Accommodating Sharia: A feminist institutionalist analysis of Sharia law in Australia, Canada, and the United Kingdom

Amira Aftab

Bachelor of Arts (Honours) / Bachelor of Laws

Macquarie University

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CANDIDATE DECLARATION

I certify that the work in this thesis entitled 'Accommodating Sharia: A feminist institutionalist analysis of Sharia law in Australia, Canada, and the United Kingdom' has not previously been submitted for a degree, nor has it been submitted as part of requirements for a degree to any other university or institution other than Macquarie University.

I also certify that the thesis is an original piece of research and it has been written by me. Any help and assistance that I have received in my research work and the preparation of the thesis itself has been appropriately acknowledged.

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Amira Aftab
23 October 2017

ABSTRACT

The debates around Sharia law in Western multicultural societies are ongoing, and often draw on feminist arguments opposing multiculturalism to illustrate the "perils" of accommodating minority religious groups. An alternative focus of Sharia discussions is to consider the possibilities of legal pluralism within the state, and whether accommodation of minority religious laws is even possible. Whilst interesting, these debates do not adequately address how and why Sharia councils and tribunals have seemingly flourished in the United Kingdom, but not so in the comparable multicultural contexts of Australia and Canada. This thesis moves beyond the existing discussions of legal pluralism and the normative value of multiculturalism to examine the competing political interests that arise in debates around accommodating religious laws (specifically Sharia law), and the issues of gender equality. Drawing on theories of feminist institutionalism, I will offer a comparative analysis of the political conditions within Australia, Canada, and the UK. The key questions explored are: how has each institution influenced the experience with Sharia in each state; and what are the outcomes for women that arise within the institutional landscape. This institutional discussion will focus on two formal institutions, the legal structures of each state, and state multicultural policies; as well as two informal institutions, the influence of dominant Christian religious groups, and informal networks of men. These formal and informal institutions are examined to provide context, and better understand the development of the Sharia debate and experience in each country, as well as the outcomes for women. State law is often positioned within these debates as the "best" alternative for gender justice, as it is considered secular and "neutral". However, this fails to account for the reality that institutions, such as the law, are gendered. By adopting a feminist institutionalist approach, this thesis aims to move beyond the liberal rights framework that is typically used to discuss Muslim women and Sharia in the West. By doing so, we are better able to understand the institutional nuances that shape the experience with Sharia within countries such as Australia, Canada and the UK.

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INTRODUCTION

Conversations around the recognition of religious freedom in Western multicultural societies have gradually shifted over the years to focus specifically on Muslim groups. Increasing requests for greater accommodation of Sharia[1] law in countries like Australia, Canada, and the United Kingdom (UK) have brought about a new dimension to the debates around Sharia and multicultural accommodation; particularly in the UK where Sharia councils and tribunals have been operating "in the shadows" of state legal systems for many years.[2] Requests for greater recognition of Islamic law (particularly Islamic family law) highlight the growth of Muslim communities[3] in these countries, as well as the ongoing predicament faced by Muslims living as minority groups in the West; where they work to satisfy their Islamic personal law duties and obligations, whilst also being governed by the secular laws of these Western liberal states. What is particularly interesting, however, is the fact that the UK has seen the establishment of Sharia councils and tribunals in a way that makes them quite visible with a prominent place within Muslim communities. A number of these tribunals claim to have jurisdiction over personal arbitrations under the UK's 1996 *Arbitration Act*. In contrast, Australia and Canada have no similar councils or tribunals. Any operation of Sharia law in these jurisdictions occurs "in the shadow of the law",[4] and are not as visible or presumably as numerous as the Sharia councils in the UK. This difference between the

[1] The term Sharia is also spelt Shari'ah, Shariah, and Shari'a in the literature discussing Muslims and Islamic family law. With variations amongst texts I have chosen to use Sharia within my discussion. However, where alternative spellings are used in texts and their titles, or in the names of Muslim organisations, I will employ that form when referring to them directly.

[2] While I will look at the political and legal structures of each state in Section Two, it should be noted that when referring to the UK I am focusing solely on England and Wales (where the Sharia debate has been most prominent, and where Sharia councils and tribunals have arisen). This distinction is important to keep in mind as there are different legal structures throughout the UK - with different systems in England and Wales, compared to Scotland and Ireland. Similarly, in discussing the Canadian context, I focus on the Sharia debate that unfolded in Ontario in 2003; though I will draw on differences amongst the Canadian provinces, and the gender equality movements within the state as a whole.

[3] Muslims living in the West do not form a homogeneous united community, and are often fragmented by ethnic and cultural affiliations, as well as religious sects. Thus, there are Muslim communities, rather than a singular Muslim community within each state.

[4] I describe the Sharia bodies that may operate in Australia and Canada, but are not visible and overtly operating within communities (like those in the UK) as being "in the shadow of the law". The existence and operation of these bodies are often undocumented and not widely advertised, but it is presumed that where there are religious communities there may be Sharia boards, councils or tribunals operating. An example of this is in Australia, where media reports claim that Sharia mediation is being carried out in "meeting rooms" around the city – and thus "in the shadows" - Bryan Seymour, "Law of the Land? Is Sharia Operating in Our Suburbs?" *Yahoo 7 News*, April 26, 2016, https://au.news.yahoo.com/a/31440296/law-of-the-land-is-sharia-law-operating-in-our-suburbs/ (accessed April 30, 2016).

three states is curious. While Sharia councils and tribunals have seemingly flourished in the UK, they have not in Australia and Canada. The population of Muslims in each country varies, but I argue that this alone does not offer a sufficient explanation for this difference. According to the 2011 Census, 2.2% of Australians identify as Muslim,[5] compared to the 3.2% of Muslims in Canada.[6] Whilst the UK (specifically England and Wales) has a larger percentage at 5%,[7] this is not so significantly higher than Australia and Canada that it could be the sole explanation for the establishment and growth of Sharia bodies. The size of the Muslim population in England and Wales presumably does contribute to the ability for Muslim communities to be able to form organisations and participate in the political realm; but this is dependent on other factors, such as location and ethnic fragmentation within Muslim populations (as will be explored in Chapter Nine).

These Sharia councils and tribunals[8] in the UK are informal religious-based institutions that appear to be uniquely British – in the sense that they are visible within communities, and have not appeared in other Western liberal states, like Australia and Canada, where any similar bodies operate "in the shadow of the law". Some of these British Sharia institutions, like the Muslim Arbitration Tribunal (MAT) claim to have jurisdiction under the UK *Arbitration Act* 1996.[9] These councils and tribunals are typically run by self-appointed religious leaders, and attempt to bridge the gap

[5] The 2016 Australian Census revealed that 2.6% of the Australian population identifies as Muslim [See Australian Bureau of Statistics, "Australia Today: The Way We Live Now," *Census of Population and Housing: Australia Revealed*, Catalogue no. 2024.0, http://www.abs.gov.au/ausstats/abs@.nsf/mf/2024.0 (accessed on July 15, 2017)]. However, without comparable updated statistics for Canada and the UK, I outline the 2011 statistics in each jurisdiction to illustrate the difference in Muslim population across jurisdictions in the same time period.

[6] This is according to the 2011 National Household Survey. It should be noted that information on the Muslim population in Canada is incomplete, and that the "collection of information on religious affiliation was abandoned in the 2011 Census, and information was instead captured through a less reliable National Household Survey" - Wendy Kennett, "Religious Arbitration in North America", in *Gender and Justice in Family Law Disputes*, ed. Samia Bano (Waltham: Brandeis University Press, 2017) p. 195. In terms of updated statistics, the most "recent" statistics are those derived from the "less reliable" National Household Survey in 2011, and the religion question will not be asked again until 2021.

[7] It has been approximated that in 2016, that 5.4% of the population in England and Wales is Muslim. However, this has been estimated in the media, with the most up to date statistics from the government being those from the 2011 Census for England and Wales [See Lexi Finnigan, "Number of UK Muslims exceeds three million for first time," *The Telegraph*, January 31, 2016 http://www.telegraph.co.uk/news/uknews/12132641/Number-of-UK-Muslims-exceeds-three-million-for-first-time.html (accessed July 18, 2017)].

[8] The councils and tribunals are different, with councils being more informal mediation-based bodies. The tribunals (like the MAT) on the other hand claim to have jurisdiction under arbitration provisions, are thus are quasi-judicial.

[9] Muslim Arbitration Tribunal, *Muslim Arbitration Tribunal*, http://www.matribunal.com/history.php (accessed May 15, 2013).

between the (secular) state laws and the religious laws that many Muslims living in the West navigate in matters such as family law.[10] However, it is important to note that not all Muslims demand or seek some kind of "accommodation" of their religious laws and norms. As such, this thesis considers the rise of informal Islamic law institutions and processes (Sharia councils) within each jurisdiction, that are sometimes accompanied by a request from some (but not all) groups within the Muslim population, for greater recognition or "accommodation". The exact number of Sharia councils operating in the UK is not known, but in 2009 it was estimated to be approximately 85.[11] With these councils run by members of the Muslim communities, the processes are not uniform amongst the bodies, and there is no unitary body that governs their practices. Similarly, the nature of Sharia law itself is open to interpretation with no centrally agreed upon understanding of Sharia (as will be outlined in Chapter Three). This means that decisions are relatively ad hoc, and as those opposing Sharia in the West argue, there is a possibility that certain individuals, namely Muslim women, will be disadvantaged within this religious arbitration – particularly as the models of reconciliation that are within these Sharia arbitrations draw upon patriarchal concepts of women as wives, daughters, and mothers.[12] In 2012, a paper was published to offer support for Baroness Cox's *Arbitration and Mediation Services (Equality) Bill*, which aimed to outlaw all possibilities of religious arbitration. One of the women's stories offered as evidence in opposing religious arbitration was that of Sania, a British national seeking an Islamic divorce through the Dewsbury Sharia Council. However, in Sania's experience the Sharia Council ignored protection orders made by the UK courts, as she had been subject to physical and emotional abuse at the hands of her husband, instead insisting that she attend mediation with her husband.[13] This is not an uncommon experience, and is one of the primary arguments used by those opposing religious arbitration. However, the dilemma here is that many Muslim women seek out Sharia councils for religious divorces, often in

[10] Works such as *Accommodating Muslims under Common Law: A comparative* analysis by Salim Farrar and Ghena Krayem explore the ways in which Muslims living in the West are faced with reconciling Islamic law with state laws – in matters of family law, criminal law, and business transactions.
[11] Denis MacEoin, "Sharia Law or 'One Law For All'?" in *Sharia Law or 'One Law For All'*, ed. David G Green (London: Civitas, 2009), 69.
[12] In the Canadian Sharia debate women's groups drew on this argument. In the UK, supporters of Baroness Cox's *Arbitration and Mediation Services (Equality) Bill* (which included both men and women) also argued that religious arbitration centred on patriarchal ideas on women as mothers, wives and daughters.
[13] Equal and Free, *Equal and Free? Evidence in Support of Baroness Cox's Arbitration and Mediation Services (Equality) Bill (Researched and Drafted by Charlotte Rachael Proudman)* (London: Equal and Free, 2012), 19.

conjunction with civil divorces by the states' courts, as they do not feel divorced until both are obtained.[14] To simply deny and outlaw religious arbitration does not resolve this dilemma. In fact, it merely pushes religious mediation and arbitration into the shadows, well beyond the reach of the law and any safeguards that could be implemented to combat the issues that arise with religious dispute resolution.

Australia and Canada are heralded as successful multicultural states with similar political and legal traditions to the UK. As such, it is reasonable to question why it is that the UK has accommodated Sharia councils, while Canada and Australia have not. It would almost seem contrary that the one state to exhibit a more accommodating political landscape that has given space for Sharia councils to grow is the one with an established religion (the Church of England). Equally curious is the distinction between Canada and Australia. Whilst Canada has at least considered Sharia on a formal governmental and public level, through the Ontario debate in 2003, in Australia the Sharia debate has not been provided the political space to germinate. The Sharia debate in Ontario, Canada arose in 2003 after a public statement by the head of the Islamic Institute of Civil Justice, Syed Mumtaz Ali, noted their intention to establish religious arbitration tribunals under the provisions of Ontario's 1991 *Arbitration Act*. Other religious groups had been carrying out religious arbitration under these provisions for years without any significant attention or dispute. However, this request led to a fierce public debate, and the Ontario government commissioned a report by former Attorney General Marion Boyd, to assess the possibilities and effects of such religious arbitration. Ultimately, despite recommendations in the report noting that religious arbitration could be accommodated, with the introduction of certain safeguards to protect individuals' rights, the Ontario government amended the *Arbitration Act* in 2005 to remove any possibility of religious arbitration.

With the Sharia debate in Ontario occurring soon after the events of 9/11 in the US, it could be argued that the rise of Islamophobia in the years since have significantly influenced state policies and attitudes towards Muslims and Sharia more generally –

[14] See Ghena Krayem, *Islamic Family Law in Australia: To Recognise or Not To Recognise* (Carlton: Melbourne University Publishing, 2014); and Samia Bano, *Muslim Women and Shari'ah Councils* (Basingstoke: Palgrave Macmillan, 2012).

and in part drove the opposition to Sharia arbitration bodies in Ontario.[15] But this is not the sole influence, the strength of the women's lobbies and movements within the public Sharia discussion could also be considered to have successfully persuaded the Ontario government to ban religious arbitration. Canada has historically had a closer engagement of women's lobby groups with the government, compared to Australia and the UK, along with strong gender equality protections within constitutional documents (which will be discussed in Chapters Six and Nine). Like Canada, the UK has gone through recent equality reforms, with the introduction of the *Human Rights Act* of 1998, and the 2006 *Equality* Act. However, whilst the Sharia debate in Ontario led to a shift away from greater religious accommodation, the UK has not limited the space available for Muslim communities to operate these Sharia bodies. In Australia, gender equality reforms have seen the recent amendment of the *Sex Discrimination Act* from 1984 by the *Sex and Age Discrimination Legislation Amendment Act* 2011; as well as the introduction of the *Workplace Gender Equality Act* in 2012. With these gender equality reforms in all three states, it is evident that we are in the most advanced age of gender equality legislation than ever before. So, this raises the question: why have Sharia councils and tribunals succeeded in the UK, but not in Australia and Canada? And even more curiously, why has this development of Sharia councils in the UK occurred in an era of gender equality?

Common responses to questions surrounding religious accommodation and Sharia law often turn to discussions of legal pluralism, and the possibility for state legal systems to accommodate and recognise the laws of minority cultural and religious groups.[16] Another approach is to frame the discussion within the multiculturalism versus feminism debate that was most significantly sparked by Susan M Okin in 1999.[17] However, these frameworks while insightful and informative are not adequate in addressing the above question, of why Sharia councils have seemingly flourished in the UK, when compared to other similar jurisdictions. For instance, Leti Volpp argues that the multiculturalism-feminism debate can be problematic as it ignores the other forces

[15] Significantly, Ontario is relatively unique in its arbitration provisions – particularly in the realm of family law. Not all Canadian provinces have arbitration available as a dispute resolution mechanism, particularly in personal/family law matters.
[16] See Ann Black, "Accommodating Shariah Law in Australia's Legal System: Can we? Should we?" *Alternative Law Journal* 33, no.4 (2008); and Bryan S Turner and James T Richardson, "The Future of Legal Pluralism," in *The Sociology of Shari'a: Case Studies from around the World*, ed. Adam Possamai et al. (Switzerland: Springer International Publishing, 2015).
[17] Leti Volpp, "Feminism versus Multiculturalism," *Columbia Law Review* 101, no. 5 (2001), 1184.

that may operate alongside culture to equally impact women's lives and their agency.[18] As such, in this thesis I aim to move beyond these existing discussions of legal pluralism and the normative value of multiculturalism to examine the competing political interests that arise in debates around accommodating religious laws (like Sharia) and issues of gender equality. Drawing on theories of new institutionalism, particularly historical institutionalism (HI) and feminist institutionalism (FI), I will offer a comparative analysis of the political conditions of Australia, Canada, and the UK, to shed light on some possible reasons why the UK implementation of Sharia councils and tribunals differs from the comparable situations in Australia and Canada. The selection of these three states for comparison is primarily based on the shared legal and political traditions – particularly as Australia and Canada, as former colonies of the UK, have inherited their legal structures and parliamentary traditions from the UK. All three countries are considered modern multicultural societies, and grapple with the issues that arise regarding multicultural accommodation of minority cultural and religious groups. The central focus of the thesis will be exploring some of the factors informing *how* and *why* Sharia has been accommodated in the form of informal Sharia councils and tribunals established in the UK, but not in the comparable jurisdictions of Australia and Canada. In examining the institutional landscape in each state through a HI analysis, I will focus on two formal institutions (the legal structures of each state and state multicultural policy) and two informal institutions (the influence of dominant Christian religious groups on the state, and the impact of informal networks of men), to better understand the ways in which these institutions interact and lead to the different experiences with Sharia in each state.

With this focus on institutions I will also draw on FI theories to explore the outcomes for Muslim women that arise from the presence (or lack) of Sharia councils and tribunals in each state. State (secular) law is often positioned within multiculturalism-feminism discussions as being the "better" or more "just" alternative for justice in personal law matters for minority (Muslim) women. However, it is important to consider that state institutions themselves are not as 'neutral' or gender-bias free as is sometimes claimed. The inherent gender hierarchies in state institutions also impact outcomes for Muslim women, and can limit their agency. Nevertheless, employing an FI lens to examine the outcomes for women is a secondary question of this thesis.

[18] Ibid.

Similarly, this thesis does not offer an empirical study of Sharia law and Muslim women. There are existing empirical works that explore the operation of Sharia councils in the UK, aiming to address the substantive question of outcomes for women (and men) through interviews and observations within these institutions.[19] As noted earlier, when discussing gender and the agency of Muslim women these empirical works are often framed within the Okin paradigm of "is multiculturalism bad (or good) for women?", which is not the focus of my thesis. Instead, in presenting an institutional analysis of the Sharia experience in each state I will rely on primary and secondary sources, which include (but are not limited to): laws, governmental reports, speeches, as well as the existing empirical and theoretical works on Sharia law, Sharia councils in the UK, and Muslim women. In essence, this is a political science thesis that is concerned with questions of how states operate, what they can and will accommodate, and the institutional reasons for the possibilities, as well as constraints, for the accommodation of minority cultures and religions. To do this, the thesis employs an interdisciplinary methodology in order to examine the accommodation of law, and its effects and outcomes, through the lens of feminist political science methods.

Ultimately, I aim to move beyond the existing frameworks used in Sharia discussions, to present a different perspective, through which I hope to extend the theoretical field and discussion of FI (in examining law, as well as religious accommodation). FI draws upon concepts from the neo-institutionalist school of historical institutionalism. Whist one goal of my thesis is to offer a comparative study that explores the questions of how and why Sharia councils have arisen in Britain but not similarly in Australia or Canada, and the outcomes for women; the second goal is to progress FI methods through the use of examples, in areas which they have not been extensively applied before. Louise Chappell applies FI methods to law in the context of gender justice at the International Criminal Court,[20] and Catherine O'Rourke examines feminist legal method and the

[19] See for example: Bano, *Muslim Women and Shari'ah* Councils; Gillian Douglas et al., *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* (Cardiff: Cardiff University, 2011); and Maleiha Malik, *Minority Legal Orders in the UK: Minorities, Pluralism and the Law*, (London: The British Academy, 2012).
[20] Louise Chappell, *The Politics of Gender Justice at the International Criminal Court* (New York: Oxford University Press, 2016).

ways in which it can be used in the study of institutions.[21] However, FI has not been widely employed in the examination of religious institutions and thus, I aim to contribute to the extension of FI and gendered institutional analysis by employing it in my discussion of minority religious laws (informal institutions) and their interaction with formal state institutions (family and arbitration laws, but also public policies of multiculturalism).

Contextualising the Research

The discussion of Sharia law and Muslim women has long been the focus of studies, particularly in terms of Muslim women's agency and rights in Muslim-majority countries. In the West, the focus on minority women has been of particular interest, but there has been an increasing shift in discussions to explore Muslim women in recent years, particularly with the growing focus on Muslim minority groups in Western liberal democracies post-9/11; with states focusing on combatting religious extremism, but also the rise of Islamophobia. Notable works include *Sharia in the West* edited by Rex Ahdar and Nicholas Aroney,[22] which presents a collection of essays exploring the Sharia debate following the Archbishop of Canterbury, Rowan Williams' famous lecture in 2008; as well as the Sharia debate in Canada, specifically Ontario in the early 2000s. In the Australian context, Ann Black has presented discussion of Sharia law in Australia, predominantly focusing on the possibilities for legal pluralism and accommodation, but also the arguments about whether it is "good or bad"; outlining the key arguments that arise (for example, that it may adversely affect and reinforce oppressive traditions).[23]

In terms of the gender equality discussion, Samia Bano's *Muslim Women and Shari'ah Councils* is a leading work that explicitly explores gender and the experience with Sharia councils in the British context.[24] Bano presents findings from interviews with various Sharia councils, and Muslim women who have participated in religious mediations or arbitrations. This work is particularly helpful in understanding the ways

[21] Catherine O'Rourke, "Feminist Legal Method and the Study of Institutions," *Politics & Gender* 10, no. 4 (2014).
[22] Rex Ahdar and Nicholas Aroney, eds, *Shari'a in the West* (Oxford: Oxford University Press, 2010).
[23] Ann Black, "Accommodating Shariah Law in Australia's Legal System: Can we? Should we?" *Alternative Law Journal* 33, no.4 (2008). See also – Ann Black and Kerrie Sadiq, "Good and Bad Sharia: Australia's Mixed Response to Islamic Law," *UNSW Law Journal* 34, no.1 (2011).
[24] Bano, *Muslim Women and Shari'ah Councils*.

in which these councils position themselves within the institutional framework within the state, and how they operate. Ralph Grillo similarly presents an insightful discussion on Muslim interaction with family law in Britain, arguing that there is a legal industry of sorts that has developed, with a number of organisations and individuals (each with their own agenda and concerns) participating in the discussions of Muslims, Islam and the law in the UK.[25] Grillo explores the ways in which these various organisations, such as feminist activists, the government, Muslim community groups, Sharia councils (to name a few) interact with one another within the multicultural framework of Britain – noting the conflicts and disagreements that arise between the groups within this "legal industry" around Muslims, Islam and the law. Machteld Zee also examines the ways in which Sharia councils are at odds with the principles of liberal multicultural states, focusing on a comparative study of the UK and the Netherlands.[26] However, whilst interesting insights are offered, there are some limitations with works like Zee's. For instance, Zee's observations of Sharia councils in the UK is based on approximately three days of attending "cases" being arbitrated/mediated by these bodies. Thus, whilst she considers the impact on Muslim women, the work presents some gaps in the information and is certainly not as extensive as might be desirable; highlighting the limitations of depending solely on empirical works when studying the accommodation of Sharia in the West.

In the Australian context, Ghena Krayem presents an important work titled *Islamic Family Law in Australia*, which considers the ways in which Sharia may be able to be accommodated without the establishment of special provisions or a parallel legal system.[27] Krayem notes that the Australian family law framework is relatively flexible and provides many opportunities for Muslim Australians to fulfil their religious duties in the realm of family law (notably marriage and divorce) whilst also adhering to the state's family law provisions. However, while this work offers great insight into the compatibility of Australian laws and Sharia, there is not a considerable focus on the gender debate that often arises in discussions of religious accommodation and Sharia in the West. Similarly, whilst there have been comparative discussion of Sharia in the

[25] Ralph Grillo, *Muslim Families, Politics and the Law: A Legal Industry in Multicultural Britain* (Surrey: Ashgate, 2015).
[26] Machteld Zee, *Choosing Sharia?: Multiculturalism, Islamic Fundamentalism and Sharia Councils* (The Hague: Eleven International Publishing, 2016).
[27] Ghena Krayem, *Islamic Family Law in Australia: To Recognise or Not To Recognise* (Carlton: Melbourne University Publishing, 2014).

UK and Canada, or Canada and Australia (and occasionally all three) these are often brief and none have extensively considered the political conditions that have influenced the experience with Sharia in each state. Nor do they focus expansively on the "gender" aspect of the Sharia debates – any such consideration tends toward outlining the feminist opposition (like that of Okin) to multicultural accommodation of Sharia.[28] Restricting discussions to the multiculturalism versus feminism debate is limiting. Moving beyond the liberal rights framework when discussing Sharia might be more productive and offer alternative insights. This is where I aim to offer a different perspective in examining the experience with Sharia in Australia, Canada and the UK. By drawing on theories of HI and FI, I will examine institutions and the way that historical legacies, and implicit gender hierarchies, have shaped the space for bodies like the Sharia councils and tribunals in the UK to emerge (but not so in comparable states, like Australia and Canada). In fact, 2017 marks over 10 years of discussion and development of feminist institutionalism.[29] By drawing on the ideas around gendered institutional analysis I hope to contribute by extending and applying these principles to explore the outcomes for Muslim women (as a minority group in multicultural societies) when seeking redress in the realm of family and personal laws; though as noted above, this is a secondary aim of the thesis.

Structure of Thesis

This thesis is divided into three sections. Section One serves as a literature review, outlining the key frameworks that are often employed when discussing Sharia, gender and religious accommodation in the West; as well as outlining the methodology that underlies the thesis. Chapter One summarises the oft-used multiculturalism versus feminism framework, that arose most notably following Okin's 1999 essay *Is Multiculturalism Bad for Women?* In exploring this conflict between feminists and supporters of multiculturalism, I will note the arguments for why multiculturalism can be problematic for women's rights, but also the limitations of this multiculturalism-feminism framework in accounting for the realities of the Sharia and its

[28] Naser Ghobadzadeh (2010), looks at the multiculturalism-feminism debate in Australia and Canada. Krayem, in *Islamic Family Law in Australia* (2014) briefly outlines the Sharia and multiculturalism debates in each country. Similarly, the collection of essays in Rex Ahdar and Nicholas Aroney's book, *Sharia in West* (2010) also explores the debate in all three jurisdictions.
[29] UIC Gender Project, *Gender, Institutions and Change: Feminist Institutionalism after 10 years*, http://uicgenderconf.wixsite.com/conferencesite (accessed on August 25, 2016).

accommodation (or lack thereof) in Australia, Canada and the UK. Specifically: how and why it has or has not been accommodated, and what this accommodation means for Muslim women. Chapter Two examines legal pluralism, as discussions of accommodating minority religious law (such as Sharia) often focus on whether state legal systems can be legally pluralistic and recognise other legal orders. However, whilst this is interesting and has come up regularly in terms of Sharia law in Western liberal states, the discussion around legal pluralism and the definition of law is often circular and can sometimes seem unending in nature, without providing in-depth insight into how and why Sharia councils have emerged in the British context. Thus, I argue that it is better to look at the notion of 'reasonable accommodation' (which includes multicultural accommodation and freedom of religion), and that is what I will employ in my discussion of the Sharia in Australia, Canada and the UK, as an alternative to legal pluralism.

After establishing the frameworks within which the Sharia debate is often discussed in Chapters One and Two, I will then provide a background to Sharia law in Chapter Three. This will include an outline of what Sharia is, the history of it, and how it is perceived in the West (namely, the stereotypes that are often expounded in debates). Following this discussion, it is important to examine the discussions that have arisen around Muslim women and agency. Chapter Four extends the discussion from Chapter One, of the feminist opposition to multiculturalism, where it is often argued that cultural and religious groups oppress minority women as the 'vulnerable' members of these groups. However, I make the argument that this approach discounts women's agency, and therefore it is important to consider the perspectives of intersectional and Islamic feminists on women's rights and agency, and the possibilities for 'choice'; as well as the problems that arise when Western secular feminists, and the state define Muslim women's interests, particularly in a post-9/11 world. This sets up the context for the discussion of institutions in Chapters Nine and Ten, as the outcomes for women are impacted by the prevailing attitudes (Islamophobic or otherwise) that reside within formal and informal institutions. Whilst Chapters One through Four establish context to pre-existing debates around religious accommodation, Sharia law, and Muslim women's agency, Chapter Five sets out the methodology and theory that will be used in the thesis to explore these debates and offer an alternative perspective to the Sharia discussion.

In Section Two, I outline the political and legal situations in Canada, the UK, and Australia. This includes the experience with multiculturalism and the Sharia debate in each state. These chapters offer a comparative illustration of the differences between these states, and are important in establishing the context and background for the institutional discussion and analysis that follows in Section Three. The order in which the countries are discussed is partly driven by the development of multiculturalism within each state. Canada is heralded as the first state to introduce an official policy of multiculturalism, and thus is examined first in Chapter Six. This is followed by an examination of the political and legal structures in the UK, where multiculturalism was first discussed conceptually with an outline of the basic ideas and principles of multiculturalism. Australia followed the lead of Canada (and the UK) in exploring the idea of multiculturalism, and became the second state to adopt an official policy, after Canada. I also begin the comparative analysis of the three states with Canada, as the Sharia debate that arose in Ontario in 2003[30] sparked one the most significant discussions between supporters of Sharia and multicultural accommodation, and feminists (defending the rights of Muslim women). Whilst these conflicts between supporters of multicultural accommodation and feminists have been ongoing and are not particularly new, it was the first time in a Western liberal democracy that Sharia law was discussed with the involvement of the state. The Sharia debate in the UK did not definitively begin in 2008, but a lecture delivered by the Archbishop of Canterbury, Rowan Williams, suggesting that Sharia could perhaps be accommodated, generated much controversy and conversation about Sharia in the UK.[31] Australia has not seen the same level of debate of Sharia, and therefore, positioning discussion of the Australian context and Sharia debate in Chapter Eight allows a better examination of the differences to the experiences in Canada and the UK.

After outlining the political and legal backgrounds, multicultural policies and engagement with Sharia debate in each state in Section Two, I draw on this

[30] Sparked by the statement issued by the Islamic Institute of Civil Justice (IICJ) that outlined their intent to establish a Sharia tribunal that would arbitrate disputes according to Sharia law, and drawing jurisdiction and authority to do so under Ontario's *Arbitration Act* 1991. This will be discussed further in Chapter Six.

[31] A debate which has continued to present day, in considering the place and existence of Sharia councils and tribunals. An investigation was launched into these councils in 2016 by the now PM Theresa May (during her time as the former Home Secretary) – but were preceded by anti-Sharia movements, such as the campaign behind the Bill proposed by Baroness Cox opposing religious arbitration.

information to offer an exploration of two key questions in Section Three. These questions study the accommodation of minority religious laws (namely, Sharia) in Western liberal states, and explicitly examine formal and informal institutions within each state. With the first question, I consider how the formal and informal institutions might be implicated in the accommodation of Sharia in each state. The formal institutions examined in Chapter Nine include the legal and political structure of each state (for example, constitutions, laws, federalism), and state multicultural policies. Discussion of the informal institutions follows in Chapter Ten and explores the influence of the dominant religion within the state (such as the Church of England or the Catholic Church), and the informal networks (of men) that arise within the institutional landscape and shape the space available for women to engage with both formal and informal institutions. This institutional analysis offers insight into why the British experience has seen the growth and establishment of Sharia councils and tribunals in a way that is not mirrored in Canada or Australia. The second question looks at the outcomes for women that arise from the accommodation (or lack of accommodation) that arises within this institutional landscape. In particular, it considers: what do the institutional outcomes mean for minority women and their agency (in this case the agency of Muslim women) who are seeking resolution of personal law disputes, in particular, divorce and property settlement? It is in this discussion of the outcomes for Muslim women that the secular state laws are often positioned as the "best" option or alternative to religious norms and laws (an idea central to feminist opposition to multicultural accommodation). However, this argument overlooks the inherent patriarchal norms and traditions that are embedded within the state legal systems and policies. As such, a consideration of the ways in which informal institutions have influenced formal state institutions like the law and policies of multiculturalism, can shed light on gender hierarchies, and historical gender legacies that have been inherited and imbued within laws. I will look at the ways in which family laws are inherently gendered, leading to unequal outcomes for women (generally), and thus also affect minority women when they are seeking justice through state-sanctioned legal avenues.

In considering the outcomes for Muslim women and their engagement within private dispute resolution, including Sharia councils and other informal Islamic community processes, it is important to recognise that not all Muslim women's experiences are the

same. Whilst many Muslim women turn to religious mediation or arbitration, alongside the civil divorce process, not all Muslim women want or seek religious divorce through these institutions. The varying experiences of Muslim women living in the West cannot be reduced to a singular, universal voice. As with any group of minority women, Muslim women face various challenges – as their gender intersects with "other categories and identities", which demonstrates the complex nature of their lived experience.[32] The intersectional approach within feminist theory encourages recognition of the fact that ideologies of gender, race, class and sexuality are "reciprocally constitutive categories of experience and analysis".[33] Thus, it is necessary to take into account the various dimensions that constitute Muslim women's identity and experience. Muslim women in the West often straddle two worlds: the liberal values of the "secular" state, and the cultural and religious communities they are members of. Their experiences do consist of "intersecting patterns" of both racism and sexism, and they face marginalisation on both fronts, and within all groups which they are members of.[34] As such, I recognise that Muslim women do not simply "choose" between state institutions and religious bodies when seeking post-divorce settlement and dispute resolution; and that they have the capacity to navigate (and do engage with) multiple institutions and legal forums.[35] However, as the informal religious bodies and processes that have emerged within each jurisdiction do compete with the formal state legal system in the realm of private dispute resolution (particularly in family law), I argue that we must acknowledge the hidden gendered hierarchies and legacies in both. Whenever Sharia debates emerge publically the reality is one where the secular state is measured against minority religious orders, and heralded as "neutral" (and therefore better for gender equality). As such it is this claim of "neutrality" that needs to be examined and better understood - though in doing so I am not discounting the different experiences and ways in which Muslim engage with these institutions.

[32] Samia Bano, "Agency, Autonomy, and Rights: Muslim Women and Alternative Dispute Resolution in Britain," in *Gender and Justice in Family Law Disputes*, ed. Samia Bano (Waltham: Brandeis University Press, 2017), 58.
[33] Valerie Smith, *Not Just Race, Not Just Gender* (New York: Routledge, 1998), xiii.
[34] Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," *University of Chicago Legal Forum* 1, no.8 (1989): 1243-44.
[35] Bano, "Agency, Autonomy, and Rights," 58.

In discussing Sharia in each state, along with the outcomes for Muslim women, I do not offer a "solution" to the dilemma of accommodating minority religious orders in multicultural societies. Indeed, this could prove an almost impossible task, as it often leads to circular and unending debates over the appropriate limits of multicultural accommodation and possibilities of legal pluralism. Through my discussion, I hope to illustrate the institutional conditions that have contributed to the varied experiences with Sharia in each state selected for my comparative analysis. I aim to outline the underlying historical legacies that shape formal state institutions, as well as the "hidden" gender hierarchies and biases that exist within both formal and informal institutions and impact the outcomes for women, in particular the agency of Muslim women. Ultimately, this is not an empirical thesis, and I do not claim nor aim to speak for Muslim women in any country. Rather, I examine the political conditions that shape the personal and public lives of Muslim women, and provide theoretical explanation for these. With the current migration crisis in Europe reshaping the geopolitical climate, the assertion of minority (particularly Muslim) rights is set to become even more topical and important. The shifting focus of discussions around the "appropriate bounds" of multiculturalism onto Muslim groups in a post-9/11 world means that it is important to continue to explore questions of religious accommodation, and assess how this may be balanced in a time of increasing gender equality reforms. However, before we can truly understand if and how a balance might be achieved between religious freedoms and gender equality, it is necessary to explore how and why certain outcomes with Sharia have developed in states with similar political and legal traditions – and the role that institutions, gender norms, and historical legacies have in shaping these outcomes.

SECTION ONE:

THEORETICAL FRAMEWORKS AND BACKGROUND TO STUDY

CHAPTER ONE

Multiculturalism versus Feminism

Discussion of religious freedom and gender equality often happens against the background of the multiculturalism versus feminism debate that arose in response to Susan Okin's 1999 essay "Is Multiculturalism Bad for Women?". Recent Sharia debates – for example, that which arose in Ontario, Canada following a request for Islamic arbitration in 2003 – have drawn on this multiculturalism-feminism framework; with women's groups and feminists opposing Sharia arbitration by outlining the impact multiculturalism has on women. In this chapter, I will outline multiculturalism as supported by liberal theorists such as, Will Kymlicka and Charles Taylor; followed by the feminist opposition to such multicultural ideals, as led by Okin. I examine the multiculturalism-feminism dichotomy as it is often employed in examinations of minority groups in liberal multicultural states, and is an important one. This framework offers some insights into the issues that may arise around requests by minority groups for greater recognition and accommodation, but is limited in scope. The narrow focus of this framework in centring on the arguments put forth by liberal multicultural theorists and the opposition by feminists, fails to present answers to other questions that arise. For instance: how and why there is seemingly greater accommodation of Sharia and Muslim groups in some states (like the UK) but not so in other comparable liberal multicultural states (Australia and Canada) – a key question that will be explored in Section Three of this thesis.

Multiculturalism

Multiculturalism is a widely debated and discussed concept. There are many understandings and "versions" of multiculturalism, and theorists that describe themselves as "multicultural liberals" also differ from one another.[1] The term multiculturalist could refer to those who argue that cultural diversity within Western liberal democracies challenges traditional liberal ideologies; alternatively, it can refer to the theories that propose liberalism can (and should) accommodate the challenge of

[1] John Horton, "Liberalism and multiculturalism: once more unto the breach," in *Multiculturalism, Identity and Rights*, eds. Bruce Haddock and Peter Sutch (London and New York: Routledge, 2003), 25.

cultural pluralism.[2] The term multiculturalism is often employed in highlighting the existence of diverse cultural groups within a nation state, whose values or ways of life may conflict with one another.[3] For theorists such as Homi Bhabha, multiculturalism is viewed a "portmanteau term for anything from minority discourse to postcolonial critique".[4] In discussing multiculturalism within the context of the "multiculturalism-feminism" debate I refer to this idea of minority groups seeking accommodation and recognition by the state, as opposed to seeking political independence.

The discussion surrounding multiculturalism and pluralism within Western liberal democracies is relatively recent, with the idea of multiculturalism coming to the forefront of both academic and political debates during the last half century.[5] In the political and policy arena, multiculturalism first appeared during the 1970s in Australia, the UK, and Canada in relation to governmental policies and legislation concerning immigration.[6] A lot of the initial theorising and debate of multiculturalism stemmed predominantly from Canadian and Australian academics.[7] However, for prominent multicultural theorists like Will Kymlicka, multiculturalism has only really appeared during the 1990s.[8] Liberal theorists may claim that liberalism is a neutral and objective theory, however, there is evidence that liberal laws in the West may impact some groups within society more unfairly than others.[9] This inequality between social groups is typically based on culture or religion, and may be perpetuated through the establishment of laws, which make the cultural activities of some groups illegal; or it may inhibit their ability to adhere to/carry out their cultural or religious duties.[10] It is based on this idea of inequality between the majority group within liberal societies and minority cultural or religious groups, that there is a call for accommodation of minority groups, through granting them special group rights.

[2] Ibid., 26.
[3] Ibid.
[4] Homi Bhabha, "Culture's in between," *Artforum International* 32, no. 1 (1993), 31.
[5] Andrew Vincent discusses the idea that multiculturalism has only come about in the last 30 or so years. With the work published in 2003, this is presumably now closer to 50 - Andrew Vincent, "What is so different about difference?" in *Multiculturalism, Identity and Rights*, eds. Bruce Haddock and Peter Sutch (London and New York: Routledge, 2003), 43.
[6] Ibid.
[7] Ibid.
[8] Ibid.
[9] Horton, "Liberalism and multiculturalism," 27-29.
[10] Ibid.

Multicultural theorist Will Kymlicka has led the discussion of multiculturalism, as well as significantly shaping the multiculturalism-feminism debate. Kymlicka defines multiculturalism as being the premise that individual rights are not sufficient in protecting minority cultures, and that special group rights should be afforded to better protect members of these minority cultures. For Kymlicka, there are two forms of multiculturalism, one where national minorities seek to maintain themselves as separate societies alongside the majority culture, and the other where ethnic groups seek greater recognition of their ethnic identity.[11] Within the latter form of multiculturalism, minority groups seek acceptance as full members of society whilst the institutions and laws of the mainstream society accommodate their cultural differences.[12] Within liberal democracies a key mechanism for accommodating the cultural differences between the groups within society is via the protection of individual rights.[13] This accommodation is important as having a cultural structure is deemed important for allowing individuals to make meaningful life decisions; and as such there is a need for states to adopt policies of multiculturalism and accommodation.[14] With culture providing such a fundamental role and framework for individuals in relation to organising their lives in a meaningful way, the threat of cultural extinction should be addressed by the state and protection of these cultures should be established through granting special rights.[15]

This argument, regarding the importance of individuals in minority groups having access to a framework that allows them to make meaningful choices, is echoed by Charles Taylor. Taylor discusses multiculturalism and the need for special rights for minority cultures in the context of politics of recognition. For Taylor, recognition is important, as it is the fundamental means by which an individual's identity is shaped.[16] The central claim within the politics of recognition is that individuals' membership within groups is an important part of ensuring a person's wellbeing.[17] This is the

[11] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority* (Oxford: Clarendon Press, 1995), 10.
[12] Ibid., 11.
[13] Ibid., 84.
[14] Ibid.
[15] Ibid., 73.
[16] Charles Taylor, *Multiculturalism: Examining the Politics of* Recognition (Princeton: Princeton University Press, 1994)
[17] Jonathan Seglow, "Recognition and Religious Diversity: The Case of Legal Exemptions," in *Recognition Theory as Social Research*, eds. Nicholas H. Smith and Shane O'Neill (London: Palgrave Macmillan, 2012), 132.

justification of granting group specific rights, as denying recognition may harm individuals. Forms of equal recognition have been an essential feature of democratic culture, and the politics of such equal recognition has quite a significant role to play in the public sphere.[18] Alongside this modern notion of identity that is heavily based on the concept of recognition, there has been the rise of a politics of difference. The politics of difference is the idea that every individual should be recognised for their unique identity.[19] Parallel to this politics of difference is what Taylor calls the politics of equal dignity. The politics of equal dignity is the granting of an "identical basket of rights and immunities" to individuals and groups.[20] Ultimately, the politics of recognition advocates for minority groups that are marginalised or disadvantaged within the broader society to have their status reinforced and supported through public policies.[21] By doing so, it is believed that individuals that are part of these minority groups would be placed in the same position as the rest of society. However, these two ideas, the politics of difference and politics of equal dignity, come into conflict with one another even though they are both founded on the ideal of equal respect.[22] For instance, the politics of equal dignity advocates the adoption of a difference-blind approach, where the differences between citizens are ignored. This contrasts to the politics of difference, which encourages making necessary distinctions on the basis of differential treatment.[23]

The problem that arises from this difference-blind approach is that it is most likely to reflect one hegemonic culture – that of the majority group within society. This can lead to minority cultures feeling suppressed and forced to adopt an "alien" form.[24] For Taylor, this approach is ultimately "inhuman" and detrimental to the wellbeing of minority cultures.[25] In terms of whether it is possible to move away from this difference-blind approach and accommodate collective groups rights to minority cultures, Kymlicka and Taylor strongly believe that it is not only a worthwhile cause but that it is entirely achievable. Even if difficulties were to arise, the protection of individuals' rights and freedoms whilst granting group rights would arguably not be a

[18] Taylor, *Multiculturalism*, 27 and 37.
[19] Ibid., 38.
[20] Ibid.
[21] Seglow, "Recognition and Religious Diversity."
[22] Taylor, *Multiculturalism*, 43.
[23] Ibid., 39.
[24] Ibid., 43.
[25] Ibid.

more difficult pursuit than others faced by liberal societies – for instance, the challenge of combining liberty and equality.[26] In essence, this issue of recognition that lies at the heart of the multiculturalism debate essentially arises from the fact that some cultures (namely, the majority culture) impose their views and practices on others, and thus they assume a sense of superiority. To overcome this, it is necessary to recognise the equal value of all cultures, irrespective of their differences, and provide them with sufficient protections in order to allow them to flourish and survive.[27] Furthermore, implementing laws that restrict the practices and ability of minority cultural groups to exist freely, and places a disproportionate burden on them. One such example, is the law restricting headscarves in France. This unfairly affects religious groups whose traditional practices run against the current law, thereby making it impossible for them to abide by the religious requirements.[28]

A key argument against any such recognition is that it denies the value of individual liberty and therefore is illiberal.[29] The issue that may arise from such accommodation of minority cultural groups' rights is that certain individuals may be marginalised. Kymlicka recognises this possibility, noting that as may occur within the majority culture of society, LGBTI groups and people with disabilities may be treated unequally. This is a key issue that is raised by feminists when addressing and disputing multiculturalism. It is recognised by various supporters of multiculturalism, particularly Kymlicka, that some ethnic and national groups are deeply illiberal and that their practices would violate the liberty of individual members.[30] However, a caveat proposed by Kymlicka in order to create an acceptable theory of cultural rights for minorities, is that any accommodation must be compatible with the just demands of these disadvantaged social groups and individuals.[31] Critics of liberalism, namely feminists, find this caveat insufficient in ensuring that individuals are protected from oppressive practices. Feminists argue that women in patriarchal societies and cultures are often forced to adopt images of themselves that are negative and belittling; and from this they develop a mindset of their own inferiority and limits, which prevents

[26] Ibid., 59.
[27] Ibid., 64.
[28] Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Harvard University Press, 2001), 61
[29] Ibid., 125.
[30] Kymlicka, *Multicultural Citizenship*, 200.
[31] Ibid., p.19.

them from growing and advancing as individuals.[32] Nonetheless, the argument remains that even cultures that "flout the rights of [their individual members] in liberal society" should be granted groups rights and privileges, particularly if the existence of the minority culture depends on this accommodation and "protection".[33] For others, like Chandon Kukathas, illiberal groups, even ones that violate the individual rights of their members, have the right to be left to themselves, to practice their culture or religion in the way that they choose, as this is the essence of a liberal society and the notion of liberty.[34]

Feminist Response to Multiculturalism

The theories of multiculturalism, as presented by Kymlicka and Taylor, are strongly opposed by feminists such as Okin, and this opposition provides for the basis of the multiculturalism-feminism debate that prevails today. Okin argues that accommodation of minority groups' cultural rights under multicultural policies leads to oppression of vulnerable individuals (such as women) within minority cultures.[35] There is a belief that feminism and multiculturalism cannot be easily reconciled. By "feminism", Okin refers to the idea that women should not be disadvantaged based on their sex, and that they should be recognised as having equal human dignity to men; as well as have the opportunity to live fulfilling and freely chosen lives.[36] In addressing "multiculturalism" Okin acknowledges that it is a term that is difficult to define, but the specific element that concerns her is the claim by Kymlicka that minority cultures and ways of life are not sufficiently protected within liberal democratic regimes.[37] Feminists, like Okin, recognise that many supporters of multiculturalism claim that rights should only be given to minority cultures that are internally liberal. However, she suggests that most cultures are riddled with practices and ideologies that concern gender, and unfairly prejudice women – and thus are largely illiberal in nature.[38] As such policing which groups are internally liberal or not would be a difficult task.

[32] Taylor, *Multiculturalism*, 25.
[33] Anshai Margalit and Moshe Halbertal okin
[34] Chandon Kukathas, "Liberalism and Multiculturalism: The Politics of Indifference," *Political Theory* 26, no. 5 (1998); and Kymlicka, *Multicultural Citizenship*, 396.
[35] Susan Moller Okin, "Is Multiculturalism Bad for Women?" in *Is Multiculturalism Bad for Women?*, eds. Joshua Cohen, Matthew Howard and Martha Nussbaum (Princeton: Princeton University Press, 1999),10.
[36] Ibid.
[37] Ibid., 11.
[38] Ibid., 12.

The primary argument in opposing multiculturalism rests with Okin's observation that male members of such groups are generally in positions of power to determine and articulate the group's beliefs and practices, and that culture endorses and facilitates the control of men over women in a variety of ways.[39] Of particular concern is the focus of religious and cultural groups on "personal law", such as laws of marriage, divorce, child custody, and inheritance. Therefore, it is argued that defending and protecting cultural practices most greatly impacts the lives of women and girls, as they are predominantly tasked with preserving and maintaining "the personal, familial and reproductive side of life".[40] To illustrate this argument that most cultures have as a primary aim the control of women by men, Okin cites religious founding myths from Judaism, Christianity and Islam. More specifically, she notes that these religious founding myths portray women (through Eve) as being weak and lesser than men, as Eve is "made out of Adam" and it is her weakness that led Adam astray.[41] Ultimately, feminists like Okin claim that many of the world's traditions and cultures are distinctly patriarchal in nature, and in cultures outside of the West there are practices that make it impossible for women to live independently, to be celibate or lesbian, or decide not to have children.[42] To strengthen this claim and provide evidence, Okin cites issues of female genital mutilation, polygamy and the forcing of girls to marry their rapists that exist in (what she deems) non-Western, illiberal cultures.[43] Ultimately, the domestic sphere is rife with injustice towards women and children, as the family is a place "where illiberal things happen", not only because of male subordination over women, but also the power imbalances between adults and children.[44] What results from this is the inevitability of cultural implantation as "parents will always constrain their children by enculturating them".[45]

Okin acknowledges that Western cultures still practice various forms of sex discrimination, but this is seen to be less of an issue where there are legal protections that guarantee women many of the same freedoms and opportunities afforded to

[39] Ibid.
[40] Ibid., 13.
[41] Ibid.
[42] Ibid., 14.
[43] Ibid., 16.
[44] Janet E. Halley, "Culture Constrains," in *Is Multiculturalism Bad for Women?*, eds. Joshua Cohen, Matthew Howard and Martha Nussbaum (Princeton: Princeton University Press, 1999), 103.
[45] Ibid., 104.

men.[46] To further this idea, Okin explores the issue of cultural defences that have been raised in cases of violence against women in the West by cultural minorities, whereby individuals claim their actions are sanctioned by their culture.[47] Ultimately, the claim is that women from a more patriarchal background should not be less protected from male violence than any other women. The claim by multiculturalists that rights be given to only internally liberal cultural groups is unrealistic and Okin provides examples to highlight her belief that very few minority cultures would be able to claim group rights based on this liberal justification.[48] Essentially, the feminist stance, as expressed by Okin, is that minority groups' rights simply exacerbate the problem for women, and that it may be beneficial for the members of the minority group, particularly the women, to integrate into the less sexist culture of the majority culture.[49]

Extending this discussion, Katha Pollitt finds the real issue to be defining what culture is and how to know what cultural practices are. Essentially, Pollitt supports Okin's claim that the cultural defence arguments that minority groups and individuals may employ in legal cases in Western societies, such as America, are unacceptable. To prove her point, Pollitt argues that if the issue concerned money, cultural excuses would not be accepted – for instance, pleading that Islam forbids interest on a loan or credit card and therefore you cannot pay it, would not succeed in Western courts.[50] As such Pollitt argues: why would cultural defences even be remotely acceptable when it concerns violence against women or children, if they are not acceptable in relation to other matters?[51] Similarly, Janet Halley reasons, like Okin, that women's rights conflicts are especially problematic in relation to "cultural rights". She argues that essentially culture constrains.[52] Illustrating that Kymlicka's multiculturalism and test of whether groups are internally liberal is more problematic than Kymlicka and other multiculturalists who adopt this stance acknowledge.[53]

[46] Okin, "Is Multiculturalism Bad for Women?" 16-17.
[47] Ibid., 18.
[48] Ibid., 20.
[49] Ibid., 24.
[50] Katha Pollitt, "Whose Culture?" in *Is Multiculturalism Bad for Women?*, eds. Joshua Cohen, Matthew Howard and Martha Nussbaum (Princeton: Princeton University Press, 1999), 29.
[51] Ibid.
[52] Halley, "Culture Constrains," 100.
[53] Ibid., 101.

Nonetheless, other feminist theorists such as Martha Nussbaum, Bonnie Honig and Azizah Y Al-Hibri are less critical of multiculturalism, when compared to Okin. For instance, Nussbaum in her response *A Plea for Difficulty*, agrees with the notion that the current liberal interest in multiculturalism holds some grave dangers for gender equality. However, she ultimately believes that Okin's argument is too simplistic.[54] To explore Okin's assertions further, Nussbaum adopts a focus on religion rather than other issues of culture, and addresses Okin's claim that religious founding myths are inherently sexist.[55] Contrary to Okin's claims, there is evidence that the Islamic holy book, the Qur'an, holds both men and women to the same norms of modest behaviour. The failure by feminists, such as Okin, to even try to understand what drives large numbers of individuals around the world to hold religious beliefs, is inherently disrespectful on behalf of religious people.[56] Nussbaum argues that Okin's critique of multiculturalism fails to reference the positive aspects of religion, as well as the fact that the ability for individuals to search for the meaning of life (whether this be through religion or not) is a "central element of a life that is fully human".[57]

There is also a larger issue of the relationship between comprehensive liberalism and political liberalism, which is touched upon by Okin, and explored further by Nussbaum. Nussbaum asserts that Okin endorses a form of comprehensive liberalism, in which personal autonomy and dignity are the core values.[58] This differs to the political liberalism, which promotes "reasonable disagreement" and the "existence of reasonable plurality of comprehensive doctrines about the good" within society.[59] Essentially, the political liberal is protective and respectful of these doctrines. Nussbaum appears to support this particular strand of liberalism, and she claims that it is more able to accommodate the value of a citizen's religious freedom far better than comprehensive liberalism ever could.[60] Ultimately, Nussbaum favours the stance of providing religion with special deference, and justifies this on the basis that minority religious groups are particularly vulnerable in all societies and require special

[54] Martha Nussbaum, "A Plea for Difficulty," in *Is Multiculturalism Bad for Women?*, eds. Joshua Cohen, Matthew Howard and Martha Nussbaum (Princeton: Princeton University Press, 1999), 105.
[55] Ibid., 106.
[56] Ibid., 106-107.
[57] Ibid., 108.
[58] Ibid., 109.
[59] Ibid.
[60] Ibid., 110.

protection.[61] Thus, Nussbaum's argument appears to be more in line with the multiculturalism arguments put forth by Kymlicka and Taylor in advocating for special rights for minority groups. However, Nussbaum also agrees with Okin's arguments regarding gender equality. The solution she proposes to this conflict between both views is finding a balance between religious and non-religious citizens, whereby they respect each other. By doing so, Nussbaum believes that the State could better protect women, whilst also respecting the religion freedom of citizens.[62] Essentially, for Nussbaum, religion and culture is central to the identity of women. Thus, we cannot simply take away religious freedoms as Okin proposes, as it would not only affect the men that dominate the religion but also the women.

