activities. I outline the challenges of this project methodologically. I outline my sampling procedures as well as my research instruments and details of the data collection process for this project. I outline my strategies for analysing the data gathered in this project.

## 3.1 Crossing Boundaries and Positionality

From the outset my dissertation committee and I have been very aware of the fact that this dissertation involves myself, the researcher, in a project that crosses many boundaries. I am a male, academic, middle class, white, Christian, whose first language is English, one of Canada's official languages. Also, I belong historically, nationally and ethnically to a group of western colonizers, or family of white nations, as Sherene Razack refers to them (Razack 2008). Of my proposed research participants most are non-Christian, racialized, non-academic, women and men; for many English is not their first language. Many of these people belong to or descend from populations that have been

colonized by western nations. This presents a number of issues regarding power relations between researcher and research participants that must be addressed theoretically and practically. There is a long history of research of this kind undertaken by a privileged researcher like myself on "Others." Uncritically carried out, this research has often been framed by the interests of dominant and colonizing populations, and therefore it ultimately serves to consolidate the power of the rulers over historically marginalized, racialized, and colonized peoples.[57] Along with my dissertation committee, I have tried very hard to be aware of and address the inequalities and hazards of research across these boundaries and to structure the research and writing of this project in such a way as to mitigate them.

An important clarification on the focus of my research project came early in the process. One of the central issues in the public debate on faith based arbitration was the risks it presented to vulnerable Muslim women. However, early on the thesis committee and I decided that this project was not to be a fieldwork exploration or representation of Muslim women. Rather, this project is an investigation of multicultural practices in Canada in the context of the legal regime that protects religious freedom and diversity (which includes the Charter of Rights) with regard to the issue of faith based arbitration. Although this project certainly addresses issues that have an impact on Muslim women,

[57] Peter Pels and Oscar Salemink. 1999. *Colonial Subjects: Essays on the Practical History of Anthropology*. Ann Arbor: The University of Michigan Press; Chandra Talpade Mohanty. 1991. "Under Western Eyes: Feminist Scholarship and Colonial Discourses." In Chandra Talpade Mohanty, Ann Russ, and Lourdes Torres eds. *Third World Women and the Politics of Feminism*. Bloomington and Indianapolis: Indiana UP; Elizabeth Hallam and Brian V. Street. 2000. *Cultural Encounters: Representing 'Otherness'*. London and New York: Routledge; Yvonna S. Lincoln. 1993. "I and Thou: Method, Voice, and Roles in Research with the Silenced." In Daniel McLaughlin and William G. Tierney eds. *Naming Silenced Lives: Personal Narratives and Processes of Educational Change*. New York and London: Routledge; Kagendo Mutua and Beth Blue Swadener, eds. 2004. *Decolonizing Research in Cross-Cultural Contexts: Critical Personal Narratives*. Albany, New York: State University of New York Press; Edward W. Said. 1978. *Orientalism*. New York: Pantheon Books; Ziauddin Sardar. 1999. *Orientalism*. Buckhingham, Philadelphia: Open University Press.

and to some extent researches the opinions and perceptions of Muslim women, this is not the central focus of the project.

Instead, the fieldwork focuses heavily on community leaders, social workers, and academics investigating the actual community practices of faith based arbitration. Second, where I have sought the experiences and opinions of adherents I have sought this from both men and women. For example, the web survey was aimed at Muslim communities generally, not only women. Third, my fieldwork focused on Jewish communities as well as Muslim communities. Fourth, to the extent that I did engage with Muslim women regarding their experiences and opinions regarding faith based arbitration we used fieldwork strategies that minimized direct contact and carefully theorized my position as a researcher with regard to how I represent their voices in this project as outlined below.

### 3.1.1 Framing the research.

From the outset I framed the project generally with the goals of critical ethnography in mind. I attempted to incorporate the voices of diverse Muslim and Jewish positions not previously represented in the existing research or public discourse on the subject from the outset. One of the aims of this project has been to counter the Islamophobic, racist, and colonial discourses that dominated the public debate on faith based arbitration with a more balanced, reasoned, and open approach to the diverse experiences and positions Muslims and Jewish people occupy on the issue. For example, this project was not designed to support those who claim that Muslim women really are oppressed, that Muslim men really are domineering and unmodern, and that the practice of Sharia domestically is indeed inequitable and gender discriminatory. On the other

hand, this project was also not designed to prove that Sharia was an ideal legal or moral system or that Muslim women and men were the model of gender equity. This project has attempted to be forthcoming about inequities between the dominant population towards Jewish and particularly Muslim minorities as well as inequities within the respective communities. However, in the current context, it is very difficult to discuss inequities within the religious communities I set out to study without having that research used to confirm Islamophobic and racist stereotypes (Razack 2008, Zine 2009).

### 3.1.2 Embodied researcher

My social and political position is signaled also by my body. I am male, white, speak English as my first language, and am a Christian. My body signals my membership in the family of white western nations that has historically been engaged in colonial and imperial projects for more than five centuries, and remains dominant globally (Razack 2008). In order to mitigate some of the effects of my embodiment as a researcher, I have made a number of strategic research design decisions. Regarding the fieldwork, I focused mainly on imams, sheikhs and rabbis, social workers, as well as other leaders in the respective religious communities that were educated and more experienced in dealing with researchers and the public generally than laypeople might be. Many of these interviews were done over the phone as well to mitigate the effect of my embodiment on the responses of research participants. The parts of my fieldwork that did cross further boundaries were designed to virtually remove my body altogether. The email survey/interview and web survey using Survey Monkey was designed to reach out to a broader sample of lay Muslims for their experiences and perceptions. This method for the

most part did not involve me in any direct contact with the research participants, who interacted mainly with web based technologies.

### 3.1.3 Critical Sociological Fieldwork

This project is not a critical ethnography per se, because it is not an ethnography proper, but it employs several principles and approaches that are used in critical ethnography. Critical ethnography seeks to give voice to multiple alternative discourses in the interests of uncovering, questioning, and resisting dominant discourses.[58] Challenging dominant discourses creates opportunities for resistance to dominant power structures in society. Not only does the knowledge generated in this project suggest avenues for liberating minoritized, racialized, and othered communities in the context of a majority white, Christian nation, but also means for protecting vulnerable people within minoritized communities. In this sense, I designed the project with the insights of critical ethnography in mind. For this reason I call the method used in this project critical sociological fieldwork, as this is not an ethnography proper.

This project addresses dominance and marginality on a number of levels. First, this project is relevant to the dominance of the mainly white and Christian or secular national population over Muslim racialized minorities in Canada specifically and the West generally, as well as global western European and American dominance over Muslim majority countries generally. In this project I will analyse the dominant public discourse in Canada on faith based arbitration that read Muslims in Orientalist ways especially in the post 9/11 context as non-modern (even anti-modern), unjust, barbaric

[58] Joe L. Kincheloe and Peter L. McLaren. 1994. "Rethinking Critical Theory and Qualitative Research." In Norman K. Denzin and Yvonna S. Lincoln eds. *Handbook of Qualitative Research*. Thousand Oaks, London, New Delhi: Sage Publications; Jasmin Zine. 2008. *Canadian Islamic Schools: Unraveling the Politics of Faith, Gender, Knowledge, and Identity*. Toronto: Toronto UP.

and un-Canadian. I subject this stereotypical image to anti-racist and anti-Orientalist theoretical analysis, as well as my own critical analysis, and I also place these stereotypes alongside the responses of those whom I encountered during my fieldwork research for critical comparison. In this way multiple voices on this issue will be represented in this project.

The second level of dominance that I address consists of the diverse relations of power within Muslim and Jewish communities in Ontario. There are a number of issues to consider here. First there are issues that arise between majority and minority ethnic communities within Muslim communities. In Ontario the South Asian immigrant population, for example, far outnumbers other Muslim communities such as the Bosnian, Arab, or African Muslim communities. Second, the majority Sunni Muslims in Ontario far outnumber the various Shia and Sufi communities. Third, there are in a number of cases inequities between men, women, and children that will be addressed. Fourth there are inequities in power within the religious tradition between religious specialists, leaders, and scholars, and other community members. This project will attempt to analyze these numerous voices and positions of power.

The issue of gender inequity is difficult to address, because although there certainly are issues of gender inequity in Muslim and Jewish families and communities, as in all communities and societies, it is very difficult to discuss the words, criticisms, and complaints of marginalized women in Muslim communities without having them appropriated to support the dominant western stereotypes of Islam that claim Muslims are "traditional", non-modern, inassimilable, hopelessly patriarchal and violent. My aim here will be to produce analysis and incorporate participant narratives that challenge both

patriarchy within Muslim communities as well as Orientalist narratives and religious discrimination against Muslim communities generally. I would not like to see my analysis of the inequities a number of vulnerable Muslim people face used for the purposes of reinforcing religious discrimination by the majority Canadian community against Canadian Muslims.

Critical ethnography is concerned with how fieldwork is accomplished, but it is also concerned with the power the author has to write and represent the words of her or his participants. This project will aim to disclose that power and incorporate a reflexive analysis of it. As the author of this project I have the power to frame the questions and in part influence the environment in which the questions are answered. As the author I possess the power to select which participant narratives to include or exclude; I choose to emphasize certain comments and minimize others (Brown 2001). I frame how a participant's narrative will appear within this written project, and what parts of that narrative will appear. I will endeavor to exercise this power in a reflexive and analytical way, offering justifications for my choices, highlighting other choices that may have been made, and most importantly critically divulging the discourses that will be supported by my choices and those that may be marginalized.

## 3.2 Research Strategies and Activities

### 3.2.1 Gaining Access to Research Participants:

Although I had done some research previously among Muslims in Kitchener-Waterloo, the vast majority of people I interviewed for this project were new to me. Dr. Jasmin Zine, a member of my dissertation committee, was instrumental in aiding me in

the beginning to gain access to the communities. She also provided me with a contact in the Jewish community to get me started. Dr. Zine's position is that academics and various leaders in the field are "fair game" for seeking out interviews. The point at which we begin to seek out interviews of adherents generally who might not be as well educated or have the same resources or experience working with the public and researchers is the point where one adopts more careful strategies of fieldwork. As regards one-on-one interviews, I have interviewed mainly leaders, social workers, religious specialists, and scholars of Muslim and Jewish communities.

Although Dr. Zine gave me a very good start with interview contacts in Muslim and Jewish communities in Southern Ontario, I very quickly expanded my prospects by asking research participants for other participants they might suggest. More importantly, the internet provided an invaluable source of information regarding local Muslim and Jewish institutions, which I then contacted by phone and email to request interviews. I found members of the Muslim communities on the whole very forthcoming. The vast majority of Muslim leaders were very willing to spend in many cases significant amounts of time with me for the purposes of interviewing. Only a very few were hesitant and did not wish to be interviewed.

I was surprised to find, however, that it was much more difficult to find willing participants and subsequent contacts in the Jewish community. The Orthodox community is the most organized with regard to faith based arbitration and mediation among Jewish communities in Ontario. The Orthodox Jewish community had formed the Beth Din or Jewish court in order to handle civil disputes of both family and business related matters. Informal mediation and counseling of course takes place in Conservative, Reform, and

Reconstructionist Jewish communities, but formal faith based arbitration is much more common in Orthodox communities. I was able to get in contact with the administrators of the Beth Din and eventually interview them, but generally speaking it was very difficult to get in contact with the six to eight rabbis who sit on the Beth Din in turns. I had to painstakingly search out these rabbis through the internet and by calling numerous Orthodox Synagogues. In the end I was able to get a good representation of interviews from those most involved in the Beth Din. I was able also to interview a few Jewish representatives of the Canadian Jewish Congress (CJC) and the Conservative Jewish Community, which does have some informal mediation services. Because the number of rabbis involved in the Beth Din is modest, and because the information I received was quite consistent between interviewees, I reached sufficient saturation in my interviews in the Jewish community with twenty interviews.

Beyond one-on-one interviews, I attempted a number of electronic survey methods for gathering fieldwork information from Muslim communities. This method was especially helpful in mitigating some of the boundary crossing nature of my research as it involved participants in contact only with online technologies rather than in person or telephone conversations with an interviewer potentially of a different religion, gender, race, ethnicity, educational level, and class. First, Dr. Jasmin Zine was instrumental in assisting my email survey/interview of a number of Muslim women through a Muslim women's reading group that she and another academics at Wilfrid Laurier University belonged to. This was a fairly short and informally structured survey/interview with six open ended questions (See Appendix F). Unfortunately, although the submissions I did receive were very rich I only received four responses to this survey/interview, and

therefore the much more developed web survey using Survey Monkey was very useful for gathering a much more representative sample of respondents. The email survey response is clearly too small to stand on its own, so I have I combined these with my in-person interviews with women leaders and lay-people for a total of twelve interviews with Muslim women.

The survey constructed using Survey Monkey was edited and commented on by my supervisory committee as well as two researchers in the University of Waterloo Survey Research Centre. This survey was very much geared to getting Muslims' perception of the issues of faith based arbitration and mediation, and especially if and why Muslims had, or may, or may not use such services (see appendix D).[59] For the most part, I asked Muslim community leaders and workers for permission to send them the link to the web-survey, asking them to forward the survey on to other community members as they felt appropriate. The web-survey participants then snowballed from that point, as the survey itself asks participants to pass the survey on to others they feel might be interested in participating.

### 3.2.2 Chronology of Research Activities:

- *September 2007-April 2009: General Fieldwork*

The bulk of my fieldwork was carried out over a two-year period from September of 2007 through April of 2009, though I have added the occasional interview as the opportunity arose even after this point. I spent the fall of 2007 mainly writing and passing through the ethics review process at the University of Waterloo. I began slowly with a small number of interviews both in-person and over the phone once my ethics review

[59] Although I employed qualitative interviews with both Muslim and Jewish individuals, the web-survey was designed only for Muslim communities.

application had been passed. My most productive section of interviewing took place during the winter and spring terms 2008. I held several interviews over the phone with social workers, Imams, and other leaders in the Muslim community, as well as with spokespersons for Jewish organizations and a number of rabbis and administrative staff of the Jewish Orthodox Beth Din. I continued to have a few occasional interviews even after this main period of fieldwork productivity right up until April of 2009 as more ideas for people I thought I should interview arose. There were two main periods of transcription work for these interviews. In the fall of 2008 I transcribed significant portions of the interviews I had completed to that point (near thirty) in preparation for my conference paper presentation to the Association of Muslim Social Scientists in October of 2008. In April of 2009 I completed the remainder of the transcriptions of key sections of my interviews for the purposes of completing my dissertation.

- *April to June 2008: Muslim women's reading group email survey*

During a short few months in the spring of 2008 I completed the email survey of the Muslim women's reading group to which Dr. Jasmin Zine belonged and assisted in gaining access to for the purposes of the survey. As mentioned above, I only received four responses, though very rich and valuable responses indeed. All responses for the email survey of the Muslim women's reading group were received by June of 2008, after having initially sent out the survey in April of 2008.

- *(September 2008) March 2009 – April 2013: Web Survey.*

I initially purchased my account with Survey Monkey in September of 2008. The extensive process of creating the survey and then having it reviewed by both members of my committees as well as two members of the University of Waterloo's Survey Research

Centre took approximately six months to complete. The two reviewers from the University of Waterloo Survey Research Centre were much more experienced in written online survey research, and their advice was invaluable for fine tuning this research instrument. I was finally able to administer this survey to the Muslim communities of Southern Ontario in March of 2009. When I accomplished my interviews previously I asked many participants if they would be interested in passing on an online survey to other members of their community, and many offered enthusiastically and generously to do so. It is mainly through these contacts and through Dr. Zine that this survey was spread to the community. From there the participants passed on the survey by email to other people they knew, and so the web survey spread in snowball sampling fashion.

### 3.2.3 Challenges

As stated above, this is not a project focusing on Muslim women. However, given the focus on Muslim women in the media discourse on faith based arbitration, it is important to include the voices of the people on whose behalf the media discourse and certain spokespersons allegedly spoke on. As one-on-one interviews would involve me as a researcher in crossing too many boundaries, we had to find other ways to listen to the voices of Muslim women. First, the Muslim women I interviewed were mainly leaders and educated social service workers in the community. Second, I employed a variety of other research methods such as email surveys and web surveys to gather voices of Muslim women without direct contact and boundary crossing.

With regard to the web survey, I would have liked to have been able to conduct at least a portion of the survey as a technically random sampling, which would make it more statistically representative. Although I judged this in the end to be not feasible, the

sampling I did manage to acquire through the web survey is still representative of a large number of Muslims mainly in Ontario.

### 3.2.4 Sampling Procedures

For the purposes of exploring the actual practices of faith based arbitration and mediation, I chose to focus mainly on Muslim and Jewish leaders who offered such services. In Muslim communities, I interviewed mainly imams who were leaders in their local *masjids*. While some of these leaders were full time paid imams, others were part time volunteers depending on the resources available to the respective communities. Many of these imams simply incorporated faith based mediation and arbitration into their weekly *masjid* activities and responsibilities. A number of imams however simultaneously belonged to organizations independent of their *masjids* that were specifically designed to address faith based mediation and arbitration. Some leaders I spoke with only worked through organizations that offered mediation and arbitration services, and were not imams as such in their local *masjids*. I also interviewed Muslim community social workers and other prominent active members who serve their community.

My personal interviews surveyed a wide sample of ethnic diversity, not only among interviewees themselves, but also given the fact that these interviewees were often leaders and workers representing the very diverse communities they serve. I interviewed leaders of diverse South Asian, Middle Eastern, Balkan, and African backgrounds. Therefore, in my one-on-one interviews ethnic diversity is represented first by the ethnic diversity of the leaders and workers themselves, as well as by the diversity of communities they interact with and serve.

In both personal interviews as well as electronic survey methods I used a process of snowball sampling rather than a sample structured according to specific criteria or a properly statistically random sample. The sample included: fifteen imams, one dedicated Muslim arbitrator/mediator, one leader from a prominent Muslim women's organization, one Muslim lawyer, and one Muslim lay person recommended to me by a woman social worker. Also included in the sample were seven social service workers including six women and 1 man. Four Muslim women also filled out the email interviews. Altogether these total thirty interviews with Muslim participants. The Jewish sample included two administrators in the Jewish Orthodox Beth Din, and five rabbis that regularly sit on the Beth Din. I interviewed eight other Orthodox rabbis that do not regularly sit on the Beth Din but send adherents in need of its services regularly, and may attempt to mediate a situation if possible before it is taken before the Beth Din. I interviewed two other members of the CJC, one Jewish woman lay leader, and two conservative Jewish rabbis involved in mediation activities. The total number of Jewish interview participants was twenty.

There were seventy respondents to the web survey. The web survey did not take any personal information that might identify participants. However, demographic information was gathered including age, income, gender, employment, ethnicity, place of birth, etc. I used Survey Monkey software, available online, to generate a thirty-item survey. The survey was emailed to potential participants in the form of a web-link which would connect him or her to the survey. Of the seventy respondents fifty completed the survey; however, even those that did not complete the survey answered a number of questions. The question with the most responses recorded sixty-six answers. Fifty-six

participants responded to approximately one quarter of the questions regarding faith based arbitration (i.e. not including questions related to the identity of the respondent). And 53 participants answered the majority of the questions in the survey.

### 3.2.5 Research Instruments and Data Collection

I gathered data for this project mainly in the form of informal semi-structured one-on-one interviews both in person and over the telephone. I supplemented this information with field notes, an email survey, and a web survey.[60] I interviewed fifty people in total. In each case I provided interview survey participants with a form that served as both an information letter explaining the project and an ethics consent form that explained the rights and protections regarding confidentiality of participants and asked for their conscious and informed consent or refusal to participate in the project (see Appendix A).[61] Some participants explicitly stated they did not mind, and even preferred that their voices be represented with their proper names. In this case they amended the consent form to reflect their wishes. In some cases I explained that if I referred to a leader of a specific organization, even using a pseudonym, their narratives may not be as anonymous as they might prefer, particularly for people inside the communities familiar with the organizations in question. Therefore, although most were comfortable with this, in a number of cases interviewees requested that I send them a transcription of the sections of the interview I planned to use in the written dissertation prior to submission or publication.

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[60] Following are works I consulted on the methods mentioned here. Rubin and Rubin 2008, Arksey and Knight 1999, Spradley 1979.

[61] The information regarding the project included in the letter explained the background, rationale, shape, objectives, questions, and direction of the research project generally. The consent form explained to potential participants that the information collected from them would be kept in a secure and private location indefinitely, and that any information shared would be represented in the project using pseudonyms, protecting their identity with anonymity.

Beginning with a basic question set for one-on-one interviews, I then tailored each question set to the particular individual I spoke to depending on the organization and responsibilities each participant had (see Appendices B and C). Although I had fashioned a semi-structured set of questions, these were also intended to be open ended. I attempted to structure the flow of questions in a natural progression from general opinions about the issues related to faith based arbitration to more specific experiences and positions on the details of faith based arbitration and mediation. Furthermore, I allowed for significant "play" in the conversation allowing participants to take the conversation in directions of their choosing, or I created new questions based on what was being shared and followed that direction for a time, latter circling back to all questions I intended to cover by the conclusion of the interview.

The average length of interviews was about 60 – 90 minutes. My longest interviews were four hours and my shortest less than half an hour. A number of participants expressed gratitude that their voices were being heard in ways that were not well represented in the media debate on faith based arbitration. However, many continued to be leery of the final products of the project, worrying that their views might be misrepresented again as had happened many times in the media. While direct quotations were kept faithful to the original words of participants, I made some occasional minor editing for grammatical reasons. I digitally recorded most interviews using a Sony ICD-P series digital recorder. I used this recorder for both in-person interviews and telephone interviews. I logged the content of each interview, and I transcribed significant portions of each interview. I did not transcribe all interviews in their entirety. A few interview participants did not wish to be digitally recorded, in which case I took notes during the

interview, and immediately following the interview I digitally recorded myself in private recounting everything I could about the interview verbally using the question set and written notes to jog my memory. I then logged these verbal notes and transcribed significant portions, though of course I did not use these as direct quotations from participants in the written dissertation, but rather paraphrased the participants' statements, and where necessary explained that I was doing so. Most of the interviews took place either over the phone, or in an interview participants' home, or in the interview participants' religious institution. I held several interviews at *masjids* in Toronto, as well as the homes of imams in Southern Ontario generally.

I designed the question set for the email survey/interview specifically for the members of the Muslim women's reading group. I designed this survey/interview with six brief and very open ended questions, not including demographic questions (see Appendix F). I was concerned that it had to be short enough that people would participate in the project, but the questions had to be rich enough to elicit useful responses. The length of responses varied considerably, but in many cases they were very rich and useful indeed. My only regret is that not more people participated in this survey/interview instrument. However, the web survey garnered a much greater response rate.

As per the nature of web surveys, the questions are very structured and responses are quite limited. Although I am not happy about that aspect of the survey method, the much larger response rate and therefore representation is a very welcome benefit. Moreover, although the survey questions and possible responses were highly structured, I gave participants the option to write any additional responses they wished at the end of every question (see Appendix D). The web survey also concluded with a request for

feedback on the survey overall, offering a large text box in which participants could express their own opinions. The statistical information gathered from the survey was analysed with the help of the University of Waterloo Survey Research Centre. And I included the written responses gathered from the survey's numerous "other" sections and final feedback section selectively as they had been written, editing only occasionally and lightly for grammatical reasons.

### 3.2.6 Data Analysis

Even though this is not a full blown ethnography, employing a critical ethnographic approach, I have attempted to include the diverse discursive positions of research participants' narratives and responses in order to challenge and revise existing sociological theories of modernity, rather than simply fitting these into a previously constructed theory. Admittedly, I do employ pre-existing theories such as conflict theory and post-colonial anti-racist theory in this work to make sense of my findings, but I attempt to give the fieldwork findings precedence, and fit the theory to the empirical findings, revising the theory when necessary, rather than fitting the fieldwork findings to the theories. With regard to theory, I include the multiple discursive positions of participants in this project narrative in a way that informs and challenges theories of modernity, secularization, privatization, and religion. Multiple and diverse participant voices also challenge prominent biases, and misunderstandings proliferated in the public debate on faith based arbitration. And finally, I include multiple voices that challenge gender inequity and other kinds of inequity within respective religious communities. I have not used the voices of participants to produce a new grounded theory, but rather to

question and revise existing theories and conceptions, as well as prominent biases and prejudices.

I analysed the results of the web-survey using simple forms of univirate analysis. These include "eyeballing" the data for obvious patterns, calculating central tendencies, measures of dispersion, and charting distributions (Bernard 2002). The small sample size of the survey does not justify more complex forms of analysis such as bi-virate and multi-virate analysis. I provided a text box for feedback on every page of the survey. I have collated and analyzed the textual responses of participants much the same way I did for the interviews as stated below.

I analyzed in-person and phone interviews, as well as the email surveys in an informal "qualitative analysis of qualitative data" method (Bernard 2002, 428). Based on the questions I asked, as well as the questions that arose during the interviews in response to participants' narratives, I identified and collated patterns among the responses and narratives of participants by "eyeballing" the data (Willis 2007, 298). In this sense, although the interviews were not formally coded, I coded the results informally according first to the categories of questions asked in interviews, and second according to varieties of answers to question categories. The patterns identified illustrate the attitudes and practices of Muslim and Jewish leaders and adherents regarding faith based mediation and arbitration in Ontario. This is a substantial though not representative sample. Although this is not properly a representative sample, my interviews altogether show a substantial amount of saturation (Jackson & Verberg 2007, 153). I then compared these patterns of responses and actual practice of Muslim and Jewish communities to the public discourse on faith based arbitration that took place in the media. I found several

disjunctures between the issues and meanings that proliferated in the media compared to those articulated by the actual religious community members and leaders who use or offer these kinds of services. Based on these findings I argue that the public policy that followed the "sharia debate", although positive in some respects, missed the mark in a number of ways based on what Muslims and Jewish people were experiencing on the ground. I present the results of the analysis of my fieldwork in chapter 6. In my conclusion, I summarize my findings and make policy recommendations.

# Chapter 4 Truncated Agency: Reading the History of the "Sharia Debate" Through a Postcolonial Lens

## 4.1 Can the Imperiled Muslim Woman be Protected?

It is understandable that the McGuinty government and those commentators on the so-called sharia debate committed to democracy, procedural liberalism, and the rule of law could find the prospect of Muslim faith based arbitration potentially threatening. Many Muslims themselves, both in the media and among my own interviewees, expressed serious concern about the real potential for vulnerable people to be disadvantaged by particular Muslim faith based arbitrators holding particular interpretations of Islamic legal tradition. However, quite aside from this legitimate concern, upon further analysis of the history and discourse of the so-called sharia debate I find more pernicious assumptions, interpretations, stereotypes, and actions taken that work much more to fulfill the interests of dominant populations than the protection of vulnerable people. Building on the theoretical frame outlined in chapter two, the particular way the so-called sharia debate religionized the issue of faith based arbitration rendered religion generally and Islam in particular as nearly intrinsically oppressive and inherently premodern—or even *anti*modern. Uncritical forms of multiculturalism and imperial secularism abound in the history of this debate. I conclude that a critical multiculturalism that incorporates anti-imperial secularism would be far more effective for addressing the issues affecting vulnerable people in the context of faith based civil dispute resolution.

Much of the public discourse that surrounds and articulates the issue of faith based arbitration in Ontario has used what Sherene Razack has called the productive discursive figures of the "imperiled Muslim woman" and the "dangerous Muslim man," often in contrast to the figure of the "civilized European" (Razack 2008). These three figures are not real women and men but discursive tools that I will track and interrogate through their appearance in the debates on faith based arbitration. However, although these are discursive figures, when deployed they very much affect the lives of Muslims living in Canada and around the world.[62] The figures of the imperiled Muslim woman and the dangerous Muslim man are shaped and utilized in a way that primarily serves western interests. In other words, these stereotypical figures are utilized to defend several excessive policies of control, surveillance, and policing of Muslim populations in several western countries currently as well as justifying western foreign policies and economic exploitation of resources in so-called Muslim countries. "Being tough on Muslims, as many European scholars have observed, is one significant way in which contemporary Western governments secure both their own domestic base (through appealing to the right and consolidating the idea that there is one white national culture) and their international stature (through appearing to be active participants of the 'war on terror')" (Razack 2008, 160). The media discourse and public debate over the issue of faith based arbitration are saturated with these discursive figures. I will examine the construction, logic, and productive power of these figures throughout my analysis of the history and debate of faith based arbitration in Ontario in this and the following chapter.

[62] For a further discussion of the appearance of these figures in the media representation of the so-called sharia debate see chapter 5 below.

My central argument in this chapter is that because of the realities of Canada's modern legal system, which is fundamentally dependent on the exercise of human agency to be effective, the figure of the imperiled Muslim woman, devoid of agency as she is imagined in public discourse, cannot be protected by Canadian law, except in a partial, distorted and paternalistic manner. Therefore I argue that because of the productive power[63] of the stereotypical image of the imperiled Muslim woman as outlined by Razack, and despite the laudable but limited protection that has been afforded through the revised Arbitration Act, ironically the deployment of the "imperiled Muslim woman" has been productive of more harm than protection for vulnerable Muslims.

An individual without agency cannot be fully human in the liberal model. Therefore I argue that, because the figure of the imperiled Muslim woman is imagined for several reasons to be virtually devoid of human agency, in the context of liberalism her humanity is denied. Policies and laws based on this paternalistic conceptualization of the Muslim woman as a "sub-human" figure are designed to protect people who are imagined to have no agency. For vulnerable people on the ground, there are at least two harmful consequences. First, such policies cannot protect vulnerable peoples because the existing legal system is fundamentally designed to protect people largely only when they exercise their agency. Despite the fact that faith based arbitration is technically no longer allowed in Ontario (and I will clarify the extent to which this is the case below), I argue in this chapter that de facto legal pluralism on the ground leaves vulnerable people open to many forms of legally enforceable contracts that might be based on religious law. Furthermore, because the solution of the McGuinty government was simply to end all

[63] Razack is referring here to Foucault's thesis that power is not simply repressive, it is also productive. In this instance the stereotypical image of the imperilled Muslim woman has been used to produce assumptions and reinforce relations that further western interests.

faith based arbitration, in part because vulnerable Muslim women were imagined as unable to exercise the agency necessary to access the protections of the legal system over against the dangerous Muslim man, little further policy has been developed to assist vulnerable people that may find themselves presented with these other types of legal contracts.[64] Second, vulnerable people are much better protected I argue with policies and practices that support and facilitate their agency, rather than those that are based on the assumption of an absence of agency. For the most part agency-affirming policies have not been developed, and in the limited extent to which they have been developed they have remained largely hidden.[65]

## 4.2 Dangerous Muslim Men, Imperiled Muslim Women and Civilized Europeans

Sherene Razack names three tropes that have been highly productive for western interests: the dangerous Muslim man,[66] the imperiled Muslim woman, and the civilized European (Razack 2008).[67] These tropes justify the surveillance and control of the lands, resources, rights, and actions of Others (Muslims in this case) in the name of, for example, rescuing imperiled Muslim women from dangerous Muslim men. Many have noted the public political justification of the war in Afghanistan in part as an operation

[64] I am not saying that there were not legitimate concerns about family and community pressures to contract out of one's rightful default legal norms in Ontario Family Law in the context of faith based arbitration. What I am saying is that in order for the legal changes made to the Arbitration Act to effectively protect vulnerable peoples in the context of the realities of Ontario law, many more agency-affirming policies would need to be developed. Again, I will explore this in more detail below.
[65] In my concluding chapter I will offer a number of recommendations for agency-affirming or agency-enabling policies as well as methods for making existing agency-affirming policies more visible to those who may benefit from them most.
[66] See also Guenif-Souilamas 2004 and Spivak 1988.
[67] Razack intends here those more generally of European descent that have become dominant globally, mainly in Western Europe, North America, and Australia.

intended to rescue Afghan women from barbaric Afghan men.[68] Ironically, Afghan women have benefited little as a result of the war in Afghanistan,[69] although western control of the region has arguably been achieved.[70] Razack warns that "we are in a historical moment in which feminism can be easily annexed to the project of empire. As I and others have shown, it is often through the language of human rights and gender equality that empire is accomplished today" (Razack 2008, 148). As illustrated in the case of Afghanistan, rarely do these western projects of rescue actually benefit Muslim women, a number of whom do indeed suffer due to inequity. More often these projects only consolidate western power abroad, and tighten control over racialized and religionized domestic Others at home in order to consolidate the (white and secular) "Canadian nation."

Each of the three stereotypes identified by Razack justifies different things and operates in different ways. The imperiled Muslim woman is represented as nearly helpless, and therefore dependant on benevolent (paternalistic) non-Muslims for rescue. The dangerous Muslim man is represented as too patriarchal and unreasonable to be properly modern, and therefore is in need of surveillance, inordinate legal constraints, and policing (Razack 2008, 146). These stereotypes are used to further suggest that Islam itself is inherently too patriarchal and unmodern to be tolerated equally with other more

[68] "When the occupation of Afghanistan by American forces can be justified as necessary in order to save Afghan women from the Taliban, feminists must necessarily pay attention to how their demands serve the interests of imperialism and white supremacy" (Razack 2008, 149).
[69] Cf. Khan, S. 2008. From Rescue to Recognition: Rethinking the Afghan Conflict. Topia 19: 115-136. Laxer, J. 2008. "Chapter 7: This War is not About Human Rights." In *Mission of Folly: Canada and Afghanistan*. Toronto: Between the Lines Press. Pgs. 69-79. The *Échec à la Guerre* Steering Committee. 2006. "Canada's Role in the Occupation of Afghanistan." In *Échec à la guerre (Stop the War!).* http://www.echecalaguerre.org/index.php?id=186 . Accessed June 23, 2010.
[70] I do not of course mean that western control is not regularly resisted by insurgents, but western control of the region is undeniably established in Afghanistan, and if and when western countries pull out they will leave a government friendly to their interests.

"modernized religions," further justifying various forms of surveillance, policing, and exclusion of Muslim bodies. Finally, the civilized European is represented as the only legitimate savior of Muslim women, as he or she is the only one with the agency and interest in human rights necessary to liberate Muslim women and usher them into modernity (Razack 2008, 146, 148). Furthermore, as Saba Mahmood argues, in western feminist discourse agency for the Muslim woman can only be expressed as resistance to Islam and Muslim men (and religious adherence only as oppression and denial of her agency) so that a woman cannot be conceived of as *both* a practicing Muslim *and* liberated at the same time (Mahmood 2005). As Razack observes, these tropes, stereotypes, and fantasies were central to the debate over faith based arbitration in Ontario, and I argue were ultimately productive more of the control and marginalization of Muslims generally than significant protection of vulnerable people in the context of faith based arbitration specifically, or religiously influenced civil contracts generally, which are equally enforceable.

In this chapter I want to build on Razack's insights in a number of ways. I will argue that the cost of the Sharia debate goes beyond simply a recurrence of Islamophobia and re-affirming some terrible binaries. Razack states, "at the end of the day, something positive may have been achieved in that the plans of a small conservative religious faction may have been upset, but it has been achieved through reinforcing some rather terrible dualisms (women's rights versus multiculturalism; West versus Muslims; enlightened Western feminists versus imperiled Muslim women) that, in a post-9/11 era, has tremendous utility for states seeking to regulate Muslim populations" (Razack 2008, 171). My object here is to extend Razack's analysis of the "multiplicity of factors that

have produced and sustained" the marginalization of vulnerable peoples in the context of faith based arbitration. I will search for these multiple factors in my analysis of western legal structures, public policies, and western discourses on Muslims, as well as patriarchy in Muslim communities. First, I argue the discourse on the sharia debate is one that has represented Muslim women as essentially lacking agency. This paternalism is akin to dehumanization, especially in the context of a liberal democracy. A defining component of a full human person in liberalism is her or his autonomy and agency.[71] To represent a fully mentally functioning adult person, particularly in the context of a liberal democracy, as absent of agency is thus to dehumanize them to some degree. I do not mean that Muslim women are dehumanized in the same way that Jews were dehumanized by the Nazis in order to exterminate them. I also acknowledge that in certain contexts the law protects those understood to have limited agency such as children, the developmentally challenged, the mentally ill, people suffering from dementia, etc. However, my point is that placing Muslim women in the same category as though they possessed limited agency in the same way is paternalistic and infantilizes Muslim women, and thus dehumanizes them. Second, in part as a result of this dehumanizing discourse, the policies that have been adopted to rescue and protect vulnerable people have essentially been designed for people without agency, and therefore, for reasons I will explain below, I argue that these are largely ineffective or even counterproductive in practice.

Many now imagine that faith based arbitration has been prohibited, and therefore that vulnerable people are effectively protected. However, even now as Marion Boyd

[71] Cf. Gill, Emily. 2001. *Becoming free: autonomy and diversity in the liberal polity*. Lawrence: University Press of Kansas. Chambers, Clare. 2008. *Sex, culture, and justice: the limits of choice*. University Park, Pennsylvania: Pennsylvania State University Press. Christman, John Philip and Anderson, Joel eds. 2005. *Autonomy and the challenges to liberalism new essays*. Cambridge: Cambridge University Press.

repeatedly pointed out in her report, the only way for a vulnerable person to activate the protections that the Canadian legal system offers she or he *must* exercise her or his agency.[72] Although the figure of the vulnerable Muslim woman was central to the public debate on so-called sharia courts in Ontario, I argue the striking irony is that if this figure were a real person she could not possibly be protected in the current legal regime. Therefore I argue that basing governing decisions on the logic of this figure is not a good way to make policy. In response to this state of affairs, I argue that only policies and practices that affirm the exercise of agency of vulnerable peoples can protect them given the realities of Canada's current liberal society and legal system.[73]

I want to be careful here not to reaffirm Islamophobia and the stereotypical figures Sherene Razack critiques. I am not arguing that agency affirming policies of protection for vulnerable people are needed because Muslim alternative dispute resolution (ADR) is in fact egregious. I argue below based on my fieldwork research that there is much being practiced in Muslim communities with regard to divorce, custody, and inheritance, for example, that is quite acceptable with regard to Canadian legal norms. Furthermore, the number of people who might suffer as a result of coerced legally enforceable contracts based on religious tradition is very likely quite small, in fact no greater than those who suffer as a result of other forms of contracts. We should not

[72] "Arbitration disputes are like all legal disputes, in that arbitration is triggered only by the parties who wish to use the law to resolve a dispute. Similarly, if the arbitration process has contravened the Act or has infringed on the rights of the parties, the person who has the problem must go to the court to seek a remedy. People with complaints about other people's behavior generally must bring a claim to the courts (or tribunals) and ask for help. The state does not have agents going throughout society looking for wrongs to set right, except in the case of crimes and health and safety inspections and, arguably, in child welfare matters. *People are expected to look out for themselves*, and at the same time are allowed to resolve disputes privately if they so choose" (Boyd 2004, 9). Italics Mine.

[73] I am aware that the amendments to the Arbitration Act were intended to protect people who may have had their autonomy threatened or compromised by others in their family or community, but I argue that these policies designed to limit this threat to the autonomy of vulnerable peoples are not enough to protect these people. They must be accompanied simultaneously by policies that enable the autonomy of vulnerable peoples in order to be effective.

ignore, as was often done during the Sharia debate, the fact of potential mistreatment, unfairness, and coercion that can occur in any Canadian community, religious or otherwise. A number of Muslim women themselves have expressed concern about the risks inherent in faith based arbitration, though many I spoke with were also offended by the atmosphere of moral panic in which the issue was addressed and by the negative representation of the community in the public debate. I do not here want to trivialize the very real threat to women's equality posed by some Muslims who may want to use faith based arbitration, or religiously influenced civil contract formation generally, to coerce women into unfair agreements. Rather, I want to complicate and contextualize the much starker and overwhelmingly negative representations of Muslim communities that arose in the public discourse. I wish to further show that the tropes employed in the public debate, and to some degree the result they engendered, in fact exacerbated the inequity suffered by vulnerable people more than they helped. It is in this carefully limited sense that I argue for agency affirming tools and policies for the protection of vulnerable people in civil dispute resolution.

I aim to accomplish three tasks in this chapter in the course of pushing assumptions about the imperiled Muslim woman to their logical conclusion in order to show their contradictions and incoherence. First, I will argue that the arguments based on the alleged extreme vulnerabilities of the imperiled Muslim woman cannot justify the dissolution of faith based arbitration without also justifying very radical change to the Family Law Act. The reason I argue this is that Canada's liberal legal system depends on the autonomy and agency of the individual. In order to actually protect the imperiled Muslim woman one would have to enact an entire legal system for all Canadians

designed to protect people without agency.[74] Such a system would be perceived to be oppressive, because it would negate the liberal individual's autonomy to contract agreements appropriate to unique family situations. Second, I will trace the logic of the imperiled Muslim woman through the issues of faith based arbitration to show that she cannot possibly be protected in the current legal system (even outside of faith based arbitration), and that she therefore cannot be the basis of effective policy to protect vulnerable people. Finally, I will examine the resulting policy decision made by the McGuinty government to forbid all faith based arbitration, arguing that this result in practice makes very little difference in protecting the rights of vulnerable Muslim peoples. In my analysis of the McGuinty government's actions, I will make suggestions as to which policies could be further developed and extended in order to better protect vulnerable people as autonomous agents.

## 4.3 A History of the Faith Based Arbitration Debate in Ontario

The purpose of this section is to provide a historical overview and description of the issues relevant to the faith based arbitration debate. The analysis following this chapter will focus on the productive power of the imperiled Muslim woman and the inadequacy of policy based on the logic of this figure. In this section I will explore how the figure of the imperiled Muslim woman in some cases led to and in other cases reinforced several misunderstandings and oversimplifications of the issues related to faith based arbitration.

### 4.3.1 What is the Difference Between Arbitration and Mediation?

[74] I argue this in the context of family law. This is not the case in other legal jurisdictions, for example criminal law.

Since there are now several publications that explain the legal context of family mediation and arbitration in Ontario (Bunting 2009; Bakht 2006; Boyd 2004), this dissertation will not reproduce a thorough exploration of the history and workings of the legal regimes in question. However, there appears indeed to have been much misunderstanding about what exactly family arbitration and mediation are, evidenced in the public debate, noticed by other scholars, and present among my own interview respondents (Bunting 2009). I have therefore attempted to briefly clarify these in my introductory chapter, and I will summarize those points here, my main point again being to contrast how the figure of the imperiled Muslim woman was represented as being at risk in faith based arbitration with the actual logic of how this stereotype would function in these institutions.

As stated in the introductory chapter, arbitration involves giving decision making powers to a third party in order to break a deadlock that two disputants are not able to resolve themselves. Mediation on the other hand does not lock the disputants into the decisions a mediator might suggest; disputants are free to take the advice of a mediator and enter the results into enforceable contracts such as separation agreements and wills. My fieldwork research reveals that some Muslim mediators in fact recommend women to enter the results of the mediation or advisory arbitration into an enforceable agreement in order to protect vulnerable women who will benefit from the power of the state to force ex-husbands to pay child and spousal support. Therefore, my research suggests it is women most often who may benefit from enforceable contracts, rather than men who will try to enforce an unfair contract of some kind. In the realm of family law, disputants can choose not to go to mediation if they wish. This is notably in contrast to Quebec, which

in fact requires *all* family law disputes to go to mandatory mediation before going to court (Boyd 2004, 32). This is ironic, given that many opposed to faith based arbitration pointed to Quebec as a model in that Quebec forbids arbitration of disputes relating to family law. This is puzzling, as those concerned with the privatization of family law critique mediation for the same reasons they critique arbitration: mediation might not lead to just outcomes because there may be substantial power imbalances between the disputants (Bakht 2006, 4-7). Forbidding family law arbitration, but requiring family law mediation then seems to be counterproductive. Furthermore, I argue that given the flexibility of the *Civil Code of Quebec* to allow, for example, divorcing couples to opt out of their statutory default norms much like Ontario's FLA, renders Quebec's prohibition of the arbitration of family law issues nearly meaningless.

