

REALITIES OF *RELIGIO-LEGALISM*: RELIGIOUS COURTS AND  
WOMEN'S RIGHTS IN CANADA, THE UNITED KINGDOM, AND THE  
UNITED STATES

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ABSTRACT

Religio-legalism – the enforcement of religious law by specifically-religious courts that are tolerated or endorsed by civil government – has long operated against women's interests in liberty and equality. In the 21<sup>st</sup> century, religious tribunals – Protestant, Catholic, Jewish, and Muslim – operate throughout the world. Almost all are male-dominated, patriarchal, and sex-discriminatory. Harms to women produced by Muslim or sharia courts have come into focus in recent years, but present realities of religio-legalism operating through Christian and Jewish – as well as Muslim – religious courts in Western nations have been under-examined. This essay documents controversies concerning sharia-courts that have arisen in Canada and in the United Kingdom during the past decade and also looks at concurrent developments relating to sharia and to other-than-Muslim religious courts in the US.

Religious courts – Christian, Jewish, and Muslim – have in common that they assert original or exclusive jurisdiction over certain matters. In calls for “official recognition” of sharia-courts, proponents have advanced a religious-equality argument, claiming that denial of that status to Muslim tribunals would violate the governmental obligation to avoid discrimination among religions. At the same time, sharia-related controversy has raised sharply the question about the implications for women's liberty and equality rights that are produced by governmental accommodations of the religious-equality and religious-liberty interests asserted by all religious entities enjoying governmental recognition.

While recognizing the legitimacy and weight of the complaint against inequitable treatment of religions, we argue here that whenever governmental action to “resolve” sharia-related conflict adopts the avoidance of discrimination among religions as its single goal and therefore expands its “official recognition” to include additional religious courts, it

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will have the effect of enlarging religions' power and at the same time exacerbating harms to women.

*Referencing feminist writings that have documented the global spread of religious fundamentalisms from the 1990s to the present and that have exposed capitulations of liberalism to those fundamentalisms, we call for reconceptualization of the law-religion-women nexus. We urge recognition that governmental goals of equitable treatment of religions and protection of women's rights will together be served not by expansions of governmental engagements with religion, but by retrenchment from religio-legalism. Thus, we urge, in policy and in law, clear prioritization of the protection of women's rights and concurrent retreat from the formal recognition of all religious courts and of civil-law enforcement of the orders of any such bodies.*

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## INTRODUCTION

During the decades since 1990, *religio-legalism* – the enforcement of religious law by specifically-religious courts that are tolerated or endorsed by civil government – has become a prominent concern within the disciplines of political science and legal theory. Scholars in these areas have expressed enthusiasm for – or resistance to – the present reality and the possible future expansion of “legal pluralism.”<sup>1</sup> And, during the last ten years, *religio-legalism* has emerged as a highly-divisive political issue in Canada, the United Kingdom (UK) and the United States (US).<sup>2</sup>

In each of these three nations, recent controversy about *religio-legalism* has focused almost exclusively on its operation in the context of Muslim or *sharia*<sup>3</sup> tribunals. Advocates of such tribunals have insisted that they be accommodated by civil governments as a matter of equity, given the reality that other-than-Muslim religious courts – Protestant, Catholic, and Jewish – have long enjoyed protection by civil governments in the liberal Western democracies. *Sharia* tribunals must be likewise protected, it has been urged, in order to avoid governmental discrimination among religions. Opponents of *sharia* tribunals have minimized the reality of inequity among religions and have formulated criticisms characterizing these specifically-Muslim entities as uniquely threatening to women’s interests in equality and in liberty. Women who self-identify as feminists have occupied places on both sides of these issues.

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<sup>1</sup> In this essay, our use of the terms “legal pluralism” and “*religio-legal* pluralism” – neither to be confused with “religious pluralism” – designates the existence and operation of specifically-religious judicial entities (termed, variously, “courts,” “tribunals,” or “synods”) within the contexts of Western liberal democracies. For a useful introduction to the concept, see generally William Twining, *Normative and Legal Pluralism: A Global Perspective*, 20 DUKE J. COMP. & INT’L L. 473 (2010).

<sup>2</sup> In this essay, we address *religio-legalism* as it operates through the exercise of jurisdiction by specifically-religious courts. *Religio-legalism* can also operate when civil courts rely upon and apply religious law while cloaking the latter under the discourse of civil law. See generally Marie Ashe, *Privacy and Prurience: An Essay on American Law, Religion, and Women*, 51 AM. J. LEGAL HIST. 461 (2011) (examining *religio-legalism* in 21st century U.S. Supreme Court decisions and in 17th century Bay Colony civil and ecclesiastical courts), available at <http://ssrn.com/abstract=1935705>.

<sup>3</sup> The usage of the term “*sharia*” has been criticized on the basis that it fails to communicate the diversity across Muslim jurisprudence (within specific schools of thought), and tends to present Muslim laws as constituting a homogeneous body. See *infra* note 117 and accompanying text. While aware of this criticism and supportive of it, we use the term here as it has been popularly and politically used in Canada, the UK and the US in recent years. Except when quoting from material that has adopted an alternative, we consistently use the spelling “*sharia*.”

Civil governmental recognitions of jurisdiction in specifically-religious courts may be the most extraordinary of the accommodations currently being provided to religious organizations. The toleration of judicial autonomy in such bodies in itself manifests a striking sharing of sovereignty. And the ceding to religious bodies of a central feature of governmental sovereignty – the judicial power – becomes particularly problematic when that power is utilized in order to enforce religious law that conflicts with fundamental principles of the civil law. It is largely uncontroverted that religious laws are often inconsistent with protections of women provided by civil law in the nations being considered in this essay. Another way to formulate this is to say that – regarding women’s liberty and equality interests – *religio-legalism* is often inconsistent with liberal legalism.<sup>4</sup> This means that even if the problem of discrimination among religions were to be resolved by adoption of governmental policy tolerating the religious courts of all religious groups, the threat to women’s rights posed by some or all of these courts would not have been resolved.<sup>5</sup>

Pending controversies have been focused on *sharia*. But in light of tensions and contradictions between religious laws and civil laws relating to women’s liberty and equality, these controversies raise the larger and urgent question of the degree to which any religious court should be tolerated within liberal legalism.<sup>6</sup> The multiplicity of religious courts currently operating in Western nations – including Christian, Jewish, and Muslim – is a significantly underappreciated reality.<sup>7</sup> Neither the narrow nor the broad question regarding the status of these entities has been settled. The Canadian “*sharia* tribunal” controversy that occurred in Ontario between 2004-2006 culminated in what is only a temporary “resolution” – one that could well be undone by a ruling of the Supreme Court of Canada. In the UK, the workings of Muslim arbitration tribunals and mediation councils have only recently begun to be documented in empirical study, and they remain the subject of live political controversy. To the degree that any British “resolution” of the status of the tribunals and councils has been reached, it is the opposite of the Canadian resolution. And the more-recently emergent

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<sup>4</sup> For earlier writing relating to this issue, see Anissa Hélie & Marie Ashe, *Multiculturalist Liberalism and Harms to Women: Looking through the Issue of “The Veil”* 19 U.C. DAVIS J. INT’L LAW & POL’Y 1 (2012), available at <http://ssrn.com/abstract=2263035>.

<sup>5</sup> See *id.* at 44-54.

<sup>6</sup> For the most notable recent treatment of this problematic, see BRIAN LEITER, WHY TOLERATE RELIGION? (2012). Of course, overcoming the problem of discrimination-among-religions would not resolve the problem of inequity created by governmental discrimination privileging religion-based values over secular ones.

<sup>7</sup> See *Applying God’s Law: Religious Courts and Mediation in the US*, PEW RES. RELIGIOUS & PUB. LIFE PROJECT (April 8, 2013), <http://www.pewforum.org/2013/04/08/applying-gods-law-religious-courts-and-mediation-in-the-us/>.

American attention to religious tribunals – expressed most dramatically in activity surrounding “anti-*sharia*” state-legislative initiatives from 2009 to the present – has been characterized by heat rather than light and also remains far from resolution.<sup>8</sup>

The non-settled status of *sharia*-related questions invites broader, more historically-informed, and more comparative inquiry concerning the policies that should shape liberal-governmental interaction with religious courts in general. Our intent in this essay is to lay a foundation for such comparative examination, and to propose answers – or to identify resources relevant to shaping answers – to that broad question. For that purpose, we provide a history of legal and political developments relating to religious tribunals – and relating to women’s interests in liberty and equality – that have occurred from 1990 to the present in Canada, the UK, and the US. Our account exposes parallel and divergent developments in the three nations. It also highlights, as a resource for further consideration, the comparative and international perspectives of historically-informed feminist scholars whose work of the 1990s has struck us as prescient in its perceptions and understandings.

In *Part One* we provide an account of the “*sharia* tribunal” controversy that peaked in the Province of Ontario between 2004-2006. At issue in that controversy was the proposal that Muslim tribunals would decide “family matters” of Muslims through binding arbitration<sup>9</sup> based on “*sharia* law” and that Ontario’s civil courts would provide enforcement of *sharia*-based arbitral decrees. The call for formal recognition of “*sharia* tribunals” had been motivated, in part, by immigrant Muslims’ experiences of racism in Canada and by their perception of inequity in governmental preferencing of non-Muslim religions. Discerning the harms to women that would be produced by these tribunals, a coalition of religious and secular women in Canada undertook a two-year campaign against their operation in decision of family matters. That alliance was supported by associations of women across the globe who perceived that success of the “*sharia* tribunal” proposal in

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<sup>8</sup> See discussion *infra* Parts I, II, and III.

<sup>9</sup> We use the term “arbitration” to designate the form of private (outside the civil court system) process by which parties in dispute about civil (non-criminal) matters agree to submit to *binding* resolution of their conflict by the decision of an arbitrator. The parties to arbitration may agree about what law will govern the process, and the arbitrator’s decision is intended to be *final*. Having agreed to arbitration, parties have minimal rights of appeal from the arbitration decisions, and such decisions will generally be recognized, and *enforceable*, by civil courts. Arbitration has long been used to resolve commercial disputes. We use the term “mediation” to designate the process by which parties are guided toward agreements – in lieu of litigation – through which they may voluntarily settle their disputes. Unlike arbitration, mediation is a *non-binding* method of dispute resolution. Agreements achieved through mediation may – or may not – be enforced as contracts; they will *not* be *directly enforced* by incorporation into orders of civil courts.

Western, liberal, democratic Canada would threaten rights of women everywhere. Urging “One Law for All,” the coalition defeated the proposal. The Ontario controversy has been resolved, for the time being, by legislation that now prohibits arbitration of family matters based on any religious law (or, indeed on any law other than that of Ontario or of Canada), though the permanency of that resolution remains uncertain.

In *Part Two*, we focus on still-developing issues involving operations of Muslim “alternative dispute resolution” bodies in the UK in years subsequent to the resolution of the Canadian controversy. These include Muslim “tribunals” that offer to provide binding arbitration “in accordance with Islamic Sacred Law.”<sup>10</sup> And they include “councils” that offer *sharia*-based mediation of family matters. The tribunal and council operations raise legal issues highly analogous to those that were central to the Ontarian controversy, and these entities have become widely perceived as operating in ways harmful to women. In our account, we detail: the historical background surrounding the decades-long development of Muslim tribunals and councils; the strong support of *sharia* courts expressed by the Archbishop of Canterbury in 2008 and their emergence into higher visibility shortly thereafter; and, findings relating to the operations of these entities and their effects on British Muslim women, as reported by scholars, persons closely involved with the experiences of women from Muslim communities, and women who have themselves experienced their processes. We also detail the emergence and status of the *Arbitration and Mediation (Equality) Bill* pending in the House of Lords, formulated to address evidence of serious gender discrimination produced by the operations of the tribunals and councils.

In *Part Three*, in a step toward contextualization of the Canadian and UK developments by reference to related American trends, we focus on recent developments in the United States affecting the American constitutional law-religion-women nexus. We provide an overview of relevant constitutional law development from about 1990 to the present; examine the operation of a Christian religious court in a matter involving disability-discrimination in employment; and consider the still-evolving American “anti-*sharia*” movement.

In *Part Four*, we identify the need for reconceptualization of civil law’s posture relative to religious courts, and relative to religion in general. We assert that such reconceptualizations of church-state relationships are urgently needed if the protection of women’s most basic rights is to be upheld. Additionally, we identify resources for re-thinkings capable of addressing, undoing, and avoiding harms to women produced by multiple forms of *religio-legalism* and other “religious accommodations.”

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<sup>10</sup> MUSLIM ARB. TRIB., <http://www.matribunal.com/> (last visited Aug. 8, 2013).

## I. THE ONTARIAN “SHARIA TRIBUNAL” CONTROVERSY (2003-2006)

The *sharia* tribunal controversy that came to a head in Ontario in 2005-2006 had roots in Canadian developments over at least the preceding three decades. A “multiculturalist” project had been defined in Canada in 1971 by Prime Minister Trudeau with his speech to the House of Commons recommending “a policy of multiculturalism,”<sup>11</sup> and that project was carried forward during the 1980s.

In 1982, Canada enacted its new *Constitution Act*,<sup>12</sup> which included the *Charter of Rights and Freedoms* (“*Charter*”).<sup>13</sup> The *Charter* explicitly guaranteed particular individual and group rights. It guaranteed “fundamental freedoms” belonging to “everyone” (in *Section 2*);<sup>14</sup> guaranteed a number of “equality rights,” including sexual equality and religious equality (in *Section 15*);<sup>15</sup> and explicitly acknowledged the “multicultural heritage” of Canada and a national interest in “preservation and enhancement” of that heritage (in *Section 27*).<sup>16</sup> Further, Canada’s *Multiculturalism Act* was passed in 1985.<sup>17</sup>

The moves toward a national multiculturalist commitment did not go forward without resistance. They were strongly resisted by the Province of Quebec,<sup>18</sup> so much so that in 1991 a separation by Quebec appeared highly

<sup>11</sup> See Prime Minister Pierre E. Trudeau, Speech to the House of Commons on Multiculturalism (with Government Response to Volume 4 of the Report of the Royal Commission on Bilingualism and Biculturalism, Commissioners Andre Laurendeau and Davidson Dunton) (Oct. 8, 1971), transcript available at <http://www.canadahistory.com/sections/documents/Primeministers/trudeau/docs-onmulticulturalism.htm>.

<sup>12</sup> Constitution Act, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

<sup>13</sup> The Canadian Charter of Rights and Freedoms is Part I of the Constitution Act, 1982.

<sup>14</sup> Canadian Chart of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 2(a) (U.K.) (“Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other means of communication; (c) freedom of peaceful assembly; and, (d) freedom of association.”).

<sup>15</sup> *Id.* at § 15(1) (“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”). [Emphasis added.]

*Id.* at § 15(2) (“Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.”).

<sup>16</sup> *Id.* at § 27 (“This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”).

<sup>17</sup> Canadian Multiculturalism Act, R.S.C. 1985, c. 24.

<sup>18</sup> In 1980, Quebec considered but failed to pass a referendum that would have separated it from Canada. Quebec was the only one of the provincial governments that refused to endorse the *Constitution* and the *Charter*. ROBERT A. YOUNG, *THE STRUGGLE FOR QUEBEC*:

possible.<sup>19</sup> If there was dissatisfaction in Quebec with the very concept of multiculturalism, there was also dissatisfaction – among supporters of the concept – with its practical operation. In 1991, a strong expression of that dissatisfaction appeared with the publication, by the Canadian Society of Muslims, of the paper *Oh! Canada: Whose Land, whose dream?*<sup>20</sup> This publication marked one of the early steps in what would be a seventeen-year effort by Syed Mumtaz Ali, president of the Canadian Society of Muslims to obtain “formal recognition” of *sharia* tribunals. The publication of the paper coincided with an important development in Ontario, the passage of a new *Arbitration Act*. An understanding of the *Arbitration Act*’s provisions will shed some light on the nature of the complaints and proposals expressed by Ali in *Oh! Canada*.

#### A. *The Ontarian Arbitration Act of 1991*

In 1991 the Province of Ontario adopted an *Arbitration Act*<sup>21</sup> specifying procedures pursuant to which consenting parties might resolve disputes outside the traditional civil court system. This legislation altered previously operative Ontarian provisions concerning arbitration.<sup>22</sup> It was intended to provide a mechanism for resolution of civil disputes through procedures speedier and less-costly than those available through the provincial courts, and it was intended to be available primarily for resolution of commercial matters.<sup>23</sup> In a move toward efficiency and privatizing, the changes made in 1991 reduced the reviewing authority of civil courts with regard to arbitral decisions.

The 1991 enactment provided for only minimal regulation of

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FROM REFERENDUM TO REFERENDUM? 8 (1999).

<sup>19</sup> In 1995, Quebec would consider a second provincial referendum on secession from Canada. And although this referendum did not produce quite the majority support needed to separate Quebec from Canada, the vote was very close. The final result of the referendum showed 49.42% of voters supporting separation and Quebec sovereignty, while 50.58% of voters opposed that change. *Id.* at 37.

<sup>20</sup> Syed Mumtaz Ali and Anab Whitehouse, *Oh! Canada: Whose Land, whose dream?* (Can. Soc’y of Muslims), (1991), accessible at <http://muslimcanada.org/ocanada.pdf>. In 1991, Ali was the president of the Canadian Society of Muslims, and Whitehouse was the secretary of that organization.

<sup>21</sup> Arbitration Act, S.O. 1991, c. 17.

<sup>22</sup> See *id.* at c. 17, § 46(1). See W. H. Hurlburt, *A New Bottle for Renewed Wine: The Arbitration Act, 1991*, 34 ALTA. L. REV. 86, 87-88 (1995) (detailing the history of the Arbitration Act prior to its 1991 reformulation).

<sup>23</sup> See Natasha Bakht, *Arbitration, Religion and Family Law: Private Justice on the Backs of Women* (Nat’l Ass’n of Women & the Law, Ottawa, ON) March 2005 at 7 (citing Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, November 5, 1991 at 3384 (Mr. Hampton); and, Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, June 19, 1990 at 1845 (Mr. Scott)).

arbitrators. With regard to their qualifications, it specified that they should be independent and neutral relative to the parties, but it required no training or certification of individuals to authorize their conducting arbitration. With regard to the procedures to be followed in the arbitration process, the *Act* was similarly minimal, not requiring even that written records of arbitral proceedings be maintained. As a consequence – and consistent with the “privatizing” purpose of the *Act* – arbitral awards would generally become matters of public information only in the event that a party sought court enforcement of an award or elected to appeal an award.

The possibility of an appeal – let alone a successful appeal – from an arbitration decision was quite limited, both as a matter of law and as a matter of reality. With regard to the *Act* provisions themselves: *Section 45* of the *Act* provided no general right of appeal but only a possibility of appeal if a court permitted the same upon application of a party. Further, the *Act* provided that parties could specifically waive any right of appeal through a provision of their arbitration agreement – and, since the agreement to arbitrate would involve a decision to substitute private decision-making for the ordinary judicial process, parties might well decide to forego any appeal possibility. Indeed, while *Section 50(3)* of the *Arbitration Act* on its face provided for judicial enforcement of an arbitral award (unless the award had been set aside upon a party’s appeal), other provisions of the *Act* created hurdles impeding access to judicial enforcement or reversal of arbitral determinations. Additionally, in the event of a court’s actually hearing an appeal, the standard of review would involve great deference to the arbitrator’s findings of fact. Strictness in the judicial review would apply only to “pure questions of law.”<sup>24</sup>

As these provisions indicate, arbitration pursuant to the 1991 *Act* was intended as a form of dispute resolution that would, largely and in the ordinary course, displace the jurisdiction of civil courts. Most significantly, the *Act* unqualifiedly permitted parties to agree to arbitration using any “rules of law.”<sup>25</sup> This meant that arbitration of family matters in Ontario could be based on religious law.

### *B. Religious Arbitration throughout Canada*

The “any law” provision of the 1991 *Act* made Ontario one of seven Canadian provinces that permitted “religious arbitration.” Allowing for any rules of law to govern arbitration differentiated Ontario from the two

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<sup>24</sup> See Bakht, *supra* note 23 at 13. It should be noted that the *Arbitration Act* provides not for appeal per se but for “judicial review” for procedural deficits in the arbitration process. *See id.* at 15.

<sup>25</sup> See *Arbitration Act*, c. 17, s. 32(1).

provinces and three territories that explicitly disallowed religion-based arbitration of such matters, and distinguished it, also, from the Province of Quebec, which entirely prohibited arbitration of family matters.<sup>26</sup> With *Act*-authorized arbitration intended to constitute a “private” alternative to the courts, the *Act* did not itself make clear what the relationship would be between an

arbitral decision and the “supreme law of the land” embodied in the *Constitution of Canada*<sup>27</sup> and in the *Canadian Charter of Rights and Freedoms*.<sup>28</sup> While arbitration pursuant to the *Act* was most frequently utilized to resolve business disputes, certain religious groups – particularly Jewish Orthodox communities – created arbitration tribunals that might bindingly resolve commercial controversies and might also grant specifically-religious divorces, acting, in either case, consistently with the authority granted by the *Act*’s permitting determinations based on any “rules of law.”<sup>29</sup>

Civil divorce itself is determined by federal law in Canada and would therefore be outside the jurisdiction of any provincial tribunal established pursuant to the *Arbitration Act*. But Jewish-religious courts (known as “*Beis Din*”) granted religious divorces – known as “*gets*” – that were recognized and effective within Orthodox Jewish communities. Because a Jewish

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<sup>26</sup> Polly Dondy-Kaplan & Natasha Bakht, *The Application of Religious Law in Family Law Arbitration Across Canada* (Women’s Legal Educ. & Action Fund, Toronto, ON), Apr. 2006, at 24, available at <http://www.leaf.ca/legal/submissions/2006-application-religious-law-in-family-law.pdf>. See also Beverley Baines, *Must Feminists Identify as Secular Citizens? Lessons from Ontario*, in GENDER EQUALITY: DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP 83, 96 (Linda C. McClain and Joanna L. Grossman eds., 2009). Baines summarizes the data gathered in the Dondy-Kaplan and Bakht study: “[I]ts province-by-province details reveal that seven provinces (Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, and Saskatchewan) allow faith-based family arbitrations; two provinces (Newfoundland and Labrador, and Prince Edward Island) and all three territories (Northwest Territory, Nunavut, and Yukon) permit family but not faith-based arbitrations; and one province (Quebec) precludes arbitration of family matters [Emphasis added.] *Id.*”

<sup>27</sup> Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c.11, § 52(1) (U.K.) (“The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”).

<sup>28</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c.11 (U.K.).

