Boundaries of Religious Freedom:
Regulating Religion in Diverse Societies 1

Adam Possamai
James T. Richardson
Bryan S. Turner *Editors*

The Sociology of *Shari'a*: Case Studies from around the World

Boundaries of Religious Freedom: Regulating Religion in Diverse Societies

Volume 1

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Processes of globalization have resulted in increasingly culturally and religiously diverse societies. In addition, religion is occupying a more prominent place in the public sphere at the turn of the 21st Century, despite predictions of religious decline. The rise in religious diversity, and in the salience of religious identity, is posing both challenges and opportunities pertaining to issues of governance. Indeed, a series of tensions have arisen between state and religious actors regarding a variety of matters including burial rites, religious education and gender equality. Many of these debates have focused on the need for, and limits of, religious freedom especially in situations where certain religious practices risk impinging upon the freedom of others. Moreover, different responses to religious pluralism are often informed by the relationship between religion and state in each society. Due to the changing nature of societies, most have needed to define, or redefine, the boundaries of religious freedom reflected in laws, policies and the design and use of public spaces. These boundaries, however, continue to be contested, debated and reviewed, at local, national and global levels of governance.

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The Sociology of *Shari'a*: Case Studies from around the World

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Chapter 1
Introduction: Legal Pluralism and *Shari'a*

Bryan S. Turner and Adam Possamai

Legal pluralism may be simply defined as the development of a number of different legal traditions within a given sovereign territory. Legal pluralism is often held to be a challenge to legal centralism, a legal doctrine claiming that the state has a monopoly over law making in its sovereign space. Opponents of state centralism based on state sovereignty and a legal monopoly often regard it as an ideology rather than a legal doctrine. The modern critique of legal centralism is associated with an influential article ('What is Legal Pluralism?') by John Griffith (1986), but the origin of the theory of legal pluralism goes back to Eugen Ehrlich's *Fundamental Principles of the Sociology of Law* that was published in 1913. In many societies legal pluralism is now related to the recognition of indigenous traditional laws and, consequently, it is often referred to as 'Unofficial Law.' Studies of native traditions—such as Llewellyn and Hoebel's *The Cheyenne Way* (1941)—have influenced recognition of the importance of custom in the normative foundation of law and thence the legal order of society. The debate about legal pluralism is also closely associated with theories of multiculturalism and cosmopolitanism (de Sousa Santos and Rodriguez-Garavito 2005). These debates around pluralism raise a host of difficult conceptual issues, including the problem of defining law itself. Before turning to some of these vexed definitional issues, we should start with a brief consideration of the so-called 'legal centralism' position.

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The creation of the modern nation state typically involved an historical process establishing political sovereignty over territory and constructing political unity through the development of a unified legal system, a common framework of taxation, a national currency, the recognition of a national language and the development of a national army through male conscription. These processes lay at the core of the institution building that we now refer to as 'modernization.' These processes, both in Europe and in Asia, were typical of nineteenth century developmental strategies. In Asia, the construction of a centralized bureaucratic state was associated with the Meiji Restoration in Japan in 1868 that created a sound basis for state taxes, reformed the military and brought in legal changes based on western models. Similarly, in Turkey, the Early Republican Period (1923–1938) laid the foundation for secularism, cultural modernization and constitutional reform that followed aspects of French law and *laicité*. Turkish republicanism involved the termination of the caliphate and the partial exclusion of the *Shari'a* from public life.

In sociology, the principal theorist of this conceptual assembly of nation, state and law was Max Weber, in his *Economy and Society* (1978). Weber starts his account of law by making a distinction between 'legal dogmatics'—the question of the contents and validity of law—and the sociology of law, which is concerned with how law actually functions as an institution. For Weber, the enforcement of formal legal norms requires a coercive apparatus, but not an apparatus that primarily requires the exercise of physical violence. His famous definition of these conditions is as follows. Whether law exists "depends on the availability of an organized coercive apparatus for the nonviolent exercise of legal coercion. This apparatus must also possess such power that there is in fact a significant probability that the norm will be respected because of the possibility of recourse to such coercion. Today legal coercion by violence is the monopoly of the state" (Weber 1978 vol. 1: 314). In short, in a modern society with a sovereign state, the law is enforced through the courts with the ultimate guarantee of state enforcement. Weber was, of course, interested in the historical development of the law and at various points in his sociology of law he referred to the development of sacred law through revelation, such as the *Shari'a*, and he acknowledged early developments of customary law which were based on communal consensus. For example, he noted that in the late Roman Empire the jurists had to take note of the 'law of the land' in the case of the Common Law of the English provinces, and the distinction on the Continent between the Roman law and the 'indigenous bodies of law' (Weber 1978 vol. 2: 754). However the thrust of Weber's historical view was that, with legal 'rationalization' and the rise of the modern state, such customary laws disappeared under the impact of the monopolization of power by the bureaucratic state.

In the development of the sociology of law, an alternative to Weber's position can be found in the work of the Austrian sociologist Eugen Ehrlich (1862–1922). Ehrlich was born in Czernowitz (in present day Ukraine), which was the capital of Bukowina on the edge of the decaying Austro-Habsburg Empire, and died prematurely of tuberculosis before completing his trilogy in the sociology of law. His work on customary law in part reflects the status of his birthplace in the power structure of Austria. While being subject to the centralized system of Austrian law,

Bukowina also had a rich tradition of customary laws. Like most of the Austrian Empire, Bukowina was a multicultural society and, in fact, Ehrlich regarded it as a 'tribal society' in which diverse groups (Germans, Gipsies, Jews, Hungarians, Romanians, Russians, and more) lived side by side under the political and legal umbrella of the Austrian imperial state. As a baptized Roman Catholic of Jewish descent, Ehrlich was only too aware of the cultural diversity that lay beneath the outer shell of Austrian imperial institutions.

In this context, he became interested in the gap between the actual practice of law 'on the ground' and the formal doctrines of law that were embraced and developed by the legal professionals in the universities and the formal courts. In response to this gap and the fictions of the formal law, in 1913, in *Fundamental Principles of the Sociology of Law* (Ehrlich 2001), he coined the phrase 'living law,' to distinguish his approach from state-centred theories of law, which assume that law is created by the state to achieve a unified and coercive system of legal domination. Ehrlich argued that law is not exclusively produced by the state or the courts or by tribunals. He rejected the idea that is central to Weber, that law is a deductive system of legal propositions from general legal notions about contract, property, and sovereignty. He looked instead to how customary practices operated at the community level, as the living law of the land. Hence, he took the view that law is basically about establishing a social order and it is to be found everywhere; law is concerned with "ordering and upholding every human association" (Ehrlich 2001: 25). In the same passage he drew attention to the importance of sociology in the teaching of jurisprudence: "Since the law is a social phenomenon, every kind of legal science (*Jurisprudenz*) is a social science; but legal science in the proper sense of the term is a part of the theoretical science of society, of sociology" (Ehrlich 2001: 25). In focusing on what lawyers do, rather than on what they are supposed to do, he developed a battery of concepts: living law, the inner order of association, rules of conduct, and rules of decision. It is perhaps unsurprising that Ehrlich's ideas found a ready audience in the United States, where legal realism had turned its back on the formal jurisprudence of Europe. American pragmatism offered a fruitful context for his ideas on living law and his work was eventually supported by Roscoe Pound (1870–1964) at the Harvard Law School, who developed his own version of 'sociological jurisprudence.' Ehrlich's ideas prepared the way for theories of legal pluralism, which reject the idea that law is only state law (Neklen 1984).

In this framework, legal pluralism can be seen as a controversial sociological issue, because it can only exist in contrast to the notion that the state has a monopoly over the law. In other words, the idea of legal pluralism also functions as a critique of the state-centred or 'official' view of the law. We argue that, while this sociological interpretation of legal pluralism is important and plausible, there may be other arguments about the importance of a shared citizenship to guarantee equality (especially equality before the law) that must be taken into account. Ehrlich's view of living law made sense in a society of multiple and distinct ethno-cultural communities with their own customs of normative ordering, but, in societies where the majority shares a common culture and a unified citizenship, can legal pluralism find a place? Can legal pluralism add more fuel to the bonfire of civil unrest, especially where a

majority fears the impact of a minority? In modern societies, the revival of Islam and the demand for the *Shari'a* have become the principal testing ground for the operation of legal pluralism. Sub-Saharan Africa is an extreme illustration.

Legal pluralism can often be a spur to civil unrest rather than to social harmony. In November 2002, conflicts around the Miss World Competition plunged Nigeria into violent clashes between Christians and Muslims, thereby deepening the controversy surrounding the revival of the strict criminal code of the *Shari'a* in 12 of Nigeria's 36 administrative regions. In December, there were violent protests from Muslims in Abuja, where contestants awaited the opening of the pageant, and eventually Muslims attacked Christians in Kaduna, which is one of Nigeria's most volatile northern cities. The contemporary problem of Christian–Muslim relations is compounded by the fact that Nigeria is made up of 250 separate ethnic groups, with 400 linguistic groups. The struggle over the law is simply a manifestation of a deeper struggle over the unity of the sovereign state. While legal pluralism is an outcrop of a society that is already diverse and deeply divided, it becomes, in itself, a component of struggle and division, igniting further conflagration between social groups (Clarke 2009).

Before proceeding, we need to explore the complexity of the various definitions of the *Shari'a* that can be found around the world. This domain has become controversial because it is bound up, not just with the practice of law, but with the question of Muslim identity. It has also become associated with radical Muslim movements such as Boko Haram in Nigeria, where there is a political movement to establish *Shari'a* as the exclusive jurisdiction over Islamic territory. Critics have also drawn attention to the *Hudud* laws which contain draconian provisions for any transgression of laws relating to alcohol consumption or illegal sexual intercourse. After 9/11, many security agencies came to see the *Shari'a* as a threat to democracy, and perceptions of the criminal law components in the *Shari'a* emphasized those measures that appeared to re-enforce gender inequality.

In some US conservative states, Christian conservatives have responded to what they perceive as the spread of the *Shari'a* by arguing that the United States should develop its own Christian *Shari'a* in order to impose God's law on the country. One example of this response is the Kansas House of Representatives' introduction of a bill to permit individuals or businesses to refuse services to same sex couples, when the religious beliefs of these individuals or businesses are compromised. These developments are controversial because they are not consistent with the separation of church and state which is enshrined in the American constitution.

These negative views of the *Shari'a* are generally not accepted by scholars, who emphasize its internal variety and the fact that it is composed of law, a moral system, and a religious code. The *Shari'a* is thus a comprehensive system covering politics, economics, morality, and religious practices. In formal terms, the sources of the *Shari'a* are primarily the *Qur'an*—as the ultimate foundation of authority, being the divine revelation vouchsafed to the Prophet—and the *Sunnah* (or the ways of the Prophet). These formal sources have been, over time, supplemented by interpretations by judges [*qadis*], the consensus of legal scholars [*ulama*], and finally, legal reasoning. Given these diverse sources of authority, it is hardly surprising that

Muslim law is diverse and that it evolves constantly over time (Hallaq 2009: 27). Hence Weber was mistaken in believing that a legal system based ultimately on revelation could not change to meet new circumstances and that the gap between tradition and actual circumstances could only be bridged by arbitrary legal decisions [*fatwas*].

It is useful to distinguish different levels of the *Shari'a.* First, there are universal values relating to justice and equality. Second, there are the regulations that apply specifically to Muslims' personal behaviour, concerning aspects such as diet and modesty. Third, there is the *Shari'a* as practised by the various law schools. Many of these legal rulings, for example, those regarding veiling and diet, are subject to dispute among legal authorities. This is hardly surprising since all legal decisions—whether religious or secular—are subject to interpretation (Hosen 2007: 204).

Modern scholars, departing from Weber, see the *Shari'a* as a flexible and open system of law that can respond, and is responding, to modern circumstances. As is the case in secular legal systems, there are many versions of the *Shari'a* in terms of legal traditions and schools, and there are also differences between the forms of *Shari'a* practised by *Sunni* and *Shi'ite* communities, respectively. However, one immediate problem in defining the *Shari'a* as 'law' is that this downplays, or even ignores, the role of the *Shari'a* as a comprehensive system of ethics. Access to the *Shari'a* has become increasingly important for Muslim minorities in western societies, where they are faced with new questions about how they should behave piously in public spaces. If we are to think of *Shari'a* as law, we would be better advised to compare it with rabbinic law, because both these systems are devolved and local, dependent on the judgments of mullahs and rabbis regarding specific questions. In this sense *Shari'a* is not state law, but is closer, as Max Weber recognized, to common law. Like secular law, the *Shari'a* is constantly evolving and developing as Muslims face new challenges for which there are no definitive answers to be found in tradition.

Despite attempts by scholars to correct misunderstandings of the *Shari'a*, western critics (for example, in Republican dominated states in America) have been hostile towards its development (Turner and Richardson 2012). In attempting to come to a balanced judgment about these debates, it is important to keep in mind the differences between the role of *Shari'a* in societies where Muslims are a minority and in those where they are a majority. Even in some societies or states that do have a Muslim majority the introduction of strict and comprehensive *Shari'a* law has been controversial. For example, in 2014 the sultanate of Brunei introduced a harsh version of the *Shari'a* criminal law tradition, including punishment by flogging and death by stoning. There has been international condemnation of this development from human rights groups. In 2012, President Morsi of Egypt attempted to enforce *Shari'a* more widely and more intensely in the country, and was subsequently ousted in 2013 by a military coup. With respect to these controversial developments, for legal scholars, the merit of legal pluralism is that it can avoid civil conflict resulting from any attempt to impose a unified legal framework in a society which has distinctive minorities, each with their own cultural and legal traditions.

1.1 The Breakdown of Legal Centralism

It is widely held among social scientists, that the model of the unified sovereign state is breaking down under the impact of globalization, and one manifestation of this political transformation is the growing importance of legal pluralism. It is also argued by both sociologists and legal theorists, that, with globalization, there has been some erosion of state sovereignty and the emergence of porosity of state boundaries, requiring a revision of the traditional assumptions of national citizenship, such as 'flexible citizenship,' post-national national citizenship, and semi-citizenship. The corresponding growth of legal pluralism merely gives legal expression to these developments (Teubner 1997). In addition, with economic and financial globalization, there has been further growth in commercial law, which is not specific to state boundaries and can constrain government policies over economic issues (Twining 2000).

Legal pluralism is also associated with the role of law in regulating common resources such as access to sea routes for trade. Medieval trade was regulated by *lex mercatoria* and, in recent history, exploration rights for oil and gas, where state borders in coastal areas are contentious, often requires legal intervention. The United Nations Convention on the Law of the Sea (1982) would be one important illustration of this (Charney 2002). Within the European community, the growth of legally binding relations can also be seen as an important instance of legal internationalism and pluralism. In 1951, the Treaty Establishing the European Coal and Steel Community made provision for an independent court, the Court of Justice, to interpret and enforce the treaty's provisions. In global terms, the extension of human rights provisions over states is further evidence of legal measures that impinge on state sovereignty. International legal relations have multiplied in recognition of the need to develop a set of universal norms to address global concerns relating to major issues, especially concerning threats to the environment. As a result, citizens can find themselves at the intersection of diverse laws (international, national, and customary) that regulate their lives at both the national and local levels.

There is an international legal system that constrains and regulates the behaviour of nation states through consensual multilateral forums. These legal arrangements recognize a mutual interest in safe-guarding the environment and they have important consequences for the autonomy of the nation state. There is an emerging recognition among legal experts regarding "the enormous destructive potential of some activities and the precarious condition of some objects of international concern make full autonomy undesirable, if not potentially catastrophic" (Charney 1993: 530). Where there is some recognition that common resources are threatened, then there are compelling reasons for legally enforced co-operation between states. As a consequence, conventional legal boundaries between independent states become more porous. However, Jean Cohen (2012), in *Globalization and Sovereignty*, argues that there is no fundamental incompatibility between sovereignty and the participation of states in international legal agreements, and at the same time modifies what she defines as the 'monist' position of Hans Kelsen,

in order to promote the idea of constitutional pluralism. In short, it is not the case that arguments about state porosity have won the day.

Anthropological research played a significant role in recognizing the continuing importance of customary law in the lives of indigenous peoples. As a result, the idea of legal pluralism became significant in the 1970s in response to the research of social anthropologists on the role of 'living law' in post-colonial societies. In these anthropological studies, the notion typically referred to the continuity of customary law alongside the state system. The growth of legal pluralism in post-colonial societies has often involved the recognition of customary law among aboriginal communities, as for example, in Australia. With the decline of authoritarian states in Latin America and the expansion of democratic institutions, there was greater social inclusion and recognition of the rights of indigenous peoples. The result was also an expansion of legal pluralism (Sieder 2002).

The implications of the anthropology of law were subsequently recognized by legal theorists, often influenced by postmodernism, post-colonialism, and pragmatism, in describing the multiple legal systems of modern societies (Tamanaha 1997). However, it turns out that the problem in defining legal pluralism is simply a consequence of the more problematic issue of defining law itself (Turner and Arslan 2011). For Roscoe Pound (1966), who was in many respects sympathetic to Ehrlich, law can only exist where there are judges sitting in courts with the ultimate backing of the state. Pound (2009: lxvi), following the argument of Henry Maine that the judge precedes the law in historical evolution, held that the law is "a specialized form of social control through the systematic application of the force of the politically organized society that achieved paramountcy after the Reformation." Similarly in the legacy of John Austin and Hans Kelsen, law is ultimately a command backed up by the authority of the state through judges sitting in courts (Hart 1977). Without effective political and legitimate enforcement, how can any normative order function as law? In short, all forms of normative structure will require the ultimate sanction of a law court and finally of a state.

In some branches of contemporary jurisprudence, 'law' has come to be defined simply as any form of normative or regulatory pluralism (de Sousa Santos 1995). Whenever 'legal pluralism' is invoked "it is almost invariably the case that the social arena at issue has multiple active sources of normative ordering" such as official legal systems, folkways, religious traditions, economic or commercial regulations, "functional normative systems," and community or culturally normative systems (Tamanaha 2008: 397). In summary, it is claimed that modern legal systems are becoming pluralistic, either through the recognition of customary law in post-colonial and post-imperial societies or through the impact of globalization, for example, through the spread of human rights. In this volume we are concerned with tracing the development of the *Shari'a* as an example of legal pluralism in societies where typically secular law is the dominant tradition. At the same time, the potential for civil conflict over competing legal systems requires the preservation of a secular public sphere and the implicit, and occasionally explicit, management of religion by the state. While legal pluralism might be deemed inevitable and compatible with multiculturalism and liberal tolerance, state law may be necessary as a last

resort in societies where there is conflict between competing social groups with incommensurable demands about the law and general values.

1.2 *Shari'a* and Legal Pluralism

As we have already observed, in contemporary politics it is often the acceptance of the Muslim legal tradition, or *Shari'a*, that has occupied the key position in debates about legal pluralism. In many post-colonial societies in Africa and Asia, English common law traditions exist alongside the *Shari'a*. For example, in Singapore, where Muslims are a minority, *Shari'a* operates in domestic disputes, marriages, and divorce settlements under the general oversight of the Majlis Ugama Islam Singapura, or Muslim Council of Singapore (Kamaludeen et al. 2010). There is significant variation in the treatment of Islamic communities and *Shari'a* in Eastern Europe, Russia and parts of China, where 'legal pluralism' is an appropriate description for societies that combine customary law, secular constitutions and religious law (Kemper and Reinkowski 2005). Greece represents a case where *Shari'a* is practised by a Muslim minority as a relic of past international agreements. As a legacy of the Ottoman *millet* system and based on the Lausanne Treaty of 24 July 1923, the Greek government recognizes *Shari'a* as the law regulating family and civic issues for Muslims who live in Western Thrace. While it is estimated that 95 % of the population in Greece is identified as Greek Orthodox, a section of the Muslim minority living in Western Thrace enjoys a minority status that is recognized by the Lausanne Treaty.

Many different cases of *Shari'a* and legal pluralism are compared in this volume. In the West, acceptance of the *Shari'a* has been deeply controversial. Public opposition to Muslim tribunals in Ontario Canada in the 1990s has had a significant impact on developments elsewhere (Boyd 2004). Critics tend to believe that gender equality cannot be secured under the *Shari'a* and that there is little guarantee of transparency. The situation in the United States is somewhat different. The dominance of the Supreme Court in the Constitution in principle precludes the growth of legal pluralism, but even in the United States critics such as the Center for Security Policy have claimed that *Shari'a* has entered into state court decisions, reporting 50 appellate legal cases where there was a 'conflict of law.' The much disputed report (Turner and Richardson 2012) also documented 15 Trial Court cases and 12 Appellate Court cases where the *Shari'a* was found to be applicable at bar (Center for Security Policy 2011: 8). In anticipation of further evolution of the *Shari'a* in the United States, the American Public Policy Alliance has drafted the American Laws for American Courts Act to prevent any enforcement of foreign laws in American courts, and the Act has been passed in Tennessee, Louisiana, and Arizona. While right-wing elements in the Republican Party brought the debate about the *Shari'a* into the political debates around President Obama's second election, there was little public debate in 2013 about the spread of the *Shari'a*. Against these criticisms of the presence of the *Shari'a* in the United States, Christian Joppke and John Torpey, in

Legal Integration of Islam (2013), argue that Muslims have become part of the mainstream of American life and that, unlike in France and Germany, the *Shari'a* has not proved to be so deeply controversial. Islamic practices including the *Shari'a* have become acceptable under the provisions of freedom of religion in the Constitution, despite much widespread Islamophia amongst the general population.

1.3 The Structure of This Volume

This book, through a number of specific cases studies—of Bangladesh, Malaysia, Singapore, Philippines, Turkey, and so forth—explores these issues with a focus on the question of legal pluralism, state sovereignty, and social–religious divisions. Although the contributors of this volume are from various disciplines (such as law, anthropology, and sociology), the book has a strong sociological focus on the analysis of *Shari'a*.

This edited volume provides a comparative analysis of the application of *Shari'a* in countries with Muslim minorities (Part II) and in countries with Muslim majorities (Part I). It thus offers a global analysis of the phenomenon that goes beyond the usual dichotomy of the 'West versus the rest.' In addition, the case studies in Muslim minority countries are not located in the 'West' only, but include studies in South Africa and China.

The first part of this book, 'Case Studies from Muslim Majority Countries,' starts in Asia with a study of Malaysia. Shamsul, A. B., in his chapter 'One State, Three Legal Systems: Negotiating Justice in a Multi-ethnic and Multi-religious Malaysia,' first gives an historical analysis of how this country's legal system has dealt with religious diversity and legal pluralism over the last 600 years. He then assesses the social cohesion impact of this particular form of legal pluralism, which has been endorsed and accepted by the state's Federal Constitution. This legal process is closely linked to the long history of religious and ethnic diversity of this part of the world.

Habibul Haque Khondker's 'Modern Law, Traditional "*Shalish*" and Civil Society Activism in Bangladesh' explores the confrontation between the institutionalization of modern law and the practice of traditional arbitration, known as *shalish*. The author explores the relation between state and civil society, and between civil society and the country's traditional rural society. Through an analysis of the activities of some civil society organizations, and of the traditional mediation process in place in rural Bangladesh, Khondker underlines practices of gender inequality. To remedy discrimination against rural women, he proposes a balance between universal rights and local traditions through the implementation of a gender balanced *shalish* committee.

In Semi-official Turkish Muslim Legal Pluralism: Encounters Between Secular Official Law and Unofficial *Shari'a* Ihsan Yilmaz focuses on the construction of unofficial Muslim family law and explores the results of various surveys with regards to its application. He finds differences at the grassroots level between the

secular civil law of Turkey and the Muslim local law. Despite the efforts of the Kemalist hegemonic elite to secularize the Turkish society through a top-down use of law, he argues that Muslim law has continued to be unofficially influential in people's lives.

The second part of the book moves to case studies from Muslim minority countries and starts with Singapore, with Bryan S. Turner's contribution, 'Soft Authoritarianism, Social Diversity and Legal Pluralism: The Case of Singapore.' Through his analysis of the 'soft authoritarianism' of this city-state, Turner studies the interaction of Islam and the state within this post-colonial society and how, through a management of religious diversity, *Shari'a* is being modernized.

Isabelita Solamo-Antonio's 'The Philippine *Shari'a* Courts: Women, Men and the Code of Muslim Personal Laws' reviews, through the work of the PILIPINA Legal Resources Center, the issues the Muslim population has experienced when dealing with *Shari'a* in the south of the country. She also discusses how her NGO has been dealing with the legislative reform of the Code of Muslim Personal Laws.

Helen McCue and Ghena Kraven's '*Shari'a* and Muslim Women's Agency in a Multicultural Context: Recent Changes in Women's Culture' employs the theories of Will Kymlicka and Tariq Modood to assess multiculturalism in Australia. They use dress and sport as a case study to analyze how *Shari'a* is lived in a multicultural context. In this chapter, they demonstrate that Muslim women exercise agency, and challenge the dominant negative discourses about Islam.

Vito Breda's '*Shari'a* Law in Catholic Italy: A Non-agnostic Model of Accommodation' brings us to the home of the Roman Catholic faith and addresses the notion of positive secularism which, in the case of this country, is a distinctive pragmatic constitutional stance. Through the exploration of some court cases, which are grounded within this paradigm, Breda discovers an openness of the Italian judiciary towards *Shari'a* law.

In a further study in Europe, Wold D. Ahmed Aries and James T. Richardson explore, in 'Trial and Error: Muslims and *Shari'a* in the German Context,' the *Shari'a* controversies first introduced with the migration of Muslim workers to Western Europe soon after the Second World War. They observe that some accommodation to *Shari'a* is now slowly happening in the areas of finance, family matters, and food preparation.

Yuting Wang's 'Between the Sacred and Secular: Living Islam in China' brings us back to Asia, where she first explores briefly the history of Islam and then deals with the variations in acculturation and the practice of *Shari'a* among Chinese Muslim communities. Wang claims that despite some challenges that have their roots in a long history of tension between Islam and the state, the religious policy of this country is nevertheless maturing with time.

For the final chapter of this part, we move to another continent, with 'The Case of the Recognition of Muslim Personal Law in South Africa: Colonialism, Apartheid and Constitutional Democracy,' written by Wesahl Domingo. Contrary to the case in other countries represented in the second part of this book, this country has a constitutional commitment by the state to provide recognition to customary and religious law. Domingo quotes Nelson Mandela, the first democratic president of South Africa, who said in a public address to Muslims: "We (ANC) regard it highly insen-

sible and arrogant that the culture of other groups can be disregarded. The ANC has pledged itself to recognize Muslim Personal Law." In this chapter, she explores the pragmatic steps that are being taken to recognize Muslim personal law.

The third part of this book draws out from the case studies explored, and deals with, theoretical and comparative considerations. Arskal Salim's 'The Constitutionalization of *Shari'a* in Muslim Societies: Comparing Indonesia, Tunisia and Egypt' explores how the Islamic political parties of these countries have worked towards having *Shari'a* recognized in their country's constitution or, at least, being given a stronger status in the public sphere.

The chapter by Bryan S. Turner and Berna Zengin Arslan, 'Legal Pluralism and the *Shari'a*: A Comparison of Greece and Turkey,' comes back to the study of Turkish family law and can be read alongside the chapter by Ihsan Yilmaz. This contribution provides a comparison of *Shari'a* in Greece and Turkey. In 1923, the Lausanne Treaty gave legal protection to Muslims in Greece, following an exchange of populations between Greece and Turkey. Thus, Greece is the only EU country in which *Shari'a* is guaranteed by treaty arrangements. While the population of Greece, as a whole, is approximately 95 % Orthodox, the small Muslim community in Western Thrace has access to the *Shari'a*, and *muftis* provide legal services to the community in family law and civic issues. The independence of the *Shari'a* has been compromised over the years by pressure from the secular state. The Greek case study provides an interesting contrast to the situation in Turkey, which, while it is constitutionally secular, appears to be making concessions to religious interests, under the government of Prime Minister Tayyip Erdogan. The religious situation is complicated by delays in the process by which Turkey could become a member of the European community. While the country is officially secular, the majority of its population identifies with Islam, and minority religions do not enjoy the full provisions of the original Lausanne Treaty. In short, legal pluralism struggles to find full acceptance in both Greece and Turkey.

James T. Richardson's 'Contradictions, Conflicts, Dilemmas, and Temporary Resolutions: A Sociology of Law Analysis of *Shari'a* in Selected Western Societies' applies the sociology of law theories of William Chambliss in order to understand the processes of conflict resolution with regards to *Shari'a* in the United States, Canada, and Australia. In these cases, Richardson unpacks the resolutions effected by the relevant political structures, which appear to be strongly symbolic.

The chapter by Possamai, Turner, Roose, Degistanli and Voyce, 'Perception of *Shari'a* in Sydney and New York Newspapers,' analyses the way *Shari'a* is reported, and discovers a more neutral approach to the issue in New York than in Sydney. In this global city in the southern hemisphere, *Shari'a* is treated negatively, rather than neutrally, when it comes to family law issues, and positively when it comes to financial matters.

Salim Farrar's 'Profiting from *Shari'a*: Islamic Banking and Finance in Australia' studies how some countries, which do not have a Muslim majority, deal with *Shari'a*-compliant finance. Farrar further discusses how the changes involved take into account the various legal and cultural environments in these countries.

Adam Possamai's '*Shari'a* and Multiple Modernities in Western Countries: Toward a Multi-faith Pragmatic Modern Approach Rather than a Legal Pluralist

One?' uses Shmuel Eisenstadt's theory of multiple modernities to understand legal pluralism. The chapter offers an invitation to use this theory as a third way, in between the classical approach of 'universal' legalism and the more postmodern approach of legal pluralism.

The volume concludes with a discussion on the future of legal pluralism by Bryan S. Turner and James T. Richardson, which considers some of the tensions between the demand for equality in the evolution of citizenship and the demand for recognition of difference in multicultural societies that are exposed to legal pluralism. They consider three contexts in which legal pluralism is present. The first is legal pluralism in imperial systems before and during the consolidation of nation states. The second is the awareness of legal pluralism arising from the process of de-colonization and the slow and contested recognition of indigenous rights. The third situation is the recognition of different legal traditions in multicultural societies in which a majority agrees, possibly under considerable political and legal pressure, to recognize that a minority community has a claim to its own distinctive legal traditions, at least for the resolution of domestic conflicts. This third case is thought to be the consequence of the globalization of labour markets and the development of permanent diasporic communities.

1.4 Coda

While many conservative political movements see legal pluralism as a threat to national sovereignty, there is some general recognition that legal pluralism is an inevitable consequence of contemporary globalization, in which laws associated, for example, with the acceptance of human rights impinge on domestic legal affairs. Despite arguments about the decline of the nation state, it remains a necessary basis for the enforcement of the law. Controversy about the *Shari'a* will remain a feature of politics in western societies where the notion of a 'clash of civilizations' remains an aspect of the security debate. In North Africa and the Middle East, there is also growing controversy about the apparent spread of the *Shari'a* in the aftermath of the Arab Spring in Tunisia, Yemen and Egypt (Voorhoeve 2012), where feminists have complained about the intrusion of the *Shari'a* into areas of society that were previously secular. In 2013 the conflicts in major cities in Turkey were in part motivated by fear of the impact of religious norms in a secular society. It appears that controversy over the law will become a major feature of social and political conflicts between competing social groups in societies that are becoming diverse as a consequence of globalization, or in post-colonial societies with unresolved disputes over ethnic and religious boundaries.

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Part I
Case Studies from Muslim Majority Countries

Chapter 2
One State, Three Legal Systems: Social Cohesion in a Multi-ethnic and Multi-religious Malaysia

A.B. Shamsul

2.1 Introduction

Since the Second World War, Malaysia has enjoyed long periods of peace and stability, or social cohesion, punctuated by violent ethnic conflicts in 1945, 1964, 1969 and 2001. Each of these was of a different intensity, the worst being that in 1969, with a small number of deaths—according to written record, the total number was below 500. This general condition of social cohesion does not, however, mean that everything is plain sailing in Malaysia.[1]

Malaysians would be the first to admit that it has not been easy to maintain peace and stability for such long periods, but it has long-term benefits, especially in terms of economic development and quality of life. Malaysians would like to claim that they 'talk conflict but walk cohesion.' This simply means they would continue to verbally contest, protest and oppose (out in the open or in blogs) whatever they are not happy about. This is true now more than ever, hence the 'talk conflict' label. They also know that violence is never an option and has to be avoided at all costs, hence their choice to 'walk cohesion.'

In other words, Malaysians are not willing to sacrifice the prosperity and the quality of life they have enjoyed for more than 50 years since Independence in 1957. However, this doesn't mean they are unwilling to fight for their rights and to protest, potentially risking the peace and stability that they enjoy and have held so dear. Indeed they do protest, even to the point of conducting street demonstrations (albeit responsibly) if the situation demands it. This seemingly paradoxical situation has to

[1] See Shamsul and Yusoff (2011). This is a report that has been presented, at the request of the Institute of Economics and Peace Sydney, Australia, on the occasion of the launching of the Global Peace Index 2011 at the United Nations, New York, 25 May 2011.

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do with the character and nature of Malaysian society, which exhibits, predominantly, features of—to borrow from Derrida—'social difference,' such as religious diversity, legal pluralism, and class differences. Each of these features has the potential to be a source of conflict and become the motivation for protest and contestation. At the same time, these centripetal forces are the motivation for seeking centrifugal existence in the society.

In this brief essay, I intend to examine, specifically, the interconnectedness of religious diversity and legal pluralism in Malaysia and the social consequences, cohesion and conflict that it has brought to the society.[2] I shall begin by presenting my interpretation of the embedding process of the different religious traditions and legal systems in the Malay world and in Malaysia, which is captured in the title of the essay as 'one state, three legal systems.' Following that I shall present, in the overall context of religious diversity and legal pluralism in Malaysia, an analysis of the social cohesion and conflict, both macro and micro, which have resulted from the contradictions arising from the diversity and pluralism. Through persistent negotiation and bargaining, consensus and compromise among the various interested parties in Malaysia have been achieved, which, in turn, guarantee that peace and stability in Malaysia will continue.

2.2 Embedding of Religious Diversity and Legal Pluralism in Malaysia: A Brief Historical Analysis

Historians have divided the formation of the state of Malaysia into three convenient chronological periods, namely, the pre-colonial (before 1791), colonial (1791–1957) and postcolonial (after 1957) periods.[3] Each period is characterized by a 'pluralistic' legal system in which a number of sets of rules and sanctions, relating to politics, economics, moral standards and social intercourse, co-existed and were practised as frameworks of social organization and control. In other words, Malaysia's legal system has been determined by events and circumstances that were embedded and re-embedded, spanning a period of more than six centuries, even before the famous Malacca Sultanate era.[4] Of these circumstances, three major historical events-cum-periods were largely responsible for shaping the current system: the first was the founding of the Malacca Sultanate at the beginning of the fifteenth

[2] For an excellent analysis on legal pluralism, see Tamanaha (2008), and for a useful discussion on religious diversity, see Gross (1999).

[3] The standard text on Malaysian history is by Leonard and Barbara Andaya (1982). A number of well-known lawyers and judges (for example, Ahmad Ibrahim and Ahilemah Joned 1985 and Wu Min Aun 1990) have written, both in English and Malay, about the complex history of Malaysian legal systems, covering the period before British colonialism.

[4] See Wu Min Aun (1990) for a brief but excellent general introduction to the evolution of rules and laws in Malaysia. See, also, Suffian (1988). For a more 'technical' introduction, see Hickling (1987).

century; the second was the indigenous culture; and the third, and probably the most significant in modern Malaysia, was British colonial rule.

For more than a millennium, before the Malacca Sultanate was established (circa 1400), *adat*, or an indigenous legal system that is based upon a complex set of customary practices guided mostly by oral traditions, was the major framework within which the Malay feudal societies and numerous isolated indigenous social groups existed.[5] However, since the literal meaning of the Malay word '*adat*' is 'the accepted way,' its scope of social meaning goes beyond the legal sphere and often used to mean 'the indigenous way of life,' and, thus, Malay culture. After the arrival of Hinduism (circa first century BCE) and Buddhism (circa seventh century BCE), Hindu and Buddhist tenets were fused with *adat* and absorbed into the local cultures. So strong was the impact of both of these religions, especially amongst the ruling elites, that some of the Malay kingdoms, in fact, became 'Malay-Hindu' or 'Malay-Buddhist' kingdoms. This inevitably led to the formation of a syncretic belief system, hence also legal system, amongst the indigenous populace.[6]

Probably the most profound and lasting of the non-indigenous influences was the introduction of Islam into the Malay world from around the fourteenth century CE. It had a significant impact on indigenous *adat*. The establishment of the Malacca Sultanate and, later, its demise, is critical in our understanding of the historical origins of the plurality of legal systems in present-day Malaysia. However, the adoption of the new religion did not result in the complete elimination of the pre-Islamic *adat*. On the contrary, the more prevalent Hindu customs and animistic traditions continued unabated. Islam was merely grafted onto the existing culture. Today, the Hindu elements are still observed in the practice of indigenous cultures, such as in the celebration of marriages amongst the rural Malay folk, as well as in the pompous traditional-style coronation of rulers in a highly westernized urban context.[7]

As Islam took a firm hold in Malacca and eventually became the state religion, Muslim laws were increasingly applied alongside *adat*. In other words, through a process of syncretization, the Hindu-Buddhist-Islam elements were adapted, in parallel or rationalized to suit the pre-existing indigenous *adat*. However, since the feudal ruler became a Muslim, so, too, his court and the organization of his kingdom were dominated by Islam. The maintenance of law and order in Malacca was crucial to its prosperity as a trading port. The formal legal text of the Malacca Sultanate consisted of *Undang-Undang Melaka* [Laws of Malacca], sometimes also known as *Undang-Undang Laut Melaka* [Maritime Laws of Malacca]. The laws, as written in the legal digests, went through an evolutionary process and were improved and

[5] Hooker's *Adat Laws in Modern Malaya* (1972) and *Native Law in Sabah and Sarawak* (1980) remain the most important contributions in the study of Malaysia's indigenous rules and laws.

[6] For an interesting account of the Hindu and Buddhist influence in a Malay kingdom around the Middle Ages, see Walters (1970).

[7] A number of interesting books on Islamic laws in Malaysia have been published, both in English and Malay. But the most important text is still that of Ibrahim (1965). Other useful recent contributions are those of Jusoh (1991) and Othman (1994).

expanded by the different Malacca sultans. The legal rules that eventually evolved were shaped by three main influences, namely, the indigenous *adat*, Hindu-Buddhist tradition, and Islam. The extent to which these laws were actually applied is unclear. However, some accounts of the administration of criminal justice can be found in Portuguese and British accounts.

When Malacca was conquered and ruled first by the Portuguese (1511–1641), then by the Dutch (1641–1824) and finally by the British (1824–1957), another non-indigenous system, namely, the western legal system, was introduced and applied in Malaysia, on top of the three traditions mentioned above. However, historians and legal scholars have argued that during the Portuguese and Dutch eras the western laws applied by them made relatively little impact on the pre-existing pluralistic legal system as a whole, other than upon the narrow realm of administrative structures. The local people continued to practise Islamic law and Malay *adat* because both the Portuguese and the Dutch did not interfere unnecessarily with local *adat* and religion. This, perhaps, was because the Malays remained Muslims and were not converted to Christianity, either by the Portuguese or the Dutch during their more than three centuries' rules of Malacca and other parts of Malaysia (1511–1824).

However, British colonial rule (1824–1957) transformed the pattern of domains of social control in Malaysia forever, because, unlike that of the Portuguese and the Dutch, British control was not localized to Malacca. British colonialism affected the whole of the Malay peninsula and North Borneo, a geographical area nearly 50 times bigger, which includes at least 10 Malay sultanates, rich mining areas (for tin, gold, bauxite), millions of acres of primary tropical forest, cash crop plantations and traditional rice fields, hundreds of towns, ports and market centres (big and small), and, most importantly, the large pool of multi-ethnic and multi-religious human resources. This inevitably demanded a systematic and more effective social organization and control system that could hold the political, economic and social diversity together.

The British, as they did in Africa, applied the 'indirect rule' system of governance in Malaya, whereby, for instance, the indigenous legal system was maintained but subsumed under the more dominant English common law.[8] Therefore, matters pertaining to religion and *adat* were put under the jurisdiction of the Malay sultans, who headed each *kerajaan negeri*, or provincial government, and their chiefs. Even in *negeri* without sultans, the British instituted Native Courts, run mostly by local chiefs under the guidance of British officers.[9] The legal rules that eventually evolved in British colonial Malaya were shaped by four main influences, namely, the indigenous *adat*, Hindu-Buddhist tradition, Islam, and English common law.

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[8]Two scholars have offered brilliant analyses of the impact of British colonialism and colonial knowledge in defining social life and social order, including in terms of religion, in the British colonies, in which the influence of Henry J. Maine (1822–1888) was pivotal in developing, in the post 1857 British empire, the concept of 'indirect rule' (see Cohn 1996; Mahmood Mamdani 2012).

[9]The experiences of Sarawak and Sabah under British rule provide ample examples on this; see, for example, Richards (1964) and Sandin (1980). See, also, Hooker (1980).

In practice, however, the legal system during the British rule was divided three ways. First, there was the 'English common law' system that was accepted as the general legal system and was responsible for dealing with all matters in the sphere of criminal justice affecting all citizens. In the sphere of personal laws it was only applied to migrant non-Muslims (e.g. European, Chinese, Indian). The Muslims, largely Malays, were subject to the Islamic laws, or *Shari'a*, particularly in matters relating to marriage, divorce and inheritance. The form of *Shari'a* accepted and practised during the British era was 'framed, blamed and renamed' according to an orientalist understanding.[10] So, the *Shari'a* laws formed the second legal system in British Malaya. The third legal system operating then was the *adat* system, or the Customary or Native legal system, applied mainly in the areas of personal laws and, in a very limited context, also in the sphere of criminal justice for some groups of native peoples in Peninsular Malaysia, Sabah and Sarawak. The *adat* legal system was a heterogeneous one because there were many distinct and large 'native' or 'tribal' groups, mostly non-Muslims, especially in Sabah and Sarawak, each having their own tribal-specific *adat* codes, mostly in the form of oral traditions, applied in a localized context.

The only Muslim indigenous community that had its own *adat* laws, based on *perbilangan* (memorized oral codes), and claimed that the communal *adat* land was its core, was the community of the so-called 'Minangkabau Malays' (a contested anthropological term), whose matrilineal society practised *Adat Perpatih*. The British recognized and accepted this claim. Members of this community were located in parts of Malacca and Negeri Sembilan.[11] To this day, this is the only community in British Malaya or Peninsular Malaysia that was affected by all three legal systems that existed then, namely, the English common law, the Islamic/*Shari'a* law and the *adat* law.

As a member of the *Adat Perpatih* community, I still remember how this situation was best summarized anecdotally by my elders. They said, "should you commit a crime you go to the *orang putih*'s (lit. white man's) court, should you want to marry you go to the *Kadi* (local Islamic official), and should you want your mother's *tanah pesaka* (lit. ancestral communal land) after her demise, sorry, you can't, it's your sister's, so says our *adat perpatih*."

During the postcolonial period, this three-tier legal system continues to rule the social lives of Malaysians, especially the indigenous population. In summary, it could be said that, sociologically, for them no single cultural strain is pervasive: each has contributed its individual piquancy to create a singular, if syncretic, fusion. Therefore, this process is critical to understanding the indigenous cultures, for present-day indigenous values are compounded of a sometimes contradictory admixture of pre-Islamic custom, the purer precepts of Islam, and western influences.

[10] See the brilliant article by Kugle (2001) on how this happened in the whole of South India during the British period.

[11] The most recent and comprehensive account on the social history of the *Adat Perpatih* in Negeri Sembilan is the contribution by Ibrahim (1995). For anthropological accounts on the practice of *Adat Perpatih*, see Swift (1965) and Peletz (1988, 1996).

The shaping of the indigenous people's values, and, to a great extent, those of the rest of the Malaysian populace too, has been profoundly affected by these conflicting impulses.

Viewed in this context, particularly against the theme of this book, Malaysia provides an interesting singular example as to how 'religious diversity and legal pluralism' have co-existed for at least a millennium, have found expression and shaped a particular society. Observing the impact is equally important. In the Malaysian case, it is a society, a new entrant in the world group of newly-industrialized countries that has been a focus point for international mass media, not only because of its consistently high annual economic growth but also owing to the vocal, assertive, self-imposed world statesman style of its former Prime Minister, Dr Mahathir Mohamed.

For some countries of the south, Malaysia is an example they wish to emulate. For these reasons, Malaysian domestic affairs have been closely scrutinized by both local and international interests, be they investors, NGOs, or regional and international organizations. The main criticism leveled at Malaysia relates to its 'human rights' and 'ecological' records; for the former it has been described as having an 'authoritarian government' and for the latter it has been labeled a 'destroyer of nature.' While it is not my intention here to defend nor attack Malaysia, it is useful to examine these criticisms in the context of the book's theme, to allow us to analyze the situation from an alternative perspective, perhaps for a wider application, beyond Malaysia.

2.3 Social Impact of Religious Diversity and Legal Pluralism in Malaysia

It seems 'natural' to most social scientists who are keen observers of Malaysian past and current affairs to offer analysis on Malaysia from a 'conflict approach,' on the basis that it is a 'plural society' which is characterized by diversity, differences, dividedness, and fragmentation. Hence the assumption, indeed a simplistic one, is that the society, literally, 'must' be overwhelmed by conflict, contestation and contradiction.[12] During the Cold War such an approach and viewpoint in relation to Malaysia gained popularity because Malaysia has been perceived as a 'fragile and vulnerable' country, on the verge of breaking down. The sociological naiveté demonstrated by these observers, a majority of whom are political scientists, shaped the mainstream approach in creating academic and non-academic narratives on 'social conflict' in Malaysia.

This 'literal' perception of Malaysia, as a society in constant conflict, ignores and almost dismisses the possibility of Malaysia's experiencing some form of social

[12] We are yet to read a thorough and respected Marxist- or Weberian-based study, in English or Malay, on Malaysian economy and society, but there exists a small collection of 'Marxisant' and 'Weberianistic' attempts which are mistaken by many for the real thing.

cohesion. Therefore, the fact that Malaysia has enjoyed long periods of peace and stability, through sheer hard work, punctuated by a few violent conflicts in the last 60 years, had escaped the attention of most analysts—but not of Stiglitz, winner of the 2001 Nobel Prize for economics, who said:

> I had the opportunity to talk to Malaysia's prime minister after the riots in Indonesia. His country has also experienced ethnic riots in the past. Malaysia has done a lot to prevent their recurrence, including putting in a program to promote employment for ethnic Malays. Mahathir knew that all gains in building a multiracial society could be lost, had he let the IMF dictate its policies to him and his country and then riots had broken out. For him, preventing a severe recession was not just a matter of economics, it was a matter of the survival of the nation. (Stiglitz 2002: 120)

I would like to argue that it is more beneficial, analytically, to discuss the existence of religious diversity and legal pluralism in Malaysia not immediately in terms of 'social conflict' but in terms of 'social impact,' because 'social impact' could occur in the forms of both 'social conflict' and 'social cohesion,' that is, it could sometimes exhibit strong elements of conflict and contestation, and at other times cohesion and compromise. We need to establish and register the fluidity between the varieties of social impact, so that we can capture the uncertainties, ruptures and tensions which emerge from our discourse on religious diversity and legal pluralism in Malaysia.

I would like to present a way forward in our approach to analyzing Malaysia, moving beyond the 'social conflict' obsession, by proposing that it is imperative, as the first step, to comprehend the nature and workings of Malaysia's federalism and to view its constitution as an instrument in which the country's religious diversity and legal pluralism find convergence in spite of the obvious, sometimes unresolved, social differences.[13]

2.4 The Social Impact of the Unresolved 'Federalism' Puzzle in Malaysia

One critical institutional factor that escapes the attention of most researchers analyzing 'social conflict' in Malaysia is the existence of 'federalism' as the governance structure of choice of the people. The complex nature of Malaysia's federalism has not been captured fully by any study thus far. Four major studies have been published in the last 40 years, on various aspects of federalism in Malaysia.[14] We are

[13] It is cliché for observers and op-ed writers on Malaysia to characterize and arrogantly dismiss any analysis that does not highlight social conflict or does not give prominence to non-Muslim non-Malay viewpoints as 'a dominant, conservative Malay-Muslim perspective.' In the broader sense, such a viewpoint has been labeled 'myopic and racist.' It is not common for religious issues to be examined in the context of the Malaysian federalist system.

[14] See Balasubramaniam (1999), Shafruddin (1987), Simandjuntak (1969), Yusoff (2006).

still waiting for an overall comprehensive survey that could guide us to make sense of the socially defining impact of federalism's structurally dominant presence.

Unknown to many, there is indeed a three-tier federalism in Malaysia. What are these three federalisms, within which religious diversity and legal pluralism are accommodated and contained?

The earliest and oldest form of federalism in Malaysia is found in Negeri Sembilan (lit. a federation of Nine States) which, in 1773, had its first paramount ruler, called *Yang DiPertuan Besar* (lit. 'He Who is Made the Highest Lord'), who was an outsider invited to be the ruler by the *Undang*, or Chief, of each of the Nine States, now known as nine *luak*.[15]

I would argue that Negeri Sembilan is one of the oldest, if not the oldest, federalist entity in the world, established during the European Enlightenment era of the eighteenth century and coming into being long before European federalism officially existed, also before the notion of the nation state was introduced and consolidated in Europe in the nineteenth century.

The second tier is the Federation of Malaya, established in 1948, and which, for the first time, brought together every state in the peninsula in one federal entity. Previously, there had been many smaller versions, such as the Federated Malay States of Perak Selangor, Negeri Sembilan and Pahang. The rest of the states did not belong to a federation but were collectively called the Unfederated Malay States. The Federation of Malaya became independent in 1957 and has its own constitution, which clearly states that each of the states [*negeri*] has autonomous control over two matters, namely, land, and religion and culture.

The third and last tier is the Federation of Malaysia, which was established in 1963, with its own constitution. This constitution was based on the Federation of Malaya 1957 constitution, but considerably expanded,[16] including new provisions that allowed Sabah to have autonomous control over 20 matters, and Sarawak over 18 matters, in terms of governance—obviously much more control than was allowed to the states [*negeri*] within the former Federation of Malaya, now collectively known as Peninsular Malaysia.

For all intents and purposes, Sabah and Sarawak could be considered as autonomous states within Malaysia, because persons born in the former Federation of Malaysia had to have a passport to enter Sarawak and Sabah (now only an identity card is needed), and they cannot work in either of these states without a work permit. Sabah and Sarawak each have a separate superior court (the High Court in Sabah and the High Court in Sarawak), which enjoys a separate local jurisdiction, similar to the one enjoyed by the High Court in Malaya. Appeals from both these courts go to the Malaysian Court of Appeal, and if unsuccessful, further appeals are heard by the Federal Court of Malaysia. Of course, the *Yang DiPertuan Agong*, or the paramount ruler, has the power of clemency.

[15] See Gullick (2003), but be warned, the Wikipedia version contains many factual errors and misinterpretations.

[16] See Gullick (1967).

2.5 Federalism and the Application and Non-application of *Shari'a* Law

Both the High Courts have unlimited jurisdiction in all criminal matters other than matters involving Islamic law, or *Shari'a*. In relation to Islamic law, each state (or *negeri*) has its own independent *Shari'a* court, as provided for by the constitution. In practical terms, a *Shari'a* lawyer has to register separately, for a stipulated fee, in each of these *negeri* courts in order to be able to operate in each state. In short, a *Shari'a* lawyer who wants to take up cases in all the states/*negeri* has to register in all the *Shari'a* courts of the Federation.

It is also a well-known fact that some parts of the *Shari'a* laws are interpreted differently in each state. For instance, the law on polygamy in the state of Selangor states that a husband must bring his wife to court to declare that she agrees to her husband's marrying a second wife. In the state of Perlis, this is not necessary at all—a husband can marry a second wife without the first wife's consent.

This factor of inter-state differences in interpretation is seldom taken into consideration in the analysis of religious diversity and legal pluralism in Malaysia. The attempts by the states of Kelantan and Terengganu to introduce strict Islamic *Hudud* laws, have, in the past, been unsuccessful because of the complicated constitutional process and the involvement of the Federal Parliament. The experts in constitutional law are of the opinion that *Hudud* can be enforced in Malaysia only after a new Malaysian constitution is drawn up to make Malaysia an Islamic state.[17]

There seems to be an assumption that the *Shari'a* laws are uniform in the whole country and that every Muslim is subject to the same interpretation of *Shari'a* rules. The following quote illustrates this assumption:

> The (Malaysian) State administers Shariah Law through Shariah courts that have authority for all Muslims in Malaysia. The Shariah court is responsible for administrating family laws and rulings on religious issues for Muslims. Islamic education is compulsory in schools for Muslim children and only private schools can offer non-Islamic religious education. All Muslim civil servants are required to attend state-approved religious classes. (Bouma et al. 2009: 72)

It is true that the *Shari'a* court is legally responsible for personal matters concerning the Muslims in Malaysia. However, it is not administered by one single federal *Shari'a* court, as the above quotation seems to assume and imply. There are individual *Shari'a* courts in each of the states/*negeri* of the Federation of Malaysia. Every Muslim is under the jurisdiction of the particular *Shari'a* court where he or she lives. A federal *Shari'a* appeals court does not exist in Malaysia. Even the Federal Fatwa Council, which issues *fatwa* [religious ruling or Islamic decree] from time to time on all aspects of Muslim life and life styles, has no power to enforce the *fatwa*. Many non-Muslims and non-Malaysians view the *fatwa* as a binding ruling upon all Malaysian Muslims, and yet in reality it is not.

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[17] See the article, '"Hudud has no place in the present constitutional structure," say legal experts' (2014). Since 1 May 2014, *Shari'a* law has been enforced by a royal decree to replace the civil law in the Sultanate of Brunei Darussalam.

The perceived homogeneity of *Shari'a* laws in Malaysia has been the biggest source of disinformation on 'religious conflict' in Malaysia. Indeed the 'conflict,' if we could label it as such, is really among the different interpretations of Islamic personal laws by different religious authorities of different states/*negeri*, besides the perceived 'Muslim vs non-Muslim' religious conflict.

This misperception is a major empirical error, that has led to an equally highly inaccurate conceptualization, which is to be found in every major country's report on Malaysia that is used as a standard reference by foreign researchers, journalists included, writing on Malaysia (for example, the CIA World Factbook, United States State Department annual country reports, UNICEF Report, non-Muslim based Global Information Network report and the like). This situation has led to the continuous active re-cycling of this major error, which is, as can be expected, believed as the 'truth,' and which is used, for convenience, by Malaysians who have, apparently, an axe to grind against Islam, Muslims, and anything to do with Malay-Muslims in Malaysia.

The best example that could be put forward here relates to the issue of the conversion of non-Muslims to Islam, in order for them to be able to marry a Muslim, and their subsequent request to return to their original religion. In the last 5 years, a number of high profile cases have been covered in the media, mostly sensationalized, and with the coverage demonstrating a distinct lack of understanding of the federalist context within which these cases have to be contextualized.

The impression given by media, and popular discussion, is that a re-conversion is totally impossible, because the person involved has to get permission from the *Shari'a* court to be 'released' from Islam. The reality is rather different. The *Shari'a* court in Penang allowed a Chinese lady, a Muslim convert, to return to her original religion after her divorce from her Muslim husband. Another Chinese lady, also a Muslim convert, died after being a nominal Muslim for many years. The *Shari'a* court in Negeri Sembilan allowed her body to be buried as a non-Muslim in a Chinese cemetery.[18] Indeed, the same Negeri Sembilan *Shari'a* court has allowed, in the last 15 years, 62 out of 840 Muslim converts to renounce Islam and return to their original religion.[19]

Yet in another case, involving a male Indian Muslim convert, who converted without the knowledge of his Hindu wife and family, the *Shari'a* court in the Federal Territory ordered that he be buried as a Muslim, against the wishes of his wife and family.

Another 'world famous' case involved one Lina Joy, a Malay convert from Islam to Christianity. She applied to the National Registration Department (NRD) of Malaysia to have her name changed from Azlina bt Jailani to Lina Joy, which was allowed. But when she applied to have her religion changed from Islam to Christianity on her identity card, her application was rejected by the NRD on the basis that she did not submit with her application a letter of confirmation from any *Shari'a* court that she had renounced Islam.

[18] See the report in the article, 'Doing the impossible: Quitting Islam' (2007).

[19] Data from the various records, in the last 15 years, of Jabatan Agama Islam, Negeri Sembilan.

Lina Joy had decided to bypass that *Shari'a* rule because, by the time she applied, she had already converted to Christianity, and it is not difficult to understand her assumption, then, that she was no longer under the *Shari'a* court's jurisdiction. So, in 1999, she applied to the High Court of Malaya, to have her religion on her identity card changed to Christianity, on the grounds that she was already a Christian and that her name had been changed. Her application was rejected by the High Court on the same basis as the NRD's reasoning. She then submitted an appeal to the Federal Appeal Court, and, in 2006, the Court rejected her appeal and reaffirmed the decision of the High Court, hence, also, that of the NRD.

The unanswered question to this day is, could what has been described as a 'social conflict' have been avoided if, firstly, the woman had changed her home address to a location in Negeri Sembilan, and, secondly, applied to the *Shari'a* Court in Negeri Sembilan for permission to renounce Islam? Would she, like the 62 others before her, have obtained the renouncement certification letter from the Negeri Sembilan *Shari'a* court?

She never did try this process, and her lawyers did not advise her on this possibility. Instead, she, her lawyers, and her Church apparently preferred a 'trial by the media.' Is this then a 'social conflict' that has been induced before all avenues to resolve it have been explored?

However, the above-mentioned cases have, no doubt, had an impact on the relationship between believers of different religions within this religiously diverse country that practices legal pluralism—an impact mostly viewed as negative within a socially cohesive Malaysia. The first type of case above concerns the place of Islamic law within Malaysian law and how it is perceived as 'imposing' on non-Muslims, but is perceived by conservative Muslims as a 'threat' to Islam, which is the official religion of the country. Open, heated, verbal confrontation has developed from this situation. The second type of case relates to Muslims who have converted to other religions, but without first getting permission from the various state-level *Shari'a* courts. Those Muslims were either totally ignorant of the need to get *Shari'a* court permission to convert or ignorant of the Negeri Sembilan cases. Even if they were aware of the rules, the social collective pressure imposed by family and friends would often be too much for individual converts to bear. Besides, no Muslim would like to be declared 'apostate.'

However, nobody has ever launched a challenge, in the context of human rights, through civil society, that a Malay has been denied the right to follow freely his or her religion of choice. This would seem to show that the Malay-Muslim case is a foregone conclusion and that non-Malays can practice whatever is their religion of choice.

2.6 Social Cohesion Impacts

A number of other policies are implemented by the Federal and State/*Negeri* governments to peacefully 'manage' religious diversity in Malaysia, through a structural condition of its legal pluralism endorsed and accepted by its Federal Constitution.

First, the government has made a serious effort to look after the state of religion and religious diversity by offering these diverse religions both status and revenues. The government has encouraged the registration, with the Registrar of Societies (ROS), of bodies or sub-bodies of the Malaysian Consultative Council of Buddhism, Christianity, Hinduism and Sikhism. Registration entitles the organization to government grants, including for the building of religious premises. If any such sub-body fails to qualify for ROS, it can, under the Companies Act, register with the Registrar of Companies (ROC) as a legitimate business and entity, but it does not receive any government grants. In other words, if any religious body or sub-body wants to operate in Malaysia, there is really nothing to stop it.

Second, efforts have been made to make possible, and create, a form of inter-religious dialogue. The latest result of such efforts is the setting up of the Committee for the Promotion of Inter-Religious Understanding and Harmony Among Adherents (CPIRUHAA), under the leadership of the Director General, Department of National Unity and Integration, of the Prime Minister's Department. Previous attempts to set up a National Inter-Faith Commission failed because the Muslim conservatives believe that non-Muslims cannot discuss sensitive theological matters relating to Muslims, and they do not wish to discuss theological issues relating to other religions. They argued that what was needed, before a dialogue could ever begin, was a good and comprehensive understanding, by the different parties, of each other's beliefs—hence the formation of CPIRUHAA. In spite of such opposition, inter-religious dialogues do occur through bodies like the Human Rights Commission and other civil society bodies.

2.7 Conclusion

Malaysia celebrates its religious and ethnic diversity. Most of the Malaysian public holidays are related to important religious and ethnic-cultural events. However, this diversity has been framed, mitigated, and negotiated within a set of rules called the Constitution. The interpretation of this constitution, whether in the civil or *Shari'a* courts or in the popular media, is, equally, open to diverse opinions. Because religion is an ethnic identifier in Malaysia—a Malay is defined as a Muslim by the constitution—religious diversity and legal pluralism always have a double impact, on both religion and ethnicity, when one or the other enters the purview of the public.

Interestingly, this diversity has been a hugely important commodity to Malaysia. Indeed, 'selling diversity,' for want of a better term, is one of the biggest income earners for Malaysia, upon which the travel-related service industry in Malaysia has been conceptualized and promoted—best captured in the ingenious slogan 'Malaysia Truly Asia.' The non-conflictual social (read economic) impact of this diversity is really a significant contributing factor towards the quality of life in peaceful and stable Malaysia. In 2011, travel-related activities in Malaysia earned the country US$9.8 billion and provided thousands of jobs.

Nonetheless, this same diversity that Malaysia has enjoyed also has a negative aspect. It emphasizes differences, such as those in the religious context, that could lead to potentially explosive conflicts. So diversity in Malaysia has two faces, a positive face and a negative one, which have long co-existed in Malaysia's history—hence Malaysia's 'state of stable tension,' as this essay had attempted to demonstrate.

In conclusion, it could be said that religious diversity and legal pluralism in Malaysia is the result of historical-structural events that took place during at least the last 2,000 years, in the region once known as Nusantara, the Malay world, the Malay archipelago, the Far East, Southeast Asia and, recently, as ASEAN. It shall remain an interesting and important object of investigation to those interested in social conflict and/or social cohesion studies.

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Chapter 3
Modern Law, Traditional '*Shalish*' and Civil Society Activism in Bangladesh

Habibul Haque Khondker

3.1 Introduction

One of the challenges of modernization in Bangladesh is played out in the confrontation between the institutionalization of modern law and the practice of traditional arbitration, known as s*halish*. Often, this traditional, informal or semi-formal adjudication process, which survives in the rural society, deals with issues related to the transgression of social and cultural norms and practices, mostly, though not exclusively, involving women. Moreover, the protagonists of *shalish* often invoke some kind of localized and twisted interpretation of *Shari'a* to legitimize the trial, especially the sentencing of the alleged criminals. While political problems, disasters (both natural and man-made), and sometimes glimmers of economic growth dominate international attention, modernization of the legal sphere in this nation of 160 million people remains a neglected field. Despite its confrontational political culture, Bangladesh has been able to post a 6.5 % GDP growth for the past 5 years and over 5 % growth for the past two decades. In governance indicators, Bangladesh gets low marks, due to its high corruption level as well as ineffective administration of law. Of the host of problems related to the administration of law, the institutionalization of modern legal systems, and the cultural acceptance of, and respect for, the rule of law in general, the impact of legal pluralism on the women of Bangladesh remains under studied. The present chapter is concerned with the impact of *shalish* on women, an area which is of immense concern to the civil society organizations in Bangladesh, and a subject that deserves more attention than it has received so far. This chapter explores the ongoing interrogations and contestations which aim to reform, and, when necessary, coopt, the traditional system of mediation and dispute resolution, *shalish*. Informal mediation and dispute

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resolutions based on social norms and customary laws can be viewed as an aspect of alternative dispute resolution (ADR) embedded in the principle of legal pluralism. *Shalish* derives from an Arabic word '*sulh*,' which means peace or reconciliation (especially between husband and wife). The dictionary meaning of this word in Bengali is 'arbitration.' In the everyday Bengali parlance, *shalish* is meant to be mediation and dispute resolution.

The practice and the rules of *shalish* vary from region to region in Bangladesh. In this chapter the word '*shalish*' refers to informal arbitration. The mediation that begins informally, following the customary practices, leads to arbitration, judgment, and punishment or acquittal. In the villages, *shalish* is presided over by the traditional village headman or by an elected chairman or other senior members (or *murobbis*) of the village. In this chapter, our focus is on the *shalish* emerging from religious '*fatwas*' which are often pronounced by the religious leaders, who are not competent authorities to issue them. The invocation of *Shari'a* is confounding because the pluralist legal system in Bangladesh is somewhat *Shari'a*-compliant with regard to laws dealing with marriage and inheritance of property, although the bulk of the country's laws are rooted in the colonial legal traditions. Sometimes the maulavis or the imams of the mosques are also regarded as both religious leaders and the community leaders in the village. In the words of one author, "[t]he *shalish* is usually an all male affair, and is not known for its commitment to social justice or the rule of law. On the contrary, the *shalish* has been actively used as a means of social control, including upholding gender and social hierarchies" (Hasle 2003: 106). By invoking Foucault, it can be added that, traditionally, the *shalish* has been a key apparatus in the disciplining and punishment of rural women, who make up the majority of women in Bangladesh.

This chapter attempts to examine the role of civil society activism in spreading the ethos of rights, as understood in the modern politico-legal discourse, especially the right to the protection of the law against arbitrary adjudications, arbitrations or punishments. Many of the arbitrations in rural Bangladesh are based on age-old traditions known locally as '*shalish*,' and these localized arbitrations are administered by rural elders who often follow religious edicts or '*fatwas*' or some rough interpretation of *Shari'a* codes in arbitrating disputes. Especially when these disputes involve transgression of moral norms, sexual conduct, or any such behaviors involving the relationship between members of the opposite sexes, the judgments are invariably biased against women. Sentencing in such cases is harsh, often barbaric, and the staging of such unconscionable punishments is public. The public nature of punishments, reminiscent of the Middle Ages, is intended to inflict maximum humiliation and to post a warning to the community of the consequences of such transgressions. Invoking Emile Durkheim, it can be stated that the public nature of the punishment, in the presence of the village community, is reminiscent of the mechanical solidarity which in the past played a role in maintaining social order. The maintenance of social order in the Bangladeshi context is but a periodic renewal of patriarchy.

In a modern society, or a society characterized by organic solidarity, such punishments are at odds with the norms of equality of law and justice, as envisaged under

the modern states, based on the rule of law. Bangladesh has had a long history of exposure to global modernity, ushered in by traders and missionaries, for more than the past two centuries. British colonial rule formalized that engagement with the global processes by introducing modern education and the British legal system. A lopsided socio-economic development, as is often characteristic of colonial rule, created in Bangladesh an educated middle class elite, numerically small in a vast majority of peasantry. Bangladesh, which is part of Bengal, was a province of Mogul India and then of British India. Bengal was the birthplace of Indian modernity—often referred to as the 'Oriental Renaissance'—because it was through Bengal that colonial encroachment and its so-called 'civilizing mission' began, as manifested in the introduction of modern education and the system of law. The uneven development provided the political-economic basis for the checkered nature of the political history of Bengal. In 1947, the Muslim-dominated Eastern part of Bengal became a part of Pakistan and, with the help of India, that same region emerged as an independent country in 1971. Despite the existence of widespread poverty Bangladesh has made significant progress in the human development indicators, especially pertaining to women's literacy and the reduction of maternal mortality, thus meeting two of the eight goals of the Millennium Development Goals (MDGs). Yet a large number of women are exposed to systematic exploitation, domination and humiliation on a day to day basis. Despite tangible improvements in the overall conditions and status of women, as evidenced in the UN data, paradoxically, a large number of rural women remain vulnerable to the stranglehold of patriarchal institutions, of which the traditional arbitration, or '*shalish*' is, perhaps, the worst. By monopolizing the domain of administration of justice, this practice ensures control over women's bodies and lives. Newspapers and reports put out by various research and non-governmental organizations bring to light countless cases of violations of women's rights and their continued vulnerability.

As Bangladesh emerged as an independent country in 1971 it embraced the ideals of democracy and secularism. From 1975, following a military overthrow of the civilian rule, and through the train of dictators that followed from 1975 to 1990, the ideals and the constitutional provision of secularism were abandoned. Constitutional amendments revived the Jamaat-i-Islami in 1976 through a proclamation of martial law, eliminated secularism as a state principle in 1977, and made Islam a state religion in 1987 (Hossain 1996). Under the tenure of General Zia, one of the military dictators in the late 1970s, the committee on curricula and syllabi stated: "Islam is a complete code of life, not just a sum of rituals. A Muslim has to live his [sic] personal, social economic and international life in accordance with Islam from childhood to death" (Kabir 2004: 88). Even a democratically elected government, in 2000, under Mrs Zia, implemented a policy of primary education, the first objective of which was "indoctrination of students in the loyalty to and belief in the Almighty Allah, so that the belief inspires the students in their thought and work, and helps shape their spiritual, moral, social and human values" (Kabir 2004: 88). So, also, did the secular administrations under the Awami League use the trappings of religion, and continued to placate the religious constituency by allowing a variety of Madrassah-based religious education programs—some within and some outside the

regulation of the Ministry of Education—as parallel systems of education. The leaderships of both the major political parties—the Awami League and the Bangladesh Nationalist Party—are wont to assure the people that no laws would be passed that are against the letter and the spirit of Islam, as enunciated in the Qur'an and *Shari'a*. Both religion-leaning and secularism-leaning parties try to woo the Islamic religious constituencies with such assurances (Khondker 2010).

While the successive governments were courting the large religious constituency for their support, the NGOs, though not openly confronting the religious right ideologically, in implementing their modernizing programs were often unwittingly on a collision course with the Islamist groups.

Since 1991, incidents of *shalish*, and *fatwas* on women and NGOs, have increased in Bangladesh (Riaz 2005).

> The NGO BRAC [Bangladesh Rehabilitation Assistance Committee] found itself the object of Islamist wrath in 1993. Across the country, BRAC schools were burned down and BRAC women's employment projects attacked. BRAC was an obvious target for two reasons. It is the largest NGO in Bangladesh, and perhaps even in the world. The size and scale of its operations have made it a household name. As such, an attack on BRAC is a symbolic attack on all NGO activity. Second, BRAC schools focus to a great extent on girls' education. (Siddiqi 2006: 7)

In the mid 1990s, Ain o Salish Kendra (ASK) compiled a list of *fatwas* issued by local imams against a number of activities of the NGOs aimed at rural development. A sample of those cases follows:

> 15–18 January 1994: At a village in Kishorganj, local maulanas and imams, under the leadership of Maulana Menoo, issued *fatwas* to prevent children from going to BRAC schools. Burial rites were not to be performed for children studying in BRAC schools. *Fatwas* were issued to cut down 6,000 mulberry trees grown by women in the food for work program. Some madrassah students inspired by the *fatwas* attacked the NGO field workers.
>
> February 1994: At a village in Bogra, 25 BRAC schools that promoted non-formal education were burnt down, at the instigation of fundamentalists, on the false allegation that children were being converted to Christianity. In another village in Bogra, in March 1994, an imam issued orders to the husbands of 10 women to divorce their wives who worked with NGOs, and 60 families were ostracized for the same reason. In another case, again in Bogra, *fatwas* were issued by imams in 12 villages to confine working women inside their houses, on the grounds that 'working outside was against Islam.' In yet another case in a village in Bogra, in March 1994, a local maulana issued a *fatwa* against a man and his wife that both of them should be whipped 101 times, because the wife had taken a loan from Grameen Bank. After the man's father died, the maulana refused to perform the burial services.

Throughout the 1990s many such cases of local *fatwas* were reported in the daily newspapers in Bangladesh. There are hardly any studies by which to track trends, but based on news reports, it seems that there has been a slight decline in such local level mediation and sentencing. Usually, not all sentences are executed. The NGOs and some of the government policies have played a role in slowing down the incidence of such cases.

One of the positive developments in Bangladesh has been the rise of a civil society, albeit urban-based and led by the English-educated middle and upper classes of Bangladesh society. Many of these NGOs have achieved some degree of penetration

into the rural society. Non-governmental organizations, in recent years, have proliferated in Bangladesh. One of the reasons for this is the absence of government effectiveness. Some of the organizations, such as BRAC or Grameen Bank, which began as NGOs, have grown very big. It is sometimes disputed as to whether Grameen Bank is an NGO or just a bank with a social agenda (a social business, perhaps) or a business house. BRAC is regarded as the largest NGO in the world, in terms of its budget and personnel. Skeptics regard it as a government within the government or a parallel government. There is a plethora of criticism against the NGOs in Bangladesh. Some of the critiques from the left denounce the NGOs as either agents of capitalism or of western cultural imperialism. Critics from the religious right portray NGOs as missionary agents for the conversion of poor Bangladeshi Muslims to Christianity. In fact, in recent years several Islamic NGOs have flourished, as if to counter the alleged trend. Elsewhere, I have suggested that, broadly, the NGOs in Bangladesh can be divided into two types: money-driven and consciousness-driven. Some of the consciousness-driven NGOS or civil society groups, such as Ain o Salish Kendra (ASK) or Nijera Kori, have been very active in raising the consciousness of the women in Bangladesh, providing them legal assistance in times of need and other services. In addition to ASK, there are number of legal aid organizations in Bangladesh in the NGO sector. In fact, law has become a vehicle for social activism in Bangladesh. As Sheldrick suggests, "[l]aw, with its language of justice, fairness and equity, seems well suited to advancing claims for social justice…social movements frequently employ the strategies and tactics centered around the concept of rights" (Sheldrick 2004: 10).

This chapter examines the role of Ain o Salish Kendra (ASK) in promoting the rights of the women and making them aware of their rights as guaranteed in the Constitution of the People's Republic of Bangladesh. Since its formation in 1986, ASK has made a significant contribution to the protection of the rights of women in rural Bangladesh. Following a brief discussion of the evolution of modern legal systems in Bangladesh, I present a number of cases where rural women of various ages were subjected to tortures, dreadful abuse, and death under the cover of *shalish*, the so-called traditional adjudication, and I then discuss the role of the civil society organizations, Ain o Salish Kendra in particular, in fighting this menace.

3.2 Development of Modern Law in Bangladesh

Bangladesh, as part of the historically defined Indian sub-continent, has been exposed to the forces of global modernity since the colonial days dating back to the late eighteenth century. One of the markers of institutional modernization was the introduction of the colonial legal system.

Henry Maine's distinction between status-based societies and contract-based societies may be somewhat overdrawn, but it presents ideal-typical polar types. In most societies, legal codes are embedded in traditional customs, social norms, and broader cultural boundaries. Bangladesh is no exception. In rural Bangladesh,

where the reaches of the state law are limited or have had very little traction, customary laws, administered by the local headman ('*morol*' in local parlance), dominate. The practice of *shalish* has a long history in the context of Bangladesh. The forces of modern laws and their ancillary institutions have had little impact in the everyday lives of the people. In a society where respect for elders, especially older male figures who happen to be part of the landed elites in rural Bangladesh (and, before the nation came into existence, in Bengal), these practices are deeply entrenched.

Since modern laws could not replace the traditional customary practices of arbitration and sentencing, they came to coexist with the practices of *shalish*. In the framework of legal pluralism such coexistence of the two streams of laws may seem to be a pragmatic compromise, but in reality, it often makes a mockery of justice. A reformed system of *shalish*, constituted by people with knowledge of the laws, and ensuring protection of the rights of the defendant (if need be by means of providing a system of legal counsel) may contribute to the enhancement of the administration of justice at the grassroots level. But that is yet to happen. At the same time, studies have shown that *shalish* suffers from the same influences of class and party partisanship, as well as bribery (Alim and Rafi 2003), as does its more formalized counterpart in the modern sector of the society.

Shalish covers a wide range of rule violations and 'inappropriate' (according to whom?) behaviors in the rural context. The force of traditional (i.e. patriarchal) customary laws on the bodies and behaviors of women presents a classic example of Foucauldian discourse, and of governmentality. Women's bodies are under constant surveillance, and their moral behaviors monitored and scrutinized, to the extent that even the slightest infringement would meet with sharp reactions and rapid adjudication followed by harsh punishment.

As women in traditional Bengal were not aware their rights, let alone able to fight for them, the practice of *shalish* went unchallenged and remained part of a tradition that most people accepted. Conformity, rather than rebellion or protest, was the norm. With the growing concern with human rights in general, and women's rights in particular, a section of women armed with modern education and knowledge started questioning the dominance of the traditional practices of *shalish*.

For illustrative purposes, one can draw some parallels between rural Bangladesh and medieval Europe.

In late medieval Europe private relations were governed, by and large, by socially accepted and popular customs. In the West, in the first half of the twentieth century, the relationship of the legal order with the wider social order became established beyond question as a central (perhaps *the* central) juristic and jurisprudential concern. Attention was increasingly directed to the effects of law upon the complex of human attitudes, behavior, organization, environment, skills and powers involved in the maintenance of particular societies, or kinds of societies, and conversely, on the effects of these upon the particular social order (Stone 1966: 3).

Modern laws came to India with the rule of the East India Company, in the latter half of the eighteenth century. The legal systems began to spread from city to city, though even after the formal incorporation of India into the British Empire, in the

middle of the nineteenth century, in the wake of the failed revolt—then known as the Sepoy munity, and now labeled 'the first war of independence'—traditional, customary laws persisted. The company law was metamorphosed into a state-wide legal system and thus the British common law tradition came to the region which is now Bangladesh.

The legal system in Bangladesh is over-burdened with a large number of cases, with limited availability of judges and able prosecutors. The legal system is part of a larger social system in Bangladesh characterized by inefficiency and incompetence. A relatively weak administration of justice is not unique by any means; it is part of a general deficit of governance.

The imposition of modern laws was never intended to replace traditional practices of *shalish*. Informal *shalish* has some role in adjudicating inter-personal or familial conflicts. Such arbitrations are often accepted by the feuding parties. However, what is unacceptable is the unlawful authority of the local elders to impose brutal sentencing on the alleged offenders. The impositions of punishments, which are often public, humiliate the victims of this system to the extent that many of them commit suicide. Despite the rulings of the High Court, a number of cases of *shalish*-driven sentencing have taken place in Bangladesh. Trial by *shalish* is clearly unconstitutional. Article 35 clause 3 of the Bangladesh Constitution (Government of Bangladesh 1973) specifically mentions "court or tribunal established by law." The implication here is law of the country.

35. Protection in respect of trial and punishment.

(1) No person shall be convicted to any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from that which might have been inflicted under the law in force at the time of the commission of the offence.
(2) No person shall be prosecuted and punished for the same offence more than once.
(3) Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law.

Bangladesh does not lack the necessary laws. In fact, a number of laws exist to protect the rights of women and children in Bangladesh, for example, Nari O Shishu Nirjaton Domon Act in 2000 [Prevention of Torture against Women and Children Act]. Besides this there is the Penal Code to protect them from physical and mental violence. On 14 May 2009, the High Court Division of the supreme court of Bangladesh expanded the definition of violence to include 'sexual harassment,' and the Constitution of the Republic provides equal legal protection for all, regardless of gender, ethnicity and religion.

Article 31 of the Constitution states unambiguously:

31. To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

Constitutionally at least, there is no gender inequality in Bangladesh. In fact, Article 19 of the Constitution ensures the promotion of gender equality in

Bangladesh, recognizing the political rights of women by clearly enunciating that no discrimination on the basis of sex shall be permitted, as it states in clause 1.

19. Equality of opportunity.

(1) The State shall endeavor to ensure equality of opportunity to all citizens.
(2) The State shall adopt effective measures to remove social and economic inequality between man and man and to ensure the equitable distribution of wealth among citizens, and of opportunities in order to attain a uniform level of economic development throughout the Republic.

Articles 27 and 28 of the Constitution relate to the topics of equality and discrimination, stating categorically:

27. All citizens are equal before the law, and are entitled to equal protection by the law.

28. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.

(2) Women shall have equal rights with men in all spheres of the State and of public life. (Bangladesh Constitution 1972)

No such assurance was given outside these spheres (Sobhan 1978).

Despite the constitutional guarantee of equal rights and protection, such egalitarian and democratic ideals remain eclipsed by the shadow of a society that remains in the grip of religious obscurantism. 'Eclipse' is an appropriate metaphor for describing the conditions of exposure of women in rural Bangladesh to the traditional mediation process of *shalish*. A documentary film, titled 'Eclipse,' was made by Ain o Salish Kendra in 1995, following one of the most barbaric cases of *shalish* judgment, where a couple was subjected to stoning for their alleged 'adultery.' On 10 January 1993, in Sylhet, a northeastern district of Bangladesh, a couple was accused of cohabitation and thus an unlawful sexual relationship. Although the couple claimed they were married, as is often the case in rural Bangladesh they did not have chapters (certificates) to prove it and so the local *shalish* did not recognize their marriage. Even the parents of the 23 year old woman, Nurjahan, were punished. The couple was punished for committing adultery, or *zina*, according to the so-called Islamic laws of the Middle Ages. Nurjahan and her husband Mutalib were buried in a waist-deep pit and were pelted with 101 stones. Both of them survived the punishment, but, overcome with humiliation, Nurjahan committed suicide later that day. This horrific violation of fundamental rights was picked up by the media and became a talking point for the entire nation.