There are several costs and benefits to using private forms of dispute resolution discussed in the introductory chapter. Lower costs, privacy, flexibility, and relative speed of alternative dispute resolution are cited as clear benefits over the adversarial and top-down nature of the public court system. Furthermore, the public court system is less well equipped to take into account the concerns of racialized, religionized, and culturally minoritized communities. Even many feminists who opposed faith based arbitration do not hail the public court system as necessarily superior for upholding the rights of women, especially minoritized and racialized women, relative to alternative dispute resolution services with the proper safeguards in place. The potential costs of alternative dispute resolution are examined in detail by scholars who criticize what they understand to be the increasing privatization of justice. These scholars express fear that important legal advances in gender equity in family law may be opted out of in the context of

certain alternative dispute resolution services. The McGuinty government has made excellent changes to the Arbitration Act to mitigate these issues. However, I also argue that ironically, at the same moment, those who would have stood to benefit most from these excellent new protections are now essentially excluded from them.

### 4.3.2 A New Development in Ontario Law?

Many of the misunderstandings I deal with in this chapter are not simply innocent errors. Misconceptions often betray underlying assumptions that lead to and support these misunderstandings. These misconceptions in turn confirm and support the assumptions that helped to create them in the first place. In clarifying here the misunderstandings regarding faith based arbitration I seek not simply to provide correct information in place of misinformation. I seek also to expose and question the underlying body of assumptions that helped produce them. Many assumed for instance that the so-called proposal for Muslim arbitration called for a radically new development in Canadian law.[75] The facts are however that the Arbitration Act had made room for faith based arbitration by any religious community since 1991 (*Arbitration Act* 1991). Furthermore, Canadian courts have been reluctant to interfere with religious legal customs generally (Syrtash 1992, 98). Historically, religious communities have been given substantial jurisdiction in family law matters (Syrtash 1992; Kirsch 1971). I do not simply want to correct this misunderstanding however. I argue rather that this misconception was supported by and in turn reinforced underlying assumptions of a single (post-Christian) "white national culture" (Razack 2009, 160) that needs to be questioned in a country that aims to be

[75] "For many weeks there was a prevalent misunderstanding, which continues to be repeated by both the media and opponents of arbitration, that the government of Ontario surreptitiously colluded with a Muslim organization known as the Islamic Institute of Civil Justice to create a [new] parallel legal system for Muslims, thereby depriving them of their legal rights under Ontario and Canadian law" (Bakht 2006, 1).

multicultural and anti-racist. As Razack has argued, the secular/religious distinction stood in for a religious colour line in the so-called sharia debate (Razack 2009, 148). As I have argued above in chapter 2, this particular invocation of the secular deploys a modern hierarchy that polarizes the so-called civilized secular over against alleged barbaric religion that further facilitates the marginalization of racialized and what I have termed "religionized" Others.[76]

I document the beginnings of the so-called sharia debate in the introductory chapter, where I point out that most assumed that what the Muslim arbitration that the Islamic Institute of Civil Justice was proposing was a radically new development in Ontario law. However, contrary to popular perception, the IICJ was not asking for new concessions or accommodations. Rather, they were simply voicing their intention to participate in a legal option that had been open to all faith communities for several years. Importantly, these Muslims were in this sense seeking to join in, integrate with, engage, and participate in existing Canadian institutions rather than to isolate themselves from or dramatically change them as many charged (Syed 2012). Although this misperception likely had its beginning with Mumtaz Ali's own words, the way his words were read confirms rather than questions the presence of Islamophobia in the media. It is ironic that while there is much public discourse accusing Muslims of not integrating into existing Canadian institutions and culture, that when they attempt to do so they are still accused of attempting to violate Canadian norms, or transform and take over Canadian society.[77]

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[76] See Chapter 2 for a discussion of modern conceptualizations of religion, and processes of "religionization" in secular states.

[77] David Warren, "Multiculturalism -from Britannia to Sharia," *National Post, 8* December 2003, A14. Ken Elgert, "Islamic Law a Step toward Legal Apartheid," *Edmonton Journal,* 4 December 2003, A19. Sara Harkirpal Singh, "Religious Law Undermines Loyalty to Canada," *Vancouver Sun,* 10 December 2003, A23. Ghammim Harris, "Sharia Is Not a Law by Canadian Standards," *Vancouver Sun,* 15 December 2003, A15. As referenced in Razack 2009, p.207.

The assumption that Islamic law could not possibly have already been allowed to operate within the parameters of enforceable Canadian law suggests a further more pernicious assumption that Muslims are Others in Canada (Razack 2009). This assumption was expressed in numerous calls to protect the Canadian nation against infiltration by a non-Canadian pre-modern, misogynistic, and Other religious community. Islamic law could not be imagined as a part of the Canadian nation without also being represented as a fundamental betrayal of what Canada "stands for" (Syed 2012). The media discourse (discussed more fully in chapter 5) revealed assumptions that Islamic law is inherently unjust, premodern, patriarchal, barbaric, utterly Other and anything but Canadian. This discourse flourished despite a much more complex historic and present reality in which several Muslim jurisdictions attempt to be flexible in local situations, effect equity, and more recently attempt to install practices that are similar to western norms of equality and justice generally.

To uncritically assume that the participation of Muslims in faith based arbitration was radically new already suggests assumptions about the nature of Islamic legal practices and the "proper" place of Muslim culture in the Canadian state. Syed Mumtaz Ali's attempt to garner praise and generate awareness albeit dramatically, was quickly (mis-)interpreted in the media and public discourse as true without question, and read as violation, breech, and contamination of the Canadian nation. This was not a discourse of reasoned assessment of substantive and procedural threats to legal equality. This was the reading and representation of an Other to be contained.

### 4.3.3 Legitimate Concerns of Feminists Regarding Arbitration

I do not want my critique of the public debate on faith based arbitration to suggest that there were no legitimate feminist concerns. The challenge, eloquently expressed by Razack, is to address feminist concerns without falling into stereotypical and Islamophobic reaction (Razack 2009). Aside from the media discourse, several feminists, both Muslim and non-Muslim, raised concerns about women's rights in the context of faith based arbitration of family disputes. Much has changed for the better in the Arbitration Act as a result of the amendments that took effect in 2006. I will outline here the concerns of some feminists about the practice of arbitration that precipitated the amendments. It was indeed a group of Muslim women who first raised concerns regarding the potential risks of religious arbitration to vulnerable persons. In response to these concerns the National Association of Women and the Law commissioned Natasha Bakht to examine the legal facets of faith based arbitration under Ontario's 1991 Arbitration Act. Several pertinent issues affecting women were uncovered in this earlier version of the Act, were it to be used in family arbitrations (Bakht 2006, 5). Feminists have argued against alternative dispute resolution generally for some time (Bakht 2006, 6). Their concern is the privatization of family law, and these feminists have argued that the Canadian state must take responsibility for ensuring that women's interests are protected. Given that separation and divorce regularly result in the "feminization of poverty" (Bakht 2006, 6), family law is of particular concern to women. Feminists feared given that any legal tradition or principles could be used in arbitration, this could lead to any pre-*Rathwell*-ian[78] legal standard being applied in family law arbitrations that could

[78] Rathwell v. Rathwell [1978] 2 S.C.R. 436 [Rathwell] this is the case that set the precedent for a fifty/fifty division of resources upon divorce in Canadian family law.

result in “unfair division of property, spousal support, child support, custody, or access awards” (Bakht 2005, 27).

There have been substantial improvements to the position of women in family law disputes in the previous thirty years; however, there continue to be significant challenges. In particular, private dispute resolution in family legal matters has led to substandard outcomes for many women (Gordon 2001). Several feminist scholars worry that privatized forms of justice easily fall prey to reinforcing gender biases in society, where public oversight is not permitted to aid in protecting women’s interests (Bakht 2005, 28). Women might experience pressure from their family members, community, or religious leaders to engage in private judicial practices that are inequitable (Stopler 2003). Furthermore, if arbitrators are not trained and required to screen for domestic abuse, then a person who does suffer from family violence by definition cannot be genuinely free to choose private dispute resolution mechanisms (Hart 1990). Recent immigrant women may also be particularly vulnerable as they may not be familiar with their Canadian rights in family law, or she may be in an unequal power relationship if her husband has sponsored her to come to Canada, and there may also be substantial linguistic barriers to accessing justice (Bakht 2005, 28-29). Finally, inequity tends to impact on justice across intersecting lines of gender, “class, (dis)ability, race, and cultur[e]” (Bakht 2005, 29; Razack 2009; Goundry et. al. 1998).

Feminists also pointed to several shortcomings in the 1991 version of the Arbitration Act specifically for protecting the interests of women in family law disputes. Under the old Act, arbitrators had no requirements for or standards of legal training or training in screening for domestic abuse. The previous Act allowed for disputants to

contract out of their right to appeal an arbitral decision, which could effectively destroy a crucial tool for judicial oversight. One could sign ahead of time a contract committing oneself to arbitrate a family law dispute that might arise in future. This could become a problem if a party to the dispute for any number of reasons changed their mind once a dispute had arisen, perhaps years later, and wanted to go to the courts instead. This would ultimately mean that genuine consent to arbitration could be absent. There was no requirement for independent legal advice under the previous Arbitration Act. There were no requirements for keeping records, so that not only might an award not be honoured perhaps because it was verbal? only, but also there are little or no records of arbitrations to examine the impact of this form of private dispute resolution on women (Bakht 2006, 6-7). In the second half of the chapter I will explore how these feminist concerns have been addressed in part by the revised Arbitration Act, and how they might be better addressed by further policy development. However, in the interests of addressing feminist concerns without being reactionary, I continue here my critique of the public discourse on faith based arbitration and the misunderstandings it produced.

### 4.3.4 One law for all?

Several participants in the public debate on faith based arbitration made a plea for "one law for all" for the sake of protecting the imperiled Muslim woman.[79] These people assumed that one law for all would clearly benefit vulnerable peoples more than diversity or flexibility in the law. These spokespersons further assumed that legal pluralism, if not used by biased persons toward inequitable ends, would at least be used to affect uneven degrees of justice between people, rather than applying equally legitimate forms of

[79] "One country, one legal code, one court –for everybody." In Ingrid Peritz. 2005. "Ebadi decries idea of Islamic law in Canada." GlobeandMail.com. Accessed Tuesday June 14, 2005.

justice to diverse situations and contexts.[80] However, not only is the assumption that one law for all is superior misplaced, but also one law for all is not possible under Ontario's current family law regime.

First, legal rigidity, inevitably based on dominant cultural norms, has been shown repeatedly in legal history to disadvantage vulnerable people, particularly women (Bartlett 1990; Bartlett and Kennedy 1991). There is a long history of establishing equality through legal flexibility, and sustaining inequity through legal rigidity. For example, before reforms to the Divorce Act that set default norms in the event of divorce to an equal share of family resources between spouses, the law essentially stated that in the event of divorce all individuals would simply retain their own property and resources registered in their name.[81] The law assumed that this legally uniform treatment between all peoples regardless of class or gender was fair and equitable. However, given that at the time most women did not have jobs outside the home and did not take legal ownership in name of family assets, what appeared to be a fair one law for all was actually deeply biased in favor of men over against women. Furthermore, the only context in which the original law could even appear to be fair, given the gross gender inequity regarding economic privilege, would be in a patriarchal society where women are essentially expected to be the wards of men. This law, which had been perfectly consistent between all individuals, was changed in order to be more equitable. In other words, because individuals were diverse as to economic privilege, the law had to forsake

[80] My research demonstrates, for example, that some imams will go "*madhab* shopping" beyond their usual schools of jurisprudence in order to find a school of Islamic law that benefits Muslim women best in the Canadian context. See the section on the Darul Iftaa in Chapter 6 below. (A *madhab* is a school of Islamic jurisprudence).

[81] Cf. Rathwell v. Rathwell, [1978] 2 S.C.R. 436; Louise Dulude. 1982. *Outline of matrimonial property laws in Canada: from east to west*. Ottawa: Canadian Advisory Council on the Status of Women; James G. McLeod, Alfred A. Mamo eds. 1988. *Matrimonial Property Law in Canada*. Toronto: Carswell.

legal uniformity to take account of that diversity in order to ensure fairness and equity between peoples.

Revising the Family Law Act accomplished fairness in at least two ways. First, statutes were established in the Family Law Act to ensure that certain broadly fair default norms for the division of family assets and spousal and child support could be ordered by a judge in the event of a spousal dispute on these matters in divorce. These are likely what those calling for one law for all are referring to, although it has apparently been lost that this was at its inception a move toward legal accommodation of diversity and away from legal uniformity (because it disadvantaged women) for the purposes of establishing economic equity. Second, the autonomy of disputants to make choices in divorce was preserved in the Family Law Act as parties retain the right to opt out of their statutory default entitlements. Once again, this is in order to avoid the difficulties and inequities often caused by one law for all legal regimes. Perhaps a woman will need more than the statutory division of resources or default levels of support to take care of the children in the way she or both parents would prefer. Or perhaps a woman might prefer to pursue her career while having the father look after their children, in which case she might opt to give more support and resources to the father to take care of their children, freeing her to pursue her career. If the couple were not allowed the legal flexibility to contract out of the statutory default norms of the Family Law Act, these types of arrangements would not be possible. Natasha Bakht further argues that section 15 of the Canadian Charter of Rights and Freedoms explicitly recognizes that treating all people as if they were the same is not always an effective way to be equitable. She points out that "the many legal distinctions in the law based on, for example, sex and race are not considered measures

that are discriminatory but, on the contrary, that promote substantive equality by emphasizing a consideration of the impact of laws on members of groups subject to stereotyping and historic disadvantage. This vision of equality is significant because it accounts for the cumulative effects of past discrimination" (Bakht 2007, 137).[82] It is understandable in the context of liberal democratic society with its assumption that justice, equality, freedom and liberty are best achieved through procedural liberalism that many would assume one law for all is the best way to affect egalitarian justice.[83] However, given the history of effecting injustice for minorities by treating everyone the same, it is puzzling that one law for all would be the cry of those seeking to protect disadvantaged people.

My second related point is that because the Family Law Act allows such great flexibility in contracting out of default norms, this equals de-facto legal pluralism in family law. As Annie Bunting has stated, the "scope permitted by the act for private contracting out of statutory rights puts the lie to the myth, propagated repeatedly during the Sharia tribunal debates, that there is one family law for all Ontarians. The law permits privatized legal pluralism" (Bunting 2009, 237). It is for this reason that there can never be one law for all in the context of family law, unless the law is drastically changed to disallow persons to contract out of their statutory entitlements. Annie Bunting makes the point forcefully when she states that if the:

[82] Bakht provides the example of the sentencing provision in section 718.2(e) of Canada's *Criminal Code* that instructs judges to avoid incarcerating Canadian Aboriginal peoples as far as possible in order to counter the gross over-representation of Aboriginal peoples in the prison system. This "discrimination" in the *Criminal Code* is meant to affect justice and equity, not constitute a parallel and disadvantaging legal system. (Bakht 2007, 137).

[83] See Taylor (1994) for an explanation and critique of procedural liberalism.

> Government were truly interested in creating "one family law for all Ontarians," as its rhetoric suggests, then it would have had to take a very different course. It would have had to ban the contracting out of statutory entitlements altogether. However, the creation of a one-size-fits-all regime would encounter significant political resistance. The recent amendments leave untouched the *Family Law Act*'s balance between private contractual autonomy and statutory entitlements. (Bunting 2009, 240)

Again, one reason autonomy is retained is to protect vulnerable people from the inequity that can result form rigid legal codes that cannot take account of diverse family situations. I argue that the goal of those concerned with protecting vulnerable people should not be one law for all, because this historically benefits the dominant and disadvantages the vulnerable, but rather equity and fairness for all, which admittedly can be more complex and difficult to achieve, but is no less valuable for that (Bartlett 1990 Bartlett and Kennedy 1991). Ironically, detractors from faith based arbitration themselves argued in other contexts that rigid forms of law counter equality, where Islamic law was repeatedly condemned for being an ancient and inflexible legal regime frozen in time. It seems inconsistent then to posit that the solution to an allegedly unbendable legal form is a modern inflexible and "frozen" version of "one family law for all."[84]

### 4.3.5 Domestic Violence and Abuse?

Several commentators feared that faith based arbitration might facilitate domestic violence. However, the potential connection between faith based arbitration and domestic

[84] My point is not that inflexible laws can't be beneficial, human rights charters being a modern case in point. The point is that rigidity is praised in one area, while it is condemned in another, uncritically. For a critical discussion of the western perception of the "ancientness and frozenness" of sharia, see Emon (2009).

violence must be carefully clarified. Furthermore, it is important to ask how domestic violence in Muslim communities might be addressed without reaffirming Islamophobia, or the stereotypes of the imperiled Muslim woman and dangerous Muslim man. The issue of domestic violence is certainly a real and serious issue. I will attempt to carefully delineate how the issue of domestic violence might be connected to the issue of faith based arbitration specifically and civil disputes under the Family Law Act generally. I will also attempt to outline how they are not connected, so as to be clear about the risks without uncritically assuming that allowing faith based arbitration equals unbridled domestic abuse, as seems to have been the implication in the public discourse.[85]

Domestic abuse can present a major obstacle to equity in the settling of civil disputes. Several scholars have documented the affects of domestic abuse in rendering the settling of family legal issues drastically unequal (Goundry et al. 1998, 38-41). If, for example, a partner to a divorce is suffering domestic abuse from the spouse, then they can hardly be regarded as being able to negotiate that divorce on equal terms. This is a crucial issue in the private resolution of civil disputes. I will consider how this might be addressed after I have shown how domestic abuse is not, in fact, related to civil dispute resolution.

It is important to point out that domestic abuse cannot be the *subject* of arbitration, mediation, or any court proceeding under the *Family Law Act*. Domestic abuse is a criminal legal issue and can only be the subject of a criminal law prosecution. This might seem to be a mundane point, but apparently it is not, given the public discourse on the so-called sharia debate. For example, several media articles expressed fears that imams would recommend that husbands beat their women, or that women

[85] For a further discussion of the media discourse on the "Sharia debate" please see chapter 5 below.

would be sentenced to stoning for adultery.[86] A personal conversation illustrates the point here. My interlocutor, a non-Muslim, felt that it was important to forbid faith based arbitration in order to send the message to Muslim men that they "cannot beat their wives with a stone." This statement is a sad corruption of two widespread misperceptions: first that most Muslim men beat their wives regularly and second that stoning is a widespread Muslim punishment for adultery.[87] Neither is true, although domestic abuse generally is certainly a real and important issue to address among Canadian Muslim communities—just as it is among non-Muslim Canadians. But as concerns the law, domestic abuse is a criminal act and cannot legally be the subject of an arbitration or mediation of any sort.

Therefore, how might domestic violence in Muslim communities in the context of alternative dispute resolution be addressed without reaffirming Islamophobia, or the stereotypes of the imperiled Muslim woman and dangerous Muslim man? First, it is important to realize that the alleged exclusion of faith based arbitration has not ended the potential for power imbalances and domestic abuse in faith based alternative dispute resolution. Some imams clearly are not trained well, and/or do not take seriously enough the issue of domestic abuse. Though I interviewed several that did take it seriously who had immediately advised Muslim women to call the police, Julie Macfarlane and I both found some Muslim leaders who did not act effectively or appropriately to address this

[86] "Sharia-approved but illegal activities already occur in Toronto, and she fears this will give strength to them. Muslim women are battered but don't dare report it (Hurst 2004). In the course of documenting an alleged example of Muslim alternative dispute resolution, Jimenez states "One day they had a physical altercation that resulted in the police coming. No charges were laid, but police gave her ex-husband a warning after Shinaz said he tried to strangle her" (Jimenez 2005). "Opponents of the new tribunals argue that the government's imprimatur will give sharia law even greater legitimacy. Sharia law is based on the Koran, which, according to Muslim belief, provides the divine rules for behavior. What is called sharia varies widely (in Nigeria, for example, it has been invoked to justify death by stoning)" (Wente 2004).
[87] For a further discussion of these issues please see chapter 5 below.

issue (Macfarlane 2012).[88] Macfarlane suggests that 1 in 3 of her Muslim female respondents seeking divorce experienced violence and/or abuse in their marriage (2012).[89] It is therefore important to see that religious leaders and private dispute resolution providers might in fact play an important role in reporting domestic abuse. This is more the case now because the Arbitration Act has been changed to require arbitrators to receive training in order to perform the mandatory screening for domestic abuse, or to require someone qualified to do it if they are not. Furthermore, a modest number of mosques and Muslim organizations are holding their own community education workshops on domestic violence.[90] These are certainly in the minority; however, it is important to note that it is already taking place. Government, and other non-Muslim or Muslim community organizations and NGO's might further offer or be invited to help in these endeavors. Government and Muslim and non-Muslim community organizations and NGO's might be able to assist in organizing and carrying out educational workshops designed to educate imams and other religious leaders in particular regarding how to deal appropriately with domestic violence in Ontario as well.[91] Since, the supposed ban on faith based arbitration has not removed the potential for all religiously based alternative dispute resolution, religious communities and leaders should be regarded as partners working against domestic violence, rather than assuming

[88] For example, one Imam stated "Well, this kind of anger that you see in a relationship; it is hard to get out of it. I get this most of the time because they [Muslim women] have been denied the religious divorce [by other Imams who do not recognize the physical or emotional abuse]. That's when I say look, you go get the legal divorce, and I will give you the Islamic divorce. So if you are certain you have the abuse physically or emotionally . . . I help them. It happens many times." (Personal Interview August 30, 2008).
[89] For broader Canadian data on intimate partner violence see Beaman 2013.
[90] I note three institutions that undertook such workshops recently, even in my limited research.
[91] I do not want to mention these issues in a way that simply confirms the stereotypes proliferated in the press during the so-called sharia debate. Just like non-Muslim communities in Ontario, there are several people living and acting justly, and there are a number of people and institutions that continue to struggle with patriarchy and other forms of inequity.

incorrectly that the issue of domestic violence in alternative dispute resolution is best dealt with (and has in fact been accomplished by) excluding religion from impacting enforceable domestic contracts altogether.

Domestic abuse is addressed nominally in the amendments to the Arbitration Act in that parties to a dispute must be screened for domestic abuse. But outside the context of arbitration, domestic abuse remains an issue that might be better addressed through community development and educational initiatives as I have outlined above. Once again, the revised Act seems to exclude the very people it was meant to protect: vulnerable people, who have now been told that faith based arbitration is forbidden and therefore will likely not benefit from the amendments regarding screening for unequal power relations and domestic violence, and for whom arbitration is now very likely prohibitively costly because although ILA and screening for inequity and abuse is required, Legal Aid is not provided.

## 4.4 An Analysis of Faith Based Arbitration and the Imperiled Muslim Woman Post-Revised Act

### 4.4.1 The Revised Arbitration Act

The original Ontario *Arbitration Act, 1991* has been amended by two pieces of legislation: the *Family Statute Law Amendment Act* and a new *Regulation* under the *Arbitration Act, 1991*, which both came into effect April 30, 2007 (An Act to amend the Arbitration Act, 1991; Arbitration Act, 1991 Ontario Regulation 134/07 Family Arbitration). A number of changes have been made with the intent of better protecting vulnerable people generally and of limiting the state enforcement of faith based arbitrations specifically. I have already mentioned in the introductory chapter that there

are excellent new protections for vulnerable people provided for in the revised Act, including new procedural requirements designed to increase accountability and transparency. Furthermore, I discussed there that the revised Act also accomplishes a very important new move, namely the subjection of the Arbitration Act to the Family Law Act. Finally, I note in the introductory chapter that in addition to these important and very valuable amendments to the Arbitration Act, the new Act also states that no law other than Canadian law may be used in Arbitration. This is the amendment meant in part to exclude the use of religious law from arbitration in Ontario.

Although there are now valuable changes to the Act, there are several forms of faith based arbitration and potentially enforceable mediation that remain available to Canadians. First, one can still go for faith based mediation, and this can be entered into binding private contracts. Second, one can still participate in faith based arbitration in the sense that a religious person or leader can arbitrate a dispute, but they have to sign an agreement saying they have used Canadian law exclusively to make their decision. Third, one can still have an advisory arbitration, and it remains up to the disputants whether they accept it and enter it into a binding and enforceable private agreement such as a prenuptial agreement or separation agreement, or will. Faith based arbitration has not been banned, and to suggest otherwise is very misleading. As Annie Bunting has argued, "the government's denial of legally binding force to family arbitration based on religious principles is, it turns out, a matter of legal form rather than normative substance. The formal obstacle to binding religious arbitration of family matters is easily evaded, if the parties so desire, by embodying the results of advisory religious arbitration decisions in negotiated separation agreements" (Bunting 2009, 6). Faith based arbitration has certainly

been substantially limited; however, faith based civil dispute resolution generally, and certain types of faith based arbitration specifically have not been banned. Furthermore, those who choose from these remaining forms of legitimate faith based dispute resolution continue to be open to the potential for pressure and inequity. I argue it is vitally important to understand these complexities and nuances of the law in order to offer the best possible assistance and protection to vulnerable peoples as autonomous agents, rather than as stereotypical non-agents.

In one interview, I debated with a representative of a Muslim women's organization about whether it is appropriate to state that faith based arbitration is still available. Her position was given that religious laws can no longer be used in enforceable arbitrations one should no longer say that faith based arbitration is available. However, my concern is that if advisory faith based arbitrations are still enforceable if they are entered into domestic contracts, and de facto legal pluralism in the Family Law Act allows great flexibility for the inclusion of religious principles in settling disputes in an enforceable way, that these points will be lost if one simply states that faith based arbitration is no longer available. The public currently assumes that because McGuinty has announced that "there will be no Sharia in Ontario" that there are no avenues for religious laws and principles to be enforced through civil contracts. Although it is important to signal the valuable changes that have been made to the Arbitration Act, I argue that to say simply that faith based arbitration is no longer enforceable in Ontario leads to significant misunderstandings. This both hides further potential sources of inequity, and occludes highlighting potential inclusion of religious communities while offering the protections of the Family Law Act. Finally, the opportunity for the public to

perceive overlaps and complementary principles that Muslim law and Canadian law might share is missed, further reinforcing rather than challenging western stereotypes of Islam that fuel moral panic and Islamophobia.

A subtle but suggestive point deserves mentioning here. In fact, adding the pronouncement that no other law than Canadian law can be used is somewhat redundant after having already stated that family arbitrations are subject to the *Family Law Act*, and that in the event of a discrepancy, the *Family Law Act* will take precedence. In addition to signing a document that states that an arbitrator followed the revised Arbitration Act in the arbitration (which already places the arbitration entirely under the jurisdiction of Canadian family law), she or he must also sign a declaration stating they did not use a law other than Canadian law to arbitrate the dispute. This is at best redundant and at worst unnecessarily exclusionary (Bakht 2007, 142). A civil dispute mechanism (arbitration) that is formally and explicitly subject to a law code (FLA) *already* cannot be overruled by another law code. Therefore, what does the added legislation produce? I argue it needlessly suggests that Other (and especially Islamic given the impetus for the legislative changes) cultural or legal traditions cannot not share affinities with Canadian law, and perhaps suggests as Sherene Razack has argued that the government is taking a "strong stance on Muslims" in order to be seen to be participating in the war on terror (Razack 2004, 160). If the government had simply subjected family arbitrations to the FLA, then the government could have rather emphasized that cultural and religious diversity can be practiced in the context of Family Law but only in-so-far as these do not conflict with the Family Law Act. Furthermore, forbidding all legal codes other than Canadian law might suggest that an arbitrator would not deviate from the Family Law

Act for any reason other than adhering to another legal regime, which is simply false. Despite the changes to the Arbitration Act, it is still possible to make contextually sensitive (positive) or inequitable (negative) arbitral decisions that diverge substantially from the default norms of the Family Law Act (given the flexibility afforded in the Act) without actually using a law other than Canadian law. The decision might then be overturned by the courts because the reasons given are not acceptable, or it might indeed be accepted as reasonable, but it would not be overturned because of the use of another legal code.

### 4.4.2 Can the Imperiled Muslim Woman be Protected?

I argue that the stereotypical figure of the imperiled Muslim woman could not be protected if she were a real person. Vulnerable people must exercise their agency in order to benefit from the protections afforded by the legal system. The logic of the figure of the imperiled Muslim woman, conceived of as having little or no agency, means that such a person would never show up in arbitration, mediation, or even a state court, because the figure of the dangerous Muslim man would never need to, much less allow it. Such a man would never need to have an arbitration enforced by the state, because there would be no question of his will, combined with the supposedly irresistible pressure of family, community, and religion on the imperiled Muslim woman. If the dangerous Muslim man is, as he is imagined, so extremely patriarchal as to, for example, absolutely demand certain terms in a divorce without question, and if the imperiled Muslim woman is, as she is imagined, so extremely pressured by husband, family, community, and religion as to be nearly devoid of agency and therefore to acquiesce unquestionably, *then there is no dispute*. What many failed to understand (and this is why Boyd tried to emphasize the

point repeatedly) is that the issue is not only that a vulnerable person may end up in forms of dispute resolution that may be unfair because there has to be a *dispute* in the first place. Indeed, if the a matter between husband and wife winds up in some form of civil dispute resolution at all, then the woman is already manifesting more autonomy than the imperiled Muslim woman is imagined to have. The greater problem rather would be that in order for a civil dispute to be brought to public or private dispute resolution mechanisms, one has to in fact dispute a matter. One must exercise one's agency, voice one's concerns, or launch a dispute whether it be in the context of mediation, arbitration, or the courts. If a Muslim woman, for example, does not dispute a separation agreement, the contract does not end up in arbitration, or mediation, or even the state court system. Otherwise, separation agreements are more or less rubber stamped by the courts who assume that if no one is disputing the agreement the resolution is amicable among all agents to the contract.[92] I cannot over-emphasize this point. If the imperiled Muslim woman is as devoid of autonomy and agency as she is imagined, then she would not end up in arbitration of any kind (despite the excellent new protections the Act affords), because she would not dispute her husband. She would not even end up in private mediation or the court system if she did not exercise her right to dispute. Therefore, if the imperiled Muslim woman were a real person she could not be protected by Canada's current family law system, regardless of whether one is speaking of private or public dispute resolution mechanisms.

[92] "Other than in matters involving children, such as custody and child support, where the courts will invoke their parens patriae jurisdiction to approve agreements that are in the best interests of the children, and in separation agreements that must meet the broad objectives of the Divorce Act couples' decisions to settle their family law affairs are generally left un-reviewed by the courts." (Bakht 2007, 138)

The sharia debate was treated in the press and represented in the public governmental discourse as though the question of faith based arbitration required a simple "yes" or "no" answer. That is, the options appeared to be either the imperiled Muslim woman could be allowed (to be coerced against her will) into faith based arbitration, or she could be protected (despite her lack of agency) once and for all by forbidding faith based arbitration. McGuinty's discourse also suggests finality to the solution. McGuinty declared that he "would not let his province become the first Western government to allow the use of Islamic law to settle family disputes and that the boundaries between church and state would become clearer by banning religious arbitration completely;" therefore, McGuinty announced "there will be no Sharia in Ontario" (CTV.ca News Staff, "McGuinty Rules Out Use of Sharia Law in Ontario"). This strongly suggests that there is no more danger to the imperiled Muslim woman because the opportunity for autonomous choice has been legislated away. The discourse proceeds as if what matters most is not the autonomy and agency of the vulnerable person to access the legal protections available, rather it is allegedly the legislation which will supposedly protect vulnerable people quite apart from the exercise of their autonomy. Ironically, the only way a vulnerable person can really be protected is through the exercise of her or his agency, regardless of the amendments to the Arbitration Act. The only way for a vulnerable person to access the protections the new Act affords is if she or he exercises her or his agency by raising the dispute and having the matter brought before a formal arbitration tribunal that meets the new requirements enshrined in the Act.

### 4.4.3 Dehumanization of Muslims

Once again, one can understand that stakeholders with an interest in justice and fairness could be deeply concerned about the prospect of Muslim faith based arbitration. Many Muslims themselves were concerned, as evidenced in the media debate and among my own interviewees. However, quite apart from this legitimate concern I have discovered through my analysis a much more insidious series of suppositions, stereotypes, and interpretations in the history and discourses of the so-called sharia debate, and these things are less effective for protecting vulnerable people than they are for protecting the interests of dominant populations.

Colonialism and imperialism have historically dehumanized the Other in several ways in order to justify forms of governance of Others that minoritize, subjugate, and "liberate" their lands, labour and resources for imperial exploitation (Loomba 1998; Said 1978). In the sharia debate and resulting policy, I also see subtle forms of dehumanization employed in rendering Muslim bodies subject to inordinate policing, control, rescue, and forcible ushering into modernity (Razack 2009, 148). The imperiled Muslim woman suggests that Muslim women are not fully human in that they do not possess sufficient autonomy and agency to be full liberal individuals. This justifies their forcible ushering into modernity through "liberating" them from the bounds of their communities and cultural (religious) traditions (Razack 2008; Bakht 2007).[93] The dangerous Muslim man is also not fully human because he is too patriarchal, barbaric and pre-modern. These figures justify the desire for inordinate policing and control of his (religious) culture in the context of practices of private ordering in civil disputes. Only the westerner is human because fully modern, and burdened with responsibility to control, police, and by

[93] There are close parallels to be drawn to the paternalism inherent in The Indian Act and other Canadian legislation aimed at aboriginal peoples as well. Cf. Dean 2005; Razack 2002; Razack 1998.

whatever other means necessary to usher these figures into modernity for everyone's good.[94] This constitutes a form of secularism that is deeply imperialist.

There is a deep irony in the discourse used in the sharia debate that accuses the dangerous Muslim man of dehumanizing (denying the full humanity of) the imperiled Muslim woman through patriarchal compromise of her legal rights to equality. Here, Muslim communities are accused of dehumanizing their potentially marginalized members, but as I have argued, the discourse used and actions taken by the dominant communities is deeply dehumanizing as well. I argue that these dehumanizing stereotypes have further led to inadequate policy where exclusion rather than inclusion is emphasized to the detriment of vulnerable people in Muslim communities, and therefore those who might benefit most from the protections the revised Act affords, likely cannot afford them. Ironically, on the one hand the discourse on the Sharia debate suggests that vulnerable Muslim people are in need of inordinate paternalistic oversight and protection, while on the other hand the fact that current policy in many ways leaves them in the lurch suggests that these people are not worthy of genuine protection. The result is that Muslim communities have been more effectively excluded than vulnerable peoples have been effectively protected. The important question this raises is: how might the issues of gender inequity and human rights with regard to the privatization of family law be addressed while avoiding the dehumanization of Muslims and the consolidation of empire and oppression that such dehumanization is too often used to justify? I make some

[94] "This colour line is an especially pernicious one in a post-9/11 world when, in the name of anti-terrorism, Western states have won support for a variety of punitive and stigmatizing measures against Muslims and other groups of colour. Such measures are often defended as civilizing measures, necessary in order to bring democracy, human rights, and Women's rights to Muslim countries. . . I explore below how ideas about women's rights and secularism are part of the neo-liberal management of racial-minority populations who are scripted as pre-modern and requiring considerable regulation and surveillance. . . presumed to be trapped in the pre-modern by virtue of their particularist tendencies" (Razack 2008, 148).

practical, discursive, and policy recommendations as to how to accomplish these goals in a humanizing way in the concluding section below.

Several forms of marginalization or forcible assimilation through dehumanization have been used in the history of colonialism (Loomba 1998; Said 1978). Many of these forms surface subtly and not-so-subtly in the sharia debate as well. First, we see in the sharia debate and policy outcomes discourse and activity that dehumanizes in order to control, exclude and ghettoize Others. Several headlines suggested, or outright declared, that Sharia was not Canadian.[95] Even Muslims who opposed faith based arbitration were appalled at the discourse and Islamophobia proliferated in the debate, as I found in many of my interviews for this project. McGuinty's pronouncement that "there will be no Sharia in Ontario" on September 11, 2005 without any attendant qualifications that faith based mediation and advisory arbitration was still acceptable, and that Islamic law could be practiced as long as it did not contradict Canadian law, were noticeably absent. The discourse of the debate, and the policy actions that followed have left Muslim communities feeling deeply excluded. As the announcement of amendments to the Arbitration Act was couched in a discourse of absolute forbiddance of faith based arbitration, this has left any people who may have wanted to engage in some form of faith based alternative civil dispute resolution feeling ghettoized, as they likely perceive that only "back alley arbitrations" (Emon 2005) are available at this point.

Inordinate control and surveillance of Muslim communities are also suggested by the policy actions following the debate. In addition to keeping careful written records of

[95] David Warren, "Multiculturalism -from Britannia to Sharia," *National Post, 8* December 2003, A14. Ken Elgert, "Islamic Law a Step toward Legal Apartheid," *Edmonton Journal,* 4 December 2003, A19. Sara Harkirpal Singh, "Religious Law Undermines Loyalty to Canada," *Vancouver Sun,* 10 December 2003, A23. Ghammim Harris, "Sharia Is Not a Law by Canadian Standards," *Vancouver Sun,* 15 December 2003, A15.

proceedings on file, now arbitrators are required to submit annual reports of all their cases to the Attorney General's office for review. All participants are required to have documentation of independent legal advice. Furthermore, in addition to the requirement of arbitrators to screen parties separately for domestic abuse, even the *Child and Family Services Act* has been changed to legally require arbitrators to report child abuse if they suspect it. Most if not all of these measures are laudable for the protection of vulnerable peoples in the context of family arbitration generally. However, their strong association with Muslim communities as a result of the discourse and history of the sharia debate suggests that Muslim communities are marked for extraordinary levels of surveillance and control. Razack, I think, rightly fears that although more explicit and extreme laws deploying forms of surveillance and controls found in Europe are arguably not yet present to the same degree in Canada, the discourse and policies enacted as a result of the sharia debate have prepared the ground for such laws to be developed potentially in future.[96]

Second, the discourse on the Sharia debate and aspects of the policy following also function to forcibly assimilate. The dehumanization of the imperiled Muslim woman as virtually absent of autonomous agency justifies her rescue by the civilized European. The announcement of the amendments to the Arbitration Act suggested that the way her rescue would be accomplished would be through the utter exclusion of the practice of faith based arbitration, allegedly leaving imperiled Muslim women and dangerous Muslim men no choice but to abide by Canadian legal traditions. The message therefore

[96] "[M]y guess is that the way is paved, if it was not before; for the kinds of laws we are seeing in Europe, which are enacted in the name of protecting Muslim women but are thinly disguised methods of putting Muslim populations under heavy surveillance while relieving the state of scrutiny about its practices towards both Muslims and all women" (Razack 2008, 171).

suggested here that religious communities generally, and Muslim communities in particular, must assimilate themselves to Canadian cultural norms and practices. This message further suggests that Muslims in Canada did not already possess cultural norms and practices compatible with Canadian legal norms. Although instilling legal protections for universal human rights is essential, the message of the sharia debate and the policy changes that followed was that in order to remain in Canada, and to be fully Canadian, one must assimilate unconditionally to certain national cultural (legal) norms. Furthermore, although this dual strategy of both exclusion and assimilation appears to be contradictory, it is not. There is a long history of colonial strategies that combine both assimilation and exclusion to accomplish imperial goals. Excluding racialized others at the same time (limited) integration is offered at the cost of assimilation is a well established colonial strategy. Assimilation requires filtering out one's religious, cultural, and social otherness, ushering that person into a specific and uncompromising, though no less culturally located, form of modernity. Perhaps a better term for this form of colonialism taking place within the Canadian state might be internal colonialism, which refers to dominant populations marginalizing disadvantaged minority groups in the context of a single country, rather than between countries as has been more often the case (Hechter 1975, Benjamin & Hall 2010). In place of this assimilationist approach, I suggest a critical multiculturalism that includes anti-imperial secularism as outlined in chapter two. I will return to this issue in my concluding chapter.

Third and finally, the dehumanizing discourse and limited policy following the sharia debate functions tacitly to consolidate and justify foreign policies of war and economic imperialism designed to exploit fossil fuel rich countries. Discourses of rescue

of imperiled Muslim women from dangerous Muslim men have been used repeatedly to justify war and economic exploitation (Razack 2008; Bunting 2006, 2007). Furthermore, as Razack has pointed out, being seen to be participating in the "war on terror" in the current post 9/11 geo-political climate by being "tough on Muslims" also benefits Canada by consolidating its membership in the family of white western nations (Razack 2008, 160). The desire of Canada to secure its place among the family of white western nations surfaces in more subtle ways as well. Canada desires to maintain an international reputation as "respectable," and being dubbed by other nations as accommodating Muslims, especially in regard to anything suggesting sharia law, would be interpreted by many nations as meaning that Canada is becoming less white, rational, just, and egalitarian. This would suggest that Canada is "surrendering to Islam" in the eyes of many white western nations, and would not be regarded as "respectable" among those nations.

Religionization in the context of the so-called sharia debate placed Islam much further down a cultural hierarchy that places more highly other religions regarded as more modern and civilized. The forms of secularism invoked in the name of protecting the imperiled Muslim woman were deeply imperialist. I suggest that anti-imperial forms of secularism that address both inequities between marginalized and dominant populations, as well as inequities within marginalized communities, would be much better suited for addressing issues facing vulnerable people in the context of faith based arbitration specifically, and faith based private forms of ordering civil contracts more generally. I explore further policy recommendations in this regard in the concluding chapter.

# Chapter 5: Western and Media discourses on the "Sharia Debate"

I have explained above in chapter four why the "imperiled Muslim woman" cannot be protected by secular law, even under the revised Arbitration Act. Now I will explore and critique how this stereotype, as proliferated by the Ontario and Canadian newsprint media during the debate, precludes the possibility of protective justice in the context of Muslim family law. One of the primary reasons that the "imperiled Muslim woman" cannot be protected is that she cannot, according to the stereotype, receive anything like justice at the hands of her community and religious tradition. This is because she is imperiled by what is imagined to be irredeemably patriarchal sharia law implemented at the hands of misogynistic Muslim men. To the stereotypes of the "imperiled Muslim woman," "dangerous Muslim man" and "civilized European" that Razack identifies, we might add the stereotype of "uncivilized sharia" (Razack 2008).

This chapter will explore this latter stereotype for its productive power. I will also attempt to critique this stereotype such that, on the one hand, inequitable interpretations of sharia may be left open to feminist critique without, on the other hand, falling back into the disparaging and imperialist stereotype of "uncivilized sharia". Based on Razack's argument regarding the three stereotypes she identifies (see chapter 4), I argue that the stereotype of "uncivilized sharia" also does not in fact effectively dismantle patriarchal inequity or violence in any case, either in Islamic culture or Western culture, but rather reinforces it (Razack 2008). Dismantling the stereotype of "uncivilized sharia" is therefore I argue an important strategy for also dismantling patriarchy, gender inequity, and violence in both dominant and minoritized cultures.

I have already argued, on the one hand, why the "imperiled Muslim woman" cannot be protected by secular law. If on the other hand, as much of the media discourse insists, the "imperiled Muslim woman" cannot access justice in her community either, then she is caught between a proverbial rock and a hard place. Dismantling the stereotype of "uncivilized sharia," in addition to dismantling the other stereotypes Razack has identified, I argue is an important contribution to opening up a public and political space where Muslim women's agency can be more effectively facilitated to protect Muslim women in the context of both religious and secular spaces in Canada.

This chapter also aims more generally to document, analyse, and critique the othering of Muslims and Islam in the context of the "sharia debate" as it proceeded in the media. I will explore the media analyses of the public sharia debate of several authors here. I will clarify some of the misunderstandings of Islamic legal tradition that the media discourse proliferated. And, finally, I argue that the modern media is a fundamental instrument and institution of secularization (as I have defined secularization in chapter three). Most importantly for my purposes, the media establish and maintain secularization as cultural hierarchy. This means that secularization is as much about protecting dominant cultural (secular and religious) interests and racializing and marginalizing religious others, as it is about regulating religion fairly in an allegedly neutral, secular public sphere. I use this media case study of the so-called "sharia debate" to illustrate how these things are accomplished in contemporary Canada.