<sup>29</sup> Some Jewish courts had been operating in various areas of Canada since 1982, well before the enactment of the Arbitration Act. See Natasha Bakht, *Family Arbitration Using Sharia Law: Examining Ontario’s Arbitration Act and Its Impact on Women*, 1 MUSLIM WORLD J. HUM. RTS. 1, 1 (2004). By 2004, Ismaili Muslim groups had “set up a system of mediation and arbitration in every province in Canada,” resolving mostly commercial disputes, but also “some family law issues amongst Ismaili Canadians using the relevant Canadian law.” *Id.* at 21.

person who obtains a civil law divorce will not be permitted to re-marry in a synagogue without having obtained a *get*, providing these religious divorces was a major part of the work of all the *Beis Din* operating in Canada during the 1990s.<sup>30</sup>

The Biblical divorce law or *Halakha* – as applied in *Beis Din* proceedings – sometimes had seriously negative consequences for Jewish women and their children. In the event of a husband’s refusal to grant a *get*, a wife could become *agunah* – that is, chained or anchored to her religious marriage. Even if she has obtained a civil divorce, absent a *get*, she will remain married in the eyes of her religious community. The Orthodox Jewish view is that in the event of the woman’s giving birth to children while not having obtained a *get*, she herself becomes greatly stigmatized, and her children – termed *mamzerim* – are not recognized as or admissible (even by their own later conversion to Judaism) as members of the religious community.<sup>31</sup>

### C. The Ontarian “Sharia Tribunal” Proposal and Controversy

In 1986, Syed Mumtaz Ali, a Muslim leader in Ontario, began to express publicly his proposal that Muslim personal laws – or *sharia*<sup>32</sup> – should begin to be recognized in Canada as a form of law providing the basis for arbitration of family matters.<sup>33</sup>

<sup>30</sup> See Lynne Cohen, *Inside the Beis Din*, CANADIAN LAWYER, May 2000, at 27-34, 30.

<sup>31</sup> See generally AYELET SHACHAR, MULTICULTURAL JURISDICTIONS (2001), 57-60 (summarizing the *agunah* issue and discussing the increasingly strict enforcement of associated stigmatization and exclusion practices). Shachar notes the failure of Orthodox Judaism, despite its “rich tradition of legal innovation,” to provide a “viable *Halakhic* solution to the *agunah* problem.” *Id.* at 59. She observes: “Part of the problem lies in the fact that representatives of Orthodox Judaism (the most conservative branch of Judaism) have drifted toward the reactive culturalism path since the late eighteenth century, when members of the Jewish community were for the first time given the opportunity to fully join the larger society as equal citizens – so long as they relegated their religious ‘differences’ to the private sphere. This external change has caused radical internal changes to the organization of the Jewish community, especially since significant numbers of individuals have indeed chosen to either fully assimilate or to embark on the path of limited particularism. Among those who have resisted these two alternatives, state and societal assimilation pressures have in certain cases led to stricter readings of *Halakhic* marriage and divorce law in the name of protecting ‘authentic’ Jewish tradition and ensuring its continued survival. This strict enforcement of the tradition has generally subjected women to greater pressure in the family law context.” *Id.*

<sup>32</sup> See *supra* text accompanying note 3.

<sup>33</sup> See Syed Mumtaz Ali, *1st Muslim Lawyer in Canada, dies at 82*, CBC NEWS July 17, 2009, <http://www.cbc.ca/news/canada/story/2009/07/17/syed-mumtaz-ali.html>. Ali, an immigrant to Canada in 1960, was well-known as the president of the Canadian Society of Muslims. *Id.* Born in India, Ali had there studied theology and Muslim law. *Id.* He had practiced Muslim law in Pakistan and studied at the University of London before immigrating to Toronto in 1960. *Id.* According to the Canadian Society of Muslims, Ali became the first

Contemporaneous with the Ontarian adoption of the *Arbitration Act*, Ali co-authored and published in 1991 a paper that recommended broad changes in Canadian constitutionalism to assure recognition of the “sovereignty” of Canadian Muslims, emphasizing themes of multiculturalism and incorporating rhetoric characteristic of the emergent politics of “recognition.”<sup>34</sup> Ali identified and complained of inequalities produced by Canadian governmental discriminations among religions (especially in the area of subsidization of religious education), as he argued for financial subsidization of an array of religious groups’ schools.<sup>35</sup> Beyond demanding equality for Muslims, however, Ali sought “sovereignty,” which he defined as protection – or, in his term, “underwriting” – of Muslims’ “autonomy.” His purpose was to assure Muslims’ “direct, unmediated access to real power”<sup>36</sup> [*emphasis added*] In order to lay a foundation for claiming special protection of “Muslims” as a single cultural, or religio-cultural group within the mosaic of Canadian multiculturalism, Ali downplayed the great variations among Muslim people living in Canada:

[A]lthough many different ethnic groups and races are represented within Islam, as Muslims – as those who follow the Islamic religious tradition – all these various ethnic groups and races are one people. As a people, Muslims feel there are a number of ways in which their reality as a people is marginalized, if not denied, by the present constitutional arrangement.<sup>37</sup>

Of central concern to Ali was the “official recognition and sanctioning of Muslim personal/family law.”<sup>38</sup> In his 1991 writing, Ali made clear that the areas of life over which Muslim sovereignty should govern would include “marriage, divorce, separation, maintenance, child support, and inheritance.”<sup>39</sup> The governance he proposed would operate through

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Muslim lawyer in Canada after his graduation from the Law School at York University in 1962.

<sup>34</sup> See Ali & Whitehouse, *supra* note 20. Important writing supportive of governmental “recognition” of various cultural groups – which appeared concurrently with Ali’s early-1990s work and would later be invoked to support concepts of “legal pluralism” – was that of Canadian philosopher Charles Taylor. See Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25 (Amy Gutmann ed., 1992).

<sup>35</sup> Ali & Whitehouse, *supra* note 20, at 39-41. Governmental subsidization strongly preferred Catholic schools over the schools of other religious groups. *Id.* at 40.

<sup>36</sup> *Id.* at 2.

<sup>37</sup> *Id.* at 39.

<sup>38</sup> *Id.* at 54. Note here Ali’s suggestion that there exists a single body of such “law.” *Cf. supra* text accompanying note 3.

<sup>39</sup> *Id.* at 41.

“tribunals for handling dispute resolution issues in areas covered by Muslim personal/family law [which] would be set up, staffed and monitored by people from the Muslim community.”<sup>40</sup> Ali was here clearly advocating what we term “*religio-legal pluralism*” which would include autonomy and self-governance in religious communities, supported by the enforcement power – the “*real power*” – of civil courts.

Ali’s rhetoric in 1991 included elaboration of a specifically “Islamic”<sup>41</sup> model of “the sovereignty of women.” He characterized that sovereignty of women as “a principle which is firmly established” in Islamic law that is “every bit as sophisticated as anything in the Canadian legal system.”<sup>42</sup> And he noted that “such sovereignty [of women] encompasses a great many entitlements that have surfaced only recently in North America.”<sup>43</sup>

The relationship that Ali envisioned between his proposed Muslim tribunals and the civil government was more elaborately explained in his writing of 1994.<sup>44</sup> Beverley Baines has summarized the explanation he

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<sup>40</sup> *Id.* at 43.

<sup>41</sup> Ali emphasizes what he designates as the “Islamic” character of his propositions. Using the terms “Muslim” and “Islamic” interchangeably, he intends that they be understood as synonymous. It is important to recognize that his move blurs crucial distinctions. Nigerian feminist Ayesha Imam has argued against the “conflation between ‘Islamic’ and ‘Muslim.’ Islam is the religion or faith (the way of Allah), while Muslims are those who believe in Islam and attempt to practice it ... The recognition that Islamic and Muslim are not synonymous is important because it helps avoid essentialising Islam and reifying it as an a-historical, disembodied ideal which is more-or-less imperfectly actualized in this or that community.” Ayesha M. Imam, *The Muslim Religious Right (‘Fundamentalists’) and Sexuality*, DOSSIER 17 (Women Living Under Muslim Laws) 7 (June 1997), available at <http://www.wluml.org/sites/wluml.org/files/D-17.pdf>. In other words, qualifying a ruling/ law/ value/ or practice as “Islamic” confers upon it the status of being “god-given” (in accordance with god’s will), and constructs it as being, therefore, intrinsically irrefutable. Using the adjective “Muslim,” on the other hand, acknowledges that a specific ruling/ law/ value or practice was developed by Muslim people, that is, by fallible human beings who are believers in Islam. While it is frequently claimed that any given state, society, community or practice is Islamic, Farida Shaheed, current UN Special Rapporteur in the field of cultural rights, points out the error: “It is in fact not Islamic (i.e. that which is ordained) but Muslim (i.e., of those who adhere to Islam) and reflects the assimilation of Islam into prevailing structure, system and practices.” Farida Shaheed, *Controlled or Autonomous: Identity and the Experience of the Network Women Living Under Muslim Laws*, OCCASIONAL PAPER 5 (Women Living Under Muslim Laws) 2 (1994), available at <http://www.wluml.org/node/421>.

<sup>42</sup> Ali & Whitehouse, *supra* note 20, at 42.

<sup>43</sup> *Id.* Ali provided no specification of what those “great many entitlements” of women might include.

<sup>44</sup> See SYED MUMTAZ ALI, THE REVIEW OF THE ONTARIO CIVIL JUSTICE SYSTEM: THE RECONSTRUCTION OF THE CANADIAN CONSTITUTION AND THE CASE FOR MUSLIM PERSONAL/FAMILY LAW: A SUBMISSION TO THE ONTARIO CIVIL JUSTICE REVIEW TASK FORCE (Can. Soc’y of Muslims, 1994), available at <http://www.muslimcanada.org/submission.pdf>.

offered at that time:

[I]t became clear he intended arbitrations to begin and end in the civil courts. Upon receipt of a statement of claim, a court should immediately refer the matter to arbitration to settle the issues in accordance with *sharia* law; thereafter, the award would be filed with the court to make it enforceable as the court's judgment. Ali did not propose to sever the relationship between arbitration tribunals and courts. Instead he sought to restrict the role of courts to purely procedural matters: judges should not be called upon to interpret *sharia* law.<sup>45</sup>

Ali's writings, generated over a period of at least seventeen years, provided a blueprint for the design and operation of *sharia* tribunals, and an outline of arguments to support or justify the formal recognition of these *religio-legal* entities. Legal scholar Natasha Bakht characterized and criticized Ali's proposals:

[T]his process of family arbitration [would be] but one step toward a separate system of justice for Muslims where they would be permitted to govern their own affairs in the realm of civil law...Mumtaz Ali confuses the limited ability to provide services to resolve certain civil matters through the *Arbitration Act* with the right to set up a parallel institution of justice that resembles the redress sought by those seeking self-government.<sup>46</sup>

Canadian feminist academics were not unresponsive to the developments represented in Ali's proposals. Two commentators whose voices sounded during the 1990s with the authority of personal experience were sociologists: Pakistani immigrant Shahnaz Khan and Iranian immigrant Haideh Moghissi.

Shahnaz Khan, identifying herself as both feminist and Muslim, and having had the experience, while growing up in the 1960s, of a Muslim life in Pakistan far different from the religio-legally controlled one that would be implemented by initiatives such as the *sharia* tribunal proposal, replied in 1993 to Ali's paper.<sup>47</sup> In this early intervention, Khan recorded her own

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<sup>45</sup> Baines, *supra* note 26, at 86 (citing Ali, *supra* note 44, at 41).

<sup>46</sup> Bakht, *supra* note 23, at 51 (referencing Ali, *supra* note 20, at 3 and Ali, *supra* note 44). Bakht is here pointing to Ali's comparison of Canadian Muslims to Canada's First Nations peoples "in order to justify increased legal and political autonomy for Muslims." *See also* Ali & Whitehouse, *supra* note 20 (citing Ali's intent to construct Muslims as "one people.").

<sup>47</sup> Shahnaz Khan, *Canadian Muslim Women and Shari'a Law: A Feminist Response to*

perception of the reality of racist discrimination against Muslims in Canada, identifying that harm as having produced “a situation where some Muslim people in Canada feel a need to turn to unjust Shari’a laws.”<sup>48</sup> At the same time – and unlike Ali – she refused to close her eyes to the reality of sexism within and outside Muslim communities, arguing: “Racism and sexism are interlinked oppressions and cannot be separated.”<sup>49</sup> Khan pointedly rejected Ali’s reliance on – and attempt to extend – multiculturalist notions. She insisted that Canadian multiculturalist policies actually supported discrimination against Muslims and against women by their perpetuating negative stereotypes – especially stereotypes of Muslim women as “backward, passive, and horribly oppressed by religion”<sup>50</sup> – and by their consequent constriction of the range of “choice” available to Muslim women. She explained:

It is highly unlikely that all “consenting” adults, particularly women, would willingly and gladly consent to arrange their lives according to laws which give them unequal status before the law. Although we may characterize some women as “choosing,” no doubt they would experience a certain amount of pressure to conform. However, should they decline to be governed by Muslim Personal Status Laws and find themselves ostracized by their families and their community, they would have to confront the discrimination of the larger Canadian population because they are both women and Muslims without community support to fall back on. This situation is particularly severe in the case of women who have concentrated on preserving Muslim culture, which is encouraged by multiculturalist policies, and who therefore have few skills with which to survive in the white world.<sup>51</sup>

Ali’s proposal, Khan insisted, “reproduces the dominant liberal ethos of the management of race relations and the maintenance of the status quo of power relations in Canada.”<sup>52</sup> Khan challenged Ali’s invocation of *sharia* as

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“O! Canada!,” 6 CAN. J. WOMEN & L./REVUE FEMMES ET DROIT 52 (1993). Khan recalled: “...the 1960s in Pakistan when Islam was a part of my life. We were free to choose how religious we wanted to be. There was little compulsion to obey rules handed down from a self-appointed clergy.” *Id.* at 53-54.

<sup>48</sup> *Id.* at 63.

<sup>49</sup> *Id.* at 60. For our own recent treatment of this interlinkage in discussion of issues of “veiling” by Muslim women, see Hélie and Ashe, *supra* note 4.

<sup>50</sup> Khan, *supra* note 47, at 55.

<sup>51</sup> *Id.* at 60.

<sup>52</sup> *Id.* at 55.

if that term referenced a single body of law whose content can be ascertained and agreed-upon. She stressed the variations among Muslim laws, noting that that variation makes it uncertain and unreliable as a source of protection of women's equality. Khan contrasted with that uncertainty and unreliability the Canadian civil laws (e.g., *Charter* provisions) which are clearer, more stable, and stronger as bases for protection for women.<sup>53</sup>

In another important feminist critique of Ali's project, in the late 1990s, sociologist Haideh Moghissi, challenged and confronted the concept of "Islamic feminism" and urged resistance to the "mystification of 'Islamic traditions'" that was being developed to support an active "Islamization project."<sup>54</sup> Moghissi's work was informed by her history of life and work in Iran prior to her emigration away from the fundamentalism that succeeded the 1979 Islamic revolution. Moghissi's writing, as indicated by her book's subtitle, focused on the negative implications of postmodernist analyses. She argued that such approaches – by cultivating "cultural relativism" – lent themselves to the projects of dangerous religious fundamentalisms marked by anti-modernity, anti-democracy, and anti-feminist commitments and seeking expansions of religious accommodations.<sup>55</sup>

In what we read as adopting a countervailing direction, Ayelet Shachar, political scientist and Israeli immigrant to Canada, showing the strong influence of Will Kymlicka's multiculturalism, theorized a model of "shared governance" that was closer to Ali's "sovereignty" model than to Shahnaz Khan's and Haideh Moghissi's critiques.<sup>56</sup> While aware of the potential for intra-community oppression of women, Shachar called for a form of legal pluralism that she termed "shared governance," through which, she imagined and proposed, "transformative accommodation" of both religious communities and dominant secular governments might occur, in ways protective of women.<sup>57</sup>

After seventeen years of persistent effort to persuade provincial

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<sup>53</sup> *Id.*

<sup>54</sup> See Haideh Moghissi, *FEMINISM AND ISLAMIC FUNDAMENTALISM: THE LIMITS OF POSTMODERN ANALYSIS* 78-124 (1999).

<sup>55</sup> See *id.* at 49-93.

<sup>56</sup> SHACHAR, *supra* note 31. Shachar's model essentially constructed a version of *multiculturalism* and *legal pluralism*, according to which certain minorities – i.e., certain religious groups – would be provided "accommodations" (i.e., special group-rights) in the expectation that the granting of those accommodations would contribute to "transformation" of the groups themselves. Shachar called these particular provisions for religious groups "transformative accommodations." We read this early work by Shachar as much less historically-informed than that of Khan and Moghissi, and we note our assessment of it *infra*, in *Part Four*.

<sup>57</sup> Shachar's proposals for "shared governance" and "transformative accommodations" would be invoked in 2008 by Rowan Williams, Archbishop of Canterbury, to support the institution of sharia tribunals in the UK. See *infra* note 120 and accompanying text.

government to support his proposal for recognition of powerful Muslim tribunals, in late 2003 Ali joined with a number of Muslim leaders in Toronto and established an entity, the Islamic Institute of Civil Justice Studies, that would set up Muslim tribunals in Ontario to arbitrate family disputes in conformity with requirements of *sharia*. Public statements made by imams during the year 2004 indicated that in actuality the Islamic Council of Imams-Canada had already been practicing mediation and arbitration for more than ten years and that they had “dealt with a number of issues including Islamic divorce.”<sup>58</sup> Ali continued to assert that Muslims were religiously obligated to utilize *sharia* courts.<sup>59</sup>

In support of Ali’s institution of “*sharia* tribunals,” some Muslim leaders cited the history of operation and acceptance of Jewish arbitration tribunals (the *Beis Din*). They also cited Muslim interests in religious equality, protected by the *Section 15* of the *Canadian Charter of Rights and Freedoms*, suggesting that Muslims would be denied *Charter* protections should the Province decline to permit their operation of tribunals while permitting other religious groups that liberty.<sup>60</sup>

Ali’s announcement of the new tribunals and his proposal that orders of “*sharia* tribunals” should be effectuated by judicial enforcement triggered the eruption of major controversy in Ontario. Women’s groups would become the dominant force in opposition.

#### *D. Feminist Opposition, the Boyd Report, and Further Feminist Opposition*

Spearheading the criticism and opposition to the proposal for *sharia* tribunals was the Canadian Council of Muslim Women (CCMW), a group of Muslim religious women – “believing women who are committed to our [Muslim] faith”<sup>61</sup> – acting under the directorship of Alia Hogben. The CCMW’s leadership – in a project that would require two years of work in alliance with more than 50 religious and secular groups, perhaps most notably the National Association of Women and Law (NAWL) – organized

<sup>58</sup> See Bakht, *supra* note 29, at 1 n.7 (referencing a June 2004 statement of Imam Hamid Slimi concerning the Islamic Council of Imams-Canada).

<sup>59</sup> See, Baines, *supra* note 26, at 87, n.33 (citing Syed Mumtaz Ali & Anab Whitehouse, *The Reconstruction of the Constitution and the Case for Muslim Personal Law in Canada*, 13 J. INST. MUSLIM MINORITY AFF. 156, 170 (1992). It should be noted that in suggesting that Muslims *must* resort to religious courts, Ali offered no explanation of the reality that civil court systems do exist in Muslim countries.

<sup>60</sup> See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c.11, § 15 (U.K.) (relating to religion); Imam Hamid Slimi, Op-Ed., *Should Ontario allow sharia law? YES Religious leaders already mediate, in compliance with Canadian law*, THE TORONTO STAR, June 1, 2004, at A19.

<sup>61</sup> See generally CANADIAN COUNCIL OF MUSLIM WOMEN, <http://ccmw.com>.

a national and international resistance that would ultimately defeat Ali's proposal. Very shortly after Ali's announcement, in early 2004, the CCMW began its public argument that the institution of the proposed tribunals would contravene protections of women guaranteed by the *Charter of Rights and Freedoms*. Shortly after that, NAWL joined with CCMW, contributing to the escalation of public discussion of the tribunals proposal.<sup>62</sup>

In response to the intensifying controversy, in June 2004, the Premier of Ontario, Dalton McGuinty, appointed Marion Boyd, a well-known political figure in Ontario,<sup>63</sup> to inquire into the ongoing status of religion-based arbitration in Ontario and to make recommendations about how the *Arbitration Act* should be applied to the *sharia* tribunal proposal.<sup>64</sup> Over succeeding months, Boyd engaged in consultation with numerous individuals and groups and conducted public hearings to tap into diverse perspectives, including those of Muslim groups. In August 2004, Boyd heard the position of the Muslim Canadian Congress, a secular organization that argued against the proposal, contending that establishment of the tribunals would be "racist" and "unconstitutional," and that it would have the effect of "discriminatory ghettoization and marginalization" of "the Muslim community."<sup>65</sup>

Advocates of the tribunals responded to criticisms with the claim that these were rooted in "Islamophobia." It was argued that rejection of the proposal – even if that rejection were to take the form of a prohibition of all family law arbitration<sup>66</sup> or of all religion-based family law arbitration – would in reality amount to differential treatment of Islam relative to other

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<sup>62</sup> National Association of Women and Law, *No Religious Arbitration Coalition: What Have We Learned?* February 17, 2007, p.1. Accessible at: <http://www.nawl.ca/en/library/entry/no-religious-arbitration-coalition-what-have-we-learned>.

<sup>63</sup> Marion Boyd was a former Attorney General of Ontario and a former Minister Responsible for Women's Issues. The formal appointment of Ms. Boyd was made by the Attorney General, Michael Bryant, and by Minister Responsible for Women's Issues, Sandra Pupatello.

<sup>64</sup> See Marion Boyd, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION, 3-5 (2004), at 1, available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs.boyd> [hereinafter BOYD REPORT]. The full report may be accessed in both English and French though the official website of the Ontario Ministry of the Attorney General.

<sup>65</sup> See Press Release, Muslim Canadian Congress, *Sharia based Arbitration Racist and Unconstitutional* (Aug. 26, 2004), available at <http://muslimcanadiancongress.info/wp-content/uploads/2013/08/MCC-challenges-Sharia-in-Ontario-August-26-2004.pdf>; Press Release, Muslim Canadian Congress, *Submissions by Muslim Canadian Congress, Review of Arbitration Process by Marion Boyd*, (Aug. 26, 2004), available at <http://muslimcanadiancongress.info/wp-content/uploads/2013/08/MCC-challenges-Sharia-in-Ontario-August-26-2004.pdf>.

<sup>66</sup> Such a total prohibition of arbitration of family matters already existed in Quebec, as provided by *Civil Code of Quebec*, S.Q., 1991, c. 64, § 2629.

religious interests.<sup>67</sup> The argument was also advanced that rejection of the proposal would perpetuate the racism implicated in the project of “saving Muslim women” from the male members of their own communities.<sup>68</sup> Media coverage of the controversy was extensive, and heated conflict became evident on university campuses in Toronto and elsewhere. In the fall of 2004, demonstrations took place not only in Canada but also in Canadian embassies across the world.<sup>69</sup>

Boyd’s *Report*, issued in December 2004, documented her investigation and consultations, and it concluded with recommendations that: (i) endorsed the continuation of arbitration – including arbitration by all religious groups – of family matters; and, (ii) proposed regulation of such arbitration.<sup>70</sup>

The issuance of the *Boyd Report* did not resolve the “sharia tribunal” controversy. Public debate continued and resistance by the women’s coalition intensified.