A report published by Ain o Salish Kendra (ASK) recorded the various aspects of social life in Bangladesh against which *fatwas* were declared in the period between 1991 and 1995.

1. Against use of contraceptives:

June 1993: 35 women in a village in Serajgonj were ostracized because they used contraceptives.

November 1993: Two imams were suspended from their mosque duties because their wives used contraceptives.

2. Against education:

January 1995: Children were deterred from going to BRAC schools. Imams refused to perform burial rites for children who had attended BRAC schools.

February 1995: Schools were burnt following *fatwas*.

3. Against women's development:

January 1994: 600 mulberry trees cultivated by women were cut down by madrassah students.

March 1994: 10 women were divorced for working with NGOs and ostracized for working outside the home, which is 'against Islam.'

4. Against freedom of speech:

June 1991: A case was filed charging editors of *Jonokontho*, under Section 295(c), with malicious and deliberate intent of harming the religious sentiment of the people. Warrants of arrest were issued against the editors.

May and June 1994: Religious extremists attacked or committed arson in several Bangla daily news chapter offices, such as *Bhorer Kagoj*, *Aajker Kagoj*, and *Jonokontho*.

5. Blasphemy Law:

June 1992: Jamaat-i-Islami tabled a bill in Parliament to make blasphemy punishable by death.

In the words of Dr Hameeda Hossain, Chairman of ASK and a founding member of the organization:

> As a legal aid and human rights centre Ain o Salish Kendra (ASK) has been concerned with the recent surfacing of intolerance by religious extremists manifested in an increasing violence and violation of human rights both in the region and within the country. The chronology of violations of legal and human rights committed in the name of religion in the last two years, in particular, illustrates the threats to civil society. The attacks have been directed against women, in particular, but also against other progressive groups. (Hossain, H. 1996)

In a recent survey it has been seen that from 1 January 2005 to 28 February 2011, 1,257 women were killed, 348 were ill-treated and 243 committed suicide due to dowry related violence; 526 women were victims of acid violence; and 1,876 women and 1,598 young girls were victims of rape. The same source also shows that in 2010, 216 girls and women were victims of harassment (Saleheen 2012).

Selected incidents of violence and cruelty against women as a result of *shalish* are presented below:

In Kashiganj, Rangpur, a northern district, a woman was punished for working for a candidate in a local government election with one of her female friends. Her husband committed suicide over her defiance of his instruction. A *shalish* meted out punishment against the two women.

In August 2011, Ferdausi Begum, 32, wife of an expatriate Bangladeshi worker, fell foul of a self-appointed bunch of rural arbitrators in Habiganj. On charges of having an extra-marital relationship, Ferdausi Begum was publicly whipped and ostracized from the community. Haunted by the pain and shame of torture, she jumped, along with her four children, in front of a moving train. She and two of her children died instantly, leaving the other two critically injured. Her husband, Jilon Mia, worked as an expatriate worker in Saudi Arabia.

In Madaripur, Shirin Akhter, a teenaged madrassah student, took her life by hanging herself from a ceiling fan. The tragedy originated in a small tiff centering on an

> allegation of a goat grazing the grass on the so-called complainant's land. She was declared guilty in the local *shalish*. The public humiliation she suffered on being caned and forced to touch the feet of the complainant was simply too much for the teenager to bear.

Many of the informal trials in rural Bangladesh are conducted in light of *fatwas* declared by the religious leaders. The High Court, in a verdict in July 2010, declared illegal all kinds of extrajudicial punishment, including those made in the name of a *fatwa* in local arbitration. This was an important decision but fell short of banning *fatwas*.

The court, however, directed the authorities concerned to take punitive action against the people involved in enforcing *fatwas* against women. The court observed that anyone involved, present at or taking part in, or assisting any such conviction or execution would come under purview of the offences under the Penal Code and would be subject to punishment. It also observed that infliction of brutal punishment, including caning, whipping and beating, in local *shalish* [arbitration] by persons devoid of judicial authority, constitutes the violation of constitutional rights. The court said the people's rights to life and equal protection must be treated in accordance with the law.

The High Court stated in its ruling that, as per the provisions of the Constitution, the citizens will not be subject to cruel, inhumane and degrading treatment or punishment.

Civil society organizations filed a writ in 2009 and lawyers filed two separate writs in 2010, with the High Court, seeking the necessary directives from the court to stop extrajudicial punishment in the name of *fatwas*. The petitions were filed following several newspaper reports and investigations by the petitioners into violence inflicted on women, in the name of *fatwas*, by local religious leaders and powerful sectors. The petitions were filed by rights organizations—Bangladesh Legal Aid and Services Trust (BLAST), Ain o Salish Kendra (ASK), Bangladesh Mahila Parishad, BRAC Human Rights and Legal Services, and Nijera Kori—and four Supreme Court lawyers, who were all men.

It was alleged in the petitions that a number of deaths, suicides and incidents of grievous harm to women had been reported arising from punishment given in *shalish*, but that the law-enforcement agencies took no action to prevent those unlawful punishments. Such kinds of conviction and punishment were clearly extrajudicial.

The petitioners referred to international obligation under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, and the Convention on the Elimination of All Forms of Discrimination Against Women 1979.

Earlier, on 25 August 2009, the High Court directed the secretary to the Ministry of Local Government and Rural Development, officials of the law-enforcement agencies, and the chairmen of union parishads and municipalities to take immediate measures against extrajudicial penalties decreed in *shalish*. It also issued a ruling asking them to show cause as to why their failure to prevent such illegal acts, in compliance with their statutory obligations, should not be declared illegal.

In a landmark verdict in 2001, the High Court bench of Justice Mohammad Gholam Rabbani and Nazmun Ara Sultana declared *fatwa* illegal, following the case of a *fatwa*-sanctioned marriage (Hossain 2002). An appeal was lodged with the Appellate Division in this regard. The verdict of July 2010 was wider in scope than that of 2001, declaring all kinds of extrajudicial punishment illegal. The verdict of 2010 also asked the law enforcers to remain vigilant against extrajudicial punishment and report to the court about such incidents.

Despite this landmark decision, rural women in Bangladesh, irrespective of their religion, ethnic background and, sometimes, social status, continue to suffer in the name of traditional justice because the protection of the modern laws fails to reach them. In sustaining the traditional, localized arbitration system, dominant religion also plays a role. Interpretation, or misinterpretation, of Islam in Bangladesh is instrumental in the perpetuation of this traditional 'justice' because few would dare criticize a practice for which some—even tenuous or just dubious—support can be found in certain *hadith* or *sunna* (traditions of the Prophet). The following two cases illustrate these points well.

The death of 14 year old Hena Akhter of Chamta village in Shariatpur district in January 2011, after she was forced to suffer arbitrary punishment at the hands of self-styled adjudicators, provides a glaring example of how vulnerable women still are in Bangladesh society. The victim was raped by her 40 year old married cousin, whom she probably trusted. Rather than showing any sympathy for the grievous wrong done to her, the local elders, in a *shalish*, blamed the victim. Following a *fatwa* issued by the prayer leader of the village mosque they sentenced her to 100 lashes. The victim, already traumatized by the rape, had then to suffer the lashes. One analyst wrote in a national news edition:

> The word cruel is not enough to describe the mental state of those who perpetrated the monstrosity. It was too much for the hapless girl from a poor household to bear. The parents, being too afraid to protest, had nothing to do but helplessly watch the tragic end of their beloved daughter at the local Upazila Health Complex as she succumbed to the physical and mental wounds she was compelled to suffer. And thus a girl's right to live and see justice was denied by some so-called village guardians. Unfortunately, the vile drama of the murder of the girl by a hurriedly constituted 'village arbitration court' was staged despite the existence of a High Court (HC) order that declares all kinds of extrajudicial trial, including those by *fatwa*, illegal and anti-constitutional. The said HC rule further provides that the executors, accomplices or even those present at the scene of such trial would come under the purview of offence according to the penal code.

The murder of Hena, in the name of a so-called trial, was to prick the conscience of the whole nation after it was reported in the media. And that, too, was possible only after the bereaved father of the girl, out of desperation, lodged a case against the culprits involved with the local police station, defying the intimidation of the powerful quarters of the village. The case of Hena provides yet another illustration of local-level arbitrations, where it is mostly the poor and the vulnerable who are at the receiving end of the judgments. The so-called trials through *shalish* (village arbitration) are often run by the powerful quarters of the locality, while the half-literate village adjudicators and *fatwa*-issuing *mollahs* are in cahoots with the local elite. According to Ain o Salish Kendra's estimate, given in July 2010, some 10 to

12 such *fatwa*-based village trials took place in the previous year. As indicated above, the reported number of such trials is just the 'tip of the iceberg.' More studies and in-depth researches are necessary to determine the actual extent of the crimes being thus committed in the villages, unknown to the civilized world (Alim 2011).

In another incident, Serafina Mardi, a Christian girl, died from burns on 21 February 2011. She had set herself ablaze in disgust, as she had received no justice after being gang raped by nine men of her village on 4 April 2010. Bypassing the legal system of the country, Serafina, too, was forced to accept *shalish*, or community arbitration, that promised her monetary compensation from the rapists and marriage to one of them. Failing to get justice, the young girl finally committed suicide. In both of these cases, one Christian and the other Muslim, the local community bypassed the existing law of the land and used a version of religion to impose so-called traditional justice on these unfortunate girls.

Unlike Hena's family, Serafina's family was able to file a case against the rape, but community leaders, along with the Shurshunipara Catholic Church, in an attempt to save the unity of the community, forced the victim's family to withdraw the case. On 23 April 2010 they arranged arbitration and imposed an out of court settlement with the victim while the rape case was still under trial. The disturbing question in both these cases was how the existing system of law was totally ignored and the victims were forced to accept arbitration judgment by local community leaders. Referring to the arbitrations that took place in Hena's and Serafina's cases, Nina Gowsami, a lawyer of Ain o Salish Kendra, a legal aid and human rights organization, commented: "Such arbitration has no validity. There should be no arbitration for rape case as it is completely non-compoundable." Citing the above cases, the human rights lawyer added that the victims' families never voluntarily went for arbitration, rather, they were forced to accept the judgment imposed on them because of the 'muscle power' of the perpetrators.

In both cases, the local community leaders sought the backing of religion to carry out their abominable acts. The imam of the local mosque, Hafez Mafiz, endorsed Hena's lashing, and Reverend Bernand Tudu, considered as the guardian of the parish, did not intervene while arbitration went on in the church's premises, which was an injustice to Serafina. Islamic scholar and academic, Dr Shamsher Ali, commented to the press: "There is an established system of law in this country for rape cases. Other than in cases like marriage and inheritance, we do not apply Islamic law for social mishaps like rape." He further added that although there was specific punishment mentioned in the Qur'an for cases of adultery, nothing was stated as a punishment for rape. Referring to Hena's case he said: "As we are not governed by Shariah Council, such village arbitration has no basis at all. When anybody uses religion to dictate such justice, religion itself is being maligned."

Father Advocate Albert Rozerio, Secretary General, Episcopal Commission for Justice and Peace in Bangladesh and Legal Advisor, Dhaka Catholic Archdiocese, defended the action of Reverend Bernand Tudu, saying:

> The initiative for the arbitration was not taken by the Father. As Fathers we always want peace and since our Christian religion preaches peace, Father Tudu must have supported the arbitration thinking it as a good step towards peace and settlement.

In reply to the question of whether the Church had the authority to carry out arbitration and deal with crimes like rape Father Albert said:

> Each religious community or parish is under one or more parish priest. To assist him, a parish council looks after the education, health, social justice and legal arbitration of the community. The president of the parish is a Father and there is an understanding that to maintain the peace of the parish they are allowed to take any decision. But this does not have any legal basis. It can work only as a support to the existing law of the land but has no legal power…We have Cannon Laws to govern a congregation, but for crimes like rape, murder, robbery the law of the state has to be followed.

Besides the obvious role played by local community and religious leaders, the entire legal process played an inexplicable role in dealing with the rape cases of Hena and Serafina. In Hena's case, the investigation officer and police inspector wrongly filed the case and the civil surgeon and doctors of Shariatpur Sadar Hospital came up with a false post-mortem report. In Serafina's case, the public prosecutor and the lower judiciary did not question Serafina's statement when she said she had filed a false case of rape, even when her medical report clearly showed she had been gang raped. The court informally knew about the illegal out of court settlement and acquitted the nine rapists. Nina Gowsami says:

> Government was the plaintiff in this case. As long as the government does not withdraw the case, trial can still be held even if the victim withdraws and witnesses do not cooperate. The trial of Serafina's case could have been carried out using the medical report and other documents. Unlike Hena's case where High Court has taken up the initiative, interest of the lower judiciary in Serafina's case is not perceivable.

Apart from being members of the weaker sex, both these girls—Hena Akhter and Serafina Mardi—were born to poor families.

> As a result the worth of their life could easily be traded for the larger good of their respective communities—to the extent of protecting their rapists. As long as society's attitude towards rape and the victims does not change, and the legal system continues to fail in delivering quick and exemplary punishment to rapists, girls like Hena and Serafina will continue to make the headlines for the wrong reason and the vulnerability of women, irrespective of their religion, race and social status will continue to amplify. (Khan 2011)

Barristers Rabia Bhuiyan, Sara Hossain and Mahbub Shafique, and advocate KM Hafizul Alam, lawyers for the writ petitioners, placed the judgment before the bench following the incident involving Hena. The human rights watchdog, Ain o Salish Kendra, expressed deep concern and shock at the killing of teenage rape victim Hena. It demanded punitive action against those who enforced the *fatwa* concerning her. ASK called upon the government to take effective steps to stop the recurrence of such incidents. The High Court ordered district officials in Shariatpur to explain why they had failed to protect 14 year old rape victim Hena from being whipped to death as per a *fatwa*. The deputy commissioner, the superintendent of police and local officials were ordered to report to the High Court in 15 days as to how the incident had occurred even though the High Court had, 8 months before, declared *fatwa* illegal and a punishable offence. In a *suo moto* rule, the High Court directed them also to report what steps they had taken in this regard.

Not all such cases of abuse in Bangladesh now go unnoticed, as the following case indicates.

> When an 11 year old girl was physically assaulted by village arbitrators and hospitalized, a national outcry followed. Though the girl was a victim of harassment by two local youths at Ghaura village on 11 September 2011, the arbitrators accused her of sexually luring one of the two and beat her severely following a *shalish*. After a case was filed by her father with the local police station on 12 September 2011, accusing 10 people, seven of them were arrested by police the same day, including both the stalkers and arbitrators. ('Culprit at large as girl groans in pain.' 2011)

3.3 Civil Society Activism

There are nearly 6,000 NGOs of various sizes and strengths operating in Bangladesh. Three of the leading NGOs are Bangladesh Rehabilitation Assistance Committee (BRAC), Proshika, and Ain o Salish Kendra (ASK) (Chowdhury 1989). The leading NGOs are viewed as development NGOs, with a slew of programs ranging from education to micro-finance. A number of NGOs are known as human rights NGOs, with a mission of providing legal assistance to those who are unable to access the legal services. Many of these rights-based NGOs arose in the early 1990s. Banchte Shekkho was launched in 1992; Bangladesh Legal Aid and Services Trust was launched in 1994. Ain o Salish Kendra, a relatively small NGO, is the oldest and best known of these NGOs in Bangladesh. Since 20 September 1986, ASK has been providing legal aid, when required, to the victims of human rights violations and has earned national and international recognition. ASK remains vocal against the repression of women and children, against *fatwas* (religious edicts), extra-judicial killing, custodial torture, minority repression, deprivation of the rights of indigenous people and repression of workers. Legal steps taken by ASK have resulted in High Court directives on a number of issues, including a ban on slum eviction without rehousing, and a ban on custodial torture and corporal punishment at educational institutions.

Ain o Salish Kendra has been fighting for the rights of the common people for the last 25 years. In particular, it has worked for the betterment of women in Bangladesh, who are often victims of domestic violence and discriminatory laws that deprive them of basic rights. Many of these women are not even aware of what their rights are. ASK has worked relentlessly to establish the basic rights of those who do not have the resources to fight for their own rights.

Initially, ASK was more involved in solving family conflicts through *shalish* (informal interventions) and trying to reach an acceptable solution of problems; however, the increasing number of people taking legal aid from ASK compelled it to expand its activities. In the mid 1980s, as military rule came under heavy pressure from populist movements that demanded a return to a representative structure of governance, ASK was born in a climate of pro-democracy movements. Gender justice was the main issue for ASK. It was recognized that, without the active

participation of citizens, state institutions and authoritarian traditions of family and community will not change.

Five of the founding members of ASK came from a legal background, while the rest had vast experience in development work. ASK, in addition to engaging with legal issues, was able to take a more holistic support approach on behalf of disempowered women, workers, minorities and others similarly deprived. ASK was founded by Abdul Khaleque, the late Aminul Haq, Amirul Islam, Fazle Hasan Abed, Hameeda Hossain, Khursheed Erfan Ahmed, the late KM Subhan, the late Salma Sobhan, and Taherunnessa Abdullah. Salma Sobhan, a Cambridge-educated lawyer, was the first executive director. She served ASK in that capacity until her retirement in 2001.

While legal aid was often limited to a bandaid approach, the experience ASK gained in addressing individual disputes led its members to make more strategic interventions to address the social and political causes of conflict in Bangladesh. In the 1980s and 1990s, when there was a growing wave of Islamic extremism, ASK became a pace-setting catalyst, addressing inequalities through legal intervention, building solidarity amongst human rights defenders around concepts of human rights, gender, and social justice, and campaigning in national and international forums—challenging the state.

Currently the organization operates 17 units with around 240 activists. ASK continues to provide legal support to the deprived masses. While working on women's rights issues, ASK discovered that children were also a highly vulnerable group. ASK decided to single out the rights of the working street children. ASK believes that poverty is the worst form of human rights violation. Thus, economic empowerment, especially for women deprived of their rights and livelihoods under a patriarchal society, became its prime focus. ASK began to work on women's property rights. ASK has seven Legal Aid Clinics working in the capital. In the case of human rights violations, ASK also sends its activists out of Dhaka to provide immediate help. In addition, ASK plays a major role in monitoring the human rights situation in the country, especially in the areas of civil and political rights, economic, social and cultural rights, women's rights, and labor rights. ASK publishes a quarterly bulletin, an annual human rights report, and special publications and articles. Its other programs include advocacy initiatives, children's rights, community activism, human rights awareness, and legal aid.

Talking about the philosophy of the organization, Sultana Kamal says that ASK's philosophy is to establish connection among people. Communication among citizens and communication between the government and citizens is a must for establishing social justice.

> The whole effort often faces different challenges. It is a very small organization that cannot reach every citizen. We can have a concern on a particular issue and recommend some probable solution of the problem but we cannot always make people listen to us.

Since its inception in 1986, ASK, with its team of dedicated individuals, has been instrumental in helping the marginalized people in society to raise their voices. ASK has brought different rights issues into the limelight and made the government

rethink many of its policies. In a recent interview the Executive Director of the organization stated:

> Social justice and equality must be gained. We hope that more people will be involved with our struggle for gaining human rights. We hope to establish a healthy practice of democracy where citizens and the rulers never go for confrontation, rather, co-exist with mutual respect and cooperation. We are fighting against all the process of disempowerment of people and the fight will continue. (Urmee 2011)

ASK has been a brave and relentless champion of human rights in Bangladesh.

Largely due to the civic engagement of organizations such as ASK, the High Court gave a ruling in 2010 declaring *fatwa* illegal. The decision was appealed. During the deliberations over the appeal, one of the leading lawyers, and the main drafter of the Bangladesh Constitution, Dr. Kamal Hossain, argued before the Supreme Court that the constitution and the laws of the republic did not permit any extra-judicial punishment in the name of *fatwa. The Daily Star* reported of him: "Some people indulge in illegal practice of fatwa for personal gains in the country's rural areas, he said while making submissions during the hearing of an overdue appeal against a High Court verdict that had declared fatwa illegal" ('Fatwa Illegal, Goes Against Constitution' 2011).

3.4 Legal Pluralism in Bangladesh

Positivist legal theory, according to Nobles and Schiff (2006: 82),

> operates on the assumption that the legal system can insulate itself from other kinds of communication and thereby maintain its autonomy, provided that it can take communications from other systems into itself only at those points where it runs out of good reasons for deciding issues using materials already identified by authoritative sources.

Such ambitions notwithstanding, legal systems in most societies are characterized by plurality of perspectives and traditions. Carol Smart points out that "law constitutes a plurality of principles, knowledges, and events, yet it claims a unity through the common usage of the term 'law'" (Smart 1989: 4). The discourse of legal pluralism emerged in the mid 1970s, as a number of academics and legal experts (Griffiths 1986; Hooker 1975; Merry 1988; Moore 1973) began to insist on the need to accommodate rules and norms outside the existing formal laws, in view of the changing society and the emergence of new circumstances. Legal pluralism was traced to the colonial encounters. Since the beginning of the colonial encounters, the European laws were superimposed on existing informal and semi-formal legal and normative systems that helped maintain pre-colonial social order.

In modern society, the assumptions and *raison d'être* of legal pluralism are not exactly the same as those of the pre-colonial societies. With the presence of migrant communities and the recognition of their cultural identities, as well as the identities of the religious and ethnic minorities in various formally democratic societies, legal pluralism is a reality. There are, however, critiques of the idea of legal pluralism.

Some of the critics have situated the concept under the broader cultural construct of postmodernism. For Teubner (1992), the tendency to fuse "social norms and legal rules, law and society, formal and informal, rule-oriented and spontaneous" is consistent with postmodern society. Postmodern or not, liberal, pluralistic tendencies have penetrated the peripheral societies of the world system as well under the impact of cultural, ideological, and political globalization. Hence, Bangladesh is not immune to these tendencies. As a signatory to various international conventions and organizations, Bangladesh has embraced the principles of respecting the rights of the minorities, and ethnic or sub-national groups.

The legal system of Bangladesh has incorporated some degree of legal pluralism, which was introduced by the British, who applied a combination of civil law and religion-specific personal law to both Muslims and Hindus. In addition to the inheritance of the British law and the common law traditions, Muslim personal laws govern property rights, marriage, divorce, alimony, and custody of children (Chaudhury and Ahmed 1980). These laws are, by and large, discriminatory against women. A reform of the legal system to correct these gender biases is desirable but politically not feasible. In 2008, when a caretaker government wanted to implement a set of rules removing such inequities, there was a sharp reaction from the conservative sections of the society. The reactions led the administration to retract. In order for the legal reforms to be sustainable there has to be a movement from below to make the public conscious of their responsibilities and duties to build a truly democratic and equitable society. When the Awami League and its coalitions formed government in 2009 they advanced and refined the legal rights of women but fell short of full gender equality. The improvements were tangible. In 2013, the right-wing groups, under the implicit support of the main opposition, BNP, challenged the women's policies and in effect challenged those policies of the government.

Alternative dispute resolution (ADR) has been in practice in Bangladesh formally since 1978, with the formation of Madaripur Legal Aid Association (MLAA) as a dispute resolution NGO. With the support of Asia Foundation and the USAID, MLAA sometimes works with other organizations such as BRAC. By 1988, MLAA started focusing on mediation and set up mediation committees at the village level, comprising the local elites. This became a counterweight to the authority of the maulanas and imams in mediating under the cover of '*fatwas*.' While community-based mediation, as developed by the Madaripur Model of Mediation (MMM), was an auxiliary to the formal justice system, it was revealed that women, who were traditionally the victims of alternative dispute resolutions, were left out. In order to rectify and improve the system, both the Madaripur Legal Aid Association and NGOs such as Banchte Shekha included women as members of *shalish* committees (Penal Reform International 2003). BRAC, too, introduced a Human Rights and Legal Services in 1998 which was rooted in BRAC's paralegal program initiated in 1986. Nagorik Uddyog, another human rights NGO with the objective of enhancing women's access to justice, was set up in 1995. One third of the members of the *shalish* committee of Nagorik Uddyog were women, which played an important part in empowering rural women (Hasle 2003; Siddiqi 2003). The strategy of coopting the traditional mediation process in rural Bangladesh as an alternative dispute

mediation process is a sound strategy as it is cost-effective, is able to resolve disputes speedily and provides access to justice to groups that were victims of unfair and *fatwa*-driven *shalish*. The unintended consequence, of a modified and gender-balanced *shalish* system, can play a role in the empowerment of the rural women.

The incorporation of legal pluralism is consistent with the democratic values of pluralism and the right to self-determination of various ethnic and religious communities. Yet, in order for a nation-state to be a functioning state, the implementation of the laws enshrined in the constitution cannot be abridged or compromised for the sake of recognition of local norms and indigenous practices, especially if those norms and practices infringe the fundamental rights of the people. The line needs to be drawn in favor of universal rights. Despite the doubts expressed by a genre of intellectuals and their critiques, however well-meaning and intellectually sophisticated, there cannot be any excuse for defending *fatwa*-driven brutal punishment and violence against women in the name of 'traditions' and cultural relativism. Herein this analysis is in agreement with Coomuraswamy (2005). Yet there are risks in going overboard with the universalizing mission in a country where a large number of the people take religion seriously, and could be provoked to violence at any hint of sacrilege. A balance between universal rights and little traditions can be maintained through reasoned discussions, thereby upholding such universal values as equal justice for all genders, classes, and religious and ethnic groups. However, the inculcation of the universal values of justice and equality can be successful and enduring if they are translated into local idioms and practices. In this regard a gender-balanced *shalish* committee, under the guidance of reasonable and universal principles of justice, can be a positive force in ensuring access to justice for all.

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Chapter 4
Semi-official Turkish Muslim Legal Pluralism: Encounters Between Secular Official Law and Unofficial *Shari'a*

Ihsan Yilmaz

4.1 Introduction

The study looks at various aspects of the relationship between official law and the Muslim majority's unofficial *Shari'a* law in Turkey. It provides a concise account of the current secular Turkish Civil Code with a special focus on family law issues such as consent, age of marriage, registration of marriage, religious marriage ceremonies conducted by imams, and polygamy.[1]

There are some differences between the secular civil law of Turkey and the surviving Muslim unofficial law. Statistics and research have shown that in the socio-legal sphere Muslim unofficial law has continued to exist. Turkish Muslims have reconciled conflicting points between official and unofficial laws by employing certain strategies and methods in matters such as the solemnization of marriages, age of marriage, and polygamy. As a result, a few cases have appeared before the

[1] This study, which mainly draws on and updates Yilmaz (2005), only deals with family law issues, but Muslim law is also observable in the Turkish society in fields such as finance, banking, the economy, insurance, and in many other spheres of life. Muslim law is referred to and obeyed by many people despite its non-recognition by the state. Some examples of contemporary and frequently questioned issues in Turkey are: using an amplifier when reading *azan*, Friday prayer and work, *dar al-Islam*, fasting, travelling by train, the stock exchange, taxation, *halal* meat, marrying a non-Muslim woman, *talaq*, court divorce, polygamy, nationalism, unemployment benefits, inflation, interest, customs tax, bribery, depositing money at a bank in non-Muslim countries, selling alcohol in a non-Muslim country, gambling in *dar al-harb*, sterilization, plastic surgery, using perfumes, abortion, *ijtihad*, military service, organ transplantation, prayers [*salat*] on buses, VAT, mortgage, The European Union, having a gold tooth, alcohol in medication, eau de cologne, life insurance, interest, inflation, insurance, feminism, *nikah*, and fertility clinics (see Beşer 1991, 1993; Kurucan 1998; TDV 1999). *Fatwa* books are bestsellers in Turkey. Moreover, many newspapers have *fatwa* columns. There are also many Turkish online *fatwa* sites on the Internet.

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courts, leading in some cases, to the courts having to deal with *Shari'a* issues. Even though the main focus in this chapter (that draws on Yilmaz 2002, 2003, 2005) is on family law issues, it must be noted that some Muslims in the country have obeyed *Shari'a* in several other areas of life, such as interest-free banking, and the wearing of headscarves, which has caused controversy in the country.

4.2 Expected Secularization Versus Unofficial Muslim Law

The speed of legal reforms, legal modernization and legal secularization had been quickened and reforms had become more radicalized after the proclamation of the Republic in Turkey in 1923. The law actually had begun to be modernized, secularized and codified during the time of the Ottoman State in the nineteenth century. Several codes, such as commercial and penal ones, were directly transplanted, in toto, from the West and for the first time in Muslim history even the Muslim law related to civil code was codified.

During the nineteenth century, several "state councils were established to make new laws, administer taxation and budgets, control the army and navy and exercise governmental oversight both at the capital and in the provinces" (Darling 2008: 24). In order to gain the loyalty of all the subjects and tackle the external pressure coming especially from the West but also from Russia, Ottoman reformists endeavoured to save the state by granting equal rights to Muslim and non-Muslim subjects alike (Bozkurt 1998: 284). Secular courts were established and the compilation of secular laws and the transplantation of European laws and regulations began to appear, including the Charter of *Gülhane* and the *Ferman* of Reforms, the Ottoman Penal Codes of 1840 and 1858, the Ottoman Commercial Code of 1850 and some other laws and regulations of European origin. The introduction of western-based systems of law into the Ottoman State was in addition to, and not a replacement of, the Muslim law, contributing to the development of a dualist legal structure (Starr 1992: 21).

The jurisdiction of the *Shari'a* courts was limited to issues of personal status, family, and succession. Commercial and penal matters, damages, and contracts were dealt with by the secular Nizamiye Courts (Koçak 2010). Probably the most important legal reform of the nineteenth century was the promulgation of a new civil code, the Mecelle, firmly based on the *Shari'a*. The Mecelle only remained in force in Turkey until 1926, but in other parts of the former Ottoman Empire it remained in use for much longer (Koçak 2010). The first Ottoman regulation on family issues was made in the form of the Family Rights Law of 1917 (Koçak 2010). This law also established unity in the court structure, and competences in family law issues were removed from the religious courts (Koçak 2010). Section 38 of this code aimed at ending the practice of polygamy, relying on a view held by the Hanbali School (Koçak 2010).

After the establishment of the Turkish Republic in 1923, the Turkish state, under the reins of the Kemalist elite, tried to impose a westernist and secularist cultural

change from above through the force of law. The underlying ideal of the constitutions prepared by the Kemalists has not been “the protection of the existing nation” but “nothing less than the creation of a new nation” (Shambayati 2008: 99). The state tradition in the county “tends to protect the state from the people rather than the other way around” (Bilgin 2008: 133).

Mustafa Kemal Ataturk adapted the French model of laicism, emphasizing state control of religious expression and institutions, into a mixture of Turkish nationalist, Sunni Islamic, and European laicist traditions that is known as Kemalism (Hurd 2008). The Kemalist reforms included a new Turkish Civil Code in 1926, a ban on Sufi *tarikats*, the abolishment of religious courts, and the replacement of Arabic script with the Latin alphabet (Hurd 2008).

During the years of state and nation building, a series of reforms were initiated with the aim of constructing a ‘civilized’ nation that would have no ties with the Ottomans. In this respect, the process of ‘civilization’ “took on the character of a cultural revolution aiming to produce radical changes in social mentality, lifestyles and world views” (Özman 2010: 70). This social-engineering process involved denial of the political and social characteristics of Islam and Kemalists tried “to displace the Islamic Weltanschauung, introducing nationalism and secularism as the cultural bases of the new society” (Özman 2010: 71).

The Kemalists thought that the envisioned cultural transformation needed to start with the very smallest unit, the family. Thus, radical reforms were introduced in family law matters. All earlier reforms had not much affected traditional Muslim law. Since the Kemalists thought that family plays a crucial role in transmitting hegemonic culture to younger generations, they tried to modernize the family by using the law (Toprak 1981; Starr 1992).

The Civil Code of 1926 abolished polygamy, made the sexes substantially equal in rights to divorce, and required that divorce be subject to court rulings on specified grounds, rather than being a male prerogative. The regulation of births, upbringing and custody of children, cultural education, marriage, death, and inheritance were no longer the domain of the religious courts (Örücü 2008). An official marriage contract had to be concluded before an official marriage registrar (Koçak 2010).[2]

Even several decades after the reforms, customary and religious practices continue to be more influential than the civil code in the daily lives of many people living in Turkey; this is especially the case for women living in Eastern Turkey (Ilkkaracan 1998). Customary practices and norms compete with the official law in three ways: they “are applied because the law does not cover the contingency in question, the law is legislated in a way that it aligns with the customary practice, or laws are subverted in practice” (Erdem-Akçay 2013: 77).

Islam continues to affect people’s lives. The expectation that people would learn and follow only the official *lex loci*, by entirely abandoning the Muslim law, has not

[2] Recent research (Miller 2000; Ozsu 2010; Yildirim 2005) has powerfully shown that drafters of the 1926 code aimed at minimizing disturbance to the patriarchal and Islamic norms and practices in society. Nevertheless, this chapter looks at the issues concerning which there is an obvious clash between official and unofficial laws.

been fulfilled (Ansay 1996). The tension between official rights gained by reforms and the long-standing cultural traditions still exists (Carkoglu et al. 2012). Family law has been the most problematic in more than one way (Oguz 2005). The 1926 code was amended 15 times, and there were various drafts for a new code throughout the 50 years before it was eventually replaced. The amendments, especially those on family law, reflect the contestation between official and unofficial laws (Erdem-Akçay 2013). In addition to legislation, in the judicial processes, "when law meets cultures that it does not cater for, the judges either try to eradicate and ignore them in keeping with the vision of the legislator, or accommodate them within the official framework" (Örücü 2012: 60).

4.3 Construction of Unofficial Muslim Family Law

Under the official law, only civil marriages performed by authorized marriage officers are allowed and recognized and this is safeguarded by the constitution.[3] Article 134 of the new Civil Code 2001 states that the formalities of celebration commence with the submission of the necessary documents by the parties to the marriage office at the place where they are residing at the time. The authorities start inquiries to check whether impediments to the marriage exist. Article 143 of the new Civil Code 2001 provides that a marriage may be solemnized in accordance with any religious rites if the parties desire, but registration of marriage preceding such a solemnization is necessary. Only after the celebration of the civil marriage is a *nikah* permitted and the parties should present their marriage document to the imam before the religious marriage.[4] If a civil ceremony in a registry office is followed by a religious one, the religious ceremony does not supersede or invalidate the civil ceremony and is not registered with any authority.[5] The civil ceremony is clearly the only marriage that the official law recognizes. The men and women who perform a religious marriage ceremony without having made the legal marriage contract are considered punishable.[6] De facto relationships (co-habitation) are still not officially recognized in Turkey. This creates problems of protection in domestic violence cases as well as

[3] Article 174/4 of the Turkish Constitution.

[4] Article 143 of the new Civil Code and Article 237/3 of the Criminal Code. This is today regulated by the new 2005 Penal Code's Article 230.

[5] Article 143 of the new Civil Code.

[6] The previous Criminal Code's relevant article was as follows: (1) A marriage officer who knowingly solemnizes the marriage of persons who are not legally entitled to marry, parties to such a marriage, and appointed or natural guardians who consent or lead the parties to such a marriage, shall be imprisoned for 3 months to 2 years. (2) A public officer issuing marriage certificates without abiding by legal requirements shall be punished by imprisonment for not more than 3 months. (3) Whoever performs a religious ceremony for a marriage without seeing the certificate indicating that the parties are lawfully married shall be punished by the punishment prescribed in the foregoing paragraph. (4) Men and women who cause a religious ceremony to be performed prior to being married lawfully shall be punished by imprisonment for 2–6 months.

problems concerning partner legal representation, transactions, and work/travel/place of residence decisions (Carkoglu et al. 2012).

Despite all the legal measures, such as those described in this article, the authorities would not know of a contentious incident unless a dispute arose (Kruger 1991). Or, as happens in many cases, judges would be tolerant with the convicted party and would change the punishment from imprisonment to a pecuniary punishment, which shows the perpetuating impact of the legal postulates.[7] According to earlier research, 15.4 % of all marriages in Turkey were celebrated without any civil ceremony (Alkan 1981). Balaman (1985) mentions that there were a number of people who were married only by religious ceremony and in the researched population no marriages took place without a religious ceremony.

In the late 1980s and early 1990s, the State Planning Organization (SPO) conducted research that is considered representative of the whole of Turkey (SPO 1992). This comprehensive research covered 18,210 households from urban and rural communities.[8] The results were then generalized to apply to all Turkey. According to this research, 9.56 % of marriages were civil only, 4.89 % were religious only, and 84.92 % were both civil and religious (SPO 1992: 42). Another survey in 1993 found that in Eastern Anatolia, while 22.4 % of marriages were religious only, 75.9 % were both religious and civil. In Western Anatolia the percentages were, respectively, 2.2 and 92.4 % (HUNEE 1993, cited in Kümbetoğlu 1997: 122).

A survey in 1998, based on data from interviews conducted with 599 women in 19 settlements in Eastern and Southeastern Anatolia, within the framework of a broader research study on the impact of official, religious, and customary laws on women's lives in Turkey, found that 5.8 % of marriages were civil only, 19.6 % were religious only, and 74.4 % were both civil and religious (İlkkaracan 1998: 69). This research shows customary and religious laws and beliefs and their impact on the situation of both rural and urban women in Eastern Turkey. It shows that early marriage and polygyny are still prevalent, that religious marriage still takes place earlier than civil marriage, although the former is not legally binding, that forced marriages still take place, and that arranged marriages are still in the majority, though more younger women now expected to be able to choose their partners (İlkkaracan 1998). The study also finds that most women would feel unable to seek divorce if their husbands had an extra-marital relationship, but many women feared the custom of so-called 'honour killing' if they were suspected of such an affair (İlkkaracan 1998).

Another survey, conducted in 2006 in a village in the Southern Turkish city of Mersin, interviewed 265 married women and found that 18.9 % of marriages were

[7] Y2HD 06. 06. 1983 E 983. 2664 K 983. 3310; Y2HD 04. 06. 1985 E. 985. 5223 K. 985. 5310; Y 4CD 28. 04. 1992 E. 992. 2504 K. 992. 3125.

[8] Cities and regions included are: Istanbul, Izmir, Bursa, Sakarya, Denizli from Western Anatolia, Gaziantep, Adana, Antalya, Hatay from South Anatolia, Ankara, Eskişehir, Konya, Kütahya from Central Anatolia, Samsun, Zonguldak, Trabzon, Kastamonu from Blacksea, Malatya, Erzurum, Diyarbakır, Sivas, Van, Kars, Şanlıurfa, Adıyaman, Siirt, Ağrı from East and South East Anatolia (SPO 1992).

civil only, 8.8 % were religious only, and 74.3 % were both civil and religious marriages (Karataş et al. 2006: 11).

In recent quantitative research that surveyed 462 married women aged between 15 and 49 years who attended the Central Maternal and Child Health and Family Planning Polyclinic in the Eastern Turkish city of Van, it was found that while 95 % of monogamist women were both officially and unofficially married, only 4.6 % had only a religious marriage (Gücük et al. 2010: 128–129). As for the polygamists, the figures were, respectively, 61.5 and 38.5 %. All of the women had a religious marriage (Gücük et al. 2010: 128–129).

There have been several unofficial marriage (imam or religious marriage) cases dealt with by the secular Turkish courts. Some of these cases have even reached the top level of the Court of Cassation (Yargıtay). Case law shows that the Court of Cassation accommodates unofficial religious marriages "when the matter at hand is not related to giving effect to the marriage but, for instance, to the law of obligations where the Court does not have to go into the issue" (Örücü 2008: 46). For instance, for the sake of justice, the Court of Cassation (Yargıtay) has "extended the right to compensation for death in work-related accidents to the unmarried cohabiting woman, albeit on a different basis from the married woman" (Örücü 2008: 45).

In a 1996 case, the childless surviving partner of a religious marriage asked for material and moral compensation after the death of her partner in a work-related accident. The insurance company refused the demand but the Court of Cassation "decided on a percentage lower than that which would be the due of the married wife" (Örücü 2008: 45).[9]

In 1997, the Court of Cassation held that a woman who was married to a man with only a religious marriage was entitled to some compensation from her ex-husband who evicted her from their home.[10]

In 2001, it was held by the Court that a woman was entitled to compensation, since there had been a religious marriage in accordance with the local customs and also a wedding.[11]

In another case, the Court held that the petitioner was an adult at the time of the religious marriage and had agreed to a religious only marriage arrangement; thus she could not demand any compensation because the official marriage did not take place.[12]

In a 2003 case related to the return of jewellery given at the religious wedding, the Court referred to the wife as the unofficial partner and accepted her claim (Örücü 2008).[13]

[9] 96/1606; 96/1661; 21.3.1996; 22 Yargıtay Kararları Dergisi 1996, 1291.

[10] YARGITAY HUKUK GENEL KURULU E. 1997/4-690 K. 1997/893 T. 5.11.1997, for a similar 2002 case see T.C. YARGITAY HUKUK DAİRESİ 4 Esas No. 2001/13026 Karar No. 2002/3866 Tarihi 01.04.2002.

[11] T.C. YARGITAY 4. HUKUK DAİRESİ E. 2001/4849 K. 2001/8843 T. 1.10.2001.

[12] T.C. YARGITAY 4. HUKUK DAİRESİ E. 2004/5370 K. 2004/14142 T. 13.12.2004.

[13] 02/1153; 03/2380; 6.3.2003; 29 Yargıtay Kararları Dergisi, 2003, 1044.

In a 2005 Council of State case, an unofficially married wife applied to the state for compensation and social security payment because her state-employee village-guard husband was killed in a terrorist attack. The lower administrative court refused the demand and the Council of State upheld the decision of the lower court.[14]

In 2008, a woman who was married to a man with only a religious marriage lost her husband as the result of a traffic accident caused by an unlicensed driver. She filed a motion to intervene in the case but the lower court refused her demand. The Court of Cassation overruled this verdict and stated that "refusing her demand to intervene without taking into account the damage inflicted on her as a result of the accident is against the law."[15] Several such cases have appeared before the Court of Cassation. In these cases, women who were only married with a religious marriage applied to the courts for insurance claims after the deaths of their husbands and the Courts have generally decided for compensation, albeit for lower percentages compared to that granted to official wives.[16]

In a 2009 case, a wife who had only a religious marriage applied to the court with a complaint of her husband's violence towards her and her children and asked for protection, but the lower court decided that since she was not officially married, she could not benefit from the law. Nevertheless, the Court of Cassation overruled this decision and held that the union that was established with a religious marriage was also a family union and deserved the state's protection. The Court held that "even though they are not officially married, it is apparent that there is a de facto marriage. They have a consistent family life that cannot be discerned from an official marriage in any aspect. Thus, there is no doubt that they have a family life that deserves to be protected by law."[17]

In an ECHR (European Court of Human Rights) case (*Şerife Yiğit v Turkey*) on the issue of family life and the prohibition of discrimination (Article 8 in conjunction with 14 ECHR), relying on Article 8 of the Convention, the applicant alleged that, after having lived in an Islamic 'religious marriage' (*imam nikah*) with her partner, with whom she had six children, she had been unable to claim retirement benefits (survivor's pension) or health insurance (social security) cover on her partner's death in 2002. The wife asked for the recognition and registration of her marriage in the Turkish register and for the registration of the children as being the children of the deceased husband. The registration of the children was accepted, but

[14] Danıştay 11. Daire, E:2003/121, K:2005/5372.

[15] See http://www.milliyet.com.tr/default.aspx?aType=SonDakika&ArticleID=1017782.

[16] T.C. YARGITAY 4. HUKUK DAİRESİ E. 2004/15423 K. 2005/13451 T. 13.12.2005, YARGITAY 21. HUKUK DAİRESİ E. 2007/289 K. 2007/8718 E. 2007/289 K. 2007/8718 T. 28.5.2007. For similar previous Court of Cassation cases see Y. 21. HUKUK DAİRESİ E. 1996/1604 K. 1996/1661 T. 21.3.1996, Y.21.H.D. 03.02.2000 Gün 2000/711 Esas 2000/637 Karar, Y. 21. HUKUK DAİRESİ E. 2001/4847 K. 2001/6170 T. 25.9.2001, Y. 21. HUKUK DAİRESİ E. 1997/2093 K. 1997/2188 T. 25.3.1997.

[17] See http://haber5.com/guncel/imam-nikahina-yargitay-korumasi ; for a recent Court of Cassation case involving religious only marriage see YHGK 22.12.2010 E.2010/3-634–K.2010/677. For different views on the doctrine on this issue see Ayan (2004: 303), Badur (2009: 73), Köseoğlu (2008: 329).

the registration of the marriage was refused. The Court recognized that there was a de facto existing family life that fell within the protection of Article 8 ECHR. However, the claim of the wife was eventually dismissed. The ECHR stated that the Court held the view that Article 8 cannot be interpreted as imposing an obligation on the State to recognise religious marriage. In that regard it is important to point out, as the Chamber did, that Article 8 does not require the State to establish a special regime for a particular category of unmarried couples. For that reason, the fact that the applicant, in accordance with both the provisions of the Civil Code governing inheritance and the legislation concerning domestic social security, does not have the status of heir, does not imply that there has been a breach of her rights under Article 8.[18] The Court considered that, although there are Member States of the Council of Europe which recognize other stable relationships alongside the traditional marriage, Turkey cannot be obliged to do the same (Rutten 2010).

In a case heard in 2010, the Supreme Court of Appeals held that a women, who was married unofficially, could not claim the pension rights of her deceased husband. The Court referred to the European Court of Human Rights verdict dated 20 January 2009 (S. Y. Versus Turkey Application No. 3976/05), which states that in some countries, traditional informal weddings, common-law couples or civil partnerships are welcomed and accepted as a social trend and custom. Nevertheless, the Supreme Court of Appeals stated that ECHR recognizes the discretion of the courts of the contracting states. Thus, Turkish law does not grant all the rights and obligations of an official marriage to an unofficial marriage. In the absence of a binding legal agreement, the Turkish legislature safeguards only the official marriage.[19]

In 2013, the Court of Cassations annulled a lower court decision that punished a couple who had had an unofficial imam marriage in 1979. Upon appeal of the decision, the Supreme Court of Appeals, 14th Criminal Chamber, reversed the decision of the local court, citing the principle of a statute of limitations restricting the maximum time after an event that legal proceedings may be initiated. For the offense in question, the maximum penalty is prescribed in No. 765 Turkish Penal Code (TCK) 102/4, subject to a limitation period specified in Article 5. In the resolution, the following statements were made: (1) the crime was committed in 1979, and the indictment was not issued until 2009, nearly 30 years later; (2) according to the law concerning this offense the prescribed time limit had expired; (3) no retrial was required for the public cases for which it was judged that the prescribed time limit had expired.[20]

In March 2014, the Court of Appeals Criminal General Council, which is the highest legal decision-making body, stated that the penalty for unofficial imam marriages cannot be 'postponed,' since these marriages are contrary to the Revolutionary Laws. The court held that, regarding the penalty to be imposed on those who undertake a religious marriage without an official marriage, the decision of 'postponing

[18] http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101579#{"itemid":["001-101579"]}.

[19] Yargıtay 10. Hukuk Dairesi 2008/18155 E.N., 2010/2758 K.N. http://www.kararara.com/yargitay/10hd/k3278.htm.

[20] http://www.hurriyet.com.tr/gundem/23230899.asp.

the verdict' cannot be given. In a case of this kind, the lower court found the couple (S. and Z.) guilty of the crime of having an unofficial marriage without the official marriage, which is an offense under TCC 230/5, 62, 50 and Article 52. This decision was appealed by the defendants. The Supreme Court of Appeals, 14th Criminal Chamber, rejected the appeal and upheld the court's decision. However, at this stage, the Attorney General and the Supreme Court disagreed. Evaluating the case, the General Penal Board of Appeal supported the court's decision.[21] Recently a trend is developing for people to inquire about the status of their unofficial imam marriages through legal advice blogging web sites.[22]

In Ottoman times there was no minimum age prescribed for marriage; until the child reached puberty it was up to the parents to decide. Later, the Ottoman Family Laws Ordinance (OFLO) of 1917 prescribed a minimum age of 9 for women and 10 for men. Then, in the Republican period, the age of marriage was adopted from Swiss law as being 18 years for males and 17 years for females. However, this proved to be unsuitable for the Turkish situation, for various cultural and geographical reasons, and in 1938 the minimum ages were reduced, respectively, to 17 (15 with the permission of the judge) and 15 (14 with the permission of the judge) (Lipstein 1956: 17).[23] Now, according to Article 124 of the new Civil Code of 2001, the legal age for marriage for both parties is 17. Article 124 further states that under extraordinary conditions a judge may allow a man or woman to marry at a slightly younger age. If possible, the judge would listen to the evidence of parents or a guardian. Permission may be granted because of one of the following circumstances: elopement and deflowerment, pregnancy, or the couple's living together as husband and wife.

The official law is in conflict with traditional Muslim law. In the eyes of the people and according to Muslim law, when a boy or girl reaches puberty, he or she can marry, whatever his or her age. Quantitative data show that people, in many cases, do not take into account the provisions of the Civil Code. Parents in rural areas, especially, or illiterate parents (although these are rare), tend to marry off their offspring just after puberty, which may be reached well before the age of 15. In these cases, families at first employ only Muslim law and solemnize marriages according to its rules. Married only by *nikah*, the spouses' cohabitation is legitimate for the community. After reaching the officially permitted age, they register their marriages with the state.

The above-mentioned State Planning Organization shows that the percentage of under-age marriages (i.e. taking place under the age of 16 years) in Turkey in 1991 was about 9 % (SPO 1992: 39). Only 0.37 % of all existing marriages were conducted at or below the age of 12, 0.90 % at the age 13, 2.19 % at the age of 14 and 5.38 % at the age of 15 (SPO 1992: 39).

[21] http://www.taraf.com.tr/haber-yargitay-dini-nikahin-cezasi-ertelenmeyecek-149808/.

[22] See for an example http://www.hukuki.net/showthread.php?113241-Resmi-nikah-olmadan-kiyilan-dini-nikah.

[23] Act No. 3453, 1938.

Even official census data show the reality of under-age marriages. In a recent publication by the State Institute of Statistics (SIS), it is very clear that even in 1990, some 60 years after the adoption of the Swiss Civil Code, the percentage for marriages in the age group of 12–14 years was 0.54 % for females and 0.88 % for males (SIS 1996: 20). Moreover, it must be emphasized that these figures are not reflective of the true proportion of under-age marriages, since most people are not eager to report such illegal marriages to civil servants.

In his field research, Yıldırak (1992) found that when a girl and a boy inform the imam of their consent to marry, this is sufficient for the imam to solemnize their marriage. Girls marry despite being only 10 or 11 years of age. In these cases, the imam neglects, or 'forgets,' to ask the bride her age (Yıldırak 1992). Other fieldwork has shown that in some regions of Turkey, despite what the law asserts or prohibits, parents marry off their daughters after the age of 11 and their sons after the age of 14 (Elmacı 1994). Turkish culture does not condone marriage before puberty, so this is virtually non-existent. The 1998 survey (mentioned earlier) based on data from interviews conducted with 599 women in Eastern and Southeastern Anatolia, showed that 16.3 % of women living in the region had been married under the age of 15 and in a religious ceremony (İlkkaracan 1998).

In a recent quantitative survey (Gücük et al. 2010) of 462 married women aged between 15 and 49 years who attended the Central Maternal and Child Health and Family Planning Polyclinic of the Eastern Turkish city of Van, it was found that "[t]he percentage with age at first pregnancy of ≤14 years was 11.5 % for women in polygamous marriages and 10.2 % for women in monogamous marriages" (Gücük et al. 2010: 127); 17.3 % of women in polygamous marriages were married at or before the age of 14 and the figure for the women in monogamous marriages was 20.3 %. About 10 % of these women had their first pregnancies either at the age of 14 or under (Gücük et al. 2010: 129).

These data plainly show that, in spite of all the efforts by the state, under-age marriages, although rare, are a part of socio-legal reality in Turkey. Şahinkaya (1983) mentions a girl who was married at the age of 12. Another girl was married at 13, but her parents officially 'increased' her age and she was married in both civil and religious ceremonies (Şahinkaya 1983). Only a few examples of such cases where the marriage was overruled by the Court of Cassation have been noted here, as these are the only reported cases. The highest court, the Court of Cassation, strictly applies the letter of the law. Presumably, there are a number of similar but unreported cases of under-age marriage that have never come to the Court of Cassation and have therefore not been overruled.

In some cases, people have even succeeded in registering under-age marriages illegally.[24] The judges in the lower courts have tolerated a number of under-age marriages, but the Court of Cassation has cancelled these decisions if it did not see an exceptional reason to justify such an approach in the case.[25] In one case, a court gave

[24] Y4CD 14. 03. 1990 E. 990. 916- K. 990. 1435.

[25] See, for such an example, Y2HD 28.4.1986, E.4269- K.4463.

permission to a girl aged 11 to marry and it was not appealed. However, the Court of Cassation overruled that court's decision.[26]

In another case, a boy under the age of 15 received permission from a judge to marry, but the Court of Cassation held that the judgment was void.[27]

In a case involving under-age married parties the Court of Cassation decided for compensation to be given to the woman. The verdict states that both parties agreed that they married before the legal age and lived as husband and wife for some time. Since the woman entered the marriage a virgin and left it as a divorcee, the court held that she deserved financial compensation.[28]

In a similar case, an under-age man and woman were married at the instigation of their parents, with a view to having an official marriage when they reached the legal age. They did not get along well with each other and were 'divorced.' The court held that given the woman's age and that she had lost her virginity, the man's act was an unjust act. Thus, she was right to file a compensation suit. "The petitioner's unofficial marriage does not exist legally but social values that paved the way for this marriage put a burden of loyalty on an unofficial marriage."[29] In a 2014 case before the Court of Appeals, a man was punished with 8 years' imprisonment for marrying an under-age girl at the age of 14, 8 years previously.[30]

There is an obvious conflict between traditional Muslim law, where a man is widely assumed to be permitted to marry up to four wives at any one time, and the official law of Turkey. When polygamy was abolished by the Civil Code in 1926, the Islamic law that allowed polygamy became officially null and void. Thus, a marriage in which either party is already married to someone else will automatically be null and void according to the official law. The official law has no flexibility regarding polygamous marriages—a person cannot marry polygamously under Turkish law.

If a person is a party to an existing marriage, he or she cannot validly contract a second or subsequent marriage. Articles 92, 113, 114, 115 of the Civil Code 1926 and Article 130 of the Civil Code 2001 provide that no person shall marry again unless he or she proves that the earlier marriage has been dissolved by death, by divorce, or by a decree of nullity. Article 145 of the Civil Code 2001 states that a second marriage is invalid if a person had a spouse living at the time of the subsequent marriage. In other words, the second marriage is absolutely void, or void *ab initio*.[31]

Estimates of the proportion of polygamous marriages in rural areas during the present century range between 2 and 10 %. According to a study sponsored by the

[26] Y2HD 28.12.1987, E.11288- K.10889. See also Y2HD 07. 05. 1985, E. 4496- K. 4385. For another under-age marriage see also Y.21.H.D. 03.02.2000 E. 2000/711 K. 2000/637.

[27] Y2HD 24.9.1985, E. 8499- K.7437. For a similar case, see Y2HD 7.5.1985, E.4496- K. 4385.

[28] T.C. Yargitay Hukuk Genel Kurulu Esas No. 2003/4-55 Karar No. 2003/100 T. 26.02.2003.

[29] T.C. Yargitay Hukuk Genel Kurulu Esas No. 2003/4-55 Karar No. 2003/100 T. 26.02.2003.

[30] http://www.hurriyet.com.tr/gundem/25748529.asp.

[31] YHGK 26. 03. 1986, E. 2. 751- K. 287; Y2HD 27. 02. 1986, E. 1729- K. 2054; Y2HD 03. 06. 1990 194. 2546.

Turkish Ministry of Justice in 1942, almost all polygamous marriages involved two wives (Magnarella 1974). A study based on survey research found that approximately 2.0 % of all marriages in Turkey were polygamous in the early 1970s (Timur 1972: 93). Whereas the percentage of men with more than one wife was 1.6 % in the cities, the figure increased to 2.7 % in the villages (Timur 1972: 94). In the early 1980s, Şahinkaya (1983: 50), in Eastern Anatolia, found the rate of polygamy to be about 4.4 %. According to other research (Gökçe 1991: 113 cited in Elmacı 1994: 84), the polygamy rate for the whole of Turkey in 1991 was approximately 2 %.

It is common to come across news in the media about a celebrity who has recently been married by only a religious ceremony. This news item will have no accompanying negative comment, despite the fact that the marriage is unofficial, and illegal.[32] In the columns of the scholars who answer people's questions regarding religion and society, these issues are discussed openly.[33]

A survey that included 599 women, aged 14–75 years, living in 19 settlements in Southeastern and Eastern Turkey showed that while 89.4 % of them had monogamous marriages, 10.6 % were living in polygamous partnerships (İlkkaracan 1998: 69).

In a recent quantitative survey (Gücük et al. 2010) of 462 married women, aged between 15 and 49 years, who attended Van Central Maternal and Child Health and Family Planning Polyclinic, it was found that "while 410 (88.7 %) women were in monogamous marriages, 52 (11.3 %) were in polygamous marriages" (Gücük et al. 2010: 127). It was also found that 78.2 % of women in polygamous marriages and 57.3 % of women in monogamous marriages were illiterate, and that polygamy significantly decreased with literacy (Gücük et al. 2010: 130).

A remarkable situation occurs in Gökçe (a village of 4,000 people in Mardin, a province of the Southeast region of Turkey), where the men of the village benefit from a 'virtual matchmaking' service, and prefer, in particular, Moroccan women, who do not need to procure a visa to come to Turkey. In the recent decade, a total of 10 brides have been brought to the village from Morocco. Three Internet cafés, situated in Gökçe, are used by the men who want to find a second wife. French, English, and Spanish speaking Moroccan women come to marry as second, third or fourth wives to these men (Batı and Atıcı 2011). Most of the Moroccan women who come to this poor town of the Kızıltepe district of Mardin are university graduates and professional workers. The men of the town meet them through the Internet and the families of the women even give their approval to the marriages after viewing the prospective bridegrooms during videoconferences (Batı and Atıcı 2011).

In some cases, courts treat the second wife with some recognition, despite the fact that she has only married unofficially. In one case, the judge held that, on the death of her unofficial husband at work, the second wife should be paid some compensation from the insurance company.[34] In another case, a wife petitioned that her

[32] See, for an example, *Milliyet*, 6 March 1998, p. 3.

[33] It is so common that one can find many examples for this. See, for instance, *Zaman*, 11 April 1998, p. 11.

[34] Y21HD 21.03.1996, E. 1604- K. 1661.

husband had not informed her that he had an existing marriage, and applied for financial compensation. The court decided in her favour.[35] In yet another case, a man married a woman in a religious marriage, assuring her that he would divorce his first wife, but later he and his first wife oppressed the second wife and evicted her from their home. Upon petition, the Court of Cassation decided in the second wife's favour.[36]

4.4 Conclusion

The Kemalist hegemonic elite have endeavoured to secularize society by top-down use of law. One of their main targets has been the family, which has been the last bastion of Muslim law in the modern era. Unlike other westernist Muslim modernizers, the Kemalists have attempted to totally secularize the family law of Muslims in Turkey. For this reason, the Swiss Civil Code was adopted and, based on this, a new secular civil code was enacted in 1926. This area of the law was further reformed with a new civil code in 2001. Nevertheless, despite the Kemalist attempts of almost 90 years, the society has not been secularized in toto and Islam has still been influential in people's individual, social and public lives. Muslim family law has also been obeyed by some people despite the fact that it is not recognized by the official law and that, in some cases, following it is a criminal offence. In other words, unofficial Muslim family law has co-existed with the official secular civil code in the country. As a result, several cases involving *Shari'a* have come before the judges of the civil courts.

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[35] Yargitay Genel Kurulu E. 2006/2-558 K. 2006/568 T. 20.9.2006.

[36] Yargitay 4. Hukuk Dairesi E.2004/14503 K. 2005/11211 T. 20.10.2005.

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Part II
Case Studies from Muslim Minority Countries

Chapter 5
Soft Authoritarianism, Social Diversity and Legal Pluralism: The Case of Singapore

Bryan S. Turner

5.1 Introduction

'Soft authoritarianism,' as a general description of many modern Asian societies, can be defined as a polity in which there are some basic components of a democracy, such as elections and opposition parties, but fundamental social and political rights and the rule of law are often compromised either by the need for rapid industrialization or by military and political considerations. In general the 'developmental state' pursues rapid economic growth at the cost of social rights. In Taiwan, South Korea and Hong Kong, there are clearly elements of democracy. However they have experienced 'compressed modernity' in their concentration on rapid economic growth and as a result individual rights are often constrained and occasionally compromised (Chang 1999). Singapore has similar characteristics—rapid economic growth, meritocracy, state intervention into the economy and into civil society, constraints on individual liberties in the name of moral regulation, and restraints on freedom of expression in favor of a social harmony that is imposed by the state. Typically, soft authoritarian states govern according to the principles of constitutionalism, but often use the law to suppress political activity, for example, through libel actions in court against their critics.

It is a serious mistake, however, to regard the Singaporean state as tyrannical or brutally oppressive. Singapore is not Myanmar. It has not used draconian measures

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against its opponents but the state has been able to control political dissent through the law courts and through moral exhortation in the school system. One might also suggest that Asian societies with a strong sense of the legacy of Confucianism have often replaced the rule of law with the rule of virtue, whereby the duties of the citizen to the state are more prominent and important than the responsibilities of the state towards the citizen. In Singapore, the government has embraced a neo-Confucian state ideology which was laid out in the White Paper (1991) *Shared Values*. The primary Singaporean values were nation before community and society above self, and recognition of the family as the essential building block of society. In authoritarian polities, the state promotes an educational system to discipline the electorate rather than to create an informed and active citizenry, simply because there is relatively low trust between political leaders and the electorate. The duty of the passive citizen is merely to consent to the legitimacy of the regime and the role of the state is simply to provide security and prosperity, rather than democracy and individual freedoms. The current economic crisis in Europe, civil unrest against austerity packages in Greece and Spain, the Italian political crisis, the dysfunctional Congress in the United States and riots on the streets of London are seen by the political establishment in Singapore as tangible evidence of the superiority of a planned society with a strong government and a political ideology emphasizing the merits of social consensus and community solidarity over individual rights and public debate.

5.2 Singapore: Its History and Social Structure

Singapore was part of the Straits Settlement and a Crown Colony until 1959 when it achieved self-governing status. In 1963 it joined the Federation of Malaysia, only to secede in 1965 as a sovereign state. However, long before the arrival of the British, Singapore had been a trading centre with a highly diverse population in ethnic and religious terms. The island was part of 'the Malay world' or *alam Melayu*:

> Located within a maritime environment, this *alam Melayu* was an open world into which not only non-Malays but also Malays outside *alam Melayu* crossed. For the Malays of the Riaus, this was *jemberang,* crossing to the other side of the Straits of Singapore, Melaka or the various passages of the Riaus. This movement of people created complex issues of who then are the indigenous and exogenous population of a locality. (Kwa 1998: 23)

Given this complex mixture of cultures, Singapore is often referred to in a more technical sense as a 'plural society,' by reference to the famous discussion of pluralism to be found in J. S. Furnival's *Colonial Policy and Practice* (1948), in which he argued that Burma and Java were, in social terms, a 'medley.' By a 'medley' or 'plural society' he meant that each ethnic community retained its own religions, cultures and traditions, and that these social groups only met in the market place where they interacted for purposes of economic exchange. He went on to observe that even in the economic division of labor each ethno-religious group had its own occupational niche.

As a trading port created by the British East India Company when Sir Stamford Raffles landed in 1819, Singapore was one such 'plural society.' However, throughout the colonial world there were new barriers erected by the colonial authorities between the white colonial elite and the ethnic communities that served the colonial bureaucracy. In British Egypt during Lord Cromer's administration, the colonial office created a hierarchy of occupational levels in the bureaucracy that were filled by different ethno-religious communities (Owen 2004). In British India, the Gurkhas became famous as a military force and in Singapore a similar division took place in which, for example, educated Chinese, known as 'the Queen's Chinese' in Queen Victoria's reign, rose through the ranks of the colonial service, while Malays and Hindus were confined to occupations of low status. It was this educated Chinese stratum in the occupational hierarchy that created the Straits Chinese British Association, and organized the Singapore Volunteers, and the Social Purity Union (Trocki 2005: 72).

Before the introduction of the Mahomedan Marriage Ordinance of 1880, the British authorities had followed a laissez-faire strategy in the colony by allowing local customs, rituals and traditional legal arrangements to continue. Indeed, in 1823 Sir Stamford Raffles had re-asserted the existing policy that the rituals, customs and laws of the Malay Muslim population had to be respected. In 1865, the first example occurred (in *Hawad v Daud*) of a British court applying 'Islamic law' rather than common law in a property settlement. In 1915 the British established the Mohammedan Advisory Board to provide expert opinion in legal matters relating to Muslims and in 1958 the Syariah Court was recognized as having jurisdiction over Muslim marriages and divorce under the Muslim Ordinance of 1957 (Ahmad 2012). In 1957, Part II of the Muslim Ordinance established the Syariah Court for the colony, thereby transferring family law matters from the secular to the Muslim court that would be "staffed by people whose qualifications were religious rather than purely legal in the technical sense" (Hooker 1984: 108).

I have gone into some detail about the early history of Singapore as a plural society merely to describe the context in which Singapore also enjoyed legal pluralism as the legacy of British colonialism, which pragmatically accepted the cultural diversity of ethnic groups in its colonies. Many historians of Singapore regard pluralism, including legal pluralism, as an aspect of cultural and legal barriers, as a colonial policy of the British (Butcher 1979; Stoler 1989; Taylor 1983). An alternative interpretation is to see legal pluralism throughout the British Commonwealth as the unintended consequence of British liberalism and pragmatism. According to Tim Lindsey and Kirstin Steiner (2012: 18), in their definitive study of law in Singapore, the British authorities "were ultimately more concerned with securing and developing trade than with the administration of law for its own sake." This attitude was underpinned by the fact that the British colonial officials regarded religion as an essentially private matter that was not, and should not be, administered or regulated by the state (Anderson 1959: 184). We can grasp this pragmatic attitude by comparing British and French colonialism. While French Indo-China was regarded as culturally part of metropolitan France, the British created trading ports in Gibraltar, Aden, Goa, Singapore, Hong Kong and so forth in order to

maintain Britain's trading advantages and as staging posts for the British navy. Whereas France fought serious colonial wars to maintain its colonial power in Algeria and Vietnam, Britain rapidly abandoned its colonies when they were no longer profitable. British colonial conflicts in Malaysia, Aden and Suez were military episodes rather than colonial wars. British pragmatism was perhaps best summarized in the prime ministership of Harold Macmillan who, in his famous speech to the Houses of Parliament of the Union of South Africa on 3 February 1960, recognized the inevitable growth of African national independence. He said, "[t]he wind of change is blowing through this continent, and, whether we like it or not, this growth of national consciousness is a political fact" (Macmillan 1972: 475). Recognition of political facts rather than political ideals allowed Macmillan to extract Britain incrementally from its colonial possessions while offering the British the promise of domestic security and prosperity rather than overseas wars. Domestic consumerism was to replace overseas imperialism.

This pragmatism might also be regarded as characteristic of common law itself as a system of judge-made decisions that creates a tradition that responds to local needs and interests rather than to some overriding set of legal principles. Once again it may be apt to draw a contrast between British politico-legal attitudes and French political principles. It is in the response of Edmund Burke to the French Revolution that one finds a dramatic defence of British, or more precisely English, legal attitudes. For Burke, in his *Reflections on the Revolution in France* (1955), the legal traditions of English common law were a far better defence of individual liberties than the abstract laws of 'the Rights of Man.' He took a similar attitude towards American independence in his speech advocating 'conciliation with the colonies' (Burke 1993). In the sociology of law, Max Weber also recognized these important differences between English common law and continental or Roman law traditions. For Weber (1978), whereas English judge-made law was local and particularistic, continental law was capable of rational and coherent development as an abstract universalistic pattern of law-making. The consequence is that in the post-colonial context, where the common law tradition survives, it exists alongside other, typically customary, legal traditions. Indeed the modern debate about legal pluralism has emerged partly as a result of the research of anthropologists of law into the continuities of customary law into the modern post-colonial period. In Indonesia this pattern of legal pluralism gave rise to complicated debates about the relationship between customary law, *Shari'a*, and Dutch colonial law (Geertz 1983). In short, the continuity of the *Shari'a* in Singapore was neither the outcome of a careful and well developed colonial policy nor specifically the product of English liberalism. It was simply pragmatism. Provided existing practices in religion and law did not interfere with the profitable conduct of trade, the British turned a blind eye to local needs. These pragmatic arrangements, which are largely still in place in Singapore, avoided any direct clash between the piecemeal nature of common law and the *Shari'a* as the divine code of the Muslim faithful.

There are obviously problems in defining legal pluralism, and its causes are much disputed (Griffith 1986). In the West it is typically associated with multiculturalism and with multicultural policies that are responses to minorities,

arising out of migration. In many societies, it is the survival of informal arrangements or folk traditions, especially relating to customary practices in the domestic sphere. In many societies in Africa legal pluralism is associated with tensions between minorities and majorities, especially Muslim minorities (Clarke 2009). In Latin America legal pluralism has emerged out of post-colonialism with the partial recognition of the customary laws of indigenous peoples. In Asia the issue of legal pluralism often arises in response to a Muslim minority in a Christian majority society such as the Philippines, or to a Muslim minority in a Chinese (Buddhist and Christian) majority society such as Singapore. It may be associated with Muslim majority societies with substantial minorities (Malaysia and Indonesia), where a society is attempting to integrate civil society around Islamization. In this chapter my argument is that it is often associated with British post-colonial societies such as Malaysia, Singapore, and India, where English common law continues after independence.

The idea of legal pluralism in the sociology of law was spelled out by Eugen Ehrlich in 1913 in *Fundamental Principles of the Sociology of Law*, in which he spoke about ‘living law’ (that is, law as practiced) to distinguish his approach from state-centred theories of law, which assume that law is created by the state to unify legal domination. Ehrlich argued, in contrast to juridical philosophers like Hans Kelsen, that law is not exclusively produced by the state or the courts or by tribunals. Hence he took the view that law is basically about establishing a social order and it is to be found everywhere; law is concerned with “ordering and upholding every human association” (Ehrlich 2001: 25). Within this sociological tradition, legal pluralism becomes controversial, because it can only exist in contrast to the idea that the state has a legal monopoly. In other words, the notion of legal pluralism also functions as a critique of the state-centred or ‘official’ view of the law.

5.3 Singapore’s Legal Traditions

In Singapore, the post-colonial society inherited both British common law and *Shari’a*. The historical development of legal pluralism in Singapore followed a common pattern that was experienced in much of the colonial world, where laws created by a state interacted with customary or religious traditions producing a layering of legal norms (Hooker 1975: 6). As was typical throughout the British Empire, Singapore acquired a common law tradition through the Charter of Justice in 1823 and this system was maintained after Independence, partly because it was useful for continuing trade relations and because it inspired some degree of international confidence in the legality of the newly independent government (Phang 1990; Thio 2004). Unsurprisingly, there have been some developments in the law, which has adjusted in an evolutionary fashion to local circumstances. For example, the Singaporean government has been forced to take into account the ethnic and racial diversity of the society. In approximate terms, 75 % of the population is Chinese, 14 % is Malay, and 9 % is Indian. In religious terms 43 % is Buddhist, 15 % is

Muslim, 15 % is Christian, and 4 % is Hindu. The critical issue behind these figures is that the overwhelming majority of Malays are Muslim, and as a result Islam remains an important cultural force in Singapore despite the fact that Malays are a numerical minority. Malay Muslims have a higher fertility rate than the Chinese majority and they have been less successful in terms of education and social mobility within the society. The Chinese elite have been worried about the 'Malay problem,' because of the potential spread of political radicalization from militant Islamic groups in Malaysia and Indonesia (Kamaludeen et al. 2009). In order to protect the community from religious conflict the government introduced the Presidential Council for Religious Harmony and the Maintenance of Religious Harmony Act in 1990. The Act allows the Minister for Home Affairs to issue restraining orders for individuals or groups who are found guilty of causing feelings of enmity or hatred towards different religious groups, or of using religion to promote a political cause, or of carrying out subversive acts under the guise of religion, or, finally, of inciting disaffection against the President or government in the name of religion.

In addition, the state embraced a policy of cultural preservation in which each community would be encouraged and supported by the state. This strategy was an attempt to bolster Asian identities and values against the endless tide of westernization. In principle, each ethnic community and its culture was to be treated equally. An important element of this multicultural policy was to support language training (the 'mother tongue' policy) in which Mandarin, Malay and Tamil were offered in all primary schools. Another feature of this program was to defend the religious integrity of each community, for example, by supporting religious holidays. However, English is the language of public conduct in the military, schools, universities and business.

One 'shared value' in the official discourse is that of racial and religious harmony, but there have been important tensions between the state and religion in the past. For example, in the 1990s the court supported the government's view that the Jehovah's Witnesses were not compatible with the national interest, especially since their commitment to pacifism prevented their members undertaking national military service. As a result they were deregistered under the Societies Act and their Watchtower magazine was banned under the Publications Act. Another example of state management of religions occurred in May 1987, when 22 Marxist 'conspirators,' including religious workers and social activists, were detained on suspicion that they were planning to undermine the state. The government claimed that these arrests had averted an international conspiracy, based in London, to establish a communist state in Singapore. Anxiety about communist infiltration in the 1980s has been replaced by government anxiety about the spread of radical Islam in Southeast Asia after 9/11 and after the Bali Bombings.

Important developments in the law in Singapore were directed at the status of women. When the PAP was returned to office in 1959, it was intent upon reforming the family law and improving the status of women. It issued the Women's Charter in 1961 which became law on 15 September 1961. The Charter provided that a married woman has secure property rights to acquire, hold and dispose of property. As a result of experience arising from the law, it was refined in 1967 by the Women's

Charter (Amendment) Act. The aim of this act was to provide for monogamous marriages and to proscribe polygamous unions in the future. For example, if a Chinese man who is married according to Chinese customs were to seek to marry a second wife by converting to Islam, the provisions of the Ordinance would make such a marriage invalid and contrary to the law (Ahmad 1970).

In these legal developments Professor Ahmad Ibrahim played a key role. He became Singapore's first State Advocate General in 1959 and its first Attorney-General in 1966. As an expert in Muslim legal matters, he drafted the Administration of Muslim Law Act (AMLA) of 1966 which revised and revitalized the Shari'a Court's jurisdiction and established Majlis Ugama Islam Singapura (MUIS, the Islamic Religious Council of Singapore). AMLA is charged with three responsibilities, namely oversight of MUIS, management of the Syriah (Shari'a) Court, and the registration of Muslim marriages. AMLA came into effect in 1968 and MUIS was charged with responsibility for the administration of *zakat* (religious taxes) and *wakat* (endowments). It was also in charge of *madrasahs* or religious educational institutions. More importantly for the topic of this chapter, it was responsible for issuing *fatwas* or legal decisions.

In Singapore the Shari'a Court has the jurisdiction to hear cases and determine all proceedings in which the contending parties are Muslims or where the man and woman were married under the legal provisions of the *Shari'a* relating to marriage, divorce, the disposition of property on divorce, and the payment of the dower (*maskahwin*), and the maintenance and distribution of gifts (*mutu'ah*). Muslim law prohibited the solemnization of a marriage where either party was under the age of 16 years, and allowed polygamy provided the religious authorities saw no obstacle to the marriage (Ahmad 1970). AMLA provides for divorce by mutual consent. The grounds for judicial divorce have been extended to include desertion, failure to maintain, and cruelty. All divorces must be formally registered in the Shari'a Court.

In terms of guidance for everyday practices such as food consumption, *halal* certification was started in 1978 via a Halal Certificate Strategic Unit which monitors food outlets to guarantee the consumption of food is according to *Shari'a* rules. While Muslims share a common understanding of the division between *halal and haram*—what is permitted and what is forbidden—there is some diversity within the Singaporean Muslim community, in which the majority are Sunni and follow the Shafi'i school of law, while there is a minority who follow the Hanafi school.

5.4 Law and Legitimacy

Obviously, when Singapore declared independence from Britain it rejected traditional forms of colonial legitimacy. Although, as a young politician, Lee Kuan Yew had a charismatic appeal in his quest for national self-determination, Singapore rapidly moved towards legal-rational political authority as the People's Action Party (PAP) became the dominant political force. While the PAP has successfully legitimated itself through parliamentary elections, there has been no change of

leadership since 1965 and therefore questions have been routinely raised about the basic legitimacy of the Singapore government. For legal theorists, Singapore has not fully adhered to the principles of the rule of law (Peerenboom 2004). For other critics, Singapore is a 'managed society,' with the government attempting to control major dimensions of society such as housing, population, migration, and the economy. Thus the making of today's Singapore has involved "the elimination [of] all forms of civil society" (Trocki 2005: 131), especially, the containment of all forms of political activism and critical intellectual engagement.

Despite these critical accounts of Singapore, the Singaporean government enjoyed legality rather than electoral or popular legitimacy. Modern Singapore is unambiguously a legal state, but, because the PAP has been in power continuously since the creation of the Republic of Singapore, there is a question over the depth of its popular support. Lee Kuan Yew was the first prime minister and later became MM Lee (the Minister Mentor Lee). His son Lee Hsien Loong replaced him in 2004 as prime minister. The Lee family has been politically successful, not through the arbitrary use of physical force, but in rational-legal measures such as turning regularly to the courts to crush any direct criticism of the Lee family or the government or the PAP. The routine use of libel laws has protected the Lee family, kept the government out of scandal and impoverished its critics. What cannot be ignored or denied is the fact that the PAP came to power and remains in power because it has been overwhelming successful in the ballot box. However, its critics argue that it retains electoral support and political power only by gerrymandering the electoral boundaries of parliamentary seats. In addition, the constitution allows it to appoint a limited number of people to seats to bolster its support in parliament, although this group of representatives has no voting rights. Its critics believe that the government has too much influence over the editorial policy of the *Straits Times.* Under the Emergency Laws inherited from British colonial times, protests and street gatherings are strictly controlled by the use of licenses, and consequently a gathering of four people or more without permission is defined as an illegal assembly. While the government claims to abide by human rights conventions, it adheres to capital punishment for first-degree murder, which is used frequently against serious offenders, and it favors judicial corporal punishment (such as caning) for other criminal offences. Amnesty International has claimed that Singapore, relative to the size of its population, has the highest rate of executions of any modern state. The jury system has been abolished, because the government assumed that laymen would be sentimental in their approach to crime and would, as a result, tend to be too lenient towards offenders. The government is also believed by its critics to enjoy too much influence over news coverage through its oversight of the media. For example, the *Straits Times* regularly provides public support for the government's domestic policies, while at the same time holding up foreign governments for criticism. There are few legal checks on the government and, within the constitution, the elected president of Singapore has ceremonial functions but no power. This combination of circumstances has meant that, in practice, there has been no effective opposition to provide a legitimate channel for public criticism of the government. Perhaps, regrettably, a "stable authoritarian regime is a lot more

desirable for most of its citizens than a failed democratic state. Even justice probably counts less than administrative competence and order in the streets" (Judt 2010: 220). Given that there is little appetite for radical change in Singapore, it is unlikely that there will be any strong or concerted effort to expand the scope of the *Shari'a* in the Singaporean legal system.

The Singaporean state can therefore be appropriately defined as a hyper-judicial institution in which the legal apparatus is overused to sustain power by suppressing opposition and, therefore, there is reasonable doubt about the political legitimacy of the state but no question about its formal legality. Its legitimacy is questionable, because there has been no change of government since 1965 and political consent is carefully managed. Not surprisingly, support for the government from the middle classes rests on the economic performance of the government. Its legality is routinely underpinned by the courts and the legal establishment. The normal function of parliamentary elections in changing unpopular governments does not appear to operate, and hence, paradoxically, it is the very legality of states such as Singapore that casts doubt on their legitimacy. A hyper-judicial state may be successful in giving its citizens prosperity, security and stability, but it is doubtful that it can unquestionably deliver democracy and legitimacy. A judicial state, while clearly different from a repressive colonial or predatory state, may be equally problematic from the perspective of the operation of human rights. Although many Asian governments are based to some degree on procedural legality, they follow a 'rule of virtue' rather than a 'rule of law.' Citizen obedience is a primary virtue over active participation, and democracy is seen by authoritarian regimes to be a form of government that ushers in social instability.