## 5.1 The "Sharia Debate" in the Media

On the whole, the tone of much of the media debate on faith based arbitration in Ontario was very negative, and negatively represented Islam and Muslims. Confusion was fostered in the media with statements suggesting that "sharia courts" were being proposed rather than that Muslims were intending to use already existing processes of faith based arbitration. Ken Elgert (2003) writing for the *Edmonton Journal* entitled his article "Islamic Law a Step toward Legal Apartheid." Writing for the *Edmonton Journal*, Allyson Jeffs (2005) entitles her article "Iranian activist warns against the hammer of Sharia law." *Globe and Mail* Montreal correspondent Ingrid Peritz (2005) said that "[t]he advent of traditional Islamic law, or sharia, to settle family disputes has set off an impassioned debate in Canada ever since a Muslim group proposed setting up an arbitration panel in Ontario." There is no mention of existing arbitration law or the fact that Jewish communities have been arbitrating civil disputes for years. Another pattern was to place the more inflammatory discourse very early in an article, and bury the more balanced information deep within the text. *Globe and Mail* columnist Margaret Wente (2004) dramatically asserts very early in her piece, "Sharia law in Canada? Yes. The province of Ontario has authorized the use of sharia law in civil arbitrations, if both parties consent". Not until much later in the article does she mention that faith-based arbitration has already been practiced for several years by other religious communities in Ontario under the arbitration act. *Toronto Sun* columnist and founding editor, Peter Worthington (2004) introduces his article with a similarly alarmist first line before later clarifying his point: stating "Outrageous as it is, former NDP attorney-general Marion Boyd wants sharia law introduced into Ontario to resolve Muslim domestic disputes." Writing for the *National Post*, David Warren (2003) further suggests multiculturalism is

folly in his article entitled "Multiculturalism – from Britannia to Sharia." Finally, writing for the *Vancouver Sun*, Ghammim Harris (2003) further suggests the exclusion of Islam from the Canadian nation in his article title "Sharia Is Not a Law by Canadian Standards."

Islam was singled out as much more dangerous and premodern than other religious communities in Canada. Worthington (2004) writes "Catholics and Jews can arbitrate domestic disputes within their faiths, and Ms Boyd apparently sees no fundamental difference between them and sharia law for Muslims. In fact, there is a hell of a lot of difference. Catholics and Jews don't discriminate against women the way sharia law does by violating fundamental rights enshrined in our Constitution for equal treatment." Much of the media descriptions of sharia associated it strongly with extreme criminal laws such those that prescribed hands being cut off for theft, death by stoning for adultery, or beheadings, and allowed for polygamous marriages. Worthington (2004) states,

> Under some interpretations of sharia, a woman who is raped is guilty of tempting the man. Showing an ankle is tantamount to enticement. A Muslim husband has the right – duty even – to beat his wife if she's disobedient. A Muslim who converts to Christianity technically could face the death sentence . . . In its extreme form, as with the Taliban of Afghanistan, on select Fridays in Kabul women who were deemed guilty of violating sharia law – like leaving their houses, or showing their faces – were taken to the football stadium to be humiliated. Some were beaten, some were shot. That won't happen here, but it's sharia law and the pressure on women will be acute.

Wente (2004) said "What is called sharia varies widely (in Nigeria, for example, it has been invoked to justify death by stoning". The one common denominator is that it is strongly patriarchal." Worthington (2004) admitted, "In Ontario it may not be used to order women stoned to death for behavior it tolerates in men, but it is a matter of degree." Feature writer for the *Toronto Star* Lynda Hurst (2004) states of Homa Arjomand, Iranian-Canadian political activist and coordinator of the International Campaign Against Sharia Court in Canada, that "All – all – of the women's activists she worked with in Tehran have been executed, victims of a reactionary regime that rules, and continues to rule, by strict adherence to Islam's sharia law." Kevin Dougherty (2005) quotes Ms. Houda-Pepin pondering which version of sharia would be used in Canada saying "In Pakistan, a woman who is raped can be flogged unless she can produce four male witnesses to prove she was raped, she said, while in Nigeria a woman can be stoned to death for sexual relations outside marriage." Hurst (2004) relates information provided by Arjomand "Sharia-approved but illegal activities already occur in Toronto, and she fears this will give strength to them. Muslim women are battered but don't dare report it. Bigamous marriages occur."

Several media articles suggested that many if not all Muslim women would have their agency compromised if faith based arbitration were allowed. Worthington (2004) asserted "Ms Boyd says Muslim women will have a choice – be adjudicated by sharia law, or Ontario law, and have a choice of adjudicators. In theory, maybe, but in practice – look at how many abused women haven't the strength to defy their abusers." After a long criticism of the dangers of sharia law Wente (2004) states "Immigrant women are among the most vulnerable people in Canada. Many don't speak English, are poorly educated,

and are isolated from the broader culture. They may live here for decades without learning the language, and they stay utterly dependent on their families. They have no idea of their rights under Canadian law." New York based columnist for Asharq al-Awsat, Mona Eltahawy (2005) said "with sharia tribunals in place in Ontario, it isn't difficult to imagine the pressure that would be exerted on Muslim women to choose them over civil courts." Dougherty (2005) quotes Tarek Fatah in his article saying "'To have choice you have to have the ability to make the choice. To suggest that Muslim immigrants, Muslim women, who are among the lowest income group in the country have the ability to make the choice is absolute nonsense.'" Wente (2004) states "These decisions can be appealed to the regular courts. But for Muslim women, the pressures to abide by the precepts of sharia are overwhelming. To reject sharia is, quite simply, to be a bad Muslim." Hurst (2004) quotes Arjomand saying "'In a straight disagreement between a husband and a wife, the husband's testimony will prevail. That is sharia. Even those women who know they can appeal will not challenge an arbitration decision for fear of the consequences.' Despite what the attorney-general's office blithely assumes, she says, it's unlikely decisions contrary to Canadian law will ever show up before the courts."

Ironically, the media coverage of the so-called "sharia debate" suggested that sharia law was a disadvantage both because it was ancient, and therefore rigid and inflexible, but also because it was diverse. Worthington (2004) asserted "Sharia law has no place in civilized society, no matter how benignly it is depicted. It dates back to the 14th century and does not treat the sexes equally. Period." Hurst (2004) states "The 1,300-year-old body of laws and rules for living was inspired by the Qur'an, Islam's holy book." Speaking of a Muslim women's council of over 900 members from a diversity of

Islamic backgrounds Hurst (2004) said "But they feel they must (oppose faith based arbitration), she says, because the equality of the sexes espoused by the Qur'an is not reflected in the sharia – the laws that evolved over 200 years following the death of Mohammad in 632." Freelance writer, J. D. Sturtridge (2004) states "I do miss them, those loud, demanding, politically adept second wave feminists, and not because I am feeling particularly nostalgic. I miss them because we need them, and we need them because a 1400 year-old malignant presence is stirring in the peaceable kingdom, a presence called Shari'a." However, on the other hand sharia is criticized for being diverse. Hurst (2004) asserts "Many in the Muslim community, men included, don't see how the arbitration tribunals can possibly work. Sharia differs among various sects and countries of origin. An interpretation in one country is unacceptable in another." As noted above, Wente also states "What is called sharia *varies widely* (in Nigeria, for example, it has been invoked to justify death by stoning)" (Wente 2004 italics mine). Eltahawy (2005) said "Even more problematic, there is no consensus on sharia, which is derived from the Koran and the life and sayings of the prophet Muhammad."

Several media articles after suggesting the othering of Islam as illustrated above, privilege the secular by suggesting secular law is the answer to the inequality and oppression experienced Muslim women. Writing for the *Vancouver Sun*, Sara Harkirpal Singh (2003) entitles her article "Religious Law Undermines Loyalty to Canada." Worthington (2004) states that "In Ontario it may not be used to order women stoned to death for behavior it tolerates in men, but it is a matter of degree. There is no need for (faith based arbitration) in Canada. It is not religious freedom, it is religious oppression." Eltahawy 2005 said "But what is wrong with Canadian civil law that religious Canadians

must look elsewhere?" Ingrid Peritz (2005) quotes Shirin Ebadi stating "One country, one legal code, one court – for everybody." Columnist for the *Globe and Mail*, Marina Jimenez (2005) states "The Ontario government is currently considering whether to accept the recommendations of a recent report that found the existing system does not discriminate against women. Critics say otherwise, and today, demonstrations against the act are planned in 12 cities in Canada and Europe including Amsterdam, London, Paris and Dusseldorf, in what activists say is part of a global battle between secular societies and 'political Islam.'"

Not all media coverage was as negative or confused. A number of media articles took a more balanced and less alarmist approach such as Judy Van Rhijn's early article "First Steps Taken Towards Sharia Law in Canada" (2003); Michelle Mann's article "Only Fair to Treat All Religions the Same" (2006); and Mirko Petricevic's "Faith-Based Arbitration Comes Under Spotlight" (2005). These articles are more sober about what exactly was proposed in the context of existing law under the Arbitration Act. They are more balanced with regard to the advantages and disadvantages of Muslim faith based arbitration and mediation. Finally, these articles do not imagine Muslim women to be completely devoid of agency. Following is an analysis of the negative kind of discourse found in the media debate, in concert with a number of other media analyses that make similar observations.

## 5.2 Western Perceptions of Islam, Sharia, and Muslim Women circulated in the "Sharia Debate"

Although several legitimate concerns were raised in the public "sharia debate", on many occasions they were married to Islamophobic, racist, and imperialist conceptions that were proliferated widely in the media. I argue generally that these latter elements in fact increase rather than decrease patriarchy, inequity, and violence. Therefore, anti-racism, anti-Islamophobia, and anti-imperialism are important strategies for *facilitating* liberation and protection of Muslim women. Furthermore, media representations of Muslim women's agency were often confused, contradictory, and ultimately detracted from Muslim women's agency. This is a crucial matter to explore, because as I have been arguing, Muslim women's agency is crucial for protecting Muslim women given the realities of Canada's legal system.

### 5.2.1 National Identity and Orientalist Othering

I use Sherene Razack and Jasmin Zine in order to outline the general configurations of the othering of Islam in the West before proceeding to an analysis of how this was achieved more specifically through the mass media "sharia Debate." Zine highlights the disconnection for Muslims in the West who, on the one hand, have rights and obligations as citizens or legitimate immigrants of western nation states, and on the other receive multiple signals that they yet do not in fact belong to the national imaginary (Zine 2009). Overwhelmingly negative representations of Muslims in the media as well as several state policies in western countries including the banning of ostensibly Muslim headscarves in France, citizenship tests in Germany, and immigration videos in the Netherlands suggest that Muslim identities are not welcome in western nations (Zine 2009, 149-150). However, more than exclusion from national identity, even basic citizen rights are put in peril by such government policies as "extraordinary rendition, security

certificates and secret evidence and trials" (Zine 2009, 151; Razack 2008). Borrowing Agamben's (2005) analysis of the "state of exception", Razack points out that Canadian immigration and anti-terrorism policies directed at Muslims are characteristic of war measures (Razack 2008). These kinds of policies are used domestically to reinforce "the logic of empire in a world increasingly governed by the state of exception, one in which Muslims are cast out of the national and political community" (Zine 2009, 151).[97]

The western media has often become the purveyor of Orientalist fears and fantasies: fears of violent premodern Muslims bent on harming western bodies, and fantasies of the West as the benevolent and peaceful harbinger of (only the benefits of) enlightened modernity (Zine 2009, 148-149). Furthermore Orientalist fantasies of western rescue of imperiled Muslim women from dangerous Muslim men have been widespread in the media as well (Razack 2008). Several scholars note that these fears and fantasies have functioned to justify western military aggression against Muslim lands abroad in pursuit of imperial interests as well as western xenophobic over-policing of Muslim bodies domestically, ostensibly in the interests of national security, but also in the interests of preserving and protecting the dominant (racialized and religionized) national identity (Zine 2009; Razack 2008; Asad 2003).

These more general patterns of Muslim marginalization observable in western media and policy are noticeable in the media-orchestrated "sharia debate" in particular ways. To illustrate an important contrast, although Jasmine Zine, a Muslim, scholar and

[97] This is Zine's deft summary of Razack's argument in *Casting Out: The Eviction of Muslims from Western Law and Politics*. 2008.

activist,[98] for example took a position against the proposal for sharia based tribunals, she did not regard sharia as intrinsically and unchangeably patriarchal and unfair to women. Although noting recent Muslim scholarship and national legal reforms in countries like Morocco that are increasingly fair with regard to gender equality, Zine still took this position on the Ontario debate because these more gender equitable interpretations of Islamic tradition require time to become more widespread in Muslim communities in Canada (Zine 2009). However, notably she did not take the position of many in the media that imagined Islam as frozen in time and irredeemably hostile to women's rights and equality. Furthermore, Zine did not represent the liberal modern West as the only legitimate and unproblematic protector of women's rights generally and Muslim women specifically. However, several media articles did take this Orientalist position,[99] calling for the paternalistic state to rescue racialized and religionized Muslim women's bodies (Zine 2009; Razack 2008; Syed 2012). Zine notes the double bind of Muslim feminists attempting to address issues of gender inequity within communities, at the same time they face an Orientalist majority society quick to take such action as confirmation of Orientalist interpretations of Islam (Zine 2009, 153). Although the direction of the McGuinty government's decision on the sharia debate was generally in line with her position on the issue, Zine critiques the overwhelmingly Orientalist media renderings of Islam as premodern others to be disciplined culturally by a "superior" and paternalistic western state.

[98] Jasmin Zine. "Creating a Critical Faith-Centred Space for Antiracist Feminism: Reflections of a Muslim Scholar Activist." *Journal of Feminist Studies in Religion*. Vol. 20, No. 2, Fall, 2004. Indiana University Press.

[99] That the Orientalist position of assuming secular liberal western civilization is the answer to the problems experienced by non-western societies.

Itrath Syed, a Muslim political and feminist activist, on the other hand at first took a position against faith based arbitration, but then revised her stance because she was far more disturbed by the overwhelmingly Orientalist discourse of the media's coverage of the so-called sharia debate than at faith based arbitration itself. However, she remains critical of gender inequity in Muslim communities. Syed noticed that the discourse of the media debate was not simply about the advantages and disadvantages of the proposal, but rather what amounted to an overt *denationalizing* (i.e. defining Islam as explicitly outside Canada's national imaginary) of Muslim culture (Syed 2012, 2-3). These conclusions were reached after careful study of several newspaper articles mainly from the *Toronto Star*, *Globe and Mail*, and *National Post* between September 2004 and September 2005 (Syed 2012, 3). Syed laments that "according to the parameters of the discourse there were only two, very polarized, sides to the debate. One side was civilized, Canadian and feminist, and the other was barbaric, medieval, foreign and misogynist. These dichotomies were erected by invoking familiar tropes in which Muslim women were infantilized, the Muslim community of Canada was denationalized and Islamic law was fossilized" (Syed 2012, 1).

The othering of Muslims in this debate took on a tone of denationalizing Muslim culture and Muslim people over against an overwhelmingly white civilized Euro-Canadian national identity (Razack 2008). Syed calls attention to the irony of portraying Muslims as foreigners and invaders in the debate given that these Muslims were in fact proposing access to already existing legal provision of the Arbitration Act rather than, as they were represented in many media articles, attempting to completely transform Canadian law "as part of a larger plan to destroy Canadian society, constituting a full

frontal attack on all that is good and decent in the Nation" (Syed 2012, 4). Syed notes that the largely irrelevant gestures to dramatically oppressive practices in some countries with a Muslim majority often functioned to shut down debate on the real issues at stake in the "sharia debate" (Syed 2012, 5). Much discourse in the debate rendered Muslims a "cunning" and "silent threat" to Canadian society, in line with the general characteristic of anti-immigrant discourse in Canada historically (Syed 2012, 6).[100] Such accusations state that Muslims are using multiculturalism and human rights regimes against modernity in order to infiltrate modern society with traditional (and oppressive) Islamic culture. Even though a number of these statements were made by Muslims or people whose origins could be traced to "Muslim countries" Syed notes sadly that they too are structured by the racialized imagination they deployed (Syed 2012, 6).

I am arguing that the othering critiqued above more than fails to facilitate Muslim women's agency and equality; it also in fact reinforces patriarchy, inequity, and violence domestically and abroad (Razack 2008). This is because of several reasons mentioned above. First, military aggression on the part of western imperial interests in Muslim lands and resources is justified by such othering and colonialist rescue narratives, whereas the military action justified has rarely resulted in substantial benefit to Muslim women, for example in Afghanistan (Khan 2008). This imperial aggression is itself deeply reflective of western patriarchy, inequality, and violence globally (Razack 2008). Second, the othering that occurred in the sharia debate shut down reasoned and rational debate (a supposed hallmark of liberal western modernity) on the crucial issues at stake. I have already argued in chapter four that this contributed to the formation of limited policies of

[100] For example, these stereotypes echo "yellow peril" stereotypes in Canada in the late nineteenth and early twentieth century directed toward Asian immigrant communities.

protection because policy makers did not fully understand and therefore better facilitate the central role of Muslim women's agency in protecting Muslim women. Finally, Orientalist voices reinforced the very fears they in large part created of a dangerous other over against a civilized "us." Reinforcing this discourse further alienates those who already feel excluded, increasing the chances for aggression against western nations. Co-opting Muslim feminist voices for Orientalist and imperialist ends undermines the goals for which they struggle. Too often the discourse on sharia in the West regards sharia as too much of a threat to even talk about or consider rationally. It is important to note the productive power of placing an issue beyond the pale of reasoned consideration because it is putatively beyond "rationality" and "civility".

### 5.2.2 Re-presenting Muslim Communities

Several scholars have highlighted the various ways that Muslim communities have been disparaged generally, how sharia has been vilified specifically, and Muslim women's agency denied summarily in the media's so-called "sharia debate". Many have observed that this kind of approach severely limited the public debate (Korteweg 2008, 448). James Thornback found that to the degree that Islam was represented as a monolithic other to the West, journalists were reduced to taking over-simplified positions for or against the alleged proposal, unable to genuinely understand or address the more complex problems of family law and mediation/arbitration. Thornback found in his analysis of the media that only those who did not embrace such Orientalist tropes were able to debate the real issues at stake in Ontario law and offer reasoned criticisms and suggestions for change (Thornback 2005).

Meena Sharify-Funk has pointed out how the media participated in over-simplifying the debate by privileging the voices of two opposing and increasingly hostile voices in the dispute, namely the secular Muslim Canadian Congress (MCC) and the more traditional Canadian Islamic Congress (CIC) (Sharify-Funk 2009). Although Sharify-Funk acknowledges that the primary responsibility for the nature of the increasingly adverse exchange between these two organizations belongs first and foremost to the two organizations, she nonetheless holds the media responsible for emphasizing these voices in particular and virtually excluding more nuanced and balanced voices issuing from other Muslim groups. This media emphasis also reflected back to Muslim communities a restricted sense of communal diversity, therefore also perhaps having an impact on how Muslim communities viewed themselves and the available options within their communities. Finally, possibly as a result of the apparent increasing hostility within Muslim communities, McGuinty's own ultimate decision regarding faith based arbitration may have been unduly influenced. Although as Sharify-Funk observes, journalists do not see their job primarily as "facilitating dialogue or probing for common ground . . . an understandable position, perhaps, but [this is] also a constraint that contributed directly to the incivility that manifested in full public view during the Shari'ah debate" (Sharify-Funk 2009, 85). In the process of her analysis Sharify-Funk found that "the media have been complicit in the rancorous outcome of the Shari'ah debate, having played a role in defining the scope and parameters of discussion and amplified more divisive rather than conciliatory voices" (Sharify-Funk 2009, 85).

### 5.2.3 Muslim Women's Agency

Itrath Syed decries what she calls the "Construction of the Iconic Infantilized Muslim Woman" in the sharia debate (Syed 2012, 9). Syed notes the overwhelming otherness with which Muslim women's oppression is represented in the media compared to any sexism western women might experience (Syed 2012, 10). Syed too notes "the marked difference in the ways that the Jewish community and the Muslim community have been racialized in Canada. Jewish women are not racialized in Canada as being infantile, unable to look out for themselves or unable to know their own best interests. In contrast, Muslim women are racialized to be entirely unable to have any agency over their lives. Similarly Jewish men are not racialized to be hyper–oppressive, whereas Muslim men are racialized in this way" (Syed 2012, 11), despite the fact that it took Jewish women several years to lobby for changes to the law to protect divorced Jewish women (see chapter 6). Yet even though clearly they were struggling against patriarchal forms of religious legal tradition there was no media outcry whatsoever. This drastically unequal representation of sexism functioned to close down reasoned debate, validating policies that attempted to protect Muslim women *despite* their alleged utter lack of agency instead of developing policy that would *facilitate* Muslim women's agency.

Anna Korteweg has conducted perhaps the most extensive and thorough media analysis of the sharia debate to date, documenting 108 relevant newspaper articles published in the *Globe and Mail*, *National Post*, and *Toronto Star* (Korteweg 2008, 439-441). Korteweg's main argument is regarding the representation of Muslim women's agency in these media articles along two main tracks. First, the dominant representation by far came from articles that conceived of agency in a very culturally limited and historically specific sense: agency as resistance to dominance. This conception, though it

is often represented by pundits of modernity as universal, in fact proceeds from a highly specific historical occasion: liberal modernity's "free will" and "free choice" understandings of human subjectivity (Mahmood 2005). This conception of agency can only understand people who embrace cultural norms that appear to be oppressive as either lacking agency or doing so for the sake of other material interests (Korteweg 2008, 438).[101] This conception cannot perceive anything but a resistive response to oppression as a form of agency. Second, a minority of media articles conceived of agency more broadly as contingent and embedded in wider cultural, communal, historical, economic and social contexts (Korteweg 2008, 438-439).[102] This notion of agency acknowledges that all actions by agents issue inextricably from social contexts and contingencies, rather than feigning an individual that experiences relatively little encumbrance to freely choosing either to embrace or oppose potentially oppressive practices.

First, Korteweg found that these different conceptions of agency led to different types of policy suggestions accordingly. Second, holding one or the other conception of agency also had an impact on how minority communities were conceived of as different from the majority community ethnically and racially. The majority of articles that suggested a reductive notion of Muslim women's agency as resistance were also associated with suggestions for state intervention that called for the proposal to be quashed. Korteweg argues that these opponents positioned the state as the secular and only legitimate protector of women's equality. On the other hand, those who appeared

[101] Korteweg is referring here to Mahmood 2001.

[102] It is important to note that although the majority of media representations of Islam generally and sharia specifically were deeply negative, not all were. There was a minority of reasonable fair and well-reasoned journalism on the "sharia debate". For example Judy Van Rhijn's early article *First Steps Taken Towards Sharia Law in Canada* (2003); Michelle Mann's article *Only Fair to Treat All Religions the Same* (2006); and Mirko Petricevic's *Faith-Based Arbitration Comes Under Spotlight* (2005). I spend the balance of this chapter critiquing Islamophobic renderings, but I acknowledge a minority of more balanced media treatments of the issue.

generally to subscribe to an embedded conception of Muslim women's agency rather more frequently, "led to calls for state oversight of sharia-based tribunals to reduce the potential for abuse and strengthen the aspects of Islamic jurisprudence that support women's capacity to act in their own interests. In these representations, the state [rather] *facilitated* the agency of devout Muslim women" (Korteweg 2008, 447. Italics mine). This coincides with what I have been arguing about the "imperiled Muslim woman" in chapter 4.

It is important to note that the notion of agency one took in the media articles was not necessarily correlated to one's position on the debate. One might assume that those who reduced agency to resistance were against the proposed sharia tribunals, and those with a more robust notion of agency were in favor. Rather, some like the Canadian Council of Muslim Women appeared to conceive of agency as embedded in wider contexts even though they were against the apparent proposal. However, even though the CCMW was against faith based arbitration, I show in Chapter 6 that they still view the state as a facilitator of Muslim women's agency rather than simply the only legitimate paternal protector of Muslim women.

Racialization and othering of Muslim communities were also correlated with narrow estimations of Muslim women's agency in the media articles (Korteweg 2008). Those who could not conceive of Muslim women as possessing agency in relation to inequity unless they were resisting often held more general views of Muslim communities as homogenized and racialized others. Racialization here refers "to the process of imputing innate group differences that distinguish subordinate groups from majority society" (Korteweg 2008, 448). Much of the discourse in the debate suggested

that social pressure to accept unjust outcomes was far more generally characteristic of Muslim communities than the majority society, whereas in fact this pressure is felt across all communities. Equitable gender relations then were almost exclusively associated with the majority society over against minoritized Muslim communities. And once again, this racialization coincided mainly with those articles that held narrow views on what counted as agency.

Several feminists claimed that even though patriarchy and inequity remain significant problems in Canadian courts, they are preferable to the level of patriarchy they imagined Muslim women would suffer in the context of faith based arbitration. The issue of the privatization of family law through alternative dispute resolution, which feminists have been sounding alarms about for several years, does not get much press in any case (Goundry et al. 1998). That is why it is so surprising that when the opportunity arose to highlight the problems of gender inequity in the privatization of family law in ADR generally and arbitration specifically, rather than highlighting the dangers common to all women under such legal regimes, sharia was represented as an incomprehensible threat while the Canadian courts were represented as the modern and virtuous savior of "imperiled Muslim women".[103] Therefore, it is not clear why sharia required such a degree of moral panic. Itrath Syed fears "if the issue is that privatization and ghettoization are against women's interests, then surely the largely undocumented, unaccountable systems of community mediations are worse for women than the

[103] "Not surprisingly, through this process of the demonization of Islamic law, the corresponding result was that Canadian law became stabilized in the debate as being egalitarian, accessible, and ideal. Despite there being decades of feminist criticism of Canadian Family Law, within the 'shariah' debate many feminists became impassioned champions of the law. Much like the way in which real citizens are ennobled when juxtaposed to the 'anti-citizens', and western women and men are ennobled when juxtaposed to the racialized constructions of Muslim women and men, so too, Canadian Family Law began to take on a nobility when juxtaposed to the spectre of 'shariah'. The result in all cases is the same; the boundaries of 'here' were policed against the intrusions of 'there'" (Syed 2012).

arbitration process which would have a [comparably] greater means of transparency and intervention. I would argue that the compromise suggested by many opponents [that those interested in Islamic law continue to use it privately, i.e. away from the gaze of the Nation] reveals the real issue at hand. It was not just the concern for women's rights that were at the core of this opposition, but rather the maintenance of the distinctions between what is and is not acceptable as the public face of Canada" (Syed 2012, 16).

## 5.3 What is "Sharia Law"?

The media repeatedly stated that "sharia Courts" had been "proposed" in Ontario (Boyd 2004, 3-4). This statement led to much confusion. First, many wondered if the proposal was for a fully functioning separate court independent from the secular system, and whether this would receive operational funding from the state. Lebanon for example runs numerous parallel courts with their own bodies of law all operating independently of a unified secular legal system with full state funding and sanction (Mallat 1990). However, this was not what was being proposed in Ontario. No separate "court" was proposed as such. And the IICJ would not have received any state funding to operate. Moreover, the IICJ would not have had the freedom to operate independently of Canadian law as its own separate legal system.[104] Rather, the 1991 Ontario Arbitration Act stated well prior to 2006 that any two parties may choose any third party (arbitrator) they wish to arbitrate a civil dispute, including family disputes. Moreover, the two disputing parties could choose whatever law they wanted to have applied to their dispute (Boyd 2004). For example, one could have New York state law applied to a civil dispute

[104] Although the notion of "de facto legal pluralism" in Canada discussed in chapter 4 mitigates this idea somewhat.

being arbitrated in Ontario if both parties freely chose to do so. The Arbitration Act then left open the possibility of choosing various religious legal traditions, and therefore religious arbitrators, to resolve a dispute as well. The Arbitration Act stipulated that the two disputants must choose their arbitrator and legal tradition freely and mutually in order for the final decision to be enforceable by the state. Therefore rather than asking for an independent "sharia court," the IICJ was announcing the organization of a Muslim or Islamic Tribunal or arbitration board based on Islam in the context of already existing legal structures. Once again, nothing new was proposed. Rather, the IICJ was seeking to participate in existing Canadian legal institutions rather than striving to isolate themselves or dramatically change them as many charged.

Anver Emon points out that both opponents and supporters of Muslim faith based arbitration used a notion of sharia that is in fact a very recent construction and does not reflect the diversity of what sharia has been or might be (Emon 2006, 2-3). He notes that "the conception of sharia that prevailed in the Ontario debates was one that viewed the tradition as an inflexible and immutable code of religious rules, based on the Qur'an and traditions of the Prophet Muhammad. Various media outlets described the sharia as a 'code' of law that deterministically governs every aspect of a Muslim's life" (Emon 2006, 3). Opponents critiqued sharia as being ancient, frozen and unable to offer anything but findings detrimental to the well-being of women in family law contexts (Syed 2012).[105] However, there is ample evidence that shows sharia is not a code that was delivered immutably at the outset. There are a number of sources for sharia including the

[105] Most participants in Marion Boyd's consultation including supporters suggested using the alternative phrases Islamic personal/family law or Muslim personal/family law (Boyd 45, 2004). But what is meant by this is not always clear either.

Qur'an and various sources for the Sunnah.[106] However, there is a long tradition of diverse juristic interpretation of these original sources stretching over hundreds of years using several methods of juristic interpretation (Emon 2006, 4-5). Furthermore, there arose several competing interpretive communities so that now there are at least four established *madhabs* or bodies of law[107] for Sunni communities and at least one established body of law (*Jafari*) for Shia communities. Therefore, during centuries of development of Islamic tradition sharia was not simply "found" by looking into the authoritative religious sources for a ready-made ruling, but rather it was created and composed of a very complex and involved body of interpretation. Moreover, these distinct interpretive communities arose in response to the differing contexts in which they were applied, rather than simply being applied regardless of context as sharia was represented in the media debate.

In addition to the influence of cultural context on the development of sharia, new institutional contexts developed over time "that transformed what might have been moral norms into enforced legal rules" (Emon 2006, 7). These new institutional contexts are an important further and very different kind of constructive framework that changed sharia as it developed. This new procedural institutional context became so important "that resolving a particular controversy may not be dependent upon some doctrinal, substantive determination of the law" (Emon 2006, 8). Several matters not clearly dealt with in religious sources have been submitted to Muslim judges to be adjudicated by the analysis and determination of the human justice (Emon 2006, 8). Therefore even the history of the

[106] Sunnah refers to the traditions of the Prophet Muhammad such as the *hadith* (recorded narrations of the words and deed of the Prophet Muhammad) and *sira* (biographies of the Prophet Muhammad)
[107] The schools of law are Maliki, Hanbali, Hanafi, and Shafi'i.

legal institution of sharia is one of continual negotiation and adjudication by a diverse judiciary.

Emon points out however that one of the most important transformations of "sharia" in Islamic history was precipitated, and in many ways caused, by western colonization of Muslim lands. During this period of colonialism beginning in the eighteenth century "the institutional structure that gave real-world significance to Islamic law began to be dismantled or modified" (Emon 2006, 8). Emon provides a very detailed analytical history documenting many of the cunning tactics used by colonial rulers to dismantle, restructure, and even themselves administer Islamic law as a tool for ruling the colonized (2006, 9-19). Once these lively and context based institutions were dismantled, all that remained were abstract doctrines left over from previously living, flexible, and interpretive institutional structures. No longer did institutions exist that could continue the work of contextual interpretation that "can mediated between text and context" (Emon 2006, 8). Therefore, what is referred to as Islamic law currently is in fact only the records of a very lively and diverse past set of juristic institutions (Emon 2006, 9).

To complicate matters further, the products of this very recent formation facilitated and forced by colonial interference are now jealously guarded by those Muslims who strive to protect what is left of Muslim legal traditions. According to Emon this has transformed the products of colonial attempts to codify (or freeze) Islamic legal tradition (in order to make it easier to administer), which Emon calls reductive Anglo-Muhammadan law, into ideologies of identity (2006, 9). Therefore attempts to change these laws in order to adapt them once again to current contexts is frequently interpreted as an attack on Muslim political identity, reminiscent of past colonial, and suggestive of

ongoing imperial interests (Emon 2006, 9). Therefore the West is deeply implicated in both the freezing and the politicization of Islamic law. In this way, the policing of Muslim women's bodies becomes symbolic on the one hand of modernization relative to western interests at the same time they are on the other hand symbolic of retaining Muslim identity for Muslims (Kassam 2000).

There is some irony therefore in the fact that many in the media disparaged sharia for on the one hand being ancient and frozen, in other words not only outdated but also inflexible to new contexts, and on the other hand for being too diverse.[108] The fact that there are several schools of Islamic law raised the question of which law would be used, and the assumption was made that the fact that this variable was unknown would somehow disadvantage vulnerable people.[109] This is ironic as the fact of several schools of Islamic law suggests on the one hand that sharia might have a history of development, rather than being frozen in time from its inception as suggested by the media, and on the other hand may have been, at least at some point, amenable to diverse local contexts, rather than inflexible despite context as the media suggested. The critiques are not entirely inappropriate of course, because for the reasons Anver Emon mentions even though sharia has a history of diversity and context sensitivity suggested by the multiple schools of sharia tradition, these have in recent times been largely codified into established legal norms, while the institutions that gave sharia its judicial contextual flexibility have been largely dismantled (Emon 2006). However, the analysis present in

[108] Griefenhagen. 2005. 'Sharia' and 'Multiculturalism' Discourses: Exclusions and Equities in the Controversy over the issue of Muslim Personal Law in Ontario. Unpublished. On file with the author.
[109] "Sharia differs among sects and countries of origin." Lynda Hurst. *Toronto Star*. May 22, 2004. "What is called sharia varies widely." Margaret Wente. Globe and Mail. May 29, 2004. "There are four main schools of Sunni Muslim law. Different countries have different interpretations and applications of Muslim laws. Proponents say sharia-inspired arbitration can successfully be adapted to the contemporary Canadian context. Opponents question which set of Muslim laws will be applied by arbitrators in Canada." Mirko Petricevic. "Faith-based arbitration comes under spotlight." *The Record*. July 30, 2005.

the media debate does not go this far. Rather, it appears sharia is uncritically and contradictorily lambasted for being both too flexible and too rigid. This is in line with an approach to sharia that appears to simply seek to render it so other and uncivilized that even apparently contradictory critiques of it are presented and accepted as legitimate without qualification or question.[110]

One might reply that the relevance of this history of sharia is limited because, as Emon notes himself, both supporters and opponents in the sharia debate were operating as if sharia did not have this history, therefore Emon's is a moot point for the sharia debate. Sharia may have been very different things in the past, and there may be great potential for the future; however, as Zine has pointed out, this history and potential is not yet realized in the community to the extent that more recent and patriarchal interpretations have been substantially decentred (Zine 2009). What relevance does the history of diversity within and colonial influence upon sharia have on the current debate? I would argue this history does offer many important insights into and critiques of the "sharia debate".

First, Orientalist representations of sharia are in part dismantled by this history. Not only is the notion of sharia being frozen in time from its inception deeply complicated here, but also the entire Orientalist notion of a closing of the gates of *ijtihad* is put into question. Indeed, Anver Emon notes several authors who argue that the gates of *ijtihad*[111] were never "closed" until perhaps western colonialism closed them (Emon

[110] Itrath Syed suggests that "The limited willingness to engage with the possibilities of the proposal was very telling. Any substantive interrogation of the proposal would have rendered the discussion plausible and rational. I would argue that the opponents preferred the debate to remain in the realm of the implausible and the entirely unintelligible. That was the only way to completely demonize the proposal and all those who were willing to engage with it" (Syed 2012).

[111] Ijtihad is defined by Frederick M. Denny as "independent legal reasoning in search of an opinion" (2011, 190).

2006, 19; Halaq 1984; Ali-Karamali and Dunne 1994). This realization of western responsibility may have changed in part the tone of the sharia debate from one of unconditional othering to one of partial responsibility for current Muslim cultural configurations. The West is deeply implicated in the process of creating the arguably "frozen" notion of sharia still held to varying degrees by many post-colonial Muslim states today. This places a moral responsibility for this development on the West, therefore deeply challenging western disparaging of an allegedly "uncivilized sharia". It is rather the uncivilized history of western colonialism that has played a decisive role in fashioning what today is taken to be sharia. Western condemnation of "uncivilized sharia" is therefore in a very real sense an unwitting self-condemnation.

Second, the West's implication in the "freezing" of sharia globally suggests ethically, I would argue, that this partial responsibility calls for Western states to do their part in dismantling the Orientalist constructions and representations they helped to create. Anti-colonialism and anti-Orientalism is not an option; it is an ethical requirement for the West.

Third, western states might open themselves to facilitating Muslim feminist, anti-racist and anti-colonial initiatives. This will of course not mean a second colonial restructuring of Muslim states under European domination, but rather perhaps openness to "dialectical interaction" (Stone 2000) or "transformative accommodation" (Shachar 2001) in which western countries might genuinely engage the legal diversity represented by their diverse populations. It is essential that western organizations not attempt to "fix" patriarchy in the other but rather only facilitate such indigenous Muslim transformative

projects.[112] Importantly, western stakeholders must realize feminist transformation does not necessarily mean the erasure of Islamic religious tradition (Mahmood 2005).

Fourth, western nations must be attuned to what colonial constructions and Orientalist images of Islam generally and sharia specifically continue to produce that benefit the West (despite the post-colonial era), in order to dismantle lingering motivations for Orientalist representations of the other. As I have been arguing, even if the post-colonial era has arguably arrived, these lingering constructions continue to justify western domination of Muslim lands and resources, and the policing of Muslim bodies domestically in part to protect the cultural identity of the nation at home. Unmasking these hidden benefits is an important step in dismantling the unethical use of these tools of domination to achieve those reprehensible ends.

Fifth and finally, Emon makes his own suggestions as to how multicultural accommodation of cultural diversity might proceed, specifically in the legal sphere, in the West (Emon 2006, 24-28). Although faith based arbitration has been arguably circumscribed, mediation has certainly not been affected. Therefore, Emon suggests that "in liberal democratic states where Muslims wish to observe sharia values in the area of family relations, the government can create a legal regime that facilitates and regulates the development of non-profit Muslim family service organizations. By utilizing various legislative regimes such as corporations law and tax law, and by using the power of judicial review, the government can create venues for Muslims to create their own civil society institutions through which they can critically evaluate the historical sharia

[112] It is theoretically conceivable that such a project could be initiated by western agencies acceptably if Muslim stakeholders were given sufficient consultative power over the project and western initiators accepted only a facilitative role. However, given the histories of colonialism and imperialism in the West, such a prospect makes this researcher extremely uneasy.

doctrine, determine how it fits within the state's legal system, and arbitrate family disputes in light of their *de novo* analysis of sharia" (Emon 2006, 25). Emon recommends several checks and balances in this government supported (and therefore regulated) system similar to the changes made to the Arbitration Act to protect vulnerable people and to ensure diverse community engagement. A number of Muslims during the sharia debate, including women, rejected the suggestion that all arbitrations without exception conducted under "Muslim principles" would be inequitable toward women, not least because this suggested that any egalitarian rulings could not be regarded as issuing authentically from Islamic law. Such people fiercely defended the notion that Islamic law is open to reinterpretation (Syed 2012, 14). What Emon suggests then, is that if the government partially funds Muslim non-profit centres that would assist in their developing a "Canadian sharia", then the government could facilitate and regulate this process from the bottom up, given that mediation and advisory arbitration are still available to Muslims, even under the revised Arbitration Act, and therefore that Muslim legal principles can still be enshrined in legally enforceable contracts in various ways at any rate. .

## 5.4 Criminal law and Illegal practices?

Much of the public discourse provoked by the "sharia debate" fed on media images of hands being cut off for theft, of adultery punished by stoning, of beheadings, and of polygamous marriages. As I have argued above, this imagery was central to the construction of moral panic regarding the "sharia debate" in Ontario. However, none of these practices had any relevance to faith based arbitration. First, criminal law cannot be

the subject of arbitration. The Arbitration Act can only apply to commercial or family law issues. Furthermore, nothing that is against criminal law in Canada can be prescribed by an arbitrator. And of course, adultery is not a criminal offence in Canada, while stoning is a criminal offence. Therefore, none of these media images found in the sharia debate had any relevance whatsoever to the issue of faith based arbitration. However, as I have mentioned above, these images were absolutely central to the western discourse on sharia, and the imperial and racist national interests they serve. One of the important functions of these extreme images of "sharia" is to reinforce the notion that Muslim women are absolute victims of Muslim community and traditions, and therefore once again they are striped of agency. The only expression of Muslim women's agency in the context of religious community recognizable to most western eyes is resistance to Islam. All else is seen as subjugation (Mahmood 2005).

Accusations of polygamy bear special consideration here for several reasons. The allegation of "polygamy" was used uncritically as a blanket accusation of gender inequity (Boyd 2004, 24), and this contrasts ironically with the actual practice of increasing "poly-spousal" legal recognition in Canada, precipitated by the liberalization of divorce laws. Therefore I suggest a more nuanced approach to the issue of polygamy that might have generated a more rational and less othering debate on the issue of gender inequity in faith based arbitration.

The first point to be made is that polygamous marriage cannot legally be performed in Canada. Therefore, as this is a criminal practice it cannot be the subject of arbitration under the Arbitration Act nor can it be prescribed by an arbitrator. Furthermore, even if polygamy were legal in Canada, it could not become the subject of

arbitration. One cannot ask a third party to take on decision making powers regarding whether one will marry or not in either Muslim or Canadian legal traditions. The only issue that might arise would be that raised by a divorcing polygamous family, in which case matters of support, division of assets, and custody could become matters of arbitration. In this case, one might argue that a woman in a polygamous marriage might be awarded less in the event of divorce because the resources of the household would be divided between more than two spouses. This is a legitimate concern, but it is also a concern that a woman divorcing from a polygamous marriage might get far less than she would have in a legitimate marriage in support or division of property because such marriages are not recognized in Canada (Boyd 2004, 23). Marion Boyd points out that if a polygamous marriage was performed in a foreign jurisdiction that recognizes such marriages as legal, then the marriage will also be recognized in Canada. And one important rationale for this is that women will be able to legally claim support and a portion of the family property (Boyd 2004, 23). Certainly patriarchal forms of polygamy have been shown generally to be potentially detrimental to women's rights and interests (Campbell 2005) and are therefore a legitimate concern. However, recognition of foreign polygamous marriages has been an important avenue for upholding gender equality in Canada for these families in the event of divorce, and this recognition of a claim to support and property division is the only aspect of polygamy that faith based arbitration could have touched. However, this was not dealt with reasonably in the debate, but rather polygamy was used simply as an example of the gender inequity allegedly endemic to Muslim culture and community.

The second point is that statistics suggest the actual practice of polygamy is extremely rare as, for example, less than two percent of Middle Eastern populations are involved in polygamous marriages (Rebhun 2008, 11). Moreover, as already stated above, patriarchal polygamous practices increasingly are banned in "Muslim" countries (Emon 2006).