The CCMW had already commissioned two studies: one by Natasha Bakht investigating the “legal implications of tribunals that will utilize Sharia law in Ontario...with a particular emphasis on the impact that Sharia could have on Muslim women in Ontario;”<sup>71</sup> and one by Pascale Fournier investigating the operation of *sharia* in France, Germany, and Britain.<sup>72</sup> The Bakht and Fournier reports provided empirical data about women’s concerns as well as legal and policy analyses that would inform and sustain the CCMW’s efforts.

Drawing upon the commissioned studies, upon clear understanding of Canadian law and politics, and upon its members’ appreciation of non-Muslim religious and secular perspectives, CCMW was able to articulate refutations of all the propositions featured in Ali’s proposal. CCMW – speaking out of its members’ religious identities – embraced civil law as preferable to religious law for protection of women’s equality, and it entirely rejected the invitation of “legal pluralism.”<sup>73</sup> Perhaps most significantly,

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<sup>67</sup> In September 2004, B’nai Brith Canada expressed support of the tribunals. See Dahlia Lithwick, *How Do You Solve the Problem of Sharia?*, SLATE (Sept. 10, 2004), <http://www.slate.com/toolbar.aspx?action=print&id=2106547>.

<sup>68</sup> See generally Lila Abu-Lughod, *Do Muslim Women Really Need Saving?: Anthropological Reflections on Cultural Relativism and Its Others*, 104 AM. ANTHROPOLOGIST 783, 788-89 (2002).

<sup>69</sup> See Lithwick, *supra* note 67.

<sup>70</sup> See BOYD REPORT, *supra* note 64, at 133.

<sup>71</sup> Bakht, *supra* note 29, at 2.

<sup>72</sup> See Pascale Fournier, *The Reception of Muslim Family Law in Western Liberal States*, DOSSIER 27: MUSLIM MINORITIES (Women Living Under Muslim Laws) 65 (Dec. 2005), available at <http://www.wluml.org/sites/wluml.org/files/import/english/pubs/pdf/dossier27/doss27-e.pdf>.

<sup>73</sup> See Alia Hogben, *Introduction of Religious Family Laws in Canada: A Case Study*, DOSSIER 30-31: THE STRUGGLE FOR SECULARISM IN EUROPE AND NORTH AMERICA (Women

they were able to refute the proposition that Muslim women would have “choice” about submission to the tribunals. They argued strenuously that women who agreed to participate in arbitration would suffer the same handicaps as women who agreed to mediation in family law matters: both the privacy of the arbitration proceeding and a gender-based unevenness in bargaining power would work to the detriment of women. They were able to explain how the tribunals would likely erode the modest and hard-won protections of equality-in-citizenship that had been achieved by Canadian women. They were also able to identify as especially vulnerable to the operation of Act-authorized “*sharia* tribunals” those women who had recently immigrated into Canada from parts of the world in which “*sharia* law” governs. They elucidated, as had Bakht, the folly of attributing “choice” to women in situations of vulnerability:

New immigrant women from countries where sharia law is practiced are particularly vulnerable because they may be unaware of their rights in Canada. These women may be complacent with the decision of a sharia tribunal because arbitral awards may seem equal to or better than what might be available in their country of origin. An immigrant woman who is sponsored by her husband is in an unequal relationship of power with her sponsor. It may be impossible for a woman in this situation to refuse a request or offer from a husband, making consent to arbitration illusory. Linguistic barriers will also disadvantage women who may be at the mercy of family or community members that may perpetuate deep-rooted patriarchal points of view. If a woman manages to access the court via judicial review or appeal, she may well be told that she “chose” the disadvantageous situation that she finds herself in, further entrenching her feelings of helplessness and inferiority... The consequences of family arbitration with few limits will seriously and detrimentally impact the lives of women. This gender-based impact will likely be felt widely and will have intersecting class, (dis)ability, race and cultural implications.<sup>74</sup>

Under the continuing leadership of CCMW, the resistance movement

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Living Under Muslim Laws) 183 (July 2011), available at <http://www.wluml.org/sites/wluml.org/files/WLUML%20dossier%2030-31%20v2.pdf>. In this writing, Hogben provides a summary account of the CCMW struggle against the *sharia* proposal. She invokes writing of legal scholar Jean-Francois Gaudreault DesBiens, finding that “legal pluralism” is likely to expand the rights of groups while diminishing those of individuals. *See id.* at 187.

<sup>74</sup> Bakht, *supra* note 29, at 19-20.

drew in extensive Canadian – and, ultimately, international – support. To provide education to Ontarians, members of the international solidarity network Women Living Under Muslim Laws (WLUML) were invited to speak in April 2005 in Toronto about their experiences living in various countries governed by various forms of Muslim laws. By the end of the spring of 2005, a highly diverse network of individuals and groups – both religious and secular – had constituted itself as the “No Religious Arbitration Coalition.” This coalition worked to further educate both politicians and members of the public about the need – for the protection of women’s liberty and equality interests – to defeat the new proposal and, indeed, to assure that there would be no arbitration of family matters in Ontario based on any religious law. In fall 2005, WLUML assisted the Coalition in organizing international demonstrations against the *sharia* tribunal proposal, and those occurred on September 8, 2005, in major cities across the globe.<sup>75</sup>

#### E. The McGuinty “Ban” and Ontarian Legislation of 2006

A step toward ending the controversy was taken on September 11, 2005, three days after the international demonstrations, when Ontarian Premier McGuinty announced his introduction of *Bill 27*, which, he said, was intended to ban all religion-based arbitration of family matters. The McGuinty ban was translated into legislation in February 2006, when the provincial government of Ontario enacted *Bill 27, The Family Statute Law Amendment Act*<sup>76</sup> (hereinafter, *FSLAA*). The new statute meant that the term “family arbitration” would apply only to processes that were conducted exclusively under the law of Ontario or of another Canadian jurisdiction. It meant that other third-party decision-making processes (such as, for example, decision-making in whole or in part on the basis of religious law or foreign law) – would not be considered “family arbitrations” and would have no legal effect.<sup>77</sup> Amending both the *Arbitration Act of 1991*<sup>78</sup> and the

<sup>75</sup> Demonstrations occurred in Toronto, Montreal, Ottawa, Victoria, London, Amsterdam, Paris, and Dusseldorf. Baines, *supra* note 26, at 93.

<sup>76</sup> Family Law Statute Amendment Act, 2006 S.O. 2006, c. 1 – Bill 27, *available at* [https://www.e-laws.gov.on.ca/html/source/statutes/english/2006/elaws\\_src\\_s06001\\_e.htm](https://www.e-laws.gov.on.ca/html/source/statutes/english/2006/elaws_src_s06001_e.htm). This Bill received “Royal Assent” on February 23, 2006.

<sup>77</sup> *See id.* at § 2.2.(1) and 5.10 (citing language specifying “no legal effect”).

<sup>78</sup> The new law’s relevant amendment of the *Arbitration Act* includes: *cl. 1. (1)*: defining “family arbitration” as “...an arbitration that ... (b) is conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction;” and *cl. 2.2(1)*, which specifies that when a decision about a family matter is “made by a third-person in a process that is not conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction, (a) the process is not a family arbitration; and (b) the decision is not a family arbitration award and has no legal effect.” *Id.* at § 2.2(1).

provincial *Family Law Act*,<sup>79</sup> the *FSLAA* required that the practice of arbitration in Ontario be based exclusively on non-religious Canadian and provincial law.

With its ban on family-related arbitration according to any religious law, *FSLAA* treated all religions equally. The resolution was resented by both Orthodox Jews and Muslim advocates of the *sharia* tribunals. And, the enactment of the *FSLAA* did not mean that decision-making based on religious precepts would not continue to be a reality within religious communities in Ontario. It was widely recognized that existing practices involving such decision-making would continue. It was also noted that the relatively private nature of intra-community activity involving both decision-making and mediation would pose problems of its own.<sup>80</sup> But the new law did both clarify and firm up the separation of civil law from religious law. The situation constructed by the new law marked Ontario's commitment to religious pluralism and its rejection of legal – and specifically *religio-legal*-pluralism.

However, Canadian legal scholar Beverley Baines has noted that the “resolution” accomplished by the new legislation is not guaranteed to be permanent.<sup>81</sup> Baines discusses various Constitutional challenges that could conceivably be raised against the new law. She notes her belief that when Canadian feminists lobbied for what would become the sexual equality provision of the *Charter*,<sup>82</sup> they did not fully appreciate “the threat that the major religions – Christianity, Islam and Judaism – posed for women's

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<sup>79</sup> The new law's relevant amendment of the *Family Law Act* includes: *cl. 5.(7)*, defining “family arbitration” as “...an arbitration that ... (b) is conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction;” and *cl. 5.(10)*, which specifies that when a decision about a family matter is “made by a third-person in a process that is not conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction, (a) the process is not a family arbitration; and (b) the decision is not a family arbitration award and has no legal effect.” *Id.* at § 5.10.

<sup>80</sup> See Anver Emon, *A Mistake to Ban Sharia*, *GLOBE & MAIL* (Sept. 13, 2005), <http://www.theglobeandmail.com/globe-debate/a-mistake-to-ban-sharia/article1331425/> (proposing that it would have been better to regulate rather than to ban *Sharia*, in order to reduce harms being produced by “the informal back alley Islamic mediations that are still in place[.]”).

<sup>81</sup> Beverley Baines, *Equality's Nemesis?*, 5 *J. L. & EQUALITY* 57 (2007). Baines notes: “It is only a matter of time before fundamentalists invoke their right to freedom of religion in section 2(a) of the *Charter* to challenge ... provincial legislation regarding family law arbitration. Wielding freedom of religion as a sword rather than a shield, fundamentalist Muslims and/or Jews will argue that family arbitrations conducted according to their respective religious tenets should be enforceable in the regular court system.” *Id.* at 59.

<sup>82</sup> See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.). The *Charter* specifies: *Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.* *Id.* at § 28.

equality rights.”<sup>83</sup> Baines has come to believe that these religions – all of them – in fact constitute “equality’s nemesis.”<sup>84</sup> Looking at the likelihood that religious arbitration will eventually come to the Supreme Court of Canada as a *Charter* issue, in which parties will “pit claims for the right to freedom of religion against those for women’s equality rights,”<sup>85</sup> Baines finds no reason to expect that the Supreme Court of Canada will rule in favor of women.

## II. MUSLIM TRIBUNALS AND *SHARIA* COUNCILS IN THE UNITED KINGDOM (2008-2014)

Having concluded our account of developments in Canada, we now turn our attention to somewhat parallel developments in the United Kingdom (UK).<sup>86</sup> Here we focus on the enlargement and the increased public awareness of mediation and arbitration activities currently being provided by Muslim councils and tribunals that identify themselves as operating in reliance on *sharia*. It is widely understood that, among the Western nations, “[O]f all Western countries, Britain has the most developed set of institutions for Islamic [*sic*] dispute mediation,”<sup>87</sup> and it is known, too, that this has been the case since as early as the 1980s. As awareness of the operation of *sharia* councils and tribunals has increased in recent years, that operation has been questioned and criticized for its negative impact on the equality interests of women from Muslim communities – and especially immigrant women. Essentially, the claim is raised that Britain’s form of “legal pluralism” is supporting a religious-law system that operates in parallel to the civil law system, and that its maintenance has the effect of depriving many women of British civil law protections against gender discrimination.<sup>88</sup>

Understanding and assessment of the present status of Muslim community bodies offering services relating in particular to marriage and divorce cannot be reached without some consideration of the history of

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<sup>83</sup> Baines, *supra* note 81, at 57.

<sup>84</sup> *Id.* at 80.

<sup>85</sup> *Id.* at 57-58.

<sup>86</sup> By “UK,” we reference here Britain and Wales, but not Scotland or Northern Ireland.

<sup>87</sup> JOHN R. BOWEN, *BLAMING ISLAM* at 74 (2012). Like many other commentators, Bowen appears not to discern the different meanings of the terms “Islamic” and “Muslim.” This is unfortunate, as it masks the reality of intentional blurring of the meanings of the terms as a political move by proponents of “sharia” as a uniform body of law whose implementation requires no human intervention. *Cf. supra* text accompanying note 41 (citing rhetoric of Syed Mumtaz Ali).

<sup>88</sup> See 19 Oct. 2012, *PARL. DEB., H.L.* (2012) 1684 (U.K.), available at <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/121019-0001.htm#12101923000438>.

Muslims in the UK in the decades succeeding their *post*-World War II immigration. We thus begin with an overview highlighting British governmental policies of multiculturalism and of professed secularism, and an indication of how feminist critique has evaluated those policies. We then move to direct examination of what is known, believed, and/or feared about *sharia* councils and tribunals. We consider their not fully-resolved status under existing British law, and we document the controversy that has surrounded the recent proposal of legislation intended to regulate and rein in their operations in order to protect women. Throughout, we invite readers to consider the parallels between British developments and the Canadian developments we have already detailed.

### A. *Historical Background*

In the UK, the development of multiple (official as well as unregulated) legal bodies relevant to minority communities – that is, systems initiated and sustained by immigrant communities themselves – grew out of British governmental failures to meet the social service needs of those communities. Development of such bodies was also actively encouraged by the British government’s adoption – from the 1960s onward – of numerous multiculturalist policies.<sup>89</sup> As Yasmin Ali has noted, underlying the British multiculturalist approach was:

the assumption... – not always explicit – that minorities can be given limited autonomy over internal “community” affairs, such as religious observance, dress, food, and other

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<sup>89</sup> Sociologist Samia Bano has noted: “Multiculturalism is not a singular doctrine and has been described as embodying three different forms: conservative multiculturalism that insists upon assimilation; liberal multiculturalism which focuses upon integration in mainstream society while tolerating certain cultural practices in private; and pluralist multiculturalism which affords groups rights for cultural communities under a communitarian political order.” SAMIA BANO, *MUSLIM WOMEN AND SHARI’AH COUNCILS: TRANSCENDING THE BOUNDARIES OF COMMUNITY AND LAW* 8 (2012) [hereinafter “BANO, MUSLIM WOMEN”] (citing Stuart Hall, *The multi-cultural question*, in *UNSETTLED MULTICULTURALISMS: DIASPORAS, ENTANGLEMENTS, TRANSRUPTIONS* 209, 210-211 (Barner Hesse ed., 2000). It should be noted that Bano’s research is groundbreaking as an academic, social-science investigation of women’s personal experiences of council operations. She focuses specifically on women from the Pakistani community in Britain. In addition to her in-depth observational research and analysis of case-files of four main *sharia* councils (from the Maliki school of law) in 2000-2004, Bano also identified roughly 30 organizations “where some kind of Shari’ah-related advice on family law matters was available to local Muslim communities.” See generally SAMIA BANO, *AN EXPLORATORY STUDY OF SHARIAH COUNCILS IN ENGLAND WITH RESPECT TO FAMILY LAW* (Oct. 2, 2012), available at [http://www.reading.ac.uk/web/FILES/law/An\\_exploratory\\_study\\_of\\_Shariah\\_councils\\_in\\_England\\_with\\_respect\\_to\\_family\\_law\\_.pdf](http://www.reading.ac.uk/web/FILES/law/An_exploratory_study_of_Shariah_councils_in_England_with_respect_to_family_law_.pdf) (unpublished project funded by the British Ministry of Justice) [hereinafter “BANO, EXPLORATORY STUDY”] (discussing telephone survey of 22 such entities).

supposedly “non-political” matters, including the social control of women, without their presence offering any major challenge to the basic framework of social, economic and political relations in society.<sup>90</sup>

Since the 1980s, scholars and activists – Black feminists in particular – have criticized the British multiculturalist model on various grounds. They have characterized it as the following: a tool for control of minorities;<sup>91</sup> a source of empowerment for religious fundamentalist ideologies;<sup>92</sup> or a mechanism undermining minority women’s demands for gender equality.<sup>93</sup> In 1992, for example, Gita Sahgal and Nira Yuval-Davis argued: “In the multiculturalist discourse, minority communities are defined by a stereotypical notion of their ‘culture,’ which is increasingly being collapsed into matters of religious identity.”<sup>94</sup> According to this scenario, self-appointed male community leaders, often conservative clerics, are afforded the right to speak on behalf of “their” communities, and on behalf of “their” women in particular, assuming the role of “legitimate” interlocutors to the

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<sup>90</sup> Yasmin Ali, *Muslim Women and the Politics of Ethnicity and Culture in Northern England*, in REFUSING HOLY ORDERS: WOMEN AND FUNDAMENTALISM IN BRITAIN 101, 102-103 (Gita Sahgal & Nira Yuval-Davis eds., 1992).

<sup>91</sup> For example, Yasmin Ali proposed that “[M]ulticulturalism has provided the ideological justification of – and coherence for – a range of policies designed to contain [minority] communities and isolate them from – or mediate their limited entry to – the local political arena. It has also had the purpose, as far as governments of both the Labour and Conservatives Parties have been concerned, of depoliticizing ‘race’ as an unpredictable factor in British politics.” *Id.* at 103.

<sup>92</sup> Journalist and human rights activist Gita Sahgal and sociologist Nira Yuval-Davis have stressed that “[f]undamentalist leaderships have been the main beneficiaries of the adoption of multiculturalist norms....[T]heir campaigns have been fought within the framework of multiculturalism – it has provided their chief ideological weapon. They argued [in 1989] to extend the blasphemy law to Islam under the banner of ‘Equal Rights for Muslims.’ They presented themselves as the most ‘authentic’ representatives of the different communities and prevented ‘outsiders’ from taking sides in power struggles within those communities, on the grounds that such intervention was racist. On the other hand, Christianity, as a signifier of ‘Western civilization’, or ‘civilization’ in general, has become one of the major ways in which white racism has come to be expressed.” Gita Sahgal & Nira Yuval-Davis, *Introduction: Fundamentalism, Multiculturalism, and Women in Britain*, in REFUSING HOLY ORDERS: WOMEN AND FUNDAMENTALISM IN BRITAIN 1, 16 (Gita Sahgal & Nira Yuval-Davis eds., 1992).

<sup>93</sup> Sahgal and Yuval-Davis warned: “Women have been particularly vulnerable to the effects of the multiculturalist perspective. Minority women’s demands for freedom and equality were seen as being ‘outside ‘cultural traditions’ (often themselves only half understood) and were therefore not regarded as legitimate. By contrast, the most conservative versions of traditional ‘womanhood’ were considered to be the most ‘authentic.’”

*Id.* at 8.

<sup>94</sup> *Id.* at 15.

state.<sup>95</sup> Sahgal and Yuval-Davis propose that this homogenizing construction of minority communities as monolithic – i.e. as supposedly unaffected by ethnic, linguistic, national, political, class or gender differences – leads to relegating women to the position of minorities within minorities.<sup>96</sup>

Mindful that “fundamentalism is not peculiar to Islam,”<sup>97</sup> Sahgal and Yuval-Davis perceived and documented – early and clearly – strong linkages between empowerment of (all kinds of) fundamentalist religious groups and harms to women. They saw, in the late 1980s and early 1990s, that:

...in the closing decades of the twentieth century, not only has religion achieved a new lease of life, but particular forms of religious movements, which can be grouped under the umbrella concept of “fundamentalism,” seem to be the most vital force for (and against) social change all over the world and within different religions. [emphasis added] Moreover, these forms of religious movements have often been incorporated into and transformed nationalist movements.<sup>98</sup>

They pointed to the reality that Britain was the “receiver, rather than the

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<sup>95</sup> The British state itself has sometimes made strategic use of such alliances with “the Muslim community,” acceding to political interests that hardly take women constituents into consideration. Sometimes this has proven misguided or embarrassing. See BANO, MUSLIM WOMEN, *supra* note 89, at 33 (identifying the British government’s selection of the Muslim Council of Britain (MCB) as the group with which to “engage in dialogue” – after the 9/11 and 7/7 attacks and during wars in Afghanistan and Iraq in order to “manage and deal with issues of security and introduce a series of policies to counter the threat of ‘home-grown terrorism’.”). According to Bano, this selection and dialogue were “based on a fixed understanding of what was represented as the ‘moderate Muslim’ and endowed this group with the tacit power to represent the voices of all British Muslims.” *Id.* After entering into that engagement in 2009 the government discovered that the MCB deputy secretary general had attended the Global Anti-Aggression conference in Istanbul and had signed a declaration that called for violence against “foreign forces” (which could include the British Navy) and against Jewish communities. Hazel Blears, then Communities Secretary, acknowledged this development in an Open Letter, stressing the government’s serious concern and “duty [to] investigate any potential threat to the security of our troops and communities” – but noting, at the same time, a hope for continued governmental engagement with the MCB: “I would urge the MCB to accept the serious nature of this issue and work with us to resolve it so that we can continue in partnership to build the safe, strong, cohesive communities in which we all want to live.” Hazel Blears, *Our shunning of the MCB is not grandstanding*, THE GUARDIAN, Mar. 25, 2009, <http://www.theguardian.com/commentisfree/2009/mar/25/islam-terrorism>.

<sup>96</sup> We note that all these developments – and the feminist commentary concerning them -- are analogous to concurrent developments in Canada, discussed in *Part I*.

<sup>97</sup> Sahgal & Yuval-Davis, *supra* note 92, at 1.

<sup>98</sup> *Id.* at 2.

initiator, of many global fundamentalist movements...<sup>99</sup> And, surveying the scope of this movement, they concluded:

[T]he overall effect of fundamentalist movements has been very detrimental to women, limiting and defining their roles and activities and actively oppressing them when they step out of the preordained limits of their designated roles. This link between fundamentalism and women's oppression has been recognized by women in many countries<sup>100</sup>

In further consideration of the relationship of highly-conservative religious movements to women, religionist Sara Maitland noted the nearly-polar opposition of feminist goals and the goals of the deeply-conservative religious movements moving into political prominence. Maitland observed that "the political agenda of moral-majority Christians seems...determinedly set by feminism's concerns..."<sup>101</sup> And she noted, as well, the transnational feature of the religious forces of "radical conservatism" that operated with a "powerful parent movement in the USA" feeding the emergent fundamentalist movement in England.<sup>102</sup>

During the decade of the 1990s, religious forces, especially conservative ones, grew stronger across the world. In the UK, when the events of 9/11 and 7/7 triggered broad anxiety about home-grown terrorism and inflamed racist rhetoric,<sup>103</sup> the commitment to multiculturalism became transmuted, with a new emphasis on "social cohesion."<sup>104</sup> Longtime women's human rights advocate Pragna Patel has identified this recent and still ongoing trend as involving a shift from multiculturalism to multi-faithism.<sup>105</sup> She sums up the implications of new governmental policy that uncritically embraces "faith communities":

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 9.

<sup>101</sup> Sara Maitland, *Biblicism: A Radical Rhetoric*, in REFUSING HOLY ORDERS: WOMEN AND FUNDAMENTALISM IN BRITAIN 26, 41 (Gita Sahgal & Nira Yuval-Davis eds., 1992).

<sup>102</sup> See *id.* at 27. Maitland notes as an example of this US-UK interchange the origin of Operation Rescue in the US, and its having "developed branches in [the UK], not merely inspired by but actively supported (and probably funded) from the USA." *Id.* at 34.