5.5 Political Islam

The political conflicts with dissidents during the so-called 'Marxist conspiracy' shaped the government's attitude towards intellectuals inside and outside the churches, but more recent anxiety about 'political Islam' was obviously intensified by the attack on the Twin Towers in New York, by the Bali bombings, and by the war on terrorism in Iraq and Afghanistan. As a result of these global conflicts, the government came to develop a variety of policies to create a more effective surveillance over religious groups, resulting in a general strategy to impose a 'management of religion' in Singapore (Kamaludeen et al. 2009). In *Hard Truths to Keep Singapore Going*, Lee Kuan Yew expressed his nervousness about the possible introduction of political Islam into Southeast Asia and eventually into Singapore. The government was also embarrassed, at least in its official pronouncements, by the escape of detained terrorist Mas Selamat Kastari. A successful terrorist attack on Singapore would raise doubts about the effectiveness of government and the value of its policies on religious harmony. More importantly, it would also have a devastating impact on investment, tourism and trade. In this context MUIS has been important in mediating between the Malay Muslim community and the state. It has

offered an alternative interpretation of Islam to counter the influence of Wahhabism which is being exported to Asia from Saudi Arabia. MUIS accepted the ban on foreign preachers and encouraged Muslim youth going overseas for religious training to study in Jordan rather than Saudi Arabia (Han et al. 2011).

In his comments on the 'hard truths' facing Singaporean society, Lee appeared to echo attitudes and policies that had appeared in public statements by various European leaders—especially by David Cameron in Britain, Angela Merkel in Germany and former President Sarkosy in France—and in the United States by Republicans such as Newt Gingrich. Lee suggested that multiculturalism had failed as a public policy and that it was necessary to maintain firm control over the pattern and nature of migration. Controversially, he claimed that Singapore had been progressing well "until the surge of Islam" had brought into question the ability of Muslims to integrate successfully into Singapore. In calling for Muslims to be less strict in their religious practices and less rigid in their beliefs, he claimed that, while the assimilation of all religions and races had been successful, there were many remaining problems in the assimilation of Muslims (Han et al. 2011: 228). These statements, which were subsequently severely criticized in the media, were an overt criticism of MUIS, which has the task of supervising the everyday running of mosques and *madrasahs* in Singapore. To deflect the influence of conservative 'Middle Eastern Islam,' many high ranking MUIS officials, including the Mufti of Singapore, are sponsored to pursue their postgraduate Islamic education in western institutions, especially in the United States.

Lee's observations on the failure of Muslims to integrate successfully into mainstream society were critically debated by both Muslims and non-Muslims across society as a whole and many refuted the claims made by Singapore's Minister Mentor. In response to these criticisms, Lee was forced to recant his earlier assertions, admitting "I made this one comment on the Muslims integrating with other communities probably 2 or 3 years ago. Ministers and MPs, both Malay and non-Malay, have since told me that Singapore Malays have indeed made special efforts to integrate with the other communities, especially since 9/11, and that my call is out of date…I stand corrected. I hope that this trend will continue in the future" (Zakir 2011).

In the period leading up to the elections, Prime Minister Lee Hsien Loong, in an unprecedented admission, apologized for the mistakes of the government over the previous 5 years and pledged to undertake reforms of the system. The state was also quick to allay the fears of the Malay Muslim minority and Lee Kuan Yew claimed that "[w]e have never discriminated against the Malays. In fact we have many affirmative actions for the Malays" (Imelda 2011). Recognizing the possibility of some movement of the Chinese vote towards the parliamentary opposition, he surmised that the Malay vote would be "sufficiently substantial" to usher the PAP into parliament, claiming that it "makes no sense for the Malays to go and vote for an opposition that cannot form the government and cannot look after you" (Imelda 2011).

In conclusion we can say that colonial Britain had a pragmatic view of local customs, religions and laws. It both inherited and accepted pluralism because it was good for trade. The Singapore government, in the first instance, took over these

British colonial institutions, but over time it has developed more explicit, detailed and comprehensive policies towards racial harmony and religious diversity. As we have seen, there were important developments in the 1960s relating to the *Shari'a* through the enactment of AMLA. Subsequently, MUIS has become an important component of its strategy to secure social harmony. Over time, these social policies became more, rather than less, important in shielding Singapore from the problems that beset Indonesia, where Islamic militancy, combined with working-class discontent, fuelled anti-Chinese riots that resulted in significant loss of life (Case 2002: 50). Because Singapore is surrounded by populous Muslim societies, it cannot afford religious conflict. Legal pluralism avoids alienating the Muslim population by allowing the *Shari'a* to function in domestic matters, especially in the settlement of property disputes in divorce cases. However, behind this appearance of cultural diversity, legal pluralism and tolerance, the state remains very much in charge of religious affairs. Indeed the provisions that were passed in 1999 demonstrated that "it is consistently the state that determines the administration, and thus the substance, of law for Muslims in Singapore and not the Muslim population and its community organisations" (Lindsey and Steiner 2012).

5.6 Conclusion: Soft Authoritarianism and Social Change

There are at least two reasons why soft authoritarian regimes cannot be regarded as functioning democracies. First, elections do not expose or bring into view the real source of the regime's power, and second, the electorate is not in a position effectively to relocate power to a new leadership. A minimal criterion of electoral democracy is peaceful, albeit intermittent, transitions in governments. If elections do not offer any possibility for the rotation of different political elites, then the political system cannot be regarded as a functioning democracy. In Singapore the PAP has been in power since Independence in 1965. However, it is also the case that such regimes cannot be categorized as purely authoritarian, because there is a certain degree of openness in the political process. In addition, such regimes accept a partial challenge to their authority through the ballot box and allow some degree of freedom for competing parties. In short, there are important differences, contrary to the arguments of Stephen McCarthy (2006), between Myanmar, China, and Singapore.

Although there is ample and continuous criticism of Singapore from political sociologists, Singapore is undeniably a successful society when measured, not simply in terms of economic growth, but in terms of social stability and harmony. There are tensions below the surface, for example, about the rapid increase in migration to the city-state that has forced up housing costs and general inflation. However, as a multicultural and diverse society, Singapore managed to negotiate its way through the twentieth century with relatively little social turmoil. Its success in the management of religious differences can be attributed in large measure to legal pluralism, which has allowed Muslims to settle their domestic disputes within the

framework of the *Shari'a* while allowing them access to secular common law as an alternative system. The legal compromise that has been institutionalized in MUIS may fall far short of the comprehensive demand by radical Muslims for a caliphate in Southeast Asia, but it has avoided the deep conflicts that have challenged the political stability of many African societies that have been unable to reach a compromise between secular law and the *Shari'a*.

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Chapter 6
The Philippine *Shari'a* Courts and the Code of Muslim Personal Laws

Isabelita Solamo-Antonio

6.1 The Socio-political Context

Mindanao, the second largest island in a predominantly Catholic Philippines, is home to about 6.5 million Muslims, which is approximately 30 % of its total population.[1] The independence movement in Muslim parts of Mindanao emerged in 1967, achieving autonomy for Muslims in five provinces and one city in Mindanao after an Organic Act was enacted by the Philippine legislature. This autonomous area is called the Autonomous Region in Muslim Mindanao (ARMM).

In 1977, in an attempt to appease Muslim separatists, a Code of Muslim Personal Laws (CMPL) was enacted as a Presidential Decree during the martial law regime of former President Ferdinand Marcos. The enactment was also in keeping with the 1976 Tripoli agreement between the Philippines and the Moro National Liberation Front (MNLF), which provided, among other things, that Muslims should have courts to hear *Shari'a* law cases. This was also about the time that 'Moro' became a popular word to denote Muslim Filipinos, and 'Bangsamoro' to mean a nation or a community of people espousing the right to self determination. In 1996, 20 years after the Tripoli agreement, a Final Peace Agreement between the Philippine government and the MNLF was forged. In spite of the 1996 peace agreement, war erupted with another MNLF splinter group, called the Moro Islamic Liberation

PILIPINA Legal Resources Center (PLRC), founded in 1982, is a social development agency which implements development programs concerning women and the law. Its founders are members of PILIPINA, the Filipino national feminist movement. At the time of writing, PLRC continues all its advocacy work through various local, national and international networks.

[1] The population of Mindanao according to the 2010 government census by the National Statistics Office was 21,582,540.

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Front (MILF). A failed 2008 agreement between the Philippine government and the MILF outlined geographical areas which are beyond the current ARMM. This Memorandum of Agreement on Ancestral Domain (MOA-AD) was decreed unconstitutional by the Supreme Court. In 2012, a new peace agreement was written between the Philippine government and the MILF.

Historically, the Moro sultanates (a governance structure having all the elements of a state) in Mindanao are older than the Philippine Republic by almost 500 years (Rodil 2003). The Bangsamoro issue is one of the longest running problems in the world. This is why calls and proposals for new political configurations and political projects are forever brewing, and religion, which is a complete code of life for the Muslim community, is at the heart of the discourse.

Muslim women have very limited presence in local political affairs and governance and their status is significantly lower than that of women from other communities.

6.2 Our Work in Muslim Communities

The ideas and findings in this chapter are linked to a network of Muslim partners, both women and men, *Shari'a* court judges and lawyers, volunteer *Shari'a* court monitoring teams and various multisectoral stakeholders in the Autonomous Region in Muslim Mindanao (ARMM) and in Muslim communities outside of the ARMM.

Our center, the PILIPINA Legal Resources Center (PLRC) has been working in Muslim communities since 1987. Our first survey, 'The Implications of the Code of Muslim Personal Laws (PD 1083) on the Muslim Women of Regions IX and XII,' was made in 1988 and published a year later. The next years were spent on (a) legal literacy work popularizing the Code of Muslim Personal Laws and promoting an alternative formulation in keeping with the gender equality provision of the Philippine Constitution, and (b) monitoring the *Shari'a* courts through a Shari'a Court Watch project with judges, community stakeholders and policymakers.

In some communities there were courts that did not have judges and this has implications for citizens' access to justice. For those communities, exclusion from the justice system structures is tantamount to deprivation, and, as determined by a human development report, perceived relative deprivation is one of the predictors of armed conflict (Human Development Network 2005).

One result of this work was the creation of a government search committee that appointed judges to the vacancies in the *Shari'a* courts. Also, two more women judges have since been appointed, increasing the total number of women judges in our courts, and making them a showcase to the rest of the Muslim world, which still believes that women cannot become judges.

In 2001, our women's center, the PILIPINA Legal Resources Center, worked with the National Network for Muslim Women's Rights, composed of Muslim

women leaders, in proposing changes to the current Code of Muslim Personal Laws.[2] The CMPL is a 'man-made law' by virtue of a Presidential Decree in 1977 issued by former President Marcos, before the gender equality provision was enshrined in our 1987 Constitution. A proposed Revised Code of Muslim Personal Laws was carefully shaped and nurtured through the years through a process which included organizing a critical mass of advocates committed to working for the passage of the proposed changes in the Code into a new law. When our political party, Abanse! Pinay,[3] won a seat in Congress and our party's representative became the Chair of the Committee on Women in the House of Representatives, PLRC regarded this as a methodological and political chance to work for legal reform. So, our center began to facilitate the process of reviewing and proposing changes to some provisions of the Code of Muslim Personal Laws.

While the network's focus was on the Code of Muslim Personal Laws, the network also worked on reproductive rights, sexuality and social justice in the context of Muslim customary and statutory laws, which govern not only the life but also the sexual behavior of women. The narrative of our advocacy is that the justice system and the Mindanao political economy must be linked to ethics, to the materiality of our bodies, to human development and the development of our communities.

Our center also worked with the Women Living Under Muslim Laws network (WLUML) in the international program 'Women and Law in the Muslim World,' and this collective work, in more than 20 countries, has carefully documented the variations in Muslim laws in many countries, providing evidence that there is no one homogeneous Muslim world. In solidarity with Muslim feminists, there is an emerging clamor to search for space within these customs or interpretations in which to promote progressive alternative formulations and jurisprudence based on social justice.

The framework of our UN CEDAW (Committee on the Elimination of Discrimination Against Women) Benchbook for judges is informed by an extensive exposure to various structures and perceived changes in Muslim communities in the Philippines over a long period of time. We were thus able to focus on particular themes, which seem to us to have been the sites of gender inequality and discrimination.

When norms and standards are legislated, these become sources of specific rights that are accessible, enforceable and demandable. Thus, human-made legislations, such as the Code of Muslim Personal Laws, need to be revisited and interfaced with current standards which have universal mandates, such as the UN CEDAW. That a

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[2] The proposed 'Revised CMPL' was officially presented to the 11th Congress of the Philippines through Congressman Abdulgani Salapuddin, the Vice Chair of the Committee on Muslim Affairs, and through Congresswoman Patricia Sarenas, Chair of the Committee on Women. The advocacy by the network for the passage of the proposed law continues. Advocacy activities at the local government units and at the level of the Autonomous Region in Muslim Mindanao have also begun.

[3] Abanse! Pinay was a women's political party which had the goal of advancing the women's agenda in Congress through the election of three women sectoral representatives under the party-list system.

community of nations shares this standard is an indication that the promotion of equality between women and men cannot be compromised by making reference to an ever-changing culture or to human-made religious interpretations and practices.

The Philippines recently passed a law on reproductive health and family planning and these are parts of our treaty obligation to the UN CEDAW.

6.3 The Code of Muslim Personal Laws and the *Shari'a* Courts: Cases and Incidence

The Code applies to all Muslims, but since the Code was promulgated before the 1987 Constitution, which has a gender equality provision, some of the rights won by the women's movement are not reflected in the Code.

Still, in recognition of multiculturalism in Mindanao, "and as the only Catholic-majority country in the world to recognize Islamic law, the scope of the Code is more expansive than its equivalents in neighboring Thailand and even Muslim-majority Indonesia" (Stephens 2011).

The *Shari'a* courts which form part of the judicial system of the Philippines became operational in 1985. They are special courts with limited jurisdiction for the Muslims and are charged with the administration and dispensation of justice. The Code of Muslim Personal Laws was promulgated for enforcement in Muslim communities (Executive Order No. 442, 23 December 1974). These communities are found in the ten provinces and six cities comprising the five *Shari'a* judicial districts (Art. 138, Philippine CMPL).

As provided for by law, there are two classes of *Shari'a* courts: the Shari'a Circuit Courts and the Shari'a District Courts. Both courts have original jurisdictions, while the District Courts have appellate jurisdiction. The decisions of the Shari'a District Courts, whether on appeal from the Circuit Courts or not, are final, except on questions purely of law that can be directly appealed to the Supreme Court.

Marriage The issues we studied concerning marriage focused on the age at which a woman can legally and independently contract a marriage, whether the consent of the woman can be vitiated by the intervention of a marriage guardian (or *wali*), and whether child marriage is sanctioned by law or is actually practiced.

It is the practice in rural Muslim towns that marriage occurs as early as puberty (i.e. from as young an age as 12 years) for both young men and women, with the approval of their parents. Also, in rural Muslim geographical areas, there are no birth certificates to prove a person's age. The marriageable age, as dictated by customary and religious considerations, is very variable.

Our data from one Shari'a District Court showed that the highest percentage of marriages occurred in the age bracket of over 25 years. The age bracket of 19–24 years had the next highest percentage, and the age bracket below 18 years had the smallest. Marriages taking place below the age of 18 were more numerous for

females. Although marriage at under 18 years has the least incidence, it is still an alarming trend that child marriage has continued as a practice, despite existing international conventions against it. Many research results have shown the ill effects on women of early marriage. The oldest recorded age of marriage for men is 65 years and the youngest is 11 years; for women the oldest recorded age at marriage is 62 years and the youngest is 7 years.

Nobody, then, in the National Network for Muslim Women's Rights[4] wants children to marry. There was a consensus in the network to adopt the Convention on the Rights of a Child, which has defined a child as being below 18 years of age. Informed by this, the National Network for Muslim Women's Rights has proposed raising the legal age of marriage to 18 years for both men and women. Thus, the network is proposing to reform the current law that states that the option of annulment is not available upon the child's attaining the age of puberty if the marriage guardian (*wali*) who contracted the child marriage is the father or paternal grandfather. There was a consensus in the network that this exception to the option of annulment at puberty violates the child's rights.

In an earlier PLRC focused group discussion held among women in the academe (at the University of the Philippines in 1995), Muslim women stated that even though some of them had married young, they would not wish it for their children.

According to the study by the Women Living Under Muslim Laws network,[5] child marriages are forced marriages, because children lack the capacity to understand the consequences of marriage and make an informed choice and because of the limited options available to children to resist marriage under the pressure of family and community. This study also documented that most option-giving laws in some Muslim countries and communities have discouraged child marriage by rendering it illegal (for instance, through the Child Marriage Restraint Act of Bangladesh) and by imposing strict penalties on guardians, solemnizers and adult spouses, while still recognizing marriages once they do occur so as to guarantee the rights and legal claims of parties (as, for instance, according to the Code of Muslim Personal Laws in the Philippines). One implication of recognizing child marriages once they occur is that children of these marriages are considered legitimate.

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[4]The core members of the network came from the following organizations: Amanat Foundation, Al-Mujadilah Development Foundation, Kabuhi-anan Foundation, Salam Foundation, Ulama League of the Philippines, Davao Women Islamic Welfare Foundation, Bangsamoro Women Federation Multi-Purpose Cooperative, Bangsamoro Women Foundation for Peace and Development, Muslim Women of Basilan, Institute of Islamic Studies—U.P. Diliman, Sulu Media Arts, Jolo School Of Fisheries, Mindanao State University, Muslimah Resources and Integrated Development Center, Kadtuntaya Foundation, Saligan, professors at MSU-Tawitawi, Office of Muslim Affairs. These women and men represent the following Muslim tribes: Tausugs, Yakans, Maguindanaos, Maranaos, Kalagans and Samals. The PILIPINA Legal Resources Center convened this network in 2001.

[5]This study comes from the 20 country Women and Law Project of the Women Living Under Muslim Laws (WLUML), in which Isabelita Solamo-Antonio took part. The research results were published in *Knowing our rights: Women, family, laws and customs in the Muslim world* (WLUML 2006).

***Wali* (Marriage Guardian)** The Philippine *Shari'a* courts have always enforced the requirement of the presence of the *wali* in the solemnization of a marriage. Even women desiring to contract a divorce seek the advice of the *wali*. In local communities, and in all Muslim tribes, the consent of the woman in marriage is given through the *wali*. The marriage ceremony is more or less similar in all tribes, involving a religious leader (imam) and witnesses. In the ritual, the bride's parents make a testimonial offer (*ijab*), and the groom responds with a pledge of *qabul* (acceptance of the offer) to live with his wife in keeping with the Muslim faith. However, even though the Code of Muslim Personal Laws recognizes the four orthodox (Sunni) schools of law, it is not popularly known by Muslim men and women that the *wali* is not required under the Hanafi school of Muslim law.

Adultery One topic discussed in the synthesis meetings was that the women in our communities should know that registration of divorce is proof of divorce. This is important for a woman's safety, because without proof of divorce, a woman who remarries could be liable to a charge of adultery (*zina*). Registration is particularly important in the case of unilateral oral divorce (*talaq*), since husbands do not need to petition the court to obtain this kind of divorce.

Restitution of Marital Rights In two lower courts, cases have been filed, by husbands, for the restitution of conjugal rights. In each case, the husband demanded that his wife return to the conjugal home and perform her obligations and duties as his wife. These cases were decided in favor of the husband, and the wife was ordered to return home and perform her marital duties. An order from the court to physically return the wife to the conjugal abode is not an option-giving order. From a feminist perspective, such an order is a violation of freedom and difficult to enforce. But, for Filipino Muslims, divorce is available as a positive alternative if the woman does not wish to return to the conjugal home, provided that there are grounds for divorce, or that she has the right of *tafwid* (delegation of *talaq* to the wife), or returns the *mahr* (dower).

Traditional interpretations of Islam point out that desertion of the conjugal home is disobedience; but progressive interpretations are different, and some Muslims think that, since she cannot be forced to obey, the solution to the problem of a 'disobedient' wife is to divorce her.

Polygyny In one circuit court, ten cases involving violations of provisions on subsequent marriage were heard. The common ground for the complaints was the absence of the required notice to the court. The actual complainants in these cases were the wives, but because the cases were classified as criminal cases, the People of the Philippines became the plaintiff. In one judicial district, nearly 3 % (2.86%) of all cases filed in a period of 5 years involved violations of laws concerning polygamy.

Divorce In one district court,[6] 50 % of cases filed between July 1998 and July 1999 concerned the registration of a man's unilateral pronouncement of oral divorce (*talaq*). One positive inclusion in the Philippine Code of Muslim Personal Laws,

[6] These cases were heard in 5th Shari'a Circuit Court, Maguindanao (SHCC Civil Case no. 98-492 to 99-527).

that sets it apart from codes of other Muslim countries, is the requirement for registration of oral divorce. Also, the Philippine National Statistics Office (NSO) requires a court decree as proof of divorce.[7] In cases of *talaq*, Muslim husbands have not needed to petition the court to obtain a divorce. After repudiating the wife, they have simply filed a written notice of this pronouncement with the clerk of the *Shari'a* courts and waited for the expiration of the waiting period (*'idda*). These courts convened the Agama arbitration councils.

According to this study, most women's divorces were granted by judicial decree (*faskh*), while men simply repudiated their wives through oral divorce (*talaq*). No case of *tafwid* (a woman's right similar to *talaq*—if established in a prenuptial agreement) has yet been filed. It was found that even educated women are not aware that it is possible for them, also, to orally divorce their husbands.

One celebrated divorce in Maguindanao was a case of divorce by *khul*, where the woman offered to return her dower (*mahr*). News of this divorce became a popular topic in the Muslim community, because it seems that ordinary women have not, so far, accessed this kind of divorce. The Certificate of Divorce issued by the court for such mutually agreed divorces states that they are divorce by *talaq*, because there is no pro forma certificate for this kind of divorce, or *mubara'at*.

In cases that went to trial, 50 divorce petitions were filed by women in court and only one by a man. In the circuit court of one judicial district, of the total number of petitioners for divorce, 86.42 % were women, while only 8.93 % were men. This study found that the cases for divorce by judicial decree (*faskh*) that were filed by women were based on complaints of abandonment, abuse, and exploitation.

Financial Provisions Partition of property has always been a problem for divorcing couples. Since Filipino Muslims are governed by a regime of complete separation of property, couples do not bother to identify or segregate their separate properties while they are still married, let alone state in a written agreement what property belongs to each of them.

In one case of property ownership, decided by a circuit court, the judge ordered that the wife be given one third of the value of the property used in a business established by the husband as her share for helping in managing the business.[8]

In one *Shari'a* district, cases were filed for the recovery of *mahr.* In these cases, because of the failure of the marriage or because the marriage was not consummated, the husband aimed to recover the *mahr* given to the wife. The court decided these cases in favor of the men. It was found that the unconsummated marriages had been arranged by the parents of the couples.

Some of the married women in the focused group discussion in Davao City did not seem bothered that, under the CMPL, the share of family assets to which sons

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[7] In the Philippines, absolute divorce is legal only for Muslims and is not available to the rest of the Filipino population. Apart from Vatican City, the Philippines is now the only country in the world which does not allow divorce for the majority of its population.

[8] This instance was Civil case no. 95-012, *Rasmiah and Abdul Raof Dipatuan v Ali and Salic Onday* for recovery of *mahr* and division of property after divorce, promulgated on 28 June 1996, in Marawi City.

are entitled is double the entitlement of daughters. It was their opinion that there are other financial resources available to daughters, such as their entitlement to *mahr*, the provision, under the CMPL, that a married couple is governed by the complete separation of property, and the maintenance that wives receive from their husbands.

In the validation meeting, after a feminist sharing, the women agreed that this unequal division of inheritance rights among daughters and sons is prejudicial to single women and female heads of households. The women were, therefore, amenable to proposed reforms.

One of the proposals for inclusion in the revised formulation of the Code of Muslim Personal Laws is that a daughter who is providing for, or supporting, the brothers and/or other members of the family, or a daughter who is in dire need, may petition the court for payment of her incurred expenses of support, as well as payment for future expenses of support. Such support shall be charged to the estate.

Another strategy put forward by the women in the discussion group was to ask parents to write a will stipulating equality in the division of property. Under the CMPL, this is possible in practice, as one third of the hereditary estate is disposable (Art. 106, CMPL).

Support or Mutual Maintenance In court cases involving maintenance, the support demanded usually covered those payments which were in arrears for several months (for both the wife and children), and support during the *'idda*. Often, when cases are filed for divorce by judicial decree (*faskh*), they already include supplications for support for the wife and the children. However, sometimes wives have to go back to court and pay to get the financial support to which they are legally entitled, but which is denied to them by irresponsible husbands.

On the other hand, under Philippine secular law, mutual maintenance is the rule. It is revealing that, in our earlier survey, it was found that 83 % of Muslim women were either employed or worked as traders, businesswomen or working peasants (PLRC 1988).

Custody Issues of custody often result from divorce. The courts determine an arrangement for custody and maintenance of children if the spouses have not come to a mutual agreement. One of the very few *Shari'a* court cases that have reached the Supreme Court concerned custody.[9] The case involved a Catholic Filipino nurse who resided in a non-Muslim area in the Philippines but was married to a Muslim Kuwaiti student. The wife petitioned the Supreme Court to fight a *Shari'a* court decision that denied her motion to dismiss the case filed by her husband in the *Shari'a* court. She filed for custody in the regular courts, and, before the case was settled, her husband filed a petition for joint custody in the *Shari'a* court. She then filed a motion to dismiss the case in the *Shari'a* court, citing the following: (a) the court had no jurisdiction over the subject of the petition or over her person; and (b) her case was pending already in a regular court. The *Shari'a* court denied her

[9] 165 Supreme Court Reports Annotated 771.

motion, so she went to the Supreme Court on a petition for certiorari to review the order of the *Shari'a* court. The Supreme Court granted her petition, citing that the Code of Muslim Personal Laws is applicable only in Muslim communities.

6.4 The CMPL and the UN CEDAW

In February 1977, 10 years before the adoption of the 1987 Constitution and 2 years before the adoption of CEDAW, the Code of Muslim Personal Laws was issued by Presidential Decree 1083. The CMPL is applicable only to Muslims, and states: "Nothing herein shall be construed to operate to the prejudice of a non-Muslim." However, there are instances in the Muslim Code where the law applies to non-Muslims. One example is the provision on divorce, in the Muslim Code, with regard to a couple, comprising a Muslim male and a non-Muslim female, whose marriage has been solemnized in accordance with Muslim law in any part of the Philippines.[10] Under the CMPL, although the wife is a non-Muslim, the Muslim Code still applies to her, and while there is no divorce law for non-Muslims, a non-Muslim wife could be divorced by her Muslim husband.

The CMPL remains as law for all Muslims in the Philippines, even though it has already been rendered outdated and is contradictory to some 1987 constitutional provisions, the organic acts for ARMM,[11] and international laws. A review of the CMPL vis à vis the 1987 Constitution reveals that the CMPL is no longer consistent with the constitutional provision of fundamental equality before the law of women and men. A guide book within the framework of CEDAW was therefore needed to guide *Shari'a* judges in resolving cases involving Muslim women.

The 1987 Philippine Constitution provides for autonomous regions in Muslim Mindanao and the Cordilleras, within the framework of the Philippine Constitution and its national sovereignty. Congress is empowered to create 'organic acts' for the autonomous regions providing for "special courts with personal, family, and property law consistent with the provisions of the 1987 Constitution and national laws" (1987 Philippine Constitution, Art. X, Sec. 18). Given the mandates of the 1987 Constitution on equality of women with men under the law, and the adoption of the internationally accepted principles of law as part of the law of the land, as well as the Organic Acts for ARMM, the CMPL now needs to be reviewed and amended in the light of the current constitutional and organic act provisions, as well as international standards. Provisions that perpetuate inequality and discrimination against women no longer have legal validity and should no longer be applied in deciding cases. Article 5 of the CMPL itself states that an *ada* that is contrary to the Philippine Constitution, public policy or public interest has no legal effect. *Shari'a* judges, like all other Philippine judges, are bound, not only by the valid provisions of CMPL,

[10] PD 1083, Art. 13.

[11] R.A. 6734 and R.A. 9054.

but also by international and constitutional law and the Organic Act for the Muslim region, in their interpretation and application of *ada* and local laws. Any custom or customary law that violates women's rights cannot be justified by any provision of the Code of Muslim Personal Law, as this safeguard is written in the CMPL itself: "No ada which is contrary to the Constitution of the Philippines, this Code, Muslim law, public order, public policy or public interest shall be given any legal effect" (Art. 5 CMPL).

One of the authors of the CMPL, Attorney Michael Mastura has maintained that test litigation is an alternative path to a legal reform project of revising the current CMPL. Aside from legislation, the other path is training, or dialogue and engagement with the judges of the *Shari'a* courts, because, as can be seen from court decisions, these judges exercise wide discretion.

In 2012, more than two decades after the 1988 survey research was undertaken, I examined the ponencia or court decisions, and the following are three of the recent positive developments identified.

Whereas, formerly, in cases of restitution of marital rights, decisions were made ordering women to return to the conjugal home, there is now a realization that such orders violate women's autonomy. It is now held by judges that such an order is only persuasive and not mandatory, because as marriage is itself a contract, it is based on mutual agreement of the parties.

Although cruelty is one of the grounds for divorce, our earlier studies, in the year 2000, showed that no cases for divorce had been filed on grounds of domestic violence, wife beating, or marital rape. Now, cruelty, as grounds for the termination of marriage, is described in the ponencia and is no longer absent from written decisions.

We are now able to read, in actual court decisions, of divorce by *tafwid*, where the husband delegated to the wife the right to orally divorce him.[12] Oral divorce was, in recent years, traditionally the preserve of men.

6.5 Community Practices of which *Shari'a* Courts Still Take Cognizance

After a series of community consultations and verification activities by PLRC, it was confirmed that there are discriminatory practices that are still very much prevalent in Muslim communities.

Both the community and courts have taken cognizance that the following practices are continuing: the 'four male witness rule' is valid in cases of sex related offenses, but in the absence of witnesses an oath before the Qur'an (*yamin*) is still a sacred practice; the marriage of a Muslim woman with a non-Muslim man is still culturally not allowed; and the consent in marriage of a female minor is given

[12] *Shari'a* Circuit Court Case No. 2006-1074, Jolo, Sulu Archipelago, 2006.

through the marriage guardian (*wali*) and her consent is presumed, as the marriage guardian is deemed to represent the best interests of the child.

In terms of substantive equality, the current areas of the CMPL that need legal reform pertain to: marriage requirements and divorce; the provision on hereditary rights, which differentiates between sexes; the provisions that prioritize the prerogative of the husband (concerning, for example, the choice of where the family should live, and the right to work or practice one's profession); the provision on the management of the household, which is specified as the domain of the wife; the provision on child marriage, which violates Article 16 of CEDAW paragraph 2, as well as the UN Child Rights Convention (CRC); and the operational definition of 'just treatment' in subsequent marriage or marriages, which is currently unclear and may be interpreted arbitrarily by a man.

Marriage Requirements A review of the CMPL vis à vis the Philippine Constitution and national laws, and consultations with Muslim women's organizations in other countries,[13] led the Women Living Under Muslim Laws to recommend that CMPL provisions that are not particularly mandated by the Qur'an and by basic Islamic teachings should, as much as possible, be consistent with the CEDAW, the Philippine Constitution, and national laws such as the Family Code. For example, the age of marriage is not mandated by the Qur'an. Other predominantly Islamic countries have pegged the minimum age of marriage at 18 years. According to the CMPL, the Shari'a District Court may, upon petition by a proper *wali*, order the solemnization of the marriage of a female who, though less than 15 but not below 12 years of age, has attained puberty. Under CEDAW and the Philippine laws, the consent of a woman is more important than the consent of a *wali*. The consent of the woman—whether virgin, divorced, or widowed—should be sought first and should prevail over that of the *wali.*

As a party to the CEDAW, the Philippines is under an obligation to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations, and, in particular, is obliged to ensure, on a basis of equality for men and for women, the same right to enter into marriage, the same right freely to choose a spouse and to enter into marriage only with their free and full consent, and the same rights and responsibilities during marriage and at its dissolution.

Subsequent Marriages According to the CMPL, a man is allowed to marry up to four wives. A husband may have more than one wife provided he can "deal with them with equal companionship and just treatment as enjoined by Islamic law and only in exceptional cases."

There is, here, a need to specify and define the acts that constitute 'equal companionship,' 'just treatment,' and 'exceptional cases.' There is also no provision in the CMPL regarding consulting the wife or obtaining her consent to her

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[13] These organizations include Women Living under Muslim Laws (Pakistan), Sisters in Islam (Malaysia), and Fatayat NU (Indonesia).

husband's subsequent marriage. In a case brought to PLRC,[14] a Muslim wife was divorced by *talaq* because she refused to give her consent to her Muslim husband's subsequent marriage.

Divorce Divorce is allowed under the CMPL, but it is "to be granted only after the exhaustion of all possible means of reconciliation between the spouses." In practice, however, a man can unilaterally repudiate his wife and divorce (*talaq*) her. Both under CMPL and in practice, no reason for *talaq* needs to be given by a man. A husband is not required to petition the court when he divorces his wife by *talaq*. The "exhaustion of all possible means of reconciliation between spouses" does not appear to be implemented.

The procedures for divorce by *talaq* need to be specified and followed before it is granted or validated.

Rights and Obligations of Spouses The CMPL makes provisions for the rights and obligations of the spouses. It provides that the husband shall fix the residence of the family, while the wife shall dutifully manage the affairs of the household. The wife may, with her husband's consent, exercise any profession or occupation or engage in lawful business that is in keeping with Islamic modesty and virtue.

In view of the invalidity of the unequal and discriminatory provisions of the CMPL, *Shari'a* judges may opt to apply the other existing Philippine laws concerning the family.[15]

Parental Authority The CMPL provides the rules governing parental authority. Under the CMPL, the right to administer a child's property belongs to the father, and the mother may act only in the absence of the father. A widowed mother who remarries loses parental authority and custody of her children by the previous husband, but the same does not apply to the widowed father who remarries.

In compliance with international standards and the equality provisions of the Philippine Constitution, conjugal rights and obligations, as well as parental authority, should apply equally to both spouses.

Inheritance In the CMPL, the shares of inheritance property allocated to sons and daughters differ, discriminating against women. These provisions should be revised to meet the legal standards of non-discrimination and equality. The Civil Code laws on succession do not distinguish rights on the basis of sex.

Right to Health and Reproductive Health, and Family Planning The CMPL has no provisions on the right to health, reproductive health, and family planning. However, there is an Islamic Official Ruling, or *fatwa*, on Reproductive Health and Family Planning, issued by the Assembly of Darul-Ifta of the Philippines in November 2003. The *fatwa* noted the definition of reproductive health, as provided by the International Conference on Population and Development (ICPD), and found

[14] This was a case handled by Attorney Emelina Quintillan.

[15] A much later 1988 Family Code is in place for the rest of Filipinos, except that this law does not provide for absolute divorce.

nothing objectionable in it. The ICPD defined reproductive health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity in all matters relating to the reproductive system and to its functions and processes" (ICPD report Ch. VII, 7.2, September 1994). While reproductive health is more than just family planning, the *fatwa* focused on the issues of preventing birth or birth spacing, without addressing the other factors of reproductive health. The Assembly reviewed the Qur'an and found nothing that prohibited the spacing of births or limiting the number of children. It also consulted Islamic scholars, who found that family planning is not incompatible with nature, it is not disagreeable to the national conscience nor is it forbidden by national conscience, and is not forbidden by *Shari'a*. It said that the practice of preventing pregnancy was allowed by the Prophet Muhammad and found nothing wrong with the use of contraceptives.

There is, however, very little awareness of the *fatwa* on family planning. According to a survey commissioned by the Academy for Educational Development (AED) (2006), only 28 % of the adult population in the surveyed areas of the Autonomous Region of Muslim Mindanao (ARMM) was aware of it. Many members of PLRC's *Shari'a* Court Monitoring Team are actively promoting this *fatwa*.[16]

Violence Against Women Violence affects the lives of women in all socio-economic and educational classes. It cuts across cultural and religious barriers, impeding the right of women to participate fully in society. Violence comes in many forms, including domestic violence, rape, incest, prostitution, trafficking, bride-burning (sati), sexual assault within marriage, sexual harassment, and traditional practices such as female genital mutilation (FGM), son preference, dowry related violence, and early marriage. Researchers from Mindanao's Ateneo de Zamboanga University and Notre Dame University report that deadly family quarrels have erupted over the flimsiest disputes, such as women eloping with men who were out of favor with their respective families or who failed to pay a dowry (Clan feuds still a problem in Philippines 2005).

Under the CMPL, a man's failure to provide for the family for a period of 6 months (which is a form of violence under international standards) is grounds for divorce by *faskh*.

The CMPL designates unusual cruelty as grounds for divorce. Attorney Emelina Quintillan has noted that there is a culture of silence about violence that women suffer in Muslim communities. PLRC, however, has been privy to the experiences of Muslim women who have sought the help of its staff and lawyers. Since 1985, PLRC lawyers have addressed, through advocacy, various cases of violence against women, including rape, wife-beating, and torture. Patricia Sarenas, one of the Directors of PLRC, who became a legislator, brought our advocacy to Congress and authored the law on Anti-Violence Against Women and Their Children Act, or Republic Act 9262.

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[16]A copy of this *fatwa* is also found in the unpublished book, *2012 Benchbook on the Code of Muslim Personal Laws and the UN Cedaw*, PILIPINA Legal Resources Center.

Early Marriage The UN CEDAW Special Committee made the following comments about early marriage among Muslim women in the Philippines (CEDAW 2006):

> The Committee expresses its concern about the precarious situation of rural and indigenous women, as well as the Muslim women in the autonomous region of Muslim Mindanao, who lack access to adequate health services, education, clean water and sanitation services and credit facilities. The Committee is also concerned about women's limited access to justice in cases of violence, especially in the conflict zones, and the lack of sanctions against the perpetrators of such violence. The Committee is furthermore concerned that the practice of early marriage is persistent among Muslim women. (Comment 29)

> The Committee calls upon the State party to pay special attention to the needs of rural women, indigenous women and Muslim women living in the autonomous region of Muslim Mindanao, ensuring that they have access to health care, social security, education, clean water and sanitation services, fertile land, income-generation opportunities and participation in decision making processes. The Committee recommends that the State party ensure women's access to justice through the provision of legal aid and take steps to prosecute the perpetrators of violence against them. It also encourages the State party to provide increased educational opportunities to Muslim girls to discourage early marriages. The Committee requests the State party to include in its next report sex-disaggregated data and information on the de facto position of rural, indigenous and Muslim women, and on the impact of measures taken and results achieved with policies and programmes implemented for these groups of women. (Comment 30)

From Comment 30, it is evident that the UN CEDAW Special Committee clearly recognizes that the practice of early marriage is persistent among Muslim women, and encourages the Philippine government to provide the increased educational opportunities for Muslim girls which would discourage these early marriages. This recognition is in consonance with Article 16 (2) of the CEDAW, which states:

> The betrothal and the marriage of a child shall have no legal effect, and *all necessary action, including legislation, shall be taken to specify a minimum age for marriage* and to make the registration of marriages in an official registry compulsory. (italics added)

Under the ruling in the third paragraph of Article 16 of the Muslim Code, betrothal may only be annulled, upon petition, if there has been no cohabitation and if the *wali* is not the father or parental grandfather of the bride.[17]

The comments by the Special Committee concluded with a request to the Philippine government to address the concerns it had expressed, as well as a request to submit the eighth and ninth reports, due on September 2010 (CEDAW 2006: 7).

The scope of obligations imposed by Article 16 of the CEDAW is comprehensive. State parties are obligated to take steps to ensure that women are entitled to choose when, if, and whom they shall marry, by, inter alia, discouraging forced marriages and remarriages. Child marriages are to be the focus of legislation, especially to specify the minimum age for marriage. A function of the Special Committee

[17] Article 16 (3) of the Muslim Code provides that marriage, through a *wali*, of a minor below the prescribed ages shall be regarded as betrothal, and may be annulled upon the petition of either party within four years of attaining the age of puberty, provided that no voluntary cohabitation has taken place and that the *wali* who contracted the marriage was other than the father or paternal grandfather of the bride.

is to issue General Reports, or GRs. GRs are authoritative interpretations by the Special Committee of the provisions of the CEDAW Convention with respect to the rights of women and the obligations of the State. In order to better understand Article 16, it should be taken together with General Report 21 made by the Special Committee, entitled 'Equality in Marriage and Family Relations' (CEDAW 1994).

General Report 21 includes specific references to child marriages. In Comment 36, the Committee mentioned that "Article 16 (2) and the provisions of the Convention on the Rights of the Child (CRC) (General Assembly Resolution 44/25) preclude State Parties from permitting or giving validity to a marriage between persons who have not attained their majority." The Committee also refers to Article 1 of the CRC and considers that the minimum age for marriage should be 18 years. Comment 36 further provides that marriage should not be permitted before children have attained full maturity and capacity to act.

In Comment 38, the Committee made reference to the practice, in some countries, of stipulating different ages for legal marriage for men and for women. The Committee is calling for the abolition of provisions like these, because such provisions incorrectly assume that women have a different rate of intellectual development from men. Comment 38 (General Report 21) further notes that in some countries "the betrothal of girls or undertakings by family members on their behalf is permitted. Such measures contravene not only the Convention, but also a woman's right freely to choose her partner."

6.6 The ARMM Gender and Development (GAD) Code

As an outreach of our earlier research project, we gave Gender and Development training to key members of the Regional Commission on Bangsamoro Women (RCBW). We then organized a dialogue with ARMM stakeholders, pertaining to the state obligations of our government under the UN CEDAW treaty. Recently, a GAD Code has been put in place in the ARMM. A much greater achievement is the adoption by the ARMM GAD Code of the UN CEDAW's definition of discrimination.

The ARMM GAD Code is about substantive equality, non-discrimination and state obligation through policy and law. Our Philippine Constitution, the fundamental law, already makes everyone equal before the law, but the principle of substantive equality obligates states to write laws that correct and prevent discrimination. This entails a recognition that discrimination against women is socially constructed or simply cultural. The solution, therefore, is cultural change through change in behavior. The fastest and surest way to change behavior is through a law or policy that disallows discrimination or makes it illegal.

The future interface of ARMM and any political entity that will come out of the peace agreement between the Government of the Philippines and the Moro Islamic Liberation Front (GPH-MILF) is promising. Foremost, in my mind, is that the women in the ARMM have had vested entitlements and vested rights and social

infrastructures protected under current policies and laws in the ARMM and national government over the years. One of these infrastructures is the Regional Commission on Bangsamoro Women (RCBW), the entity taking care of policies and programs for women, which has nominated to be part of a national machinery for women, mostly in the spirit of solidarity in terms of women's issues and, yes, national budget appropriation for programs. Of course, all these issues can also be worked out in the spirit of autonomy or in any political arrangement. What is crucial is that women's rights and entitlements are protected.

6.7 Concluding Remarks

We (PLRC) have wanted women to have access to justice and to *Shari'a* courts, but the more basic questions have been what kinds of laws and what kind of judges' orientation do we want our women to have access to? Our theme has been shown to be very relevant, given the issues discussed in the 2012 impeachment trial and conviction of the Chief Justice of the Supreme Court of the Philippines.

The CMPL was legislated during the time that the Philippines was under martial rule and ruled by presidential decrees. It is also one of the results of the 1976 Tripoli agreement between the Philippines and the MNLF. Religion is a complete code of life for our Muslim community and it is a major issue in the ongoing peace talks between the Philippines and the MILF.

Although we were not able to achieve a legislative reform of the Code of Muslim Personal Laws (CMPL) from the 11th Congress of the Philippines, we were able to access the UN CEDAW Committee through the Philippine Commission on Women (formerly the National Commission on the Role of Filipino Women (NCRFW)). We have conducted workshops with the *Shari'a* court judges on the Concluding Remarks of the UN CEDAW Committee. The judges were convinced that, since the Philippines is a signatory to UN CEDAW, it is obliged and bound by the provisions of these international standards of human rights.

PLRC's work in Muslim communities has been communicated to policymakers and stakeholders. Our earlier work has also been published and it has been translated in French and Arabic publications, which have been a means of leverage to promote our advocacy worldwide.[18] As a result of what has been learned through PLRC's outreach projects in Muslim communities, on the application of the Code of Muslim Personal Laws, it is recommended by the organization that the Code be reviewed and revised to conform with the equality and non-discrimination mandates of the UN CEDAW, the Constitution, and the Organic Act of ARMM. It is recommended that the training for *Shari'a* judges should include the UN CEDAW, other international standards, and Philippine commitments, as well as national laws affecting women (for example, the Code of Women in Nation-building, and those laws concerning violence against women). It is also crucial that the Philippine and

[18] A part of our work in Muslim communities was published in *Dossier 27* (WLUML 2005).

ARMM governments should take note of the comments and recommendations of the CEDAW committee regarding the CMPL. The PILIPINA Legal Resources Center counts as one of the results of its peace work in Muslim communities, the provision, in the Autonomous Region in Muslim Mindanao, of ARMM GAD Code on anti-discrimination, which is based on the UN CEDAW definition of discrimination. The few words written into law in the ARMM will result in many programs and much funding for the promotion of the rights and well-being of Muslim women and men. This is PLRC's contribution to peace work in the Philippines.

6.8 Postscript

The PLRC and the various organizations it is working with have moved to the political and advocacy arena in relation to their peace work, and towards crafting the Bangsamoro Basic Law (BBL).

The Muslim community in the Philippines is now officially called the Bangsamoro. A new peace pact, called the Comprehensive Agreement on the Bangsamoro (CAB), was signed in 2014 by the government of the Philippines (GPH) and the Moro Islamic Liberation Front (MILF). The peace agreement identifies as Bangsamoro all those who are descendants of the original inhabitants of Mindanao, and all those who identify themselves as Bangsamoro by ascription or self ascription. It further states that the freedom of choice of indigenous peoples shall be respected.

The proposed organic act, or BBL, which will be passed by the Philippine legislature, has been drafted by the Bangsamoro Transition Commission, an entity created by the Office of the President of the Philippines. The organic law will replace the current Autonomous Region in Muslim Mindanao (ARMM). The enactment of ARMM as an entity, in 1990, has not rectified the historical marginalization of the Bangsamoro in all spheres: political, economic and social. Nobody wants war. Peace benefits the entire country, and this political agreement between the GPH and MILF is the path to peace, spelling out the method of achieving the new structure and function of the Bangsamoro political entity, and describing the mechanisms for the creation of legal instruments for its implementation.

Aside from achieving peace, the ultimate vision for the BBL is the development of the Bangsamoro region, and the Philippines as well, through the creation of a new political subdivision which has more powers than local government units or regions, like the current Autonomous Region in Muslim Mindanao or ARMM, now hold.

This organic act also provides for the creation of sources of revenue, and for wealth sharing, to address economic marginalization. Other important themes in the peace deal are power sharing and normalization. The Constitution and existing laws, such as those concerning local governance, and reserved powers, concurrent powers, and devolved powers, are examined. Reserved powers of the state, such as national defense, foreign affairs, citizenship, and tariffs and customs, are not given to the Muslim communities (Bangsamoro).

Under the proposed Bangsamoro Basic Law, there will be many justice mechanisms that will be operational in Bangsamoro communities: national laws, *Shari'a* systems, local regular courts, and indigenous traditional justice systems. The *Shari'a* judicial system which will include civil, commercial and penal systems will be applicable only to Muslims. As to criminal laws that will be passed by the Bangsamoro government, the BBL writes that such penal laws "shall be in accordance with generally accepted principles and standards of human rights." While the Comprehensive Peace Agreement on the Bangsamoro recognizes parallel justice institutions, such as alternative dispute resolution systems and civil courts, the peace deal affirms the supremacy of the *Shari'a*, but with the proviso that it shall only be applied to Muslims.

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Chapter 7
Shari'a and Muslim Women's Agency in a Multicultural Context: Recent Changes in Sports Culture

Helen McCue and Ghena Krayem

7.1 Introduction

There is no doubt that multiculturalism has recently been a somewhat vexed issue in many liberal democratic countries. This chapter will argue that recent comments and concerns in relation to this topic are not really as much about multiculturalism as they are about the accommodation of Muslim minority groups in multicultural states. The main issues of concern are that current policies pose a threat to the cohesion of society, and that they place women in a particularly vulnerable position. This chapter will seek to address these two concerns by exploring the issues of Australian Muslim women's agency, multiculturalism, and *Shari'a* in select areas of Muslim women's lives, including the women's choice of dress and their participation in a key area of Australian cultural life, that of competitive sport.

By drawing on the work of Will Kymlicka and Tariq Modood, we will argue that multicultural policies have an important place in liberal democratic states and that they contribute to the integration of minority groups into the wider society. Drawing on Foucault's work on power and resistance, we will argue, also, that multicultural policies facilitate Muslim women's resistance to existing dominant discourses, specifically in the arenas of dress and sports culture, and that through such gained agency Muslim women are able to challenge these discourses.

This chapter will explore these two issues within the context of the application of *Shari'a*, or principles of Islamic law, by Muslim communities in liberal democratic

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states. This understanding encompasses the principles associated with Muslim women and their mode of dress. In particular, the discussion will consider how Muslim women rely upon principles of *Shari'a*, multiculturalism, and agency to strengthen the ties that bind their religious identity to the wider Australian community and to create their own new realities in these social and cultural domains.

7.2 Multicultural Citizenship and Policies

Australia, like many other countries in the world today, is culturally and religiously diverse, with Australians reporting more than 270 different ancestries. Indeed it is this diversity that has led to the description of Australia as a multicultural society. However, it is important to appreciate that the term 'multiculturalism' can be used in different ways. It can be used as a description of the demographic make-up of our society, but it can also be used as a set of norms or principles that uphold the right of the individual to retain, express and enjoy their culture, as well as government policy responding to diversity (Australian Human Rights Commission 2007). Multiculturalism in the latter sense emerged in Australia in the 1970s, initially as a means of providing special services to minority ethnic groups, but by the 1980s it had "become a way of looking at Australian society and a prescription for national identity" (Galligan and Roberts 2003: 7). Similarly, in Canada, US and UK, government policies of multiculturalism have taken root.

However, in recent years, multiculturalism has come under increased scrutiny and criticism. This has signaled a backlash against multiculturalism in Australia and other western nations, believed, by some, to be a response to the way in which Muslim minority groups have integrated into western society. Kymlicka argues that "public support for multiculturalism has declined as Muslims have come to be seen as the main proponents or beneficiaries of the policy" (Kymlicka 2007: 126). Similarly, Modood contends that "Muslims have become central to the merits and demerits of multiculturalism as a public policy" (Modood 2007: 4).

These comments highlight an important challenge for multiculturalism—how does it deal with the demands made by Muslims within multicultural states? In particular, do multicultural policies pose a concern for liberal democratic states, in that they threaten social cohesion and create parallel communities? Additionally, a concern often expressed about multicultural policies is that they disadvantage women and come at the cost of women's rights (Cohen et al. 1999).

Among competing arguments, accommodating the practices, laws and principles of minority groups becomes a challenge for any state. It is an even greater challenge in multicultural states with so many diverse cultural, ethnic, religious and linguistic communities. Historically, the response of states to such a task has been to place the obligation on minority groups to assimilate into the majority culture and society. This meant their abandoning any different practices they may have had. However this has not in fact occurred. Rather, states have had to deal with the demands made by minority groups for recognition and accommodation of their cultural and religious identity (Baumeister 2003). This has led to the development of multicultural

policies. Such policies help to create a level playing field for minority groups, as the laws of a state tend to reflect the history and norms of the majority, and therefore the practices of the minority are seen as 'different' (Baumeister 2003) and perceived to be the 'other' (Addis 1992). It is the rectification of such disadvantage that requires and justifies the provision of minority rights, and obligates a state to take into account and accommodate the various cultural communities that reside within it (Kymlicka 1989). Kymlicka goes even further, to argue that there are greater benefits resulting from multicultural policies, as they can "expand human freedom, strengthen human rights, diminish ethnic and racial hierarchies and deepen democracy" (Kymlicka 2007: 18).

7.3 Does Multiculturalism Pose a Threat to Social Cohesion?

In spite of multicultural policies at the state level, as mentioned above, there is an increasing fear that multiculturalism "produces separateness and is counterproductive to social cohesion" (Vertovec and Wessendorf 2005: 21). In particular, the criticism is that multiculturalism fragments society, undermines its stability and ultimately erodes our ability to act collectively as citizens (Kymlicka 1998). Kymlicka disagrees, arguing that in multicultural states there are still important policies designed to promote overarching national identities and loyalties (Kymlicka 2007). According to Kymlicka, there is no evidence to support the claim that multiculturalism promotes ethnic separateness or impedes immigrant integration; rather, it allows difference to be respected and accommodated whilst simultaneously facilitating the integration of immigrants into a larger society (Kymlicka 2007).

How is it that such policies promote integration into the larger society and not self-government by different groups? This occurs for several reasons. In demanding greater recognition or accommodation, these groups aim to modify the institutions and laws of the mainstream society to make them more accommodating of differences (Kymlicka 1995). Fielding sees this accommodation as a cause of the strengthening of civil society by creating a pluralistic public space (Fielding 2008). It allows minority groups to more actively participate in civil society and reciprocate the tolerance shown towards them. If minority groups are alienated, then they are more likely to "withdraw into their ghettoized communities" (Fielding 2008: 45–46).

What does such integration entail? Kymlicka describes integration as a "two way process—it requires the mainstream society to adapt itself to immigrants, just as immigrants must adapt to the mainstream" (Kymlicka 1995: 96). This process may require modification of the institutions of the dominant culture to accommodate the differences and needs of minority groups. Also, it can be equally "transformative" of the identities and practices of the minority groups, and that "far from guaranteeing traditional ways of life of either the majority or minorities, liberal multiculturalism poses multiple challenges to them" (Kymlicka 2007: 100). In this way it is accepted that culture is not static, but, rather, that it is adaptive and that cultural hybridism is the normal state of affairs (Kymlicka 2007). In the context of this chapter, this is a critical point, for, as difficult as the question of accommodation of

certain principles of Islamic law or practice may seem for a liberal democratic state, we will demonstrate how this accommodation can assist in the integration of Muslims into official institutions and various social and cultural structures.

7.4 Is Multiculturalism Bad for Women?

One of the most significant criticisms of multicultural policies is that they disadvantage women. This concern is closely connected to the general concern that multicultural policies can operate to oppress individual members of minority groups. It is argued that unless limits are placed on multiculturalism there is a great threat to individual rights, as this lack of limitation could provide a justification for allowing each group to impose its own traditions on its members, even when these traditions conflict with human rights and constitutional principles (Kymlicka 1995). In particular, it is asserted that it is women who will be most affected. Women are seen to be the most vulnerable community members and they risk being oppressed and denied basic rights by theocratic and patriarchal cultures (Kymlicka 1995).

One of the most vocal critics of liberal multiculturalism was the late Moller Okin, who posed the question: “Is multiculturalism bad for women?” (Moller Okin 1999) She argues that there is a conflict between ‘feminism’ and ‘multiculturalism’ and it is this contention that has been one of the most pervasive and powerful arguments against the recognition of minority rights (Moller Okin 1999). The discussion below seeks to challenge the assumptions made by Okin, and, by drawing on the work of Foucault on power and resistance, it will be argued that multicultural policies facilitate Muslim women’s resistance to existing discourses and allow them to exercise agency as they rely upon principles of *Shari’a* in a multicultural context. However, Okin’s discussion does raise a very important point, which is the need to be conscious of the position of women and the rights of women in multicultural states, and ultimately to ensure that such rights are not compromised in the name of recognition of minority rights (Moller Okin 1999). A challenge for multicultural states is to find a way to translate women’s rights into cultural and religious language and to acknowledge the great role played by insiders in such cultures or religions who “play a crucial part” in the continuing struggle for women’s equality (Moller Okin 1998: 101). Okin concludes by saying that in a debate about these issues, value should be given to the many different and varied views that are expressed by women in these cultures. It is these views and voices that demonstrate the often ignored agency that Muslim women exercise.

7.5 Multiculturalism, Power and Agency

In exploring Muslim women’s cultural and religious rights within multicultural Australia we will now examine the ways in which Muslim women are seeking to express and enjoy those rights in a way that strengthens their identity within the

wider community while simultaneously challenging dominant discourses, particularly in relation to dress and sports culture.

In sociology, 'structure' generally refers to the recurrent organization and patterned arrangements, such as social class, gender, religion, ethnicity and customs, that affect and influence individual opportunities for action. This concept of structure has been informed by the theory of structuralism (Barker 2000). Structural theory explains the process of generating and reproducing meaning through various practices and activities within such structure. For instance, practices and activities that create meaning for sports culture include the various meanings attached to sports dress, sports rules and regulations, and the use of sport and recreational spaces. Similarly, within the structure of religion, in this case Islam, there are identified meanings attached to dress and gendered spaces. Therefore, the particular practices and activities within these social structures create identifiable and relevant meanings for Australian Muslim women. Such social structures also produce discourses, that is, forms of knowledge and practices that structure reality and meaning and that normalize such reality and meanings. In the process of theoretical evolution, post-structuralism has evolved to replace structuralism, so that the static and stable meanings and universal truths implied in structuralism have given way in a post-structural analysis to an understanding that meaning is always "in process," that it can be expressed in multiples and can always be contested (Barker 2000: 18).

The work of Michael Foucault, a post-structuralist, has significant relevance to our present discussion—specifically, his analysis of modern power, discourses and knowledge. Foucault argues that "there are no relations of power without resistances; the latter are all the more real and effective because they are formed right at the point where relations of power are exercised" (Foucault 1980: 142). Foucault also argues that the formation of identities is always "in process" of formation and therefore always open to contestation (Armstrong 2003). He claims, too, that history shapes new discourses and that these new "truths" help us to order knowledge and beliefs so that, in time, these new "truths" become accepted as common knowledge. Feminist Nancy Fraser refers to Foucault's discussion of modern power, where he claims that power involves the "politics of everyday life" and, furthermore, that it is through its "capillary" character that modern power is located in the multiple micro-practices of everyday social life (Fraser 1981: 272). Such post-structural arguments have relevance in our discussion of Muslim women in multicultural states, where we argue that traditional meanings, the forms of knowledge and practice that exist in society, are continuously 'in process,' and are therefore being continuously contested. We argue that the 'politics of everyday life' for Muslim women involves contesting discourses over such ordinary things as the opportunity to swim in a gendered swimming space, or to wear religiously appropriate dress.

While Foucault argues that power is 'everywhere,' he also proposes that power is not simply negative but is, above all, productive, and he argues that wherever there is power there is resistance—resistance emerges from the site of struggle (Armstrong 2003). We argue that it is through this fluid and dynamic process of resistance that power through agency is contested and that new selves and new

meanings are constructed. Thus it is within this theoretical framework of power and resistance that we argue that the normative identity of Australian Muslim women is being contested and that new narratives of Australian Muslim women are being established.

7.6 *Shari'a* and Dress

'*Shari'a*' is not an easy term to define and understand because it can have a variety of meanings for Muslims. Literally, it means a 'path' or 'way to the watering-place' or a 'path seeking felicity' (Kamali 2008). In a general sense it is a path towards God and is primarily concerned "with a set of values that are essential to Islam and the best manner of their protection" (Kamali 2008: 2). In this way it can refer to the basic tenants of the Islamic faith included in the values, principles and norms that the Qur'an and *Sunnah* (the practice of the Prophet) provide. For others, *Shari'a* might mean the rules and regulations that are clearly articulated in these two foundational texts and, by extension, the laws that have been developed by Muslim jurists based on Islamic principles of jurisprudence and the Qur'an and *Sunnah*. This latter definition tends to encompass the more legal aspects of the Islamic faith, which is also referred to as *fiqh* (Kamali 2008).

In this chapter, we adopt the broader definition and usage of the term '*Shari'a*,' as it "not only regulates legal rights and obligations, but also non-legal matters, and provides moral guidance for human conduct in general" (Kamali 2008: 18), including things that a Muslim would rely upon on a daily basis and that we ordinarily do not view as having anything to do with law—for example, praying, fasting, giving charity and even manner of dress. Clearly these principles operate in the unofficial and unenforceable realm but nonetheless are part and parcel of what Muslims understand to be *Shari'a*.

We turn now to the issue of dress, which is the focus of this chapter. There is no doubt that one of the most controversial and commented upon issues to do with Muslim women is their dress, particularly the *hijab* (headscarf) and *niqab* (face covering). Indeed, Hale argues that there are few, if any, other such examples of a situation where one element in the culture symbolizes and means as much to scholars and observers as does the veil (Hale 2004). The question needs to be asked: why has the dress of Muslim women become such a contentious issue and why within sport culture has it become a site of contention also? Arguably, it is not the dress itself but what it has come to represent that is important here. As Ahmed argues (1984: 119), "it is the idea of the veil much more than the veil's material presence that is the powerful signifier." But what does it signify? Many argue, as Ahmed goes on to say, that it is a signifier of women's seclusion and relegation to a private world, of their proper non-participation, passivity and even invisibility in the public domain (Ahmed 1984). Indeed, the dress comes to represent the oppression of women.

This is not an issue that concerns only Muslim women in Muslim majority countries, as the discussion below demonstrates that the issue of dress is also one

of great significance to Muslim women in multicultural states where Muslim communities exist as minority communities. This concern is reflected in the recent attempts in various countries to regulate and even ban the traditional dress of Muslim women. The reasons provided have varied. Some see the dress as a threat. For example, a member of the French parliament spoke in support of the ban in the following way:

> A lot of Muslim girls say that they wear the headscarf freely…But in fact when you look carefully you will see that they are in some cases, in fact in most cases, motivated by religious fundamentalists and if you give them just a bit of a finger they will eat up your arm to the elbow. (BBC News 2003)

Others have sought to outlaw Muslim women's dress on the basis that Muslim women need to be saved from themselves. One Australian member of parliament said, as he introduced a Bill into parliament attempting to ban Muslim women from dressing according to their religious beliefs, that it was a form of oppression that had no place in the twenty-first century (Nile 2010).

Regardless of the justification and reasons provided, we can argue that on this issue the portrayal of Muslim women is extreme—either as a threat to society or as a threat to their own self dignity and worth as women. The discussion demonstrates that the often held view about Muslim women and their mode of dress is that it is an area where they do not exercise much agency, if any at all, and hence it is a practice that is abhorrent to the values of liberal democratic states. Essential to this view is the notion that Muslim women are forced to dress in a particular way by men, whether it be by a husband, father, brother, or uncle. This generalization is quite offensive to the many Muslim women who freely choose to dress according to their religious belief, as it denies the spiritual significance of their dress, which, to them, is as an act of obedience to God and part of their spiritual journey. Bullock (2002: 39) argues: "that some Muslim women experience hijab as oppressive is known, but the received wisdom about the veil (it's oppressiveness) fails to recognize the possibility that some women may not experience hijab as oppressive." This, Bullock continues, results in a denial of Muslim women's agency.

> [C]ast forever as the victim, as the submissive, oppressed Muslim woman, negative stereotyping has denied that Muslim women have agency, that they have autonomy and even that they have any critical perspective on their own situation. Any support for Islam and its prescriptions is frequently taken as an example of false consciousness. (Bullock 2002: 39)

These observations raise serious questions about the assumptions that are made about Muslim women and their right to dress according to principles based in *Shari'a* or Islamic law. It should be said that there is no one single Muslim woman's experience in regards to dress, and it needs to be acknowledged that there is a great deal of diversity of forms that the dress can take, depending on culture and location, yet all are based on principles found within the *Shari'a*. The Qur'an instructs women in the following verse found in chapter 24, verses 30–31:

> And O Prophet, tell the believing women to lower their gaze, and protect their private parts, and not show off their adornment except only that which is apparent and to draw their veils all over their bodies.

However, the right of Muslim women to dress in such a manner has been contested in many countries, with the response being either to attempt to ban the dress, regulate it, or at the least not to support multicultural policies that allow it to be accommodated. Yet many Muslim women in western liberal states have spoken out in support of their right to dress according to their beliefs (Krayem 2010). Whilst there is no doubt that some Muslim women do experience oppression, and in some circumstances this may be manifested by their dress, it does not follow that all Muslim women feel that way, nor that the dress is incompatible with liberal democratic values.

7.7 *Shari'a*, Dress and Sport in a Multicultural Context

In academic studies exploring sports culture, post-structuralist feminists have also drawn on the work of Foucault. Academics such as Scraton and Flintoff (2003) hold that theories of post-structuralist feminism, used in the field of sports culture, provide an important basis for the analysis of women's agency in this area of cultural life. They argue that Foucault's "conception of power provides opportunities for women's resistance and struggle, with more of the emphasis on the everyday experiences and agency of individual women" (Scraton and Flintoff 2003: 40). Such an analysis, they hold, shifts "focus from the structural constraints on women and sport to the possibilities of empowerment and resistance through sport" (Scraton and Flintoff 2003: 41).

In this chapter we argue that, increasingly, Australian Muslim women are engaged in competitive sport in Australia, resisting the dominant discourse around dress, and that they do so within a framework of informed agency. We argue that a space for a new discourse for Australian Muslim women has emerged, that allows for a process of transformation of the self as a result of Muslim women's active engagement with sporting social structures.

As with all other aspects of their lives, Muslim women are guided by the Qur'an and the *Hadith*. In relation to exercise and sport, such references include, among many others, Umar Ibn Khattab's recalling that the Prophet urged followers to "teach your children swimming and archery, and tell them to jump on the horse's back" (Qaradawy 1992 cited in Walseth and Fasting 2003: 53).

Research by McCue (2008) on Muslim women and sport in Australia noted that some women see competitive sport within this spiritual context and interpret such Islamic *Hadith* within the holistic understandings of Qur'anic texts that Muslim women scholars Barlas (2001) and Wadud (1995–1996) refer to. For instance, one of McCue's survey participants noted that

> [t]here is that perception that Muslim women are not allowed to keep themselves fit but your body has rights over you so you have to maintain your body…you have to feed it properly, keep it fit. God's given this to you so you have to take care of it. (McCue 2008: 102)

For all Australians, but especially for young people, sports participation can develop skills such as co-operation, respect and working as a team and it can also help establish rules and norms of behavior. Sports participation can hold communities together and build community 'social capital.' It can also help to break down social, cultural and religious barriers and create opportunities for partnerships. As noted in research by Northcote and Casimiro (2009), "sport and Australians' understanding of themselves are intertwined in a complex and enduring way that is absent in other nations" (Northcote and Casimiro 2009: 178). Attending competitive games in sporting venues is also very popular and testifies to the important role that organized sport plays in Australian social and cultural life.

In Australia there is also an extraordinary electronic and print media emphasis on sports, particularly on rugby, Australian Rules football and cricket—sports dominated by men. The discourse surrounding such sporting activities is also largely male dominated and, according to the Australian Womensport and Recreation Association (AWRA) (2009), "media coverage of women's sport in Australia is deficient in the extreme, despite the increased quality of the performances of women athletes." This male dominance extends beyond the public domain. Men hold the key administrative positions in sporting associations, constitute the majority of coaches, even in women's sports, and in physical education in schools the majority of teachers are male. In 2009 the AWRA noted that women still largely fail to achieve senior management and leadership positions, with women holding only 7 % of such positions. Figures for women as coaches and officials are also similarly low (Australian Womensport and Recreation Association 2009).

Not only is sport in Australia dominated by men, but it is also largely dominated by people from an English speaking background. Reports over past decades illustrate that non-English people from culturally and linguistically diverse cultures (CALD) and those with specific religious requirements are largely excluded (Cortis et al. 2007; Taylor and Toohey 1998, 1999). Religious dress and the dress requirements of specific sports, lack of gender specific spaces as well as lack of privacy in showers and change rooms were identified as barriers to CALD women. Cortis and Muir also identified that sports dress and the specific cultural environment of sports organizations led to feelings of exclusion in Muslim women (Cortis and Muir 2007). A 2008 report by the Youth Affairs Network in Queensland on young Muslim women's participation in sport confirmed that religious dress (especially for those wearing the *hijab),* the general lack of women-only sports opportunities, spaces and facilities, as well as the lack of women trainers, coaches and referees were all factors affecting young Muslim women's participation in sports (Queensland Youth Affairs Network 2008). These findings are similar to those from research carried out in several European countries (Walseth and Fasting 2004).

Findings such as these led the Australian Federal Government to develop strategies as part of its multiculturalism policy to "encourage more active participation in mainstream sporting, social and cultural activities to lessen feelings of isolation and marginalization in some communities" (Ministerial Council on Immigration and

Multicultural Affairs 2007: 13). This expression of multicultural policy was further strengthened in February 2011, when the government launched Australia's new multicultural policy, The People of Australia—Australia's multicultural policy that included the Multicultural Youth Sports Partnership Program to be administered by the Australian Sports Commission (2012). This new policy was aimed specifically at new and emerging communities, and youth from culturally and linguistically diverse backgrounds (including refugees and minor refugees), its purpose being to strengthen ties between youth in these communities and neighborhood sports and community organizations through sport and active recreation activities (Multicultural Youth Sports Partnership Program 2011).

However, despite these barriers to participation, as identified above, research undertaken by McCue (2008) found that Muslim women in Australia are participating in competitive sports such as soccer, tennis, kickboxing, Tai Kwon Do, karate and netball. And in spite of the difficulties they faced in sporting clubs, Muslim women reported that they do belong to such clubs—in particular kickboxing or Tai Kwon Do—and some younger women reported belonging to soccer clubs. In such participation it can be argued that these Muslim women demonstrate a sound understanding of *Shari'a* law and, in particular, an understanding of the principles relating to the need for the soundness of body and fitness which the Prophet urges to his followers.

The development in 2008, by an Australian Muslim business woman, of the innovative swimming attire referred to as the 'Burqini' has also enabled Muslim women to participate more fully in Australia's swimming culture (Ahiida 2008). The Burqini is a loose fitting two-piece swimsuit that covers the arms and legs and has a hood that meets, for some Muslim women, the religious requirements regarding modesty.

This innovation has allowed some Muslim women to express their agency with regard to Australian swimming culture, has created a new meaning for Australian swimwear, and opened up the potential for Muslim women to participate in competitive swimming. One Muslim women involved in the research by McCue commented: "I really liked the fact that I can wear my Islamic swimsuit and feel that I was properly covered" (McCue 2008: 102). It can be argued that this woman felt that she was adhering to *Shari'a* law and to verse 59 in chapter 33 of the Qur'an, which states:

> O Prophet! Tell your wives and daughters and the believing women that they should draw over themselves their jilbab (outer garments) (when in public); this will be more conducive to their being recognized (as decent women) and not harassed. But God is indeed oft-forgiving, most merciful.

In this way, by resisting the dominant discourse regarding swim wear in Australian culture, Muslim women have created a new meaning of modesty for themselves within their religious understandings, while at the same time being able to participate to a greater extent in Australian swimming cultural life. In the process, they have created a new understanding of self as an Australian Muslim woman.

Women's soccer is another area where Muslim women have been very successful in resisting the dominant discourse of sporting associations at the local, national and international levels, while at the same time maintaining their religious understandings of modesty and dress. For example, the South Western Sydney Lakemba-based all Muslim girls' soccer team was formed by the Muslim Women's Association and the Lakemba Sports and Recreation Club in order to have female-only soccer teams where the majority of players are Muslim women. Similar programs exist in Melbourne and other states (McCue 2010: 151).

In relation to dress in soccer, another significant innovation has enabled Muslim women to meet their religious requirements and to participate more fully in this sport. The Netherlands-designed headwear for sporty Muslim women, called 'capsters,' was used extensively by Muslim women at the recent 2012 Olympic games in London following the lifting of the ban on the *hijab* in international soccer by the Football International Federation Association (FIFA) (Abbas 2012). Lifting the ban has affected Australian Muslim women's soccer too, with *hijab*-wearing Assmaah Helal, a center-back with the UNSW Eastern Lions Women's Super League team, stating that "Muslim women can pursue [soccer] at an elite level now…there is nothing stopping them from representing Australia at the international level" (Shafaqna 2012).

Other competitive sports that are increasingly popular with young Muslim women are kickboxing and other martial arts, where there are sports dress codes covering the body, and where Muslim women have been successful in negotiating head dress appropriate to their faith.

Netball is another competitive sport that is very popular with Muslim women and schoolgirls, and Muslim women participants within this sports code have shown considerable resistance to the dominant discourse concerning women's dress for competitive netball. Following negotiations, the all-Muslim women's netball teams of the Sydney-based Bankstown Netball Association and the Spears Sports Club are now permitted by the NSW Netball Association to wear appropriate Muslim women's dress and compete in the association's games (McCue 2010). For example, track suits are allowed to be worn instead of shorts, more single-sex physical education training is available, more privacy is provided in changing and showering arrangements and accommodations are made for the religious feast of Ramadan. These examples, contrary to the normative discourse surrounding Muslim women and sport, and the dominant discourse around Muslim women's dress and oppression, illustrate that Muslim women in Australian do, in fact, participate in a wide variety of competitive sporting activities while at the same time expressing their Muslim identity. Within such a sporting culture as Australia's, it is a clear expression of agency. Muslim women participate while complying with their own religious understandings of modesty, covering and gendered spaces.

Such Muslim sportswomen are part of an international movement by Muslim women to contest the dominant discourse on women's sporting attire in elite competitive sport. Muslim women's participation in Olympic sports such as athletics,

equestrian events, kayaking, shooting, ice-skating, judo, badminton, running and weight lifting, are all indicative of the success of Muslim women's agency at this elite sporting level. In spite of FIFA's ban on the *hijab* in international soccer in April 2012 (subsequently overturned in July 2012), nine Iranian women were able to participate for the first time at the 2012 London Olympics, and the relaxation of clothing rules by various international sporting federations has allowed more Muslim women to compete in these games. These women include judo player Wodjan Ali Seraj Abdulrahim and Saudi Arabian runner Sarah Attar, and for the first time in international weightlifting, female weightlifters are now permitted to cover their arms and legs, with UAE representative 17-year-old Khadija Mohammed being the first to compete wearing the *hijab* (Khaleeli 2012). Relaxation of dress requirements by the International Boxing Association (IBA) also has allowed female boxers from Afghanistan to participate in the Olympics for the first time (Women's Islamic Initiative 2012).

The developments outlined above indicate a growing acceptance of Muslim women's religious dress by sporting codes and associations at the international elite sporting level (Benn et al. 2010; Hargreaves 2000; Hoodfar 2008; Jassat 2012; Radzi 2006; Sehlikoglu 2012). The breakthrough regarding women's sporting attire has been the most significant factor in facilitating Muslim women's participation in sport at all levels, and, according to Rimla Akhtar, "a way has been found of combining women's passion for sport with their passion for their faith and the sports hijab will certainly aid women's participation in sport at all levels" (Khaleeli 2012). This breakthrough is seen by Muslim sportswomen as allowing them to fulfil their obligations to meet *Shari'a* law and to meet the Qur'anic injunctions, mentioned above, to draw over themselves their *jilbab* (outer garments) (when in public).

7.8 Conclusion

The discussion above has demonstrated that, contrary to often held misconceptions, and the generalizations made about Muslim women in liberal democratic states which view them at the extremes of being either a threat to society or extremely vulnerable and oppressed, Muslim women are actually neither of these things. They are able to live their lives both according to their religious principles (*Shari'a*) and as citizens of a nation state, and multicultural policies which accommodate their particular needs help to facilitate their integration into the wider society. Thus, Muslim women are, in fact, exercising agency and challenging dominant discourses, as demonstrated by the discussion above in relation to the dress of Muslim women and their participation in competitive sports.

Muslim women have acted to ensure that they can dress according to their religious requirements, thereby complying with the principles of *Shari'a*. Through such agency they have challenged normative understandings of sports attire at national and international levels, a challenge which has resulted in sports institutions and relevant sports clubs reviewing their dress codes. All of these local,

national and international developments illustrate the changing nature and the complexity and fluidity of meanings that are now applied to Muslim women's dress in competitive sport. Women's agency, and their resistance, has enabled a new discourse on dress to emerge in some competitive sports for women. Such agency also demonstrates that there are no stable meanings or 'truths' in relation to women's dress and that social, historical and religious forces continue to shape the development of these meanings.

We are not claiming that Muslim women are homogenous in their engagement with sporting cultural structures, nor are we claiming that 'a level playing field' exists in sport in multicultural Australia. But we have demonstrated that there are many areas where it is possible for Muslim women to contest and resist the dominant discourse within this sporting culture. They have done so in an innovative, energetic and empowered way. Such resistance, we claim, has resulted in a new expression of self for Muslim women in Australia that is both religiously and socially congruent with modern-day life, thereby demonstrating that despite the often held belief that *Shari'a* is static and outdated it can in fact be evolving and contextual.

We would argue also that this agency has, in line with Kymlicka's multicultural arguments, modified sporting bodies and facilitated greater accommodation of difference and has also strengthened civil society by creating a pluralistic sporting space that is accommodating to Muslim women's religious rights. In this way it demonstrates a way forward for the challenge of multiculturalism in dealing with Muslim communities, and that Muslims in these states are forging a new identity that encapsulates both their religious identity and their citizenship. As Ramadan observes:

> We are currently living through a veritable silent revolution in Muslim communities in the West: more and more young people and intellectuals are actively looking for a way to live in harmony with their faith while participating in the societies that are their societies. (Ramadan 2004: 4)

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Chapter 8
Shari'a Law in Catholic Italy: A Non-agnostic Model of Accommodation

Vito Breda

8.1 Introduction

Discussing the application of *Shari'a* law in Italy might appear counterintuitive. The Italian state is perceived by many commentators as the home of the Catholic faith. Lamb, for instance, in his article *When Human Rights Have Gone too Far: Religious Tradition and Equality in Lautsi v. Italy*, suggests that the atheist beliefs of Finnish passport holder Mrs Lautsi should not find accommodation in a strongly Catholic Italy (2011: 752). Whilst a large proportion of the Italian population, that is, 87 % (Eurispes 2011, sec. 52), describe themselves as Catholics, the Republic is secular and it is committed to granting equal freedom to all religions (Italian Constitution 1948 article 8 (1)).

The state's commitment to neutrality is mediated by a positive constitutional obligation towards fostering individual public activities (article 3) in "which individuals develop their personalities" (article 2). In addition, the Constitution imposes a duty on the state to protect all residents from religious discrimination (article 19) and, perhaps as a corollary, a negative obligation not to be the entity that imposes special limitations on religious groups (article 20).

There are many implications arising from the constitutional regime of the freedom of religion; however, in terms of the main theme of this essay, the most significant implications relate to the positive commitment to treating all religious communities in Italy as equally free (article 8 (1)) and autonomous (article 8 (2)).

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> All religious denominations are equally free before the law.
>
> Denominations other than Catholicism have the right to self-organisation according to their own statutes, provided these do not conflict with Italian law. Their relations with the State are regulated by law, based on agreements with their respective representatives. (Senato della Republica 2007: 5)

In the area of religious freedom, the Italian Constitution might appear to be 'over drafted.' For instance, the institutional autonomy of a religious group, explicitly granted by article 20, could have been logically deduced from article 8 (2). Freedoms, such as the one relating to manifesting religious beliefs, are normally granted to all. However, there are historical reasons for such a qualification, which I will discuss in detail later. At this point, it is important to note that, in 1948, the Constitutional Commission inherited a series of discriminatory policies against non-Catholics from the disbanded Fascist regime; policies that were antithetical to a liberal constitutional system.

Consequently, the Constitutional Commission, by drafting a series of articles that, in effect, repealed the Fascist sectarian legislation (Constitutional Court 1957, 1958), laid the groundwork for a pluralistic legal system with which to promote the integration of the demands from both the theist and secular public spheres (Italian Constitution 1948, article 8). Through this process, rather than promoting secularism per se, state institutions strive to be independent referees. Perhaps one of the clearest renderings of this stance can be seen in McGoldrick's analysis of the Italian accommodation of religious claims. She explains that Italian institutions strive for a distinctive type of secularism that she calls 'positive.' She defines it in a concise narrative as "a *secular* view of a lay public sphere as the only solution to ensuring *genuine equality* between members of majority and minority churches, agnostics, atheists or non-theists and eliminating religious and anti-religious tensions" (McGoldrick 2011: 454, emphasis added). In short, the Italian Constitution is designed to protect the public sphere from outright domination by either its theist or its secular communities.