Third and finally, the degree of concern over polygamy is somewhat disingenuous given the current state of Canadian legal practice. Research suggests that polygamy in non-Muslim contexts in Canada although frowned upon is not regarded with the same kind of moral panic or level of government interest as that expressed in the sharia debate.[113] More importantly, because "poly-spousal" relationships are increasingly a legal option and norm in Canada, I argue that ultimately the only legal approach to addressing gender inequities in polygamous relationships that will be available to Canadians will not be continued attempts to eliminate polygamy, but rather will only be taking steps to make it more equitable. There are numerous legal definitions of "spouse" in Canadian law. This point challenges those who would use polygamy uncritically as a generic example of gender inequity among Muslims. Not only are people who are legally married considered spouses, but also common law relationships between people who live together in the same dwelling for an extended period of time, or couples who share a child and have a relationship of some permanence, whether or not they are married or common law, are recognized legally as spouses for the purposes of support claims as well (Boyd 2004, 23-24). Boyd writes:

[113] Campbell, Angela. 2005. *Polygamy in Canada: legal and social implications for women and children : a collection of policy research reports*. Ottawa, Ontario: Status of Women Canada. The reasoned arguments and rational research accomplished in these policy reports suggests a reasoned engagement with the issue not present in the sharia debate.

> Consider the hypothetical case of Tim, who married Jane when he was 22, and separated from her at 24 when he went to live with Mika. He and Mika lived together for 4 years, during which time he had an affair with Laura. Laura became pregnant, and since the child's birth 8 months ago, he has been living with Laura and the child. If Tim and Jane have never divorced, Tim has three spouses for the purpose of spousal support obligations. Ironically, permitting polygamy would provide additional protection to Mika and Laura in this example, because they would also be able to claim a division of property, in addition to support rights. Boyd 24, 2004

It is important to understand the dynamics of effecting gender equity in the context of marriage and divorce law. The liberalization of divorce laws has of course helped to make divorce much more common. This has had a positive effect on women's equity as women are freer to leave a relationship with support and equal division of property if they wish. However, this has increased the incidence of women in relationships that are not marital. Given that men still hold more wealth generally in Canada, if women could not claim support in the context of a common law or co-parenting relationship, either because the divorce from their former spouse was not complete, and/or they were not legally married to their common-law or co-parenting "spouse", this would increase the feminization of poverty if these subsequent relationships ended. Therefore, although this is not the same as supporting polygamy, the recognition of "poly-spousal" relationships in these ways is an important strategy for effecting gender equity.

Canadians are free to engage in all manner of sexual or co-habitational relationships enjoying various forms of legal recognition of those "spousal" relationships

for the purposes of spousal support in the event that the relationship ends.[114] Canadians are free to engage in multiple "poly-spousal relationships", but they are still not allowed to legally marry polygamously. Put differently, Canadians are allowed to engage in all the practices that compose polygamy without legally being able to marry polygamously (Boyd 2004, 23-24). The main difference therefore between Canadian law and interpretations of Islamic law that allow for polygamy is not that one allows it and the other does not, but rather that in Islam only men can engage in multiple-spousal relationships, while in Canada both men and women can engage in multiple-spousal relationships. Therefore the important distinction to make rather is between patriarchal polygamy and gender equal polygamy. Ironically, recognition of polygamous marriage gives women the opportunity to claim a division of property as well as support, whereas the various forms of poly-spousal legal recognition in Canada only give women the right to claim child or spousal support. Only marriage gives women the right to claim equal property division in Canadian law, and therefore current common law disadvantages women and continues to feminize poverty in this way. I anticipate the increasing recognition of "poly-spousal" relationships in Canadian law, precipitated by liberalized divorce laws, together with the increasing non-monogamous diversity of polyamorous relationships Canadians engage in,[115] will eventually undermine attempts to police

[114] It is important to note as well that marriage is still legally privileged over other forms of spousal recognition as it is the only legal relationship in which partners may claim a division of property (in addition to support). Even a legally recognized common law relationship does not give partners the right to claim a division of property.

[115] See Anapol, Deborah M 2010. *Polyamory in the twenty-first century: love and intimacy with multiple partners*. Lanham: Rowman & Littlefield Publishers; Barker, Meg.; Langdridge, Darren. 2009. *Understanding non-monogamies.* New York: Routledge 2009; Loue, Sana. 2006. *Sexual partnering, sexual practices, and health*. New York : Springer c2006; Walker, Rebecca. 2009. *One big happy family : 18 writers talk about open adoption, mixed marriage, polyamory, househusbandry, single motherhood, and other realities of truly modern love*. New York: Riverhead Books 2009; Klesse, Christian. 2007. *The*

polygamy, and in the interests of equality and fairness, necessitate rather the development of legally recognized gender-equal polygamy. Efforts to ensure such relationships are equitable in practice will have to take the tack of facilitating agency within the context of such relationships, rather than attempting to criminalize these relational forms.

I am not defending polygamy or even the legal recognition of polygamy here. I am pointing out the contradictions between the way polygamy was discussed during the "sharia debate", essentially used to other Muslim communities generally and faith based arbitration specifically, and the way polygamy and multiple-spouse relationships in fact are dealt with in Canadian legal practice. To represent polygamy as uncompromisingly anti-woman, when recognizing multiple-spousal relationships legally is increasingly the norm in Canada, a result of the express interest of protecting gender equity, is disingenuous at the very least. Using polygamy in this way without considering Canadian legal practice honestly and rationally reflects the tendency in the debate to simply other sharia at all costs, and to represent it as so far beyond civilized rational consideration that it cannot even be entertained in a reasoned fashion. However, a reasoned understanding of polygamy reveals that ever since the liberalization of divorce laws, increasing recognition of multiple-spouse relationships is absolutely central to protecting gender equity for women. Furthermore, Canada recognizes polygamous marriages that were performed in a jurisdiction that recognizes them, for the express purpose of protecting gender equity in the event of a marriage breakdown. If Canada did not recognize polygamy or multiple-spouse relationships for these purposes, this would disadvantage women who would not be able to claim support or division of property. Surprisingly, this

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*spectre of promiscuity: gay male and bisexual non-monogamies and polyamories*. Aldershot, Hampshire, England ; Burlington, VT: Ashgate.

is the only role that faith based arbitration could have played relative to polygamous relationships. Arbitration does not involve sanctioning or performing polygamous marriages. It could only be used to assign support or division of property in the event of a divorce. Therefore, the othering role polygamy was made to play in the sharia debate is problematic at best.

## 5.5 "There will be no Sharia in Ontario"

I will here unpack the discourse that Ontario premier Dalton McGuinty used in his pronouncement on September 11, 2006 facing an upcoming election in 2007. McGuinty was widely reported in the media to have stated "[t]here will be no shariah law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians"[116] What might these words have been taken to mean by the public, and why was this approach taken rather than another? Aside from the obvious intent to communicate that enforceable arbitration according to any non-Canadian legal regime had been eliminated in Ontario, several other things are suggested given the tenor of the "sharia debate." Given the context and content of the debate, I will pay careful attention to what was *not said* by McGuinty as much as what *was* said.

Although McGuinty's comments are most likely intended only to refer to legally enforceable forms of faith based arbitration, the over-simplified nature of the statements further suggest that a central practice of Islam, sharia, will also play no part in the cultural life of Ontario's citizens generally. More than simply referring to legally enforceable forms of faith based arbitration, McGuinty suggests that even the private life and culture

[116] CTV.ca News Staff. Monday September 12, 2005. "McGuinty rules out use of sharia law in Ontario." http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1126472943217_26/?hub=TopStories Accessed Friday July 2, 2010.

of observant Muslims is excluded as well, because in addition to understanding sharia as informing family law, many Muslims regard sharia as a guide to the way a Muslim should conduct herself or himself in order to follow the "straight path" of Islam. This is not literally what was intended by McGuinty, but to express what he did mean in the way he did is a careless, damaging and perhaps strategic overgeneralization.[117] To be fair, on the one hand McGuinty was attempting to address the legitimate concerns of several Canadians, Muslim or otherwise. On the other hand, turning a blind eye to the racialization, Orientalism, and othering of the sharia debate is a deeply damaging incidence of political and public neglect.[118]

For McGuinty to apparently leave aside in his announcement the issue of Islamophobia and blatant stereotyping and misunderstanding of sharia and Muslim communities that proliferated in the press was a gross oversight. McGuinty's statements simply suggest that the discourse was correct in its moral panic, and that for this reason sharia will be excluded from arbitration. The wording of the announcement targets sharia specifically first, before it expands to religious arbitration generally. Therefore, the rationale and target of the announcement is made clear at the outset. To leave these issues unclarified invites interpretations of McGuinty's comments that connote a much deeper cultural exclusion than restrictions on enforceable faith based arbitration alone.

Furthermore, McGuinty's comments completely ignore the realities of de facto legal pluralism in Ontario, including several enforceable (and non-enforceable but legally practicable) avenues for the practice of Muslim family law still available as discussed in

[117] Razack (2008) suggests that one of the motivations for countries to demonstrate their participation in the American led "War on Terror" it to gain admission to what she calls the fraternity of white nations (160).
[118] Perhaps this is more a reflection of the media representation of McGuinty's announcement rather than a full representation of what he actually said. To the degree that this is true, I am critiquing the media representation of McGuinty rather than government representatives or policies.

chapter 4. Finally, in order for Muslim women to be protected, agency affirming policy must be developed, because the only way for women to be protected in the existing legal system is for women to exercise their agency.[119] McGuinty's comments suggest that the problem of protection has been solved apart from Muslim women's agency, when in fact that is not entirely the case. McGuinty's announcement does not suggest that Muslim women must be educated and better enabled to exercise their agency for fuller protections to be achieved, leaving readers to assume there is no cause for concern. In conclusion, I argue that 1. McGuinty's comments promise more than they deliver, 2. they affirm Islamophobia and misunderstanding more than they dismantle it, and 3. they deny the importance of Muslim women's agency and ultimately protection, given the realities of Ontario's legal system, more than they affirm or offer it.

In fact, religious arbitration was not explicitly banned. Only non-Canadian laws, religious or otherwise, were banned, so to mention religious laws generally, and sharia specifically, without pointing out that the legislation will explicitly target neither, perhaps clouds the issues more than it clarifies. McGuinty could have taken the opportunity to affirm that the intent is not to exclude Islam, Muslims, and religious people generally as being particularly pre-modern and inequitable, but rather that vulnerable people regardless of culture or religion will benefit from the new protections. This message was not communicated at this press release, and to my knowledge it has not been communicated publicly in any substantial way since.

Finally, why was exclusion of sharia, and religious laws generally, the focus of the pronouncement rather than the equitable *inclusion* of religious laws in the context of adding extra protections for the rights of vulnerable peoples? Now that family arbitrations

[119] See chapter 4.

are explicitly governed by the Family Law Act, excellent new protections are afforded those seeking family arbitration. Religious people of all sorts may engage in formal arbitration based on their traditions in so far as their decisions do not contradict Ontario's Family Law Act. McGuinty could have recognized that there are similarities between several religious legal traditions and Canada's legal traditions that could be embraced as mutually similar and affirming.[120] Rather than suggesting the possibility, as did several Muslim leaders I spoke to, that Ontario's justice system generally, and its family law specifically, is deeply Islamic because of its pursuit of justice, the assumption that Islam is inherently other was re-affirmed. Overall, I characterize this announcement as a sadly missed opportunity at best, and at worst an uncritical affirmation of the damaging racialized Islamophobia and misunderstandings circulated in the media debate.

## 5.6 Conclusion

My overall argument in this chapter is that dismantling the stereotype of "uncivilized sharia" is an important part of dismantling patriarchy and facilitating Muslim women's agency. Therefore, anti-racism, anti-Islamophobia, and anti-imperialism are important strategies for *facilitating* liberation and protection of Muslim women. Western discourses and assumptions about "sharia law" often represent it as barbarically violent, frozen in time and therefore hopelessly premodern and deeply patriarchal. There are few western voices that represent sharia Law as flexible, open to interpretation, or able to constitute anything approximating justice as envisioned by

[120] See chapter 4. For example, several imams I interviewed viewed Canadian law as "Islamic" because they recognized it as a system that genuinely seeks out justice. Therefore, several imams embrace Canadian norms of spousal and child support, as well as equal distribution of resources upon divorce and equal distributions of inheritance in wills because they recognize these as just, and therefore in line with sharia.

"modern" human rights and legal regimes. This assumption then forms the basis for the position that the only possible protection for Muslim women's rights must be found outside their religious communities and traditions within the protective arms of the supposedly benign secular state. However, once again, the question is how to address the patriarchalism that Muslim women do face in the context of sharia and family law, without falling into disparaging over-generalizing about a hegemonic and monolithic Islam. Therefore, I have here critiqued this over-generalization not only to show that there may be avenues of protection of Muslim women's rights in the context of sharia family law, but also to show that given Canada's current legal regime, the best possible mode of protection for Muslim women who want to practice faith based mediation and family legal practices is one that works in concert between Muslim communities, the secular state, and civil society generally, and more importantly one that facilitates Muslim women's agency rather than assuming it to be inconsequential. The final argument I am making in this chapter is that, as argued in chapter 2, an essential component of secularism is installing a cultural hierarchy at odds with the aims of building an equal and neutral public sphere, and that the sharia debate illustrates how the mass media have played an important role as a secularizing institution in this regard of hierarchy construction and maintenance.

### 5.6.1 The Media as Secularizing Institution

The state uses secularism to guarantee the relations it wants (Razack 2008, 148; 161; Asad 2003). This does not of course mean simply that benign states always work to protect religious minorities against persecution, work to protect citizens against religious establishment by enforcing religious freedom, and strive to protect individual (especially

women's) rights over against communal rights and actions. It means rather that in the name of aiming at these higher ideals, other more patriarchal and imperialist ends might be achieved, in the same way that several feminists have observed imperial feminism was used in the service of neo-colonial interests in Afghanistan to far more affect than substantially improving the plight of Afghan women (Khan 2008). Secularism in the sharia debate was not simply employed benignly to protect Muslim women from oppression and Canadian society from forms of Islamism that militate against human rights. Rather, imperial feminism was again used to justify over-policing of a community, single them out as national others for cultural exclusion, and further justify the control of Muslim lands abroad and Muslim bodies domestically in Canada. In the same way that women's rights can be used to justify wars on others that in fact destroy and deprivilege women deeply, secularism can also be used to oppress religious minorities, police religionized others, and disregard genuine consideration of Muslim women's agency rather than facilitating Muslim women's agency (Khan 2008).

Several media articles merge two notions: privileging of the secular and the othering of Islam.[121] I argue that the modern media is a fundamental instrument and institution of secularization (as I have defined secularization in chapter two). Most importantly for my purposes, the media establish and maintain secularization as cultural hierarchy. This means that secularization is as much about protecting dominant cultural (including religious) interests and racializing and marginalizing religious others, as it is

[121] David Warren, 'Multiculturalism -from Britannia to Sharia,' National Post,8 December 2003, A14. Margaret Wente, "Life under sharia, in Canada?" Globe and Mail. Saturday May 29, 2004. Ken Elgert, 'Islamic Law a Step toward Legal Apartheid,' Edmonton Journal, 4 December 2003, A19. Lynda Hurst, "Ontario sharia tribunals assailed." *Toronto Star*. May 22, 2004. Sara Harkirpal Singh, 'Religious Law Undermines Loyalty to Canada,' Vancouver Sun, 10 December 2003, A23. Margaret Wente, "The state should not give its blessing to Muslim Courts." *Globe and Mail*, December, 23, 2004. Ghammim Harris, 'Sharia Is Not a Law by Canadian Standards,' Vancouver Sun, 15 December 2003, A15.

about regulating religion in an allegedly neutral secular public sphere. In the same way that "gender" is not a neutral category, but has historically always referred to hierarchy between masculine and feminine, so to the secular historically has not been a neutral category, but has in practice referred to a space that is stratified hierarchically between dominant privileged religions (and forms of religion) and marginalized religions, despite modern claims to a neutral secular sphere. This has been a strategic hierarchalizing project as much as it has been a historic coincidence resulting from the mere fact of statistically cultural majorities.

Furthermore, in the same way that what Shahnaz Khan has called "imperial feminism" has achieved imperial interests more than actually furthering women's rights, I will coin the term "imperialist secularism," which too has been used to marginalize religious others more than it has been used to secure the religious neutrality of democratic states and human rights. Using the analogy of feminism, there is an important parallel with third wave feminism (Gillis et al. 2007). Gender hierarchy in third wave feminism is identified as not being limited to that between men and women (i.e. between secular and religion in parallel) but also to racialization, imperialism, class differences, and othering that creates a hierarchy among women between white, colonial, privileged women and other women (i.e. between a hierarchy of religions in the "secular" modern state along a continuum of privileged to othered). Furthermore, my argument has been that secularism as imperial hierarchy is not simply an occasional unfortunate accretion onto an otherwise benign and neutral secularism proper, but rather has been intrinsic and essential to western secularism from its inception, bound up as it was and is with colonialism and imperialism. This argument parallels anti-colonial anti-racist arguments that understand

racism to not simply be an unfortunate aberration of historic western modernity, but in fact absolutely central to modernity and modernization from its historical inception to the present day. My argument then is an extension of those of other authors on secularism and post-colonial anti-racist theory such as Talal Asad, Sherene Razack, and Jasmin Zine. I build on this work offering a new conception of secularization that is similar to but I argue extends this previous work. I therefore use this case study of the so-called "sharia debate" to illustrate how imperial hierarchy is accomplished in the modern West through "secularization" as well.

McGuinty's announcement was not simply a further clarification of the division between the "church" and the state. This decision was also bound up with and in concert with Orientalist, racist, and ultimately othering discourses and policies such as those identified above by Razack. This association of othering, racism and Orientalism is not, I argue, simply an unfortunate incidental and contextual appendage to an otherwise "purely" innocent secularizing action that "only" sought to clarify legal spaces. Quite to the contrary: othering, racism, and Orientalism have been absolutely central to modern projects generally and secularization specifically in actual practice from the outset of modernity. I argue that this is a continuation of a central tool of secularization rather than an infrequent coincidental junction. The beginnings of a solution is to work towards anti-racist, anti-Orientalist, and anti-imperial forms of secularization against what I am calling imperialist secularization, in the same way that anti-racist, anti-imperial feminism is suggested to be the way to correct the damage and oversight of imperialist feminism (Khan 2008). Put differently, rejecting imperial feminism or imperial secularism does not entail rejecting feminism or secularism entirely. My point is that one must be aware that

there are these different types, and one must be careful what form of feminism or secularism one is embracing—or rejecting.

# Chapter 6
# Fieldwork Results

## 6.1 Constraining Sharia

Based on my empirical research with faith-based religious groups in southern Ontario from 2007-2009, I argue that in practice the most pressing issue of the "Sharia debate" for Muslim leaders and adherents in Ontario was not faith-based arbitration *per se*, but rather religious divorce. Much of the so-called "Sharia debate" focused on the plight of vulnerable people in the context of faith-based arbitration. The media generally as well as Muslim and non-Muslim feminists specifically expressed concern that Muslim women and children might not receive fair and equitable treatment in the event of a civil dispute (such as a contested will) or of a marriage breakdown (involving disputes over spousal support, child support, custody, or division of family resources) (see Boyd 2004). Much of the public "Sharia debate" assumed that Muslim community leaders were fully aware of the *Arbitration Act* and intended to use it to make third-party decisions on behalf of, for example, divorcing Muslim couples in ways that would be detrimental to Muslim women. However, my fieldwork findings suggest that this was not the case. First, most Muslim couples in the process of divorce did not seek full arbitration agreements on the legal and financial matters of divorce. Rather, the majority of Muslims approaching Muslim leaders for assistance with civil disputes were looking for a religious divorce in addition to the legal divorce granted by the Canadian courts. Second, Muslim women constitute the vast majority of those approaching Muslim leaders and other Muslim organizations for assistance in securing a religious divorce. I argue that for these reasons the 2006 policy change enacted by the McGuinty government has made little difference

on the ground, and that the most pressing issue impacting Ontarian Muslim women's rights and wellbeing – the granting or withholding of religious divorce – has been ignored. In fact, it has made obtaining such a divorce more difficult.

To consider the disparity between the prevalent discourse and Muslim religious arbitration on the ground, the first part of this chapter reports my findings regarding the practices of Muslims with regard to private ordering[122] of civil disputes within three organizations: the Islamic Institute for Civil Justice, the Darul Iftaa[123] and the Islamic Social Services and Resources Association. I briefly mention research on other similar Muslim dispute resolution service providers in Ontario. The second part of the chapter discusses the relevance and impact of this reality for public policy and practice.

My fieldwork research is based on informal semi-structured interviews with 30 Muslims in leadership, lay, and Muslim social work positions in the communities. Two Muslim organizations were kind enough to share brief, anonymous case summaries of Muslim divorce/dispute resolution cases. I have received 21 such case summaries in total to date. I also interviewed 20 Jewish community leaders, Rabbi's, and community members.[124] I used Survey Monkey software, available online, to generate a thirty-item survey. Seventy respondents began the survey and fifty completed the survey. Fifty-three participants completed the majority of the web survey. I examined these fieldwork results for common themes and issues that cut across the majority of the interviewees, and I

[122] Private ordering refers to non-governmental parties entering into voluntary private agreements or contracts.
[123] Darul Iftaa literally translates as House of Advisory Council or Opinion.
[124] Ideally I would have liked to have interviewed at least 30 people in the Jewish community (mainly the Orthodox Jewish community). However, I found that because the Beth Din is a relatively small organization (there are only approximately six Rabbis that serve as judges for the Beth Din) that my interviews reached a saturation point (the information I received began to repeat itself) early on.

constructed my argument around representative examples from my fieldwork. The survey results were used mostly to confirm my findings.

## 6.2 Research Participant Reactions to the Media Debate

In chapter 5 we outlined the major themes of the so-called sharia courts debate in Ontario, offering a critique from the perspective of an anti-imperial secularism and post-secular feminism. We noted that most of this debate and analysis was rooted in imagination; few commentators actually understood what faith based arbitration services did or why Muslims would seek out those services. In this chapter we will listen to the voices of Muslim women and men who provided those services and sought them out. We discover that the media representation of the major issues missed the mark while engaging in an ideological clash. The real reason that people used these services was to overcome the issue of limping marriages by obtaining a religious divorce. The participants themselves understood that the media had caricatured the issue. One social worker responded to what she perceived to be the overgeneralizations about Muslims in the media debate on faith based arbitration stating,

> "I've been a social worker for 26 years. One of my areas of specialty has been woman abuse and child abuse. Do I hate men? No. You know? Do I hate all parents because [some of them] hurt children? No. Do I hate all Muslims because some Muslims do hurt people in their own community and others? No." (Personal interview March 5, 2008)

One Muslim social worker employed by a Muslim social services organization argued that the Muslim community does face challenges when it comes to patriarchy, but that it

is not unique in this regard. Other religious communities in Canada face the same challenges. She said, **"**My feeling is that the Muslim community would want me to say, oh, we are so different with different issues and problems. But my feeling is that many of the issues are the same as in other communities" (Personal Interview April 12, 2008). Her comments contradict those of commentators, well represented in the Ontario media debate on faith based arbitration, who stereotyped Muslim communities negatively as uniquely patriarchal.

Some of my research participants felt that both sides of the debate over faith based arbitration were lacking. One Muslim social worker stated,

> When it came up in the papers it was basic. I thought hey, interesting. And my first thought was hmmm, which Muslims is he [Syed Mumtaz Ali] talking about? I thought, interesting, but it didn't click with me. And then all hell breaks loose. I was an observer. I was very disgusted with both sides. The reason is, I think, the ones who were supporting it, they made themselves sound like they spoke for all Muslims. If you are going to propose something like that you start with talking to people, but to them it was like God is on our side… It was like we represented you. (Personal interview March 5, 2008)

Commenting on how the media sought out certain voices in order to capitalize on the sensationalism of the debate on faith based arbitration, one Muslim lawyer stated,

> Ali Hindi. He's an engineer… he's always in the press. He's always saying sensational things. He's the opposite of Tarek Fatah. The media loves the two of them. One gives them one thing and the other gives them the other stuff. So they say really outrageous things. For example, polygamy. You know, why say that

> kind of stuff? He'll give his opinion but does he have any basis for it? (Personal Interview March 11, 2008)

Several research participants commented on what they felt was a strong Islamophobic bias in the media debate on faith based arbitration. One Muslim woman social worker felt that Islamophobia played a prominent role in the public debate on faith based arbitration stating, "so opposition, the vocal one, they played to people's fear about Muslims. And I think there was a lot of Islamophobia hidden within the opposition… People with other political motives or views were utilizing this and using it for their [own] argument. Meanwhile it vilified the whole community." (Personal interview March 5, 2008). One research participant wrote to one of the participants, a well-known feminist, in the public protest that took place immediately before Dalton McGuinty, then premier of Ontario, made his final announcement to the media regarding the faith based arbitration debate on September 11, 2005. This participant responded to what she perceived to be prejudicial targeting of Muslim communities stating,

> I actually wrote her a letter. I wrote all of them, and I said I have the greatest respect for [you], but I think you weren't answering the right questions. And the only one in the picture was Islam... What about Jewish women? Are you saying that Jewish Rabbis are not capable of coercing women or marginalizing women? Is the idea that the subjugation of women and abuse of women is only rooted in Islamic culture and the Muslim tradition? Where were you when this was a non-issue? Like in New York where a Rabbi declared a woman insane in order for her children to be taken away from them, where children are being taken away regularly from these women. And they are outside the community, and that

> traditional community is very close knit, so that people outside the community are actually ostracized… where do you go? (Personal interview March 5, 2008)

This Muslim social worker further stated,

> There are women who are sponsored and don't speak the language who are oppressed. Or there are women who sponsor their husband and continue to stay with him even when he's abusive. All of these things are issues that need to be addressed. But you don't target one community and say everything they do is wrong and everything they do is evil, and you need to save their women from them. (Personal interview March 5, 2008)

When asked how she felt the Muslim community was represented in the media debate, one Muslim social worker who works in the community stated,

> I didn't think they were represented. I think they totally responded to the louder voices. I think they also responded to what they thought the society wanted to hear, which is that Muslims themselves also reject Islam. It became more than rejecting the faith based arbitration that was being presented. It became about rejecting Islam. That's how I heard it. (Personal Interview April 12, 2008)

One imam who regularly engages in faith based mediation felt that when it came to Muslims, the faith based arbitration debate was not handled in an even-handed manner stating,

> The public debate made me very sad. People got carried away. The former attorney general was also a feminist. We cannot be paternalistic when it comes to Muslims, one law for them and a different one for non-Muslims. Arbitration will

> take place whether we like it or not, and the law should be involved to make sure that justice prevails. (Personal Interview August 30, 2008)

One imam at a group interview stated "Just by looking at who was involved, this is not something that mainstream Muslims will be concerned about, although they maybe should have been. But because the person who was representing the Muslims and those that were against them… usually when these kinds of people are out there speaking, mainstream Muslims will just turn it off and think okay these aren't… they're not going to represent us anyway" (Personal Interview July 4, 2008). Another imam present at the same interview followed up by saying,

> Most of our information was coming from the Toronto Star. And most of what you read in the Toronto Star you read everywhere else. The arguments were the same. It was, you know, people's hands will be cut off eventually and women will be stoned. That was their trump card. Women are going to get stoned. Who on earth would think that a woman is going to get stoned in Ontario? How is that going to happen? How can you even make that kind of argument? But that argument was made. And it was believed. And it was all over the place. (Personal Interview July 4, 2008)

Immediately following this comment a Muslim adherent also present during this group interview responded, "post 9/11 anything can be said about Muslims and its okay," To which the imam responded "No." (Personal Interview July 4, 2008).

Commenting further on the negative representation of Islam and Muslims during the media debate on faith based arbitration, a Muslim lawyer active in the Muslim community stated,

> Being a lawyer, and understanding how the arbitration act worked, and also the fact that it had to do with private disputes not, you know, it was being projected out there the stoning of women, and cutting of arms, and whipping and all this stuff. You know, you can't arbitrate [these things]! You know, an arbitrator could not say, yes you can beat your wife… But unfortunately that wasn't the perception out there. (Personal Interview March 11, 2008)

Another imam I interviewed stated,

> It is unfortunate that the media and the politicians [played] the Islamophobic card… it was Islamophobic, saying sharia is coming to Ontario. The next thing that we can hear is actually that people will be stoned… its hate speech really, and McGuinty played the cards in order to get the Islamophobic votes you know, and this is actually unfortunate. (Personal Interview February 19, 2008).

Finally, one Muslim adherent stated of those that participated in the public media debate on faith based arbitration, "what comes out in the media are the more extreme sides of the issue, not the mainstream. You ask the Muslim in the street, and he will never identify with any of the people talking in the media. They don't represent most of Muslims in Ontario" (Personal Interview July 4, 2008).

Most web-survey respondents also felt negatively about how their community was represented in the media during the so-called "sharia debate." One participant complained of, "Too many people with their own agendas leaping in with their strident voices." Another respondent made several observations about the nature of the media debate, "media coverage, in my opinion, was superficial, partly because each side representing different Muslim community perspectives, did not make correct or complete arguments.

In particular, the proponents did not make a distinction between Sharia and Fiqh; did not indicate that there were several schools of Islamic jurisprudence. The opponents did not point out that mediation was the preferred dispute resolution approach in Islam." One participant expressed optimism that in response to media crises such as the so-called "sharia debate" the ability of Muslim communities to effectively respond and be heard by governments has improved, "we've experienced some serious community scares in the past. Since then, our community outreach programs have been well received by the various levels of government." 21 of 52 respondents (40.4%) felt their religious community was represented "very unfairly" during the media debate, and 75% felt their religious community was represented "unfairly" or "very unfairly." Only three people (5.8%) felt their religious community was represented "very fairly," and six felt it was represented "fairly."

## 6.3 Islamic Arbitration vs. Religious Divorce

Many Muslims in the Canadian context, and particularly Muslim women, will seek out a religious divorce in addition to a civil divorce. Not all Muslims will do so, as they may not be observant to that degree or they (or their community) might consider a civil divorce to be sufficient. However, my research suggests that many Muslims do seek out religious divorce and that their communities and religious leaders reinforce the importance of acquiring an Islamic divorce in addition to the civil divorce in order to be considered legitimately divorced within their religious community and before their God. For example, one Muslim woman I interviewed who had both a civil and Islamic divorce stated,

> Your divorce is not granted by the imam. The courts cannot grant an Islamic divorce. It's like the separation of church and state. If I did not get the religious divorce from the imam, then I am not considered a divorced woman." She added, "What happens is that the man has the right to divorce you. So you ask and you say, 'This thing is not working.' So you ask for the divorce called a *talaq*. And if he gives you problems and says I don't want to divorce you, then you can go to an imam and say, 'You know, I want a divorce.' The imam would do some research on the situation and try to mediate and such, and when all these resources are exhausted then he will grant the divorce. (Personal Interview May 3, 2008)

I have found that virtually all religious divorces do not typically involve negotiating terms addressed in a civil divorce, such as the division of property, support payments, or custody, issues that might be subject to arbitration. However, without a religious divorce, many women suggest they will experience social barriers to remarriage within their community, and they may fear that they are committing adultery if they remarry under Canadian law. In extreme cases, ex-husbands will behave as if they are still married, leaving some women feeling oppressed and helpless to fully dissolve a relationship. Therefore, acquiring a religious divorce is of great importance to many Muslim women in the Canadian context (see also Macfarlane 2012). There are at least three types of Muslim divorce. First, the *talaq* is a unilateral divorce performed by the husband.[125] Second, the *khula* is a wife initiated divorce that still requires the consent of the husband (generally the wife must return her dowry in this case). Third, the *faskh* is a judicial annulment of the marriage, often used when the husband cannot be contacted in order to agree to the divorce. (For a further discussion of the different types of Muslim divorce as they relate

[125] *Talaq* is the Islamic term (deriving from Arabic) meaning divorce.

to the Canadian context, see Macfarlane 2012.) I conducted research at three organizations that are confronted with Muslim women's requests for aid and guidance in obtaining a religious divorce: the Islamic Institute of Civil Justice, the Darul Iftaa of the Canadian Council of Muslim Theologians, and the Islamic Social Services and Resources Association.

### 6.3.1 The Islamic Institute for Civil Justice

Perhaps the most instructive examples of the prevalence of religious divorce over faith-based arbitration are within the practices of the Islamic Institute for Civil Justice (IICJ). It is surprising that although the IICJ is the organization responsible for making the 2003 public announcement of faith-based arbitration as available to Muslim communities, it has never performed, or apparently even intended to ever practice formal arbitration. This continues to be the case, even though the IICJ understands that it is still available under certain new guidelines outlined in the revised 2006 *Arbitration Act*.[126] As mentioned in Chapter 1, fear in the debate likely stemmed from the initial statements of the late Syed Mumtaz Ali, the founder and head of the Institute, who pronounced that "good" Muslims would be obligated to utilize faith-based arbitration (see Judy Van Rhijn 2003; see also Reda 2012). I was unable to interview Ali as he was quite aged at the time of my fieldwork and had withdrawn from public activities. However, a small number of arbitrators and mediators associated with the IICJ now work for an organization called Muslim Mediation Services (MMS). It is from the IICJ/MMS that I received my information through their kind provision of anonymous case summaries and a lengthy in-person interview. The IICJ is a part of the Canadian Society of Muslims. The Canadian

[126] This is not to say they may not pursue this in future. However, currently I base my conclusion on the actual practices of the IICJ combined with what I gathered from my interview with the IICJ all of which is documented in this chapter.

Society of Muslims is a non-profit Muslim organization based in Toronto. Its mandate is to provide information on Islam and "generate tolerance and harmony both among Muslims and non-Muslims" (muslimcanada.org). The information they provide is mainly from a Sunni-Hannafi perspective. The main activity of the organization appears to be providing information through their website. The organization also seems to issue from a South Asian context as its major leaders are of South Asian descent. There is no indication on the website as to how large the organization is. Based on the website and my interview with a member of the organization, since Syed Mumtaz Ali has passed away, it appears the IICJ is now just a website that is a subsection of the larger Canadian Society of Muslims website. It is not clear that the Canadian Society of Muslims is still active either as it appears not to have been updated since 2005. Muslim Mediation Services appears to be then made up of Muslim mediators, some of which had previously been involved with the IICJ. It is interesting that such a small organization should have triggered what became an international debate on so-called sharia courts.

The MMS is the only Islamic organization in Ontario I found to be both aware of the new regulations under the amended *Arbitration Act* and in a position to adhere to them in order to perform court-enforceable arbitration. The 2006 amendments to the *Arbitration Act* require several protective measures be taken in the context of a formal arbitration if the resulting arbitral award is to be enforceable.[127] MMS members have the appropriate training the new regulations demand: they keep written records, they are aware of the requirement to provide Independent Legal Advice (ILA), they work within

[127] For example: disputants must have Independent Legal Advice, arbitrators must keep written records of proceedings and must be trained as outlined by the Attorney General's Office of Ontario, and the arbitration must adhere to "Canadian law" alone (Attorney General 1991).

the bounds of Canadian law, and are familiar with the *Family Law Act*.[128] In addition, this organization is aware of the ambiguity of the new regulations. Although the *Act* now states one must arbitrate exclusively according to Canadian law, the MMS claims that in a sense this sanction only means that they do not "mention God" in the final report (Personal Interview July 4, 2008). Therefore, the IICJ/MMS operates on the understanding not only that Islamic law may be practiced in the context of mediation and the result may be made enforceable in a private contract, but also that Islamic law may be practiced in formal arbitration and the arbitral award made enforceable as long as the amendments to the *Arbitration Act* are followed. One of the central reasons they are able to proceed accordingly in good conscience is because Canadian family law explicitly allows a great deal of flexibility for disputants to come to their own resolution. For example any separating couple can agree to any arrangement of custody, maintenance, or division of resources that they agree upon (see Macklin 2012).[129] There are certain default norms in the event of a disagreement, but these can be contracted out within the context of the *Family Law Act* (see Macklin 2012).[130] However, although the MMS is in

[128] The mediator/arbitrator I spoke to was not a trained lawyer but claimed to possess the appropriate background training required by the revised Arbitration Act such as acceptable formal course training as an arbitrator/mediator, and training in how to screen for domestic abuse.

[129] This is arguably not the case with regard to custody and child maintenance as in the case of children the court reserves the right to determine the best interests of children (See Boyd 2004, 16). However, with regard to all other arrangements between a husband and wife, the couple may contract out of the default norms provided in the Family Law Act.

[130] Although an arbitrator must sign a document stating that he or she did not use any other legal system than Canadian law it may be possible, for example, for an arbitrator to decide a father should have custody because it is judged to be in the best interests of the child, or, for example, to decide a certain division of resources and support is fair and in the best interests of the children based entirely on the arbitrator's judgment of the situation in the context of Canadian law. It is not clear how such a situation would be dealt with as there are few if any relevant test cases that have been brought to the courts to be enforced or overturned. Natasha Bakht notes that "religious arbitrators can simply conform to the regulations regarding training and record keeping and then perform religious arbitrations that are consistent with Canadian Family Law . . . the *Family Law Amendment Act* permits religious arbitrations that conform to Canadian Family Law" (Bakht 2007, 141-142).

a position to understand and effectively use the revised *Arbitration Act* in this way, it has never done so.

As part of my research with the IICJ, I was provided anonymous case summaries of all formal cases handled by the IICJ and MMS that they completed from their inception in 1999 up to and including 2008. There have only been sixteen completed cases, with an additional six cases initiated in 2008 but not completed at the time of my research. The vast majority of cases concern the granting of religious divorces. There is also one business dispute, one customer dispute with a business, and a dispute involving wages. None of the divorce cases address significant issues that can typically be enforced or appealed by a secular court such as custody, support payments, or division of family property. The divorce case summaries only state that a religious divorce was granted to the applicant, all of whom are women, and they either order the husband to pay the *mahr* or the wife to repay her *mahr* (Islamic dowry). In some cases the husband is ordered to share the costs of the religious court and incidental expenses. The issues of custody, maintenance, and division of assets are not matters addressed in these decisions either because they have been decided already by the parties themselves or by the courts. In all cases a civil divorce was already obtained or was in the process of being obtained. Only one case addressed financial issues regarding marriage breakdown, and it consisted of mediation leading to the drawing up of a separation agreement. In this case the wife received custody of the children, and the husband agreed to support the children as he was able; the amount was not specified, presumably because he did not have regular work at the time of the agreement. In the case of the car dispute, a Muslim woman paid for work done to her car by a Muslim mechanic, and her car later broke down on the

highway. She claimed it was due to a shoddy repair job. The arbitrators decided that the mechanic in question should give her the extra money she had to pay to do a second repair after the highway breakdown. The car repair shop paid her the money, and the case was closed.

With regard to granting the religious divorce, one member of the MMA stated that the McGuinty government's decision "hasn't protected vulnerable people, because all the women who come to me are vulnerable women. And they only come to me because they heard about it from a friend or they were referred by an imam. And we are through a process of due diligence trying to make sure women are not being taken advantage of. Because these women who come they are abandoned and left with three children on welfare" (Personal Interview June 26, 2008). The MMA regards the unequal access to divorce a power imbalance and attempts to address this power imbalance by granting religious divorces to women who want them. As one representative of the MMA said:

> These are true cases. So how long do you intend to keep her in *nikkah* (religious marriage)? Oh forever! In the meantime he's gone on with another woman. You have to understand the cultural aspect that the court doesn't care about. But the court does care about the balance of power in the relationship. And this is part of what we learn to look for in mediation and arbitration: we look for power imbalances. (Personal Interview June 26, 2008)

In contrast to the concerns expressed in the media during the "sharia debate," I found no instance in the IICJ/MMS's comprehensive record of cases that suggested that fears of imposing sharia-inspired legal and financial settlements on vulnerable women was justified. In fact, while this organization calls what it does "arbitration," most of what it

does, especially regarding divorce, has nothing to do with agreements enforceable in Ontario court. Specifically, the Ontario courts do not enforce or appeal religious divorce. It is conceivable the courts might enforce the payment of the *mahr* under contract law, but in most cases this amount was a few hundred dollars, with no case of more than a $2,000 lump sum payment.[131] The separation agreement is the only contract in the MMS file enforceable by an Ontario court, but it is enforceable as a contract not as arbitration. The contents of the agreement were not decided by a third party; they are the result of mutual agreement facilitated by mediation.

Given its lack of engagement with formal arbitration services, it is ironic that the IICJ was the organization that brought the issue into the media in the first place. Although the IICJ/MMS is the only Muslim organization that was fully aware of the new *Arbitration Act* regulations and was equipped to perform arbitration that could be enforced by Ontario courts, the organization does not in fact appear to have ever undertaken formal arbitration. Despite the fears expressed following Mumtaz Ali's announcement, neither the MMS nor the IICJ has made a binding third party decision on any family matter that can be enforced in Ontario courts beyond a few small claims. In addition, these organizations have addressed far fewer cases than many of the other Muslim organizations I document below.

### 6.3.2 Darul Iftaa of the Canadian Council of Muslim Theologians

The granting of religious divorces within Muslim communities in Toronto is *the* major civil dispute issue, and the "freeing" of Muslim women from the oppression of so-called "limping marriages" has been a central aim of Muslim leaders and organizations

[131] Although Ontario courts have been reluctant to enforce *mahr* awards, British Columbia courts have been more open to enforcing them (Bunting and Mokhtari 2009, 241).

generally, and the Darul Iftaa of the Canadian Council of Muslim Theologians in particular. Most of the members of the CCMT and the majority of Darul Iftaa's clients are of South Asian background. South Asians make up 49% of the more than 250 000 Toronto-area Muslims and 42% of the more than 350 000 Ontario's Muslims, comprising its largest single ethnic group.[132] The *muftis* (certified Muslim judges) most active in the Darul Iftaa were trained in the Islamic Family Law system of India for several months. The training consisted of studying the practices of daily Indian Islamic Family Law court proceedings.[133] These *muftis* continue to consult their mentors in India on jurisprudential questions regarding issues not dealt with previously in the Canadian context.[134] The Darul Iftaa website lists seven council members who are imams in the Toronto Area who also work as *muftis* for the Darul Iftaa (iftaa.jucanada.org). The CCMT was established in the 2002 to resolve *fiqh* issues, the jurisprudencial interpretation and expansion of the Shariah having to do with Islamic morals, rituals, and legislation, facing Muslims in the Toronto area (ccmt.jucanada.org). The Darul Iftaa was organized shortly after this. The Darul Iftaa by its own designation claims to adhere to a very orthodox school of Islam (Personal Interview July 4, 2008). The support for women in limping marriages has led imams associated with the Darul Iftaa to turn away from its general adherence to an orthodox interpretation of the Hanafi School. Because the allowances for granting a *faskh*

[132] The 2001 Canadian Census reports 351 760 Muslims in Ontario of which 148 445 report South Asian visible minority status. The Census reports 253 600 Muslims in Toronto of which 124 735 report South Asian visible minority status. See Statistics Canada. *Selected Demographic and Cultural Characteristics (104), Selected Religions (35A), Age Groups (6) and Sex (3) for Population, for Canada, Provinces, Territories and Census Metropolitan Areas, 2001 Census – 20% Sample Data* (table). "Religion in Canada." "2001 Census: Release Topics." *Census*. Statistics Canada Catalogue No. 97F0022XIE2001040. Ottawa, Ontario. 25 March 2004. Web. 20 June 2012.

[133] For a discussion of the issues relating to British colonial influence on the formation of Anglo-Muhammadan law see Emon 2012.

[134] For example, finding religious legal reasons for granting a *faskh* (an Islamic marriage annulment) to a woman requesting a divorce because her husband was not ultimately granted immigrant status to come to Canada, and she does not want to move to South Asia because she is from Canada (Anonymous Interview July 4, 2008).

or annulment of an Islamic marriage in the Hanafi School are limited, the Darul Iftaa has borrowed heavily from the Maliki School in order to gain much increased latitude for freeing women oppressed by limping religious marriages where the Darul Iftaa regard the Maliki School to be more liberal on this matter.[135]

One of the interview participants from the Darul Iftaa stated "many of our women will not feel comfortable going and getting remarried without a religious divorce. We want their hearts to be at peace. And then they also want this, so for that they come to us. They get the divorce from the court and then they come to us" (Personal Interview July 4, 2008). Islamic law is understood by the majority of Sunni scholars and imams to accord husbands a unilateral right to divorce. This legal understanding is why men seldom approach imams for a religious divorce. A man may pronounce the "*talaq*" three times and the couple may be considered religiously divorced without witnesses or imams involved. However, although most schools of Islamic law allow for wife-initiated divorce, even in these circumstances if the husband does not ultimately grant the *talaq* because of recalcitrance or simply because he cannot be found or contacted, the couple may not be considered religiously divorced. It is for this reason that the vast majority of Muslims approaching religious leaders for a religious divorce are women, as Islamic law allows for a Muslim judge to grant a religious divorce on the husband's behalf (see Macfarlane 2012). This unequal access to religious divorce is the result of a patriarchal system of law. However, Muslim communities generally, and the Darul Iftaa in particular, are attempting to resolve the problems this patriarchal system causes women in a pro-women manner.