<sup>103</sup> SOHAIL WARRAICH & CASSANDRA BALCHIN, RECOGNIZING THE UN-RECOGNIZED: INTER-COUNTRY CASES AND MUSLIM MARRIAGES AND DIVORCES IN BRITAIN 32 (WLUML, 2006) ("[R]acism has entered a new phase and moved away from discourse about visible difference to discourse about cultural difference.").

<sup>104</sup> See Pragna Patel, *Faith in the State? Asian Women's Struggles for Human Rights in the U.K.*, 16 FEMINIST LEGAL STUD. 9, 14 (Apr. 2008) ("[F]ollowing the terrorist bombings in London in July 2005, the focus has been on the need for social cohesion and assimilation.").

<sup>105</sup> *Id.* at 10, 13-15.

A new settlement is taking place between “faith groups” and the state in which “faith groups” use the terrain of multiculturalism to further an authoritarian and patriarchal agenda. These groups use the language of equality and human rights whilst at the same time eschewing these very ideals. The result is that secular spaces and secular voices within minority communities are being squeezed out, which in turn means that fewer alternatives will be available to minority women and others from restrictions on fundamental freedoms.<sup>106</sup>

Patel warns that this trend poses further threats to women’s equality. She predicts:

Ironically, the current promotion of faith based projects in all areas of civil society will compromise the gender equality agenda for black and minority women in particular. It will divert women away from the legal justice system into the hands of religious conservative and fundamentalists leaders...The cry of religious discrimination can and will be used to claim access to and control over resources, whilst at the same time it will serve to perpetuate discrimination against women and other sub groups, and to deter state intervention in family matters.<sup>107</sup>

While multiculturalism became the hallmark of the British’s model of managing immigrant communities, Britain also asserted the principle of secularism as state policy. Despite the rhetoric, however, the Church of England enjoyed – as it continues to enjoy – a singularly privileged position.<sup>108</sup> Religious inequities are apparent in many ways, and an important one involves the legislative mandate of school prayer, which

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<sup>106</sup> *Id.* at 15.

<sup>107</sup> Pragna Patel, *The use and abuse of honour based violence in the UK*, OPENDEMOCRACY, (June 6, 2012), <http://www.opendemocracy.net/5050/pragna-patel/use-and-abuse-of-honour-based-violence-in-uk>.

<sup>108</sup> See Sahgal and Yuval-Davis, *supra* note 92, at 12 (“[T]he Christianity of Britain is ... anchored in law, and extended beyond the symbolism of the Queen being the titular head of the Churches of England and of Scotland ....[T]he church hierarchy participates in the British legislative process. The two archbishops and twenty-four bishops are members of the upper house in the British Parliament, the House of Lords (‘the Lords Spiritual’). It is the Prime Minister’s duty to appoint the Archbishop of Canterbury, and ... the Prime Minister’s religious affiliation and attitudes have to be accommodated in appropriate manner.”); *Id.* at 13 (“Religious affiliation has...come, in different ways, to signify collective identity and a central mode of inclusion and exclusion among ethnic minorities in Britain, as well as its majority.”).

disfavors non-Christians.<sup>109</sup> New accommodations, especially those extended toward non-Christian groups, have evoked strong expressions of resentment by secularists as well as by religious individuals who are not benefitting directly from such preferencings.<sup>110</sup>

The *post*-War development of human rights principles and analyses provoked a set of debates in the UK, as elsewhere, about the relationship of group rights (including religious group rights) to rights of individuals outside and inside the relevant “group.” In 1989, the “Rushdie Affair” brought these tensions to the forefront in England. A consideration that became prominent during the course of that matter, was the disparate treatment of religions by the UK blasphemy law, which criminalized speech attacking the Church of England but not speech attacking other religions. Muslim fundamentalists, correctly understanding the law as racist, asserted “Equal Rights for Muslims” and opposed protection of the individual rights asserted by Salman Rushdie – demanding that British blasphemy law be expanded and made applicable to Islam.<sup>111</sup> On the other side, feminist minority groups came together to emphasize human rights principles protective of individuals. The Southall Black Sisters, for example, an advice, advocacy and resource center in London whose constituency included Asian and African-Caribbean women, stated:

As a group of women of many religions and none, we would like to express our solidarity with Salman Rushdie. Women’s voices have been largely absent in the [Rushdie] debate where battles lines have been drawn between liberalism and fundamentalism. Often, it has been assumed that the views of vocal community leaders are our views, and their demands are our demands. We reject this absolutely.”<sup>112</sup>

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<sup>109</sup> See School Standards and Framework Act 1998, c. 31, § 70 (Eng) (“...each pupil in attendance at a [state] school shall on each school day take part in an act of collective worship.”); *Id.* at sch. 20 cl. 3.(2) (specifying that the required collective worship shall be wholly or mainly of a broadly Christian character.”).

<sup>110</sup> Here again we see analogues to the Canadian context. See *supra* text accompanying note 8.

<sup>111</sup> See TALAL ASAD, GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM 239-268 (1993) (discussing this aspect of the Rushdie controversy). Sahgal and Yuval-Davis point out that: “The racialization of religion, especially Islam, reached a new peak after the Rushdie affair. Communities which were previously known by national or regional origin – Pakistani, Mirpuri, Bengali, Punjabi, etc. – are now all seen as part of a single Muslim community.” Sahgal and Yuval-Davis, *supra* note 92, at 15. Cf. *supra* notes 38 and 41 (discussing Syed Mumtaz Ali’s construction of Muslims as “one people” in spite of their varying ethnicities and cultures).

<sup>112</sup> Sahgal and Yuval-Davis, *supra* note 92, at 17.

These feminists called not for expansion of the blasphemy laws to cover all religions, but for elimination of the blasphemy laws. They did this out of an understanding that, relative to racism, “fundamentalism is a much wider phenomenon which cuts across religions and cultures”<sup>113</sup> and that resistance to racism will not, by itself, reach the powerful reality of transnational and international religious fundamentalism that threatens all women, cross-culturally and cross-racially.

These examples illustrate that Muslims in the UK have lived in a context shaped by multiple and complex tensions, internal as well as external. Within that context, community leaders have developed community-based practices regulating marriage and divorce. These practices are currently implemented by arbitration tribunals and by mediation councils, and are frequently characterized – by Muslims and non-Muslims, alike – as involving governance by *sharia*.

Demands for implementation of *sharia* date back to the 1970s, when the Union of Muslim Organizations of the UK and Eire called for a separate system to be automatically applicable to Muslims. In 1984, a “Muslim Charter” included the same demand, which was last articulated publicly in 1996. Since then, Warraich and Balchin have noted: “there has been no coherent [such] demand. This is an indication that the precise content of such a system and who it would be administered by would be so contentious *within* the community that it is best left to a vague – and therefore *political* rather than legal – demand.”<sup>114</sup>

Within public discourse in the UK, *sharia* is typically constructed monolithically.<sup>115</sup> There is little general understanding of the documentation of localized religious interpretations in Muslim-majority counties, which debunks the myth of the applicability of *sharia* as a homogeneous legal body.<sup>116</sup> Likewise, public discussion reflects little awareness of the perspective of Sudanese Muslim scholar Abdullahi An-Naim, who asserts that “Although Shari’a professes to be a single logical whole, there is

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<sup>113</sup> *Id.* at 3.

<sup>114</sup> WARRAICH & BALCHIN, *supra* note 103, at 33.

<sup>115</sup> Voices that construct Muslim laws as a homogeneous legal body are numerous, emanating from ill-informed “experts” and lawyers as well as from racists and proponents of the religious right (including Muslims, as well as Christians or Hindus). As noted above, this homogeneous construction was evident in public discussions of the Ontarian “*sharia* tribunal” controversy. See *supra* text accompanying note 41.

<sup>116</sup> See Cassandra Balchin, *Having our cake and eating it: British Muslim women*, OPENDEMOCRACY, (Feb. 1, 2011), <http://www.opendemocracy.net/5050/cassandra-balchin/having-our-cake-and-eating-it-british-muslim-women> (explaining practically and succinctly: “If everything were agreed and crystal clear in the holy texts, there wouldn’t be 22 different laws on divorce in 22 different Muslim countries according to Women Living Under Muslim Laws’ 10-year Women & Law research programme.”).

significant diversity of opinion not only between the schools but within them as well.”<sup>117</sup> Similarly absent from broad public commentary is the understanding articulated by Samia Bano:

The practice of ‘Shari’ah law’ can then be better understood as the application of norms and values rather than a legal system which operates outside constitutional and state law. Furthermore questions of what constitutes Shari’ah and Shari’ah Law for Muslims continue to be debated among Muslim and non-Muslim scholars around the world.”<sup>118</sup>

And, findings derived from the still-incipient empirical research on the operations of Sharia councils and the nature of the law(s) they apply in the UK have also not made their way into general public awareness. Thus there is little public awareness of Bano’s finding:

[E]xisting scholarship demonstrates that Shari’ah councils have developed frameworks of “governance” and administrative processes that are characterized by specific and localized cultural and religious norms and values through which we can see in evidence a new form of “Muslim family justice” emerging within Muslim communities in Britain.<sup>119</sup>

Reflective of the lack of awareness of the diversity within Muslim jurisprudence, a notable event in the history of the development of Muslim tribunals in the UK occurred in February 2008, when Rowan Williams, then-Archbishop of Canterbury, delivered the introductory lecture in a series dedicated to consideration of “Islam in English Law.” Williams ruminated on the future relationship of Christianity and Islam in the UK; characterized as “inevitable” the operation of *sharia* tribunals in the UK; and invoked Ayelet Shachar’s work as an *apologia* for the kind of religious accommodation (a “shared governance”/“legal pluralism” model) that would make operational the decrees of Muslim religious courts.<sup>120</sup>

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<sup>117</sup> ABDULLAHI AN-NAIM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW 33 (1990).

<sup>118</sup> BANO, MUSLIM WOMEN, *supra* note 89 at 44.

<sup>119</sup> *Id.* at 4.

<sup>120</sup> Rowan Williams, *Civil Law & Religious Law in England: A Religious Perspective*, DR. ROWAN WILLIAMS 104TH ARCHBISHOP OF CANTERBURY (Feb. 7, 2008), <http://rowanwilliams.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective>. See also ISLAM AND ENGLISH LAW: RIGHTS, RESPONSIBILITIES AND THE PLACE OF SHARI’A (Robin Griffith Jones ed., 2013) (commenting on Rowan Williams’ comments, their reception, and additional *sharia*-related

The Archbishop's lecture was broadcast by the BBC, received international media attention, and triggered a public outcry. On July 3, 2008, Nicholas Phillips, the Lord Chief Justice of Britain, defended Rowan Williams' position, declaring that there was "no reason" why *sharia* could not be used for alternative dispute resolution.<sup>121</sup>

The statements of the Archbishop and the Lord Chief Justice drew attention to the formal opening of the Muslim Arbitration Tribunal in Warwickshire, which had actually begun its operation quietly in 2007. They also triggered attention to – and led to research into – the operations of other Muslim arbitration tribunals and mediation councils in the UK.

In June 2011, adopting an approach drastically different from that of the Archbishop and the Chief Justice, Baroness Caroline Cox would propose the *Arbitration and Mediation Services (Equality) Bill* (hereinafter, *Cox Bill #1*) in the House of Lords.<sup>122</sup> Her proposal and presentation of that *Bill* intensified public debate about "*sharia* tribunals" and a new version of the *Bill* (hereinafter, *Cox Bill #2*) was introduced in May 2013.<sup>123</sup> A major question at the heart of the UK controversy has been whether the law in England and Wales should be modeled on the new Ontarian legislation or not.

### B. Muslim Arbitration Tribunals and Sharia Councils

In 2011, a team at Cardiff University reported (hereinafter, the *Cardiff Report*) on the results of their examination of the ongoing operations of religious tribunals in the UK. Their research considered the legal status – relative to British law – of the jurisdiction and the procedures of three religious courts: one Christian; one Jewish; and one Muslim.<sup>124</sup> The *Cardiff*

developments).

<sup>121</sup> Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales, Speech at the East London Muslim Centre, Whitechapel (Jul. 3, 2008). See also *Lord Chief Justice: Sharia Law could have UK role*, WALES ONLINE (Jul. 3, 2008), <http://www.walesonline.co.uk/news/wales-news/lord-chief-justice-sharia-law-2162248>.

<sup>122</sup> The Arbitration and Mediation Services (Equality) Bill [HL] was introduced by Baroness Cox, read a first time, and ordered to be printed, on June 7, 2011. See 7 Jun. 2011, PARL. DEB., H.L. (2011) 136 (U.K.), available at <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110607-0001.htm#11060733000388>. A "second reading" and debate of the bill occurred on October 19, 2012. See 19 Oct. 2012, PARL. DEB., H.L. (2012) 1682 (U.K.), available at <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/121019-0001.htm#12101923000438>.

<sup>123</sup> See 7 Jun. 2011, PARL. DEB., H.L. (2011) 136 (U.K.), available at <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110607-0001.htm#11060733000388>.

<sup>124</sup> See Gillian Douglas, Norman Doe, Sophie-Gilliat-Ray, Russell Sandberg & Asma Khan, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts: Report of a*

*Report* was a preliminary and very limited one in that it depended on perspectives expressed by the three courts' male decision-makers, without examining at all the perspectives of users – who were predominantly women. Thus, the *Cardiff Report* did not include even preliminary analysis of the gender implications of the three courts' operations.

The *Cardiff Report* usefully reminds readers of the difference between mediation and arbitration, noting that of the religious courts examined, only those operating under the provisions of the *Arbitration Act of 1996* can have any basis at all for expecting or claiming that their decisions should be directly enforceable by civil courts. Thus, it is possible that Muslim arbitration tribunals may have a basis for expecting such enforceability; but Muslim councils – offering mediation but not arbitration – will not have reason for expectation of civil court enforcement of agreements achieved through mediation processes. The Muslim tribunals and councils now operating in the UK, therefore, require separate assessments.<sup>125</sup> In this section we outline what is currently known, believed, and feared about operations of Muslim arbitration tribunals and mediation councils and their effects for women.

#### 1. Muslim Arbitration Tribunals: Operations and Effects for Women

In September 2008,<sup>126</sup> the beginning of arbitration services by the Muslim Arbitration Tribunal (hereinafter, “MAT”) in Warwickshire was formally announced by Sheik Faiz-ul-Aqtab Siddiqi, who stated that the MAT had begun to conduct arbitration concerning family matters including “domestic violence, nuisance, divorce and inheritance cases”<sup>127</sup> pursuant to the statute governing arbitration in England and Wales, the *Arbitration Act 1996*. Provisions of this *Act* authorize parties – by agreement – to obtain resolution of their controversies by binding arbitration – with arbitral awards to be enforced by civil courts.<sup>128</sup>

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*Research Study Funded by the AHRC* (June 2011), available at <http://www.law.cf.ac.uk/clr/Social%20Cohesion%20and%20Civil%20Law%20Full%20Report.pdf> [hereinafter *Cardiff Report*]. The courts examined were the Catholic National Tribunal for Wales in Cardiff; the Jewish London Beth Din, Family Division; and the Sharia Council of the Birmingham Central Mosque. *Id.* at 5.

<sup>125</sup> *Id.* at 42.

<sup>126</sup> Abul Taher, *Revealed: UK's First Official Sharia Courts*, TIMESONLINE (Sept. 14, 2008), <http://www.timesonline.co.uk/tol/news/uk/crime/article4749183.ece>.

<sup>127</sup> *Id.*

<sup>128</sup> Arbitration Act, 1996, c. 23, §58 (U.K.) (specifying: “An award made by the tribunal pursuant to an arbitration agreement is final and binding on both parties and on any persons claiming through or under them. Section 66 provides that an arbitral award: ...may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same

The enactment of this *Arbitration Act* contributed to the ongoing trend toward the privatization of law, and in the direction of permitting greater authority in individuals to agree to settle their controversies outside the civil court system.<sup>129</sup> Beyond requiring written consent of parties,<sup>130</sup> the limitations placed on arbitration processes by explicit provisions of the *Act* are minimal.<sup>131</sup> Notably, the 1996 *Act* changed the previously operative legislation by reducing the possibility of appeal from an arbitral decision. It provides that civil courts will enforce arbitral decisions unless a court finds that there exists some “public policy” that “requires” its non-enforcement.<sup>132</sup>

As a form of alternative dispute resolution in the UK, arbitration has been used extensively by parties seeking rapid and efficient resolution of commercial matters. Outside the area of commercial matters, however, the scope of arbitration jurisdiction remains imperfectly defined. The 1996 *Arbitration Act* itself does not clearly define that scope. For example, the *Act* does not explicitly limit arbitration to civil matters and exclude its operation in matters of criminal law – though that limiting principle is universally recognized. Also, while the *Act* does not provide explicitly for arbitration of family matters, neither does it specifically define such matters as non-arbitrable. Thus, the *Act* does not clearly designate whether religious courts are authorized to arbitrate family matters on the basis of religious – e.g., *sharia* – law. The tribunals that now operate as parts of the MAT (hereinafter, “MATs”) do clearly advertise themselves as arbitrators of family matters (quite broadly defined) on the basis of religious – i.e., *sharia* – law.

Since 2007, additional (in 2012, at least four more) Muslim arbitration tribunals have begun to operate in the UK as branches of the MAT.<sup>133</sup> As

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*effect.*”).

<sup>129</sup> Thus, the UK *Arbitration Act 1996* bore strong resemblance to the Ontario *Arbitration Act of 1991*.

<sup>130</sup> Arbitration Act, 1996, c. 23, § 1 (U.K.) (requiring agreement or consent, which has always been understood to be the necessary foundation for arbitration).

<sup>131</sup> Human Rights law provisions, however, may operate – beyond the *Arbitration Act* itself – as external constraints on the arbitration process. See Cardiff Report, *supra* note 124, at 21 (discussing the protection of right to a fair trial specified by *Article 14* of the *International Covenant on Civil and Political Rights*, as well as the protection of right to fair trial assured by *Article 6* of the *European Convention on Human Rights* made part of English Law by the *Human Rights Act 1998*).

<sup>132</sup> Arbitration Act 1996, c. 23 § 67(1)(a) (U.K.) (providing an arbitral award may be challenged on the basis of lack of substantive jurisdiction in the arbitration tribunal); *Id.* at §68(2) (providing possibility of appeal “on the ground of serious irregularity affecting the tribunal, the proceedings or award”); *Id.* at §68(2)(g) (listing such “serious irregularities...which the court considers has caused or will cause substantial injustice to the applicant”).

<sup>133</sup> There is no official registry of arbitrators, but additional Muslim arbitration tribunals

public awareness of the operation of the MATs has grown, numerous features of their operations have been claimed to be problematic for women. Challenges to the continuing operation of the tribunals have cited: the particular law governing the operations (with the claim that *sharia* is both uncertainly-defined and intrinsically attached to gender inequality); the procedures of tribunals which may disfavor women; the inability of many women, because of linguistic barriers, ignorance or external pressure, to truly agree or consent to arbitral jurisdiction, foregoing judicial determinations by civil courts; and, consequent financial harms, as religious tribunals' decrees typically afford women financial remedies significantly less than those to which they are entitled by civil law. Additionally, and importantly, there have also been concerns raised about the possibility that tribunals may exceed their remit – to women's serious detriment – by dealing with domestic violence incidents that ought to be handled by civil courts.

Assessment of the weight to be given to these challenges – based on assertions of harms to women – has been difficult because of the non-transparency of the tribunals. Tribunals' operations occur away from public access and scrutiny. Most of the information available about them is self-generated information made available on their websites. It appears that the tribunals do not purport to offer “legal” divorces (recognizable by civil law) – but to offer religious divorces pursuant to *sharia*. It is not at all unlikely that, pursuant to that approach, the tribunals' religious divorces may make, as a condition of the religious divorce, property-related decisions much less favorable for women than those that would be awarded under civil law.<sup>134</sup>

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now include, at least, branch courts in London, Birmingham, Bradford, and Manchester. See MUSLIM ARBITRATION TRIBUNAL, LIBERATION FROM FORCED MARRIAGES 19, available at [http://www.matribunal.com/downloads/MAT Forced Marriage Report.pdf](http://www.matribunal.com/downloads/MAT%20Forced%20Marriage%20Report.pdf). While our focus in this essay is on the at-least-partially visible tribunals that are clearly operating as branches of the MAT, it should be noted that there appear to be “many more courts” operating less-formally outside the aegis of the MAT. See DENIS MACEOIN, SHARIA LAW OR ‘ONE LAW FOR ALL?’ 3, 69 (David Green ed., Civitas: Institute for the Study of Civil Society) (2009), available at <http://www.civitas.org.uk/pdf/ShariaLawOrOneLawForAll.pdf>. Indeed, the Civitas report indicates that “an indeterminate number of sharia courts or tribunals have emerged and are currently working in the UK...Most reports cite five courts as working in this way....However, our investigations indicate that a considerably larger number – 85 at least – are operating mainly out of mosques dotted around the country.” See also ONE LAW FOR ALL, SHARIA LAW IN BRITAIN: A THREAT TO ONE LAW FOR ALL & EQUAL RIGHTS 9 (2010) (noting that there has also been an additional tribunal established in Wales), available at [http://www.onelawforall.org.uk/wp-content/uploads/New-Report-Sharia-Law-in-Britain\\_fixed.pdf](http://www.onelawforall.org.uk/wp-content/uploads/New-Report-Sharia-Law-in-Britain_fixed.pdf).

<sup>134</sup> See Fournier, *supra* note 72, at 26 (noting the willingness of British courts to enforce the *mahr* provisions by which the husband agrees to pay to the wife a certain sum of money in the event of termination of marriage by divorce). Tribunals and councils, on the other hand, appear ready to require or accept a wife's foregoing her entitlement to *mahr* – without inquiry

Apart from property-related matters, some information – especially about the consent and domestic violence matters – has come from accounts of the Muslim arbitration tribunals provided by lawyers and by members of advocacy groups serving Muslim women. That emerging information definitely does give reason for concern.

For example, a major concern about the operation of Muslim arbitration tribunals has been that women submitting to arbitration procedures may stay with the decision-making processes of their communities because of ignorance that civil law alternatives exist or because of strong family and community pressure. And, that ignorance or pressure has been seen as amounting to “coercion” that obviates the necessary “consent” or “agreement” to arbitration. Fionnuala Murphy has written powerfully about the family and social pressure operative in many Muslim women’s lives.<sup>135</sup> As illustrative of these pressures and how they are inadequately addressed by the MAT, Murphy notes: the well-documented gravity of the “forced marriage” problem in the UK;<sup>136</sup> the MAT’s claims of entitlement to exclusive jurisdiction in its courts over forced marriage matters;<sup>137</sup> and the fact that the MAT approach to determining whether women and girls have been “coerced” into marriage is in conflict with governmental guidelines.<sup>138</sup>

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into the fairness of that surrender – in order to obtain her husband’s consent to the divorce. *Id.*; BANO, MUSLIM WOMEN, *supra* note 89, at 93.