Similarly, Honig questions Okin's claim about women's fight for equal protection. Honig asserts that in order to understand this claim better we must delve deeper to question what constitutes male violence and sex inequality, in addition to what exactly constitutes "culture", and how these various factors are interrelated.[63] In exploring Okin's discussion of the apparent patriarchal nature of cultures, Honig argues that these are less patriarchal than Okin imagines and that the unfamiliar practices that Okin labels as "sexist" are more ambiguous than such a label allows.[64] For example, Honig states that Judaism, Christianity and Islam do not seek to "control" women's sexuality, and argues that any such "control" is often matched by similar controls upon male sexuality as well.[65] To illustrate her point Honig explores the issue of veiling and the idea that it is sexist, and concludes that it is necessary to understand the function of veiling and its significance in its particular context before stating what it means, as it varies from situation to situation. There are Muslim feminists, such as Homa Hoodfar and Leila Ahmed, who view veiling to be an empowering practice.[66] For Honig, "culture" is a way of life, where the diverse and conflicting narratives, as well as the roles and responsibilities of individuals, is constantly negotiated. It can provide agency, power and privilege to its members, and in certain settings this agency can empower

[61] Ibid., 110-111.
[62] Ibid., 114.
[63] Bonnie Honig, "My Culture Made Me Do It," in *Is Multiculturalism Bad for Women?*, eds. Joshua Cohen, Matthew Howard and Martha Nussbaum (Princeton: Princeton University Press, 1999), 35.
[64] Ibid., 37.
[65] Ibid.
[66] Ibid.

the vulnerable members of minority cultures and groups.[67] In fact, the real issue, according to Honig, is whether liberal states should even be regulating sexuality at all.

Much like Honig, Al-Hibri takes issue with Okin's discussion, claiming that it suffers from several problems, the first being that Okin approaches the matter from the perspective of dominant "Western" culture.[68] This is exacerbated by the fact that Okin's understanding of other cultures and religions are stereotypical in nature and based on secondary sources outside these cultures and religions. For instance, the discussion surrounding religious "founding myths", Al-Hibri asserts, is incorrect and they are really about human condition not gender - as in Islam the Qur'an never mentions Eve being created out of Adam, and the fall from heaven is as a result of both Adam *and* Eve's weakness.[69] Al-Hibri is also critical of Okin interchanging the terms culture and religion, which in her view are distinct and not interchangeable. Al-Hibri states that one of the biggest problems in feminist critiques on culture and religion, is failing to understand that they are distinct, and that in the instance of Islam, a lot of controversial customs that are labelled as stemming from the religion are actually local, cultural customs that are retained in Muslim-majority states.[70] Overall, Al-Hibri acknowledges that Okin's attempt to liberate the women of minority cultures is somewhat admirable, yet, it is misguided to believe that educated women living in the West who choose to practice these apparently "oppressive religions" (such as Islam or Orthodox Judaism) are being misled, and do not have the freedom to make their own choices.[71] Ultimately, Al-Hibri believes, as was similarly argued by Nussbaum, that forcing women to abandon their religious choices is patronising and not always helpful or positive.

Kymlicka in his essay *Liberal Complacencies* responds to Okin's paper. He agrees with the basic claim put forward by Okin concerning the need for multiculturalism to look more closely at any intragroup inequalities, specifically gender inequalities.[72]

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[67] Ibid., 39.
[68] Azizah Y. Al-Hibri, '"s Western Patriarchal Feminism Good for Third World/Minority Women," in *Is Multiculturalism Bad for Women?*, eds. Joshua Cohen, Matthew Howard and Martha Nussbaum (Princeton: Princeton University Press, 1999), 41.
[69] Ibid., 42.
[70] Ibid., 43.
[71] Ibid., 44.
[72] Will Kymlicka, "Liberal Complacencies," in *Is Multiculturalism Bad for Women?*, eds. Joshua Cohen, Matthew Howard and Martha Nussbaum (Princeton: Princeton University Press, 1999), 31.

Furthermore, Kymlicka acknowledges Okin's point about his account of "internal restrictions" being too narrow. To clarify his original point Kymlicka notes that he had not intended "individual freedoms" to be interpreted in a purely formal or legalistic way, and that the oppression in the domestic sphere discussed by Okin is an example of the "internal restriction" which liberals have a duty to oppose.[73] Ultimately, Kymlicka believes that feminism and multiculturalism are both making the same point regarding the inadequacy of the traditional liberal notion of individual rights.[74] Kymlicka believes that both are also looking to the same remedies. Whilst Okin and many other feminists are seeking affirmative action (granting rights to women that are not available to men), multicultural theorists are looking for special rights to be granted to minority cultures (that are not available to the majority).[75] For Kymlicka, multiculturalism and feminism are "allies" engaged in a related struggle for a more inclusive conception of justice.

Multiculturalism, Feminism, and the Sharia debate

In the context of the Sharia debate in Western liberal democracies, the multiculturalism-feminism framework has been employed to discuss accommodation of Sharia – particularly in the realm of family/personal laws. Natasha Bakht notes the opposition between these two schools of thought in considering the Sharia debate that occurred in Ontario, Canada in 2003. The conflict between the principles of multiculturalism and feminism arose in this Sharia debate, as Canada has a commitment to both a policy of multiculturalism, as well as women's rights. As Bakht observes, "although these values need not necessarily conflict, in this context, they have carried a tension that must be reconciled".[76] Whilst the multiculturalism-feminism opposition may be employed in various contexts to discuss cultural groups and their practices (as Okin notes in terms of cultural defences to violence against women), the Ontario Sharia debate was rather overt in drawing on the opposition between both schools of thought. The potential for "deep-rooted" patriarchal viewpoints (derived from religious norms and values) to be reproduced in the

[73] Ibid., 32.
[74] Ibid., 32-33.
[75] Ibid., 33.
[76] Natasha Bakht, "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women," *Muslim World Journal of Human Rights* 1, no.1 (2004): 1.

proposed religious-based arbitration was argued by feminists to be contrary to the gender equality protected in the *Canadian Charter of Rights and Freedoms*.[77] Naser Ghobadzadeh also considers the dispute between multiculturalism and feminism in the context of the Sharia debate in Australia and Canada. Turning to multicultural policy within each state, Ghobadzadeh argues that this idea of the incompatibility between the two is "symptomatic of its experimental nature".[78] Sharia debates, in both Australia and Canada, essentially look to the impact any accommodation of Sharia may have on Muslim women, and it is this characteristic of the Sharia debates in the West that means it is often positioned within the framework of multiculturalism and feminism.[79] However, reducing discussion of religious arbitration and the hesitations that may arise around multicultural accommodation in terms of women's rights to this framework, can be problematic. In particular, it ignores the other factors that influence and shape the outcomes for Muslim women,[80] stemming from both religious institutions as well as (secular) state institutions.

Conclusion

The ideal of multiculturalism has long been debated and contested. The concept of accommodating minority cultural groups through special groups rights (as laid out by theorists like Kymlicka and Taylor) is predominantly opposed by feminist theorists, namely Okin. The multiculturalism-feminism framework is an insightful and important one that sheds light on the potential incompatibilities between the two schools of thought. A key argument around the apparent incompatibility between multiculturalism and feminism is that affording minority groups special rights can lead to further oppression of vulnerable members (particularly, women) within groups that are innately patriarchal. This framework is often employed in discussions of accommodating minority religious laws (like Sharia) in the West – as evidenced in the analysis of the Ontario Sharia debate offered by Bakht. In the Ontario Sharia debate, feminist opposition to the proposal of a Sharia-based arbitration tribunal followed arguments put forth by Okin. Namely, that the nature of Islamic principles and laws

[77] Ibid., 20.
[78] Naser Ghobadzedah, "A multiculturalism-feminism dispute: Muslim women and the Sharia debate in Canada and Australia," *Commonwealth and Comparative Politics* 48, no. 3 (2010): 305.
[79] Ibid., 311.
[80] Leti Volpp, "Feminism versus Multiculturalism," *Columbia Law Review* 101, no. 5 (2001): 1184.

are intrinsically patriarchal, and thus allowing religious-based arbitration would reinforce inequalities faced by Muslim women. It is in this debate, and others like it that the state laws are positioned as the "better" option, and therefore should be the only avenue for personal and family law dispute resolution (an idea that will be explored further in Section Three).

Ultimately, there are limits to using this multiculturalism-feminism framework in discussing religious accommodation. As Leti Volpp notes, confining discussion against this background of multiculturalism versus feminism, overlooks the other influences that shape the reality for Muslim women.[81] The approach can prove to be narrow in focus, and does not address other questions that arise around the accommodation of religion, and women's rights. For example, how and why such accommodation is occurring in some states (like the UK) and not others, and what the outcomes, from this accommodation, are for Muslim women. Additional questions arise when considering the fact that Sharia processes operate mostly in the private sphere, particularly in terms of whether this is evidence of formal religious accommodation (an idea explored in the following chapter). This feminist opposition to multiculturalism also tends to overlook the actual wants and opinions of Muslim women (an idea that is explored further in Chapter Four when discussing Muslim women and agency).

[81] Ibid.

CHAPTER TWO

Legal Pluralism and Reasonable Accommodation

In the last chapter I briefly outlined the multiculturalism versus feminism framework that is often used in discussing the accommodation of Sharia in the West. The discussion around accommodation of the cultural and religious laws of minority groups in the West also raises the question of whether legal pluralism exists, or is possible. The question addressed within the multiculturalism-feminism debate is whether Western liberal democracies *should* accommodate minority groups. Here, the question is whether these states *can* accommodate cultural and religious legal norms. To better understand the Sharia debate in the West (particularly in Australia, Canada and the UK) it is useful to first look at what legal pluralism is, and whether it exists within these states. As such, in this chapter I will explore the concept of legal pluralism. In many states, legal pluralism is often argued to be in practise through the religious exemptions given to minority religious groups, whether this is for individuals in workplaces, or religious institutions. Similarly, the discussion of multicultural accommodation in countries, such as Canada and Australia, highlights ways in which the religious laws are granted a space within the legal and state institutional framework, leading to an "informal" legal pluralism to blossom within the state. However, the discussion of minority laws and legal pluralism is problematic, with no widely accepted definition of legal pluralism. As such, focusing discussions of requests for Sharia within this framework is not necessarily helpful – aside from illustrating that legal pluralism is generally not an option in accommodating minority religious legal systems like Sharia in the West. Like the multiculturalism-feminism framework, considering legal pluralism offers an interesting background against which Sharia can be (and has been) discussed.[1] However, with no universally accepted definition of legal pluralism it is easy to get mired in the contentions surrounding the concept, instead of usefully employing it to better understand the Sharia debate. Instead, I argue that employing the notion of "reasonable (multicultural) accommodation" proves more practical when considering the recognition and accommodation of Sharia by Western

[1] See for example, Ghena Krayem, *Islamic Family Law in Australia: To Recognise or Not To Recognise* (Carlton: Melbourne University Publishing, 2014), 38-39; and Samia Bano, *Muslim Women and Shari'ah Councils* (Basingstoke: Palgrave Macmillan, 2012), 73-80.

liberal states, as it provides a context in which to explore such debates, and avoids the conflicts over the definition of legal pluralism.

What is Legal Pluralism?

Legal pluralism is a modern concept that first emerged in analyses of the social and legal ordering of states colonised by Western European states in the 19th and 20th centuries. One of the first proponents of legal pluralism, John Griffiths, offers a definition of legal pluralism (written at a time when the concept was still in its infancy):

> A situation of legal pluralism – the omnipresent, normal situation in human society – is one in which law and legal institutions are not all subsumable within one 'system' but have their sources in the self-regulatory activities of all the multifarious social fields present, activities which may support, complement, ignore or frustrate one another, so that the 'law' which is actually effective on the 'ground floor' of society is the result of enormously complex and usually in practice unpredictable patterns of competitions, interaction, negotiation, isolation and the like.[2]

Based on this definition, legal pluralism arises from the various "social fields" that exist within a state and hold their own internal legal order. This idea of legal pluralism challenges the ideology of legal centralism that is intrinsic to the development and nature of the modern nation state. Legal centralism is the idea that "law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions".[3] Essentially, the law of the state is supreme, and all other social and legal orderings, from other organisations (whether they are cultural, religious or economic in nature) are to adhere to this centralised, overarching law. This legal centralist ideology establishes a hierarchy, with state sovereignty at the top, and all "lesser normative orderings" (for example, the church or the family) being subordinate to the sovereign command of the state.[4] Despite this view of the supremacy of state law, Griffiths argues that the reality of the modern nation state, is one which accommodates legal pluralism. As Brian Tamanaha notes (whilst himself accepting legal pluralism) there are inherent problems that arise

[2] John Griffiths, "What is Legal Pluralism?" *The Journal of Legal Pluralism and Unofficial Law* 18, no. 24 (1986): 38-39.
[3] Ibid., 3.
[4] Ibid.

around the idea of legal pluralism.[5] For instance, while supporters of legal pluralism (like Griffiths) can agree that plurality exists, they do not have unified agreement on what it includes – and this is based on each theorist holding individual definitions of law.[6]

Despite criticisms, and a lack of agreement over "what is law", the concept of legal pluralism has continued to be considered and has become increasingly relevant to discussions of modern nation states. In the context of European colonial laws being introduced into Africa, Asia and the Middle East, there is a clearer example of how a plurality of legal orders may form. Sally E. Merry defines legal pluralism based on this example, noting that "it is generally defined as a situation in which two or more legal systems coexist in the same social field".[7] However, that is not to say that colonial and post-colonial examples are the only situations in which legal pluralism may arise. In fact, Merry notes that the concept has evolved from merely the relationship between colonial powers and their colonised societies; and has been applied to non-colonised societies (for example, many Western European states), and these offer cases of a "new legal pluralism".[8] Under this "new legal pluralism" the focus is on the interaction between the dominant groups (predominantly state institutions and legal orders) with other groups within society that have their own normative orders, which are often presented through their social networks and "informal" cultural or religious institutions. These "subgroups" within a state are each viewed as having their "own legal system which is necessarily different in some respects from those of the other subgroups".[9]

As such, it can be argued that there are various forms of legal pluralism. The traditional understanding based on colonial relationships, and this "new" understanding that looks to the relationship between the state and the minority religious or cultural groups within it. Following this evolution of the understanding of legal pluralism, it can be defined more simply as "the development of a number of

[5] Brian Z Tamanaha, "A Non-Essentialist Version of Legal Pluralism," *Journal of Law and Society* 27, no. 2 (2000).
[6] Ibid., 297.
[7] Sally E Merry, "Legal Pluralism," *Law and Society Review* 22, no. 5 (1988): 870.
[8] Ibid., 872.
[9] Leopold Pospisil, "Modern and Traditional Administration of Justice in New Guinea," *Journal of Legal Pluralism* 19, no. 93 (1971): 107.

different legal traditions within a given sovereign territory".[10] In a similar vein, Samia Bano defines legal pluralism as recognising "multiple forms of ordering and bodies of rules which may be central to the lives of individuals, but which are not dependent upon the state or state law for recognition or legitimacy".[11] Like Merry, Bano recognises that the historical discussion of legal pluralism, or what she calls the "first phase" examined the conflict between the customary practices of the native indigenous communities in the colonies (located throughout Africa, Asia and the Middle East) and the state law introduced by the European colonial powers.[12] However, like Merry's "new legal pluralism" discussion, Bano views legal pluralism scholarship as having two other "phases". One which analyses the emergence of a conflict in Western liberal democracies between the state's secular laws and minority religious groups, who are seeking religious accommodation and recognition; and the other focuses on "regulated interaction" between secular laws and religious laws.[13] The phase outlined by Bano concerning conflicts between state laws and minority religious groups, is an increasingly common discussion to arise in the context of the multicultural jurisdictions of Western liberal democracies – like Australia, Canada and the UK. The other phase related to "regulated interaction" (which has also been described as "interlegality" or "multicultural interlegality") looks at the overlapping of minority religious laws and practices with state personal and family laws; to highlight that there is no clear and strict separation of private and public spheres, or official state laws and religious/cultural norms.[14] This can be evidenced through the evolving framework of religious exemptions that are offered by states, as well as the "space" in which minority groups are able to exercise and practice their religious/cultural norms and laws within the legal sphere – for instance, arbitration.

Legal Pluralism in Multicultural Jurisdictions

The emergence of multicultural societies in Western liberal states has seen a rise in demands for greater recognition and accommodation by minority religious and ethnic

[10] Bryan S Turner and Adam Possamai, "Introduction: Legal Pluralism and *Shari'a*," in *The Sociology of Shari'a: Case Studies from around the World*, ed. Adam Possamai et al. (Switzerland: Springer International Publishing, 2015), 1.
[11] Samia Bano, *Muslim Women and Shari'ah Councils* (Basingstoke: Palgrave Macmillan, 2012), 74.
[12] Ibid.
[13] Ibid., 75.
[14] Ibid.

groups. The call for accommodation of Sharia law by Muslim groups within the UK and Canada are prominent examples of this request. Whilst a leading characteristic of the modern liberal state is a centralised, single secular law, the underlying liberal nature of these states promotes an accommodation of differences.[15] The idea of a single law is challenged by this liberal ideology, as any accommodation (for example, through legal exemptions) of normative orders of minority religious groups suggests that the idea of legal centralism is not a reality. In these liberal democratic states where religious accommodation is part of the political and legal framework, it can be argued that there are sources of law that fall outside the formal state institutions; that outside the "official state-sponsored system" there are other sources from which social and economic power can be derived.[16] One area in which this may become obvious is in the area of family law, where "other" personal law systems derived from "religio-legal norms and institutions" of minority groups may operate.[17]

Despite the existence of alternative normative orders of minority groups, which may influence the area of personal and family law, officially there is no formal legal pluralism in multicultural states, such as Australia, Canada and the UK.[18] In these states governments have refused to officially incorporate the legal norms of minority religious groups into the legal system, despite numerous calls for greater accommodation. Nonetheless, there are other ways in which these states may be considered as having a pluralistic legal system – an "unofficial" or "informal" legal pluralism. This recognition of different sources of legal rules and norms by legal institutions can be through: enclaves within a state operating according to separate legal rules; or legal systems sanctioning alternative systems of "normative state of affairs".[19] One example through which the first "type" of legal pluralism may arise (i.e. enclaves operating according to their own separate legal norms) is in relation to Indigenous groups. As the earliest discussions of legal pluralism were in terms of

[15] Archana Parashar, "Australian Muslims and Family Law: Diversity and Gender Justice," *Journal of Intercultural Studies* 33, no. 5 (2012): 566.
[16] David Schneiderman, "Associational Rights, Religion and the *Charter*" in *Law and Religious Pluralism in Canada,* ed. Richard Moon (Vancouver: UBC Press, 2008), 71.
[17] Malcolm Voyce and Adam Possamai, "Legal Pluralism, Family Personal Laws and the Rejection of Shari'a in Australia: A Case of Multiple or 'Clashing' Modernities?" *Democracy and Security* 7, no. 4 (2011): 341.
[18] Ibid.
[19] Ian Edge, "Islamic finance, alternative dispute resolution and family law: developments towards legal pluralism?" in *Islam and English Law*, ed. Robin Griffith-Jones (Cambridge: Cambridge University Press, 2013), 138.

colonial and post-colonial relationships, this is particularly relevant to both Australia and Canada, as former colonies of the British Empire. Legal pluralism is often viewed as having been implicit from the first moment of European colonisation, and thus the idea of legal pluralism being too "radical" or new is not entirely accurate.[20] This is based on the idea that Indigenous peoples are not mere "passive recipients of externally imposed law";[21] that they actually have their own traditional mechanisms for dispute resolution.[22] However, the problem that arises with this perspective of legal pluralism stems from the definitional issues surrounding 'what is law' and when a system of rules may be considered law. The understanding of law by legal scholars differs from those in other fields of social science.[23] From a legal jurist perspective, considering legal pluralism to be implicit at the time of colonisation, would suggest that colonialism never occurred, as legal pluralism in this view is dependent on the development of the modern state as the central authority.[24] As such, recognition of any minority cultural/religious laws, like Indigenous laws in Australia (in the *Mabo* case)[25] occurs within the framework of the state legal system (as the overarching authority), and not a stand-alone legal system operating outside of this. Thus, there is more of an "accommodation" of Indigenous laws and principles, than a legal pluralism.

In Canada, the First Nations (the Indigenous peoples of Canada) are afforded their own "sphere and enclave of legal competence".[26] So, within their communities the traditional laws of each group are applied in settling matters, rather than deferring to the state law of Canada. Within the Canadian judicial system, courts have in fact recognised First Nations law as being a legitimate legal source.[27] The Supreme Court of Canada recognised a "legal as well as just claim to retain possession of [their territory],

[20] Kayleen M Hazlehurst, "Introduction: Unyielding domains in the post-colonial relationship," in *Legal Pluralism and the Colonial Legacy*, ed. Kayleen M Hazlehurst (Aldershot: Avebury, 1995), xvi.
[21] Russell Smandych and Rick Linden, "Co-existing forms of Aboriginal and private justice: An historical study of the Canadian West," in *Legal Pluralism and the Colonial Legacy*, ed. Kayleen M Hazlehurst (Aldershot: Avebury, 1995), 5.
[22] Ibid., 6.
[23] Archana Parashar, "Religious personal laws as non-state laws: implications for gender justice," *The Journal of Legal Pluralism and Unofficial Law* 45, no 1. (2013): 11.
[24] Ibid., 11-12.
[25] 'Mabo' refers to the landmark High Court decision in the 1992 case of *Mabo v Queensland (No 2)*. The Court recognised that Indigenous Australians had a system of law, and that there were pre-existing land rights (native title). This is discussed in more detail in Chapter Eight.
[26] Edge, "Islamic finance, alternative dispute resolution and family law," 138.
[27] John Borrows, "With or Without You: First Nations Law (in Canada)," *McGill Law Journal* 41 (1996): 635.

and to use it according to their own discretion".[28] This recognition of First Nation land occupation was dependant on the acknowledgement that there is an existence of First Nations laws, and offers a stepping stone for the recognition of other indigenous rights.[29] In Australia, the government has historically rejected the adoption of the personal laws of Indigenous Australians. However, following the 1992 High Court decision in *Mabo v Queensland (No 2)*, there has been a shift to legally recognise Indigenous laws,[30] in a similar way that First Nation land rights have been recognised in Canada. By granting formal recognition of native title and Indigenous land rights, under common law, it could be argued that there is an unofficial legal pluralism. Following *Mabo*, the introduction of the *Native Title Act* in 1993 grants land rights to Indigenous Australians in their own terms,[31] providing opportunities for Aboriginal and Torres Strait Islander groups to assert their rights and claim ancestral lands and resources.[32] Recognition of the traditional laws of Indigenous peoples, for instance land rights, is often termed "unofficial law",[33] and highlights a form of legal pluralism that relates to an accommodation of Indigenous laws and rights in Australia. Like Canada, there is evidence of indigenous laws being recognised in sentencing, which has been termed "a soft legal pluralism".[34] Despite a lack of formal legal pluralism, this would suggest that an informal legal pluralism has developed within the Australian and Canadian legal landscapes, as the recognition of Indigenous land rights is founded on the idea that Indigenous peoples have their own laws.

Whilst there has been some progress with recognising Indigenous laws in Australia and Canada, and thus it may be argued by some that legal pluralism exists in an unofficial capacity, it is more apt to think of it as greater accommodation of minority laws and norms. A similar recognition has not been given to other minority groups within these multicultural societies. As Bano notes, another "phase" of legal pluralism focuses on the conflict between secular state laws and personal legal norms and

[28] Guerin v R. [1984] 2 S.C.R 335 at 378, cited in Borrows "With or Without You," 640.
[29] Borrows, "With or Without You," 641.
[30] Hazlehurst, "Introduction: Unyielding domains in the post-colonial relationship," xx.
[31] Garth Nettheim, "Mabo and legal pluralism: The Australian Aboriginal justice experience," in *Legal Pluralism and the Colonial Legacy*, ed. Kayleen M Hazlehurst (Aldershot: Avebury, 1995), 107.
[32] Hazlehurst, "Introduction: Unyielding domains in the post-colonial relationship," xx.
[33] Turner and Possamai, *Introduction: Legal Pluralism and Shari'a*, 1.
[34] Gillian Douglas et al., *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* (Cardiff: Cardiff University, 2011), 141.

systems of minority religious groups.[35] The most significant discussion in recent years is that around Sharia law, and the request by Muslim groups in the UK and Canada (and to a lesser extent Australia) for accommodation of their religious laws within the state's legal system. With these increasing demands for recognition of Sharia law, the question of legal pluralism and whether the legal norms of these groups can be accommodated has come to the forefront of political debates. It is an unavoidable by-product of the multicultural nature of these states. There are competing systems of law stemming from the multicultural accommodation of ethnic, cultural and religious groups, and these laws challenge the central secular law of the state in seeking greater recognition and "space", as well as authority in the lives of their communities and groups.[36] In the UK and Canada, demands for the recognition of Sharia have predominantly focused on the area of family law. This has led to significant public debates in both jurisdictions, where the possibilities and limits of such recognition have been widely discussed. However, outside of an explicit accommodation of Sharia within the law, there are other ways in which legal pluralism is argued to exist within these multicultural states. For examples, through religious exemptions and exceptions offered by the state, as well as the space created by access to legal options, such as third-party arbitration.

Religious Accommodation

As Ian Edge notes, alternative sources of legal rules may be recognised where legal systems sanction different normative systems.[37] For example, in the area of personal laws (such as marriage, divorce, and inheritance) minority groups may be given space by the state to act in accordance with their ethnic or religious laws. This is often through the granting of religious exemptions, or legislation being quite broad and accommodating in scope. For example, family law in Australia is seen as being quite accommodating – with minority religious groups able to follow their religious laws and norms,[38] in relation to marriage. This is made possible through legislation such as the Australian *Marriage Act 1961* (Cth) or the UK's *Marriage Act* 1994, which recognise

[35] Bano, *Muslim Women and Shari'ah Councils*, 75.
[36] Bryan S Turner, "Legal Pluralism, State Sovereignty, and Citizenship," *Democracy and Security* 7, no. 4 (2011): 319.
[37] Edge, "Islamic finance, alternative dispute resolution and family law," 138.
[38] Voyce and Possamai, "Legal Pluralism, Family Personal Laws and the Rejection of Shari'a in Australia," 339.

religious ministers and religious ceremonies as being valid avenues through which a state-recognised marriage may take place.[39] This is more broadly offered under the freedom of religion that is protected in Western liberal democracies. For instance, in The Australian Constitution provides for freedom of religion under section 116, which explicitly states that the Commonwealth "shall not make any law" that prohibits "the free exercise of any religion".[40] This freedom of religion is further supported through state anti-discrimination legislations, that aim to protect individuals based on their religion. In the UK, a comparable provision of freedom of religion is found under the *Human Rights Act* 1998.[41]

A key way in which states could be considered as being legally pluralistic is in the realm of arbitration. Arbitration provisions offer a space for accommodation, as they are quite broad and often allow for alternative legal norms to be employed in guiding an arbitration.[42] In the UK, the *Arbitration Act* of 1996 states that parties are "free to agree how their disputes are resolved".[43] This is the basis upon which a few Sharia tribunals[44] have set up in the UK and claim to have some operational jurisdiction in carrying out personal arbitrations that are guided by the principles of Sharia. An example of one such religious arbitral body is the Muslim Arbitration Tribunal (MAT). Ultimately, non-formal dispute mechanisms, such as religious arbitration bodies can establish themselves within the legal landscape but operate outside of the state's legal codes; and under a broad definition of legal pluralism, these bodies based on customary practices may be viewed as "legal".[45] This issues around the possibilities of employing alternative norms in dispute resolutions was considered in the public Ontario debate discussion in Ontario (2003), as well as in the UK following the Archbishop of Canterbury, Rowan William's speech in 2008. Though, this argument of "unofficial" legal pluralism is problematic, as the encouragement of private settlement by the state legal system (and increasing privatisation generally) has been around for a

[39] *Marriage Act 1961* (Cth); and *Marriage Act*, 1994, c. 4 (Eng.).
[40] *Commonwealth of Australia Constitution Act 1900*, s. 116.
[41] This is discussed in further detail in the case studies on Canada, the UK, and Australia presented in Section Two of this thesis.
[42] Voyce and Possamai, "Legal Pluralism, Family Personal Laws and the Rejection of Shari'a in Australia," 339.
[43] *Arbitration Act*, 1996, c.2, s. 1(b).
[44] These tribunals must be contrasted to the Sharia councils, which are far more informal in nature, and do not claim any jurisdiction or authority under the UK's 1996 *Arbitration Act*.
[45] Voyce and Possamai, "Legal Pluralism, Family Personal Laws and the Rejection of Shari'a in Australia," 14.

while, particularly in Australian family law (as well as other areas of law) so to suggest it is legal pluralism would mean that the legal system has been pluralistic always.

This "unofficial" legal pluralism that appears with the existence of religious arbitration bodies, could be argued as being a form of legal pluralism that attempts to maintain the rules of minority religious and ethnic groups, without official state recognition – as they are producing legal norms that the state should acknowledge in some way.[46] The reality in multicultural jurisdictions like Australia, Canada and the UK is that alternative mechanisms of dispute resolution and adjudication exist, and operate in the shadow of (and somewhat parallel to) state laws. Not only are there the Sharia arbitration bodies that have become more visible in recent years in the UK, for instance; but there have been other religious bodies, particularly the Jewish Beth Din bodies that have operated for years outside the official legal system.[47] The Beth Din decisions have even received some level of state recognition (a further point in support of this "unofficial" legal pluralism). The Jewish Beth Din and religious laws have been given some recognition under the *Divorce (Religious Marriages) Act* 2002 (UK), where it states that a High Court judge may refuse to grant a civil divorce if one party in the divorce is refusing to give a religious divorce to the other party.[48]

Outside of recognition of religious laws by the state in the realm of family law, an "unofficial" legal pluralism is argued to arise through other religious exemptions – which is also referred to as unintentional accommodation. Religious toleration through accommodation in some way legalises various "world views" by granting them equal rights through constitutional rights that allow religious minority groups to organise themselves and operate according to their religious norms and principles; and even more broadly by allowing individuals to exercise a freedom of religion and conscience.[49] Examples of this toleration include religious exemptions offered by the state to religious schools (in operational matters), and special tax rules/exemptions offered to religious institutions. These concessions follow the basic rights of religious freedom and toleration that are offered by modern liberal democratic states.[50] Specific

[46] Edge, "Islamic finance, alternative dispute resolution and family law," 139.
[47] Ibid.
[48] Ibid.
[49] Ole Riis, "Religion as a Multicultural Marker in Advanced Modern Society," in *Reasonable Accommodation: Managing Religious Diversity*, ed. Lori G. Beaman (Vancouver: UBC Press, 2012), 196.
[50] Ibid., 196.

religious exemptions have also been offered within these states, for example, in the UK there has been accommodation of religious animal slaughter practices, as well a religious dress codes.[51]

Freedom of religion, along with religious exemptions and exceptions offered by states, embodies a legal accommodation. There are various areas within the legal realm where the law relies on private enforcement – for example, personal laws (like family law, that governs relationships between individuals), as well as contracts and torts, and property. In these areas of law there is a reliance on individuals bringing forward a complaint to the courts.[52] Even where such action is taken there is a duty placed upon the law breaker to act in remedying the situation. As these areas rely on a "private enforcement" it provides scope for religious minorities to follow their own legal norms, where victims may choose to forego the state legal system and apply religious legal norms instead.[53] This private law enforcement offers a "choice", which appears as an unintentional accommodation by the state – creating a "space" for legal pluralism in multicultural states.[54] Along with religious exemptions offered by the state, and the space created for minority religious groups to employ their norms through alternative dispute resolution, it could be argued that there is an unofficial legal pluralism operating within some multicultural jurisdictions.

Conclusion

Whilst some arguments may point to the rise of an "informal" legal pluralism (particularly concerning minority religious laws) in Western liberal states, the concept of legal pluralism is problematic. This is due to the wide variety of definitions of the term, which ultimately leads to unending debates around what is, or is not, to be considered legal pluralism. When looking specifically at the Sharia discussions in Australia, Canada or the UK, there may be some "accommodation" of religion by the state legal system, but this is not necessarily legal pluralism. In fact, many supporters of Sharia arbitration in these states are not requesting separate parallel legal systems to

[51] Edge, "Islamic finance, alternative dispute resolution and family law," 139.
[52] Alvin Esau, "Living by Different Law: Legal Pluralism, Freedom of Religion and Illiberal Religious Groups," in *Law and Religious Pluralism in Canada,* ed. Richard Moon (Vancouver: UBC Press, 2008), 112.
[53] Ibid., 113.
[54] Ibid.

operate alongside state laws. As Archana Parashar argues, it may be "misleading to suggest the existence of legal pluralism" when discussing religious laws.[55] As such, it may be more useful to simply focus on the notion of "reasonable accommodation". This is what Jeremy Waldron, in discussing minority groups, refers to as "accommodation within a modern legal system of the norms and requirements of their culture or religion…" and considers accommodation as including:

> (i) exemptions from generally applicable prohibitions or requirements to permit actions (or omissions) required by minority norms but presently prohibited by general law, or
>
> (ii) giving legal effect to transactions (such as certain types of marriage or property transactions) structured and controlled by norms other than those used to structure and control similar transaction in the general system of law.[56]

This notion of "reasonable accommodation" appears to be a better means through which to approach discussions of accommodating Sharia. It steers clear of the different, subjective definitions of legal pluralism that lead to circular debates about its nature, whilst considering the legal recognition of certain religious norms and laws. In this thesis, I will focus on discussing this idea "accommodation" of Sharia, in both the multicultural and legal sense, as it aligns more closely with the notion of "informal" legal pluralism discussed above.

Furthermore, when considering Sharia or Islamic community processes in Western multicultural states (particularly Sharia councils and tribunals in the UK), the question arises as to whether these religious institutions operating in the private sphere can be understood as part of a formal religious accommodation. When considering the example of the Muslim Arbitration Tribunal, which operates under the auspices of the UK's *Arbitration Act*, there is a clearer "accommodation" as the religious institution has a distinct place within formal state legal processes. This religious body operates in a private legal space, but has the potential to be incorporated into the realm of state law where privately arbitrated agreements may be recognised or enforced by state courts. Sharia councils, on the other hand, are not only difficult to define, but are far more informal in nature - placed firmly within the private sphere. Discussing the

[55] Parashar, "Religious personal laws as non-state laws," 11.
[56] Jeremy Waldron, "Questions about the Reasonable Accommodation of Minorities," in *Shari'a in the West*, ed. Rex Ahdar and Nicholas Aroney (Oxford: Oxford University Press, 2010), 103.

Islamic community processes in Australia, Krayem and Ahmed propose that there is the potential for these processes to be recognised as family dispute resolution.[57] This potential arises from the increasing preference to keep family disputes out of the state legal system, and thus encourages parties to turn to the various forms of family dispute resolution available (mediation or arbitration).[58] There is a similar turn toward private dispute resolution, namely mediation, in the UK – and it is within this realm that Sharia councils *may* be able to find a "space" as a form of alternative dispute settlement.

Existing firmly within the private sphere, Sharia councils in the UK have little interaction with state institutions. Whilst this means that there is no formal accommodation by the state, it could be argued that there is still an accommodation of sorts. The fact that these councils are left alone by the state to operate in the private sphere, and have not been banned outright, may suggest that they are "accommodated", and that there is a religious freedom granted to groups in this area. The division of legal regulation into public and private realms does not mean that the private sphere is completely unregulated. Even where the law may not interact directly within the private sphere and religious bodies, other state institutions (i.e. public policies) can and do regulate behaviour within the private sphere. As such, the state has the power to place restrictions on bodies, like the informal Sharia councils, but have not presently done so. Ultimately, the deference of power and increasing privatisation of family law by the state means that there are opportunities for greater religious freedom and accommodation – and both the Muslims Arbitration Tribunal, and the informal Sharia bodies in the UK, appear to have found a "space" to establish and operate in this way.

[57] Ghena Krayem and Farrah Ahmed, "Islamic Community Processes in Australia: An Introduction," in *Gender and Justice in Family Law Disputes*, ed. Samia Bano (Waltham: Brandeis University Press, 2017), 262.
[58] Ibid.

CHAPTER THREE

Sharia Law

In Chapters One and Two, I outlined the multiculturalism and feminism discussion, and the idea of legal pluralism – two frameworks that are often employed in discussing Sharia in the West. Regardless of the framework against which Sharia is discussed, it is important to understand what Sharia is, and the arguments that arise in support for and opposition to Sharia both in Muslim-majority states and Western liberal democracies with growing Muslim minorities. Thus, in this chapter, I offer a discussion of Sharia, in particular, an outline of what Sharia is, how it governs Islamic family life, and the main principles surrounding marriage and divorce. Islamic family law is often the area in which calls for accommodation are centred – with practising Muslims living in the West seeking greater recognition of their religious obligation when family disputes (like divorce) arise. This is the area in which liberal feminists would argue the biggest incompatibility with secular state family laws and norms arises. It is important to examine the rights of women under Sharia, in order to better understand the Sharia discussions that develop – including how Sharia and the human rights framework interact (and whether there is a compatibility). This includes consideration of international women's rights obligations and whether Sharia can be reconciled with these. There are many misunderstandings about the religion, along with stereotypes that are perpetuated by politicians and the media in the West, which make it difficult to understand what exactly Islam is and what Sharia entails. In fact, Islamic (or intersectional) feminists may argue that religion is an integral part of a religiously devout woman's identity and agency, and thus, is an essential mechanism through which they are able to achieve equality and recognition of rights.[1] Moral and religious values can form an inherent part of an individual's identity (as noted in arguments raised by supporters of multiculturalism, that were discussed in Chapter One). However, the differences that arise in Sharia practised by Muslims living in the West and the principles and values of secular law is where debate develops. As such, it is important to outline what Sharia is before discussing the Sharia debates that occur in relation to multicultural accommodation in Australia, Canada, and the UK. This is necessary, in order to understand the myriad of perceptions and understandings of

[1] An idea that explored further in Chapter Four, but relates to the debates outlined in this chapter.

Sharia that ultimately underlie these debates. Another facet of the Sharia debates is the compatibility of principles of Sharia with international human rights, as such I will also briefly discuss the objections to Sharia that arise from a human rights perspective.

What is Sharia Law?

Sharia law is the Islamic religious law that is derived from the Qur'an (the holy book in Islam) and the Sunnah (the actions and words of the Islamic Prophet Muhammed).[2] The Sunnah was recorded by the companions of the Prophet, and these accounts are known as the *hadith*. With the Qur'an and the Sunnah as the primary sources of Sharia (divine law), Islamic jurisprudence and laws are inferred from these sources by Islamic scholars and jurists – this is known as *fiqh*, the knowledge of rights and duties.[3] In the centuries following the death of the Prophet. Islamic jurists and scholars interpreted the Qur'an and *hadith* in search of the code of conduct (obligations and rights) by which Muslim people should abide and structure their lives. It is important to note that "authoritative collections of *hadith*" were only compiled in the 9th century, so there are a variety of legal opinions and views reflected in the different versions that have been recorded and followed.[4] In cases where the Qur'an and Sunnah do not give a direct and clear ruling, these scholars referred to secondary sources to derive legal reasoning and directive.[5] To be a scholar with the authority to offer such legal reasoning, one must be knowledgeable in all the legal-related verses of the Qur'an and the *hadith*, as well as fluent in the Arabic language of the Qur'an and *hadith*.[6] Whilst the sources of Sharia are easy to identify, it is important to note that there is diversity within the practice and understanding of Sharia law based on the distinct divisions of Muslims into groups (the two main being Sunni and Shi'ite, amongst other smaller groups).[7] The division amongst Sunni and Shi'ite groups appears largely political in

[2] John Esposito and Natana J DeLong-Bas, *Women in Muslim Family Law*, 2nd ed. (Syracuse: Syracuse University Press, 2001), 3-5; Raffia Arshad, *Islamic Family Law* (London: Sweet and Maxwell, 2010), 15.
[3] Arshad, *Islamic Family Law*, 15; and Lena Salaymeh, "Islamic Law," in *International Encyclopedia of the Social and Behavioral Sciences*, ed. James D Wright (Elsevier, 2nd ed, 2015), 746. Salaymeh notes: that "This Islamic jurisprudence is generated by an interpretive process anchored in canonical Islamic texts".
[4] Esposito and DeLong-Bas, *Women in Muslim Family Law*, 5.
[5] Arshad, *Islamic Family Law*, 20.
[6] Ibid.
[7] Marie Egan Provins, "Constructing an Islamic Institute of Civil Justice that Encourages Women's Rights," *Loyola of Los Angeles International and Comparative Law Review* 27 (2005): 517.

nature; whilst there is adherence to the same scripture and basic pillars of Islam, there are disagreements about the Prophet's successor upon his death.[8]

In addition to this, Muslims may follow the Sharia interpretation and ruling of a particular school of thought. There are four main (Sunni) schools of Islamic legal thought (Hanafi, Maliki, Shafi, and Hanbali) based on the interpretations of four major jurists in the 8th and 9th centuries after which the schools are named.[9] The difference between the schools of jurisprudence appears to concern variations in the interpretation of the religious texts, as well as the geographical location of each schools' followers. For instance, the Hanafi school of thought is dominant in South Asia and Turkey, Maliki followers appear dominant in North Africa, Hanbali are found in the Gulf region of the Middle East, and Shafis are largely based in South East Asia and Egypt.[10] Outside of the differences in Sharia that arise between the different schools of thought, the Sharia followed in each part of the world differs too. Sharia law in the West is not the same as Sharia practised in majority-Muslim states, but even between these majority-Muslim nations there are differences in the "version" of Sharia that is implemented.[11] As such, when arguing for greater recognition of Sharia in Western multicultural societies, it is not possible to pinpoint a cohesive body of Sharia that can or should be accommodated.

Islamic Family Law

Sharia family law governs a variety of personal law matters, namely: inheritance, property, marriage and divorce, and child custody. Inheritance, marriage, and divorce are the key areas that are focused on in discussions of Sharia in the West. Many Muslims living in secular states choose to abide by these principles, in addition to the secular state laws, and find ways to follow both. To better understand what the Sharia

[8] Anver M. Emon, "Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation," in *Debating Sharia: Islam, Gender Politics, and Family Law*, ed. Anna C Korteweg and Jennifer A Selby (Toronto: University of Toronto Press, 2012), 195.
[9] Arshad, *Islamic Family Law*, 28; and Fatima Z Rahman, "Gender Equality in Muslim-Majority States and Shari'a Family Law: Is There a Link?" *Australian Journal of Political Science* 47, no. 3 (2012), 349. In Rahman's text, the fifth school is listed as Ja'fari.
[10] Emon, "Islamic Law and the Canadian Mosaic," 195.
[11] See Abdullahi A An-Na'im, *Islamic Family Law in a Changing World: A Global Resource Book* (London: Zed Books, 2002).

provisions around inheritance, marriage and divorce, and child custody entail, I will outline the key principles in each area.

Inheritance

The Islamic law of inheritance (also referred to as *mirath*) is one of the most detailed and explicitly outlined areas of Sharia offered by Islamic jurists over the centuries. Drawing on verses of the Qur'an, and stories of the *hadith*, the eligible heirs and shares of inheritance are defined.[12] Those that may inherit are blood-relatives, namely, mothers, fathers, daughters, sons, wives, nephews, nieces, uncles, and aunts.[13] The estate, first and foremost, must cover the costs of the deceased, for example, burial expenses and any outstanding debts; and then the rest of the estate may be distributed in accordance with the provisions outlined under Sharia. Wives receive one-eighth of a husband's property if the husband has any children, and is qualified due to the fact that they are given a dowry upon marriage to ensure their financial security; whilst distant (blood-related) relatives (such as cousins) may also have claims to inheritance in situations where there is, for instance, only a daughter from the marriage.[14] Sons receive inheritance that is double that of a daughter's share.[15] There are differences in the approaches of the schools of Sunni and Shi'ite legal thought, with Sunni inheritance laws being more rigid, particularly in terms of making a will or bequest of greater inheritance to a family member.[16]

Marriage and Divorce

Marriage and divorce are two of the most significantly discussed areas of Sharia, particularly when discussing greater accommodation in multicultural societies, like Australia, Canada or the UK. As with inheritance, many Muslims living in secular states will navigate the terrain between the civil state laws on inheritance, marriage and divorce, and their religious obligations, in order to satisfy the requirements of

[12] J.N.D Anderson, "Recent Reforms in the Islamic Law of Inheritance," *International and Comparative Law Quarterly* 14, no. 2 (1965): 849.
[13] Law and Sharia Consultants, *Inheritance according to Islamic Sharia Law* http://www.muslimpersonallaw.co.za/Inheritance%20according%20to%20Islamic%20Sharia%20Law.pdf (accessed December 12, 2016).
[14] Anderson, "Recent Reforms in the Islamic Law of Inheritance," 850.
[15] Law and Sharia Consultants, *Inheritance according to Islamic Sharia Law*.
[16] Anderson, "Recent Reforms in the Islamic Law of Inheritance," 851.

both. The accommodation of religious marriage ceremonies is possible and quite common under the legislative provisions around marriage in all three states (as will be discussed in Section Two). The real challenge arises when it comes to the divide between religious divorce, and the divorce provisions outlined in the state laws.

In Islam, marriage is "a solemn civil contract between a man and a woman" that is referred to as a *nikah* contract, and is binding on both parties.[17] It is a privileged and central area in Islamic family law and life.[18] There are number of conditions that need to be satisfied in order for a *nikah* to be valid and recognised as a Muslim marriage contract.[19] One element of the marriage contract is the *mahr*, which is a "nuptial gift" or compulsory payment given to the wife by the husband as consideration for the marriage.[20] There are two parts to *mahr*: that which is given at the time of entering into the marriage contract, and that which is deferred to be paid if/when the marriage is dissolved (either by death of the husband or divorce). One of the purposes of the *mahr* is to ensure the financial security and independence of the wife.[21] The issue of secular courts recognising *mahr* and Islamic marriage contracts is one that has been discussed often in the Canadian and British contexts, but only once in the Australian context.[22]

In terms of divorce, there are several options outlined under Sharia law, including the various costs that may be associated with each path to divorce. A husband can divorce without any specific grounds or reasons, and does not need the consent of his wife to

[17] David Pearl and Werner Menski, *Muslim Family Law* (London: Sweet and Maxwell, 1998) cited in Ralph Grillo, *Muslim Families, Politics and the Law: A Legal Industry in Multicultural Britain* (Surrey: Ashgate, 2015), 41; Rahman, "Gender Equality in Muslim-Majority States and Shari'a Family Law," 349.
[18] Judith E Tucker, *Women, Family, Gender in Islamic Law* (Cambridge: Cambridge University Press, 2008), 38.
[19] Ihsan Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralisms in England, Turkey and Pakistan* (Aldershot: Ashgate, 2005) cited Grillo, *Muslim Families, Politics and the Law*, 41.
[20] Pascale Fournier, "On God, Promises, and Money," in *Feminist Constitutionalism: Global Perspectives*, eds. Berverley Baines, Daphnes Barak-Erez and Tsvu Kahana (Cambridge: Cambridge University Press, 2011), 434.
[21] Ibid; and Celene Ibrahim, "Family law reform, spousal relations, and the 'intentions of Islamic law'," in *Women's Rights and Religious Law*, eds. Fareda Banda and Lisa Fishbayn Joffe (Milton Park: Routledge, 2016), 111.
[22] The Australian High Court considered *mahr* agreement as a contract in *Mohamed v Mohamed* (2012) NSWSC 852. However, important to note that this was not acceptance of religious principles by Australian law. Pascale Fournier (2011) has explored and discussed cases in Canada that have considered *mahr*, the courts have not recognised *mahr* despite element of Jewish marriage contracts being recognized and enforced.

do so.[23] This avenue of divorce is referred to a *talaq*, and consists of the husband declaring three times that he is divorcing the wife. However, with this divorce option, the husband has an obligation to pay any deferred *mahr* in completion upon the third declaration of *talaq*.[24] Whilst Sharia does provide women the ability to seek a divorce, it is not as straightforward or easy when compared to the *talaq* option available to men - unless the ability to unilaterally terminate the marriage has been delegated to the wife in the *nikah* contract.[25] Outside of this possibility, the different options for divorce available are a *khul* or *faskh* divorce, which require the wife to apply to Sharia bodies or a *qadi* (religious leader/advisor). A *khul* divorce is where the wife has the husband's consent to seek a divorce (though this requirement of consent is contested amongst the different Islamic schools), but absolves the husband from any obligation to pay any promised, deferred *mahr*.[26] A *faskh* divorce requires the wife to ask the court or *qadi* to dissolve the marriage based on one of the grounds of divorce (that establishes a "fault" on the husband's part).[27] These grounds for divorce include: impotence, insanity, not financing the maintenance of the wife (or asking the wife for money), and mistreatment. These categories of divorce are contested in terms of the specific requirements needed for divorce according to different schools of thought, and are not necessarily as distinct as they initially appear. For instance, there are several versions of *khula*, and the *faskh* divorce option is not accepted by all the schools of Islamic legal thought.[28]

When it comes to the question of greater accommodation of religious minorities, particularly Muslims in the West, a key argument surrounds the inherent differences of Sharia from Western liberal ideals that are embedded within state laws. One similarity to Western liberal ideals around divorce is the option for "no fault" divorce. In all three countries considered in this thesis, there has been the establishment of civil "no fault" divorces. However, issues of compatibility arise between Sharia principles surrounding divorce and those that exist within the civil law, with women often not placed on an equal ground in negotiations under Sharia. As will be discussed

[23] Rahman, "Gender Equality in Muslim-Majority States and Shari'a Family Law," 350.
[24] Fournier, "On God, Promises, and Money," 435.
[25] Ibid.
[26] Ibid.
[27] Ghena Krayem, *Islamic Family Law in Australia: To Recognise or Not To Recognise* (Carlton: Melbourne University Publishing, 2014), 180.
[28] Grillo, *Muslim Families, Politics and the Law,* 94.

below, women are not equal in terms of evidentiary compatibility, and inheritance rights. While there are provisions for women to divorce, it is a lot harder than the divorce provisions available to men, and many devout women feel compelled to seek advice and divorce from religious leaders in the community.

Sharia and Women

The most common discussion that arises around Sharia in debates around greater accommodation and recognition of religious laws in secular states is the place of women. The gap between human rights doctrines and the gender biases that emerge in religious laws and norms are often too far apart to easily reconcile. Like various other religions, Islam (and therefore the principles of Sharia) assign distinct spaces to men and women (through outlining rights and responsibilities). It is these seemingly unequal assignations of rights that sparks feminist opposition to any recognition or accommodation of Sharia, as witnessed in the debates that have arisen in the UK, Canada, and to a lesser extent, Australia.

So, what is the place of women under Sharia? Sharia, irrespective of the school of thought, is based on particular ideals and conceptions of gender that assigns men and women different rights and responsibilities – which are essentially based on what the Qur'an notes as being their uniquely advantageous qualities, in which they excel compared to one another.[29] Within this view, men are seen as physically stronger and "excel" women in "constitution" which gives them a greater ability to face dangers and survive hardships.[30] By comparison women are assigned "softer" qualities, which focus on their strengths in providing "love and affection", a natural division that complements men and women to help the "progress of humanity".[31] Following on from these qualities that are assigned to men and women, the responsibilities under Sharia are gendered, with differences in marriage responsibilities, in inheritance rights, and the ease of obtaining a divorce.

[29] Rahman, "Gender Equality in Muslim-Majority States and Shari'a Family Law," 349.
[30] Ibid.
[31] Ibid.

While Sharia Law covers various areas of personal life, from marriage to inheritance, it is often characterised as being oppressive to women, with the example of inheritance laws illustrating an area where this arises. Under Sharia, women face discriminatory outcomes whereby they receive a mere fraction of the deceased's estate – which leaves many women financially vulnerable.[32] A particular example is that a wife may never inherit more than one-fourth of the estate, and this is lessened if she has children. Similarly, when inheriting from a parent, women generally receive only half the amount received by a brother.[33] Given this unequal treatment of women, this is where opposition to multicultural accommodation may argue that policymakers should consider the inequities inherent within Sharia Law before granting Islamic groups rights to self-govern; thereby giving effect to religious and cultural views that may trap women in poverty or abusive relationships.[34] It is this argument that is at the heart of the Sharia debates in Canada, Australia, and the UK.