[135] The Hanafi school of Islamic Law is currently prominent in Central and Western Asia, Lower Egypt, and the Indian subcontinent. The Maliki school of Islamic Law is currently prominent in North African and Upper Egypt (Denny 2011).

The Darul Iftaa also attempts to counter cultural proscriptions against divorce as Islam allows divorce.

> The parents sometimes feel the cultural shame if their daughter goes and asks for a divorce. And a lot of times the family pressure is to not do something like this. And it will take a lot of courage for that woman to come to us and say I want a divorce because of these reasons. Because a lot of the time the background comes in where they think that the word will get out in the community that their daughter went and got a divorce and that's a shame for the family. It is partly a cultural thing. And also a lack of knowledge of the option that they have within the religion. (Personal Interview July 4, 2008)

The Darul Iftaa has even tried to educate Muslims who do not realize the Muslim women have a right to initiate divorce.

> There is this idea, obviously it's a misconception or misunderstanding among many Muslim males that they are the sole possessors of the right of divorce, and that no matter what may happen the wife has no way to attain a divorce besides the husband issuing a divorce. And because of this there was a lot of oppression on women. They didn't realize that even within our Islamic teaching that the wife does have the right to divorce. (Personal Interview July 4, 2008)

The Darul Iftaa has dealt with a far greater number of cases involving civil disputes among Muslims as compared to the IICJ/MMS. The Darul Iftaa is a division of the Toronto-based Canadian Council of Muslim Theologians (http://iftaa.jucanada.org). Even though this division of the CCMT has only been in operation since early 2007, by the summer of 2008 it had received between 100 and 150 cases dealing mainly with granting

religious divorces (Personal Interview July 4, 2008). When I spoke with representatives from the Darul Iftaa in the late spring of 2008, they had already received 47 cases that year. Although the Darul Iftaa has a well-designed, organized and maintained website, it is otherwise wary of explicitly advertising its services for fear it would be overwhelmed with new cases. Currently clients are referred to the Darul Iftaa through imams who are aware of the organization or are dues-paying members. The CCMT boasts a membership of more than 100 religious leaders mostly in the Toronto area. The rationale for creating the Darul Iftaa was overwhelmingly centered upon granting religious divorces to women in "limping marriages."[136]

All of the cases brought to the Darul Iftaa to date have been brought by women. They are all marriage annulment cases.[137] There is a widespread belief among many Muslims in Toronto that only a qualified Islamic judge can pronounce a religious divorce on behalf of a husband unable or, more often, unwilling to grant a *talaq* or accept *khula*[138] (a wife-initiated divorce, normally requiring her to return her dowry), and people with this qualification are apparently hard to come by.[139] As one member of Darul Iftaa

[136] The phrase "limping marriages" appears to have become widely used in Europe. It refers to couples who have been granted a civil divorce but have not been granted a religious divorce. Many women feel that they are unable to remarry within their religious community without being granted a religious divorce in addition to a secular civil divorce (Kramer 2005).

[137] Julie Macfarlane has made the important point that many so-called *khulas* are in fact *faskhs* or marriage annulments. I have found that many imams have worked hard to encourage Muslim men to grant the *talaq* as well (Macfarlane 2012).

[138] The reasons the numbers of Muslim women looking for a religious divorce from an Islamic organization are not higher is presumably because there are many Muslim men who are willing to grant the religious divorce. However, one should not underestimate the number of Muslim women looking for a religious divorce. Virtually all Muslim leaders I spoke to provided this service, or referred clients to another organization, and it was by far the most common service related to divorce that Muslim leaders offered or addressed.

[139] Although I have found a number of organizations and individual imams who do grant religious divorces, the Darul Iftaa is by far the most organized and thorough, and handles the greatest number of cases specifically to do with granting *faskh* (Islamic marriage annulment). The charge for the Darul Iftaa's services is $200 for administrative costs. However, if the applicant cannot afford the fee she is not required to pay, although most are able to.

stated "the issue was not so much the issue of the press and McGuinty's decision. It is far and away the issue of granting religious divorces. Same as the Jewish community, the secular divorce may not be recognized by the rabbinate. So she needs a religious divorce so that she can remarry within her community" (Personal Interview July 4, 2008).[140] The Darul Iftaa generously provided me with five anonymous sample case summaries of the types of cases it has dealt with in the previous eighteen months. They all deal with wives who have been abandoned or legally divorced by their husbands but have not been granted a religiously-valid divorce.[141] In four of the five cases the men never appeared before the Darul Iftaa even after being repeatedly summoned to defend their case for keeping the religious marriage intact. The wife is asked to bring at least two male witnesses to support her claims that her husband is not fulfilling his religious duties or respecting her religious rights. In cases where a wife was not able to bring the requisite number of witnesses, that the husband does not appear counts against him and the divorce is granted. The religious reasons for granting the divorce recorded are fairly extensive including quotes from the Qur'an and Hadith and a number of jurists, often filling four pages of single-spaced text. The reasons for granting the divorce range from husbands not providing financially for wives because of abandonment, to verbal abuse by husbands, to husbands cheating on their wives, and "irreconcilable differences" (their translation of *shiqaaq*).[142]

[140] The practice parallels the practice of marriage annulment in the Catholic Church as the Catholic Church does not allow divorce, but under certain circumstances will grant an annulment which allows members previously married to remarry within the tradition.
[141] To the best of my knowledge these cases were randomly selected, although one case appears to have been selected intentionally because of its exceptional nature.
[142] According to the representatives of the Darul Iftaa I spoke to, *Shiqaaq* is a term referring to a marriage that has broken down to the point that divorce has become a reasonable option. These representatives translate the term *Shiqaaq* as "irreconcilable differences" – the closest legal equivalent in English Canadian divorce law.

In some cases the husband appears at initial divorce hearings, often getting into abusive arguments with the Darul Iftaa, and alleging that his wife was coerced by her parents to get the divorce. These are the only cases the Darul Iftaa has had where coercion was suspected as a factor in a woman's approaching the organization. However, in these cases the Darul Iftaa ultimately decided that the husbands were making the accusation in an effort to frustrate the attempts of their wives to get a religious divorce. The Darul Iftaa in each case called the wife suing for divorce numerous times and asked repeatedly, while she was alone and away from her parents, whether she was being coerced to obtain a religious divorce. All wives consistently held that they were not and wanted genuinely to be free to move on with their lives. The husbands very often ultimately cut off all relations with the Darul Iftaa and refused to appear at any future hearings. All of these women were granted the divorce.

It appears that a few women were refused a *faskh* from the Darul Iftaa as they had left their marriage partners to have an affair and often were currently living with their boyfriends whom they wanted to marry after procuring the religious divorce. The Darul Iftaa *muftis* expressed shock that these women would openly and without shame come to a known orthodox Islamic organization making such a request. While one might wonder why these women came to this particular organization rather than another more liberal imam or Muslim organization, these refusals again illustrate the unequal treatment of women in Muslim divorce as men have a unilateral right to divorce independent of any religious authority or reasoning (see Macfarlane 2012).

The religious divorce documents clearly state on every page that they are strictly the rulings of a religious authority and not a legal document.[143] The Darul Iftaa informed me that it does not attempt to deal in a formal way with any monetary issues regarding division of assets or support. The Darul Iftaa *muftis* state that these elements are simply too contentious, and they have enough conflict to deal with from recalcitrant husbands who want to keep their wives within limping marriages. If clients request the judge's opinion about religious norms for custody, support, or division of assets they will give it informally (orally), but they are clear that these do not constitute any formal religious or legal ruling.

### 6.3.3 Islamic Social Services and Resources Association

The Islamic Social Services and Resources Association (ISSRA) was established in Toronto in 1990 in order to help meet the social services needs of the Muslim communities of Toronto. ISSRA provides many social services, and coordinates numerous social programs and hundreds of volunteer staff (issra.ca). ISSRA serves people from very diverse ethnic backgrounds, and thus applies the school of Islamic law appropriate to a client's place of origin upon request. ISSRA sees approximately two new cases regarding family issues per week, and therefore addresses approximately one hundred new cases every year. *Masjids* (mosques) all over Toronto refer their members to ISSRA if they feel their needs cannot be met at the local level.[144] ISSRA estimates that approximately 70 percent of these cases have to do with marriage and divorce issues, and 30 percent have to do with mediating parent-child relationships, i.e., family counselling.

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[143] Darul Iftaa Documents #1 through #5 on file with the author (see also http://iftaa.jucanada.org/uploads/MCo9V4LBmItlEqMLo58MLQ/ksao_VsL0kFYGrkibMbOrQ/Darul-Iftaa-Application.pdf).

[144] ISSRA serves people from very diverse ethnic backgrounds, and thus applies the school of Islamic law appropriate to a client's place of origin upon request.

ISSRA also estimates that about 60 percent of marital issues are reconciled through counselling, while roughly 40 percent end in divorce (Personal Interview July 5, 2008). Of the people who initially approach ISSRA for assistance approximately 80 percent are women. Due to its advocacy of Muslim women's rights in defense against the sometimes unfair demands of husbands, two members of ISSRA report that it has gained the reputation of being "pro-women."

ISSRA has not done and does not do formal arbitration of civil disputes. However, it has mediated between family members on a wide variety of issues, which in many cases has influenced how families have settled divorces in the civil courts regarding issues of maintenance, division of resources, and custody. Once again the most significant issue by far is that of securing religious divorce for women. ISSRA also reports that many men believe it is their right to keep their wives tied to limping marriages, and a number of husbands apparently use this situation against their ex-wives out of bitterness and as a tool of revenge. One member of ISSRA stated, "The bottom line here is the women do have recourse. Lots of guys think they can hold on to wives as long as they don't pronounce divorce, so wives can't get on with their lives and remarry" (Personal Interview July 5, 2008). ISSRA always counsels women that they have the right of religious divorce and has granted a number of these despite husbands' refusal to pronounce *talaq* or agree to *khula*.

Before an Islamic divorce is granted, ISSRA requires a civil divorce be procured, and the organization provides a referral list of Muslim lawyers for independent legal advice for the purposes of civil divorce. However, ISSRA often suggests mediating financial issues rather than going to court because the court process is much more

expensive, adversarial, and takes a greater emotional toll on couples. Furthermore, according to ISSRA, the mediated arrangements are often very similar to what is awarded in civil courts. ISSRA's preferred approach is for the mediator to ask the wife what she feels she needs with regards to support, and then attempt to negotiate this request with the husband, rather than for the mediator to try to come up with a number on behalf of the couple. One member of ISSRA told me, "I don't really get into the 50/50 part. I ask them to come up with their own figures. Most times the wife doesn't want 50/50 she just wants support enough to move on with her life. So I negotiate with the couple about what that is" (Personal Interview July 5, 2008). One member of ISSRA reported that many women are not interested in an equal division of family assets because either they have not been married for long, or the family does not have many resources, or they are only interested in enough support to get on with their lives.

A number of husbands agree to support their wives and children and honour that agreement. A number of other husbands agree to support, but then default on the payments. ISSRA tries to contact these men to encourage them to restart the payments, which is effective in some cases, but on many occasions ISSRA's calls are simply not returned. Sadly, as in many cases in Ontario, the husband has sometimes disappeared either to another country or to an unknown address. On member of ISSRA has noted a general reluctance of women to pursue ex-husbands for support either through ISSRA or the civil courts because they do not want to undergo the emotional difficulty and time-consuming work for what they expect will be very little payoff. ISSRA further notes reluctance among Muslim women to approach the secular system as many feel it is not Islamic. The imam of ISSRA claims to always counsel clients that Canada's justice

system shares with Islam its struggle to effect justice and claims to advise that the Canadian justice system is in many ways itself Islamic. He said, "The thing I tell clients and people all the time is that the Canadian legal system is not un-Islamic. Many people seem to think that Euro-American legal systems are un-Islamic. I tell them no, because the primary objective of the legal system is to serve justice. And that is an Islamic objective" (Personal Interview July 5, 2008). The imam for ISSRA laments that it does not have more power to enforce support payments on women's behalf.

The imam for ISSRA usually recommends children stay with the mother until the age of majority. However, according to him in many cases the husband has left in any case. The imam for ISSRA and other organizations state that given this religious group is largely a recent immigrant group, many families experience financial hardship because family members cannot get jobs. Therefore the imams, social workers and community workers from most of the Muslim organizations I interviewed note that husbands or fathers who cannot find work sometimes leave Canada to find work in their home countries or elsewhere, leaving their families in Canada putatively because they cannot afford to do otherwise.

A number of clients have consulted ISSRA about inheritance as well. If people want to draw up a will according to Islamic norms, ISSRA will provide the requested recommendations. These usually involve the traditional half that girls are given relative to boys, with the clear proviso that men are required to support families with these resources, and women are the sole owners of their inheritance with no obligation to spend a cent on anyone else. However, in many cases ISSRA has advised that sons, for instance, who stand to inherit twice what daughters may inherit, are free to give up this

right if they are fully informed of their rights and they choose to do so. The imam for ISSRA has not heard back from these clients as to their final decision, but his reading of the clients has been one of relief at finding that they are free to draw up an inheritance that is equally divided among all family members without violating Islamic legal tradition. ISSRA has not addressed any disputes with regard to an inheritance.

ISSRA's experiences with religious divorce lead to a number of observations. First, even this very organized Muslim body has never practiced formal arbitration—or even intended to. Second, outside of arbitration there remains great leeway for faith-based principles to be drawn up in contracts that are then enforceable by Canadian law, such as prenuptial agreements, separation agreements, or wills (see Bakht 2007, 2006, and Bunting 2009). ISSRA has mediated many separations and counselled a number of people on wills that are then drawn up in legally-enforceable documents. The changes to the *Arbitration Act* do not change the nature or enforceability of these private contracts. The power of the state may be used to enforce the private religious decisions of citizens who draw up those decisions in legal contracts. Third, there is apparently very little difference between what people agree upon in divorce through mediation with ISSRA and the arrangements arrived at in court. ISSRA in fact reports one husband who sought to dispute a separation agreement in court because he felt he could pay less than what ISSRA was asking him to agree to. Finally, religious divorce for women in limping marriages is by far the most prevalent of all civil dispute issues ISSRA addresses.

### 6.3.4 Imams and Muslim Leaders in the GTA Generally

In all of my research to date I have not found a single instance of a formal signed arbitration (faith-based or otherwise) agreement taking place in Muslim communities.

However, although no one appears to be arbitrating formally in Muslim communities of Ontario, a number of imams are assisting Muslims through faith-based mediation in the formation of separation agreements, wills, and prenuptial agreements. All of these contracts are enforceable by provincial law. This practice is noted above with ISSRA and in one instance with the IICJ. It is also practiced among a number of other leaders and mediators with whom I spoke. For example, one self-described "moderate" Muslim scholar encourages, through mediation, the forming of separation agreements that appear very equitable in comparison with Canadian default norms of family law. In view of Ontario's Family Law default norms, equitable divisions of family assets are sought and reasonable amounts of child support are recommended. This scholar stated "I have advised that the man should be providing support for the children until the children are capable of taking care of themselves. According to one's needs that is the Qur'anic concept" (Personal Interview August 30, 2008). The scholar reasons based on Sharia that the Canadian context must be taken into account when sorting these issues out between couples, and he also suggests that the intent of Sharia – which he believes to be equitable, fair, and just – must be translated into the modern Canadian context. In his opinion, older rulings would no longer be just in current Canadian society where women are not cared for in the same extended-family contexts as they were centuries ago. This scholar strongly encourages the couple to get a mediated agreement drawn up in a formal separation agreement, precisely because it is then a contract that can be enforced by the state. This agreement usually benefits women who are most often in need of the enforcing power of the state, usually to make men pay the promised child support. In another example, the imam for ISSRA advises that it is Islamic to adhere to the Canadian

Family Law default norm of a 50/50 division of family property and resources. ISSRA also consults the Federal Child Support Guidelines when asked to recommend reasonable child support amounts. See http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/legis/fcsg-lfpae/index.html.

Another Toronto-based imam, who could be read as more conservative-leaning, also appeared to take measures to ensure equity and fairness with regards to women in mediating separation agreements. His calculation of support took into account the lifestyle the wife was accustomed to during marriage. The value of the *mahr* had to take into account the value of the currency at the time the contract was made relative to its value in Canadian dollars at the time, and then inflation had to be taken into account, so that the true value of the original *mahr* is preserved. This imam also strongly encouraged the couple to enter the results of the mediation in a separation agreement. Here the imam sought to make evident his mediation so that its results would not be lost in a later secular court decision. This request raises some concern of coercion. However, in one of the cases the imam shared with me the couple did end up taking the matter to civil court after all, and ironically, after the couple paid the lawyers tens of thousands of dollars, the wife ended up with half the amount of support that she would have received if the couple had agreed to the imam's recommendations. I am aware that my evidence comes from imams who might want to create the impression of gender fairness given the tenor of the "Sharia debate." However, my research access to several diverse imams who provide dispute resolution services, together with my access to several case files and personal interviews with Muslim women in the communities, including some women who have had a Muslim divorce themselves, suggest that although there are likely inequitable and patriarchal

religious leaders and dispute resolution service providers in Ontario, there are also several that are quite equitable by Ontario's family law standards.

The majority of leaders I spoke with agreed that according to Islamic tradition women are entitled to child support for as long as she takes care of the children, that she is at least entitled to the assets she brought to the marriage, any earnings she has made, and any inheritance that she has received. Wives are entitled to support from husbands throughout the marriage, and many also stated if that support is not fully rendered during the marriage it is payable in some form upon divorce. Not all agreed that a fifty/fifty division of the marital home and wealth gained during marriage[145] was Islamic, but some did, and the vast majority made recommendations for support and division of assets that would likely be interpreted as reasonable and fair in Canadian courts. For example, one scholar stated "people ask me if it is Islamic to divide things up 50/50, and I say it is the custom of this country and you both agree to that there is nothing wrong with that. That is how I look at it" (Personal Interview August 30, 2008). However, there is no way to know if all imams are as equitable in their mediation of civil matters as those with whom I spoke.

## 6.4 Responses of Muslim Women

A consideration of the responses of Muslim women I interviewed illuminates some of the reasons they may or may not seek out faith based arbitration and mediation. I interviewed eight Muslim women community leaders, social workers, and adherents in

[145] When I mention the 50/50 division of family assets in this dissertation, I refer to the Canadian family law practice of each spouse having a right to 50% of all assets gained during marriage or any increase in value of assets brought to the marriage. This excludes, for example, the original value of assets owned by individuals before marriage, as well as gifts, and inheritances (*Family Law Act* 1990).

person or by phone, four women submitted email interview responses, and 20 participants identified as women in the web-survey for a total of thirty two Muslim woman research participants.[146] Although this sample is somewhat limited, what I have gathered helps to expand on other similar surveys of Muslim women's responses to this issue.[147]

The women who participated in the web-survey were, by and large, practicing Muslims. Twelve of the women said they considered themselves practicing Muslims and seven said this was true "to some degree." Only one woman said she was not practicing. When asked "how important is it to you to have an Islamic marriage or *nikah* (as opposed to only having a civil marriage)?" of the 20 participants who identified as women in the web survey 17 said it was "very important," two said it was "somewhat important," and one said it was "very unimportant." When asked, if divorcing, how important it would be to have an Islamic divorce 12 women said it would be "very important," four said it would be "somewhat important," and three said it would be "very unimportant."

A Muslim woman social worker reflected the thinking of many Muslim women from the community she works with stating "I'm not going to city hall, so where am I going? In my mind the same person that put us together is the same person that can take us apart." Two other social workers who work primarily with Muslim women noted that some Muslims prefer Muslim marriage and divorce to civil marriage and divorce stating, "someone recently ran into a problem when they were filing taxes, and they said well I got divorced Islamically. And we said hello! That doesn't work here. Some of them refuse [stating] I'm not going to no court house, I'm not signing a paper."

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[146] See Chapter 3 for a more detailed discussion of research methods.
[147] See Canadian Council of Muslim Women 2004 Regional General Meetings Report. http://www.ccmw.com/documents/CCMWRegionalMeetingsSummaryReport.pdf. See also Bunting 2009; Bunting and Mokhtary 2009, and Macfarlane 2012.

When asked "if you were involved in a divorce, how important for you would it be to have issues such as the division of family assets, amount and duration of maintenance of a dependent wife and children, and child custody decided according to Islamic principles?," one woman stated "as my spouse and I had a *nikkah*, we have set up our financial portfolio with this in mind." One person expressed confidence in the equality of Islamic law as well, "the Islamic way of divorce has been well defined in Quran and Sunnah of the Prophet Mohammad. There is no ambiguity in such matters. Any decisions based on these principles that are amicable to both the parties involved is the best course. Islam has never been partial to either gender in any respect." One wrote, "in the case of divorce, I would respect Islamic laws and would want to do what is necessary for a good Muslim. However, if I feel that those laws/practices do not sit well because of my gender (female) then I will bypass it." When answering this question only 10 women who participated in the web-survey said it would be "very important," three said it would be "somewhat important," and six said it would be "very unimportant." Generally speaking then, among the women who participated in the web-survey, it is more important to have an Islamic marriage than it is to make divorce arrangements according to Islamic principles, but still the majority of women, 13 of 20, stated the latter would be either very important or somewhat important to do so.

Illustrating the importance of resolving civil disputes according to Islamic tradition, one woman I interviewed stated "if I were involved in a civil dispute I would want it to be decided by Sharia because for Muslims, Islam is a way of life that encompasses all aspects including any disputes that invariably arise" (Email Interview April 14, 2008). When asked "if you were drawing up your will, how important would it

be for you to will your assets to your family according to Islamic principles?" Ten women participating in the web survey said it would be "very important," five said it would be "somewhat unimportant," two said it would be "somewhat unimportant," one said it would be "very unimportant," and one said "I don't know." When also asked in the web survey "if you were involved in a dispute with your family over an inheritance that was willed to you, how important would it be to you to have that dispute resolved according to Islamic principles?" nine women reported "very important," six reported "somewhat important," one reported "somewhat unimportant," and three reported "very unimportant."

When asked how they felt generally about faith based mediation, feelings among women participants in the web-survey were generally positive. Sixteen of the 20 women reported either "very positive" (10) or "positive" (6). Only three reported "negative," and no one reported "very negative." These women also generally felt positively about recommending faith based mediation to a friend or family member: Sixteen reported either "yes certainly" (8) or "yes possibly" (8), while only one said "no possibly," two said "no certainly," and one said she did not know. However, when asked about their general feelings regarding faith based arbitration, one woman stated "I would never use faith-based arbitration the way it was proposed; I find our standard Canadian family law to be more in keeping with Islamic principles than the proposed medieval Muslim law" (Email Interview March 30, 2008). Another women stated "although I would want mediation/arbitration based on Islamic teachings and principles, I would be concerned about possible culturally-rooted injustices occurring, e.g. attitudes towards women." Another participant stated, "faith-based arbitration may not work for women in general. I

would only accept it if I know that the arbitrator is not only well-versed in religious matters, he/she also possesses in depth knowledge of cultural context (North American in our case) and is very much aware of Canadian laws." only nine women participating in the web-survey reported "very positive" (3) or "positive" (6). Two women reported "negative," four reported "very negative," three reported "I don't know," and two skipped the question entirely. Responses were similarly negative when asked whether they would recommend faith based arbitration to a friend or family member if, hypothetically, it were still available. Only 10 women participating in the web-survey said "yes certainly" (2) or "yes possibly" (8). However, two said "no possibly," three said "no certainly," three said they did not know, and two skipped the question entirely. Feelings about faith based arbitration among the women of this survey are much more negative or ambivalent than their feelings about faith based mediation.

I asked if participants agreed with the Dalton McGuinty government's decision to change the Ontario *Arbitration Act* so that the state would no longer enforce arbitrations decided according to religious laws. One woman expressed a sentiment common among the Muslims I interviewed when she said that even though McGuinty said there will be no Sharia in Ontario, the practice of Sharia in the daily life of Muslims is widespread and unaffected by McGuinty's decision because it is such an integrated aspect of her everyday life. A Muslim woman social worker working in the Muslim community further stated, "And we also believe that McGuinty will try as much as he might, but we don't believe he will be successful in terms of trying to stop it. He cannot stop it." Another Muslim woman social worker stated, "McGuinty says there is no religious arbitration in Ontario, but there is. And who is going to stop any two people, because it is not illegal.

Who is going to stop them from entering into any arbitration, nobody." These women express the sentiment, common among my interview participants, that the McGuinty government did not protect vulnerable people because faith based arbitration and mediation will simply continue underground where there are no protections or systems of accountability. However, a number of interview participants who would choose to resolve their civil dispute according to Sharia still felt that McGuinty made the right decision, arguing the Ontario Muslim community needs to develop further before it is ready to offer proper mediation and arbitration services. These sentiments may in part explain the tendency of web-survey participants to strongly support resolving their civil disputes according to Islamic principles at the same time they are unsure about the effectiveness of the McGuinty government's decision regarding faith based arbitration. Another reason interview participants were unsure if the amendments to the *Arbitration Act* had effectively protected vulnerable people was because, in their opinion, such protection is more a matter of education and awareness building than legislative change. One Muslim woman social worker stated,

> I know for a fact that it still happens today. And women don't know how to take court action. They don't have the connections, or they're afraid. It is the women who are isolated and are not connected to anything... So I think they [the McGuinty Government] focused on the wrong angle. I think what they should have focused on was to say, do women have the resources and the know-how to access legal resources? You know, if they got into this. And if not, why? And how [can this be changed]… I know for a fact in working with a lot of [Muslim] women, when I was working as a counsellor with [Muslim] women, I know a lot

> of them don't know about their rights. They don't know about the legal system. They don't know. They're not informed…When this issue came up in the press it made me want to know more. So if I ever get divorced I [now] know where to go, what lawyers to hire to get the most out of my husband (laughing). But that's the thing. I can read these things. Other women don't. They don't speak the language. Some have a limited education. The ones of most concern are the poor, marginalized, and exploited. They are the ones who are more likely than anyone to go to an imam rather than going to the legal system. (Personal Interview April 12, 2008)

When answering this question in the survey itself, only four women participating in the web-survey said they either "strongly agreed" (2), or "agreed" (2). Three women said they "disagreed," five said they "strongly disagreed," one person skipped the question and seven said they did not know. It is unexpected that women would feel so negatively or ambivalent about faith based arbitration, while only four agreed with the McGuinty government's decision.

I asked my participants how well trained they felt Muslim faith based mediators were regarding women's rights in both Islamic law and Canadian law. One Muslim woman social worker stated flatly, "imam's don't have the training." Another Muslim woman who has had both a civil and religious divorce stated "the wise men of the community are women." One woman I interviewed stated "I believe that Muslims want and need faith based arbitration, so they can live according to the sharia. I worry that some imams are prejudiced against women, and don't give them their full rights. However, I believe the imperfections lie not in shariah, but in the wrong application of it.

There are many imams who try their best to be just to women" (Email Interview April 3, 2008). Another Muslim woman who had had both a civil and religious divorce was more positive, but still added a note of caution stating "yes, they are very fair because they follow what the Qur'an says. And they are good about those things, the rights of the woman. Of course you have to use your common sense, but mainly they are very fair. And I think they take care of women and kids" (Telephone Interview May 3, 2008).

The women I interviewed stated that they would consult any number of trusted Islamic authorities including imams, or other trusted people knowledgeable in Islam generally, as well as reputable websites such as Islamonline.net. However, most women I interviewed also had questions about the training and judgments of particular imams. They felt that "shopping around," seeking out trustworthy leaders and sources, and even going to more than one source for diverse opinions was a good way to ensure they received the justice and equity they believe Islam accords to women. The women who participated in the web-survey seem to be divided about whether they feel Muslim faith based mediators are adequately aware of women's rights in Canadian law. No one said "all or most are," four said "many are," three said "50/50," eight said "few are," no one said "none are," four said they did not know, and one skipped the question. However, I was surprised to find that the women who participated in this survey also seem to be divided about whether they feel Muslim faith based mediators are adequately aware of women's rights in Islamic law. No one said "all or most are," six said "many are," and four said "50/50." Four said few are, no one said "none are," and six said they did not know.

The women who participated in the web-survey are generally positive about the possibility of interpreting Islamic law or sharia and applying it in civil disputes in a way that is generally in keeping with Canadian law. One woman I interviewed stated "I would want my civil dispute to be decided according to shariah. This is my obligation as a Muslim. However, I also know that according to the shariah we must obey the laws of the land in which we live, so recourse to the Canadian courts can also be a form of abiding by the shariah, so I do not think the dichotomy of shariah vs. Canadian courts is a simple as people make it out to be. The Canadian court system could integrate shariah rulings for Muslims. Both systems aim for justice" (Email Interview April 3, 2008). When responding to the survey itself, seventeen women said either "yes certainly" (5) or "yes possibly" (12). Only two women said "no" and one skipped the question.

The women who participated in the web-survey seem to be somewhat divided regarding how often they would feel comfortable going to secular lawyers and courts to resolve civil disputes such as divorce, custody, or inheritance disputes. One Muslim woman I interviewed who had a religious and civil divorce stated of her experience in the secular court system "oh very happy. They were very good to me. I mean, I got all that I wanted… I was very happy, but people have different experiences." Another Muslim woman I interviewed who attended the divorce court proceedings of a woman family member stated,

> Honestly, I went with my [family member] to the court when she was doing the family law with her divorce for custody. The husband was filing for full custody. And honestly, the experience I got from the judges, I was sitting there for two cases before her right, and I found the way the judge was dealing with the

> situation was very good. I found the interests of the child were paramount over everything else. And he didn't demonize the husband. He showed his [the husband's] stupidity and said, you know, you're being bone headed, and he was tough when he needed to be, but at the same time didn't make him feel alienated… I found after that experience with my [family member] I actually had a good faith in the family law system. (Personal Interivew March 5, 2008)

However, one woman said, "ask any white Canadian feminist if she thinks the Canadian justice system enshrines full equality for women" (Email Interview April 3, 2008). When answering this question in the survey, 10 said either "yes always" (4) or "yes often" (6). However three said "yes sometimes," one said "yes rarely," four said "no," and two said they did not know.

Some of my interview respondents illustrated the social pressures on women not to take their husbands to court for child or spousal support. One Muslim woman stated

> I know this woman. She's a friend of mine. She works as a counsellor, like she knows the system. But she doesn't want to be stigmatized. And she's [not] going to the family courts asking for child support. So she's at the mercy of her ex-husband. They have been divorced for four years. She doesn't want to be seen in the community that she took the father to court… He might take the kids out to buy them stuff, but it is not regular. It is at his own discretion. So every time I tell her, why don't you do this [take the husband to court]? She says no, no, no, you know our community, culture. If I do this they are going to say she is Canadianized. Sometimes people don't want to take that route, but if you educate the public and say this is okay… Removing that stigma, because look at her.

> She's educated. She graduated from university… She knows that she is working and she knows that she [still] needs that support from her ex-husband, but she doesn't want to take that extra step when she has every right to go to the family court and say, you know, I want child support. Because I can't keep taking care of the kids and she's paying daycare, and she's paying child care. So cases like that also exist. And I tell her, you know you advocate for women all the time, and you advise them regularly, and you're not doing it! (Personal Interview March 5, 2008)

However, under certain circumstances Muslim women can be encouraged to take their husbands to court for child or spousal support. One Muslim woman social worker stated

> "There is this one woman I know who went to the family court. I think they met in high school. Then they went to university together. He found a great job, and then met another woman. Of course she was upset. So she went to the court, and he didn't think he had any responsibility toward her. So she went to family court… [With] that, they (family and Muslim community members) really supported her. Yeah they took her part, and they said, good for her! I think that it was not only that he cheated on her, I think it's the other woman thing, because especially the women in the community, they took her side. Because I hear this all the time, 'she showed him.'… 'How could he do this to the mother of his children?' Of course the other woman is evil as well." (Personal Interview March 5, 2008)

However, this social worker concludes, “a lot of the times it feels like there are all these people that are a part of your business (laughing). And then some of the women are sympathetic and some of them are gossiping behind you.”

One Muslim woman social worker illustrates the challenges Muslim women may face even with religious community leaders who are supportive of women’s rights to child and spousal support stating “yes, the way it goes now it is all verbal and no contracts are signed. And then the woman has to keep going back to the elders when he defaults and she gets tired of going and gives up.” This further illustrates the problems of going to a religious authority when a husband defaults on payments because they have no power to enforce payment; instead they try to pressure the husband socially. For this reason this social worker encourages divorcing women to go through the secular courts. Another Muslim woman who had both a civil and religious divorce stated, “family services got involved to help support me and get support from the father, but religious communities don’t have that power. They can try to encourage the man, but they cannot enforce it.”

Some Muslim women who would like to seek outside help for their marriage before marital breakdown experience resistance from their husbands. One Muslim woman who ultimately had a religious and civil divorce stated

> We never really got to the point of asking for help with our problems. He would always say that he was not interested in somebody getting in the middle of the situation, because he thought he knows it best. He said you know I’m living in the situation and nobody can bring anything from outside to that situation. Nobody can add anything to it. I (on the other hand) was very interested in mediation. And

> I even mentioned to him several times. And I wanted to get somebody from the community. And in our religion it explains that if two people cannot come to an agreement on a situation then they should bring family from both sides to sit down and talk about the situation. So I brought that up with him, and he said no, no. I know what's happening and nobody can add anything to that. And I said what about a social worker, or a counsellor, or an imam from the masjid? And he said no. I think he didn't want to because of privacy issues. I don't know why really. He just didn't think anyone could add anything. That went on for maybe a year. (Personal Interview May 3, 2008)

### 6.4.1 Pressure on Women to Stay Married

My interview participants illustrate well the importance of granting the religious divorce in Muslim communities by showing how difficult it can be for some women to acquire it. One Muslim woman social work stated, "if I want a divorce from my husband, do you know what the elders will ask me? How come… was he beating you? Because there are things that are unacceptable to them right? Does he not give you any money? Does he control you? Does he insult you or insult your family? And if all these questions are a no, they will say then why do you need a divorce?" Later in the interview the same woman states, "but especially if you are the one who asks for the divorce, and if he (the husband) says I want her. I want my family. I didn't want to break my family apart. She did that. And people look at the outside picture where it is a good looking family and nobody knows anything. And she's not saying you beat me up or things like this. See what I mean? She loses the public relations. And then she will be the one."

Sometimes the religious divorce will not be granted even if there is domestic abuse involved. In an interview with two social workers who work mainly with members of Muslim communities one woman stated, "sometimes imams will not give the divorce because of domestic violence. But I do have an Arabic gentleman… who gives the Islamic divorce, and we collaborate. We don't want any women going back to an abusive situation. We don't tell them to go to the mosque when things are going on. We wait until they have the Canadian divorce and then tell them to go, because then there is nothing they can do. We don't refer them to the mosque because they will turn them down." A Muslim woman social worker describes the plight of many of the women she has worked with in Muslim communities stating,

> They also put the pressure on to the man supposedly because they're interested to keep the Muslim home right? But often that pressure goes to the woman and the guilt… They start guilt-tripping her. And they will say things like, you know, we are here in this culture, your children, and use all kinds of things to [get her to] accept the situation if the man does not want a divorce… You know, basically oppress this woman. You are oppressing her if you are keeping insisting that she be your wife when she doesn't want to be. But they don't. As long as he's not beating her, he's not cheating on her, he's not, you know? Like, does the person have to go to extremes to get divorces, you know what I mean? And they would pressure the woman. They use all kinds of tactics and say like, you know, it's our duty to keep Islam because Islam is home. And we are responsible for our children, and this and that and blah, blah, blah. If you are strong and you don't have any other pressures to worry about you might say screw you I want my

> divorce. Talk to this asshole and get me my divorce or I'm going to go to the Canadian government… But you're not going to say that, you're going to say oh, okay, because you don't want to be the one who is going to break the bond." Other patriarchal aspects of the process of pursuing a religious divorce are illustrated by another Muslim woman social worker where she states, "it is easier for your brother or your father to convince the imam that he should grant the divorce than it is for a wife to convince an imam. (Personal Interview April 12, 2008)

One Muslim woman who had both a religious and civil divorce, and then had to take her husband to court in order to enforce support payments answered my question regarding how accepting her community was of going to the secular courts stating,

> Not really. Some people felt that it was unfair to the husband, like I ruined him and it was shameful to have to be taken to court, but what about me? I'm an educated woman. I had no support, no family here, and it is hard to get a full-time job and take care of the children. In order to get full-time child care I had to already have a full-time job or be going to full-time school. But how can I do that without child care? I have nobody here even for one day. It has been very hard for me. I nearly had a nervous breakdown… So what about me? He is free to go see movies and friends, so he can give some financial support. [However,] a lot of people (in the Muslim community) supported my decision to take him to court to enforce the payments. (Personal Interview May 3, 2008)

In conclusion, a Muslim woman social worker employed by ISSRA illustrates the attempts of several Muslim organizations which I have documented in this chapter when

she stated, “we want women to know that they can end their marriage even if they have been abandoned… Women need to be reminded, if one imam says no, don’t stop, try another one.”

### 6.4.2 Domestic Violence

Muslim women regularly come to mosques looking for help with situations of domestic abuse. Many religious leaders will deal with this situation appropriately and immediately call the police. However, not all imams address domestic abuse appropriately. One imam I spoke to stated “I’ve had women come to me who said another imam said: just don’t upset your husband, stay quiet, have patience and hopefully things will get better.” Another imam stated, “the first thing we do is tell the guy. Legally we should notify the police, but this is where faith based [intervention] comes in. We make him aware that he is breaking the law--from a civil and religious point of view. And we give him a certain warning. She has more empowerment to pick up the phone to call us. And if she has to call us once, then after that, [we say,] just pick up the phone and call the police; he only gets one chance for her to call us. And if it’s a case of extreme abuse we will call the police right away. But if it’s just someone throwing something.... It depends on the severity of the abuse.”

One Muslim woman social worker has not had a positive experience with efforts to spread education among Muslim communities regarding domestic abuse. She said,

> We have tried to offer training to the imams on contentious issues like women abuse. Who will actually do that? They won’t do that. If you ask them about abuse cases they pretend they’ve never heard the word before. If you ask them about what resources, education, understanding they have of it they don’t even

know what you're talking about. And that's just been my experience so maybe others have better experiences. And I'm looking for them, because I'm always open for allies. I'm always looking for partners." (Personal Interview April 12, 2008).

I have addressed the issue of domestic violence in the context of faith based arbitration and mediation in chapters four and five, and I will suggest policy recommendations relevant to domestic violence in the concluding chapter.

### 6.4.3 Canadian Council of Muslim Women

Overall, my research on Muslim women's approach to faith based arbitration contrasts somewhat with the CCMW's own survey across Canada of approximately 200 Muslim women. This survey was created and administered by the CCMW at regional chapter meetings across Canada held by the CCMW to CCMW members and participants. The majority of their respondents did not think that Islamic arbitration was a good idea. However a minority of their respondents, approximately 25% to 34%, would seek out faith based mediation or arbitration in the event of a civil dispute. The CCMW's survey has drawn a larger sample than mine. However, leaders of the CCMW also felt that their workshop surveys did not reach many more conservative leaning Muslim women who did not attend, and therefore they recognize that their survey was not statistically random, and does not represent a wide diversity of Muslim women in Canada. However it is still a valuable non-random survey of several CCMW members and participants. My survey results to date are useful simply to provide a sense of the reasoning and reservations of some Muslim women who would seek out faith based mediation or arbitration. It is very likely the case that only a minority of Muslim women

would seek out faith based arbitration. However, this is potentially a significant number of women to consider as in the Greater Toronto Area alone there are more than 250, 000 Muslims and Ontario is home to more than 350, 000 Muslims according to the 2001 Canadian Census.

My research demonstrates that of those who actually do seek out mediation and arbitration services, the overwhelming majority are women. As Saba Mahmood's work attests, there are numerous Muslim women who are not easily described as either oppressed by, or resisting the oppression of, their religion.[148] A significant minority of Muslim women in Toronto would choose, and have chosen, to embrace religious practices in the realm of addressing civil disputes by seeking out faith based mediation and arbitration.[149] However, these women also actively question the degree to which particular religious leaders are practicing genuine Sharia or not and choose the sources they go to for advice carefully. This is certainly not to be characterized as helpless oppression nor is it accurately described as resistance to Islam as a whole.[150] These women seek to resist oppressive interpretations of Islam, but not to escape Islam altogether. Rather, a number of Muslim women interpret the proper and just practice of Islam in the resolution of civil disputes to be a process that can greatly protect their rights and freedoms.

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[148] Saba Mahmood. 2005. *The Politics of Piety: the Islamic revival and the feminist subject*. Princeton, N.J.: Princeton UP.

[149] See Mahmood 2005.

[150] Mahmood notes that in feminist discourse concerning Muslim women there appears to be only two possible subject positions that are recognizable. Either there is the oppressed Muslim woman, or there is the woman who is resisting her religion. Mahmood argues against this dichotomy based on her research with Muslim women in Egypt, arguing that there are instead many Muslim women who are not resisting their tradition per se, but are not uncritically oppressed either. There are many Muslim women that embrace Muslim subjectivity at the same time they participate in its gradual change and transformation.

The activities of the Canadian Council of Muslim Women highlight the shortcomings of the amendments to the *Arbitration Act* and the concerns of Muslim women on the ground. The Canadian Council of Muslim Women (CCMW) is perhaps the largest national Canadian organization of Muslim women today. The CCMW was founded in 1982 in Winnipeg Manitoba. It serves a diverse community of Muslims, especially women, across Canada. From the beginning of this organization it has been "firmly committed to the overarching vision of improving the status of women and empowering Muslim Women to remain true to their Islamic heritage and Canadian identity" (ccmw.com). It boasts local chapters in virtually every province, and they were very active in the Ontario debate on faith based arbitration. The CCMW opposed faith based arbitration as it was proposed and argued that Marion Boyd's protections did not go far enough. It is therefore very pleased with McGuinty's decision, but it is still very active as it believes that this is in no way a dead issue. Part of McGuinty's decision included a commitment to fund further research and education around the issue of arbitration generally and its impact on vulnerable people. In keeping with that commitment the government has funded a consortium of organizations to conduct further research and develop awareness-building materials.[151] The CCMW, the only religious organization that has received funding for this purpose,[152] commissioned three major research projects to this end.