<sup>135</sup> See Fionnuala Murphy, *Sharia Law in the UK: Compromising the safety of women and children*, in EQUAL AND FREE? EVIDENCE IN SUPPORT OF BARONESS COX’S ARBITRATION AND MEDIATION SERVICES (EQUALITY) BILL 63 (Charlotte Rachael Proudman ed., 2012). Murphy works with the Iranian and Kurdish Women’s Rights Organization (IKWRO) which provides advice and support to women and girls “from the UK’s Middle Eastern communities,” whose main problems are “domestic abuse, forced marriage, and ‘honour’ based violence.” *Id.*

<sup>136</sup> *Id.* at 65 (noting “the Forced Marriage Unit, a branch of the UK Foreign and Commonwealth Office, dealt with over 1700 cases of forced marriage in 2010”. The majority of these cases of forced marriage deal with “young women, and IKWRO has worked on forced marriage cases involving girls as young as 13”). See also LOVE, HONOUR, AND DISOBEY (Faction Films Jan. 2006), available at <http://www.southallblacksisters.org.uk/love-honour-and-disobey/>.

<sup>137</sup> Murphy, *supra* note 135, at 66 (summarizing the MAT’s “civil liberty” claim to such entitlement: “The MAT repeatedly claims that it is the ideal body to tackle forced marriages and argues that the problem ‘would not befit an official, judicial or governmental jurisdiction. Any such attempts would be deemed by the community as infringement of their civil liberties and the government placing further obstacles prejudicing the Asian community.’ [But, Murphy emphasizes,] Forced marriage is a violation of human rights, and most often involves the commission of serious crimes. Protecting victims from these crimes must be the priority in any response to forced marriage, and IKWRO is extremely concerned that the MAT suggests that the community’s ‘civil liberties’ in relation to the practice of forced marriage should take precedence over the protection of individuals from it.” *Id.*, at 64). See MUSLIM ARBITRATION TRIBUNAL, LIBERATION FROM FORCED MARRIAGES, *supra*, note 133, at 14.

<sup>138</sup> Murphy, *supra* note 135, at 66. The MAT approach involves interviewing the family of

Besides indications that the MAT supports coercions of women, there are also indications that the MAT both exceeds its authority and is reckless – with regard to women’s well-being – in its dealings with situations of domestic violence. While the MAT is clearly not authorized to deal with criminal matters, Murphy notes that it does deal with domestic violence matters that belong under the jurisdiction of British criminal courts. As indicative of this reality and of the MAT approach to domestic violence, she points to Sheik Siddiqi’s statement that, as of September 2008, “[T]he MAT had dealt with six domestic violence cases. In each of the cases, the women withdrew complaints they had made to the police and the husband was ordered to attend anger management classes and to receive mentoring from community elders.”<sup>139</sup> Murphy’s assessment of the MAT is that: “[W]hile operating with a semi-official status, many MAT members appear to have no understanding of effective ways to deal with violence against women and children.”<sup>140</sup>

Expanding on that criticism, Murphy proposes that “religious dispute resolution is not an appropriate means to deal with violence against women and children.”<sup>141</sup> She also references the 2009 UN Handbook for Legislation on Violence against Women, which recommends: “[W]here there are conflicts between religious law and the formal justice system, the matter should be resolved with respect for the human rights of women and in accordance with gender equality standards.”<sup>142</sup> The reports about the tribunals’ handlings of domestic violence issues and about their approaches to potentially non-consenting women are strongly suggestive that many women (and their children) may become exposed to substantial risks through experiences of tribunals’ intervention and arbitration.

## 2. *Sharia* Councils: Operations and Effects for Women

The operations of Muslim mediation councils (“*sharia* councils”) concerning family matters differ from those of arbitration tribunals, in that agreements reached through mediation processes are not understood to have the presumed finality of arbitration decisions or to be directly enforceable by

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the potentially-coerced party. This practice conflicts with FMU guidelines, and is also contradicted by IKWRO’s experience that: “[I]nvolvement with the family will deter a victim from speaking about what has happened to them, and can put them in significant danger.” *Id.*

<sup>139</sup> *Id.* at 63 n.6.

<sup>140</sup> *Id.* at 64.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* See U.N. Dep’t of Econ. & Soc. Affairs: Div. for the Advancement of Women, Handbook for Legislation on Violence Against Women 16, U.N. Doc ST/ESA/329 (2010), available at [http://www.un.org/womenwatch/daw/vaw/handbook/Handbook for legislation on violence against women.pdf](http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf).

civil courts. For that reason, it might be “assumed that they pose less possible harm to women’s interests than do the tribunals. Although more study remains to be accomplished,<sup>143</sup> more is now known about councils than about arbitration tribunals.<sup>144</sup> The emerging information about the councils, including information reported by women who have experienced their processes, indicates bases for concerns that parallel and amplify concerns expressed about the MATs.

*i. Operations of the Mediation Councils*

At present, there are numerous *sharia* councils operating throughout the UK.<sup>145</sup> The councils are “self-constituted” and independent of one another; and, they operate without governance or oversight by any central authority.<sup>146</sup> Having grown somewhat organically from the early 1980s onward,<sup>147</sup> in their operation as unofficial dispute resolution mechanisms, the councils deal primarily with marital conflicts, especially religious divorce matters.<sup>148</sup>

Women in Muslim communities may seek religious divorces if they have never been legally married in the UK. Some women find themselves in this situation when they have had religious marriages (*niqah*) which have never been “registered” so as to make the marriages legally-recognizable in England or Wales and the women therefore eligible for civil divorces. Alternatively, if they have been legally married in the UK, and sometimes even if they have already been legally divorced, they may want to obtain Muslim divorce certificates in order to comply with their communities’ norms. In any event, the mediation councils will apply Muslim laws in determining whether a woman seeking a divorce will be granted one, and, if

<sup>143</sup> Shortage of empirical data is due in part to councils’ lack of cooperation, itself due to their alienation from the British legal system.

<sup>144</sup> Concerning women’s experiences of the Councils, *see generally* BANO, MUSLIM WOMEN; *supra* note 89; MURPHY, *supra* note 135; PRAGNA PATEL & UDITI SEN, SOUTHALL BLACK SISTERS, COHESION, FAITH AND GENDER – A REPORT ON THE IMPACT OF THE COHESION AND FAITH-BASED APPROACH ON BLACK AND MINORITY WOMEN IN EALING (2010); WARRAICH & BALCHIN, *supra* note 103; Act4America, *BBC Panorama Documentary: Secrets of Sharia councils: Hidden Camera Report*, YOUTUBE (Jul. 12, 2013), [http://www.youtube.com/watch?v=XOaJ\\_y8piNE](http://www.youtube.com/watch?v=XOaJ_y8piNE).

<sup>145</sup> *See* MACEOIN, *supra* note 133, at 69.

<sup>146</sup> WARRAICH & BALCHIN, *supra* note 103, at 78.

<sup>147</sup> *See Our History*, THE ISLAMIC SHARI’A COUNCIL, <http://www.islamic-sharia.org/4.html> (last visited Mar. 16, 2014) (stating that a group of Muslim scholars and field workers from the Muslim community met in Birmingham in 1982 and established the “Islamic Shari’a Council”, the oldest of its kind in England, based in Leyton, East London).

<sup>148</sup> Councils deal with various matters, including finance and inheritance issues. Nevertheless, marriage, and divorce especially, constitute the overwhelming majority of their work. *See infra* note 150.

so, which type of divorce it will be.

*ii. Effects for Women*

Women constitute the overwhelming majority of individuals approaching *sharia* councils, and

this fact is regularly identified by council-proponents as indicating the necessity<sup>149</sup> and adequacy of services that councils provide for women.<sup>150</sup> However, a range of problematic realities have now been both identified and documented, leading to concern about councils' operations. The primary interest of most women council-users (especially those whose marriages have not been registered in British civil courts<sup>151</sup>) will be that of obtaining a Muslim divorce certificate. Obstacles they are likely to face include – but are not limited to – the following:

—**the nature of spaces and locations in which mediation occurs:** Bano reports that councils “often continue to be based in mosques and

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<sup>149</sup> Regarding the necessity of alternatives to – or drastic improvement of – civil court processes relating to family matters, it is a reality that solicitors tend to remain uninformed about Muslim customary and religious practices and about Muslim laws. Bano has reported the disappointment of several of her interviewees, for example citing the following case: “I was very disappointed with my solicitor because I rang him time and time again but he just couldn't understand the issues in my case. He just told me my marriage was valid when it wasn't, so he obviously didn't know the law himself.” BANO, MUSLIM WOMEN, *supra* note 89, at 223. Warraich and Balchin have also noted this deficit, suggesting that the “lack of space in the English system for appropriate solutions to dilemmas facing people is precisely one of the major factors behind the emergence of non-statutory bodies such as the Shariah councils.” WARRAICH & BALCHIN, *supra* note 103, at 82. They have observed, as well, that the flaws of the British system are particularly noticeable for dual-nationals. *See id.* at 85. While significant failures of civil court systems (in the UK, and also in Canada and the US) cannot be discounted – and still need to be remedied – women's experiences of councils do indicate clearly that the councils' processes often undermine gender equality.

<sup>150</sup> Proponents of *sharia* (such as Suhaib Hasan from the Leyton Islamic Sharia Council or Faradhi Musleh from the Islamic Forum Europe) insist that up to 95% of councils users are women. Notwithstanding the lack of reliable data, this figure seems not unlikely – since husbands can unilaterally pronounce a Muslim divorce but wives need to obtain a religious scholar's ruling. However, the argument that councils meet women's needs simply because the overwhelming majority of users are women is highly misleading: men can divorce without relying on a council; women cannot. *See Services*, THE ISLAMIC SHARI'A COUNCIL, <http://www.islamic-sharia.org/2.html> (last visited Apr. 19, 2014).

<sup>151</sup> A key concern is the prevalence of Muslim marriages (*niqah*). Unless such marriages are registered before civil courts they are not considered valid (i.e., spouses in unregistered unions are in effect unmarried under English family law). Bano emphasizes that the “non-registration issue must be understood in relation to power relations and the positioning of women in family and marriage relationships (...) These women clearly lacked power and position within their new-founded famil[ies] to successfully negotiate the formal recognition of marriage and they remained dependent on the willingness of their husbands to comply.” BANO, MUSLIM WOMEN, *supra* note 89, at 161, 163-164.

imams serve as religious scholars on the council's body while operating from a separate room."<sup>152</sup> Given that mosques are gendered spaces in which women's autonomous voices tend to be marginalized,<sup>153</sup> this spatial location, and the fact that councils are all-male bodies,<sup>154</sup> together assert the legitimacy – even supremacy – of male religious authority within the relevant communities. As Bano has noted, the “powerful role of the [*sharia* council's] mediator in constructing ideologies of Muslim family and marriage plays a pivotal role in the ways in which the [marital] dispute is framed and its outcome.”<sup>155</sup> The reason this is troubling is that empirical data show that communities' values and individual women's interests may well be at odds. Community councils will tend to be largely preoccupied with the maintenance of “the traditional Muslim family.”

—**women's inability to give meaningful consent:** The “non-consent” issue has been discussed in conjunction with operations of the arbitration tribunals. Greater access to councils than to tribunals has provided additional evidence of the ignorance about the law and/or the intensive community and family pressures that can effectively require women's recourse to council proceeding. One telling example: During Bano's direct observation of counseling sessions in one *sharia* council alone,<sup>156</sup> in 24 out of 26 cases, the woman seeking divorce was accompanied by a family member. The (female)

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<sup>152</sup> Bano notes that the historical development of the councils has caused them to operate now in spaces and locations that may be intrinsically inhospitable to women. Following the immigration influx in which people brought country-of-origin customs and practices along with them into metropolitan areas of England, issues related to family disputes within Muslim communities were handled informally by imams. The spread of councils, consequently, was closely associated with the development of mosque networks. *See id.* at 91.

<sup>153</sup> *See id.* at 91 (concerning marginalization, Bano notes that “[W]omen are not actively involved in mosques committees, they have little input in the administrative tasks of running a mosque and when they are involved, they are designated to the realm of ‘women's issues.’”). *See also* Qudsia Mirza, *Islam, Hybridity and the Laws of Marriage*, 14 AUST. FEMINIST L.J. 1, 13 (2000) (stating that “[t]he installation of separate entrances, separate seating arrangements and the bifurcation of rooms by screens or awnings to create sharp, well-defined boundaries between sections of the mosque are the means by which the contours of gendered space and the pattern of restricted interaction between the sexes are produced.”).

<sup>154</sup> Bano notes that until 2006 there was no female decision-making member sitting on a *sharia* council in Britain. BANO, MUSLIM WOMEN, *supra* note 89, at 107. This reality contrasts with the situations in, for example, Pakistan and Bangladesh, where “women are Family Courts and High Court judges.” WARRAICH & BALCHIN, *supra* note 103, at 66. A limited number of women were involved in counseling and mediation services in some of the councils surveyed by Bano, but none of them acted as religious scholars or sat on council panels – the bodies that makes final decisions. By 2011, the Muslim Family Support Service and Sharia Council in Birmingham had appointed just one woman onto its council panel. BANO, MUSLIM WOMEN, *supra* note 89, at 288.

<sup>155</sup> BANO, MUSLIM WOMEN, *supra* note 89, at 111.

<sup>156</sup> *See id.* at 123-30 (discussing The Muslim Family Support Service and Shari'ah Council of Birmingham).

head of counseling services in this particular council was well aware of “familial pressure on the women who may be encouraged to reconcile” with their husbands.<sup>157</sup> Women’s testimonies confirm that they often face pressure to remain married<sup>158</sup> in order to maintain the honor (*izzat*) of the family. In this context, women stress that relying exclusively on British civil courts to obtain a divorce would lead to their being labeled traitors to their community, culture, and religion.

—**mandatory reconciliation processes:** While Muslim laws provide for various divorce options,<sup>159</sup> all schools of Muslim jurisprudence agree that attempts to reconcile the parties must be made before a divorce is effective, and insist on the involvement of religious scholars to encourage spousal reconciliation. While women are often reluctant to pursue reconciliation, because, typically, they will have attempted reconciliation prior to initiating contact with a council,<sup>160</sup> council scholars routinely suspect that women have not tried hard enough to reconcile with their husbands. Women are most distressed when councils put them at risk by insisting on reconciliation sessions with abusive husbands, ignoring their warnings about having endured domestic violence.<sup>161</sup>

—**councils’ practices of exceeding their actual authority:** English law does not allow *sharia* councils (or any other mediation bodies) any jurisdiction over criminal matters. Yet, evidence shows that some councils do involve themselves with criminal matters such as domestic violence, causing wives to receive threats from their husbands as a result.<sup>162</sup> Additionally, and particularly worrisome to many women, there are

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<sup>157</sup> *Id.* at 124-25.

<sup>158</sup> Several testimonies collected by Bano highlight the family and community pressures women face. For example, one woman stated that: “It took me a long time to get the strength to do what was right. My Dad goes to the mosque a lot and he spoke to one of the *maulvis* there and he came back to me and said that only my husband could divorce me and that I should stay with him to make it work.” *Id.* at 202. Another explains that: “I was the shameless one who wanted a divorce... My mum would meet someone in the shop who would say your daughter’s a whore because she did this, this and this and people would invite themselves to my family home, uncles of mine, and say you know you should now disown her and have nothing to do with her and all this kind of stuff. So my family had that for many, many years.” *Id.* at 62.

<sup>159</sup> The range of divorce alternatives is not necessarily recognized across all Muslim contexts. *See generally* WOMEN LIVING UNDER MUSLIM LAWS, KNOWING OUR RIGHTS: WOMEN, FAMILY, LAWS AND CUSTOMS IN THE MUSLIM WORLD (3d ed. 2006) (providing a comprehensive overview of existing laws and customs pertaining to Muslim marriage, divorce and child custody in 22 different countries).

<sup>160</sup> BANO, MUSLIM WOMEN, *supra* note 89, at 130.

<sup>161</sup> *Id.* at 126, 213, 227.

<sup>162</sup> *Id.* at 125-26. This matter has already been discussed in its connection to arbitration tribunal activity.

numerous instances in which councils continue to insist on reconciliation even when women have – prior to coming to the councils – obtained restraining orders against their husbands, issued by British courts.<sup>163</sup>

—**narrow expertise of councils’ religious scholars:** Another harm to women arises out of the advice often given them during mediation processes. Whether or not gender inequity is intrinsic to Muslim jurisprudence,<sup>164</sup> much equality-undermining advice derives from the largely conservative opinions that councils’ religious scholars in Britain tend to promote. Scholars vary in the interpretative approaches they adopt toward Muslim laws, but their training<sup>165</sup> – in conjunction with the worldwide rise of religious fundamentalism – works to limit women’s rights in the UK. An important reality is the “Taliban-style interpretations of Muslim laws coming to Britain via *imams* imported from South Asia preaching in British mosques.”<sup>166</sup> The particular version of “law” applied by council scholars will tend to produce results for women significantly less favorable than those assured by civil law.

Councils’ scholars attitudes tend to reflect the cultural notion that, as one cleric puts it, “divorce is shunned in our communities and rightly so.”<sup>167</sup> Scholars therefore construct a woman’s desire to divorce “as threatening to the stability and continuity of the traditional Muslim family,”<sup>168</sup> and of the community as a whole. This, it has been noted, leads to male-dominated councils’ providing “inaccurate and outdated understanding of forms of divorce initiated by women in Muslim laws.”<sup>169</sup> Balchin observes: “Having married and divorced in Pakistan, having edited *KNOWING OUR RIGHTS*,<sup>170</sup> and having assisted dozens of women in crisis in Britain who have interacted with the Sharia councils, I can confidently state that the Sharia councils’ interpretations here in Britain are among the most conservative and gender

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<sup>163</sup> *Id.* at 130.

<sup>164</sup> Sudanese Muslim scholar Abdullahi An-Naim documents the multiplicity of ways in which “aspects of historical Shari’ah in relation to women ... violate the constitutional principle of equality before the law.” AN-NAIM, *supra* note 117, at 89.

<sup>165</sup> See BANO, *MUSLIM WOMEN*, *supra* note 89, at 86 (noting “advisors (scholars) had received formal Islamic jurisprudential training in India, Pakistan, Egypt, Saudi Arabia or Yemen while *imams* from Pakistan had been involved in setting up each of [the] councils [under study] ... Shari’ah councils are therefore a product of transnational networks, operate within a national and global landscape and mirror the local ethnic profile of Muslim communities in which they are situated.”).

<sup>166</sup> WARRAICH & BALCHIN, *supra* note 103, at 77.

<sup>167</sup> BANO, *MUSLIM WOMEN*, *supra* note 89, at 58. These attitudes have also been expressed by other similar Muslim clerics. See *id.* at 121-22.

<sup>168</sup> *Id.* at 139.

<sup>169</sup> WARRAICH & BALCHIN, *supra* note 103, at 69.

<sup>170</sup> See *WOMEN LIVING UNDER MUSLIM LAWS*, *supra* note 159, at 7.

discriminatory in the world.”<sup>171</sup>

The features of the mediation councils most threatening to women’s interests have motivated the introduction of the *Cox Bill*. The perception in the UK of actual harms already being experienced by women from Muslim communities has been summed up by the “One Law For All Campaign”, supporters of the *Cox Bill* who call for rejection of “the discriminatory parallel legal system running counter to British law” based on the documentation of “women being held to ransom, told to remain in violent situations, blamed for the violence they face, refused divorces over many years, and placed under undue pressure including with regards to child access and welfare.”<sup>172</sup>

Documentation that has now been produced – both independent of and in conjunction with the move to enact the *Cox Bill* – now appears to establish bases for belief that *sharia* council operations may discriminate against many women in highly-troubling ways. It remains uncertain what the legal response to that reality will be.

### C. Arbitration and Mediation (Equality) Bill

In June 2011, Baroness Caroline Cox introduced into the House of Lords the *Arbitration and Mediation Services (Equality) Bill* – which we designate as *Cox Bill #1* – intended to amend various statutes governing practices of arbitration and mediation in the UK that she had come to believe were permitting gender discrimination causing significant suffering to women and girls.<sup>173</sup> The most notable provision of *Cox Bill #1* was its absolute prohibition of any arbitration of family law matters.<sup>174</sup> With this provision, the *Bill* followed the model of the Province of Quebec. Unlike Ontario, which now bars arbitration on the basis of religious or other non-Canadian law,<sup>175</sup> *Cox Bill #1* – more broadly – entirely barred every form of arbitration of any family law matter.

<sup>171</sup> Balchin, *supra* note 116.

<sup>172</sup> Maryam Namazie, *BBC Panorama Programme on Sharia: It is enough now*, FREETHOUGHT BLOGS (Apr. 24, 2013), <http://freethoughtblogs.com/maryamnamazie/2013/04/24/sharia-panorama/>; Maryam Namazie, *Update from One Law for All*, FREETHOUGHT BLOGS (Apr. 26, 2013), <http://freethoughtblogs.com/maryamnamazie/2013/04/26/update-from-one-law-for-all/>.

<sup>173</sup> Arbitration and Mediation Services (Equality) Bill, 2010-12, H.L. Bill [72] cl. 1 §4(3A) (Eng. and Wales) [hereinafter *Cox Bill #1*], available at <http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0072/2012072.pdf>.

<sup>174</sup> *Id.* *Cox Bill #1, Part Two, cl. 4* provided for amendment of the Arbitration Act 1996 by introduction of a new specification: Section 80A Criminal and family law matters not arbitrable: Any matter which is within the jurisdiction of the criminal or family courts cannot be the subject of arbitration proceedings.”

<sup>175</sup> See Family Statute Law Amendment Act, *supra* note 76 and accompanying text.

*Cox Bill #1* also regulated arbitration by incorporating new provisions into the *Equality Act 2010* that specifically prohibit sex-discriminatory arbitration practices.<sup>176</sup> It added provisions criminalizing the conduct of any person who “purports to determine” a family law matter in arbitration proceedings<sup>177</sup> or who “falsely purports to exercise any of the powers or duties of a court to make legally binding rulings.”<sup>178</sup> And, it included provisions, with further amendments to the *Equality Act*, defining the “public sector equality duty” as including a duty in some public officials to act affirmatively in order to provide protections of persons whose marriages might not be legal.<sup>179</sup>

*Cox Bill #1* also included provisions relating to “mediation settlement agreements.” These provisions were intended to invite meaningful court assessment of “the genuineness of a party’s consent” to participation in a mediation process.<sup>180</sup>

The new measures in their totality were intended to achieve the objectives of: “protection for women from discrimination and intimidation; prevention of the establishment of a parallel quasi-legal jurisdiction; and a requirement for relevant authorities to provide information to women to enable them to know their legal rights and how to access them.”<sup>181</sup>

The language of *Cox Bill #1* was inclusive and neutral. With regard to arbitration-related provisions, it would treat would-be arbitrators equally without distinguishing between or among religions and it would not treat would-be religious arbitrators differently from non-religious ones. Nonetheless, it was clear that the Bill was intended to address primarily the harms that Baroness Cox has discerned in the operations of Muslim tribunals

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<sup>176</sup> *Id.* cl. 1 § (2)(11) to (12)(a)(c) (stating that “[a] person must not, in providing a service in relation to arbitration, do anything that constitutes discrimination, harassment or victimization on grounds of sex... [D]iscrimination on grounds of sex would include: (a) treating the evidence of a man as worth more than the evidence of a women, or vice versa, (b) proceeding on the assumption that the division of an estate between male and female children on intestacy must be unequal, or (c) proceeding on the assumption that a woman has fewer property rights than a man, or vice versa.”).