Women are provided with a *mahr* in marriage in order to help them maintain some semblance of financial independence. However, there are a number of other provisions, which place women in a disadvantageous situation. Essentially, the power allocation within marriage is unequal with the husband retaining greater control and power.[35] But even prior to entering marriage, women are wed under the permission of their guardians, who facilitate and ultimately agree to the marriage.[36] Within a marriage, men, as the "stronger" sex are responsible for maintaining the wife, by providing food, shelter and clothing.[37] However, in return the responsibilities of the wife are to ensure obedience to the husband, and to provide physical companionship.[38] In terms of divorce, Sharia does not allow equal access to divorce on the part of men and women and this contravenes various international conventions on women's rights.[39] As discussed above when outlining the types of divorce available, it is clear that men are able to divorce without any obligation to seek consent from the wife, though women are provided for by the requirement for husbands to pay out deferred

[32] Robin F Wilson, "Privatizing Family Law in the Name of Religion," *William and Mary Bill of Rights Journal* 18, no. 4 (2010): 926.
[33] Provins, "Constructing an Islamic Institute of Civil Justice that Encourages Women's Rights," 538.
[34] Wilson, "Privatizing Family Law in the Name of Religion," 926.
[35] Tucker, *Women, Family, Gender in Islamic Law*, 38.
[36] Ibid., 44.
[37] Rahman, "Gender Equality in Muslim-Majority States and Shari'a Family Law," 349.
[38] Ibid.
[39] Carolyn Hamilton, *Family Law and Religion* (London: Sweet and Maxwell, 1005) cited in Grillo, *Muslim Families, Politics and the Law*, 94.

mahr; and in this way they are supposed to be protected from ending up destitute and without any means for surviving. However, the difficulties in a woman seeking divorce, and the forfeiture of *mahr* places women in a precarious situation, where they have to prove that a divorce is justified and may end up financially burdened. The gender roles that underlie Sharia are distinctly evident in this area of governance, and they also extend to matters of child custody that arise in divorce. Principles surrounding child custody are gendered by placing fathers as the legal guardians, through their role as the financial heads of the families - whilst mothers are seen as "caretakers" with primary responsibilities in looking after children during the early childhood years.[40] The division of responsibilities along gendered lines, has often meant that Muslim women are discouraged from pursuing educational opportunities or work outside of the home, as there is a reinforcement by communities and families of their responsibilities and "necessary" caretaker role within the home.[41]

Sharia Debate in the West

The Islamic family law outlined above is often the area, which centres on debates around Sharia accommodation in the West. Tensions arise between secular family law provisions and the precepts of Islamic family law,[42] as illustrated in debates like that which arose in Ontario in 2003. The idea of accommodating potentially incompatible norms drives opposition to Sharia, though these arguments often fail to consider the fact that many debates on Islam occur in shifting contexts. For instance, debates about the practice of Sharia are often transferred from Muslim-majority countries to the West without recognising a growing environment (and effects) of securitisation and Islamophobia in a post-9/11 world.[43] It is important to look beyond the narrow lens of arguments opposing Sharia to understand that with the growing Muslim population in the West (particularly, in a post-colonial world), accommodation is a necessary discussion to be had.[44] There is a need to understand the arguments for and against

[40] Rahman, "Gender Equality in Muslim-Majority States and Shari'a Family Law," 350.
[41] Ibid., 351.
[42] Jocelyn Cesari, "Foreword: Sharia and the Future of Western Secularism," in *Debating Sharia: Islam, Gender Politics, and Family Law*, ed. Anna C Korteweg and Jennifer A Selby (Toronto: University of Toronto Press, 2012), 9.
[43] Ibid., 7.
[44] Stephen Hockman – Islam and English Law book p.1

Sharia, but also the inherent misconceptions that are reinforced sometimes unwittingly, but often consciously.

Key arguments supporting the accommodation of Sharia reiterate the idea that religion is an inherent part of an individual's identity, including Muslim women. Where it is argued that Sharia is oppressive, some would argue that it is not as oppressive as it is made out to be, and that Islamic family law offers women fair outcomes (for example, allowing women to keep their property upon divorce), and that "Sharia would favour women 80% of the time".[45] Following these arguments is the idea that the Sharia that is covered in the media or practised by some groups or individuals within society is "being improperly applied".[46] It is similarly argued that Sharia can align with liberal values, with examples of Muslim-majority states drawn upon to illustrate this idea. In particular, Tunisia's approach to Islamic law saw the adoption of relatively liberal ideas into their family law code in banning polygamy - justification of which was interestingly drawn from Islamic principles.[47] Furthermore, it is sometimes argued that Sharia recognises human rights. However, this is a contentious claim as there is evidence that Sharia (particularly that practised in Muslim-majority states) is inconsistent with the ideals of human rights outlined in modern day international covenants – namely, the Universal Declaration on Human Rights, and International Convention on Civil and Political Rights.[48]

Exploring Sharia in relation to the international human rights framework provides an added dimension to the debates around the compatibility of Sharia with liberal democratic ideals – particularly when considering how Islamic law does not align with human rights protections, as there appear to be inconsistencies. Such a discussion sheds light on whether the competing human rights of freedom of religion and women's individual rights can successfully co-exist and be granted equal protection, or whether one should be more greatly safeguarded than the other. Shirish Chotalia and

[45] Vivian Song, "Sharia Law in Ontario: Proponents Insist Laws Are Misunderstood," *Toronto Sun*, 15 June (2004), cited in Lynda Clarke, "Asking Questions about Sharia: Lessons from Ontario," in *Debating Sharia: Islam, Gender Politics, and Family Law*, ed. Anna C Korteweg and Jennifer A Selby (Toronto: University of Toronto Press, 2012), 162.
[46] Ibid.
[47] Emon, "Islamic Law and the Canadian Mosaic," 211.
[48] Ann Black, Hossein Esmaeili and Nadirsyah Hosen, *Modern Perspectives on Islamic Law* (Cheltenham: Edward Elgar, 2013), 21.

Dominic McGoldrick examine this idea of compatibility in the Canadian and European contexts (respectively).

Chotalia in her work *Arbitration Using Sharia Law in Canada* adopts a constitutional and human rights perspective to her exploration of the Sharia debate in Canada. Chotalia provides a background to the Canadian Sharia debate that arose in 2003 with the request of the Islamic Institute of Civil Justice's request for Sharia Courts; highlighting arguments put forth by female Muslim human rights activists, such as Shirin Ebadi, who argue that Islamic tribunals open the door to the potential abuse of human rights (specifically, for Muslim women).[49] Chotalia follows this up by stating that Islamic law relies on individual interpretations, and thus, without a centralised law could lead many interpretations that go against human rights and are anti-democratic in nature. To strengthen the argument, a number of ways in which this can happen are outlined, most notably, through suppression of women's sexuality, forced veiling and polygamy. Chotalia also examines Sharia Law in relation to the Constitution of Canada, including the Canadian *Charter of Rights and Freedoms* (the Charter), which embeds human rights into the supreme law of Canada. When taken in relation to the Charter, the general rules of Muslim law appear on the surface to infringe the Charter, and thus human rights – specifically freedom of speech, freedom of association and gender equality.[50] In the interests of providing a balanced discussion Chotalia also looks at the other side of the debate - the freedom of religion. However, \ Chotalia concludes that there are various parameters and limitations, and that ultimately the freedom of religion is not absolute. To further drive home this point Chotalia refers to the *International Covenant on Civil and Political Rights* in order to highlight the limitations and note that the freedom may be limited where it is necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others.[51] Ultimately, Chotalia determines that from a human rights perspective it is difficult to reconcile the rights of women and freedom of religion. Chotalia, sees secular laws as preserving and safeguarding freedom of religion, but

[49] Shirish Chotalia, "Arbitration Using Sharia Law in Canada: A Constitutional and Human Rights Perspective," *Constitutional Forum* 15, no. 2 (2006): 65.
[50] Ibid., 67.
[51] Ibid.

argues that allowing Sharia law would essentially jeopardise equality rights of women.[52]

Like Chotalia, McGoldrick provides an informative discussion of Islamic law in respect to human rights. However, examination of the topic focuses on the European context - specifically the compatibility of Sharia rules with the *European Convention on Human Rights* (ECHR). McGoldrick begins by emphatically stating that Sharia law is not compatible with the ECHR. For McGoldrick, the biggest challenge is: "how should Muslims be positively accommodated and integrated within European states?"[53] This question is an important one, particularly in terms of the effect that such positive accommodation may have on women. As such, the discussion that follows in McGoldrick's work proves to be very insightful as he examines questions of whether Sharia law is compatible with the very concept of human rights. On this point, McGoldrick believes that it is not necessarily incompatible as there is much in the history of Islamic doctrine that is consistent with human rights. However, the issue for McGoldrick is what he states as the need for "theological re-interpretations" of Sharia to bring it up-to-date and conform to the modern human rights framework.[54]

To better understand the issues that arise in the examination of Sharia law and human rights, McGoldrick provides an analysis and critique of the *Refah* case heard by the European Court of Human Rights (ECtHR). *Refah* concerned the dissolution of an Islamic political party in Turkey, with a fundamental issue being the proposed plurality of legal systems. The ECtHR ultimately concluded that the party's intention to establish a Sharia regime was incompatible with the fundamental principles of democracy; which meant dissolution of the party was justified, and did not breach the ECHR's provision of freedom of association.[55] For McGoldrick, *Refah* highlights the major issues surrounding the compatibility of Sharia law with international human rights law – that the difference in terms of liberal democratic ideals and Sharia is too large.[56] Following this conclusion, McGoldrick states that the real question perhaps, is

[52] Ibid., 71.
[53] Dominic McGoldrick, "The Compatibility of an Islamic/*shar'ia* law system or *shar'ia* rules with the European Convention on Human Rights," in *Islamic and English Law*, ed. Robin Griffith-Jones (Cambridge: Cambridge University Press, 2013), 43.
[54] Ibid., 45.
[55] Idib., 46.
[56] Ibid., 51.

whether there should be accommodation of Islamic law through adoption of particular rules of Sharia, rather than a general adoption of Sharia law.[57] Similarly, he notes that perhaps Sharia could be adopted through allowing more religiously based opt-outs within the secular law system.[58] Ultimately, McGoldrick concludes by advocating an active engagement between Muslims and the ECHR rather than incorporation of Sharia law into the law of European states. It is in this way, McGoldrick notes, that Sharia law may possibly be accommodated in a way that is compatible with the human rights framework, but that even so it would still be a difficult battle.[59] Based on this suggestion, perhaps, through a careful and close engagement with Muslim communities, a "middle ground" can be found between accommodation of religious laws and the protections found in international (and domestic) human rights laws. However, the biggest obstacle would be in reconciling the protections afforded to women within human rights doctrines and the gendered principles and hierarchies that exist within Sharia.

This apparent incompatibility between Sharia law and principles of human rights (as found in international doctrines) is compounded by other criticisms of Sharia. A key criticism is that there is no one version or "code" of Sharia, and thus in debates for accommodation of Sharia in the West, there is no single body that can be referred to in reference for what Sharia is, or is not. This variance in the understanding and practice of Sharia is then used as the basis for arguing that any accommodation is "vulnerable to political control and manipulation", as there is a reliance on religious leaders (who are often self-appointed – an idea explored further in Chapter Ten) to interpret and implement Sharia.[60] The views of religious leaders and the "average" Muslim living in the West can be vastly different, with many viewing Sharia as an ideal or symbol that is invested with personal meaning, which differs to the "code" that is often heralded by religious leaders.[61] Similarly, the position of women within these interpretations of Sharia is often a driving influence in the opposition to accommodating Sharia in the West (in discussing religious arbitration, or otherwise). There is a reality of a high incidence of male-female sexual violence in Muslim countries.[62] However, to simply

[57] Ibid., 53.
[58] Ibid., 55.
[59] Ibid., 70-71.
[60] Emon, "Islamic Law and the Canadian Mosaic," 210.
[61] Clarke, "Asking Questions about Sharia," 168.
[62] Hina Azam, *Sexual Violation in Islamic Law* (New York: Cambridge University Press, 2015), 1.

reduce this, as being a derivative of religious norms and principles can be problematic, as this sexual violence and oppression stems from socio-cultural attitudes and practices that are inherently patriarchal and misogynistic, and influence the interpretation of religious laws (where religion and cultural traditions become intertwined).[63]

Despite these criticisms that are often directed towards Sharia, in particular when discussing accommodation in the West, it is important to note that there are many misconceptions that arise surrounding Sharia – with confusion arising from the different practices within different Muslim nations and Muslim communities. Contributing to this confusion are media representations in the West of Sharia stereotyped as merely being about violent floggings and beheadings, with news media emphasising notions of Islam as "barbaric" and a "dangerous threat"[64] – ideas which then form the basis of arguments opposing religious freedom and greater accommodation. Whilst these practices may take place in some parts of the world,[65] it is problematic to categorise the increasingly different and adapted versions of Sharia that are being practised by Muslims in the West in the same way – where Muslims are often straddling two worlds: the secular, liberal democratic beliefs of their Western liberal democratic state, and their religion. Underlying some of these misconceived views on Islam in the West is the growing influence of Islamophobia, and the general "throwback" to Orientalist conceptions and ideals of Muslims and the Islamic world, which typically labelled them as being "barbaric" and "uncivilised".[66] These Orientalist attitudes continue to form the background of arguments that are raised by politicians in various Western countries. A good example being the recent statements made by Australian Senators Pauline Hanson and Cory Bernardi, in lobbying for greater

[63] Ibid. – Azam, discusses socio-cultural attitudes that influence Sharia law and its practice, and provides examples of women being punished for rape under adultery Sharia laws.
[64] Kerry Moore, Paul Mason and Justin Lewis, "Images of Islam in the UK: The Representation of British Muslims in the National Print News Media 2000-2008," Working Paper, Cardiff, Cardiff University, 7th July 2008, 32, http://orca.cf.ac.uk/53005/1/08channel4-dispatches.pdf.
[65] Countries like Saudi Arabia are known for their strict punishments and implementation of Sharia – i.e. cutting off the hands of those found guilty of theft (see for example: Newsweek Staff, "The World's Most Barbaric Punishments," *Newsweek*, September 7, 2010, http://europe.newsweek.com/worlds-most-barbaric-punishments-74537?rm=eu). However, this is not the practice of all Muslim states, and thus it is problematic to characterise all Muslim countries and practice of Sharia in this way.
[66] Christine Ho, "Muslim women's new defenders: Women's rights, nationalism and Islamophobia in contemporary Australia," *Women's Studies International Forum* 30, no. 4, (2007); Emon, "Islamic Law and the Canadian Mosaic".

investigations into Sharia.[67] Notably, throughout Hanson's election campaign in 2016, she called for a Royal Commission or Inquiry into Sharia.[68] This anti-Sharia sentiment was reinforced again in her maiden speech to the Australian Senate in November 2016, with calls to ban Muslim immigration.[69] These ideas of Muslim women being repressed, and the "violent" physical punishments that are issues in some Muslim countries are emphasised, and sometimes dramatised with the intent to create and reinforce a general suspicion and distrust of Muslim communities.[70] With the threat of terrorism becoming a prominent political issue post-9/11, these ideas underlie Islamophobia, which has become a reality that influences various political and social discussions, and works to perpetuate the categorisation and stereotyping of Muslims (this is discussed further in Chapter Nine).

Conclusion

This chapter outlines the essence of Sharia law, particularly in relation to familial and personal law matters – namely, inheritance, marriage and divorce. The most common point of contention in Sharia debates in the West is those surrounding the compatibility of Sharia with Western liberal ideals around equality and human rights. There are certainly areas where Sharia does not align with ideals of women's rights and equality that have emerged within contemporary rights discourses and family laws within countries like Australia, Canada, and the UK. Sharia assigns certain rights and responsibilities to men and women in marriage and divorce, and the reconciliation of these principles with civil marriage and divorce laws may be tricky. That said, many Muslims in the West have been working to meet the requirements of both their religious obligations and that outlined by their state's laws, so perhaps this is not

[67] Cory Bernardi, "An Inconvenient Truth." *Cory Bernardi*, http://www.corybernardi.com/an_inconvenient_truth (accessed November 23, 2016); Pauline Hanson, "Transcript: Pauline Hanson's 2016 maiden speech to the Senate." *ABC News* http://www.abc.net.au/news/2016-09-15/pauline-hanson-maiden-speech-2016/7847136 (accessed September 15, 2016).

[68] Kym Agius, "Election 2016: Pauline Hanson not backing down on call for royal commission into Islam," *ABC News*, July 4, 2016 http://www.abc.net.au/news/2016-07-04/election-2016-pauline-hanson-royal-commission-islam-banking/7566416 (accessed January 3, 2016).

[69] Jane Norman, "Pauline Hanson calls for Muslim immigration ban in maiden speech to Senate," *ABC News*, September 14, 2016, http://www.abc.net.au/news/2016-09-14/one-nation-senator-pauline-hanson-makes-first-speech-to-senate/7845150 (accessed September 15, 2016).

[70] Jennifer A Selby and Anna C Korteweg, "Introduction: Situating the Sharia Debate in Ontario," in *Debating Sharia: Islam, Gender Politics, and Family Law*, ed. Anna C Korteweg and Jennifer A Selby (Toronto: University of Toronto Press, 2012), 19.

impossible. The concern that arises from the perspective of liberal feminists is how to ensure that Muslim women are treated fairly, and their rights are protected from potentially oppressive situations that may leave them with no avenue for justice or recourse in family law matters. However, this raises questions about the agency of Muslim women and the ways in which they are characterised and stereotyped within discussions concerning their "interests", rights and access to justice, an idea that I will explore in the following chapter.

CHAPTER FOUR

Muslim Women, Choice and Agency

In this chapter I explore the idea of Muslim women and agency. The discussions by liberal feminists in challenging multicultural accommodation of culture and religion, and more particularly Sharia law (which is seen to be most incompatible with liberal ideals) often characterise Muslim women as lacking agency in order to reiterate the argument that they are "oppressed" internal minorities within the minority religious group. However, as Shakira Hussein has argued when examining the "choice" versus "force" dichotomy that appears to arise when discussing Muslim women and veiling, this simplification of Muslim women and their position as agents can be problematic. In outlining the choice-force discussion, I will argue that Muslim women can and do have an agency (of sorts) that cannot be completely dismissed. In fact, Islamic feminists in both Muslim majority states, and in Western liberal democracies, would argue that Islam can be empowering for Muslim women. However, as the term Islamic feminism is also widely contested, I will also explore the arguments of intersectional feminists, particularly in the context of the Canadian Sharia debate that arose in Ontario. Ultimately, one of the inherent problems is that Muslim women are often characterised as victims that "need saving". This is accompanied by a general silencing of Muslim women by dominant male figures, as well as liberal (secular) feminists that claim to speak for them. Without including Muslim women in the discussion, we can never truly address the gender hierarchies and biases that exist within the minority religious/cultural communities, but also within more formal institutional bodies.

Muslim Women and "Choice"

A prominent argument against the recognition of Sharia Law in "secular" states, such as Australia, Canada and the UK, is that there are underlying inter and intra-communal pressures. These pressures involve the possibility of forced, involuntary participation of individuals in cultural or religious practises, which are justified by dominant members of the group, who outline the practises to be central to complying

with the tenets of a religious faith (in this discussion, Islam and Sharia).[1] Essentially, the "choice" given to women to choose religious arbitration over secular remedies may not be viewed as not a truly "free" choice, as it raises questions of loyalty to the religious group and community.[2] Hussein explores this idea of "choice" and "force" in relation to Muslim women's choice of dress and veiling. In this example, it is noted that women typically do not choose, but rather negotiate such issues, and that this negotiation is not on equal terms between Muslim women, and their families and communities (including the wider secular society).[3] Muslim women are caught between the patriarchal demands of their religious faith and the racism of the external secular society. Furthermore, what is often referred to as "choice" may actually be mandatory or obligatory.[4] Ultimately, Muslim women may feel obliged to participate in religious arbitration under a Sharia tribunal, due to the pressures from community and family – as a religious and cultural upbringing may influence women's views and actions.[5] In particular, devoutly religious women may face the greatest pressure to consent to religious arbitration, and thus the idea of choice is, in a sense, illusory.[6] Forced participation leads to the threat of harsh and unconscionable outcomes for women.[7] On this basis it is difficult to ensure free and voluntary consent by women to religious arbitration, and thus it may be viewed as a mechanism through which achieving and ensuring gender equality is not realistic.

Similar concerns arise in relation to women's "free choice" to elect or opt out of religious arbitration, if Sharia tribunals were to be allowed (in the West), based on the fact that religion establishes idealised and gendered images of women as mothers, caretakers and moral guardians of the private sphere.[8] It sets up traditional roles where women and men are unequal, and based on this seemingly "authentic" identity of a woman, a Muslim woman selecting secular legal recourse over a Sharia tribunal would

[1] Shirish Chotalia, "Arbitration Using Sharia Law in Canada: A Constitutional and Human Rights Perspective," *Constitutional Forum* 15, no. 2 (2006): 66.
[2] Ayelet Shachar, "Religion, State and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies," *McGill Law Journal* 50 (2005): 64.
[3] Shakira Hussein, "The Limits of Force/Choice Discourses in Discussing Muslim Women's Dress Codes," *Transforming Cultures eJournal* 2, no. 1 (2007).
[4] Ibid.
[5] Marie Egan Provins, "Constructing an Islamic Institute of Civil Justice that Encourages Women's Rights," *Loyola of Los Angeles International and Comparative Law Review* 27 (2005): 528.
[6] Ibid., 527.
[7] Robin F Wilson, "Privatizing Family Law in the Name of Religion," *William and Mary Bill of Rights Journal* 18, no. 4 (2010): 950.
[8] Shachar, "Religion, State and the Problem of Gender," 72.

be viewed as disloyal.[9] With women viewed as playing an important role in contributing to and maintaining the religious group's collective identity, they may be pressured into turning away from secular society and legal processes in favour of their duty to religion.[10] In much the same way, women who have recently migrated to a secular state (like Australia, Canada or the UK), may not have a formal education or be fluent in the state's official language, and may be accustomed to their religious and cultural communities and only have contact with their families.[11] This argument about migrant women being uneducated has been misappropriated by some governments (namely, the UK government under former PM David Cameron) in justifying state policies that reinforce an underlying (and growing) Islamophobia in state institutions (an idea that will be explored further in Chapter Nine when looking at formal institutions). Regardless of the ways in which the state has drawn on this insulation of Muslim women within their communities for their own political purposes, the overarching issue that arises is that it may lead to coercion to participate in religious arbitration, without a complete understanding and knowledge of all the options available. Thus, patriarchal structures could continue to dominate, and women would be no closer to having achieved equality and truly "free" choice.

It is argued that in moving towards a protection of Muslim women's rights and equality, it is necessary that minority cultural and religious groups modify their attitudes towards women and the perceptions of their roles within the group. There is a need to acknowledge intra-group inequalities, as well as a need for adequate representation of less powerful members (namely, women) in the minority group so as to prevent harm coming to the interests of vulnerable members.[12] Often representation of minority cultural groups is conducted by those deemed official spokespeople, and are predominantly men.[13] It is suggested that by allowing subordinated members within cultural groups to have the opportunity to participate in the policy-making processes undertaken by the government, they may be better able to protect their

[9] Ibid., 64.
[10] Ayelet Shachar, "Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law," *Theoretical Inquiries in Law* 9 (2008): 591.
[11] Provins, "Constructing an Islamic Institute of Civil Justice that Encourages Women's Rights," 526.
[12] Naser Ghobadzedah, "A multiculturalism-feminism dispute: Muslim women and the Sharia debate in Canada and Australia," *Commonwealth and Comparative Politics* 48, no. 3 (2010): 306.
[13] Shachar, "Religion, State and the Problem of Gender," 71. Also, it should be noted that these are "informal networks of men", and have a significant role in the effectiveness of women's participation, and will discussed further in Chapter Ten.

rights.[14] This is more of a positive action rather than mere resistance to patriarchal domination and gender inequality.

Dialogue between cultures (that of the wider society and the minority group) along with intra-group contestation is important in reforming cultural identity and structure, and forming one that rejects the typical multicultural approach – which often reinforces gender inequalities, rather than encouraging greater rights for women within the group.[15] Adopting a multicultural approach, guided by ideals of including women, and equality for all members of the group, may be more effective in democratising the private sphere and addressing issues of oppression and prejudice.[16] Therefore, it is important for governments to create policies that respond to cultural minorities' requests for group rights, but where adequate representation and consideration of vulnerable members are taken into account.[17] Ultimately, to realise equality for women within the realm of cultural rights, it is important that women are fully represented in negotiations for group rights from the beginning, in order for them to achieve better protection of their rights. If not, women will be no closer to achieving equality.

The very idea of culture, it is suggested, is one that is fluid and can constantly be transformed and renegotiated.[18] Confining discussion of cultural rights to one that only considers power relations is futile as it does not take into account the other intra-group differences, and places women as perpetual victims who cannot possibly bring about change for themselves.[19] As such, perhaps a more productive (and effective) approach in bringing about women's equality within minority cultures is to find a balance between the approaches of multiculturalism and feminism. The compatibility of the two is often contested, and feminists argue that there is a fundamental conflict that cannot be resolved. This is based on ideas derived from Okin's arguments (discussed in Chapter One), where group rights are viewed as working to benefit male members of the group over others.[20] However, it is possible that the conflict is not that

[14] Ghobadzedah, "A multiculturalism-feminism dispute,"307.
[15] Shachar, "Religion, State and the Problem of Gender," 71.
[16] Ibid.
[17] Susan Moller Okin, "Feminism and Multiculturalism: Some Tensions," *Ethics* 108, no. 4 (1998): 684.
[18] Ghobadzedah, "A multiculturalism-feminism dispute," 304.
[19] Ibid.
[20] Okin, "Feminism and Multiculturalism," 644.

deep, and that by finding a balance between the two approaches a more effective one can be introduced, to grant women greater equality.[21] Thus, in exploring state multicultural policies and the limits of "reasonable accommodation", there could be a possible compromise where the special group rights of religious groups that Kymlicka and his fellow multicultural theorists advocate are recognised, in addition to greater gender equality rights and protections.

One suggestion on how a multiculturalism approach to group rights could take into account feminist concerns, is by introducing policies that incentivise groups to reinterpret their traditions, in a way that preserves their culture but also improves women's standing and equality within the group.[22] This could be achieved through a multicultural approach that has internal protections that balance the harms of cultural practises against the value attributed to those practises by the culture.[23] Whilst this approach may not be entirely neutral, if the best possible efforts are made to understand the practises and an assessment made of all the relevant factors, the harm of the practise could in some way be weighed against its value. Thus, it could be an effective way to move towards achieving greater equality for women within minority cultures.

Similarly, multicultural policies could be viewed as providing a means by which members of minority cultures can facilitate participation. Rather than being seen as merely reinforcing the inequality of women, it could be taken to be an opportunity through which the marginalised members (women) can transform the patriarchal nature of the culture.[24] This leads into the idea of "agency", which is seen as a key mechanism through which the private sphere, for instance, can be transformed and shaped via engagement with social, economic and religious contexts and frameworks.[25] Agency is inherently related to the idea of helping women engage with their cultural group in working towards changing the repressive structures and practises. However, feminists like Okin argue that if women are accepting of the norms of the culture, which, in relation to liberal ideals, could be considered illiberal norms, then there can

[21] Ghobadzedah, "A multiculturalism-feminism dispute," 305.
[22] Shachar, "Religion, State and the Problem of Gender," 71.
[23] Faisal Bhabha, "Between Exclusion and Assimilation: Experimentalizing Multiculturalism," *McGill Law Journal* 54 (2009): 72.
[24] Ghobadzedah, "A multiculturalism-feminism dispute," 309.
[25] Provins, "Constructing an Islamic Institute of Civil Justice that Encourages Women's Rights," 524.

be no agency; that agency would essentially be a useless, ineffectual concept.[26] Whilst agency may be considered a means by which to work towards enhanced rights for women, a key issue that arises is whether women can have agency without completely shunning practises that may be considered illiberal. Ultimately, a multicultural policy that considers the internal inequalities, and provides protection for vulnerable members might be an effective means by which cultures that operate mainly within the private sphere can be transformed to grant women equality. However, achieving this greater participation of vulnerable members of minority groups is limited by the inherent gender hierarchies that operate both within religious groups and the state. It is important to recognise these gender hierarchies (an idea explored in Chapters Nine and Ten) before any participation by Muslim women might be effective to bring about change and greater equality in institutional structures.

Islamic and Intersectional Feminism

Supporters of multiculturalism, in particular the proponents of the establishment and recognition of Sharia law, argue that there is a "right to exit" that would sufficiently protect vulnerable members of the group.[27] However, this so-called choice would not truly protect the rights of women, as it is an "either/or" choice – to either conform to group norms or leave the group.[28] The problem that arises is how an individual would actually go about exiting their culture, which is an inherent part of their identity. It does not provide empowerment to women, especially those who identify themselves as religious, and want to honour their religious duties, as they would not find it easy to turn their back on the community.[29] Thus, they would most likely feel pressured to "choose" religious arbitration, rather than risk losing their place within the group. As such, it would appear that a strict separation of law and religion should be maintained. However, the argument that gender equality would not be possible if Sharia Law was to be allowed under policies of multiculturalism is challenged by the argument that denying recognition of Sharia law will lead to greater risk of victimisation of women. Since Sharia law is practised in an unofficial capacity within personal lives, the denial of non-state religious tribunals would be likely to push these tribunals and practises

[26] Ibid., 523.
[27] Bhabha, "Between Exclusion and Assimilation," 61.
[28] Ibid.
[29] Ibid., 55.

underground, where no state regulation or legal recourse would be available to those vulnerable members of the group.[30] Thus, women would, arguably, be further victimised and oppressed by unjust rulings that are not within a formalised system with review mechanisms and standards. As such, supporters of Sharia arbitration bodies would potentially argue that to have a chance to achieve greater gender equality, it is necessary to recognise Sharia law and keep it out of the unregulated "shadows of the law".

In much the same way, it is argued that religion could in fact give women greater rights, and actually conforms to such equality rights.[31] Islamic and intersectional feminists argue that religious traditions can be modified, and that religious understanding is constantly changing, not static and fixed.[32] In fact, many Muslim women in the West (such as Canadian and Australian Muslim women) perceive Islam to be a religion that has traditionally provided safeguards for women's rights and promoted gender equality.[33] Furthermore, it is argued that the idea that Canadian Muslim women would be vulnerable and incapable of making autonomous decisions is ill-conceived; and that issues of gender inequality are not just situated within the Muslim community, but also exist in the wider Canadian society.[34] In essence, the Sharia debate should have taken into account that Canadian Muslim women may not be manipulated or oppressed, as they are individuals capable of making decisions.[35]

Intersectional feminists[36] would argue that culture and religion, as inherent parts of women's identity, can in fact be empowering. Opposition to multiculturalism advocates a situation whereby women are pushed to choose between their culture/religion and their individual rights (as outlined by Western liberal feminists

[30] Ibid., 83.
[31] Natasha Bakht, "Religious Arbitration in Canada: Protecting Women by Protecting Them from Religion," *Canadian Journal of Women and the Law* 19, no. 1 (2008): 131.
[32] Ibid.
[33] Aziza Y Al-Hibri, "Is Western Patriarchal Feminism good for the third world/minority women?" in *Is Multiculturalism Bad for Women?*, eds. Joshua Cohen, Matthew Howard and Martha Nussbaum (Princeton: Princeton University Press, 1999), 42.
[34] Anna C Korteweg, "The Sharia Debate in Ontario: Gender, Islam and Representations of Muslim Women's Agency," *Gender and Society* 22, no. 4 (2008): 449.
[35] Natasha Bakht, "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women," *Muslim World Journal of Human Rights* 1, no.1 (2004): 22.
[36] For example, Natasha Bakht and Sherene Rezeck. There are also several Islamic feminists who discuss agency of Muslim women in the context of Muslim-majority states, for example, Amal Treacher and Asifa Qureshi.

and rights discourses) – but this ultimately discounts the fact that many women live within patriarchal Muslim-majority states are still are able to exercise agency.[37] This is the same for women in minority groups living in multicultural societies. Framing women as "vulnerable members of cultural groups" conceals the reality of women in these groups having and exercising real agency; whether this be in challenging discriminatory gender hierarchies from within the group, or looking for ways to engage with external movements in order to attain support needed to enact or encourage change to gender-biased cultural practises.[38] For religious women the ideals of what is often termed "Western secular feminism", feels disconnected from their lived realities, discounting the inherent role that religion has in shaping their lives and identities.[39] As Beverly Baines outlines, in the Ontario Sharia debate the arguments put forth by secular feminists were challenged by those who hold sex equality and religious freedom as "equally compelling values" – this can be considered "intersectional feminism".[40] However, the voices of women who attempted to distinguish themselves as valuing both religious freedom and gender equality were largely silenced in the debate.[41] A problem faced often by Muslim women even where they are the centre of the debate, and thus the discounting of their capacity to exercise agency continues. Intersectional feminists, like Sherene Razack, are not wholly pro-culture/religious accommodation, and nor are they on board with secular feminist arguments to ban multicultural accommodation. Instead, they point out the dangers of both approaches, and in particular, the creation of a "religion versus secularism" dichotomy, which can instead (sometimes unwittingly) work to reinforce cultural and racial boundaries amongst women. For example, the ideas around "white, modern, enlightened West" and the "people of colour" (Muslims), which returns to the historical, racialized notion

[37] Vrinda Narain, "Critical Multiculturalism," in *Feminist Constitutionalism: Global Perspectives*, eds. Beverley Baines, Daphnes Barak-Erez and Tsvu Kahana (Cambridge: Cambridge University Press, 2011), 383.
[38] Monique Deveaux, *Gender and Justice in Multicultural Liberal States* (Oxford: Oxford University Press, 2006), 16.
[39] In discussing this idea, Bulbeck refers to Feda Abdo and others that feel feminism is of little significance in their lives - Chilla Bulbeck, "'Recognising' each other in Conversations between Anglo Feminists and Muslim Women," in *Beyond the Hijab Debates: New Conversations on Gender, Race and Religion*, eds. Tanja Dreher and Christina Ho (Newcastle upon Tyne: Cambridge Scholars Publishing, 2009), 215.
[40] Beverly Baines, "Must Feminists Identify as Secular Citizens? Lessons From Ontario," in *Gender Equality: Dimensions of Women's Equal Citizenship*, eds. Linda C McClain and Joanna L Grossman (New York: Cambridge University Press, 2012), 84.
[41] Ibid., 97.

of Orientalism.[42] The problems that arise from here ultimately continue the silencing of Muslim women, and define their "interests" for them without asking them.

The Silencing of Muslim Women

The silencing of Muslim women denies the possibilities for them to have and exercise agency – even where this agency may be more of a negotiation (as argued by Hussein). Post-9/11 Western liberal societies, like Australia, Canada and the UK, have witnessed a rise in Islamophobia – which tends to disadvantage Muslim women the most. The biggest constraint to arise for Muslim women is their classification as either "victims" or "suspects" – but never really agents with a voice and ability to represent themselves in the multicultural discussion, a concept discussed more broadly by Hussein.[43] This binary categorisation of Muslim women works to reinforce historically-derived imperial gender hierarchies – i.e. "needing to save the women from the East/the Orient", along with the general othering of Muslims, and ideas of Muslims being barbaric and uncivilised. In doing so it also emphasises ideas where agency is attributed as being male, while women are always placed as the victim, without any agency or voice.[44]

Ultimately, "women's interests" (in this case the interests of Muslim women) are defined by the state and constructed against a political and institutional context.[45] In recent British multicultural discussions, their interests are defined as "needing saving", victims of their patriarchal religion, and deprived of freedom and choice. Alternatively, Muslim women are viewed as needing to be reformed or prevented from becoming "suspects". Both definitions of Muslim women's interests fail to involve them in the actual process of defining the interests. Essentially, they become *victims* because they are oppressed and confined to the domestic realm, viewed as "traditionally submissive" within their families (and thus assumed to be uneducated, and unable to read), but

[42] Sherene H Razack, *Casting Out: The Eviction of Muslims From Western Law and Politics* (Toronto: University of Toronto Press, 2008), 147-148 cited in Baines, "Must Feminists Identify as Secular Citizens?" 98.
[43] Shakira Hussein, *From Victims to Suspects: Muslim Women since 9/11* (Sydney: NewSouth Publishing, 2016).
[44] Christine Ho, "Muslim women's new defenders: Women's rights, nationalism and Islamophobia in contemporary Australia," *Women's Studies International Forum* 30, no. 4, (2007): 294.
[45] Francesca Gains and Vivien Lowndes, "How is Institutional Formation Gendered, and Does it Make a Difference? A New Conceptual Framework and a Case Study of Police and Crime Commissioners in England and Wales," *Politics and Gender* 10 (2014): 529-530.

they also become *suspects* because they are the "mother" and "wives", with a duty of sorts to help the state in counter-terrorism efforts. These binaries are not only enforced by state institutions that work to define minority women's interests, but also by Western "secular" feminists. The "East versus West trope" continues (often inadvertently) to be employed when framing discussions of multicultural accommodation,[46] particularly post-9/11 with returns to Orientalist ideas of Muslim women/women in the "East" needing saving from the "uncivilised", "barbaric" men within their communities.

Conclusion

In debates around multiculturalism, it becomes clear that it is problematic to reduce minority women (in the context of Sharia debate, Muslim women) as not having agency. Whilst they may make decisions that are more of a negotiation than a "free choice", being spoken for and silenced is not helpful in determining what their interests are. There clearly needs to be a greater inclusion of minority/religious women in the discussion, but even where this happens, there is a need to also acknowledge the context in which they are existing. Notably, that Muslim women in minority groups in Western liberal democracies are faced with the biases and inequalities within their religious groups, but also the inequalities and gender hierarchies in society – and within state institutions. So, whilst minority religious principles may be deemed illiberal, even with the more liberal ideals underpinning the secular state, we need to acknowledge that there are also limitations to the "justice" and equality available for Muslim women in that arena too. As Vrinda Narain suggests, there is a need to look at the "mainstream institutions" to understand the power relations that operate within them, often influenced by "nonstate dimensions" such as culture, religions and social movements.[47] In this vein, I suggest employing a feminist institutionalist approach to examine how gender is structured within institutions (both formal and informal), and is influenced by cultural, social and religion norms. Doing so can provide a useful lens through which to better understand Muslim women and dilemmas around multicultural accommodation, in the context of the Sharia debates.

[46] Narain, "Critical Multiculturalism," 383.
[47] Ibid., 389.

CHAPTER FIVE

New Institutionalism and Feminist Institutionalism

The study of institutions within political science has evolved in the last several decades to develop a new understanding of institutions, within which political institutions are inherently influenced by factors external to the institution. These include: culture, economics, demographics and ideology. Termed "New Institutionalism" (NI) to mark this turn in the scholarship of institutions, this theoretical approach looks to the power relations that exist within institutions. However, whilst NI acknowledges the need to address the various factors that shape the operation of political institutions, there is no acknowledgment of gender as being one of these influential factors. This poses a significant gap in the approach of NI, and has led to a response by feminist political theorists in the form of 'Feminist Institutionalism' (FI). This new approach to institutionalism aims to explore the way in which gender impacts the opportunities that are made available to political actors, as well as the way it shapes political institutions more broadly. It highlights the failure of NI to acknowledge the hidden gendered nature of institutions. Instead, NI seems to reiterate the intrinsic norm of neutrality in regards to gender, a view that is promoted within orthodox approaches to institutional analysis.

While FI adopts a more inclusive approach in acknowledging gender, the focus of much FI literature has been on parliamentary and bureaucratic institutions, with minimal focus on law as an inherently gendered political institution. Like the bureaucratic realm, law is often presented as being a neutral player within the institutional landscape. However, employing an FI analysis suggests, that as with other political institutions that have been the focus of FI scholarship, the legal system also lacks a neutral framework in terms of gender justice. The socially accepted masculine ideal that governs the behaviour of actors within the political and legal arenas poses limits and boundaries for actors.

New Institutionalism

New institutionalism[1] developed within political science, as a response to the behavioural theory standpoint of the mid-20th century, within which institutions were seen as reflecting the decisions and actions of individual actors.[2] James March and Johan Olsen, in their 1984 article *The New Institutionalism: Organizational Factors in Political Life* present a highly influential discussion of institutions, highlighting their importance within political science. In examining the political landscape and the prevalence of various social, economic and political institutions, March and Olsen note that the way in which the world is viewed is not consistent with the ways in which political theorists are implored to discuss and contemplate it.[3] An underlying concept of NI then, according to March and Olsen, is that institutions matter and the way in which political life is organised must be considered and understood.[4] Central to this concept of NI is the "logic of appropriateness". This "logic of appropriateness" stems from the norms, values and practices found within political institutions, and shapes the ways in which institutional actors behave and make decisions. It can "override purely rational calculation when actors confront decision choices".[5] Ultimately, individuals derive a sense of rights and responsibilities from the practices and norms of the institutions, and their role as rational independent actors can be viewed as being inherently influenced by their involvement with an institution.[6]

The term "New Institutionalism" has no single, distinct definition despite its rising presence within the realm of political science. Hall and Taylor highlight this in their article *Political Science and the Three New Institutionalisms*, which notes that there is a great debate surrounding exactly what NI entails.[7] For March and Olsen, institutionalism is seen as a "general approach to the study of political institutions, a

[1] Also referred to by some scholars as Neo-Institutionalism.
[2] James G March and Johan P Olsen, "The New Institutionalism: Organizational Factors in Political Life," *The American Political Science Review* 78 (1984): 734-735.
[3] Ibid., 747.
[4] Ibid.
[5] Vivien Lowndes, "Something Old, Something New, Something Borrowed…How institutions change (and stay the same) in local governance," *Policy Studies* 26, no. 3-4 (2005): 294.
[6] James G March and Johan P Olsen, "Elaborating the 'New Institutionalism'," in *The Oxford Handbook of Political Institutions*, eds. Sarah A Binder, R.A.W Rhodes and Bert A Rockman (Oxford: Oxford University Press, 2008: 8.
[7] Peter A Hall and Rosemary C R Taylor, "Political Science and the Three New Institutionalisms," *Political Studies* 44, no. 5 (1996): 936.

set of theoretical ideas and hypotheses concerning the relations between institutional characteristics and political agency, performance and change".[8] In this view, NI is seen as focusing more on the social structure of political institutions, where they are not seen to merely be the result of contracts between individual political actors, or even avenues for opposing social forces to battle each other. Instead, institutions are viewed as "collections of structures, rules and standard operating procedures that have a partly autonomous role in political life".[9] They are seen as organising the state with significant influence over how power and authority is established, distributed, and exercised; and affect the capacity of political actors to govern, putting in place measures that may constrain or enable.[10] Institutions can be viewed as sites of continuous political challenges, where political conflicts and partnerships take centre stage.[11]

There are four approaches to NI that can be identified: historical; rational choice; sociological (or organisational); and discursive (or constructivist) institutionalism.[12] Historical institutionalism (HI) focuses on the "big real world questions" of politics and history, placing institutions within the context of defining political events and understanding them to be inherently shaped by this history.[13] HI theorists look to the variations and patterns of events in order to explain how institutions are structured.[14] Rational Choice Institutionalism (RCI), by comparison, looks to the interaction between the micro-level and macro-level of processes and events, and more specifically at the driving forces behind the actions of individual actors.[15] Discursive Institutionalism focuses on the role that ideas and discourse have in shaping the behaviour of political actors.[16] Sociological Institutionalism places an emphasis on the

[8] March and Olsen, "Elaborating the 'New Institutionalism'," 4.
[9] Ibid.
[10] Ibid., 7.
[11] Meryl Kenny, "Gender, Institutions and Power: A Critical Review," *Politics* 27, no. 2 (2007): 93.
[12] Fiona Mackay, Meryl Kenny and Louise Chappell, "New Institutionalism Through a Gender Lens: Towards a Feminists Institutionalism?" *International Political Science Review* 31 (2010): 574.
[13] Ibid., 575.
[14] Georgina Waylen, "What Can Historical Institutionalism Offer Feminist Institutionalists?" *Politics and Gender* 5, no. 2 (2009): 246.
[15] Amanda Driscoll and Mona Lena Krook, "Can There Be a Feminist Rational Choice Institutionalism," *Politics and Gender* 5, no. 2 (2009): 239.
[16] Mackay, Kenny and Chappell, "New Institutionalism Through a Gender Lens," 575.

analysis of the relationships between institutional actors and institutions, with institutions seen as reflecting, '"shared understandings" of "the way the world works".[17]

These various schools of NI are seen as promising, with the potential to provide an "integrative framework" that can take political science into a new era.[18] The theorists of NI (irrespective of approach) build on the earlier discussion of institutionalism in political science and endeavour to steer beyond these largely descriptive approaches, in order to highlight the formal and informal institutional rules that structure political behaviour.[19] A commonality amongst all the NI approaches is that they look not only at the formal features and characteristics of a political system, but also those informal norms, conventions and practices that often 'hide' in the background of the formal.[20]

What is an institution?

In order to better understand NI, it is important to first understand how institutions are defined. Going back to the 1950s, the traditional definition of an institution in political theory was contextual and reductionist. It placed politics as an inherent part of society that could not be separated, and attributed political events as being the result of the decisions and actions of individuals, rather than a result of organisational structures.[21] There was a focus on political actors following their self-interest as opposed to making decisions based on their political obligations and duties, and there was no consideration of the ways in which political life might be organised in accordance to cultural ceremonies and rituals. Contemporary political science has since developed a new conception of institutions whereby the process and structure of politics is seen as being influenced by the physical environment, culture, economics, as well as demographics, religion and ideologies.[22]

[17] Kathleen Thelen, "Historical Institutionalism in Comparative Politics," *Annual Review of Political Science* 2, no. 1 (1999): 386.
[18] Robert E Goodin and Hans-Dieter Klingemann, "Political Science: The Discipline," in *A New Handbook of Political Science*, eds. Robert E Goodin and Hans-Dieter Klingemann (Oxford: Oxford University Press, 1996), 25; March and Olsen, "Elaborating the 'New Institutionalism'," 15.
[19] Mackay, Kenny and Chappell, "New Institutionalism Through a Gender Lens," 574.
[20] Kenny, "Gender, Institutions and Power," 92.
[21] March and Olsen, "The New Institutionalism,"735.
[22] Ibid.

A widely accepted definition of institutions comes from Douglass North, who views institutions as "any form of constraint that human beings devise to shape human interaction", regardless of whether these constraints are formal or informal.[23] Similarly, Samuel P. Huntington notes institutions as being "stable, valued and recurring patterns of behaviour".[24] The constraints imposed by institutions typically outline prohibitions of individual behaviour, as well as which conditions may be permissible for certain activities to be carried out.[25] In line with these understandings of institutions, March and Olsen view political institutions as "collections of interrelated rules and routines that define appropriate actions in terms of relations between roles and situations" and these rules are then conveyed to individuals who interact with the institutions.[26] For Hall and Taylor, institutions range "from the rule of a constitutional order or the standard operating procedures of a bureaucracy to the conventions governing trade union behaviour or bank-firm relations".[27] What institutions are not, however, are organisations; and thus, there is a distinction that is often drawn between the two. The idea that organisations and institutions are one and the same is a notion that is found in earlier theories of political science.[28] The two are similar in the way they provide some structure to human relationships and interaction; however, the creation and development of organisations are ultimately influenced by institutional frameworks.[29] Organisations are seen as agents or players within the realm of institutional change, whilst institutions are seen as setting the guidelines within which institutional actors function.[30]

Rules are an inherent feature of institutions and are established and sustained through shared identities and membership within groups, as well as a recognition and acceptance of roles.[31] Based on this view, institutions are often deemed to be the "rules of the game" in society, as they help to guide and shape (constrain) human

[23] Douglass C North, *Institutions, Institutional Change and Economic Performances* (Cambridge: Cambridge University Press, 1990), 4.
[24] Samuel P Huntington, *Political Order in Changing Societies* (New Haven: Yale University Press, 1996), 12.
[25] North, *Institutions, Institutional Change and Economic Performances*, 4.
[26] James G March and Johan P Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (New York: Free Press, 1989), 161.
[27] Hall and Taylor, "Political Science and the Three New Institutionalisms," 938.
[28] Lowndes, "Something Old, Something New, Something Borrowed," 293.
[29] North, *Institutions, Institutional Change and Economic Performances*, 4-5.
[30] Ibid., 5.
[31] March and Olsen, "Elaborating the 'New Institutionalism'," 7.

interactions.[32] Within this "rules of the game" understanding of institutions, the concept of rules is at the heart of any analysis of institutions. This view is derived from game theory, under which both physical and institutional factors work to "structure the game"; with the role of rules being to define the choices available in a given situation, as well as the possible outcomes resulting from the choice made.[33] Rules that are well designed and enforced are seen as operating to 'rule out some actions and to rule in others'.[34] Essentially, rules work to create "positions", in that they can shape and dictate procedures regarding how individuals within an institution may participate – i.e. how to enter/leave certain positions, the actions allowed to be carried out and what area they may take action in.[35]

In determining what action is or is not appropriate within institutions, a "logic of appropriateness" appears within the NI use and understanding of institutions. This logic harks back to the idea of institutions working to constrain certain types of behaviour while advocating other types.[36] The rules within institutions are seen as determining what kind of behaviour is appropriate within various situations.[37] Political actors adapt these socially constructed and widely accepted rules in order to organise their actions and practices accordingly.[38] Through the rules and "a logic of appropriateness, political institutions realize both order, stability and predictability, on the one hand, and flexibility and adaptiveness on the other".[39] This logic is not unchangeable, though it is more difficult to alter as institutions tend to be protected by those within them through a devoted upholding of the rules, as these institutional actors tend to "embody and reflect existing norms and beliefs".[40] Similarly, those outside the institutions who view the rules and routines as legitimate and expected often validate these institutional rules.[41]

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[32] North, *Institutions, Institutional Change and Economic Performances*, 3.
[33] Elinor Ostrom, *Understanding Institutional Diversity* (Princeton: Princeton University Press, 2005), 17-18.
[34] Ibid., 18.
[35] Ibid., 5
[36] Louise Chappell, "Comparing Political Institutions: Revealing the Gendered 'Logic of Appropriateness'," *Politics and Gender* 2, no. 2 (2006): 225
[37] March and Olsen, *Rediscovering* Institutions, 38.
[38] March and Olsen, "Elaborating the 'New Institutionalism'," 8.
[39] March and Olsen, *Rediscovering Institutions*, 161.
[40] Doug McAdam and W Richard Scott, "Organizations and Movements," in *Social Movements and Organisation Theory*, eds. Gerald F Davis et al (Cambridge: Cambridge University Press, 2005), 15.
[41] March and Olsen, "Elaborating the 'New Institutionalism'," 8.

Following the contemporary development in the understanding of institutions, NI theorists across all approaches embrace institutions as being both formal and informal in nature.[42] NI considers informal institutions as having just as much influence as formal institutions, if not more. The importance of both formal and informal "rules" within institutions is based on the idea that the constraints imposed by these rules are shaped by the interaction between formal rules derived from state constitutions and laws, and the informal conventions and norms within the polity.[43] The "rules of the game" view of institutions places a great deal of importance on norms, which under this NI view of institutions, sees them as being central to shaping the nature of institutions. [44] Formal institutions are easier to define, and have been more predominantly discussed within NI literature.

Formal institutions are defined by Helmke and Levitsky as consisting of procedures and rules that are "created, communicated and enforced through channels widely accepted as official".[45] Examples of these formal institutions include: state institutions, such as courts, and legislatures; rules administered by state bodies, such as constitutions, laws and regulations; as well as the official rules that are implemented in the management of organisations (whether these be corporations or political groups).[46] However, under the "rules of the games" approach, alongside these obvious formal institutions with formal rules, those rules that are seen to structure and guide political institutions typically tend to be informal – established and operating outside of these "official" formally sanctioned channels.[47] More generally, informal institutions are believed to emerge in situations where formal institutions may be incomplete or where solutions are not possible to be achieved through the structure and mechanisms of formal institutions.[48]

[42] Louise Chappell and Georgina Waylen, "Gender and the Hidden Life of Institutions," *Public Administration* 91, no. 3 (2013): 604.
[43] Ibid.
[44] Chappell, "Comparing Political Institutions," 225.
[45] Gretchen Helmke and Steven Levitsky, "Informal Institutions and Comparative Politics: A Research Agenda," *Perspectives on Politics* 2, no. 4 (2004): 727.
[46] Ibid.
[47] Ibid., 726.
[48] Ibid., 730-731.