The first CCMW project concerns the Muslim marriage contract or *iddat* domestic contract. The CCMW repeatedly informed me that although they believe that

[151] Seven organizations were funded by the government to reach out to and education vulnerable women regarding civil dispute resolution and family law. The CCMW is the only religious and Muslim organization that was funded. (www.onefamilylaw.ca).
[152] www.onefamilylaw.ca

what McGuinty has done is excellent as far as it goes, it is concerned about a number of "loopholes" in the *Family Law Act* because people are still free to opt out of a number of important rights. For example, a woman may give up her right to spousal support or an equal claim to family assets (see Macklin 2012). The CCMW is lobbying the government to update Ontario's *Family Law Act* claiming Ontario has changed dramatically since the FLA's last draft approximately fifteen years ago. In the meantime the CCMW's project on domestic contracts aims to create awareness of vulnerable people's rights regarding domestic contracts. The CCMW fears that Muslim women might be signing their rights away without even realizing they have these rights. Furthermore, the CCMW is aware that many practicing Muslim women want their marriages to reflect their religion meaningfully, and to that end the CCMW is drawing up a sample Muslim marriage contract that clearly lays out women's Muslim and Canadian rights.[153]

The second project will develop educational materials concerning marriage and divorce more generally, especially issues related to foreign marriages and divorces. Finally, the third project aims to create better awareness about arbitration and mediation. The materials developed out of this project will clearly lay out the qualifications and requirements of arbitrators necessary for conducting legitimate arbitrations that can be enforced by the courts. It will lay out the right of appeal if the process proceeds unfairly, and it will inform vulnerable people of their rights so they do not unknowingly or lightly contract out of them. The CCMW is fully aware that Muslims may still elect to go to a

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[153] The CCMW has now published its "Marriage Contract Toolkit" online through their website. The page containing the link to the PDF marriage contract toolkit states "During the No Religious Arbitration debate, we came across some women wishing to deal with family matters in accordance with the traditions of their faith. Realizing the need, CCMW published this kit which allows women to develop a marriage contract in keeping with Muslim and Canadian family laws" (ccmw.com).

religious leader for mediation or arbitration, though of course arbitration will now have to be much more clearly practiced within the bounds of Canadian law. However, the CCMW ultimately wants potentially vulnerable people seeking faith based mediation or arbitration to be fully aware of their rights and protections under both Canadian and Islamic laws.

The CCMW is also lobbying the government to provide legal aid to people looking for faith based arbitration. Currently it is not the usual practice of the government to provide legal aid for those opting to use arbitration, faith based or otherwise. I argue that even though the *Arbitration Act* now requires independent legal advice for arbitrations, the people most likely to need this advice, people with few financial resources, are precisely those who would not be able to afford the lawyers in order to benefit from the protections the new regulations provide. Furthermore, the CCMW has lobbied the government to train "cultural interpreters" working for the courts that understand better the diverse cultures and religions of people accessing the justice system so that the court system may be more accommodating and understanding of differences, making the secular legal system potentially more accessible and welcoming to wary Muslims. These cultural interpreters would act as advocates explaining relevant cultural and religious matters to the courts as well as assisting Muslims through the court system by explaining the system and its procedures.

Finally, the CCMW is very concerned about the belief among Muslims that they need a religious divorce in addition to a civil divorce. One member of the CCMW said

> The worry is that people are assuming that they cannot remarry without getting a religious divorce. But that is simply not true. But it gives religious leaders and

> imams a lot of control and power. Nowhere in Islam does it say you have to get a religious divorce to remarry as it is in Judaism. Are religious women being given this message that they must get a religious divorce? Because religious divorces are not recognized in Canada. Is it to make the couple feel better? Is there any money transaction taking place? What does a woman do with a piece of paper that says she's religiously divorced if it's not recognized in Canadian court (Personal Interview September 2, 2008)

The work of the CCMW indicates that it is fully aware the issue of faith based arbitration and mediation is far from concluded. Not only is it attempting to lobby the government to provide legal aid for arbitrations so that the protections now afforded by the *Act* may actually benefit those most in need of them, but also it is striving to provide educational and practical materials that will better inform Muslim women of their Islamic and Canadian rights while drawing up of private contracts. The limitation of faith based arbitration in Ontario has not affected the state enforcement of private contracts that are open to a wide diversity of private ordering arrangements, religious or otherwise.

## 6.5 Web Survey

Out of 66 respondents, 90% (60 respondents) reported that it was "very important" for them to have an Islamic marriage or *nikah* (as opposed to only having a civil marriage). This question had the most responses for any question in the entire survey. Four respondents (6.1%) said it was "somewhat important," and two respondents (3%) said it was "very unimportant." One respondent felt that a marriage was not legitimate unless there was a *nikah*. Another participant emphasized the importance of

the *nikah* over the civil contract, "for me, doing/holding a *nikkah* rather than a civil ceremony… Knowing that my spouse and I committed to both the religion and each other, we solidified our foundation for the future." Another participant insisted there is no real difference between civil marriages and the *nikah*, "a marriage in Islam is a Civil Contract and since EVERYTHING in Islam begins and ends with the name of The Almighty God, it becomes a religious ceremony by itself. There is NO such thing as Islamic marriage; please inform yourselves." One participant noted concerns about the attitudes of the next generation, "even though I said that a Muslim wedding (*nikkah*) is very important to me, I know that our children (who are also Muslim) may not think so. That is possibly because they view it as a 'tradition' or 'culture' more than a religious requirement."

Forty-four out of 56 who answered the question (78.6%) said it would be "very important" if they were divorcing their spouse to have an Islamic divorce. Six (10.7%) said it would be "somewhat important." Five (8.9%) said it would be very unimportant, and one person said they did not know. However, slightly fewer said it would be important for them to have issues such as the division of family assets, amount and duration of maintenance of a dependent wife and children, and child custody decided according to Islamic principles[154] in the even of a divorce. Thirty-seven of 56 who answered the question (66.1%) said it would be "very important." Nine participants (or 16.1%) said it would be "somewhat important." Two people (3.6%) said it would be

[154] Although this has become known as the "sharia debate" simply using the term sharia in this web-survey was problematic as was *fiqh*, Muslim personal law, Islamic law, etc. In the interests of maximum generality with the opportunity for participants to clarify matters further I elected to use the term "Islamic principles" and included the following caveat in relevant web-survey questions: "I realize the term "Islamic Principles" is very general, and that there is a lot of complexity and diversity that could be included under this term. Please feel free to make any comments on this term you would like to in the comment box below."

"somewhat unimportant." Seven people (12.5%) said it would be "very unimportant," and one person again said they did not know. Some respondents who left written comments strongly affirmed the importance of deferring to Islam in the event of marital breakdown. "Islamic divorce is mandatory for all married Muslims."[155] "The only way is the Islamic way." Another person stated the matter with more complexity, "there are no universally accepted "Islamic Principles". There are minimum requirements. However, justice and equity are the overriding requirements and take precedence."

Other respondents expressed a desire to adhere to Islamic principles in the event of marital breakdown but were concerned about gender equality. One participant could see the logic in it, but was not necessarily enthusiastic about the proposal: "as I have lived in this society my entire life, I am not passionate about having Islamic law with Canadian divorce law. However, I do see value in having integrated... if a *nikkah* is important, wouldn't it make sense to have an Islamic divorce?" One participant expressed the opinion that one does not need an Islamic divorce in addition to a civil divorce. "'Islamic divorces' seems to me to be a misnomer. Islamic marriages are contractual - not sacramental. In Canada, divorce should be in accordance with Canadian law." One participant expressed clearly the complexity of the issues for some Muslims, "it's a complex issue and it generates myriads of mixed emotions and loyalty for many Muslims. It's more complex than the way it's discussed. Many Muslims like me use parts of it and are happy to use those parts. For example I cannot see myself not having an Islamic marriage or *nikah* but I don't think I would be comfortable going through arbitration if I was dealing with custody and child support issues." One participant held

[155] I of course interpret this to mean that all married Muslims seeking a divorce must have an Islamic divorce, not that it is the duty of all married Muslims to get a divorce.

Islamic divorce in very low esteem, "since the 'Islamic' MEN have made a MESS of Islamic laws and twisted them according to their likes and dislikes, I am sorry to inform you that EVEN an Islamic divorce will be a FARCE."

For many participants in this survey, the concern with having civil contracts drawn up according to Islamic principles extended to wills as well. Thirty-nine of 56 who answered the question (69.6%) said it would be "very important" to draw up a will according to Islamic principles. Nine (16.1%) said it would be "somewhat important." Three (5.4%) said it would be "somewhat unimportant." Four (7.1%) said it would be "very unimportant," and one person said they did not know. For some people, because of their circumstances, this is not an important issue. One wrote, "since I only have daughters, it is more important for me that they both equally share in my assets." One participant preferred to take the matter into her or his own hands, "the inheritance divisions by percent are probably something I would want to figure out on my own." Another respondent suggested a way around the issue of inheritance, suggesting also the historic context and reason for sons inheriting more than daughters, "for my wife I can give as much as I want in my life time, so she does not become destitute."[156] One respondent clearly outlines the struggle of adhering to Islamic tradition in the modern Canadian context, "I struggle with this one. I understand that my daughters should get half of the share than my son. However, as I understand it is because men are financially responsible for women (including sisters) in the family. However, in the cultural milieu that we are living in now, I do not see this happening at all. And so I find myself

[156] Historically sons were expected to take care of a surviving mother as well as unwed sisters. This is often cited as the historic context and justification for giving sons twice the inheritance of daughters. However, daughters were in fact technically allowed to inherit and women could own their own assets.

struggling with the idea of a half share for my daughters. Not sure at this time how I am going to resolve this issue."

The responses remained relatively consistent when also asked how important it would be to resolve a family dispute over an inheritance according to Islamic principles. Thirty-seven people of 56 (66.1%) said it would be "very important." Eleven (19.6%) said it would be "somewhat important." Two (3.6%) said it would be "somewhat unimportant," and six people (10.7%) said it would be "very unimportant." Wishing to avoid conflict, one respondent stated "the wishes of the deceased, if there is a will, should take priority." Another participant stated "if it is my right, I am willing to give it up." Participants in the survey felt generally more positive about faith based mediation than faith based arbitration. Forty-nine out of 53 who answered the question (92.5%) generally felt "positive" or "very positive" about faith based mediation. In fact, 64.2% felt "very positive." Three people felt "negative" and only one person felt "very negative." However, the responses are much more mixed regarding general feelings about faith based arbitration. Only 34.6% of respondents (18 of 52) said they felt generally "very positive" about faith based arbitration. Seventeen people 32.7% felt "positive." Whereas 32.6% either felt "negative," "very negative," or did not know how they felt about faith based arbitration. Five (9.6%) felt "negative." Six people felt "very negative," and six people said they did not know. Although a majority of participants still generally felt positive toward faith based arbitration, 92.5% of respondents generally felt "positive" or "very positive" towards faith based mediation, while only 67.3% felt "positive" or "very positive" about faith based arbitration. These numbers remained fairly consistent when

asked if hypothetically they would recommend faith based mediation and faith based arbitration respectively to a friend or family member.

Many of the written comments offered by participants illustrate their concerns about faith based arbitration and mediation well. Another respondent stated "I feel that people running these arbitrations are mostly culture based and do not apply Islamic principles but their own cultural bias which often undermines women's rights. That's why I hesitate to endorse this process. I've read that Jewish women's rights are also compromised in these kinds of arbitrations so this does not only apply to Islamic based arbitrations." Many were concerned about the qualifications of mediators and arbitrators, "the people involved would have to be VERY professional in their approach and there need to be guarantees that there would be no culturally-based decisions made." One wrote simply: "must be done by qualified persons." Another said, "If I am sure about the process and if the people conducting it have a good track record. I would also make sure all decisions are in compliance with Canadian laws." One respondent illustrated the potential need for arbitration if mediation fails, "it really depends on the situation and the person(s) involved. If the parties were mature and had the capability to make sound decisions based upon facts, I wouldn't recommend Arbitration. However, if the parties were immature, unreasonable, difficult, etc then I would recommend Arbitration."
In the comments there was a general preference for mediation rather than arbitration. One respondent wrote, "in Islam, mediation is at the heart of resolving disputes. Each party should be left with dignity and a sense that it is their solution. Arbitration is still an adversarial process, that, in order to convince the arbitrator, hurtful things may be said."

Another stated, “I don’t mind seeking religious advice, but I would rather have the power and control over my affairs, rather than giving the decision making to someone.”

I included questions that I hoped would give some wider indication of how frequently faith based arbitration or mediation is used. Fourteen of 52 respondents (about one quarter) said they know someone who has used faith based arbitration. Twenty-two respondents (42.3%) said they knew someone who had used faith based mediation. Only 18 people (34.6%) said they knew of no one who had used faith based mediation or arbitration. Eleven respondents (21.6%) said they had used faith based mediation in the past. While only 3 people (5.9%) said they had used faith based arbitration in the past. One participant stated “I am a Mediator/Arbitrator. I have done number of them.” Others were glad they had not previously needed faith based arbitration or mediation, “I never got any chance so far. Thanks Lord.” One person claimed to have participated in faith based mediation or arbitration, and clearly did not have a positive experience, “it did not work.” One person stated “I heard (single sided opinions) from friends about arbitration that was not fair.”

When asked to check all that apply, 27 of 51 (52.9%) said they “would use faith based mediation” hypothetically in future for advice or help with resolving an issue or dispute. Twenty-five (49%) said they “might use faith based mediation” in future. While only three people said they would not use faith based mediation in future, and two people said they did not know. More people said they would not use faith based arbitration in future than faith based mediation if faith based arbitration had remained an option. Twelve of 53 (22.6%) said they would not use faith based arbitration even if it were still available, and five (9.4%) said they did not know. However, still a clear majority (67.9%)

said either they would or might have used faith based arbitration in future if it were still available. One participant was open to faith based mediation in future "if it worked." But clearly she had not had a good experience with a previous divorce, "I won't get married again because *nikah* is nothing more than a licence for fornication." Another was open to faith based mediation "if necessary." Some participants took the opportunity to recall the issue of the qualifications of mediators, "it all depends on the credibility of the individuals running the mediation." One participant interestingly proposed that mediators could be trained to address issues of faith without actually belonging to the faith community of the disputants, "there are professional mediators who do NOT need faith to mediate, believe me, I know of mediators who STUDY your faith before they mediate so that they can give the CORRECT mediation and arbitrate with JUSTICE. Sorry to again inform you that "Islamically" based mediation is MALE biased." Another respondent insisted trust in the arbitrator was more important than whether the arbitration was faith based or not: "arbitration is done with someone you can TRUST and that does NOT have to be faith based."

Only 21% of 52 people "agreed" or "strongly agreed" with the Dalton McGuinty government's decision to change the Ontario *Arbitration Act* so that the state will no longer enforce arbitrations decided according to religious laws. The majority (53.8%) disagreed with the McGuinty government's decision. One quarter of respondents said they simply did not know either way. One respondent stated,

> I did not like the way it was done. I personally think that people will choose faith based mediation/arbitration anyway. It would have been much better to be able to regulate it. I sometimes compare it with the abortion issue. Making abortion

> illegal does not solve the problem because people would do it anyway if they need to, but in this case there is more potential for harm. If it is legal, then at least it can be regulated as well as it will minimize the health and life risks associated with illegal abortions.

One respondent noted the importance of understanding that faith based arbitration has a longer and more complex history than some were aware of: "you would need to mention the year that this happened so people know that it started in the 1990's with Lynn MacLeod (?) [Marion Boyd] and then it came up again in the early 2000's. Also, Jewish faith and I believe one other already had it." One respondent expressed why some felt the McGuinty government's decision was the right one, at least for the time being, "I think our society may not be ready. More time is needed to adjust, prepare and implement this solution, in my opinion." Some participants in the survey felt they were not well informed about this issue, "I have not heard this news before!" "I was not following the subject closely to make an informed decision." One participant expressed an understanding of de facto legal pluralism in Canada as discussed in chapter 4, stating "I just want to add that mediation can still be done according to sharia here as the law allows for any mutual settlement among parties. Of course things like multiple marriage are not allowed and I think as Muslims are required to obey the law of the land they should not indulge in multiple marriage or any thing else which breaks the law." Whether participants agreed with the McGuinty government's decision or not, several expressed regret that the decision had been made in the context of debating Muslim communities specifically rather than religious communities more generally, "…also, the abrupt decision to cancel the whole thing because Muslims were asking for it was very

demeaning. If a Muslim woman chooses to use faith-based mediation/arbitration, she should have the right to do so." Another wrote: "…but not surprisingly, when the public became aware of the so called 'Sharia Law' coming to Ontario, there was alarm bells set off (similarly to how the John Tory lost the election because of his proposal to fund religious based schools in Ontario)." Another participant stated "what bothered me about the decision was that it specifically targeted Muslims and made it seem they were more prone to oppress and abuse women's rights when it's clear that's not the case. The decision was based in xenophobic hysteria and it was disheartening."

As expected, respondents generally felt that Muslim faith based mediators are more adequately aware of women's rights in Islamic law than women's rights in Canadian law. However given the strong support for faith based mediation and arbitration, the overall level of confidence in Muslim faith based mediator's awareness of women's rights in both Islamic law and Canadian law is surprisingly low. Only 21.6% of 51 respondents felt that "all or most" or "many" Muslim faith based mediators were adequately aware of women's rights in Canadian law. Thirteen point seven percent felt that half were adequately aware. Twenty-five point five percent said they did not know, and a full 39.2% said few Muslim faith based mediators are adequately aware of women's rights in Canadian law. However, even overall confidence in Muslim faith based mediator's awareness of women's rights in Islamic law is not as high as I would have expected. Of 52 responses, 42.3% felt that "all or most" or "many" were adequately aware of women's rights in Islamic law. Eleven point 5 percent felt that half were adequately aware. Twenty-five percent did not know, and 21.2% felt that few Muslim faith based mediators possessed adequate awareness of women's rights in Islamic law.

One participant noted the issue of mediators trained in the diversity of Muslim traditions, "I am not sure if 'qualified' mediators or arbitrators exist in the variety of Muslim beliefs (example the sub-sects of Sunni Muslims). This point may be a reason for the people not accept the process." Some were unclear on how adequately aware Muslim faith based mediators are of women's rights in Islamic law, but felt this was an important issue. One wrote, "not sure what to answer as I haven't dealt directly with these matters. But it is a huge concern." Another participant responded,

> From my interactions with many of them, it does not seem like that. There are various interpretations to start with. Most of them are grown up in another culture with culture-based understanding of 'women's rights in Islamic law'. It may sound ridiculous but it happens. So for example, most scholars from South Asia would not like to see women praying at the mosques at all, whereas Arab and North African culture is fine with it. Then there are issues such as interpretation of some verses for example 'men are in-charge, or protectors or maintainers of women?' I personally think there is definitely a gender gap here. Muslim men in general would lean more to the in-charge than maintainers whereas women would long for more equality. I see many Muslim women around me making more money than their husbands and what happens in their case is that they become 'maintainers.' So what happens in such cases? If there are those who are willing to apply Islam's strong stance on equality in gendered situations, I would be happy to have them as mediators.

Another participant noted the importance of proper training, "if we have faith based arbitration, then should we not also have licensed mediators? And if so, mediators need to

follow a standard application of Religious law. (Law applications can not have grey areas).” Another raised an important issue of awareness and training stating, “I do not know their qualifications (are they Lawyers?)” Other participants were more negative regarding how adequately aware Muslim faith based mediators are of women’s rights in Islamic law, “they follow the books that were altered after the time of the Prophet (sm) and have changed the law according to the THEN misogynistic rules (that were passed down from other faiths). Islam is not misogynistic but people have made it that way.” Another wrote: “they do not care enough. The REALLY GOOD people who KNOW and follow Islamic law would be fair to women.”

However, in contrast there is great confidence that Islamic law or sharia can be interpreted and applied today in civil disputes in a way that is generally in keeping with Canadian law. Several respondents expressed this generally positive response in writing, “there is nothing non-Islamic in the Canadian law. It coincides quite well.” Another wrote: “a middle path could be achieved.” Other respondents emphasized the flexibility of Islamic tradition and the importance of choice, “critically analyzing various *fiqh* positions based on our times and context is required. Choose the ones that applies best to our context. Even better to find new interpretations. For example, the inheritance law, divorce laws, child custody should be debated and discussed openly in the community of scholars.” “The law was created to make it equal and fair for everyone. I think if people had a choice that would be good. If I were a Muslim that chose NOT to go via Sharia law, then I should be allowed to.” Another wrote: “after all, Sharia is itself the interpretation of Quran and Hadith. When I say ‘interpretation,’ it is on the basis of today’s scientific knowledge and broad and unbiased judgement. I think there is room in

Sharia to take opinions from another scholar who might have more experience in the subject of discussion. For example, forensic scientific knowledge could be used to solve [crimes] in advanced cities whereas the same cannot be solved in undeveloped countries." One respondent wrote: "if women are given the two choices (Islamic and Canadian law) and voluntarily chose Islamic. Or if the other party forgave the women when they selected the Canadian law)." I take this to mean that this person thinks that Islamic law or sharia can be interpreted and applied today in civil disputes in a way that is generally in keeping with Canadian law as long as women have a choice, or if the person she is in a dispute with agrees to the use of Canadian law. This suggests that the respondent thinks Canadian law is not contrary to Islamic law. One respondent expressed a more negative position regarding mediators, but a positive position regarding the compatibility of Canadian family law and Islamic principles, "my experience is that those who wish to use this approach want the minimum of what is required, not justice and equity. Most mediators are men who are burdened with a foreign cultural overlay, which they interpret as being Islamic. I have yet to hear a criticism of Canadian family law, describing in what way it offends Islamic principles." Of 50 responses, 84% felt that this was "certainly" true or "possibly" true (responses were equally divided between these two options). Only 14% felt that this was not true, and only one person said they did not know.

That being said, overall confidence in the secular court system is not very high either. One participant expressed concern that "civil courts are very difficult for low income women. They are complex and very hard to deal with, so sometimes people choose the simplicity of what they know and can understand." Some participants noted

occasions when they would prefer deferring to Islamic tradition, and other occasions when they would be required to use the secular courts and lawyers, "I would advise them of our law, and if the conflict is with a person of my faith to try mediation according to it; however if it is with a person of another faith or a secular person then the arbitration or mediation will have to be according to the secular law." Another wrote: "there are enough laws in Islam to solve any problem. In case there is challenger who does not want to agree with the Islamic law, I would have no chance but to go to the Secular Law." One participant said they would use secular courts and lawyers "if other efforts failed." One participant suggested those practicing Canadian law could be better educated about diverse legal traditions, "do you have to be Muslim to understand Islamic law and appreciate the religious and cultural sensitivities of Muslims? Maybe the effort should be made in training lawyers, mediators, social workers to address this population – and others. The collaborative approach to family law, which is now a specialization in Canada, is in tune with how Muslims should style family disputes." On the other hand, one participant expressed a feeling of exclusion to even be asked about faith based arbitration or mediation,

> I wish you luck in your Project for your Dissertation but I do not understand the purpose of this Survey. We live in Canada, and Canadian Law is for ALL of us (and it is a VERY FAIR Law without contradicting anything that Islam teaches us), why would you Isolate a Community by having a separate Law system for them? I find it degrading actually that I would be on a different level than all Canadians. Why are the Courts of Canada allowing a different system? Why even ask. Are the Courts not wanting to do their JOB? We Muslims came to

> CANADA, if we wanted to live in a "Sharia" based country, why did we leave? OR, if you ask me "What about the children who were born here in Canada, grew up here and WANT Mediation or Arbitration in an Islamic way"? Sir, they have a CHOICE to go and live in a country that Arbitrates or Mediates Islamically. I would NOT change this FAIR Canadian System for anything.[157]

When asked if they would feel comfortable going to secular lawyers and courts to resolve civil disputes such as divorce, custody, or inheritance disputes, of 52 respondents only 30.8% said "yes always" or "yes often." Thirteen point five percent said "sometimes." However, 36.5% said "no," and 13.5% said "rarely," while 5.8% did not know. In sum, overall confidence in faith based mediation or arbitration is higher than confidence in Canada's secular courts for resolving civil disputes related to family law and inheritance law among the participants in the survey.

Of 51 participants in the survey 96.1% considered themselves practicing Muslims or practicing to some degree. When asked if they considered themselves practicing Muslims 66.7% said "yes" and 29.4% said "yes to some degree." Only one person said "no," and one person said they did not know. One participant stated, "I pray five times a day, wear a hijab and fulfil my other religious obligations. I have read Qur'an with translation and *tafseer*." Another stated, "I am a practicing Muslim, but I don't wear a Hijab 24/7 (only to Mosque and when I pray). But I do my prayers 5 times a day, believe in God, fast during Ramadan and have made the Hajj." One respondent simply stated "try to."

[157] However, interpreting what survey participants mean by faith based arbitration must take into account the qualitative work by myself and Julie McFarlane. Most so-called faith based arbitrations are in fact religious divorces that have little or nothing to do with making decisions about financial decisions regarding the dissolution of marital relationships.

The numbers overall were only slightly lower when asked how important it is to live according to the sharia generally (not necessarily according to Islamic family law in particular). Of 50 people who answered this question 62% said it was "very important," 24% said it was "somewhat important," while only 6% said it was "somewhat unimportant," 6% said it was "very unimportant," and one person said they did not know. However, participants had much more to say about the meanings and nuances of this question. Several participants in my fieldwork overall had substantial concerns about what is meant by "sharia," its importance, who gets to decide what is and is not "sharia," and whether even to use the term at all in the context of debating faith based arbitration or mediation. Therefore, it is important to quote several participants directly on this issue. One participant stated, "living according to Islam is very important to me. Whether that comes under the heading of 'sharia' when living in a majority non-Muslim country is open to debate and probably has been for centuries! Being able to deal with the kind of family matters mentioned in this survey in accordance with sharia is very important to me." Another respondent opined, "important in the sense that shari'a covers prayers, fasting, charity, interactions with others, etc. Of course, this does not mean that Shari'a would have to take place of Canadian criminal code as many in the media would suggest. Only about 5% of the Shari'a deals with criminal law, the rest has to do with religious conduct, daily affairs, settling of debts, prayers, all of which point to the end goal which is worshiping and loving God. Shari'a is not the end, but the means through which one can attain the goals of Islam, which as mentioned are worshiping and loving God." One participant was very concerned about who get the power to decide what counts as "sharia," "I KNOW my Sharia through the Quran and I know it is VERY important for

me and I follow it. I just do NOT want anyone else to dictate that to me. There is a LOT of danger is someone else dictating THEIR Sharia over me. I am a free person to understand and live by God Almighty's prescribed Shari'a and I shall be answerable for my deeds, I just do NOT like the idea of someone else prescribing Sharia to me." Another stated, "if I am in a practicing Islamic country, but I realize that there is no practicing Islamic country these days I totally understand that there is no sharia in secular countries but I do not mind living in a country where there is fairness and respect and at liberty to practice our own faith. I actually prefer to live in our country where I can try to practice my faith correctly so that I can help remove many misconceptions which arise due to wrong practices by Muslims who do not understand their faith." One participant stated "I really struggle with the wide spread acceptance of *fiqh* as unchallengeable part of sharia." One respondent expressed flexibility stating, "some areas I adhere to sharia but in others I do not." Another participant questioned the importance of the issue, "I live in a diverse culture, and have lived without religious laws thus far." One participant was more concerned to preserve the integrity of "sharia," "the Sharia is God's Law. Muslims have no right to tamper with it or to tone it down just for the sake of pleasing the non-Muslims around them, just as it was not for the Prophet Muhammad (peace be upon him) to do the same (as is clear in the Quranic verses, 69:44-47). Unfortunately though, a lot of the Muslims who have been influenced by the false 'liberties' and 'freedoms' of the West don't understand the meaning of Sharia, let alone the gravity of living by it."

Of 51 people who disclosed their gender, 60.8% were male and 39.2% were female. The demographic of people who completed the survey is relatively young. 59.6% of 52 who disclosed their age range were 40 years of age or below. Twenty-one point two

percent were 41-50 years of age. Only 19.2% were above the age of 50.[158] The majority of participants were married (65.4% of 52), and one person had a partner. Twenty-six point nine percent were single. One person was separated and two people were divorced. Most participants had children (51.9% of 52 people). Of 50 participants who revealed their ethnicity, the majority were South Asian (62%). Twenty percent claimed East and Southeast Asian origins. Eighteen percent claimed Arab origins, and generally small numbers (normally between one and three people each) claimed other ethnic origins such as British Isles, Caribbean, Eastern European, or West Asian origins. Ten percent total claimed "western origins" of some type including North American, European, Western European, or Northern European origins.

In conclusion, the practice of religious marriage and divorce is widespread in the Muslim community. However, it is less important to have civil disputes arbitrated or mediated by community leaders. This makes sense in light of the responses of many web-survey participants who not only had reservations about Muslim mediators and arbitrator's familiarity with Muslim women's rights under Canadian law, but also Muslim women's rights under Islamic law. The Muslims who participated in the survey generally feel more positively about mediation than arbitration, not wanting to give decision making power away to an arbitrator. However, many were still ambivalent about the McGuinty government's decision to prohibit faith based arbitration. There is pressure on women to stay married if the husband wants to stay married and if religious leadership does not recognize the wife's reasons for wanting a religious divorce as legitimate. This

[158] Although this survey is not representative, the average age of respondents is roughly similar to the average age of Canada's Muslim population, which is quite young. The 2001 Canadian Census reports that 80% of Muslims were below the age of 45, making the average age of Canadian Muslims slightly younger than those that participated in my survey. Statistics Canada, 2001 Census of Population, Statistics Canada catalogue no. 95F0450XCB2001004 (Canada, Code01).

reality illustrates the need for granting the religious divorce among Muslim communities. These responses reveal that Muslim Canadians have adopted an individualistic and subjectivated form of the religion in which they do not automatically cede authority over their lives to religious leaders. They wish to live by and learn from the Islamic tradition, but this does not mean that they blindly follow Islamic leadership.

## 6.6 Jewish Orthodox Communities

There are important similarities between the issues that Muslim organizations contend with and those the Jewish Orthodox Beth Din faces with regard to family disputes and especially with regard to religious divorces. The Beth Din has at the time of my research received approximately twenty-five inquiries per year. However, only about eight or nine of these cases will end up going to the Jewish court for formal judgment. The vast majority of cases deal with business disputes or wrongful dismissal. The administration of the Beth Din estimates of the twenty-five inquiries the organization initially receives each year approximately fifteen concern business disputes, five concern wrongful dismissal, and another five concern family law disputes. The Beth Din estimates that the Orthodox Jewish community numbers approximately 15 000 in the Greater Toronto Area. There are over 164 000 Jews in Toronto, over 190 000 in Ontario, and nearly 330 000 in Canada (Beyer 2005).

The Beth Din has a long history of drawing up formal arbitration agreements that disputants sign before going to judgment by the Jewish court. One rabbi who formerly worked for the Beth Din of Toronto stated “people are required by Jewish law to resolve civil disputes according to Jewish law” (Personal interview May 16, 2008). A rabbi who

was then current director of the Beth Din of Toronto stated "People seek us out because they know they should go to a Beth Din rather than a secular court… We receive many referrals from rabbis" (Beth Din Director Interview Aug. 20, 2008). Those who approach the Beth Din of Toronto are encouraged to resolve their dispute on their own as far as possible, and if that does not work, "I usually suggest they send one last demand letter giving a time limit of a week or 10 days saying that if the issue is not resolved in that period then they will commence an action with the Beth Din. And often that is enough to get disputants to settle" (Beth Din Director Interview Aug. 20, 2008). A regular judge for the Toronto Beth Din stated,

> A religious Jew by Jewish law has to come first to the Rabbinic court, the beth din for these kind of cases. Then if it doesn't work out, and if it can't work… or the other side refuses to come, then that person who did initially want to come has permission from us and the Rabbis. You've done what you're supposed to do. The other person is not cooperating, so you now have official permission to go to the civil courts. And then the other person is sent a letter by us telling them they have violated Jewish law. And you're Rabbi, your synagogue, will be notified. They won't be too happy about it. (Interview with Beth Din Judge November 30, 2011)

The advantages of faith based arbitration are clear to many Jews as well,

> Even those who are not observant Jews will come to us because they know it's quicker. It's cleaner. Our decisions are very just and honourable and within the context of Ontario law and so on. And they don't have to worry about lawyers and this and that, and it's a lot smoother a lot cleaner and *far* less expensive. There is just a fee that they pay in, you know, to cover the paper work and stuff like that.

> And [the director of the Toronto Beth Din] spends the time he's got to get a few dollars pay. It's all basically volunteer work. People don't realize we spend a lot of time volunteering. Sometimes you wonder do they appreciate it. That's another issue. (Interview with Beth Din Judge November 30, 2011)

The Toronto Beth Din also initiates reintegration of the disputants into peaceful relations among community members as part of the process of arbitration, "when we finish a case we get both sides to shake hands. It's over with. Finished. Now, shake hands. Be friends and go on with your life. So there's no need to want to do that (take it to civil court afterwards)" (Interview with Beth Din Judge November 30, 2011). Indeed, very few Jewish arbitrations are taken to the courts to be enforced or overturned.

Most Canadian Jews live in the Toronto or Montreal area, so that is where the two dedicated Beth Din in Canada can be found. The Beth Din of Toronto draws,

> on a pool of seven or eight judges. For each case there are three judges, although sometimes the parties will agree to one judge. The Canadian system is adversarial. Lawyers ask the questions. The Beth Din is more like the European system. It is inquisitorial; the judges ask the questions of the parties. The disputing parties are given a choice: either the Beth Din chooses the judges or one person chooses one judge, the other chooses another judge, and the two judges appoint a third. (Beth Din Director Interview Aug. 20, 2008)

Normally lawyers are not a part of the process. The Director for the Toronto Beth Din stated "usually we do not allow advocates/lawyers, unless there are exceptional circumstances like they are recent immigrants and not familiar with the process. But generally speaking we don't, and some beth din's don't allow any advocates at all. That

being said sometimes they will allow someone in the room to advise them but not to address the beth din directly" (Beth Din Director Interview Aug. 20, 2008). The Director for the Toronto Beth Din states that Jews in Canada are not concerned with establishing, for example, the conditions to be put in place in the event of a marriage breakdown, in the context of the marriage contract or prenuptial agreement because, "Canada has a good justice system so we don't worry about that here. But in the past or in other countries that did not have this kind of justice system it would become much more important, especially regarding support for the wife in the event of divorce" (Beth Din Director Interview Aug. 20, 2008). Only approximately a half dozen arbitrations have ever been brought to the civil courts for enforcement or appeal. However, the most striking finding from my research is that despite the amendments to the *Arbitration Act*, which state that no law other than Canadian law can be used in an enforceable Arbitration agreement, according to the Beth Din "nothing has changed" with regard to their everyday practice (Interview with anonymous rabbi December 12, 2011; Interview with Beth Din Judge November 29, 2011). This is precisely because of the *de facto* legal pluralism that Canadian Family law allows.[159] A regular judge for the Toronto Beth Din stated,

> "you have to understand it is all voluntary anyway to begin with. And those people who… you know religious Jews, who want to use the services of the Rabbinate and so on, and so they come to us and we do it. So I don't see where it has affected it… The only way it technically affect is… if a person is unsatisfied with our decision, then they might try to go to civil court. But what we make them do is to sign in advance an arbitration agreement and we become legal arbitration,

[159] See Chapter 1.

> not a Rabbinic court… even though the rulings might be in accordance with Jewish laws. (Interview with Beth Din Judge November 30, 2011)

When asked about the new provision in the *Arbitration Act* regarding only using Canadian law, the same rabbi stated, "Yeah, that's why we're very, very carful. Everything we do we make sure is in sync with Canadian law, Ontario law. We do nothing… you know, we're very, very careful about that… If you studied intimately Jewish law you would see that most of common law, civil law, western law is taken from that" (Interview with Beth Din Judge November 30, 2011). The rabbi explains further,

> Judaism itself is bound by the laws of the land. There is a concept in Jewish law of, you know, if the laws of the land do not to some great extent contradict Jewish Laws and so on and we will follow, you know, in any case, when they come to us for these kinds of things we look at the Ontario laws, provision of properties and so on, but no, its very rare, that aspect is very rare, its just the *gett*. (Interview with Beth Din Judge November 30, 2011) .

The judge states in conclusion,

> It goes on as before because the people come voluntarily. That's why they are there, and they sign an agreement that they will abide by the decision of the rabbis, the beth din. And we proceed. Its usually not very complex cases. It is usually very simple, to some degree.. you know, those who come to us are religious Jews who want to use the rabbinical authorities. And they come for arbitration. So we haven't [seen] much of an impact I don't think. I haven't noticed much difference. (Interview with Beth Din Judge November 30, 2011)

On the whole however, much like the Muslim communities of Ontario, the Toronto Beth Din has tried to stay away from deciding issues of divorce such as child or spousal support, division of family assets, and the like. A judge for the Toronto Beth Din states, "over the years we have tried to keep away from the disposition of property and things like that… we let them go to the courts and let the lawyers work that out" (Interview with Beth Din Judge November 30, 2011). The Toronto Beth Din does not deal with very many divorces in any case; one judge said,

> Maybe one every couple years. And even then we try, we do this, we meet with them and try to work things out properly. Inevitably both sides have lawyers and they will get them to go to court anyway, that's how they do these things. So we figured it out pretty quickly, we're wasting our time because lawyers themselves are going to take it to the courts and do their thing. (Interview with Beth Din Judge November 30, 2011)

The fact members of the Beth Din feel that in practice nothing has changed despite the amendments to the *Arbitration Act* again raises the question of what the amendments to the *Arbitration Act* actually mean. Much of the media coverage of McGuinty's decision has given the impression that faith based arbitration is now forbidden in Ontario. However, this is clearly not the case. First, anyone can mediate a civil dispute. Second, anyone, including religious leaders, can arbitrate a civil dispute as long as the decision adheres exclusively to Canadian law and arbitrators sign a declaration that the arbitration has been done exclusively according to Canadian law. This is the caveat that is meant to exclude the use of religious laws in civil arbitrations. Furthermore, arbitrators must meet a minimum standard of training, keep written records, screen for abuse, provide bi-annual

reports of their activities to the Ministry of the Attorney General, and ensure that disputants receive independent legal advice.[160]

Most commentators in the press assumed Jewish law to be relatively similar to Canadian law. In fact it shares more in common with Islamic than Canadian law, and Jewish custody traditions are somewhat similar to some Islamic traditions. For example, traditionally, girls are often sent to live with their mothers and boys with their fathers. This is not the practice as much in Canada. In contrast, the Beth Din does recommend that boys go to live with their fathers after the age of thirteen if their father is able to give them religious instruction.[161] One rabbi who formerly worked for the Beth Din of Toronto stated "male children who have a father in a position to teach the boy about Jewish tradition may be encouraged by Jewish law to go with the father after the age of 13 (Personal interview, May 16, 2008). However, in practice the Beth Din tends to favour the mother in custody disputes.

Like the *nikah* (marriage contract which may include stipulations commonly entered into prenuptial agreements) in Islam, there is a Jewish marriage contract or prenuptial agreement called the *ketubah* in which, much like the Islamic *mahr* (dowry), there is an amount called the *mohar* (Jewish dowry) that remains an established part of the *ketubah* in Ontario Jewish communities today. The *mohar* is an amount that is paid in the event of divorce and was traditionally intended as a deterrent against hasty divorce and financial support for the wife in the event of divorce or widowhood. The rights of Jewish women in marriage are similar to those of Muslims. For example, husbands are

[160] The Ontario Ministry of the Attorney General http://www.attorneygeneral.jus.gov.on.ca/english/family/arbitration/ .

[161] A number of Muslim leaders I spoke to maintained that the tradition is for both male and female children to go with the mother until somewhere between the ages of 7 and 13 at which point they should live with the father if he is in a position to teach the children the religious tradition.

required to support their wives, while wives are not required to support the household financially. Other stipulations of the relationship are laid out in the marriage contract, and the contract may be changed to suit the desires of the couple before signing, as in the *nikah*. In Jewish law, husbands are required to support children upon divorce as in Islamic law; however there was traditionally no support accorded to the wife, unlike Islamic law which traditionally supported the wife for the period of the *Iddat* (traditional three-month waiting period to ensure the wife is not pregnant, or establish paternity if she is, before she potentially remarries). Also, the assets of the husband and wife were traditionally separate: she kept her assets upon divorce and he his, as in many Islamic traditions. Traditional inheritance norms are similar to Muslim norms as well, with males inheriting more than women and the firstborn inheriting more than those born later. One Jewish woman lay-leader stated of Jewish faith based arbitration,

> Were there instances where in the Jewish community somebody who was more vulnerable wasn't adequately represented or didn't, you know, in the end attain what could have been attained in faith based arbitration? Of course, I'm sure that happened, as I'm sure it happens in every legal system and every arbitration situation… But there is always room for improvement. Obviously there are parts of the community that weren't being accessed as well educationally, or weren't as aware of the infrastructure that is open and available, those kinds of things. So things can always improve (Personal interview April 2, 2008).

With regard to arbitrating family disputes, such as separation and divorce, in most cases today the Beth Din of Toronto simply adheres to the law of the land as there is always room in Jewish law to go by the law of the land as long as important religious practices

are not broken. One rabbi who formerly worked for the Beth Din of Toronto stated that the "tendency in Jewish law is to go with the law of the land you find yourself in… There is no tradition in Jewish law for support of women after marriage. This is a North American tradition" (Personal interview, May 16, 2008). Therefore, division of family assets is fifty/fifty, and spousal support and child support are worked out in similar fashion to Canadian methods. This is interpreted as in keeping with Jewish law.

A fascinating comparison to the Muslim communities of Ontario concerns religious divorce. Orthodox Judaism shares with many Muslims a belief that religious divorce is necessary in addition to civil divorce, and may only be granted by the husband. One rabbi attempted to distinguish Muslim and Jewish law on divorce stating, "the husband is the only one that can grant the *get*, yes, but she can also refuse it. So he cannot divorce her without her permission. It's not like in Islam where, you know, 'I divorce you, I divorce you, I divorce you' like that three times, and you're gone… she needs to be present, she needs your consent. If she doesn't give her consent then there's no *get*"[162] (Interview with Beth Din Judge November 30, 2011). However, Orthodox Judaism appears to be more restricted in that there is no room for a Jewish judge to pronounce a religious divorce on behalf of an absent or recalcitrant husband. Jewish courts can order a husband to grant a religious divorce but have no further religious legal powers to pronounce divorce on his behalf. The Beth Din does not, according to them, deal with very many cases of limping marriages. In the vast majority of cases mediation is successful, the husband grants the divorce, and the two go their separate ways. However, there have

[162] As stated above, the majority of Muslim leaders in Ontario do not believe that the husband has the right to divorce his wife as simply as this. Even though husbands have a unilateral right to religious divorce in Islam (as in Judaism) the process for them is more complex than this, takes more time, and must involve a religious authority that recognizes the religious divorce as such. Judaism and Islam are very similar in this regard.

been a few cases where an ex-husband has kept his ex-wife tied to a limping marriage, refusing to grant the *get*, or religious divorce. In this case the Jewish community resorts to social pressure on the husband to grant the *get*, "what happens is community pressure. *Community pressure*. You know, the Amish got it right. I wouldn't call it shunning (laughing), but you know its that kind of thing. In other words we let the community know that this person's recalcitrant. There's no possibility of reconciliation. If there's a possibility we try to help them" (Interview with Beth Din Judge November 30, 2011). For the apparent few who suffer from limping marriages, the suffering had been so acute for the women that a group of Jewish women organized to lobby the Canadian government for a number of years to include a legal provision in Canadian law that required a Jewish husband to grant the *get* upon receiving a civil divorce.[163] One Toronto Beth Din judge stated,

> But when it comes to the Jewish divorce… The courts here in Ontario, and in Canada have sort of cooperated with us. In other words if they see, because once a person gets a divorce they should have a right to remarry right? If a person doesn't have his Jewish divorce, Jewishly they can't remarry in spite of the fact they got a civil divorce. So then the courts are saying you're hindering civil divorce procedure. So therefore they say you cannot do anything to prevent anyone from remarrying once they get a civil divorce. So they will kind of push the issue with the husband if he is the recalcitrant one. And it is [often that] he's going to punish her. He wants certain things out of her. So there is what we call in Canada the *get* law. There is a legislation. (Interview with Beth Din Judge November 30, 2011)

[163] See Norma Baumel Joseph 1994.