All secular constitutions rely on the idea of a lay public sphere—and, thus, on a separation of the public and private spheres (Sajó 2008: 607)—yet positive secularism explicitly acknowledges the limits of the enlightenment movement within constitutional law. Pluralism, as a legal concept, demands the recognition of diversity and the acceptance of a dialogue that transforms a multitude of legal orders, and a plurality of perceptions of the good life as represented by such a multitude, into procedures aimed at accommodating concurring rights. Concurring rights are granted to all (for example, the right given to parents to choose the type of education that they want for their children), but they might generate competing claims over public resources. The multiplicity of calls for the recognition of individual rights makes it inappropriate and impractical for a state to favour one group over the other, leading instead to an open-ended dialogue in which institutions are, by default, receptive to all demands (Breda 2013).

Shachar provides one of the most articulate analyses of the benefits and the shortfalls of these types of arrangements (2001: 63–85). For instance, the recognition of a self-regulatory regime for a community might prove to be a 'buzzword' for

accepting discriminatory policies, especially against women. The dilemma concerns how we integrate and retain liberal values and systems in the face of an alien and sometimes extremely non-liberal culture that wishes to retain its own laws when in a 'foreign' land. Sajó, for instance, explicitly considered the concessions required in pluralist (secular) legal systems as Trojan horses, bringing unverified religious claims into the citadel of liberal values by making use of the narrative of western-style rights (2008: 607).

The maelstrom generated by the debate over the boundaries of liberalism will not be discussed in this essay. However, it is reasonably clear that the dilemma of how to accommodate these types of 'Trojan horses' into the stables of modern democracy has so far escaped a normative answer (Viellechner 2009: 596). For instance, an aprioristic exclusion of all religious claims from the constitutional system would make liberal democracy an oxymoron (Rosenfeld 2008: 2333; Sajó 2008: 613). Even countries such as the USA and France, which are committed to a robust separation between the secular/public and possibly theistic private spheres, accept that the separation is merely conceptual. Government policies in both France and the USA do accommodate theistic demands by recognizing, for instance, religious festivities and by tolerating religious references during school activities (Rosenfeld 2008: 2348; Sajó 2008: 610). Rosenfeld, in his analysis of the US constitutional system, prefers to use the term 'areligious' to acknowledge both the substantive protection that is in place to allow for the manifestation of religious beliefs, and the state's commitment to the non-endorsement of theistic views (2008: 2334). Developing this point, the Italian constitutional stance might be described as one of the manifestations of secularism, rather than as a distinctive approach to it.

However, the distinctive element of positive secularism in the 1948 Italian Constitution concerns the development of the legal framework to allow religious groups to form a joint-governance agreement without the imposition of a pro-religion (or pro-secular) constitutional stance being placed upon it (Croce 2009). These joint-governance agreements regulate the partnership between state institutions and religious groups. It is also important to note that Italian institutions do not promote or discourage such agreements. Having a constitutional norm such as article 8 that allows state institutions to form a governance regulation for religious communities, independently of their size or creed, makes the Italian legal system particularly open to religious pluralism. It is this distinctive openness, inserted in the constitutional fabric of Italian law that qualifies the Italian secularism as 'positive.' It is not, therefore, a Panglossian attempt to find a normative response to the challenges of accommodating both liberalism and pluralism into the constitution.

Positive secularism is a distinctive pragmatic constitutional stance that has resulted from the Italian historical experience. A similar pragmatic approach to religious freedom, with a due margin of equivocation concerning any parallelism, has been found in the small-scale empirical analyses of the Australian universities' policy towards the use of chaplaincy facilities (Brakenreg and Possamai 2009). A distinctive element of the Italian constitutional regime of religious freedom is, however, a positive commitment in terms of state institutions engaging religious groups that want to obtain official recognition. The recognition does not affect the

freedoms that are recognized by the constitution. Rather, such recognition is a manifestation of the obligation to promote all associations that contribute to the formation of individual personality (Casucelli 2000). For instance, recognized faith institutions, including religious tribunals, have the opportunity to act as autonomous agencies, and their policies, including religious tribunal decisions, are automatically recognized by Italian law.

In other words, the recognition process set out in the Italian Constitution is not part of a 'carrot or stick' approach to the freedom of religion. It does not seek to disguise the state's policy of control over religious associations with some pragmatic benefits. It is reasonably clear that the Italian Constitution has set up a framework to enable religious groups to regulate their partnership with state institutions (Casucelli 2000). The positive secularism upheld in the Italian Constitution aims at reducing the gap between religious communities and the state, and the policies therein thus provide for a genuine climate of joint governance.

This essay aims to describe the effects of positive secularism in the growing number of Italian Islamic communities. Firstly, I will explain that positive secularism has set a distinctive policy of inclusion, in which the judiciary has transferred the effect of relationships, within the limit of reasonableness, based on *Shari'a* law. Secondly, I will report on the progress of the recognition of Islam as an official Italian religion.

However, before I develop my analysis, a series of issues have to be dealt with as preliminary debates. Firstly, what we call *Shari'a* law is a complex and multifaceted system of rules that changes in relation to the legal system within which it has been given effect. In other words, the implementation of *Shari'a* law marriage might be different in Iran and in Morocco. Yet, on a general level, *Shari'a* law is drawn from four sources: the Qur'an, the *Sunna*, the *Jina* and the *Qiyas* (Kamali 2008: 23). The Qur'an and the *Sunna* are the main sources of *Shari'a* law and their verses are a direct manifestation of the divinity held within the texts. A series of interpretative methods (*usul al-fiqh*) are adopted to distil normative rules from the verses of the Qur'an (Kamali 2008: 117). Different theological schools adopt dissimilar interpretative methods and that, in turn, creates a multiplicity of variations in *Shari'a* law.

Secondly, at present, one of the most prolific channels for the introduction of *Shari'a* law in Italy has been via the judicial recognition of legal relationships (based on foreign legislation and overseas judicial practice) by the Italian Court. It is a common misconception that in civil law countries, such as Italy, precedents do not have general value. In legal practices, the doctrine of the stare decisis only marginally differentiates between common law systems. For instance, Italian judges are also obliged to provide consistent decisions (the so-called horizontal effect of the doctrine of the binding precedent) and to comply with the jurisprudence of the final appellate courts (Croce 2006; Fon and Parisi 2006).

Thirdly, some commentators describe the Italian regime of the state–church relationship as 'mixed' (Doe 2011: 224). They are perhaps confused by analyses such as those of Lamb (2011), which depict Catholicism as being the de facto established church in Italy. The term 'mixed system' might indeed help to differentiate the Italian Constitution agreements from the constitutionally entrenched separation

between state and church, such as the one derived from the First Amendment of the US Constitution (1791), and the practice of adopting an established church, such as the one adopted in England.

Such a qualification is, however, misleading, since it might lead readers to believe that state and church institutions in Italy have 'mixed functions' (like, for example, the role of Anglican bishops in the House of Lords) or, even worse, that Catholics manage state institutions as their own fiefdoms. Whilst members of religious groups are encouraged to participate in public life, state institutions are secular. The secular stance of the Constitution was made explicit by the jurisprudence of the Constitutional Court (1989). In addition, a large population of Catholics does not translate into an outright domination of the country's legal system by either its theist or its secular communities (Croce 2009).

For instance, in the last two decades, a series of political parties has been created to convey Christian values, but these new parties have never managed to collect more than 8 % of the votes in national elections (Ministero dell'Interno 2012). Without getting involved in the minefield of Italian politics, it is sufficient to say that, whilst Catholics do manage to elect MPs, and these individuals might have ministerial roles, the political support of Catholics is not translated into the 'political colonization' of the judiciary or of the legal system.

Additionally, the reasons for adopting positive secularism as the template for the state–church relationship are historical, but their effects are a distinctive process of the recognition of multiculturalism that might serve the growing community of Italian Muslims. The present constitutional norms that regulate and protect the freedom of religion are the result of two centuries of institutional dialogue between the state and the Vatican. The integration began with the unilateral recognition of Catholicism as a state religion (article 1 of the Statuto Albertino 1848), but, in the eighteenth century, disputes over boundaries were the proxy of open antagonism between the state and the Catholic Church. For instance, from 1870 to 1929, Italy and the Vatican State were officially at war, the Italian royal family was excommunicated and, after 1865, the Civil Code excluded the validity of religious marriages (Breda 2013).

Two international treaties—the Lateran Agreement of 1929 and its later Revision of 1988—between the Vatican and the Italian government normalized the constitutional relationship between the Republic and Catholics (Croce 2009: 118). The Lateran Agreement recognizes the Vatican as an international entity and the Catholic Church as an independent institution within the Italian Republic. For instance, Catholic tribunals are not subjected to jurisdictional reviews by state jurisdictions. The Concordat and its Revision also set the procedures for the automatic recognition of key religious institutions (e.g. marriage) and the civil validity of some decisions taken by cannon law tribunals (e.g. decisions that void marriages).

It appears that the Italian legal system has somehow "learned from the high and the low of the State–Vatican dialogues" (Croce 2009: 121). For instance, the post 1865 historical attempt to separate the state from the church had a disproportionate effect on the private life of individuals in areas such as marriage and filiation. These general effects of ideological separation, as well as pluralism, are well explained

elsewhere and we do not need to dwell on them here (Shachar 2001: 132). However, in Italy, they had the effect of creating a divide between the social expectations of the large majority of Italians who, for instance, wanted to get married in church, and the legal implications of their choices.

The 1929 Lateran Agreement between the Vatican and the Fascist government again swung the position of the Italian monarchy in favour of the Vatican, and Catholicism became the established religion. In 1948, the role of the Catholic Church in Italy was reviewed once more by the Constitutional Commission. Religious minorities such as the Protestants and the Jews, who were discriminated against by the Fascists, requested the same freedom for all faiths. The Constitutional Convention, however, could not alter the terms of an international treaty such as the Lateran Agreement, which granted a series of privileges to Catholics. The solution in the constitutional text combined acuity with empathy: it established a mechanism for allowing all non-Catholics to access the privileges that were granted to Catholics by the Fascist regime.

8.2 *Shari'a* Law and Italian International Private Law

In this section, I will highlight the most obvious evidence of these regimes and this can be found in Italian international private law. International private law regulates how the Italian legal system introduces the effects of foreign relationships into Italian law. For instance, international private law includes the adjudication concerning which law to apply to international commercial relations in which one of the parties is a foreign company. It is a system of norms based on a statutory prescription (Act n. 218 1995). However, perhaps due to the large variety of the overseas relationships covered by Act n. 218, it was natural that international private law included a series of reported cases.

In the past two decades, a large quota of immigrants arrived from countries with a large population of Muslims. The immigration flow towards Italy started in the late 1980s, and slowly increased until the 2008 economic crisis (Calvanese 2011). Presently, the Istituto Nazionale di Statistica reports that there are over 4.6 million resident immigrants and over a million of those immigrants are originally from countries with a large population of Muslims: Morocco, Albania and Pakistan (2011: 8).

A large number of the family relations of such a large community of Muslims are based on *Shari'a* law that might have local variations, and are recognized by Italian judges. For instance, Italian private law provides a *quasi*-automatic recognition of *Shari'a* marriages. The contract of marriage (*nikah*) is one of the few contracts clearly defined in *Shari'a* law. The contract might have different clauses in different cases, but a valid marriage presumes the legal capacity and the assent of both parties, a male tutor (*wali*) witnessing the free will of the woman, and a gift (*mahr*) (Welchman 2011). The ceremony does not require the presence of an imam, and it is common for immigrants to get married in their consulate and then register their marriage in the city council's registry of marriages.

To have effect in Italian law, the marriage must be recorded in a registry at the city council where the newlyweds are resident. This is a requirement for all civil and religious marriages, and it has the consequence of setting a more favourable, by comparison with cohabiting couples, fiscal regime for married couples.

The registration of an overseas marriage at the city council is a non-inquisitive process. In the late 1980s and during the early stage of the mass immigration phenomenon some register keepers misinterpreted the requirement to check the compatibility of such marriages against the Italian public order. In practice, register keepers required evidence that neither of the parties was already married. The civil servants involved were made aware of this obligation through an internal memo sent by the Minister of Justice (n. 1/54/f63 (86)1395 1987). However, the administrative tribunals, including the Consiglio di Stato, were quick to consider the memo as illegitimate due to its giving the register keepers the prerogative to refuse the registration of marriage certificates when these had been drafted in states that allowed polygamy (Order of 7 June 1988). Register keepers might check for the eventuality of recording a polygamous marriage, but their starting assumption is that the marriage was legal and that the parties do not have to prove their previously unmarried status (Campiglio 2008: 57).

The possibility of legally recognizing a polygamous marriage (*Sura* 5: 5) was discussed by the Italian civil courts. Polygamy conflicts with the Italian public order, and the Minister of the Interior, in another explanatory memo (n. 599/443/1512756/A16/88 1988), instructed civil servants to refuse all visa applications based on marital relationships between a foreign Italian resident and an alien from countries such as Morocco, which recognized the validity of polygamous marriages. Similar stances can be found in other European states. For instance, France explicitly excludes the recognition of polygamy (Act n. 93-1027 1993) and, in cases where both immigrants are already resident within French territory, it imposes an obligation of non-cohabitation.

The limits of the register keeper prerogatives were also discussed in *P. A., P. P. v. S. N. I.* by the Corte di Cassazione (n. 1739 1999). The respondent in this case was Mrs S. N. I., a Somali widow who had been married to an Italian citizen in Somalia. After the death of her husband, his two daughters from a previous marriage (P. A., P. P.) challenged the compatibility of a Somali marriage with Italian public order. Specifically, the counsel for the two daughters argued that Somali law allows for polygamy and that the marriage should have been considered as incompatible with Italian public order (ex article 33 Preleggi in the Royal Decree n. 262 16 March 1942). The Tribunal of Lodi initially accepted the two daughters' argument (Decision 23 June 1988). However, the Court of Appeal of the Tribunal of Milan (Decision n. 916 1994) distinguished between the validity of a Somali marriage in Italy and its effects in terms of, for instance, inheritance law. The daughters appealed to the Corte di Cassazione. The Court rejected the appeal, and in an *obiter,* reminded the city council register keepers of their limited investigative role in evaluating the legitimacy of overseas marriages: "Albeit for information purposes only, it appears superfluous to add that this principle [the separation between effects and potential incompatibility of an overseas marriage] complies with the decision of Consiglio di

Stato" (Corte di Cassazione n. 1739 1999, para. 6). The *obiter* is particularly significant, since seldom, by comparison to common law judges, does an Italian court use the prerogative to engage in an issue not raised by the parties, and that alone might give an indication of the court's frustration with civil servants who refuse to register overseas marriages.

More evidence of the effect of the policy of positive secularism is to be found in the Italian international private law practice of recognizing divorces and adoptions. The *Shari'a* regulation on divorce, as with other *Shari'a* law religious prescriptions, is susceptible to a variety of interpretations. However, and this can only be a very general analysis, married couples with at least one party wanting to have his or her marriage dissolved have three courses of action (Welchman 2011: 6). The first method relies on a request to a judge (a *quadi*) to void the marriage. The second divorce procedure dissolves the contract of marriage by forming a new mutual agreement (*Sura* 2: 229). The third possibility is based on the unilateral decision of the husband using the 'formula of the triple *talaqs*.'

The insertion of the effects of the first two forms of divorce in Italian law is unproblematic and will not be discussed further. The stumbling block for Italian international private law has been the recognition of the unilateral divorce. In a series of decisions that spanned over six decades, the Corte di Cassazione has consistently confirmed the incompatibility of unilateral divorce with the Italian public order. In particular, courts have found it incompatible with their role to give effect to a process that might be humiliating for the dignity of women.

The effect of not recognizing the unilateral divorce is a 'limping marriage' that is valid only in Italy. However, courts have shown some leniency in cases in which the effects of the unilateral divorce were desired by the woman. The Corte di Cassazione, for instance, recognized the effect of a first marriage in *Ministero dell' Interno v. M. J.*, between two Moroccan divorcees, in which the former wife was resident and remarried in Italy (Corte di Cassazione n. 12169 2005). The first marriage was dissolved using the formula of the triple *talaqs*. One of the effects of a unilateral divorce under Moroccan law (*Moudawana*) was the curtailment of the mother's duty of care for the children born during the lapsed marriage. Following the immigration of the ex-wife to Italy, the children were given in custody to a third person.

After remarrying in Italy, M. J. requested a series of visa applications for her children born during her first marriage. However, the visas were refused by the Italian Consulate in Rabat. The consulate justified its decision by referring to the Moroccan law (*Moudawana*) which, in this case, made the father the only parent legally responsible for the children of the lapsed marriage. M. J. appealed against the decision of the Consulate and the Tribunale di Perugia accepted her appeal (2004). The decision was appealed, again, by the Italian Ministry of the Interior. However, the Corte di Cassazione, in Decision n. 12169 (2005), rejected the appeal and allowed the children to join their mother in Italy.

An additional effect of the case was the possibility of the biological father's being able to ask for a family visa (to join his children), yet the most interesting aspect of the decision, and perhaps a sign of more to come, was the fact that a final appellate court had to recognize, implicitly, the validity of the Moroccan unilateral

divorce (*Sura* 65: 1). Without the recognition of the validity of the unilateral divorce (based on the triple *talaqs* formula), the first husband would have been considered as still being married, and as a result, the court decision would have had the legal effect of accepting the existence of a polyandrous relationship in the Italian legal system.

Instead, the interest of the ex-wife is considered in instances in which not recognizing the unilateral divorce might have a further detrimental effect on her life, such as being prevented from remarrying in Italy or from taking custody of her children. In these cases, the tribunals of first instance tend to apply Italian law and grant a new Italian divorce to the wife (Campiglio 2008: 66).

This case law analysis suggests that courts are willing to apply *Shari'a* law, and in cases in which its application might conflict with Italian public order, judges tend to look at the practical effects of their decision. For instance, a unilateral divorce, incompatible with the Italian public order, is inserted into Italian law to allow the woman to have custody of her children. Courts, also, have granted visas to cohabitant polygamous families to ensure the best possible education for the children.

Similar pragmatic analyses are taken by Italian courts that are asked to recognize the guardianship of minors (*Sura* 33). The guardianship of minors (*kafala*) requires one or more adults (*kafil*) to take responsibility for looking after a minor (*makfoll*). The *kafala* has no legal equivalent in Italian law and, as a result, Italian international private law has no rules for recognizing its effects. Once more, the courts have tried to mediate between the consequences of religious practices in an overseas jurisdiction and their legal effects under Italian law. In this case, the line of authority is set by the Tribunal of Trento that, with a decree, refused to transfer the effect of the *kafala* into Italian law (Decree of 11 March 1993). However, in the same sentence, the Tribunal, via decree, allowed the *kafil* couple to adopt their *makfoll*. The family law Tribunal of Bari reached a similar conclusion (Decree of 16 April 2004). A minor sought to join his guardian who lived in Italy, but his visa application was refused by the Italian Consulate in Morocco. The family law tribunal was deciding (as a preliminary issue under appeal against the refused visa) whether the *kafala* could be considered as a base for recognized family relations. The Tribunal of Bari confirmed the lack of an equivalent of the *kafala* in Italian law, but in the same decision, added that a gap in the Italian law could not be sufficient reason for refusing the visa to a minor who wanted to live with his or her guardian. In other words, the court regarded the legality of the relationship in Morocco as a sufficient justification for granting a visa for family reasons.

This paper could continue to discuss more examples taken from case law. For instance, filiation might provide more evidence of Italian judicial practice. However, it is reasonably clear that the Italian judiciary has consistently tried to reduce the gap between the effects of key life decisions in legal systems that apply *Shari'a* law and the effects of those decisions in Italy. The reason for this stance might be found in the past (e.g. the state–Vatican interaction), but the result is a constitutional commitment to reducing the divide between religious life and civil society. This stance is upheld by the courts, even against government policies that have tried to use arguments based on the incompatibility of religious practice with public order to limit immigration.

8.3 Moving On: Islam as an Officially Recognized Religion

In the previous section, I explained that Muslim immigrants might have benefited from the judicial interpretation of Italian international private law. In particular, I argued that courts have, over the years, tried to reduce the divide between the effects of private decisions in the country of origin and the effects of such practices in Italy. However, the judicial accommodation of *Shari'a* law via the path of judicial recognition of the effect of an alien legal system is only a temporary solution. The special legal status granted to immigrants might not be passed on to the second generation of Muslims, and that might have the effect of key life choices for over a million individuals going unrecognized by Italian law (Guolo 2000). The most likely solution to the problem is for the multitude of Islamic communities to ask for the recognition of Islam as an official religion. This part of the essay discusses the process of recognition and how Islamic communities might benefit from it. It also seeks to explain some of the present difficulties.

Official recognition is an ad hoc process that might have, depending on the needs of the religious community, different effects. In general, official recognition changes the relationship with the state in three different areas. The first group of consequences are internal ones that are based on the acceptance by the Italian state of the internal self-regulation of the religious community. The internal statute of the community becomes Italian law and might include an official recognition of the jurisdiction of religious tribunals. For instance, article 2 of the Adventist Church agreement set the exclusive jurisdictional competence of the religious tribunal in disputes that were internal to the Church and its institutions, such as schools and hospitals (Act n. 400 1988).

The second group of prerogatives is external in nature. The activities of the religious groups project their religious effect into civil society. Religious marriages and jurisdiction decisions might have a direct effect on Italian law. In addition, religious schools and universities managed by religious orders might grant recognized diplomas and degrees. The third group of potential consequences provides direct financial support to recognized faiths. Religious institutions have, for instance, a preferential fiscal regime and might also decide to collect a share of their members' taxes. For instance, the agreement between the state and the Italian Association of Hebrew Communities (Unione delle Comunità Ebraiche Italiane) asserts that all religious publications and all published material that disseminate religious beliefs are exempt from fiscal duties for published material (Act n. 101 1989, article 2 (2)). In addition, supporters of an officially recognized religious community might allocate a proportion of their taxes (0.08 % of their income tax) to their chosen religion. The level of these resources might be increased substantially by the state.

In short, the effects of recognizing a religious community mean that it has a much higher degree of independence and financial support in comparison to a non-recognized faith. Eleven faith-based religious groups have demanded, and subsequently obtained, official recognition (Act n. 400 1988; Decree n. 303 1999): the Waldensian Evangelical Church, the World Assemblies of God Fellowship, the

Evangelical Baptist Church, the Lutheran Baptist Church, the Apostolic Church, the Church of Jesus Christ of the Latter-Day Saints, the Adventist Church, the Greek Orthodox Archdiocese of Italy, Hebrew Communities of Italy, the Italian Buddhist Union, and the Italian Hinduist Union. Eight out of the 11 communities are Christian: the Waldensian Evangelical Church, the World Assemblies of God Fellowship, the Evangelical Baptist Church, the Lutheran Baptist Church, the Apostolic Church, the Church of Jesus Christ of the Latter-Day Saints, the Adventist Church, and the Greek Orthodox Archdiocese of Italy.

The benefits for officially recognized faiths are substantial and the popularity of the process is justified. The possibility granted to a faith to have part of its internal constitution sanctioned by law is in sharp contrast with the regime of non-recognized religious communities. Those religious communities, such as Italian Muslims, are regulated by Statute n. 1159 (1929). Statute 1159 was drafted by the Fascist government, which had an open discriminatory agenda against non-Catholics. The Italian history of the racial law that discriminates against the Jewish communities preceded Fascism, and does not need to be further clarified here. It is important to remember that racial laws were the legal springboard for the Italian genocide against the Jews (Act n.1024 1939; Royal Decree n. 1728 1938). Perhaps it is less known that Fascism discriminated against all non-Catholic religious communities by imposing police control over their activities (Royal Decree n. 289 1930). Some religious communities, such as the Pentecostals, were banned outright (Memo n. 600 1935), and religious associations, such as the Salvation Army, were put under police administration (Spano 2009).

Religious groups that were victims of Fascist discriminatory policies were particularly active contributors to the 1948 Constitutional Convention that drafted the Italian Constitution. In particular, the wording of article 8, which began the process of official recognition for non-Catholic faiths, was the result of the contribution of Protestant communities (Long 1990: 251–257). The wording of the article grants all religious communities (also including Catholics) the same level of freedom. In addition, the second comma of article 8 gives the prerogative to non-Catholic religious groups to obtain official recognition analogous to that obtained by the Catholic Church via international treaties between Italy and the Vatican state (Long 1990: 257–260).

The process of recognition relies on a non-codified institutional praxis. The government is expected to delegate a commission to draft a concordat between the state and the religious groups. The commission is composed of a balanced number of representatives of the government (including members of civil society) and representatives of the community (selected by the religious group) that aspires to obtain official recognition.

The recognition process is voluntary and, in theory, non-inquisitive of the internal structure of the faith-based community. In practice, however, it requires an evaluation of the aims of the religious group (Act n. 1159 1929, article 2). The agreements are normally very clearly articulated documents and they might set specific prerogatives for the recognized church. For instance, article 2 of the Adventist Church agreement expressly excludes the jurisdiction of the Italian courts in religious and disciplinary matters decided by religious tribunals (Act n. 400 1988).

The autonomy and legitimacy of such tribunals have been confirmed in *Montalti Urbano v. Unione Italiana delle Chiese Cristiane Avventiste Del 7 Giorno and Others* by the Corte di Cassazione (n. 5213 1994). Mr Montalti was excluded from the Adventist Church as a result of internal disciplinary proceedings. He objected and sought a remedy in the civil courts. After a series of appeals, the case reached the Corte di Cassazione, which was asked whether the jurisdictional restrictions set by article 2 of the agreement between the Italian government and the Adventist Church were legitimate, and which concluded that "there are no doubts, therefore, that acts on disciplinary and spiritual issues by the Adventist Church cannot be altered by state institutions" (n. 5213 1994, para. 13). Consequently, religious tribunals, if they were granted such a prerogative in the joint agreement, have the final jurisdiction on their internal matters.

Given the extent of the benefits connected with official recognition, it appears odd that a community of over a million Muslims living in Italy has not acquired such a status. A series of draft proposals were made by different Islamic associations. For instance, in 1992, the Unione delle Comunità Islamiche d'Italia presented a draft agreement to the Italian government. In 1996, another draft was produced by the Associazione per l'Informazione sull'Islam in Italia-CO.RE.IS (Pacini 2001: 21). Unfortunately, none of the proposals managed to reach the level at which they could be considered by the Italian government. However, the bathos of failed recognition does not need to be followed by desperation.

The failure to reach an agreement with the Italian institutions is due to a series of legal and pragmatic reasons. Firstly, Islamic communities in Italy are not uniform and are not organized in a hierarchical structure. What we might call the Italian Muslim community is a complex puzzle of multiple and often overlapping memberships that has so far resisted the idea of appointing a common representative to discuss the recognition of Islam. The effect of the internal pluralism of Islam is accentuated in countries such as Italy, where the bulk of Muslim communities are divided along ethnic lines (Pacini 2001). Interestingly, external entities such as diplomatic representatives of some of the countries of origin of the Muslim immigrants might not have helped the dialogue between the groups. In a nutshell, the heterogeneity of the Italian Muslim community tends to slow the process of official recognition.

Secondly, the statutory framework for non-Catholic religions is based on Act n. 1159 (1929). Some of its most strict provisions were declared unconstitutional by the Constitutional Court. For instance, Act n. 1159 imposed a series of restrictions on non-Catholic public religious ceremonies. Non-Catholic religious ceremonies were to be authorized by the local chief constable (Royal Decree n. 773 1931, articles 17, 18, 25). In particular, Act n. 1159 entrusted the police with the prerogative of forbidding a religious gathering organized by a non-Catholic community that might be perceived as contrary to the public order.

The compatibility of such restrictions was taken on as an ancillary issue in a criminal case against an evangelical pastor, Mr Umberto Lasco. Mr Lasco celebrated a mass in a public space without the required authorization. The pastor was, in the first instance, sentenced by the local magistrate to 15 days imprisonment. However, Mr Lasco appealed and the Tribunal of Locri accepted his submission (1955). The Crime Prosecution Service sought redress at the Corte di Cassazione, which consid-

ered the ancillary issue (proposed by Mr Lasco) of the constitutional compatibility of article 3 of Act n. 1159 and its executive regulation in Royal Decree n. 773. The Constitutional Court accepted, with some qualifications, the argument submitted by Mr Lasco's counsel and declared the restrictions on (non-Catholic) public religious ceremonies unconstitutional (1957).

After the 1957 Lasco case, the jurisprudence of the Constitutional Court continued to void specific restrictions on non-Catholic religious groups that were inherited from the Fascist regime. In 1959, for instance, the court declared unconstitutional the restriction on setting up and running a Pentecostal temple in the city of Crotone (Tribunal of Crotone 1957). In this instance, the ancillary constitutional issue was linked to a criminal charge brought against Mr Rauti. Mr Rauti refused to comply with a police order (ex article 2 and article 3 of Act n. 1159, and its executive regulation, Royal Decree n. 289 1930, articles 1, 2), which required all non-Catholic religious associations to ask for the authorization to open and run religious establishments. The Constitutional Court promptly declared the executive regulations unconstitutional.

The process of purging the law of the Italian Republic from its inherited illiberal regulations has been quite successful; however, non-Catholic associations which would like to be recognized by the Italian government are still required to have their internal constitution reviewed by the functionaries of the Minister of the Interior. The review has the aim of checking the compatibility of the religious association's internal constitution against Italian public order and common decency aspects (Act n. 1159 1929, article 2). The Islamic Association, based at the Grande Moschea di Roma (the largest in Western Europe), is already registered by the Italian government; however, the other 700 Muslim groups have been slow to take up the opportunity of becoming officially acknowledged.

Official registration is a required step for official recognition. A recent analysis recorded over 700 Islamic places of worship, called *musallas*, and 3 mosques (Allievi 2011). There are also practical limitations in terms of the public use of places of worship. For instance, some *musallas* have chosen to operate without gaining planning permission and have, subsequently, been closed down by administrative tribunals (e.g. Consiglio di Stato n. 4915 2010). State intervention in the administration of religious sites is unfortunate for different reasons, but perhaps this is more unappealing in Italy, since a recognized religious community would have the prerogative to derogate some of the local planning regulations (Botta 2000).

The reason for avoiding the review of ex article 2 (Act n. 1159 1929), which would have granted a legal personality and all the benefits to a non-recognized faith, is a matter of speculation, yet there are a series of factors that might help us to understand the reticence of some Muslim communities.

For instance, most of the practising Italian Muslims are immigrants. The regulatory framework that dealt with the first waves of Muslim immigrants (and which was still operative in the 1980s) was set in articles 142–149 of the Regio Decreto n. 773 (1931), also known as Testo Unico delle Leggi di Pubblica Sicurezza (hereafter TULPS). The articles were again redesigned during the Fascist regime, and they set a series of strict limitations on travel, dwellings and the employment of foreigners (Calvanese 2011: 47).

Even a cursory reading of TULPS reveals the signs of the police regime that gave birth to it. For instance, the few foreigners who already had a visa before entering the country had 3 days to request a local 'resident permit' from the police constabulary (article 142). Landlords (or lease holders who might be relatives and were themselves immigrants) hosting foreigners had only 48 h to notify the local constabulary (article 147). Employers were also affected by the regulation. They were obliged to inform the police of the nationality of their workforce, and in case of dismissal, to inform the same constabulary of the 'probable destination' of the non-Italian citizen (article 146). Revoking the resident permit was the most common sanction for the violation of any of the above statutory dispositions (article 148). In brief, foreigners were heavily monitored administrative license holders rather than rights bearers.

Long before the reforms of the 1990s, the statutory provisions (and their sanctions) might have given rise to a question of constitutional compatibility. Yet, in practice, the norms regarding foreigners were widely ignored by all concerned. Administrative inefficiency played a part in making TULPS ineffective. The administrative unit within the police constabulary charged with the task of authorizing foreign residency was unprepared to cope with mass immigration. It was common for foreigners to wait for months for resident permits which allowed them to work, forcing them into areas of illegal residency and perhaps illegal activities.

On a pragmatic level, administrative inefficiency mediated a draconian regulatory system. During the 1990s, a series of reforms was intended to change the plight of the foreigners in Italy from precarious administrative license holders to 'rights bearers' (Act n. 28 1990; Act n. 286 1998). In particular, Legge n. 286 (25/07/1998) organized all the new statutory measures together in a codification called the Testo Unico delle Disposizioni Concernenti la Disciplina dell'Immigrazione e Norme sulla Condizione dello Straniero (hereafter TU). Firstly, the TU introduced a rationalization of the work visas. Secondly, it established an electronic database of all foreigners who explicitly asked to work in Italy. Thirdly, it streamlined the immigration procedures and integration (Nascinbene 2000).

However, in the decade that followed the approval of the TU, there were few signs that Italy had moved away from the police regime for its immigrants. Some of the negative aspects of TULPS outlived the reforms. For instance, the TU maintained many of the restrictions of the resident permit system designed for all immigrants, and the measures that were aimed at creating a more appealing environment for immigrants by fostering integration and intercultural exchange remained unapplied (Act n. 40 1998, article 36).

In short, the image of obstreperous Muslim immigrants depicted by the Italian media is very much a hollow one. Muslim immigrants are particularly wary of public attention and of Italian public officials (Calvanese 2011). It might take some time to see a large number of Muslim religious associations accepting the scrutiny of Italian institutions. It is also difficult to imagine that delicate theological (and culturally entrenched) differences might be quickly ironed out to allow for the appointment of a religious representative. However, heterogeneous religions such as Judaism and the group of Protestant communities have managed to obtain official recognition. For instance, the Jewish communities, after a long process of negotia-

tion, managed to find in Unione delle Comunità Ebraiche Italiane a common referent. The process chosen by the Unione delle Comunità Ebraiche is particularly significant. Act n. 101 (1989), which recognized the association, included an official simultaneous acknowledgment of the over 20 independent Jewish communities that were at the time represented by the Unione (1989).

Islamic communities might also follow the path set by Protestant communities and try to sign an ad hoc agreement with the government (Casucelli 2000: 100). The Grande Moschea di Roma, which has already had its internal constitution recognized via the review set in article 2 of Act n. 1159, might, for instance, seek the official recognition of its community. Having one of the communities recognized might open the door to other Islamic religious groups. For instance, the Waldesian Community was the harbinger of the wave of requests for official recognition. Other Protestant religious groups, such as the Adventists quickly followed the path set by the Waldesians. It is a matter of speculation as to what might happen with the Islamic community, and forecasting official recognition carries with it the risk of being a Pangloss. Yet, there are signs that recognition of a community such as the one represented by the Grande Moschea might be the harbinger of a wave of demands for recognition (Ferrari 2000).

More difficult, perhaps, is to reduce the mistrust of the Italian institutions held by many immigrants who directly experienced the effect of the 1930s police state. However, it is hard to envisage that a fast-growing Islamic community might continue to operate in Italy without demanding official recognition and institutional autonomy. The most recent, and also the most significant, indication of the government reducing the divide between the state and the Islamic communities can be seen in the establishment of the Committee for Islam (Comitato per l'Islam Italiano) within the Ministry of Interior Affairs. The Committee's remit is to advise parliament in matters that are related to the growing number of Islamic communities in Italy. It includes, among others, representatives from Islamic communities in Italy (e.g. Moroccans), imams, such as Abdellah Mechnoune (the Mosque of Turin) and Muslim scholars, such as the Director of the Islamic Centre of Rome. The Committee provided a series of reasoned responses to private bills that were proposed (e.g. Bill C512 proposed that imams should hold an antiterrorism certificate), which demanded, for instance, a specific regulative framework for Islamic communities (e.g. an antiterrorism review of their leaders). The Comitato per l'Islam Italiano reminded Parliament that all religious associations are constitutionally protected and a particular faith cannot be subject to discriminatory policies. The Parliament duly complied.

The hope is that, with the establishment the Committee, Muslim communities might start to interact with civil institutions. It would be naïve to expect that a committee might expunge, overnight, the experiences of dealing with inefficient and discriminatory immigration policies. It is also improbable that all the 700 Islamic communities operating in Italy might decide to appoint their own representatives and start a negotiation process with the government. However, the past history of the dialogue between the state and non-Catholic communities shows religious groups have adapted and developed strategies and reached official recognition.

8.4 Conclusion

Shari'a law has already had a significant impact on Italian law. In this essay, I explained that Italian international private law accommodated the effect of legal relations settled in countries that applied *Shari'a* law. The process had the effect of recognizing marriages (including polygamous marriages), divorces (including unilateral divorce) and the guardianship of minors. The judiciary has been particularly mindful of the implications of their decisions and has avoided axiological stances. Thus, the evaluation of life-changing decisions that have engaged with public order issues and/or fundamental rights has been assessed in practice. For instance, the limits set by the Italian public order on unilateral divorces have been balanced against the right of self-determination of women who express the desire to remarry.

The openness of the Italian judiciary to *Shari'a* law is, I argued, one of the manifestations of positive secularism. Positive secularism is a pragmatic constitutional approach to religious freedom. It imposes two obligations on Italian institutions. Firstly, all religious communities have to be treated equally. Secondly, state institutions must be open to accommodate, within the limit of reasonableness, the pragmatic manifestations of religious freedom.

The second obligation allows non-Catholic communities to demand, via the process of official recognition, prerogatives similar to the one historically obtained by the Vatican for the Catholic Church. The last section of the essay focused on the process of the official recognition of Islam for Italian citizens. Recognition has the advantages of increasing self-regulatory powers, which might include a limitation on the competence of Italian law, and financial support. Official recognition would allow Islamic communities to have some aspects of *Shari'a* law (marriages and the decisions of religious tribunals) automatically recognized by Italian law. Unfortunately, the internal divisions and a culture of mistrust towards the Italian institutions have slowed the recognition process. However, in the past 3 years the government has tried to establish institutional dialogue with Italian Muslims by setting up a ministerial committee composed of representatives of the larger Islamic communities in Italy. In the past, these types of committees have been proxies for the official recognition of non-Catholics. In addition, there are Islamic associations such as the one at the Grande Moschea di Roma that have already passed through the administrative review necessary for starting negotiations with the Italian government. This form of proactive pluralism might be perceived as endangering rights in liberal society. This is, for instance, the view of Shachar (2001).

In conclusion, whilst 'positive secularism' in Italy might not be a neat apotropaic device that prevents cultural hegemony, giving official recognition to religious groups allows for a pragmatic acknowledgment of the positive contribution of religious communities to a society.

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Chapter 9
Trial and Error: Muslims and *Shari'a* in the German Context

Wolf D. Ahmed Aries and James T. Richardson

9.1 Introductory Remarks

Within the focus on Islam as a global phenomenon considerable research concentrates on the question of population shifts on the European continent caused by Muslims—workers, persons in search of asylum, students, trainees, entrepreneurs, and such—who have arrived in Western Europe for various purposes. Not all who came were believers in a strict Islamic sense, but they did have roots in the religious culture in which they were brought up. Few who came expected that Islam would become a problem in their new environment or for society as a whole. But some western trained social scientists examining the influx of different cultures into western societies were not surprised that issues arose. A look at reports on Muslims, their organizational structures and transplanted cultures, shows that the experiences reported could be grouped into several categories:

- European secularization and non-secularized Muslims
- National and global identity for Muslims
- Family matters, including divorce
- Organizational development and local empowerment
- Integration challenges for Muslims
- Interreligious dialogue
- State legal structures and juridical norms

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Each of these subjects of investigation covers a broad field, but taken as themes they are ‘collective singulars’ [*Kollektivsingulare*] which tend to be perceived as specific entities. And those people to whom researchers turn for information are not just experimental subjects, but people who are subjectively involved and who are experiencing dramatic life changes. If researchers want to learn about Muslims in western countries they should understand from which point of view a respondent is answering.[1] A check through various research reports reveals that the group interviewed for a particular study often belongs to one specific group; thus the research results may be limited in their application to a political party, to one out of several churches or organized anti-religious associations, or to a group interested in securing a certain policy. If these questions of context are not addressed the reader has to guess which hermeneutic circle is being represented in the report.

9.2 The Starting Point

In 1948 the military governments of the western allies ordered their German administrations to come together in order to develop a constitution for a future German government. The members of this parliamentary council [*Parlamentarischer Rat*] met to reappraise the political, as well as the intellectual, German past. Within this specific context conservatives, liberals, social democrats, and communists who had survived the Nazi terror discussed the relationship of church and state. At the end of the debates a compromise was reached that incorporated as a human right the freeing of religion from the relevant articles of the constitution of Weimar which were put in force after 1919.

At that time, just after the war, few people imagined that there could be a development that would call this compromise into question. Secularization meant, on the one hand, freedom of belief and no state church, and on the other hand, the full acknowledgment of all treaties and agreements between the different churches and the state(s) which existed before 1933. The entire legal structure is described by the notion ‘*Staatskirchenrecht*’,[2] church under public law.

In 1949 the term ‘state’ meant a federal administration at Bonn and ten federal Lands and the Bavarian Freestate [*Freistaat Bayern*] which received full cultural autonomy. The established Land churches built on historical territories, kingdoms

[1] No social scientific investigation starts from zero. The groups, persons, and associations questioned have begun in a certain historical context, often long before any scientist reflected on hypotheses concerning them. Thus the language in which the researcher questions an interviewee might not be the one with which that person is familiar. The interviewee might comprehend enough to give the researcher a response he can understand; but if a third person were to question the two interview partners about what each of them understands and associates with, for example, the term ‘secularization’ this person would probably hear two different descriptions, since for each partner the term has its own history.

[2] The concept was developed in 1742 by Christoph Matthäi Pfaff who used the word in an academic article, and it became a popular term during the nineteenth century.

or princedoms, etc., establishing their old orders within historical borders which did not correspond with the borders of the different Lands. For example, the Land of Lower Saxony, which was invented by the British Military Government, included the Protestant Land church of Braunschweig, the Land churches of Hannover, Schaumburg-Lippe, and Oldenburg. This legal context became the basis for new agreements and state treaties, and is the fundamental context of today's German juridical secularity. The churches remained bodies under public law, religious education remained part of the state school curriculum in most Lands, theological chairs at universities were paid by the state, and the juridical rights of the churches were not touched. Thus a law student could study state law and additionally church law, and develop a thesis in each subject, in order to become *Doktor beider Rechte* [doctor of the two laws].[3]

In contrast to the past ideological dictatorship of the Nazi Government and in awareness of the communist regime in Eastern Europe, the new German state sought to secure the so-called *Rechtsstaatlichkeit*,[4] which posited political good will of the state towards religious communities and churches.

When the new Federal Republic of Germany was founded few could have imagined that a few decades later there would be a new Jewish minority and also an Islamic one. In contrast to the Muslim newcomers, the Jewish communities could refer for legal status back to a royal decree of the nineteenth century, when the Prussian King, although head of the Protestant church in his country, decided that each synagogue should be accorded the legal status of a church under public law. The small groups of Muslims who were living in southern Germany at the time obtained a special agreement that allowed them to exist. They were aliens, but nobody worried about the situation because they were few in number and relatively isolated from the rest of Germany.

9.3 Changing Atmosphere

As a consequence of the Second World War the new German republic had to incorporate millions of refugees from those provinces the country had lost through the agreements signed at Tehran and Potsdam. These population shifts caused a problem as the religious landscape became muddled. Since the end of the Thirty Years War, in 1648, the peace treaties of Münster and Osnabrück, with the principle '*cuius regio eius religio*,' had regulated the question of religious affiliation: the head of the state decided to which church or religion his subjects would belong. After 1945

[3] The term 'Doktor beider Rechte' means that the candidate has passed two exams, one of the state with its secularized (Roman) system and, additionally, the exam of the church(es). The Catholic and the Protestant churches each have a law of their own and, consequently, courts of their own. This system is still in place. These judges discuss questions of parishes, priests, orders, etc., and the Roman Catholic courts also discuss divorces (see von Campenhausen and de Wall 2006).

[4] '*Rechtsstaatlichkeit*' can be translated as 'rule of law'.

people from different churches had to be integrated at the place where they arrived, and local residents often had severe problems accepting the newcomers. Governments and churches started a special effort to establish a dialogue between newcomers and longer term residents. It took years to reconcile refugees and locals, and even then the reconciliation was not complete.

In the decades after WWII the churches lost much of their traditional influence in German society. Up to the 1960s 51 % of the population stated that they belonged to one of the Protestant churches and 45 % professed to being Catholic. Two decades later these percentages were reduced to 42 % Protestant and 43 % Catholic. A survey made in 2008 showed that 30 % of the population belonged to the Catholic Church, 30 % to the Protestant churches, and 34 % was without any affiliation. However, this societal and demographic change did not change the legal status of any church. One might say that the contrary was true, as newly arrived Christian churches received acknowledgment as legal bodies under public law, even including Orthodox churches to which Greek or Romanian (guest) workers belonged.

During the twentieth century many social scientists and media representatives were convinced that religion would disappear, or at least be withdrawn from the public sphere. Convinced non-believers founded associations of their own on the basis of German club law. Their representatives joined the general societal discourse, and they asked for ethics education to be provided in the schools in place of religious education. However, after WWII the newly arrived Islamic minority upset this development, and spoiled the overall impression that all was well concerning the religious situation in German society. In contrast to Christians, who had conducted their worship in church buildings and were not easily identifiable in public, many Muslims could be seen and easily identified by their dress and other outward signs of their faith and ethnicity. Their beliefs and modes of worship were public by their very nature—thus Muslims are more orthopractically oriented and not as 'theological' as many Christians.

Many politicians and Christian groups, as well as atheistic intellectuals, were not happy with this new development and opposed any tendency to integrate the Turkish or Arabian workers into German society as practising Muslims. At the end of the 1960s and at the beginning of the 1970s the situation became chaotic, causing a few German Muslims at the bureau of the Islamic World Congress in Karachi to act, and its board decided to reestablish its bureau in Germany, the Central Institute Islam Archives, in 1979. This became the Islamic 'voice' in the Federal Republic. Its director became the consultant for administrations, parliaments, political parties, and nearly all minority organizations and Land churches. Its small staff developed not only a network in Germany but also an effective lobby. The Archives was the first institution which demonstrated to the public that some parts of the new minority would become a permanent part of German society. At the same time it helped various Islamic groups to settle in Germany.

The Archives staff had to attempt to integrate two potentially conflicting ideas: those of the Kemalistic representatives in the Federal Republic on one side, and that of 'integration' on the other. A typical case might involve an Islamic organization which had hired a town hall for a meeting. The Turkish consulate might protest

to the city administration, saying that this organization was forbidden in Turkey. The town hall's manager would then cancel the hiring agreement. The Muslim organization representatives would then call the Archives, whose head would call the mayor, telling him that he had infringed the human right of religious freedom, and that the Archives would take the matter to court. The mayor would then cancel his order and inform the Turkish diplomat, who, typically, would react angrily. Both the Turkish bodies and Muslim immigrants had to learn what religious freedom meant in the German context.

9.4 The Learning Process

Whether accepted or not, the discourse between the growing Islamic minority and the increasingly secularized majority became part of societal and political development in all Lands, even if the conversation was sometimes one-sided, favouring the majority group's perspectives. The issue of how to deal with the growing Muslim minority groups was involved in election campaigns and well covered by mass media. However, new research by social scientists at the University of Münster (Westphalia) has shown that most leading journalists thought that churches were a phenomenon of the historical past, and not a major part of modern society (Gärtner et al. 2012).

In the late 1970s talks began between the new Muslim minority and representatives of the societal majority, organized by the adult educational institutions, *Akademien*, which belonged to different churches. The *Akademien* invited opponents—church leaders, politicians from all political parties, and Muslims—to discuss possible integration. These discussions often centered on the question of how Muslim organizations in Germany could achieve the same legal status as the traditional Christian churches. The usual opinion reached was that Muslims could not obtain this status because the Lands could not find an organization which could speak for all Muslims living in a federal Land.

Because nobody could find a solution to this dilemma, Muslims began a long process of trial and error. Sometimes they were assisted by lawyers, individual members of churches, politicians, or human rights activists. Eventually some Islamic organizations went to court to establish their legal right to exist. Initially some Islamic intellectuals thought that establishing a religious club based on German club law, which is a part of the common law, would serve to establish the legality of their mosques. But this effort, to be discussed in more detail below, was largely unsuccessful. The next stage was the establishment of an Islamic foundation or association on the federal or national level. This also was a dead end because the federal government is precluded from passing culturally based laws concerning any religious question.

In the course of these debates politicians and jurists asked the Islamic participants what legitimized their representing Muslims in Germany. Surveys showed that only 12–15 % of Muslims living in Germany were members of the negotiating

associations. Suddenly both sides faced a structural problem: what legitimized the representatives of those Muslims who were negotiating with the specific Land governments? If the administration spoke with a clerical representative of one of the traditional Christian churches it knew exactly through which procedures the representative received his legitimation. This was to be seen in the historically developed church hierarchy. Muslims, however, did not have such legitimation, as authority within Muslim communities was not bound to a certain hierarchy. Muslims attribute authority to an *alim* or augment it after they have become convinced of his worthiness through his words, acts, and advice. A second means of legitimation of a representative derives from the state in which the individual Muslim lives—the appointment can depend on the religious education offered at universities or schools, and quite often on the political background of the government. The consequence is that Muslims might choose between these two authorities (El Fadl 2001).

One solution to this problem evolved out of discussions concerning the constitutions of Islamic clubs, which were based on German club law, the norms of which dictate free and secret voting to elect the governing board. Thus the representatives of these clubs were democratically legitimate, but not religiously sanctioned. The membership of such Islamic clubs did not include a large part of the Islamic minority. Nevertheless, this tactic furnished a limited political basis for some Muslims in Germany.

Muslims who settled in Germany came from states and societies which had a nationwide central administration, and it was on the basis of this experience that they built and organized their associations. The German state, however, is a federal republic, in which many responsibilities of governance fall to the Lands. In consequence, the centralized Islamic associations had to reorganize their structures according to the German political structures. This meant dividing power and income or fees, which, for decades, many organizations refused to do. Eventually a group of Islamic clubs in Lower-Saxony came together and founded a *shura* in 2002.[5] This Land association, which was joined by a number of different local clubs, became an accepted partner of the Land administration. The centralized national Muslim organizations were not at all amused, but this approach did achieve some success.

Parallel to these new developments, legal discussions were focused on a new aspect of some import. Human rights activists, church lawyers, and constitutional lawyers decided to give up the notion of *Staatskirchenrecht*, church under public law, in order to replace it with the term '*Religionsverfassungsrecht*,' religious law, within the context of the constitution. This development opened the way for a new discourse.

At this point we must discuss the behaviour of an important organizational player in Germany, the Diyanet Işleri Türk Islam Birliği [Türkisch-Islamische Union der Anstalt für Religion or the Turkish-Islamic Association of the Agency for Religion] known as the DITIB, which is the official representative of the Turkish religious

[5] The term '*shura*' is an Arabic word which means 'assembly' or 'congregation.' It was adopted by the mosques in the federal Lands of Lower Saxony and Hamburg so that they would have an Islamic term for their organizational form. A *shura* is somewhat like a parliament.

body called DIYANET (Diyanet Işleri Türk Islam Birliği [Türkische Religionsbehörde or the Turkish Agency for Religion]), the governmental administration for religious affairs within the Turkish government. The DITIB controls all national religious activities within the Turkish Republic. Every embassy has a religious attaché who is responsible for all representatives working at the consulates general in Germany. These representatives are, de facto, the superiors of all Islamic clubs which have joined the DITIB association. Via their bureaus the individual mosques still get, as their imams who work in Germany, Turkish civil servants on leave. The DITIB organization represents the Turkish position, especially with regard to the ideology of Kemalism, the dominant political philosophy of modern Turkey, which German politicians, governments, and administrations saw as analogous to their own secularism. Thus the local mosques which were, and still are, under direct or indirect supervision from Turkey became the 'opposing party' in any move towards 'integration' which might have affected Turkish policies. The internal policies of both countries had a foreign aspect that had to be taken into account.

The board of DITIB insisted on centralization, and on the association's right to represent all Muslims because it was more secularized. However, because of the success of the *shura* founded by a group of Islamic clubs in Lower-Saxony (referred to above), the advent of the new Turkish government in Ankara under Prime Minister Erdogan, and the appearance of new Turko-Islamic organizations like the UETD[6] (Union of European Turkish Democrats), DITIB changed its policies somewhat, agreeing to found Land based organizations, and to take part in the negotiations between *shura* and the Land governments.

Meanwhile the 16 Land governments discussed Islamic development at the federal level. Some Lands decided to implement an Islamic religious curriculum in their state schools in a manner analogous to their implementation of existing Protestant and Catholic curricula. The question of who should educate the teachers necessary for this new curriculum was answered by the Federal Science Council, a neutral body founded to give advice to the federal and Land governments on political issues. Its members recommended that Land administrations should found five Islamic centres at different universities. Legal barriers to their establishment could be surmounted by creating 'consulting councils' whose members would be jointly appointed by the Islamic organizations and Land administrations. This solution did not completely correspond with constitutional norms, but was accepted by most participants. This concept came originally from Professor Janbernd Oebbecke who occupies a chair at the University of Münster.

Over time the migrant organizations changed from Turkish centered bodies to self-help communities, then to service organizations, without losing their emotional feelings for the home countries of their ancestors. Werner Schiffauer, from the University of Frankfurt an der Oder, described this development through research on Milli Görüs, a very important Turkish based organization formed in the 1970s to

[6]The UETD is a typical second generation association whose bilingual members grew up in Germany but had deep roots in Turkish culture and Islam. Most members studied at German universities.

represent Muslims in the political arenas of Western Europe (Schiffauer 2010). Eventually the board of Milli Görüs grew to be a major player in home affairs in the new societal surroundings in Germany. Because its newer members belonged to the second generation of migrants, and were educated in their federal Land and examined at local universities, they knew which methods should be used in order to achieve their aims. The organization, however, lost the trust of German home security bodies, which looked on it as an organization with two faces: one turned to Germany and the other to Islamic issues. The consequence was that German home ministries discriminate against Milli Görüs, although the situation has improved somewhat in recent years.[7]

9.5 Barriers to Overcome

In order to give a general description of the efforts Muslims have made towards integration into German society, several contentious issues which have influenced the related discourses should be discussed. One factor was the atheism, or anti-religious sentiment, that characterized some Muslim immigrants who, because of their political engagement, had found it necessary to leave their home country. Some had gone to Eastern Europe where they had been educated and trained at ideological centres. Years later they came to Germany where they received political asylum. A few became members of the unions and related political parties and continued their fight against Islam, which they saw as a barrier to progress toward modernity. Such individuals became the natural allies of those Germans who opposed the recognition of Islam. In the 1970s and 1980s some of these people were involved in public discourse concerning the place of Islam in Germany.

A second issue can be seen in the phenomenon which José Casanova (2009) called "Europe's fear [*Angst*] of religion" (Casanova 2009). A growing number of citizens have left, and are leaving, the organized churches in Germany. They not only refuse to pay church taxes, but also want to get rid of the churches' moral regulations with regard to hedonism and sexuality, including homosexuality. Islamic beliefs on these matters have provoked an attitude of anti-Islamism which has eventually evolved for some anti-religionists into an open Islamophobia.

[7] One consequence of this conflict can be a methodological trap if foreign researchers begin their work with representatives of the organization's opponents. As anti-Islamic persons and organizations tend to be much more responsive than pious ones the research can be biased before it starts. This situation has occurred often during recent years and conceals the fact that the German Muslim community has a Turkish majority and several smaller minorities, the biggest of which is the Arab one, which is itself quite varied in the country of origin of its members. Each national group tends to found its own mosque and Islamic club. Thus one may find five different mosques on the same street. The umbrella organizations—Islamic Council of Germany and the Central Council of Muslims in Germany—tried to unite the smaller groups under their umbrella but had a limited success. The African and Islamic mystical orders, especially, still go their own separate ways.

A third problematic issue derived from debates on what in political discourse is called 'integration.' Many scientists, as well as politicians, referred to Islam as 'just a religion,' treating the terms 'Islam' and 'religion' as synonymous. It took years for them to accept that the concepts of 'integration' and 'religion' had to be discussed separately. Neither the mass media nor the general public were aware of the many ways in which Turks, Arabs, Bosnians, and others participated in normal social institutions in Germany: students attended grammar schools, studied, and became 'normal' citizens; about 1,000 did their service with the *Bundeswehr*, and became police officers or teachers. A growing number founded business enterprises. However these successful forms of integration were little known.

Related to this concern is the issue of citizenship. Germany does not allow dual citizenship, thus forcing immigrants to choose to give up their status as a citizen of their country of origin if they want to become a German citizen. This has caused considerable difficulty for many Turkish immigrants who would like to become more integrated into German society.

Most Muslims are on their way to becoming 'normal' citizens in Germany. Nevertheless, many German people mistrust 'Islam' and interpret the abstract term as referring to aggression. Thus Islam is defined by many as a security problem. Some home ministers in Land governments are consciously playing this card, and by so doing are neglecting normal legal limitations on what is acceptable commentary in public discourse. The consequence is a general attitude of suspicion against Islam which Muslims have difficulty countering.[8]

In an effort to counteract the growing Islamophobia in Germany nearly all mosques tried to establish some sort of open dialogue with the communities in which they operated. For example, the Central Council of Muslims in Germany, an Arab dominated umbrella organization, asked the local mosques to open their praying places on a day in October, and offer 'sightseeing tours.' These efforts have had some success in informing ordinary German citizens about Islam.

9.6 *Shari'a*: Controversies Abound

The juridical discussion of *Shari'a* is generally limited to legal experts and is not part of public debate in Germany. The religious aspects of *Shari'a* are restricted to discourses within the Islamic minority and usually do not reach the public.

[8] Some social scientists think that the German development of the relationship of minority to majority, here concerning the Muslim minority, should be seen as part of a longer historical development, as Muslims are not the first minority group which has tried to become part of German society. Catholic historians point out that the arguments used against Muslims are the same as those which were used against the Catholics after 1871, the year in which the German Reich was founded at Versailles. The Protestant majority fought against the so-called *Ultramontanismus*. With regard to integration, one might assume that the ongoing processes are usual. The definitive, but open, question is how to keep the implicit aggression under control.

Nevertheless, all Islamic book shops offer literature concerning *Shari'a*.[9] Arguments on the questions about *halal* and *haram* take *Shari'a* norms into account, and every Islamic organization has released publications explaining how *Shari'a* might apply to everyday life.

However, if there is a shibboleth or a combative term in German discourse on Islam it is the notion of *Shari'a*. Thus *Shari'a* has played an important part in the trial and error process of affiliation and integration of Muslims in Germany. If, in any discussion on integration, one of the participants wants to mark out what is unacceptable in Germany he declares that *Shari'a* is not wanted. Such a statement will be accepted unanimously—without any contrary comment by Muslim representatives or others. Virtually all Islamic efforts to differentiate among local customs, law in foreign countries, and societal or folkloristic or religious aspects have failed. Even the publications of a well-known scientist like Mathias Rohe (University of Nürnberg-Erlangen) could not change the prevailing mood. His book *Das Islamische Recht* [Islamic Law] (Rohe 2009)[10] was reviewed in all leading newspapers and scientific magazines, and was universally acclaimed. Nevertheless, it did not change the overall negative atmosphere. Federal and Land Ministers of the Interior, journalists and others use the concept of *Shari'a* in order to indicate the outside limits of acceptable integration. The different offices responsible for defending the German constitution use the term '*Shari'a*' to characterize an Islamic organization as problematic for security reasons.

Mathias Rohe, in a later publication, discusses differences between what he terms "external" and "internal" reasons for supporting the application of *Shari'a* in western societies (Rohe 2009: 25–26). By 'external' he refers to situations where "the law of the land" prescribes what must happen in a given situation. 'Internal' reasons are derived from the desires of the parties involved in a situation requiring resolution. Rohe then says:

> There are *four fields* of law where Islamic norms may be applicable or recognized for mainly external reasons. First, private international law may lead to the application of shari'a within the limits of public policy; second, in some states Islamic norms have been integrated into the existing law of the land; third, given legal facts created under shari'a may be recognized under Western laws for social reasons; and lastly, there are cases of maintaining personal law systems, including shari'a for Muslims, for historical reasons.

Rohe then notes that, in the arena of private law, courts in Germany, France, and Austria are "often obliged to apply Islamic legal rules when these are the national

[9] For example: *Islam im Alltag* (Borek 1999); *Ilmihal: Der gelebte Islam* (no author n.d.)—a best seller among Turkish Muslims; *Handbuch Islam: Die Glaubens- und Rechtslehre der Muslime* (Reidegeld 2005)—used by intellectual Germans.

[10] In a recent publication Rohe complains about the reaction to his efforts to interpret Islam for the public in Germany. He says, "I myself was repeatedly denounced for promoting the replacement of the German legal order by shari'a, simply because I wanted to inform the public about *existing* German legal order with respect to the treatment of Islamic norms" (see Rohe 2013: 25).

law of the person involved…In this respect it may be generally stated that until now, shari'a has had a particularly strong position in family law and the law of succession" (Rohe 2009: 27). He also, in reference to his third 'field of law' states that

> German social security laws treat polygamous marriages as legally valid, provided that the marriage contracts were valid under the laws applicable to them at the place of their formation…The legal reasoning behind the recognition…is to avoid depriving these women of their marital rights, including maintenance. (Rohe 2009: 28)

Rohe states that, while some European nations have approached *Shari'a* in terms of the second and fourth 'fields of law,' Germany is not likely to proceed in along those lines.

The discussion of internal reasons for the application of *Shari'a* in the West offered by Rohe includes what he terms 'technical/institutional' reasons, cultural reasons, and religious reasons (Rohe 2009: 30–34). The first reason focuses on the desires of individuals to have their marriage arrangements recognized by all nations in which they might reside, an important consideration in an age in which many people cross national boundaries and also intermarry with people from other nations. Cultural reasons focus on Muslims' desire to maintain their values when they leave their home country to live in nations that do not readily recognize Islamic values. Religious reasons, according to Rohe, include recognition of traditional rules and norms of marriage in Islamic societies, including such elements as recognition of *mahr* (an Islamic form of dowry). Such agreements are typically enforced by courts in Germany by treating them as contractual arrangements under German law.[11]

The use of alternative dispute resolution (ADR) mechanisms by Muslims as a way of applying *Shari'a* principles to family matters is also discussed at length by Rohe, who notes that this is controversial, although it has worked reasonably well within the UK (Rohe 2009: 35–39). The controversial nature of the use of ADR in Germany was shown in 2011, as newspapers reported that Turkish and Lebanese families in certain districts of bigger towns in Germany often asked an Islamic scholar whom they trusted to settle their quarrels. Nearly all papers discussed the question of whether these scholars should be precluded from making judgements on private affairs, because it was assumed that they would apply elements of *Shari'a*. The debate dissipated after some weeks because the German juridical system did not enter into it, and most experts agreed that there is no option for any formal juridical multiculturalism in Germany.[12]

Experts such as Mathias Rohe, as well as others, have discussed in conferences the question of which juridical contexts might allow an application of *Shari'a* norms. The *Grundgesetz*, the German constitution, guarantees religious freedom to any individual on German territory. There are in it, however, ambiguous areas with

[11] For a detailed discussion of *mahr* under German law see Yassari (2013).

[12] But see Balz (2007) for an account of efforts to develop financial transactions that would function for Muslims in Germany.

regard to industrial law, cemeteries, and education. It is not clear what religious freedom means in those contexts, and applications of the concept are yet to be determined.

German public and industrial laws exclude the application of alien or foreign laws or norms. Courts which have made decisions within the contexts of international private law may take into account the foreign norms, but there are strict limits. A typical example is the Islamic type of divorce called *talaq* which involves a male's right to institute a divorce by simple oral pronouncement; this practice is against the law in Germany.

Questions arise about how to decide complicated family matters involving Muslims in Germany. A typical scenario might be the following: a couple marry in an Islamic majority society but then emigrate to the Federal Republic of Germany where they both become German nationals; the woman is the man's fourth wife in a polygamous marriage; the husband dies, raising the question of whether the wife will receive the pension or stay on the husband's health insurance. The general juridical opinion in such cases in Germany is that all wives can be taken into account, as each woman married with the prospect that her future would be secured by her husband. Such decisions do not, however, include formal acknowledgment of any form of polygamy.

Discussions by the public and in the media summarize similar cases under the notion of '*Shari'a*.' In Germany the debate concerning these issues is split into three different factions: the public one uses the term '*Shari'a*' undifferentiated and as if the notion is offensive. A second faction consists of a few law experts at courts and universities who have founded a task force called *Gesellschaft für Arabisches und Islamisches Recht e.V.* [Society for Arabic and Islamic Law]. This organization publishes its sessions and has a website of its own.[13] The highly differentiated third group is formed by the Muslim minority itself. During recent years all large Islamic organizations have founded their own law departments. Also, some Arabic and Kurdish Muslims, and a few Muslim families of other ethnicities turn to an Islamic justice of peace who decides on what *Shari'a* rules are applicable to individual cases. These recent developments are known about but as yet there is no research on the phenomenon, perhaps because it is quite difficult to get through the societal barriers.

9.6.1 Food Preparation Issues for German Muslims

Another aspect of the discussion concerning integration is *halal* food preparation. As slaughtering according to Islamic rules is forbidden by law in Germany, many retailers buy their meat in Holland or Poland or import *halal* products from Turkey. Talks with ministries and politicians show that there is little chance of legalizing

[13] Society for Arabic and Islamic Law: http://www.gair.uni-erlangen.de.

halal slaughtering in Germany.[14] Meanwhile, some devout Muslims have released booklets on the question of ingredients in food, and relevant lists of acceptable foods have been made available on websites.[15] Also, an open discussion is taking place among Muslims on how to handle the issue of alcohol free beverages like beer. A further example of the current integration process involves Muslim responses to the German habit of having a Bratwurst (roasted sausage) while shopping or going out on the town. Typically, this food is made of pork. Recently however, a young Turkish man offered *halal* Bratwurst for sale in the street for the first time, and Muslims began to buy his sausages. Such developments make it less clear to an observer who in the street is a Muslim or who is not, as many Muslims are living lives which are relatively indistinguishable from those of ordinary German citizens.

Unlike in rural societies, where everyone sees how their food is produced, a citizen in an urban environment goes to a food market, where he or she buys, for instance, steak or bread without knowing how it is made. An Islamic consumer has to put trust in those who have produced the food. In order to gain the consumer's confidence some firms engage a Muslim whose job it is to certify that substances and ingredients are *halal*. Thus some entrepreneurs specialize in producing *halal* certificates for German businesses and industries, even when a product (for example, bread) is exported. Because the rules differ in some cases, the firms have founded a group in which they discuss which products, which slaughtering methods, and which ingredients should be judged as *halal* or not *halal*.

9.6.2 Financial Issues Under **Shari'a**

The banking sector is also engaged in efforts to cope with *Shari'a*-based expectations in the area of finance in order to attract Muslim consumers. From time to time a newspaper will publish an article on this subject, but there is little general debate, and *Shari'a*-compliant mortgages are not readily available in Germany. Most non-Muslim experts tell the interested sector of the public that there is no chance for a broader market for *Shari'a*-compliant banking facilities and products to develop in the financial sector. Nevertheless, a few financial institutes are trying to access international *Shari'a*-compliant financial markets to better serve Muslim consumers.

Kilian Balz, a prominent German lawyer and scholar of Islamic finance, has compared the burgeoning development of *Shari'a*-compliant financial instruments in the UK with their slow progress in Germany. The reasons he notes for this disparity involve cultural and demographic differences not only between the UK and

[14] Balz writes, however, that "the German Animal Welfare Act [*Tierschutzgesetz*] provides for an exemption if it is required by the needs of members of certain religious communities 'whose mandatory rules require ritual slaughter'" (Balz 2007: 563). It is not known how often this exemption is exercised, but apparently it is not frequent in Muslim communities.

[15] Examples of these websites are: http://myhalalcheck.misawa; http://MuslimMarkt.de; http://vzbv.de.

Germany, but also within the Muslim communities in Germany. He also points out important differences in attitudes in Germany compared to the UK. Notable as well is the fact that there is a larger market in the UK because of the presence there of a proportionally larger middle and upper class group of Muslims.

> In the German setting, one often encounters the argument that the development of Islamic retail products is neither required nor desirable and may even be harmful. The latter opinion is particularly prominent among those who have difficulty viewing Germany as a multi-ethnic and multi-religious society and who, instead, clearly advocate a 'hegemonial culture' (*Leitkultur*). From this perspective, there is no need to foster the pluralization of the financial system by offering products targeting Muslims and other ethnic and religious minorities. In contrast, the financial system should be one and the same for all in order to prevent the development of so-called parallel societies (*Parallelgesellschaften*). Financial services, from this perspective, are one means of promoting integration by compelling people to adapt to the mainstream of society. (Balz 2007: 557–558)

Nevertheless, Balz advocates in favour of the development of financial instruments to serve Muslims in Germany. He claims that banks should view this from a straightforward business perspective because there is great market potential for such things as *Shari'a*-compliant mortgages and other financial products. He argues that such developments would comport well with the current marketing strategy of the German financial services sector to serve various niches in the retail consumer market and the German government's policy of 'financial inclusion' that would grant wider access to financial services for all German citizens (Balz 2007: 553–554). Balz then explains in some detail how *Shari'a*-compliant financial services could be developed, stressing that they need to take into account the legal structure of Germany but also the values of the subcultures of the Muslims within German society. He discusses ways to overcome the 'double transfer taxation' problem of developing *Shari'a*-compliant mortgages, issues raised in providing warranty for vehicles purchased in adherence to *Shari'a* principles, and also examines various ways to handle dispute resolution in the Islamic financial arena in a manner that comports with German law.[16]

9.6.3 The Recent Circumcision Issue in Germany

Controversies have developed on other issues as well. For example, in June 2012 a court in Cologne, *Landgericht*, released, in the case of Muslim boy, a ruling which forbade any form of male circumcision. The judges justified their decision as being

[16] When goods are purchased through a *murabaha* contract, the bank owns the building or the vehicle (for example), even if temporarily. This forces banks to find ways to handle warranty problems for the vehicle and also to pay a transfer tax on property, unless some way is found to avoid this double taxation, as is done in the UK through an exemption explicit in the tax statutes. Balz offered several solutions to both these problems in his 2007 article. Dr Balz also gave a lecture on *Shari'a* financial issues at Harvard Law School while he was a Visiting Professor at the Islamic Legal Studies Program in 2008 (see Balz 2008).

based on reasoning already published, in 2008, by Professor Pufke of the University of Passau (Bavaria). He argued that the child is entitled to the human rights of religious freedom and freedom from bodily harm, and that these rights supersede the parental claims and the claims of a religious community. Islamic and Jewish organizations released protests and asked for a special federal law exempting them from the court's ruling. The European Conference of Rabbis which met in Germany released a declaration telling the public that this ban would have consequences for the Jewish minority in Germany; that it might even lead to another exodus. Such harsh reactions by Islamic and Jewish organizations provoked a media debate in which atheists, pious people, clerics, and laymen participated. Some cultural anthropologists fear that the Islamophobia debates have changed their subject from headscarf to foreskin.

Politicians are however reluctant to intervene. Newspapers reported that members from all parties and even Land ministries had recommended that Jewish and Islamic organizations go to court. Both sides, however, fear that the procedures leading to the *Bundesverfassungsgericht* would not only take years of uncertainty, but that its judges might simply reaffirm the lower court's decision. Such reservations are based on other cases. The *Bundesverfassungsgericht* has always preferred freedom of arts and of speech, protection of animals, and secular education over religious claims.

There are signs that these debates might grow into a European discussion. The Knesset has recently discussed the developments in Germany, and European newspapers have shown an interest in the Muslim assimilation question.

9.7 Concluding Comments

This chapter has attempted to explain the relatively short history of Muslims in Germany, from the perspective of someone who has experienced and participated in that history (the first author), as well as from the perspective of an external observer and student of the developing jurisprudence patterns concerning minority faiths and cultures in Europe and other westernized nations (second author) That history began in the post-WWII era with the influx into Germany of many Muslim workers, particularly from Turkey. This influx has been defined and dealt with over the decades since the war in a number of ways, with the growing Muslim minority being treated initially as invisible or inconsequential, but then, in more recent decades, as a significant challenge to the modern secular German state. As German society was becoming more secular, with its citizens showing less interest in organized Catholic and Protestant churches, many people in Muslim communities were attempting to live their lives according to the edicts of Muslim cultures of the countries whence they came. Conflict and confusion has ensued, including even disagreement with foreign governments such as that of Turkey, as Muslim communities and German officials in Germany's federated political system have experimented with various forms of accommodation of Muslim values and practices.

Formidable efforts to overcome barriers to the peaceful existence of a growing Muslim minority in Germany have been necessary, in part because of the 'moral panic' that has developed in Germany around the meaning and implications of *Shari'a*. Debate continues, concerning the place and role of Muslims in Germany, and the ways that some elements of the *Shari'a* might be admitted as a part of ordinary life for Muslims in Germany. Such changes will be difficult for many Germans to accept, however. The recent debate over circumcision is a sign that significant controversy still is occurring over elements of Muslim culture. Similar conclusions can be drawn concerning controversies over access to *halal* foods and over how to accommodate Muslim values within the financial sector. Nonetheless, if the experiences of some other European nations, such as the United Kingdom, are a guide, we can expect to see progress, albeit slow, in integrating values and practices that accommodate the Muslim minority in areas such as finance and food preparation, as well as allowances being made for Muslim values to be implemented, at least partially, in domestic matters. Such a prediction must be tempered, of course. If other catastrophic events, such as more bombings, are attributed to Islamic extremists this would fuel the moral panic that exists in some European nations concerning Islam. Also, development of a more virulent form of secularism as a guiding political philosophy would hinder the integration of Muslims into German society.

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Chapter 10
Between the Sacred and the Secular: Living Islam in China

Yuting Wang

10.1 Introduction

The compatibility between Islam and the Chinese civilization is a contested topic (Dillon 1997; Gladney 1996; Israeli 1978; Lipman 1997). Living in the midst of an overwhelming *Han* Chinese population, Muslims who submit to *Allah*—the one and only God—meticulously carry out their religious rituals, and maintain a pork and alcohol free diet, are indeed, in a sense, "strangers in a strange land" (Andrew 1921: 12). The Confucian teachings and traditions permeate all aspects of traditional Chinese society, making it highly problematic for Muslims to live in accordance with the dictates of *Shari'a*, or the Islamic law. The bitter history of Muslim rebellions during the late Qing Dynasty attests to the unpleasant experience of coexistence (Israeli 1978).

China's Muslims are not alone in having to cope with the reality of living under non-Islamic rules. The historical debate on the definition of *Dar-al-Islam* and *Dar-al-Harb* has become increasingly relevant in a shrinking world, as more and more people now frequently travel across borders and communicate over the Internet. The watershed events of 9/11 have presented further challenges for Muslims worldwide. Although lessons learnt from the past remain valuable, it is beneficial to take into consideration these new developments in order to truly understand the situation of Muslims in China today. Many of the new challenges China's Muslims confront result from China's great transformations in the last three decades and the growing impact of globalization. Meanwhile, new opportunities also arise as China seeks to strengthen its economic ties with the Islamic world, especially the oil rich countries on the Arabian Peninsula (Davidson 2010).

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It is true that the religious freedom granted to Muslims is limited in China; nevertheless, Muslim minorities have not only survived in Chinese society, but have also been successful in reconciling the mandate of Islamic law to their local cultures (Gladney 2003). Muslim and non-Muslim Chinese have enjoyed peaceful relationships in general. Although China continues to maintain paramilitary control in Xinjiang, fearing for Uyghur separatist movements (Chou 2012), Muslims in the rest of China are little affected. In fact, despite its highly restrictive policies on religion, China again dropped on the Social Hostilities Index in 2012 released by the Pew Research Center's Forum on Religion and Public Life. Measuring acts of religious hostility by private individuals, organizations and social groups, the index shows that incidents such as mob or sectarian violence, harassment over attire for religious reasons, and other religion related intimidation or abuse are much less likely to happen in China than in countries like the UK and the United States (Pew Research Center 2012).

Moreover, as the negotiation between China and the Gulf Cooperation Council to establish a Free Trade Agreement accelerates following the 6 day visit of the former Chinese Premier, Wen Jiaobao, to Saudi Arabia, Qatar, and the United Arab Emirates in April 2012, China's Muslim entrepreneurs and Islamic resources become important assets in enhancing the economic collaborations between the two partners. The recently established Inland Opening-up Pilot Economic Zone in Ningxia Hui Autonomous Region is a clear manifestation of the growing importance of China's Muslim concentrated north-western region.[1] As a result, the Chinese government is likely to continue improving the conditions of its Muslim minorities so as not to jeopardize its growing influence in the Persian-Arab Gulf region.

In this chapter, I argue that the increasing transnational ties between China's Muslim communities and the Islamic world and China's priority of economic development are important factors shaping China's policies toward Muslim minorities. The Chinese state, although it will continue to closely monitor its religious communities, is unlikely to turn the clock back to the time of the Cultural Revolution. The situation of Muslims in China will improve rather than deteriorate. The growing attention from Chinese legal scholars in the 1990s to folk law and customary law has also allowed Chinese Islamic theologians to further elaborate their understanding of *Shari'a* and implement it under the Chinese national legal system (Li 2011; Ma 2011). As a result, *Shari'a* will continue to play important roles within China's Muslim communities—as informal moral doctrines rather than formal legal code—in regulating the conduct of individual Muslims and conciliating internal conflicts, filling in the space that the government has frequently failed to reach. To arrive at this conclusion, I shall first recount the history of Islam in China and analyze some of the historical conditions that led to various forms of adaptation of Muslims to their host society. Then, I will look into the shifting terminologies used in the discourses on Islam and Muslims in China, which reflect the intricate relationships between Islam and the Chinese state and facilitate our discussions of the

[1] See press release at http://news.xinhuanet.com/english/china/2012-09/12/c_123708278.htm

practice of *Shari'a* within China's Muslim communities. Finally, I present the case of Yiwu to consider the impact of China's rapid economic development on its Muslim minorities and to shed light on the possible approaches Muslims may develop in response to new challenges and opportunities.

10.2 A Brief History of Islam in China

Today, the number of Muslims in China has reached about 23 million (Poston et al. 2011), the majority of whom are found in China's north-western and south-eastern frontiers, while the rest are scattered throughout China. In spite of the common assumption of homogeneity of the Muslim population in China, the diversity among Muslim Chinese has been well documented (Gladney 1996). Although Muslims in China have undergone acculturation throughout time, the levels of adaptation remain widely different across regions and Islamic sects. There are pious *Ahongs*[2] (Imams), as well as communist cadres. Some pray five times a day, while some do not mind drinking alcoholic beverages. People living in closely-knit Muslim villages in the north-west tend to have better *jiaomen* (教门), or a higher level of religiosity, compared to those who are scattered in urban areas. Therefore, the implementation of *Shari'a* within China's Muslim communities has never been a uniform process.

Islam in China has a surprisingly long history, spanning more than 1,400 years. Its presence in China was largely due to commerce and trade enabled by the sea routes of the spice trade and by the overland Silk Road. During the Tang and Song dynasties (from the middle of the seventh century to the end of the thirteenth century), the seafaring Arab and Persian merchants sailed from the Red Sea and the Persian Gulf to the southern tip of India, the Bay of Bengal, the South China Sea, and finally to China's south-east coasts, and the caravaniers from Dashi and Bosi[3] traversed the rough terrain between West Asia and inland Chinese cities. These merchants brought their religions and cultures to cities such as Chang'an (the capital city of the Tang Dynasty), Yangzhou (an inland port city), and Quanzhou, Changzhou, and Guangzhou (the south-eastern coastal cities). Many of these Arabs and Persians were Muslims. As they settled down in these cities, they built mosques and established residential communities in the Middle Kingdom. However, these first waves of Muslims were mostly sojourners, who did not have the intention to integrate into Chinese society (Lipman 1997). Although many ended up settling down permanently and marrying local women, Muslims remained "foreign guests" and stayed "out of" Chinese society until the Ming Dynasty (Israeli 1978: 99).

During the Yuan Dynasty (1271–1368), a large number of Muslim soldiers from Central Asia were brought by the Mongols to help conquer the *Han* Chinese. After

[2] '*Ahong*' comes from the Persian word '*Akhun*' meaning 'Imam' in Arabic.