Informal institutions are thus viewed as behaviour that deviates from the "written down rules". This definition categorises informal institutions as the unwritten rules that are established, shared and communicated outside the "official" channels of state-enforced formal institutions, in a more social environment.[49] Azari and Smith build on this definition to add that such institutions come into existence where there are "shared expectations outside the official rules of the game" that typically structure political behaviour and interactions.[50] However, there is a limit to this notion of informal institutions. If there is not a socially accepted and shared understanding of a particular behaviour, or there is no pattern to the behaviour then it cannot be classed as an institution.[51] Ultimately, when looking at informal institutions, there is a focus on customs and norms. According to North, these institutions are derived from culture.[52] They are centred upon the "traditions, customs, moral values, religious beliefs and all other norms of behaviour that have passed the test of time".[53]

For the purposes of political science and NI, Helmke and Levitsky build upon these understandings of informal institutions to differentiate what informal institutions are not. For instance, they are not merely weak institutions, nor are they behavioural regularities (unless they are founded upon an established rule or guideline with sanctions for enforcement purposes).[54] Similarly, in line with the differentiation between formal institutions and organisations, informal institutions need to be separated from informal organisations – though it is important to note that informal rules that make up these institutions may exist within and influence organisations.[55] In terms of culture, there is also a need to distinguish between informal institutions and the general notion of culture; however, as with organisations, culture may play a significant role in shaping and influencing informal institutions.[56]

In order to further differentiate between these two types of institutions, we can look to the enforcement mechanisms available. Formal institutions are more obvious and at

[49] Ibid., 727.
[50] Julia R Azari and Jennifer K Smith, "Unwritten Rules: Informal Institutions in Established Democracies," *Perspectives on Politics* 10, no. 1 (2012): 39.
[51] Ibid.
[52] North, *Institutions, Institutional Change and Economic Performances*, 37.
[53] Svetozar Pejovich, "The Effects of the Interaction of Formal and Informal Institutions on Social Stability and Economic Development." *Journal of Markets and Morality* 2, no. 2 (1999): 166.
[54] Helmke and Levitsky, "Informal Institutions and Comparative Politics" 727.
[55] Ibid.
[56] Ibid., 728.

the forefront of the political arena, with clear enforcement procedures, and involving state-appointed actors – such as courts and the police.[57] Informal institutions, on the other hand, being more invisible have sanctions and enforcement procedures that are less evident, with these often being "subtle, hidden and even illegal channels".[58] Despite the differences in enforcing the rules, both formal and informal institutions are administered through sanctions. However, informal institutions are often overlooked and not taken into consideration by political scientists with the same importance that formal institutions because "they shy away from publicity".[59] Informal institutions tend to be hidden within practices that are normalised and widely accepted as everyday behaviour, and thus are more difficult to identify and study.[60]

However, having a primary focus on formal institutions means that there is a greater risk that many of the true motivations and limitations that drive political behaviour may go unnoticed and be misunderstood.[61] Thus, the NI approach of addressing both formal and informal institutions in political analysis is important as it covers the more "obvious" institutional influences, as well as attempting to address the concealed, informal side of political institutions. The rules stemming from formal and informal institutions work alongside one another in order to "guide and constrain political behaviour".[62] Thus highlighting that a key role of institutions in society, under NI, is to establish a clear and firm structure within which human interaction can take place.[63]

New Institutionalism and the Law

NI analysis and discussion is not just confined to the bureaucratic parliamentary aspects of political arena; it is also considered in the context of law. The institutions of law, like those of the bureaucracy, hold a significant and influential role in contemporary political life. Informal rules have just as much impact in the area of judicial and legislative politics as they do in areas of public administration.[64] In the

[57] Chappell and Waylen, "Gender and the Hidden Life of Institutions," 605 .
[58] Helmke and Levitsky, "Informal Institutions and Comparative Politics," 733.
[59] Hans-Joachim Lauth, "Informal Institutions and Democracy," *Democratization* 7, no. 4 (2000): 26.
[60] Louise Chappell, "Conflicting Institutions and the Search for Gender Justice at the International Criminal Court," *Political Research Quarterly* 67 (2014): 184.
[61] Helmke and Levitsky, "Informal Institutions and Comparative Politics," 734.
[62] Lowndes, "Something Old, Something New, Something Borrowed," 546.
[63] North, *Institutions, Institutional Change and Economic Performances*, 6.
[64] Helmke and Levitsky, "Informal Institutions and Comparative Politics," 725.

same way that both formal and informal rules dictate what behaviour is accepted as normal in parliamentary institutions, they also influence how legal actors, such as judges, are expected to work and respond to particular situations.[65] As with all political institutions, it is difficult to completely understand the structure and operation of courts of law without considering their institutional nature.

The idea that institutions influence the actions of political actors can also be applied and understood within the context of public law. It can help to unravel the idea that characteristic of judicial actors (for instance, age and education) may influence their votes or decision within cases.[66] Within legal institutions there are structures and rules that guide the practices and values within judicial procedures and constrain the behaviour of judicial actors, such as judges.[67] Judicial decisions may be influenced by social norms and biased rules, resulting in the limitation of the groups or individuals who may access the legal system, and regulating their ability to claim or assert rights they may believe they possess.[68] As institutional actors are seen as influencing the rules, in addition to being influenced by the norms, rules and practices within formal and informal institutions – judicial decision makers too have significant influence on shaping the rules that dictate and outline which interests and principles should be at the forefront of the agendas of legal institutions.[69]

These ideas have been examined in the context of the Supreme Court of the United States of America (US), illustrating that whilst the Court's decision-making might not be as obviously impacted by bureaucratic structures as other political institutions, they are still influenced. This influence is seen to shape the beliefs that judicial actors within the Court promote, through the feeling of obligation to act a certain way in order to fulfil certain expectations; the responsibilities they perceive is bestowed upon them by the institutions; and their particular role within it.[70] It is argued that as an

[65] March and Olsen, "Elaborating the 'New Institutionalism'," 7.
[66] Rogers M Smith, "Political Jurisprudence, the "New Institutionalism" and the Future of Public Law," *The American Political Science Review* 82, no. 1 (1988), 95.
[67] Ibid.
[68] Ibid., 98.
[69] Ibid., 99.
[70] Howard Gillman and Cornell W Clayton, "Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making," in *Supreme Court Decision-Making: New Institutionalist Approaches*, eds. Cornell W. Clayton and Howard Gillman (London: University of Chicago Press, 1999), 4.

institution, the law and courts are a source of political biases and preferences.[71] Reinforcing the NI idea that institutions are shaped by external political values, whether these be particular ideologies, or economic of culture; and that these values govern the behaviour of institutional actors. This idea of external factors and values shaping legal institutions and influencing institutional actors, suggests that the idea of value neutrality existing within the law and judiciary is a falsehood that is perpetuated by more orthodox approaches and conceptions of institutions.[72] The concept of value neutrality within the law is most commonly discussed in regards to the nature of the Rule of Law, whereby the law is perceived to be morally neutral. This notion that the law is neutral of moral values is based on the nature of law itself and the fact that it is procedural and structured through formal rules.[73]

Just as the personal biases of judicial decision makers influence the law, the interaction between the law and judicial institutions with executive and legislative institutions, has a significant impact and influence over its operation and the development of institutional norms and practices.[74] This reiterates the idea that, in shaping the behaviour of institutional actors within judicial institutions, legal rules work alongside social norms and practices of derived from other formal and informal institutions. Shared world views and norms expressed through informal rules affect how judicial decisions are made, with social norms being invoked as justification with the "rule-bound nature of decisions".[75] This is particularly the case with the exercise of judicial discretion in decision-making.[76] Through this discretionary process informal rules and norms are communicated and legitimised. NI offers an approach to legal institutions, where the actions of individuals and organisations within this realm are shaped and dictated by the overarching institution of law. Like other political institutions, law is seen to structure actions through defining which issues are to be addressed, and by

[71] Ibid., 5.
[72] Tara Smith, "Neutrality Isn't Neutral: On the Value Neutrality of the Rule of Law," *Washington University Jurisprudence Review* 4(1) (2011): 51.
[73] Ibid.
[74] Sarah Murray, *The Remaking of the Courts: Less-Adversarial Practice and the Constitutional Role of the Judiciary in Australia* (Leichardt: The Federation Press, 2014), 26.
[75] Julia Black, "New Institutionalism and Naturalism in Socio-Legal Analysis: Institutionalist Approaches to Regulatory Decision Making," *Law and Policy* 19, no. 1 (1997): 52.
[76] Ibid., 54.

shaping preferences – and in return it is influenced by the actions carried out by institutional actors who participate in judicial decision-making processes.[77]

Law is similarly understood as an institution, in the context of legal actors and regulatory bodies that have an influential role upon organisational environments. Law has the ability to encourage certain outcomes through coercing institutional actors to conform; as it is able to layout a structure of values and behaviours within which actors may operate.[78] As North notes, organisations are seen as agents within the realm of institutional change, and the same could be said for organisations that adopt laws in order to legitimise themselves.[79] By conforming to legal requirements – as Heimer observes occurs in relation to US employment law with organisations implementing HR hiring policies – organisations perpetuate and encourage the implementation of law.[80] In this way, law as an institution communicates rules that may be created and endorsed by other social actors, and these are adopted by organisations that, as "players" in the political landscape, assist in fashioning, disseminating and implementing the law.[81]

Historical Institutionalism

Historical institutionalism (HI) concerns the context in which institutions emerge, and encourages an exploration of how the choices that drive institutional design continue to influence the decision-making of institutional actors (and contributes to the "logic of appropriateness" that emerges).[82] According to Kathleen Thelen, the focus of this approach is "on how institutions emerge from and are embedded in concrete temporal processes".[83] Where institutions evolve or "new" institutions emerge, there is a "path dependency" that underlies and shapes political institutions. One conception of path dependency within HI, "suggests that institutions continue to evolve in response to changing environmental conditions and ongoing political manoeuvring but in ways

[77] Ibid., 75.
[78] C.A Heimer, "Law: New Institutionalism," in *International Encyclopedia of the Social and Behavioral Sciences*, eds. N.J. Smelser and P.B. Bates (Oxford: Pergamon, 2001), 8534.
[79] North, *Institutions, Institutional Change and Economic Performances*.
[80] Heimer, "Law: New Institutionalism," 8535.
[81] Ibid., 8535.
[82] Vivien Lowndes, "The Institutional Approach," in *Theory and Methods in Political Science*, eds. David Marsh and Gerry Stoker, 3rd ed. (Basingstoke: Palgrave Macmillan, 2010), 65.
[83] Thelen, "Historical Institutionalism in Comparative Politics," 371.

that are constrained by past trajectories".[84] Essentially theorists within HI perceive institutions to be "enduring legacies of political struggles".[85] By "placing politics in time" it may be possible to determine the causes behind the emergence of particular political outcomes".[86]

Feminist Institutionalism

With the narrow focus of traditional feminist political science analyses, and NI scholarship neglecting to address the role of gender within institutions, there is a need for a new approach and direction within political science scholarship and the study of institutions. As a result, there has been the development of Feminist Institutionalism (FI), which attempts to redress the failure of these approaches to consider the gendered nature of institutions. Whilst NI examines the way that institutions influence and shape the political landscape (and in return, is influenced by political, economic, and social forces) there has been a significant gap in examining and understanding how gender and institutions interact and influence one another.[87] However, by adopting NI theory under this umbrella of FI, and employing it alongside traditional feminist political science approaches, it may be possible to better understand the way that gender shapes political institutions and can open up new opportunities for political actors. Traditional feminist engagement with political science scholarship has typically focused on women as individuals and how they engage in politics – examining issues such as sexism within the government and election quotas – rather than addressing the ways in which institutional structures can inform and reinforce gender inequities.[88] Engagement with institutions has focused on the representation of women in political institutions and public life. Similarly, these feminist political studies have tended to reduce the relationship between gender and the state into two distinct categories: the state as a gender-neutral entity, thus empowering women; or

[84] Ibid., 387.
[85] Ibid., 388.
[86] Paul Pierson, *Politics in Time: History, Institutions and Social Analysis* (Princeton: Princeton University Press, 2004); and Meryl Kenny, "A Feminist Institutionalist Approach," *Politics and Gender* 10, no. 4 (2014): 682. This is an idea that I explore in relation to state multicultural policies in Chapter Nine.
[87] Mackay, Kenny and Chappell, "New Institutionalism Through a Gender Lens," 574.
[88] Mona Lena Krook and Fiona Mackay, "Introduction: Gender, Politics and Institutions," in *Gender, Politics and Institutions: Towards a Feminist Institutionalism*, eds. Mona Lena Krook and Fiona Mackay (London: Palgrave Macmillan, 2011), 3-4.

oppressing women through inherent patriarchal structure.[89] Traditional feminist scholarship looked to the problems faced by women, in order to create solution to help women achieve equality and be liberated from the oppressive patriarchal structures in the political arena.[90]

FI is seen to offer a critique of the existing institutionalist theory and feminist political science, incorporating gender analysis in order to enhance our understanding of institutions, their processes, mechanisms for change and overall structure.[91] Essentially, by examining institutions through a "gendered" lens, it may be possible to see how gender norms operate within institutions, and how they influence the relationship between the institution itself, and the actors within it.[92] Both NI and FI ultimately look at the ways in which apparently neutral institutional processes and systems are actually riddled with norms and values that operate in the background, giving preference and power to certain norms, groups and actors, over others.[93] In terms of institutions, these constructions of masculine and feminine norms are seen as being imbued within political institutions, working to shape and guide the interactions between political actors.[94]

To better understand this gendered dimension of institutions, it is important to understand what gender is. Gender is generally understood as being a product of social and cultural stereotypes about the differences and behaviours of men and women.[95] These perceived differences about men and women are used to construct certain power structures and hierarchies within society. There are two ways in which gender is perceived to exist within institutions – this is nominally and substantively. The nominal dimension of gender is a product of historical understandings of the dominance and power of men within the political arena, often based purely on

[89] Louise Chappell, *Gendering Government: Feminist Engagement with the State in Australia and Canada* (Vancouver: UBC Press, 2002), 3.
[90] Marian Sawer, "Feminist Political Science and Feminist Politics" *Australian Feminist Studies* 29, no. 80 (2014): 138-139.
[91] Chappell and Waylen, "Gender and the Hidden Life of Institutions," 600.
[92] Kenny, "Gender, Institutions and Power," 96.
[93] Ibid., 95.
[94] Mackay, Kenny and Chappell, "New Institutionalism Through a Gender Lens," 580.
[95] Karen Beckwith, "Introduction : Comparative Politics and the Logics of a Comparative Politics of Gender," *Perspectives on Politics* 8, no. 1 (2010): 160 cited in Chappell and Waylen, "Gender and the Hidden Life of Institutions," 600.

numbers and presence.[96] The substantive aspect of gender within institutions concerns the inherent gender bias that permeates political institutions, despite the apparently "gender neutral" attitudes that are adopted.[97] The gender bias that appears within institutions is derived from the social norms that outline feminine and masculine ideas; where masculine qualities are typically portrayed as "positive" ones, such as strength and power, and feminine qualities are seen as being "weaker" more passive and illogical.[98]

With a lack of focus on this hidden aspect of gender within institutions, NI appears to advocate a norm of neutrality – the idea that the rules within institutions are gender neutral. This is an idea that is often discussed in terms of the bureaucratic systems of Western liberal nations, but underlying this "neutral appearance" are inherent expectations of acceptable types of behaviour and action – typically based on socially accepted masculine qualities.[99] The influence of such social norms that reiterate a gender bias makes it clear that rules (and thus institutions) are in fact gendered. Within formal institutions, gender biases may operate to clearly and explicitly ban men or women from actively participating within the institution.[100] In informal institutions they operate through norms and practices that create a "gendered logic of appropriateness". [101] This "logic" outlines understandings of behaviour within institutions, based on socially assigned masculine and feminine values.[102] The dominance of men as the "powerful" actors within political institutions is reinforced through this "gendered logic of appropriateness" with the rules, policies and norms working to continue the exclusion of women and concealing their interests.[103] The gendered rules stemming from informal institutions tend to get overlooked compared to formal rules, due to their "hidden" nature, operating in the shadow of formal rules. Thus, even where formal institutional rules are deemed to be officially gender neutral, the rules that are actually perpetuating gender biases within the political arena are

[96] Chappell and Waylen, "Gender and the Hidden Life of Institutions," 601.
[97] Ibid.
[98] Ibid.; Charlotte Hooper, *Manly States: Masculinities, International Relations and Gender Politics* (New York: Columbia University Press, 2001): 44.
[99] Chappell, "Comparing Political Institutions," 227.
[100] Chappell, "Conflicting Institutions and the Search for Gender Justice at the International Criminal Court," 184.
[101] Ibid.
[102] Chappell and Waylen, "Gender and the Hidden Life of Institutions," 601.
[103] Joni Lovenduski, *Feminizing Politics* (Cambridge: Polity Press, 2005), 50; Chappell and Waylen, "Gender and the Hidden Life of Institutions," 602.

these invisible informal ones. The "masculine power advantage" is widely accepted within institutions, and is viewed as the way the institutions should operate, "setting the terms of normal, just and proper arrangements for political and social power".[104] The masculine ideal governs behaviours within the political and legal arenas, through setting limitations and boundaries for institutional actors, leading to the marginalisation of those individuals who do not fit the masculine standards.[105] Furthermore, this operation of gender bias within institutions works with other power structures and hierarchies, such as class and race, to influence institutional outcomes in even more ways – often privileging some men and disadvantaging others, in addition to women.[106]

Drawing on HI, FI theorists note that history is an important factor to be considered in studies of institutions and how they are gendered. Adopting a historical approach allows closer analysis of the ways in which gender and institutions interact and change overtime.[107] As Louise Chappell notes, institutions are "nested" within historical legacies, they are shaped by the temporal and spatial contexts from which they emerge (or continue to be embedded).[108] In discussing the International Criminal Court, Chappell argues that "'old' informal gender legacies" arise and operate within this "new" institution and ultimately shape any efforts to eliminate gender injustices within the court's procedures.[109]

FI studies have attempted to highlight the way in which the inherent gender biases that underlie institutions interact with these external power structures and influences. Chappell, in *Gendering Government*, explores FI in the parliamentary realm with a

[104] Georgia Duerst-Lahti, "Gender Ideology: Masculinism and Feminism," in *Politics, Gender, and Concepts: Theory and Methodology,* eds. Gary Goetz and Amy G Mazur (Cambridge: Cambridge University Press, 2008), 165; and Chappell and Waylen, "Gender and the Hidden Life of Institutions," 602.
[105] Georgia Duerst-Lahti and Rita Mae Kelly, *Gender Power, Leadership, and Governance* (Ann Arbor: University of Michigan Press, 1995), 20; and Louise Chappell, "Conflicting Institutions and the Search for Gender Justice at the International Criminal Court," *Political Research Quarterly* 67 (2014): 84
[106] Chappell and Waylen, "Gender and the Hidden Life of Institutions," 602.
[107] Kenny, "A Feminist Institutionalist Approach," 682.
[108] Louise Chappell, *The Politics of Gender Justice at the International Criminal Court* (New York: Oxford University Press, 2016); and Louise Chappell, "'New', 'Old,' and 'Nested' Institutions and Gender Justice Outcomes: A View from the International Criminal Court," *Politics and Gender* 10 (2014).
[109] Chappell, "'New', 'Old,' and 'Nested' Institutions and Gender Justice Outcomes: A View from the International Criminal Court," 572.

focus on the electoral system, and the bureaucracy.[110] FI has similarly been employed in discussions regarding the subtle gendered nature of political recruitment institutions, representation and participation of women as legislators, and feminist participation in advocacy in the arena of social policy.[111] Examples of FI analyses in this area include: studies around the gendered nature of federalism, and the impact that governance structures have on the space/opportunities available for women to engage with the state.[112] Whilst these discussions of the legislature and executive offer a great advancement in the analysis of how gender and institutions interact, there has been little focus on institutions in the legal realm, such as courts, despite these institutions being equally as important and influential within the state. The term "nested newness" is often employed in referring to the ways in which "new" institutions (or even change within institutions) is essentially "embedded in time, sequence and…institutional environment".[113] Vivien Lowndes argues that institutional actors in new or evolving institutions may partake in a process of "remembering" the old, and then draw on these legacies to embed them within the institution.[114] Ultimately, past institutional legacies reside within institutions, influencing and presenting conflicting interests amongst institutional actors – and challenging the ability for "new" institutions to break through these barriers or emerge with a "blank slate".[115] Ultimately, informal institutions and norms, and the gendered hierarchies that they bring with them are not "wiped out" by changes within formal institutions or the creation of new institutions.[116]

Ultimately, this issue of gender operating within institutions is not limited to the bureaucratic arena, it also affects other political institutions – though the ways in which this "gendered logic of appropriateness" operates tends to differ. Legal and constitutional institutions consist of their own formalised rules, and are supplemented

[110] Louise Chappell, *Gendering Government: Feminist Engagement with the State in Australia and Canada* (Vancouver: UBC Press, 2002).
[111] Krook and Mackay, "Introduction: Gender, Politics and Institutions."
[112] See for example - Jill Vickers, "Gender and State Architectures: The Impact of Governance Structures on Women's Politics," *Politics and Gender* 7, no 2 (2011); and Jill Vickers, "Gendering Federalism: Institutions of Decentralisation and Power-Sharing," in *Gender, Politics and Institutions: Towards a Feminist* Institutionalism, eds. Mona Lena Krook and Fiona Mackay (London: Palgrave Macmillan, 2011).
[113] Fiona Mackay, "Nested Newness, Institutional Innovation, and the Gendered Limits of Change," *Politics and Gender* 10 (2014): 552.
[114] Lowndes, "Something Old, Something New, Something Borrowed," cited in Mackay, "Nested Newness, Institutional Innovation, and the Gendered Limits of Change," 555.
[115] Mackay, "Nested Newness, Institutional Innovation, and the Gendered Limits of Change," 567.
[116] Chappell and Waylen, "Gender and the Hidden Life of Institutions," 607.

by informal practices and norms that are usually inherently gendered.[117] The "rules of the game" within legislatures, courts and bureaucracies alike, are viewed as gendered, as they tend to dictate accepted behaviours for men and women actors based on socially constructed understandings and assumptions of masculine and feminine roles and traits.[118] Even if the law is formally "gender neutral", as it is in areas of family law (specifically custody law), the informal institutions that work to influence and shape the operation of law hold inherent biases that counteract any neutrality that is intended by legislation. For example, in the area of custody law, mothers and fathers are viewed by the law to be equal and interchangeable, however, this does not account for the realities of how labour is divided within family structures.[119] In the same way that NI has shown the US Supreme Court is shaped by the personal biases and social norms, it would not be a stretch to consider that gender biases would also come into play and have an influence on judicial outcomes and decisions.

Chappell illustrates the gendered nature of law in regards to the international law system – in particular the operation of the International Criminal Court (ICC).[120] By analysing the *Lubanga* trial through a FI lens, it becomes clear that there are inherent gender norms entrenched in international law, both within formal and informal institutions. Chappell notes that regardless of formal rules appearing to specifically advocate gender justice and equality of women, there were informal rules operating in the background to influence the outcome of the *Lubanga* trial in the ICC in a way that perpetuates gender biases.[121] The prosecution was seen as overtly enforcing gender-biased norms by ignoring the sexual violence against women, and overlooking provisions in the Rome Statute that would have been far more effective in recognising and proving the defendant was guilty of widespread sexual violence.[122] Ultimately, the formal and informal rules that shape the institution of international criminal law can be argued as being gendered in two respects. First, through absolute male control in the positions of power within the institution of international criminal (as 'rule makers' such as judges, lawyers and officials who create and implement the law); and secondly,

[117] Ibid., 608.
[118] Mackay, Kenny and Chappell, "New Institutionalism Through a Gender Lens," 582.
[119] Julie Tolmie, Vivienne Elizabeth, and Nicola Gravey, "Imposing Gender Neutral Standards on a Gendered World," *Canterbury Law Review* 16 (2010): 321.
[120] Ibid.
[121] Chappell, "Conflicting Institutions and the Search for Gender Justice at the International Criminal Court," 185.
[122] Ibid., 191.

gender bias imbuing the law through subtle incorporation of prejudiced norms.[123] These norms are hidden, and often exclude women from being recognised as actors within the institutions, as well as denying women equal protections that are granted to men. Such biases are not only implied through the lack of recognition but are also present within the procedural framework of the ICC and international criminal law system more broadly, as well as in the decisions of whether to enforce the laws or not.[124]

This discussion of FI in the context of international law shows the importance of addressing the hidden gendered nature of the law. The focus of many FI analyses has predominantly been on parliaments and bureaucracies, but it is imperative to also consider the operation of gender biases within the law, as it is a significant political institution that influences and shapes society. The way that Chappell discusses FI in the context of international law illustrates that a similar approach could be taken in examining laws within states. As NI discussions surrounding the law have shown, the judiciary not only influences society, but is also influenced by social norms. Acknowledging the operation of informal institutions within the judiciary, it is possible to argue that there would also be a gendered aspect to the judiciary as well. The norm of 'neutrality' when referencing the law is outdated, thus, exploring FI further and adopting it when examining the operation of the law within states can be useful.[125] Ultimately, law has a "privileged role in defining institutions",[126] and as such there is a need to consider law and legal institutions and how they interact with and influence other formal and informal institutions more closely. With the failure of NI to take into account for gender as an influential factor shaping institutions, it is clear that FI fills the gap. FI is valuable for its consideration of the importance of formal and informal institutions in shaping society, but more particularly, the gendered nature of the influential social, political and economic forces that exist within these institutions.

[123] Ibid.
[124] Ibid., 185-186.
[125] For example, Kate Gleeson considers 'neutrality', the law, and gender justice in the context of Catholic clerical child sexual abuse in Ireland and Australia. In doing so, Gleeson demonstrates the ways in which the 'logic of appropriateness' within institutions may presuppose neutrality, but the reality is that gendered power regimes operate in government institutions (such as the law) - Kate Gleeson, "Responsibility and Redress: Theorising Gender Justice in the Context of Catholic Clerical Child Sexual Abuse in Ireland and Australia," *UNSW Law Journal* 39, no. 2 (2016): 810.
[126] Catherine O'Rourke, "Feminist Legal Method and the Study of Institutions", *Politics & Gender*, no. 10 (2014): 692.

Conclusion

Whilst the study of institutions has developed to recognise that there are factors external to political institutions that influence how they are shaped and operate, NI fails to recognise gender as being one of these factors. The reality, according to FI, is that there is a hidden gendered nature of institutions, and that gender significantly impacts the opportunities that are available to political actors. This moves away from the assumed norm of neutrality that is promoted within more orthodox approaches to institutional analysis. Much of the focus of this developing area of FI has been on political institutions within the bureaucratic arena. This overlooks another key state institution, the law. Law as a formal political institution is gendered, influenced by "hidden" informal institutions shaped by social norms (and influenced by culture and tradition) – just like the parliamentary and bureaucratic realms of the state. FI has been discussed in the context of international criminal law, and through this it is clear that the law, more broadly, is riddled with gender biases. These biases significantly shape the operation and structure of the law as an institution, and the way in which judicial actors may be influenced in their actions and decisions. Adopting this approach disproves and moves beyond the outdated norm of "neutrality". By doing so and recognising the significance of this developing FI theory, it may be possible to better understand political realities, and the operation of the varying aspects of the state – executive, legislative and judiciary – and how they affect various groups and individuals differently.

Law, as a formal political institution, is gendered and ultimately influenced by "hidden" informal institutions shaped by social norms (and influenced by culture and tradition). The framework for gender justice is not a neutral one – therefore, in discussing the Sharia law debates in the West, even if we place Sharia Law as a means for "providing justice for Muslim women" there is no certainty that it can actually achieve this. Drawing on HI and FI it is possible to understand the experience with Sharia in each state, and questions of justice and equality for Muslim women in a different light (breaking from the usual multiculturalism versus feminism debate in which it is usually framed). This moves beyond merely considering the question of whether religious groups should be accommodated (as the multiculturalism-feminism debate does), as well as whether religious groups' laws and norms can be

accommodated, as considered in discussions about the possibilities of legal pluralism. Looking at formal and informal institutions can examine how and why Sharia councils have emerged in the UK, but not so in Canada and Australia. For Muslim women, the state institutions are deemed as the fair and just alternative in family law disputes – however, considering institutions through FI shows that they too have inherent biases and problems. So, maybe not a 'perfect' alternative, and perhaps a little hypocritical to argue that only religious institutions maintain gender hierarchies and biases. Under this theoretical approach, it is possible to deepen our understanding of Muslim women's agency, and the effects of informal institutions, such as Islamophobia (which will be just one idea explored in Chapter Nine). Also, we can better understand the ways in which state institutions, in being shaped and influenced by the informal, create and limit the space for accommodating minority groups, and the impact this also has on Muslim women's agency – sometimes (inadvertently) reinforcing the stereotypes and binaries – such as the Orientalist attitudes of "women as victims" that were discussed in Chapter Four, and will be considered further in Chapter Nine.

SECTION TWO:

POLITICAL AND LEGAL CONTEXT IN CANADA, THE UNITED KINGDOM, AND AUSTRALIA

CHAPTER SIX

The Political and Legal Landscape in Canada

Canada is often heralded as being a leader in implementing state policies of multiculturalism, and as such I begin my comparative discussion of the three jurisdictions by outlining the political and legal structure of Canada. In this chapter, I outline the evolution of multiculturalism in the Canadian context, as this significantly underlies the debates around accommodation of Sharia that have emerged in recent years. This is followed by an examination of freedom of religion and the possibility of legal pluralism under Canadian law, as well as a summary of family and arbitration laws. In considering arbitration laws, the focus is primarily on Ontario, as one of the few provinces with family law arbitration provisions, and the one that most significantly featured in the Sharia debates that have emerged within the Canadian context. I will also explore the women's movements and gender equality provisions in the state, as these are often positioned against religious freedom as a key competing interest. I conclude with a brief examination of the Muslim population in Canada, along with the Sharia debate that emerged in Ontario, which ultimately resulted in the amendment of the arbitration legislation to remove the possibility for religious-based arbitration.

Political Background

The Canadian political structure is based on federalism, whereby the sovereignty and power to govern is divided between the national government and provincial governments. Canada inherits its political and legal traditions from the UK, as a member of the Commonwealth of Nations. The Constitution of Canada established in 1867, governs the state, as the supreme body of law; establishing governmental structure and the civil rights framework.[1] Entrenched within the Constitution is a bill of rights known as the *Canadian Charter of Rights and Freedoms*, added in 1982 ('The Charter'), that establishes certain political and civil rights available to all Canadian

[1] *Constitution Act 1867*, 30 & 31 Victoria, c. 3 (UK).

citizens.[2] The types of rights and freedoms protected within the Charter include: "the right to life, liberty and security of the person";[3] "freedom of religion";[4] and "equal treatment before and under the law, and equal protection and benefit of the law without discrimination".[5]

In 1982, Canada was "patriated" from Britain, through the *Canada Act 1982* (UK), which gave over exclusive parliamentary sovereignty to the Canadian parliament, and the ability to make amendments to the Constitution without referring to the UK parliament for assent. The political structure and division of legislative powers is outlined within the Constitution, with the Federal Government having power in many areas including: trade and commerce; currency; marriage and divorce; and criminal law.[6] Similarly, the Constitution gives provincial governments jurisdiction in certain areas, such as the "solemnization of marriage in the Province", and "property and civil rights within the Province".[7] In the areas of taxation and public property, legislative powers are shared between federal and provincial jurisdictions.

The legal system of Canada is also inherited from British common law. Public law (i.e. criminal law) and private law are separated between federal and provincial governments. There are ten provinces and three territories. The federal government has jurisdiction over public law, whilst private law is under that of the provinces. There are uniform laws amongst the provinces around civil rights and property, except for Quebec. The *Quebec Act* of 1774 allows the property rights (particularly land grants) to be governed in accordance with the French civil law system that has been inherited in this French-settled province of Canada. Essentially, Quebec is a mixed jurisdiction with a combination of French civil law traditions, and British juridical and administrative law.[8]

[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[3] Ibid., s.7.
[4] Ibid., s.2.
[5] Ibid., s.15.
[6] *Constitution Act 1982*, s. 91 (26)-(27).
[7] Ibid., s. 92 (12)-(13).
[8] William Tetley, "Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)," *Louisiana Law Review* 60 (2000): 696-697.

Court Structure

In terms of the judiciary, the federal government has been afforded the authority to establish "a General Court of Appeal for Canada and any Additional Courts for the better Administration of the Law of Canada".[9] Accordingly, the Canadian government has established four federal courts: the Federal Court of Appeal; the Federal Court; the Tax Court of Canada; and the Supreme Court of Canada (which is the highest court of appeal). The Supreme Court was established in 1875 by an act of parliament and is governed by the *Supreme Court Act* of 1875; it hears cases from all the lower Canadian courts, not only matters of appeal but also constitutional and administrative law matters.[10]

Religion and the State

In the realm of Church-State relations, unlike the UK, Canada does not have an established, state-sponsored Church. The long history of French rule, followed by British rule, has meant that there have been competing religious interests between the Roman Catholic Church in Franco-Canadian regions of Canada (namely, Quebec) and the Protestant Church traditions of British-Canadians. This duality of "French Roman Catholicism and British Protestantism" has largely driven public debates around Canadian religious and cultural identity (particularly in the early years of multiculturalism).[11] Whilst there is no single state-sponsored Church leading to an official state religion within Canada, unlike Australia (which has a similar lack of state religion) there is no explicit separation between "church" and state stated in any Canadian constitutional documents. In fact, like the Australian Constitution, the Canadian Charter of Rights recognises the "supremacy of God" in addition to the rule of law in its preamble,[12] which hints at the influence Christian religious traditions may have in Canadian legal and political traditions.

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[9] *Constitution Act 1982*, s. 101.
[10] Supreme Court of Canada, "The Canadian Judicial System", *Supreme Court of Canada*, http://www.scc-csc.gc.ca/court-cour/sys-eng.aspx (accessed October 19, 2015).
[11] Margaret H Ogilvie, *Religious Institutions and the Law in Canada*, 3rd ed. (Toronto: Irwin Law Inc, 2010), 47.
[12] *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act 1982*.

Multiculturalism

Canada's policy of multiculturalism is often heralded as being the first of its kind, and paving the way for multiculturalism in the West. Whilst Australia and the UK have both adopted similar policies, Canada's journey towards a state policy of multiculturalism began much earlier than the rest. This move towards multiculturalism was a gradual one beginning in the 1960s, transitioning away from the discriminatory immigration policies (also referred to as "White Immigration" policies).[13] These policies are comparable to the "White Australia" policy in Australia, which was in operation around the same period. However, Canada began the shift away from policies of integration earlier, recognising that it was difficult for migrants to integrate into the dominant culture of wider Canadian society, and to encourage migrants to maintain their traditions and culture (particularly language).[14] In looking towards more multiculturalism-oriented policies, the Canadian government acknowledged that retention of cultures by migrants could be positive, as it could interact with the dominant culture to create a new cohesive national culture.[15]

The development of multiculturalism within Canadian governmental policies, and society, was not only driven by large numbers of migration in the early 20th century from non-British countries (i.e. North-Western Europe, but also post-WWII, from "non-preferred" European countries, such as Italy and Greece),[16] but also the refugee policy which led to a large number of Jewish refugees following WWII, as well as Tibetan refugees, resettling in Canada.[17] This was also accompanied by the ongoing clashes between British and French "settler" cultures when attempting to establish a united national identity. The move towards multiculturalism began with the idea of a "new nationalism" that was touted by Lester Pearson (the Canadian Prime Minister at the time). Introducing a new national flag in 1965, Pearson remarked that the flag was

[13] Jatinder Mann, "The introduction of multiculturalism in Canada and Australia," *Nations and Nationalism* 18, no. 3 (2012): 483.
[14] Ibid., 484.
[15] Ibid.
[16] Alan G Green and David A Green, "Canadian Immigration Policy: The Effectiveness of the Point System and Other Instruments," *The Canadian Journal of Economics* 28, no.4b (1995): 1011.
[17] Mann, "The introduction of multiculturalism in Canada and Australia," 488.

a symbol of the "new chapter" in the nation's story – one of unity that recognises "the contributions and cultures of many other races".[18] Pearson emphasised the fact that Canada was now a multiracial society and made biculturalism a key feature of this "new nationalism" – in order to recognise the culture of both French Canadians, and Canadians of British descent.[19] The history of colonisation is a significant part of Canada's political identity and the development of multiculturalism. As such, discussion around accommodation of minority cultural and religious groups in Canada have always first had to consider the issues stemming from the biculturalism of French and British colonisers, but also the First Peoples of Canada (Indigenous population) before considering other minority cultural groups. This historical legacy of colonisation has had a significant role in shaping the way that multiculturalism has developed over the years, and in determining what the priorities of such policies may be.

In implementing this new approach under the "new nationalism" mentioned by Pearson in 1965, the "White Canada" policy was discarded; with a new non-discriminatory immigration policy introduced in its place. The new *Immigration Regulations* of 1967 adopted recommendations from the 1966 White Paper on Immigration, which advocated for a new policy that "must involve no discrimination by reason, race, colour or religion".[20] Following this, the *Immigration Regulations* established a system of points that was non-discriminatory in nature, instead assessing occupational skills, education, employment prospects, and personal character. If an individual receives 50 or more points in these areas, entry is granted regardless of their ethnicity, nationality or race.[21] This new immigration policy also featured a refugee policy, which was a significant step forward in terms of becoming more multicultural and accepting of all individuals regardless of their ethnic or racial background.

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[18] Lester B Pearson, *Text of the address by the Right Honourable Lester B. Pearson, Prime Minister of Canada, on the occasion of the inauguration of the flag of Canada* (Ottawa: Office of the Prime Minister, 1965), http://www.collectionscanada.ca/primeministers/h4-4028-e.html (accessed March 3, 2016).
[19] Stuart Ward, "The 'New Nationalism' in Australia, Canada and New Zealand: Civic Culture In the Wake of the British World," in *Britishness Abroad: Transnational Movements and Imperial Cultures*, eds. Kate Darian-Smith, Patricia Grimshaw, and Stuart Macintyre (Carlton: Melbourne University Press, 2011), 247; and Mann, "The introduction of multiculturalism in Canada and Australia," 487.
[20] Department of Manpower and Immigration, *Canadian Immigration Policy, 1966* (Ottawa: Queen's Printer, 1966), 6.
[21] Government of Canada, "Immigration Act, Immigration Regulations, Part 1, Amended P.C. 1967-1616" (August 16 1967), *Digital History- Histoire Numérique*, http://216.48.92.16/omeka2/jmccutcheon/items/show/25 (accessed January 7, 2017).

In 1963, Prime Minister Pearson established a Royal Commission on Bilingualism and Biculturalism (informally referred to as the "Bi-Bi commission"). The Commission explored the culture and language in Canada on a federal and provincial level. It was predominantly in response to the increasing unrest amongst French Canadians (in Quebec) wanting greater recognition of their language and inherited French culture. Concluding in 1969, the Commission proposed several changes to public policy (such as, including compulsory French language education in schools), leading to the establishment of a federal department of multiculturalism, as well as the *Official Languages Act* 1969 (later updated in 1988), which recognised that Canada has two official languages – English and French.[22] However, whilst the Commission made great strides in recognising French Canadian language and culture, it did not consider the diverse ethnic groups outside of the two founding groups (British and French). The reaction of ethnic groups (i.e. Ukrainian Canadian Committee) was one of great disappointment, claiming that the lack of recognition of their groups established a sort of hierarchy or superiority amongst races.[23]

Nonetheless, the Bi-Bi Commission was a great stride forward in the move towards multiculturalism. In July of 1971, there was a formal proposal of a policy of multiculturalism in Parliament. The memorandum presented was titled *Canada: the Multicultural Society – a Response to Book IV of the B & B Commission*, and recognised that all ethnic groups within the nation had a right to preserve and grow their culture within Canadian society.[24] On the 8th of October 1971, Prime Minister Pierre Trudeau announced the introduction of a multicultural policy, and stated:

> A policy of multiculturalism within a bilingual framework… (is) the most suitable means of assuring the cultural freedom of all Canadians. Such a policy should help to break down discriminatory attitudes and cultural jealousies. National unity, if it is to mean anything in the deeply personal sense, must be founded in confidence in one's own individual identity; out of this can grow respect for that of others, and a willingness to share ideas, attitudes and assumptions…The Government will support and encourage the various cultural and ethnic groups that give structure and vitality to our society. They will

[22] Historical Canada, *Royal Commission on Bilingualism and Biculturalism*, http://www.thecanadianencyclopedia.ca/en/article/royal-commission-on-bilingualism-and-biculturalism/ (accessed September 30, 2015).
[23] Mann, "The introduction of multiculturalism in Canada and Australia," 489.
[24] Ibid., 491.

be encouraged to share their cultural expression and values with other Canadians and so contribute to a richer life for all.[25]

The policy that was implemented in the 1971 *Multiculturalism Act* essentially focused on the recognition of different demographics and symbolically celebrated the diverse cultural heritages within Canadian society as being a part of the overarching Canadian heritage.[26] The focus shifted from national identity and the "new nationalism" of previous years, to individual identity and cultural freedom.[27]

The law was revised with the *Multiculturalism Act* of 1988 in an effort to achieve a more definite and clear implementation of multiculturalism. The 1988 Act stated that the Government's policy in regards to multiculturalism is to:

> ...recognize and promote the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage.[28]

This amendment to the multiculturalism legislation recognised the importance of developing a cultural heritage, and the "invaluable resource" multiculturalism provides in "shaping Canada's future".[29] In addition to developing a cultural heritage for the nation, the 1988 Act aims for the equal treatment and protection of all individuals whilst "respecting their diversity"[30], as well as "to promote the full and equitable participation of individuals and communities of all origins in the continuing evolution and shaping of all aspects of Canadian society and assist them in the elimination of any barrier to that participation".[31]

According to Wood and Gilbert, there has been an "institutionalisation of multiculturalism" through the various legislative instruments and laws that are important symbols of multiculturalism to minority ethnic and cultural groups within

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[25] Pierre Trudeau, "Announcement of implementation of policy of multiculturalism within a bilingual speech," *House of Common Debates*, vol. VIII, 1971 (8 October 1971), 8545.
[26] Patricia K Wood and Liette Gilbert, "Multiculturalism in Canada: Accidental Discourse, Alternative Vision, Urban Practice," *International Journal of Urban and Regional Research* 29, no. 3 (2005): 683.
[27] Mann, "The introduction of multiculturalism in Canada and Australia," 491.
[28] *Multiculturalism Act 1988*, c.31, Preamble.
[29] Ibid., s. 3(b); and John W Berry, "Research on multiculturalism in Canada," *International Journal of Intercultural Relations* 37 (2013): 664.
[30] *Multiculturalism Act 1988*, c.31, s. 3(e).
[31] Ibid., s. 3(c).

Canadian society.[32] Alongside the actual policy of multiculturalism (the 1988 Act) two other prominent instruments promoting multiculturalism include the *Constitution*, with the *Charter of Rights and Freedoms*, which specifically addresses multiculturalism in section 27 by requiring that the Charter be interpreted in a "manner that is consistent with the preservation and enhancement of the multicultural heritage of Canadians".[33] Under this provision, the *Charter* offers the opportunity for minority groups to make claims for special recognition, both collectively or individually.[34]

Other expressions of this institutionalisation of multiculturalism include, the *Immigration Regulations* of 1967, which, as discussed above, promotes non-discrimination of race, ethnicity and nationality. The *Employment Equity Act* of 1995 encourages reasonable accommodation in regards to employment opportunities for four groups: women, Aboriginal peoples, persons with disabilities, and members of visible minorities through "giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences".[35] Similarly, the Canadian *Human Rights Act* outlines that prohibited groups of discrimination include: race, national or ethnic origin, colour and religion, amongst other factors.[36] The Canadian *Criminal Code* also promotes multiculturalism through the hate crime provisions in section 319 "Public incitement of hatred", which states that anyone who communicates statements in a public space that "incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of…an indictable offence".[37]

Ultimately, Canada is seen as giving the concept of multiculturalism a far greater political and institutional importance, when compared to states with similar multicultural policies, like Australia.[38] When dealing with issues such as the Sharia debate that arose in Ontario in 2003, the state policies and legislation promoting

[32] Wood and Gilbert, "Multiculturalism in Canada," 682.
[33] *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act 1982*, s. 27.
[34] Faisal Bhabha, "Between Exclusion and Assimilation: Experimentalizing Multiculturalism," *McGill Law Journal* 54 (2009): 77.
[35] *Employment Equity Act*, S.C. 1995, c. 44, s. 2.
[36] *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, s. 3(1).
[37] *Criminal Code*, R.S.C., 1985, c. C-46, s. 319 (1)(a)-(b).
[38] Naser Ghobadzedah, "A multiculturalism-feminism dispute: Muslim women and the Sharia debate in Canada and Australia," *Commonwealth and Comparative Politics* 48, no. 3 (2010): 311.

multiculturalism played a prominent role.[39] The historical background to the rise and development of Canadian multiculturalism is founded in the notion of group survival and to be free from all forms of discrimination.[40] The two fundamental elements that have remained strong throughout the development of Canada's multicultural policy, from the 1960s to now are that of diversity and equality (though the emphasis and focus on each has shifted throughout the years).[41] One such shift has arisen from the changing political climate, globally, following the events of 9/11. The influence of rising Islamophobia has impacted state and social attitudes towards multiculturalism, particularly with discussions around accommodation increasingly focusing on the growing Muslim population in Canada (particularly as Islam is now the second largest faith after Christianity). The narratives around citizenship and security have come to focus on "Arab, Afghani, and Muslim communities" as potential threats,[42] placing them at the front and centre of debates around a "retreat" from multiculturalism.

Freedom of Religion and Legal Pluralism

A significant driver of multicultural discussion in Canada (pre-9/11) stemmed from the duality of Canadian cultural and religious identity, particularly from the competing interests of French Canadians and British Canadians, as the two dominant "settler" cultures in Canada. The dominant religion amongst French-Canadians was Roman Catholicism, whilst British Canadians inherited Protestant religious traditions. As such, multicultural accommodation has had to contend with calls for religious exemptions and freedom of religion, the first of which was requests for government funding to extend beyond the religious schools of Protestant groups to also include Catholic schools.[43] Section 93 of the Constitution of 1867 addresses this request and extended funding of religious schools to French Catholic groups.[44] However, the funding of Catholic schools by provincial governments has continued to be controversial in provinces outside Quebec (for example, in 2014 Ontario had a renewed public debate

[39] Ibid.
[40] Bhabha, "Between Exclusion and Assimilation," 49.
[41] Berry, "Research on multiculturalism in Canada," 665.
[42] Wayne Hanniman, "Canadian Muslims, Islamophobia and national security," *International Journal of Law, Crime and Justice* 36 (2008): 273.
[43] Ogilvie, *Religious Institutions and the Law in Canada*, 48.
[44] Ibid.

about funding of Catholic schools).[45] Over the years the religious landscape in Canada has become more diverse, moving beyond the duality between Catholicism and Protestantism, with the establishment of other religious groups – with Islam the second largest religion after Christianity, according to the 2011 National Household Survey.[46] The legal protection of religious freedom and conscience pre-dates the modern Canadian Constitution and Charter in addressing religious liberty issues that arose in Quebec in the 18th century – specifically, the Quebec Act of 1774 granted free exercise of religion to the Roman Catholic residents of Quebec.[47] This commitment to religious freedom continues in modern day Canadian legal documents. Most notably, the Charter protects religious freedom in section 2 where it states that everyone has the fundamental freedom of conscience and religion.[48]

Within the Canadian legal system, there has been no formal legal pluralism. In fact, state law has supremacy over all other laws, including the laws and norms of religious and cultural groups living in Canada.[49] The Chief Justice of the Supreme Court of Canada, Beverly McLachlin recently reiterated this idea, stating that when courts consider the competing sovereignties of the state and religious laws there needs to be a balance, but any religious norms given recognition or space within the legal system cannot conflict with overarching purpose of Canadian law – namely, the "integrity of the rule of law and the values for which it stands".[50] The freedom of religion that is afforded to Canadian citizens via the *Charter* is about accommodation by the state, not recognition of separate, independent religious legal systems.[51] This reinforces the arguments raised in Chapter Two, where the question of minority groups' laws is more practically considered in terms of "reasonable accommodation" rather than the

[45] Sarah Boesveld, "'Pay for it yourself': Canadian Catholics fighting renewed push for single publicly funded school system," *National Post*, April 12, 2014, http://news.nationalpost.com/news/canada/canadian-catholics-fighting-renewed-push-for-single-publicly-funded-school-system (accessed July 12, 2016).
[46] Statistics Canada, *2011 National Household Survey*, Statistics Canada Catalogue no. 99-010-X2011032, Ottawa, Ontario, Last updated July 1, 2016, http://www12.statcan.gc.ca/nhs-enm/2011/dp-pd/dt-td/Rp-eng.cfm?LANG=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=0&GK=0&GRP=0&PID=105399&PRID=0&PTYPE=105277&S=0&SHOWALL=0&SUB=0&Temporal=2013&THEME=95&VID=0&VNAMEE=&VNAMEF= (accessed on September 10, 2016).
[47] Beverly McLachlin, "Freedom of Religion and the Rule of Law," in *Recognizing Religion in a Secular Society*, ed. Douglas Farrow (Montreal: McGill-Queen's University Press, 2004), 16-17.
[48] *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act 1982*, s. 2(a).
[49] Alvin Esau, "Living by Different Law: Legal Pluralism, Freedom of Religion and Illiberal Religious Groups," in *Law and Religious Pluralism in Canada,* ed. Richard Moon (Vancouver: UBC Press, 2008), 111.
[50] McLachlin, "Freedom of Religion and the Rule of Law," 28.
[51] Esau, "Living by Different Law", 111.

possibilities of legal pluralism – particularly as these groups are not necessarily seeking the establishment of a separate legal system. There have been numerous public discussions and controversies around religious freedom, and its accommodation by the legal system. Two notable cases in the last few decades are the Sharia arbitration debate in Ontario (2003) and the proposal by the Government of Quebec to introduce a Charter of Values that would prohibit religious symbols in public spaces (not unlike the banning of headscarves in France).[52] This Quebec Charter proposal concerning religious symbols was unsuccessful, with opposition to the proposed bill based on inherent violations to the freedoms of religion and expression. The debate in this context differed to the Ontario Sharia debate, where the outcome was to amend the arbitration provisions to prohibit religious-based arbitration. Both debates, however, illustrate that the conversation about the rights of religious groups is about (reasonable) accommodation, and not legal pluralism. Similarly, through these public discussions there is a reiteration that there is no existing formal legal pluralism afforded by Canada's Constitution and laws, when it comes to accommodating minority religious law and systems.[53]

However, outside of these public debates about formal accommodation of religion, legal pluralism issues and discussions also arise in the context of "unintentional" accommodation by courts.[54] There are three prominent cases heard in the Supreme Court that highlight this discussion around accommodation, and two out of the three illustrate instances of this "unintentional accommodation". The first case *Amselem v Syndicat Northcrest* (*Amselem*) concerned the bylaws of a condominium complex which prohibited "decorations, alterations and constructions" on condo balconies. Some Jewish residents wished to construct *Succoth* (ritual huts) during the nine-day holiday of *Succoth*. Whilst the condominium board sought an injunction, which was initially granted in the lower courts, the Supreme Court held that the religious freedom of these residents outweighed the board's concerns about aesthetic appearance of the

[52] Howard Kislowicz, "Sacred Laws in Earthly Courts: Legal Pluralism in Canadian Religious Freedom Litigation," *Queen's Law Journal* 39, no. 1 (2013): 176.
[53] It should be noted that there is a 'territorial pluralism' that exists within Canada, whereby there are multiple (fragmented) family law codes sanctioned by the state, as well as delegation of certain aspects of family law to non-state authorities (See Jill Vickers, "Territorial Pluralism and Family-Law Reform: Conflicts between Gender and Culture Rights in Federations, North and South," *Politikon* 40, no. 1 (2013): 57-82)
[54] Esau, "Living by Different Law," 113.

complex.[55] Similarly in the case of *Multani v Commission scolaire Marguerite-Bourgeoys* (*Multani*) the Supreme Court unanimously held that the right to religious freedom under section 2(a) of the *Charter* included the right for Sikh kirpans to be worn in schools.[56] The case concerned a school student, Gurbaj Singh carrying the kirpan (a symbolic dagger carried by some Sikhs) to school. Singh's family and the school came to an agreement that would allow Gurbaj Singh to wear the kirpan secured under his clothing, however, the school board's Council of Commissioners refused to ratify this agreement. The initial judgement in the lower courts ruled in favour of the Multani family, but this was overturned by the Quebec Court of Appeal, until it was heard by the Supreme Court, who held in favour of the initial judgement.[57]

Not all cases concerning the freedom of religion heard by the Supreme Court have been accommodating. Unlike *Amselem* and *Multani*, the case of *Alberta v Hutteria Brethren of Wilson County* (*Wilson County*) saw the Supreme Court hold that government had justifiably breached the provision of religious freedom in the *Charter*.[58] The case concerned a group of Hutterian Brethren residing in Wilson Colony, whose religious beliefs prohibit them from displaying images, like driver's licence photos. The Alberta government had previously exempted them from the requirement to have a photo on their driver's licences; however, with the introduction of new governmental policies targeting identity fraud, this exemption was removed. The lower courts ruled in favour of the Wilson Colony, however, the Supreme Court overruled this decision, noting that the requirement, whilst infringing on religious freedom, was a legitimate governmental goal, and thus justified any breach of this freedom.[59] Following on from this decision, the trend within Canadian courts is to view freedom of religion as only being breached when the state restricts a religious practice in a trivial way, and it must be shown that the interference is non-trivial, even where the government may have a legitimate goal or public purpose.[60]

[55] Kislowicz, "Sacred Laws in Earthly Courts," 180; and Amselem v Syndicat Northcrest [2002] RJQ 906.
[56] *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] 1 SCR 25.
[57] Kislowicz, "Sacred Laws in Earthly Courts," 181.
[58] Alberta v Hutteria Brethren of Wilson Colony [2009] 2 S.C.R 567.
[59] Kislowicz, "Sacred Laws in Earthly Courts," 183-184.
[60] Richard Moon, "Accommodation Without Compromise: Comment on Alberta v Hutterian Brethren of Wilson Colony," *Supreme Court Law Review* 51 (2010): 116-117.

Religious exemptions in anti-discrimination provisions are another way in which religious freedom has manifested itself within the Canadian jurisdiction, and shows a multicultural accommodative approach to the diversity of religious groups within Canadian society. Specifically, religious institutions are able to exercise exceptions from the protections against discrimination outlined within provincial legislation. For example, section 10 of the Quebec *Charter of Human Rights and Freedom*, notes that "every person has a right to full and equal recognition and exercise of his human rights and freedoms…except as provided by law, religion, political convictions…".[61] Similarly, Ontario's *Human Rights Code* 1990 states that the rights to equal treatment "are not infringed where membership or participation in a religious…institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified".[62] Also, provisions on "special employment" in section 24(1) of the Code notes that there is no infringement where a religious institution or organisation make a reasonable qualification due to the "nature of employment".[63] The Supreme Court of Canada has upheld these exceptions to anti-discrimination legislation for religious institutions. For instance, in the 1984 case of *Caldwell v St Thomas Aquinas High School*, Mrs Caldwell was not rehired by the school as it viewed a Catholic teacher divorcing as incompatible with the principles of the school and its Catholic teaching; the Supreme Court determined the school was entitled to impose this faith requirement on its teachers and thus was entitled to do so towards Caldwell.[64]

Family Law and Arbitration

Jurisdiction in the realm of family law is split between the federal government and provincial governments. Divorce law is governed by the federal government under section 91(26) of the *Constitution*, but property settlement (along with the solemnization of marriage) is part of the provincial governments' powers. For example, Ontario's *Family Law Act* 1990 covers property settlement of the matrimonial home, as well as child custody and support arrangements.[65] Within family law, arbitration is an

[61] *Charter of Human Rights and Freedom,* c C-12, s. 10 (Quebec).
[62] *Human Rights Code*, R.S.O. 1990, c. H.19, s.18.
[63] Ibid., s.24(1).
[64] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Portland: Hart Publishing, 2008), 202.
[65] *Family Law Act*, R.S.O 1990, c.F.3.

option upon the voluntary agreement of both parties. Each province has individual arbitration provisions, drawing from the *Uniform Arbitration Act* that exists at the federal level.[66] Whilst the federal *Uniform Arbitration Act* relates primarily to commercial matters, Ontario (and the province of Alberta to some extent) are unique in having family law arbitration available.[67] As such, focusing on Ontario as an example is useful in this discussion of religious accommodation and family law because arbitration in the realm of family law is provided for under the *Arbitration Act* 1991 (*'Arbitration Act'*), and was a central focus of the Sharia debate that arose in 2003.