This is a fascinating case where at the bequest of religiously vulnerable people the state has agreed to attempt to intervene in religious matters where unjust oppression occurs. I know of no cases where this was effective. However, there was a recent highly publicized case in which a woman sued her husband for not granting her a Jewish divorce after he signed a civil divorce document promising to do so.[164] The case went all the way to the Supreme Court of Canada where the husband was ordered to pay nearly $50 000 in damages to the woman for the fifteen years he kept her in *agunot* or chained, which put her past child rearing age before she could remarry within her community. However, this was apparently not enforced because of the amendments to Canadian law. Rather it was enforced as a contract that the husband signed and then defaulted on. Therefore, the new legislation requiring a civilly divorced husband to grant the *get* has, to my knowledge, not been tested. In summary, one Jewish Rabbi stated,

> In my opinion, the real effect of the McGuinty decision did not prevent religious courts from continuing, but prevented the recommended safeguards from taking effect. McGuinty rejected the suggestions of his commission after what I think was a misguided hue and cry from feminists alarmed by sharia law. I believe it was a grievous error. What did they think Marion Boyd was proposing? They could have had safeguards established in law. Instead, they got the worst possible results. People continue to use sharia courts, but without any of the safeguards Boyd had proposed for the women who can be easily taken advantage of. (Personal interview April 18, 2008)

When asked whether faith based arbitration in the Jewish community was ongoing, one Jewish woman lay-leader stated,

[164] See Wendy Leung 2008.

> Oh absolutely! The only thing that's been removed is the government support. What's really ironic is that it seems that the reasoning of the government was that they wanted to make sure to secure the rights of the vulnerable. But really what they've done is they've removed any kind of accountability that would have secured the rights of the vulnerable. Communities are going to continue to do this anyway. Without question. I mean, faith based arbitration panels are empowered by their community. So with the government pulling supports it doesn't take away the community empowerment, you know, it just removes a layer of security. That's the irony of what happened. They actually accomplished the opposite of what they were hoping to accomplish. The matching of the two is really what will secure vulnerable people, because you could always have reviews and you could always appeal something as not being in line or supportive with Canadian values and Canadian law, and its much harder now. (Personal Interview April 2, 2008)

A number of observations may be made about the experiences of the Beth Din and practices of Jewish law in Canada. First, it is clear that all forms of faith based arbitration have not been forbidden. There are new protections, and the arbitrator must in good conscience formally declare that the arbitration has been decided according to Canadian law. However that is not an issue as in most matters the Beth Din adopts judgments very close to Canadian legal norms, but it claims to be able to do so fully in keeping with Jewish law. Therefore, the Beth Din claims that its practice of Jewish law and Canadian law is integrated. Secondly, the Beth Din and many other religious organizations are not in a position to afford the protections the amendments to the *Arbitration Act*. This could potentially disadvantage vulnerable people, for while the

amendments included new protections in the *Act*, simultaneously the new protections were made inaccessible to the people who might benefit from them most. Third, assumptions voiced in the media that Islamic law is hopelessly patriarchal and backward while Jewish law is presumably much more acceptable to Canadian standards overlook the fact that Jewish legal tradition is much closer to Islamic legal traditions than Canadian legal norms. Many would be surprised to find that Islamic law grants far more powers for women to receive a religious divorce denied by their husbands than the Jewish legal tradition. Furthermore, as documented in this chapter, the practice of Jewish and Islamic faith based mediation and arbitration is also very similar. Jewish and Islamic faith based mediation and arbitration is carried out in close proximity to Canadian legal norms, and Canadian law is practiced as consistent and integrated with Jewish and Islamic law, as both legal systems allow for abiding by the laws of the land. Given the fact that Jewish communities had been practicing faith based mediation and arbitration for many years, and the similarity between Jewish and Islamic family law, the reaction against Muslims practicing faith based mediation and arbitration suggests that Jewish communities are regarded as an accepted community in Canada (and anti-Semitism is socially unacceptable) while Muslims are still regarded as foreign and dangerous (and Islamophobia is not widely regarded as socially unacceptable). Finally, the Jewish case suggests a caveat to the separation of religion and state approach advocated by the McGuinty Government. It appears from the issue of the *get*, and granting religious divorces generally, that there may be room for state coercion of religious practice. There are precedents in Canadian legal practice of coercing Jewish men to grant the *get*, which under Jewish religious legal practice is the husband's exclusive religious right. This is

justified because it is in the state's interest to protect citizens who may be unfairly disadvantaged by the religious practices of others. Whether or not state coercion of religious matters in the realm of granting Muslim divorces for the sake of protecting vulnerable people is a viable option remains to be seen.

## 6.7 Mediation and Religious Divorce: Discussion and Conclusion

One of the main points I have sought to emphasize in this chapter is the contrast between the issues that were thought to be important in the public "Sharia debate" regarding faith-based arbitration and the issues that are actually important to Ontario Muslims. Because of the media coverage, the public debate imagined that the most important issue had to do with formal arbitration.[165] This assumption meant that much of the debate focused on issues that could be legally decided by a third party in the context of arbitration, such as amounts of spousal support and child support, and division of resources upon marital breakdown. However, arbitration proper occurs only when two parties in dispute choose a third party to make a binding decision on behalf of both parties. Very few in the Muslim community, leaders or adherents, were or are interested in formal faith-based arbitration as such. The majority of clients seeking Muslim civil dispute resolution services are women in need of a religious divorce. Furthermore, the majority of Muslims who are seeking advice from religious leaders on how to divide resources, establish amounts for child and spousal support, or informally decide custody according to Islamic tradition Islamically in the event of divorce are not interested in subjecting these decisions to formal arbitration, and I found no Muslim leaders or

[165] "Formal" arbitration is redundant, but I include it to emphasize the difference between that and "informal" mediation.

organizations that were anxious to encourage couples to have these issues formally arbitrated, religiously or otherwise. This is not the case because Muslims now imagine faith based arbitration to be legally forbidden. The demand or desire is simply not there. The most dramatic case in point is that of the IICJ. Aforementioned, the IICJ is the only organization I found that fully understood the nature and requirements of the *Arbitration Act*. Further, its members understand that limited forms of "faith-based arbitration" are *still allowable and legally enforceable* even under the new amendments to the *Act* as long as certain requirements and guidelines are followed. However, the IICJ has never performed a formal arbitration process, nor have their clients requested or inquired about it. Moreover, the IICJ has not attempted to use its knowledge of the *Arbitration Act* to either market or pressure formal arbitration onto their clients. Rather, the majority of the small number of clients of the IICJ, as is the experience of *all* other Muslim organizations and leaders I have interviewed, are looking for assistance with some form of religious divorce whether it be *talaq*, *khula*, or *faskh*.

# Chapter 7:
# Conclusion

During my fieldwork for this dissertation I found that it is mainly women who seek out the services of Muslim leaders and institutions on matters related to family law. Most commonly, Muslim women are looking for a religious divorce in addition to the civil divorce so that they can move on with their lives and perhaps remarry within their religious community with a free conscience that they are not committing adultery by doing so. I also found that, if Muslim women are experiencing oppression in the realm of family law matters, most commonly it is oppression relating to the granting of the religious divorce. A number of social workers in Muslim communities spoke of women who were not granted a religious divorce, especially if the husband did not want to divorce her. Some recalcitrant Muslim men would like to keep their ex-wives "chained" to them by religious marriage, even if they have had a civil divorce, and even if he has moved on and married someone else. These men often do so out of bitterness because they did not initiate the divorce, or because they want to punish their ex-wives. Sometimes they will use religious divorce as a bargaining chip in separation negotiations to lower spousal support. Sometimes men will simply disappear or move back to their homelands because they cannot provide adequately for their families. Whatever the reasons, my fieldwork suggests that not being able to obtain a religious divorce is by far the largest potential source of religious oppression related to family law matters that Muslim women may face in Ontario.

However, I also found in my fieldwork several Muslim leaders and institutions that are attempting to grant religious divorces as freely as possible. I found Muslim

leaders and institutions going out of their way to seek out schools of Islamic law that they may not normally use in order to grant religious divorces to Muslim women with limping marriages as frequently as allowable. I found Muslim social workers that would encourage women not to give up the first time they were denied a religious divorce and who may even recommend a specific religious leader or institution that they know would grant the religious divorce readily. Therefore, based on my fieldwork I found that faith based mediation of matters such as child support, spousal support, division of marital assets, custody, etc. was not the most important issue to Muslim communities. In fact I found relatively few Muslims looking for or providing these services. Rather, my fieldwork suggests that the issue of granting or withholding the religious divorce is much more important. The changes made by the McGuinty government to the Arbitration Act are excellent as far as they go. However, they do not touch the most important issue affected by religion in the area of the private resolution of family law matters for Muslims in Ontario, the religious divorce.

In the sections that follow, I attempt to first expand my consideration of how a secular Canada in the context of the policy goals of its laws on multiculturalism, accommodates the *Canadian Charter* guarantee of religious freedom of people who wish to practice faith based arbitration in Ontario, as well as what the limits of this accommodation are by revisiting the theoretical contributions of this dissertation in light of my fieldwork findings. The second section attempts to further answer my thesis question through an evaluation of previous scholars who argue for transformative accommodation in legal matters in light of my fieldwork findings. I argue that transformative accommodation is an example of anti-imperial and feminist forms of

secularism that would serve as a framework for policy-making in the area of faith-based arbitration in family law. The third section makes several suggestions for policy development based on my findings in the spirit of anti-imperial secularism and post-secular feminism. Finally I make suggestions for future research.

## 7.1 Is Secularism Bad for Women?

In this section I revisit the theory discussed in chapter two in light of my fieldwork findings. A common assumption expressed by many during the Sharia debate was that secularism is almost always good for women (Razack 2008). Those who hold this position appear to assume both that secularism is nearly monolithic, and also that it has not been used in the service of imperial and dominant (including gendered) interests. If "dangerous Muslim men" and "uncivilized sharia" were the main "problems" identified with faith based arbitration in the so-called sharia debate, then secularism was most often represented as the solution to these problems. We need to challenge these comfortable assumptions because secularism has historically not only been diverse, but also frequently conducive to dominant sexist and colonial interests. However, it would be unwarranted to argue that secularism will always be harmful for women.

Imperial secularism and colonial feminism in the case of the "sharia debate" placed the overwhelming responsibility for the potential disadvantage of Muslim women almost exclusively on "dangerous Muslim men" and "uncivilized sharia" (see chapters four and five). The problem with these approaches is that they hide several other reasons – cultural, social and structural – that work in concert to disadvantage Muslim women on this issue. Moreover, as a direct result of these approaches, numerous methods and

resources that could have facilitated much better protection of Muslim women were ignored or not well developed. I have argued in this dissertation that imperial formations of secularism share responsibility in creating the conditions for the potentially unfair treatment of vulnerable people generally and Muslim women in particular. Yes, Muslim women may be harmed by patriarchy among some Muslim men and by particular interpretations of sharia. However, orientalism, racism, western forms of patriarchy, the culturalization of inequities and deviance in Othered minoritized communities, hierarchy, colonial feminism, imperial secularism, and generally the pursuit of western imperial interests abroad and domestically contribute greatly to creating the conditions for the marginalization of and inequity experienced by Muslim women globally and in Ontario specifically.[166]

One unseen and direct result of imperial secularism in the sharia debate and resulting policy has been the obfuscation of several methods and resources for facilitating Muslim women's rights and agency. In chapter five I argued that the discourse used in much of the media and public discourse on the so-called sharia debate paternalistically infantilized Muslim women by imagining them generally to be largely devoid of human agency. The Othering accomplished by the public discourse on the sharia debate generally shows the secularizing function of media institutions, as I have defined imperial secularism as in part a hierarchy producing and maintaining program.[167] Given this dominant discourse on the "imperiled Muslim woman," as I argued in chapter four,

[166] Razack has suggested that while patriarchy and inequity are significant threats to vulnerable people in a number of Muslim homelands, the discourse and state policies on Muslims in the West are the greater threats to Muslims living in the West generally, and Muslim Canadians specifically at present (Razack 2009, 163).

[167] And as discussed in chapter two, my concept of religionization not only allows me to provisionally define the object of my study as "religious," it enables me to see that religionization is an important tool of imperial secularism for its effective hierarchy producing capability.

imagining Muslim women to be largely devoid of agency in the face of the "dangerous Muslim man" and "uncivilized sharia" has led to policy developments largely designed to aid persons imagined to be in need of rescue and to be without agency instead of policies designed to facilitate the agency of vulnerable people. This has been a major oversight because the realities of de facto legal pluralism mean that the "one law for all" approach is not a real possibility currently in Canada (Bunting 2008; Bakht 2008). Even though technically an agreement can no longer be enforced if religious laws were used as the basis of deciding a dispute in a formal arbitration, there are several ways that religious laws can be made a part of legal contracts that are legally enforceable. In other words, the legal system remains overwhelmingly dependant on agents exercising their agency in order to bring to bear the protections the legal system offers. This means that policy designed to protect non-agents could very likely be largely ineffective. Policy designed to better facilitate the agency of vulnerable people is what is needed. I make several recommendations in this regard in section three of this chapter.

Exploring what Muslim communities are doing on the ground has also revealed several realities that media pundits, public spokespersons, and policy makers did not expect. There are few Muslim service providers that are attempting to pursue the offering of faith based arbitration *per se*. The vast majority are offering religious divorces in addition to legal divorces and this by far, as I have argued in chapter six, is the major issue of inequity facing Muslim women in Canada. This issue has not been touched by the amendments to the Arbitration Act. Furthermore, those Muslim family service providers that are offering legal advice regarding how to dissolve a marriage according to Islamic tradition, for example, are doing so in the context of mediation, the results of

which can be entered into a separation agreement and are therefore also legally enforceable. Such contracts again are not touched by the recent changes to the Arbitration Act. Furthermore, the attempt to protect vulnerable women through the revisions of the Arbitration Act seems disingenuous given that legal aid is still not provided to those choosing to resolve their civil disputes through arbitration. This means that although what has been changed in the Arbitration Act is quite good as far as it goes, it does little to touch most of the issues that concern vulnerable people on the ground.

Furthermore, we do not find the majority of Muslim service providers shamelessly attempting to take advantage of Muslim women. Although certainly patriarchy is a major concern among Muslim communities as it is among all Canadian communities, we see numerous examples of Muslim civil dispute resolution service providers working to benefit women as best they are able in their particular positions. For example, several Muslim organizations go out of their way to liberate women from religious marriages against the will of recalcitrant husbands in order that women might better perceive themselves to be fully divorced from these men, as well as to free them to remarry within the community if they wish. The research results presented here challenge the tone of the "sharia debate," while still being realistic about the need for policy developments that genuinely protect and facilitate the agency of vulnerable peoples generally, and Muslim women in particular.

I use the new concepts and revised theories presented in this dissertation to express my general theory that the "sharia debate" was an example of how Canadian secularism distorted public policy debates by positing abstract caricatures of a Muslim "other", specifically, the vulnerable, uneducated, Muslim woman and the predatory,

dominating, irrational pre-modern Muslim man. Sherene Razack refers to these stereotypical figures as the "imperiled Muslim woman" and the "dangerous Muslim man". What I have termed imperial secularism served several functions including racism, sexism, anti-immigrant sentiment, Orientalism and Islamophobia. This form of secularism was deployed by several figures and organizations in the name of colonial feminism over against Islam and Muslims in Canada generally. This form of secularism operated through a discourse that did not refer to real women. Therefore I introduce original empirical evidence to show that these media and public discourses have nothing to do with the real lives of Muslim Canadians and therefore are an abstract fabrication of an Orientalist imagination.

Building on Asad's insights regarding France, Razack examines how the public discourse operated in Ontario's "Sharia debate." Razack argues that the secular/religious divide was made to stand in for a racialized colour line separating white modern civilized subjects over against premodern racialized and even barbaric Others in need of being brought (by force if necessary) into modernity (Razack 2008, 146). It is not always clear whether Razack sees religion as simply coming to stand in for racism, or whether she sees Islamophobia for example as separable, even theoretically, from racism though intersecting intimately with it here. I would argue that the latter is the better way to understand the situation, lest religious discrimination be ignored because completely reducible to racial discrimination. Razack argues that this kind of project is also intended to create neo-liberal citizens unconnected to community so that they may be better integrated into the needs and wants of modern capitalist economies (Razack 2008, 169). Furthermore, the discourse of the so-called "Sharia debate" further illustrated Canada's

commitment to the "war on terror" in the context of a larger effort, Razack argues, in which Canada is anxious to solidify its membership in the family of privileged and dominant white nations (Razack 2008, 160).

Scholars such as Sherene Razack (2008) have convincingly argued that although patriarchy is certainly a major concern of several Muslim women living in Muslim countries often the greater threat to Muslim women in the West is the racist and imperial discourses and projects that seek to benefit dominant populations and marginalize minoritized women. However, because of the lack of research into what is happening in Muslim communities on the ground, Razack and others critical of racist and imperialist projects and discourses have nonetheless concluded that the McGuinty government's decision was the right one, at least for now. She states, "[w]here I run aground, however is in the perception of risk. Many of my good friends breathed a sigh of relief when Premier McGuinty announced the end of faith-based arbitration. These are friends who know the power of fundamentalism and how much it oppresses women. They are women who insist that Sharia always works in favour of men and that for it to work otherwise requires considerable resources that Canadian Muslim women do not have. Making equality arguments within Islam certainly requires a long-term strategy" (Razack 2008, 171). I hope that my work has clarified several of the concrete issues surrounding the debate and actual practice of private ordering in minoritized communities, as well as the substantial complexity of the issue of allowing or denying faith based arbitration counter to the simple yes/no manner in which the debate was characterized.

I have argued that imperial formations of secularism have been deeply detrimental to minoritized and religionized women. However, there are other types of secularism that

might better facilitate the promotion of equity and agency of women generally, and Othered women specifically. I have argued in this dissertation that anti-imperialist secularism and post-secular feminism must be developed to better protect and facilitate Muslim women's agency, opening up a third option for Muslim women between potentially patriarchal communities and potentially racist and imperialist western nation states (Khan 1998; Khan 2000). Anti-imperial forms of secularism aid in the struggle against Orientalism, racism, the culturalization of deviance or inequity in minoritized communities, and hierarchies. In the context of Canadian multiculturalism, Canadians must uncover and counter those assumptions rooted in what I have called imperial secularism. Post-secular feminism is at once anti-imperial in thrust, but also by its name suggests a criticism of colonial feminism for assuming that secularism is always the best way to protect the rights of, especially religiously minoritized, women. Colonial feminism, as stated above, blames any patriarchal inequity experienced by Muslim women almost exclusively on Muslim men and Islam, suggesting that Muslim women are primarily the victims of their culture. Post-secular feminism rather recognizes several global, imperial, and economic contexts that create the conditions for global patriarchy, and challenges these other sources of patriarchal oppression as well. Building on Habermas' notion of the post-secular, post-secular feminism further takes religious subjectivity seriously, and attempts to achieve feminist goals without marginalizing religious subjectivity or assuming the superiority of imperial forms of secularism.. Imperial secularism must be countered with anti-imperial secularism; colonial feminism must be countered with post-secular feminism, and these will help achieve the policy goals of Canadian multiculturalism in the arena of combating religious discrimination,

accommodating religious diversity, and protecting religious freedom without compromising individual rights. Rather than attempting to outline what each of these might look like in a general and theoretical way, I have made specific policy recommendations below in section three that I think work towards these ends in concrete ways through this particular case study of faith based arbitration generally and the "sharia debate" specifically.

## 7.2 Return to Theory: Transformative Accommodation

Now that I have offered my analysis of what I deem to be imperial secularism and colonial feminism in the sharia debate and resulting policy, I attempt here to return to our earlier theoretical discussion in chapter 2 in order to propose forms of anti-imperial and feminist secularism to address the broader concerns of inequity raised in the so-called sharia debate in the Canadian context. In order to right the damage of the discourse on the "Sharia debate" as well as the oversights of the resulting policy practice of the government, Canada must better embrace critical multiculturalism generally as well as anti-imperial secularism and post-secular feminism specifically. I argue that transformative accommodation as proposed by Ayelet Shachar and Anver Emon is in part an attempt to craft just such a post-secular feminist and anti-imperial secular accommodation of religious legal diversity. Transformational accommodation asks how, and to what extent legal codes can themselves be diversified in order to build legal diversity that accommodates the legal traditions and norms of diverse cultures without compromising individual rights or overloading the state. How much legal pluralism can Canada incorporate, if any, without disadvantaging women for example?

### 7.2.1 Ayelet Shachar: Legal Pluralism

Ayelet Shachar's *Multicultural Jurisdictions: Cultural Differences and Women's Right*s offers a robust development of a program for legal pluralism specifically that attempts to address the question of legal transformation, pluralism and individual, especially women's, rights (2001). In place of earlier forms of accommodating cultural diversity through the law, Shachar proposes what she calls "transformative accommodation" of cultural diversity in state legal matters in her well-known work *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (2001). Here I evaluate this program in light of faith based arbitration generally and the Sharia debate specifically. Transformative accommodation is constituted by four basic principles. First is "allocating jurisdiction along "sub-matter" lines (Shachar 2001, 119-120). This means that diverse areas of contestation between cultural groups and the state can be further divided into sub-matters. For example, family law in the area of marriage can be divided further into the sub-matters of status and property relations. Shachar argues that transformative accommodation allows competing entities to have a share in or joint jurisdiction of matters and sub-matters rather than falling back into the either/or position of *either* the state *or* cultural/religious communities having exclusive reign over a given jurisdiction. For example, perhaps the state will want to maintain exclusive power over the ability to assign the status of divorce, but it may share jurisdiction with religious communities regarding the status of marriage. Authorized religious leaders may act as representatives of the state in marrying couples. Furthermore, both the state and religious communities might claim a role in governing property relations between married couples.

Shachar's point is that if larger jurisdictions are divided into sub-matters, it is easier to see how jurisdiction might be shared rather than exclusively assigned to the state *or* cultural communities.

Second, is the "no monopoly" rule (Shachar 2001, 120). This simply means that as often as is reasonably possible, individuals should be able to choose between either the state or cultural communities for governance on certain legal issues. Together with this goes the third requirement of transformative accommodation, "the establishment of clearly delineated choice options" (Shachar 2001, 122). These conditions aim to ensure that citizens may always choose their authority, rather than only one authority legitimately holding sway over a specific jurisdictional matter or sub-matter. Furthermore, built into the clearly delineated choice options are openly laid out "reversal conditions." This means that the parameters are clearly laid out to help clients identify when the relevant jurisdiction is not meeting the needs of individuals so that they might *partially* opt for the other jurisdiction. This aims to make opting out more feasible in that the conditions for opting out are agreed to in advance by both the state and cultural communities, and they are explicit and therefore individuals are made aware of these reversal conditions in advance. Moreover, opting out does not have to mean, for example, that a religious community member must completely opt-out of his or her community, but only on very specific and clearly delineated sub-matters. If religious communities have agreed to these conditions in advance, it is less likely that individuals will be excommunicated or shunned for opting out of one aspect of a sub-matter of jurisdiction. Furthermore, religious communities may thus be pressured to make changes gradually to accommodate especially their most marginalized members (Shachar 2001, 144).

Conceivably, state jurisdictions could be encouraged to better accommodate cultural/religious difference as well if clients continue to opt for community-provided services rather than state institutions. Finally, a "single cohesive system of checks and balances guarantees that neither the state nor the group is enabled to govern alone" (Shachar 2001, 143).

Shachar argues that although some minority groups will resent not possessing the sole power to authoritatively govern a particular jurisdiction, this system potentially offers the best of both worlds. Importantly, Shachar maintains that the "last word on the 'reversal' of jurisdiction belongs to those group members who are at most risk from oppressive group practices" (Shachar 2001, 144). This approach, Shachar argues, is superior to those that oppose all state interference in private affairs, given that states inevitably interfere in private matters in any case, even when they simply turn a blind eye to internal community norms that may disadvantage vulnerable people. The question for Shachar then becomes *how* the state is to interfere in private lives, not if.

Shachar introduces the term *privatized diversity* into the sharia debate that assists in conceptualizing a component of the proposal of the Islamic Institute for Civil Justice to offer faith based arbitration (2008, 575). If "multicultural accommodation" means making accommodations to diverse cultural practices within the context of the existing state, then "privatized diversity" refers to the option of minority cultural groups to opt out of state requirements and institutions altogether. In these instances, diversity is "privatized," that is, relegated to the "private" sphere that includes personal life, family relations, and ethno-religious communities and associations. In this case, although the Islamic Institute of Civil Justice was attempting to join in with Orthodox Jews for

example who were operating within already existing Arbitration law, Shachar argues that the Islamic Institute of Civil Justice also voiced its desire to at least partially "opt out" of the family law system through the Arbitration Act. Even though part of the point of binding arbitration is to make such decisions enforceable by the state, and the Arbitration Act is itself state legislation, Shachar makes the point that the Islamic Institute of Civil Justice still apparently wanted as far as possible to apply Islamic legal codes in family matters rather than the Family Law Act. Thus it sought privatized diversity to a significant extent. Shachar opposes both the privatized diversity proposed by the Islamic Institute of Civil Justice and the much more exclusionary form ultimately carried out by the McGuinty government which did not eliminate faith based arbitration but rather moved it completely into the private realm, i.e., the realm of underground arbitrations and mediations. Instead, she offers a variety of proposals designed to work toward the transformative accommodation program she recommends in *Multicultural Jurisdictions*. As Shachar argues "individuals and families should not be forced to choose between the rights of citizenship and group membership: instead they should be afforded the opportunity to express their commitment to both" (2008, 574). To this end she proposes a "non-dichotomous" route (592).

Shachar's suggestion is to allow faith based arbitration again but with clearly outlined protections in the form of explicit choice options and reversal conditions. The area of family law is already divided along submatter lines, which better allows community members choices on specific matters rather than suggesting that a community member must opt out entirely of one's community to afford the alternative legal options the state might offer. For example, the matters of spousal support and division of family

assets are already subdivided in family law, meaning that one could choose to accept the right to fifty percent of the family assets (according the *Family Law Act*), but at the same time one could choose to follow religious legal traditions regarding spousal support. The benefit here according to Shachar is that the legal situation does not have to be all or nothing regarding secular or religious law. If one wants to adjudicate a certain matter under religious tradition, and another matter under the Family Law Act, one has that choice. A litigant does not have to choose only religious law or secular law for all family law matters. Moreover, offering people this choice would ensure that no one community has a monopoly on offering this type of service, thus fulfilling the first two requirements of transformative accommodation (allocating jurisdiction along "sub-matter" lines and no monopoly). Furthermore, if faith based arbitrators wanted to offer their services such that the results of their decisions would be enforceable by the state, Shachar suggests the state draft legislation that faith based arbitrators must first and foremost employ Canadian legal default norms of the Family Law Act. Several other protections could also be built into the process such as mandatory independent legal advice, training of arbitrators, record keeping and the like. In this case faith communities voluntarily agree to statutory default norms established in the Family Law Act in order to afford the enforceability of their arbitral outcomes by the state. Such a system, Shachar argues, could promote the development of moderate interpretations of religious traditions in the area of family law practices, at the same time it promotes the diversification of existing state institutions as well. Shachar notes that the Jewish community claims to have elected to adhere to the default norms of the Family Law act on its own initiative previously, even though before the recent changes to the Arbitration Act any form of law in fact was allowable in

enforceable arbitration (Shachar 2008, 603). Shachar's program may raise the question of whether it only protects diversity that is not substantially outside Canadian law. I believe her aim is to include more diversity than, for example, the McGuinty government has chosen to in prohibiting faith based arbitration altogether, while at the same time imposing acceptable limits, and she attempts to accomplish this in a more liberal, rational, and less arbitrary way than the McGuinty government has done, or some religious communities have proposed.

I argue in response to Shachar's proposal simply that essentially what she recommends has in fact now all but been put into place. Several clearly outlined reversal conditions are now enshrined in the revised Arbitration Act. However, two major changes need yet to be made to achieve Shachar's vision. First, the province needs to provide legal aid to those electing arbitration but unable to shoulder the costs. Without this, those most in need of the legal protection (despite the requirement for independent legal advice in the revised Arbitration Act) will be precisely the ones who cannot afford the protections the revised Act now affords. Second, religious arbitration must be allowed again in order for Shachar's vision to fully materialize. This would fulfill the only remaining of the four parts of transformative accommodation that is not fulfilled, addressing the current monopoly of the state and religious community over the services they provide. For example, if faith based arbitration were allowed under the Arbitration Act, then religious communities would not have complete monopoly on providing religious dispute resolution services, nor would the state have a complete monopoly on legally enforceable dispute resolution services that encompass the rights afforded by the Family Law Act. Again, the potential benefit of this arrangement is that if a client was

not receiving satisfactory dispute resolution services in her religious community, she could turn to the Arbitration Act without completely rejecting her religious tradition. Furthermore, if a client felt that she did not prefer the secularism or dominant culture as manifested through the court system, she could turn to faith based arbitration under the Arbitration Act and therefore not be required to completely give up all of her rights under the Family Law Act in order to observe her religious tradition in the processes of family dispute resolution.

In sum we have come very close to realizing Shachar's vision in one sense, and at the same time exponentially more distant from it. Excellent new reversal conditions in the form of several protections have now been included in the revised Arbitration Act, at the same time the monopoly of the state over family law matters was apparently reaffirmed to the exclusion of choice options related to faith based arbitration. Moreover, the trust necessary between majority and minoritized communities for transformative accommodation to work has been even more battered and bruised. As Shachar has argued, the tone of the "sharia debate" has likely promoted "reactive culturalism," that is, the retreat away from the secular state back into one's culture as a response to the perceived rejection by mainstream society of the culture in question. If the issue of faith based arbitration were raised again in the press, the old stereotypical discourse is now ready to rematerialize against it, making the potential to allow religious arbitration again virtually impossible.

### 7.2.2 Anver Emon: Multicultural Jurisprudence

Anver Emon suggests that "the government and private sector can facilitate the development of a Muslim family-service civil society," (Emon 2006, 353) but recognizes

that civil society alone may not always produce just ends in this realm. Thus, he recommends government regulated oversight of processes related to family services. Emon here is advocating not just the open competition between public state and private religious entities on this matter but also the public funding of religious family service organizations in order in part to ensure greater oversight and regulation of religious providers of family services (Emon 2006, 354). For example, Emon suggests that the government might build tax auditing procedures to "ensure that the financial support for each centre represents a community of interests, rather than a single donor trying to unduly influence the debate unilaterally" (354). I would add to that the general requirement that religious organizations receiving tax breaks (and in this case potentially tax dollars) would be required to be run by an elected board of governors. Interestingly, this too has already been practiced by the McGuinty government in some small measure. As mentioned in chapter 6, the McGuinty government has already used public tax dollars to pay for the contractual arrangement for services delivered by a Muslim religious organization, the Canadian Council of Muslim Women, to research this issue further, and has also paid them to create an Islamic marriage contract template that clearly outlines Muslim women's rights according to specific Muslim traditions. Beyond this, Emon suggests all the checks and balances that the revised Arbitration Act now includes, such as requirements regarding training of arbitrators, record keeping, adherence to the default norms of Canadian jurisprudence, and independent legal advice, although again, ironically these have also now been excluded from being applied to faith based arbitration in the revised Act.

What I think Emon offers here is a proposal for an open market system of religious family service provision that complements the transformative justice system that Shachar suggests. Muslims will not simply have the option to choose between secular state forms of legal resolution of family law disputes and religious forms as Shachar suggests, but they will also for example have a great variety of Muslim family service institutions to choose from as well. This adds a further level of choice and therefore a further element of "market" regulation into family law service provision.[168] The other suggestion that Emon makes that Shachar does not is the public funding of religious organizations that provide these services. Shachar suggests clear choice options and reversal points, but not necessarily the funding of religious organizations in order to better develop as well as better oversee these institutions. Shachar's program offers rather the benefit of state enforcement at the cost of state oversight, but this is state oversight at a distance in the sense that organizations are free to operate by the Family Law Act and observe its statutory norms in exchange for the potential enforceability of its arbitral awards, or not.

Facilitating Muslim family-service civil society through direct government funding of Muslim institutions presents a number of benefits as well as disadvantages. The obvious advantage is greater likelihood and assurance that the rights of vulnerable people will be protected by the legal norms of the state. However, a potential disadvantage is that Emon's proposal might place a heavier hand of oversight on

[168] I include here a qualification that Emon included in his own article in full, "To use 'market' and 'Islam' in the same sentence might strike some as odd, if not inappropriate. The idea here, though, is not to reduce religious practice and belief to some vulgar capitalist free market system. Rather, the 'market' is a metaphor used to understand how institutional development of a civil society sector can avoid current pitfalls, by ensuring a regulatory design meant to foster an open Muslim society, through various incentive structures that also protect against monopolistic control. For a study on the 'religious marketplace', see Rex Ahdar, "The idea of 'religious markets'," International Journal of Law in Context 2, no. 1 (2006): 49-65." (Emon 2006, 26 footnote 105).

minoritized and marginalized communities, suggesting a paternalistic and imperialistic approach. Perhaps Shachar's vision is preferable in this regard, as it maintains an arms-length distance between the state and service providers. However, the other major advantage of Emon's suggestion is that even though faith based arbitration is not officially allowed at the moment, the government could still proceed with facilitating the development of more general family service provision organizations in religious communities. This could have the double result that religious communities would be better equipped to protect vulnerable people over time, and in the long run this might increase the likelihood that faith based arbitration would again be allowed in future, under much more favourable circumstances. Once again, at that point the process of faith based arbitration would finally benefit from the excellent new protections and reversal conditions now afforded by the revised Arbitration Act.

Both Shachar's and Emon's proposals are examples of transformative accommodation because they propose forms of accommodating diversity, which while attempting to protect the rights of vulnerable people and avoid imperial forms of secularism, also attempt to ultimately open Canadian legal traditions and institutions to genuine change rather than forcing minoritized people to assimilate to existing dominant norms.

### 7.2.3 Veit Bader: Associational Democracy

Veit Bader attempts to answer the question of legal and institutional pluralism in western democracies in a theoretical fashion. In doing so, he suggests a model of associational democracy as a political philosophical justification for transformational accommodation (2009). Bader's revolutionary suggestion is essentially to drop

secularism altogether. There are secular ideologies such as fascism, communism, and scientism that pose threats to the moral values of secular democracies, therefore targeting religious groups for special exclusions is unwarranted. Rather, Bader recommends refocusing on applying the minimal moral values of liberal democracy in the governance of all societal groups, religious or secular, though this still includes mutual autonomy for religious groups and governmental institutions. Bader suggests a middle way between, on the one hand, comprehensive liberalism or liberal perfectionism, which strongly favors individual liberties at the expense of associational interests, such as religious groups, and on the other hand, absolute accommodation, which favors the accommodation of associations such as religious groups at the expense of individual rights, especially those of minorities within minorities such as Muslim women and children. He proposes rather a decent society that upholds minimum standards of equality and human rights without enforcing absolute equality. Bader conceives state neutrality as 'fairness as even handedness' rather than 'strict neutrality' or 'neutrality as hands off.'

However, Bader is not simply reinstalling the individualism of liberal democracy here. Associational democracy, as the phrase suggests, engages citizens as members of groups as well as individuals with certain rights. In terms of governance, associational democracy in Bader's view favours manifold levels of government, and although he recommends a strong central state, it must also be minimal. Power sharing must also be as wide and diverse as possible without threatening the stability and minimal unity of the society. In this context, Bader recommends 1. maximum accommodation of religious groups, for example, recognition of religious holidays and dietary requirements, 2. political representation of religious groups through, for example, advisory councils, and

3. public funding of faith based institutions, for example faith based educational institutions and social service providers. He shows concretely that associational democracy can justify and produce policies that are maximally accommodating of religious diversity at the same time it justifies maximal protection of vulnerable people through his recommendations regarding faith based arbitration. The more religious groups want recognition and enforcement by the state of legal diversity, the more they must apply liberal democratic moral norms. If religious communities would like to use faith based arbitration, and ultimately rely on the state to enforce arbitral awards, then Bader suggests a number of recommendations for changing the Arbitration Act to better protect vulnerable people, rather than prohibiting faith based arbitration altogether. Bader recommends mandatory independent legal advice for both parties, carefully documenting the arbitration process in writing, freedom to turn to civil courts at any time, and several other procedural measures mentioned by other authors discussed in this dissertation and largely already enacted in the revised Arbitration Act of Ontario. He does not necessarily recommend heavy judicial review that would apply default amounts stipulated in the Family Law Act for example, though I think he would agree with the current revisions of the Arbitration Act which as discussed previously subsumes the Arbitration Act under the Family Law Act in matters of family law, with the proviso of defacto legal pluralism. In sum, Bader's recommendations have essentially been implemented by the revisions to the Arbitration Act, minus the prohibition of faith based arbitration. For Bader, associational democracy would rather have allowed faith based arbitration to continue, but only in the context of the type of protections now offered in the revised Arbitration Act.

Bader's contribution is to offer a larger political philosophy justification for transformative accommodation. My position is that both Shachar's and Emon's positions are laudable, but if Shachar's is not fully realizable at the moment, Emon's could be pursued in the meantime, preparing religious communities with better resources to provide alternative dispute resolution services if and when faith based arbitration is again allowed in the context of the Arbitration Act.

### 7.2.4 Lori Beaman: Deep Equality

Veit Bader's associational democracy, I would argue, is founded on the principle that Lori Beaman identifies as "deep equality." Beaman argues that the dominant discourse of "reasonable accommodation" needs to be replaced because, like the term "tolerance," reasonable accommodation suggests an us/them binary that must be challenged. In this binary, one group is imagined as a dominant majority that is offering accommodation to another group imagined as an exceptional, "not-normal" minority (Beaman 2012, 208). She states, "when we 'accommodate' someone we, grant an exception to the rule, rather than questioning the inclusiveness of the rule itself" (Beaman 2012, 208). Beaman notes that in some recent court decisions concerning minoritized religious communities the courts have regressed to formal equality, that is a form of equality that treats everyone the same regardless of minoritized status and structural inequality in society. This is a step backwards from the achievement of a more substantive form of equality, which takes into account structural inequity in society and minoritized status, in other recent court decisions. Reasonable accommodation would presumably at least attempt to achieve more substantive modes of equality over formal

modes, but Beaman maintains that this still does not go far enough because of the us/them binary it continues to support.

Therefore, Beaman promotes a commitment to "deep equality" instead of "reasonable accommodation." She states, "As an emergent concept, deep equality might include a number of elements, including a substantive notion of equality, institutional flexibility, an emphasis on shared ground rather than otherness, a simultaneous recognition of difference that respects the richness of social texture, a complex understanding of identity, and agonistic respect[169]" (Beaman 2012, 213). Deep equality strives to be flexible as it attempts to achieve strong substantive forms of equality over weak forms of substantive equality or formal equality. Deep equality means acknowledging one's privileged position that comes with beloning to the majority rather than assuming hierarchies of accommodation and tolerance to be normative. Deep equality is "needs-based and "practice-oriented," innovative and creative" (Beaman 2012, 213). In short, deep equality assumes the real equality of all people, to the extent that the justness of laws and social norms are questioned rather than the noncomformity of minoritized groups assumed and their relative accommodation negotiated.

Beaman makes an important observation about the "reasonable accommodation approach of great relevance to this dissertation. She states,

> Questions about agency, particularly that of women, are often used as a beginning point for discussion about what is reasonable accommodation or an appropriate level of tolerance. These discussions can lead to a situation in which women and children are "protected," as was the frequent refrain during the hottest moments of

[169] By "agonistic respect" Beaman means, building on the work of William Connolly a "willingness to suspend one's own position to open space for conversation that involves shared exploration of possibilities" (Beaman 2012b)

> public discussions about polygamy. Policies or approaches are therefore developed "for their own good," with little or no consideration of the ways in which women themselves have and exercise agency. In the context of reasonable accommodation, practices that implicate women, such as the wearing of the niqab and hijab or polygamy, are then unable to be accommodated with little unpacking of the ways in which the practices manifest or implicate women. (Beaman 2012, 213)

This dissertation attempts to move toward deep equality by taking into account the lived experience of Muslims and Jews on the ground, and how they affect vulnerable people. I have argued that policies arising from a discourse of "rescue" have in fact left vulnerable people wanting. I suggest rather policies that recognize and facilitate agency, rather than assuming that vulnerable people must be rescued despite their putative lack of agency.

Notwithstanding a number of legitimate criticisms of multiculturalism, it can also positively enhance "not only the recognition of difference but also a simultaneous questioning of the very social construction of difference" (Beaman 2012, 215). This facet of multiculturalism facilitates deep equality. There are of course limits to freedom, religious or otherwise, that must be protected in the interests of justice. Yet Beaman argues, "Limits, though, and discussions of harm must be carefully worked through with a full exploration of the practice in question and an assessment of its social and cultural context" (Beaman 2012, 220). Deep equality attempts to establish justice on the basis of the substantive equality of all people, regardless of hierarchy and differentiation of power in society. In order to achieve that kind of equality, continuing inequity and hierarchy in society must be acknowledged, and policies and forms of justice developed to right these

inequities. A commitment to deep equality could, for example, lead to the adoption of the institutional and legal pluralism that Shachar, Emon and Bader encourage.

## 7.3 Policy Recommendations

Having discussed the potential for developing transformative accommodation in the context of the faith based arbitration debate, I turn now to more specific and concrete policy recommendations meant to further develop an anti-colonial feminist and anti-imperial secularist approach to the issues of inequity raised by the so called sharia debate. One of the main points I have sought to emphasize in this dissertation is the contrast between the issues that were thought to be important in the public "Sharia debate" regarding faith-based arbitration and the issues that are actually important to Ontario Muslims. Not unreasonably, the public debate imagined that the most important issue had to do with formal arbitration.[170] This assumption meant that much of the debate focused on issues that could be legally decided by a third party in the context of arbitration, such as amounts of spousal support and child support, and division of resources upon marital breakdown. However, arbitration proper occurs only when two parties in dispute choose a third party to make a binding decision on behalf of both parties. Very few in the Muslim community, leaders or adherents, were or are interested in formal faith-based arbitration as such. According to my interviewees, the majority of clients seeking Muslim civil dispute resolution services are women in need of a religious divorce. Furthermore, the majority of Muslims who seek advice from religious leaders on how to divide resources, establish amounts for child and spousal support, or informally decide custody in

[170] "Formal" arbitration is redundant, but I include it to emphasize the difference between that and "informal" mediation.

accordance with Islamic tradition are not interested in subjecting these decisions to formal arbitration. I found no Muslim leaders or organizations that were anxious to encourage couples to have these issues formally arbitrated, religiously or otherwise. This was not because Muslims now imagine faith based arbitration to be legally forbidden. The demand or desire was simply not there. The most dramatic case in point is that of the Islamic Institute of Civil Justice. The Islamic Institute of Civil Justice is the only organization I found that fully understood the nature and requirements of the Arbitration Act. Further, its members understand that limited forms of "faith-based arbitration" are *still allowable and legally enforceable* even under the new amendments to the Act as long as certain requirements and guidelines are followed. However, my research found that the Islamic Institute of Civil Justice has never performed a formal arbitration process, nor have their clients requested it – or even inquired about it. Moreover, the Institute has not attempted to use its knowledge of the Arbitration Act to either market or pressure their clients into entering into formal arbitration. Rather, the majority of its small number of clients, as was the case of *all* other Muslim organizations and leaders I have interviewed, were looking for assistance with some form of religious divorce whether it be *talaq*, *khula*, *faskh*, or marriage annulment.