[3] These are terms used to refer to Arabia, Persia, and the broad Central Asian regions in the Tang Dynasty (618–907 CE).

the war many of the demobilized soldiers were stationed in the middle and lower Yellow River areas and later developed into farming communities. Some were relocated to the remote north-western and south-western regions, spreading into the heartland of Islam in contemporary China. It is worth noting that under the rule of the Mongol Empire, Muslims, categorized as *semu*—second in the racial hierarchy following the Mongols—ascended to important positions, assisting the Yuan rulers to govern the vast land of China (Dillon 1999; Lipman 1997). It was also during this time that Muslims in China became widely known as *Huihui*, or *Hui*, suggesting that the process of acculturation and integration had taken place gradually, as interracial marriages increased and Muslim villagers adapted to the sedentary farming lifestyle. Trade and commerce flourished during the Yuan Dynasty, which had an enormous territory stretching from the east coast of China to the Mediterranean. The constant contact with the rest of the Muslim world through the trading routes ensured that Muslims remained strong in their religious identity. Although those residing in south-eastern coastal cities gradually left their ancestral heritage behind, the relatively secluded mosque-centered communities in the north-west, south-west, and central China had successfully resisted the pull of assimilation (Dillon 1999).

However, responding to enormous local pressures, Muslims were forced to undergo a process of acculturation during the Ming Dynasty (1368–1644). They still remained separate from the *Han* majority due to their unique religious practices, such as their mosque-centered lifestyle, their marriage and burial rites, their use of languages, and their lack of ancestral worship, which was considered of the utmost importance to the Confucian Chinese. However, the appearance of Islam had become definitively Chinese as Muslims adopted Chinese names, switched to Chinese language in their daily lives, discarded their traditional clothes, and built their mosques in the dominant Chinese architectural style. Most impressively, a group of *Hui* intellectuals, well conversant in Confucian language, had attempted to reconcile the two seemingly incompatible civilizations—Confucianism and Islam (Liu 2006). In their groundbreaking works, *Hui* Confucian thinkers, such as Liu Chih and Wang Taiyu, linked Chinese mythology to the history of Islam and reinterpreted the Islamic concepts using indigenous Confucian terms, seeking to revive the tradition of Islam among Muslims who had distanced themselves from the *Tao* of Islam as a result of Sinification (Murata 2000). Largely overlooked in the past, their endeavors have been reexamined and extolled by contemporary scholars in an attempt to mend the worsening relationship between Islam and the West.[4]

Ironically, such efforts to systematically reconcile the differences and possibly create a syncretic religion may have helped to expose the unbridgeable gap between Islam and Confucianism and contributed to the uprisings during the Qing Dynasty (1644–1912) (Israeli 1978). Under the influence of Sufi movements, the loyalty to

[4] In recent years a number of important events have been dedicated to the dialogues between Confucianism and Islam, such as the panel attended by Seyyed Hossein Nasr and Tu Weiming in 2009 sponsored by the Matheson Trust for the Study of Comparative Religion (see http://themathesontrust.org/library/dialog-islam-confucianism).

Shaykhs (the leaders of Sufi orders) and the formation of Sufi *menhuan*,[5] enabled the expansion of Muslim networks all over the north-west. It also allowed the local elites to control a substantial amount of property and gain significant political and economic potential that gave rise to Muslim warlords in the early twentieth century (Guan and Ma 2010). Although the small renaissance Islam experienced during the Republican era may give us the impression that Islam had developed a separatist tendency promoted by the writings of Islamic intellectuals at that time who had apparently abandoned those earlier Muslim literati's efforts at reconciliation (Israeli 2002: 99–112), the history of the north-western warlords suggests the opposite. During the turmoil in the first half of the twentieth century, the Muslim warlords in the north-west, instead of challenging the authority of central governments, mastered the skills in negotiating the complex relationships between the Muslim presence and the non-Muslim Chinese ruling class, suggesting that these Muslim elites had become fully integrated into mainstream Chinese society and political culture and were adept in dealing with both manifested and latent rules in the Chinese state. Those influential warlords, such as Ma Bufang, Ma Fuxiang, and Ma Hongkui, all adhered to the principles of the separation of religion and politics when articulating their political and social visions. They advocated the importance of neutrality in dealing with the conflict arising from the *menhuan* system and promoted the modernization of *Hui* people through secular and religious education (Shi 2006).

Following the founding of the People's Republic of China in 1949, the Communist Party (CCP) promptly applied restrictive policies to regulate all religious activities and sought to systematically weaken the roles of religion in everyday life so as to eventually replace religion with Marxian materialistic atheism. Although granted legal status as one of the five official religions in China, Islam was substantially suppressed during the socialist transformation that forcefully reduced the scale and venues of religious activities (Yang 2004). During the Cultural Revolution, all religious activities were eradicated. Mosques were shut down throughout the country. Any form of participation in religious activities, such as worshipping, fasting, and donning of religious garments, was forbidden and severely punished. In some places, Red Guards turned mosques into pig farms to humiliate Muslims, as abstinence from pork has served as an important identity marker for Chinese Muslims.

After the Cultural Revolution, the constitutional right of religious freedom was gradually restored. 'Normal' religious activities are now protected under party supervision. Although the freedom is limited, it was still a positive improvement on the past. Mosques were repaired and reopened; confiscated properties were returned to the mosques; the connections between Muslim communities and the Islamic world were reestablished, allowing more Muslims to study abroad and perform *Hajj*. The impetus of economic development further contributed to CCP's loosening of control over religion. Aiming at promoting joint ventures and attracting foreign direct investment, the local governments adopted the innovative and pragmatic strategy known as 'Building the religious/cultural stage to sing the

[5] '*Menhuan*,' meaning the 'leading' or 'saintly' descent groups, is a unique organizational structure of Muslim communities in China, influenced by the Sufi order.

economic opera.' Although this strategy mostly benefited Buddhism and Taoism, as these are seen by local officials as indigenous and therefore less harmful compared to Christianity and Islam, which are more likely to raise suspicion of foreign influence, the central government's ambitious plan of opening up the north-western regions is now pushing China's Muslim communities to the front stage. The significant presence of Muslims and the rich repertoire of religious resources in the north-western provinces, such as Ningxia, Guansu, and Qinghai, make it substantially easier for the Chinese to build meaningful social and cultural ties with the Islamic world—especially the Gulf countries—to strengthen, deepen, and expand the mutually beneficial economic cooperation.

However, it would be erroneous to assume that the government's religious policy has been applied evenly and uniformly throughout China. The persistent threat of separatist movements in Xinjiang province has led to heavy government surveillance of religious activities. For instance, Chinese Muslim officials and students under the age of 18 in Xijiang province are still not allowed to fast during the holy month of Ramadan. In contrast, in some newly formed Muslim communities in China's south-eastern regions, religion is deemed as a harmless and useful tool that benefits the local economic development. Islam has thus gained a stronghold in some south-eastern coastal cities, reminiscent of the once thriving Muslim communities in the ancient port cities during the Song and Yuan dynasties. In most cases, the local governments have adopted a laissez-faire attitude toward ethnic affairs, creating a gray space in which *Shari'a* may be practiced as a form of folk law or customary law to resolve marital and family problems, business and property disputes, and so on.

10.3 Politics of Muslims Identities in China

In China, things related to Islamic subjects and Muslims are known as *qing zhen* (清真), often translated as 'pure and true,' symbolizing two important aspects of Muslim identity within China's complex social, cultural, and political contexts. *Qing*, meaning 'pure' or 'clean,' represents the significance of 'ritual cleanliness and moral conduct' in Islam, while *Zhen*, meaning 'true' or 'authentic,' points to the very question of legitimacy and authenticity of Islam as a way of life in a predominantly Confucian society (Gladney 1996: 13). The concept of *qing zhen* embodies the flexibility and originality of China's Muslims in interpreting their own understanding of Islam within the Chinese linguistic context. It is the very concept of *qing zhen* that helps them to draw boundaries between themselves and the *Han* majority and maintain their distinctiveness, thus making it possible to survive as a religious minority in a rather assimilative environment (Gladney 1996).

On the other hand, the term *Huihui* or *Hui* has also been widely used since the thirteenth century and became institutionalized by the state to label people who follow the teachings of Islam, or *Hui Jiao* (the religion of *Huihui*). During the early twentieth century, *Huihui* was recognized by the national leader, Sun Yat-sen, as

one of the 'five races' making up a unified Chinese nation, while the Stalinist categorization of *Hui Zu* was created and implemented in the early 1950s under the Communist rule to strengthen the newly founded People's Republic. The term *Hui Zu* is narrower in scope than *Huihui*, referring to the Chinese-speaking Muslims who are scattered throughout China and are otherwise quite similar to the *Han* majority, whereas the non-Chinese-speaking Muslims were distinguished into nine different nationalities who are mostly concentrated in the north-western provinces, including Uyghur, Kazak, Uzbek, Tajik, Tatar, Kirgiz, Salar, Dongxiang, and Bao'an. Among these ten nationalities officially recognized as Muslims, *Hui* is the largest group in terms of both number and influence, comprising almost half of China's Muslim population (Poston et al. 2011). Given that Uyghur, the second largest group, is mostly concentrated in Xinjiang province and is Turkic-speaking, with distinctive physical features compared to the *Hui*, some scholars insist that the English term 'Chinese Muslims' should be exclusively reserved for the *Hui*. In any case, the concept of *Huihui* and the creation of *Hui* nationality have successfully reinforced the ethnic characteristics of Islam in Chinese society. Despite its universality, Islam has become virtually synonymous with the 'religion of *Hui*,' making it an ethnically bounded religion in China. The localization and indigenization of Islam in China as *Hui Jiao*, or the religion of *Hui*, is compatible with the Marxian understanding of the fate of religion in modern society and is thus welcomed by the Community Party as an effective measure to contain the growth of Islam.

Throughout the millennia, both non-Muslim Chinese and Chinese Muslims have used various terms to refer to Islam and its believers, such as the above mentioned *qing zhen* and *Hui*, or *Huihui*. However, it was not until the establishment of the People's Republic of China that *Yisilan Jiao* (伊斯兰教) and *Musilin* (穆斯林), the Chinese transliterations of 'Islam' and 'Muslim,' entered the official vocabulary. Following the founding of the People's Republic in 1949, the Communist government implemented its nationality policy and established a number of autonomous regions at the provincial, prefectural, county, township, and village levels in Muslim concentrated areas, appointing Muslims from the ten ethnic groups as administrative heads of the local governments. The inauguration of the Islamic Association of China took place on 11 May 1953 in Beijing, formally acknowledging the legitimacy of Islam as one of the five official religions recognized by the party-state. The Association's missions include assisting the central government to implement its policy of religious freedom, preserving and passing down the tradition of Islam, unifying Muslims in participating in the construction of the motherland, maintaining world peace, and collecting and correcting historical data on Islam (Ma 2006).

The Chinese Communist Party's intentional adoption of the Chinese transliteration of Islam (*Yisilian Jiao*) and Muslim (*Musilin*) and its handling of *Hui Zu* as a separate domain distinguished from the traditional usage of *Huihui* have far-reaching implications not only in the decade leading up to the Cultural Revolution, but also during the reform era following the disambiguation of the Gang of Four. The subtle differences among these terms reflect the Marxian rejection of religion, the enduring stereotype of Islam as a foreign religion incompatible with Confucian social etiquette, and the powerful unitarian Chinese state in relation to the status of

religion in Chinese society throughout China's thousands of years of history. However, it is important to note that China's Muslim communities have also internalized these labels and many have actively promoted some over others. For example, intellectuals and urban *Hui* have frequently distanced themselves from the term *Huihui* for its rural connotation (Gladney 1996). Moreover, as communications and exchanges between China and the Islamic world increase since the implementation of the Reform and Opening-up policy, more and more *Hui* people now consciously use *Yisilan Jiao* (Islam) and *Musilin* (Muslim) to draw the line between religion and ethnicity so as to return to the 'orthodox Islam,' reestablish the legitimate status of Chinese Muslims within the global *ummah*, and draw converts from the *Han* majority and other ethnic minorities.

10.4 Variations in Acculturation and the Practice of *Shari'a* Among China's Muslim Communities

Not only does the shift in terminology epitomize identity politics in China, it is also essential in our discussions of the status and application of *Shari'a* in China's Muslim communities that are far from homogenous. Denoting 'path to the watering place,' *Shari'a* is a set of moral codes, as well as a legal system based on the Qur'an and *Sunnah*. Embodying religious beliefs, moral standards, ways of thinking, social values and ideals, *Shari'a* governs all aspects of a Muslim's life from birth to death and to the life hereafter. To be a pious Muslim, one must submit his or her will completely to *Allah*—the one and only God—and obey the divinely ordained law. The process of modernization and secularization created tensions between *Shari'a*, the Islamic law, and the secular legal systems that have gained domination through the colonial expansion of western nations. The practice of *Shari'a* is often deemed as antagonistic to the separation of religion and state, and thus anti-modern in nature. Negative sentiment toward *Shari'a* reached a new height in the last decade following 9/11, linking it to Islamic extremism and militant Islam. However, the historical development of *Shari'a* shows that *Shari'a* is not inherently anti-modern. Its divine status and immutability should not be confused with the flexibility in the interpretation and application of *Shari'a* within local communities that are shaped by widely varying social, cultural, and political forces (Anderson 1959; Coulson 1964).

Surrounded by an overwhelmingly large non-Muslim population since their arrival in China in the middle of the seventh century, China's Muslims have endured incredible hardship to maintain their distinctiveness and resist the danger of drowning in the Confucian sea. From the onset of their journey to China, Muslims' total and unconditional submission to the will of *Allah* met a huge challenge stemming from the Confucian understanding of the hierarchical relationships among human beings in society and its humanistic concerns, or what Henry Fingarette (1972) called 'the secular as sacred.' In addition, when Muslims arrived in the Chinese imperial court, the Chinese empire had already developed an impressive bureaucratic system to manage its expanding territory and the increasing diversity among its

subjects. The Chinese state has always had the upper hand and firmly controlled religion. Although scholars have not reached consensus on whether Confucianism is a religion or a philosophy, it is clear that it has never triumphed over politics (Zhuo 2008). As an ideology and a moral system, Confucianism serves, rather than dictates to, the imperial power, ensuring that no religion or other ideology can infiltrate politics. It was always the emperor, or the son of heaven (天子), imbued with divine power, who had the ultimate authority to stipulate and interpret law. The Chinese empire's fully-fledged bureaucratic system and its powerful Confucian value system were fully capable of accommodating Muslims and their religion. In fact, Muslim merchants and other 'foreign guests' who arrived in China's capital city of Chang'an and the south-east coastal cities of Quanzhou, Changzhou, and Guangzhou during the seventh and eighth centuries were granted extra-territorial privileges, which demonstrated the confidence of Chinese rulers. *Shari'a* was allowed within the boundaries of *fanfang* (蕃坊)—the residential district of foreign guests—where *fanke* (蕃客)—foreign guests—resided and worked, under the condition that the application of such law would not come into conflict with the law of the emperor (Ma 2006).

By the late Ming and early Qing Dynasties, as Muslims adopted Chinese names and customs, Islam had gradually become localized and ethnicized. The influence of Muslim communities had also subsided as their connections with Central Asia and the Middle East were cut off, and some Muslims had gradually forsaken the tenets of Islam, becoming no different from the *Han* people. During the early Qing Dynasty, however, another trend also emerged as Sufism was introduced to the Chinese Muslims through activities along the reopened Silk Road, transforming the traditional organizational structure, *Gedimu*,[6] into *menhuan*[7] (Gladney 1996). The ambition of Muslims to revive their religion and their active involvement in reinterpreting Islam using Confucian terms and concepts created unease within the ruling Qing elites. Conflict within Muslim communities fueled regional rebellions against the Qing imperial rule. In the process of cracking down on these uprisings, Islam was banned and in some cases Muslims were persecuted. Hatred subsequently developed between *Hui* and *Han*, threatening the very existence of Islam.

As Muslims were being pushed off to remote areas and forced to relocate, *Shari'a* turned inward to regulate the everyday life and internal affairs of Muslim communities, while the state law was strictly followed to secure the safety of Muslim communities in the foreign land. Particularly, during the Republican era, Muslim

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[6] '*Gedimu*' is from the Arabic word '*qadim*,' meaning 'old.' *Gedimu* follows the *Hanafi* school of Islamic law of *Sunni* Islam. In China, *Gedimu* is found in relatively independent *Hui* villages. Each village is centered around a single mosque headed by an itinerant *Ahong* (or Imam), who travels among multiple mosques in the area.

[7] According to Michael Dillon, '*menhuan*' is equivalent to the Arabic term '*silsila*,' "referring to the chain of hereditary Shaykhs (Sufi masters) who trace their authority back to the Prophet Mohammad or his descendants" (Dillon 1996: 21–22). The Chinese Communist historiography has emphasized the 'feudal' nature of the *menhuan* (Jin 1984), while western scholars are more intrigued by its non-religious political nature played out in Muslim rebellions in the north-west at the end of nineteenth century (Kim 2004).

warlords—usually both social elites and religious leaders—in China's north-western regions voluntarily submitted to and cooperated with the central government. They were clearly aware of the importance of such an approach in securing the legitimacy of Muslim communities within Chinese society (Guan and Ma 2010). This strategy has been carried well into the Communist regime, reinforced by the Chinese Communist Party's policy toward ethnic minorities and the establishment of administrative autonomous regions. *Shari'a* was applied in several cases of adultery and in business disputes in the mid 1950s in Lanzhou city, the capital of Gansu Province in north-west China. Within the boundaries of *Hui fang* (villages or urban residential quarters), Imams (the religious leaders of the community), in consultation with the *majilis* and following the protocol of *Shari'a* in collecting evidence and locating witnesses, played the role of arbitrators (Ma 2011).

Despite the unfavorable attitudes toward Islam and the restrictive policies over any kind of religious activity under Communist rule, Chinese Muslims have managed to implement *Shari'a* as a way of life whenever possible and have been flexible and original, in many cases, in pushing the boundaries. *Shari'a* complements rather than challenges the existing social order. The ongoing Prohibition of Alcohol Campaign initiated by local Muslims in Shadian area of Yunnan Province makes an important case of reference. Beginning in 2009, volunteers in Shadian, a small *Hui* autonomous village in south-west China of around 5,000 residents, started imposing a village-wide ban on liquor sale and consumption. Drawing on religious scripture and aligning with CCP's national campaign to reduce crime and violence, volunteers effectively mobilized local officials, religious leaders, business owners, as well as ordinary villagers, to support their effort to reduce alcohol-related violence. The positive impact of this religious movement, of a return to a pure and true lifestyle free of substance abuse, was publicly acknowledged by the local government officials. Shadian Muslims are praised as an exemplar of patriotic religious and ethnic minorities who are truly devoted to building a 'harmonious' society. In fact, according to a number of personal accounts on various social media websites, the anti-alcohol team was backed by the local police. With consent from the local police station, the non-Muslim residents in Shadian were either persuaded to stop consuming alcohol or were asked to move to another village. Substantial controversies did arise questioning the apparent role religion plays in the public sphere in a secular country, especially following volunteers' searches of both *Hui* and *Han* households for alcohol. However, the fact that there were no official reports whatsoever on these concerns toward alcohol prohibition in Shadian suggests that extra-territorial rights were granted in this case.

The extra-territorial rights enjoyed by *fanke* (foreign guests) within their residential quarters (*fanfang*, 蕃坊) since the Tang Dynasty, and the self-governance and self-determination principles granted by the CCP reflect the Chinese way of dealing with religion both in ancient times and at present. Even for Muslims scattered in urban areas, *Shari'a* is understood as the customs of the *Hui* people and its practice is thus allowed to a certain degree. However, it is vital to acknowledge the fact that it is only when Islam exists within the boundaries of *Hui* nationality (and of the other nine previously listed nationalities) that *Shari'a* as a moral code can manifest

itself as a way of life and the foreign characteristics of Muslim minorities can be tolerated. Thus, to understand the peculiar situation of Chinese Muslims, it is imperative to apprehend the intricate relationship between religion and the state in China and the changing status of Islam in Chinese society throughout history. It is also constructive to view the Muslim communities in China not as a static historical product but as a constantly changing social organization shaped by the force of globalization.

10.5 Islam and the State in China

To further understand the status of Muslim communities in China and the practice of *Shari'a* within Muslim communities, one must first recognize that Islam is but one of the institutionalized religions that coexist with all sorts of Chinese folk beliefs and practices, which are often defined as 'superstition.' Chinese Confucian society has the tendency and enormous capacities to tolerate and absorb different ideological systems, including Islam, as Chinese are highly eclectic when it comes to religions (Yang 1961). Islam has never been singled out to endure persecution and oppression carried out by the state. In fact, it was tolerated throughout most of its history in China. The brutally crushed Muslim rebellions during the mid-nineteenth century in Shaanxi, Qinghai, Gansu, Xinjiang, and Yunnan should not be seen as a particular Muslim problem. Muslims in Central China, such as in Henan province, did not revolt, nor were they affected in any way by the rebellions, and the Qing armies spared those who did not rebel against the imperial court in Yunnan (Dillon 1999). After all, it was the Muslim elites who helped the Qing general Zuo Zongtang to annihilate the Muslim rebels (Kim 2004).

Moreover, the tension between *Hui* and *Han* reported in mainstream media is usually not the result of unfavorable state policies toward the *Hui*; rather, it is more likely caused by personal grudges fueled by ethnic stereotypes and religious zeal (Ma 2002). During the Republican era and Communist regime, Islam has, in fact, been explicitly or implicitly approved as the customs and traditions of ethnic minorities and is considered important in the public discourses promoting the unity of a multi-ethnic Chinese society. CCP had no intention to eradicate Islam in particular, except during the Cultural Revolution when all religions were oppressed.

The increasing frequency of violent confrontations between the Chinese state and Uyghur separatists in Xinjiang Uyghur Autonomous Region since the 1990s, however, has drawn international attention to China's oppressive policies toward religious minorities—in this case, Muslims—justified within the global anti-terrorism rhetoric. The fact that Uyghur separatist groups have gradually become deeply embedded in the intricate al-Qaeda networks has given the Chinese government legitimacy to implement heavy security measures and exercise tight controls on religious activities in Xinjiang, where the influence of Islamic extremism has grown substantially in recent years.

Bordering some of the world's most precarious and volatile regions, including Pakistan, Afghanistan, and the central Asian countries, Xinjiang is China's frontier in its own 'War on Terror.' Occupying one sixth of China's landmass, Xinjiang is of the utmost strategic importance to Beijing. It boasts rich natural resources and is home to 13 ethnic groups, the largest being the Turkish-speaking minority, Uyghur. Amid the turmoil of the early twentieth century, Xinjiang enjoyed intermittent independence until 1949. This historical period has played an important role in shaping Uyghur nationalistic discourses. However, the Chinese government has repeatedly claimed Xinjiang as an 'inseparable part of the unitary multi-ethnic Chinese nation' since the third century BC, and none of China's neighbors seem to support the activities of the Uyghur separatists (Bhattacharji 2008). In fact, China's counterterrorism policies have gained much support in the West, especially after the riots in Urumqi in July 2009, when it became apparent that the ties between Uyghur separatists and al-Qaeda were no longer hypothetical (Potter 2013).

Xinjiang has undergone dramatic transformations since 1954, when Xinjiang Production and Construction Corps began ambitious agricultural and infrastructural projects. The influx of migrant workers from all over China in the last several decades has profoundly shaped Xinjiang's physical and cultural landscape. The number of *Han* Chinese in Xinjiang has increased from less than 7 % of the population in 1940 to 40 % today, making them the second largest group after the Uyghur, who comprise about 45 % of the population. This demographic change dilutes Uyghur culture and identity. Economic disparities further exacerbate ethnic frictions, which are often counted as the result of practices in education and employment which are discriminatory toward the Uyghurs. The intertwined nature of religion (Islam) and ethnicity of the Uyghur Muslims in Xinjiang further legitimizes the use of religious sources to address deeply rooted social problems that plague Chinese society at large, particularly, in the last three decades, the widening gap between the rich and the poor. The growing influence of Islamic fundamentalism in Xinjiang promotes anti-state activities, which, in turn, validates the Chinese government's paramilitary control of the region. Responding to the interwoven Uyghur nationalism and religious extremism in Xinjiang with heavy policing and repressive religious policies intensifies antagonism and fertilizes the ground for radicalization. The situation in Xinjiang is extremely delicate and worrisome.

Nevertheless, the Chinese government has generally been more tolerant towards Muslims outside Xinjiang and, particularly, towards *Hui* Muslims—the 'good' Muslims who have no intention to ally with the Uyghur separatists (Wang 2013). We must not forget the general relationship between religion and the state throughout the millennia of Chinese history. Depending on the definition of religion, Confucianism may be considered a state religion that was combined with the powerful Chinese state to govern its vast land and massive population. However, the relationship between Confucianism and the Chinese state cannot be equated to that of the church–state relationship in medieval Europe, where the church dominated the state. In Chinese dynasties, Confucianism serves the state; the emperor is the son of heaven, endowed with power as the head of the state and the 'Pope' of his Confucian religion. If Confucianism is not understood as religion, it is still evident that no religion has ever dominated politics in Chinese history. Nor was there the

modern sense of separation of religion from politics, as belief in the supernatural was infused in Chinese political and social institutions (Zhuo 2008).

In many ways, the concept of religion is a modern construct in China, where "the religious, the political, and the social were not clearly distinguished before the twentieth century" (Goossaert and Palmer 2011: 2–3). The Chinese state, especially in contemporary China, is an "oligopoly" when it comes to its policy toward religions, both its indigenous traditions and foreign imports (Yang 2012: 159–166). Even when Confucianism was the ruling ideology, the state still recognized the legal status of more than one religion, thus it has never had a religious monopoly. Neither has pluralism existed in China, given that the state has always used one religion or ideology to police other religions, resulting in the unequal status of different religions. In Communist China, five religions—Protestantism, Catholicism, Islam, Buddhism, and Taoism—are officially sanctioned and can legally operate within set boundaries, but other religions or certain branches of the official religions are banned or suppressed. Therefore, Muslims are not unique in having to adhere to the state legislation whenever *Shari'a* is in conflict with those laws.

Careful readers of Chinese history are less likely to criticize the post-Mao Chinese Communist Party for being particularly antagonistic to religion. One may even argue that the Communist Party has, to a certain degree, facilitated the growth of China's traditional religions (Laliberté 2011). In the case of Islam, as of other state-sanctioned religions, the majority of Muslims have been allowed to practice their religion freely, albeit within the boundaries of state approved religious sites and the definition of 'normal' religious activities. Throughout my own research on China's Muslim communities, it has become evident that Islam has always been contained within the framework of a religious oligopoly in China. Its status, in fact, has become less ambiguous under the Communist regime. *Shari'a* has remained powerful in regulating religious rituals, individual behaviors, and social relations within China's Muslim communities. What complicates the situation is the variation in the implementation by local governments of CCP's religious policy (for example, the case of Shadian in Yunnan Province contrasts with the much stricter control in Xinjiang province). To further elaborate on the role of local governments and the new situation which has arisen during the last three decades, I will now turn to the case of Yiwu, whose growing Muslim community is reminiscent of the ancient trade diasporas on China's south-east coast, and other similar Muslim communities newly formed on the Pearl River Delta as the result of China's massive internal labor migration and urbanization, which began in the 1980s.

10.6 Migration, New Communities, and Extra-Territorial Rights

In early December 2012 I visited the city of Yiwu, home of the world's largest small commodities market. Situated 300 km south-west of Shanghai, Yiwu was, for most of its history, an impoverished rural town of no significance. It was known as a place of nothing: it has almost no natural resources, nor fertile soil; it is far from the

border and the coast; it has no well-developed agricultural or manufacturing industry. Yet it has managed to put itself on the map and has grown into one of the strongest county-level economies in China. Many use the word 'miracle' to describe what Yiwu has achieved within a matter of three decades since the early 1980s. Despite the dubious status of trade and commerce at the beginning of the reform era, Yiwu's businessmen and businesswomen defied various ideological and structural obstacles and pushed open the market. Protected by the laissez-faire principle implemented by the equally defiant local government officials, Yiwu's merchants quickly established an impressive trading network connecting with China's centers of manufacturing industries and built up a comprehensive inventory that made one-stop shopping possible for foreign companies. Once it had earned the reputation, Yiwu was unstoppable. It soon became the largest trading center of small commodities in China, and subsequently, in the world. Thirty years later, Yiwu's enormous market offers more than 400,000 different kinds of products at incredibly low prices, attracting tens of thousands of foreign business people from all over the world. Thousands of containers leave Yiwu daily to be shipped to more than 200 countries and regions. More than 8,000 trading companies are stationed in the city, contributing to a growing banking industry (Huang 2007). The provincial government granted special privileges to trading companies, making it easier for them to wire money internationally, report customs duties, and receive and ship their containers. Yiwu has achieved a number of unparalleled 'extra-territorial' rights that are rarely seen in other coastal cities.

This is indeed a miracle. What is even more miraculous in Yiwu is the unanticipated formation of a young, yet vibrant, Muslim community. Little has been recorded about Yiwu's Muslim presence prior to 1949, when the Chinese Communist Party came into power. The local yearbook shows that 17 officials of *Hui* origin had worked in Yiwu during the Yuan Dynasty, while there was no record of Muslims during the Ming and Qing Dynasties or during the Republican era. Muslims were almost non-existent during the early years of the People's Republic. According to official population registration records, there were only two *Hui* people in Yiwu in 1953. The number increased only slightly to 11 in 1964, and 19 in 1982 (Ma 2010). Located in the predominantly *Han* territory and surrounded by mountains, Yiwu was not particularly inviting to Muslim traders. Pork was the staple source of protein for the local residents. There was no trace of mosques or anything related to Islam and Muslims.

A large number of Muslims arrived a decade later. In the early 1990s, some *Hui* and Uyghur people were seen near the train station peddling or operating small *halal* restaurants. Toward the end of the 1990s and in the early 2000s, Yiwu had become a well-known center for small commodities, attracting business people from predominantly Muslim countries, including Pakistan, Bangladesh, Afghanistan, and the Middle East and North African regions. The growing presence of foreign Muslims encouraged the *Hui* and Uyghur people who were already in Yiwu at that time to bring their families, relatives, and friends to the city. The shortage of translators of Arabic was supplemented by Muslims trained in mosques and private Arabic schools, as well as returning students from Islamic universities overseas. Equipped by their religious and ethnic capital, these Muslims often found employment in

companies owned by foreign Muslim businessmen. Some of them have managed to cultivate loyal customers, establishing trading companies of their own.

According to data gathered by the Grand Mosque in Yiwu, the number of Muslim residents in Yiwu exceeded 20,000 by 2006, although the number fluctuates due to the nature of business activities (Ma 2010). Most of these Muslims are from Muslim concentrated regions, such as in the north-west (Xinjiang, Ningxia, Gansu, and Qinghai), the south-west (Yunnan), and some central provinces (Henan and Shanxi). Interracial marriages between foreign Muslims and local *Han* people have also become increasingly common. Many foreign Muslims have chosen to settle down in Yiwu, despite the unpleasant and prolonged process of filing for a Chinese green card. Consequently, several Muslim concentrated residential communities have started to form in the city, creating a growing demand for Islamic centers and gathering places.

Some observers have used the term 'new *fanfang*' (新蕃坊) to describe Yiwu's Muslim community, which in many ways resembles the trade diaspora established in Quanzhou, Changzhou, and Guangzhou by the seafaring Muslim merchants who arrived from the Spice Road (Guo 2007). These early Muslim communities, formed in the seventh and eighth centuries, were the result of trade and commerce. At the peak of Indian Ocean trade, splendid mosques were built in these cities. Interracial marriages created converts and the first generation of Chinese-born Muslims. However, as the volume of trade diminished, the Muslim communities also moved away, leaving small isolated groups who would eventually forsake their ancestral faith. Yiwu's sudden wealth and its uncertain future in the global capitalist economy have a significant impact on its Muslim population. Since it has no particular strength in producing high-end products, it is possible that, as the cost of labor in Yiwu increases, Yiwu's market may lose businesses to places that can supply even cheaper labor, such as Cambodia and Vietnam, and thus be forcibly removed from the chain of production and commerce. One cannot help wondering if Yiwu's Muslim community would be able to put down roots and flourish, or eventually disappear just like their ancestors in Quanzhou.

No visitor would fail to notice the glittering sign of Yiwu's Grand Mosque standing on a million-dollar lot on the river bank in the city's downtown business district, where the wealthy reside. Converted from an abandoned factory, the Mosque has been fully renovated to reflect the typical Islamic architectural style. The project cost more than 5 million dollars and is now the center of Yiwu's young and growing Muslim community. It is packed by more than 10,000 worshippers every Friday afternoon. During my short stay in Yiwu, in December 2012, I attended a lecture by an Islamic scholar recently returned to China after completing his studies in Pakistan, and I sat in a panel discussion attended by the community *Ahong*, the above-mentioned scholar, and another well-known Chinese Muslim scholar who now bases his *Da'wa* activities in Yiwu. Also, an exhibition of Arabic calligraphy by a touring Chinese Muslim calligrapher was being staged. I was told by the proud *Ahong* that Yiwu is probably the only place in China where religious events of such high frequency could be held without attracting overt police visits. He added that he enjoyed much more freedom living in Yiwu as a Muslim than in his hometown in the Ningxia Hui Autonomous Region. What is even more impressive is the existence of some 20

Muslim Youth Activity Centers (*Musilin Qingnian Huodong Zhongxin*, 穆斯林青年活动中心) in Yiwu's Muslim concentrated residential areas. These activity centers, clearly marked, using large green sign boards, are usually multifunctional venues serving as gathering places for social events, daily prayers, and other religious activities. The use of the word 'Muslim' instead of '*Hui*' on the conspicuous sign accentuates the importance of shared religion among participants and reflects the diversity within the Muslim community in Yiwu, which would demand the more generic term to build solidarity. It is worth noting that in Guangzhou, a cosmopolitan city on China's south-east coast, the weekly gatherings of a group of Muslims took place in an unmarked unit in a middle-class residential apartment complex.[8] The participants intentionally parked their cars far away from the building so as to avoid arousing suspicion among the non-Muslim residents, who may report any 'unusual' activities in their residential complex to the authorities.

The facts that most Chinese Muslims in Yiwu come from north-western provinces, some are related, and some have attended the same Arabic schools, makes it convenient for them to live in the same areas, thus, in a sense, forming a *Gemeinschaft*. Within the community, informal norms based on Islamic teaching and ethnic cultures play important roles in maintaining group solidarity. Once a residential area gains the reputation of being a 'Muslim place,' it starts to draw Muslim-owned businesses and becomes more attractive to other Muslims, both foreign and domestic. Wu'ai Village is one such place in the city that houses a large number of Muslims. However, Muslims have not gained numerical majority in any residential area throughout the city. In a deregulated housing market, it is almost impossible to form a genuinely residential community without government interference. That is to say, the 'new *fanfang*' is a community based on shared religion and culture rather than geography. In contrast to the historically formed Muslim villages, without a real 'territory' new Muslim communities cannot begin to demand extra-territorial rights. It is, therefore, impossible to implement *Shari'a* as a customary law or folk law within Yiwu's Muslim community in the same manner as it is implemented by their counterparts in Shadian *Hui* village.

Moreover, the future of the new Muslim community in the city of Yiwu is ambiguous. Under the grandeur of the gold-plated façade of the Grand Mosque, the sobering fact is that Yiwu's Grand Mosque is legally defined as a 'temporary worship place.' Since there was no historical presence of Muslims in Yiwu, the local government was not prepared to deal with these new comers. Many officials have little knowledge of Islam and Muslims, let alone an understanding of the connotations of the various terms that have been used in reference to Islam and Muslims in Chinese history. Recently, tensions were built up as the government changed the name 'Grand Mosque of Yiwu' (*Yiwu Qingzhen Da Si*, 义乌清真大寺) to 'Place for Islamic Activities in Yiwu' (*Yiwu Yisilan Jiao Lin Shi Huo Dong Chang Suo*, 义乌伊斯兰教活动场所) despite strong protest from the community members, who at one point even took down the new sign and restored the old one.[9] For students of Islam and Muslims in

[8] This observation is from my own field research.

[9] At the time of the writing of this paper, the situation is still developing. There is no formal report of this incident in mainstream media. Discussions of this incident can be found on Muslim online forums, such as www.2muslim.com.

China, the awkwardness of this new name is apparent. As noted earlier, '*Qing Zhen*' has long been used to refer to things related to Islam and Muslims. Naming the mosque '*Qing Zhen Si*' (清真寺), or the 'Temple of the Pure and True,' is the outcome of the centuries-long acculturation and adaptation of Muslims to the dominating *Han* Chinese culture. Name switching in this case has far reaching consequences. As this incident is still unfolding, it is not entirely clear why the Yiwu government would take such a measure in the first place. Needless to say, the CCP still has ultimate power to determine the fate of China's Muslim communities.

10.7 Conclusion

Despite the above-mentioned odd event, Muslims in Yiwu have generally enjoyed a greater amount of freedom compared to Muslims in other places in China. The loosened control over religious activities throughout the city of Yiwu should be understood within the framework of 'building the religious/cultural stage to sing the economic opera.' China is experiencing rapid economic development. Throughout the 30-year experience of China's economic reform, its leaders have become keenly aware of the soft power of culture, which would include religion. The unceasing criticism of China's human rights issues, including the oppression of religious minorities in Xinjiang and elsewhere, has also forced Beijing to respond with positive gestures.

Yiwu is one of the few places in China that has attracted a large number of Muslims, both foreign and domestic. The transnational characteristics of these Muslims force the local government to stay open-minded while remaining cautious in dealing with a highly diverse population in the city. Muslims in Yiwu have yet to enjoy any 'extra-territorial' rights and are still subject to China's national legal system. However, a number of facts regarding Yiwu's Muslim community are encouraging. For example, gathering places for the purpose of worship and other social activities have been established without encountering many obstacles. Numerous *halal* restaurants, bakeries, and grocery shops sprout up to cater for an ever-increasing Muslim population. Islamic publications have been widely distributed. In addition, online forums and social media sites have played active roles in helping to create a virtual Muslim community and to connect individuals scattered throughout the city. Most importantly, the local government has also so far been supportive, allocating burial sites for Muslim citizens and guests, sponsoring cultural events, and even paying off the remaining bill for the renovation of the Grand Mosque.

CCP's religious policy is maturing with time. Given the current global economic and political situation, it would be extremely hard to image that CCP would resort to extreme measures to limit the growth of religions, as such behaviors would easily damage its hard won positive image before the international community and invite unwanted attention that would compromise economic growth, on which CCP's legitimacy is based. However, some old challenges that have their roots in the long history of Islam and Muslims in China would continue to exist.

The unfolding name-changing incident in Yiwu reflects the considerable gap between Muslim and non-Muslim Chinese in terms of their understanding of Islam and Muslim identity in China. Despite a millennium of coexistence, Muslims remain 'the familiar stranger' for most of the *Han* Chinese (Lipman 1997). The Prohibition of Alcohol Campaign in Shadian *Hui* village has also ignited fear of extremism and has heated debate on the status of religion in a secular country that officially subscribes to atheism.

Yiwu may be an exceptional case; yet its experience offers an interesting case of reference for Muslims in China. We ought to consider China's Muslims with respect to China's economic priorities, the effect of transnational religious ties, and the volatile global political situation. All these factors will play significant roles in shaping the relationship between Islam and the Chinese state, as well as the status of Muslim communities in China. Throughout more than 1,000 years of struggle between the sacred and the secular, China's Muslim community has acquired a vast repertoire of skills and resources with which to cope with new challenges. While China's Muslims remain under the control of non-Muslim rules, *Shari'a* will continue to function as a system of moral code, as the foundation of China's Muslims' culture, and their way of life.

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Chapter 11
The Case of the Recognition of Muslim Personal Law in South Africa: Colonialism, Apartheid and Constitutional Democracy

Wesahl Domingo

11.1 Introduction

The mosaic of South African history is richly interwoven with Islam since the arrival of Muslims coming from all parts of the world more than 360 years ago. The history of Muslims in South Africa is inextricably linked to the presence of colonialism, apartheid and constitutional democracy.

Dr Nelson Mandela, the first democratically elected president of South Africa, said in a public address to Muslims: "We (ANC), regard it highly insensible and arrogant that the culture of other groups can be disregarded. The ANC has pledged itself to recognise Muslim personal law" (Toffar 2008). Section 15 of the South African Constitution provides for freedom of religion, belief and opinion. Section 15(1) states that "[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion." Furthermore, section 15(3)(a)(ii) provides that this section does not prevent legislation recognising "systems of personal and family law under any tradition, or adhered to by persons professing a particular religion" (Constitution of the Republic of South Africa 1996). South Africa therefore provides an ideal example of legal pluralism where there is a constitutional commitment by the state to provide recognition to religious law.

The law governing Muslim marriage, divorce, custody and maintenance, collectively called Muslim personal law, is on the verge of recognition and implementation in South Africa. The South African Muslim community is divided on the issue of whether it should recognise the state's having jurisdiction over Muslim personal law through the enactment of a Muslim Marriages Bill (hereinafter referred to as the Bill) (Draft Muslim Marriages Bill (DMMB) 2011). This chapter critically discusses the opportunities and challenges South African Muslims have faced, and

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are facing, with the recognition of Muslim personal law. Section 11.2 of this chapter briefly traces the historical presence of Muslims in South Africa. In Sect. 11.3, in order to elucidate the Muslim personal law debate in South Africa, I provide a basic primer of classical Islamic family law. Section 11.4 deals with issues involved in Islamic marriage and divorce. Section 11.5 discusses the present practice of Muslim personal law within the community. It highlights how South African courts have dealt with Muslim personal law issues during apartheid and the new judicial activism present in the post-apartheid courts today. In Sect. 11.6, I provide an overview of the Bill and in Sect. 11.7, I engage with a critical discussion of the Bill from an Islamic and South African constitutional law perspective.

11.2 Historical Background

Islam came to South Africa in 1652 when the Dutch East India Company decided to set up a refreshment station at the Cape and also used the Cape as a penal settlement for political prisoners. Muslims came to South Africa between 1652 and 1658 from the Dutch colonies in the East Indies (now Indonesia), Malaysia and the coastal regions of Southern India (Davids 1980). They came as political prisoners of war,[1] political exiles, high princes, imams (religious leaders) and slaves.

In 1657, the Dutch introduced a set of laws called the Placaarten, aimed at preventing Muslims from practising Islam. Muslims were faced with the death penalty if they practised Islam in public (Mahida 1993). Muslims were forced to practise their religion in private as no public congregations were allowed.

Dutch occupation of the Cape came to an end in 1795 through the first British occupation, which lasted till 1803. Thereafter, the Cape was under the control of the Batavian Republic from 1803 to 1806. On 25 July 1804, under Batavian occupation, Muslims were granted freedom to practise their religion publicly. This freedom was granted to the Muslim community in appreciation of their assistance in fighting the British at Blaauberg in Table Bay (Mahida 1993).

In 1806 the second British occupation took place. This lasted until the formation of the Union of South Africa on 31 May 1910. Throughout the colonial period the personal laws of Muslims were given no legal recognition. If Muslims wanted a legally recognised marriage and legitimate children, they had to enter a civil marriage recognised under the secular law of the land. The vast majority of Muslims resorted to marrying in mosques, according to the prescripts of Islam and in the presence of a male congregation. There was no registration of these marriages and, regrettably, no official

[1] These political prisoners have had a profound impact on Islam in South Africa. They are often regarded as the forefathers of Muslims in South Africa because they came with a wealth of Islamic knowledge. For example, Tuan Guru, a prisoner who had fought against the Dutch in Malaysia, was imprisoned on Robben Island from 1781–1793, during which time the great scholar wrote the entire Qur'an from memory. He also wrote many books on Islamic jurisprudence, which are still used as reference books in South Africa.

archive records exist. This process of marriage still exists today, except that registration of marriages by Muslims themselves took place from around the 1950s (Toffar 2008).

11.3 A Basic Framework of Islamic Family Law

In order to understand the Muslim personal law debate in South Africa, we need to understand the basic framework of Islamic law and classical Islamic family law doctrine. We need to understand what *Shari'a* is. This is by no means an in-depth analysis of Islamic law; it is a very basic outline.[2] *Shari'a* literally means a 'street,' 'way' or 'well-trodden road,' (originally, to a watering hole) (Quraishi 2011). "In English, the word is usually translated as 'Islamic law,' but the Arabic carries a broader feeling of ultimate justice, a divine rule of law" (Quraishi 2011: 203). Quraishi correctly points out that "*sharia* is a big word for Muslims" (Quraishi 2011: 203). It takes many different forms of observance among Muslims, but "all Muslims understand *shari'a* to describe their personal responsibilities as a Muslim, whether or not they live in a Muslim state" (Macfarlane 2012: xv). "In the Qur'an, *sharia* corresponds to the idea of God's Way—divine exhortation about the ideal way to behave in this world—thus, 'God's Law'" (Quraishi 2011: 203). The basic text which provides the guidelines for God's law is the Qur'an, believed to be the revealed word of God (Quraishi 2011). However, the Qur'an does not address every possible situation that may face Muslims. For cases ambiguously or not explicitly expressed in the Qur'an, Muslims look to the example of the Prophet Muhammad as a secondary source. The life example of the Prophet is called the '*Sunnah*' (Quraishi 2011). Yet the *Sunnah* too, often, leaves open some questions of interpretation and application. In such cases Muslim legal scholars rely on *ijtihad*, which is the ability to analyse and study the Qur'anic text or a problematic situation within the relevant socio-cultural and historical context and then devise an appropriate interpretation, solution or elaboration of what they understand are the rules of God's law based on a thorough understanding of the Qur'an and *Sunnah* (Quraishi 2011). "These rules are called *fiqh* (literally, 'understanding'), and cover a wide range of topics, from contracts and property to inheritance and criminal law" (Quraishi 2011: 203). Scholars performing *ijtihad* have not always come to the same conclusions, which has resulted in a highly flexible jurisprudence and the development of jurisprudential schools (Quraishi 2011). There are four Sunni schools of law—the Hanafi, Shafi'i, Hanbali and Maliki schools. "Thus, for a Muslim, there is one Law of God (*sharia*), but there are many versions of *fiqh* articulating that ultimate Law on earth" (Quraishi 2011: 204). Quraishi correctly states that we should remember "that *fiqh*—the product of human legal interpretation—is inherently fallible and thus open to question, whereas *sharia*—God's Law—is not" (Quraishi 2011: 204).

Islamic family law is part of *Shari'a* (God's Law) and *fiqh* (jurisprudential understandings). Matters relating to Muslim marriage, divorce, custody, maintenance and

[2] For a more detailed analysis see Hallaq (2009), and Sardar (2011).

succession have been designated by various Muslim countries, jurists and scholars as 'Muslim Personal Law' (Moosa, N. 2011: 10). This term was also used during the colonial period, when Muslim minorities were allowed to apply their own religious personal laws.

11.4 Islamic Marriage and Divorce

11.4.1 Marriage (Nikah)

The marriage relationship in Islam is described as a source of blessing and tranquillity (see Qur'an: ch. 30, v. 21). The Prophet Muhammad has also stated that *nikah* (marriage) 'is my *Sunnah* (tradition).' According to classical *fiqh* doctrine and *Hadith* (report of the deeds and sayings of the Prophet Muhammad), marriage in Islam "rests on an indefinite contract that may be written or oral, but in all cases must involve at least two contracting parties, two witnesses, and a guardian" (Hallaq 2009: 272). The two foundational elements or pillars (*arkan*) necessary to make the contract valid are offer and acceptance. The parties to the contract must have legal capacity to act and be able to understand the nature of the contract (see Quraishi and Vogel 2008). "The guardian [*wali*] represents the woman in concluding the contract, and the witnesses attest to it as a legal fact" (Hallaq 2009: 273). The presence of the *wali* is believed by classical Muslim jurists to be necessary to give validity to the marriage contract. The Hanafi school of thought is the only Sunni school which permits a free woman, who is *compos mentis* and who has reached the age of majority, to conclude her own marriage contract without her guardian (Hallaq 2009). However, in order for such a marriage to be regarded as valid, the woman must marry a man of equal status and piety, and must request the proper dower (see Esposito and Delong-Bas 2001).

The payment of *mahr* (dower) is one of the essential components of an Islamic marriage contract (Qur'an: ch. 4, v. 4, 24). This payment can be effected in three ways: (1) the payment may be made immediately on the conclusion of the marriage contract; (2) payment may be deferred or delayed to a later date; or (3) payment of a portion of the dower may be paid at the conclusion of the marriage contract and the balance paid at the dissolution of the marriage through divorce or death (Hallaq 2009: 277).

In terms of the classical teachings of the Qur'an, polygyny is allowed, although polyandry (the right of a woman to have more than one husband at the same time) is prohibited (Nasir 2009). Under Islam a man is allowed a maximum of four wives simultaneously, provided he is able to do justice to, and provide maintenance to all of them (see Qur'an: ch. 4, v. 3, 129).

In terms of classical Islamic law, the matrimonial property regime that governs a Muslim marriage is not community of property. Each spouse retains sole ownership and control over her or his property, whether movable or immovable, and whether acquired before or after the marriage (Denson 2009). Under Islamic law the wife

has a right to earn, acquire and inherit property, which she is entitled to possess independent of her husband or any male person (Denson 2009).

According to classic Islamic jurisprudence, "maintenance [*nafaqah*] by the husband is the woman's right, even if she is actually wealthier than he" (Nasir 2009: 33). The husband has to provide maintenance to his wife according to his means and financial circumstances (Nasir 2009).

11.4.2 Divorce

It is a reality of life that disputes between spouses may arise during the period of their marriage. If these disputes cannot be resolved between the spouses the Qur'an states that members of their families need to attempt reconciliation (Qur'an: ch. 4, v. 35). In terms of *Shari'a*, divorce is the least preferred course of action, but where there are irreconcilable differences and reconciliation has failed, divorce is permitted. Hallaq points out that "divorce in modern Western law finds no exact parallel in *fiqh*" (Hallaq 2009: 280). When we think of divorce in Islam, we immediately link it to *talaq*, which is a form of dissolution of the marriage "emanating from the will and action of the husband" (Hallaq 2009: 280). Instead, it may be easier, I believe, if we think of divorce in Islam simply as an umbrella, covering three methods of dissolution of an Islamic marriage, depending on the circumstances: namely, divorce by (1) the husband, (2) the wife, and (3) the court.

One method of divorce is *talaq*, which is unilateral divorce executed by the husband. A *talaq* may be given orally or in writing. "*Talaq* can be either revocable (*raj'i*) or irrevocable (*ba'in*)" (Ali 2006: 26). In a revocable divorce the husband has the right to reconsider his decision and can take his wife back during the *iddah* (a waiting period of three menstrual cycles) that follows the divorce. All schools agree that the *talaq* does not become irrevocable until the husband has pronounced *talaq* three times (Macfarlane 2012).

Another method of divorce is 'by the wife' which takes place through either (1) *talaq al-tafwid* (delegation of *talaq* to wife), or (2) *khul'a*. In the case of the *talaq al-tafwid*, a husband may delegate his right of *talaq* to his wife. This may be done at the commencement of the marriage or subsequent to the marriage (Vahed 2006). A *khul'a* is "effected by an offer from the wife to pay or consent to pay compensation to her husband and acceptance by the latter of the offer" (Vahed 2006: 42).

The final method of divorce, one granted by the court, is called *faskh.* It is the only method by which a wife, if she has cause, can obtain a divorce without the consent of her husband (Denson 2009). The grounds for *faskh* vary widely amongst the different schools. Feminist scholar, Kecia Ali states:

> In the Hanafi school, which is the most restrictive [in terms of grounds for *faskh* divorce], a woman has almost no grounds for obtaining a divorce provided her husband consummated the marriage; neither failure to support her, nor life imprisonment, nor abuse is considered grounds for divorce. If he is declared missing, she may have the marriage dissolved (on grounds of presumed widowhood) at the time when he would have completed his natural

> lifespan, which could be as old as ninety. In contrast, the Maliki law allows the most generous grounds for a woman to seek divorce including non-support, abandonment, and the broad charge of 'injury' (*darar*), which can be physical or otherwise. (Ali 2006: 27)

After a pronouncement of *talaq, khul'a* or *faskh* divorce a Muslim woman must observe *iddah*, which is a period during which, according to traditional scholars, she must remain in seclusion and abstain from marriage (Vahed 2006). The purpose of the *iddah*, or waiting period, is to ensure that the wife is not pregnant by her husband and to give the couple the opportunity to reconsider and possibly reconcile (Macfarlane 2012). A husband also has to provide his wife maintenance during the length of the *iddah* period (Vahed 2006).

11.4.3 Custody

The issues around custody (*hidanat*) are not directly addressed in the Qur'an. However, jurists often quote the following verse when considering custody issues:

> The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child nor father on account of his child. (Qur'an: ch. 2, v. 233)

There are also several *Hadith* (sayings of the Prophet) regarding custody; the following are two examples:

> First, a woman once complained to the Prophet that upon divorce, her husband wished to remove her young child from her custody. The Prophet commented: "You have the first right to the child as long as you do not marry." Secondly, on a different occasion a woman again complained that her husband wanted to take her son away from her, although her son was a source of great comfort and warmth to her. Her husband simultaneously denied her claim over the child. The Prophet said: "Child, here is your father and here is your mother; make a choice between the two as to whom you prefer." The son took hold of his mother's hand and they dispersed. (Goolam 1998: 375)

With regard to custody, there are differences of opinion amongst the four Sunni schools, based on the Qur'anic verse and Prophetic sayings above. My focus in this section primarily deals with the custody of children by their parents. The Hanafi's rule is that a mother "is entitled to the custody of her male child until he reaches the age of seven years and of her female child until she attains puberty (9 years)" (Vahed 2006: 44). The Shafi'i school does not distinguish between male and female children and they "set no definite term for the female custody period to run, maintaining that it shall run until the child reaches the age of discretion and is assumed capable of making a choice between the two parents, which choice will be respected" (Nasir 2009: 202). The Hanbalis do not distinguish between a boy or girl, and rule that a mother is entitled to custody of either a son or daughter from birth until the age of 7 years, at which age the child itself shall be given a choice between parents (Nasir 2009). "The Malikis rule that female custody of a boy will run from his birth until he reaches puberty and a girl until she gets married" (Nasir 2009: 202).

According to Islamic scholars and jurists, under *Shari'a* the non-custodial parent has the right to access to the child and should not be prevented from seeing the child (Nasir 2009). As for financial support of the child, there is a clear gender distinction between mother and father in all schools: "A father is responsible for the maintenance of his sons until they attain the age of majority and of his daughters until they are contracted into marriage" (Vahed 2006: 46).

11.5 Present Day Practice of Muslim Personal Law in South Africa

After a presence of more than 360 years, Muslims in South Africa have established themselves as an integral part of South African society. The majority of these Muslims are third generation or more, and have far less attachment to Indonesia, Malaysia or India than did their forefathers. Muslims constitute approximately 2 % of the total population of South Africa.[3]

Muslim personal law has not yet been recognised by the South African government, despite the long history of Muslim presence in the country. Although the state does not recognise Muslim marriages, there are some statutes that include spouses married in terms of religious law. This recognition is achieved by defining 'marriage' to include a religious marriage, and 'spouse' to include a spouse or partner married in terms of religious law.[4]

Muslim marriages still take place in mosques, according to the prescripts of Islam. Couples do have the option of entering a civil marriage. As soon as a civil marriage is entered into, the legal consequences of that marriage are automatically subject to the civil law Marriages Act 25 of 1961. Muslim couples who do not enter into a civil marriage have their marriage and divorce regulated by informal judicial councils. While Islam has no official clergy, in South Africa there is a socially recognised class of religious leaders called 'Ulama who belong to religious judicial bodies.

> In the first half of the twentieth century three major 'ulama bodies were established: the Jamiatul 'Ulama of Transvaal (1935); the Muslim Judicial Council (1945) and the Jamiatul 'Ulama of Natal (1955). Later, other bodies emerged: the Majlis Ashura al-Islami (1969); the Islamic Council of South Africa (1975); the Sunni Jamiatul 'Ulama of South Africa (1975) and the Sunni 'Ulama Council (1994). Each of these formations has some form of judicial and social welfare division which deals with the resolution of personal law matters: marriage, divorce, custody and succession, among other pastoral functions. This suggests that informal law and community justice has a long tradition within the Muslim community spanning some three centuries. (Moosa, E. 1996: 130, 134)

[3] This figure is according to South Africa's 2001 Census. The total population in South Africa in 2001 was 44.9 million. The census conducted in 2011 did not include any questions on religion, due to its being a low priority.

[4] See the following statutes: Children's Act 38 of 2005; Births and Deaths Registration Act 51 of 1992; Domestic Violence Act 116 of 1998; Income Tax Act 58 of 1962; Pensions Funds Act 24 of 1956; and Insolvency Act 24 of 1936.

These judicial bodies still exist today and continue to have exclusive jurisdiction over Muslim personal law. They represent a multitude of theological backgrounds and are made up of mostly male scholars, imams (community leaders) and ‘Ulama. The decisions of these judicial bodies have no legal enforcement and are merely binding on the conscience of Muslims. Their decisions do have social and religious authority among Muslims, however some may argue that they are gender biased in favour of husbands. Many Muslim women have expressed their dissatisfaction with the way in which their cases are handled by the judicial bodies. They encounter unnecessary delays, they pay more for a request to have their marriage dissolved than men do and they are told to have patience, even where they have a legitimate grievance. The lack of support and women’s lack of knowledge of their Islamic rights place women in a very vulnerable position.

The South African Commission on Gender Equality conducted a series of four women’s focus groups in Cape Town in 2000. The following are a few of the concerns and experiences raised by the women in these focus groups (Seedat 2000; see also Domingo 2005):

(a) Women were often merely informed of their being divorced (*talaq*) by their husbands.
(b) Imams often confirmed a *talaq* without consulting the wife.
(c) Women experience difficulty getting their husbands to register their marriages in court.
(d) Wives have often been left destitute at the end of a marriage. This was true for those in Muslim marriages as well as those in civil marriages.
(e) Most women did not have marriage contracts and even fewer were aware that they could shape the contents of these contracts.
(f) It was difficult to negotiate a contract, due to the stigma attached to being a critical and informed woman.
(g) Upon the refusal by the husband to divorce the wife, very few women applied for an annulment (*faskh*), as the process was extremely time consuming, often too difficult or too expensive and at times even humiliating. The Commission heard of one imam charging R100 for securing a divorce (*talaq*) and R1,500 to pronounce an annulment (*faskh*).
(h) Imams regularly perform subsequent marriages to a second, third or fourth wife without gathering adequate information about the man or the circumstances of his previous marriage/s and/or financial situation.
(i) Many women find themselves financially dependent on their husbands and therefore unable to determine their own economic futures. They are consequently unable to leave unhappy or abusive marriages easily.
(j) Though women did not find it acceptable to place a total ban on polygyny, they were firm in stating the need to ensure that it is strictly regulated in terms of the Qur’anic injunction and the husband’s ability to provide for his wives.
(k) There was unanimity that the existing wife/wives be informed and be required to give consent to a second (or subsequent) marriage.

Men and women who have entered both a civil and religious marriage also experience difficulties. If a wife obtains a civil divorce, such civil divorce is not

recognised in Islamic law as valid. In the eyes of her community and in terms of Islamic law she will not be able to enter into another marriage, while her husband may take another wife. This issue is further compounded when a South African court grants the civil divorce and the husband refuses to give the wife the required Islamic divorce (*talaq*). The above situation is not unique to the Muslim community in South Africa. A similar situation also occurs within the South African Jewish community.

In the case *Amar v Amar* (1999: 606), a husband was willing to accept a civil divorce granted by a South African court but refused to grant his wife a *get* (Jewish divorce document), which meant she was not free to remarry according to Jewish law. The South African legislature remedied the situation by inserting S5A in the Divorce Act (Act 70 1979). Section 5A—refusal to grant divorce—states the following:

> If it appears to a court in divorce proceedings that despite the granting of a decree of divorce by the court the spouses or either of them will, by reason of the prescripts of their religion or the religion of either one of them, not to be free to remarry unless the marriage is also dissolved in accordance with such prescripts or unless a barrier to the re-marriage of the spouse concerned is removed, the court may refuse to grant a decree of divorce unless the court is satisfied that the spouse within whose power it is to have the marriage so dissolved or the said barrier removed, has taken all the necessary steps to have the marriage so dissolved or the barrier to the re-marriage of the other spouse removed or the court may make any other order that it finds just.

The court in the Amar case held that the purpose of S5A is to "create mechanisms whereby recalcitrant spouses can be encouraged or even pressurised into granting religious divorces where these are necessary to enable spouses to remarry" (1999: 606 I–J). The courts may therefore invoke S5A, when dealing with Muslim spouses who are married according to civil law and Islamic law, where the husband refuses to grant his wife a religious divorce.

There is no centralised system of regulating Muslim personal law in South Africa; judicial bodies work independently from each other. There is the principle that one judicial council respects the ruling of another judicial body, but in practice this is not happening. There is a litany of complaints from both men and women on the unfair status of Muslim personal law, as there is no system in place to hold judicial bodies accountable for their actions. Therefore, some Muslims want the establishment of a single religious council, while other Muslims want the recognition and implementation of Muslim personal law as part of the South African legal order. Despite the split in the community with regard to the recognition of Muslim personal law, it is a fact that no single Muslim judicial body in South Africa has supreme authority. There is therefore an urgent need to address the problems Muslim women and men face in regard to Muslim personal law.

There has always been a call in some parts of the community for the recognition and implementation of Muslim personal law as part of South African legislation.

> In 1975 the Director of the Cape Town based Institute of Islamic Shari'a Studies made representations to then Prime Minister, B. J Vorster, that aspects of Islamic law relating to marriage, divorce and succession and custody be recognised. At that time the South Africa Law Commission stated that it was unwilling to include the investigation in its program because it was of the opinion that the recognition of the relevant aspects of Islamic law could lead to confusion in South African law and secondly, because the existing rules of South African law do not prohibit a Muslim from living in accordance with the relevant directions of Islamic law. (Moosa, E. 1996: 135)

In the 1980s the South African Law Commission changed its position and an attempt was made to recognise aspects of Muslim personal law. However, most anti-apartheid Muslim groups were resistant to this because they felt it was placed on the agenda of South African Law Commission to "dampen and defuse Muslim political anger, especially among the youth" (Moosa, E. 1996: 138).

In the 1990s, with the ushering in of a constitutional democracy and with the adoption of the Final Constitution of the Republic of South Africa, founded on the principles and values of human dignity and equality, a new legal era was born in South Africa. As stated earlier, Section 15 of the Constitution of 1996 states that "[e]veryone has the right to freedom of conscience, religion, thought." It further provides in S15(3)(a) that this section does not prevent legislation recognising marriages or systems of personal or family law under any tradition or religion, so long as such recognition is consistent with this and other provisions of the Constitution. The Constitution creates a comprehensive system of rights to culture and religion. Section 31 of the Constitution provides that "persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to enjoy their culture, practise their religion and use their language" (Constitution, of the Republic of South Africa 1996). South Africa's commitment to legal pluralism and traditional structures is an important development because it reflects not only a constitutional dedication to multiculturalism, but also a political and functional need for incorporating traditional and legal systems (see Domingo 2011).

Prior to the Constitution, only civil marriages were recognised in South Africa, solemnised through the Marriage Act 25 of 1961. Limited recognition was given to customary marriages and no recognition was given to religious marriages. South African family law has undergone radical changes. There are now two additional types of marriage recognised, namely, customary marriages (Act 120 1998) and civil unions, which allow for same sex marriage (Act 17 2006).

During the apartheid era, South African courts consistently held that Muslim marriages were invalid because of their potentially polygynous nature. The court in *Ismail v Ismail* (1983: 1024) stated the following:

> The concept of marriage as a monogamous union is firmly entrenched in our society and the recognition of polygamy would, undoubtedly, tend to prejudice or undermine the status of marriage as we know it.

In the *Seedats* case (1917: 307–308) the court held the following in the context of Muslim marriages:

> [N]o country is under the obligation on grounds of international comity to recognise a legal relation which is repugnant to the moral principles of its people. Polygamy vitally affects the nature of the most important relationship into which human beings can enter. It is reprobated by the majority of civilised peoples, on grounds of morality and religion, and the Courts of a country which forbids it are not justified in recognising a polygamous union as a valid marriage.

With the hailing in of a constitutional democracy, a new judicial activism has taken place in South African courts, based on a democratic ethos rooted in the values and principles of human dignity, equality, tolerance and social justice. Courts are embracing pluralism and respect for culture and religion.

The following are a few examples of case law where the South African courts, post-apartheid, have extended marriage-like benefits to couples married in terms of Islamic law.

In 1996 in the *Ryland v Edros* case (1996: 557) the court held that the contractual obligations flowing from a monogamous Muslim marriage must be recognised and enforced even though such a marriage is potentially polygynous.

In the case of *Amod v Multilateral Motor Vehicle Accident Fund* (1999: 1319) a surviving spouse from a Muslim marriage was granted the right to claim for damages for loss of support from the Accident Fund when her husband died in a motor vehicle collision. The court held that a monogamous Muslim spouse qualifies as a dependent in terms of a dependent's action for loss of support. The court recognised the contractual duty of support which flows from a monogamous Muslim marriage.

In *Daniels v Campbell N.O. and Others* (2004: 331) the Constitutional Court granted a monogamous spouse (Mrs Daniels) the right to claim maintenance from the estate of her deceased husband to whom she had been married by Islamic law, in terms of the Maintenance of Surviving Spouses Act, as well as the right to claim inheritance in terms of the Intestate Succession Act (Act 81 1987).[5] This was a landmark decision, as both these Acts do not define 'surviving spouse' to include spouses in religious marriages.

In the case of *Khan v Khan* (2005: 272) a Muslim women who was party to a polygynous Muslim marriage was given the right to claim maintenance from her spouse in terms of the Maintenance Act (Act 99 1998). For the first time, a South African court recognised that a legal duty of support exists between parties who have a polygynous Muslim marriage. The court stated that public policy considerations have changed:

> The argument that it is *contra bonos mores* to grant a Muslim wife, married in accordance with Islamic rites, maintenance where the marriage is not monogamous, can no longer hold water. It will be blatant discrimination to grant, in the one instance, a Muslim wife in a monogamous Muslim marriage a right to maintenance, but to deny a Muslim wife married in terms of the same Islamic rites (which are inherently polygamous) and who has the same faith and beliefs as the one in the monogamous marriage, a right to maintenance. (*Khan v Khan* 2005: 272 para. 11.11)

In 2009 in the *Hassam v Jacobs N.O.* case (2009: 572) the Constitutional Court extended to surviving spouses of de facto polygynous Muslim marriages the recognition of the right to inherit in terms of the Intestate Succession Act.

In all of the above cases the South African judiciary dealt with either a constitutional challenge of a statute or common law duty of support and they deferred the question of the recognition or non-recognition of a Muslim marriage to the legislature.

[5] Section 1 of the Intestate Succession Act 81 of 1987 provides for inheritance by a surviving spouse, as does the Maintenance of Surviving Spouses Act, which provides that a surviving spouse may have a claim against the deceased estate.

11.6 Overview of the Muslim Marriages Bill

South Africa has chosen the codification of Muslim personal law through legislation as the method of integration of Muslim personal law into South African civil family law. In late 2002 the South African Law Reform Commission first published its Muslim Marriages Bill, after wide consultation with conservative and progressive groups within the Muslim community. In 2003 the South African Law Reform Commission completed its amended version of the Bill and sent it to the Minister of Justice and Constitutional development. From 2003 to 2008 the process reached an impasse. In 2009 an application to the Constitutional Court was made by the Women's Legal Centre Trust, in which they argued that "the Constitution obliges the President and Parliament to prepare, initiate, and enact the legislation (Muslim Marriages Bill) envisaged—but they have taken no meaningful steps to pass such legislation since 2003" (*Women's Legal Centre Trust v President of the Republic of South Africa* 2009: 94 para. 9). The application was dismissed on procedural and technical grounds. However, it did provide political momentum. On 20 January 2011 the Minister of Justice and Constitutional development released a second revision of the Muslim Marriages Bill for public comment. To date, the Muslim Marriages Bill has not yet been introduced into legislation.

The following is a brief overview of the key features of the Bill. Under the Bill, Muslim couples have the choice to opt into or opt out of the Bill. That is, Muslim couples can either marry through a judicial council or register under the Bill. The provisions of the Bill will apply to Muslim marriages that are concluded after the implementation of the Bill, for those who elect to be bound. Existing Muslim marriages will be subject to the Bill, unless the couple jointly decide not to be bound by the Bill (Draft Muslim Marriages Bill (DMMB) 2011: cl. 2). In addition, clause 3 of the Bill provides for "equal status and capacity of spouse." It states that:

> A wife and husband in a Muslim marriage are equal in human dignity and both have, on the basis of equality, full status, capacity and financial independence, including the capacity to own and acquire assets and to dispose of them, to enter contracts and to litigate.

For a Muslim marriage to be valid both parties must be 18 years old, they must consent to the marriage, and witnesses must be present at the marriage ceremony, which must be solemnised by a registered marriage officer (DMMB 2011: cl. 5, 6). The proprietal consequences of all marriages concluded under the Bill shall automatically be out of community of property, excluding the accrual system, unless the parties enter into an ante nuptial contract (DMMB 2011: cl. 8(1)).

The Bill allows for both monogamous and polygynous Muslim marriages. Should a man want to enter a second marriage, he has to make an application to court. If he fails to do this he "shall be guilty of an offence and liable on conviction to a fine not exceeding R20,000" (DMMB 2011: cl. 8(11)). The consent of the court is required, and must be granted if the court is satisfied that the husband is able to "maintain equality between the spouses as is prescribed in the Qur'an" (DMMB 2011: cl. 8(6), 8(7)).

The Bill provides for three forms of dissolution of a marriage, namely, *talaq*, *faskh* and *khul'a* (DMMB 2011: cl. 9(2)). It makes provision for divorce by *talaq*

and includes a *tafwid al-talaq* (the delegated *talaq* of a wife) (DMMB 2011: cl. 9). The Bill defines *talaq* as the dissolution of a Muslim marriage, for, with, or at a later stage, by, a husband, his wife or agent, duly authorised by him or her, using the word *talaq* or a synonym or derivative thereof in any language (DMMB 2011: cl. 1). The *talaq* must be registered within 30 days after pronouncement (DMMB 2011: cl. 9(3)(a)), and within 14 days of registration the spouse who issued the *talaq* must institute a court action to confirm the dissolution of the marriage (DMMB 2011: cl. 9(3)(e)), failing which, the spouse may be "guilty of an offence and is liable on conviction to a fine not exceeding R20,000" (DMMB 2011: cl. 9(4)(a)).

The Bill also makes provision for the dissolution of a marriage through *fashk* and *khul'a*. According to the Bill, *faskh* means a decree of dissolution of a marriage by a court upon the application of either husband or wife. The Bill provides a list of grounds on which a *faskh* may be granted: for example, disappearance of the husband, failure to maintain, imprisonment for 3 years or more, mental illness, impotence, cruelty which renders cohabitation intolerable, withholding sexual intercourse, and polygyny that leads to unjust treatment in terms of the Qur'an and discord. *Khul'a* is the dissolution of a marriage at the instance of the wife, in terms of an agreement for the transfer of property or other permissible consideration between the spouses according to Islamic law (DMMB 2011: cl. 1). The Bill further regulates issues around custody, intestate succession and maintenance.

In regard to maintenance during the marriage, there is no reciprocal duty of maintenance as in South African civil family law. The husband has to maintain his wife according to his means and her reasonable needs. He is obliged to maintain his female children until they are married and male children until they reach the age of majority (18 years) or for the period that they are in need of support (DMMB 2011: cl. 11(2)).

After divorce, the husband is obliged to maintain his wife for the mandatory waiting period of *iddah* (DMMB 2011: cl. 11(c)(i)). If the wife has custody of any children, the husband, after the expiry of the *iddah* period, is obliged to remunerate her, including the provision of a separate residence for her if she has no residence, for the period of custody only (DMMB 2011: cl. 11(c)(ii)). The wife is entitled to remuneration for breast-feeding for a period of up to 2 years after the birth of the infant, provided that she has in fact breast-fed the infant (DMMB 2011: cl. 11(c)(iii)).

In its present form the Bill provides for South African courts to adjudicate matters relating to Muslim personal law, namely, marriage, divorce, maintenance and custody (DMMB 2011: cl.1). Clause 12 of the Bill also introduces compulsory mediation.

11.7 Disputed Issues in the Bill

The South African Law Commission has tried to address many of the concerns raised by the Muslim community. However, the Bill still contains many contentious issues, and, as a result, the South African Muslim community is divided on the issue of whether they should support the Bill. There have been comments such as:

"allow us to practise our religion without interference from anybody"; the "draft should remain a draft, in fact, shelved for good" (Domingo 2005: 103); "when you opt for Muslim personal law, you accept a system which is foreign to Islam. You enchain yourself to state interference by bartering away the existing *Deeni* (religious) freedom you have in your marital affairs" (Majlisul Ulama 2004: 43). These feelings manifest themselves within the community because acceptance and acknowledgment of the Bill raises in the minds of many Muslims the question of sovereignty and authority (Domingo 2011). One of the foundational beliefs in Islam is rooted in the concept of *Shahadah*. It is that "God and God alone has the authority to confer rights and impose obligations," which means that a man-made constitution that does not derive its authority from God is a violation of God's rightful monopoly on authority (Domingo 2011: 384). By the same token, some Muslims believe that any Muslim who recognises the validity of such a constitution is guilty of attributing legal authority and sovereignty to someone other than God, a clear violation of Islamic monotheism (*tawhid*) and an open act of polytheism (*shirk*) (Domingo 2011). They therefore strongly believe that Muslim personal law should not be integrated into South African law. Spearheading this opposition to the Bill is the ultra-conservative Majlisul Ulama of South Africa. They have labelled the Bill as the '*Kuffr* Bill.'[6]

Within this discourse there are other Muslim groups who have no problem with Muslim personal law operating within a secular constitutional system. They believe that *Shari'a* can operate in tandem with South African constitutionalism without the former being subverted (Domingo 2011). This, it is argued, may be achieved by invoking mechanisms of Islamic jurisprudence (*fiqh*) and general principles of Islamic law to render Muslim personal law regimes compatible with South African constitutionalism and international instruments concerning the family. It involves a process of legal reasoning and a teleological interpretive methodology which does not infringe upon the sanctity of *Shari'a* (Domingo 2011). Spearheading this support is the United 'Ulama Council of South Africa (UUCSA) and feminist women's organizations. The UUCSA comprises of about seven 'Ulama councils.[7] In principal they support the Bill, albeit with some reservations regarding certain clauses which they are trying to make more *Shari'a* compliant.

The feminist women groups strongly advocate that the Bill must incorporate gender equality as espoused and guaranteed by the South African Constitution. As stated by the late gender activist Shamima Shaik:

> Muslim personal law cannot be exempted from the Bill of Rights and be allowed to perpetuate inequalities. To even consider exempting any sector of society from being covered by the Bill of Rights is an injustice and makes a mockery of the Bill. (Safiyya 2009)

[6] '*Kuffr*' means all things unacceptable and offensive to God.

[7] The members of the UUCSA are the following: The Muslim Judicial Council (MJC); The Sunni 'Ulama Council (SUC); The Jamiatul 'Ulama KZN (JUKZN); The Jamiatul 'Ulama (JU); The Sunni 'Ulama Natal (SJUN); Eastern Cape Islamic Congress (ECIC) and the Council of 'Ulama Eastern Cape (CUEC).

11.7.1 Islamic Law Issues

The body of Muslim law used in South Africa dates back to the nineteenth century Muslim law schools of the Middle East, namely, the Hanafi and Shafi'i schools of jurisprudence. The Muslim community in South Africa is not a homogenous group. They practise and interpret Islam in different ways. The Bill is a combination of the Hanafi and Shafi'i schools of jurisprudence. No distinction is made between the schools. This may present problems, where a wife belongs to the Hanafi school and the husband to the Shafi'i school, as to which school of thought will prevail in settling a dispute. For example, as discussed in Sect. 11.4.1, it is a well-established rule in the Hanafi school that a woman may contract her marriage unilaterally, without the consent of her guardian/father. However, within the Shafi'i school this is forbidden, and such a marriage is null and void. The Bill does not make the provision for such unilateral consent.

Furthermore, how will the courts deal with members of the Muslim community who belong to neither of these two schools? Within South Africa's Muslim community there are Muslim minority groups who belong to the Shi'a, Suffi and Achmadiyah sects. They have completely different rules with regard to the regulation and interpretation of Muslim personal law.

The Bill defines a Muslim as "a person who believes in the oneness of Allah and who believes in the Holy Messenger Muhammad as the final prophet and who has faith in all the essentials of Islam (*Daruriyyat Al-Din*)" (DMMB 2011: cl. 1). A number of difficulties may arise with this definition, such as the following:

> Who is empowered to decide who is or is not a Muslim for the purposes of this Act?
>
> Does the Act apply to someone who is merely Muslim in name, but is, for example, not practising?
>
> What does it mean to have 'faith in the essentials of Islam'?
>
> Will there be subjective inquiries on Islam by non-Muslim judges in this regard?
>
> Will sects such as the Qadiani, Achmadiyah or even Shi'a be recognised as Muslims? (Muslim Lawyers Association (MLA) n.d.: 8)

There are many provisions within the Bill which refer to matters being dealt with in accordance with Islamic law. Islamic law is defined in the Bill as "the law as derived from the holy Qur'an, the *Sunnah* (Prophetic Model), the consensus from Muslim jurists (*Ijma*) and analogical deductions based on the primary sources (*Qiyas*)" (DMMB 2011: cl. 1). The question raised here, is how will the courts interpret Islamic law? The definition would allow secular judges to make analogical deductions on Islamic law and define verses of the Qur'an and the *Sunnah*. The Muslim Lawyers Association of South Africa has vehemently objected to this because they argue this "gives a blanket license to secular judges to make *ijtihad* (juridical interpretation)" (MLA n.d.: 9). Furthermore, how are secular judges going to interpret the Qur'an without in depth knowledge of Arabic or Islamic jurisprudence?

Another concern, since matters are to be dealt with in accordance with Islamic law, is whether Islamic law of evidence will be considered, or South African law of evidence will take precedence, as this could substantially influence the adjudication

process. Section 15 (3)(b) of the Constitution provides that legislation recognising systems of personal law and family law must be consistent with the Bill of Rights section and with the rest of the Constitution (Constitution of the Republic of South Africa 1996). The Bill is a piece of South African legislation. It will be subject to the South African legal system, including South African law of evidence. "The most profound argument against legislative intervention into Muslim personal law in a secular democracy is that it will inexorably lead to a transmogrification of the *shari'a* and to a contamination of its sacred sources" (MLA n.d.: 16).

Proponents of the Bill advocate that the challenge that will face South African Muslim judges, scholars, and the Muslim community at large in developing the body of Muslim personal law within the framework of the Constitution will be to open the doors of juridical interpretation (*ijtihad*). They argue that the principle of the evolution and changeability of Islamic rules does not mean changing the texts themselves. The texts are divine. What is meant by change is really the change of interpretation in the customs or in the effective causes upon which they are based (Domingo 2006–2007). It is argued that the doors of interpretation need to be opened to confront the challenges of modern times, as this will not only make the task much easier, it will also make it far more exciting. "The challenge facing Muslim jurisprudence today lies between the need to define the relationship between the standards imposed by the religious faith and the mundane forces which activate society" (Rauf 1999: 130).

In regard to the question of differences of opinion between the four jurisprudential schools, Muslim scholars have advocated that the possibility exists that we need not follow one particular school, but develop Muslim personal law through the principle of '*Takhayur*.' *Takhayur* is the modern process of selecting a course of legal action from the various juristic opinions of the different schools (Rauf 1999). It is argued that this will allow for the removal of injustice and inequity in adjudication. Thus, over the last century, laws in Islamic lands have blended what was deemed most equitable from whichever schools of law, applying the principle of *Takhayur*, especially in the areas of personal law (marriage, divorce and inheritance) to eliminate abuses that have crept into practice. This selecting from different schools to achieve some sense of equity was called *talfiq* (patched up, pieced together) (Rauf 1999). To accomplish this, Muslim men and women will have to study the specific historical and cultural context in which they find themselves positioned in South Africa. They will also have to reconceptualise their preconceived ideas and beliefs about traditional interpretations of religious and legal texts.

Despite the fact that polygyny is permitted in the Bill, there are concerns regarding its regulation. The Bill gives overt consideration to the financial means of the man as a criterion for polygynous marriages, as well as the husband's propensity for justice (*adl*) and the absence of oppression (*zulm*). This subjective test, it is felt, should also apply to the first marriage. A husband must have the financial capacity to maintain his first wife. In terms of Clause 8(11) of the Bill, the sanction for entering into a further Muslim marriage without the consent of the court is not invalidity, but a fine of up to R20,000. It is argued by some Muslims that "there is no *Sharia'a* basis and/or justification for making it a criminal offence not to get the permission of a court to enter into a polygynous marriage. This makes unlawful what the Qur'an makes lawful" (MLA n.d.: 11).