The *Arbitration Act* in Ontario allowed parties to a family law dispute to elect a neutral third party to arbitrate and decide the dispute. This had to be voluntary and upon mutual agreement in terms of electing the arbitrator.[68] The arbitration agreement is viewed as a contract,[69] and the arbitrator has no power to compel the parties to do something they would not agree to independently. As the arbitration agreement is based on a contract it is enforceable like any other contractual agreement; so even where one party may later change their mind the decision of the arbitration (referred to as an "award") may be enforceable like a judgment.[70] Prior to 2006, arbitrations could be guided by religious laws, upon the agreement of the parties, though this was implicit and in no way an establishment of "formal" legal pluralism (though perhaps it could be deemed an "informal" legal pluralistic accommodation of religious laws). This provision was drawn from the language of the Act appearing to allow a different type of law to be selected, whether this is religious law or rules within a private organisation.[71] The specific provision implying this was section 32(1) of the *Arbitration Act*, which noted that the parties were free to choose the legal system, upon which their dispute would be settled.[72] Under this provision, Jewish and Christian groups had a long standing history of arbitrating disputes based on their respective religious law.[73]

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[66] Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, (Ontario: Ministry of Attorney General, December 2004), 11
[67] Morris arbitration paper (on computer desktop)
[68] Boyd, *Dispute Resolution in Family Law*, 9
[69] *Arbitration Act 1991*, SO 1991, c. 17, s.2.
[70] Boyd, *Dispute Resolution in Family Law*, 12.
[71] Ibid.
[72] *Arbitration Act 1991*, SO 1991, c. 17, s.32(1); Ghobadzedah, "A multiculturalism-feminism dispute," 312.
[73] Tabassum Fahim Ruby, "Muslim women and the Ontario *Shari'ah* tribunals: Discourses of race and imperial hegemony in the name of gender equality," *Women's Studies International Forum* 38 (2013): 32; Jennifer A Selby and Anna C Korteweg, "Introduction: Situating the Sharia Debate in Ontario," in in *Debating Sharia: Islam, Gender Politics, and Family Law*, ed. Anna C Korteweg and Jennifer A Selby (Toronto: University of Toronto Press, 2012); and Anna C Korteweg, "The Sharia Debate in Ontario,"

For instance, the Orthodox Jewish *Beth Din* in Toronto asked parties to sign agreements in family dispute resolutions that would make them enforceable in court under these arbitration agreement requirements.[74] Ultimately, the Orthodox Jewish communities had been using private arbitration under the *Arbitration Act* for many decades.[75] However, following the public debate around the possibility of Islamic family law arbitration and "accommodation of Sharia", this provision allowing a choice of law in arbitration was amended with the introduction of the *Ontario Regulation 134/07* on family arbitration. This regulation means that any arbitration that is based on non-Canadian law is not valid and cannot be enforced by the courts.[76] Well ahead of the Ontario government's decision to outlaw religious arbitration in family law matters, Quebec does not allow arbitration in family law matters (amongst others), as outlined under the 1991 *Civil Code of Quebec*.[77] In terms of whether there is the possibility for the accommodation of minority religious laws, the Quebec government adopted a policy of "interculturalism", which differs from the Canadian government's multicultural policy. Under this "interculturalism" policy minority groups are integrated into "a common civic culture using the French language".[78] By contrast, arbitration is available as an option in the province of British Columbia. The British Columbia *Arbitration Act* of 1996 does not explicitly forbid the use of religious laws in guiding an arbitration; though section 23(3) states that the arbitration must not be contrary to the laws of British Columbia.[79]

Outside of arbitration, religious law has been considered and recognised to some extent within family law decisions in the Supreme Court. However, this appears to be limited to cases concerning Jewish marriage contracts – particularly the *get* that is promised to wives. This is similar to the Islamic *mahr*, which is an amount the husband promises (and is obliged) to pay the wife under the marriage contract, to

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ISIM Review (Autumn 2006): 50 (Korteweg notes that Ismaili Muslims, had also set up arbitration boards that arbitrated in accordance with their religious principles).

[74] Nicholas Walter, "Religious Arbitration in the United States and Canada," *Santa Clara Law Review* 52 (2012): 531.

[75] Arsani Williams, "The Unjust Doctrine of Civil Arbitration: Sharia Courts in Canada and England," *Stanford Journal of International Relations* 11, no. 2 (2010): 41.

[76] Ontario Regulation 134/07, under *Arbitration Act 1991*, SO 1991, c. 17, s.2(4).

[77] Article 2639 of the *Civil Code of Quebec*, S.Q., 1991, c 64 cited in Natasha Bakht, "Arbitration, Religion and Family Law: Private Justice on the Backs of Women," *National Association of Women and the Law* (March 2005) 35 and 64.

[78] Bakht, "Arbitration, Religion and Family Law," 37. See also – Gerard Bouchard, *Interculturalism: A View from Quebec*, (Toronto: University of Toronto Press, 2015).

[79] *Arbitration Act* RSBC 1996, c.55

provide financial security.[80] In 2007, the Supreme Court decided the case of *Bruker v Marcovitz*, which concerned an agreement by a Jewish man to grant a *get* to his former wife. The Court held that despite the religious element to the dispute, as long as these moral, religious obligations are in a legally binding form (i.e. contract) and do not conflict with Canadian law and public policy, then it able to be heard by the Canadian courts, and is legally enforceable.[81] Like Jewish marriage contracts, Islamic marriage contracts are civil contracts, with nothing particular sacred to the solemnization of the marriage (there is no compulsory religious component or requirement when getting married); thus in many ways it is similar to Christian marriage traditions as well.[82] However, unlike the enforcement of Jewish *get* by the Supreme Court, the Canadian courts have generally been hesitant to recognise and enforce the Islamic *mahr* agreements. For instance, in *Kaddoura v Hammoud* the Ontario Court of Justice refused to enforce the payment of the *mahr*, noting that because the contract had a religious element there was no obligation by the civil courts to adjudicate the matter.[83] As such, it is appears that there has been some recognition and accommodation by the legal system in regards to religious family law; however, this is not applied equally to all religious faiths.

Gender Equality and Women's Rights Movements

In Canada there has been an institutionalisation of the women's rights movements and lobbying, which has manifested itself through the establishment of productive national women's organisations – like the National Action Committee on the Status of Women (NAC) which was founded in 1971.[84] There have been moves to establish federal government organisations that focus on gender equality and work with federal institutions to ensure that equality is a key consideration in the development of state policies and programs (an example of one such organisation is the Status of Women

[80] Fareen L Jamal, "Enforcing Mahr in Canadian Courts," *Canadian Family Law Quarterly* 32, no.1 (2013): 97; Ghena Krayem, *Islamic Family Law in Australia: To Recognise or Not To Recognise* (Carlton: Melbourne University Publishing, 2014), 142-143.
[81] Jamal, "Enforcing Mahr in Canadian Courts," 97; Bruker v Marcovitz [2007] 3 S.C.R 607, 2007 SCC 54
[82] Jamal, "Enforcing Mahr in Canadian Courts," 98.
[83] Kaddoura v Hammoud [1998] O.J No. 5054 [Q.L.]; Natasha Bakht, "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women," *Muslim World Journal of Human Rights* 1, no.1 (2004): 11.
[84] Louise Chappell, *Gendering Government: Feminist Engagement with the State in Australia and Canada* (Vancouver: UBC Press, 2002), 38.

Canada).[85] In the early 1980s, feminists (notably, the NAC) lobbied at both federal and provincial governmental level for the recognition of women's rights in the Constitution.[86] As a result, unlike Australia and the UK, Canada has included protections within constitutional documents. This is primarily through sections 15 and 28 of the Charter of Rights and Freedoms. Section 15(1) states that all individuals have a right to equal protection and benefit of the law without discrimination based on a number of characteristics, including sex.[87] Section 28 on the other hand deals exclusively with sex equality, and states that "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons".[88] Gender equality and women rights are further protected in the Canadian *Human Rights Act* of 1985, which offers protection from discrimination based on sex, sexual orientation, marital status and family status.[89] These protections are similarly offered within human rights legislations within the provinces – i.e. *Human Rights Code* 1990 in Ontario, and the 1975 *Charter of Human Rights and Freedom* in Quebec. However, it should be noted that the NAC, despite being central to the Canadian women's movement through the 1970s and 1980s, has largely disbanded in the 21st Century. The NAC was a strong and leading voice for women, that could legitimately and effectively communicate feminist concerns to the federal government. However, in losing state funding in the 1990s, which was accompanied by internal divisions, the NAC was left "broke and struggling to survive" in the period between 2001 and 2005.[90] Another challenge to the women's movement in the Canadian context is the differences that arise regionally. In particular, the challenge of large minorities that choose to organise separately and maintain separate priorities and agendas, like the Franco-Quebec feminists that form part of the "territorially organised minority" located in Quebec.[91] Their aims differ to national women's organisations, as well as

[85] See Status of Women Canada, *Status of Women Canada*, http://www.swc-cfc.gc.ca//index-en.html (accessed on September 10, 2016).
[86] Beverly Baines, "Using the Canadian Charter of Rights and Freedoms to Constitute Women," in *The Gender of Constitutional* Jurisprudence, eds. Beverly Baines and Ruth Rubio-Marin (Cambridge: Cambridge University Press, 2005), 49.
[87] *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act 1982*, s.15(1).
[88] Ibid., s.28.
[89] *Canadian Human Rights Act*, R.S.C., 1985, c. H-6.
[90] Cheryl Collier, "Not Quite the Death of Organized Feminism in Canada: Understanding the Demise of the National Action Committee on the Status of Women," *Canadian Political Science Review* 8, no.2 (2014): 18.
[91] Jill Vickers, "A Two-Way Street: Federalism and Women's Politics in Canada and the United States," *The Journal of Federalism* 40, no.3: 418.

those that originate from other provinces that share a largely English-Canadian background.

Sharia in Canada

Muslims in Canada

According to the 2011 National Household Survey, approximately 3.2% of the population in Canada identify as Muslim.[92] This almost doubled from the approximately 579,600 Muslims noted in the 2001 census, sitting at approximately 1.05 million.[93] Historically, the first Muslim migration to North America was in the form of industrial workers beginning in the 1950s, though the Canadian Muslim community has grown over the years to develop a Canadian Muslim religious identity.[94] Muslim migration has largely been from South Asia (Pakistan, India, Bangladesh and Sri Lanka) though there has also been significant migration from the Middle East and North Africa.[95] In fact, Canadian Muslims come from over 60 ethnic groups.[96] The distribution of the Muslim population amongst the provinces locates the majority in Ontario (approx. 581,950 according to the 2011 statistics),[97] with the rest

[92] Statistics Canada, *2011 National Household Survey*, Statistics Canada Catalogue no. 99-010-X2011032, Ottawa, Ontario, Last updated July 1, 2016, http://www12.statcan.gc.ca/nhs-enm/2011/dp-pd/dt-td/Rp-eng.cfm?LANG=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=0&GK=0&GRP=0&PID=105399&PRID=0&PTYPE=105277&S=0&SHOWALL=0&SUB=0&Temporal=2013&THEME=95&VID=0&VNAMEE=&VNAMEF= (accessed on September 10, 2016).

[93] Statistics Canada, "Population by religion, by province and territory," (table) *2001 Census*, Last updated January 25, 2005, http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo30a-eng.htm (accessed on September 10, 2016); Statistics Canada, *2011 National Household Survey*, Statistics Canada Catalogue no. 99-010-X2011032, Ottawa, Ontario, Last updated February 14, 2017, http://www12.statcan.gc.ca/nhs-enm/2011/dp-pd/dt-td/Rp-eng.cfm?LANG=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=0&GK=0&GRP=0&PID=105399&PRID=0&PTYPE=105277&S=0&SHOWALL=0&SUB=0&Temporal=2013&THEME=95&VID=0 (accessed July 22, 2017); and Amir Hussain, "Muslims in Canada: Opportunities and challenges," *Studies in Religion* 33, no. 3-4 (2004): 361-362.

[94] Hussain, "Muslims in Canada," 360.

[95] Ibid., 361; and Salim Farrar and Ghena Krayem, *Accommodating Muslims under Common Law* (Milton Park: Routledge, 2016), 17.

[96] Farrar and Krayem, *Accommodating Muslims under Common Law*, 17.

[97] Statistics Canada, *2011 National Household Survey*, Statistics Canada Catalogue no. 99-010-X2011032, Ottawa, Ontario, Last updated February 14, 2017, *http://www12.statcan.gc.ca/nhs-enm/2011/dp-pd/dt-td/Rp-eng.cfm?TABID=2&LANG=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GK=0&GRP=0&PID=105399&PRID=0&PTYPE=105277&S=0&SHOWALL=0&SUB=0&Temporal=2013&THEME=95&VID=0&VNAMEE=&VNAMEF=* (accessed July 22, 2017).

predominantly located in Quebec and British Columbia.[98] The Muslim communities within the provinces, are primarily centred in the bigger cities, such as Toronto, Montréal, Ottawa and Vancouver. There are divisions amongst different groups of Islamic practice and thought, with a majority of Canadian Muslims identifying as Sunni, whilst others identify as Shi'i or Ismaili.[99] In recent years, refugee resettlement from Syria (as well as other parts of the Middle East) has also contributed to an increase in the Muslim population in Canada.

Sharia Debate in Canada

The Sharia debate in Canada first came in to the public consciousness in Ontario in 2003, with a statement of intention by the Islamic Institute of Civil Justice (IICJ) that it was planning to establish a religious arbitration tribunal that would arbitrate matters of family law. Led by the president of the organisation, Syed Mumtaz Ali, the IICJ was exploring ways of establishing a Darul-Qada (a religious judicial tribunal) that would operate as a "private Islamic Court of Justice without in any way infringing on Canadian judicial jurisdictions or legal authorities, or violating any Canadian law".[100] Following this announcement by the IICJ, there were numerous reports and editorials in the news media debating the possibility of Sharia being employed in family arbitrations.[101] The New Democratic Party and many Canadian women, including some groups of Muslim women, opposed this possibility of Sharia being employed in private arbitration by the IICJ.[102] In particular, several women's rights organisations came together in the "No Religious Arbitration" movement, arguing that religious arbitration oppressed women and infringed upon their individual rights and freedoms (afforded by the Canadian Constitution and Charter).[103] The organisations part of this movement were led by the Canadian Council of Muslim Women (CCMW), who opposed arbitration, not because of a general opposition to multiculturalism or religious

[98] Wendy Kennett, "Religious Arbitration in North America", in *Gender and Justice in Family Law Disputes*, ed. Samia Bano (Waltham: Brandeis University Press, 2017) 195.
[99] Hussain, "Muslims in Canada,"361.
[100] The Canadian Society of Muslims, "Darul-Qada: Beginnings of Muslim Civil Justice System in Canada," *The Canadian Society of Muslims News Bulletin*, April 2003, http://muslimcanada.org/news03.html (accessed September 25, 2015).
[101] Korteweg, "The Sharia Debate in Ontario," 50.
[102] Williams, "The Unjust Doctrine of Civil Arbitration," 41.
[103] Eleanore Lepinard, "In the Name of Equality? The Missing Intersection in Canadian Feminists' Legal Mobilization Against Multiculturalism," *American Behavioral Scientist* 53, no 12 (2010): 1765.

dispute resolution (such as mediation),[104] but due to the "difficulty in understanding, interpreting or applying" the complex legal system that is Sharia "with any uniformity".[105] The particular concern around religious arbitration was the "legally binding" nature of the proposal, and the potential to intensify inequalities faced by vulnerable Muslim women.[106] Other groups supporting the "No Religious Arbitration" movement include: the National Council of Women of Canada (NCWC);[107] National Association of Women and the Law; and the Canadian Federation of University Women Clubs, to name a few.[108] Notably, other key feminist organisations like the Women's Legal Education and Action Fund (LEAF) did not advocate the removal of alternative dispute resolution means altogether, including religious arbitration. Their reasoning was that "the courts are financially, linguistically or culturally inaccessible for many people", and alternative dispute resolution offers women a full range of choices in seeking protection for themselves and their children.[109] In addition to the women's organisations (both religious-based and secular), opposition to religious-based arbitration was also voiced by the Muslim Canadian Congress (MCC) – a Muslim organisation that was a "go-to" organisation for the Canadian media during the debate.[110] The MCC was vocal in outlining their concerns around the potential for differential treatment of women and men under Islamic law that may underlie religious arbitration processes (if accommodated), and "inevitably lead to discrimination, and perpetuate unequal power relations within households and extended family networks".[111]

Ultimately, the debate was grounded in the feminism versus multiculturalism dichotomy, with those groups opposing religious arbitration drawing on feminist arguments to oppose multiculturalism as both a policy and theory. Religious

[104] In fact, the CCMW explicitly note that they do not oppose religious mediation, as it can be similar to seeking "good advice" on a matter. They also respect the "choice" of some individuals within the community to seek advice and counselling from community elders and religious institutions. See Canadian Council of Muslim Women, "No Religious Arbitration – Frequently Asked Questions," *Canadian Council of Muslim Women*, http://beta.ccmw.com/wp-content/uploads/2013/04/No-Religious-Arbitration-FAQs.pdf (accessed July 22, 2017).
[105] Bakht, "Arbitration, Religion and Family Law," 55.
[106] Ibid, 56.
[107] Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Ontario: Ministry of Attorney General, December 2004), 31.
[108] Ibid, 5.
[109] Bakht, "Arbitration, Religion and Family Law," 62.
[110] Meena Sharify-Funk, "Representing Canadian Muslims: Media, Muslim Advocacy Organizations, and Gender in the Ontario Shari'ah Debate," *Global Media Journal -- Canadian Edition* 2, no. 2 (2009): 81.
[111] Ibid.

arbitration had been occurring for many years in other religious communities, including amongst Ismaili Muslims, but had never evoked a response like that seen in 2003 towards an Islamic arbitration tribunal, as they had never made formal public statements outlining their intentions to set up religious arbitration.[112] This strong public debate and large movement against Sharia also reflected rising Islamophobic attitudes that have emerged in many Western countries post-9/11, along with concerns from the wider community about the welfare of Muslim women, whereby Muslim women were viewed as needing protection from their oppressive patriarchal religion. Critics of Sharia relied on racialized notions of Muslim "Others" in order to categorise this proposed religious tribunal as a threat to Canada's identity as a nation.[113] Overall, this opposition relied on arguments of gender equality and the need to protect all women, but particularly Muslim women from the potential injustices of religious arbitration. In response to this public outcry around the possibilities of Sharia being used in family law arbitration, the Ontario government, in 2004, commissioned Marion Boyd to compile a report on the issue. The report titled *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* was presented in December 2004, and made recommendations on how to approach this request for religious arbitration by groups like the IICJ. In undertaking this review, a multicultural approach was adopted, with Muslim women being encouraged to join the debate and discussion.[114] The ultimate recommendations of the review were that religious law should remain an option in family law arbitration as long as a number of safeguards were introduced, that addressed the concerns of women's groups and would ensure gender equality.[115] Despite these recommendations, in 2005 Premier McGuinty announced that an amendment would be proposed to the *Arbitration Act* that would ultimately ensure "one law for all" in Ontario.[116] This amendment came into effect in 2006 in the form of the *Ontario Regulation 134/07*. Thus, religious arbitration, at least in Ontario, is no longer available. It has not been considered in the same way in other provinces, so it is hard to determine whether this opposition that came out in the Sharia debate is country-wide. Some other provinces have followed suit and made similar amendments to their arbitration provisions.

[112] Korteweg, "The Sharia Debate in Ontario," 50.
[113] Ruby, "Muslim women and the Ontario *Shari'ah* tribunals," 33.
[114] Ghobadzedah, "A multiculturalism-feminism dispute," 313.
[115] Boyd, *Dispute Resolution in Family Law*, 3.
[116] Korteweg, "The Sharia Debate in Ontario," 50

Canadian feminists saw this amendment to the *Arbitration Act* as a victory in their legal mobilisation and fight against multiculturalism.[117] Some of the concerns from women's groups included that of the Muslim Canadian Congress, who argued religious arbitration had the potential for allowing religious clerics to enforce their "waning authority over vulnerable communities".[118] Despite this seeming victory and therefore end to the Sharia debate in Ontario, the questions of religious accommodation within the Canadian legal system, and in particular questions around enforceability of Islamic family law agreements, such as marriage contracts/*mahr*, continue to be considered by Canadian courts.[119] Significant problems that have come out of the debate include the reinforcement of negative stereotypes of religious communities and individuals, and have raised issues around multiculturalism in Canada, particularly in the way that multiculturalism is framed and understood at present.[120]

Conclusion

As a leader in multicultural policies, it is not surprising that Canada has had to deal with questions of accommodating minority religious groups. Whilst there is no formal legal pluralism, the courts have faced questions regarding the limits of religious freedom – which in many ways has led to accommodation of minority religious laws and norms (albeit often unintentionally). However, religious freedom has often been challenged by gender equality and women's rights movements, many of which have had success in engaging with the Canadian federal and provincial governments (an idea that will be explored further in Section Three). The Ontario Sharia debate in 2003 demonstrated a strong feminist opposition to greater religious freedom and extension of multicultural accommodation to allow Sharia arbitration (despite years of other religious groups carrying out religious arbitration), which appears to have greatly influenced the outcome of amending Ontario's arbitration legislation to preclude any possibility for religious-based arbitration. This differs significantly to the UK, which will be considered in the following chapter, where Sharia councils and tribunals continue to operate, with some even claiming to have jurisdiction under the UK's comparable arbitration legislation.

[117] Lepinard, "In the Name of Equality?" 1764.
[118] Walter, "Religious Arbitration in the United States and Canada," 533.
[119] See Jamal, "Enforcing Mahr in Canadian Courts,"; Bakht, "Family Arbitration Using Sharia Law".
[120] Korteweg, "The Sharia Debate in Ontario," 51.

CHAPTER SEVEN

The Political and Legal Landscape in the United Kingdom

In the last chapter I outlined the political and legal background in Canada, including the state policies of multiculturalism and the Sharia debate that arose in Ontario in 2003. In this chapter, I will similarly examine the political and legal structure, and evolution of multiculturalism in the UK, offering a comparison to that in Canada. The experience with multiculturalism in both states evolved around the same time. Whilst Canada may have been the first to implement an official state policy, the UK was the first to outline the basic ideals of multiculturalism in the political sphere. I will then explore the provisions for religious freedom, and whether there is the possibility for legal pluralism in the UK. In an age of equality reforms, like the Canadian discussion, I outline the women's movement and equality provisions within this jurisdiction. Following this I will discuss the family law and arbitration provisions – which prove interesting as comparators to the Canadian Sharia debate, as the UK has an Arbitration Act, like Ontario, under which religious tribunals do claim to have authority and jurisdiction to resolve disputes. These religious tribunals include Sharia tribunals, namely the Muslim Arbitration Tribunal. I conclude this chapter with an examination of the Sharia debate as it has arisen in the UK, but also the Sharia councils and tribunals that have emerged within this political landscape. These bodies are uniquely British, in the sense that they are visible within British society, and are not "hidden" or operating "in the shadows" (as any similar unofficial bodies may be in Canada and Australia). It is necessary to understand what they are and how they operate to offer context to the discussion that will follow in Section Three, as the reality is that the Sharia councils and tribunals that exist within the UK have not been paralleled in the Canadian or Australian jurisdictions. In outlining the nature of Sharia councils and tribunals I will offer a brief institutional analysis, particularly, the ways in which the bodies are the product of their temporal and spatial contexts. Thus, not only may they contain their own religious values, they may adopt any gender legacies or hierarchies that are embedded within the legal frameworks in which they position themselves against.

Political Background

The United Kingdom of Great Britain and Northern Ireland (UK) is a constitutional monarchy, with the British monarch the official head of state, the current monarch being Queen Elizabeth II. Essentially, the government is centralised, with delegation of powers from the central parliamentary body amongst governmental bodies and organisations. Parliamentary sovereignty in the UK is centralised and vested entirely in the Parliament of Great Britain (which is formally, the Parliament of the United Kingdom of Great Britain and Northern Ireland). However, there is a devolution of power to the parliaments in Scotland, Wales, and Northern Ireland - although this is statutory, and ultimate authority resides in the central Parliament of the UK (meaning that these powers can be amended or repealed by this central authority). This differs from Canada and Australia, which both follow a federalist structure, with sovereign power divided between the federal and state/provincial governments. The UK Parliament is divided into the House of Commons and House of Lords. The House of Commons consists of 650 Members of Parliament (MPs) elected by local constituencies, and works to approve new laws and taxes, whilst overseeing the operation of the government.[1] The House of Lords operates independently from the House of Commons, also tasked with "holding the government to account" in addition to creating laws and debating public policy.[2]

Court structure

The highest court in the UK is the UK Supreme Court, which hears appeals regarding points of law, and their interpretation. Below this court is the Court of Appeal, which hears appeals on points of law as well, but also cases referred from tribunals and lowers courts. The High Court, which has three divisions (the Chancery, Queen's Bench and Family divisions), hears appeals from the lower courts, as well as hearing cases in the "first instance". On the lower level, there is the Magistrate's Court (which hears mainly criminal cases), County Court, and Family Court, which generally hear civil matters.

[1] UK Parliament, "The House of Commons At Work," *UK Parliament*, September 2016, http://www.parliament.uk/documents/commons-information-office/Publications-2015/House-of-Commons-at-work-booklet.pdf (accessed on October 1, 2016).
[2] UK Parliament, "Work of the House of Lords," *UK Parliament*, http://www.parliament.uk/about/mps-and-lords/about-lords/what-the-lords-do/ (accessed on October 1, 2016).

Also, in this tier of the judicial system, is the Crown Court, which hears criminal matters with juries.[3]

Religion and the State

In the UK, there is no distinct separation between the state and religion, as there is in Canada and Australia. The official state religion is that of the Anglican Church of England, with the Church being granted a privileged status within the state structure. The Monarch of the UK is also the Supreme Governor (head) of the Church of England, which provides for an overlap between state and Church. Archbishops and Bishops of the Church sit in the House of Lords, and represent the diocese.[4] As a result of this privilege accorded by the state, the Church is seen to have great influence over the creation and implementations of laws and public policies.[5] The established Church of England with its preeminent status, differs to the "quasi-established" Church of Scotland, which by contrast is independent of the state.[6] The history of the Church in the UK is a long one that goes back to the *Articles of Religion* brought into force by King Henry VIII, who denounced the authority of the Pope and the Catholic Church in England.[7]

Multiculturalism

The rise of multiculturalism as a policy in the UK developed around the same time that Canada was having this discussion about multiculturalism. Whilst Canada may be the first state to have an official policy of multiculturalism introduced in 1971, the UK is seen as outlining the basic ideas and principles that might make up a state multiculturalism policy and approach well before this, in the 1960s.[8] Specifically, in 1966, then Home Secretary Roy Jenkins, outlined the basic ideas that underpin the

[3] UK Judiciary, "The Structure of the Courts," *Courts and Tribunals Judiciary*, https://www.judiciary.gov.uk/wp-content/uploads/2012/08/courts-structure-0715.pdf (accessed September 12, 2016).
[4] The Church of England, "The Lords Spiritual," *The Church of England*, https://www.churchofengland.org/our-views/the-church-in-parliament/bishops-in-the-house-of-lords.aspx (accessed September 12, 2016).
[5] Samia Bano, *Muslim Women and Shari'ah Councils* (Basingstoke: Palgrave Macmillan, 2012) 43.
[6] Linda Woodhead, "Liberal religion and illerberal secularism," in *Religion in a Liberal State*, eds. Gavin D'Costa et al. (Cambridge: Cambridge University Press, 2013), 108.
[7] Tom Frame, *Church and State: Australia's Imaginary Wall* (Sydney: UNSW Press, 2006), 23.
[8] Max Farrar, "Multiculturalism: Commonality, Diversity and Psychological Integration," in *Islam in the West*, eds. Max Farrar et al. (Basingstoke: Palgrave Macmillan, 2012), 9.

concept of multiculturalism. In a speech to the National Committee for Commonwealth Immigrants, Jenkins proposed a more integrationist approach, to replace existing assimilationist attitudes towards immigration, describing integration as:

> I do not regard [integration] as meaning the loss, by immigrants, of their own national characteristics and culture. I do not think that we need in this country a 'melting pot', which will turn everybody out in a common mould, as one of a series of carbon copies of someone's misplaced vision of the stereotyped Englishman... I define integration, therefore, not as a flattening process of assimilation but as equal opportunity, accompanied by cultural diversity, in an atmosphere of mutual tolerance.

Jenkins's comment came in response to a spate of violent attacks in London towards the West Indian community. As a result of Britain's colonial imperialism, there was a need to address the settlement of groups coming from "the New Commonwealth" (the Caribbean, Africa and South Asia) and advocating integration over assimilation; Jenkins statement illustrates the first step towards multiculturalism in the British context.[9] This approach focused on ideas of equal opportunity, toleration and integration into the wider British society whilst celebrating the differences and diversity of cultures.

Whilst this did not lead to the formulation of a specific multicultural policy, it had a significant impact on the development and framing of racial discrimination law, as well as the development of policies in the following decade. For instance, the *Race Relations Act* 1968, which established a Commission on Community relations, whose policies were inherently shaped by this integrationist, more multicultural approach presented by Jenkins.[10] In 1969, a highly influential report titled *Colour and Citizenship* was published. The report encouraged recognition of cultural differences that exist between groups within society, and encouraged that this cultural diversity be valued.[11]

However, the move towards multiculturalism faced a lot of opposition and throughout the 1970s, there were many calls to uphold traditional ideals of "Britishness". Britishness is a contested term with debate over whether it is a type of state patriotism,

[9] Ibid.
[10] Ibid., 10.
[11] Ibid.

or whether it is a political tradition.[12] With the Acts of the Union bringing together England and Scotland on a parliamentary level in 1707, and the historical dependency of Wales (legally, economically and politically) on England, Britishness appears to merely be a political allegiance for the Scots and the Welsh, rather than an all-encompassing united identity – as there are distinct ethnic identities that exist in Scotland, Northern Ireland and Wales.[13] Nevertheless, Britishness was (and remains) an important political ideal, and thus calls to uphold this ideal came from Conservative Ministers who were concerned about a "dilution of British identity" and feared that British society would break down if the migrants from the "New Commonwealth" were accommodated in any way.[14] Enoch Powell, a Conservative Member of Parliament, was a staunch supporter of assimilation, placing (white) Englishness as being the timeless and key ideal of Britain's national identity.[15] Margaret Thatcher (an MP at the time) reinforced the sentiments expressed by Powell in 1978, stating:

> People are really rather afraid that this country might be swamped by people with a different culture…We are a British nation with British characteristics. Every country can take some small minorities and in many ways they add to the richness and variety of this country. The moment the minority threatens to become a big one, people get frightened…[16]

However, the late 1980s saw the beginning of a shift in state policies and multiculturalism. Multiculturalism became a central concept, despite the history of great debate and opposition. The 1985 Swann Report, which explored "the response of the education service to ethnic diversity" reiterated the government's commitment to a principle of good education for all children "irrespective of race, colour or ethnic origin".[17] The report argued that there was a need to introduce a more multicultural curriculum into schools. The need to recognise ethnic diversity and accommodate minority cultural groups was a long time coming. Outside of the increasing number of immigrants coming from South East Asia, the arrival of The Empire Windrush from the Caribbean settled a large number of West Indian migrants in Britain, bringing with it a need to recognise the shifting cultural identity of Britain. By the 1970s, West Indian

[12] Rebecca Langlands, "Britishness or Englishness? The historical problem of national identity in Britain," *Nations and Nationalism* 5, no. 1 (1999): 54.
[13] Ibid., 60-63.
[14] Farrar, "Multiculturalism," 10.
[15] Ibid.
[16] Margaret Thatcher, "Interview with Gordon Burns," *World in Action*, GranadaTV, January 27, 1978, http://www.margaretthatcher.org/document/103485 (accessed on March 6, 2016).
[17] Lord Michael Swann, *Education for All* (London: Her Majesty's Stationery Office, 1985), viii.

communities in British communities developed a distinct "black British style" which has been shared by other migrant communities from Africa and Asia.[18] Thus, the slow adoption of multiculturalism in the mid to late 1980s was a much needed formal recognition of the culturally diverse nature of the UK.

Despite this introduction of multiculturalism into state policy extending to areas such as education, the 1990s saw a distinct shift in focus of this multiculturalism discussion on to Muslims specifically, with this minority group being singled out and "othered" within British society. With the release of Salman Rushdie's book *The Satanic Verses* in 1988, the media focus turned to British Muslims, and fuelled the anxiety around race within society.[19] Ultimately, the public debate shifted from "Asians" more generally to Muslims more specifically. Public debate within the media surrounded Islam attempting to highlight the apparently "illiberal" principles of the religion, and thus the "otherness" of Muslims.[20] Despite this explicit focus on Muslims within public discussion of multiculturalism, both sides of the government (the Conservatives and Labour) reiterated their support for cultural diversity, maintaining multiculturalism as a key principle within governmental policy considerations.[21] Ultimately, over the past couple of decades conversations about ethnic minorities in the UK have gone beyond "the Asians" to focus on the religious association of the majority of the "Asian" community, which happens to be Islam.[22] This is a result of the mass migration of South Asians beginning in the 1950s, specifically from Pakistan (a former British colony, as part of India).[23] At the time of migration, there was some religious accommodation of Pakistani Muslims as a religious minority, through allowing them to build mosques.[24]

Post 9/11 there has been a shift in attitudes towards Muslims globally, but particularly in Europe and the UK, which has paved the way for an "attack" on multiculturalism within the British context. The events of 9/11 and reaction by governments has

[18] Mike Phillips, "Windrush – the Passengers," *BBC*, March 10, 2011, http://www.bbc.co.uk/history/british/modern/windrush_01.shtml (accessed December 5, 2015).
[19] Farrar, "Multiculturalism," 13.
[20] Ibid.
[21] Ibid.
[22] Paul Wetherly et al., "Introduction: 'Islam', 'the West' and 'Multiculturalism'," in *Islam in the West*, eds. Max Farrar et al. (Basingstoke: Palgrave Macmillan, 2012), 3.
[23] Bano, *Muslim Women and Shari'ah Councils*, 26.
[24] Ibid., 31.

accelerated an assault on multiculturalism. The rise of Islamophobia as an informal institution that influences both political and social attitudes towards multiculturalism has had a major impact on discussions around multicultural accommodation. It has opened up a space for tensions to arise between multiculturalism and national identity within the British context, whereby multiculturalism is viewed as breaking down the "shared foundations of national citizenship".[25] In recent years, multiculturalism as state policy has come under great criticism, with former PM David Cameron stating that it has "failed", and arguing that multiculturalism fosters separate and disconnected communities that ultimately effect the united British society.[26] In 2007-2008, the New Labour Government claimed that even where accommodating and allowing separate cultures to be retained by minority groups, a certain "dimension of Britishness" needs to be upheld.[27] This retreat from multiculturalism is very much a product of the post-9/11 "age of terror", in addition to the increased number of asylum seekers and refugees coming from Muslim states, such as Syria. In some way, the debates around multiculturalism and its apparent failure coincides with discussions around refugees and the responsibility of the UK as a wealthy, Western, "power" nation to take in refugees fleeing war-torn nations in the Middle East – and in many ways by focusing on multiculturalism the conversation disguises the real discussion around refugees, and immigration policies. The apparent "harm" to society arising from multiculturalism is a line that has been adopted by the British government following the Cantle Report in 2001, by arguing that it segregates society there is an implicit justification of tightening and restricting immigration, and conservatively approaching refugee policies (under the guise of focusing on "fixing" multiculturalism).[28] The development of a focus on Muslims in the last couple of decades has reiterated assumptions and stereotypes of Muslims, with terms like "Sharia" and "Muslim" being used with negative connotations.[29] Within this idea that Islam is apparently "illiberal" and Muslims are "others" comes the argument that multiculturalism is bound to fail, as

[25] Elise Rietveld, "Debating multiculturalism and national identity in Britain: Competing frames," *Ethnicities* 14, no.1 (2014), 51.
[26] Anthony Heath and Neli Demireva, "Has multiculturalism failed in Britain?" *Ethnic and Racial Studies* 37, no.1 (2014): 161-162.
[27] John Milbank, "Multiculturalism in Britain and the Political Identity of Europe," *International journal for the Study for the Study of the Christian Church* 9, no.4 (2009): 270.
[28] Gareth Mulvey, "When Policy Creates Politics: the Problematizing of Immigration and the Consequences for Refugee Integration in the UK," *Journal of Refugee Studies* 23, no. 4 (2010): 449.
[29] Bano, *Muslim Women and Shari'ah Councils*, 8.

Islam and the West are seen as incompatible.[30] With attacks on multiculturalism arising from all sides of the political spectrum in the UK, the responsibility remains with the state to uphold these principles of integration. However, this appears to be becoming an increasingly lower priority in recent policies, where there is a slow but steady regression towards principles of Britishness.[31] The increased visibility and rise of far-right, fascist political parties, such as the British National Party,[32] and anti-immigration parties (like the UK Independence Party) has a significant influence on the shifting social and political attitudes on multiculturalism and immigration.[33] This was seen with the 2016 Brexit vote and the success of the "leave" campaign that was headed by members of the Conservatives, Labour, and UKIP parties. The Brexit decision is a prominent example of the effect the growing, conservative anti-immigration stance is having on British society and ideas of accommodation. In a recent statement, Prime Minister Theresa May noted that a large aim of Brexit is regaining control over the borders, which reinforces the idea that Brexit has, and is, largely about immigration.[34]

Freedom of Religion and Legal Pluralism

In 2007 the Archbishop of Canterbury, Rowan Williams sparked controversy about the possibility of state recognition and legal accommodation of the laws of religious groups, citing Sharia Law as a specific example. Like Canada, the UK does not have formal legal pluralism. However, the operation of Sharia tribunals and councils within the legal arbitration framework offers an example of the existence of "informal" legal pluralism, and Williams's discussion merely considered what space existed for religious laws to operate alongside the secular legal framework. In his lecture to the Royal Courts of Justice, Williams advocated for recognising the plurality that exists within society in the legal framework, and noted that this is a real possibility through negotiation between religious and secular laws, and addressing the overlap between the two, to

[30] Wetherly et al., "Introduction," 4.
[31] Bano, *Muslim Women and Shari'ah Councils*, 44.
[32] Matthew J Goodwin, *New British Fascism: Rise of the British National Party* (New York: Routledge, 2011).
[33] Alex Hunt, "UKIP: The story of the UK Independence Party's rise," *BBC News*, November 21, 2014, http://www.bbc.com/news/uk-politics-21614073 (accessed February 2, 2016).
[34] Steven Swinford, and Ben Riley-Smith, "Theresa May signals that Britain will leave Single Market so it can take control of immigration," *The Telegraph*, January 8, 2017, http://www.telegraph.co.uk/news/2017/01/07/theresa-may-unveils-plans-create-shared-society-reform-vision/ (accessed January 9, 2017).

find a space to possibly accommodate religious laws within the legal framework.[35] In addition to this, Williams was worried about the threat to the rights of minority groups, namely Muslims, based on the contemporary threats arising from shifts in social attitudes and public policies, post 9/11.[36]

In terms of accommodation of religious laws, the privilege accorded to the Church of England means that it is an inherent part of the English legal system, with the modern ecclesiastical courts of the Church able to make decisions. These decisions are subject to review by the High Court, but are a good example of religious laws operating within the legal system.[37] However, when it comes to recognition of minority legal orders, such as Sharia, it is an entirely different scenario. Muslims, Catholics and Jews have all established councils, and long practised religious arbitration of civil disputes, though these are not recognised by state law in the same way that the Courts of the Church of England have an integrated place within the British legal system.[38]

Of course, whilst legal pluralism does not exist formally in regards to minority religious groups and their laws, like in the Canadian context it could be argued that in Britain there has been an accommodation of these religious laws on a more informal level – through accommodation or recognition of religious arbitration by the courts. As was seen in Canada, the legal system in the UK has considered cases concerning decisions that have stemmed from a religious arbitration tribunal, more specifically, a decision from a Jewish *Beth Din* court. The leading example is the 2013 case of *AI v MT*, which was a family law matter concerning a couple seeking divorce. The parties requested that the issues be resolved through arbitration in a Jewish *Beth Din* court. Justice Baker agreed to this request, and thus the matters, including the care of the couple's children, were referred to a religious court. Ultimately, the High Court recognised and upheld the arbitration decision of the *Beth Din*.[39] In addition to this explicit consideration of a religious arbitration, and recognising the laws of a religious group in the above case, it

[35] Rowan Williams, "Civil and Religious Law in England: a religious perspective," *Dr Rowan Williams 104th Archbishop of Canterbury* (February 7, 2008) http://rowanwilliams.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective (accessed on August 10, 2014).
[36] Milbank, "Multiculturalism in Britain and the Political Identity of Europe," 270.
[37] Russell Sandberg et al., "Britain's Religious Tribunals: 'Joint Governance' in Practice," *Oxford Journal of Legal Studies* 33, no. 2 (2013): 264.
[38] Maleiha Malik, *Minority Legal Orders in the UK: Minorities, Pluralism and the Law* (London: The British Academy, 2012), 10.
[39] AI v MT [2013] EWHC 100 (Fam).

can be argued that there is a form of accommodation of religious groups through religious exemptions in anti-discrimination laws. English law is founded on the liberal principle of "universal neutrality" and legislation like the *Race Relations Act* of 1976 explicitly promotes equal opportunities and non-discrimination in the realm of employment practices.[40] The Act aims to protect individuals from discrimination, on the basis of their "colour, race, nationality or ethnic or national origins".[41]

Whilst the *Race Relations Act* is a fundamental step towards recognising the multicultural nature of British society, it only addresses matters of race, ethnicity and nationality – with no explicit mention of religion. However, despite the exclusion of religion as a basis for protection from discrimination, there are cases in which the question of what constitutes an ethnic or racial group has been considered, recognising religion as being a characteristic that might constitute an "ethnic" group. This was most significantly discussed in the case of *Mandla v Dowell Lee*, where a young Sikh student was refused the right to carry religious symbols (including wearing a turban) in school.[42] On appeal in the House of Lords, the court considered what makes up an ethnic group for the purposes of the Act. Lord Fraser of Tullybelton noted that "For a group to constitute an ethnic group in the sense of the 1976 Act, it must… regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics" – and one of these essential characteristics includes a "common religion" distinct from neighbouring groups and wider community in which the group resides.[43] Ultimately, it was decided that the Sikh community with a shared language, religion and cultural tradition was an ethnic group. Thus, it can be seen that even under the provisions of the *Race Relations Act* religion may be a factor that is considered in terms of ethnic and racial groups.

There are also a number of legislative provisions outside of the *Race Relations Act* that are seen to specifically address and promote accommodation of religious groups. For instance, the *Shop Act* of 1950 is one of the earliest "accommodations" of a religious group. In relation to Sunday trading laws, which deemed that business are restricted in opening and trading on a Sunday, section 53 exempted "the occupier of any shop who

[40] Bano, *Muslim Women and Shari'ah Councils*, 23.
[41] *Race Relations Act*, 1976, c. 74, s.3(1)
[42] Bano, *Muslim Women and Shari'ah Councils*, 23.
[43] Mandla v Dowell Lee [1983] UKHL 7.

is a person of the Jewish religion", recognising that in observing the Jewish Sabbath, the shop would close for trade on Saturdays, and thus be allowed to open for business on Sundays.[44] Similarly, the 1974 *Slaughterhouses Act* accommodated the religious laws of Jewish and Muslim communities, in terms of slaughtering animals according to religious guidelines for kosher and halal meat. Specifically, section 16(2) notes that local authorities must not "deny any religious community reasonable facilities for obtaining as food the flesh of animals slaughtered by the method specially required by their religion".[45] In more recent years, the introduction of the *Employment Equality Act (Religion or Belief) Regulation* 2003 introduced provisions targeting discrimination in the area of employment and vocational training, based on an individual's religion or belief; whilst the *Equality Act* 2006 broadened the scope of anti-discrimination in regards to religion to cover provision of goods and services, education and exercise of public functions.[46] Both these acts were repealed and replaced with the *Equality Act* 2010, which outlines "protected characteristics" that are fundamental in promoting equality within society; section 10 specifically addresses "religion or belief" as one of these 'protected characteristics'.[47] Also in operation is the 2006 *Racial and Religious Hatred Act,* which makes it an offence where the action is seen as " involving stirring up hatred against persons on racial or religious grounds".[48]

An explicit freedom of religion is provided for in the *Human Rights Act* of 1998, which guarantees that:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.[49]

Following this provision, courts are required to have regard for the importance of this freedom where a question arises concerning the ability of an individual or religious

[44] *Shop Act*, 1950, c.28, s. 53.
[45] *Slaughterhouses Act*, 1974, c. 3, s.16(2).
[46] *Employment Equality Act (Religion or Belief) Regulations*, 2003, No.1660; *Equality Act*, 2006, c.3; and Bano, *Muslim Women and Shari'ah Councils*, 23.
[47] *Equality Act*, 2010, c.15, s.10.
[48] *Racial and Religious Hatred* Act, 2006, c.1.
[49] *Human Rights Act*, 1998, c. 42, Schedule 1, Article 9.

organization to exercise the right to "freedom of thought, conscience and religion".[50] Of course, this freedom is subject to some limitations that are:

> ...prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protections of the rights and freedoms of others.[51]

Based on this freedom of religion that is entrenched in the *Human Rights Act*, there have been several cases heard by the courts deciding on what constitutes a legitimate expression of this right to freedom of religion. One particularly notable case is that of *Begum v Denbigh High School Governors*, which concerned a Muslim girl, Shabina Begum, wearing a *jilbab* (religious covering) to school. This contravened the school's uniform policy, and she was subsequently barred from attending the school.[52] Begum argued that the school "unjustifiably limited" her right under this freedom of religion provision.[53] On appeal, the House of Lords determined that there is a "need in some situations to restrict freedom to manifest religious belief" and thus, the school had legitimately infringed upon this freedom of religion in the interests of promoting and maintaining social cohesion within the school community.[54] Similarly, in the *Azmi v Kirklees* it was determined there was no indirect discrimination by an employer. In this case a Muslim woman, Aishah Azmi worked in a school as a teaching aide, and wore a full-face veil when working with male teachers, ignoring requests by the school to stop wearing the full veil.[55] Azmi took her employers to court for unfair dismissal and harassment based on religious discrimination. On appeal in the Employment Appeal Tribunal, it was found that there was no indirect discrimination and the aims of the local council (employer) were proportionately balanced against Azmi's interests and right to freedom of religion.[56]

[50] Ibid., s.13 (1).
[51] Ibid., Schedule 1, Article 9.
[52] Bano, *Muslim Women and Shari'ah Councils*, 45.
[53] Begum v Denbigh High School Governors [2006] UKHL 15, para 1.
[54] Ibid., para 32.
[55] Bano, *Muslim Women and Shari'ah Councils*, 46.
[56] Azmi v Kirkless Metropolitan Borough Council [2007] IRLR 434.

Matters of family law, such as, divorce, disputes on family matters, and rights to marital property, are covered by the *Family Law Act* 1996.[57] In terms of marriage laws, the *Marriage Act* of 1949 is the governing Act in England and Wales. Amendments were introduced by the *Marriage Act* 1994 regarding the ability to have a marriage take place in approved premises, which are not religious institutions or a register office – a previous requirement under the 1949 Act.[58] According to the *Marriage Act* 1949, marriages may be solemnized "according to a relevant form, rite or ceremony in the presence of a registrar of the registration district in which the place where the marriage is solemnized is situated", with "relevant form, rite or ceremony" referring to a "body of persons who meet for religious worship in any registered building being a form, rite or ceremony in accordance with which members of that body are married…"[59] The Act also refers to marriages in accordance with Jewish and Quaker religious traditions.[60] Highlighting the fact that individuals may be married in accordance with their religious beliefs and that solemnization of marriages by religious ceremony will be recognised by the state upon registration.

With divorce matters, there has generally been little accommodation of any religious ceremony or rites. The *Family Law Act* 1996 clearly outlines the procedures that must be followed in order for a divorce order to be granted. These provisions include, showing that a period of separation, in which reflection and counselling is undertaken, has passed, and following this time the marriage is seen to be "broken down irretrievably".[61] Nowhere in this particular legislation is religion referred to, in the way that the Marriage Act does. However, the 2002 *Divorce (Religious Marriages) Act* does recognise the issues arising from religious marriages, and provides for the court ordering a couple who was married in accordance with Jewish religious laws to take the necessary steps to dissolve the marriage religiously before a civil divorce will be granted.[62] This legislation was introduced to address the increasingly problematic existence of "chained wives" within Jewish communities, where civil divorces have

[57] *Family Law Act*, 1996, c.27.
[58] *Marriage Act*, 1994, c. 34, s. 1; *Marriage Act*, 1949, c. 76 (Regnal. 12, 13 and 14 Geo 6), s.46A.
[59] *Marriage Act*, 1949, c. 76 (Regnal. 12, 13 and 14 Geo 6), s.45A.
[60] Ibid., ss. 26 and 53.
[61] *Family Law Act*, 1996, c.27, ss. 1 and 5.
[62] *Divorce (Religious Marriages) Act*, 2002, c.27, Section 1.

been granted, but husbands were refusing to grant religious divorces to their wives (which precluded them from remarrying).[63] Whilst this Act specifically refers to individuals of the Jewish faith, with the wording "religious usages" it could be open to interpretation, and applicable to people from other religious communities, for instance, Muslim women who often experience the same bind of being divorced under secular law but not religiously.

Similarly, under the *Family Law Act*, there is no provision for arbitration being a method of resolving matters, such as property division. However, in 2012, family law arbitration was seen to appear with the establishment of the Institute of Family Law Arbitration (IFLA) scheme. The scheme created a body of rules for family arbitration, which were subsequently endorsed by English family court judges in 2014. In the case of *S v S,* Sir James Munby, the President of the Family Division upheld a decision that was made via private arbitration, following the IFLA scheme.[64] He noted "there is no conceptual difference between the parties making an agreement and agreeing to give an arbitrator the power to make the decision for them".[65] Whilst there is no legislation making family law arbitration awards binding, they are treated as such in practice, particularly following President Munby's judgement. A consent order is required following arbitration to place it in a more enforceable and binding format.[66] In his judgement, President Munby stated that:

> Where the consent order which the judge is being asked to approve is founded on an arbitral award under the IFLA Scheme or something similar (and the judge will, of course, need to check that the order does indeed give effect to the arbitral award and is workable) the judge's role will be simple. The judge will not need to play the detective unless something leaps off the page to indicate that something has gone so seriously wrong in the arbitral process as fundamentally to vitiate the arbitral award.[67]

[63] Lisa Pilgram, "British-Muslim family law and citizenship," *Citizenship Studies* 16, no. 5-6 (2012): 772.
[64] Resolution, "Resolution welcomes judgment on family arbitration award," *Resolution: First for Family Law*, January 14, 2014, http://www.resolution.org.uk/news-list.asp?page_id=228&n_id=210 (accessed on June 29, 2015).
[65] S v S [2014] EWHC 7 (Fam), [para 19].
[66] David Hodson, "Family Law Arbitration," *International Family Law Group* LLP, January 2014, www.iflg.uk.com (accessed July 15, 2014).
[67] S v S [2014] EWHC 7 (Fam), [para 21].

Thus, unless there is something inherently wrong with the arbitration award, and a party presents this in a dispute, judges will generally uphold arbitration awards, unless there are good reasons as to why a consent order is invalid.

In terms of arbitration more broadly, outside of the family law context, this is provided for under the *Arbitration Act* 1996. The general principles of the *Arbitration Act* are to encourage "fair resolution of disputes by an impartial tribunal" and to allow parties to "be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest".[68] It is under these provisions that religious groups have established councils, courts and tribunals to resolve disputes amongst members of their faith. For instance, Jewish groups have established *Beth Din*, like the London Beth Din at the United Synagogue; there are Catholic tribunals, such as the Catholic National Tribunal for Wales in Cardiff; and Muslim groups have Sharia councils (like the Shariah Council of Birmingham).[69] These religious councils and tribunals have been active for many years, and operate under the premise of the arbitration legislation.

Over the years, UK courts have considered arbitrations carried out in accordance with religious laws – Jewish, Christian and Islamic. Focusing specifically on Sharia council decisions, there are several cases that have looked at arbitration agreements based on religious principles in civil matters, such as business agreements and inheritance. The *Al-Midani v Al-Midani* case concerned a dispute regarding the validity of will that was based on an agreement reached between parties with the help of a London Sharia council.[70] It was decided that the judgement of the Sharia Council could not be considered an arbitration award as it did not obtain consent from all parties, and the agreement was not based on any statutory authority.[71] Thus, highlighting that an arbitration agreement achieved through religious arbitration might be valid, but only where there is consent from all the parties involved and state laws are not contravened. In a 2009 case, *Bhatti v Bhatti*, the court granted in favour of applicant's claim regarding ownership of certain properties, this followed the determination of the dispute (settled in favour of the applicant) through arbitration by a Muslim Ahmadiyya

[68] *Arbitration Act*, 1996, c.2, s.1.
[69] Sandberg et al., "Britain's Religious Tribunals."
[70] Bano, *Muslim Women and Shari'ah Councils*, 229.
[71] Al Midani and Another v Al Midani and Others [1999] 1 Lloyd's Rep 923.