<sup>177</sup> *Id.* at cl. 7 § (2)(1)(a).

<sup>178</sup> *Id.* at cl. 7 § (2)(1)(b).

<sup>179</sup> *See id.* at cl. 1 § (4)(3A), (3B). Thus, the “public sector equality duty” as defined by *Cox Bill #1, Part one, cl. (4)(3A)* included a duty to take “steps to take account of the fact that those who are married only according to certain religious practices and not according to law ... may be without legal protection; and cl. 4 (3B) specified that such steps would include “(a) informing individuals of the need to obtain an officially recognized marriage in order to have legal protection.”

<sup>180</sup> *See id.* at cl. 5 § (2)(1)(5).

<sup>181</sup> *See* Charlotte Rachel Proudman, *Executive Summary, in Equal AND FREE?, EVIDENCE IN SUPPORT OF BARONESS COX’ ARBITRATION AND MEDIATION SERVICES (EQUALITY) BILL 9* (Charlotte Rachael Proudman, ed., 2012).

and mediation councils. Indeed, in May 2012, Baroness Cox distributed to members of the House of Lords a booklet containing information about the circumstances that led her to believe her Bill was urgently needed,<sup>182</sup> and the evidence compiled in the booklet was evidence about harms to women being produced by the Muslim arbitration tribunals and *sharia* councils.<sup>183</sup>

The booklet, according to Baroness Cox, provided evidence concerning “the problems and suffering of Muslim women in Britain today, including: condoning of domestic violence by Sharia courts and councils; asymmetrical access to divorce; rulings regarding child custody that ignore the best interests of the child; discriminatory policies defining the testimonies of women as being only worth half that of men; and the denial of the concept of marital rape.”<sup>184</sup> The documentary evidence provided included women’s written statements about their experiences of councils; statements of service providers and advocacy groups led by minority women; and, views of UK lawyers.

A “second reading” and discussion of the Bill took place in the House of Lords on October 19, 2012.<sup>185</sup> Several members expressed strong statements of support, but an amendment of the Bill was also proposed, to assure that the operation of Jewish *Beth Din* would not be barred by the proposed law.

Notable among the statements expressing concern for Orthodox Jewish interests was that of the Lord Bishop of Manchester, who identified himself as the “chairman of the Council of Christians and Jews.”<sup>186</sup> Calling for continuing recognition of the decrees of *Beth Din*, the Bishop stated that if the *Cox Bill* were to apply to the *Beth Din*: “For those Orthodox Jews who wish to follow ancient Jewish law and bequeath their estate to their sons while conferring substantial dowries on their daughters, if a man died intestate his children would not be able to seek an adjudication of the *Beth Din* as to the disposition of the estate.”<sup>187</sup> While the meaning of the Bishop’s statement was not fully transparent, it suggested both a readiness to discriminate between Jewish courts and Muslim courts, and a readiness to overlook a likelihood of *Beth Din* gender discrimination, based on Jewish law, also urged that with regard to inheritance rights of sons and daughters. Sentiments similar to those of the Lord Bishop of Manchester were offered

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<sup>182</sup> See Caroline Cox, *Letter, in* EQUAL AND FREE?, EVIDENCE IN SUPPORT OF BARONESS COX’ ARBITRATION AND MEDIATION SERVICES (EQUALITY) BILL 5 (Charlotte Rachael Proudman, ed., 2012).

<sup>183</sup> Proudman, *supra* note 181.

<sup>184</sup> *Id.*

<sup>185</sup> See 19 Oct. 2012, PARL. DEB., H.L. (2012) 1694 (U.K.), available at <http://services.parliament.uk/bills/2012-2013/arbitrationandmediationservicesequality.html>.

<sup>186</sup> *Id.* at 1694 (statement of Lord Bishop of Manchester).

<sup>187</sup> *Id.*

by Lord Kalms.<sup>188</sup> We hear, in these comments, echoes of the Jewish-Muslim tensions that operated in the controversy about the Ontarian Muslim Arbitration Tribunal proposal.<sup>189</sup> Responding to these comments seeking to discriminate between Jewish and Muslim courts (perpetuating the former while excluding the latter), Baroness Cox indicated her readiness to amend *Cox Bill #1*.<sup>190</sup>

The Government stated its position in opposition to the Bill and indicated that it was taking steps to assure that Muslim women would become informed of their rights under British law.<sup>191</sup> *Cox Bill #1* did not progress further during 2012.

In May 2013, Baroness Cox introduced a new version of her proposed legislation – which we here designate as *Cox Bill #2* – into the House of Lords.<sup>192</sup> Still titled *Arbitration and Mediation Services (Equality) Bill*, the *Cox Bill #2* differed importantly from its predecessor version. Notably, and presumably in concession to political pressures, Baroness Cox eliminated from *Cox Bill #2* the provision that would have removed family matters entirely from arbitration.

At the time of this writing, *Cox Bill #2* has not been scheduled for a “second reading” and discussion in the House of Lords. In its present formulation, the proposed legislation corresponds neither to the legislation in effect in Quebec (barring all arbitration of family law matters) nor to the legislation currently in place in Ontario (barring arbitration of family matters based on religious law or on any other non-Canadian law). It thus appears that in order to avoid discrimination between Jewish and Muslim courts, *Cox Bill #2* abandoned the strong commitment to women’s interests that had been evidenced in *Cox Bill #1*.

In another recent British development affecting the interests of women and supporting their being treated less favorable than men in civil courts, in

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<sup>188</sup> *Id.* at 1701-02 (statement of Lord Kalms) (speaking of the need for continued protection of *Beth Din*, and attempting to distinguish the Jewish courts’ operations from those of “Sharia courts.”)

<sup>189</sup> See Ali and Whitehouse, *supra* note 35 and accompanying text; and see Slimi, *supra* note 60.

<sup>190</sup> *Id.* at 1684 and 1686 (statement of Baroness Cox).

<sup>191</sup> *Id.* at 1710-14 (statement of Lord Gardiner of Kimble for the Government) (stating that the Bill was not needed because “[T]he Government are fully committed to protecting the rights of all citizens, and there is legislation in place to uphold those rights....[T]he Government are actively working with groups to ensure that there is awareness and a change of attitude.”). But see Douglas Murray, *The government kicks the Sharia debate into the long grass*, THE SPECTATOR, October 22, 2012, available at <http://blogs.spectator.co.uk/douglas-murray/2012/10/the-government-kicks-the-Sharia-debate-into-the-long-grass>.

<sup>192</sup> Arbitration and Mediation (Equality) Services Bill, 2013-14, H.L. Bill [20] (U.K.), available at <http://services.parliament.uk/bills/2013-14/arbitrationandmediationequalityservices.html>.

March 2014, the Law Society of England and Wales (a group akin to the American Bar Association in the US) for the first time provided advice to solicitors on how to draft “Sharia-compliant” wills to be enforced by British courts. The Law Society’s new Practice Note makes clear than in Sharia-compliant wills, “male heirs in most cases receive double the amount inherited by a female heir of the same class.”<sup>193</sup>

### III. REALITIES OF *RELIGO-LEGALISM* IN THE UNITED STATES

In Canada and the UK, controversies about *sharia* tribunals were provoked by those entities’ emergence into public visibility and by their claims of entitlement to equal treatment vis-à-vis the judicial bodies of other religious groups, especially the *Beth Din* of Orthodox Judaism. There has not been any precisely parallel American development, but it would be a serious error to imagine that *religio-legalism* is not operating in the US or that there is no likelihood of imminent US controversy about *sharia*.

The political forces exercised by religious groups are powerful, and during the past two decades they have sometimes produced, in the US, extraordinary cedings of authority by civil government to religious-governmental entities. During the 1990s, such a move was evident when New York State’s legislature permitted a single Jewish religious group – a Satmar Hasidic community – to constitute its own “public” school district.<sup>194</sup> And during the first decade of the 21<sup>st</sup> century, as noted above, the

Supreme Court of the United States (hereinafter, “Supreme Court”) has seemed to act as a religious-court in abortion decisions, including most

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<sup>193</sup> See The Law Society, Practice Note, *Sharia succession rules* (Mar. 13, 2014), § 3.6, available at <http://www.lawsociety.org.uk/advice/practice-notes/sharia-succession-rules/#sharia3>. The Practice Note also makes clear that: illegitimate and adopted children are not *sharia* heirs; that non-Muslims may not inherit at all; and that only Muslim marriages are recognized. *Id.* We emphasize here that our concern focuses on the questionability of a Bar Association’s active facilitation of the drafting of wills whose provisions will so clearly contradict public policy protective of the interests of women and of children.

<sup>194</sup> After lengthy litigation, the New York State action was struck down as violative of the Establishment Clause. *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 690 (1994). However, the New York legislature eventually found a way to permit the continuing operation of the Kiryas Joel religious community as an independent school district. See Tamar Lewis, *Controversy Over, Enclave Joins School Board Group*, N.Y. TIMES (Apr. 20, 2002), <http://www.nytimes.com/2002/04/20/nyregion/controversy-over-enclave-joins-school-board-group.html>. As in many religious communities, a concern to constrict the roles of women was evident in Kiryas Joel. For example, community leaders cited religious convictions relating to sex-segregation in justification of Kiryas Joel schoolboys’ refusals to board school buses operated by women bus drivers. See *Bollenbach v. Board of Education of Monroe-Woodbury Cent. Sch. Dist.*, 659 F. Supp. 1450, 1474-75 (S.D.N.Y. 1987).

notably in *Gonzales v. Carhart*.<sup>195</sup>

The law-religion-women nexus has operated in the background or at the forefront of numerous constitutional developments of the years from 1990 to the present. That nexus has also figured in the Supreme Court's recent decision of a case involving a Christian religious court and its claim of exemption from federal anti-discrimination employment law.<sup>196</sup> It figures, as well, in emergent controversy about the place of *sharia* in American culture and constitutional law. Understanding of each of these developments requires some appreciation of the significant changes in the constitutional law-religion interaction that have been underway in the US since about 1990.

We have hoped that the history of the Canadian and British developments that we have presented in this essay may contribute toward informing the public discussion that will be provoked and required in the US in coming years concerning questions of *religio-legalism* and the law-religion-women nexus, and we will explore that possibility in *Part Four*. Preliminary to doing that, we first provide, in this *Part*, a tracking of the course of developments of the last 25 or so years in American constitutional law relating to religion and to women, highlighting ways in which those developments have enlarged the power of religious entities in general and have undermined protections of women's liberty and equality. Secondly, we examine the reality of Christian "religious tribunals" in the US. And, thirdly, we provide an account of the "anti-*sharia*" movement that has begun to develop within the specificities of the US context. Finally, we note very recent US governmental moves in the direction of increased religious "engagement" in the international area, which we believe portend worsening consequences for women.

A. *The American Constitutional Law-Religion-Women Nexus (1990-Present)*

During the four decades or so following the ending of World War II, there developed in the United States a social, cultural, and legal project of integrating into full and equal citizenship-status some non-Protestant religious Americans. This "religious pluralism" project was both grand in its aspiration and limited in its scope. Indicative of both the aspiration and its limits, a notion of "Judeo-Christianity" emerged in this period, and was

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<sup>195</sup> *Gonzales v. Carhart*, 550 U.S. 124 (2007) (striking down the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. Section 1531 (2000 ed., Supp. IV)). See Ashe, *supra* note 2, at 479-504.

<sup>196</sup> See *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* 132 S. Ct. 694, 705-08 (2012) (recognizing, for the first time, a Constitutionally-based "ministerial exemption" from Federal anti-discrimination law).

relied upon to identify American society and what Will Herberg would characterize as a “new religion of Americanism.”<sup>197</sup> Its focus was on integration or assimilation of Catholics and Jews and it was largely indifferent to the interests of members of other minority religions. Further, it had no aspirations whatsoever with regard to remediation of the inferior status of women. Indeed, during the first two decades of this project, governmental sex discrimination was not even recognized as a constitutional wrong. The Supreme Court played a major role in advancing the religious-pluralism project through its interpretations of the Free Exercise and non-Establishment mandates of the First Amendment.

Achieved in American constitutional law during the pluralism period were an understanding (based on Establishment Clause interpretations) that there exists in the United States a “wall of separation” between church and state, and understanding that this “wall” – however uncertainly defined – assures that government will not legislate with non-secular purpose; that it will neither support nor hinder religion; and that it will avoid “excessive entanglement” with religion.<sup>198</sup> Perfect separation of church and state was never achieved – as it perhaps never can be – but active governmental support of religious-denominational schools, for example, was minimal. And, concurrently, interpretations of the Free Exercise Clause meant that relatively modest religion-based exemptions from neutral governmental regulation would sometimes (especially in the area of unemployment compensation) – but only seldom – be required.<sup>199</sup>

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<sup>197</sup> See WILL HERBERG, *PROTESTANT-CATHOLIC-JEW* 36-37 (1960).

<sup>198</sup> The three-pronged “*Lemon* test” defined these standards. See *Lemon v. Kurtzman*, 403 U.S. 602, 603 (1971).

<sup>199</sup> The history of Free Exercise interpretations between *Sherbert v. Verner*, 374 U.S. 398 (1963) (requiring strict scrutiny of state’s unemployment compensation scheme and requiring religious exemption to benefit Seventh Day Adventist complainant) and *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (rejecting requirement of strict scrutiny as applicable in judicial review of neutral and generally applicable criminal (drug control) law, and finding no requirement of religious exemption from state’s unemployment compensation policies for benefit of persons terminated from jobs because of their participants in Native American religious ceremony involving use of peyote) discloses a dearth of successful Constitutional claims to religion-based exemption from neutral and generally-applicable law. Except for *Wisconsin v. Yoder*, 406 U.S. 205 (1973) (requiring exemption from state compulsory education law for Old Order Amish parents unwilling to send their children to school after they reached age 14), other Free Exercise-based challenges to state and federal regulation were unsuccessful. See *U.S. v. Lee*, 455 U.S. 252 (1982) (rejecting Amish employer’s claim of right to religious exemption from obligation to pay Social Security tax for his employees); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (not applying strict scrutiny but deferring to military policy disallowing the wearing of yarmulke by on-duty Air Force officer); *Bowen v. Roy*, 476 U.S. 693 (1986) (upholding, against religious challenge brought by Native American parents, the assignment of a Social Security number to their daughter pursuant to federal AFDC (welfare) and Food Stamp program requirements);

By the year 1990, through the national religious-pluralism project, Catholics and Jews had unquestionably become well integrated into American society with little cause to perceive themselves as “second-class citizens.” Two other major developments had also occurred. First, because of changes in immigration policy, the US had become an extremely religiously-diverse nation. Second, women had made significant strides – during the second decade of the pluralism project, through the 1970s and the 1980s – and had won recognition of Fourteenth Amendment-based constitutional protections of liberty and equality.

In 1990, with its decision in *Smith*, holding that the Free Exercise Clause does not require – though it does permit – legislatively-specified religious-exemptions from neutral and generally applicable laws, the Supreme Court effectively announced the end of federal court activism in advancing the assimilationist goals of the pluralism project.<sup>200</sup> The *Smith* decision changed the constitutional meaning of Free Exercise, and it invited legislators to play the dominant role in structuring the relationship between civil law and religions’ practices, to define the scope of “religious liberty” with little constitutional constraint. Federal and state legislators leapt at the *Smith* invitation, and readily put into place stronger protections and accommodations of religious liberty than had ever been constitutionally required.<sup>201</sup> In the years following *Smith*, with new interpretations of the Establishment Clause, the Supreme Court opened the door for massive infusions of governmental funding to religious entities,<sup>202</sup> and it permitted

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O’Lone v. Estate of Shabazz (1987) (finding no Free Exercise violation in state prison regulations that had effect of preventing some Muslim prisoners from attending midday Friday *Jumu’ah* service); Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988) (not applying strict scrutiny to U.S. Forest Service plan to construct road through area of national forest traditionally used by Native American tribes as sacred site for religious rituals).

<sup>200</sup> *Smith*, 492 U.S. 872, 890. See Marie Ashe, *Women’s Wrongs, Religions’ Rights: Women, Free Exercise, and Establishment in American Law*, 21 TEMP. POL. & CIV. RTS. L. REV. 163, 198-213 (2011) (providing additional commentary on the doctrinal change effected by the *Smith* decision).

<sup>201</sup> See Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)). As presently interpreted, RFRA requires that any Federal law that imposes a substantial burden on an individual’s religion-based conduct will not be permitted unless it is shown to serve a “compelling” governmental interest. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-32, 439 (2006).

<sup>202</sup> *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) (holding that the Establishment Clause did not prohibit – and the Free Speech clause affirmatively required – a public university to offer funding to religious student groups when it had a policy of offering such funding to non-religious groups); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding a state program delivering tuition to religious schools through a system that provided vouchers to parents who could use them for tuition payments); *Arizona*

governments' symbolic sponsorship of religious expression on a basis that has treated religions inequitably, with clear preference of Protestant-Christian entities.<sup>203</sup> At the time of this writing, the Supreme Court is prepared to decide a case challenging public officials' opening of governmental meetings with Christian prayers. And it will not be at all surprising if the Court permits the town's practice to continue.<sup>204</sup>

During the post-*Smith* years – from 1990 to the present – while churches have gained enlarged protections of their liberty and equality interests, the interests of American women in those same values have been diminished through an array of Supreme Court decisions. Concurrent with destruction of the “wall of separation” and elevation of churches' liberty and equality in American society, an onslaught of legislation hostile to women's interests – and precisely advancing the agendas of conservative, evangelistic or fundamentalist churches – has been supported and assisted by Supreme Court decisions.<sup>205</sup>

In the years following September 11, 2001, we have entered a new period. This time – in which religious wars afflict the world – raises new challenges to past understandings of the proper relationship between civil law and religions. It is a time in which divisiveness about religion needs to be ameliorated rather than provoked by legislatures and courts.<sup>206</sup> It is a time

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Christian School Tuition Organization v. Winn, 131 S. Ct. 1436 (2011) (re-interpreting “standing” doctrine to disallow taxpayer-plaintiffs' challenge of a state statute that provided “tax credits” to persons for their donations to organizations that offered scholarships to students to support their attendance at religious – or other private – schools).

<sup>203</sup> Favorable treatment of “symbolic support” for religion was evident in *Van Orden v. Perry*, 545 U.S. 677, 681 (2005) (upholding the display of a large (Protestant version) “Ten Commandments” monument on the grounds of the Texas State Capitol). An inequitable approach to Americans of different religions (or of no religion) was particularly evident in the separate concurrence of Justice Scalia in *McCreary County, Ky. v. ACLU of Kentucky*, 545 U.S. 844 (2005), decided on the same day as *Van Orden*. Scalia opined that: “...the Establishment Clause permits ... disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.” *Id.* at 893. Justice Stevens expressed a diametrically-opposed Establishment Clause interpretation in his dissent in *Van Orden*, opining: “As religious pluralism has expanded, so has our acceptance of what constitutes valid belief systems. The evil of discriminating today against atheists, ‘polytheists[,] and believers in unconcerned deities,’ is in my view a direct descendent of the evil of discriminating among Christian sects. The Establishment Clause thus forbids it...” *Van Orden*, 545 at 734-735 (Stevens, J., dissenting).

<sup>204</sup> *Galloway v. Town of Greece*, 681 F.3d 20, 22 (2nd Cir. 2012), *cert. granted, sub nom; Town of Greece v. Galloway*, 133 S. Ct. 2388 (2013).

<sup>205</sup> Perhaps the most notable instance of this has been the Supreme Court's upholding of increasingly restrictive state and federal abortion regulation during the years 1992-2007. *See Planned Parenthood v. Casey*, 505 U.S. 833 (1992); and *Gonzalez v. Carhart*, 550 U.S. 124 (2007).

<sup>206</sup> The majority decision in *Zelman* is one instance of the U.S. Supreme Court's manifesting indifference to dangers of political divisiveness based on religious differences,

in which the need for governmental equity in treatment of all religions has been lacking and is urgently required. It is also one in which wrongs to women – traceable to the excessive preference for conservative religious entities and their agendas in the years since 1990 – demand remediation.

At the time of this writing, the Supreme Court will shortly review federal appeals courts' decisions that have addressed the most recent conflict of religions' rights versus women's interests. In numerous cases pending in US federal courts, for-profit corporations are asserting that they are religious "persons" covered by RFRA, and entitled to "religious liberty" barring application to them of the contraceptive coverage mandate of the Affordable Care Act<sup>207</sup> (hereinafter, "ACA"). Essentially, the plaintiffs in these cases – in order to avoid even indirectly supporting women's reproductive liberty – seek recognition of a never-before-recognized form of "religious liberty" and a judicial mandate of "accommodation" of this interest.

In November 2013, the Supreme Court granted *certiorari* in one case in which the corporate plaintiffs had succeeded, and in another in which corporate plaintiffs had lost.<sup>208</sup> There will be every reason to be unsurprised if the Supreme Court decisions of these ACA-related cases have the effect of further enlarging protections of "religious liberty" in a context in which women's interests will be devalued. If such proves to be the outcome of the Supreme Court's decisions in 2014, it will represent an additional step along a direction that the Court pursued in 2012 in its decision of the *Hosanna-Tabor* case,<sup>209</sup> examined below, a matter involving an American Christian religious court.<sup>210</sup>

### B. Operations of Christian Religious Courts in the US

The existence and operation of Jewish courts (which issue Jewish-

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dangers that were recognized in the 1970s in *Lemon*, *supra* note 198. The dissenters in *Zelman* highlighted that concern. See *Zelman*, *supra* note 202, at 723 (Breyer, J., dissenting).

<sup>207</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) ("Affordable Care Act" or "ACA").

<sup>208</sup> Plaintiffs prevailed in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted sub nom.* *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 678 (Nov. 26, 2013). Plaintiffs' RFRA claim failed in *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013), *cert. granted* Oral argument of these cases occurred on Mar. 25, 2014).