The regulation of *talaq* in the Bill is also a contentious issue. One potential problem, as explained by the Muslim Lawyers Association is that

> [o]n the face of it the Bill purports to stipulate that an irrevocable *talaq* which has not been registered is none the less effective from the time of pronouncement. The efficacy however is substantially diluted or even contradicted by the provision entitling one party to confirm the *talaq* in action proceedings after registration thereof. Pending the outcome of the action the court may provide for maintenance beyond the *iddah* period. Action proceedings may take years to finalise way beyond the *iddah* period. The court is given the power in clause 9(8) to confirm a decree of *talaq*. It may refuse to do so. The effective date of the *talaq* is therefore unclear and the Bill is inherently contradictory. (MLA n.d.: 10)

The Bill will apply to all existing marriages concluded before the Bill, unless the couple jointly agree otherwise. This 'opt in/opt out' clause is problematic. It follows, axiomatically, that if only one party decides not to be bound by the Bill, the Bill will apply (MLA n.d.: 6). This, on face value, appears to provide the vulnerable spouse, in most cases the woman, greater protection, because the decision to opt out has to be made jointly. However, one also has to take into account that most women are placed in a weaker bargaining position, which means they may be forced under duress to not have the Bill apply to their marriage.

Another bone of contention within the Muslim community is the absence in the Bill of the consent and presence of a women's guardian (*wali*), usually her father, as one of the requirements of a valid marriage. In South Africa, where Muslim marriages are usually solemnised in the Mosque or other community venue, it is customary that the bride is absent. In these instances the representative of the bride, normally her *wali*, will transmit her consent to the marriage. As discussed earlier, the Hanafi School of Islamic law does not make a *wali*'s consent a requirement of marriage, while the Shafi'i and Maliki jurisprudential schools do require the presence of the *wali* for a marriage to be valid. In these schools, it is believed that the duty of the *wali* is to ensure that the proposed groom is a reliable and trustworthy person, who will carry on the *wali*'s roles and responsibility towards the bride after marriage. The absence of a *wali* has received harsh criticism from many sectors of the Muslim community who follow non-Hanafi schools of Islamic law (see Domingo 2005).

11.7.2 Constitutional Law Issues

The South African Constitution is the supreme law of the land. All laws in South Africa must be interpreted in accordance with the values enshrined in the Bill of Rights section in the Constitution. As discussed earlier, Section 15 (freedom of religion) of the Constitution provides the constitutional framework for the future recognition and implementation of Muslim personal law. It allows for the recognition of "marriages concluded under any tradition, or a system of religious, personal or family law" (Constitution of the Republic of South Africa 1996: S15(3)(a)). The section is qualified by the proviso that these rights can only be exercised in a manner

consistent with the Constitution. The opponents to the Bill argue that the Bill "does more than recognise *shari'a*. It transmogrifies it and contaminates it. The model goes beyond what is mandated by recognition" (MLA n.d.: 12). The Bill appears to both prescribe and coerce how the Muslim community must practise their religion.

One of the dangers with the implementation of the Bill is that the courts, in interpreting the Bill, will give a particular understanding of religion. "[F]rom a constitutional point of view, the legislature will be forced to choose one personal law system even though there are differences of opinion between the four schools of *fiqh* on a variety of matters governing Muslim personal law" (MLA n.d.: 21). For example, the Bill, in its definition section, chooses particular interpretations of *faskh*, *iddah*, *khul'a* and many other terms on which religious scholars may disagree. Indirectly, the state will be favouring a particular interpretation of Islam, and when the state starts taking sides in religious doctrine it may result in hatred, disrespect and contempt by those who hold contrary views. Professor Ziyad Motala correctly states:

> The power and duty to allow communities to practice their religion should not be understood as the power to prescribe religion. In other words, the State (be it the Legislature, the Executive or the Courts) should not enter the religious thicket by making pronouncements on what constitutes proper religious doctrine. (MLA n.d.: 22)

He further points out this potential legal quagmire if the Bill becomes law (see also Motala 2011):

> Religious doctrines brim with complexities, uncertainties and very different disciplining rules and procedures which their interpretative communities follow. Judges usually do not have the insight into religions…developing religious law against the ethos and values of the constitution is unlikely to resonate well among the religious group affected and is bound to inflame sectarian differences as exemplified in India. (MLA n.d.: 22)

Not only does the secular adjudication of religious law bother Muslims who are worried that this transforms their religious law, but this aspect of the Bill also raises the question of whether this goes beyond the scope of rights provided for in Section 15 of the South African Constitution. The yardstick for determining Muslim personal law will be the Constitution. Section 39(2) of the Constitution requires the judiciary, when interpreting any legislation, and when developing the common or customary law, to promote the spirit, purport and objects of the Bill of Rights (Constitution of the Republic of South Africa 1996). The judiciary have held that the courts should not be engaged in deciding what is part of religion or what is central to religion. Nor should the courts be pronouncing what is effective practice of a particular religion. It is argued that the "state should not be taking sides or lending its power to one side in controversies over religious authority or dogma."[8] Therefore, if the Bill passes, the South African judiciary will have to be very careful when it renders any interpretation of Muslim personal law.

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[8] See *Prince v President of the Law Society of the Cape of Good Hope and Others* 2002 (2) SA 794 (CC).

One of the greatest challenges with the recognition and implementation of the Bill is the balancing of rights: for example, balancing the right to equality with the right to freedom of religion. Judge Kentridge is of the opinion that

> one of the intractable problems that arises in a heterogeneous society is that of reconciling respect for cultural diversity with the commitment to uphold human rights. For example, many religions assign particular social and religious roles to men and women. The elimination of such distinctions is regarded as inimical to the religion itself. The need for sensitivity in considering such questions is acknowledged. It is nevertheless submitted that, in cases of conflict, equality trumps religious freedom and culture. (Kentridge 2002: 14, 52)

The following examples demonstrate the tension between the right to equality and the right to freedom of religion.

According to the Bill, a Muslim marriage is a "marriage between a man and a woman contracted in accordance with Islamic law only" (DMMB 2011: cl. 1). The prerequisite of a 'man and a woman' excludes same sex Muslim marriage, which is not recognised in Islam. This provision may be challenged on the basis of the equality clause of the Constitution, which provides for sexual orientation. "It is not unforeseeable that a gay couple, claiming that they satisfy the definition of a Muslim, may approach a court to declare the Act unconstitutional for not recognising their marriage" (MLA n.d.: 20). Likewise, due to the impermissibility of sex changes in Islam, a marriage of a Muslim to a spouse of the opposite sex, who underwent a sex change (male or female), will not be valid.

The fact that a Muslim man may take another wife under the Bill, but a Muslim woman may not take another husband, means that there is no formal equality within the marriage. It is also argued that polygyny reinforces and fosters patriarchy. This provision, therefore, could be attacked on the grounds of the equality clause of the Constitution. "To bring about equality polygamy will have to be abolished or both sexes would have to be given the same rights" (MLA n.d.: 20).

In addition, in the Bill a husband has a right to *talaq* his wife on broader grounds than the wife has to obtain a *faskh*. "This violates the right to equality and indeed international Conventions such as the Convention on the Elimination of All Forms of Discrimination against Women, which, for example, allows spouses freely to dissolve the marriage on the same grounds" (MLA n.d.: 19).

Constitutionally, the definition of '*iddah*' (DMMB 2011: cl. 1) as the waiting period after a divorce or death before a wife can remarry, appears to infringe a woman's right to equality, because there is no obligation on a man to observe an *iddah* period. The *iddah* also seems to infringe on a woman's right to dignity and freedom of movement (see Domingo 2005).

Finally, with regard to maintenance, according to the Bill a husband has the duty to maintain his wife during the duration of the marriage and, unlike in South African law, generally there is no reciprocal duty on the wife to maintain her husband. It may be possible that a husband may approach the courts and argue that this provision violates his right to equality. It remains to be seen how this constitutional tug of war will be resolved, especially in light of the many possible gender implications and equality violations present in the Bill.

11.8 Conclusion

The South African Constitution welcomes legal pluralism in the context of the recognition and implementation of Muslim personal law. The Bill, if recognised and implemented, will be subject to the secular Constitution of South Africa. Proponents of and opponents to the Bill will have to enter constructive dialogue and will have to address the challenges Muslims face in their communities in regard to issues involving marriage, divorce, maintenance, custody and inheritance. Muslim men and women face difficulties in matters relating to Muslim personal law because the rulings of Muslim judicial bodies have no legal enforcement. Whether the Bill is enacted into legislation or not, Muslims in South Africa should embrace the fact that steps are being taken to recognise Muslim personal law. They should use this opportunity to think innovatively about how Muslim personal law may be implemented within a constitutional democracy.

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Part III
Theoretical and Comparative Considerations

Chapter 12
The Constitutionalization of *Shari'a* in Muslim Societies: Comparing Indonesia, Tunisia and Egypt

Arskal Salim

> *[T]he job of writing a constitution and governing requires cooperation across society. No one person, no one party, has all the answers. Every country is stronger by listening with respect to those with whom we differ. So to write a constitution, the governing party now and then will have to work with other parties, including secular parties, and persuade voters across the political spectrum to respect fundamental principles.*
>
> Hillary R. Clinton addressing the Tunisian Youth at Palais du Baron d'Erlanger Tunis 25 February 2012

12.1 Introduction

The constitutional revision processes undertaken in the aftermath of the collapse of authoritarian regimes are very important in ensuring the scenario of a successful shift from authoritarian regime to democratic system. It is surely true that the outcome of toppling a despotic ruler will not automatically be a democratic state. If a clear demarcation between authoritarian regime and democratic rule is to be made, successful constitutional reform is necessary.

In many non-Muslim states, constitutional reform focuses on two basic structural issues: (1) limitation of the state by means of a set of rights and freedoms guaranteed to the citizens, and (2) separation of powers within the state (Lane 1996 25, 62). By contrast, in most Muslim countries, two quite different issues attract political attention throughout debates on constitutional reform: (1) the religious rights of Muslim citizens to freely apply *Shari'a*, and (2) the obligation of the government to arrange properly for the implementation of *Shari'a* rules in the country.

This chapter was finalized before the Egyptian army removed President Morsi from power in July 2013 and suspended the newly passed constitution, which is being discussed here.

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This chapter addresses the completed, as well as the ongoing, processes of the constitutionalization of *Shari'a* in three Muslim countries: Indonesia, Tunisia and Egypt. The constitutional revision in Indonesia was completed in 2002. The same process took place in Egypt 10 years later, in 2012, and that in Tunisia was expected to end in late 2013. These three countries are selected because they have undergone constitutional revisions which have received intense international media coverage, especially concerning the constitutional position of *Shari'a*. The chapter explains efforts by Islamic political parties in those countries to have *Shari'a* constitutionally acknowledged or to give it a more powerful constitutional status, and argues that failure to enshrine *Shari'a* in the constitutions of these Muslim countries results not only from unresolved deficiencies within their Islamic parties, but also, to a large extent, from strong resistance from other elements of their societies. The chapter especially looks at the on-going processes of constitutional revision in Tunisia and Egypt. In addition, the concept of 'legal pluralism' will be employed as an analytical tool to examine the extent to which the official acknowledgment of *Shari'a* in their constitutions allows legal pluralism within each of the Muslim societies discussed here. Finally, the chapter will offer some comparative remarks.

The unprecedented and contagious revolutionary movements in the current Arab world caused many people to wonder what this so-called 'Arab Spring' would lead to. Some expressed enthusiasm and optimism, but there were others who did not believe in a bright future for democracy in this part of the world. Both optimism and pessimism are grounded on the way in which political transition transpires in a country. The pessimists took the view that, historically, no Arab countries, in the aftermath of revolutions that have taken place in the past century, have ever come to embrace political pluralism, religious tolerance and human rights protection, including for women. The optimists considered that the current revolutionary wave would provide a real chance for democratizing the Arab world.

The high priority placed, in Muslim countries, on the issue of *Shari'a* in particular is mostly based on the classical juristic traditions that emphasize that the ultimate goal of the state is to apply *Shari'a*, in order to guarantee happiness for its subjects in this world and to avoid punishment in the hereafter (Black 2001; Lambton 1981). For this reason, constitutional reform in many Muslim countries has often been preoccupied by the proposal by Islamic parties to give *Shari'a* a much stronger constitutional status. Despite the fact that this kind of proposal has been able to attract the Muslim majority population in those countries and to gain its support, there has always been stiff resistance (based on human rights discourses) from other groups and individuals with secular-liberal backgrounds.

Before delving into details of each country, two general observations are worth presenting. First, the question of who leads the country during the transitionary period while the new constitution is being amended or redrafted has been a key factor in determining the final outcome of constitutional processes.

In Indonesia, the new president who succeeded Soeharto was his former vice president, Habibie. Although a close ally of the former authoritarian president, Habibie was a civil democrat. He was no longer in office when all processes of constitutional reform were completed in 2002, yet many would agree that President Habibie was a significant figure, who played an important role in making the constitutional and institutional

changes necessary for establishing a democratic system, and especially for organizing a fair and free parliamentary election in 1999 (Crouch 2010; Hosen 2003).

In Tunisia, following the ouster of President Ben Ali, the Prime Minister, Mohammed Ghannouchi, briefly claimed the presidency. However, this self-claim was protested by many as being contradictory to the Tunisian constitution. Following the Constitutional Council's interpretation of the constitution, and with regard to the emergency situation, Fouad Mebazaa, who had acted as a member of the Central Committee of the former ruling party, Constitutional Democratic Rally, was appointed as interim president, and Ghannouchi's former position as prime minister was handed over to Beji Caid-Essebsi, who had served in various ministry positions under President Habib Bourguiba and had held a top position at the Chamber of Deputies under President Ben Ali. Although both President Mebazaa and Prime Minister Essebsi were part of the former authoritarian regime, they were able to assure people that they would not usurp power, by organizing a fair and free election not long after they were appointed (Arieff 2011; Paciello 2011). In December 2011, Moncef Marzuki, who was unanimously voted in by the members of the newly elected Tunisian parliament, succeeded President Mebazaa as the new Tunisian president. Marzuki then appointed Hamadi Jebali from the Ennahda Party as the new prime minister, replacing Essebsi.

In Egypt, following the resignation of President Mubarak on 14 February 2011, after his being in office for almost 30 years, the presidential power was supposedly transferred to his vice president, Omar Suleiman. However, Suleiman faced the same situation as PM Ghannouchi in Tunisia, and only occupied the state leadership position for a short time. The presidential power in Egypt was then taken over by a collective entity, not, as it was in Tunisia, by a single person. This entity, the Supreme Council of the Armed Forces (SCAF), consisting of 20 senior military officers, governed Egypt until the new president was elected to office (Sharp 2011).

The second observation is that the abstention of the army, as well as the police forces, from involving themselves in the primary political position during the transitional period plays a vital role in bringing about an effective progression towards a democratic system.

While senior army officials in Indonesia and Tunisia refrained from directly taking a leading role in the executive branch of government, the reverse situation was observable in Egypt. The SCAF, under the interim constitution, had a wide range of authority, from making legislation, issuing public policies and offering appointments to reducing punishments. This was in stark contrast, for example, to the purview of the Indonesian army and police officers, who had only minor political authority and privileges, including sending their 38 appointed representatives to the parliament to take part in the process of amending the constitution.

12.2 Constitutional Amendment in Indonesia

The downfall of the Soeharto authoritarian regime in 1998 brought new opportunities for major political changes in Indonesia. These changes were crucial to transforming Indonesia from an authoritarian state to a democratic country. Many Indonesians

condemned the 1945 constitution, before its being amended, as the root cause of the dictatorship of the outgoing President Soeharto. It contained conditions that make authoritarianism possible. In fact, the 1945 constitution was widely criticized for being very 'executive heavy,' with too much power being concentrated in the hands of the president (Salim 2003).

The political shift from an authoritarian to a more democratic order has given Indonesian people a fresh start for rebuilding the nation and consolidating upon existing legal systems. Triggered by demands for legal reform, aspirations concerning the place of religious law (or *Shari'a*) and its institutional presence in Indonesia have been an important issue for numerous Indonesian Muslim groups. This kind of aspiration has actually gained in significance because, with political liberalization in the wake of Soeharto's fall, individuals or groups have felt free to express their goals and interests (Salim 2003).

Calls for constitutional status for *Shari'a* in Indonesia were often echoed through a demand to bring a popular phrase (consisting of '*tujuh patah kata Piagam Jakarta*' [seven words of the Jakarta Charter]), back into Indonesia's constitution. The phrase alluded to was actually part of the first draft of the preamble to that constitution and has since become very well known in Indonesia: '*dengan kewajiban menjalankan syariat Islam bagi pemeluknya*' [with the obligation of carrying out Islamic *Shari'a* for its adherents]. This phrase, famous today simply as the 'seven words,' was eventually removed from the final and ratified draft of the preamble on 18 August 1945 (Anshari 1997; Boland 1982). In the view of some, the deletion of the seven words that day was a temporal or conditional consensus, and, hence, a tentative agreement, but for others, the withdrawal of the seven words was a substantial agreement, and, hence, a decisive agreement, made by the Founding Fathers of the country for the sake of Indonesian unity. Since then, however, the status of the 'seven words' has been a constantly controversial issue (Salim 2008).

The struggle for the 'seven words' has remained an ongoing issue in Indonesian politics. It has arisen repeatedly since Indonesia's independence in 1945. Attempts to reintroduce the Islamic *Shari'a* into the Indonesian constitution have been made three times. The first attempt was made in the meetings of the Constituent Assembly from 1957 to 1959 (Ma'arif 1985). The second took place in the first years of the New Order era (1966–1998), during the meetings of the Annual Session of the People's Consultative Assembly from 1966 to 1968 (Feillard 1995). Finally, the third attempt occurred during the process of constitutional amendment in the annual meetings of the People's Consultative Assembly in 2000, 2001 and 2002 (Indrayana 2008). All these attempts were, however, unsuccessful.

The result of the 1999 legislative election is relevant to a better understanding of the constitutional amendment process in Indonesia from 2000 to 2002, and is therefore worth presenting here. The Islamic parties occupied far fewer seats than did the two major nationalist parties (PDIP and Golkar). The nationalist wing Indonesian Democratic Party (Struggle (PDIP)) won the election by occupying 153 seats. Next, as runner up, the nationalist ruling party under the Soeharto regime (Golkar) won 120 seats. Meanwhile, Islamic parties (PPP, PBB and PK), with 87 seats, could only control around 16 % of the Assembly. Two other political parties,

PKB and PAN, with a strong Muslim vote, won 51 seats and 34 seats respectively (See Haris 2004; Suryadinata 2002). When all seats won by all political parties with Islamic symbols and Muslim backgrounds were combined, and likewise those of the nationalist parties, regardless of their different political interests, the result was that the Islamic parties held 36 % of seats and the nationalist parties held 64 %.

A heated debate between contending factions over constitutional status for Islamic *Shari'a* took place, mostly in 2002. The Islamic faction can be identified as the pro-amendment camp. Other factions, that included secular nationalist parties and Christian parties and the representatives of the army and police forces, were the contra-amendment camp, who wished to maintain the original text of the constitution.

For the Islamic parties, the key objective of their struggle for constitutional amendment was to succeed in their proposal to reinsert the seven words of the Jakarta Charter into Paragraph 1 of Article 29 (Hosen 2007; Indrayana 2008; Salim 2008). Originally, as confirmed as part of the Indonesian constitution in the first days after the proclamation of independence, Article 29 (1) states a formula similar to what has been stipulated in the preamble of the constitution: "The state is based on belief in One God." No reference is made to Islamic *Shari'a*.

In an attempt to amend Article 29, Islamic parties proposed that one of two phrases (as shown below) should be inserted (in italics) at the end of Article. This would have changed the Article in either of two ways:

1. The state is based on belief in One God *with the obligation to enforce Islamic Shari'a for its adherents.*
2. The state is based on belief in One God *with the obligation to enforce religious teachings for respective believers*.

While both these proposals imply the official recognition of legal pluralism in the constitution, the second proposal would further enforce separate legal pluralism and establish boundaries between believers of different religions in Indonesia. Under this scheme, the state would deal with its citizens on the basis of their membership in a religious community, not as autonomous individuals. For Islamic parties, this situation would not be problematic, since it existed during the Dutch colonial times when different systems of laws (Dutch, customary, and Islamic jurisprudences) were applied for differently classified people (Europeans, Foreign Easterners, and Indigenous Islanders).

Four arguments were presented by the Islamic faction to support its proposal of this amendment to Article 29. First, the proposal was closely related to the Presidential Decree of 5 July 1959, which acknowledged the role of the Jakarta Charter in inspiring and influencing the constitution. Second, every religion teaches about faith and piety, and hence, the inclusion of the 'seven words' into the constitution would be a solution to the perceived moral decadence of the country. Third, Islamic *Shari'a* would be applicable only for Muslim adherents, so followers of other religions had no need to be concerned. And fourth, the reinsertion of the seven words of the Jakarta Charter into Article 29 would clarify the constitutional position of *Shari'a*. Thus, any proposal for incorporating an aspect of Islamic *Shari'a* into the Indonesian legal system would be justified (Salim 2008).

In contrast, the anti-amendment camp, or the nationalist faction, offered four reasons for maintaining the original text, as well as for opposing the amendment to Article 29. First, they considered national integrity was much more important than the political interests of any particular group of citizens. Second, since Indonesia is a *Pancasila*, and not a theocratic state, the state has no right to control the observance of religious duties by its citizens. Third, to mention the rights and obligations of one particular religion in the constitution at the expense of other religions would violate the principle of equality. The final reason for resisting the effort to amend Article 29 has to do with the fact that stipulations in this Article were derived from the constitution's preamble. And, because a consensus not to amend the preamble had already been accepted by all political parties in 2000, both the preamble and the text of Article 29 must be consistent and coherent. To amend this particular Article would contradict what has been already stated in the preamble (Salim 2008).

A peculiar problem that appeared from the running debate throughout the meeting of the Assembly's annual sessions was that the meaning of *Shari'a* remained unclear. Even the Islamic parties seemed to have different understandings about its meaning. If one reads carefully through the proceedings of the Ad Hoc Committee One meetings in the 2002 Assembly's annual sessions, it becomes evident that there was no clarity about what kind of Islamic *Shari'a* it was that the Islamic parties actually proposed (Lindsey 2002; Salim 2008). It seems that all elements of Islamic *Shari'a* would be included in their proposal. In that case, they wanted the constitution to formally declare that Muslim citizens are obliged to perform religious duties, without any precision as to what those duties might be.

Although the Islamic parties struggled to formally constitutionalize the implementation of *Shari'a* in Indonesia, this effort eventually failed due to the stiff resistance of nationalist secular and Christian parties at the 2002 People's Assembly meetings. In fact, the Islamic parties' proposal was also totally rejected by various Muslim organizations who criticized what they (Islamic parties) meant by the term '*Shari'a*.' A majority of Indonesian Muslims, at least as represented by the two biggest Islamic organizations—Nahdlatul Ulama (NU) and Muhammadiyah—have very different visions of *Shari'a*, and therefore opposed the proposal of the Islamic parties. These Muslim organizations understand *Shari'a* merely as communal directives for Muslims, and not as having a constitutional status (Salim 2008). With *Shari'a* having no clear position in the constitution of Indonesia, the state, in theory, welcomes a variety of Islamic interpretations available within Muslim society. This guarantees the condition of intra-legal pluralism within a religion, especially Islam. Furthermore, the state is not only to be impartial to all different views and practices within the same religion, but is also required to respect and protect diversities between different religions.

12.3 Constitutional Revision in Tunisia

In late March 2012, the European Union Institute for Security Studies (EUISS) invited me to Tunis and Cairo. I was asked to deliver a seminar on religion, politics and the state, with a special reference to Indonesia. As it is the largest democratic

Muslim country in the world, there has been an increasing interest in contemporary Indonesia's political system. In particular, Tunisian people have little information on the political experiences of Indonesia during its transition period to democracy in the last 14 years. Instead, many Tunisians have been overwhelmed by information gathered from Turkey's experience of democracy. For many secularists and liberalists, Turkey's was the better experience and its model, therefore, worth adopting. Nevertheless, given the result of the Tunisian election in late 2011, in which an Islamic party (i.e. Ennahda) won a majority of parliamentary seats, Turkey's model would not be easily accepted in Tunisia. In fact, it is unclear if the Ennahda party wished to follow, exactly, the example of the development of secular democracy in Turkey. It is for this reason that some have looked to Indonesia and sought to learn from its experiences of democracy.

It must be immediately added here, however, that although Tunisian political leaders look to other countries' experiences, this does not mean they do not learn also from their own past. Tunisia became an independent state in 1956 and remained so until the Jasmine Revolution in early 2011 (i.e. for 54.5 years). There were only two persons who ruled the country during this time, Habib Bourguiba and Ben Ali, both of whom were despotic presidents. This situation was similar to that in Indonesia, where two authoritarian presidents (Soekarno and Soeharto) led the country for almost 53 years, from August 1945 to May 1998. Interestingly though, following the removal of rule by dictatorial powers, while Indonesia keeps the presidential system, Tunisia (at least under the winner of this election, the Ennahda party) has withdrawn it, and prefers to have a parliamentary system. Meanwhile, since some other parties in Tunisia (e.g. CRP and PDP) still expected to have a presidential system, a slight modification was sought to make the system resemble a semi-presidential government (Pickard 2012). The renunciation of the presidential system by many Tunisians perhaps has to do largely with their bad experience in the past with the two previous authoritarian presidents ruling since Tunisia's independence.

The post-revolution Tunisian election took place on 23 October 2011. The result of this election brought the Ennahda party relative dominance of the parliament. They managed to place representatives in 90 of the total 217 parliamentary seats. The rest (127 seats) were shared among 17 political parties and independent candidates. All these 217 elected members from different political parties then formed the Constituent Assembly, whose main task has been to draft a new Tunisian constitution (Fair 2011).

The composition of the National Constituent Assembly of Tunisia is very similar to that of the assembly that drafted Indonesia's latest constitution. Their mandate to revise the constitution was derived from public election rather than through appointment. Nonetheless, unlike Indonesia, which was supposedly to amend its existing constitution (albeit with a substantial revision), Tunisia decided to prepare a newly drafted constitution, which is totally different from the one that was previously promulgated by President Bourguiba in 1957. In the view of Omri (2013), this was a radical move intended to meet revolutionary expectations and to construct a new government that would not be contaminated by dictatorship and corruption.

Like Indonesia's constitution, the 1957 Constitution of Tunisia does not prescribe anything with regard to the implementation of *Shari'a*. Yet Article 1 of

Tunisia's constitution stipulates that Islam is the official religion of the country: "Tunisia is a free, independent and sovereign state. Its religion is Islam, its language is Arabic and its type of government is the Republic."

As far as the effort to introduce Islamic *Shari'a* into the Tunisian constitution is concerned, some citizens have been alarmed by the domination of the Ennahda Islamic party in the People's Assembly. Responding to this, the founder and leader of Ennahda, Rachid Ghannouchi, has repeatedly stated that his party would be happy to retain the first clause of the previous constitution without pushing for *Shari'a* to be written into the new constitution. At an occasion before the election, he said, "there will be no other references to religion in the constitution. We want to provide freedom for the whole country" (Goodenough 2012). Despite this, the party's final position was not announced, and in the light of this situation, a delegate of the Ennahda party in the People's Assembly, Ali Fares, was quoted as saying that *Shari'a* "must be a principal point of reference in our constitution" (Goodenough 2012).

It became apparent that some Ennahda leaders had booked a place for *Shari'a* to be inserted into the Tunisian constitution. After the election, they were seeking to establish *Shari'a* as a principal source of legislation. Like the previous Egyptian constitution under Presidents Sadat and Mubarak, the draft constitution being considered by the Tunisian People's Assembly stated: "Using Islamic *shari'a* as a principal source of legislation will guarantee freedom, justice, social equality, consultation, human rights and the dignity of all its people, men and women" (Goodenough 2012). It is quite unclear where this particular phrase would be located, whether in the constitutional preamble or in Article 1. If its location were to be in the preamble and Article 1 remained untouched, the Ennahda party leaders who proposed this particular phrase would probably not see themselves as being inconsistent with the promise they had made earlier.

As pointed out by Fassatoui (2012), as early as January 2012, an unofficial draft of Tunisia's constitution was prepared by some leading figures in Ennahda. Article 10 of this draft stipulated that the Islamic *Shari'a* is the main reference of the law, while its Article 126 suggested the founding of an Islamic Supreme Council, an independent constitutional authority who would be responsible for decreeing *fatwas* (religious opinions) according to *Shari'a* law. In fact, this aspiration to give *Shari'a* a constitutional status was supported by more than 3,000 people who marched before the Tunisian People's Assembly in March 2012 to advocate a reference to *Shari'a* in the new constitution.

Drafters of the constitution from other parties objected to the Islamic Party's proposal to integrate *Shari'a* into the new constitution of Tunisia. It was reported that Nadia Chaabane, a member of a small modernist group that advocates for gender equality and the separation of religion and politics, and which holds five parliamentary seats, was challenging the proposal, saying:

> While we need to be in harmony with our identity, we cannot use the shari'a as a source of legislation because it can disrupt the balance of Tunisian society…Even if we did use it—whose version will we follow? Shari'a is so vague and unclear—it needs a lot of interpretation. Moroccan interpretation, for instance, is not the same as Iranian. (Goodenough 2012)

The statement made by the Ennahda leader, Rachid Ghannouchi, on 26 March 2012, seemed to direct Ennahda's withdrawal from proposing the integration of *Shari'a* into the new constitution of Tunisia. His strong messages seemed to end the controversy of the constitutional status of *Shari'a*. He was quoted as saying:

> We do not want Tunisian society to be divided into two ideologically opposed camps, one pro-Sharia and one anti-Sharia. We want above all a constitution that is for all Tunisians, whatever their convictions. (Browne 2012)

Following this, a senior party official, Ameur Larayed, told local media that the first article of the old 1959 constitution would remain the same and his party would not call for *Shari'a* to be the source of all legislation. He said, "Ennahda has decided to retain the first clause of the previous constitution without change…We want the unity of our people and we do not want divisions" (BBC News Africa 2012).

As Duncan Pickard (2012) explained, the decision of the Ennahda party to renounce the introduction of *Shari'a* into the constitution was made by the high consultative council of the party, which consists of 120 elected members. Of the 80 members who attended the internal debate over the issue in question, only 12 supported the inclusion of *Shari'a* into the constitution. It was said that the high council of the Ennahda party came to this decision due to a number of reasons: (1) the plurality of possible meanings of *Shari'a* makes it likely to be misinterpreted by public or judicial authorities; (2) the issue of *Shari'a* in the constitution was not so important to the party when compared with other political and socio-economic problems facing the country; (3) the pre-election platform of the party (i.e. that there would be no reference to *Shari'a* in the constitution) needed to be maintained, as it would bolster the position of the party that adopts the constitution by consensus; (4) the *Shari'a* issue had emerged as a red line for the non-Islamic parties, and moving beyond this would only cause division among the Tunisian people; and (5) the party leaders sought to show the world that including a reference to *Shari'a* is not necessary for creating a democracy which is compatible with Islam (Pickard 2012).

Now that the ruling Ennahda party has guaranteed that no reference to *Shari'a* would be made in the new constitution of Tunisia, the discussion in the People's Assembly has become a bit lighter. Its current focus has shifted to issues such as the wording of the constitutional preamble—in which key issues and rights related to the Tunisian people were not well addressed in the initial stages—and the form of the Tunisian government, i.e. whether it is to be mainly and effectively led by a prime minister or a president. While the Ennahda party seeks a pure parliamentary system, other parties prefer to offer certain key powers into the hands of the President. This particular debate has caused serious delay, and the plan to have Tunisia's new constitution completed by October 2012, as promised by the head of the People's Assembly, Mustapha Ben Jaafar, was revised, and the completion date postponed until 2013 (Amara 2013; Lambroschini 2012). Despite the fact that in June 2013 the Head of Assembly, Ben Jaafar, signed the final draft of the new constitution, and then presented it to President Moncef Marzouki and Prime Minister Ali Larayedh, the new Tunisian constitution will take effect in governing both parliamentary and presidential elections only by the end of 2013.

Given that the new Tunisian constitution does not adopt *Shari'a* or grant it constitutional status, one can say that legal pluralism is officially absent from Tunisia's legal system. Although it acknowledges that Islam is the religion of the state, the constitution of Tunisia remains secular in practice. The Tunisian government is not obliged to directly arrange a standardized or a required practice based on the doctrines of a particular Islamic legal school. The state would neither categorize its subjects into religious communities nor delegate any power to authorities of religious communities. The state, instead, would deal with Tunisian people directly as autonomous individuals.

12.4 Constitutional Referendum in Egypt

Unlike Tunisia, which has apparently steered its constitutional revision onto the right track, Egypt's effort to do the same has been somewhat paralyzed, and has led almost to a 'no through road.' As of the beginning of 2013, or at the time when this chapter was revised, many people in Egypt have a sense of uncertainty about the future path of Egypt's political transition. This uncertainty is largely because it is unclear whether Egypt would have, for the first step, a new president, elected by the people, or a new constitution drafted by the Constituent Assembly. According to a plan prepared by the Supreme Council of the Armed Forces (SCAF), the transitionary military authority which took over the governing power in Egypt following the overthrow of President Mubarak in February 2011, a new constitution should have been drafted prior to the presidential elections held in mid 2012 (Mohamed 2012).

Progress towards a new constitution, let alone towards giving *Shari'a* more authoritative status, is not easy and requires a very long process. The direct election of members of the Egyptian People's Assembly, in late 2011, did not automatically grant them full power to draft a new constitution. Instead, according to the interim constitution adopted by the SCAF in March 2011, the institution that would draft a new constitution is the Constituent Assembly (CA). This Constituent Assembly would consist of 100 participants and would be chosen by all elected members of the Egyptian Bicameral Parliament (made up of the People's Assembly and the Shoura Councils). The Shoura Councils, or the upper house, has 180 members in total, 150 of whom come from the Islamic coalitions. The CA has been assigned to complete a draft constitution within 6 months of its formation (Saleh and Zayed 2012).

The position of *Shari'a* in the constitution has always been a subject of heated debate between religious leaders and politicians. Unlike the constitutions of Indonesia and Tunisia, which do not mention *Shari'a* at all, the constitution of Egypt has included a phrase concerning *Shari'a* since it was ratified in 1971 under President Anwar Sadat: "Fundamentals of Islamic *Shari'a* are a principal source of the legislation [*Mabadi' al-shari'a al-Islamiyya masdarun rai'isiyyun littashri'*]."

This phrase was not present at all in previous constitutions, which only mentioned that "Islam is the religion of the state, and the Arabic language is its official

language." It was said that President Sadat added this phrase into Article 2 due to a demand by the Muslim Brotherhood and in exchange for the modification of another Article in the constitution that would enable Sadat to be re-elected as president of Egypt for more than the two terms allowed in the original text. When Sadat was assassinated and Mubarak took over the presidency in 1980, this particular clause was then amended again due to strong political pressure from Islamic groups (Staringattheview 2011). The wording of this Article changed to the more forceful statement in the last amendment and remained the same in the interim constitutional declaration of March 2011: "Fundamentals of Islamic *Shari'a* are the chief source of the legislation [*Mabadi' al-shari'a al-Islamiyya al-masdar al-rai'isiy littashri'*]."

According to Lombardi (1998), this change in the wording of Article 2 transformed the formerly innocuous clause into a potentially powerful one. However, the implication of this change was vague, as what exactly this amended Article meant or what precisely the government should enforce was not clarified.

What does it mean for (fundamentals of) *Shari'a* to be 'the chief source of legislation'? It was unclear whether the amended Article 2 makes *Shari'a* the preferred source of legislation, or the source of the legislation that controls all other legislations. Lombardi (1998) has discussed this issue in detail and explained that for the Islamic groups, the revised clause means that *Shari'a* is the supreme source. Thus, all Egyptian laws must accord with the rules of Islamic *Shari'a*, and any existing laws that contradict *Shari'a* would have to be revoked. However, in the view of the secularists, the altered Article 2 made *Shari'a*, at most, the preferred form of legislation. Thus, they argued, the legislature should consider the dictates of *Shari'a* in enacting legislation, but it was not bound to follow any particular version of *Shari'a* laws—it would be free to modify traditional rules of *Shari'a* whenever the *Shari'a* seemed anachronistic or impractical.

Despite the change in wording of Article 2 in 1980, the legislation, as well as the enforcement of *Shari'a* thereafter by the Mubarak government, has not fulfilled the expectation of many people from the Islamic groups. The new hope for a fully practical *Shari'a* application in Egypt emerged as the Mubarak regime collapsed in 2011 and Islamic groups have been able to dominate the parliament following the first free election in November the same year. Two leading Islamic parties, the sponsored Muslim Brotherhood Freedom and Justice Party (FJP) and the Salafist Annour Party, were successful in securing a significant majority vote from the people. They hold between them 65 % of the 508 members' seats of the Egyptian People's Assembly, or the lower house. Each combining with other tiny parties, they form two separate big coalitions (Democratic Alliance and Islamist Bloc), which together control almost 70 % of seats in the lower house. With this configuration, Islamist coalitions are better politically equipped to push for enacting more *Shari'a* rules in the country.

What are the stances of both these Islamic parties (FJP and Annour Party) regarding the formulation of *Shari'a* for the new Egyptian constitution? From the initial stage, we heard some of their leaders envisioning the implementation of *Shari'a* in Egypt. During their campaign rallies leading to the presidential election in June

2012, both parties' leaders supported and promised the enforcement of *Shari'a*. Nevertheless, when it came to the constitutional revision of Article 2, they had different proposals. The FJP preferred to keep Article 2 untouched, while the Salafist Annour, an ultra-conservative Islamist party that maintains a literal version of Islam, wanted to change it. This Salafist party sought to replace the term '*mabadi*' [fundamentals], which is now located before the phrase '*al-shari'a al-Islamiyya*,' with another word '*ahkam*' [rules]. Alternatively, if this party's proposal for rewording Article 2 were considered too extreme, they would have been happy enough to see the word '*mabadi*' removed, thus putting the word '*al-shari'a*' in Article 2 at the start of the constitutional stipulation.

As far as the unequivocal implementation of *Shari'a* in Egypt is concerned, the proposal of the Salafist Annour party has been to remove the word '*mabadi*' or 'principles' (Hope 2012). By doing this, this party seeks to resolve constitutional ambiguities, in which the meaning of *Shari'a* in Article 2 often becomes vague when it comes to its interpretation by the Supreme Constitutional Court, which has authority to oversee and settle all conflicting interpretations of *Shari'a*. As was discussed by Lombardi (1998), in a number of cases the Supreme Constitutional Court has understood fundamentals [*mabadi*] of Islamic *Shari'a* to consist of all laws which conform to the broad legal principles that were laid down in the Qur'an and which have been accepted by all Muslim jurists over the years. Thus, if legislation does not violate the fundamental principles of Islamic *Shari'a*, it is in keeping with the *Shari'a* and does not violate Article 2. Given this, the Court believes that the principles referred to in Article 2 should be general principles that function to advance certain divinely-favored social outcomes. Considering this Court's view, it is no wonder that the Salafist Annour Party sought to erase the term '*mabadi*' from Article 2. In their opinion, such a sloppy interpretation by the Court would no longer be valid if the term '*mabadi*' were to be removed.

The Salafist Party has, also, another concern with the institution that would decide whether or not any enacted law in Egypt complies with the *Shari'a* or is in accordance with the *Shari'a* principles. Over more than three decades, the Supreme Constitutional Court, whose judges were primarily trained in secular laws, has been requested to define Islamic *Shari'a* and to determine what it means to be 'the principal source of Egyptian legislation.' The Annour Party was not content with the way the Supreme Constitutional Court (re)interpreted Article 2. This party therefore proposed that the authority for assessing the *Shari'a* compliance of any legislated laws should be taken away from this special court and handed over to the Islamic scholars they trusted. The party wanted to have Al-Azhar University as the new authority for interpreting whether or not laws were in accordance with *Shari'a* principles (Hope 2012).

Since coalitions of Islamic parties in the parliament managed to secure almost 70 % of seats, they were able to make the Islamic *Shari'a* in Article 2 more elaborated in some parts of the new constitution of Egypt. But this was not an easy process, as numerous elements of Egyptian society made every endeavour to oppose any move to clarify the constitutional position of *Shari'a*. That *Shari'a* achieves more recognition in Egypt's new constitution became evident when, in late

November 2012, the Constituent Assembly eventually approved the final draft before it was then ratified by the people of Egypt through a constitutional referendum in December 2012.

Two stipulations closely related to the constitutionalization of *Shari'a* were added into the new constitution. The first is Article 4, that grants Al-Azhar unprecedented autonomy and authority. The Article says:

> Al-Azhar is an encompassing independent Islamic institution, with exclusive autonomy over its own affairs, responsible for preaching Islam, religious knowledge and the Arabic language in Egypt and the world. Al-Azhar Senior Scholars [*kibar al-ulama bi al-Azhar*] are to be consulted in matters pertaining to Islamic *shari'a*.

This provision will give Al-Azhar an important role in legislation and adjudication when aspects of the *Shari'a* are directly involved. In the view of Islamic parties, as cited by Carnegie Endowment (2013), this article specifying the role of Al-Azhar was long overdue, given the institution's prominent position in Egyptian society.

The second stipulation is Article 219, that clarifies which source of *Shari'a* is referred to in the stipulation in Article 2, that Islamic *Shari'a* is the main source of legislation. Article 219 states:

> The principles of Islamic *Shari'a* include its *adilla kulliya* [general valid evidences], *qawa'id usuli* [foundational rules], *qawa'id fiqhiyya* [rules of jurisprudence] and the credible sources accepted by Sunni *madhhabs* [legal communities].

All these kinds of sources of *Shari'a* are standard and technical terms exclusively attached to the Islamic legal tradition, and only those who are specialized as Islamic jurists or have training or background in Islamic law will be familiar with them. Brown and Lombardi (2012) argued that despite contested opinions, negotiation and compromise took place in the Constituent Assembly meetings; the wording of this particular article provides firm evidence that the coalitions of Islamic parties were able to control and dictate the formulation of this document. There is no doubt that Article 219 was produced by hard politics, and not simply by intellectual debates (Brown and Lombardi 2012).

To clarify what each of those technical terms would mean and to put an end to all conflicting opinions regarding the interpretation of 'principles of *Shari'a*' in Article 2, the Muslim Brotherhood issued a statement elaborating on those sources of *Shari'a* mentioned in Article 219. In their view, *adilla kulliya* includes all instructions, rules and commandments specifically mentioned in the Qur'an and the authenticated traditions of the Prophet Muhammad, while *qawa'id usuli* and *qawa'id fiqhiyya* are foundational rules derived from the undisputed general Islamic legal bases and which also serve the objectives of *Shari'a* [*maqasid al-shari'a*]. The 'Sunni accepted legal sources' are meant to be the Qur'an, the Prophet's traditions, the consensus of Islamic jurists, or *ijma'*, and analogy, or *qiyas* (Muslim Brotherhood 2012).

With these two additional Articles—on the role of Al-Azhar and on the confirmed sources of *Shari'a*—in the new constitution of Egypt, the Islamic groups show confidence that *Shari'a* in Egypt will be applied properly. These Articles not only elucidate what the sources of *Shari'a* principles are, but also make clear which should be the most legitimate institution to interpret the meaning of *Shari'a* in its

actual implementation in Egypt. For the Islamic parties, this point is important to guarantee that the *Shari'a* principles would be defined by Muslim jurists they trusted, in this case, the senior religious scholars of Al-Azhar. In addition, such new Articles would assure the Islamists that the Supreme Constitutional Court judges would no longer be authorized to define and interpret *Shari'a* compliance.

However, the Islamic groups should not yet feel satisfied with what they have achieved politically. The presence of those two provisions on *Shari'a* in Egypt's new constitution would not necessarily and effectively stimulate the immediate, successful implementation of *Shari'a* in the country. The role of Al-Azhar in interpreting and deciding which Islamic *Shari'a* is to be legislated, as stipulated in Article 4, appears vague, mostly because it is formulated in passive voice in Arabic and there is no other stipulation in the new constitution that explains the mechanisms through which Al-Azhar would be called upon to act (Brown and Al-Ali 2013). Additionally, any promised autonomy or independent role of Al-Azhar would be meaningless, because the final clause of Article 4 makes all of its previous clauses subject to regulation of law, and this may have the result of controlling Al-Azhar religious scholars.

With all the recent political developments in Egypt, it remains to be seen whether or not the meaning of *Shari'a* is much more clearly (re)interpreted and whether its enforcement becomes more effective at practical levels. Judging from what is written in the constitution, the future application of *Shari'a* in Egypt is not very bright. There will be a long religious and political battle among various parties, not only between Islamist and non-Islamist parties, but also between Islamic groups and the Al-Azhar. Brown and Al-Ali (2013) demonstrated how the statement concerning Al-Azhar was at odds with the Islamic groups' position on a couple of issues. In fact, Article 4 has created an autonomous religious entity that can speak authoritatively for Islam that neither represents the majority, nor is fully in line with the political interests of the president and the parliament, both of which are in the Muslim Brotherhood's control.

Finally, seen from the perspective of legal pluralism, the new constitution of Egypt tends to make the variety of religious interpretations less tenable. With the promotion of Al-Azhar senior religious scholars to the status of the leading authorities in Islamic issues, intra-legal pluralism within Muslim communities is under threat. With this kind of constitutional revision, the government of Egypt would standardize Islamic legal practice based on *fatwas* derived from the Al-Azhar scholars, thus erasing plural legal practices among Muslim people.

In addition, the elaborated position of *Shari'a* in the new constitution of Egypt has, in fact, ignored the religious legal pluralism found in Egyptian society. The constitutional revision would most likely lead to the government's being unable to deal equally and impartially with all believers in different religions in Egypt. The Coptic Church leaders complained that the new constitution only guaranteed the rights of Muslims and prioritized Islam over other faiths, especially those of religious minorities. Instead of allowing each of the various subnational legal systems to operate, the constitution of Egypt appears to be legally monolithic. As Bishop Kyrillos William, administrator of the Coptic Catholic Patriarchate of Alexandria, said:

> Everywhere in the constitution there are clauses saying everything should be in accordance with Islamic law…The constitution not only outlines the principles of Sharia but [also] describes in detail all of the values and opinions contained in the Sharia. It will be terrible—everything will be interpreted according to Sharia. (Pontifex 2013)

Apparently, the stronger position of *Shari'a* in the new constitution of Egypt has prevented this constitution from representing the whole of the Egyptian people, regardless of their different religious backgrounds. Instead, it is considered to represent only one Islamic group, the Sunni Muslims. The Shi'ite Muslims, Baha'is and other minorities are not even represented in the constitution of the country.

12.5 Conclusion: Some Comparative Lessons

For none of three countries presented here has the process of constitutional reform been entirely positive. While the process of constitutional amendment in Indonesia was accomplished more than a decade ago, and the constitutional revision processes in Tunisia and Egypt are either only just completed or nearly so, it is perhaps important to outline a number of commonalities and differences among these three countries, as lessons learnt.

The first difference concerns whether the party (Islamic or otherwise) that has won a majority of seats in the parliamentary election has been an important agent in defining whether the government of the country is going to accommodate, equally, members of a pluralistic society, or preside over an exclusive and discriminatory legal system. Although in both Indonesia and Tunisia Islamic parties were able to gain between 30 and 40 % of the total number of parliamentary seats (in fact the Ennahda Islamic party in Tunisia won the 2011 election), none of them were able to easily introduce *Shari'a* into the constitution. In Egypt, Islamic coalitions have been able to dominate the parliament by holding two thirds of the seats. With this political configuration, they have been relatively successful in making the position of *Shari'a* in Egypt's new constitution more pronounced and specific than ever before.

The second difference lies in the issue of which institution, assigned to draft, or amend, the constitution, is significant in accomplishing a successful constitutional reform. Unlike Indonesia and Tunisia, whose parliaments or People's Assembly automatically became the Constituent Assembly, Egypt decided to establish a separate institution to draft a new constitution. From a comparative constitutional view, the Constituent Assembly faces more challenges and difficulties than does the parliament in revising, or remaking a constitution. A study by Hassall and Saunders (2002) revealed that the experience of a number of countries in the Asia Pacific region demonstrated that the Constituent Assembly often failed in achieving its ultimate objective, due to tension with the transitionary power or the incumbent government. Egypt's Constituent Assembly, which was dominated by Islamic groups, was able to complete its task simply because it received full support from the newly elected president, Mohamed Morsi, who had a background with the Muslim Brotherhood. Replacing the interim military authority soon after the

presidential election in June 2012, President Morsi backed up the Constituent Assembly by issuing a new Constitutional Declaration in November 2012, which not only extended its working period from 6 to 8 months but also safeguarded it from dissolution by an Egyptian judicial body. Had the new president of Egypt not been elected, and had the Constituent Assembly worked while the transitionary military rule was in power, the new Egyptian constitution might not yet exist.

The third issue for comparison is the extent to which political parties or other involved stakeholders are able to agree on a number of fundamental issues. Having a pre-consensus among members of the Constitutional Assembly, prior to the drafting of the constitution, is somehow critical to producing a new constitution that is representative of all subjects of the country. Just before they started their official meetings, Indonesian parliament members had achieved consensus on five issues, one of which was to keep the preamble of the existing constitution unchanged, which in turn became a pretext for preventing *Shari'a* from being included into the constitutional amendments. A slightly similar situation seems to have existed in Tunisia. All parties, including the election winning party, Ennahda, agreed not to propose that *Shari'a* should have a place in the constitution, either in the preamble or in any Article provisions. This kind of pre-consensus was, however, totally absent in Egypt.

12.6 Postscript

Since this chapter was submitted to the publisher in late 2013, dramatic political changes have taken place in both Egypt and Tunisia which need to be included and addressed. Following the overthrow of President Morsi by the military in mid 2013, the Egyptian Constitution of 2012, which had come into effect under Morsi, was suspended, and two different committees were set up to make amendments to that constitution. In January 2014, a referendum was held to pass the amended draft prepared by the committees (Aljazeera 2014; El Din 2013). This new Egyptian constitution retains Article 2 on Islam as the religion of the state and Islamic *Shari'a* as the main source of legislation. However, Article 4 on the legislative role for Al-Azhar senior religious scholars, whom lawmakers were required to consult in matters pertaining to Islamic law, was eliminated. Likewise, another Article that sought to define the 'principles of *Shari'a*' as the principal source of legislation was removed from the 2014 Constitution of Egypt. It appears that some sectors of non-Islamist parties feared this provision would be used to impose a specific understanding of Islamic law.

In Tunisia, after a process lasting almost 2 years, during which several drafts had been presented and critically discussed, the Constituent Assembly was finally able to pass the Constitution of the Tunisian Republic in January 2014. The new constitution of Tunisia maintains Islam as a state religion, but does not mention it as a source of legislation. It also dismisses the term '*Shari'a*' and, in fact, avoids any reference to it at all. Nevertheless, Article 6 of the new constitution introduces

a unique stipulation on the role of the state pertaining to issues on religious freedom. It reads:

> The State shall protect religion, guarantee freedom of belief and conscience and religious practices, and ensure the impartiality of mosques and places of worship away from partisan instrumentalisation. The State shall commit to spreading the values of moderation and tolerance, protecting of sanctities and preventing attacks on them, just as it shall commit to preventing calls of *takfeer* [calling another Muslim an unbeliever] and incitement to hatred and violence and to confronting them. (Unofficial translation by Jasmine Foundation, www.jasmine-foundation.org/en)

The fact that *Shari'a* does not appear in the new Tunisian constitution ensues from the differing views within Ennahda elites. Those who believed that the term '*Shari'a*' should be included into the new constitution were in the minority. On the other hand, a core group of elites, who had long advocated a looser interpretation of *Shari'a*, were able to build a broad-based internal consensus for not introducing the term. These elites see the *Shari'a* as an ideal ethical framework and feel that society needs to be educated to better understand its 'true meaning,' which is not necessarily couched in legalistic, rule-based terms (Marks 2014).

Ennahda's lack of insistence on giving *Shari'a* a constitutional status appears to be a key factor enabling Tunisia's Constituent Assembly to pass a new constitution without any substantial violence or rioting taking place, in marked contrast to the occurrences in its neighbour, Egypt. In addition, as pointed out earlier in this chapter, inaction by the Tunisian military during the process of deliberation of the draft constitution also seems to be an important factor and distinguishes the situation in Tunisia from that of Egypt. Despite its imperfections, many Tunisians believe that their current applicable constitution is quite advanced. Tunisia's new constitution deserves a great commendation, given that in it compromises were successfully formulated on the role of religion in the state and society (Al-Ali and Ben Romdhane 2014). This 'Tunisian way' may inspire or encourage other Muslim countries in the region in (dis)positioning religion, or *Shari'a*, in their constitutions.

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Chapter 13
Legal Pluralism and the *Shari'a*: A Comparison of Greece and Turkey

Bryan S. Turner and Berna Zengin Arslan

13.1 Introduction: Sovereignty, Globalization and the Law

The historical rise of the modern state in the West typically involved the establishment of secular citizenship, which in turn required the development of territorial sovereignty and the construction of social and political unity through a unified legal system, a common taxation system, a national currency, the recognition of a national language and the development of a conscripted national army. These institutional processes lay at the core of nation building and they constituted what we now describe as 'modernization.' In European history, this complex process occurred over a number of centuries, starting in the seventeenth century. The process of state building was coercive, often involving the enclosure of the land, and the suppression of local customs, minority languages, popular religious traditions and customary laws. The final outcome, at least in the European experience, was the construction of a common framework of secular citizenship grounded in a myth of national coherence. This institutional complex is often referred to as 'the Westphalian system' after the famous treaty of 1648, which was important in creating the modern system of international relations and constitutional secularization. For the purpose of this

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article, the authors emphasize the importance of the construction of a unified system of law, imposed by the state and in opposition to legal pluralism arising from religious law, as a critical feature of this historical development.

Social scientists argue that the Westphalian model of an international system of autonomous and unified sovereign states is under strain because of contemporary globalization, and may even be breaking down. It is claimed that state borders have become porous and one manifestation of this political erosion is the growing importance of legal pluralism. Simply defined, legal pluralism is the presence of a number of different legal traditions within a given sovereign territory. It is seen as a challenge to legal centralism, which is an ideology claiming that the state has a monopoly over law making within its sovereign space. The critique of legal centralism is associated with the legacy of Eugen Ehrlich and with modern critics such as John Griffith (1986). It has subsequently been embraced by many legal theorists, often influenced by postmodernism and pragmatism, to describe the fragmentation emerging from multiple legal systems in modern societies (Tamanaha 1997). In many societies legal pluralism is related to the recognition of indigenous traditional laws and consequently it is often referred to as 'unofficial law.' The debate about legal pluralism is also closely associated with theories of multiculturalism and cosmopolitanism (de Sousa Santos and Rodriguez-Garavito 2005). We take the contemporary development of the *Shari'a* in developed societies in the West and in developing societies in Asia and Africa as a classic example of legal pluralism partly as a consequence of globalization.

Legal pluralism takes rather different forms in the core states of the industrial West and in post-colonial societies. In the latter, de-colonization, for example, in Latin America, has given rise to some recognition of customary laws (Sieder 2002). Jurisprudential recognition of the *Shari'a* has also taken rather different forms. There has been growing acceptance of the *Shari'a* in post-colonial societies, especially where Muslims represent a majority of the population, such as Malaysia and Indonesia. In Singapore, where Muslims are a minority, *Shari'a* law operates in domestic disputes, marriages, and divorce settlements under the general oversight of the Majlis Ugama Islam Singapura (Kamaludeen et al. 2010). Nevertheless, the function of the *Shari'a* in Singapore is clearly controlled by a secular state and traditional legal scholars, such as Ahmad bin Mohamed Ibrahim (1965: 62), have taken the view that "the demand for a pure Muslim law in Singapore will lead to immense difficulties in practice and application, especially as in the absence of any constituted Muslim authority every Muslim leader and journalist can claim to be an authority on Muslim law." While Singapore has recognized a limited legal pluralism, there has been general resistance to the spread of the *Shari'a* in the United Kingdom and Europe, and also, but to a lesser extent, in the United States (Joppke and Torpey 2013). There is significant variation in the treatment of Islamic communities and *Shari'a* in Eastern Europe, Russia and parts of China, where 'legal pluralism' is an appropriate description for societies that combine customary law, secular constitutions, and religious law (Kemper and Reinkowski 2005). The complex mixture of legal pluralism, multiculturalism, and population characteristics of the citizens in terms of majority–minority relationships has become an important test of state sovereignty.

We need to add one further important dimension to this sociological complexity by taking note of the fact that the *Shari'a* is not a unified system of state law. In this respect, as Max Weber observed, the *Shari'a* and English common law share one thing in common—they are both examples of judge-made law. Although in theological terms the *Shari'a* was given by the revelation of the Qur'an, its application required decisions that were, at least in principle, grounded in the *Hadith*—the sayings and practices of the Prophet. Hence, Weber (1978: 820) referred to Islamic law as "jurists' law."

Leaving to one side the question of post-colonialism, the principal cause of modern legal pluralism is said to be globalization (Teubner 1997). With economic and financial globalization, there has been an inevitable growth of commercial law, which is not specific to state boundaries (Twining 2000). Second, the growth of human rights legislation has constrained states to behave according to international legal norms and has, as a result, further contributed to legal pluralism (Moyn 2010). Third, with mass migration and open labour markets, the flow of migrants across borders has intensified cultural diversity, necessitating the partial recognition of legal differences within states.

There are various theoretical difficulties around the notions of legal pluralism and the institutions, such as arbitration tribunals, associated with it. For many contemporary legal scholars, the problem in defining legal pluralism is simply a consequence of the broader issue of defining law itself (Tamanaha 2008). Perhaps the most influential attempt to define the law was found in the work of H. L. A. Hart (1961), who distinguished between law as consisting of primary rules (or the rules that apply to conduct) and secondary rules (or the rules that determine which primary rules are valid, how they are found, and how they should be applied). However, every institution, by definition, applies rules and there is, therefore, no obvious way to determine which are public and which are not. Are the rules of trade unions, Boy Scout clubs or the National Rifle Association in fact laws? These jurisprudential issues are important for any discussion of the *Shari'a* since, crucially, there is no clear view about whether the enforcement of norms by religious arbitration tribunals is, in fact, law. For some legal theorists, law can only exist where there are judges sitting in courts with the ultimate backing of the state and in this sense tribunals are not courts (Pound 1966). There is much conceptual confusion as a result and some writers accept the view that legal pluralism simply defines any form of normative or regulatory pluralism (de Sousa Santos 1995). Whenever 'legal pluralism' is invoked "it is almost invariably the case that the social arena at issue has multiple active sources of normative ordering," such as official legal systems, customs, religious traditions, commercial regulations, "functional normative systems" and community or culturally normative systems (Tamanaha 2008: 397). As a consequence, the idea that a single, coherent and integrated legal system is constitutive of a modern society has fallen out of favour.

One might ask why sociologists, as opposed to legal theorists or juridical philosophers, should be interested in legal pluralism. One answer might be to examine the work of the Austrian sociologist Eugen Ehrlich, who is generally recognized as the founder of the sociology of law. He was born in Bukovina in 1862 on the edge of the

Austro-Habsburg Empire. Subject to Austrian law, Bukovina also had a rich tradition of customary laws. Ehrlich coined the phrase 'living law' in 1913, in *Fundamental Principles of the Sociology of Law*, to distinguish his approach from state-centred theories of law, which assume that law is created by the state to construct a unified and coercive system of legal domination. Ehrlich argued, in contrast to Hans Kelsen (2009), that law is not exclusively produced by the state or the courts or by tribunals. Hence, he took the view that law is basically about establishing a social order and it is to be found everywhere; law is concerned with "ordering and upholding every human association" (Ehrlich 2001: 25). In this framework, legal pluralism becomes a controversial sociological issue, because it can only exist in contrast to the notion that the state has a monopoly over the law. In other words, the idea of legal pluralism also functions as a critique of the state-centred or 'official' view of the law. We argue that, while this sociological interpretation of legal pluralism is plausible, there may be other arguments about the importance of a shared citizenship to guarantee equality (especially equality before the law) that must be taken into account. This argument about legal rationalization involving an integration of the legal system is partly derived from Max Weber's sociology of law in his posthumously published *Economy and Society* (1978).

However, the practical issue in any discussion of the *Shari'a*, or indeed of any system of rules, is: who will enforce it? In the legacy of legal philosophers such as John Austin and Hans Kelsen, law is ultimately a command backed up by the authority of the state (Hart 1977). Without effective and legitimate enforcement, how can any normative ordering function as law? This problem of enforcement arises, critically, in the case of human rights, which are typically enforced by nation states in the absence of global governance (Donnelly 1986, 2003). In short, all forms of 'normative ordering' will require the ultimate sanction of a court and finally of a state.

13.2 Public Dispute over Muslim Tribunals

We are, however, particularly interested in the pressure on sovereign states—from human rights norms regarding freedom of religion—to recognize different legal traditions and practices, and, especially, in the debate that has surrounded the recognition of the *Shari'a* in the public domain. The underlying question is whether secular liberal democracies can embrace different legal traditions that have an overtly religious inspiration, just as they might recognize different dress codes in the civil sphere. If secular democracies recognize the veil and the turban as appropriate public attire, why not formally recognize the *Shari'a*? We stress the idea of 'formal recognition' here, because there are various avenues for the informal spread of the *Shari'a*—for example, when a Muslim consults a religious authority for a judgement about some aspect of personal behaviour. The problem is, in fact, more complex. Many western societies have historically accepted Catholic canonical courts and Jewish courts as a means of dispute resolution and, consequently, it appears to

be inconsistent not to recognize Muslim arbitration courts. We argue, following Weber, that legal systems tend towards rational consistency and, hence, the recognition of rabbinical courts would imply that legal coherence would require recognition of *Shari'a* courts. Inconsistency in legal systems becomes the target of debate and criticism not simply by legal experts but by the general public. Why can Sikhs wear turbans when carrying out public duties while veiling is regarded as problematic?

The political backlash in recent years against *Shari'a* tribunals in the United Kingdom, the United States, Australia, and Canada has been considerable and there is, in addition, growing criticism of the social consequences of multiculturalism in France, Denmark, Germany, Norway, and the Netherlands. In particular, the prospects of pluralism and tolerance since 9/11 and 7/7 have been tested by a growing emphasis on security and protection of political borders. There is mounting opposition in Europe, from various political parties, to continuing migration and a determination to eliminate illegal migration through enhanced border security. These security measures are largely directed against political Islam and for many right-wing political groups, such as Golden Dawn, the English Defence League, and the Norwegian Defence League, Islamic civilization has been defined as incompatible with western liberal values. Anti-Muslim prejudice is widespread in Europe, especially in Eastern Europe, and it is mostly associated with communities with high unemployment (Strabac and Listhaug 2008). Hence, while the overt argument against the *Shari'a* is couched in a legal discourse—for example about whether women can enforce their legal entitlements in divorce proceedings—the substantive argument is social, namely, about whether Muslims can be successfully integrated into western societies.

The evolution of the *Shari'a* in the West raises questions about secularization and about religious freedom. Liberal tolerance invites us to respect the *Shari'a* where it is seen to be a necessary foundation of Islamic faith. One might imagine a *prima facie* case, therefore, within a liberal tradition that recognition of the legitimacy of the *Shari'a* would follow automatically from the principle of liberty of conscience. If we adopted the liberal philosophy of John Rawls and the defence of what he called 'reasonable pluralism' (Rawls 1993), then a reasonable and rational defence of the *Shari'a* would be a component of "an overlapping consensus of fundamental doctrines" (Rawls 1999: 171). However, from a liberal perspective, the introduction of the *Shari'a* would have to satisfy a range of criteria to protect individual rights. Furthermore, judgments within a *Shari'a* court would have to be ultimately subject to enforcement by a secular civil court.

In Islamic reform movements, Muslims who are committed to religious renewal often want to imagine that there was a time when the *Shari'a* was the dominant and sole authority, but this notion also turns out to be historically problematic, according to Abdullahi Ahmed An-Na'im (2008). In his interpretation, the *Shari'a* must necessarily exist outside the state and thus the notion of an Islamic state or *Shari'a*-state would not in fact correspond to traditional jurisprudence. His interpretation confirms the claim that the *Shari'a* is not state law. For An-Na'im, it is important, therefore, to recognize the differences between secular western law and the *Shari'a*. In western notions of sovereignty, the state is the ultimate repository of legal authority, but legal authority in Islam "is acquired, rather, in the first instance, informally by way

of reputation (or formally according to Shi'ite tradition, by designation) and then via grants of authorization from individual teacher to student" (Jackson 1996: xiv–xv). Our approach broadly follows the argument put forward by Professor An-Na'im, that secularization is, paradoxically, a necessary condition for the full enjoyment of a religious life in any multi-faith society. He shows that "[b]y its nature and purpose *Shari'a* can only be freely observed by believers; its principles lose their religious authority and value when enforced by the state…the state has its proper functions, which may include adjudication among competing claims of religious and secular institutions, but it should be seen as a politically neutral institution performing necessarily secular functions, without claiming religious authority as such" (An-Na'im 2008: 4). The neutrality of the state and the law—the principle of a level playing field—is a necessary precondition of legal pluralism.

13.3 Greece, Turkey and the European Union

We have chosen to examine legal pluralism and state sovereignty in Greece and Turkey, because these two societies represent contrasting cases and raise interesting issues for legal systems in the European Union (EU). Greece presents an instructive case study of legal pluralism, because its Muslim minority has guaranteed access to the *Shari'a*. In Turkey, a society with a secular constitution has shown some willingness to relax the separation of religion and state that has been the legacy of Kemalist republicanism.

With the break-up of the Ottoman Empire in the early decades of the twentieth century, there was a significant exchange of populations under the arrangements of the Lausanne Treaty between Greece and Turkey, leaving a Muslim minority in Greece, where Muslims continue to enjoy some limited degree of legal autonomy. Within the Turkish Republic, the Kemalist legislation abolished the *Shari'a* as a legal tradition in 1926, adopting a secular constitution that was based on French legal traditions. However, with the election of the AKP (Adalet ve Kalkinma Partisi) there is some evidence of the growing interest in implementing some aspects of the *Shari'a*. This contrast between Turkey and Greece is interesting and important because, while Greece is a member of the EU, Turkey has, to date, not yet been admitted. The prospect of the *Shari'a* having some informal influence in domestic disputes in Muslim communities in continental Europe and the United Kingdom has caused considerable controversy and, hence, we need to consider whether the position of Islam in Greece and Turkey will increase the prospect of the *Shari'a*'s becoming part of the legal pluralism of the West. The comparison of Greece and Turkey, in the context of anxiety in the West regarding the development of the *Shari'a*, raises significant issues for both public policy and social theory.

Greece and Turkey provide two examples for the application of Islamic law in two secular states—first, for a minority Muslim population, in family and civic issues and second, for a Muslim majority population, in the economic domain. In these two examples, Greece represents a case in which the *Shari'a* is practised by

a Muslim minority as a legal and cultural relic (Tsitselikis 2011: 665) and a legacy of the Ottoman 'millet system,' while being protected by the 1923 Lausanne Treaty, and thus by international law. The practice of Islamic law in Greece has become a complex case because, on the one hand, the minority policies of the EU ensure the protection of the right to religious practice, but, on the other hand, some *Shari'a* practices are challenged insofar as they contradict principles of equality in the Greek constitution and EU legal system. Secularism is emphatically stated as a principle of the Republic in the Turkish constitution and, unlike in Greece, Islamic law is not part of the legal system. However, Turkey can usefully provide a case study in which various aspects of the *Shari'a*, such as Islamic banking and *Shari'a*-compliant companies, have been adapted to the secular system, while being bound to the support of the international economic system and the acceptance of the public at the local level. Both cases are important in displaying potential transformations in interpretations and practices of the *Shari'a* in secular countries. These developments also open up the possibility that the *Shari'a* could develop in a convergent manner consistent with human rights principles.

13.4 The Muslim Minority and the *Shari'a* in Greece

Greece is the only member of the EU where the application of Islamic law with the adjudication by a *mufti* is officially recognized and integrated into the national legal system (Borou 2009; Tsitselikis 2011). As a legacy of the Ottoman millet system and based on the Lausanne Treaty, which was signed on 24 July 1923, the Greek government recognizes the *Shari'a* as the law regulating family and civic issues for Muslims who live in Western Thrace. Three *muftis* of Komotini, Xanthi and Didimotyho apply *Shari'a* law in Western Thrace. While it is estimated that 95 % of the population in Greece is identified as Greek Orthodox, a section of the Muslim minority living in Western Thrace enjoys a minority status that is recognized by the Lausanne Treaty. In recognition of their minority status, Muslims in Western Thrace are granted basic entitlements, such as the right to learn their mother language and use it in everyday life, the right to receive an education in Turkish, and the right to practise their religion without any restraints and to administer their own social, religious and charitable institutions (*waqfs*) (Onar and Özgünes 2010). It should be noted that only Muslims living in Western Thrace, but not the whole Muslim population of Greece, possess both national citizenship and minority rights. The new immigrant Muslim population in Greece, which has increased in recent decades to approximately 200,000, mostly originating from Arab countries and other societies such as Turkey, Iran, India, Pakistan and Bangladesh (Tsitselikis 2004), are exempted from these rights. These demographic issues may have long-term consequences for the eventual compromise of the Treaty provisions with respect to cultural rights.

The 1923 Lausanne Treaty is currently the major legal text for both Greece and Turkey in defining the status of their minority groups and regulating their minority

rights. Following a set of protocols and agreements signed between the Greek and the Ottoman/Turkish states—the Protocol 3 signed in 1830, the Treaty of Constantinople in 1881 and the Treaty of Athens in 1913—the Treaty of Lausanne has been accepted as the most significant document for Greco-Turkish relations, because it "regulates the status of modern Turkey" and "determines the Greek-Turkish border by attributing Western Thrace to Greece and Eastern Thrace to Turkey" (Tsitselikis 2004: 5). The Lausanne Treaty has also played an important role for both countries in their respective attempts to build ethnically homogenous populations, by regulating mandatory population exchanges between these two countries and by identifying the ethnic minorities that can enjoy citizenship rights in each country. According to the Lausanne arrangements, Muslims of Thrace, as well as Greek Orthodox of Istanbul, Gökçeada (Imbros) and Bozcaada (Tenedos) were exempted from the population exchange. Thus, Muslims in Western Thrace and Greeks, Jews and Armenians in Turkey are officially recognized as minority groups (Tekin 2010), providing them with special minority rights as well as equal citizenship rights with the majority population. In Greece, the Muslim minority acquired a special status and rights to build Muslim schools, to keep their charitable foundations (*waqfs*) and to maintain religious hierarchies (*muftis* and *imams*) as a continuation of the Ottoman administrative system. After the obligatory population exchange of 1923, the "number of Muslims in Greece reduced to approximately 200,000, of which around 180,000 lived in the region of Western Thrace" (Katsikas 2009: 1). The Turkish minority population continued to decline owing to a pattern of ongoing migration to Turkey in search of better living conditions.

The practice of the *Shari'a* in Western Thrace is historically connected to the Ottoman millet system that was organized on the basis of distinct ethno-religious communities. However, it has acquired "a certain amount of new content and functions" (Tsitselikis 2011: 663), especially in terms of the role and duties of the *mufti* in adjudicating Islamic law, as well as in the definition of the boundaries of *Shari'a* practice under the Greek legal system. Specifically for the Muslim minority in Greece, the *mufti* has a legal capacity concerning "private disputes of inheritance or family matters," which traditionally, is fulfilled by the *qadi* (judge) according to the Islamic law (Tsitselikis 2003: 2). Therefore, unlike in the Ottoman period, when the *qadi* appointed the *mufti* "as an interpreter of Shari'a law," in the Greek system the *mufti* "became both judge and interpreter of Shari'a" (Tsitselikis 2011: 663). In addition, the *mufti*'s role in practising Islamic law in Western Thrace is limited to disputes relating to family and inheritance. Thus, in the Greek legal system, the *muftis* officiate over marriages and divorces, and adjudicate "family law in matters such as divorce, pensions, alimony (*nafaqa*), emancipation of minors and custody" (Tsitselikis 2011: 668). However, "[c]ases related to adoption, children born out of wedlock, division of property upon divorce, and communication with children are not subject to the *mufti*'s jurisdiction" (Tsitselikis 2011: 668). In terms of inheritance, "the *mufti* has jurisdiction solely in cases related to Islamic wills, according to which not more than one third of the overall inheritance may pass to anyone other than the relatives of the deceased" (Tsitselikis 2011: 668). Also, the *mufti* cannot sanction polygamous marriages, which are prohibited in Greek law.

We should note that, in addition to their legal role, the *muftis* administer the mosques, appoint the religious officers at the local mosques, collect *zakat* (taxes) and issue *fatwas*, or religious interpretations, that "do not have legal binding effects" (Tsitselikis 2003: 1–2). Having acquired all these administrative and legal capacities, that closely engage with the everyday life of the Muslim community, *muftis* have also acquired a role of political and community leadership within the Greek system, in most cases acting as the "heads of the local Muslim communities with political authority, representing the Muslim community to the Greek administration" (Tsitselikis 2011: 663). Therefore, the *muftis* have become both actors for and symbols of the preservation and representation of the Muslim minority identity in the region.

This legal system is considered as functioning in parallel with the civil court system in Greece, and in the first instance, courts in Western Thrace should routinely ratify the decisions of *muftis*. Also, a member of the minority can return to the Greek state's civil tribunals to appeal a decision of a *mufti*. Similarly, the "judicial role of the *mufti* is optional and supplementary" (Tsitselikis 2011: 669) rather than mandatory, while the "members of the Muslim minority have the right to choose between the civil courts and the religious courts" (Boussiakou 2008: 14). However, critics argue that, in practice, these presumptions do not necessarily work according to explicit expectations. Tsitselikis (2003) notes that appeals are not always feasible, because they are based on constitutional control and the civil courts are not sufficiently knowledgeable in Islamic law. Also these civil court officials do not want to be accused of infringing the minority's institutional autonomy (Tsitselikis 2011).

Adem Bekioğlu, a Muslim lawyer in the region, expresses this same concern, because "judges declare themselves not competent and return the cases to the *Muftis*" (Eubusiness.com 2003). It is argued that compelling the Muslim minority to submit their cases to the *mufti*'s jurisdiction conflicts with the Greek constitution and the European Convention on Human Rights (ECHR), because it imposes a "distinction between Greek citizens on the grounds of religion" (Tsitselikis 2011: 669).

The current practice of *Shari'a* law in Western Thrace in the Greek legal system and constitution, as well as in the EU legal system, is controversial owing to the legal complexities thrown up by this instance of legal pluralism. One of the reasons for this complexity is that the *mufti* plays an important role in preserving the Muslim minority identity in Western Thrace, while the *Shari'a*, as adjudicated by the *mufti*, is one of the minority rights enacted by the Lausanne Treaty. The political relations between Greece and Turkey also influence the condition of minorities in both countries. Another problem results from the conflicts between the liberal principle of equality in the Greek constitution and the practice of the *Shari'a* in the region. Recognition of the *Shari'a* as law, regulating family and civic issues for the Muslim minority, has been criticized in recent years by both the Greek state and independent human rights organizations, which claim that the *Shari'a* can 'restrict the civil rights of some citizens, especially women' regarding the issues of child custody, divorce and inheritance. Although women have the capacity in Islamic law to initiate divorce, men enjoy important advantages, because the "husband, but not wife can obtain a divorce without giving any grounds; the husband can initiate a divorce

without the consent of the wife, but not vice versa" (Tsitselikis 2011: 670). Similarly, Islamic law has protective measures for the wife and children both during marriage and after divorce, as the "husband is obliged to feed children and wife during marriage, and after divorce the husband has to pay a kind of alimony for the wife for 3 months and for sons and daughters up to the age of 7 and 9 respectively" and "a divorced father is obliged to pay an average of 169–230 Euros per child per month" (Tsitselikis 2011: 668). However, in contrast to any equality principle, once they have reached these ages children are placed under the protection of the father. Polygamy for men is another practice that is accepted under specific conditions by the *Shari'a*, but the Greek state rejects polygamous marriage as null and void (Tsitselikis 2003). The question of women's agency, which is polarized between contrasted positions, lies at the centre of this debate. Some academics and Muslim representatives suggest that because "women's religious conviction and dedication to religious principles" requires them to follow the *Shari'a*, their piety should be taken into account in legal proceedings (Alev 2010: 7). The satisfying of religious and cultural differences may not always be compatible with universal notions of equality for women. Critics tend to consider women in Western Thrace as not free to make autonomous decisions to participate in the *Shari'a*. Their commitment to "traditional and community values" is seen as acting as a barrier to their full integration into Greek society (Boussiakou 2008: 31).

CEDAW (Committee on the Elimination of Discrimination Against Women) (2007) and the Human Rights Council of Europe (Hammarberg 2009) reported practices such as polygamy, unequal allocation of inheritance, child marriage, and proxy marriage as examples of gender inequality, and thus as violations of the Greek Constitution, and as constituting one of the most problematic issues in terms of the human rights conventions that Greece has ratified (Hammarberg 2009). In addition, in the Greek report by the Council of Europe's Commissioner for Human Rights, Thomas Hammarberg (2009) argued that *Shari'a* law in Greece is incompatible with European and international human rights standards. These reports emphasized that the *mufti*'s role should be limited to religious leadership and to issuing *fatwas*. The Greek state expresses what it sees as the need to limit the capacity of the *muftis* to religious affairs, by arguing that permitting the use of *Shari'a* law for the Muslim minority is, in fact, contrary to the equality principle of the EU legislative system. Similar reports on gender inequality in the practices of Islamic law in Western Thrace have been given by members of the Greek Muslim minority. For example, the women's rights activist, Raif Shukran, has criticized *mufti* decisions, stating that "daughters inherit a third of the fortune, boys two thirds" and "to get divorce, a man just has to say three times he repudiates his wife. He then also automatically wins custody over the children when she remarries" (Eubusiness.com 2003).

According to a law issued in 1991 (Act 1920/1991), the *mufti* is required to be a Greek citizen, and to use the Greek language, although Turkish and Arabic can be used in internal affairs (Tsitselikis 2003). The same law also enacted to the Greek state the right to select and appoint *muftis* and *imams*, even though, until then, the Muslim minority had elected the three *mufti*s, thus stirring a continuing debate between the representatives of the Muslim minority in Western Thrace and the Greek state. According to this law, the state selects the *muftis* from the list proposed

by a committee "chaired by the prefect and composed of eminent Muslims" (Chousein 2005: 89–90). This new law, indeed, "retained the legal content of the previous regime regarding the law and the procedure to be applied" (Tsitselikis 2011: 666), but it imposed selection of the *mufti* by appointment instead of by election. The Greek state suggests that the *mufti* is a legal personage who cannot be elected, but can only be appointed by the state. The opponents of this law among the Muslim minority suggest that the *muftis* have an increasing significance for the members of the Muslim minority because they "play an important role in their everyday life," defending their minority rights against the Greek state, and "sustaining Muslim and Turkish identity in Western Thrace" (Hüseyinoğlu 2011). Currently, the *Shari'a* in family law is debated in different ways and on different accounts: it conflicts with the Greek constitution and with the ECHR that Greece ratified; it is also a highly sensitive and politicized subject that involves different actors, including the Turkish state and the EU; and it is related to the question of the protection of minority rights guaranteed by the Lausanne Treaty. As a result of these factors, it will probably remain a challenging and problematic case for secularism in the EU.

This debate has no equivalent in Turkey, because unlike the *muftis*, the religious leaders of the minorities in Turkey have duties only relating to religious matters, and the appointment of these leaders is independent of the Turkish state's involvement, while the appointment process varies for each minority. For example, the religious council selects the Armenian Gregorian Patriarchate, while the members of the Jewish community select the chief rabbi. In Turkey, after the abolition of the *Shari'a* and the implementation of the Swiss civil code in 1926 (Ahmad 1993: 80), and as a result of political pressure from the Turkish state, the minorities signed a declaration of non-application of article 42 of the Treaty of Lausanne, and thus gave up their right to have an independent jurisdiction (Tsitselikis 2011). Turkey has opened discussions with the Greek government, with a view to abolishing *Shari'a* courts in Thrace, on two occasions—first in 1931 and again in 1959, regarding "a reform of *Shari'a* courts based civil law" and stating that the *Shari'a* law "constituted a social regression" (Tsitselikis 2011: 667) In both cases Greece refused to either reform or to abolish the *Shari'a*, referring to the protection of these regulations by international treaties and to the minority's satisfaction with the existing practices.