Community, which was acting as an arbitration tribunal as defined under English law.[72]

Outside of the arbitration framework, there has been much discussion and consideration of the validity of Islamic marriage contracts (*nikah*) and the entitlement to *mahr* that is set out in these contracts. In the case of *Uddin v Choudhury and Ors*, the courts explored a case where a religious marriage has taken place, but had not been registered with the state (as per the requirement of the *Marriage Act* 1949).[73] The dispute was over the payment of *mahr* to the wife, which it was claimed was still outstanding, and was owed by the husband.[74] It was found that the amount of *mahr* retained by the bride were to be viewed as non-returnable gifts, not part of the dowry, and thus she was entitled to keep them.[75] Questions around the recognition of *mahr* predate discussions around arbitrations by religious bodies. For instance, in 1964 the issue of *mahr* was examined in the case of *Shahnaz v Rizwan*, specifically in terms of whether English courts had jurisdiction to consider the matter (as it concerned a marriage contract made in India). The courts ultimately determined that it was a contractual issue, more so than a matrimonial matter, and thus highlighted the role contract law can play in deciding religious matters such as that of *mahr*.[76]

Despite these considerations of *mahr* by the courts, marital contracts (including prenuptial agreements) are not binding in England and Wales.[77] This differs to the approach to prenuptial contracts in Australia, which are generally enforced as long as they remain neutral of religion and religious terms. In an effort to bring religious marriage contracts into conformity with English legal provisions around marriage, many Muslims, and religious leaders, have introduced standard *nikah* contracts across Britain so that they are less "prenuptial" and religious, and more in the format of a binding contractual agreement.[78] Despite not being binding, marital contracts have

[72] Bano, *Muslim Women and Shari'ah Councils*, 229.
[73] Uddin v Choudhury & Ors [2009] EWCA Civ 1205.
[74] Ibid., [para 3].
[75] Ibid., [para 14]; and Bano, *Muslim Women and Shari'ah Councils*, 231.
[76] Bano, *Muslim Women and Shari'ah Councils*, 232.
[77] Ibid., 233.
[78] Ibid.

been recognised to some extent in divorce proceedings, when deciding on the financial relief to be granted to each party.[79]

Gender Equality and Women's Rights Movements

The women's rights movements in the UK have a long history, dating back as far as the 19th century with the suffragette movement. In more recent times, lobbying by women's organisations have been effective in areas such as domestic violence, with success in influencing the creation of the *Domestic Violence and Matrimonial Proceedings Act* in 1976.[80] The Women's Liberation movement in Britain during the mid to late 20th century had an impact internationally, including on Australian "second wave" feminists in the 1970s.[81] However, in recent years, a bulk of women's lobbying in the UK has relied on the efforts of, and collaboration with, regional organisations, like the European Women's Lobby – particularly when addressing matters relating to equal pay and employment opportunities.[82] This perhaps could be the result of the Thatcher government years being relatively inhospitable for women's movements.[83] Even so, it has been suggested that in the UK (England and Wales in particular), the collective mobilisation and unification of women has been actively rejected.[84] This differs quite radically to the mobilisation of women in Canada (on a federal level).[85]

In terms of gender equality legislative provisions, the UK introduced the *Sex Discrimination Act* in 1975, which is similar to provisions found in Australia. There was

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[79] Ibid.; See for example, MacLeod v MacLeod [2008] UKPC 64, which concerned a post-nuptial agreement. Baroness Hale found that the agreement was enforceable, but do remain subject to court order. Similarly, the case of NG v KR (Pre-nuptial contract) [2008] EWHC 1532 (Fam) concerned the validity of a pre-nuptial contract.

[80] Women's Aid Federation of England, "Our history," *Women's Aid*, https://www.womensaid.org.uk/about-us/history/ (accessed October 1, 2016).

[81] Sarah Maddison, "Discursive politics: changing the talk and raising expectations," in *The Women's Movement in Protest, Institutions and the Internet*, eds. Sarah Maddison and Marian Sawer (New York: Routledge, 2013), 39.

[82] Mary Hawkesworth pp.178-179

[83] Ibid., 179.

[84] Marian Sawer, "Finding the women's movement," in *The Women's Movement in Protest, Institutions and the Internet*, eds. Sarah Maddison and Marian Sawer (New York: Routledge, 2013), 16.

[85] Louise Chappell, *Gendering Government: Feminist Engagement with the State in Australia and Canada* (Vancouver: UBC Press, 2002). For discussion on federalism and women's representation, see also – Jill Vickers, "Is Federalism Gendered? Incorporating Gender into Studies of Federalism," *The Journal of Federalism* 43, no. 1 (2012); and Marian Sawer, *Femocrats and Ecorats: Women's Policy Machinery in Australia, Canada and New Zealand,* (Geneva: United Nations Research Institution for Social Development, March 1996).

also the *Equal Pay Act* 1970.[86] However, these Acts has been replaced with the *Equality Act* 2010 (which was preceded by the *Equality Act* 2006), which operates as an all-encompassing equality legislation. It protects against discrimination based on sex, sexual orientation, gender reassignment, marriage and civil partnership, and pregnancy.[87] This has been supplemented by the *Equality Act (Sexual Orientation*) regulations, secondary legislation introduced in 2007 that specifically addresses discrimination on the grounds of sexual orientation.[88]

Sharia in the UK

Muslims in the UK

The Muslim population in the UK differs amongst England, Scotland, North Ireland and Wales. The first migration of Muslims to Britain occurred in the 19th century from the Middle East and India (mainly seamen who were on trading cargo ships), which led to the formation of Muslim communities in Liverpool, Cardiff, and East London.[89] However, the largest wave of Muslim migration was post-WWII, which was contributed to by the partition of India and Pakistan; as such a large number of Muslims in Britain today are from South Asia, particularly Pakistan (approximately 68%).[90] According to the 2011 census, there are 2.7 million Muslims in England and Wales (approximately 4.8% of the population).[91] In 2016, this number was estimated to be approximately 5.4% (approximately 3.1 million).[92] The Muslim population in Scotland during the 2011 census is estimated to be 1.4% of the population (approximately 77,000).[93] In Northern Ireland, the 2011 census estimates there are

[86] *Sex Discrimination Act* 1975, c. 65; and *Equal Pay Act* 1970, c. 41.
[87] *Equality Act*, 2010, c.15.
[88] *The Equality Act (Sexual Orientation) Regulations*, 2007, No. 1263.
[89] John Wolffe, "Fragmented universality: Islam and Muslims," in *The Growth of Religious Diversity: Britain from* 1945, ed. Gerald Parsons (Milton Park: Routledge, 1993), 144.
[90] Ibid.
[91] Office for National Statistics, "Religion in England and Wales 2011," *Office for National Statistics*, December 11, 2012, https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/religion/articles/religioninenglandandwales2011/2012-12-11 (accessed on January 9, 2015).
[92] Lexi Finnigan, "Number of UK Muslims exceeds three million for first time," *The Telegraph*, January 31, 2016 http://www.telegraph.co.uk/news/uknews/12132641/Number-of-UK-Muslims-exceeds-three-million-for-first-time.html (accessed July 18, 2017).
[93] National Records of Scotland, *Religious Group Demographics*, http://www.gov.scot/Topics/People/Equality/Equalities/DataGrid/Religion/RelPopMig (accessed on January 9, 2015).

approximately 3832 Muslims, who were categorised in the 0.9% "other" religion category of the census.[94] According to the Muslim Council of Britain's report on the 2011 census, the majority of Muslims are located in England, with 76% of Muslims of the Muslims residing "in the inner city conurbations of Greater London, West Midlands, the North West, and Yorkshire and Humberside".[95]

Sharia Councils and Controversy

The call from some Muslim groups within the UK to have their religious laws recognised in the area of private (personal) laws in not a new phenomenon, despite coming into public consciousness more significantly post-9/11, and particularly following Rowan Williams's lecture in 2008. In the 1970s, around the time multiculturalism was developing within state dialogue and policy, the Union of Muslim Organisations, which was one of the first Muslim community groups in the UK requested the recognition of Islamic personal laws.[96] It is possible that unofficial Sharia councils and tribunals have existed for many decades, but only with recent developments, such as the establishment of the Muslim Arbitration Tribunal (MAT) in 2007 have we seen greater discussions and examinations of the existence and operation of these tribunals. The development of Sharia tribunals (like MAT) and the more informal Sharia councils, is argued to be the result of engagement between the state and the religious groups/organisations, fundamentally shaped and driven by this policy of multiculturalism that has underpinned British community policies since the 1980s.[97] It should be noted that not all Muslims and Muslim communities within the UK request or want accommodation of religious arbitration by the state. Whilst there have been demands by some groups and religious leaders, they do not represent or speak for all British Muslims – as there is no singular, homogenous Muslim community.[98]

In the last decade, English Sharia "courts" have issued hundreds of decisions concerning civil matters such as divorce and finance, though these "courts" have

[94] Ami Sedghi, "Northern Ireland census 2011: religion and identity mapped," *The Guardian*, December 13, 2012,https://www.theguardian.com/news/datablog/2012/dec/12/northern-ireland-census-2011-religion-identity-mapped (accessed on January 9, 2015).
[95] Muslim Council of Britain Research & Documentation Committee, *British Muslims in Numbers* (London: Muslim Council of Britain, 2015).
[96] Bano, *Muslim Women and Shari'ah Councils*, 41.
[97] Ibid., 83.
[98] Bano, "In Pursuit of Religious and Legal Diversity," 292.

operated largely in the background of the English law and court system.[99] In a 2012 study, Samia Bano identified that approximately 30 councils are in operation through the UK.[100] This is in contrast to claims that often exaggerate the number of councils in existence to be approximately 85 and counting when outlining the apparent "rise" of Sharia in Britain.[101] There are several prominent Sharia councils in operation, for example: the Muslim Family Support Service and Shari'ah Council in Birmingham (this is one of the largest); the Muslim (Shariah) Council in West London; The Islamic Shari'a Council of East London; and the Shari'ah Court of the UK in North London.[102] In addition to these councils there are others operating in Manchester, Bradford, Nuneaton, Glasgow and Edinburgh – where there are large Muslim communities.[103]

These councils, like the Jewish Beth Din courts in Canada (and the Beth Din and Catholic tribunals in the UK) operate largely within the realms of British law and procedures, in order to ensure there is no conflict with the state's family law provisions that would draw attention to and invalidate their 'arbitral' decisions.[104] Ultimately, Sharia councils and tribunals operate within the private sphere where they remain largely unregulated by the UK's family law.[105] In 2007, the establishment of the MAT was a move towards Sharia councils coming out of the private sphere and towards the public arena. The MAT claims to have authority to operate and make arbitration awards based on the *Arbitration Act* 1996.[106] It is modelled on the Beth Din tribunals that have been operating in the British context for many years, and seeks to resolve disputes in accordance with "Islamic Sacred Law".[107] This tribunal does not operate like a court but more like any other non-religious arbitration tribunal you might find in the English judicial framework. In order to decide an issue, the tribunal needs consent of all parties involved (in accordance with the *Arbitration Act*) and whilst there is no ability to enforce decisions, they can place the agreement into consent orders and refer

[99] Arsani Williams, "The Unjust Doctrine of Civil Arbitration: Sharia Courts in Canada and England," *Stanford Journal of International Relations* 11, no. 2 (2010): 42.
[100] Samia Bano, *An exploratory study of Shariah councils in England with respect to Family Law* (University of Reading: University of Reading and Ministry of Justice, 2012).
[101] Denis MacEoin, "Sharia Law or 'One Law For All'?" in *Sharia Law or 'One Law For All'*, ed. David G Green (London: Civitas, 2009), 69.
[102] Bano, *Muslim Women and Shari'ah Councils*, 100.
[103] Williams, "The Unjust Doctrine of Civil Arbitration," 43.
[104] Bano, *Muslim Women and Shari'ah Councils*, 141.
[105] Ibid., 185.
[106] Muslim Arbitration Tribunal, *Muslim Arbitration Tribunal*, http://www.matribunal.com/history.php (accessed May 15, 2013).
[107] Samia Bano, "In Pursuit of Religious and Legal Diversity: A Response to the Archbishop of Canterbury and the 'Sharia Debate' in Britain," *Ecclesiastical Law Journal* 10, no. 3 (2008): 285.

them to English county or high courts for enforcement.[108] As the courts have previously explored in matters of arbitration, it is clear that any arbitration decisions made by the MAT must be in line with the principles of UK law, otherwise they will be entirely incompatible and invalid. The MAT claim that they operate "within the legal framework of England and Wales thereby ensuring that any decision reached by the MAT can be enforced through existing means of enforcement".[109]

Following the establishment of MAT, which preceded the infamous lecture by the Archbishop of Canterbury in 2008, there has been significant public debate about the level of legal recognition or accommodation that should be afforded to minority religious groups.[110] The possibility of Sharia tribunals or courts is viewed by some (including Archbishop Williams' predecessor Lord Carey) as a threat to the Christian values that are inherent to the British legal system – which became very obvious in the criticism that followed the Archbishop's statements, where it was assumed that he was referring specifically to accommodation of Sharia.[111] Similarly, it is argued that Islam and the liberal democratic values of British society and government are incompatible, so even accommodation in this way could be problematic.[112] In terms of women's rights, feminists (for example, Julie Bindel) argue that the operation of Sharia councils is bad for women as it reinforces the patriarchal values that are embedded within the religion and its principles.[113] These arguments echo sentiments raised by Okin's opposition to multiculturalism, that minority women are placed in disadvantageous positions within their cultural and religious groups. As such, with the existence of Sharia councils or tribunals within British-Muslim communities, women may feel pressured or coerced into participating in arbitration, rather than choosing to go directly to the UK court system for redress and settlement of family law matters.[114]

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[108] Robert Blackett, "The status of 'religious courts' in English law," *Decisions, Decisions: Disputes and International Arbitration Newsletter* (2009), 13, cited in Bano, *Muslim Women and Shari'ah Councils*, 239.
[109] Muslim Arbitration Tribunal, *Muslim Arbitration Tribunal*, http://www.matribunal.com/why-MAT.php (accessed May 15, 2013).
[110] Simon Robinson and Paul Wetherly, "Secularism and the Accommodation of Religious Law: Reflections on Rowan Williams' Lecture," in *Islam in the West*, eds. Max Farrar et al., (Basingstoke: Palgrave Macmillan, 2012), 65.
[111] Ibid.
[112] Ibid.
[113] Bano, *Muslim Women and Shari'ah Councils*, 246; Ralph Grillo, *Muslim Families, Politics and the Law: A Legal Industry in Multicultural Britain* (Surrey: Ashgate, 2015), 131.
[114] Bano, *Muslim Women and Shari'ah Councils*, 246

Furthermore, the decisions issued by these arbitration tribunals (like MAT) or the more informal councils, may not align with civil rights and the secular legal system in terms of divorce – as Islamic principles differ in what husbands and wives may be entitled to.[115] In response to these concerns, which have been raised publically regularly since 2008, there has been the establishment of conservative, right-wing group Sharia Watch UK founded by Anne Marie Waters (formerly a member of the group One Law For All) in 2014,[116] a body which monitors developments in Sharia in the UK and is stated to be a "resistance" that observes, records and comments on the apparent "non-benign influence Islam" is having on British society.[117] This follows the 2012 proposal by Baroness Cox (who has been a prominent anti-Sharia advocate) of the *Arbitration and Mediation Services (Equality) Bill*. The Bill addressed two concerns, gender discrimination in the context of quasi-legal systems, and the operations and existence of these quasi-legal systems themselves, resolving disputes under the provisions of the *Arbitration Act*.[118] Despite not referring specifically to Sharia, the proposal came at a time of heated public debate around Sharia, and since it targeted the apparent inequalities for women in community operated arbitration tribunals, it implied that Sharia was the primary concern of the Bill.[119] The Bill aimed to "limit the legality" of Sharia law, specifically in the way it applied to Muslim women.[120] Ultimately, the Bill has been unsuccessful, having failed to pass through Parliament four times since it was first introduced in 2011.[121]

Despite these concerns and efforts to prevent the "rise of Sharia" in the UK, it appears that religious arbitration is accommodated to a certain extent, as long as it complies with the provisions of the arbitration legislation. There have also been initiatives by

[115] Ibid.
[116] Hilary Aked, "Sharia Watch and the Metamorphosis of Anne Marie Waters," *Institute of Race Relations*, January 21, 2015, http://www.irr.org.uk/news/sharia-watch-uk-and-the-metamorphosis-of-anne-marie-waters/ (accessed on October 5, 2016).
[117] Charlie Klendjian, "Launch of 'Sharia Watch UK'," (speech, House of Lords, London, April 24, 2014) https://lawyerssecularsociety.files.wordpress.com/2013/04/sharia-watch-uk-speech-24-apr-14.pdf (accessed on December 29, 2014).
[118] Frank Cranmer, "Sharia law, the Arbitration Act 1996 and the Arbitration and Mediation Services (Equality) Bill)," *Law and Religion UK*, October 24, 2012, http://www.lawandreligionuk.com/2012/10/24/ (accessed on November 3, 2015).
[119] Ibid.
[120] Salim Farrar and Ghena Krayem, *Accommodating Muslims under Common Law* (Milton Park: Routledge, 2016), 29.
[121] Amin Al-Astewani, "Why has Baroness Cox's Bill failed to become law," *Law and Religion UK*, April 4, 2016, http://www.lawandreligionuk.com/2016/04/04/why-has-baroness-coxs-bill-failed-to-become-law/ (accessed on June 4, 2016).

Muslim women, such as the proposal of female-led mosques which intend to also offer services including divorce and legal advice.[122] This challenges the arguments that are oft-cited about Muslim women being oppressed and not wanting Sharia to be accommodated; it shows the other side of the argument, where some Muslim women welcome an avenue through which they can follow both the requirements of the religious beliefs, but also the laws of the State. Ultimately, there are Muslim women on both sides of the debate. For many devout Muslim women in the UK, the main reason to support the idea of accommodating religious divorce, and approach a Sharia council when seeking a divorce is the desire to ensure that they are religiously divorced (in addition to a civil divorce where the marriage is registered with the state).[123] However, there are groups of Muslim women, in addition to liberal non-Muslim feminists who oppose Sharia, with groups such as Women Living Under Muslim Laws (an international network established in 1984) supporting Cox's proposed Equality Bill.[124] In 2015, the Home Secretary at the time, Theresa May, announced that the government would set up an independent investigation into Sharia councils in the UK. The review was launched on the 26th of May 2016, chaired by Professor Mona Siddiqui, to investigate the compatibility of Sharia law with the law of England and Wales.[125] The review was launched as part of a broader "approach to tackling extremism" by the UK Government.[126] As Salim Farrar and Ghena Krayem note, the review is "extraordinary" as political leaders have consistently reiterated that Sharia is not officially recognised by the State, and merely operates within the realm of private dispute resolution.[127] Launching a governmental inquiry into Sharia suggests that it is accommodated by the State, even if this accommodation is unintentional (through the existence of broad arbitration provisions) and has not been formally sanctioned.

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[122] See Aisha Gani, "Muslim group to consult on plans for Britain's first women's mosque," *The Guardian*, May 13, 2015, https://www.theguardian.com/world/2015/may/12/muslim-womens-council-mosque-plans-teaching-uk (accessed December 2, 2015); and Aisha Gani, "Meet Bana Gora, the woman planning Britain's first female-managed mosque," *The Guardian*, August 1, 2015, https://www.theguardian.com/lifeandstyle/2015/jul/31/bana-gora-muslim-womens-council-bradford-mosque (accessed December 2, 2015).

[123] Samia Bano, "Muslim Family Justice and Human Rights: The Experience of British Muslim Women," *Journal of Comparative Law* 2, no. 2 (2007): 48.

[124] Grillo, *Muslim Families, Politics and the* Law, 210.

[125] Home Office and Theresa May, "Independent review into sharia law launched," *GOV.UK*, May 26, 2016, https://www.gov.uk/government/news/independent-review-into-sharia-law-launched (accessed July 16, 2016).

[126] Farrar and Krayem, *Accommodating Muslims under Common Law*, 30.

[127] Ibid.

Sharia Councils and Tribunals in the UK

Sharia Councils in the UK are informal religious-based institutions that are uniquely British, as they have not arisen in the same way in other Western states (like Australia and Canada). There are also the Sharia tribunals, like the MAT, which claim to have jurisdiction under the UK's *Arbitration Act* of 1996 – thus they appear slightly more formal than the Councils. Both the Sharia councils and tribunals are unlike the Sharia legal institutions that operate within Muslim majority states, where Sharia is an integral and central part of the state institutional structure and operation. These British Sharia councils and tribunals attempt to bridge the gap between Islamic legal traditions and norms, and the state legal system.

Sharia Councils and Tribunals – what are they?

One definition of Sharia councils is that they are "unofficial legal bodies specialising in Muslim family law and providing advice and assistance to Muslim communities" on personal matters such as inheritance, marriage and divorce.[128] The informal nature of Sharia councils in Britain has meant that it is hard to gauge an exact number that are currently operating within Muslim communities. It was estimated in 2009, that approximately 85 Sharia councils were in operation, a statistic that was then perpetuated by the media.[129] This number differs to that published within a Ministry of Justice report, which identified 30 councils.[130] Regardless what the exact number may be, it is thought that the origins of these uniquely British Sharia councils dates back to the 1970s and 1980s (aligning with the emergence of state multicultural policies).[131] One of the first Sharia councils is thought to have been established in 1978 by Zaki Badawi, who along with a group of imams, resolved issues of Islamic laws at the Regent's Park Islamic Centre.[132]

[128] Samia Bano, "Muslim Dispute Resolution in Britain: Towards a New Framework of Family Law Governance?" in *Managing Family Justice in Diverse Societies*, eds. Mavis Maclean and John Eekelaar (Oxford: Hart Publishing, 2013), 67.
[129] Denis MacEoin, "Sharia Law or 'One Law For All'?" in *Sharia Law or 'One Law For All'*, ed. David G Green (London: Civitas, 2009), 69; Grillo, *Muslim Families, Politics and the Law*, 144.
[130] Bano, *An exploratory study of Shariah councils in England with respect to Family Law*, 5.
[131] Bano, *Muslim Women and Shari'ah Councils*, 85.
[132] Grillo, *Muslim Families, Politics and the Law,* 17.

In terms of the general structure and procedures within these Sharia councils, insight is available from a number of academic studies that have interviewed and observed the workings of some councils. However, these are not extensive and do not cover all councils, which would arguably differ as there is no standardised and generally accepted format of these councils. Presumably the councils would be divided in practice based on the different schools of Islamic thought they subscribe to (as they are often closely associated with mosques),[133] as well as along ethno-cultural community lines. The councils and tribunals also differ in the fact that some, like the Muslim Arbitration Tribunal and Islamic Sharia Council, claim to operate under the *Arbitration Act 1996* (UK), and thus are more formal in their set-up and operation.[134] Sharia councils and tribunals both tend to have "judges" who are typically religious leaders within the community, and they are the ones to mediate and arbitrate disputes, and dispense advice on religious matters. These individuals are not always trained Islamic scholars and jurists, and may often include "lay people".[135] Bano conducted interviews along with observing certain Sharia councils. The findings of this research sheds light on the general process that may occur within the councils (keeping in mind that there is no overarching formula for structure and processes). For instance, the councils generally have two to three primary advisors that work in conjunction with a council of religious scholars (that varies in size, from five to twelve); the councils may meet monthly and in these meetings, consider divorce applications amongst other matters.[136] Divorce cases are the main cases brought before Sharia councils and tribunals, with women the primary applicants approaching the councils and tribunals for advice and decisions on Islamic divorce.[137]

[133] Ibid., 19. Here, Grillo also notes that the councils differ in outlook and there may be a rivalry (of sorts) amongst them.
[134] Ashley Nickel, "Abusing the System: Domestic Violence Judgements from Sharia Arbitration Tribunals Create Parallel Legal Structures in the United Kingdom," *The Arbitration Brief* 4, no. 1 (2014): 101.
[135] Gillian Douglas et al., *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* (Cardiff: Cardiff University, 2011), 142.
[136] Bano, *Muslim Women and Shari'ah Councils*, 101.
[137] Nickel, "Abusing the System," 94; Grillo, *Muslim Families, Politics and the Law*, 19.

As FI theorists would argue, institutions both formal and informal do not emerge or develop in a vacuum. They are the product of temporal and spatial contexts.[138] As such, Sharia councils and tribunals as informal institutions are "nested" within the particular contexts in which they emerge and are embedded. These institutions are not only carrying patriarchal traditions and gender hierarchies that emerge from the religious norms and customs, as well as from the behaviours of the actors (namely the religious leaders running these councils); but they are also at risk of inheriting gender norms from external institutions (specifically, the formal state institutions, as well as other religious institutions that have contributed to the "space" that has seemingly been created for Sharia institutions in the UK).[139]

The family laws and arbitration provisions that some of these councils use to situate themselves within the British legal landscape are riddled with inherent gender biases and hierarchies that can work to reinforce patriarchal traditions and attitudes within religious organisations. This includes within Sharia councils and the way they view and treat Muslim women who are seeking justice in personal legal matters (particularly divorce). There have been suggestions of incorporating or accommodating religious laws within the legal system either, through the operation of Sharia councils but with greater state oversight; or by incorporating religious principles within state family law. However, the inherent gender hierarchies within the informal (religious) institution cannot be completely removed, and with the gender hierarchies that operate within state institutions, they will merely work to reinforce the biases that arise in this institutional landscape. This brings us to a crossroads, where there is no clear way to overcome the gender inequalities that both these options present (but a solution for which is beyond the scope of the discussion in this thesis).

[138] Louise Chappell, "'New', 'Old,' and 'Nested' Institutions and Gender Justice Outcomes: A View from the International Criminal Court," *Politics and Gender* 10 (2014); Louise Chappell, *The Politics of Gender Justice at the International Criminal Court* (New York: Oxford University Press, 2016).
[139] This is discussed in Chapter Ten.

Conclusion

Whilst the UK adopted policies of multiculturalism around the same time as Canada, the experiences in implementing policies of multiculturalism differ. Significant differences include the more "localised" nature of multiculturalism in the UK (which will be discussed in more depth in Chapter Nine), and the fact that unlike Canada and Australia, the UK has not had to grapple with the matter of recognising and accommodating Indigenous communities. Similarly, the establishment of Sharia bodies in the UK has not been mirrored in Canada or Australia. Any unofficial Sharia courts, councils or tribunals in these states are not visible, and operate "in the shadows", despite similar political and legal traditions. With some Sharia institutions (namely the MAT) drawing on the UK's *Arbitration Act* for authority and jurisdiction to carry out dispute resolution, this offers yet another contrast to the Canadian experience – where Ontario's arbitration legislation was amended to rule out any possibility of religious-based arbitrations. Despite recent equality reforms in the UK, within the Sharia debates that emerged in recent years (after the Archbishop of Canterbury's speech in 2008, and the proposed Bills by Baroness Cox), there has not been as strong a preference afforded to gender equality over religious freedom. This diverges from the Canadian experience, where there was an implicit preference of gender equality over religious freedom triumphed in the campaign opposing the Sharia proposal by the IICJ in Ontario (this will also be further explored in Chapter Nine).

CHAPTER EIGHT

The Political and Legal Landscape in Australia

In the previous two chapters I examined the political and legal contexts in Canada and the UK, and contrasted the experiences with Sharia in both states. In this chapter I offer a similar exploration of the Australian context, to draw out the similarities and contrasts between the Australian political and legal systems and these other two jurisdictions. Like Canada and the UK, Australia has implemented policies of multiculturalism, and protects a freedom of religion. I outline the development of multiculturalism in Australia, and the extent to which religious freedom has been implemented and upheld by the courts. In terms of differences, the most significant distinctions between Australia and the other two states arise in regard to the lack of a comparable arbitration provision, and the Sharia debate itself. The Sharia debate in Australia is underdeveloped compared to those that have arisen and been discussed publically and politically within Ontario, Canada, and the UK. Whilst there have been controversies around halal certification and the "threat" of Sharia, these have predominantly unfolded in the media, with no official inquiry or report commissioned by the federal or state governments.

Political Background

The Australian governmental structure is one of federalism, similar to Canada, where there is a federal government alongside the governments of states and territories. There are six states and two federal territories (which fall under the jurisdiction of the federal government). The government and legal framework of Australia under this federalist approach was established by the *Commonwealth of Australia Constitution Act* of 1900 ('The Constitution'), which came into effect on January 1st, 1901. The Constitution, like the Canadian Constitution, outlines the separation of powers between the federal and state governments. This separation of powers is explicitly listed in section 51 of The Constitution, noting that tax, currency, trade and commerce are exclusively within the federal jurisdiction. It also includes marriage, as well as "divorce and matrimonial causes; and in relation thereto, parental rights, and the

custody and guardianship of infants".[1] The Federal government also has the power to make "special laws" for "the people of any race, for whom it is deemed necessary to make special laws".[2] Outside of these explicitly outlined federal powers, state governments are able to make legislation; however, "where inconsistent with the law of the Commonwealth, the latter shall prevail".[3]

Religion and the State

Australia has a clear separation between the state and religion (and therefore an inferred right to religious freedoms), which is outlined in section 116 of The Constitution, which notes:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

This is similar to the separation between church and state in Canada, but differs to the UK, where the Church of England is an inherent part of the state institutional structure. However, despite this explicit separation of church and state, the reality is one where the Australian Head of State (Queen Elizabeth II) is a member of the Anglican Church.[4] Similarly, the Preamble of the Constitution states "Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite…", which indicates a religious undertone to the establishment of the Australian federation, despite the apparent separation between church and state.[5] In the early years of colonisation, the Church of England was inherited and transplanted from Britain, having a significant influence on social and political issues over the years. However, the Roman Catholic Church has since become the most influential church and dominant religion in Australian society.[6]

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[1] *Commonwealth of Australia Constitution Act 1900*, s.51 (xxi)-(xxii).
[2] Ibid., s.51 (xxvi).
[3] Ibid., s. 109.
[4] James T Richardson, "Minority Religions ('Cults') and the Law: Comparisons of the United States, Europe and Australia," *University of Queensland Law Journal* 18, no. 2 (1995): 196-197.
[5] *Commonwealth of Australia Constitution Act 1900*, Preamble.
[6] Tom Frame, *Church and State: Australia's Imaginary Wall* (Sydney: UNSW Press, 2006), 48.

The Australian Constitution separates powers between the three branches of government: the Executive, Parliament and Judiciary. The Judiciary is independent from the Executive and Parliament.[7] Prior to 1986, the UK Parliament had the ability to legislate in Australia, and cases from Australian courts could go on appeal to British courts. However, with the introduction of the *Australia Acts* (*Australia Act 1986 (Cth) and Australia Act 1986 (UK)*), these provisions were eliminated; making the High Court of Australia (the High Court), the highest judicial institution and court of appeal in Australia. The High Court was established under section 71 of The Constitution, and has both original and appellate jurisdiction:

> The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.[8]

The original jurisdiction of the High Court consists of deciding questions of legal and constitutional interpretation.[9] Whilst the jurisdiction of the court is outlined in The Constitution, the structure and operation of the Court is regulated by the *Judiciary Act 1903* (Cth).[10]

In addition to the High Court, there are several other federal courts in Australia. These include: the Federal Court of Australia, which hears matters in a range of commercial matters, including appeals from the Federal Circuit Court. The Federal Circuit Court of Australia (formerly known as the Federal Magistrates Court) hears matters such as "family, administrative, bankruptcy and industrial relations".[11] The Family Court of Australia is another federal court that specifically deals with family disputes, in addition to hearing appeals from decisions in family law matters from the Federal

[7] Commonwealth Attorney-General's Department, "The courts," *Attorney-General's Department*, http://www.ag.gov.au/legalsystem/courts/Pages/default.aspx (accessed on July 17, 2015).
[8] *Commonwealth of Australia Constitution Act 1900*, s.71.
[9] Ibid., s.73. (Section 73 also outlines the appellate jurisdiction of the High Court).
[10] Commonwealth Government of Australia, High Court of Australia, "History of the High Court," *High Court of Australia*, http://www.hcourt.gov.au/about/history (accessed on July 10,2015).
[11] Federal Court of Australia, *Federal Court of Australia*, http://www.fedcourt.gov.au (accessed on July 10, 2015); and Federal Circuit Court of Australia, *Federal Circuit Court of Australia*, http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/home (accessed on July 10, 2015).

Magistrates Court. (this court sits in each state and territory, except for Western Australia, which has its own state-based Family Court).[12] The Family Court hears matters concerning parenting – such as, child welfare and residential arrangements after divorce and separation – in addition to financial cases, and was established in 1975 under the provisions in Chapter III of The Constitution.[13] Outside of this network of federal courts, each state and territory has its own laws and court system. The highest courts in the state jurisdictions are Supreme Courts, which are appeal courts and can refer cases on to the High Court. Below these Supreme Courts are the District and Local Courts, which operate alongside tribunals (for example, the NSW Civil and Administrative Tribunal).[14]

Multiculturalism

The development of a policy of multiculturalism in Australia began in the 1970s, following soon after the multicultural conversations began in Canada and the UK. There are many similarities between the Canadian and Australian jurisdictions, as Australia's "White Australia Policy" that was in place from federation until the end of the 1960s is similar to Canada's "White Immigration" policies. So, it is not surprising that at a time when both countries were experiencing a shift in migration patterns that both were also navigating a move towards multiculturalism. Presumably, there would have also been a strong influence as both countries are a part of the Commonwealth, and have inherited British traditions in terms of government and judicial structures.

The "White Australia Policy", a policy of assimilation, was in force from Federation (in 1901) until the end of the 1960s, and was based on concepts of ethnicity, race and religion that were inherited from the UK.[15] With the majority of the "settler" population of Anglo-Celtic/Saxon (mostly Irish) descent, the colonisation of Indigenous peoples led to the "White Australia Policy" and an expectation that Indigenous Australians conform to the "British" expectations, values and way of life

[12] Family Court of Australia, *Family Court of Australia*, http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/ (accessed on July 11, 2015).
[13] Ibid.; and *Commonwealth of Australia Constitution Act 1900*, Chapter III.
[14] State of New South Wales Department of Justice, "Courts and Tribunals," *NSW Government Justice*, http://www.courts.justice.nsw.gov.au/ (accessed on March 2, 2016); and Commonwealth Government of Australia, "The courts."
[15] Anthony Moran, "Multiculturalism as nation-building in Australia: Inclusive national identity and the embrace of diversity," *Ethnic and Racial Studies* 34, no. 12 (2011): 2156.

transported from Britain. In the period pre-World War II (WWII), immigration was viewed as a necessity (economically), but migrants were expected to assimilate into "Australian society", which was predominantly Anglo-Celtic. Most migrants were of a European background, as the government carefully controlled a selection of who would be allowed to settle permanently in Australia.[16] Following WWII, there was a strong need for immigration for economic purposes, but there was also a humanitarian need to help those affected in post-war Europe.[17] A post-war mass immigration program that was centred firmly on assimilationism was implemented by the Labor Government at the time; and within the institutional framework of the government, a Department of Immigration was created in 1945 (along with a Minister for Immigration) to help manage and implement the migration/assimilation policy.[18] The assimilation policy towards migrants settling in Australia from other countries follows a long history of assimilation and integration in regards to Indigenous Australians; which is an important parallel narrative that was playing out at the same time the "issue" of migration and social integration was being discussed during the years of the White Australia Policy.[19]

From the mid-1960s there began a shift away from the "White Australia Policy". The changing international environment in part influenced this abandonment of the policy.[20] Particularly, the significant rise in global migration meant that Western countries, including Australia, were pressured to accept and resettle migrants from countries they previously did not (under White Australia, the focus was primarily on migrants from European backgrounds).[21] As a result, throughout the 1960s and 1970s there were a large number of migrations from Asia.[22] This was also accompanied by shifts in trade and defence relationships, where Australia moved away from only focusing on the UK to develop alliances and relationships in the Asia-Pacific region.[23] These changes in the Australian social landscape were reflected in political changes,

[16] Mark Lopez, *The Origins of Multiculturalism in Australian Politics* (Carlton South: Melbourne University Press, 2000), 43.
[17] Ibid., 44.
[18] Ibid., 45-46.
[19] Robert van Krieken, "Between assimilation and multiculturalism: models of integration in Australia," *Patters of Prejudice* 46, no. 5 (2012): 501; 511.
[20] Jatinder Mann, "The introduction of multiculturalism in Canada and Australia," *Nations and Nationalism* 18, no. 3 (2012), 493.
[21] Lopez, *The Origins of Multiculturalism in Australian Politics*, 68.
[22] Mann, "The introduction of multiculturalism in Canada and Australia," 494.
[23] Lopez, *The Origins of Multiculturalism in Australian Politics*, 69.

with politicians realising that the continued exclusion of various racial and ethnic groups would further isolate Australia from its neighbouring countries, but also damage Australia's profile and reputation in the increasingly globalised world, dealing with the changing post-colonial landscape.[24]

In conjunction with these international influences that encouraged a move away from policies of assimilation, there were a number of domestic factors that moved towards a more multicultural Australia. For instance, the traditional "Britishness"-based conception of Australian identity was changing with the existence of a more ethnically diverse population (a result of shifting immigration policies).[25] These cultural and social shifts within Australian society, and demographic diversification, were accompanied by a more intensified activist movement and protests by Indigenous Australia communities in the late 1960s; ultimately contributing to a more "multicultural reality of Australia".[26] The integrationist approach in governmental immigration policies was slowly replaced with multiculturalism, following this shift towards a "multicultural ideology in Australian consciousness".[27] This growing emphasis on supporting and developing migrant cultures within Australian society was far more prominent, than with the development of multiculturalism in Canada. This primarily resulted from the fact that the Canadian political and social landscape was concurrently dealing with issues of multiculturalism aside the overarching issues stemming from the bicultural settler history underlying discussions of national identity and unity.[28]

The first conceptions of multicultural governmental policy are attributed to the Whitlam Labor Government, with the term multiculturalism being introduced into political rhetoric.[29] It appeared that Gough Whitlam (the Prime Minister at the time) could see that with the retreat from this national identity based on Britishness there needed to be a new approach to nationalism.[30] This led to the rise of a "new nationalism" that was never really explicitly defined, despite multiple iterations of the

[24] van Krieken, "Between assimilation and multiculturalism," 507.
[25] Lopez, *The Origins of Multiculturalism in Australian Politics*, 73.
[26] Moran, "Multiculturalism as nation-building in Australia," 2158.
[27] Mann, "The introduction of multiculturalism in Canada and Australia,"495; 498.
[28] Ibid., 498.
[29] Ibid., 495.
[30] Ibid., 493.

term in news media and political statements. For example, a 1973 edition of *The Australian* newspaper published the term but never attempted to outline its meaning with any detail or specificity.[31] Ultimately, during the Whitlam years a multicultural approach was developed, but was never promoted as official governmental policy. The term 'multiculturalism' was never explicitly outlined in official statements but was implied, by describing Australia as a multicultural society.[32] This move towards such an approach was seen in common rhetoric around "the family of the nation", a term put forth by Al Grassby, the Minister for Immigration during the Whitlam Government.[33] Grassby was seen as being the first political figure to bring the term "multiculturalism" into public debate and discussion.[34] In a 1973 speech titled "A Multi-Cultural Society for the Future", Grassby promoted the need for Australia to address the changing demographic of Australian society, accommodating the social and cultural diversity that had accompanied the mass post-WWII migration to Australia. He referred to the "new nationalism" that had cropped up, and noted that the "increasing diversity of Australian society has gradually eroded and finally rendered untenable any prospects there might have been twenty years ago of fully assimilating newcomers to the 'Australian way of life'…"[35] He noted that the reality in Australia was one with "concentration of multiple ethnic groups" in the major cities, that were already economically integrated into society – and that the retention of their "essential ethnic character" bore no threat to Australia's future.[36] Grassby noted the problem that seemed to exist is the image of the "typical Australian", which seemed to focus on the notion of the "bushwhacker", "sportsman" or "slick city businessman", largely ignoring the "Maltese process worker, Finnish carpenter, the Italian concrete layer, the Yugoslav miner" and "Indian scientist" (significantly, all very male archetypes) that make up Australian society and keep the economy running.[37] In highlighting that the most significant resource in the nation is the people, Grassby concluded that:

> The social and cultural rights of migrant Australians are just as compelling as the rights of other

[31] Ibid., 492 – The letter to the editor titled 'Nationalism or Chauvinism' by Douglas Brass was published on the 13th of April 1973. This was followed up with a 1974 series by Robert Drewe on "The New Nationalism: How far are we going?" which critiqued and explored the Whitlam years.
[32] Moran, "Multiculturalism as nation-building in Australia," 2159.
[33] Mann, "The introduction of multiculturalism in Canada and Australia," 494.
[34] van Krieken, "Between assimilation and multiculturalism," 509.
[35] Albert J Grassby, *A Multi-cultural Society for the Future* (Canberra: Australian Government Publishing Service, 1973), 3.
[36] Ibid., 7.
[37] Ibid., 2.

Australians. The full realisation of these rights would lead to reduced conflicts and tensions between the groups which are weaving an ever more complex fabric for Australian society as we hurry towards the turn of the century.[38]

This idea built upon the slogan used during the Whitlam election campaign in 1972, which emphasised the need to accept and value social and cultural diversity within Australian society, and as part of the national identity. In part, a result of the growing Greek and Italian communities and their increasing participation in Australian political and social life.[39]

The shift towards multiculturalism continued long after the departure of the Whitlam government. However, it continued to be multiculturalism in practice rather than official policy. In 1976, the Australian Ethnic Affairs Council was established, which was to advise the government on policy surrounding ethnic affairs. In 1977, the Council's chairperson, Jerzy Zubryzycki, often heralded as the "father of multiculturalism", published the document titled *Australia as a Multicultural Society* – which presented itself as the first official statement of multiculturalism by the government. [40] Following this, the conservative Fraser Coalition Government established a committee to review the services surrounding migrant settlement.[41] Headed by Frank Galbally, the Committee offered an avenue for supporters of multiculturalism to put forth recommendations and seek multicultural reform in official policies. In 1977, the Committee published the Galbally Report, which established (in writing) an underlying principle of multiculturalism, the idea that "every person should be able to maintain his or her culture without prejudice or disadvantage".[42] The Report noted that Australian citizenship and cultural diversity should not be separated but in fact should be viewed as assets to one another:

Provided that ethnic identity is not expressed at the expense of society at large, but is interwoven into the fabric of our nationhood by the process of multicultural interaction, then the whole community as a whole will benefit substantially and its democratic nature will be reinforced.[43]

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[38] Ibid., 9.
[39] van Krieken, "Between assimilation and multiculturalism," 509.
[40] Lopez, *The Origins of Multiculturalism in Australian Politics,* 444.
[41] Ibid.
[42] Frank Galbally, *Migrant Services and Programs* (Canberra: Australian Government Publishing Service, 1978), 1; van Krieken, "Between assimilation and multiculturalism," 509.
[43] Galbally, *Migrant Services and Programs*, 3; van Krieken, "Between assimilation and multiculturalism," 509.

Essentially, the report promoted the benefit of accepting multiculturalism as an official policy. Recognising that the ethnic diversity of individuals could bring new perspectives and contributions to Australian society. Ultimately, the recommendations outlined in the Report, encouraging a more multicultural approach, were accepted by the Fraser Coalition government – marking the introduction of official state multicultural policies. In a parliamentary speech on 30th of May 1978, Prime Minister Malcolm Fraser announced that there was a need to promote intercultural understanding, and to do so would involve a change in the services offered to migrants upon settlement in Australia.[44] This need for greater intercultural understanding was driven not only by increased migration but a refugee policy instituted during the Fraser leadership – focused on the Indochinese refugee crisis in the region, and resettling a number of refugees from Vietnam and Cambodia. There was a need for a move away from the White Australia policy in order to establish better political relationships with regional neighbours in the East and South East Asia.[45]

With the establishment of official policies of multiculturalism in the late 1970s, the 1980s saw the development of multiculturalism. In 1989, the Hawke Labor Government released a policy statement on multiculturalism, titled *National Agenda for a Multicultural Australia* (*National Agenda*), which stated that Australia was now a multicultural society.[46] The unique Australian identity that had developed was attributed, by the statement, to the "diversity, and the degree of interaction between different cultures".[47] Underlying this policy of multiculturalism is a notion of inclusiveness. This was outlined by the *National Agenda* in the statement of the three key "dimensions" of multicultural policy – cultural identity, social justice, and economic efficiency:

- *cultural identity* – the right of all Australians, within carefully defined limits, to express and share their individual cultural heritage, including their language and religion;

[44] Mann, "The introduction of multiculturalism in Canada and Australia," 496.
[45] Malcolm Fraser, "Liberals and Australian Foreign Policy," *Australian Journal of Politics and History* 51, no. 3 (2005): 340.
[46] Moran, "Multiculturalism as nation-building in Australia," 2160.
[47] Office of Multicultural Affairs, *National Agenda for a Multicultural Australia*, p. 6 (1989); Moran, "Multiculturalism as nation-building in Australia," 2160.

- *social justice* – the right of all Australians to equality of treatment and opportunity, and the removal of barriers of race, ethnicity, culture and religion, language, gender or place of birth; and
- *economic efficiency* – the need to maintain, develop, and utilize effectively the skills and talents of Australians, regardless of background.[48]

Government policy in the 1990s (under the Keating Labor government) followed this "multicultural approach". The term "Australian multiculturalism" was often employed to highlight its importance, the focus on unity, and the underlying significance of multiculturalism in defining national identity as the years progressed.[49] However, in conjunction with this reiteration of Australia as a multicultural society, the Howard coalition government's election into office in 1996 saw a stall in the adoption of a multicultural approach to policy-making. The Howard government was concerned with countering what it saw as past "politically correct" policies of inclusion. This rhetoric intensified, particularly with the rise of Islamophobia that accompanied the discussion surrounding asylum seekers during the 2001 federal election (asylum seekers who happened to be predominantly of Middle Eastern origin, and thus largely Muslim).[50] The then PM John Howard stated that the reason he did not employ the term multiculturalism often was because it had "been used in a very zealous…mushy fashion by some over the years."[51] In the years post-9/11 there has been a shift in attitudes towards multiculturalism in Western liberal democracies.

There has been a rise of Islamophobia both in social and political attitudes, as has happened in Canada, as well as in the UK. It is evidenced in arguments put forward by political representatives that reference Islam and terrorism, and has manifested itself in policies and laws surrounding counter terrorism, that appear to specifically target Muslim communities, in addition to justifying a "retreat" from multiculturalism. This apparent "retreat from multiculturalism" is argued to be taking place in Australia.[52]

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[48] Office of Multicultural Affairs, *National Agenda for a Multicultural Australia: Sharing our Future* (Canberra: Office of Multicultural Affairs, 1989), vii.
[49] Moran, "Multiculturalism as nation-building in Australia," 2161-2162.
[50] Scott Poynting, "The Attack on 'Political Correctness': Islamophobia and the Erosion of Multiculturalism in Australia Under the Howard Regime," *Social Alternatives* 27, no. 1 (2008): 8.
[51] Ghena Krayem, "Multiculturalism and Its Challenges for Muslim Women," in *Challenging Identities: Muslim Women in Australia,* ed. Shahram Akbarzadeh (Melbourne: Melbourne University Press, 2010), 116.
[52] Joshua M Roose and Adam Possamai, "Between Rhetoric and Reality: Shari'a and the Shift Towards Neoliberal Multiculturalism in Australia," in *Cultural, Religious and Political Contestations*, ed. Fethi Mansouri (Switzerland: Springer International Publishing, 2015), 91.

However, arguments for a retreat are not limited to discussions of terrorism and the incompatibility with Islamic extremism and multiculturalism, but also include asylum seeker policies, with the reasoning that we must protect Australian society and one way to achieve this is tightening immigration policies (which includes refugee and asylum seeker policies). Despite the public declaration of support for multiculturalism by both major political parties in recent years, there is a "pattern of retreat".[53] One argument highlighting this retreat is that the previous approach of multiculturalism in Australia appeared to be based on a "consent" approach, whereby the state supported migrant communities in settling and adapting in Australian society, whilst maintaining their unique cultural and ethnic identity. This has since been replaced with a "new integrationism" in which integration now appears to be forced upon migrant communities; one of the primary reasons for this again goes back to the post-9/11 political climate, in which the state is seen as imposing itself within matters of religion and cultural.[54] One of the most significant ways in which this "new integrationism" or "retreat" is being evidenced, is in the change in state migration policies, including asylum seeker policies.[55] Similarly, the rise in anti-terror legislation has had an impact on Australian multiculturalism, with Australia passing more anti-terror legislation than anywhere else in the world (since 9/11), which has led to the targeting of specific religious and cultural groups.[56] In contrast to these arguments that there is a "retreat" from multiculturalism, a study of Australia's place on the "multicultural policy index" suggests that amongst Western liberal democracies, Australia has one of the strongest multicultural policies, and that this place has been consistent over the past decade.[57] The most current iteration of the Australian government's multicultural policy was developed in 2011 is *The People of Australia: Australia's Multicultural Policy*, and clearly states that the government is committed to a multicultural nation, as it is in the

[53] Ibid., 93.
[54] Scott Poynting and Victoria Mason, "The New Integrationism, the State and Islamophobia: Retreat from multiculturalism in Australia," *International Journal of Law, Crime and Justice* 36 (2008): 232. This idea is also discussed by Roose and Possamai, "Between Rhetoric and Reality," 93; as well as Moran, "Multiculturalism as nation-building in Australia," 2153
- who discusses multiculturalism as a "failed experiment".
[55] James T Richardson, "Managing minority religious and ethnic groups in Australia: Implications for social cohesion," *Social Compass* 60, no. 4 (2013): 580.
[56] Ibid., 582.
[57] Keith Banting and Will Kymlicka, "Is there really a retreat from multiculturalism policies? New evidence from the multiculturalism policy index," *Comparative European Politics* 11, no. 5 (2013): 8.

national interest to uphold multiculturalism by respecting the diversity in culture, languages and religion.[58]

Australia shares many parallels to Canada and the UK in terms of multiculturalism. All three nations experienced the rise of multiculturalism as a state policy and attitude on a similar timeline – with Canada and Australia both moving away from the embedded notion of Britishness inherited from their roots as British colonies. Both nations had a slow trajectory towards multiculturalism, though unlike Canada, Australia did not have to contend with the issues of bilingualism and biculturalism that arose from having two concurrent "settler" cultures battling for dominance – British and French.[59] However, Australia and Canada both share a past as a colonies of the British empire, and thus any discussion of multiculturalism happens alongside discussions around the recognition and accommodation of Indigenous communities. Similarly, both countries had a new focus on refugee policy leading them towards multiculturalism in the 1970s.[60] Multiculturalism in Australia was considered a project of nation building in a growing society faced with mass migration of a variety of ethnic groups – a reimagining of the nation of sorts.[61] This parallels with the British experience of constructing a new "post-ethnic" British identity, which was seen as a way in which to both accommodate multicultural diversity, as well as build a common national identity and sense of belonging; uniting both immigrant and non-immigrant individuals and social groups.[62]

Freedom of Religion and Legal Pluralism

Religious exemptions and a freedom of religion are most significantly offered by s. 116 of *The Constitution*, which specifically notes that the Commonwealth "shall not make any law", that prohibits the "free exercise of any religion".[63] The High Court considered section 116 in deciding a 1982 case concerning a custody dispute, and ultimately concluded that section 116 does not even apply to the Court or judicial orders – employing a very narrow interpretation of the constitutional provision, and

[58] Commonwealth Government of Australia, Department of Immigration and Citizenship, *The People of Australia: Australia's Multicultural Policy* (Canberra: Department of Immigration and Citizenship, 2011).
[59] Mann, "The introduction of multiculturalism in Canada and Australia," 497.
[60] Ibid., 497.
[61] Moran, "Multiculturalism as nation-building in Australia," 2154.
[62] Ibid., 2161.
[63] *Commonwealth of Australia Constitution Act 1900*, s.116.

highlighting the apparent weakness of the section 116 religious freedom provision.[64] Thus, in terms of the states, the freedom of religion provision is dependent on individual legislative provisions, or accommodation by state constitutions. Of the states, Tasmania is the only one to offer constitutional protection of freedom of religion, whilst Queensland, Western Australia and Victoria have limited protection under their respective Equal Opportunity legislative provisions.[65] The Tasmanian *Constitution Act 1934* specifically provides for religious freedom under section 47, which states that a "freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen".[66] Meanwhile, the Queensland *Anti-Discrimination Act 1991 (Qld)* and the Victorian *Equal Opportunity Act 2010 (Vic)* both address discrimination on the basis of "religious belief or activity".[67] Victoria additionally introduced the *Racial and Religious Tolerance Act* 2001, the purpose of which is to offer redress to victims of racial or religious vilifications, but also "to promote racial and religious tolerance by prohibiting certain conduct involving the vilification of persons on the ground of race or religious belief or activity".[68] NSW has the *Anti-Discrimination Act 1977*, but unlike its counterparts in other states and territories, it does not specifically protect from religious discrimination, it merely notes that "race" for the purposes of the Act may include ethno-religious origin.[69] Additionally, the Australian Capital Territory (ACT) and Victoria have Human Rights Acts which also protect freedom of thought, conscience, religion and belief. In fact, the ACT was the first Australian jurisdiction to adopt the legislative provision.[70]

At the federal level, there are several legislative provisions providing specifically for protection from discrimination based on religion. The *Racial Discrimination Act 1975* (Cth) (*RDA*) legislates against offensive behaviour that is driven by the "race, colour or national or ethnic origin" of an individual or group.[71] This is a limited protection offered where a religious group might also be classed as an "ethnic" group for the

[64] Richards Richardson, "Minority Religions ('Cults') and the Law," 198.
[65] Ibid.
[66] *Constitution Act 1934* (Tas), s.46(1).
[67] *Anti-Discrimination Act 1991* (Qld), s.7(i); and *Equal Opportunity Act 2010* (Vic), s.6(n).
[68] *Racial and Religious Tolerance Act 2001* (Vic), s.1(a)-(b).
[69] *Anti-Discrimination Act 1977* (NSW), s.4.
[70] *Human Rights Act 2004* (ACT); In Victoria the legislation is the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[71] *Racial Discrimination Act 1975* (Cth), s.18C(1)(b).

purposes of the Act.[72] Similarly, in an employment context the *Fair Work Act 2009* covers discrimination that is based on religion, and also refers to the *RDA*, and the state anti-discrimination legislations.[73] With these provisions, it is clear that there is a freedom of religion present within Australia. However, these provisions are not as extensive as those offered in Canada (or even the UK) as there has not been a strong endorsement in the common law, with many judges declaring that any such freedom is limited and restricted in scope – as witnessed by the High Court's interpretation of section 116 of The Constitution.