<sup>209</sup> *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC.*, 132 S. Ct. 694 (2012),

<sup>210</sup> The account of Constitutional law and RFRA-related developments presented here is highly abbreviated. For fuller account of this history of changes in constitutional law affecting religion and women, see Ashe, *Women's Wrongs, Religions' Rights*, *supra* note 200; Ashe, *Privacy and Prurience*, *supra* note 2.

religious divorces in a process in which women are highly disadvantaged) and of Catholic Canon Law courts (which issue Catholic-religious annulments of marriage) are well known. But the full range of non-Muslim religious courts operating in the United States – and the scope of their decision-making – are much less widely comprehended.<sup>211</sup> One such non-Muslim religious court is the Lutheran Church-Missouri Synod, which asserts jurisdiction over more than 6000 congregations and operates a large religious school system employing thousands of lay personnel. The Synod also exercises a judicial role, maintaining its own dispute-resolution system.<sup>212</sup> The nature and operations of the Synod surfaced in 2012 in the *Hosanna-Tabor*<sup>213</sup> case, in which the Supreme Court addressed the issue of whether the Americans with Disabilities Act (ADA)<sup>214</sup> would – or would not – apply to the employment relationship that had existed between a non-ordained teacher (of mostly secular subjects) and her employer, the Hosanna-Tabor Evangelical Lutheran School. The ADA prohibits disability-discrimination in employment, in general, and also prohibits employers' retaliation against employees because of their filing charges alleging the employers' discriminatory activity.<sup>215</sup> It includes no exemption for religious employers.

In the course of their dispute about accommodation of her disability, Cheryl Perich, the Hosanna-Tabor employee, indicated that she was ready to take legal action against her employer, and the school terminated her for that reason. When Perich did complain to the EEOC, which sued Hosanna-Tabor alleging its having retaliated against Perich in violation of the ADA, Hosanna-Tabor argued that the governance of the Lutheran Church-Missouri Synod (of which Hosanna-Tabor was a member congregation) permitted Perich to pursue dispute resolution through the Synod but barred her seeking resolution in civil courts. The school also argued that a “ministerial exemption” – not limited to ordained ministers and not theretofore recognized by the Supreme Court – was provided by the Constitution and barred civil courts from any consideration of the dispute.

The justices' interest in the dispute-resolution authority of the “synod” was highly evident during the oral argument of *Hosanna-Tabor*,<sup>216</sup> and anxiety about what the implications of the decision might be for a variety of

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<sup>211</sup> See *Applying God's Law*, *supra* note 7.

<sup>212</sup> *Hosanna-Tabor*, 132 S. Ct. at 715-16 (Alito, J., concurring). See also *Applying God's Law*, *supra* note 7 at 16-17.

<sup>213</sup> *Hosanna-Tabor*, 132 S. Ct. 694 (2012).

<sup>214</sup> 42 U.S.C. § 12101 et seq. (1990).

<sup>215</sup> 42 U.S.C. § 12203(a).

<sup>216</sup> Transcript of Oral Argument at 4, 8, 10, 20, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553).

religious-courts in the US was evident in the amicus brief filed by “Religious Tribunals Experts.”<sup>217</sup> The holding of the Court proved friendly to those amicus’ interests. Unanimously, the Supreme Court ruled against the employee and in favor of the church. The *Hosanna-Tabor* Court permitted relegation of a matter of employment-discrimination (involving subject matter less-plausibly characterized as “private” than the matters of family relationships over which Jewish and Muslim courts have sought recognition of their jurisdiction) to the exclusive jurisdiction of a Protestant (Lutheran) religious-court.<sup>218</sup> It permitted a reality of “no exit” of ill-defined “ministerial employees” from the church-court system, even though this empowerment of religious-courts required displacement of the Congressional determination not to exempt religious employers from the general obligation of non-discrimination on the basis of disability put into place by the ADA.

The full implications of *Hosanna-Tabor* remain unclear, as the Court was vague about how employees barred from civil litigation by the operation of the “ministerial exemption” would be identified. On the other hand, *Hosanna-Tabor* does suggest that churches may obtain exemption from additional (other than the ADA) federal and state laws protective against discrimination in employment. It is important to keep this case in mind as an indicator of the Supreme Court’s toleration of mainstream religious-court authority. In *Hosanna-Tabor*, the employment interests of disabled employees – and of women who, in religious schools, make up the overwhelming majority of teachers – yielded to the interests of a church entity claiming the Supreme Court’s first-time recognition of a constitutionally-based “ministerial exemption” from federal and state employment regulation.

### C. The American “Anti-Sharia” Movement

During 2009, there emerged in the US – perhaps prompted in part by the controversies that had developed in Canada and in England<sup>219</sup> – a

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<sup>217</sup> Brief for Religious Tribunals Experts as Amici Curiae Supporting Petitioner, *Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553).

<sup>218</sup> Indeed, the concurring opinion authored by Justice Alito, *supra* note 212, appeared to acknowledge that the Lutheran Church-Missouri Synod “doctrine of internal dispute resolution” is not “well-known.” But it opined: “What matters...is that *Hosanna-Tabor* believes that the religious function that respondent performed made it essential that she abide by the doctrine of internal dispute resolution; and the civil courts are in no position to second-guess that assessment.” *Id.* at 715-16.

<sup>219</sup> John Witte has characterized the initiative that became enacted as an anti-*sharia* amendment to Oklahoma’s state constitution as “a direct rejoinder to other Western nations allowing Muslim citizens to enforce Muslim marriage contracts in state courts and to resolve family law issues before Shari’ah tribunals without state interference.” John Witte, Jr.,

movement with the purpose of instituting “anti-*sharia*” measures in state law. By August 2013, anti-*sharia* initiatives had been introduced into at least half the state legislatures and enacted into law (by statute or constitutional amendment) in seven.<sup>220</sup> Despite an unfavorable Circuit Court ruling in 2012,<sup>221</sup> the anti-*sharia* movement remains alive and visibly attached to concurrent highly-conservative religious movements seeking legal and political change in the US.

For assessment of the meaning of the anti-*sharia* development, it will be important to keep in mind the ways in which the law-religion-women nexus has been re-shaped within US constitutional doctrine in the years since 1990, with enlarged support of “religious liberty” and attendant shrinkage of women’s liberty and equality protections. It will be important, also, to remain mindful of the apparent indifference of the Supreme Court to the dangers of political divisiveness produced by governmental support for some (but not all) religions, and the readiness of the Court to tolerate governments’ discriminations among religions through symbolic support for some (but not all). It is also important to consider certain particularities of the anti-*sharia* movement itself.

Key to understanding of the American anti-*sharia* movement is the recognition that – despite its denomination – it is not a movement against *religio-legalism*. On the contrary, it strongly supports Christian and Jewish expressions of *religio-legalism*, while seeking to squelch analogous Muslim expressions that it recognizes or constructs through its use of the term *sharia*.<sup>222</sup> The American anti-*sharia* movement opposes what it characterizes as an existential danger posed by Muslim fundamentalism in the US, while at the same time it rallies Christian and Jewish fundamentalists. Indeed, the campaign can be understood as a manifestation of internecine warfare within the global movement of religious fundamentalism, involving, on the one side, an alliance of fundamentalist Christians and Jews; on the other, fundamentalist Muslims.

A narrow legal account of the anti-*sharia* movement can be stated straightforwardly. In 2009, relying to some degree on a model drafted by David Yerushalmi,<sup>223</sup> proposals for anti-*sharia* laws began to be introduced

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*Shari’ah’s Uphill Climb: Does Muslim law have a place in the American landscape?*, CHRISTIANITY TODAY, November 2012, at 31.

<sup>220</sup> See Andrea Elliott, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES (July 30, 2011), [http://www.nytimes.com/2011/07/31/us/31shariah.html?r=0+pagewa&\\_r=1&](http://www.nytimes.com/2011/07/31/us/31shariah.html?r=0+pagewa&_r=1&) (reporting on the political organization underlying the anti-*sharia* initiatives).

<sup>221</sup> *Awad v. Ziriax*, 670 F.3d 1111, 1130 (10th Cir. 2012).

<sup>222</sup> Rhetoric employing the *sharia* terminology in totally undifferentiated ways and conflating “Muslims” with “*sharia*” is a striking feature of the movement. *Cf.*, *supra* notes 3 and 117.

<sup>223</sup> See Elliott, *supra* note 220.

into state legislatures. In Oklahoma, this movement led to proposal of a state constitutional amendment to prohibit state courts' consideration or use of *sharia* (or other "foreign law") in their decision-making, and the proposal was supported in November 2010 by 70% of Oklahoma voters.<sup>224</sup>

Oklahoma's proposed amendment was challenged by a Muslim citizen of the state who charged that the amendment would violate the Free Exercise and Establishment provisions of the First Amendment. A preliminary injunction barring enforcement of the amendment was ordered in federal district court.<sup>225</sup> That ruling was reviewed and upheld by the Tenth Circuit Court of Appeals, which defined the proposed amendment's inequitable discrimination among religions as the factor determining its unconstitutionality.<sup>226</sup> John Witte has thus characterized the meaning of the Tenth Circuit ruling: "[I]t leaves Oklahoma courts with a stark choice: allow Muslims to use Shari'ah to govern internal religious affairs and the private lives of voluntary members, or equally prohibit all religious groups from exercising comparable authority through organs of internal mediation, ecclesiastical discipline, and canon law."<sup>227</sup>

In spite of the Oklahoma ruling, the anti-*sharia* movement has not acknowledged defeat. At present all the enacted laws are framed in neutral language that avoids explicit reference to *sharia*, and it is possible that this will permit their surviving Constitutional review.<sup>228</sup> As John Witte has observed, however, "[D]eft legal drafting will not end the matter. As American Muslims grow stronger and anti-Muslim sentiment in America goes deeper, constitutional and cultural battles over Muslim laws and tribunals will likely escalate."<sup>229</sup> This proposition raises, of course, the question about how outcomes of those battles will affect women's liberty and equality interests. Beyond the simple legal history of the anti-*sharia* movement, its political attachments and realities make clear that it poses enormous threat to those interests.

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<sup>224</sup> See *Awad*, 670 F. 3d at 1118 (noting that "just over 70 percent of Oklahoma voters" had approved the proposed Constitutional amendment).

<sup>225</sup> *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1304 (W.D. Okla. 2010).

<sup>226</sup> See *Awad*, 670 F. 3d at 1127 (reasoning that the proposed amendment – because it would inequitably discriminate among religions – would be subject to strict scrutiny pursuant to precedent established by *Larson v. Valente*, 456 U.S. 228 (1982)). Finding that the selective burdening of specifically-Muslim religious law was not supported by any "compelling state interest," the Tenth Circuit upheld the preliminary injunction, and the injunction was made permanent, after hearing on the merits, by the district court in August 2013.

<sup>227</sup> Witte, *supra* note 219.

<sup>228</sup> For an account of the status of these initiatives as of April 2013, see Pew Forum, *State Legislation Restricting Judicial Consideration of Foreign or Religious Law, 2010-2012* (April 8, 2013), available at <http://www.pewforum.org/files/2013/04/State-legislation-restricting-foreign-or-religious-law.pdf>

<sup>229</sup> Witte, *supra* note 219.

Andrea Elliott has outlined the origins of the US anti-*sharia* movement, tracing them back to Hasidic Jewish lawyer and one-time resident of a Jewish settlement in West Bank territory, David Yerushalmi.<sup>230</sup> She has identified both Yerushalmi's religious identification and his involvement with – and the extraordinary financial support provided to him by – the ultra-conservative Center for Security Policy.<sup>231</sup> Likewise, she has noted his attachment to the Tea Party movement, and his legal advocacy for Pamela Geller, a major opponent of the construction of a building containing a mosque located near Ground Zero.<sup>232</sup> Elliott's account usefully illuminates some of Yerushalmi's and his associates' political views. It also lays a foundation for recognition that the US anti-*sharia* movement proceeds by propagation of innuendo and half-truths and is a movement not at all friendly to women.

As we have noted in *Parts One* and *Two*, above, the recent history surrounding *sharia* movements provides cause for anxiety about their harmfulness to women. Indeed, recognizing dangers in *sharia*, we also recognize some insights expressed in Yerushalmi's and his associates' writings. At the same time we recognize – far more prominently – half truths, distortions, and encouragements of irrational fears.<sup>233</sup>

Andrea Elliott's account of the anti-*sharia* movement was current as of July 2011. Her characterization of Yerushalmi as Hasidic and fundamentalist identified his association with religious communities that have been highly problematic for women.<sup>234</sup> His more recent activity, in alliance with non-Jewish groups hostile to women, should also be noted. In 2012 – in association with a man who identifies himself as an “Orthodox Catholic” and an associate of the Thomas More Law Center – Yerushalmi co-founded an entity named American Freedom Law Center (AFLC). The two founders have identified AFLC as “the first truly authentic Judeo-Christian public interest law firm.” They have identified as its mission: “to fight for faith and freedom by advancing and defending America's Judeo-Christian heritage and moral foundation.”<sup>235</sup> AFLC's litigation opposing women's interests

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<sup>230</sup> Elliott, *supra* note 220.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> We see that admixture of truths, half-truths, distortions and excitements to fear in a book co-authored by Yerushalmi and other officials of the Center for Security Policy. *See generally* WILLIAM J. BOYKIN ET AL., SHARIAH: THE THREAT TO AMERICA: AN EXERCISE IN COMPETITIVE ANALYSIS (2010).

<sup>234</sup> *See* Joseph Berger, *Out of Enclaves, A Pressure to Accommodate Traditions*, N.Y. TIMES (Aug. 31, 2013), <http://www.nytimes.com/2013/08/22/nyregion/hasidic-jews-turn-up-pressure-on-city-to-accommodate-their-traditions.html?pagewanted=all&r=0>.

<sup>235</sup> *See About*, AMERICAN FREEDOM LAW CENTER, <http://www.americanfreedomlawcenter.org/about/> (last visited Apr. 20, 2014).

has included the filing of a lawsuit challenging the ACA “contraception mandate” discussed above. This by itself indicates a posture favoring religions’ rights over women’s rights. Other litigation work indicates AFLS’s anti-Muslim posture. For example, AFLC has provided legal counsel supportive of the movement to post hateful and anti-Muslim materials in subways of various American cities.<sup>236</sup>

The “Judeo-Christian” designation of the AFLC is highly ironic. As noted above, “Judeo-Christianity” terminology was a marker of an inclusive impulse in the history of American law relating to religion. It is now being employed by AFLC to mark a wall of exclusion – applicable to American Muslims. Indeed, it seems to us that the American anti-*sharia* movement must be understood as an aggressive shot-across-the-bow, asserting that while one particular form of fundamentalism (read: Muslim) is inconsistent with American constitutional principles, other forms of fundamentalism (read: Jewish and Christian) are not similarly inconsistent and should therefore be legally-preferred. The anti-*sharia* movement intends to escalate conflict between and among fundamentalisms, and it seeks the support of American law on the non-Muslim side in this religious warfare.

To support inequitable discrimination among fundamentalist religions, the anti-*sharia* movement seeks to distract Americans from recognition that fundamentalist religions are more alike than they are different. And, that persuasive effort requires distracting people from the reality that fundamentalist religions share common agendas, and that control of women is central to all of them. In *Awad*, the federal courts declined to take sides in that *fundamentalism vs. fundamentalism* battle. But the either-or choice that *Awad* created for Oklahoma will most assuredly not culminate in governmental repudiation of all fundamentalist-religious courts. The outcomes of federal courts’ addressing the still-in-effect laws that have been linguistically-altered to veil their targeting of *sharia* remain to be seen. But we have reason to fear that those decisions, too, will be crafted without attention to the harms that women experience from Protestant, Catholic and Jewish *religio-legalisms* as well as from Muslim ones.

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<sup>236</sup> The most recent litigation about these postings or proposed postings has occurred in Boston, where AFLC’s client sought an injunction requiring that the Massachusetts Bay Transit Authority (MBTA) permit its posting of an “advertisement” with this content: “In any war between the civilized man and the savage, support the civilized man. Support Israel. Defeat jihad.” The MBTA’s General Manager had rejected the proposed posting on the basis of her belief that the advertisement would demean and disparage Muslims and/or Palestinians, violating the MBTA’s advertising guidelines which exclude material that is “disparaging or demeaning” of individuals or groups. The motion for injunction has now been denied. *See American Freedom Defense Initiative, et al. v. Massachusetts Bay Transit Authority and Beverly Scott*, No. 13-cv-12803-NMG, 2013 WL 6814793 (D. Mass. Dec. 20, 2013), *available at* [http://www.gpo.gov/fdsys/pkg/USCOURTS-mad-1\\_14-cv-10292/pdf/USCOURTS-mad-1\\_14-cv-10292-0.pdf](http://www.gpo.gov/fdsys/pkg/USCOURTS-mad-1_14-cv-10292/pdf/USCOURTS-mad-1_14-cv-10292-0.pdf).

D. *Dangers of US International “Religious Engagement”*

In July 2013, the United States Department of State (State Department) announced the creation of a new office intended to be a “portal for engagement with religious leaders and organizations around the world” and to work with these individuals and entities “to advance US diplomacy and development objectives.”<sup>237</sup> Clearly, the establishment of this entity, at a time when wars of religions are raging across the planet, raises multiple concerns. The announcement of the new office included no comment whatsoever about its implications for women subject to *religio-legalisms*. History, however – including some of the history we have here outlined<sup>238</sup> – persuades us that women will be assisted not by enlarged governmental “engagement” with religions but by resistance to such entanglement.<sup>239</sup>

In response to the State Department’s announcement, Margot Badran immediately raised important questions about this new Office of Religious Engagement:

What is the purpose of religious engagement? To support human rights, social justice, societal harmony, and freedom – of religion? Of individual choice? Why not just continue to engage on (secular) national terrains, through governmental and nongovernmental entities, including religiously defined groups and individuals as some among many, rather than highlighting “religious engagement”? What would religious engagement involve, how would it be conducted, and with whom? Whose religion?<sup>240</sup>

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<sup>237</sup> See OFFICE OF FAITH-BASED COMMUNITY INITIATIVES, <http://www.state.gov/s/fbci/> (last visited Aug. 24, 2013).

<sup>238</sup> See BANO, MUSLIM WOMEN, *supra* note 89, at 33 (commenting on “partnerships” with Muslim leaders into which British government has entered).

<sup>239</sup> See Balchin, *supra* note 116 (commenting on the British Government’s “working with groups” concerning the Sharia councils, and deploring the British state’s shoring up the power of male religious authorities rather than supporting the Muslim women users of the councils who are pushing for change: “[W]hat does the Ministry of Justice do? Instead of supporting women’s organisations to build Muslim women’s capacity and knowledge, they ignore the users and fund MINAB (Mosques & Imams Advisory Board) to hold workshops for imams and produce a vague pamphlet for distribution in mosques. But getting the men to change the men – dialogue between men – is not how change has been happening.”). For discussion addressing the uncertainties and problematic prospects associated with the new U.S. State Department policy, review discussion on The Immanent Frame blog, see *On Engaging Religion at the Department of State*, THE IMMANENT FRAME (July 30, 2013), <http://blogs.ssrc.org/tif/2013/07/30/engaging-religion-at-the-department-of-state/>.

<sup>240</sup> See Margot Badran, Respondent to *Engaging Religion at the Department of State*, THE IMMANENT FRAME (July 30, 2013), <http://blogs.ssrc.org/tif/2013/07/30/engaging-religion-at-the-department-of-state/>. Badran is a Senior Scholar at the Woodrow Wilson International

Writing from Cairo, with a focus on events that had occurred in Egypt in the three weeks prior to the State Department announcement, Badran articulated her misgivings more pointedly:

Let's look at Islam, the majority religion in Egypt. Is it the Islam of the scholarly establishment around al-Azhar? Is it Sunni Islam? What about Shi'i Islam in Egypt? Is it political Islam and its various expressions: the Muslim Brothers, the Salafis, etc.? Is it the Islam of the people? Who represents religion? Who are the actors and who are the leaders? How do women as a category and as individuals, as religious actors and religious leaders, figure within religious scenarios (Muslim and otherwise) so heavily tinted by patriarchal shadows and so most often spoken for in the name of religious fiat—and who gets to say?...[A]t a moment when the country has suffered religious (societal) fracture and religious (political) manipulation, is it not troubling to see emissaries from a US office of religious engagement entering such territory?<sup>241</sup>

In another response to the announcement of the Office of Religious Engagement, Elizabeth Shakman Hurd has highlighted the reality that the new “religious engagement” will be a selective political process. It will discriminate among religions and will disfavor the non-traditional and the unorthodox, the dissidents and the doubters.<sup>242</sup> It will favor “top religious leadership” and “senior leaders,” selecting them for engagement. Although Hurd doesn't say this explicitly, it is clear to us that women in resistance to orthodoxies – those most injured by and most challenging of the patriarchal foundations and practices of *religio-legalism* – will be among the disfavored.

We very much share Badran's and Hurd's wariness, for all the reasons they have expressed. In looking at *religio-legalism* in a variety of contexts, we have found particularly inspiring the activity of women from Muslim communities who have been engaged in redefining and reshaping dominant cultural and religious practices. One recent instance of such activity has been that of women of Tamil Nadu, India, who, in 2004, concerned with discriminatory Muslim norms, set up their own women's *jamaat* in the face

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Center for Scholars, and Senior Fellow, Prince Alwaleed bin Talal Center for Muslim-Christian Understanding at Georgetown University.

<sup>241</sup> *Id.*

<sup>242</sup> Elizabeth Shakman Hurd, *Engaging Religion at the Department of State*, THE IMMANENT FRAME (July 30, 2013), <http://blogs.ssrc.org/tif/2013/07/30/engaging-religion-at-the-department-of-state/>.

of harsh opposition.<sup>243</sup> We think there is every reason to imagine that liberal support for women's liberty and equality will be most effectively and unequivocally expressed not by new "engagements" – such as the one presently becoming institutionalized in the US Department of State – but by refusals to replicate or to enforce, throughout the world, the kinds of male-dominated, patriarchal, religious forces that such courageous Muslim women are strenuously opposing for themselves and their communities – that is, by resistance to *religio-legalism*.

#### IV. RESISTANCE TO *RELIGIO-LEGALISM*

Our study of the history of *sharia* tribunals in Canada and the UK, and of the empowerment of religious bodies in these two countries as well as in the US, over the years since 1990, has disclosed a pattern of related threats and harms to women's interests. We have seen clearly the non-accidental nature of coinciding expansions of liberty and equality protections for religions and diminishment of those protections for women. Rereading the warnings expressed by feminists of the 1990s who discerned, in the changing social, cultural and legal fields of Western liberal nations, great cause for alarm, we have recognize their insightfulness and prescience. We also see that their perspectives have not been fully appreciated.

In this *Part*, we review what we have come to see more clearly through our readings and re-readings, and we highlight certain recognitions that can lead us toward the reconceptualizations of church-state relationships that are urgently needed for the protection of women's most basic rights.

##### A. *Remembering Feminist Analyses of Fundamentalisms*

Almost three decades ago, feminist advocates associated with minority communities and/or from Muslim-majority nations, foresaw the risks of harm to women that would be amplified as religions increasingly became the main markers of identity. They perceived that, given the strong male control over interpretation of texts in all religious traditions, the expansion of religions' power – accomplished in part by law and policy – would further privilege male conservative and fundamentalist leaders and would enable their further discrediting of progressive, feminist and secular voices. They understood that these latter voices would be constructed as "Westernized" and, therefore, as illegitimate.