13.5 Religion and Islamic Law in Turkey

It is commonly observed that 99 % of the population of Turkey is Muslim, the majority of whom are defined as Hanafi Sunni. However, the actual percentage of Muslims is slightly lower. In addition to the Sunni Muslim majority, it is estimated that there are between 15 and 20 million Alevis. Other religious groups include Shiite Caferis, Armenian Orthodox Christians, Jews, Syrian Orthodox (Syriac) Christians, Baha'is, Yazidis, Jehovah's Witnesses, members of various other Protestant sects, and Greek Orthodox Christians. Although it may at first seem counterintuitive, Turkish secularism actually promotes Sunni Hanafi Islam. In other words, the Turkish state does not exhibit an equal or neutral approach toward the

various religious groups living in the country. The Diyanet (the Institution for Religious Affairs), which, following the abolition of the Caliphate, was established in 1924 as the major institution of the state for the regulation of religious affairs and services, illustrates this unequal treatment. The Diyanet, which was founded according to the secular ideology of the early Republican state to represent and promote a modernized version of (Sunni) Islam under a single institution and provide centralized religious services, rather than leaving it to local groups and communities, primarily represents and provides religious services to the Sunni Hanafi majority. Imams and preachers are trained and employed by the state, and the Diyanet provides summer courses on the Qur'an (for children older than 11 years of age), and *fatwa* services for questions regarding Sunni Islam. In addition, Sunni Islam is mandatory in primary, secondary and high school education. The non-Muslim ('*gayrimüslim*') minorities that are recognized by the Lausanne Treaty—Greek Orthodox Christians, Armenian Orthodox Christians, and Jewish minorities—are exempted from this education. Only the religious foundations of these minorities, but not those of other non-Muslim communities, such as Süryanis, may operate schools in their own languages, under the supervision of the Education Ministry (Oran 2003). Children of other religious groups, such as the Alevis, who are not included among those groups, are required to take mandatory religious classes. Furthermore, religious communities outside Sunni Islam do not have a formal set of institutions in the country in which to pursue their education.

13.5.1 Islamic Banking in Turkey

Although we have described various forms of legal and political tension over the *Shari'a* and its provisions for matters relating to personal status, we conclude this section of our discussion with a brief consideration of Islamic norms concerning interest on financial transactions and the rise of Islamic banking. While laws relating to personal status cause controversy, the West has been able to absorb Islamic banking institutions without any such public controversy. Islamic banking, which must of course be recognized as a practice that is covered by *Shari'a* norms relating to interest and other financial procedures, was first introduced in Turkey in 1985 by the Motherland Party (Anavatan Partisi) under the leadership of Prime Minister Turgut Özal. The Motherland Party (MP), which espoused cultural conservatism and pursued economic liberalization, further implemented neoliberal policies that were initiated under the military regime during the period between 1980 and 1983. Initially, Turkey had become one of the shareholding member states of the Islamic Development Bank in 1975, but the legal ground for interest-free banks in Turkey was formed later, in 1983, placing these banks under the category of Özel Finans Kurumları (Special Financial Institutions) and leading the way to the foundation of three Islamic banks in 1985 (Albaraka Türk, Family Finans and Faisal Finans).

These Islamic banks have been seen to be primarily means through which to channel Saudi capital to Turkey. They have continued to grow since the mid 1990s and were officially accepted as a part of the banking system in 1999, mainly as a

result of IMF and World Bank reforms during that period (Jang 2005). Although Islamic banks were heavily investigated by the Turkish military during the early 1990s, they have enjoyed relatively trouble-free operating conditions—a situation in stark contrast with that of the Islamic National Order Party and its subsequent political manifestations, which were closed down after the military coups in 1971 and 1980, and the "soft military coup" of 1997 (Jang 2005: 53). Since the MP period, the Turkish Islamic banks have developed and consolidated personal relations with reformist political parties, such as the Justice and Development Party (Adalet ve Kalkınma Partisi), as well as the *tariqa*s (Islamic fraternal associations) and other Islamic communities. For example, the Gülen community operates the Asya Finance House—one of the three locally owned Islamic banks—and "quite a few members of the reformist wing formerly worked as board directors or managers of the banks, and possessed ownership shares in them" (Jang 2005).

The final integration of Islamic banking into the wider Turkish banking system, as an aspect of the International Monetary Fund and World Bank-led economic reforms in Turkey, is noteworthy. The Islamic bank model has increasingly become more compatible with these new banking tendencies, and is clearly in demand. For example, banks such as the HSBC and Citibank now operate Islamic units or mutual funds. Islamic banking, which was initiated in the 1970s, "is a modern and transnational phenomenon that aims at making banking practices conform to Islamic norms by avoiding interest and unjustified increases in wealth" (Jang 2005: 7).

Shari'a norms indicate that wealth should be produced only through legitimate trade and investment, which should not have any connections with alcohol, gambling or pornography. Thus, "Islamic banking replaces interest with profit and loss sharing arrangements (PLS) whereby depositors, lenders, and investors receive a predetermined share of any income generated in the borrower's business transactions, or share in any losses" (Jang 2005: 7). Jang concludes that, as a result, modern Islamic banking shares a common economic or financial cause with economic liberalism and does not experience any tensions with the Washington consensus. More broadly speaking, the European states appear to accept the *Shari'a* where it is confined to banking practices, but not when it provides a legal framework for matters of personal status relating to marriage, divorce, and child custody.

In February 2011, the Turkish government issued a law which accepted the Founding Agreement of the Islamic Corporation for the Development of the Private Sector (ICD), an entity of Islamic Development Bank Group. With the passing of this law, ICD will be able to provide "finance to private sector projects" in Turkey, "in accordance with the principles of the *Shari'a* law" (ICD website). While the government believes that this law will promote the development of the private sector in Turkey, its opponents suggest that the *Shari'a* principle in the Founding Agreement of the ICD conflicts with the secularism principle of the constitution of Turkey. Apparently, the government accepted the agreement with reservations to the articles concerning *Shari'a*. However, this resulted in a duality in the existing secular system, as these arrangements provide an obvious economic incentive to develop a *Shari'a* framework for business activity.

The current condition of the state in Turkey can provide a good example of what Saskia Sassen (2009: 577) calls "state transformation," a term she employs to

challenge the common argument in the social-science literature that interprets "deregulation and privatization as the incorporation by the state of its shrinking role." As a part of her effort to "blur some long-standing dualities in state scholarship, notably, those concerning the distinctive spheres of influence of, respectively, the national and the global, of state and non-state actors, and of the private and the public" (2009: 578), she invites us to "recognize and decipher conditions or components that do not fit into this dual structure" in order to be able "to detect deeper transformations" (2009: 578).

It is important to note that "[e]ven the process of state withdrawal from regulating the economy requires some participation by the state" (Sassen 2009: 579). The Turkish state today represents a case in which the state regulates the process of deregulation, thereby participating in the definition of a new power structure and its social actors. This development is based on the "hybrid authority" of the state which is "neither fully private nor fully public, neither fully national nor fully global" (Sassen 2009; 579). It requires the "production of new types of regulations, legislative items, court decisions, or, in brief, a whole series of new 'legalities'" (Sassen 2009: 579) rather than a reduction in the state's authority. It is possible to see these new 'legalities' in terms of legal pluralism and the shift in the conception of the secular in Turkey. The Turkish state has been regulating both its relation to the global economic system and the space of religious affairs, leading to a new secular regime, which promises legal pluralism within the existing secular legal system (Turner and Zengin Arslan 2011). In this new state approach, the *Shari'a* is integrated into the economy (through the banking system and *Shari'a*-based companies), which opens up new forms of and possibilities for global interconnectivity. The state offers a model for globalization that engages simultaneously with both Islamic and non-Islamic capital. It is possible to understand the new law as allowing, and indeed encouraging, *Shari'a*-based companies in this context. While western financial institutions have been enthusiastic in embracing Islamic banking, they must also face the fact that the profit on *Shari'a*-compliant transactions may be low. For example, the HSBC has announced that it is withdrawing from this sector, because it cannot make enough money from such activities (Hall 2012).

13.6 Conclusion: European Union, Turkey and Greece

The EU introduced a new framework for both Turkey and Greece, whereby minority rights are evaluated from a multiculturalist perspective, which has resulted in the introduction of multicultural approaches in the political agenda of both states. For Turkey, which was officially recognized as a candidate for full membership in 1999, the Copenhagen Criteria (1993) that "designated 'respect for and protection of minorities' as a condition of membership" (Tekin 2010: 88) has been important in working toward improving the conditions of its ethnic and religious minorities. Improvements in Greece, which became an EC member in 1981, commenced in the early 1990s, when a new minority policy was announced (Tekin 2010: 89).

In the 1990s, steps were taken to improve minority education in Western Thrace. The main political demands have been "the recognition of an ethnic (Turkish) identity, the improvement of the minority education system, the selection of the *mufti* (religious leader) and the management of the *waqfs* (private religious foundations) by the minority community" (Borou 2009: 7).

The EU process promises an improvement in minority rights in both countries. Both societies have abandoned some of their secular and nationalist attitudes in approaching minority rights, as a part of their integration into the EU or, in the case of Greece, to complete the integration process. Historical definitions of 'who can constitute a minority group,' based on the 1923 Lausanne Treaty, are still influential today, and minority identities, such as 'Muslims in Western Thrace,' are indeed heterogeneous. Increasingly, diverse non-Turkish social groups have been pointing to the fact that a hegemonic Turkish identity overrides their own ethnic identity. However, this situation paradoxically introduces further questions for the EU to resolve, namely, whether to recognize other minorities, and who will be empowered as legal entities to represent these minority groups.

We conclude, following Max Weber's concepts of legal rationality and rationalization, that there is some propensity within legal systems towards consistency. Weber argued that law in continental Europe inherited aspects of Roman law, in removing arbitrariness and inconsistency to become, over time, a deductive system of law. He was, therefore, critical of both English judge-made law and *qadi* justice. In the case of Islam, he argued that any legal system based on revelation could not develop in a logical fashion, because the gap between ideal and reality could only be bridged by arbitrary, ad hoc decisions, and he concluded that the *fatwa* was of this character. While modern interpretations of Weber have rejected his view of the *Shari'a*, we propose that the notion of legal rationalization points to the fact that the legal framework of Europe is evolving towards an integrated system around shared norms and procedures. This pressure for consistency in legal systems would require an acceptance of the *Shari'a*. If Turco-Muslim communities in Greece can enjoy the use of the *Shari'a* in solving domestic issues, why would this legal privilege be denied to Muslims in Britain or France or Germany? Resistance to this aspect of legal rationalization will, of course, be considerable, given the current political and financial crises within the European community. Any development of legal pluralism within the EU as a result of acceptance of aspects of the *Shari'a* will provoke demands that *Shari'a* provisions must be consistent with existing legal norms, such as those relating to gender equality. In conclusion, it seems evident that the modern legal field involves an endless tussle between legal pluralism and legal centralism.

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Chapter 14
Contradictions, Conflicts, Dilemmas and Temporary Resolutions: A Sociology of Law Analysis of *Shari'a* in Selected Western Societies

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14.1 Introduction

I have been examining theories applicable to the development of legal pluralism, and particularly *Shari'a*, in western societies, building on some ideas from major theorists in the Sociology of Law (Richardson 2001, 2004, 2005). One recent article (Richardson 2011) focused on a socio-legal approach to understanding the social construction of *Shari'a* using theories of Donald Black (Black 1976, 1999; Black and Baumgartner 1999) and ideas derived from the Sociology of Religion (Richardson 2013). In this earlier work I also referred briefly to the theoretical approach of William Chambliss (1964, 1979; Chambliss and Zatz 1993). Herein I will apply, in a post-hoc manner, Chambliss' theoretical perspective on development of law and public policy, to efforts to integrate *Shari'a* into selected western societies where *Shari'a* has become controversial—Australia, the United States, and Canada. Hopefully, this effort will illustrate the value of Chambliss' approach to explaining what is happening with controversies concerning *Shari'a* that are raging in various western societies.

The societies of Australia, the United States, and Canada differ considerably in terms of their 'structural foundations,' even though they share many cultural aspects and all have Muslim populations originating from many different countries, which have arrived for differing reasons. All three societies are predominantly Christian in their historical origins and have legal systems based on the common law tradition. All are defined as liberal democracies, and have a traditional emphasis on separation of church and state and emphasize religious freedom, even though these values differ considerably in implementation.[1]

[1]The United States has its Bill of Rights and the First Amendment of its Constitution with its anti-establishment and freedom of religion clauses, whereas Australia does not have a Bill of

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All three of these societies have been dramatically affected by the tragic triggering event of 9/11 and by subsequent events, but they vary considerably in terms of the direct impact of those events. The United States clearly experienced 9/11 as a more significant triggering event, with the direct attack on one of its major institutions, the World Trade Center, and a major city, New York. But the entire world was affected by that event, and that episode and subsequent terrorist attacks have made many people in western societies feel vulnerable, frightened, and angry. This combination of emotions has often been directed at those perceived to be 'part of the problem,' which means that Muslims (and even anyone darker skinned and 'foreign') have become targets. And the cultural values and practices of Muslims have also been targeted, which has made any effort to implement aspects of *Shari'a* a potential magnet for controversy and conflict.

14.2 Cautionary Note

Before proceeding with an examination of reactions to *Shari'a* and applications of Chambliss' theories in selected western nations, an important word of caution should be interjected. *Shari'a* is not a monolithic canon of laws that Muslims everywhere seek to implement and live by. *Shari'a* is a dynamic set of values, beliefs, and practices that have changed much over time, and which are still evolving as Islam encounters other societies and cultures and changing circumstances. While those opposing any integration of *Shari'a* elements into legal systems in a given society stress the worst possible version of *Shari'a*, taking it completely out of context, scholars of Islam stress its changing nature, even in Muslim majority countries (see Saeed 2010).

This is an important point to make in the context of applications of Chambliss' theories, because it is often the case that the dialectic processes which Chambliss assumes are influencing how *Shari'a* is implemented for Muslim minority groups within a host society also include conflicts *within* the Muslim community, as differences of opinion among various Muslim subgroups come to the fore. For instance, there are Muslims from 80 different countries residing in Australia, and only 36 % are Australian born (Bouma 2011; see also Saeed 2003). There are strong differences of opinion among the Muslims from different countries, who have arrived at different times and for different reasons. There are also important gender and generational differences within the larger, differentiated, Muslim community. To assume that Muslims in Australia or any other western society share a view of what *Shari'a* is and how it should be implemented in a society is quite naïve and problematic (see Black 2010; Kolig 2010; Richardson 2013).[2]

Rights with such guarantees, although several efforts have been made to approve such a provision for the Federal Constitution (Richardson 1995). Canada approved adding the Charter of Rights and Freedoms to its Constitution in 1982, a provision that gives considerable power to Canadian federal courts in a manner analogous to the situation in the United States. See Lori Beaman (2008) for an analysis of judicial actions concerning religious freedom issues.

[2] Not all western societies have such a variation, of course. For instance, most Muslims in France come from North Africa, while the majority of Muslims in England come from Pakistan and other

Also, as Saeed (2010) notes, it is not at all clear that most Muslims want to see *Shari'a* implemented in their host societies. Many have fled authoritarian regimes that implemented a harsh form of *Shari'a*, and they do not desire to return to such a situation. Saeed (2010) also points out that *Shari'a* in some Muslim majority countries, such as Morocco, is being dramatically changed to include elements calling for more gender equality as well as more recognition of universal norms concerning human rights. Thus he poses a question about whether (and which) *Shari'a* should be adopted in western nations, since it is undergoing profound changes in some other nations.[3]

14.3 Chambliss' Basic Approach

William Chambliss has produced an impressive body of historically informed scholarship on the *dialectic processes* whereby law and social policy develop. He derides mechanistic and reifying theories that leave people and human volition out of the equation, and instead demonstrates, with careful historical research, the way that choices are made to resolve *contradictions*, *conflicts*, and *dilemmas* in specific contexts in which law and policy are developed. His approach, which he applies to both western and socialist countries, clearly shows the working out of discretion on the part of human actors. His agency-oriented approach is summarized as follows:

> The vocabulary, theory, and methodology suitable for the study of law and society should begin not with vast impersonal forces sweeping across empty heads and determining human action, but with thinking, choosing, creating human beings. Society is a collection of human beings, not an entity with its own needs, force, and consciousness. It consists of people acting together in repetitive patterns shaped but not determined by the constraints of a particular historical period. (Chambliss and Zatz 1993: 8)

As far as I have been able to discern, Chambliss' dialectic approach has seldom been applied to the development of law and social policy dealing with religion or more specifically Islam.[4] There is no reason why this cannot be done, but before doing so, a summary of Chambliss' major ideas will be useful.

First, Chambliss makes it clear that he is not interested in mundane and minor changes in law and policy. Instead, he is interested in "critical events" that "provide a new approach to a problem" (Chambliss and Zatz 1993: 3–4). He says, "These include basic revisions of the existing relationships between the state, polity, government, and fundamental institutions." He adds that he is interested in situations that "strike out in a new direction," or "important turning points in the historical processes."

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nations in that region. This does not negate the point being made, however, that there is disagreement about 'which *Shari'a* should be implemented.'

[3] Also see Voyce and Possamai (2011) for a thoughtful analysis of changing interpretations of *Shari'a* in modern societies, and Ali (2011) for a sociologically based analysis of the possibility of formally adopting *Shari'a* in Australia. Ali concludes that the fragmentary nature of the diverse Muslim community in Australia would make adopting *Shari'a* unsustainable.

[4] One exception is Tabory (1993), who applies Chambliss' ideas to religious issues in Israel.

Second, Chambliss is very critical of both functional and Marxist theories of the origin of law. He specifically focuses on the tautological nature of both pluralist theory, which is the best known variant of functional theory, and ruling class theory, an oft-cited version of Marxist theory. He criticizes both by saying “the event is explained by the existence of the event” (Chambliss and Zatz 1993: 7). Chambliss then begins the development of his own theory by stating:

> We propose a theory that sees law as a *process* aimed at the resolution of contradictions, conflicts, and dilemmas that are historically grounded in time and space and inherent in the structure of a particular political, economic, and social structure. (Chambliss and Zatz 1993: 9)

He defines ‘contradiction’ as follows:

> A contradiction is established in a particular historical period when the working out of the logic of the extant political, economic, ideological, and social relations must necessarily destroy some fundamental aspects of existing social relations. (Chambliss and Zatz 1993)

Contradictions can be either primary or secondary, says Chambliss, citing Anthony Giddens, with primary ones being “identified as fundamentally and inextricably involved in the system reproduction of a society” (Chambliss and Zatz 1993: 10). *Contradictions* in turn produce *conflicts* between interest groups, and dealing with those conflicts produces *dilemmas* for the state apparatus to resolve. The state apparatus has to decide which set of interests to defend, or what kind of compromise to work out between competing interests. That decision produces a *resolution,* but this in turn may bring about other contradictions, simply because there is seldom, if ever, a perfect solution to conflicts and dilemmas that develop. Thus, what occurs is a continuous dialectic process of development of law and policy in a society, with contradictions leading to conflicts, which cause dilemmas for the state, which must effect a resolution which can itself lead to other conflicts, and so on.

In the closing chapter of the collection that Chambliss and Zatz edited to demonstrate the power of their approach, they discuss the impetus for their efforts and explain what they were attempting with the collection.

> In our view earlier theories of lawmaking have erred fundamentally by attempting to impose a *deterministic model of lawmaking* on what is in fact a process of choices made in the context of *structural constraints and extant resources.* Structural contradictions theory… attempts to construct a paradigm that takes into account the *process by* which laws are created, rather than to impose an abstract set of socially constructed categories presumed to determine inexorably the outcome of the lawmaking process. (Chambliss and Zatz 1993: 423)

In a summary of how the theory has been expanded, Chambliss and Zatz (1993: 424) note that the original theory focused on contradictions derived from the political and economic forces of capitalism, but then claim “the scope of the theory has been imaginatively expanded…to include social, cultural, and ideological contradictions.” They then discuss the “larger role in modeling the lawmaking process for ideological forces and attention to strategies and triggering events.”

The concept of 'triggering events,' which is incorporated from the work of sociologist John Galliher (Galliher and Basilick 1979; Galliher and Cross 1982), deserves special attention as an important addition to basic structural contradiction theory. This concept refers to events "that actually lead to passage of a specific piece of legislation" (McGarrell and Castellano 1993: 349). This concept, combined with the notion of *structural foundations*, also from the work of Galliher and Cross, has been used effectively by McGarrell and Castellano (1993) to explain the development of criminal law at a particular time in New York State. By structural foundations is meant

> both structural (economic, racial, gender, religious composition) and cultural (political climate and ideology, religious and punitive attitudes)…variables. These variable clusters generate the primary contradictions, conflicts, and dilemmas in society. (McGarrell and Castellano 1993: 349)

These two theoretical elements that have been added to and accepted into Chambliss' scheme were used earlier by Galliher and Cross (1982) to help explain the anomalous pattern of drug laws in the United States, and especially the strange situation in Nevada, which for several decades had the most open laws in the nation concerning divorce, casino gambling, and prostitution, while at the same time having the most stringent drug laws in the nation. It seems obvious that these additions to Chambliss' basic theory are useful, especially when focusing on religiously derived cultural and legal systems such as *Shari'a.*

14.4 Extending Chambliss' Ideas

One issue that can be raised concerning Chambliss' theoretical scheme concerns his limited attention to the role of court decisions in shaping law and policy. Courts did not often play a major and autonomous role in shaping law and policy in the historical times focused on by Chambliss in his earlier work. Instead, courts were assumed mainly to be an arm of the State, enforcing what laws were developed by those with the authority to do so. Chambliss' earlier historical work on the origins of the law of vagrancy (Chambliss 1964) does not assume a major role for court decisions for an understandable reason: there were few functioning autonomous courts with any authority to overrule laws that were passed, or edicted, by societal authorities such as monarchies.

There are exceptions to this assessment of Chambliss' scheme, such as his mention of the failure of English courts to enforce the many laws calling for capital punishment (some 200 at one time in England) (Chambliss and Zatz 1993). Chambliss also notes a creative role for the courts in certain key decisions in England that helped establish modern laws of theft (i.e. in the *Carrier* case in 1473), and he also describes a role for courts in terminating the Salem witch hysteria.[5] However,

[5] One chapter in Chambliss and Zatz (1993), McGarrell and Castellano (1993), does deal briefly with the role of appellate courts in 'triggering events,' citing work on the development of laws dealing with juveniles.

it seems clear that in modern times, in societies with relatively autonomous court systems, the role of the courts in making law and policy has greatly expanded, and must be taken into account in any thorough treatment of the process of lawmaking (Richardson 2001; Stone Sweet 2000; Tate and Vallinder 1995). In this chapter I will take into account the increasing role of courts in developing law and policy concerning the development of *Shari'a* in western societies. The role of the courts will be integrated into the process concerning efforts to develop *Shari'a* in western legal systems as I describe how these efforts have unfolded, analyzed using Chambliss' theoretical approach.

One other point to be noted concerns what is required to constitute a change worth examining using Chambliss' approach. He claims to focus on changes in law and practice that are major. Sometimes a resolution may entail *refusing to take action* when it would seem called for by the pressures that have built up because of contradictions and ensuing conflicts. As will be seen in the case studies below, this outcome, however temporary, should, perhaps, also be seen as a resolution of note.

14.5 *Shari'a* in Canada: The Ontario Case

Law professor Natasha Bakht (2005) has written insightfully about the controversy and 'moral panic' that erupted about *Shari'a* in Ontario, Canada, in the early 2000s.[6] Her analysis clearly shows the 'symbolic politics' of what transpired (Edelman 1964), and also amply demonstrates the dialectic nature of the process that led to a 'resolution,' even as she makes it clear that she believes the resolution is unsatisfactory and needs further refinement.

The episode was triggered when a group of Muslims, calling itself the Islamic Institute of Civil Justice (IICJ), a Toronto organization, announced that it intended to create Islamic arbitration tribunals to operate under the auspices of the 1991 federal Arbitration Act. Apparently this small group was not attempting to cause a public furor, but was seeking to establish something comparable to the Jewish tribunal (*Beis Din*) that had been operating under the Act for years without any problems. However, its announcement served as a significant 'triggering event,' and a furor quickly erupted. The way the episode played out illustrates Chambliss' basic dialectic process, as well as the emendations to his original ideas he has endorsed, such as the role of cultural factors and triggering events. Indeed, the episode clearly shows that cultural and ideological factors can play a dominant role in how contradictions, conflicts, and dilemmas are resolved, even if temporarily.

[6] Also see Macfarlane (2012), whose impressive study of Muslim attitudes and beliefs about divorce under *Shari'a* and the laws of the host societies in America and Canada was given impetus by the controversy that developed in Ontario.

The IICJ's announcement of its intention revealed a perception (by some Muslims) of a 'contradiction' in the way the Act was being applied. Its operation recognized other religious entities (i.e. Jews) who are allowed to develop tribunals under the law, and, indeed, the Act specifically allowed any parties to a dispute over family matters to seek third party intervention to settle the dispute, and to make use of any set of rules they desired. Muslims, however, were not being allowed to have their informal tribunals operate under color of the law, or to mediate disputes openly, and some decided to press the issue. They sought equal footing under the law with other entities that were making use of the allowance for mutually agreed upon third parties to intervene to help resolve disputes.

The expression of concern by the IICJ over contradictions in how the Act was being implemented led immediately to 'conflict,' as Canadian women's groups, including some Muslim ones, attacked the idea of sanctioning Islamic tribunals for use in resolving family disputes.[7] According to Bakht (2005), over 100 organizations and individuals came together to form the No Religious Arbitration Coalition, a group promoted by the Canadian Council of Muslim Women. This coalition was extremely effective in drawing the attention of the media and politicians to their cause, and even overcame the impact of an official report from the Attorney General and the Minister responsible for Women's Issues that called for the continuation of religious tribunals, but with proper safeguards.

The conflict presented the government of Ontario with a major 'dilemma,' forcing it to take action. On 11 September 2005 (a propitious date for such an announcement), after much controversy, the Premier of Ontario, Mr. Dalton McGuinty, announced in a much noticed press conference that the use of any religious law in family matters would henceforth not be allowed in the Province. This decision was aimed at *Shari'a*, but Jewish tribunals were also caught in the edict. However, this 'resolution' went too far, according to Bakht (2005: 73):

> Where feminist mobilization went astray was in their lobbying efforts to prohibit all religious arbitration. Canadian feminists resolved that the vulnerable interests of women, particularly Muslim women, were best protected through the strict separation of law and religion.

Bakht believes that religious arbitration, indeed any third party involvement, could and should be allowed, but with proper safeguards. She notes that some devout Muslim women prefer the use of Islamic tribunals, and believes their rights of religious freedom are being violated by precluding that choice as a matter of law.

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[7] This furor led to a thorough study of the Act by the National Association of Women and the Law, which in turn resulted in a number of changes in the law that Bakht (2005) views as positive. Bakht (2005) mentions several deficiencies found in the Act that led to new requirements in the law. These deficiencies included that: arbitrators were not required to have any specialized legal training; parties could contract out their right of appeal; decisions to arbitrate could be made years before any dissolution of a marriage; no legal review of an agreement was required; there were no record-keeping requirements for third party arbitrators; and arbitration could make use of any 'rules of law.' The changes enacted into the Act are enumerated in footnote 70 of Bakht's article (2005) and reflect efforts to correct the deficiencies found during this review.

Also, of course, Jewish tribunals have been disrupted, even though there had been no major issues raised about them over the years they were allowed to function. Bakht (2005: 75) adds:

> Rather than proposing a blanket prohibition on all religious arbitration, a more nuanced approach that showed consideration for the religious rights and equality rights of women would have been more useful.

Thus it appears that there are strong arguments to revisit the newly amended Act and find ways to allow some religious tribunals to operate under regulated conditions. Bakht (2005) says that to do otherwise deprives devout Muslim women (and others as well) of adequate protections under the law, leading to 'back-alley arbitration' that will not be subject to any official review. This is especially the case because current legal aid statutes in Canada do not allow use of government sponsored legal aid in arbitration matters, thus leaving those wishing to use an informal process no recourse to legal advice unless they can pay for it.

In sum, a contradiction was pointed out by some Muslim leaders, and their pointing it out led to conflict, and to a dilemma for the Ontario government. The government resolved the issue, but in a manner that, for many, was unsatisfactory. The 'triggering event,' the announcement by the IICJ, led to a strong reaction that was culturally and ideologically based, deriving in the main from feminist values.[8] But, because of the effective efforts of those espousing secular feminist values, pressures may build to see yet another resolution. And so it goes, with a continuing dialectic process involving various interest groups and individuals making decisions affecting this area of law and practice.

14.6 *Shari'a* in America: Battles in the States

The United States, which is a much larger and more complex society (see below) than either Canada or Australia, is experiencing major battles over *Shari'a*, which were given impetus by a major 'triggering event,' the tragic events of 11 September 2001 (see Note 8), when nearly 3,000 people lost their lives in a daring attack on major financial, military, and political targets in America. There was already considerable animus toward Muslims and their culture prior to 9/11, although many Muslim immigrants had successfully integrated into American society (Pew Research Center 2011). But, after the 9/11 events occurred on American soil, there was a dramatic mood shift, with all things Muslim becoming instantly suspect (Turner and Richardson 2012).

Thus, what is happening in America at this time is the dialectic process writ large, with no clear resolution at this point. The situation in America is complex because of the federated nature of the society, with each state having considerable

[8] Note that this triggering event followed what for most western societies was a much larger triggering event, the destruction of the World Trade Center in New York on 11 September 2001. This first such event (and subsequent bombings in London, Madrid, and Bali) set up these societies for massive reactions to what otherwise might have been less significant events. Thus the concept of staggered or prioritized triggering events might be a useful addition to the theorizing being applied in this paper.

autonomy in how it reacts to major events.[9] While the US Congress and the US Supreme Court have considerable authority, and can issue legislation and court rulings that are binding on the 50 states, there is often a considerable time lag between state actions and the reactions from the federal judicial and legislative branches. Also, often of late the federal Congress has been relatively deadlocked, and does not respond quickly to issues that arise.[10] Hence, there is considerable leeway granted to the states to take action on these issues as they arise. This has certainly been the case concerning *Shari'a*, as will be recounted in this chapter to demonstrate ways in which the dialectic processes are playing out in America viz-à-viz *Shari'a*.

The US Supreme Court has not yet dealt with any major case directly involving the application of *Shari'a* precepts in American life. Some case have been filed with federal courts (see below), and could, in time, come to the attention of the Supreme Court, but that eventuality is probably years away, if it occurs at all.[11] However, there has been some related attention to things Islamic in the US Congress (besides the rapid passage of the Patriot Act (see Note 10)), and one such episode demonstrates the controversial nature of the topics of Islam and *Shari'a*. Early in 2011 Republican Congressman Peter King, from New York, sponsored, over strong protests from various quarters, a hearing of the Homeland Security Committee, which he chairs, on the perceived threat posed by Muslim radicals in America. While this much publicized hearing was not specifically on *Shari'a*, the reaction to the effort clearly demonstrated emotional feelings about and sensitivity towards any focus on Islam at the federal level. The hearing did not result in any legislation, but it attracted considerable attention throughout America and even overseas.

Anti-Muslim sentiment also was expressed in the 2011 campaign for the US presidency, with nearly all the candidates for the Republican presidential nomination expressing anti-Islam views (Turner and Richardson 2012). Those expressing concerns about, and animus toward, Islam and Muslims included Herman Cain, Michele Bachmann, Newt Gingrich, and Rick Santorum. None of these candidates secured the nomination, however, and it was unclear whether Republican nominee Mitt

[9] Note that Australia and Canada also have a federated system, but it seems to this writer that the United States carries this aspect of its political structure to an extreme in terms of potential impact on various issues that arise, partly due to its much larger size and the larger number of states and other political subdivisions, but also because of the dominant political culture, an important factor under the expanded theorizing of Chambliss.

[10] Note that the exception to the 'deadlocked Congress hypothesis' occurred shortly after 9/11, with the passage of the so-called Patriot Act, designed to make it easier to deal with terrorism and terrorists. The fact that the action is widely perceived to be focused on Muslims makes passage of the Act germane to our discussion, however.

[11] The Supreme Court accepts considerably less than a hundred cases per year, and usually only takes cases where there are significant differences in ruling on similar cases from the nine regional federal appeal courts. No such pattern involving *Shari'a* currently exists, suggesting that *Shari'a* will not be a major matter of attention by the Court for some years. A review of the federal cases in which *Shari'a* is mentioned at all reveals relatively few such cases, and most of them deal with asylum cases, or business matters, but there are some which are focused on legal actions taken against Islamic entities (nations, business, organizations), after the 9/11 tragic events, by survivors or family members of those who were killed.

Romney shared those views. However, there has apparently been a dramatic shift of opinion among Muslim voters since 9/11, with more of them voting Democratic, which could eventually play a role in how the dialectic processes work concerning *Shari'a* in America.[12]

As indicated above, however, there is much activity occurring in some local regions and at the level of state governments in America (Turner and Richardson 2012). One episode that occurred in 2011 might be humorous if it were not for the seriousness of intent behind the effort. A major figure in anti-Muslim blogging in the US mounted a campaign against the marketing of *halal* turkeys, calling it a major conspiracy to force all Americans to eat *halal* food on Thanksgiving, a principal American holiday.[13] There was also a huge outcry when it was revealed that a Muslim Center was to be built fairly close to 'Ground Zero,' the site of the former World Trade Center buildings. The idea of such a building being developed close to what has become a sacred site in America caused a firestorm of controversy, with most Americans opposed to the idea, and few speaking in favor of it.[14] Those opposed to the accommodation of Islam in American society made skillful use of this controversy, disseminating misleading information, and garnering considerable media attention during the ensuing debate, thereby contributing to the moral panic about Islam in America.

Other campaigns have been mounted by quite sophisticated anti-Muslim organizations that publish websites, books, and press releases about the dangers of Islam and *Shari'a*. There is a network of these organizations that produce voluminous amounts of material for dissemination throughout the country, and their efforts are having an effect.[15] One such organization, called the Center for Security Policy (2010), produced a publication claiming to have found over 50 legal cases nationwide where *Shari'a* played a significant role. However, law professor Julie Macfarlane (2011) thoroughly debunked such claims (also see Ali and Duss 2011), pointing out that in virtually every case where *Shari'a* concepts were invoked the judges overruled them, citing concepts of equal treatment and best interest of the child—concepts embedded in American law. Macfarlane's efforts

[12] See one analysis of this at http://www.motherjones.com/politics/2011/05/gop-muslim-vote-2012?page=1 (accessed 14 May 2012), that notes a shift of Muslim voters from Republican to Democrat in the last presidential election. But also note that Muslims voting Democrat may be affected by the recent decision by President Obama to support gay marriage (see http://www.lasvegassun.com/news/2012/may/13/islam-and-muslims-same-sex-marriages/?hpop, accessed 13 May 2012).

[13] See http://www.americanthinker.com/2011/11/happy_halal_thanksgiving.html (accessed 14 May 2012) for one statement on this campaign. The attention paid to this effort can be documented by searching for terms like '*halal* turkey,' using any search engine.

[14] Notably, both President Obama and New York Mayor Bloomberg did speak in favor of maintaining calm about the issue and in favor of allowing the project to proceed.

[15] In my own state of Nevada, all members of the state legislature received an impressive and attractive book on the evils of *Shari'a*, mailed by one particular well-funded anti-Islam organization that was attempting to send copies of the book to all state legislators in the nation—a massive (and expensive) undertaking.

notwithstanding, there is a growing paranoia about things Islamic, and efforts by the network of anti-Islam organizations seem to be having success in marginalizing Muslim communities that just a few years ago seemed relatively well integrated into American society.

These localized and state level anti-Islam campaigns have borne fruit, and forged some ‘resolutions,’ even if temporary or ineffective ones. This is demonstrated by the successful passage of constitutional amendments, in several states, that would preclude the use of *Shari’a* concepts in any legal proceedings in courts in those states. Macfarlane (2011) points out that one such amendment was passed by the voters in Oklahoma with 70 % of the vote. She also notes that such measures have passed in Tennessee and Louisiana, and that, as of March 2011, they are being considered in 19 other states. These anti-Islam campaign efforts have been successfully challenged in federal courts, on the grounds (among other claims) that they violate the Establishment Clause in the federal constitution, as well as the 14th Amendment guaranteeing equal treatment before the law. In Oklahoma, a federal judge granted an injunction against implementation of the new constitutional amendment, and that decision was upheld by the 10th Circuit Court of Appeals in Denver. This ruling, and other rulings in similar cases, could eventually be reviewed by the US Supreme Court if differences occur in such rulings. But, as indicated above, such a review could be years away, if it occurs at all.

Meanwhile, Muslim groups throughout America are seeking to make use of informal *Shari’a* tribunals to settle domestic disputes involving divorce, child custody, distribution of property, and related matters (Macfarlane 2012). There is also growing interest, in the financial sector, toward developing *Shari’a* compliant financial instruments, and efforts are being made in the food industry to meet requirements of *halal* foods. These pressures will obviously play a role in the eventual outcome of the conflict over *Shari’a* in America. But the distrust and paranoia among the general public, some of which is being fomented by major media outlets, such as Fox News, and by a few prominent politicians, are impeding efforts to integrate Muslim cultural values, including, especially, aspects of *Shari’a* family law, into American culture.

How all these counter forces will play out remains to be seem, but it is clear that there are contradictions, well understood by all parties, in how the law operates now in several areas, and that current laws do not accommodate Islamic values very well. The conflict over *Shari’a* compliant financial arrangements and *halal* food preparation will probably be much more easily resolved than conflict over how to manage domestic matters for Muslims who desire to adhere to Muslim values and practices. The area of family law must somehow resolve differences between Islamic values and practices and those of a liberal democratic society. Values such as equality of the sexes and best interest of the child will be defended forcefully by some, and thus any lasting resolution must take those values and practices into account. As has been the pattern with other contentious issues in America (such as desegregation of public schools), a resolution that is to have any lasting impact should have the imprimatur of the US Supreme Court. So, it appears that some time may have to pass before the outlines of any meaningful resolutions in the family and domestic area are clear.

14.7 Australian Controversies over *Shari'a*

Australia, as indicated above, has quite a complex situation concerning *Shari'a* because of the tremendous variety of Muslim subgroups in its society. The concept 'structural foundations' (Galliher and Cross 1982), when applied to Australia, differs somewhat from its application in the United States or Canada, even though both of these also have Muslims originating from many different countries. The largest Muslim subgroup in Australia is from Lebanon, from where refugees were allowed to come to Australia in large numbers during the war in their home country. The second largest subgroup is from Turkey, whose citizens were encouraged to come to Australia because of Australia's need for workers during the boom time of the 1970s. But there are many other Muslim subgroups in Australia, coming from dozens of countries (see Saeed 2003), including immigrants from former colonial or war-torn nations in Africa and Asia, and more recently many immigrants from formerly Soviet dominated nations (Jakubowicz 2009). This great variety of ethnic Muslim groups in Australian society, coming from various parts of the world, makes it difficult to obtain agreement on what elements of *Shari'a* might be adopted in Australia, or how this might be done.[16]

The terrorist attacks of 9/11 in America and subsequent such events have dramatically affected Australia, and, although there has not been a major terrorist event on Australian soil similar to the bombings in Madrid, London, or Bali, the Bali bombing, in particular, was significant to Australians since a number of Australians were killed in that episode. As noted by law professor George Williams (2011), Australia has passed more anti-terrorism legislation than any other western nation post 9/11, and much of that legislation has been implicitly, if not explicitly, aimed at Muslims—a fact noted quite critically by Hocking (2007). The focus on terrorism has also given impetus to the move away from the multiculturalism that has dominated much of Australia's immigration policy since it abandoned its 'White Australia' policy in the post WWII period.[17]

The 9/11 and subsequent terrorist attacks were very significant triggering events, but since then there have also been other perhaps less dramatic, but nevertheless well publicized, incidents involving Muslims, or targeted at them. The widely publicized Cronulla riots of 2005 that occurred in a beachside suburb of Sydney, were especially upsetting to Australians of all ethnicities. A group of about 5,000, mostly white, youths attacked other youths and people of darker complexion, apparently in (media-induced) retaliation for the actions of some Lebanese youth gangs who had attacked white youths and harassed white females on the streets and beaches in the area (Collins 2007). Also, widely publicized cases involving gang rapes attributed to male Muslim youths, and the subsequent trials of those charged with the acts, contributed to a rising moral panic about anything Muslim (Dagistanli 2007; Humphrey 2007).

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[16] See Black, A. (2010) for a discussion of 'which *Shari'a*' might be adopted, if any.

[17] The election of John Howard as Prime Minister in 1996 marked a period of dramatic change in Australia's policy of multiculturalism, but, subsequently, Julia Gillard reaffirmed the less restrictive policy during her tenure as Prime Minister. The current government's position is not clear, but limitations on immigration are expected to continue.

In Australia there have been significant accommodations to Muslim tenets in the areas of food preparation and finance (see Black and Sadiq 2011), but the area of family law has been very contentious (Black 2010; Hussain 2011; Kayrem 2011; Richardson 2013). The lack of appreciation shown by the Australian legal system for *Shari'a* assisted resolutions in family matters has made many Muslims aware that there is a major contradiction in how they are treated in this area compared with some other groups. This contradiction has been exacerbated by the growing "Islamic revivalism" that has occurred in Australia and other western societies in the past few decades (Ali 2011: 365–366), and has in turn led to conflict, as demonstrated by the furor caused in 2010 by the efforts of the Australian Federation of Islamic Councils to have elements of *Shari'a* formally accepted for the use of Muslims in settling family disputes (Richardson 2013). This effort was manifested in a submission to a parliamentary inquiry on possible changes in family law, but it immediately provoked considerable negative attention, both within and outside the Muslim community.[18] Eventually the proposal by the Australian Federation of Islamic Communities was withdrawn, but not before major political figures in Australia vowed that *Shari'a* would never be formally recognized, thus 'resolving' the issue for the time being with a firm rejection.

However, as some scholars have noted (Black 2010), Islamic tribunals operate 'in the shadow of the law' in Australia, and do not afford Muslims using such tribunals the protection of any oversight by the legal system. Therefore, it seems that the growing pressure from some Muslim groups to allow the use of formal tribunals will not dissipate, and that this situation will continue to cause conflict and be a significant on-going dilemma facing the government of Australia.

14.8 Conclusion

The conflicts described above have led to dilemmas that have been addressed by governments in differing ways, somewhat dependent on the way the political structures of the respective societies are organized. In Canada, the province of Ontario experienced a major uproar over a rather banal effort to promote the use of *Shari'a* in family law disputes between Muslims. To date, the federal political structure of Canada has not spoken on the issue in any direct way, although the episode was certainly noticed throughout Canada. This episode also led directly to a change in the laws in Ontario, something that has not yet happened in Australia (except for the introduction of the large number of new anti-terrorism laws). In Australia, concern about the use of *Shari'a* in family law disputes has been expressed at the state level in NSW, but, given the prominence of Sydney (the capital of NSW and the largest city of Australia) in the national culture, and the fact that this area has the highest concentration of Muslims in the country, whatever happens in Sydney concerning Muslims and *Shari'a* has national implications. In the United States most action has been at the local and state levels so far, with development of constitutional amendments and other legislation

[18] Other, less media-attended, efforts to seek formalization of Islamic practices in Australian family law are also occurring. See, for example, the article by Ismail Essof (2011) calling for more formal recognition of Islamic divorce practices.

attempting to preclude use of *Shari'a* in any manner within a given state. The national media have made some issues into *causes célèbres*, such as the effort to build a Muslim Center close to Ground Zero, but, as yet, there has been little federal-level action concerning *Shari'a* either in Congress or in the Supreme Court (see Note 10). However, the major role of the federal court system in America in derailing efforts to adopt state level 'resolutions' on concerns about Islam is noteworthy. The federal court actions demonstrate that in modern societies the courts can play a significant role in the success or failure of whatever resolution is sought. In this instance the federal courts have blocked adoption of popular 'resolutions,' and have done so very effectively.

In all the situations described above, there have been resolutions, even if temporary, put into effect by the relevant political structures, but it seems fairly clear that the resolutions are only good examples of Edelman's (1964) 'symbolic uses of politics.' Political leaders making the decisions understand that they cannot stamp out *Shari'a* elements in family disputes if Muslims choose to use them, so they know their decisions are not complete resolutions to their perceived dilemmas. Pressures will therefore continue to build, as more Muslims seek to express their preferences in ways that work around the temporary resolutions that have been imposed and as the contradictions inherent in those resolutions become more apparent, leading, possibly (or probably), to more conflicts. What will happen in each of the societies discussed remains to be seen, but it is quite clear that the last word on integrating elements of *Shari'a* family law in these three societies has not yet been spoken.

However, it is also noteworthy, and predictable, that resolutions in the area of finance may be more readily accepted in all three of these societies, because many societal, political and business leaders have come to desire them. This is especially obvious in Australia, but is occurring in the United States and Canada as well. Indeed, one could argue that an accommodating 'resolution' will be much less controversial in all three societies, because allowing Islam-compliant financial instruments is materially attractive to those in positions of power in the societies. For somewhat similar reasons, this author also posits that controversies over *halal* food preparation will not be so controversial as those in the area of family law. As indicated above, business interests in the food preparation sector have already moved in the direction of allowing *halal* food preparation in two of the societies examined, Australia and the US (no information is available on Canada in this regard), and the relatively minor outcries against such procedures appear to have died down. As far as this author has been able to discern, there have been no successful legal challenges to either the development of Islam-compliant financial instruments or *halal* food preparation processes in any of the three societies examined. No major cultural value, such as 'best interest of the child,' has intervened in developments in these two areas, and none is expected. Institutions of finance and of food preparation are being allowed to make their own business decisions, which means that, probably, both such areas of endeavor can be expected to continue to evolve without major controversies arising.

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Chapter 15
Perception of *Shari'a* in Sydney and New York Newspapers

Adam Possamai, Bryan S. Turner, Joshua Roose, Selda Dagistanli, and Malcolm Voyce

15.1 Introduction

Sydney and New York are instantly recognizable as 'global cities.' Saskia Sassen has argued that global cities function in four ways: first, as "highly concentrated command points in the organization of the world economy"; second, as key locations for finance and specialized service firms; third, as sites of production including innovations; and fourth, as markets for the products and innovations produced (2001: 3–4). While New York has long been regarded as one of the world's foremost great cities, Sydney is a relative newcomer to this rank and it may be argued that it has emerged particularly since the 2000 Olympics. Both cities are at the forefront in setting the political and financial agendas of their respective nations and play

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significant roles on the world stage. Significantly, Sydney and New York have sizeable Muslim populations and are also at the forefront of the debate about the place of legal pluralism and *Shari'a* within their respective nations.

The City of Greater Sydney, with a population of 4.4 million, is Australia's largest city (Australian Bureau of Statistics 2011), while New York City is the largest city in the United States, with a population of 8.24 million (United States Census Bureau 2012). The Muslim population in Sydney at the time of the 2011 Australian national census was just over 208,000, or 4.7 % of the total population. Specific data on the Muslim population of New York is more difficult to locate since the United States lacks a US national census. The most widely cited study results from research undertaken from 1998 to 1999 by Louis Cristilo and Lorraine Minnite from Columbia University and based on the number and location of Mosques (a potentially dubious method given that many Muslims may not attend regularly). If however, this study is accepted as broadly accurate, it reveals that up to 600,000 Muslims resided in New York City just over a decade ago, making up approximately 7.5 % of the population.

Muslim communities in Sydney and New York share many similarities, including a high level of diversity. The Cristilo and Minnite study found that New York Muslims included white and Latino converts, African American Muslims, and Balkan, South West Asian and West African Muslims (Beshkin 2001). In the Australian context Abdullah Saeed states:

> They come from practically every corner of the world: from the Middle East, Russia, Europe, the Indian Subcontinent, Africa, South East Asia and even China. They speak languages ranging from English, Arabic, Turkish, Persian and Bosnian to Chinese, Tamil, Italian, German, French, Greek, Croatian, Thai, Vietnamese, Serbian, Spanish, Russian, Maltese and Hungarian. (2001: 1)

The Pew Research Center (2011) has found that American Muslims are more likely to have been born overseas (63 %) than in the US, that they come from at least 68 countries, and are of a younger average age than their non-Muslim fellow citizens. The Australian context is remarkably similar. The 2006 census revealed that 62 % of Muslims were born overseas and that Australian Muslims are, on average, younger than non-Muslims, with 37 % of the Muslim population aged 20–39 years compared to 27 % for non-Muslim Australians (Hassan 2009).

Both New York and Sydney are home to a thriving civil society of Muslim community organizations, many seeking to challenge negative representations of Islam and of Muslims at the political level, while simultaneously focusing upon meeting the religious, cultural and social needs of their constituent members. However, there are socio-economic differences among Muslim populations within these cities. In one study commissioned by the Australian Department of Immigration and Citizenship (Wise and Ali 2008), it was noted that Muslims in Sydney were concentrated in Western Sydney within the lowest socio-economic regions, while another study by the Department, specifically on the political participation of Muslim Australians, noted that such participation was the 'domain of the privileged' (Al-Momani et al. 2010). Despite demographic differences, both cities have seen the uncovering of terror plots of local Muslims and extensive surveillance by law enforcement and government agencies. Compounding the social pressure experienced by Muslims in both cities have been the numerous politically motivated disputes

and controversies about buildings, signaling dominant, culturally exclusionary understandings over the ownership of space. In Sydney this has particularly been the case with the establishment of Islamic schools being challenged by non-Muslims. In one well documented instance, the heads of dead pigs were placed on stakes in a vacant allotment which was the proposed site for an Islamic school (Kruger 2007). In New York the most notable controversy has surrounded the development of the so-called 'ground zero Mosque,' where the construction of an Islamic centre in downtown New York became an issue of national debate and international significance.

While these cities share many similarities, there are also important differences that must be considered. The key difference between Sydney and New York relates to the political approach to citizenship and the larger national project. While both Australia and the United States are settler societies that have built their wealth and power through immigration, contrasts emerge in their distinct approaches to how immigrants are expected to integrate into the local context. In the Australian context, multiculturalism, in place since 1973, recognizes and accepts cultural difference and allows for citizens to maintain their cultural heritage as long as they abide by the rules and laws of the nation. In the United States, Richard Alba and Victor Nee argue, despite its being justifiably repudiated in its manifestation as a state imposed normative program aimed at eradicating minority cultures, assimilation, as a "social process that occurs spontaneously and often unintendedly in the course of interaction between majority and minority groups," remains the key concept for the study of intergroup relations (Alba and Nee 1997: 827).

The official multicultural policies of both nations adhere to a politics of tolerance which has been criticized by some scholars as an expression of western cultural superiority that defines non-western cultures as those to be merely 'tolerated' (see Hage 1998; Zizek 2005). Hence, using the term 'tolerance' implies that there are certain limitations to how far this tolerance can be stretched. Pertinent to any analysis of *Shari'a* are the strict boundaries that are often drawn around divergent religious, cultural and legal practices represented as extremist and incompatible with the values of the West. Numerous examples of this delineation can be found in political discourses around multiculturalism. Former Australian Federal Immigration Minister, Chris Bowen, provides one such example: "Of course, anyone who comes here—or indeed if anyone born here—promotes values such as Sharia Law or religious intolerance or violence, they do not do so in the name of multiculturalism" (Bowen 2011). Interestingly, intolerance is invoked as one of the core values of *Shari'a* (aside from violence) and cited as a reason *not to tolerate* its practice within western multiculturalism.

Furthermore, religious, cultural and legal practices, such as *Shari'a*, which signal membership of a minority group with its alternative system of norms, are often treated with suspicion and represented as threatening. As Zizek argues, "in our secular liberal democracies, people who maintain a substantial religious allegiance are in a subordinate position: their faith is 'tolerated' as their own personal choice, but the moment they present it publicly as what it is for them—a matter of substantial

belonging—they stand accused of 'fundamentalism'" (2005: 4). With these points in mind, in this chapter we consider the different ways in which *Shari'a* is represented in Sydney and New York newspapers, as one way of identifying the generally suspicious responses to *Shari'a* within these social and political contexts.

15.2 The *Shari'a*

Since 9/11, an event of global significance, the role of Islam in Australian and US society has been the subject of highly politicized discussion in the public sphere. In Australia this has been compounded by the Bali bombings (2002 and 2005) and the emergence of a domestic terrorist threat. Central to the debate about Muslim identity have been the issue of women's rights in Islam, and the role of *Shari'a*. While defined literally as "path to the watering place" (Kamali 2008: 2), as a metaphor for achieving salvation, the *Shari'a* has been the topic of intense debate in the West. Indeed, the word itself has become morally and politically laden, featuring heavily in anti-multicultural and Islamophobic debates. A predominantly negative public reaction to *Shari'a* was well illustrated by the Archbishop of Canterbury (Williams 2008) in his February 2008 lecture to the Royal Courts of Justice, when he noted that the spread of *Shari'a* into the British legal system was more or less inevitable, even though dominant understandings of *Shari'a* are that it is "at best—a pre-modern system in which human rights have no role." Williams cited Tariq Ramadan, who argued, in *Western Muslims and the Future of Islam*, that "[i]n the West, the idea of *Shari'a* calls up all the darkest images of Islam: repression of women, physical punishments, stoning, and all other such things" and that "it has reached the extent that many Muslim intellectuals do not dare even to refer to the concept for fear of arousing suspicion of all their work by the mere mention of the word" (Ramadan 2004: 31; see also Marranci 2004). The Archbishop's lecture received a mixed reception which perhaps summarized public confusion. It was suggested that he should resign, and *The Times* reported on 13 February 2012 that the Queen, as head of the Church of England, was disturbed by the possible consequences of the public outcry. Objections did not come only from conservatives or the dominant culture. Articulate Muslim women were also hostile to the Archbishop's position and many moderate Muslims thought the *Shari'a* was not relevant to their needs in secular Britain. Other Muslims thought the lecture would only add to Islamophobia in Britain. Why the Archbishop gave the lecture at all remains a mystery (Milbank 2012).

While the Archbishop of Canterbury's lecture in the United Kingdom was widely reported in Australia, an informed or balanced national debate about *Shari'a* was never really developed. Suggestions of the adoption or assimilation of *Shari'a* were rejected outright by government ministers and spokespersons, with no explanation or discussion as to its particular attributes or how it actually operated in practice. Specifically, rejections were based on the equating of *Shari'a* norms with barbaric, violent and highly exclusionary practices. While the Coalition Government

(comprising the Liberal and National Parties) was in office (1996–2007), Prime Minister John Howard attempted to gain political support by condemning *Shari'a* (*Sydney Morning Herald* 20 February 2006). In a post 9/11 atmosphere Howard appeared to consider it unwise to be associated with Islamic values and that, in any event, it would go against his strong political standpoint on 'law and order' and the 'Islamic threat' to say anything that might be regarded as positive about *Shari'a*. On assuming office in 2007, the new Labor government of Kevin Rudd was likewise not prepared to engage in any discussion that might lead to recognition of the legal standing of *Shari'a* or parts of it (Osborne and Turnbull 2008).

Conservative politicians in both Australia and the United States have raised provocative questions about *Shari'a*. In some American states, calls have even been made by politicians to ban it (Turner and Richardson 2013). Australian Liberal Party senator Cory Bernadi (2012) has argued that Australia is facing a "*Shari'a* creep," while Republican Newt Gingrich has argued that *Shari'a* poses a "mortal threat to freedom in the United States" (cited in Shane 2011).

In Australian political debates about multiculturalism at the beginning of 2011, Liberal immigration spokesman Scott Morrison was vocal in promoting an overtly anti-Muslim political agenda, with suggestions that there was electoral concern over Muslim immigration and the alleged inability of Muslim migrants to 'integrate' (cited in Taylor 2011). Morrison's reference to electoral concern over Muslims has indeed been substantiated by some segments of the Australian community, as illustrated by the letters pages of some newspapers. A Stephen Dixon, from the Sydney suburb of Engadine, claimed in a letter to the *Sydney Morning Herald* that "[r]ecently it has become frustratingly common to see outpourings of a rejection of Australian cultural norms by those who wish to impose their own restrictive and alien standards on the society that has taken them in," while David Brooks, from the conservative electorate of Castle Hill, observed that "the success of the immigration program has been built upon the willingness of the vast bulk of immigrants to integrate—more specifically, to get a job and obey the law" (Brooks 2011). While these letters do not make direct references to Muslim immigration or to *Shari'a*, a connection can be inferred from the fact that they were responses to Scott Morrison's comments and to Federal Labor Immigration Minister Chris Bowen's public speech about the virtues of Australian multiculturalism.

Perhaps broader community misperceptions and confusion about *Shari'a* (as a cultural code as well as a system of laws) reflect multifarious understandings of it among Muslims themselves. Abdullah Saeed has argued that among Muslims there is no universal consensus on the meaning of *Shari'a* (2010) and that debates about it are "often influenced by a view that essentially reduces *Shari'a* to an archaic or barbaric legal code" (2010: 229). Yet Anne Black and Kerrie Sadiq (2011) have noted a more nuanced divide between 'good *Shari'a*' based on the profit-generating potential of Islamic finance and 'bad *Shari'a*' that appears to challenge Australian family and criminal laws. While there is public disquiet over family and criminal law applications of *Shari'a*, perhaps due to the emotive and morally laden nature of family and criminal law issues, there has been support for legislative change in Australia to facilitate Islamic banking and financial services, which are

apparently less contentious and can be tolerated within the boundaries of western multicultural policy.

> It seems that Islamic banking and finance laws are 'good' *Shari'a* worthy of adoption, whilst personal status laws (marriage, divorce, separation, custody of children and inheritance) are not. (Black and Sadiq 2011: 388)

Given the fact that the mass media play an important role in setting and shaping the national political agenda (Van Aelst and Walgrave 2011), a structured sociological approach to studying how the media portray *Shari'a* is a useful exercise. Recent works on *Shari'a* in Australia have already addressed this issue. Hussain (2011) connects the various ways in which *Shari'a* is portrayed with the overall portrayal of Muslims in the Australian press. Black and Sadiq (2011) cite the national newspaper, *The Australian*, and the way it characterizes 'differences' between Muslims and non-Muslims through reference to extreme and sensational cases in some Muslim countries, such as death by stoning for adultery, forced marriages and female genital mutilation. However these recent publications have not conducted a thorough and systematic analysis of the way *Shari'a* has been represented in the media and so the conversation about *Shari'a* in the media remains under-explored.

According to Van Driel and Richardson (1988: 37), the mass media are "one of the major forces that mold and shape social movements, which challenge the established order and prescribe different paths along which change should take place." Media analyses of various societal issues have dominated social science research for the last several decades. However, regardless of the consensus that has arisen among social science scholars, that the media do not represent a balanced or neutral view but rather construct 'truths' that inform individual opinion, there is little quantitative analysis of the representation of *Shari'a* within Australian society. Although the academic study of Muslims in the media is not new, it is only now that questions of quantitative reproduction of stereotypes are being analyzed (Aydin and Hammer 2009). A quantitative analysis is useful to provide an overview of the 'newsworthiness' (Hall et al. 1978) discernable through the mass production of 'Muslim issues' in the press. To address this gap in the literature, this chapter employs a method of analysis developed by van Driel and Richardson (1988) to study the way new religious movements are negatively portrayed in the media.

15.3 Method

The method for this study is based largely upon the pioneering approach developed by van Driel and Richardson (1988) in their examination of major print media coverage, over a 12 year period, of new religious movements in the United States. There are interesting similarities between adherents of such movements and Muslims in contemporary western contexts with regard to prejudicial media representations. These negative representations can shape a Muslim's sense of self and his or her relationship to wider society. Extensive research on western Muslims has revealed the similarity of their case to that of new religious movements, and

underlines the fact that the media can have a significant impact on their individual and collective sense of social exclusion (Poynting and Noble 2004; Rane 2010; Yasmeen 2008)

The Factiva Database[1] provided a highly refined search mechanism for this research, offering extensive access to a comprehensive list of newspapers in Australia and the United States and allowing for the setting of highly detailed search parameters. Where van Driel and Richardson developed the instrument of 'context units' based on predefined periods of time (6 months) and physical measurement of dedicated newspaper space focused upon new religious movements, this research has focused specifically upon any article featuring the word '*Shari'a*' and on the context in which the article was situated.

Search parameters were designed to capture the word term '*Shari'a*' (and also the common media spellings '*Sharia*' and '*Shariah*') in articles published within the 5 years following the Archbishop's lecture on 7 February 2008. The Factiva website was harvested for data published in daily news editions. Repeat articles for afternoon or online editions were excluded, as were articles that were virtually identical, with only one or two additions. Data for this research are drawn from the four major newspapers in Sydney (*The Australian Financial Review*, *The Australian*, the *Sydney Morning Herald* and the *Daily Telegraph*) and five major newspapers in New York (*Wall St Journal*, *USA Today*, *New York Times*, *New York Daily News* and *New York Post*). While an increasing array of online news sources abound that are tailored for personal computers, laptops, tablets and smart phones, the focus in this study is on hardcopy newspapers ranging from broadsheet to tabloid, with a mixture of national and local distribution. This strategy overcomes the methodological concern of "online ephemerality" outlined by Cowan (2011: 465), whereby websites and stories posted are constantly updated and are thus fluid and difficult to capture. This approach also allows for sources to be purchased by any member of the public, irrespective of familiarity with and access to new media, at any newsagent or newsstand.[2]

The circulation and readership of sampled newspapers was calculated based on data provided by Roy Morgan (March 2012) and The United States Audit Bureau of Circulations. Cumulatively, Sydney newspapers were estimated to reach 1.5 to 2 million readers a day (with variation allowing for nationally distributed newspapers), whilst New York newspapers were estimated to reach up to 5 million readers daily, reflecting the population size differential. Whilst not reaching more than 40 % of the local population at any given time, newspapers are read and drawn upon by political decision makers as a link with their broader constituency and thus continue to play an important role in the 24 h news cycle. Furthermore, newspapers are monitored by a plethora of companies that sell services to industry, political organizations and academia, shaping research and decision making.

[1] Factiva is owned by Dow Jones, a News Corporation company. It was assessed that this played no role in access to information from News Corp newspapers nor from their competitors.

[2] It should be noted that the contents of printed copy newspapers are also reproduced online but the content is updated at greater speed. Additionally, there is an emerging trend for online newspapers to require membership and payment for access to online material. Recent statistics reveal that hardcopy distribution continues to significantly outstrip online newspaper copy.

Coding on SPSS (Statistical Package for the Social Sciences) was driven by initial piloting to determine an appropriate categorization. Articles were organized by article name, date and newspaper and coded by type (news, feature story incorporating commentary, feature, opinion, letter, book review, television review), form of *Shari'a* examined (general application, family law, crime/punishment, cultural finance), the social context (local-Australian/American, western, foreign (i.e. non-western)), length (short, medium, long), the relevance of *Shari'a* to the article (primary application, secondary reference, incidental, irrelevant) and, finally, by a Likert scale modeled broadly on that developed by van Driel and Richardson (1988: 48–49). Articles were ranked according to their level of positive attitudes towards *Shari'a*. Each of these Likert ratings was given a corresponding metric (see brackets) to enable quantitative analysis and comparison. 'Extremely positive' (2) indicated that the application of *Shari'a* in the primary social context of the article was supported and/or defended and opponents of *Shari'a* were rejected. 'Somewhat positive' (1) indicated that there was a favorable approach to *Shari'a* and/or opponents of it were rejected. 'Neutral' (0) ranking indicated that *Shari'a* was reported on a factual basis in the context of a wider story or as part of a quotation, with no support or criticism of *Shari'a* evident in the author's approach, irrespective of the position of the individual or organization quoted. This rating was given even if the particular application of *Shari'a* was linked to violence or punishment in places where such events may indeed have been occurring, for example in Nigeria or Somalia. 'Somewhat negative' (−1) indicated that *Shari'a* was portrayed unfavorably by the author and/or criticized on the basis of its application. A ranking of 'extremely negative' (−2) meant that *Shari'a* was rejected and attacked and/or opponents of *Shari'a* received sympathy and support.

A second layer of coding was based on a more detailed qualitative analysis of those articles which had been identified as having a primary focus on *Shari'a*. The limitations of this method relate primarily to not taking into account the prominence and page numbers of the articles. Headlines and bylines referring to '*Shari'a*' in the first several pages of a newspaper may prove a more significant jolt to the collective consciousness than a reference within an article. However, due to the variance in daily newspapers, including dedicated advertising, picture placement and location on the page, there was little way of ensuring consistency in the approach. The primary/secondary application focus and the Likert scale can contribute to overcoming this limitation.

15.4 Data Analysis

Table 15.1 indicates that more newspaper articles dealing with *Shari'a* were found in Sydney ($n=696$) than in New York ($n=507$). The percentage of those that were neutral was higher in New York (78 %) than in Sydney (54 %). Sydney articles appeared to be more negative (a total of 36 % for those that were either somewhat or extremely negative) than articles in New York (a total of 15 %). Focusing on the

Table 15.1 All newspapers

			1		2		3		4		5	
			Extremely positive		Somewhat positive		Neutral		Somewhat negative		Extremely negative	
	N	%	n	%	n	%	n	%	n	%	n	%
All articles in Sydney	696	**100**	36	**5**	37	**5**	378	**54**	110	**16**	135	**20**
News articles in Sydney	297	**100**	22	**7**	19	**6**	214	**72**	27	**9**	15	**5**
Other (opinion, features, letters) in Sydney	399	**100**	14	**4**	18	**5**	164	**41**	83	**20**	120	**30**
All articles in NY	507	**100**	11	**2**	23	**5**	395	**78**	56	**11**	22	**4**
News articles in NY	167	**100**	0	**0**	5	**3**	159	**95**	3	**2**	0	**0**
Other (opinion, features, letters) in NY	340	**100**	11	**3**	18	**5**	236	**69**	52	**15**	23	**7**

news articles only (and leaving aside all comments, opinions and features) revealed that the proportion of neutral articles in New York was 95 % and in Sydney was 72 %. Within this news category, only 2 % of the New York articles were somewhat to extremely negative, compared to 14 % in Sydney. It is worth noting that the percentage of all non-news articles in New York that were neutral (69 %) was almost as great as the percentage of the more 'objective' news articles in Sydney that were neutral (72 %).

Table 15.1 indicates that there was more discussion about *Shari'a* in Sydney than in New York, and that the information in New York was more neutral than in Sydney. This lesser degree of neutrality in Australia might explain why the Muslim population in Australia has such a low level of trust in the mass media (Rane et al. 2011).

In a recent study (Possamai et al. 2013), we identified the importance of *Shari'a* in matters of finance and that this subject was portrayed positively in the Sydney media. When we compared this portrayal to that in New York newspapers (Table 15.2), we noticed that the results observed in Australia did not apply in New York. In New York there were only 13 articles concerning *Shari'a* in finance, compared to 51 in Sydney. In Sydney, 63 % of the articles on finance were somewhat to extremely positive, compared to a low 15 % (only 2 articles, both only somewhat positive) in New York. When we compared and contrasted articles on finance with those on other topics, we also observed a lower level of neutrality in the articles on finance, as the trend in financial articles tended to be towards the positive. However, it was very noticeable that Sydney, in its opinion pieces and more subjective articles, was embracing a 'good' *Shari'a*. The difference between 'good' and 'bad' *Shari'a* clearly made sense in Sydney but did not, at least not to the same extent, in New York. Indeed the coefficient of correlation (Pearson) between

Table 15.2 *Shari'a* in finance and in other topics

			1 Extremely positive		2 Somewhat positive		3 Neutral		4 Somewhat negative		5 Extremely negative	
	N	%	n	%	n	%	n	%	n	%	n	%
Sydney: News articles on finance	51	**100**	20	**39**	12	**24**	19	**37**	0	**0**	0	**0**
Sydney: News articles on other topics	246	**100**	2	**1**	7	**3**	195	**79**	27	**11**	15	**6**
NY: News articles on finance	13	**100**	0	**0**	2	**15**	10	**77**	1	**8**	0	**0**
NY: News articles on other topics	154	**100**	0	**0**	3	**2**	149	**97**	2	**1**	0	**0**

the Likert scale and this variable was far stronger in Sydney (0.445) than in New York (0.122).

With regard to the geographical focus of these articles featuring *Shari'a*, we designated three zones into which the press articles could be separated: local (i.e. Australia or the USA), western (i.e. a western country other than Australia or USA), and foreign (i.e. a non-western country). Of the articles in Sydney papers, we found that 57 % were focused on foreign countries, 12 % on other western countries, and 31 % on Australia. In articles in the New York papers, the focus on foreign countries was stronger (74 %) and the focus on other western countries (7 %) and USA (19 %) was much lower. In the New York papers *Shari'a* appeared to be more of a foreign issue than a local one.

In Sydney, as Table 15.3 indicates, the degree of neutrality was greater in articles concerned with *Shari'a* practiced in foreign countries (81 % of articles) than in those concerned with its practice in western countries (69 %) and in Australia (56 %). This lower percentage for neutral articles concerning *Shari'a* in Australia was due to a positive approach to *Shari'a* with regard to financial issues. In New York, while the level of neutrality was quite consistent across the three zones (from 91 % to 96 %), there was a slightly higher percentage of negative articles when dealing with *Shari'a* at the local level, a trend which ran contrary to that in Sydney.

In Table 15.4, we separated the newspapers owned by Rupert Murdoch from those owned by others. Murdoch, an Australian who has now become a citizen of the United States, controls up to 70 % of the Australian newspaper market (Mcknight 2012). In an exploration of Murdoch as a political actor, David McKnight has argued he is "at least as devoted to propagating his ideas and political beliefs as he

Table 15.3 *Shari'a* at the local and international levels

			1		2		3		4		5	
			Extremely positive		Somewhat positive		Neutral		Somewhat negative		Extremely negative	
	N	%	n	%	n	%	n	%	n	%	n	%
Sydney: News articles on foreign countries	169	**100**	3	**2**	0	**0**	137	**81**	19	**11**	10	**6**
Sydney: News articles on other Western countries	36	**100**	2	**6**	3	**8**	25	**69**	4	**11**	2	**6**
Sydney: News articles on Australia	92	**100**	17	**18**	16	**17**	52	**56**	4	**5**	3	**4**
New York: News articles on foreign countries	123	**100**	0	**0**	2	**2**	119	**96**	2	**2**	0	**0**
New York: News articles on other Western countries	12	**100**	0	**0**	0	**0**	11	**95**	1	**5**	0	**0**
New York: News articles on the US	32	**100**	0	**0**	1	**3**	29	**91**	2	**6**	0	**0**

is to making money" (2012: 26), and indeed Murdoch famously declared that his company "for better or worse is a reflection of my thinking, my character, my values" (1996 cited in McKnight 2012: 21). Whatever his political inclinations, Murdoch holds a very powerful and highly influential position in national and international political arenas. Although Murdoch has had little to say on the public record about Muslims, what he has said is instructive:

> You have to be careful about Muslims, who have a very strong, in many ways a fine, but very strong religion, which supersedes any sense of nationalism wherever they go. (*The Age* 27 June 2006)

Table 15.4 indicates that in Sydney, even though the percentage of neutral articles concerning *Shari'a* was higher in papers owned by Murdoch (76 %) than in other newspapers (62 %), the percentage of negative articles on *Shari'a* was also higher in Murdoch owned papers (15 %) than in other newspapers (11 %). The difference is not statistically significant here. However, only 9 % of the *Shari'a* related articles from the Murdoch press fitted in the 'somewhat to extremely positive' category,

Table 15.4 *Shari'a* in the Murdoch Press

			1		2		3		4		5	
			Extremely positive		Somewhat positive		Neutral		Somewhat negative		Extremely negative	
	N	%	n	%	n	%	n	%	n	%	n	%
Sydney: Murdoch owned papers: *The Australian* and the *Daily Telegraph*	218	**100**	7	**3**	12	**6**	165	**76**	21	**9**	13	**6**
Sydney: non-Murdoch owned papers: the *Sydney Morning Herald* and *The Australian Financial Review*	79	**100**	15	**19**	7	**8**	49	**62**	6	**8**	2	**3**
New York: Murdoch owned papers: *Wall St Journal* and *New York Post*	74	**100**	0	**0**	1	**1**	71	**96**	2	**3**	0	**0**
New York: non-Murdoch owned papers: *New York Times*, *USA Today* and *New York Daily News*	93	**100**	0	**0**	4	**4**	88	**95**	1	**1**	0	**0**

compared to 27 % of those from other presses. Since in Sydney most of the positive *Shari'a* related articles were concerned with financial issues, it could be assumed that the push towards the 'good *Shari'a*' was being made by newspapers not owned by Murdoch. In New York we did not find this distinction.

If we now concentrate only on the news articles in New York that dealt with *Shari'a* as a primary focus (Table 15.4 includes *Shari'a* as both a primary and secondary focus), we do find a difference. Of the 45 articles from the Murdoch press, 60 % were neutral, 29 % were somewhat to extremely negative, and 11 % were somewhat to extremely positive. Of the 60 articles from newspapers not owned by Murdoch, we found that the same percentage was neutral (60 %), but there was a higher percentage of positive articles (25 %) than negative articles (10 %). We thus found a slight antagonism towards *Shari'a* in the Murdoch press.

From this analysis, it can be concluded that Sydney papers are: (1) less neutral, (2) more focused on local issues, and (3) more inclined to promote a 'good *Shari'a*' (i.e. one dealing with finance) than are New York papers.

15.5 Discussion and Concluding Remarks

The socio-economic characteristics of Muslims in New York differ from those of Muslims in Sydney. The Pew Report (2011) on Muslim Americans underlines the results of a survey which found that Muslim American income and education levels mirror that of the general population. Further, Muslim immigrants perceive themselves as financially well off compared to native-born Muslims (e.g. African American Muslims). The same report observes their stark contrast with Muslims living in some Western European nations—and this category could be extended to include Muslims in Australia as well. In Australia, despite higher general levels of education, the incomes of Muslim citizens tends to be lower than those of non-Muslims, and Muslims tend to have a higher level of unemployment (Fozdar 2012; Hassan 2009). The relative socio-economic disadvantage of Muslim citizens when compared with non-Muslim citizens can be attributed to a number of factors, including lower levels of proficiency in English and the non-recognition of educational qualifications gained overseas, as well as deeper social issues of "prejudice and systemic discrimination" and the resulting alienation and disenfranchisement of Muslim people (Hassan 2009: 11; see also Poynting and Noble 2004).

It is important to note the socio-economic differences between American and Australian Muslims, since the social status and positioning of these groups relative to the mainstream either enables them or hinders their ability to present a strong counter-discourse to the dominant negative representations of *Shari'a* in both societies. However, these observations have only a tenuous relationship to the comparative percentages of positive and negative representations of *Shari'a* in Sydney and New York press outlets. We could surmise that the stronger socio-economic and political positioning of American Muslims (and specifically those who reside in New York) neutralizes some of the negative representations of *Shari'a* in New York; yet it does not explain the slightly higher percentage of negative representations there or the tendency of the Sydney press to be more likely to identify and promote such as phenomenon as 'good *Shari'a*' when it comes to financial matters. Perhaps a more definitive answer can be found in the fact that there is a strong strategic push from the Australian Government and Austrade (the Australian Trade Commission) to make Australia a financial hub in the Asia Pacific region. Islamic finance is recognized in the Southern hemisphere as being the fastest growing area of the financial services industry and there are pushes to remove any regulatory barriers to its development in Australia (Sadiq and Black 2012). It is even claimed that Australia has the potential to become the financial hub of South East Asia (Nathie and Freudenberg 2010). Even if (according to Khan and Bhatti (2008)) Islamic banking and finance are gaining momentum in both the USA and Australia, it appears that because of politicized trade considerations in Australia the governmental push to embrace Islamic finance is stronger in Australia than in the US .

Trade and economic rationalizations aside, we could surmise that the generally positive reception to Islamic banking and finance, contrasted by the outright rejection of Islamic family and criminal law practices, runs deep. Perhaps we can conceptualize

the value judgments made about 'good' and 'bad' *Shari'a* by considering, once again, the politics of tolerance that underpins multiculturalism in western liberal democracies. The 'neutral' language and profit making connotations of finance—even Islamic finance—appeals to the economic rationalism favored by politicians in western democracies. Islamic finance and banking do not pose a moral threat to what are upheld as the values of the West: they are seen as a divergent cultural practice that can be tolerated, even embraced. The same cannot be said of family and criminal law practices which constituted the subject matter of most negative media representations of *Shari'a*. It is in family and criminal law matters that the moral relativism of *Shari'a* is most highlighted and the negative attitudes towards legal pluralism are realized. Within family and criminal law, *Shari'a* becomes most contentious since it represents moral codes that are not seen as compatible with the values of the West. The lack of compatibility assumed is based on popular wisdom that equates *Shari'a* always with intransigent, barbaric and violent practices observed by a presupposed and homogenous Islamic culture that cannot to be tolerated in western civilized nations. It is on this level that we find that the limits of western multiculturalism are delineated through the rule of (secular) law and the eschewal of alternative value systems as intolerable, even where there is no violence or transgression of fundamental human rights. It should come as no surprise then, that media representations of 'good' or 'bad' *Shari'a* fall within the predetermined limits of western multiculturalism.

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Chapter 16
Profiting from *Shari'a*: Islamic Banking and Finance in Australia

Salim Farrar

16.1 Introduction

Although still in its infancy and small in comparison with its US$200 trillion conventional cousin (Yue 2008), Islamic Banking and Finance (IBF) has become a growth area in recent years and, according to conservative estimates, is expected to have almost US$2.8 trillion in assets by 2015.[1] Perceived by its advocates as not only *halal* (Islamically lawful) but also a safer investment option in the wake of the global financial crisis, it has continued to post 15–20 % annual growth rates ('UBS sees growth in Islamic finance' 2009). These impressive data have stimulated local interest and identified a profitable niche from which Australians can benefit. But reservations persist in Australia. Conservative inclinations and a preference for tight regulation have not facilitated entry of IBF into Australia in general, and New South Wales (NSW) in particular.[2]

In addition to providing a general review of IBF from a legal perspective, this paper assesses the extent to which Australia's regulatory framework obstructs local development of IBF. It also explores the possibility of, and

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[1] See El Baltaji (2010). For recent updates on projections and actual data, see further the World Islamic Banking Competitiveness Report 2013–2014.

[2] According to Alex Regan, the head of Islamic Finance at Mallesons Stephen Jacques, "several days of structuring sessions with potential clients discussing potential transactions often end with them thinking that it's too difficult in Australia" (Edmunds 2010).

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options for, reform in the context of regional and global moves to accommodate this growing phenomenon.

The paper is divided into three broad sections. Section 16.2 introduces Islamic Law and IBF. It also explains essential concepts, including the principal contractual forms (nominate contracts) around which particular Islamic products are based. Section 16.3 details Australia's social and regulatory environments, and explains particular difficulties encountered by Islamic Finance Service Providers (IFSPs), with a focus on taxation rules and prudential standards. Section 16.4 discusses local and regional developments as well as possible templates for legal reform.

16.2 What Is Islamic Banking and Finance?

In brief, IBF refers to a mode of banking and finance system adapted[3] to comply with Islamic legal rules found in the Holy *Qur'an*, the Prophet's *Sunnah* (his living example and sayings) or *ahadith* (i.e. Prophetic traditions) and juristic interpretation of those sources (the totality of which is referred to as the '*Shari'a*').

Whether one speaks of those juristic opinions found in the *fiqh* (the substantive *Shari'a* legal rules derived by religious scholars from the revealed sources) or the attempts by Muslim states to give them legislative effect (*Tashri' Islami*, or Islamic Law), there is no one single template which defines the 'Islamic'; the reality is one of internal pluralism and manifest diversity (Rapoport 2003) of which IBF is a product. It is not a conceptual fossil excavated from a medieval mercantile archive, but an attempt to re-engineer rules found in Islamic texts to a modern business environment.

As an applied discipline originating in a secular framework, IBF's Islamic credentials have sometimes been questioned and remain a matter of heated debate (Anwar 2003; El-Gamal 2006, 2007; Hamoudi 2008; Hussain 2010; Lewis 2007). Nevertheless, IBF operators, financial engineers and bankers, by working with and getting approval from Islamic jurists on their Sharia Advisory Boards (SABs)—which is essential for any putative Islamic Financial Service Provider (IFSP)—are constantly trying to fashion new products that are consistent, in their eyes, with Islamic teachings.