I do not want to suggest here that the amendments to the Arbitration Act were not necessary. Clearly there are many positive benefits from the amendments. For example, because the previous version of the Arbitration Act was intended more for resolving business disputes, the relationship between the Arbitration Act and the Family Law Act had never been clearly established. The amendments define this relationship much more carefully and explicitly. Also, the unamended Arbitration Act had far too few protections

for vulnerable people built into the arbitration process. The amendments now include several of the recommendations made by the Boyd commission, as well as others, such as requiring independent legal advice.[171] The only arguably contentious issue regarding the amendments was the decision to ban the use of any legal system other than Canadian law in arbitrations.[172] If a law other than Canadian law is used in formal arbitration it will not be enforceable under the Arbitration Act. This amendment has effectively ended the use of "religious laws" in formal arbitration. Although, as the website for the Attorney General's Office points out, religious figures can still act as arbitrators and may still give mediatory advice based on religious laws that may then be entered into enforceable civil contracts (attorneygeneral.jus.gov.on.ca/english/family/arbitration/faith-based.asp). Importantly, arbitrators cannot "force" a decision based on religious law as an arbitrator in the context of a "formal" arbitration, though they may perform "advisory" arbitrations that are not binding. In my view the amendments that have been made to the Arbitration Act are valuable and important, and I do not want to detract from this reality. My point here is that, although this policy change has made potential uses of the Arbitration Act much more just for possible future use, *in practice*, the vast majority of private ordering of civil matters in Muslim communities remains untouched.

### 7.3.1 Real Issues and Imagined Crises

Having established the importance of the issue of religious divorce over the issue of formal faith-based arbitration for Ontario Muslims, I turn to the possible importance and impact of these findings. First, the empirical inaccuracies of much of the negative

[171] For a more detailed account of the amendments to the Arbitration Act please see the introduction to this dissertation.
[172] Natasha Bakht, for example, argues that banning religious arbitration was a mistake (Bakht 2005, 67-82).

media discourse and portrayals of Muslim civil dispute resolution are noteworthy. Contrary to these representations, I found several Muslim organizations and leaders attempting to accomplish Muslim divorce in a way that was intended, and perceived by clients, to be highly supportive of Muslim women's rights and interests. The vast majority of clients approaching Muslim leaders and organizations regarding civil matters were Muslim women looking for assistance relating to some aspect of Islamic divorce. In the majority of cases I found leaders and organizations undertaking efforts to free women from their religious marriages. That is not to say that there are not issues of inequity and patriarchy to be addressed. Unequal access to religious divorce is the practice of a patriarchal system of law. Therefore, I do not mean to paint an overly positive picture that suggests there are no problems with private ordering of civil disputes in Ontario's Muslim communities. Rather, I seek to challenge and complicate the much starker and overwhelmingly negative portrayals of Muslim dispute resolution that proliferated in the media during the "Sharia debate."

This leads me to my second point. I am persuaded by my findings that policy-wise the Ontario provincial government has missed the boat for a number of reasons. The positive elements of the amendments to the Arbitration Act notwithstanding, little policy has arisen as a result of the Sharia debate that has helped the vast majority of Muslims currently seeking private dispute resolution in civil matters. There are also issues of inequity and patriarchy that the amendments to the Arbitration Act do not touch. First, one of the main sources of oppression from which Muslim women suffer is being stuck in a "limping marriage." This situation arises because men have a unilateral right to divorce independent of any religious authority, while women do not. Many imams and Muslim

organizations are attempting to remedy this by freeing Muslim women from limping marriages. Second, completely outside of "formal arbitration" some imams may not be equitable in a number of areas having to do with informal civil dispute resolution. I will give three types of examples. Some imams are not willing to grant a religious divorce where clearly the state would grant a legal divorce.[173] In addition, though my findings suggest that this may be rare, some imams may give informal religious advice to divorcing couples regarding support payments, division of resources, and custody which may not be acceptable with regards to the default norms of Ontario's Family Law Act. Such decisions are not being made in the context of the Arbitration Act, but they are fully enforceable by the state if they are entered into a civil contract such as a separation agreement. Finally, some imams clearly do not recognize or know how to address domestic abuse. I interviewed several who did take it seriously and immediately advised Muslim women to call the police, but Julie Macfarlane (2012) and I both found some Muslim leaders who did not act effectively or appropriately on this issue. Once again, the amendments to the Arbitration Act make virtually no difference on any of these issues. I do not want to mention these issues in a way that simply confirms the stereotypes proliferated in the press during the Sharia debate. Just like non-Muslim communities in Ontario, there are several people living and acting justly, and there are a number of people and institutions that continue to struggle with patriarchy and other forms of inequity.

### 7.3.2 What Is To Be Done?

[173] For example, more than one of my interview respondents informed me that a woman approached them for a religious divorce after she had been refused a religious divorce from another imam.

What, if anything, can be done in terms of policy that might help Muslim women and men seeking assistance from their community regarding religious divorce and other civil disputes? I suggest three proposals. First, I turn to the issue of the granting of the religious divorce. Is there anything the state can do to improve this process? To consider this query I turn to communities of Canadian Jewish women who recently lobbied the government to change state legislation to require Jewish men to grant a religious divorce once a legal divorce has been granted (Joseph 1994; Kayfetz 1986; Leung 2008). Something similar might be considered for Muslim communities where husbands refuse to give the *talaq*, and imams refuse to grant a religious divorce on behalf of the husband. Also, a formal or informal commission might be set up that could consult with Muslim communities regarding a larger Ontario Muslim consensus on the status of the legal divorce as equivalent to a religious divorce. A number of imams and organizations in Ontario already state that legal divorce in the Canadian context is equivalent to an Islamic divorce religiously. There are international examples for this as well. An umbrella organization of Muslim leaders in New York has declared that legal divorces are valid as Islamic divorces (personal communication with Laury Silvers, November 8, 2009). If this kind of endeavor were successful in Canada, it could resolve the majority of the issues that arise in the context of religious divorce. Finally, the government could assist Muslim communities to educate their adherents about their rights under Islamic law, including specifically the possibility of recognizing a Canadian civil divorce as equivalent to a religious divorce, which several imams in Ontario do already.[174]

[174] Although this recommendation might raise concerns regarding assumptions about secularism being a clear separation between church (religious institutions) and the state, my recommendations build on several already existing connections between religious institutions and the state in Canada, in a country that has never in fact fully embraced the American model of a "wall of separation" (Biles and Humera 2005).

Second is the issue of potentially inequitable recommendations made by Muslim leaders and organizations for resolving civil disputes. The matter of potentially inequitable advice based on particular Muslim interpretations of Islamic law regarding the terms of divorce remains an issue for some Muslim women who might approach Muslim leaders who hold to patriarchal interpretations of Islamic law. Once again, with the assistance of community members willing to participate, the government could facilitate community education regarding the rights of Muslim men and women, and the options for divorce.

Although some may think the state should not involve itself in such things, there is precedent. The Liberal McGuinty government has already quietly funded a number of such projects in the Muslim community. As mentioned before, the McGuinty government has given funds to the Canadian Council of Muslim Women to enable the Canadian Council of Muslim Women to commission three such projects (see Chapter 6). The Canadian Council of Muslim Women is also lobbying the government to provide legal aid to people looking for faith-based arbitration. Currently it is not the usual practice of the government to provide legal aid in this context. This amendment appears to be a major shortcoming, for even though the Arbitration Act now requires independent legal advice for arbitrations, the people who will likely need it most – vulnerable people with few financial resources – are precisely those who would not be able to afford the lawyers in order to benefit from the protections the new regulations provide. Furthermore, the Canadian Council of Muslim Women has lobbied the government to train "cultural interpreters" that understand better the diverse cultures and religions of people accessing the justice system so that it may be more accommodating and understanding of

differences, making the secular legal system potentially more accessible and welcoming to wary Muslims. These kinds of projects are excellent precedents, and changes in public policy could distribute them more widely and market them more effectively in Muslim communities.

Third is the issue of domestic abuse. It is encouraging to find that a modest number of mosques and Muslim organizations are holding their own community education workshops on domestic violence.[175] These gatherings are certainly uncommon, but no more so than in any other religious community. Government along with Muslim and non-Muslim community organizations and NGOs might be able to assist in organizing and carrying out educational workshops designed to educate imams and other religious leaders in particular regarding how to deal appropriately with domestic violence in Ontario.

Fourth and finally, the public discourse on faith based arbitration, with all its attendant misunderstandings and stereotypical figures, which the McGuinty government did very little to clarify or counter, has perhaps done far more damage to vulnerable Muslims than faith based arbitration has or could. I strongly recommend a much more ambitious government policy of anti-Islamophobia to parallel anti-racism campaigns of the 1980s to the present. The discourse employed by McGuinty in his announcement quoted above that there would be "no sharia in Ontario" only confirmed and heightened Islamophobic sentiments rather than challenging them as he should have done.

## 7.4 Suggestions for Future Research

[175] I found three institutions that undertook such workshops recently between 2006 and 2009.

The strength of this study is in the original fieldwork investigating what Muslims and Jews actually practice on the ground with regard to faith based arbitration specifically and the resolution of civil disputes in the context of family law generally. As documented in the introductory chapter, there are several publications on the debate over faith based arbitration in Ontario that evaluate the media discourse or are theoretical in nature. My study helps to fill a gap in the research. However, in future one would like to see more studies completed that test the representativeness of these research findings. Julie Macfarlane has completed the only other substantial fieldwork project on this subject that I am aware of in Canada, and she agrees that more study needs to be done in order to confirm our preliminary results (personal communication with Julie Macfarlane, February 11, 2008). Furthermore, as mentioned earlier, there are several other Canadian provinces that have arbitration acts that could be used in the realm of family law. I would like to see research done in other provinces than Ontario on faith based arbitration, mediation, and religious divorce. Eventually, it would also be important to do cross-cultural comparison with similar laws in other jurisdictions around the world. This would help us to understand our findings in the larger national and global context, and would help us understand whether our findings in Ontario are unique or are represented elsewhere. This would allow us to understand regional differences in the governance of religious diversity in Canada and to compare and contrast the relationship between religion, multiculturalism, politics and law in various jurisdictions.

Beyond more representative studies I envision several possible new directions for future projects based on the findings of this study. First, I would like to explore the influence and effectiveness of the Marriage Contract Toolkit created by the Canadian

Council of Muslim Women (ccmw.com). This toolkit attempts to make Muslim women better aware of their rights in marriage, and to have them negotiate and protect those rights through the marriage contract or *nikah* at the beginning of the marital relationship. However, it is not clear how widely used this toolkit will be. Related to this, future research projects could explore how well Muslims are aware of their religious rights in the context of marriage, how many go to the trouble of enshrining these rights in their nikahs, and to what extent. This research would tell us whether the Canadian Council of Muslim Women Marriage Contract Toolkit has been effective or not, and it would tell us how well Muslim women are aware of their Islamic and Canadian marital rights, and to what extent they act on those rights to protect their rights through the formation of their *nikah's*. Together, this will allow us to understand how the state and groups in civil society operate to integrate immigrants and minority religious traditions into Canadian society.

Second, I would like to document more representatively how many Muslims seek out the religious divorce in addition to a civil divorce compared to how many only seek out the civil divorce, and I would like to compare these findings over time. It is clear from McFarlane's research and my own that the religious divorce is widely sought among Muslims in Ontario. However, it is not clear how many Muslims do not care to seek out the religious divorce, whether this correlates with religious adherence or ethnicity, or whether the numbers of Muslims seeking the religious divorce will go down over time as Muslim immigrants increasingly integrate into Canadian society and the numbers of Canadian born Muslims increase. It is likely that one may be more or less likely to desire a religious divorce based on his or her country of origin, or whether they

are Canadian born. This will allow us to understand changing patterns of religious divorce over time and to better understand the extent of the practice of religious divorce among Muslims in Canada.

Third, I would be interested in seeing a future study of faith based mediation more generally. The Ontario family courts have lists of Muslim lawyers and mediators that they refer Muslim clients to in the event of civil disputes. I should like to see this relationship between the secular state and faith based, or at least faith-sensitive, mediators better explored and theorized. I would also like to explore how the faith based or faith-sensitive and even culturally-sensitive nature of the mediator affects the process of mediation in diverse family-related disputes. This would fill in a large gap in the research. Our fieldwork to date has focused on religious divorce and faith based mediation and arbitration largely in the context of religious communities. However, this research would enable us to understand better what is happening with regard to religious accommodation or sensitivity in the context of court mandated mediation.

Fourth, it might be useful to investigate and compare specific ethnic groups. Many of the Muslims that participated in the study are of South Asian origin or serve South Asian communities. However, I learned in my research that Somali communities for example are somewhat different in that tribal elders, in addition to imams, still play an important role in mediating disputes. This research would allow us to better understand ethnic and cultural diversity within Muslim communities as it relates to faith based resolution of family law matters.

I would like to see the theoretical work referenced and developed in this dissertation to be further developed in the post-colonial discourse. The notions I suggest

in anti-imperial secularism and post-secular feminism should be better represented and developed in the post-colonial academic literature. This work would enable us to better understand multiple secularisms and feminisms, which ultimately will assist in dismantling colonial and patriarchal powers in the interests of building more fair and just societies.

Finally, as a part-research/part-community-building project, a Muslim researcher might explore the possibility of cooperating with Muslim women's agencies and Muslim social work agencies regarding the production of a pamphlet that explains their position on the granting of the religious divorce designed to let women know their religious options. Some Muslim women's organizations, such as the Canadian Council of Muslim Women, believe that the civil divorce counts as a religious divorce, and find it difficult to understand why women feel they must also have a religious divorce granted by a religious leader or institution. To my knowledge the Canadian Council of Muslim Women is not addressing the issue of the religious divorce at all. However, based on my research it is clear that several Muslims in Ontario do feel this need, and that having limited access to religious divorce is a substantial issue of unequal access and oppression among Muslim women with limping marriages. Several Muslim organizations might then be interested in producing a pamphlet that explains various positions on whether or not one needs a religious divorce and generate awareness of options for Muslim women decide to pursue a religious divorce. One Muslim social worker I interviewed for this project reminds us of the need for such public education: "We want women to know that they can end their marriage even if they have been abandoned… Women need to be reminded, if one imam says no, don't stop, try another one." This pamphlet could be

published in several languages and distributed to social service and immigrant settlement agencies and programs in addition to as many masjids as will accept them. The goal here is to generate engaged academic scholarship in cooperation with community stake holders to achieve their goals.

Several voices raised legitimate concerns about the potential for state enforcement of inequitable religious arbitrations in the so-called Sharia debate. The McGuinty government's decision takes important steps in protecting vulnerable people in the context of formal arbitration. However, these reforms have not gone far enough in protecting the rights of vulnerable people, especially women seeking religious divorce. The vast majority of instant advocates for Muslim women who spoke out during the dramatic media debate have all but forgotten the issue. My research shows that understanding and developing the ongoing linkages between the modern Canadian state and the private practice of religion through transformative accommodation is central to ensuring the protection of the rights of vulnerable people. My study of faith-based religious groups in southern Ontario highlights how what is at stake for such people – religious divorce – has been largely ignored by government and public policy. The Islamophobic discourse of the public debate inspired by imperial secularism has led to a wrong-headed and paternalistic public policy. A commitment to post-secular feminism and anti-imperial secularism would lead to policies that affirm the agency and dignity of all Ontarians as well as a more just society.

## Appendix A – Fieldwork Research Information and Consent Form

Dear (Focus Group Participant's Name):

This letter is an invitation to consider participating in a study I am conducting as part of my Doctoral degree in the Department of Religious Studies at the University of Waterloo under the supervision of Professor Dr. David Seljak and Dr. Jasmin Zine. I would like to provide you with more information about this project and what your involvement would entail if you decide to take part.

The issue of faith based arbitration has been an important public issue since at least 2003 when the media brought it to the public's attention. And although it appears that this is a dead issue after the McGuinty government's decision to exclude the practice of faith based arbitration from Ontario's Arbitration Act, the issue remains of great importance to religious adherents who may mediate or informally arbitrate civil disputes within their religious community. Moreover, the public debate on the issue focused very little on the experiences and perceptions of actual or potential users of faith based arbitration or the perceptions of diverse Muslims who would not use faith based arbitration and why. The purpose of this study, therefore, is to document the experiences and perceptions of faith based arbitration of both arbitrators and members of religious communities who have used faith based arbitration or mediation services or may use them in the future. It is also to document diverse Muslim perceptions of faith based arbitration including those who would not use these services and why.

Participation in this study is voluntary. It will involve an interview of approximately one to two hours in length to take place in a mutually agreed upon location. You may choose to be interviewed in person or over the telephone. You may choose to consent to this interview in writing or by verbal consent in which case I will record that you consented verbally. You may decline to answer any of the interview questions if you so wish. Further, you may decide to withdraw from this study at any time without any negative consequences by advising the researcher. With your permission, the interview will be audio recorded to facilitate collection of information, and later transcribed for analysis. Shortly after the interview has been completed, I will send you a copy of the transcript to give you an opportunity to confirm the accuracy of our conversation and to add or clarify any points that you wish. All information you provide is considered completely confidential. Your name will not appear in any thesis or report resulting from this study, however, with your permission anonymous quotations may be used in the thesis and in academic publications. Data collected during this study will be retained in a secure private location indefinitely. Electronic data will be stored on compact disks kept in a secure and private location. Only researchers associated with this project will have access. Some participants in this study may become upset due to their or others experiences with religious arbitration. Contact information for a counseling referral will be provided with the assistance of the ISSRA (Islamic Social Services and Resources Association) in response to such a situation.

If you have any questions regarding this study, or would like additional information to assist you in reaching a decision about participation, please contact me by email at ccutting@artsmail.uwaterloo.ca. You can also contact my supervisor, Professor David Seljak at 519-884-8111 ext. 28232 or email dseljak@watarts.uwaterloo.ca. You may also contact Dr. Jasmin Zine at 519.884.0710 ext.3267, or by email jzine@wlu.ca.
I would like to assure you that this study has been reviewed and received ethics clearance through the Office of Research Ethics. However, the final decision about participation is yours. If you have any comments or concerns resulting from your participation in this study, please contact Dr. Susan Sykes of this office at 519-888-4567 Ext. 36005.
I hope that the results of my study will be of benefit to those religious communities and organizations directly involved in the study, as well as to the broader research community.

I very much look forward to speaking with you and thank you in advance for your assistance in this project.
Yours Sincerely,
Christopher Cutting, Student Investigator

**CONSENT FORM**

I have read the information presented in the information letter about a study being conducted by Christopher Cutting of the Department of Religious Studies at the University of Waterloo. I have had the opportunity to ask any questions related to this study, to receive satisfactory answers to my questions, and any additional details I wanted.

I am aware that I have the option of allowing my interview to be audio recorded to ensure an accurate recording of my responses.

I am also aware that excerpts from the interview may be included in the thesis and/or publications to come from this research, with the understanding that the quotations will be anonymous.

I was informed that I may withdraw my consent at any time without penalty by advising the researcher.

This project has been reviewed by, and received ethics clearance through, the Office of Research Ethics at the University of Waterloo. I was informed that if I have any comments or concerns resulting from my participation in this study, I may contact the Director, Office of Research Ethics at 519-888-4567 ext. 36005.

With full knowledge of all foregoing, I agree, of my own free will, to participate in this study.

☐YES ☐NO

I agree to have my interview audio recorded.

☐YES ☐NO

I agree to the use of anonymous quotations in any thesis or publication that comes of this research.

☐YES ☐NO

Participant Name: _____ (Please print)

Participant Signature: _____

Date: _____

## Appendix B – Interview Questions for Muslim Religious Leaders

**Background information:**

- What is the **History** of service and activities at the specific religious institution?
- Does this institution have any **relation to other known providers of FBA** such as the Darul Iftaa or the Islamic Institute of Civil Justice?
- **Where** are you from originally?
- What is your **training**? (Islam, Canadian law, mediation, counseling, addressing abuse, etc.)?
- Approximately **how large** is the religious community you serve.
- How many people from your community have used your **services** as an arbitrator or mediator and how often?
- What is the **ethnic makeup** of this religious community?

**Introduce the main topic:**

- What are your impressions of the **public debate** regarding faith based arbitration?
- How do you feel about how Muslims were **represented** in the press?
- **Were you involved** at all in this debate?

- What in your opinion are the **pros and cons** of faith based arbitration (as it was before McGuinty's decision)?

- Did you know about the arbitration act **before** the press event?

- What did you think of **Boyd's recommendations**? (Have you read them?)
- Do you think the arbitration act could have been **better amended**?

- **In your perception: What was faith based arbitration before McGuinty's decision**. (I.e. in place since 1991).

- What is your **perception of the state of FBA now** after McGuinty's announcement and the amendments?

- What is your impression of **what has been lost with these changes to FBA**?

- Do you think the **McGuinty** government's decision to disallow FBA has effectively protected "**vulnerable peoples**"? Why or why not?

- What do you make of media **representations of Muslim men** wanting to use FBA inequitably? To what degree does your experience confirm or contrast with these representations?

- Can **imams** do something about potentially inequitable uses of FBA?

- **What now**?

**Details of the practice of faith based arbitration and mediation:**

- Why is it **important** to get an Islamic marriage/divorce/arbitration/mediation?
- Are or should Muslims be **Obligated** to use FBA? Would Muslim be more obligated to use **FBA if it were still allowed**?

- Who comes looking for these services (FBA or mediation)?

- Can you describe to me the way a **typical mediation** might proceed?

- What is the specific ***legal* tradition** on which you base your arbitration and mediation services? Do you give advice based on **more than one** legal tradition?

- Are **records** kept of the proceedings? (Both arbitration & informal mediation?)

- Are disputants informed of their **rights** under religious and Canadian law?

- Are there efforts and procedures employed to encourage **transparency and accountability**?

- Is **independent legal advice** encouraged? Required?

- Are any attempts made to **protect** the rights and meet the needs of **vulnerable persons**? What **specific provisions** have been made?

- Has the provision of these services and their results been **received well** by those using faith-based arbitration services? I.e. have the disputants generally reported **positive evaluations** of the result, and have both parties **honoured** the decisions?

- How successful has the community been in **enforcing** an arbitrator's decision?

- Can you provide any anonymous **Stories/examples** of mediations/arbitrations you've been involved in **good/bad**?

**What are your interpretations of Islamic law regarding the details of divorce:**

- **Nikkah** (Marriage contract). Do you inform women of their **rights** at this point and attempt to encourage marriage **contracts** that provide for **equitable** support and division of resources in the event of relationship breakdown?
- What is your understanding of the **rights of women under Islamic law** with regard to marriage and divorce?

- **Iddat (Support** Three month waiting period?) amount that would last longer? Specific examples? One year of support?

- **Spousal support**?

- **Child support**?

- **Mahr** (Dowry). Recommended amounts?

- **Khula?** (Wife initiated divorce) **Mahr forfeited**?

- Must women get **men's permission** to divorce?

- Have you known women who have experienced **abandonment or retribution** because of initiating divorce?

- **Custody**? Specific examples?

- What is your procedure for screening for and addressing domestic **violence or abuse**?

- **Inheritance** (disputes)?

- Might a **civil divorce** count as an **Islamic** divorce?

- Are there any **challenges** that have arisen in the offering of these mediative or arbitrative services?

**Canadian Context:**

- Could Sharia be **interpreted** (authentically for you) in a way that is more conducive to women's and children's rights and protections in terms of **Canadian legal norms**?

- Can there be to some degree a **Canadian Islamic law tradition**?

- Do you think **Canadian family law** could and should be made to be better **sensitive** to the needs of Muslim communities?

**The issue of training:**

- Could/should the **quality** of training faith based arbitrators or mediators receive be improved? (Religious, Canadian law, mediation, counseling, addressing domestic abuse).

- Do you think that some trained mediators/arbitrators could make **better decisions** than some informal mediators/arbitrators?

- Have some community leaders and mediators had a **positive impact on spreading women's rights** according to Islamic and/or Canadian tradition?

**Community building potential:**

- Do you feel there is **Community building potential** with regard to providing faith based arbitration or mediation? (Re: education, rights, accountability, service provision, working together with other organizations? More?)
- **Is there anything being done here** regarding community building already?

**Can you suggest other people I might interview?**

## Appendix C – Interview Questions for Jewish Religious Leaders

**Background information:**

- What is the **History** of service and activities at the specific religious institution?
- Does this institution have any **relation to other known providers of FBA** such as the Beth Din?
- **Where** are you from originally?
- What is your **training**? (Judaism/Jewish law, Canadian law, mediation, counseling, addressing abuse, etc.)?
- Approximately **how large** is the religious community you serve.
- How many people from your community have used your **services** as an arbitrator or mediator and how often?
- What is the **ethnic makeup** of this religious community?

**Introduce the main topic:**

- What are your impressions of the **public debate** regarding faith based arbitration?
- How do you feel about how Jews were **represented** in the press?
- **Were you involved** at all in this debate?

- What in your opinion are the **pros and cons** of faith based arbitration (as it was before McGuinty's decision)?

- Did you know about the arbitration act **before** the press event?

- What did you think of **Boyd's recommendations**? (Have you read them?)
- Do you think the arbitration act could have been **better amended**?

- **In your perception: What was faith based arbitration before McGuinty's decision**. (I.e. in place since 1991).

- What is your **perception of the state of FBA now** after McGuinty's announcement and the amendments?

- What is your impression of **what has been lost with these changes to FBA**?

- Do you think the **McGuinty** government's decision to disallow FBA has effectively protected "**vulnerable peoples**"? Why or why not?

- **What now**?

**Details of the practice of faith based arbitration and mediation:**

- Why is it **important** to get an Jewish marriage/divorce/arbitration/mediation?
- Are or should Jews be **Obligated** to use FBA? Would Jews be more obligated to use **FBA if it were still allowed**?

- Who comes looking for these services (FBA or mediation)?

- Can you describe to me the way a **typical mediation** might proceed?

- What is the specific ***legal* tradition** on which you base your arbitration and mediation services? Do you give advice based on **more than one** legal tradition?

- Are **records** kept of the proceedings? (Both arbitration & informal mediation?)

- Are disputants informed of their **rights** under religious and Canadian law?

- Are there efforts and procedures employed to encourage **transparency and accountability**?

- Is **independent legal advice** encouraged? Required?

- Are any attempts made to **protect** the rights and meet the needs of **vulnerable persons**? What **specific provisions** have been made?

- Has the provision of these services and their results been **received well** by those using faith-based arbitration services? I.e. have the disputants generally reported **positive evaluations** of the result, and have both parties **honoured** the decisions?

- How successful has the community been in **enforcing** an arbitrator's decision?

- Can you provide any anonymous **Stories/examples** of mediations/arbitrations you've been involved in **good/bad**?

**What are your interpretations of Jewish law re: the details of divorce:**

- What can be negotiated in a marriage contract?

- Do you inform women of their **rights** and attempt to encourage marriage **contracts** that provide for **equitable** support and division of resources in the event of relationship breakdown?
- **What are the rights of women under Jewish law in Marriage**? (I.e. Men to take care of financial responsibilities? Compensation for women's domestic labor (compensation upon divorce)? Keep her own assets. Keep her maiden name? Etc.)

- Is there a specifically Jewish **Waiting period** of separation before divorce?

- Are there unique Jewish ways to calculate **Spousal support**? Specific examples?

- Are there unique Jewish ways to calculate the **Division of Property and Family Assets** upon divorce?

- Are there unique Jewish ways to calculate **Child support**? Specific examples?

- **What kind of Mohar** (Dowry) is normally included in Jewish marriage contracts? Specific examples? Recommended amounts?

- **Have you had to address issues in your community surrounding the granting of the Ghet? Are there very many agunot women in your community? How do you or the community deal with this issue?**

- Are there unique Jewish ways to decide child **Custody**? Specific examples?

- **Violence or abuse** procedure (children, women)? Screening? Specific **examples**?

- Are there unique Jewish **methods for designing a will according to Jewish law or tradition, or settling a dispute over Inheritance**? Specific examples?

- How much **accommodation** to Canadian legal norms has been made here?

- Are there any **problems or challenges** that have arisen in the offering of these mediative or arbitrative services? **Addressed**. Things that could be **better done**?

**Canadian Context:**

- Could Jewish law be **interpreted** (authentically for you) in a way that is more conducive to women's and children's rights and protections in terms of **Canadian legal norms**?

- Can there be to some degree a **Canadian Jewish law tradition**?

- Do you think **Canadian family law** could and should be made to be better **sensitive** to the needs of Jewish communities?

**The issue of training:**

- Could/should the **quality** of training faith based arbitrators or mediators receive be improved? (Religious, Canadian law, mediation, counseling, addressing domestic abuse).

- Do you think that some trained mediators/arbitrators could make **better decisions** than some informal mediators/arbitrators?

- Have some community leaders and mediators had a **positive impact on spreading women's rights** according to Jewish and/or Canadian tradition?

**Community building potential:**

- Do you feel there is **Community building potential** with regard to providing faith based arbitration or mediation? (Re: education, rights, accountability, service provision, working together with other organizations? More?)
- **Is there anything being done here** regarding community building already?

**Can you suggest other people I might interview?**

Conclusion of Interview.

**Addendum: Questions for participants involved in the Beth Din:**

- **How long** have you been a judge with the Beth Din?

- How long have you been working in **Ontario**? (Your **background**?)

- How does the Beth Din **work**?

- **How many "judges**" are there that make judgments at the Beth din?

- What kind of **training** does a judge require?

- Does a Jewish judge also require training outside Jewish law in **mediation techniques, counseling, and screening for abuse**?

- **How often** are arbitrations done? Mediations?

- Are **mediations** always done **before** arbitration?

- **Do Mostly men or women** or both look for this service?

- What **issues** do you arbitrate/mediate?

- Which issues to you arbitrate/mediate **most often (and how often for each general type)**? (I.e. Family law issues: Divorce, support, custody, inheritance? Business disputes? Can you give me specific (anonymous) examples to illustrate?

- Are disputants **informed** of their **Jewish and Canadian legal rights** as part of the process of arbitration or mediation?

- Are there efforts made and procedures employed to encourage **transparency and accountability**? Examples?

- Is **Independent legal advice** encouraged or required?

- Are any attempts made to protect the rights and meet the needs of **vulnerable persons**? Examples?

- Has the provision of these services and their results been **received well** by those using faith-based arbitration services? I.e. have the disputants generally reported **positive evaluations** of the result, and have both parties **honoured** the decisions?

- How successful has the community been in **enforcing** an arbitrator's decision? (Is community pressure a factor for informal enforcement? Have arbitrations needed to be enforced by the state? How often?)

## 1. Welcome to the Faith Based Arbitration and Mediation Survey!

This questionnaire will take about 7 to 8 minutes to complete.

Thank you for your interest in the Faith Based Arbitration and Mediation Survey.

Any adult over the age 18 may participate in this survey. The questions are designed to be most appropriate to Muslim communities.

It asks questions concerning your familiarity with and feelings about faith based arbitration and mediation.

The integrity of this research depends on completed questionnaires. Please attempt to answer all the questions!

Many thanks! Your participation is greatly appreciated.

Kindly,
Christopher

Christopher Cutting
Ph.D. candidate
University of Waterloo

**1. I would like to read more information about this project before I complete this survey**

- ◯ Yes
- ◯ No thanks, please begin the survey now

Appendix D – Web Survey

## 2. Information Letter

Project Title: Faith Based Arbitration and Mediation in Ontario

Dear Potential Participant,

I am a fourth year doctoral student in the joint program in Religious Diversity in North America at the University of Waterloo and Wilfrid Laurier University. The proposed research is the basis of my doctoral dissertation. You are being invited to participate in a study to learn more about the perceptions of Muslims regarding faith based arbitration and mediation. This project is under the supervision of Professor Dr. David Seljak and Dr. Jasmin Zine. I would like to provide you with more information about this project and what your involvement would entail if you decide to take part.

INFORMATION
To participate in this study you must be over the age of 18. The questions are designed to be most appropriate to Muslim communities, and non-Muslims who might use the mediation or arbitration services offered in Muslim communities.

PARTICIPATION
Participation in this study is voluntary. You may decline to answer any of the questions if you so wish. Further, you may decide to withdraw from this study at any time without any negative consequences by exiting the survey. If you agree to participate you will be asked to take approximately 7-8 minutes to fill out the following questionnaire.

CONFIDENTIALITY
All information you provide is considered completely confidential. Data collected during this study will be retained in a secure private location indefinitely. Electronic data will be stored on compact disks kept in a secure and private location. Only researchers associated with this project will have access.

RISKS AND BENEFITS
The risks of participating in this study are considered minimal. Some participants in this study may become upset due to their or others experiences with religious arbitration. Contact information for a counseling referral will be provided with the assistance of ISSRA (Islamic Social Services and Resources Association) in response to such a situation. I hope that the results of my study will be of benefit to those religious communities and organizations directly involved in the study, as well as to the broader research community.

INFORMED CONSENT
By completing and submitting the questionnaire you are considered to have given your informed consent.

CONTACT INFORMATION AND QUESTIONS
If you have any questions regarding this study, or would like additional information to assist you in reaching a decision about participation, please contact me by email at ccutting@artsmail.uwaterloo.ca. You can also contact my supervisor, Professor David Seljak at 519-884-8111 ext. 28232 or email dseljak@watarts.uwaterloo.ca. You may also contact Dr. Jasmin Zine at 519.884.0710 ext.3267, or by email jzine@wlu.ca.

ETHICAL RESEARCH PRACTICE
I would like to assure you that this study has been reviewed and received ethics clearance through the Office of Research Ethics. However, the final decision about participation is yours. If you have any comments or concerns resulting from your participation in this study, please contact Dr. Susan Sykes of this office at 519-888-4567 Ext. 36005.

FEEDBACK AND PUBLICATION
Results from this research will appear as part of my doctoral dissertation. Research material may also later appear as part of a book manuscript, or in an academic journal or other publications. Should you wish to be informed of the outcome of this research, please email me at ccutting@artsmail.uwaterloo.ca

Thank you for considering this proposal.
Yours Sincerely,

Christopher Cutting, Student Investigator

## 3. Marriage

**1. How important is it to you to have an Islamic marriage or Nikah (as opposed to only having a civil marriage)?**

- ◯ Very important
- ◯ Somewhat important
- ◯ Somewhat unimportant
- ◯ Very unimportant
- ◯ I don't know

Other (please specify)

## 4. Divorce

**1. If you and your partner were divorcing, how important to you would it be to have an Islamic divorce?**

- ◯ Very important
- ◯ Somewhat important
- ◯ Somewhat unimportant
- ◯ Very unimportant
- ◯ I don't know

Other (please specify)

**2. If you were involved in a divorce, how important for you would it be to have issues such as the division of family assets, amount and duration of maintenance of a dependent wife and children, and child custody decided according to Islamic principles? (I realize the term "Islamic Principles" is very general, and that there is a lot of complexity and diversity that could be included under this term. Please feel free to make any comments on this term you would like to in the comment box below).**

- ◯ Very important
- ◯ Somewhat important
- ◯ Somewhat unimportant
- ◯ Very unimportant
- ◯ I don't know

Other (please specify)

## 5. Wills and Inheritance

**1. If you were drawing up your will, how important would it be for you to will your assets to your family according to Islamic principles? (Once again, please feel free to comment on the term "Islamic principles" if you wish. Or simply refer back to what you have written previously on this if applicable).**

- ◯ Very important
- ◯ Somewhat important
- ◯ Somewhat unimportant
- ◯ Very unimportant
- ◯ I don't know

Other (please specify)

**2. If you were involved in a dispute with your family over an inheritance that was willed to you, how important would it be to you to have that dispute resolved according to Islamic principles? (Once again, please feel free to comment on the term "Islamic principles" if you wish. Or simply refer back to what you have written previously on this if applicable).**

- ◯ Very important
- ◯ Somewhat important
- ◯ Somewhat unimportant
- ◯ Very unimportant
- ◯ I don't know

Other (please specify)

## 6. Your Opinion of Faith Based Arbitration or Mediation?

Faith based ARBITRATION occurs when two people in a dispute mutually chose a third party to decide on the dispute for them according to religious principles. Arbitration involves giving decision making power to a third party for the purposes of resolving a dispute. Faith based MEDIATION only involves asking a third person for counsel or advice on how to resolve a dispute according to religious principles. Mediation does not involve giving away one's decision making power to a third person.

### 1. How do you feel about faith based MEDIATION generally?

- ◯ Very Positive
- ◯ Positive
- ◯ Negative
- ◯ Very Negative
- ◯ I don't know

### 2. How do you feel about faith based ARBITRATION generally?

- ◯ Very Positive
- ◯ Positive
- ◯ Negative
- ◯ Very Negative
- ◯ I don't know

Other (please specify)

## 7. Would you recommend faith based arbitration or mediation to another?:

**1. Hypothetically, would you recommend a friend or family member use faith based MEDIATION?**

- ◯ Yes certainly
- ◯ Yes possibly
- ◯ No possibly
- ◯ No certainly
- ◯ I don't know

**2. Hypothetically, if faith based ARBITRATION was still allowed, would you recommend a friend or family member use faith based ARBITRATION?**

- ◯ Yes certainly
- ◯ Yes possibly
- ◯ No possibly
- ◯ No certainly
- ◯ I don't know

Other (please specify)

## 8. Use of Faith Based Arbitration or Mediation?

**1. Have you known anyone who has used faith based mediation or arbitration in the past? (Check all that apply).**

- [ ] Yes I know of someone who used faith based arbitration
- [ ] Yes I know of someone who used faith based mediation
- [ ] No I don't know of anyone who has used faith based arbitration
- [ ] No I don't know of anyone who has used faith based mediation
- [ ] I don’t know

Other (please specify)

**2. Have you used faith based mediation or arbitration in the past? (Check all that apply).**

- [ ] Yes I have used faith based arbitration
- [ ] Yes I have used faith based mediation
- [ ] No I have not used faith based arbitration
- [ ] No I have not used faith based mediation
- [ ] I don’t know

Other (please specify)

**3. Hypothetically, might you use faith based MEDIATION in the future for advice or to help resolve an issue or dispute? (Check all that apply).**

- [ ] Yes I would use faith based mediation
- [ ] Yes I might use faith based mediation
- [ ] No I would not use faith based mediation
- [ ] I don’t know

Other (please specify)

**4. Hypothetically, if faith based ARBITRATION were still allowed, might you have used faith based ARBITRATION to resolve a civil dispute in future?**

- ◯ Yes I would have used faith based arbitration
- ◯ Yes I might have used faith based arbitration
- ◯ No I would not have used faith based arbitration
- ◯ I don't know

## 9. Media Representation and the Arbitration Act

**1. How do you feel your religious community was represented in the media and public debate generally?**

- ◯ Very fair
- ◯ Fair
- ◯ Unfair
- ◯ Very unfair
- ◯ I don't know

Other (please specify)

**2. Do you agree or disagree with the Dalton McGuinty government's decision to change the Ontario Arbitration Act so that the state will no longer enforce arbitrations decided according to religious laws?**

- ◯ Strongly Agree
- ◯ Agree
- ◯ Disagree
- ◯ Strongly disagree
- ◯ I don't know

Other (please specify)

## 10. Women

**1. Do you feel generally that Muslim faith based mediators are adequately aware of women's rights in Islamic law?**

- ◯ All or most are
- ◯ Many are
- ◯ 50/50
- ◯ Few are
- ◯ None are
- ◯ I don't know

Other (please specify)

**2. Do you feel generally that Muslim faith based mediators are adequately aware of women's rights in Canadian law?**

- ◯ All or most are
- ◯ Many are
- ◯ 50/50
- ◯ Few are
- ◯ None are
- ◯ I don't know

Other (please specify)

**3. Do you feel that Islamic law or Sharia can be interpreted and applied today in civil disputes in a way that is generally in keeping with Canadian law? (I realize the terms "Sharia" and "Islamic law" are very general, and that there is a lot of complexity and diversity that could be included under these terms. Please feel free to make any comments on these terms you would like to in the comment box below).**

- ◯ Yes certainly
- ◯ Yes possibly
- ◯ No
- ◯ I don't know

Other (please specify)

## 11. The Canadian Court System

**1. Would you feel comfortable going to secular lawyers and courts to resolve civil disputes such as divorce, custody, or inheritance disputes?**

- ◯ Yes always
- ◯ Yes often
- ◯ Yes sometimes
- ◯ Yes rarely
- ◯ No
- ◯ I don't know

Other (please specify)

## 12. Adherence

**1. Do you consider yourself to be a practicing Muslim?**

- ◯ Yes
- ◯ Yes to some degree
- ◯ No
- ◯ I don’t know

Other (please specify)

**2. How important is it to you to live according to the Sharia generally? (Not necessarily according to Islamic family law in particular). I realize the term "Sharia" is very general, and that there is a lot of complexity and diversity that could be included under this term. Please feel free to make any comments on this term you would like to in the comment box below.**

- ◯ Very Important
- ◯ Somewhat important
- ◯ Somewhat unimportant
- ◯ Very unimportant
- ◯ I don’t know

Other (please specify)

## 13. Information about you

LAST QUESTION PAGE!

YOU ARE ALMOST FINISHED THIS SURVEY!

### 1. Your gender?

- ☐ male
- ☐ female

### 2. What is your age range?

- ◯ 18-30
- ◯ 31-40
- ◯ 41-50
- ◯ 51-60
- ◯ 61-70
- ◯ 71-80
- ◯ 80+

### 3. What is your relationship status?

- ◯ single
- ◯ married
- ◯ separated
- ◯ divorced
- ◯ widowed/widower
- ◯ common law
- ◯ have partner

### 4. Do you have any children?

- ◯ Yes
- ◯ No

### 5. What do you consider to be your nationality(s)?

### 6. What is your country of birth?

**7. What is (are) your Ethnicity(s)? (Check all that apply).**

- ☐ British Isles origins
- ☐ French origins
- ☐ Aboriginal origins
- ☐ North American origins
- ☐ Caribbean origins
- ☐ Latin, Central and South American origins
- ☐ European origins
- ☐ Western European origins
- ☐ Northern European origins
- ☐ Scandinavian origins
- ☐ Eastern European origins
- ☐ Baltic origins
- ☐ Czech and Slovak origins
- ☐ Southern European origins
- ☐ Balkan origins
- ☐ Other European origins
- ☐ African origins
- ☐ Arab origins
- ☐ Maghrebi origins
- ☐ West Asian origins
- ☐ South Asian origins
- ☐ East and Southeast Asian origins
- ☐ Indo-Chinese origins
- ☐ Oceania origins
- ☐ Pacific Islands origins

Other (please specify)

## 14. Feedback

Thank you so much for your time and participation in this survey.

Please email the survey link you received on to anyone in the Muslim community you think might be interested.

If you are interested in an INTERVIEW by phone, in person, or as part of a focus group, please email me at ccutting@artsmail.uwaterloo.ca or leave your email with me in the comment box below and I will get back to you.

Thanks again, and take care,

Christopher Cutting
Ph.D. Candidate and Student Researcher
University of Waterloo

**1. If you would like to make any comments regarding the issues this survey raises, or the survey itself, please share your thoughts with me here.**

## 15. Thank you!

Thank you so much for your time and participation in this survey.

When you click the "done" button below the page will close and your survey responses will be anonymously submitted and saved.

## Appendix E – Email Interview Questions

FBA = Faith Based Arbitration.

1. How important is it to you to live according to the Sharia generally? How does it affect your everyday life? To whom do you go if you have a question about Sharia?

2. What are your perceptions of faith-based arbitration and/or mediation? Do you have any stories to tell relevant to this? In your perception, how sensitive to women's rights in Islamic and/or Canadian legal traditions are faith based arbitrators presently?

3. If you were involved in a civil dispute, would you want (or feel obligated) to have that dispute decided according to Sharia? Why? If so, who would you go to for help in doing this (if anyone)? How do you feel about the Canadian court system as a way to settle civil disputes? Could it be improved to better meet the needs of Muslims?

4. If you have reservations about FBA, would your opinions change if the quality of FBA that was being offered were more to your liking? I.e. More sensitive to Muslim women's Islamic and/or Canadian rights? Do you think this is possible in future?

5. How do you feel your religious community was represented in the media and public debate on FBA generally?

6. What do you think of McGuinty's decision to disallow FBA and has this affected you? Do you think it helps to protect "vulnerable persons"? What now?

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