These feminists pointed to and denounced the use of religions to justify

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<sup>243</sup> "*Jamaats*" are traditional community councils, similar to *jirga* in Pakistan and Afghanistan, traditionally led by men with standing in a community. See Sharifa Khanam, Presentation on The Tamil Nadu Muslim Women's Jamaat: Who We Are and What We Do?, available at [www.mazefilm.de/dokupdf/khanam.pdf](http://www.mazefilm.de/dokupdf/khanam.pdf).

discriminatory practices and violence against women. They documented the functionings of particular forms of fundamentalism; the linkages among various fundamentalisms; and the spread of fundamentalisms as “an international, cross-country phenomenon.” They were quick to anticipate that protection of the rights of groups – including the minority groups with which they were themselves culturally associated – would negatively affect the rights of individuals within those groups. They foresaw that expanded interpretations of what constitutes “religious freedom” and “religious equality” would supersede individual women’s liberty and equality interests.

Shahnaz Khan<sup>244</sup> and Haideh Moghissi<sup>245</sup> did issue warnings about the dark side of “multiculturalism” – including its masking of continuing racism, especially racism impeding Muslims in Canada – and its particularly negative implications for women. However, at the time of their publication in the 1990s, their warnings were not taken up enthusiastically by many Western liberals, including feminists. The usefulness of their perspectives did come to be appreciated when Canadian movement toward *sharia* tribunals proceeded and took many Ontarians by surprise. While there has been temporary resolution of the particular conflict between women’s rights and religions’ rights raised in the Ontarian *sharia* tribunal crisis, that resolution may not hold. It also remains the case that the insights of Khan and Moghissi for consideration of all church-state relationships have not been exploited.

In the UK, writers Gita Sahgal and Nira Yuval-Davis<sup>246</sup> similarly perceived precisely what would be accomplished and what would be obfuscated by British multiculturalist law and policy. Perhaps because they were situated in a Britain affected by fundamentalist transnational movements from East and from farther West, they were better able to recognize commonalities among fundamentalisms, including the interests in controlling women that motivate fundamentalisms of Protestants, Catholics, Jews, Muslims, and Hindus, for example.

In contrast to these complex and grounded feminist analyses, more-complicated but less-grounded social theory has appeared from time to time. Such work has had the effect of minimizing the challenges to women that are produced by governmental empowerment of religious organizations. Ayelet Shachar’s early writing is an example of such work, with its imagining that “transformative accommodation” might be achieved by permitting greater sovereignty in religious groups whose cultures have been particularly inimical to women.<sup>247</sup> It is not accidental that the head of the

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<sup>244</sup> See Khan, *supra* note 47, at 55.

<sup>245</sup> See MOGHISSI *supra* note 54, at 11-12.

<sup>246</sup> See *supra* text accompanying notes 90, 92, 93.

<sup>247</sup> See SHACHAR, *supra* note 31, at 31.

Church of England embraced Shachar's theorizing, or that Rowan Williams used it to veil with a cloak of benignity his proposition concerning the "inevitability" of formal governmental recognition of *sharia* tribunals in Britain. Shachar has since retreated from her early confidence in possibilities of "transformative accommodation." But her early work continues to be welcomed more widely than her later writing and than the countervailing work of the feminists we have identified here.

As early as 1997, *Women Living Under Muslims Laws* debunked the idea that religious tribunals provide a benign option for women – "one way" among a range of other available avenues – and the assumption that women fully consent to subjecting themselves to such entities. That international network warned that:

[F]undamentalist ideologies and movements can transform themselves from a mere presence in a society – appearing as but one of the many "options" for religious observance or affiliation – into a source of compulsion and, ultimately violation.<sup>248</sup>

Proponents of institutionalizing Muslim family laws seek to assuage concerns by adopting conciliatory rhetoric.<sup>249</sup> But this should not obscure the reality of their political agenda, which was analyzed by feminists of the 1990s. In 1997, *Women Living Under Muslim Laws* exposed the very strategies that have been – and continue to be – utilized by advocates of Muslim tribunals and *sharia* councils in Canada and Britain:

[F]undamentalist movements thrive by encouraging people to link their identity exclusively to membership of a collectivity defined by supposedly immutable characteristics of religion, ethnicity or nationality; then by

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<sup>248</sup> WOMEN LIVING UNDER MUSLIM LAWS, PLAN OF ACTION – DHAKA 9 (1997) [hereinafter WLUML DHAKA], available at <http://www.wluml.org/node/451>.

<sup>249</sup> The Leyton Islamic *Shari'a* Council website uses such a conciliatory tone while asserting its political objectives: "Though the Council is not yet legally recognized by the authorities in the UK, the fact that it is already established, and is gradually gaining ground among the Muslim community, and the satisfaction attained by those who seek its ruling, are all preparatory steps towards the final goal of gaining the confidence of the host community in the soundness of the Islamic legal system and the help and insight they could gain from it. The experience gained by the scholars taking part in its procedures make them more prepared for the eventuality of recognition for Islamic law." *Our History*, *supra* note 147. However, that Council is sometimes more outspoken: its Secretary, Dr. Suhaib Hasan, issued a statement regarding the Cox Bill: "It is indeed a crime that Lady Cox has made no attempt to understand the workings of the shariah councils." See Suhaib Hasan, *Statement by the Islamic Sharia Council on Baroness Cox's Bill*, ISLAMOPHOBIA WATCH (June 17, 2011), <http://www.islamophobia-watch.com/islamophobia-watch/2011/6/17/statement-by-the-islamic-sharia-council-on-baroness-coxs-bil.html>.

erecting the barriers between such collectivities; and finally by intensifying the threat deemed to be posed by the “other.”<sup>250</sup>

In the global political context, which includes Canada, the UK, and the US, governmental allocations of power to religions have expanded greatly and have produced a diminishment of power in women.<sup>251</sup> Still, in spite of the incisiveness of the feminist analyses of the social force of religion that were propounded in Canada and in the UK in the 1990s, commentators continue to argue that religious tribunals demonstrate a promising experiment worthy of replication. It is disappointing to note John Bowen’s proposing, in 2012, concerning Muslim tribunals:

[t]he English experience suggests that religious women’s interests can be best protected by encouraging the use of civil institutions alongside religious ones, not by restricting the exercise of religious freedom...Instead of cutting off venues, tribunals offer women a religious good not otherwise obtainable...The tribunals afford one way to broker the confusing and often incoherent world of international private law, making it easier for some Muslims to get on with family life.<sup>252</sup>

In an even more shocking development, commentators in 2013 continue to ignore evidence that religious tribunals pose harms to women. For example, the *Cardiff Report* team (whose initial survey relied solely on the assessments of three male clerics and reported literally nothing about women’s own impressions and experiences of the tribunals) has now “built” on its earlier work. Characterizing concerns over religious courts as “moral panics,” the Cardiff researchers offer a reading of Shachar’s work that leads them to encourage abandoning the “transformative accommodation” emphasis while at the same adopting Shachar’s more general model of broad “joint governance” by religious and civil legalisms.<sup>253</sup>

<sup>250</sup> WLUMD DHAKA, *supra* note 248, at 5.

<sup>251</sup> In addition to conservative religious groups’ having obtained legal accommodations in national settings, another notable development is fundamentalists’ cooptation of human rights institutions and language. For example, an increasing number of conservative religious groups have gained ECOSOC status (the consultative status given to accredited non-governmental organizations by the U.N. Economic and Social Council) since the late 1990s; and, since 2006, collations of fundamentalist member states have increased pressure on the U.N. to stand against the “defamation of religion,” or in favor of “traditional values.” Press Release, Article 19, UN Human Rights Council Undermines Freedom of Expression (Mar. 31., 2008), available at <http://www.article19.org/data/files/pdfs/press/hrc-resolution-passed.pdf>.

<sup>252</sup> BOWEN, *supra* note 87, at 91-92.

<sup>253</sup> Russell Sandberg et al., *Britain’s Religious Tribunals: ‘Joint Governance’ in Practice*,

*B. Rejecting Liberal and Fundamentalist Collusion*

Although many Western commentators fail to pay attention to gendered systems of power, some feminists do persist in identifying discrimination and xenophobia as major factors in minority women's disempowerment. As Patel remarked in 2005: "We've come to understand how these struggles, against racism and against women's oppression, have to be waged simultaneously."<sup>254</sup> One significant impediment they have to confront is blindness on the part of those who should be their natural allies, that is, liberals and feminists from Western societies.

Many liberals – including many feminists – in Western democracies appear to remain highly insular in their understandings of fundamentalist agendas developing in Western nations, ignoring the international and transnational nature of those movements. We have attempted to highlight similarities between developments in Canada and Britain because it is crucial that the links between fundamentalists' impacts in their countries of origin and in their countries of immigration be recognized, as well as the transnational reality of fundamentalist political movements.

Many liberals also erroneously assume that minority communities are homogenous and, on the basis of that on assumption, equate defending "Muslims" with defending Islamism. Further, the fear of Islamophobia-indictment is powerful, and it can have the effect of discouraging criticisms of fundamentalist groups seeking to obtain "religious accommodations." Liberals' yielding to such discouragement provides assistance to religious groups' attempts to implement theocratic projects. We have attempted to suggest here that this is not a new phenomenon. As we've noted, in 1989 the "Rushdie affair," raised issues of both racism and religion. Many liberals recognized that both racism and religious-discrimination were expressed in the British blasphemy law that criminalized only criticism of the Church of England. And they were therefore sympathetic to calls for expansion of the law to include criminalizing blasphemy against all religions, seeing that as remedial. Women Against Fundamentalism (WAF) was organized in the UK at that point, precisely to resist the inadequacy of that liberal response and to argue strenuously that the blasphemy law should be entirely abolished. While WAF included Muslim religious women keenly aware of the racism affecting their communities, its position was cheaply criticized as racist by leftist elements unable to recognize its proposal as more inclusive and more progressive than the one which would have simply enhanced the protections

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33 O.J.L.S. 2, 263, 265-66 (2013).

<sup>254</sup> Interview by Southall Black Sisters with Pragna Patel, Executive Director, Southall Black Sisters, at 1:19-1:26 (2005), available at <http://www.youtube.com/watch?v=jBF4mhrx6Ck>; E.g., LOVE, HONOUR AND DISOBEY, *supra* note 136.

to be enjoyed by religious groups already to women's interests.<sup>255</sup>

There is evidence of emerging awareness about the problematic alliances between liberals and the Muslim religious right.<sup>256</sup> But in xenophobic contexts, especially *post* 9/11 and 7/7, supporting "Muslim demands" still, and often, continues to be confused with standing against racism or imperialism, and "multiculturalism" is translated into defending cultural relativism. As a result, we are witnessing liberals' effectively lending support to fundamentalist agendas and to the shrinking of secular spaces. In responding to the anti-*sharia* movement's campaign, U.S. liberals will be particularly challenged by the need to resist, simultaneously – Islamophobia, potential incursions of *sharia*, and all Jewish, Christian, and Muslim *religio-legalisms*.

Feminists in the US, Canada and the UK have accurately encapsulated the nature of this situation. A highly significant voice is that of Rhonda Copelon, who explained that the "reluctance to really take on the political manipulation of religion [often] becomes a reluctance to take on people who act in the name of God" – particularly when the latter belong to stigmatized religious minorities:

It is easier for people in the US to take on the Christian right than the Muslim right, because you don't feel you are being discriminatory when you are taking the Christian right [since] Christians are the majority in this country. When you are taking on the Muslim right it feels like you are on the cusp, on the edge, of discrimination, because you are dealing with...an immigrant minoritised population...You are talking about a really excluded group – and that plays differently in terms of the willingness to critique the Muslim right.<sup>257</sup>

Alia Hogben's experience in Canada has taught her that dealing with issues related to minorities' status may indeed provoke racist backlash. Like Copelon, Hogben believes fear of possible backlash can cause liberals to

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<sup>255</sup> See ASAD, *supra* note 111. See also Sahgal & Yuval-Davis, *supra* note 92, at 24.

<sup>256</sup> See KARIMA BENNOUNE, *YOUR FATWA DOES NOT APPLY HERE – UNTOLD STORIES FROM THE FIGHT AGAINST MUSLIM FUNDAMENTALISM* 19-20, 22-25 (2013); MEREDITH TAX, *DOUBLE BIND: THE MUSLIM RIGHT, THE ANGLO-AMERICAN LEFT, AND UNIVERSAL HUMAN RIGHTS* 1 (2012); James Bloodworth, *Why is the left so blinkered to Islamic extremism?* THE INDEP. (June 28, 2013), <http://www.independent.co.uk/voices/comment/why-is-the-left-so-blinkered-to-islamic-extremism-8679265.html>.

<sup>257</sup> RHONDA COPELON, *Secularism Versus religious Pluralism in the US in the Light of Human Rights and Women's Rights*, in *WOMEN LIVING UNDER MUSLIM LAWS DOSSIER* 30-31, July 2011 at, 254-55, available at <http://www.wluml.org/resource/dossier-30-31-struggle-secularism-europe-and-north-america>.

become caught up in uncritical endorsements of “minorities,” leading them to sympathetically embrace all claims of “religious freedom” or “cultural rights” asserted by minority groups. Hogben recalls that during the “*sharia* tribunal” controversy the “CCMW decision to oppose the use of any religious laws in family matter...was extremely difficult as we foresaw that two sides would develop – those against all matters Muslim, and those who uncritically defended anything associated with Muslims.”<sup>258</sup>

Nira Yuval-Davis has long warned that “in multiculturalist types of solidarity politics there can be a risk of uncritical solidarity.”<sup>259</sup> And, she criticizes particularly a “politics of belonging” for its inadequate engagement with “questions of power, difference and identity within groups especially on issues of discrimination and gender equality.”<sup>260</sup>

In this confusing context, liberals in particular must heighten their awareness of the fact that simply giving Muslim tribunals the same kind of formal recognition already enjoyed by the Catholic and Jewish courts – while it would redress inequity among religions – would fail to remedy in any way the harms to women that are traceable to all religions. Indeed, given the indications that fundamentalism in a given community reinforces fundamentalism in others,<sup>261</sup> it would actively exacerbate these harms. For that reason, analysis of the proper place and power of religious tribunals within Western liberalisms will have to be approached as part of a larger reconceptualization project re-considering church-state relationships in general.

### C. *Reconceptualizing the Law-Religion-Women Nexus*

As we have indicated, we find it clear that resistance to *religio-legalism* is central to the necessary re-visioning of the relationship between civil law and religion. That resistance can take shape in various ways. In the Western nations that have begun to confront demands for the institutionalization of religious tribunals, there has sometimes been evident failure to recognize the injustices already existing because of governments’ inequitable delivering of “religious accommodations.” Some legislators may have no intent to avoid this inequity, while others may perceive it as unavoidable.<sup>262</sup> It must be

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<sup>258</sup> Hogben, *supra* note 73, at 183.

<sup>259</sup> See NIRA YUVAL-DAVIS, *GENDER AND NATION* 130 (1997).

<sup>260</sup> See BANO, *MUSLIM WOMEN*, *supra* note 89, at 44-45.

<sup>261</sup> WLUML DHAKA, *supra* note 248, at 9.

<sup>262</sup> The House of Lords debates on the *Cox Bill* #1 reflect biases among some peers that clearly indicate their assumption of superiority of Christianity over Islam. Similarly, anti-*sharia* initiatives in the US have provoked concerns about their potential applicability to non-Muslims, again asserting the protected status of Jewish law over Muslim laws. See Paul Berger, *Jewish Divorce Caught in Sharia Law Fight: Florida Bill Could Bar Orthodox*

recognized, however, that the differential treatment of Muslims, relative to other religious groups, cannot be perceived as anything but racist. Given the discriminatory treatment experienced by Jewish women users of *Beth Din*, the singling out of *sharia* courts and the blaming of “Islam” alone for harsh treatment of women will predictably and legitimately antagonize – and perhaps even radicalize – ordinary Muslims. Such apparent inequity will necessarily provoke feelings of alienation, mistrust and resentment. It will consequently increase support for the narrow definition of identity promoted by the most conservative and fundamentalist elements among Muslim minorities. This concern is corroborated by individual testimonies.<sup>263</sup>

We do not, however, argue that there is a simple resolution to these complex issues, nor propose that “the solution” lies in governmental accommodation of *sharia* tribunals as requested by some Muslim religious authorities. In this respect, we agree entirely with the position articulated by Warraich and Balchin in the British context:

While it is certainly inappropriate in a multicultural state bound by the terms of the Human Rights Act of 1998 that religious groups should be treated differently by the state, this in itself does not justify [the demand for a separate system for Muslim family laws]. It leaves unanalyzed the question of whether such separate provisions actually guarantee the rights of all within that community, specifically its women.<sup>264</sup>

Our study has convinced us that, far from safeguarding minority rights, all religious tribunals tend to discriminate against women while privileging fundamentalist ideologies. Recognition of this reality is essential, as is the understanding that the control of women is the cornerstone of all forms of fundamentalism.<sup>265</sup> Again, we want to alert liberals in Western democracies to the need to avoid legitimizing fundamentalist ideologies in the name of solidarity with stigmatized minorities.<sup>266</sup>

With regard to mediation in general, Balchin has noted that “even the most ardent supporter of the privatization of law – the World Bank –

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*Couples From Using Beth Din*, FORWARD (Mar. 9, 2012), <http://www.forward.com/articles/152534/?p=all#ixzz1oS7DeGGI>.

<sup>263</sup> BANO, MUSLIM WOMEN, *supra* note 89 at 184-85. For example, young South Asian British women have acknowledged embracing potentially discriminatory norms – such as arranged marriages – in order to assert their belonging to a community they perceive to be under siege. *Id.*

<sup>264</sup> WARRAICH & BALCHIN, *supra* note 103, at 87.

<sup>265</sup> This understanding has been documented for decades by feminist networks such as Catholics for Choice and Women Living Under Muslim Laws.

<sup>266</sup> For further elaboration on this theme, see A. Hélie and M. Ashe, *supra* note 4, at 54.

acknowledges that alternative dispute resolution doesn't work for women in contexts where discrimination prevails."<sup>267</sup> She also asserts that private laws and multiple parallel laws based on religion or custom "are generally harder than unitary systems to reform towards equality and justice [because they are] usually identity-based [hence] there are high political stakes in silencing internal contestation."<sup>268</sup> It is clear that institutionalizing religious law carries a significant risk of limiting possibilities for women's rights advocates to enact change. *Religio-legalism* also reinforces the (factually wrong) perception that religious rulings are static and non-negotiable, further legitimizing fundamentalist arguments that construct such rulings as God-given rather than as man-made. Hence, we maintain that civil law's maintenance of power in any religious tribunal causes harms to women, and that expansion of such power will worsen such harms.<sup>269</sup>

To address the harms we have identified, the reconceptualizations we urge will need to focus always on the impact of government power on the interests of individual women, as those interests are formulated within the human rights framework and in constitutional frameworks that recognize values of liberty and equality. This means that we are urging a deepened secularist commitment – in no way hostile to religion or unappreciative of its profound human meaning – strongly resistant to political pressures and slippages that would compromise individual women's interests by privileging claims of any religious group.

With regard to the form of *religio-legalism* that has been advocated in the campaigns for *sharia* courts, we strongly urge Western liberal nations to undo "religious accommodations" that provide "formal recognition" of any religious courts or provide for civil law enforcement of their decrees. Essentially, we recommend affirmative adoption of either the policy currently operating in Ontario or that governing in Quebec.<sup>270</sup>

At the same time, it is clear that the complex and deep-seated issues raised by *sharia*-proposals

cannot be resolved through purely legal means, and that there cannot be quick-fix solutions since "the problems are not at their root legal but social."<sup>271</sup> In order to truly address discrimination and promote equality,

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<sup>267</sup> CASSANDRA BALCHIN, *Bill is welcome, but Sharia Councils will no doubt continue*, LAPIDO MEDIA – RELIGIOUS LITERACY IN WORLD AFF., [http://www.lapidomedia.com/sites/default/files/Balchin – Arbitration and Mediation Services \(Equality\) Bill.pdf](http://www.lapidomedia.com/sites/default/files/Balchin – Arbitration and Mediation Services (Equality) Bill.pdf) (last visited Apr. 20, 2014).

<sup>268</sup> BALCHIN, *supra* note 116.

<sup>269</sup> For a strong expression of this perspective, see generally Gila Stopler, *The Liberal Bind: The Conflict Between Women's Rights and Patriarchal Religion in the Liberal State*, 31 SOC. THEORY & PRAC. 191 (2005).

<sup>270</sup> See, *supra* note 66; Baines, *supra* note 26, at 96.

<sup>271</sup> BALCHIN, *supra* note 267.

Western governments must commit to prioritizing the rights of marginalized individuals in all policy matters, domestic and non-domestic. This means they will need to cease to legitimize – at home and abroad – minority male conservatives and fundamentalists, with whom they have been “partnering” for decades. Instead, they will need to look out for and to support minority women’s equality initiatives, doing so in concrete ways.<sup>272</sup>

#### CONCLUSION

In her publication of 2012, Samia Bano noted that “demands for Muslim personal laws to be recognized in English law...remain sketchy and do not necessarily reflect the viewpoints of many British Muslims.”<sup>273</sup> Nonetheless, the British government has moved toward formal recognition in spite of the absence of strong Muslim demand for that development and in spite of the now-documented dangers women presented by operations of mediation councils and tribunals.

At the beginning of January 2014 and while it remains unclear what the implications of the United States Department of State’s new “religious engagement” policy may be, a report emerging from the University of Kent calls for greater involvement of religions within the UN.<sup>274</sup> Finding in the development of the law-religion-women nexus since 1990 reason for great wariness, we urge attention to the ongoing documentation of the expanding role that religious actors play in international affairs.<sup>275</sup> We reiterate our conviction that the problem of national or international bodies’ discriminations among religions will not be resolved by further involvements inclusive of more religions. Rather, we ought to retreat from those involvements, which have always been problematic for women. With regard to the UN-related proposal and to the national situations that we have examined here, we find relevance in the reminder of Farida Shaheed:

Who speaks for the community and who is accepted as “the authentic voice” by decision-makers?...Women rarely – if ever – define the dominant culture, because they do not have the economic, social or political power to do so. [Hence] it is time to see how women can be brought from

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<sup>272</sup> See *id.* (“[I]nvestment is needed in those grassroots groups working with women in Muslim communities to strengthen women’s understanding of their rights and their capacity to make choice in accordance to their needs.”).

<sup>273</sup> BANO, MUSLIM WOMEN, *supra* note 89, at 41-42.

<sup>274</sup> *United Nations Too Christian, Claims Report*, THE GUARDIAN (Jan. 1, 2014), <http://www.theguardian.com/world/2014/jan/01/united-nations-too-christian-report> (discussing Jeremy Carrette’s report on Religious NGOs and the United Nations).

<sup>275</sup> See Badran, *supra* note 240; Hurd, *supra* note 242.

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the margins of subcultures to a central position in defining the overall culture.<sup>276</sup>

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<sup>276</sup> Shaheed was U.N. Independent Expert in the Field of Cultural Rights and is UN Special Rapporteur in the Field of Cultural Rights. Farida Shaheed, U.N. Special Rapporteur in the Field of Cultural Rights, Cultures, Traditions and Violence Against Women: Human Rights Challenges, Presentation at the Palais des Nations, Geneva (Mar. 7, 2011) (transcript available from authors).