In essence, Islamic banking is 'interest-free,' but that phrase conveys neither the adaptability nor commercial reality of its operations (Hussain 2010: 15). While there is no lending with interest or for commercial gain (because of the prohibition of *al-riba* found in both the *Qur'an* and *Sunnah*), Islamic banks secure commercial profits through other transactions, such as by charging fees, leasing, trading assets, and profit and loss investment activities (Mirakhor and Zaidi 2007: 49, 52).

[3] In other words, IBF is a subset of the conventional banking and finance industry (Amin 2009).

The most popular transaction, accounting for approximately 80 % of all transactions in IBF,[4] is the *murabahah*, or cost-plus sale. Typically, this involves two contracts in which the banker or financier purchases any item (so long as it is not expressly prohibited by the *Shari'a*, as are, for example, pork, pornography and alcohol) at the request of a customer who promises to purchase the asset from the bank at cost price plus a mutually agreed premium. Rarely is full payment made on the spot, so Islamic bankers and financiers combine the *murabahah* with a payment deferral[5] to produce the Islamic financial instrument known as *bay' bi-thaman' ajil* or *bay' muʿajjal.*[6] The result is a transaction which is sometimes said to mirror a fixed interest loan.

In order to give liquidity to their markets and for short-term financing, IFSPs also make use of same item sale-repurchase with or without an intermediary, depending on the particular jurisdiction. In Malaysia and South-East Asia more generally, Islamic financiers use the latter (*bay' al-'inah*) and in the countries of the Gulf Cooperation Council (GCC), the former (*tawarruq*).[7] Both practices entail a client selling a permissible item at a cash price to a financier who sells it back to the client, on credit, for a sum equivalent to the principal amount plus a profit margin, as in a classical form of *murabahah.*

Profit and loss and investment activities include *musharakah* (*shirkah*, in the classical literature) and *mudarabah*. The former refers to contractual partnerships in which joint capital is exploited and any ensuing profits and losses are shared proportionately between the partners. *Musharakah mutanaqisah*, or diminishing partnership, is a contemporary adaptation of the *musharakah* nominate contract and is used predominantly, if not exclusively, in Islamic home financing. It is prevalent in the Middle East, UK, US and Canada and was, until recently, the preferred method of Islamic home finance in Australia through the Muslim Community Council of Australia (MCCA). Like the contemporary *murabahah*, it is a composite combining the Islamic concepts of partnership and leasing. The financier and the client jointly acquire the asset (*shirkat al-milk*), with the customer gradually increasing beneficial interest in the financed asset until securing full ownership at the end of the contractual period. Until the remaining portion is redeemed, the financier leases its share to the

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[4] This has been the case since the inception of modern Islamic banking was instigated (Humud 1976, as cited in Kahf and Khan 1992: 26–27).

[5] Although the concept is permissible by consensus, the industrial application and documentation is problematic and has proved contentious in Malaysian courts. See *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd* [2008] 5 MLJ 631; *Bank Islam Malaysia Bhd v Lim Kok Hoe* [2009] 6 CLJ 22; *Bank Islam Malaysia Bhd v Azhar bin Osman* [2010] 5 CLJ 54.

[6] These alternative Arabic terms (their use depends on the jurisdiction) both indicate that the payment has been deferred.

[7] This facility is expressly permitted by the Shariah Advisory Council of the Central Bank of Malaysia. The Fiqh Academy of the Organisation of the Islamic Conference (OIC) and the Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI), the major regulatory body for countries in the GCC, expressly prohibit *al-'inah* but permit *tawarruq*, with conditions. Their different approaches originate in doctrinal differences between the classical schools of Islamic thought and jurisprudence (see El-Gamal 2006: 70–73).

client by charging rent periodically. The periodic rents are shared and change in proportion to the extent of the customer's share.

Mudarabah (or *qirad*) is the "theoretical workhorse" (El-Gamal 2006: 120) of Islamic finance. It is a special type of partnership in which the capital owner (*rabb al-mal*), necessarily a sleeping partner in this case, advances money to an investment manager (*mudarib*) to trade with,[8] and in which the partners share the profits according to a contractually agreed ratio. There is no need to set up a company. Losses are borne solely by the capital owner, with the investment manager risking only his labour and time. *Mudarabah* contracts are used in two ways by Islamic banks (often termed 'two-tier *mudarabah*'). The first is with the bank as the *mudarib* and the depositor as *rabb al-mal*. The bank receives the money under a contract of safekeeping (*wadi'ah*), and then invests the depositor's money (with his consent, formally obtained when opening the Islamic bank account) in various schemes.[9] The second is with the bank as the *rabb al-mal*, providing start-up capital to an entrepreneur. Yet in this instance, the bank will often require collateral (*rahn*) and impose conditions on the client (Saleh 1986). In both instances, profits (supposing there are any) will be shared between the bank and the client, according to their prior agreement, and will take the place of the interest paid or received by a conventional bank. While this kind of contract offers the investor potentially greater returns than would be received via an interest rate, the *mudarabah* contract also exposes the investor to the risk of loss—so even a customer's original deposits may not be guaranteed.[10]

Sukuk (plural of '*sakk*,' meaning a deed or cheque) are normally referred to as 'Islamic bonds,' but are better described as trust or investment certificates[11] representing proportionate or undivided shares in the profits or revenues of large enterprises (Uthmani 2007). Unlike holders of conventional bonds, certificate holders are (or should be)[12] true owners of a portion of the underlying asset,[13] and share in the actual success or failure of the enterprise. There is a wide variety

[8] This is the position of the Shaf'i and Maliki schools. The Hanafi School allows *mudarabah* contracts for manufacturing. See Saleh (1986: 104).

[9] These can be general investment funds, where the bank chooses precisely where to invest; or specific investment funds where the investor is given a choice as to which projects he wants to invest in. See Saleh (1986: 102); Iqbal and Molyneux (2005: 21–22).

[10] However, this has not stopped some Islamic banks from utilising 'liberal' interpretations in an attempt to guarantee profits in order to mirror the returns investors obtain in conventional banks (see Dar 2007: 85). See, also, Saleh (1986).

[11] The main standards setting agency across the GCC, the AAOIFI, defines *sukuk* as "certificates of equal value representing receipt of the value of the certificates, which value is applied to a planned and designated use, common title to shares and rights in tangible assets, usufructs and service, equity of a given project, or equity of a special investment activity" (McMillen 2007: 200, 227).

[12] According to the Sharia Guidelines issued by AAOIFI in 2008, *sukuk* holders should be 'true owners' and share in the liabilities as well as the benefits of ownership (cited in Yean 2010).

[13] For further information, see Howladar (2009).

of legal structures for *sukuk*[14] and they can be based on *ijarah*, *murabahah*, *musharakah* or *mudarabah* concepts. Where, however, the underlying contract is a *murabahah*, the *sukuk* cannot be sold on the secondary market because of the prohibitions surrounding debt sales in the *Shari'a*.[15]

16.3 Islamic Banking and Finance in the Australian Context

16.3.1 Determining the Market for IBF in Australia and the Regulatory Challenge

Although in Australia there are 17 approved foreign banks and a number of foreign subsidiaries, including the Arab Bank and HSBC (Australian Prudential Regulation Authority 2011), there is no Islamic bank nor any conventional banks offering Islamic 'windows.' Both the Arab Bank and HSBC have Islamic subsidiaries outside Australia, but do not offer any Islamic products locally. The only foreign subsidiary offering Islamic financial services is Kuwait Finance House (located in Melbourne). Currently, only three Australian organisations offering finance products to the local retail sector[16] are labelled '*Shari'a* Compliant': the MCCA (MCCA Islamic Finance and Investments 2011), Islamic Co-operative Finance Australia Limited (ICFAL),[17] and Iskan Finance.[18] Organisations offering Islamic fund management are Crescent Investments, which offered Australia's first Islamic superannuation fund in December 2013,[19] and LM Investment Ltd, a conventional income funds manager which launched its Australian Alif Fund in May 2009, the first global onshore Islamic investment fund in Australia.[20]

One reason for the relative absence of a large-scale retail facility is the size and capacity of the Australian Muslim market. Although there is a combined Muslim population of 236 million in neighbouring South-East Asia, the number of Muslims in Australia remains very small. Out of a total of 23 million people scattered across nine states, only 2.2 % (476, 290) profess Islam, with the majority of these people living in NSW and Victoria.[21] In recent years, there has been a big percentage increase in the

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[14] Current AAOIFI guidelines provide 14 eligible asset classes (cf. McMillen 2007: 228). For further details, including the *Shari'a* standards issued by AAOIFI, see AAOIFI (2010).

[15] Where a *sukuk* consists of a mixed portfolio and one of the projects is based upon a *murabahah*, IFSPs have tended to permit sale of that *sukuk* on the secondary market where the *murabahah* comprised only a small proportion of the overall portfolio (AAOIFI 2010).

[16] For a detailed analysis and critique of the practical operations and products offered by these three organisations, see Ahmad (2010).

[17] See Islamic Co-operative Finance Australia Limited website.

[18] See Iskan Finance website.

[19] See Crescent Investments website.

[20] See LM Investment Management Limited, *Home Page.*

[21] See Australian Bureau of Statistics website for 2011 Census Data. For figures based on 2006 data, see Department of Immigration and Citizenship (Cth), *Muslims in Australia—A Snapshot.*

numbers of migrants arriving from North Africa and the Middle East,[22] and since the 2006 Census[23] the official figures show a 39.2 % increase in the number of Muslims overall. Yet in comparison with the total population, the figures remain small.[24] Moreover, many of the Muslim communities in Australia suffer social marginalisation and economic disadvantage, with higher unemployment rates and lower wages than the wider population (Ata 2009: 14–15; Phillips 2007). Muslims from such communities might find the often relatively high price of IBF retail products prohibitive.[25]

Empirical research on attitudes towards IBF has been limited, in Australia as well as elsewhere. Only two studies are known to have been carried out to date, and only one, by Rammal and Zurbruegg (2007), on the attitudes of individual customers.[26] The research by Rammal and Zurbruegg was carried out in Adelaide in June 2004 and revealed genuine interest amongst practising Muslims in the idea of Islamic banking products, but it also revealed a lack of familiarity with Islamic brands and little understanding of Islamic principles of financing (Rammal and Zurbruegg 2007). The other study, by Jalaluddin (1999)[27], surveyed the attitudes towards profit and loss finance methods of 385 small businesses and 80 financial institutions in Sydney. Jalaluddin noted that 60 % of his small business respondents (the majority of whom were non-Muslim) expressed an interest in profit and loss (i.e. *mudarabah*) financial arrangements, and more than 40 % of the financial institutions were prepared to lend on that basis.

The latter study suggests that policy makers should look beyond the actual numbers of the Muslim population when determining the potential market; IBF is not just for Muslims (Hussain 2010: 8). Evidence from Malaysia indicates a substantial take-up from non-Muslims attracted by the fair terms and quality of Islamic products.[28] Also, in Singapore, more than half of Singapore's OCBC Al-Amin Islamic Bank's customers are non-Muslim ('More Non-Muslims Trying Islamic Banking' 2008).

Foreign Islamic banks or local banks through Islamic 'windows,' however, are likely to require more positive evidence before entering the Islamic retail sector in Australia.[29] Singapore has a population of more than 500,000 Muslims but only

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[22] Department of Immigration and Citizenship (Cth), *Fact Sheet2—Key Facts in Immigration*

[23] See Cahill (2012).

[24] Further, it should not be assumed that all, or even a majority, of this population would be consumers of IBF products (see Rammal 2010: 13; Khan and Bhatti 2008: 181).

[25] Low income has been cited as a reason for not taking up Islamic finance in other jurisdictions (see Zainuddin, Jahyd and Ramayah (2004), cited in Gait and Worthington (2007)).

[26] For a case study of IBF in Australia see Saeed (2001).

[27] See also Jalaluddin and Metwally (1999).

[28] See Venardos (2005). The prevalence of non-Muslim investors in Malaysia's AmIslamic Bank was also confirmed by: Interview with Mahdi Murad, Executive Director of AmBank (Kuala Lumpur, 13 August 2009); Interview with Jamaiyah Mohammed Nor, General Manager, AmIslamic Bank (Kuala Lumpur, 13 August 2009).

[29] Interviews with Emmanuel Alfieris, Head of Financial Institutions and Trade, Global Transactional Banking Westpac Institutional Bank (31 July 2009), Rodney Maddock, Executive General Manager, Group Strategy Development, Commonwealth Bank (27 August 2009), and Imran Lum, Community and Development Manager, National Australia Bank (Melbourne, 7 October 2009) confirmed that the major banks had investigated the viability of a retail product but concluded there was an insufficient market.

OCBC, Maybank and the Islamic Bank of Asia (IB Asia)[30] offer a retail product to service that community. Although Islamic wholesale commercial banking, wealth management, and capital markets continue to grow, Islamic retail banking has been neglected. Local commentators believe this is because there are no official data on the demographics of the Muslim population in Singapore ('On the Right Track' 2011). More data are also required in Australia that would better indicate the capacity and desire of Muslim communities to patronise Islamic banking services and products.

According to Thani, Abdullah and Hassan (2010), the IBF sector requires more than a receptive market; it also needs an enabling legal environment for both the retail and wholesale markets to prosper. In their analysis of the experiences of several countries, key factors in the successful development of IBF have been: clear policy decisions and directions coordinated by local financial regulations; legislation establishing, licensing and supervising institutions offering IBF services and clarifying their differences with conventional services; comprehensive and precise mechanisms that ensure systemic *Shari'a* compliance, supervised by qualified *Shari'a* scholars as part of a Shari'a Advisory Board (SAB); taxation-friendly frameworks which enable IBF providers to compete effectively with providers of conventional finance; supporting infrastructures, including accounting standards and human resource development; and participation in global initiatives, such as the Islamic Financial Services Board (Thani et al. 2010: 41–42).

Currently, there is no mechanism in Australia that would compel IBF providers to comply with regulations and directions of the international Islamic regulatory bodies, whether directly or indirectly. There are two international standards-setting bodies: the Islamic Financial Services Board (IFSB) and the Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI). The former is an association of central banks, monetary authorities and other institutions responsible for regulation and supervision of Islamic financial services. Its primary purpose is to set and harmonise standards for supervision and regulation internationally that are consistent with *Shari'a* principles (Thani et al. 2010: 28–29). The IFSB also liaises and coordinates with standards-setting bodies from the conventional sector to promote stability and disseminate best practices. One of its most important functions to date has been the adaptation of BaseI II (and now III) on capital adequacy requirements to IBF providers (Thani et al. 2010: 105, 347–352).

The AAOIFI is an autonomous international Islamic organisation which prepares accounting, auditing, governance, ethics and *Shari'a* standards for IBF service providers. Its members are drawn from certain Islamic financial institutions and *fiqh* academies, including the Fiqh Academy of the Organisation for Islamic Cooperation (OIC). The AAOIFI complements the IFSB through the setting and harmonising of *Shari'a* standards (Thani et al. 2010: 29).

[30] IB Asia received a full banking licence from the Monetary Authority of Singapore (MAS) and was launched on 7 May 2007. The bank comprises 22 Middle Eastern investors from prominent families and groups in the GCC. See Thani, Abdullah and Hassan (2010: 326).

The rulings, standards and guidelines of both organisations are voluntary in nature but have been incorporated (directly and indirectly) into the domestic laws of some jurisdictions.

In line with the suggestions of Thani, Abdullah and Hassan, amending current Australian legislation to require the Australian regulators to refer to the standards of AAOIFI, and the IFSB in particular, would fill an important gap in the Australian context and facilitate further development.

16.3.2 The Regulatory Legislation

The principal piece of legislation with which all financial service providers across all states must comply is the Corporations Act 2001 (Cth). Matters relating to companies under its purview include: issuance of shares and debentures; managed investment schemes; continuous disclosure; and fundraising. In addition, the Act covers: the licensing of financial markets, financial service providers, and clearing and settlement facilities; compensation regimes; financial product disclosure; and conduct in relation to financial products. The problem, for IFSPs, is that, as their products often involve multiple investors, they could be regarded as 'management investment schemes' and required to register with ASIC (Australian Financial Centre Forum (Cth) 2009: 97).

In addition to the Corporations Act 2001 (Cth), there is consumer credit legislation with which IFSPs would have to comply: National Consumer Credit Protection Act 2009 (Cth) (NCCPA). This legislation applies to all financial institutions, including building societies and credit unions. The crux of the legislation is to protect consumers, and it requires full disclosure. As part of the disclosure regime, the NCCPA requires financial institutions to state specifically the 'credit charge' or annual rate of interest charged in return for the home finance. In an Islamic Home Finance package, therefore, the 'rents' payable would need to state the degree of 'profit' remitted periodically to the provider, which providers are obliged to label as 'interest' in their legal documentation.[31] The providers must also show how their rates compare with those of similar providers. The problem for local Islamic financial service providers is that Islamic finance has often been more expensive than a similar conventional product, and so not only may their charges appear uncompetitive, but the required labelling will also undercut their marketing of an Islamic 'interest-free' product.[32]

If an IFSP intends to set up a 'banking business,' it is also subject to the Banking Act 1959 (Cth). In order to be a 'bank' within the terms of the legislation, the

[31] NCCPA sch I pt 2 div I ss 17(3)–(6).

[32] For more detail on this issue, see Ahmad (2010: 166–168). The MCCA also allude to this difficulty on their website and explain that being required under Australian law to label a financial return as 'interest' does not mean that it is in Islamic teachings—it is the nature of the return that matters (which they maintain is 'profit'), and not its form. See also the MCCA, 'Frequently Asked Questions.'

institution must receive deposits and make advances; there is no requirement that the institution must pay or impose interest. On that basis, there is no insurmountable obstacle for an Islamic institution to becoming a 'bank' under Australian law. The key issues that block such institutions from receiving a banking licence relate to: (i) absence of guarantees over the principal sum deposited; (ii) capital adequacy requirements under the Basel II formula; and (iii) possible absence of a local SAB and conflicts of interest.

As to the first issue, the participants in an Islamic bank will view all deposit, savings and investment accounts as a *mudarabah* where profits and losses are shared. In principle, therefore, neither the original deposit nor returns on the invested funds can be guaranteed. Bank Islam in Malaysia, for example, provides a return to simple deposit account holders by way of gift (*hibah*), but stops short of guaranteeing any specific sum.[33] Yet the regulator in Australia would insist on guarantee of the deposits as a minimum.

In relation to the second issue, the Capital Adequacy Requirement (CAR) is one of the key 'pillars' of the Basel II framework which APRA is required to apply to all banks, including Islamic banks, in the interests of Australian depositors (Loughnan and Drummond 2010). This requires banks to hold a *minimum* amount of capital to protect themselves and their investors from categories of risk, and to have their own internal supervisory structures to ensure maintaining of adequate capital and the presence of policies and processes commensurate with their particular risk profile (Van Greuning and Iqbal 2008: 222–223, 231–232). The exact amount of capital to be held is at the discretion of the regulators and will depend on their perception of the bank's risk profile; the greater the perceived risk, the higher the amount. However, the higher the amount, the less funds are made available for investment and the more difficult it is for banks, especially the smaller institutions, to compete. It is essential, therefore, for the regulator to apply the 'right' formula and to match the CAR to a bank's true risk profile; leaning too much one way or the other could have disastrous consequences for the bank or its depositors (Archer et al. 2010).

The problem for potential Islamic banks is that the regulator may regard them as more prone to risk and impose a penal capital requirement because of the way they operate. Like any other bank, Islamic banks work in a competitive environment, so they tend to pay market-related returns to their account holders. In practice, Islamic banks stabilise profit payouts through a Profitisation Equalisation Reserve (PER) and cover periodic losses through the accumulated funds of an Investment Risk Reserve (IRR) (Archer et al. 2010: 12). The former consists of appropriations drawn from the profits of both the bank shareholders and the account holders. The latter comprises the profits of account holders only after deducting bank management fees and their contractually agreed profit. However, where asset returns are low or there are losses, because of competitive pressures the bank may also transfer some of its own additional resources to the PER. It may also voluntarily reduce its own share in the *mudarabah* arrangement to absorb the losses or drops in profits. As a result,

[33] See Bank Islam, *Wadiah Savings Account-I* website.

market or commercial risk is displaced from the account holders to the shareholders of the bank (Archer et al. 2010: 15–16). The difficulty for the regulator, then, is how to estimate or measure this 'displaced commercial risk' and how much capital it should ask the Islamic bank to set aside to protect against such exposure (Archer et al. 2010: 18).

The need for Australian institutions to have a locally vetted SAB, without conflicts of interest, might also be a stumbling block. In the IBF industry in general, there is a relative scarcity of scholars with sufficient knowledge and experience of IBF (Abbas 2008). The problem is accentuated in Australia because of the small Muslim population and the small numbers of scholars in the local community. The same scholars frequently sit on multiple Sharia Advisory Boards and assume several roles, giving advice on *Shari'a* compliance as well as performing an audit. This can raise questions as to their independence (Rammal and Parker 2010: 27). Where they are very well-known figures, members of the SAB might be regarded as 'shadow directors' on the Boards of Islamic Banks and this could bring them into conflict with the regulator (Australian Financial Centre Forum (Cth) 2009: 98). Although there are global guidelines and prudential standards issued by the IFSB to mitigate such conflicts (IFSB 2007: 3), these are only voluntary in nature and so would require specific incorporation at the national level.

16.3.3 Taxation

Perhaps of greatest importance for overseas IFSPs is Australia's tax regulatory framework, of which the aspects most relevant to potential Islamic financiers and investors are stamp duty, mortgage tax, withholding tax (WT), goods and services tax (GST), income tax, and capital gains tax (CGT). Dealing with all of the possible tax implications of IBF transactions is beyond the scope of this paper, but stamp duty, mortgage tax and WT are worthy of particular mention.[34]

Stamp duty is a state-based tax, so the particular regime will depend on with which state the IFSP is considering to deal. Because it is so financially lucrative to the states concerned, all states impose ad valorem duty on 'dutiable property' transactions, which include absolute transfers in land, interests in land, business assets, and shares in an unlisted (i.e. not listed in a recognised exchange) company.

IBF transactions are not targeted deliberately for unequal treatment, but owing to the double transfer of a property in a common Islamic home purchase arrangement—for example, by way of *bay' bi-thaman'ajil* (BBA) or *musharakah mutanaqisah* (MM)—they are penalised by double stamp duty. As a result of successful lobbying by the MCCA, and reforms passed in 2004, Victoria took measures to ensure that *murabahah* and *musharakah* lease-sale arrangements would only incur stamp duty upon the initial transfer to the financial institution and not when the title was trans-

[34] I owe a debt of gratitude to the industry of my research assistant, Fadi Schmeissen of BT Financial Group, for much of this section on Australian taxation law.

ferred to the ultimate consumer.[35] For NSW, however, this form of 'double stamp duty' still applies and is passed on to the consumer, making the transaction potentially uncompetitive.[36]

Unlike stamp duty, WT is imposed at the federal level, and applies to payments of interest, dividends and royalties made by an Australian resident to a recipient overseas. It is a direct tax on foreign investment and is paid to the Australian Tax Office (ATO) before exporting any of the profits overseas. It is charged at a flat rate of 10 % for interest, 15 % for dividends and 30 % for royalties. In the case of dividends, if there is no double taxation agreement between the two countries, the resident company or payer would need to pay 30 % WT (Grieg 1993: 28). It should be noted that, although a double taxation agreement exists between Australia and Malaysia,[37] there are no double taxation agreements for the GCC, meaning that 30 % of the profit from dividends (in relation to corporate entities located in Australia) will need to be paid to the ATO. In order to comply with ATO directions and the tax legislation, a person who is liable for WT must register with the ATO and make WT payments within the appropriate time frame, which differs depending on the size of the company or business of the particular withholder.[38]

16.4 The Response by the Australian Government and Prospects for Reform

In the past couple of years, the Australian government, at state and federal levels, though non-committal, has explored and considered the possibility of removing tax disincentives and regulatory obstacles for IFSPs. Even before their most recent pronouncements, the federal government, as well as the state governments of NSW and Victoria, had recognised the potential of IBF as a source of much needed foreign direct investment and welcomed the visits of trade delegations from the Middle East (namely the United Arab Emirates) and Malaysia. According to Kathryn Matthews, Director for Industry and Investment NSW, speaking on behalf of the NSW Government during a visit by a Malaysian Islamic Finance delegation to Sydney on 7 December 2009 (Matthews 2009), tapping into IBF represented an opportunity for Australia, especially Sydney, to be a regional financial centre and a focus for innovative financial services. She confirmed that the NSW Government was actively working towards a 'level playing field' for IBF alongside other models of finance. Interest, it seems, is across party lines. In April 2011, the new NSW Government

[35] Duties Act 2000 (Vic) ss 57A–F.

[36] The problems of competitive pricing of Islamic products in predominantly non-Muslim jurisdictions have been examined by other writers. See Balz (2007).

[37] Convention between the Government of Australia and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed 20 August 1980 [1981] ATS 16 (entered into force 26 June 1981).

[38] See Taxation Administration Act 1953 (Cth) sch 1 ss 16–140.

(through the NSW Better Regulation Office) continued with the approach of its predecessor, inviting submissions from industry players and consultants as to any potential regulatory hurdles.

As for the federal government, John Masters (formerly a partner at PricewaterhouseCoopers and an advisor to the federal and NSW governments on IBF), speaking at the same 2009 Malaysian delegation, expressed confidence that Australia would soon follow in the footsteps of the UK and that ASIC and APRA were both 'on board.' Taxation remained the biggest stumbling block for IBF and probably required enabling legislation, but the Commonwealth Treasury was 'very focused' and had convened a number of seminars on the matter.

Recent statements from government ministers and government sponsored reports support this confidence. These acknowledge Australia's previously limited engagement with the Asia-Pacific region and a lack of cross-border import and export of financial services, despite Australia's strong domestic economy and the enormous potential benefit it could gain from such engagement. In November 2009, the 'Johnson Report' (Australian Financial Centre Forum (Cth) 2009) detailed the recommendations of a roundtable comprising representatives of the Treasury, the ATO, Austrade, the Department of Foreign Affairs and Trade, the Australian Bankers Association and IFSA, which focused on the taxation of Islamic finance and concluded that Australia should follow a 'no obstacles but no special treatment' approach towards IBF. The Forum agreed with the UN Committee's Working Group that the 'legal approach' (taxing according to legal 'form') would produce anomalies in relation to Islamic financial instruments when compared with conventional products, and that an 'economic substance' approach should be preferred. At the state level, it recommended that discriminatory stamp duties be amended and at the Commonwealth level, for Islamic *sukuk* to be exempted from WT in the same way as are conventional bonds. At the same time, it recognised there were complexities deserving more serious attention and urged the matter be referred to the Board of Taxation.[39] In a media announcement in Abu Dhabi on 26 April 2010, Chris Bowen, the Minister for Financial Services, confirmed that the taxation issues were being considered by the Board of Taxation.[40] On 13 October 2010, the Board of Taxation duly published a detailed discussion paper inviting submissions from stakeholders and interested parties,[41] and formally submitted its recommendations to the Federal Government in April 2013.[42] The Forum also recommended that a special committee be formed at the federal level to explore the issues under the Corporations Act 2001 (Cth) in more detail and to investigate removing any prohibitive barriers for IBF providers.[43]

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[39] See Australian Financial Centre Forum (Cth) (2009: 70–71 (Recommendation 3.6)).

[40] See Sherry and Bowen (2010). The Board of Taxation completed its review for the federal government in June 2011. Its findings, however, have not been published.

[41] See Board of Taxation (Cth) (2010).

[42] See Moore, B. (2013). These recommendations have not been made public, however, nor is there any evidence the current government has acted upon them.

[43] See Johnson Report, Australian Financial Centre Forum (Cth), (2009: 98 (Recommendation 4.8)).

In addition to the Johnson Report, Austrade has produced its own publication, in which it explains Islamic products with a view to developing public awareness of the industry and to promoting opportunities for Islamic finance in Australia (Austrade 2010).

In summary, both state and federal governments seem to support moves to accommodate IBF, with an emphasis clearly on the wholesale market and following the UK 'level-playing field' model.[44]

16.4.1 Towards an Alternative 'Asian Model'?

The 'level playing field' model seems to be based on the assumption that Australia's natural assets, political and economic stability, geographical proximity to Asia and vibrant property sectors, among other attractions, would inevitably draw in Islamic investors, like a magnet, were it not for the regulatory obstacles already described (Austrade 2010: 5–6). Although the removal of these obstacles would be a pre-requisite for further development of a local retail and wholesale IBF sector, it is doubtful whether the preferred model would be sufficient to attract large quantities of Islamic petrodollars to Australia. First, investment in Australia is expensive because of the high level of the Australian dollar. Unless overseas Islamic investors already have large holdings of Australian dollars or the prospective financial returns are very high, increased transaction costs would militate against a major Australian investment.[45] Second, there are alternative investment-friendly jurisdictions in Asia which have provided incentives, and not just a 'level-playing field,' for IBF investment. Malaysia, in particular, has been very aggressive in luring Islamic investors, especially to its offshore location in Labuan.[46] The Labuan Offshore Business Activity Tax Act 1990 (Malaysia), as amended, came into force in February 2010, providing a tranche of tax benefits, including advance tax rulings, withholding tax and stamp duty exemptions, and a right to be taxed under the Income Tax Act 1967 (Malaysia), which also exempts from taxation capital gains and income derived from foreign sources.[47]

Unlike Malaysia, Australia is not an Islamic country[48] with a majority Muslim population. An incentive-based approach, therefore, might not seem appropriate.

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[44] For further detail on the UK approach, see Thani, Abdullah and Hassan (2010: 327–332).

[45] According to Emmanuel Alfieris, Head of Financial Institutions and Trade, Global Transactional Banking, Westpac Institutional Bank, most overseas Islamic investors do not hold Australian dollars (Interview with Emmanuel Alfieris, Sydney, 31 July 2009). The deterrent effect of the high Australian dollar was also reiterated in roundtable discussions at the Islamic Finance News Roadshow, Melbourne Exhibition Centre, 9 May 2011.

[46] A framework of tax incentives and exemptions has also been established for the mainland (see Thani et al. 2010: 131–136).

[47] Labuan International Business and Financial Centre, *Tax Benefits*.

[48] Malaysia is a member of the Organisation of the Islamic Conference, while Australia is not.

The approaches of both Singapore and Hong Kong, countries with small Muslim populations like Australia, might therefore be instructive.

IBF in Singapore has developed rapidly in recent years. In addition to three retail offerings in the banking sector (IB Asia, OCBC and Maybank), HSBC Insurance (Singapore) manages substantial assets for *takaful* products and NTUC Income's 'Amanah Fund' operates the largest *takaful* fund in South-East Asia (Venardos 2006: 204–205). Singapore has also been successful in attracting a large number of Middle Eastern investors to its ethical investments and *Shari'a*-compliant funds (Thani et al. 2010: 326). In 2008, for example, it was announced that Singapore's ARA Asset Management, working in partnership with Dubai Islamic Bank, had launched a US$450 million Islamic Far Eastern Real Estate Fund (Thani et al. 2010: 327).

While Singapore is firmly established as a regional financial hub, and has benefited from the movement of offshore funds from Switzerland following the implementation of forced changes to its tax rules in 2003 (Venardos 2006: 194–195), the country has capitalised on its good fortune by facilitating the entry of IBF investors. The existing regulatory framework was amended to accommodate Islamic banks. Although section 30 of the Banking Act (Singapore, cap. 19, 2001 rev. ed.) prohibited Islamic banks from trading, in 2005 a new regulation was passed (Regulation 22) exempting *murabahah* financing. In 2006, the Banking (Amendment No 2) Regulations (Singapore, cap. 19, 2006 rev. ed.) was also introduced, allowing banks to offer *murabahah* investment products. In 2007, Islamic investors were given the same protection as conventional depositors by having their claims put ahead of those of general unsecured creditors (Thani et al. 2010: 322).

At the same time, the Singapore government levelled the playing field for Islamic investors by amending its tax laws. In 2005, double stamp duties on real estate *murabahah* transactions were waived (Thani et al. 2010: 323). Rules on GST and income tax for *Shari'a*-compliant investments employing *murabahah, mudarabah* and *ijarah wa iqtina'* methods were amended, with the effective returns 'deemed interest' for tax purposes (Thani et al. 2010: 324) . Special consideration was also afforded to *sukuk*, remitting stamp duty on immovable property if it was in excess of that chargeable under a conventional bond (Thani et al. 2010: 324). In order to further boost and encourage IBF investment, in 2008 the Finance Minister also announced a 5 % concessionary tax rate on income derived from qualifying *Shari'a*-compliant activities, such as lending, fund management, insurance and re-insurance, and, in addition, all investors were to receive tax exemption on income derived from qualifying *sukuk* (Thani et al. 2010: 325).

To a certain extent, therefore, Singapore has done more than provide a level playing field for IBF; the government has moved in the same direction as has Malaysia by offering actual incentives.

Although Muslims comprise only 1 % of its population and number less than 70,000 in total (Nasir 2008), Hong Kong has embraced both the retail and wholesale Islamic markets. Several years ago, the Hong Kong Government identified IBF as a necessary part of its strategy to develop Hong Kong as an international financial centre (Yue 2009). In 2007, the first Islamic retail fund was launched, the Hang

Seng Islamic China Index Fund. The fund was screened by the Central Sharia Committee of HSBC Al-Amanah, approving the trust deed, explanatory memorandum and termsheet (Nasir 2008). This laid the groundwork for a successful issuance. By the end of the year, the fund was heavily subscribed and had grown by 11.04 %, outperforming the Hang Seng Fund, its conventional counterpart, which had grown by only 7.1 % (Nasir 2008). In March 2008, this was quickly followed by a US$550 million *ṣukūk* issuance that was also heavily over-subscribed (Wheatley 2009). Later the same year, the Hong Kong Monetary Authority (HKMA) granted permission to two foreign banks—Hong Leong Bank and CIMB Hong Kong (both Malaysian)—to operate Islamic banking 'windows' (Wheatley 2009).

The speed at which these events took place was facilitated by a proactive government keen to reduce taxation costs and remedy regulatory obstacles. Notwithstanding an already low taxation economy, the Hong Kong government still explored possible unfair treatment in its Comprehensive Tax Review, though it concluded IBF organisations operated without any additional penalties. Hong Kong's simple tax structure and flexibility enabled the regulator to grant tax exemptions upon application, providing a mechanism to reduce costs for IBF providers (Yue 2009).

The HKMA has also liaised closely with overseas regulators, signing memoranda of understanding with the Dubai International Financial Centre Authority and the Dubai Financial Services Authority, to facilitate the establishment of suitable infrastructures for the development of *Shari'a*-compliant products and to assist in capacity building for the development of Islamic capital markets, respectively (Wheatley 2009).

As an additional incentive, Hong Kong is also a natural conduit into China, the world's fastest developing economy.

16.5 Conclusion

The existing regulatory set-up of banking and finance in Australia, as in all predominantly non-Muslim societies, has developed largely without regard for those wanting to organise their finances in accordance with Islamic *Shari'a*. This has not stopped the emergence of local operators who, by and large, have successfully navigated the existing system, notwithstanding the penalising impact and effect of some of its regulations, especially in the area of taxation. Even in the absence of any legislative or administrative changes, local Islamic financial engineers and planners will continue to structure their products in such a way as to maximise their profits as well as to secure a *halal* return.

Recent developments indicate that momentum is building to accommodate IBF across Australia. The banks, industry associations, and state and federal governments have all observed a profitable niche from which Australia can benefit and are seeking to engage with the Middle East and Asia-Pacific regions in order to guarantee Australia's future prosperity. The recent memorandum of understanding between the Australian and the Malaysian governments, and the active involvement of Austrade

in the promotion of IBF in the region, provide further examples of this institutional interest.[49] In their private deliberations and public utterances, these institutions realise the Australian regulatory system must change to accommodate the particular needs of IFSPs.

However, the legal change they propose is distinctly European in origin—the UK's 'level playing field' approach. This may prove to be a mistake in the long term, as Australia is likely to become more dependent on the Asian economies. Malaysia, Singapore, Hong Kong and Indonesia (an underdeveloped market) have a competitive advantage over Australia in the battle for Middle Eastern (Islamic and conventional) petrodollars. They are not welfare-driven societies and tend to have much lower levels of taxation. And, as in the cases of Malaysia and Singapore, they provide tax incentives to encourage inflows of Islamic FDI. When historical links and cultural ties between South-East Asia and the GCC countries are added to the equation, it should be apparent that Australia needs to do more than advertise its natural assets and level the playing field if substantial inflows of Islamic FDI are to materialise.

But herein lies the problem. Regulatory clarity, a level playing field and a framework of incentives will all probably require separate legislation to give them effect. This would necessitate a complex series of debates in Parliament which might provoke sectarian sentiment. Just as with the UK, France, US and even South Korea,[50] cultural tensions in Australia are never far away from the surface. Popular association of Islam with international terrorism, combined with concerns over asylum seekers and migrants from Muslim countries[51] can influence decisions taken at the political level. Although the local investment banks have been confident in the viability of an Islamic wholesale market (Johnstone 2011), further development depends on the broader political environment and not just on the goodwill of regulatory officials.[52] It is no coincidence that, notwithstanding positive political signals to the IBF industry, from both Labor and Liberal governments, very little change has yet to materialise. While the Board of Taxation has submitted its recommendations, we are yet to witness any political action. Some refer to IBF as 'good *Shari'a*'[53]; but legislating for *any Shari'a* is unlikely to win local or federal political elections.

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[49] For example, Austrade was one of the facilitators for the Global Islamic Finance Forum, held in Kuala Lumpur on 25–28 October 2010.

[50] Government attempts to pass legislation to facilitate the issuance of a local *sukuk* were halted by local Christian Evangelist bodies (see Ramasamy and Yoon 2010).

[51] For an example, see Bolt (2011).

[52] On 30 November 2010 ASIC awarded Crescent Funds Management (Aust.) Ltd a licence to operate financial products in both wholesale and retail markets, opening up *Shari'a* Managed Funds to the Australian market for the first time (see Crescent Investments Australasia, *Home Page*).

[53] See Black and Sadiq (2011).

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Chapter 17
Shari'a and Multiple Modernities in Western Countries: Toward a Multi-faith Pragmatic Modern Approach Rather Than a Legal Pluralist One?

Adam Possamai

17.1 A 'Clash' or a Diversity of Modernities?

The modernity fashioned in Europe and the US was exported and expanded around the world. However, this process was neither homogenous nor straightforward. Not only were there differences in the 'modernities' despatched by these various countries, but the countries to which they were exported have interpreted and adapted the paradigm in various ways (Berger et al. 2008). With regard to religion, specifically, while some countries were eradicating religion from their public sphere to fit the European mould (as, for example, in Kamal's Turkey), others, like Malaysia, were keeping religion within a modernist ethos.

Apropos of the initiators of modernity, Casanova (2006) and Davie (2006) differentiate the European case from that of the United States. This contrast is instructive—both Europe and the US have gone through modernisation processes which have differently affected their experience of post-secularism (see below). Earlier in her work, Davie (2002) put Europe and the US at the extremes of a continuum. She described the European case in terms of state or elite control of religion, in which there is a culture of obligation (for example, going to church because one must), and the US case as that of religious voluntarism (in which there is a culture of consumption or choice). Davie (2002) observed that, along this continuum between religious obligation and religious voluntarism, Europe is slowly shifting towards voluntarism. The situation in Australia, however, is a hybrid of both obligation and voluntarism (Possamai 2008). These observations draw attention to the different cultures of these countries and, in turn, to the effects of culture upon belief and non-belief. Specifically, Davie draws attention to the varied cultures of

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individualism, which are palpable in an age of neo-liberalism, and to how these different cultures of individualism generate different national patterns of belief, adherence and commitment.[1]

To follow this inquiry, in her *Sociology of Religion,* Davie (2013) asks what the authentic core of modernity is. The answer to this is complex, as, for her, modernity is more of an attitude than a set of characteristics.

> In its early forms, it embodied above all a notion of the future which was realizable by means of human agency. As soon as the process was set in motion, however, even the core of modernity was beset by internal contradictions. Were such societies to be totalizing or pluralistic? Or what degree of control/autonomy was considered desirable? (Davie 2013: 108)

In another work (Berger et al. 2008) we find the notion that the universal features of modernity pertain to science and technology, and the way they are institutionalised leads to different social and cultural outcomes. In a version of this thesis that accepts that not all forms of modernity fit the same mould, there could be alternate forms in which religion can be included, but in which "the forms of religion may be as diverse as the forms of modernity" (Davie 2013: 109).

Researchers such as Berger, Davie and Fokas (2008), Casanova (2006), Davie (2006, 2013), and Martin (2005), for example, have used the work of Eisenstadt to shed light on this multiplicity. They have used his concept of 'multiple modernities,' which is described by Eisenstadt (2000: 2) in cultural terms:

> The idea of multiple modernities presumes that the best way to understand the contemporary world—indeed to explain the history of modernity—is to see it as a story of continual constitution and reconstitution of a multiplicity of cultural programs. These ongoing reconstructions of multiple institutional and ideological patterns are carried forward by specific social actors in close connection with social, political, and intellectual activists, and also by social movements pursuing different programs of modernity, holding very different views of what makes societies modern.

Even if, within the multiple modernities thesis, the "definition of modernity is often so inclusive as to lose coherence" (Fourie 2012: 52–69), it is nevertheless a useful concept that attempts to undermine the hegemony of western modernity and reflects cultural diversity and multiplicity.

Unlike 'postmodernity,' that is opposed to 'modernity' as a meta-narrative, the multiple modernities thesis is in disagreement only with the western domination at the roots of the project of modernity. It does not reject modernity (Lee 2006). In this sense, the theory of multiple modernities acknowledges specific expressions of culture and traditions and is reflective of a pluralist view of the world. Further, and in light of the subject of this chapter, Eisenstadt's notion of multiple modernities is conceptually useful because, in its pluralist form, it underlines the possibility that religion can assume different forms cross-culturally, and can include Habermas' (2006) post-secular project. As Eisenstadt (2000: 4) has underlined with regard to the practice of religion in the public sphere, today the challenge is to draw the

[1] Other researchers, such as Wohlrab-Sahr and Burchardt (2012), have extended this notion of multiple modernities to include that of multiple secularities, creating four ideal-types of secularity. Unfortunately, further exploration of these types is beyond the scope of this chapter.

"delimitations between a positive liberty to practise a religion of one's own and the negative liberty to remain spared from the religious practice of the others." This topic will be discussed more below.

Taking into account the multiple modernities thesis, we could argue that, with regard to *Shari'a*, there is a tension between the established secular and post-Christian modernity of many western countries and the currently growing Muslim modernities (see below). Many commentators might argue that *Shari'a* might be seen in western countries as pre-modern, in the sense that it is not codified in a universal (or western) way or subject to the same process that legal systems have undergone in the western world. *Shari'a*, it could be claimed, has not gone through the same (so-called) full process of modernity, which is a process of differentiation between law and religion characteristic of post-Westphalian societies. Indeed, according to Luhmann (Schmidt 2007), what characterises the core of the modernisation process is the differentiation between various social and cultural spheres, of which religion is no longer the overarching, all-encompassing sphere (where, for instance, religion influences law), but one among many (where religion and law are different, relatively self-regulating spheres). How can such a process be said to be applied to *Shari'a*—since, in the context of *Shari'a*, religion is the all-embracing sphere that includes the law? Could a different type of modernity be constructed without a differentiation between spheres, or do we have to expect that such differentiation is mandatory even in Islamic modernity?

Some Islamic social actors are working on Islamic projects of modernity which offer variations from western thinking (Possamai 2009). Some thinkers (e.g. Tibi 2000) believe that Islamic societies could go through this differentiation process and its secularisation process (as a social process rather than an ideology) without abandoning Islam. This could be understood within the multiple modernities thesis, and, as Göle (2002: 91) has explicitly written on this topic within an Islamic context,

> the multiple-modernities project puts the emphasis on the inclusionary dynamic of modernity, on borrowing, blending, and cross-fertilization rather than on the logic of exclusionary divergence, binary oppositions (between traditionals and moderns), or the clash of civilizations (between Islam and the West).

Göle argues that, within this contemporary phase, which explores the boundaries of modernity within an Islamic context, there is a post-Islamic stage in which Islamism is less and less about following political and revolutionary actions, but, rather, is about engaging in social and cultural everyday life practices (Göle 2002). 'Post-Islamists' would thus be working on new public spaces, on creating their new visibility, new lifestyles and identities. This post-Islamic stage is working so much on redrawing the initial western project of modernity by bringing Islam into the public space, that it is necessary to raise an important question:

> The question that needs to be asked is not whether Islam is compatible with modernity but how Islam and modernity interact with each other, transform one another, and reveal each other's limits. (Göle 2002: 94)

Some authors (e.g. Jung 2011 and Kamali 2012) argue that Islam is not incompatible with modernity, as some Islamic groups have been actively involved

in the modernisation process of their country. However, as expected, this process, also, is multifaceted. As Jung has commented,

> not only do European and Muslim voices diverge, but the formation of European and Islamic modernities also appear as internally highly contested fields of discursive practices…Islamic modernism has evolved into such different ideological projects of societal reconstruction as represented by Mawdudi's and Qutb's ideal of the Islamic state, Khomeini's political theory of the velayat-e faqih or the secularist state doctrine of Turkish Kemalism. Again, in between these extreme poles of Islamist and secularist modern thought, we must locate a broad variety of Muslim apologetic attitudes, which represent Islamic reform ideologies in the more narrow sense, aiming at a reconfiguration of religious traditions with general features of modernity. (Jung 2011: 265)

Regarding this issue of the 'multiplicity of these multiplicities,' a question must be asked as to which discourse on the normativity of *Shari'a* can be part of such a multidimensional modernist project? As there is "no such thing as a monolithic Islamic law" (Marcotte 2003: 154), Masud (2012) delineates five types of discourse found in Pakistan, which can be of use for this chapter. These are as set out below.

1. The secular discourse argues for the separation of church and state, and *Shari'a* is not seen as adequate in a modern society.
2. The traditional discourse is opposed to modernity and its link to westernisation.
3. The religious discourse follows a theological understanding of society and believes in the normativity of *Shari'a*.
4. The modernist Islamic discourse supports the view that the Islamic legal tradition is sufficiently dynamic to positively engage with modernity.
5. The Islamist discourse regards modernity as a heresy.

Not all contemporary discourses on *Shari'a*, from a Muslim perspective, are thus compatible with the multiple modernity thesis, as only the secular (type 1) and modernist Islamic (type 4) discourses can engage with this multiple modern context. As discourse 1 rejects *Shari'a*, for the remainder of this chapter I will focus on discourse 4, which works at making *Shari'a* part of a type of Islamic *aggiornamento*. Not dismissing the fact that the other three discourses exist (but would represent the minority within a western and multicultural context, and could be problematic with regard to social cohesion) they are far less conducive to a multi-faith pragmatic modernist project (see below). This chapter will therefore not address these discourses any further.

17.2 *Shari'a* and an Islamic *Aggiornamento*?

Pilgram (2012: 770) challenges "the exclusive focus on positivist state law as the sole legal framework within which Western conceptions of citizenship are being imagined." She argues that, because of a type of "legal orientalism,"

> we describe a perspective in which the ideal of modern state law, as founded on universal and secular principles, is superior to other forms of normativity. It also imagines

> and produces a divide between the occident and the orient along the lines of law, where on the one hand Western civilisation is characterised by its ability to bring into being rational secular law as autonomous from religious, tradition, culture, politics, family, etc., and on the other hand non-Western civilisations lack the indigenous ability to develop 'law'...Sharia remains inferior to occidental law because on the one hand, it is too rigid, as it is based on religious principles that cannot be challenged by the individual and are therefore anti-democratic, and on the other hand because it is too unpredictable, as it is not based on a secular positivist notion of law, something Weber called *Kadijustiz*. If played according to its rules, the orientalist game can never be won. (Pilgram 2012: 777)

However, as Pilgram (2012) points out in the UK context, Muslims create hybrid laws in which they embrace English as well as Muslim laws. Rather than focusing on an understanding of what *Shari'a* is, Yilmaz (2002) focuses instead on what Muslims do in terms of *Shari'a* (a legal-anthropological approach) and makes reference to a 'Muslim postmodern' legality to describe how Muslim individuals skilfully navigate across official and unofficial laws in the UK, whether the official law acknowledges this reality or not. In this sense legal modernity and legal centralism are challenged in a multicultural context.

A recent report from the Pew Research Center (2013) presented results from a survey designed to cover more than 38,000 people from 39 countries in Africa, Asia and Europe. It discovered that most Muslims do not perceive any tension between being religious and living in a modern society, nor between science and religion. The survey also points out that "Muslims are not equally comfortable with all aspects of sharia" (Pew Research Center 2013: 15) and that Muslims with a higher level of religious commitment are more likely to support *Shari'a*.

A western *Shari'a* could form a component of this post-Islamist project of modernity (for example, *Angrezi Shari'a* in the UK (Hussain 2013)), but this might not necessarily lead to its acceptance. The challenge might therefore be to find a way to have post-Islamism (from Muslim migrants and their descendants) and post-Christianism 'speaking' to each other in an Habermasian type of dialogue? In this sense and in this context, the whole challenge is to understand how these two modernities can enter into a dialogue, rather than into a 'clash.' This would feed into Habermas's project of post-secularism, which makes reference to the deprivatisation of religion, and to the current debate on how liberal states are developing policies to manage religious groups in the public sphere.

However, one should be aware of the difficulties of entering into such a dialogue. Michele Dillon, in her 2009 Association for the Sociology of Religion Presidential Address, stated quite sharply that "independent[ly] of whether an individual is religious or not, tolerance of otherness does not come easily" (Dillon 2010: 149), that openness to alternative beliefs is more complicated than authors such as Habermas might have us believe, and that the idea that all religious and atheist groups can live in a self-reflective manner "is attractive but hard to imagine" (Dillon 2010: 152). Such a dialogue is based on the notion that the state is neutral and objective, and as we know from sociology (see, for example, Barbalet et al. 2011), the state usually and instrumentally serves certain groups over others.

Returning to the debate on multiple modernities and pluralism, the link with post-secularism becomes clear in the work of Rosati and Stoeckl. As they state:

> A truly postsecular society is a multi-religious society, where so to speak, 'indigenous traditions nowadays live side by side with diasporic religious communities'…a postsecular society has to be understood as one in which a plurality of individual *and* collective religious belief and practices enrich and strengthen pluralism in general. A postsecular society is a society full of religious differences and particularities. (Rosati and Stoeckl 2012: 5)

But what of multiple legal practices influenced by religion? Rather than using a postmodern framework (with its rather fluid approach to social cohesion) which tends to influence the literature of legal pluralism, this chapter instead uses the concept of multiple modernities to discuss these legal and religious differences and particularities within a modernist but pluralist project. To understand how this can work, this chapter turns to the application of this concept in the Australian context.

17.3 The New Australian Conservative Modernity and Its Obstacles to Post-secularism

Using Australia as a case study for this chapter, I would like to move to the research of the social scientist Jakubowicz (2003), who uses the expression 'the new Australian conservative modernity' to make reference to the country's resurgent social values of Christian conservatism, the active government priorities of disengagement and a rapidly expanding culture of surveillance and obedience. In this new phase of modernity, there is a process of de-legitimisation of diversity, especially concerning Muslims—meaning that the process "does not deny diversity, but rather seeks to reassert a traditional hierarchy of cultural power within which diversity is only acceptable within the dominant moral order" (Jakubowicz 2003: 344). In this process, Fozdar (2011) sees a retreat from multiculturalism as a result of the policies of the conservative Howard government (1996–2007). In this new Australian modernity, political leaders portray "Christianity as the norm, as a non-migrant religion, and as the taken-for-granted foundation for the nation's values and laws" (Fozdar 2011: 632).

Muslims' detractors tend to present the Muslim religion as unchanging and as representing a pre-modern and patriarchal value system (Akbarzadech and Roose 2011). These people also tend to essentialise the Muslim community as bounded, fixed and stable. This, of course, is far from being the case. Akbarzadeh and Roose (2011) discuss three ideal types of Muslims in Australia, in order to provide a lens through which to look at this religious group. These are: an Islamist type, who would embrace *Shari'a* in line with the historic experience of the caliphate; a moderate Muslim type—those who engage with the secular West; and a cultural Muslim type—those who define themselves as Muslims but do not actively follow Islamic principles. Cultural Muslims often have a pragmatic approach to religion. Islam is celebrated when it helps consolidate community but is not allowed to interfere and

interrupt the daily routine of life, which, to all intents and purposes, may be called secular (Akbarzadech and Roose 2011).

In Australia, these cultural Muslims would be the silent majority of the Muslim minority group, not much engaged with advocacy for legal change. Those Muslims mainly engaged in working out *Shari'a* in Australia in line with (and not in opposition to) the Australian legal system, would be of the moderate type. Some moderate Muslims are already working within a type of unofficial parallel legal system in the private sphere. But when some moderate voices attempt to discuss, in the public sphere, how the two legal systems could interact, it appears the dialogue is not allowed to proceed in the post-secular fashion that Habermas would envision (Hussain and Possamai 2013; Richardson 2013). The 'extreme rights' would see the moderate Muslim as a 'Trojan horse' for the radical Islamists, as if they were harbouring a hidden Islamic agenda (Akbarzadech and Roose 2011). It might be argued that, in the public sphere, debate about the partial use of *Shari'a* leads its detractors (who are not necessarily from the extreme right) to believe that this might be a first step towards implanting full *Shari'a* law, as if *Shari'a* was an homogenous and timeless law straight from the caliphate.

Bearing in mind the relationship between the mass media and the way political agenda are constructed (Van Aelst and Walgrave 2011) this new religious project of the 'new modernity' also affects (and/or is affected by) the media. Black and Sadiq (2011) cite the national newspaper, *The Australian*, as highlighting 'differences' between Muslims and non-Muslims in some Muslim countries (with topics such as stoning as a punishment for adultery, forced marriages and female genital mutilation), and as feeding into the fear of what *Shari'a* family law would be in Australia if a dialogue on the subject were allowed. While there are demands from some groups in Australia for the adoption of full *Shari'a* (Black and Sadiq 2011), Saeed (2010) states that the large majority of Muslims advocating the use of *Shari'a* are only seeking its recognition in a few areas (e.g. marriage, burial practices, interest free financing) and are working towards a compromise between the demands of their religion and the Australian legal system.

Anne Black and Kerrie Sadiq (2011) have noted a more nuanced divide between 'good *Shari'a*,' based on the profit-generating potential of Islamic finance, and 'bad S*hari'a*' that appears to challenge Australian family and criminal laws. While there is public disquiet over family and criminal law applications of *Shari'a*, there has been support for legislative change in Australia to facilitate Islamic banking and financial services. "It seems that Islamic banking and finance laws are 'good' *Shari'a* worthy of adoption, whilst personal status laws (marriage, divorce, separation, custody of children and inheritance) are not" (Black and Sadiq 2011: 388). Possamai et al. (2013) discovered, after coding close to 700 articles from four leading Sydney newspapers, that when discussing *Shari'a*, their negative comments were mainly aimed towards this 'bad' *Shari'a*, whereas, in financial matters, newspapers not only sought to engage with the nuances of Islamic finance, but called for a greater effort to accommodate it within the Australian banking and finance sector. With regard to finances, we might have here an indication of a different type of modernity that is in contrast with conservative modernity.

To explain this different type of modernity, I am inspired by Gilliat-Ray (2000), who created a typology of four different types of universities, according to how they deal with religious matters. The 'multi-faith pragmatist' type of university is the type more open to religious diversity. As Gilliat-Ray (2000: 97) comments:

> This is a facility used by all religious groups, but with a separate specially designated area for Muslim prayers. The university interprets secular[2] to mean that special *privilege* should not be accorded to particular religious groups, *while also recognising distinctive needs*, notably of Muslims. It promotes its religious spaces as one aspect of student provision and equal opportunity, and goes beyond neutral tolerance of diversity towards a positive recognition of different religious identities. (Italics in original)

Appropriating this ideal-type of chaplaincy to the thread of this chapter, the challenge for multicultural and multi-faith modern societies would be, as will be argued below, to move towards what could be called a multi-faith pragmatic modernity. These societies should have a modernity which is secular, in the sense that no special privilege should be given to particular religious groups, and that each group should be accorded recognition of the distinctive needs of its religion including, perhaps, its practices of law. In this sense, and with regard to the application of *Shari'a* to finances, we might indeed be dealing with this type of modernity in Australia: a multiple-modernist project in action, having one facet that is conservative and one that is multi-faith pragmatic—paradoxically integrated and divided.

17.4 How to Embrace a Multi-faith Pragmatic Approach to Family Law?

The *Shari'a* debate in Ontario was accompanied by a media frenzy that involved misunderstanding and misconception concerning religious arbitration (Brown 2010). Korteweg (2008) analysed the debates around this issue and noticed that Muslim immigrant women's ability to have agency and act in a self-interested way was questioned. In this sense, the Muslim community was seen as homogenised and "the possibility that religious women might want to be able to enact certain religious practices, but that they might need government assistance in securing a fair interpretation of Islamic jurisprudence" (Korteweg 2008: 450) was not recognised. Alwani and Lizzio (2013) reinforce this point by stating that 'Muslim women' is not a homogeneous category.

In relation to the Family Law Act 1975 (Cth) in Australia, Parashar (2012) argues that there is a legal space for *Shari'a* law to be applied, but that, at the same time, the role of religious law within the state is denied. According to her analysis, it is only when the disputing parties cannot agree on a settlement and have not entered

[2] What is meant here by 'secularism' is close to what Suleiman (2012) refers to as 'procedural secularism.' This is a type of secularism which protects the rights of citizens to practise their religion and to engage in public debates on religious matters. This is opposed to 'ideological secularism' which aims at excluding or controlling religious voices in the public sphere.

into binding agreement that the court needs to intervene. If both parties are Muslims and both rely on the rules of *Shari'a*, the state law has no moral authority to 'disallow' the use of these rules. In this sense, while legal pluralism is not officially recognised, it can, in many instances, be practised in parallel to the law. However, as Parashar (2012) questions, are we, in the name of pluralism, impacting on gender equality? Even if there are Muslim women who want to follow their culture, would their willingly following *Shari'a* in the shadow of the law ensure gender equality? According to Richardson and Springer (2013), even though the application of legal pluralism might foster the personal freedom of a member of a minority group, it might also hinder it, as individual members of the group might not want to be guided by these particularistic laws.[3] This opinion is echoed in research by Bano (2008), where she found that enormous pressure was put on women to show their group loyalty and relinquish their individual citizenship rights, and in Brechin's (2013) statement that vulnerable members of a religious community might be under pressure to choose religious arbitration even if it would be more beneficial to them to have their situation arbitrated in the state courts.[4]

In a European context, Rohe (2013: 35) discusses Alternative Dispute Resolution (ADR) where "within the scope of private autonomy, the parties concerned are free to create legal relations within the limits of public policy and to agree on the ways and results of non-judicial dispute." This can allow communities to have access to a kind of formal and non-violent conflict resolution system following their own cultural and/or religious system, as long as it does not go against the law of their country of residence. However, members of the community who refuse to use these particular facilities might be seen as undermining the position of their community. Additionally, allowing such practices might create cultural segregation, in which individuals seek to follow their individual ways within the society at large (Rohe 2013), or risk creating an enclave society (Richardson and Springer 2013; Turner 2007) in which social cohesion is eroded, and could thus contribute to the development of enclaves of legal pluralism.

However, government's refusing to recognise these ADR bodies will not necessarily stop people from using unofficial mechanisms, operated by people whose background and skills may be unclear (Suleiman 2012). Within this parallel system, if there is a lack of transparency and accountability, there is also a risk that people will accept unfair treatment.[5] Rohe (2013: 38) therefore proposes

> either to implement a system of official ADR or…to heighten the cultural sensitivity of the state court system and implement information programmes focusing on the advantages of the existing legal system.

[3] However, one must also take into account that, as illustrated by the UK case (Douglas et al. 2011), as there is no 'hierarchy' of tribunals within the Muslim community, litigants can, to some extent, choose which tribunal they go to. This is called 'forum shopping.'

[4] On the other hand, Krayem (2010), from her sample of 22 Australian Muslims, claims that the women she interviewed felt they have a choice as to whether or not to participate in the process.

[5] On the other hand, and in the UK context, Bano (2008) is cautious of the assertion that formalisation will lead to more justice and greater accountability.

In the UK, Douglas et al. (2011) claim that Muslim tribunals do not seek greater 'recognition' by the state. In the US, Macfarlane (2012) reports that the respondents of her research did not see incompatibility between their religious obligations and their recourse to the civil courts, and she did not find much support for the creation of a parallel Islamic tribunal. Black (2010) argues that in Australia, if a parallel family law system for Muslims were formalised, it might be perceived as obligatory for Muslims. For this reason, formalisation should not go ahead, and the status quo should prevail. Hussain (2013) follows the same point and indeed, she argues not for

> setting up a parallel legal system based on Islamic law but for the formal recognition of agreement arrived at through Islamic mediation and arbitration by parties who have been properly advised and have consented to such process, in the same way that agreements reached through secular mediation are recognised by the legal system.

She also puts forward a case for a co-ordinated system of family dispute resolution, conducted along lines acceptable to the Muslim community. This could be in line with what the Suleiman (2012) report proposes in the UK: that adequate regulation, whether state or voluntary, be put in place to ensure the training of staff, and that inspection and procedures be organised so that women are fully informed about their choices and the consequences of those choices when dealing with these Islamic mediation and arbitration facilities.[6]

17.5 Conclusion

A recent report from the International Council on Human Rights Policy (2009) studied the divide between universalism and cultural relativism as alternatives within a legal system, and argued that that the obligation to accommodate and support a minority culture should not be absolute, and that the preference for advancing a majority culture should not be unlimited. This chapter proposes a third scenario, in between a traditional modernist and universal view of the law and a postmodern and legal pluralist view: that of a pragmatic multiple modernist project. The chapter advocates offering room for particularities that are not met by, and are not in conflict with, the secular legal system, but also advocates not offering any separatist legal systems. As the above report finds, a plurality of legal orders provides a wide scope for confusion regarding the application of the law, and decentralisation can restrict people's access to justice, as it is often difficult to navigate through legal orders. Rather than advocating the formalising of *Shari'a* courts, this chapter follows Hussein's (2013) views on recognising formal agreements and Suleiman's (2012) recommendation for more accountability rather than for any formalised sub-legal institutions. It points out that, as the multi-faith pragmatist type of multiple

[6]This proposal is also in line with Brechin's (2013) recent call for more regulation of the arbitration of these *Shari'a* courts.

modernity is already on its way in connection with the application of *Shari'a* law in the field of finance, it is possible that a further push in this direction can be made in the field of personal laws.

This chapter is a first step in validating the exploration of the use of the multiple modernities thesis with regard to *Shari'a* and legal pluralism. As research in the field of the sociology of religion has progressed from simply admitting that religion is part of the public sphere, to now attempting to understand what this means and what we are to do with this new social reality, more research into operationalising the multiple modernities thesis, with reference to *Shari'a*, needs to be put into place.

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Chapter 18
The Future of Legal Pluralism

Bryan S. Turner and James T. Richardson

18.1 The Growth of the *Shari'a* in the West

Looking back on this collection of chapters on the comparative study of legal pluralism, we can summarize our findings by proposing that legal pluralism appears in or is related to at least three different social and political contexts. The first example is the presence of legal pluralism in imperial systems before and during the consolidation of nation states (Benton and Ross 2013). The second is the awareness of legal pluralism arising from the process of de-colonization and the slow and contested recognition of indigenous rights. The third example, and the one most fully discussed in this collection, is the recognition of different legal traditions in multicultural societies in which a majority agrees, possibly under considerable political and judicial pressure, to recognize that a minority community has a claim to its own distinctive legal traditions. This third case is seen to be the consequence of the globalization of labour markets and the development of permanent diasporic communities. Before attempting to conclude, we will comment briefly on these three examples.

Regarding the imperial contexts prior to the development of the modern state, one might argue that the legal structure of the Ottoman Empire was pluralistic. Ottoman juridical arrangements are specifically relevant to our analysis of the *Shari'a*, because contemporary Muslims often look back to Ottoman times to claim that the

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Ottoman Empire before the collapse of the caliphate in 1924 was characterized by the dominance of the *Shari'a*. This historical argument provides the basis for Muslim claims that a complete and satisfying religious life cannot be fulfilled without the comprehensive restoration of the *Shari'a*. Recent historical research does not support this interpretation of Ottoman history. In fact, the *Shari'a* courts were somewhat marginalized and the state operated according to its own secular codes. In addition, Christian and Jewish communities were allowed some degree of legal autonomy. With respect to the Ottoman state and religious law, it is important to keep in mind that

> [b]y its nature and purpose Shari'a can only be freely observed by believers; its principles lose their religious authority and value when enforced by the state…the state has its proper functions, which may include adjudication among competing claims of religious and secular institutions, but it should be seen as a politically neutral institution performing necessarily secular functions, without claiming religious authority as such. (An-Na'im 2008: 4)

While, in principle, all law was thought to have a religious foundation, the Ottoman Turks adapted their pre-Islamic customs to the legal requirements of their expanding empire. Three different types of courts were recognized—*Shari'a*, courts of minorities (Christians and Jews), and trade courts. This system was subordinated to the authority of the secular law of the sultan. This differentiated legal system evolved over time and the Ottoman system was steadily reformed through the nineteenth century. Legal modernization was based on the French judicial system. The reform period, or *Tanzimat*, involved fundamental changes to the state, administration, education and law. The Penal Code of 1858 was modelled on the French Penal Code, a Commercial Procedures Code of 1861, and a Civil Code of 1876. Further reforms took place during the period of the 'Young Turks,' resulting eventually in the dismantling of the caliphate. After the First World War, during which the Ottomans had fought on the side of Germany, the British Mandate (1920–1932) involved the creation of legal pluralism as a consequence of the recognition of tribal autonomy (as, for example, in present day Iraq). The British introduced a Tribal Civil and Criminal Disputes Regulation, that was based on a similar law in India, to give certain religious leaders or sheiks the authority to resolve disputes within their tribes and to collect taxes for the government.

British imperial rule and its commonwealth traditions can be said to have left a legacy of legal pluralism in societies that were originally part of its colonial possessions. While this remains a controversial interpretation of British colonial history, the British were only interested in government and law as foundations for trade, rather than as part of any large-scale imperial ambition. As we saw in the case of Singapore, their attention to Muslim institutions was to avoid disturbances between the Chinese and Malay inhabitants. Therefore, the British "were ultimately more concerned with securing and developing trade than with the administration of law for its own sake. They saw little need for a structural system to serve the purposes of a small 'native' population" (Lindsay and Steiner 2012: 180). During this colonial period, the Malay inhabitants of the island of Singapore continued to follow their own customs, namely *adat* customary practice (Hooker 1984).

The institutional arrangements for *Shari'a* courts and the adjustment between secular and religious laws took place in Singapore after the British had left.

Another example comes from the Austro-Hapsburg Empire and in our introduction we drew attention to the sociology of law of Eugen Ehrlich (2002), whose sociological approach was directed against the state-dominated theories of law that came from Max Weber (1864–1920) and Hans Kelsen (1881–1973). Both Weber and Kelsen promoted theories of the law that recognized the sovereignty of the state as an exclusionary authority that precluded any possibility of legal pluralism. In *Economy and Society*, Weber (1978) defined the law as command with the backing of a unitary state and he was critical of the common law because it lacked the logical rigour of continental law. There are certain similarities between Weber and Kelsen on the law (Bryan et al. 2013; Vinx 2007). However it was Kelsen who developed his 'pure theory' of law, in which he envisaged the law to be an autonomous, internally consistent and logically deductive legal order. Such a system of law was grounded in a single basic foundation or basic norm. For Kelsen therefore, the pure theory of law was also a critique of both relativism and reductionism, because the authority of law was derived internally from its basic norm and not from any external source. We can understand Weber and Kelsen as providing a theory of law that could not easily tolerate pluralism. By contrast, Ehrlich offered a sociology of law that recognized the existence of diverse customary laws outside, and in many cases historically prior to, the nation state.

Kelsen's theories have been much criticized, because it is difficult to identify a ground norm that is autonomous and secure (Raz 2007). However, we believe that the Weber-Kelsen position does recognize a basic question that is pertinent to any discussion of legal pluralism, namely, who will enforce the law? In Kelsen's pure theory the idea of 'sanction' played a central role in the definition of law. Thus, "[i]f the law is conceived as a coercive order, then a behaviour can be looked upon as objectively legally commanded (and therefore as the content of a legal obligation) only if a legal norm attaches a coercive act as a sanction to the opposite behavior" (Kelsen 1967: 117). Legal obligation is ultimately defined by the presence of sanction, and sanctions are enforced by the courts and the state. It is hardly surprising, therefore, that Kelsen (1967: 286) defined the state as "a relatively centralized legal order," and such an order cannot sit comfortably with legal pluralism. Indeed, in a modern society, it is difficult to see how customary norms could be enforced in dispute resolution without courts, and the power of courts to enforce legal decisions rests ultimately on a sovereign state. This debate also raised the basic problem in legal studies, namely, what is the basis of the authority of the law? For Weber, it is the sovereignty of the state, but what is the legitimacy of the state? For Kelsen it is the 'ground norm,' but this argument is questioned by Raz. For Ehrlich, the only basis of the legitimacy of law is tradition. From this longstanding debate about the authority of the law, one can see that any growth of legal pluralism further intensifies the challenge to the foundations of the law.

The second context in which we have recognized the growth of legal pluralism relates to post-colonial societies in which the anthropology of law played an important role in recognizing the continuity of customary law. The tensions between aboriginal

customs and state law have been an important issue in contemporary politics in so-called white-settler societies. In these societies in the second half of the twentieth century, aboriginal claims for recognition also involved claims about customary law. There has, for example, been some discussion of whether and how to give greater recognition to customary law among aboriginal communities in Australia. For example, the Australian Law Reform Commission (1986) and the Law Reform Commission of Western Australia (2005) produced extensive reports looking at the possibilities of recognizing the role of customary law where these were relevant in judicial decision making. There are, however, certain obstacles to any such recognition. These include the fact that customary law varies considerably between different aboriginal communities and, furthermore, these customary norms have not been recorded or codified. Indeed, it is obvious that once customary law has been recorded and codified, it is no longer customary law.

Aboriginal customary law comes into play most prominently over land claims, when aboriginal communities seek to re-affirm their entitlement to land. These land issues are important in most white-settler societies in which wars had been conducted against native inhabitants during colonial occupation of the land. These colonial conflicts were especially intense in the United States and New Zealand. In the United States, the military were still engaged in significant combat with native American tribes until the surrender of Geronimo in 1886, and these struggles continue to have consequences for the recognition of treaties and land claims. As a result, land settlement in such societies (involving the recognition of aboriginal customary law as the basis of such claims) depends on previous treaty arrangements. In New Zealand, the Treaty of Waitangi has played a major role in contemporary aboriginal entitlement to land and marine resources.

The colonization of Australia involved violent dispossession of aboriginals, despite the claim that Australia was uninhabited or *terra nullius*. This notion was finally rejected in a famous legal case—*Mabo v Queensland (No 2)*—in 1992, that was brought to trial by the Meriam people with respect to native claim to Murray Island, which had been annexed by the state of Queensland in 1879. The Mabo decision recognized the concept of native title at common law, and the nature and content of native title was determined by the character of the connection or occupation under traditional laws and customs. The consequence of the rejection of *terra nullius* was recognition of the fact that the aboriginal people had a pre-existing system of law, which would remain in force under the new sovereign until it was modified or extinguished by legal process of law by the new sovereign power. The legal decision left many issues unsettled, especially the permissibility of any future development of land affected by native title. Some of these issues were to be managed through Native Title Acts in 1993 and 1998 which, among other things, established a tribunal system to hear disputes.

As we have seen, the main pressure for legal pluralism in contemporary societies has come from globalization and, in particular, from labour mobility leading, in many societies, to the formation of minority communities with their own customs and cultures. There is also the question of refugees who have been dislodged from their homelands and find themselves as under-privileged minorities in various host

societies. Legal pluralism in this respect is associated with multiculturalism and growing cultural diversity. While there are many new migrant communities in the West, legal pluralism has only emerged as a political issue with respect to one community: the Muslim minorities in the West. The main issue here is the status of the *Shari'a*. There has been a considerable amount of legal and social science research on this issue in recent years (Joppke and Torpey 2013). However, our principal conclusions are:

1. Fear of and hostility towards the *Shari'a* have been driven primarily by conservative political parties and by right-wing public media such as Fox News (Turner and Richardson 2013). The outrage in the United Kingdom against the Archbishop of Canterbury's public lecture in 2008 would be another illustration of this negativity (Milbank 2012). Various Republican states in America have passed pre-emptive legislation to block any future expansion of references to the *Shari'a* in legal judgements about domestic disputes. These political and legal moves to prevent the spread of *Shari'a* are alarmist, given *the fact* that there is little pressure from within the Muslim communities in the West for any comprehensive introduction of *Shari'a*, and certainly no systematic support for draconian criminal justice norms. Furthermore, desire for the *Shari'a* is confined primarily to domestic issues such as marriage, divorce, adoption and property. In addition, some societies will make provision for customary regulations that cover diet and the production of food that is governed by *halal* certificates.
2. The *Shari'a* has been evolving in the West through its interaction with western secular legal systems, but recognition of this fact depends in part on how we define *Shari'a*. Clearly, many devout Muslims want to live their lives in terms of the *Shari'a* as a moral rather than legal system. If the *Shari'a* is regarded by pious Muslims as necessary for their religious integrity, then under the principle that democratic and liberal societies should respect freedom of religion, it is difficult to deny Muslims access to *Shari'a* as the ultimate guide to religious practice. The other problem that we have identified in this regard is the apparent absence, in liberal terms, of 'a level playing field.' If pious Jews can have access to their own legal traditions and to Jewish courts, then on what grounds would Muslims be refused access to the *Shari'a*. One criticism of the cancellation of Muslim tribunals in the legal system of Ontario, Canada, was that it had the effect of denying Muslims access to their own religious traditions.
3. There is considerable evidence from our own research that judges in western legal systems are beginning to refer to the *Shari'a* on a regular basis in their deliberations regarding domestic issues. These cases typically occur when a Muslim couple who became married overseas according to Islamic norms attempt to arrive at a divorce in a secular western society. In these cases, western legal experts have to refer to the *Shari'a* in determining the appropriate legal outcome.
4. There is widespread growth and use of Islamic banking, where banks will attempt to follow Qur'anic rules about interest and investment. In other words, there is some application of the *Shari'a* to these commercial and economic institutions, although the extent of these arrangements and how far they conform to *Shari'a*

norms is somewhat unclear. However, we assume that while western capitalist societies may object to the growth of the *Shari'a* into the juridical domain, there is less anxiety about the presence of Islam in the economy. There is generally an indifference to religious differences where market exchanges are the primary concern.

5. Outside the West there is growing conflict in many parts of the Muslim world (such as Tunisia, Yemen and Egypt) over women's rights and the (re)introduction of conservative elements of *Shari'a* law regarding women.
6. We conclude that, given globalization and the expansion of Muslim minorities in the West, there is little to prevent the slow introduction of elements of the *Shari'a* into western legal decision-making processes when judges make legal decisions regarding domestic cases. Where democratic governments have a commitment to freedom of religion and equality before the law, it will be difficult to resist pressures from Muslim communities for access to *Shari'a*. However, there is, in fact, little concerted pressure from Muslim communities for any systematic introduction of the *Shari'a*. While Muslims may, in addition, seek advice of legal judgements (*fatwas*) there is little or no evidence of 'creeping *Shari'a*.' There is therefore—despite references to the growth of international law (such as labour law), human rights interventions, commercial law and so forth—little real evidence to support the idea that legal pluralism is a significant threat to the sovereignty of nation states.
7. Despite the basic principle of secularization—the separation of the church and state—governments constantly attempt to manage religions. In France there are controls over veiling in public places, especially in schools; in Switzerland, there are building regulations controlling minarets; in many societies, as distant as Singapore and Denmark, there are prohibitive controls on the building of mosques. In France, the doctrine of *laïcité* has resulted in significant legal controls over religious movements, which are typically referred to as cults. Scientology has come under considerable scrutiny (Palmer 2011). The widespread state interest in *Shari'a* is not unusual, if we take into account the widespread 'management of religion' (Barbalet et al. 2011).

18.2 Liberalism, Religion and Citizenship

Many observers of these legal developments assume that they are an inevitable consequence of globalization (Teubner 1997; Twining 2000). Because it is a facet of multiculturalism, many commentators will accept legal pluralism as an important and welcome dimension of social and cultural pluralism. If one welcomes legal pluralism, perhaps one concludes by accepting the growth of the *Shari'a* as inevitable and desirable, insofar as its integration into western societies supports the religious diversity and richness of post-secularism. We doubt that legal pluralism is a reality; it is, however, an important political debate and one reaching across many societies (Possamai et al. 2013).

These arguments have some validity but they can mask a deeper problem, which is the erosion of shared values, institutions and life chances in modern societies. The fragmentation of the public sphere is simply one facet of the general decline of the shared institutions and cultures that make collective life possible. With the growth of legal pluralism, there is a danger that modern societies will be constructed out of many social enclaves rather than on the basis of a shared citizenship (Barry 2001; Turner 2011). It is difficult to tell if, and by how much, separate legal traditions, different educational systems, different taxation arrangements, religious diversity, and different languages and dialects, will undermine the shared social reality that is necessary to maintain trust and social harmony. Our intention in raising the question of a common citizenship is not to add to the cacophony of criticism of Islamic institutions or Muslim communities. Our concerns are somewhat different. Large and complex societies, such as in the United States, that are differentiated by culture, religion and ethnicity, will need institutions and values to bind them together, especially when, as now, they are also unequal in terms of income and wealth. Small homogenous societies, such as Norway and Denmark, will need effective policies to assimilate their minority communities such as Muslims and Roma. Islamophobia and xenophobia may be not so much indicators of hostility to Muslims as indicators of a general erosion of trust.

In societies that are constitutionally secular, trust, as a minimum, requires an equal playing field where citizens feel they are not unfairly discriminated against on the basis of particularistic criteria such as their ethnicity or religion. The conditions which promote ‘reasonable pluralism’ (Rawls 1993) and social stability require strict secularization, namely, visible neutrality of the state towards both minorities and majorities. This, in turn, requires a level playing field in which there is an even hand in the treatment of religions. Legal pluralism, in these circumstances, still requires the presence of one authority (‘the law of the land’) as the final arbiter. Gender equality also has to be respected. Religious tribunals and private arrangements must adhere to gender equality or allow women the option of securing a secular tribunal or court. This provision of gender equality is difficult, since many feminist scholars would argue that the majority of religious traditions are patriarchal. Securing legal equality for women is difficult insofar as women suffer material disadvantages in society and the labour market. Legal equality probably requires gender equality in terms of economics and education. In the popular press, Islam is often portrayed as pre-eminently patriarchal towards women, but many Christian traditions, such as the Orthodox and the Roman Church, allocate more or less exclusive rights to male priests. Contemporary debates about ‘the future of religion’ have questioned the ability of the Roman Church to ever recognize a female sacerdotal priesthood (Zabala 2005). Religious traditions in secular societies will have to accept the defence of individual rights (especially freedom of conscience) and the protection of common liberal values from a legal system that represents values that are themselves incommensurable with secular liberalism. It turns out that satisfying these conditions is extremely difficult, and much criticism of the idea of introducing the *Shari'a* has been precisely around the question of gender equality and individual rights.

Many critics, especially in light of the Canadian experience with arbitration courts, would argue that any attempt to regulate religious tribunals or to abolish them will lead to the growth of informal *Shari'a* arrangements or a 'shadow' arbitration system encouraging private arrangements outside the overview of the civil courts (Bakht 2006). The development of such informal 'normative ordering' might be undesirable. The growth of an informal system of *Shari'a* arbitration is already with us in terms of Internet question and answer services, resulting in thousands of legal determinations for Muslims seeking *fatwas* over private questions of divorce, marriage and dispute resolution. Some degree of the 'informalization' of religious orthodoxy and practice (for all religions) is probably inevitable. It appears difficult to deny or preclude private arrangements, including a range of contractual relationships. However, many liberals would want to argue that freedom to arrange contracts without undue external interference is a basic right of citizens. Legal pluralism may be an unavoidable consequence of the modern emphasis on cultural identity and one more nail in the coffin of unified sovereign states. If sovereign states are slowly eroded, does that mean that the 'benefits and protections' of national citizenship are also compromised? It is, consequently, difficult to believe that the achievement of what John Rawls (1993) described as 'an overlapping consensus of comprehensive doctrines' will be easy to secure.

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