In terms of legal pluralism, there is no formal legal pluralism in Australia in the realm of personal laws (including family law), which in many ways parallels Canada and the UK. The official line tends to follow the "one law for all" approach adopted in the UK. However, that is not to say that, like Canada and the UK, there is not an informal legal pluralist approach present within the legal system (particularly via judicial decisions). As Voyce and Possamai note, legal pluralism can exist in another sense, one where it operates outside of formal institutions, through non-formal dispute mechanisms.[74] The discussion around legal pluralism and accommodation of other customary or religious laws has been considered in relation to the laws of Indigenous Australians. A report published by the Australian Law Reform Commission (ALRC) in 1986 specifically discussed and recommended recognition of Indigenous customary laws in the realm of family and personal laws – though no such recommendation was made to extend this recognition to other minority cultural or religious groups.[75]

The discussion of legal pluralism surrounding Indigenous customary laws is not a new one, and predates any similar discussions that have arisen in recent years surrounding minority groups requesting accommodation of their religious laws. Prior to the landmark High Court decision in *Mabo v Queensland (No 2)* (*Mabo* case) in 1992, there

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[72] Australian Human Rights Commission, "The *Human Rights and Equal Opportunity Commission Act 1986* (Cth): its application to religious freedom and the right to non-discrimination in employment," *Australian Human Rights Commission*, Last updated March 8, 2006, https://www.humanrights.gov.au/sites/default/files/content/word/human_rights/religion/avoiding_religious_discrimination.pdf (accessed July 17, 2016).
[73] *Fair Work Act 2009* (Cth), s.351(1) and (3).
[74] Malcolm Voyce and Adam Possamai, "Legal Pluralism, Family Personal Laws and the Rejection of Shari'a in Australia: A Case of Multiple or 'Clashing' Modernities?" *Democracy and Security* 7, no. 4 (20119: 341.
[75] Australian Law Reform Commission, *Recognition of Aboriginal Customary* Laws, ALRC Report 31 (1986).

was no legal recognition of Indigenous laws.[76] There had been consideration in earlier cases regarding whether Indigenous Australians had a system of law. Specifically, Justice Blackburn in *Milirrpum v Nabalco Pty Ltd and the Commonwealth* (1971) recognised that there was a system of law, but in following earlier precedent concluded that the Aboriginal people had no proprietary rights.[77] The *Mabo* case acknowledged that there were pre-existing Indigenous land rights (native title).[78] It was determined that the common law would recognise, respect, and protect native title stemming from Indigenous customary laws.[79] This recognition of Indigenous customary laws as they relate to land rights in *Mabo*, was followed up with the *Native Title (Queensland) Act* (*Native Title Act*) in 1993, which recognises that:

> The High Court has:
>
> (a) rejected the doctrine that Australia was terra nullius (land belonging to no-one) at the time of European settlement; and
>
> (b) held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands; and
>
> (c) held that native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates.[80]

Along with this recognition of Native Title in *Mabo* and the *Native Title Act*, there have been other legislative and judicial decisions that recognise Indigenous laws.[81] There have been a number of initiatives between Indigenous communities, and local courts

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[76] Garth Nettheim, "Mabo and legal pluralism: The Australian Aboriginal justice experience," in *Legal Pluralism and the Colonial Legacy*, ed. Kayleen M Hazlehurst (Aldershot: Avebury, 1995), 103.
[77] Ibid., 104.
[78] Mabo and others v Queensland (No 2) (1992); and Nettheim, "Mabo and legal pluralism," 106.
[79] Nettheim, "Mabo and legal pluralism," 107; Bryan S Turner and James T Richardson, "The Future of Legal Pluralism," in *The Sociology of Shari'a: Case Studies from around the World*, eds. Adam Possamai et al. (Switzerland: Springer International Publishing, 2015), 309; Archana Parashar, "Religious personal laws as non-state laws: implications for gender justice," *The Journal of Legal Pluralism and Unofficial Law* 45, no 1. (2013), 569 [Parashar notes that Mabo is not the acceptance of legal pluralism per se, but the assertion of the unquestionable jurisdiction of the state legal system to decide the relevant legal rules].
[80] *Native Title Act 1993* (Cth), Preamble.
[81] Following the *Mabo* decision, the 1996 High Court case of *Wik Peoples v Queensland Government* also found that pastoral leases did not extinguish native title rights. However, under the Howard Coalition Government there was the introduction of the "10-point plan", which introduced amendments to the *Native Title Act* 1993, through the *Native Titles (Amendment) Act* of 1998. The objective of this plan and the subsequent amendments, according to Former Prime Minister Paul Keating, was "bucket loads of extinguishment". See Paul Keating, "The 10-point plan that undid the good done on native title," *Sydney Morning Herald*, June 1, 2011, http://www.smh.com.au/federal-politics/political-opinion/the-10point-plan-that-undid-the-good-done-on-native-title-20110531-1feec.html (accessed on November 3, 2016).

and magistrates to recognise and incorporate Indigenous laws when sentencing, and consulting Aboriginal community "elders" (leaders).[82] This is most visible in Queensland and the Northern Territory, where there are larger communities of Indigenous Australians, and judges have been seen to consider the punishments in customary law when determining the sentence for an offender from an Indigenous background – particularly where the offender has requested consideration of traditional customary punishments, such as spearing, shaming and banishment.[83] The recognition of Indigenous laws in sentencing has been called "a kind of soft legal pluralism",[84] highlighting that despite a lack of formal legal pluralism, following the explicit recognition of Indigenous land rights (which rely upon customary laws and connections) there is an informal legal pluralism that has developed. As the 1986 ALRC Report highlighted there are several ways in which the Australian legislature has recognised Aboriginal traditions (including customary laws), such as:

- the protection of Aboriginal hunting, gathering and fishing rights;
- the recognition of traditional Aboriginal marriages for certain purposes;
- some provision for traditional distribution of property on death.[85]

Similarly, the Report notes the way in which the courts have in various instances considered Aboriginal customary laws and traditions when sentencing, or considering the defence of accused where there is a claim of provocation or duress, for instance.[86]

The question of legal pluralism has arisen in recent years when discussing Sharia law in Australia, and the possibility of it being accommodated in family law (including marriage, divorce, and inheritance), as well as banking and finance law (with regards to interest-free mortgages and lending). The overwhelming response from political representatives is that there is "one law for all". This was stated by the former Treasurer, Peter Costello, in a public address in 2006 where he noted that "There is one law we are all expected to abide by. It is law enacted by the Parliaments under the

[82] Nettheim, "Mabo and legal pluralism," 24-25.
[83] Heather Douglas, "Customary Law, Sentencing and the Limits of the State," *Canadian journal of law and society* 20, no. 1 (2005): 141; Elena Marchetti and Kathleen Daly, "Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model," *Sydney Law Review* 29, no. 3 (2007): 420.
[84] Douglas, "Customary Law, Sentencing and the Limits of the State," 141.
[85] Australian Law Reform Commission, *Recognition of Aboriginal Customary* Laws, Part I.
[86] Ibid.

Australian *Constitution*",[87] a sentiment that has long had the support of both major political parties.[88] The accommodation of Indigenous customary laws and traditions that is viewed as a form of legal pluralism – this "soft" legal pluralism – has not extended to other minority groups in such an overt way; though the legal recognition of religious exemptions could arguably be viewed as another form of informal legal pluralism. However, as discussed in Chapter Two, with the unsettled debates about the exact definition of legal pluralism, this informal legal pluralism is more akin to "reasonable accommodation– where norms and requirements of minority cultures and religions may be recognised or accommodated by the state's legal system (as it does with Indigenous land rights and customs) – and religious exemptions are an example of such accommodation.

Religious exemptions include allowing the establishment and operation of religious schools, which are granted an amount of autonomy by the state to run under the principles and beliefs of their religious order.[89] These institutions, which are often provided government funding, are able to promote their own social and cultural values, and are (in exercising their religious freedom) able to discriminate when it comes to employing staff.[90] In addition to religious institutions being able to opt-out of legislative requirements around non-discrimination in employment matters, religious adoption agencies are able to refuse same sex couples in fostering/adopting children – as happened in the NSW *Wesley Mission* case, where a same sex couple was refused foster caregiver status.[91] The state in funding and allowing private religious-based schools, can be seen as accommodating religious groups, including minority religious groups, as it is not just the majority Christian groups that establish schools, but also Jewish and Islamic communities.

[87] Peter Costello, "Worth Promoting, Worth Defending: Australian citizenship, what it means and how to nurture it," Address to Sydney Institute, 23 February 2006, http://www.petercostello.com.au/speeches/2006/2111-worth-promoting-worth-defending-australian-citizenship-what-it-means-and-how-to-nurture-it-address-to-the-sydney-institute-sydney (accessed September 3, 2016).
[88] Ann Black, "Accommodating Shariah Law in Australia's Legal System: Can we? Should we?" *Alternative Law Journal* 33, no.4 (2008), 215.
[89] Carolyn Evans and Leilani Ujvari, "Non-Discrimination Laws and Religious Schools in Australia," *Adelaide Law Review* 30 (2009): 31.
[90] Ibid., 33.
[91] Paul Babie, "The Place of Religion in Australian Sociolegal Interaction," in *Religion after Secularization in Australia*, ed. Timothy Stanley (New York: Palgrave Macmillan, 2015), 101; and Members of the Board of the Wesley Mission Council v OV and OW (No 2) [2009] NSWADTAP ('*Wesley Mission* case').

Similarly, marriage laws in Australia are accommodating of religious marriage customs. The *Marriage Act 1961* specifically covers ministers of religion (from recognised religious denominations) as a class of authorised celebrants who may solemnise marriage in Australia.[92] In terms of religious marriage ceremonies, the Act specifically notes that:

> Where a marriage is solemnised by or in the presence of an authorised celebrant, being a minister of religion, it may be solemnised according to any form and ceremony recognised as sufficient for the purpose by the religious body or organisation of which he or she is a minister.[93]

Outside of these provisions that accommodate religious marriages, there is an informal legal pluralism that arises from religion being considered in divorce cases, similar to the cases that considered religious principles in the Canadian and British courts. There are a number of cases that have considered Jewish religious divorce when hearing civil divorce proceedings. One such case is *In the Marriage of Gwiazda*, where the court ordered the wife to go to the relevant Jewish arbitration tribunal and accept the *get* (religious divorce) that had been issued by the husband.[94] In the case of *In the Marriage of Steinmetz*, the court imposed a maintenance payment upon the husband who was refusing his wife a *get*. This decision was based on an earlier case, where it was decided that where one spouse's conduct impacted upon the financial resources of the other then that was a relevant consideration in making a court order.[95]

These decisions, concerning finances are more contractual in nature, but highlight that the courts have made some accommodation in regards to religious divorce laws when making court orders in civil divorce proceedings. There has been a similar consideration of the Islamic *mahr* (marriage contract) in a divorce case before the courts. In the case *Mohamed v Mohamed and Another* [2012] the husband had entered into an Islamic prenuptial agreement (*mahr*) promising the wife $50,000 in the event of divorce (but only if the husband was the one to end the relationship). Upon the demise of the relationship the couple conflicted over who had ended the marriage, and after proceeding in the Local Court the husband was ordered to pay the promised

[92] *Marriage Act 1961* (Cth), s.41.
[93] Ibid., s.45(1).
[94] Amanda Williamson, "An examination of Jewish divorce under the Family Law Act 1975 (Cth)," *James Cook University Law Review* 11 (2004): 135.
[95] Ibid.

dowry.[96] The husband appealed the decision in the NSW Supreme Court claiming that it was against public policy. However, the Court found that it was not against public policy, deemed it to be a contract that happened to have a religious element to it.[97] Thus, whilst the matter was determined to be one of contract law and not family law, it is a good example of religious principles being considered and accommodated in some way by the courts.

Family Law and Arbitration

Family law in Australia is governed mostly at the federal level, with *The Constitution* clearly outlining this as a power attributed to the federal government under section 51. The Family Court of Australia, which is a federal court, as well as the Federal Circuit Court of Australia that also hears family matters, accompanies this federal power granted by *The Constitution*. Family law is governed primarily by the *Family Law Act 1975*, which addresses marriage, separation, and divorce, property settlement and child custody matters are also provided for under the Act. The Family Court is the main judicial institution to hear family law matters that are raised under the Act. The Act outlines the parameters of family dispute resolution and arbitration processes available in separations and divorces.[98] This family dispute resolution process highlights the shift in family law towards attempting to resolve the majority of disputes outside of the court system.[99] Family dispute resolution is defined as a process where an independent "family dispute practitioner helps people affects, or likely to be affected, by separation or divorce to resolve some or all of their disputes".[100] This process could be classified as mediation, though the Act also provides for arbitration where parties "present arguments and evidence to an arbitrator, who makes a determination to resolve the dispute", either section 13E arbitration or another relevant property or financial arbitration.[101] As such, like Canada and the UK, family dispute resolution in Australia may include arbitration of family law matters. However, mediation tends to be the

[96] Justice M J Beazley, "Intersection of Australian Law and the Islamic Faith," *Affinity Intercultural Foundation* (Sydney: 27 August 2014), 6; and Mohamed v Mohamed [2012] NSWSC 852.
[97] Salim Farrar, and Ghena Krayem, *Accommodating Muslims under Common Law* (Milton Park: Routledge, 2016), 77.
[98] *Family Law Act 1975* (Cth).
[99] Ghena Krayem, "Australian Muslim Women: Skilful Legal Negotiators in a Plural Legal World," in *Family Law and Australian Muslim Women*, eds. Abdullah Saeed and Helen McCue (Melbourne: Melbourne University Press, 2013), 77.
[100] *Family Law Act 1975* (Cth), s.10F
[101] Ibid., s.10L.

preferred and encouraged avenue for dispute resolution in Australia.[102] Outside of family law mediation and arbitration, arbitration in Australian is not as broad or well developed as the arbitration culture of the UK and Canada. There is no comparable arbitration legislative provision, like that which was amended to restrict religious arbitration in Ontario, or the *Arbitration Act 1996* in the UK, under which the MAT has established religious (Sharia) arbitration.[103]

Gender Equality and Women's Rights Movements

Gender equality in Australia is protected within the *Sex Discrimination Act 1984*, which promotes equality between men and women, as well as protecting the right to be free from any discrimination that is based on sex, sexual orientation and gender identity, pregnancy, marital status; in addition to eliminating sexual harassment in workplaces and educational institutions.[104] The legislative provision embeds Australia's international obligations ratified under the UN's *Convention on the Elimination of Discrimination Against Women* (CEDAW).[105] Equality based on gender has been hard fought in many Western countries, including Australia, with women's rights lobbies engaging closely with the bureaucratic realm in Australia in order to achieve change and equality through policies and law-making. The opportunity for engagement with the state arose in Australia, like Canada, in the 1970s accompanied with what has been termed "second wave" women's movement.[106] This "second wave" saw increased mobilisation of women, influenced by international movements like the British Women's Liberation movement,[107] though there was at times a reluctance, and lack of unification with older feminist movements.[108] Thus, unlike Canadian women's movements that have focused on networking amongst women's organisations and

[102] Ghena Krayem, *Islamic Family Law in Australia: To Recognise or Not To Recognise* (Carlton: Melbourne University Publishing, 2014), 110.
[103] Naser Ghobadzedah, "A multiculturalism-feminism dispute: Muslim women and the Sharia debate in Canada and Australia," *Commonwealth and Comparative Politics* 48, no. 3 (2010): 313.
[104] *Sex Discrimination Act 1975* (Cth).
[105] Australian Human Rights Commission, "Legislation," *Australian Human Rights Commission,* https://www.humanrights.gov.au/our-work/legal/legislation#sda (accessed on February 20, 2016).
[106] Marian Sawer and Abigail Groves, "'The women's lobby': Networks, coalition building and the women of middle Australia," *Australian Journal of Political Science* 29 (1994): 436.
[107] Sarah Maddison, "Discursive politics: changing the talk and raising expectations," in *The Women's Movement in Protest, Institutions and the Internet*, eds. Sarah Maddison and Marian Sawer (New York: Routledge, 2013), 39.
[108] Marian Sawer, "Finding the women's movement," in *The Women's Movement in Protest, Institutions and the Internet*, eds. Sarah Maddison and Marian Sawer (New York: Routledge, 2013), 8.

creating an institutionalisation of the women's movement nationally within the state, Australian women's rights movements have taken a different approach (that appears more fragmented, and therefore has led to different outcomes).[109] In order to achieve their feminist goals, women in these organisations took opportunities to enter in to government and engage in that way – paving the way for what is now often termed the "femocrat".[110] However, this approach has been criticised as lessening the visibility of women, and thus potentially not being as effective compared to the initiative in the Canada (at least, historically with NAC before the organisation's demise).[111] There are some similarities to the British women's rights movements, which to some extent have also rejected a collective identity in their mobilisation within the state. Despite the different approaches, feminist engagement through this "femocrat" path has been relatively effective, particularly in encouraging government engagement with minority women, and giving these women opportunities to have a voice and participate in governmental programmes and organisations.[112]

Sharia in Australia

Muslims in Australia

Muslims have migrated to Australia throughout the 20th Century, with the most significant migration beginning in the 1970s and 1980s, and continuing to present day.[113] According to the 2011 Census, approximately 2.2% of the Australian population is Muslim (around 476,000), with the largest communities of Muslims settled in Sydney and Melbourne.[114] In the 2016 Australian Census, this number rose to 2.6%, which approximates to 634,400 Muslims in Australia.[115] The Muslim population in Australia is

[109] Sawer and Groves, "'The women's lobby'," 436.
[110] Marian Sawer, "Femocrats and Ecorats: Women's Policy Machinery in Australia, Canada and New Zealand," *Occasional Paper 6, March 1996* (United Nations Research Institute for Social Development United Nations Development Programme).
[111] Sawer, "Finding the women's movement," 15.
[112] Ibid., 16-17.
[113] Jan A Ali, "A Dual Legal System in Australia: The Formalization of Shari'a," *Democracy and Security* 7, no. 4 (2011): 355.
[114] Australian Bureau of Statistics, "Cultural Diversity in Australia," *Reflecting a Nation: Stories from the 2011 Census,* Catalogue no. 2071.0, http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013 (accessed on March 6, 2016).
[115] Australian Bureau of Statistics, "Australia Today: The Way We Live Now," *Census of Population and Housing: Australia Revealed*, Catalogue no. 2024.0, http://www.abs.gov.au/ausstats/abs@.nsf/mf/2024.0 (accessed on July 15, 2017).

often divided into communities, with communities forming based on their cultural and ethnic backgrounds/affiliations. Approximately 42% of the Muslim community in Australia are of Lebanese origin, with 28% of Turkish ancestry, and the rest from other parts of the world, such as Africa and South Asia.[116]

Sharia Debate in Australia

Unlike Canada and the UK, there have not been formal calls for the accommodation of Sharia;[117] and as such, the debate is not as developed in Australia. However, that is not to say there has been no discussion of Sharia within Australian politics, or even more broadly in the community. In fact, post-9/11 there have been many conversations about Australian Muslims, and the place of Sharia within Australian society. One such instance arose in 2006, where the Australian media reported the Muslims were interested in gaining recognition of Islamic family law (within the family law process). In response the Treasurer at the time, Peter Costello, made a statement in which he noted that there was no place for Sharia law in Australia, and those who wished to abide by it may be more comfortable in one of several countries that apply Islamic laws.[118] This was followed by what has been labelled as the "AFIC controversy" in 2011. In early 2011, the Government made a call for submissions from community groups, organisations and the general public in regard to the reformulation of the country's multicultural policy. The Australian Federation of Islamic Councils (AFIC), led by their President Ikebal Patel, submitted a proposal that argued for "twin toleration".[119] This "twin toleration" essentially argued that while Muslims in Australia should be following and accepting "Australian values", Australia should provide a space within the public sphere for Muslims to be able to practise their beliefs.[120] The submission was ultimately calling for some form of accommodation of Sharia, without specific reference to which Sharia principles they wanted to have accommodated. For example,

[116] Krayem, *Islamic Family Law in Australia*, 58; and Farrar and Krayem, *Accommodating Muslims under Common Law*, 17.
[117] There was one request but it went largely under the radar, it is mentioned briefly in the Australian Federation of Islamic Councils submission (no. 81) to the Parliamentary inquiry into multiculturalism in 2011. There has not been a public or large political debate like that in Ontario, Canada. See Australian Parliament, Joint Standing Committee on Migration, "Submission No. 81," *Inquiry into Migration and Multiculturalism in Australia* (Canberra: Australian Parliament, March 2013).
[118] Costello, "Worth Promoting, Worth Defending."; and Krayem, "Multiculturalism and Its Challenges for Muslim Women," 115.
[119] Roose and Possamai, "Between Rhetoric and Reality," 95.
[120] Australian Parliament, Joint Standing Committee on Migration, "Submission No. 81," 8.

family and personal laws, or finance and banking. Controversy from this submission arose when it was later publicly released amongst the hundreds of other submissions. The media ran major headlines about the matter, which led to a very firm and immediate response from the Attorney-General, Robert McClelland, who stated that there is "no place for Sharia law in Australian society", and reiterated that whilst Australia is a multicultural country, where there is conflict between cultural values and the rule of law, the Australian law prevails.[121]

As such, Sharia in Australia, like the UK and Canada consists of largely unofficial community processes that draw on Islamic family law to resolve disputes (such as divorce and property settlement) but are ultimately unenforceable.[122] One example of this is the Islamic Judicial Council set up in Lakemba, NSW, which consists of a group of sheikhs (religious community leaders) offering advice and religious decisions on family/personal law matters (mostly divorce matters).[123] Unlike the UK, where some Sharia tribunals draw on the *Arbitration Act* to claim their decisions as enforceable, there is no comparable legislation for community arbitration bodies to draw on. The Australian experience with Sharia differs from the Canadian experience, as it does not follow a specific timeframe (where the Canadian debate happened over a number of years starting from 2003), or even have a specific demand for the type and format of implementing Sharia (where the Canadian debate centred on a request for the establishment of a religious arbitration tribunal).[124] Small appeals for accommodation have cropped up over the years. For instance, the Islamic Council of Western Australia stated an intention to offer a mediation service based on Sharia – but overwhelmingly they have not been substantial, well-organised campaigns/requests, like that in Ontario.[125]

Ultimately, the official state response to discussions around Sharia, and any mild request for accommodation that has arisen to date, has been to block any rigorous or informed debate. This contrasts greatly to Ontario, where the government opened up submissions during the Boyd Report investigation into Sharia in Ontario; even

[121] Roose and Possamai, "Between Rhetoric and Reality," 96.
[122] Krayem, "Australian Muslim Women," 77.
[123] Jennifer Crone, Andrew Arestides and Noni Hazlehurst, *Divorce: Aussie Islamic way*, directed by Jennifer Crone (Sydney: ABC1, 2012) DVD.
[124] Ghobadzedah, "A multiculturalism-feminism dispute," 310.
[125] Ibid., 312-313.

allowing Muslim women to speak for themselves in the debate.[126] By contrast, the debate in Australia tends to reside mostly in the realm of the media, with national newspapers keeping the Sharia debate alive, often with undertones of specific political purposes or messages.[127] This implicit rise of Islamophobia has most recently manifested itself in political groups such as Rise Up Australia, and the One Nation Party (led by Senator Pauline Hanson). With the recent election of Hanson and Independent Senator Derryn Hinch into the Australian Senate, they join (former Liberal) Senator Cory Bernardi as outspoken anti-Sharia advocates, and most definitely keep the debate alive in the political discussions. This can be evidenced in various statements made by the three senators, with Hanson's maiden speech to the Senate on 14th September 2016 offering a prime example of these statements on Muslims and Sharia in Australia.[128] For example, Hanson called for a stop to "further Muslim immigration and banning the burqa".[129] This was part of a broader claim that, if not stopped, Islam would threaten the "secular" Australian society, and would lead to all Australians living under Sharia law and being treated as second-class citizens.[130] Hanson has also been a vocal advocate in supporting the "anti-halal" campaign in Australia, stating that halal certification tax has been forced upon Australians at a cost of approximately $10million a year.[131] The anti-halal movement has been promoted by the groups like, Halal Choices, as well as through social media campaigns, like the "Boycott Halal in Australia" group on Facebook, with growing support from politicians, like Senators Hanson and Bernardi.[132]

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[126] Ibid., 313-314.
[127] Adam Possamai et al, "Defining the conversation about *Shari'a*: Representations in Australian newspapers," *Current Sociology* 61, no.5-6 (2013).
[128] Pauline Hanson, "Transcript: Pauline Hanson's 2016 maiden speech to the Senate." *ABC News* http://www.abc.net.au/news/2016-09-15/pauline-hanson-maiden-speech-2016/7847136 (accessed September 15, 2016).
[129] Pauline Hanson, "Transcript: Pauline Hanson's 2016 maiden speech to the Senate," *ABC News,* http://www.abc.net.au/news/2016-09-15/pauline-hanson-maiden-speech-2016/7847136 (accessed September 15, 2016).
[130] Ibid.
[131] Ibid.
[132] Alex Mann, "Why are some Australians campaigning against Halal and what's its effect?" *ABC 7.30 Report*, November 20, 2014, http://www.abc.net.au/7.30/content/2014/s4133082.htm (accessed on September 15, 2016).

Conclusion

Australia shares many legal and political traditions with Canada and the UK. Like Canada, Australia has a separation between church and state, although this is more explicit in the Australian context mentioned within the Constitution. In terms of multiculturalism, all three states developed policies of multiculturalism around the same time, influencing one another in the ideals and norms that were adopted. The difference between the UK's version of multiculturalism and that in Canada and Australia, is the need to consider accommodation of migrant minority communities alongside the accommodation and recognition of Indigenous groups in Australia and Canada. Similarly, the UK's implementation of state multicultural policies occurred on a more "local" governmental level, whereas in Australia and Canada it occurred firstly on a federal level, and then in some cases, on the state and province level. Whilst the general provisions of multiculturalism and freedom of religion are similar in each state the reality remains that the UK is the only jurisdiction with distinct and visible Sharia bodies. Unlike the UK and Canada, Australia does not have arbitration legislation that minority religious groups may draw upon to claim jurisdiction for establishing dispute resolution bodies. Similarly, the Sharia debate itself differs to those that have unfolded in the UK and Canada. There has been no inquiry or report commissioned by either the federal or state governments (despite recent calls by Senators Pauline Hanson and Corey Bernardi). As such, the debate has largely remained in the realms of social and media commentary.

SECTION THREE:

INSTITUTIONAL ANALYSIS

CHAPTER NINE

The State, Law, and Multiculturalism

In Section Two, I outlined the political and legal background of each state and the Sharia debates that have arisen. In this chapter I draw on this discussion to consider formal institutions in each country, and the way in which these institutions have impacted the experience with Muslim groups and Sharia. As I noted in Chapter Five, a widely-accepted definition of formal institutions is that from Helmke and Levitsky. Under their definition, formal institutions consist of rules that are "created, communicated and enforced through channels widely accepted as official".[1] Examples of these institutions include state bodies and institutions themselves (such as courts and legislatures), but also the rules administered by state bodies (such as constitutions, laws, and regulations).[2] Based on this definition, the first formal institution I will be discussing in this chapter is the governmental and legal structure of the state – specifically the state structure (constitutional monarchy or federation); gender equality movements; the legal provisions of freedom of religion; and family and arbitration laws. I explain the state structure of each jurisdiction to give context to the legal and political institutions by which the Sharia debate is framed in each country. This will also include a consideration of how the state structure (either federal or non-federal polity) creates particular outcomes, in terms of engagement between minority groups and women with the state, as well as flexibility in accommodating pluralism.

I will also discuss the equality legislation in each country, specifically provisions of gender equality and the freedom of religion. The structure of the state relates to the equality movements and women's lobbying efforts, in terms of the effectiveness of such endeavours. Additionally, the preference of gender equality over religious freedom impacts the possibilities for greater accommodation of Muslim groups and Sharia. I consider family laws in each state, as the debate around Sharia accommodation often falls within this realm. Secular state laws are often positioned as neutral and pro-gender equality, and thus, the better and more "just" avenue for Muslim women seeking dispute resolution of family law matters. However, secular

[1] Gretchen Helmke and Steven Levitsky, "Informal Institutions and Comparative Politics: A Research Agenda," *Perspectives on Politics* 2, no. 4 (2004): 727.
[2] Ibid.

family laws have implicit gender hierarchies and biases (as do the Sharia bodies that are often vehemently opposed) that are inherited from historical legacies, and as such, do not always offer fair outcomes for women. The comparison of state family law and Sharia councils does raise the question of whether they can even be compared. The councils are informal institutions, operating in the private sphere, and are considerably smaller in size with less resources and are not legally binding. State family law, on the other hand, is larger and formal in nature. Despite the size and nature of both institutions, they are inherently patriarchal, although this manifests in different ways. There are issues of power, transparency and accountability that arise in both, which will be discussed in this chapter when considering the privatisation of family law (as well as in Chapter Ten, when examining the operation of Sharia councils in the Britain). In comparing both institutions, I do not presume that Muslim women simply have a "choice" between state law or religious law. Such an either/or binary is too simplistic, and as I outlined in Chapter Four when considering choice, force, and the agency of Muslim women it is argued to be more of a negotiation. However, Sharia debates around "accommodation" often surround the possibility of Islamic norms being introduced, and governing the private realm of family law (namely, divorce). As such, it is important to consider gendered outcomes that may arise within state family law, and not just those within religious mediation and arbitration, which is often the focus in Sharia debates. This is particularly important where they are being used by Muslim women concurrently in navigating the religious and civil aspects of divorce.

Following this discussion of the formal legal environment, the second formal institution I will consider is state policies of multiculturalism (which aligns with the "rules administered by state bodies" definition of formal institutions). This institution has a significant impact on the accommodation of minority groups, in this case Muslim groups – and is shaped by historical constraints and influences, as well as more contemporary issues, such as the rise of Islamophobia in the post-9/11 world. These historical legacies that filter through to policies of multiculturalism create a "path dependency", that not only shapes the space available for Muslim groups to establish a presence within society (i.e. through establishing Sharia councils like those in the UK) but also has gendered implications. Muslim women, particularly in a post-9/11 environment are disadvantaged by state institutional frameworks and attitudes towards multiculturalism, where they are used to further particular state policies and

initiatives without being granted agency (or a voice). Drawing on these ideas, I conclude that the different approaches to multiculturalism in each state account for key differences in the accommodation of Sharia - between the UK (where there are visible Sharia councils established within communities), and Canada and Australia where there are no comparable bodies. In terms of the outcomes for Muslim women, I argue that the legal institutions in each state are not as free from gender biases or neutral as they claim, when positioned against Sharia tribunals and councils in Sharia debates. Muslim women may face disadvantages in seeking dispute resolution through formal state legal channels too. Similarly, the position of Muslim women in multiculturalism discussions – whereby they are positioned as "victims" or "suspects" and denied agency – is also problematic as it excludes them from having a voice and being able to define their interests. Instead the state actors draw on patriarchal traditions reminiscent of attitudes under colonialism, in which Muslim women were seen as "needing saving" from their "barbaric men" and culture.

Formal Institution One: State Legal System and Governance

The governmental structure and legal system of each state has a considerable role in shaping the "space" available to accommodate Sharia. Australia and Canada are constitutional monarchies (members of the British Commonwealth), that share similar state structures, both being federations with powers divided between a federal government and the governments of states/provinces. This differs to the centralised government of the United Kingdom, where there are devolved governments in Scotland and Wales. All three states have a common-law tradition, but Canada also has a civil law tradition in the province of Quebec. While these different state structures will be considered throughout, particularly as it affects the laws and how they are implemented, I will look specifically at three examples of legal institutions within each jurisdiction, to outline how they interact with each other, but also where they fall within the structure of the state (and what, if any, impact this has on their operation). These institutions are: legal provisions of freedom of religion; equality legislation; and family and arbitration laws. Considering how freedom of religion and gender equality are positioned against each other within the state is important in understanding the space that is available for Sharia to be accommodated.

The manifestation of multicultural accommodation within the state is influenced by how powers are divided within the state (both in terms of governance and the extent to which freedom of religion is promoted), and how this is positioned in relation to gender equality provisions within the state. For instance, there are differences whereby Canada embeds freedom of religion and gender equality within constitutional documents (*Canadian Charter of Rights and Freedoms*),[3] the UK has the *Human Rights Act 1998*, and Australia, by contrast, has no similar "bills of rights" protecting these freedoms and rights. These instruments are important in the institutional landscape. As Audrey Macklin notes, "legal enactments are…the instruments through which the state manifests its public reason in regulating how actors ought to and shall behave".[4] Legal and constitutional institutions are made up of their own formalised rules, and these formal rules are influenced by informal practices and norms (which are often gendered), to create "rules of the game" that dictate accepted behaviours for actors within the institution.[5] Essentially, the legal system is embedded with norms and processes that frame the contestations that arise around multiculturalism – despite being positioned as a "neutral arbiter of competing claims".[6] Thus, the legal provisions of freedom of religion, as well as gender equality (in particular, women's rights) are crucial to understanding the competing claims between minority religious groups and feminists, who argue that freedom of religion leads to disadvantageous outcomes for minority (in this case, Muslim) women.

The privileging of gender equality over religious freedom in some jurisdictions has an obvious impact on the space that is available for minority religious laws to operate within the broad framework of the legal system. How one is privileged over the other is illustrated through the ways in which gender equality and religious freedom is embedded within the state's legislative structure (for example, in the Canadian and Australian contexts: does it fall within the realm of the federal government or

[3] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitutions Act 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11. (Hereafter referred to as 'The Charter').
[4] Audrey Macklin, "Multiculturalism Meets Privatization: The Case of Faith-Based Arbitration," in *Debating Sharia: Islam, Gender Politics, and Family Law*, ed. Anna C Korteweg and Jennifer A Selby (Toronto: University of Toronto Press, 2012), 93.
[5] Fiona Mackay, Meryl Kenny and Louise Chappell, "New Institutionalism Through a Gender Lens: Towards a Feminists Institutionalism?" *International Political Science Review* 31 (2010): 582; Louise Chappell and Georgina Waylen, "Gender and the Hidden Life of Institutions," *Public Administration* 91, no. 3 (2013): 608-609; also Chappell explores law as a formal institution in Louise Chappell, *The Politics of Gender Justice at the International Criminal Court* (New York: Oxford University Press, 2016).
[6] Macklin, "Multiculturalism Meets Privatization," 93.

state/provincial?). In addition to the law having a privileged role in defining institutions (in this case, outlining the scope of freedom of religion or gender equality within the state),[7] the structure of each state has also shaped the opportunities available for women to engage with the state and influence policies, and lobby for changes to the legal provisions – in the pursuit of greater gender equality. This also extends to the mobilisation of other groups, with the political mobilisation of Muslim groups shaped by the state structure, which can place limits on the level of accommodation. In terms of accommodation, the provision of arbitration and mediation (and how these tie into the family law system) also impacts the space available for religious laws, and the possibilities for legal pluralism (in an unofficial, informal sense).

Family law is a significant institution within the "religious accommodation" discussion, and is one example that I will discuss further in this chapter. Outside of how it does or does not open up space for Muslim groups to incorporate religious practices, state family law is often positioned within debates on Sharia (particularly in the Ontario example) as being the more "just" and "fair" avenue for justice for Muslim women. However, this overlooks the fact that, like religious institutions such as Sharia councils and tribunals, there are underlying gender hierarchies that need to be recognised. This has largely resulted from the shift towards privatisation of family law, where women are often placed in disadvantageous positions in family law matters (e.g. divorce property settlements). The "nested newness"[8] of this privatisation of family law, that claims to encourage gender equality, develops within the context of existing family law structures, and it is often difficult to overcome these gender hierarchies and legacies that are inherited from the past. What will be illustrated through the discussion of family law and its privatised nature, is that law as an institution sets out formal "rules" but the reality of the implementation and interpretation of these rules creates a "gendered logic of appropriateness" – where there is a "remembering" of "old" family law legacies and norms.[9] Within this discussion, the role of the common law is

[7] Catherine O'Rourke, "Feminist Legal Method and the Study of Institutions", *Politics & Gender*, no. 10 (2014).
[8] Louise Chappell, "'New', 'Old,' and 'Nested' Institutions and Gender Justice Outcomes: A View from the International Criminal Court," *Politics and Gender* 10 (2014).
[9] Fiona Mackay, "Nested Newness, Institutional Innovation, and the Gendered Limits of Change," *Politics and Gender* 10 (2014): 550-551; Chappell, "'New', 'Old,' and 'Nested' Institutions and Gender Justice Outcomes."

important, as the courts and judges are given the power under the state structure to implement and interpret the laws ("rules"); and thus, the gender biases held by these actors can contribute to the creation of a "logic" that deviates from the formal legal provisions and rules that encourage gender equality. Ultimately, new rules may emerge from "old informal rules and practices", which actors within these new institutions may unwittingly continue and follow – adopting an "old" and gendered "logic of appropriateness" rather than creating a new one that is more in line with goals that may be pro-gender equality.[10] So, in arguing that state laws are the best alternative, we need to consider the patriarchal norms that may filter through. By examining the formal institutions – namely, state multicultural policies, the political structure of the state, and the legal provisions around family law and arbitration – it is possible to see the ways in which the patriarchal norms and gendered historical legacies filter into the operation of these formal institutions, and can shape the outcomes for women.

Freedom of Religion

There is a history of accommodating religious and cultural groups within each jurisdiction. In Australia, freedom of religion is outlined in section 116 of the Constitution. It is similarly protected in constitutional documents in Canada, specifically section 2 of the *Charter of Rights and Freedoms*. In the UK, this freedom is protected by the *Human Rights Act* 1998, which embeds the UK's obligations under the European Convention on Human Rights, which outlines a freedom of religion in Article 9. However, the protection of freedom of religion (or religious liberty) has a far longer history, dating back to the 17th century and the landmark 1689 Act of Toleration in England. With a long conflict between English Protestants and Catholics, the Act introduced a freedom of religious worship amongst the protestant sects in order to encourage unity in facing the "common enemy" – the Catholics. This has evolved over the years, into the modern iteration of freedom of religion. Religious freedom is also protected in each state under their respective anti-discrimination laws. However, the level at which this freedom is protected or valued over other equality provisions influences whether there is creation of "space" for minority religious groups, like Muslims, to flourish and establish their own (informal) institutions of religious laws. The Canadian context is an interesting one, where both federal and provincial

[10] Chappell, "'New', 'Old,' and 'Nested' Institutions and Gender Justice Outcomes," 590.

governments are bound by the Charter, but are given an option to "opt-out" of provisions in the Charter where it may be necessary to do so.[11] Thus, while freedom of religion appears to be a federal provision in Canada, and is outlined in the Charter, the "opt-out" provisions (also in the Charter) changes the bounds of the constitutional obligation upon provinces, and even federal state institutions to uphold and protect this freedom. The way in which freedom of religion is embedded and governed within the state structure has a significant impact on how effectively it is upheld and protected. This relates back to legal pluralism and "reasonable accommodation" debates, and how provisions of freedom of religion or gender equality are outlined within the state will determine how flexible the provisions are in informally accommodating minority groups. Gender equality is most commonly placed against freedom of religion in debates around accommodation. As such, the way in which gender equality provisions are structured within the state and implemented by actors, in comparison to freedom of religion provisions, is important in determining the outcomes of debates, like that around Sharia. The women's movement and equality provisions in Canada seem to have a profound impact on the state's attitude in protecting women's rights over religious freedom. This was clearly illustrated in the outcome of the Ontario Sharia debate, where there was a strong reiteration of a commitment to the principles of gender equality over any accommodation of religious arbitration.[12] This suggests that despite the formal rules that outline a religious freedom as well as gender equality, the "logic of appropriateness" within the state is to preference equality over religious accommodation and freedom of minority groups.

Gender Equality Provisions and Women's Movements

There has been an introduction of legislative provisions that protect and promote gender equality in all three jurisdictions. However, where gender equality provisions are situated within the legal governance structure of the state, can have an impact on how effectively gender equality is promoted and upheld within the institutional landscape. Canada embeds gender equality within both constitutional and other

[11] *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 33.
[12] Equality and non-discrimination in this context appears to mean non-discrimination of minority groups, but not an active accommodation of difference. Abdullah Saeed, "Reflections on the Establishment of Shari'a Courts in Australia," in *Shari'a in the West*, ed. Rex Ahdar and Nicholas Aroney (Oxford: Oxford University Press, 2010), 225-226.

legislative provisions, whereas Australia and the UK merely incorporate this through legislation. In Australia, this is in the form of the *Sex Discrimination Act 1984*, which promotes equality between men and women, and establishes a right to be free from discrimination based on: sex, sexual orientation and gender identity, marital status, pregnancy, and family responsibilities (just to name a few).[13] On the anti-discrimination law front, the states in Australia were far more progressive in enacting legislation before the Commonwealth government. South Australia was the first to introduce the *Sex Discrimination Act* in 1975,[14] with other states following – for example, New South Wales enacted the *Anti-Discrimination Act* 1977 (NSW). Disputes arising under these anti-discrimination provisions are resolved predominantly via the Australian Human Rights Commission (or relevant state and territory agencies), which adopts a process of conciliation over taking the dispute to court.[15] This provision applies to the delivery of services by state institutions, workplaces, and educational institutions. However, while this law introduces a formal equality, it may not adequately address or eliminate the inherent systematic discrimination and gender hierarchies that operate in the background of institutions. Informal norms (in the form of personal biases, custom or values) can influence actors in interpreting or adhering to these legislative provisions – creating a "gendered logic of appropriateness" in the practices and attitudes that surround the provision and its implementation. This is particularly so, as the dispute resolution process adopted is privatised in nature with preference given to conciliation before taking the case before a court.[16]

The UK similarly introduced the *Sex Discrimination Act 1975*, which protected only women's rights. However, this has since been superseded by the *Equality Act 2010*.[17] Sections 11 and 12 of the Act outline sex and sexual orientation to be "protected characteristics"; but more broadly the Act applies to: workplace relations and

[13] Introduction of this Act was a response to Australia's ratification of the Convention on the Elimination of Discrimination Against Women (CEDAW); *Sex Discrimination Act 1984* (Cth).
[14] *Sex Discrimination Act 1975* (SA). This Act has since been repealed and replaced by the *Equal Opportunity Act 1984* (SA).
[15] Australian Human Rights Commission, "Complaint Information," *Australian Human Rights Commission*, https://www.humanrights.gov.au/complaint-information (accessed September 6, 2016).
[16] This privatised nature of discrimination dispute resolution parallels the approaches that have arisen under family law dispute resolution - which will be discussed later in the chapter to outline how this privatised dispute resolution creates space for inequalities between parties to be reinforced.
[17] Government Equalities Office and Equality and Human Rights Commission, *Equality Act 2010: guidance*, https://www.gov.uk/guidance/equality-act-2010-guidance (accessed September 5, 2016).

employment (i.e. discrimination against pregnancy and maternity[18]); state institutions in providing services, such as pension schemes and education; and other associations or groups that have membership.[19] The protections offered under this legislation are quite similar to the Australian *Sex Discrimination Act 1984*. By contrast, Canada appears to offer the most comprehensive protection of gender equality and women's rights, starting with protection in the 1982 *Charter of Rights and Freedoms*. Section 15 of the Charter specifically states that "every individual is equal before the law without discrimination … based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".[20] Further to this initial provision, section 28 of the Charter is argued to be "rights enhancing" as an additional sex equality provision within the Charter.[21] This equality is further protected and upheld on the federal level, in the *Canadian Human Rights Act* of 1977, which reiterates a right to equality and freedom from discrimination based on sex, sexual orientation, and marital or family status.[22] So, unlike Australia and UK, sex equality is protected in constitutional documents and legislation. Complaints based on breaches of these constitutional protections can be taken to one of two federal organisations that protect human rights: the Canadian Human Rights Commission (CHRC) or the Canadian Human Rights Tribunal (CHRT). The CHRC investigates claims and offers both mediation and conciliation as part of its dispute resolution options; where it is deemed necessary the complaint may be referred to the CHRT for a hearing.[23] The CHRT can order corrective measures where it finds there has been discrimination in contravention of the human rights provisions – if either party is unhappy with the decisions made by either CHRC or CHRT, the matter can be sent to the Federal Court for review.[24] While there is a focus on privatised dispute resolution as one option, similar to that in Australia, the two federal organisations working together (along with provincial human rights commissions) to assess and enforce constitutional rights protections are more comprehensive than the Australian framework. It could thus be argued that the protection of women's rights and sex equality is much stronger under these

[18] *Equality Act*, *2010*, c. 15, ss. 17-18.
[19] *Equality Act*, *2010*, c. 15.
[20] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[21] Beverly Baines, "Section 28 of the *Canadian Charter of Rights and Freedoms*: A Purposive Interpretation," *Canadian Journal of Women and the Law* 17, no. 1 (2005).
[22] *Canadian Human Rights Act*, R.S.C., 1985, c. H-6.
[23] Canadian Human Rights Commission, "What can I expect?" *Canadian Human Rights Commission*, http://www.chrc-ccdp.gc.ca/eng/content/what-can-i-expect (accessed September 5, 2016).
[24] Ibid.

constitutional protections that are coupled with legislation, compared to the approach in Australia and the UK where it is merely manifested in legislative provisions. In fact, the Australian anti-discrimination provisions are "piecemeal" in nature, which affects their effectiveness.[25] The amendment of laws in Canada to be more gender equality focused, upholds and refers to the centralised, formal gender equality principles embedded within the formal rules set out by the constitutional provision. The example of the Ontario *Arbitration Act* being amended in line with feminist arguments illustrates that perhaps the "logic" around gender equality is one that aligns with the formal "rules of the game" found within the Canadian constitution and legislation.

The level of engagement with women's movements and lobbying in each jurisdiction has a significant influence on the extent to which these movements and lobby groups can contribute to shaping public policies and laws – including the timeline upon which sex equality provisions were introduced in the states, and the format of such protections (constitutional versus legislative provisions). The level of successful engagement with the state by feminists and women's groups is constrained by the structure of the state. Federal state structures are often regarded as allowing a closer engagement, as it allows "venue shopping" between levels of government in seeking the best opportunity for engagement,[26] and thus can have a more significant influence on the norms within state institutions (to make them more pro-gender equality). However, even within polities that subscribe to federalism, the success and approaches employed by lobbyists vary and thus lead to differing outcomes. Canadian feminists, for instance, have typically focused on the legal realm as the provisions for equality under the Charter provide a legal basis for seeking equal treatment and rights – as the executive and parliamentary realms have been viewed as less receptive and riddled with male biases in their procedures and norms that are more difficult to overcome.[27] Australian feminists have largely been engaged in the bureaucratic realm, in contrast to their Canadian counterparts who have historically engaged with the state through

[25] Julie Mansour, "Consolidation of Australian Anti-discrimination Laws," *Griffith Law Review* 21, no. 2 (2012): 533.
[26] In considering this idea of federal state structures are better for women's engagement with the state, Louise Chappell and Mayet Costello discuss "venue shopping". This allows women's groups to engage with the various levels of government, to seek the best outcomes. It can provide greater opportunities for women to further their aims, and influence and enact change. Louise Chappell and Mayet Costello, "Australian Federalism and Domestic Violence Policy-Making," *Australian Journal of Political Science* 46, no. 4 (2011): 635.
[27] Louise Chappell, *Gendering Government: Feminist Engagement with the State in Australia and Canada* (Vancouver: UBC Press, 2002), 27; 38.

lobbying initiatives to achieve change in the legal system and public policies.[28] Feminists in both states have essentially engaged with different formal (state) institutions in seeking change. Ultimately, lobbying has been a significant difference in the feminist strategies in Canada, compared to Australia[29] – the institutionalisation of the women's movement and lobbying in this jurisdiction has manifested itself through the establishment of productive and united national women's organisations (such as the National Action Committee on the Status of Women, founded in 1971) that are able to effectively mobilise and influence change in policy matters, and matters of the law.[30] Other prominent organisations include, the Status of Women Canada (SWC), a federal government organisation that works with federal bodies in ensuring that gender equality is considered when developing state policies and programs.[31] Unlike Canadian feminists, in Australia there has not been the same establishment or movement to create "peak bodies" or organisations; instead the focus has been on entering state institutions and working on change internally, assuming roles as "femocrats".[32] In Canada, the norms and principles of gender equality, and the influence of feminist lobbying efforts and organisations, appear to have influenced public policies and amending laws – and are on some level integral to changing the "rules of the game"[33] which structure the interactions taking place between and within organisations when dealing with multicultural dilemmas and sites of contestation. The Ontario Sharia debate – where gender equality was protected over religious freedom – highlights the effectiveness of the women's rights organisations opposing the possibility of Sharia and religious arbitration, by influencing the policy decision and eventual amendment of the *Arbitration Act*. The mobilisation of this opposition to Sharia in Ontario drew on the long history of feminist organisations lobbying in Canada over matters of law and policy, and effectively ensuring that women's issues are taken seriously.

There have been effective lobbying efforts in the UK by women's organisations in areas such as domestic violence as far back as 1976 with the *Domestic Violence and*

[28] Ibid., 19.
[29] Ibid., 33.
[30] Ibid., 38.
[31] Status of Women Canada, *Status of Women Canada*, http://www.swc-cfc.gc.ca/abu-ans/who-qui/index-en.html (accessed September 10, 2016).
[32] Chappell, *Gendering Government*, 41.
[33] James G March and Johan P Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (New York: Free Press, 1989), 107.

Matrimonial Proceedings Act.[34] However, much lobbying by feminists in the UK has drawn on and referred back to the efforts of organisations, such as the European Women's Lobby, working at the EU level.[35] In fact, in lobbying for equality on matters such as pay and employment, a large portion of decisions came from the European Commission or European Court of Justice (ECJ), rather than British state institutions, under the Thatcher and Major conservative governments.[36] The Thatcher decade of the 1980s was particularly inhospitable to feminism; and even initiatives from feminist groups to work with the ECJ to achieve greater equality had limitations – remaining at a largely formal level rather than a more effective substantive change to the law and institutional norms.[37] Deference to concepts of liberalism and individual rights in the European movement mean that there was little to no recognition of the differences of women, instead only encouraging further opportunities for women "to seek only what men have".[38] The preference of liberalism (which supports the principles of multiculturalism) within Europe and the UK, can be seen as working in the background in debates over Sharia – where, despite seemingly strong opposition by women's groups and various politicians – multicultural accommodation continues. Muslim groups have been able to freely practice their religion and establish informal religious arbitral bodies. This contrasts to the ability for Muslim organisations to effectively mobilise in Canada - as seen in the Ontario debate, where supporters of Islamic arbitration were slower to rally together compared to the coalition of groups (including women's NGOs) that opposed arbitration. Also, the unitary state structure of the UK has been less accommodating of feminist movements, compared to federal polities (like Australia and Canada) where feminists are able to enact change by engaging with the different levels of government – particularly where one might be less responsive than the other.[39] Thus, the federal structure appears to foster the growth of feminist movements and networks within the state, and in debates around accommodation of religion. Feminist arguments and movements, against this background, have been more successful in lobbying the government to "stop Sharia" –

[34] Women's Aid Federation of England, "Our history," *Women's Aid*, https://www.womensaid.org.uk/about-us/history/ (accessed October 1, 2016).
[35] Mary Hawkesworth, *Political Worlds of Women* (Boulder: Westview Press, 2012), 178-179.
[36] Ibid., 178.
[37] Ibid., 179.
[38] Ibid.
[39] Jill Vickers, "Gendering Federalism: Institutions of Decentralization and Power-Sharing," in *Gender, Politics and Institutions: Towards a Feminist Institutionalism*, eds. Mona Lena Krook and Fiona Mackay (London: Palgrave Macmillan, 2011), 130.

as seen in Canada, where the Ontario government followed this opposition to accommodation over the recommendations to accommodate Sharia outlined in the Boyd Report.

Family Law: Marriage and Divorce

Family law regulates families and the resolution of family disputes, governing matters of marriage, divorce, parenthood, and cohabitation. This governance of family through law is not as coherent as laws around contracts or torts (for example), but instead manifests in a wide range of provisions over child support, education, and social security (to name a few).[40] Family law acts in each state typically arose out of the need to resolve and navigate marriage breakdowns.[41] Family laws are more flexible to change, in adopting and incorporating other norms, particularly with the increasing emphasis in each jurisdiction to settle disputes outside of the courts through arbitration, mediation or counselling.[42] The family law provisions, particularly those concerning marriage and divorce, are structured differently across the three jurisdictions. In Australia, the Constitution places family law (including matters of marriage, divorce and separation) as a federal power, thus the legislation is federal and applicable to all states. This in some ways parallels the UK context, where family law is governed by the central parliamentary system. In Canada, by contrast, family law is split between the federal and provincial governments. Divorce is a federal matter governed by the Constitution, but property settlement in divorce, along with solemnisation and recognition of marriages is a provincial governmental matter. The fact that each province can introduce their own legislative provisions around settlement of divorces has led to the different experiences amongst the provinces – and goes some way in explaining why the request for Sharia family law arbitration occurred in Ontario. The way that family law and arbitration legislation is set out in each state affects the extent to which Islamic religious groups can incorporate and follow the tenets of the faith in settling disputes, and in particular, whether they can establish informal Sharia councils.

[40] Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context Teaching Materials* (South Melbourne: Oxford University Press, 2009), 1.
[41] Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context* (South Melbourne: Oxford University Press, 2009), 19
[42] Fehlberg and Behrens, *Australian Family Law (Teaching Materials)*, 7.

Accommodation of minority religious groups in family law has also differed between the three jurisdictions, which helps to explain why the experience with Sharia, and the general space for Muslims to incorporate their religious practices within the family law realm, has differed. In the UK, there is a history of accommodating the traditions of Jewish groups. The introduction of the *Divorce (Religious Marriages) Act* in 2002 states that civil divorces will not be granted until the marriage has been "dissolved in accordance with the usages of the Jews".[43] This provision is intended to address the problem of "limping marriages" whereby husbands refuse to grant their wives a *get* under Jewish religious traditions, meaning that they are "chained wives", unable to remarry later if they wish to. The implementation of the legislation followed on from the tradition of courts settling divorces and having to "find ways and means to persuade the refusing spouse to cooperate in the religious divorce".[44] It is suggested that this provision could be applied in some cases concerning Muslim divorces;[45] but by and large, it has been stated that if Muslim groups wish, they would be able to bring their faith within the scope of the legislation.[46] This accommodation of Jewish groups opens up the possibility of greater recognition and accommodation of Islamic religious laws (in the realm of divorce), contributing to the "space" that exists in the UK context for religious groups to exercise their religious freedom – and perhaps explains why Muslim groups have felt comfortable establishing Sharia councils that informally work alongside the legal system. So, where the state claims there is "no legal pluralism", there is an unintentional accommodation of religious groups here that challenges that sentiment established in state institutions generally. A "logic of appropriateness" develops from this unintentional accommodation, contrary to the formal rules stating that there is no legal pluralism – suggests that there is an informal sort of legal pluralism. There is no comparable legislation in Canada and Australia, reflecting the more conservative approach to accommodation of religious groups in those jurisdictions.

The role of the judiciary in interpreting the formal rules (laws) has a significant impact on the possibilities for accommodation and legal pluralism – they are a significant part of the states' institutional landscape. On the matter of recognising or accommodating

[43] Ralph Grillo, *Muslim Families, Politics and the Law: A Legal Industry in Multicultural Britain* (Surrey: Ashgate, 2015), 104.
[44] Ibid.
[45] Kandeel v Hannds [2010] EWCA Civ 1233.
[46] Grillo, *Muslim Families, Politics and the Law*, 104-105.

Islamic family law, each state has grappled with the matter of recognising Islamic *mahr* in divorce cases. The experience has varied, and is in part shaped by the where family law jurisdiction lies – i.e. in Australia and UK this is centralised, whereas Canada gives jurisdiction over certain elements of divorce law to the provinces (namely, property settlement). The importance of the law and courts within the state is evidenced by the way in which the common law can make important calls as to what is acceptable and what is not in matters of marriage and divorce. The common law, particularly judges as actors within this institution, play a key role in interpreting the "rules" (laws) and determining how they should be implemented within the state. They create a "logic of appropriateness", which in some cases may follow a move towards an informal legal pluralism of sorts, with a greater accommodation of Islamic family principles and determinations (as in the UK) but not so in other jurisdictions. Through judicial decisions, the UK highlights a move towards acknowledging *mahr* agreements, as well as divorce agreements negotiated through the informal Sharia councils and tribunals – using these decisions as "guiding principles". The 2009 case of *Uddin v Choudhury* is particularly illustrative of the evolving approach of UK courts, in recognising Sharia council directives and decrees within divorce cases. In that case, the court allowed a representative of the Muslim Arbitration Tribunal (MAT) to offer advice as "an expert witness"; following this the court ruled that the gifts given under *mahr* were not returnable.[47] Similarly, British courts have recognised religious marriage contracts under contract laws (e.g. *Shahnaz v Rizwan 1965*)[48] – marking yet another way in which religious groups are given some accommodation within the legal system. This has only recently been considered in the Australian context in the case of *Mohamed v Mohamed*, where the NSW Supreme Court ruled that the religious marriage contract was valid as under the provisions of Australian contracts law.[49] In Canada, like the UK, there have been cases in which the courts have enforced Jewish *get* agreements. However, the Canadian courts have been hesitant to recognise or enforce Islamic marriage contracts and *mahr* agreements. This is evidenced in cases like *Kaddoura v Hammoud*, where the Ontario Court of Justice refused to uphold a *mahr* agreement, and stated that civil courts were not obligated to decide on religious elements in

[47] Ibid., 107.
[48] Ibid., 108.
[49] Mohamed v Mohamed (2012) NSWSC 852.

disputes.[50] Thus, while the Canadian legal system across the provinces has recognised the traditions of some religious groups (notably, Jewish groups), this has not extended to Muslim groups and Islamic family laws. The history of accommodating and accepting other minority religious groups in the UK has gone some way to shaping the space for Sharia councils to flourish and establish in an informal capacity. By contrast, despite the theoretical possibilities for legal pluralism that exist within Australian law (as explored in Chapter Two) the realm of marriage laws is quite rigid.

This unyielding, and somewhat conservative quality of Australian law is illustrated by the overturning of the "territory-based" Australian Capital Territory's (ACT) *Marriage Equality Act* 2013 by the High Court in *The Commonwealth of Australia v The Australian Capital Territory* case. The Court reinforced the idea that marriage is a federal power, and that the definition of marriage is the one outlined in the federal legislation, and does not include same-sex unions.[51] The ACT Act was argued to be operating concurrently alongside the federal *Marriage Act*, recognising same sex marriages, where the federal legislation covers unions between two individuals of opposite sex.[52] However, the Court stated that parallel provisions on the state level were impermissible, with governance of marriage remaining firmly and entirely the power of the federal Parliaments, as stipulated under section 51 (xxi) of the Australian Constitution.[53] The federal *Marriage Act* as it stands is to be taken as a "comprehensive and exhaustive statement of the law of marriage", which included a provision that same sex unions solemnised in foreign jurisdictions are not recognised as a marriage in Australia.[54] This illustrates the rigid and conservative attitude towards of the High Court (but also the federal state more broadly) by reiterating the governance structure and division of powers as outlined in the Constitution. It also reinforces traditional conceptions of marriage that surround the term "marriage" as it is used in the Constitution and in the federal *Marriage Act*. Highlighting the impermeability of these understandings of marriage to challenges by state and territory governments. This reinforces the fact that where jurisdiction over family law matters lies can have a

[50] Kaddoura v Hammoud [1998] O.J No. 5054 [Q.L.]; Natasha Bakht, "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women," *Muslim World Journal of Human Rights* 1, no.1 (2004): 11.
[51] The Commonwealth of Australia v The Australian Capital Territory [2013] HCA 55
[52] Ibid., at 55.
[53] Ibid., at 56.
[54] Ibid., at 58.

significant impact on the flexibility, or space, available in accommodating other interests and norms. In this example of the marriage equality case, being a federal matter of governance means that any accommodation must be achieved at this level, which appears more difficult because it is often tied up with constitutional powers. This is a similar challenge faced by requests for greater accommodation of minority religious laws, as they must contend with the constitutionally established parameters of the legal system, and religious freedoms. In addition to this, it illustrates the substantial role the judiciary has in influencing the "logic of appropriateness" around marriage (and divorce) law, through interpreting the "rules" set out in the constitution and other legislative provisions – and the way in which this logic can be gendered through the reinforcement of traditional or conservative values (as comes through in the marriage equality example). In the Canadian context, the role of the judiciary in driving the move towards marriage equality offers an example of the judges (as institutional actors) influencing and shaping formal institutions. Canada's federal *Civil Marriage Act* 2005[55] was preceded by the Supreme Court of Canada recognising that the provisions for right to equal treatment in *Charter of Rights and Freedoms* (section 15)[56] could be extended to marriage equality, reinforcing the common law definition of marriage that extended to same-sex unions.[57] This idea that sex equality is formalised within constitutional documents appears create and reinforce a "logic of appropriateness" that is adopted by judicial and parliamentary actors to uphold gender equality in Canada.

The inflexibility in Australian marriage laws illustrates that the Australian legal system is somewhat closed off to possibilities of pluralism, and this contributes to why the space for religious arbitration has not been considered or brought up, in the same way that it has in the UK, and even Canada. Contributing to this rigidity, is the fact that within the family law provisions in each jurisdiction, there are certain ideas of family that are embedded within the laws and inherited in state institutional practices – largely influenced by Christian values and constructs around family (this will be

[55] *Civil Marriage Act*, S.C 2005, c. 33.
[56] As discussed earlier, in regards to gender equality and women's movement, Section 15 of the *Canadian Charter of Rights and Freedoms* states that "every individual is equal before the law without discrimination…based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."
[57] Wade K. Wright, "The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Wales," *International Journal of Law, Policy and the Family* 20 (2006): 250; 253.

discussed in more depth in Chapter Ten).[58] One example of the Christian values is the policies around recognition of marriages and divorces in the UK. The policies instituted by the UK Border Agency "assumed what right to family life should be".[59] In doing so, the state draws on historical and traditional conceptions of family, which operate in the background when decisions are made by actors in recognising a marriage contract made in the UK or another jurisdiction. Similarly, even with the UK Parliament introducing the *Civil Partnership* Act in 2004, its origins and scope are not as broad as Canada's *Civil Marriage Act,* and there are limitations that ultimately reinforce traditional, conservative ideals of marriage.[60] Ultimately, the division of powers in the state and the legal system both work in marking out any available space for pluralistic accommodation. The nature of marriage laws in each state illustrates the preferences that may emerge towards gender equality over religious accommodation, or even the traditional/conservative and rigid conception of marriage. Such attitudes affect that possibilities for flexibility and accommodation in other areas of family and personal laws.

Arbitration and Mediation Provisions

While there has not been any formal introduction of religious arbitration in each state, for instance, the legal provisions of arbitration and mediation, and the way in which they are structured has contributed to the different experiences with Sharia. Arbitration is an alternative dispute resolution mechanism available to parties in resolving legal disputes, purporting to offer a more effective, cheaper and quicker alternative to settling civil disputes in court. The UK has a culture of arbitration that has permeated family law, stemming from the *Arbitration Act* of 1996 ('Arbitration Act'). While it does not specifically mention religious arbitration, the provisions have been viewed as being broad enough to include religion as a guiding principle for arbitration – and thus it has led to religious arbitrations taking place (historically Christian and Jewish arbitration, but obviously more recently Islamic, with the rise of the MAT). In addition to this the *Children and Families Act 2014*, has made it compulsory for couples in England and Wales to engage in mediation before they may

[58] Grillo, *Muslim Families, Politics and the Law*, 37.
[59] Ibid., 37-38.
[60] Wright, "The Tide in Favour of Equality,"

submit a divorce application to the courts.[61] Thus, alternative dispute resolution provisions have (at least in the UK) allowed a greater "accommodation" of religious laws, with religious communities finding a space to adhere to and practice religious family laws more openly. Religious arbitrations have been upheld by UK courts in marriage and family disputes, starting with Christian religious arbitration, but later extending to Jewish groups as well.[62] Whilst Islamic arbitrations have not been considered by the courts to the same degree, the way appears to have been paved for religious accommodation in this area, so it is not an absolute impossibility. The structure of this legislative provision has opened the possibility for a sort of informal legal pluralism (or accommodation) within the state. The state, in introducing arbitration as an institution of dispute resolution, has created a space for religious arbitration to flourish. There is a long history of accommodating Jewish arbitration – and there is a prominent Beth Din that operates in London.[63] Following this, Muslim groups have established tribunals, like the MAT, that claim to have jurisdiction and operate on the same provisions that Beth Din does.[64] In addition to the arbitration legislative provisions, the IFLA introduced family law arbitration rules for practitioners. This was controversial, and indicates the growing trend towards privatised dispute resolution in family law in the UK.[65] Ultimately, rulings on family law matters may be enforced by the courts if they comply with state laws generally, but also the specifications outlined in the *Arbitration Act* (i.e. agreements formalised in consent orders through the courts).[66]

The shift towards privatisation of dispute resolution in civil matters (whereby parties avoid litigation and the court system) has occurred in part due to the time and costs of resolving cases via the courts – as an alternative it is viewed as being more cost-effective and speedy. Privatisation is a shift away from the more "public" sphere of law, where disputes were traditionally resolved by litigation in courts. This "new",

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[61] Samia Bano, "Women, Mediation, and Religious Arbitration: Thinking Through Gender and Justice in Family Law Disputes," in *Gender and Justice in Family Law Disputes*, ed. Samia Bano (Waltham: Brandeis University Press, 2017), 7.
[62] Gillian Douglas et al., *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* (Cardiff: Cardiff University, 2011), 15-16.
[63] Ibid., 32.
[64] Muslim Arbitration Tribunal. *Muslim Arbitration Tribunal*. http://www.matribunal.com/history.php (accessed May 15, 2013).
[65] David Hodson, "Family Law Arbitration," *International Family Law Group LLP* (January 2014) www.iflg.uk.com (accessed July 15, 2014).
[66] Grillo, *Muslim Families, Politics and the Law*, 31-32.

alternative approach of arbitration, encourages parties to engage a neutral third party who arbitrates the dispute with consent of both parties, and the final determination from this process must follow local laws but is ultimately enforceable.[67] Another alternative mode of dispute resolution is mediation, but unlike arbitration the decisions are not binding, and the mediator does not make a final decision like an arbitrator might, they merely facilitate discussion and agreement between parties.[68] Whether a provision is a public or private law can have an impact on the gender outcomes that emerge.[69] Mediation is perceived as being "good for women" and that it has the potential to "display inherently feminist values and principles", and thus can contribute in a positive way to empower women navigating personal dispute settlement.[70] It is argued that private dispute resolution may allow women a greater opportunity to speak and be heard.[71] However, whilst there may be the potential for greater self-expression and empowerment, within these private dispute resolution processes, particularly mediation, women are more often than not placed in weaker bargaining positions and may be encouraged to settle for a lesser outcome (such as division of property) compared to what might have been received through the adversarial process.[72] Ultimately, law regulates the relationships between individuals, and any biases inherent within the law (particularly when it is pushed into the "private" realm) can go unchecked and become problematic. This emerges within private dispute resolution in family law matters. Arbitration in the UK has been employed within family law matters, namely property settlement in divorce cases. This shift is evidenced by the increasing number of religious groups in the UK adopting arbitration or mediation to help resolve divorce matters within their communities. The move towards privatisation in family law dispute resolution is also evidenced in Australia and Canada, although mediation is the favoured approach in the Australian context; while arbitration has been the favoured approach in privatised dispute

[67] Wendy Kennett, "It's Arbitration, But Not As We Know It: Reflections on Family Law Dispute Resolution," *International Journal of Law, Policy and The Family* 30, no. 1 (2016): 2-3.
[68] John W Cooley, "Arbitration vs. mediation – explaining the differences," *Judicature* 69, no.5 (1986): 263.
[69] Catherine O'Rourke, "Feminist Legal Method and the Study of Institutions", *Politics & Gender*, no. 10 (2014): 692.
[70] Rachael Field, "Using the Feminist Critique of Mediation to Explore "The Good, The Bad and The Ugly" Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia," *Australian Journal of Family Law* 20, no. 5 (2006): 6.
[71] Samia Bano, "Agency, Autonomy, and Rights: Muslim Women and Alternative Dispute Resolution in Britain," in *Gender and Justice in Family Law Disputes*, ed. Samia Bano (Waltham: Brandeis University Press, 2017), 60.
[72] Ibid.

resolution in the UK.[73] There are no arbitration laws in Australia that appear to accommodate religious arbitration like those in the UK and Canada.

In the Canadian context, Ontario's *Arbitration Act* was quite broad prior to being amended in 2005, when the possibilities of religious arbitration were specifically outlawed. Religious groups, mainly Christian and Jewish groups had been carrying out religious arbitration for years before the public request by Islamic groups to established religious arbitration tribunals. The amendment and clear move away from religious arbitration, reflects the general attitude towards religious accommodation in Canada. There is a resistance to expanding the scope of religious freedom, and instead the focus has been on incorporating and promoting greater gender equity within family law (over religious accommodation) – particularly in terms of property settlement in divorce.[74] This is most clearly seen in the Ontario government's dismissal of Marion Boyd's recommendations that religious arbitration could be incorporated within particular parameters in Canadian family law.[75] Instead, privatisation in family law is kept firmly in the "secular" realm, with a move towards mediation and introduction of domestic contracts as avenues for settling matters of custody, property division, and spousal support.[76] This privatised realm of family dispute resolution can open up the possibilities for religious laws to be accommodated and be incorporated within this framework,[77] as has been seen in the UK context with the growth of religious arbitration, and establishment of Sharia councils to mimic similar informal institutions of other religious groups. However, the secular state law is typically positioned as the more just and "equal" option for women seeking divorce, compared to religious arbitration; particularly in debates, like that in Ontario, where the oppression and disadvantaged position of women within religious traditions is identified as the main problem with religious arbitration. Within the debates opposing Sharia arbitration in family disputes, women's rights and the oppression of Muslim women by patriarchal religious practices are consistently cited as one of the most significant reasons why it should not be allowed. This reinforces the idea that secular

[73] Ghena Krayem, *Islamic Family Law in Australia: To Recognise or Not To Recognise* (Carlton: Melbourne University Publishing, 2014), 110.
[74] Macklin, "Multiculturalism Meets Privatization," 101.
[75] Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Ontario: Ministry of Attorney General, December 2004).
[76] Macklin, "Multiculturalism Meets Privatization," 101.
[77] Krayem, *Islamic Family Law in Australia*, 238.

state law is more "just" and "fair" when it comes to resolving family disputes, and thus should be the only avenue through which Muslim women should resolve matters of divorce. The problem with this is the fact that the state family law system is implicitly biased against women. Therefore, it may be hypocritical to say Sharia is biased and patriarchal, without also considering the biases that emerge within this apparently pro-gender equality institution.

Gender in Privatised Family Law

In Australia and Canada there has been a move towards privatisation of family law, with "secular" mediation often heralded as the best option for minority women, but this is also the realm within which religious principles may unwittingly be introduced in the background of the dispute resolution.[78] These informal (gendered) norms and expectations can filter through and shape formal rules. As Vivien Lowndes notes, they can "frustrate or dilute the impact of gender equality reforms".[79] As such, where reforms have been introduced into family law mediation to make them more pro-gender equality, gendered norms work in the background to restrict the effectiveness of achieving this equality. The institution of mediation, placed in the "private" realm of law does not have appropriate safeguards to ensure that women's interests are adequately protected. The institution itself holds implicit gender biases, which come out in the procedures and practices of the mediation process; illustrating that the outcome for women (and particularly as the "just" alternative for religious women) is also biased. Thus, denying all possibilities for religious arbitration within debates like those over Sharia can be hypocritical. The state legal system in Canada and Australia are claimed to be pro-gender equality, and provisions have been introduced over the years to make the realm of privatised family law more fair and a positive avenue for women to seek justice in family law matters. Canadian statutes have been reformed to be more gender equitable, with the aim of ensuring that women who are going through a divorce are not left destitute and dependent on state support.[80] One way in which this has been manifested, is through the introduction of domestic contracts as

[78] Krayem illustrates the flexibility of family dispute resolution in her work *Islamic Family Law in Australia* (2014). It is within this realm that religious principles may be used in resolving personal and family law disputes within the current frameworks of dispute resolution.
[79] Vivien Lowndes, "How Are Things Done Around Here? Uncovering Institutional Rules and Their Gendered Effects," *Politics and Gender* 10, no. 4 (2014): 687.
[80] Macklin, "Multiculturalism Meets Privatization," 101.

an option for resolving a dispute, whereby parties can privately negotiate a settlement. This draws on concepts of individual choice, and are claimed to be "autonomy-enhancing, less adversarial" and more efficient for both parties to the dispute.[81] Another example includes the recent introduction of private dispute resolution in Quebec through reforms to the *Code of Civil Procedure*, with the intention of reducing costs and delays faced by parties.[82] This development of the (secular) privatisation of family law in the form of domestic contracts establishes this idea of a "liberal, unencumbered and rational free agent".[83] The problem with this notion, and the general development of this "new" institution of arbitration, is that it does not escape the gender biases of old family law regimes (which has similarly been witnessed in the Australian context). It is influenced by the fact that law is gendered through inherited traditions and values from Christianity. This "path dependency", that the institution cannot break free from, means that the dangers and potential harms that are outlined by those opposing faith-based arbitrations are not entirely eliminated in state institutions. There is an inherent inequality in bargaining power between men and women, which is often overlooked when considering the fairness of one of these arbitration agreements. The 2004 *Hartshorne v Hartshorne* case that came before the Supreme Court of Canada highlights this, with the court upholding a pre-nuptial agreement – which ultimately reinforced a patriarchal normative framework that governed property division in the pre-family law reform era (where the labour of stay-at-home wives was not widely recognised or valued).[84]

Similarly, in the Australian context, there have been reforms to family law to make the provisions pro-gender equality, and attempt to move the barriers typically faced by women in family law disputes. The *Family Law Act* 1975 (pre-reforms) presented a model for parental custody rights and responsibilities following separation. However, despite a child support scheme that outlined formal rules around these rights and responsibilities, they operated alongside a judicial discretion. Under this discretion judges could redistribute property upon divorce, that often led to unfair outcomes

[81] Ibid., 100-101.
[82] Anne Saris, "Challenging stereotypes: gender-sensitive imams and the resolution of family disputes in Montreal," in *Women's Rights and Religious Law*, eds. Fareda Banda and Lisa Fishbayn Joffe (Milton Park: Routledge, 2016), 255.
[83] Macklin, "Multiculturalism Meets Privatization," 103.
[84] Ibid.

between the parties.[85] The secular family law in Australia following two major reforms since the 1970s (one in 1995 and another in 2006) is often argued to be promoting gender equality through addressing these inequalities that arose around parental rights and responsibilities. The *Family Law Act* reforms introduced by the Keating Labor Government in 1995, were heralded as "new" pro-gender equality provisions (and child-focused). They introduced a formal equality around parental responsibility – but this formal equality failed to recognise the societal and structural differences in the lives of mothers and fathers, and the significantly different work they do in relation to child-rearing.[86] However, whilst the institution of family law may have seemingly evolved with this apparent recognition of equality amongst parents, it has been unable to truly escape the historical bias against women that underlies Australian family law institutions (which becomes evident when valuing contributions of both parties in divorce and custody disputes). The 2006 reforms introduced compulsory mediation as a means to settle divorces, particularly child living arrangements. Nevertheless, parties do not come into this mediation on equal terms with equal bargaining power, and thus this supposedly fair and pro-gender equality institution is inherently gendered.[87] This is evidenced in examples[88] of family law mediation where the contributions and value of domestic labour, as well as the effect child-rearing responsibilities have on women's earning capacity have largely been ignored – disadvantaging women within this dispute resolution framework.[89]

Ultimately, law is gendered through the creation and maintenance of a "male standard", which is applied to everyone, and is often used, for example in tests of "reasonableness".[90] These gender legacies carry through developments within the legal system, and even where there are reforms (or possibilities) of reform, the existing social norms and practices within the realm of family law dispute resolution can shape

[85] John Dewar, "The Normal Chaos of Family Law," *The Modern Law Review* 61, no. 4 (1998): 471; 473.
[86] Rachael Field, "Equality Based Provisions of the Family Law Act and the Invisibility of Women," *Queensland University of Technology Law Journal* 15 (1999): 94.
[87] Marcia Neave, "Private Ordering in Family Law – Will Women Benefit?" in *Public and Private: Feminist Legal Debates*, ed. Margaret Thornton (Oxford: Oxford University Press, 1995), 155.
[88] One study that highlights the problems/examples of the issues that arise in privatised family dispute resolution (FDR) is that commissioned by the Australian government to evaluate the effectiveness of the 2006 family law reforms. The study found that there is confusion around the idea of "shared parental responsibility" and this meant that "custody" was not necessarily 50-50. The study also found that there was still a long way to go in effectively addressing domestic violence and safety concerns that arise in FDR processes - Rae Kaspiew, et al., *Evaluation of the 2006 family law reforms* (Canberra: Australian Institution of Family Studies, December 2009).
[89] Neave, "Private Ordering in Family Law," 160.
[90] Chappell, *Gendering Government*, 120

the outcomes (limiting the actual realisation of gender equality as a reality and practice).[91] The male norms and standards that operate in the legal system obviously extend to the family law realm. So, even with the pro-gender equality reforms to family law, and the introduction of privatised means of dispute resolution, systematic inequalities are reinforced through institutional mechanisms, such as judicial discretion. In the Australian context, maintenance agreements that are agreed upon through arbitration must be approved by the family courts to safeguard parties from disadvantageous agreements. However, with little procedural guidance to judges on approving such agreements, there is a reliance on judicial discretion.[92] This opens up the possibilities for judges to be influenced by personal biases, and also means that the gender inequalities that often place women in weaker bargaining positions when entering such agreements are often overlooked.[93] This bargaining power is also affected by matters of domestic violence. Where women are forced to face abusive partners in mediation, their agreement will not be truly "free" and will be influenced by fear.[94] A common argument against Sharia arbitration bodies is that Muslim women are often forced into mediation with abusive husbands. However, this is a problem that arises in the secular mediation and arbitration framework as well. In this secular privatised family law ordering women are also disadvantaged in accessing legal resources, which contributes to their weaker bargaining power. This is illustrated in the Canadian context (but equally applicable to the UK and Australia), where there are gender inequalities in accessing justice. It is often manifested in financial terms where women are denied legal aid, and do not have the same funds as men to support themselves through the divorce process.[95] Thus, resulting from the lessened earning capabilities of women due to child-rearing responsibilities. Thus, whilst there may be formal equality promoted in family law reforms, and these new privatised family laws institutions of dispute resolution, there needs to be more substantive equality within the procedures and operations of family law for any equality reforms to be truly

[91] Louise Chappell discusses gender legacies within law, and the way informal rules (in the form of social norms, practices and expectations) shape the possibilities of reform in the context of international criminal law (under the Rome Statute) - Louise Chappell, *The Politics of Gender Justice at the International Criminal Court* (New York: Oxford University Press, 2016), 3.
[92] Neave, "Private Ordering in Family Law," 150.
[93] Ibid.
[94] Ibid., 169.
[95] Mary Jane Mossman, "Gender Equality, Family Law and Access to Justice," *International Journal of Law and the Family* 8, no. 3 (1994): 360.

effective.[96] Where the possibilities for pluralistic accommodation of religion within family law are completely closed off, this appears to be the best (and only) option for Muslim women to resolve family disputes that often have underlying religious elements, to be resolved. In arguing that Sharia is "bad" and oppressive to women, it is short-sighted and possibly hypocritical not to also recognise the gender biases that continue within this formal institution of family law.

These institutions of mediation and arbitration in family law are "new formal institutions" that carry multiple, contradictory, interests and are shaped by past institutional legacies. Despite claiming to be promoting gender equality, women are still disadvantaged – with informal institutions and gender norms, operating alongside with the inherent patriarchal frameworks that have not entirely been replaced with "the new" changes to the law and formal rules that claim to promote gender equality. The move towards greater privatisation in family dispute resolution is problematic as, without proper safeguards and internal procedures, they will continue to reflect and reinforce male interests and understandings of labour division. An argument that is often made in regards to religious arbitration and Sharia councils and tribunals, is that there is no way to properly ensure and institute safeguards to uphold gender equality. However, even where law reforms have been introduced to make the realm of family law more equal and fair for women, this legal institution is unable to truly make a "clean break" and achieve gender equality. So even if we were to encourage a "retreat" from multiculturalism in the interests of protecting women in minority groups, it may not make the outcomes any fairer, or less patriarchal. Pushing religious divorce settlement into the shadows of this privatised mediation approach in family law dispute resolution may also allow patriarchal hierarchies of religion to coincide with the patriarchal structures of this privatised legal institution. By reinforcing gender biases and disadvantages for women, it is hard to see how this would offer Muslim women a better outcome. Muslim women seeking dispute resolution in Sharia Councils in the UK are often considered as being in weak bargaining positions, but this happens in "secular" formal avenues of mediation and arbitration of family law matters as well.[97] The option of "state law only" means that Muslim women are faced with the same disadvantages confronted by most other women in society. Regardless of

[96] Ibid., 364.
[97] Grillo, *Muslim Families, Politics and the Law*, 129.

whether religious or secular dispute resolution is implemented, Muslim women enter in a disadvantageous bargaining position.[98] The growing privatised nature of family law dispute resolution merely compels religious groups to operate and use religious arbitration "in the shadows", which is why scholars, such as Ayelet Shachar, discuss possible alternatives whereby religious arbitration is incorporated into the "secular", where it is visible and may be scrutinised.[99] The option of religious arbitration, pushes women into a space where both religious values and patriarchal norms are reinforced along with the "secular" approach and the disadvantages carried through there, so a solution that more adequately addresses this problem is needed.[100]

Formal Institution Two: State Multicultural Policies

Examining the formal institution of state multicultural policies, helps to illustrate the ways in which the experience with Sharia in each state has been influenced by the formal institutional landscape. The way in which multicultural policies have been implemented and followed varies. These differences can help explain why Sharia councils and tribunals in the UK have found "space" to develop, but not so in Canada and Australia (despite also having policies of multiculturalism). Multicultural policies are a contemporary development and have evolved in each state from a political background of assimilation policies. By examining the historical constraints on multicultural policies, we can see how multiculturalism is embedded within a particular political context, and influenced by past ideals and legacies of colonialism and settlement – such as, assimilation policies like "White Australia", or competing dominant cultures in Canada that led to the "Bi-Bi" discussion, or the post-colonial relationship with former colonies in UK. This follows the HI notion of "nested newness" – that "new" institutions cannot "forget the old". Particularly, where, in some states, despite a formal multicultural policy that is set out in laws, the "logic of appropriateness" followed by political actors harks back to these older attitudes and norms around accommodation of minority groups.

[98] Ibid.
[99] Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001).
[100] However, discussion of what this solution might be is beyond the scope of this thesis.

State multicultural policies have also been significantly impacted by the events of 9/11. In the post-9/11 era, multiculturalism in each state has been influenced by the rise of Islamophobia, which has manifested itself informally within state policies and laws designed to combat terrorism. Muslim women are affected by this development in state policies, as the attitudes of political actors within state institutions frame the policies, and can carry through Islamophobic sentiment; ultimately, constraining and shaping the space available for Muslim women, and impacting their agency. The post-9/11 shift in policies of accommodating Muslim minorities in the West marks a critical juncture for state multiculturalism. As Kathleen Thelen argues, institutions are sites of "ongoing political contestations", and the changes that result from these contestations can act as constraints.[101] Political contestations that arise in the form of arguing for a "retreat" from multiculturalism (based on these notions of Islamophobia) highlight the way in which this institution can work as a constraint for Muslim women. In particular, the way in which Muslim women are framed within the discussion as either "victims" or "suspects" but not attributed agency.[102] This works to reinforce gender hierarchies from centuries past, adopting Orientalist notions towards "the East" where Muslim women are viewed as needing to be "saved".

Multicultural Policies

Multiculturalism is a widely-contested issue, and, as was explored in Section One, the questions around the extent to which the legal orders of minority cultural and religious groups should be accommodated can lead to circular debates. The multicultural policies of states, like Australia, Canada and the UK, represent attempts to create and implement strategies to bridge the gap between minority groups and the broader mainstream society. Many of these policies and strategies suggest that many countries in the West are culturally pluralistic.[103] The experiences with multiculturalism in Australia, Canada and the UK share many similarities, beginning with the development of multicultural state policies, which emerged around the same

[101] Kathleen Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, The United States, and Japan* (Cambridge: Cambridge University Press, 2004), 31; 290-292.
[102] Shakira Hussein, *From Victims to Suspects: Muslim Women since 9/11* (Sydney: NewSouth Publishing, 2016).
[103] Erich Kolig, "To Shari'aticize or not to Shari'aticize: Islamic and Secular Law in Liberal Democractic Society," in *Shari'a in the West*, ed. Rex Ahdar and Nicholas Aroney (Oxford: Oxford University Press, 2010), 256.

time. Canada was the first to introduce a federal policy, and is often viewed as the leader in establishing a formal multicultural policy, although the discussion of multiculturalism emerged earlier in the UK. The first piece of legislation in Canada was the 1971 *Multiculturalism Act*, which established the focus on embracing the cultural diversity of Canadian society. These ideals of multiculturalism were later entrenched in the Canadian *Charter of Rights and Freedoms* in 1982, followed by the updated *Multicultural Act* of 1988. Australia followed closely behind the Canadian adoption of multiculturalism, with the introduction of multiculturalism into government policy in 1977 under the Fraser Liberal Government,[104] although the roots of Australian multiculturalism emerged under the Whitlam Labor government, outlined in public debate first by Al Grassby.

Australia has had various iterations of federal multicultural policies over the years, but legislative provisions exist at the state and territory level (not the federal). For example, the New South Wales *Multicultural NSW Act 2000* or Victorian *Multicultural Victoria Act 2011*. By contrast, the UK has had no formal multicultural legislation or constitutional provisions. The closest provision would be the *Race Relations Act* of 1968, which established a commission to take care of community relations, and whose policies later adopted and reflected multicultural ideals and principles.[105] Influenced by its membership in the EU, where there have been a number of initiatives around cultural policy and recognising cultural diversity, the UK followed suit with a number of anti-discrimination policies and legislative provisions that have been implemented since the 1960s.[106] More recently the UK implemented the *Racial and Religious Hatred Act* of 2006. By and large, multiculturalism in the UK has consisted of governmental policies and the creation of strategies to incorporate multicultural ideals within the community – with a focus on equipping local municipal governments to implement welfare and immigration settlement policies.

[104] Krayem, "Australian Muslim Women," 59.
[105] Max Farrar, "Multiculturalism: Commonality, Diversity and Psychological Integration," in *Islam in the West*, eds. Max Farrar et al. (Basingstoke: Palgrave Macmillan, 2012), 10.
[106] Ruby Gropas and Anna Triandafyllidou, "Religious Diversity and Education: Intercultural and Multicultural Concepts and Policies," in *European Multiculturalisms: Cultural, Religious and Ethnic Challenges*, eds. Anna Triandafyllidou, Tariq Modood and Nasar Meer (Edinburgh: Edinburgh University Press, 2012), 151; and Max Farrar, "Multiculturalism: Commonality, Diversity and Psychological Integration," in *Islam in the West*, eds. Max Farrar et al. (Basingstoke: Palgrave Macmillan, 2012), 7.

In the early years of adopting multiculturalism, Australia, Canada and the UK, could be viewed as influencing one another. With multicultural policies and programs developing around the same time, there are similarities in the adoption of more culturally accommodating policies in the realms of education, immigration and settlement, and welfare. In Australia, the federal policies have focused on educating the community about multiculturalism, and offering welfare and support to migrants from non-English speaking backgrounds.[107] There were also reforms to school programs to promote social inclusion and anti-racism, as well as establishment of English as a Second Language (ESL) classes.[108] As multiculturalism developed in Canada, as an evolution from existing bi-lingual and bi-cultural discussions and policies (largely focused on the education arena), multicultural education and community support was a logical progression.[109] In the UK, the introduction of multiculturalism into education policies developed as an initiative to incorporate anti-racist policies into the community.[110] With a heightened awareness of the power hierarchies that existed amongst ethnic, religious and racial groups, and the effect this had in schools (and on the development of students), local education authorities and municipal councils developed education strategies and programs that addressed discrimination – and this has remained throughout the years, developing into the multicultural education approach that exists today. All three states have developed citizenship tests – these citizenship education and tests aim to encourage an "active citizenship" in the attempt to bridge the gaps between the cultures of migrant communities and state culture, and encourage participation in navigating integration issues.[111] With these examples, we can see there is a seeming institutionalisation of multiculturalism through state legislative provisions and initiatives. Through embedding multiculturalism within state policies, this establishes formal rules that are presumed to guide political actors within government institutions – in terms of

[107] Krayem, "Australian Muslim Women," 61.
[108] Gropas and Triandafyllidou, "Religious Diversity and Education," 150.
[109] As part of the 1969 Royal Commission on Bilingualism and Biculturalism non-French and non-English cultural groups were also considered (partly due to lobbying by some of these groups, like the Ukrainian community). Recommendations of the commission, thus, included the introduction of legal equality, as well as implementing Canadian education programs with the language and culture of these "other ethnic groups" – Patricia K Wood and Liette Gilbert, "Multiculturalism in Canada: Accidental Discourse, Alternative Vision, Urban Practice," *International Journal of Urban and Regional Research* 29, no. 3 (2005): 680-681.
[110] Gropas and Triandafyllidou, "Religious Diversity and Education," 153.
[111] Frauke Miera, "Not a One-way Road? Integration as a Concept and as a Policy," in *European Multiculturalisms: Cultural, Religious and Ethnic Challenges*, eds. Anna Triandafyllidou, Tariq Modood and Nasar Meer (Edinburgh: Edinburgh University Press, 2012), 201.

engaging with minority groups, and the extent to which they should be accommodated. This develops a "formal rule" around the need to accommodate and recognise the changing needs within the state, and address the growing number of minority cultural and religious communities. However, the actual implementation of these rules by actors where there may be influence from informal norms (such as Islamophobic or assimilationist sentiments), develops a "logic of appropriateness" that may be contrary to the formal rules outlined in the policies and legislative provisions. This "logic" becomes evident through examining how the policies have or have not been implemented – where historical constraints placed on multiculturalism within each state can be seen, and thus the influence of lingering legacies from the "old" institutions may also come through. The "logic" of multiculturalism influences whether accommodation in the legal pluralistic sense is possible in each state. Similarly, the constant debates and move towards a "retreat" from multiculturalism that have arisen post-9/11, highlight the significant influence the increasing prominence of Islamophobia within society has had on shifting the "logic of appropriateness" that underlies multiculturalism.

Implementation of Multicultural Policies

Despite the many similarities that appear in the development of multiculturalism across Australia, Canada and the UK, it is argued that the incorporation of multicultural ideals within state policies and institutional responses is not as similar as they may appear at first glance. The most significant difference is argued to be the "heavily localised" approach in the UK, that is largely voluntary, compared to the formal institutionalisation of multiculturalism in Canada and Australia (through the Canadian Charter and Australian state and territory multicultural acts).[112] This localised British approach to multiculturalism began in the late 1960s with the *Race Relations Act* of 1968 establishing the Community Relations Councils, which were local governmental entities (and later became Racial Equality Councils in 1976).[113] The Councils are the institutions that introduced and monitored the anti-racist education policies, along with introducing policies to encourage equal opportunities in

[112] Nasar Meer and Tariq Modood, "Islam and British Multiculturalism," *Global Dialogue* 9, no. 3-4 (2007): 89.
[113] Panikos Panayi, "The Evolution of Multiculturalism in Britain and Germany: An Historical Survey," *Journal of Multilingual and Multicultural Development* 25, no. 5-6 (2004): 472-473.

employment (namely, hiring policies).[114] The Local Education Authority have historically been actively involved in creating, monitoring and implementing multicultural education initiative.[115] These Councils received funding from both local councils and the Commission for Racial Equality set up by the government in 1976.[116] It is through granting local authorities these responsibilities and funding that the "heavily localised" approach to multiculturalism appears to manifest itself in the UK – and has encouraged closer engagement with local minority community groups, offering platforms for debate and consultation over public policies. Similarly, the influence of the historical engagement between the State and the Church of England (and other non-Muslim religious groups) in terms of welfare initiatives and schools has had a significant influence on policies of multiculturalism; and perhaps even on this development of the "local" approach and implementation of multiculturalism that has developed in the UK.[117] This engagement with the Church and religious groups is significant in creating a culture of ministerial consultations with religious groups, and thus, a space for Muslim groups to also engage with the state (this will be discussed further in Chapter Ten when examining church-state relations).

Australian and Canadian manifestations of multiculturalism also include local level initiatives. Canadian multicultural policy focuses on principles of social inclusion and embracing the cultural diversity of Canadian society.[118] State policy is concerned with the "management" of this cultural diversity through the establishment of formal federal, provincial and local municipal initiatives.[119] However, whilst there are similarities to the UK, in involving the lower, more local levels of government in the implementations of multicultural policies, the difference arises in the basis (or intentions) of the multicultural policy. Namely, that Canadian multicultural policy places an importance and focus on equality. Canadian multiculturalism is founded on values of equality and respect between individuals and groups regardless of "race, national or ethnic origin, colour and religion" – and it is this commitment to equality

[114] Ibid p.473
[115] Meer and Modood, "Islam and British Multiculturalism," 89.
[116] Panayi, "The Evolution of Multiculturalism in Britain and Germany," 473.
[117] J. Christopher Soper and Joel S. Fetzer, "Religious Institutions, Church-State History and Muslim Mobilisation in Britain, France and Germany," *Journal of Ethnic and Migration Studies* 33, no. 6 (2007): 934.
[118] Ilene Hyman, Agnes Meinhard and John Shields, "The Role of Multiculturalism Policy in Addressing Social Inclusions Processes in Canada," *Ryerson University Working Paper Series* 2 (2011), 6, http://www.ryerson.ca/cvss/working_papers.
[119] Ibid., 2.

(both non-discrimination and gender equality) that played a pivotal role in the Ontario Sharia debate, where there was a reiteration of commitment to principles of gender equality over accommodation of religious arbitration.[120] This discussion of the significance of gender equality to the accommodation Muslim groups and Sharia was explored in examining the state political and legal structure. The Canadian *Multicultural Act* 1988 ultimately provides a legal framework for multiculturalism, and emphasises the rights of minority religious, ethnic and racial groups to maintain and express their cultural heritage; as well as eliminating systematic and institutional inequalities (even placing an obligation on federal institutions to monitor their activities to ensure compliance with these multiculturalism provisions).[121] Canada's approach to multiculturalism is often regarded as the most comprehensive of all the multicultural legislative provisions amongst all the states, and it shows Canada giving the concept of multiculturalism a greater formal political and institutional importance compared to Australia and the UK. It also explains the scope of accommodation that was afforded to religious groups under other legislation – for example, the *Arbitration Act 1991* in Ontario (before it was amended following the Sharia controversy).

Whilst there is a shared struggle amongst the states when it comes to questions of "reasonable accommodation" of minority groups, there is a difference in the engagement with minority groups in each state – and this flows largely from the "heavily localised" version of multiculturalism in the UK. The manifestation of multiculturalism on the local community level has undoubtedly contributed to the development of Sharia councils in the UK. Despite the initial similarities in the development of multiculturalism in Australia and Canada, there has clearly been a space created for the development of these religious councils in the UK that has not happened elsewhere. They are viewed as being a uniquely British development that are an inherent part of the "socio-legal fabric of family governance".[122] Exploring the engagement between Muslim groups and state institutions in the UK offers further insight into some of the differences compared to Australia and Canada, and helps to

[120] Saeed, "Reflections on the Establishment of Shari'a Courts in Australia," 225-226.
[121] Hyman, Meinhard and Shields, "The Role of Multiculturalism Policy in Addressing Social Inclusions Processes in Canada," 6; John W. Berry, "Research on multiculturalism in Canada," *International Journal of Intercultural Relations* 37 (2013): 664.
[122] Samia Bano, "Muslim Dispute Resolution in Britain: Towards a New Framework of Family Law Governance?" in *Managing Family Justice in Diverse Societies*, eds. Mavis Maclean and John Eekelaar (Oxford: Hart Publishing, 2013), 66.

highlight why these uniquely British informal religious institutions have emerged. In terms of engagement, the size of the Muslim population in each state would (as a starting point) have a significant impact on the experience in each state, and the differences that arise in terms of political participation, and the space for religious institutions (like the Sharia councils in the UK). Within smaller populations, the conversations that have taken place in the UK have not come to the fore of political consideration in the same way. The Muslim population in the UK is larger than that in Canada and Australia, with the Muslim faith being the second largest after Christianity (and the most visible/easily identifiable in British towns across the country).[123] The development of multiculturalism in the UK has been influenced by the wave of migration from former British colonies in South East Asia (namely, Pakistan and India) beginning in the 1950s,[124] contributing to the establishment of Islam being the second largest religion in Britain today. This illustrates one of the more obvious answers as to why the UK has seen the creation of Sharia councils, compared to Australia and Canada. A majority of Muslims in the UK reside in England (approximately 76%), and are concentrated in large cities. In terms of ethnic diversity within the British Muslim population, they are predominantly from South Asian backgrounds, and thus differ from Canada and Australia where there is more significant ethnic diversity. In Canada and Australia, the Muslim population tend to be in the larger urban cities, but in Canada they are also spread out amongst the provinces. They are also more ethnically fragmented compared to the UK with Canadian Muslims coming from over 60 ethnic groups, and Australian Muslims from a variety of ethnic backgrounds (42% of Lebanese origin, but also from other parts of the Middle East, Africa and South Asia). The organisation of Muslims in Australia and Canada into cultural and ethnic communities contributes to a lack of cohesive political organisations and movement; particularly compared to Britain, where Muslims are more concentrated both in location, and along the lines of ethnic and cultural affiliations. Similarly, with larger Muslim migration and population in the UK, the discussion around accommodation would have to be different. Ultimately, patterns of migration and settlement, the cohesiveness in "coming together" to form organisations,[125] and the space given for creation of communities and avenues for religious practice and expression (against the

[123] Chris Allen, *Islamophobia* (Surrey: Ashgate, 2010), 85.
[124] Samia Bano, *Muslim Women and Shari'ah Councils* (Basingstoke: Palgrave Macmillan, 2012), 26-27.
[125] This is discussed further in Chapter Ten when considering informal networks, particularly the ability for Muslims in Britain to effectively mobilise and participate politically in comparison to the other jurisdictions.

backdrop of state laws around anti-discrimination and freedom of religion) has contributed to the development of Sharia councils in the UK.[126]

The "local" nature of multiculturalism in the UK can also be viewed as allowing religious groups, like Muslim communities across the country, to lead separate lives (to some extent) – and this is an argument that has been raised in recent years by British MPs, including former PM David Cameron, to illustrate what they believe to be one of the "problems" with British multiculturalism.[127] Whilst some may consider this to be problematic, it is clearly a contributor to the space that has been given to religious groups to feel comfortable in making a place for themselves within British society. There has also been a need for Muslim groups to engage with the state over the years, with a significant starting point being the Rushdie *Satanic Verses* affair in the 1980s (as well as the Iranian revolution), where Muslim groups felt compelled to join together to defend their communities and religious practices; and this ultimately led to the development of community organisations.[128] There has not been the same emergence (or need for) community organisations in Australia and Canada, although this is changing (slowly) in the post-9/11 climate, with Muslim communities joining together to respond to Islamophobic movements and sentiments. For example, there has been the establishment of the Islamophobia Register in Australia, in addition to Muslim groups joining together in 2014 to respond to (oppose) proposals by the Abbott coalition Government to amend the *Racial Discrimination Act* through repealing section 18C, essentially making racist hate speech lawful (a debate which has recently arisen again with proposals from Attorney General George Brandis in August 2016).[129] From the 1990s onwards, Muslims groups (and individuals) in Britain have taken action to be more active in producing change in British institutions, in order to make them more accommodating. One of the key ways in which this has been done is to get more involved in local politics and become government representatives (e.g. Mohammed Ajeeb, the first Lord Mayor of Bradford).[130] The space for Muslim communities to become more involved as political representatives was significantly

[126] Bano, "Muslim Dispute Resolution in Britain," 66.
[127] Meer and Modood, "Islam and British Multiculturalism," 87.
[128] John Wolffe, "Fragmented universality: Islam and Muslims," in *The Growth of Religious Diversity: Britain from* 1945, ed. Gerald Parsons (Milton Park: Routledge, 1993), 164.
[129] Stephanie Anderson, "The history of the Racial Discrimination Act," *ABC News*, August 30, 2016, http://mobile.abc.net.au/news/2016-08-30/racial-discrimination-act-explainer/7798546 (accessed September 15, 2016).
[130] Wolffe, "Fragmented universality," 164.

shaped by the policies of the New Labour government that came into power in 1997, under the leadership of former PM Tony Blair. The changes brought with this government allowed greater "access to corridors of power" than ever before.[131] This has been accompanied with a more general redefinition of Islam, to create a 'British Islam' by the younger/newer generations.[132]

Ultimately, the development of a British Muslim identity emerged from an environment where there was a general effort to try to accommodate minorities, and include them in British concepts of citizenship. The inclusion of immigrant communities in discussions around matters of integration on the local municipal level, but also the national level,[133] through a variety of forums, is a means of institutional recognition of minority groups and an important avenue for their participation in, and contribution to the political process (beyond a mere right to franchise/vote). One example of this is the close negotiations between local authorities and Muslim communities on matters such as religious burial and animal slaughter.[134] The result of this space for negotiation given to minority religious groups, like Muslim groups, means that these practices have been accepted and accommodated. This acceptance has also extended to the judicial realm– with the courts making great strides in "reconciling Islam and English law" compared to other countries in Europe (and this can presumably be extended to Australia and Canada as well).[135]

Increased opportunities for political participation created within state institutions have had a considerable impact on the mobilisation of minority groups.[136] Going back to the idea of a more "localised" approach to multicultural accommodation in the UK, through creating spaces for more cooperation and participation, and offering support through access to resources (such as English language education) has allowed greater participation by Muslim communities in the public institutional space. It highlights another significant difference in the political landscapes of each state, in explaining the

[131] Tariq Modood and Fauzia Ahmed, "British Muslim Perspectives on Multiculturalism," *Theory Culture Society* 24, no. 2 (2007): 204.
[132] Wolffe, "Fragmented universality," 164.
[133] Miera, "Not a One-way Road?" 203.
[134] Wolffe, "Fragmented universality," 163.
[135] Grillo, *Muslim Families, Politics and the Law*, 278.
[136] Ricard Zapata-Barrero and Ruby Gropas, "Active Immigrants in Multicultural Contexts: Democratic Challenges in Europe," in *European Multiculturalisms: Cultural, Religious and Ethnic Challenges*, eds. Anna Triandafyllidou, Tariq Modood and Nasar Meer (Edinburgh: Edinburgh University Press, 2012), 169.

space for Sharia councils that has uniquely developed in the UK. That is not to say that there is no opportunity for greater participation by Muslim groups and individuals in Canadian and Australian political institutions, it just suggests that perhaps it has not developed to the same point, yet. Again tying back to smaller Muslim populations, but also not having the same political issues arise which forced the creation of a British Islam/British Muslim identity. In the UK it would seem that the "logic" around multiculturalism is one that follows the formal rules outlined in multicultural policies and legislative provisions, with the recognition and accommodation of this unique British Muslim identity as being an inherent part of the British society; along with the local approach and engagement which brings Muslim groups and local communities closer together, and thus, creates a space for Sharia councils to be established. In Canada and Australia, while there are formal multicultural policies, the lack of a close localised multicultural engagement with Muslim groups (like that in the UK) suggests that the "logic" followed by political actors is one that does not wholly embrace the formal iterations of multiculturalism outlined in state policies. The competing interests and biases of actors would appear to come into play when implementing or interpreting policies. This is seen through the preference given to gender equality in Ontario; actors holding onto historical attitudes towards accommodation; or the rise of Islamophobia which has influenced political representatives in each jurisdiction.

Historical Constraints on New Multicultural Policies

The outcomes that emerge from the different engagement of Muslims with the state in the UK have not been seen to the same degree in Canada or Australia. This illustrates that despite the formal rules around multiculturalism, developed through the institutionalisation of multiculturalism in state practices and policies, the reality of engagement with minority groups (in this case the Muslim communities) exists amongst a "logic of appropriateness" that is shaped by traditional cultural hierarchies that persist, and have not been entirely supplanted by changes in formal rules (in this case the introduction of formal multiculturalism in Canada and Australia). There is a "nested newness" of state multiculturalism, where it is not able to completely "wipe out" legacies from the past – legacies such as old preferences around accommodating

minority groups, or policies of assimilation.[137] Ultimately, political institutions are "embedded" within particular contexts, and the path dependencies that exist within institutions mean that they cannot truly escape historical traditions.[138] In fact, the rules (like the formal rules that are outlined by the state policies of multiculturalism) develop in response to history (e.g. settler or colonial past),[139] and thus historical constraints have a significant role in shaping the institution. In this case, the success or breadth of implementation of the multicultural policies. The differences in how multiculturalism has been instituted through state policies highlights this, and to better understand this, we need to look at historical context from which multiculturalism emerged, and how this has contributed to the different experiences of Sharia and Muslims in Canada and Australia (compared to the UK).

The development of multiculturalism is "nested in time"[140] emerging out of the politics and dissension around national identity, particularly in Australia and Canada. Both nations face a "settler" history which has a significant impact on their national identity, addressing questions around accommodating Indigenous populations – but in Canada there is also the competing bilingual and bicultural interests. Whilst path dependencies in "new" institutions, like the development of multicultural state policies, display the ability for institutions to evolve and change, it is argued that they cannot (and do not) truly escape historical traditions.[141] At a minimum the influence of significant historical events and traditions would have an impact on how "new" institutions are formed. As such, the policies of multiculturalism in each state are shaped by the context from which they emerged. Australia and Canada have a history as "settler" societies, which have impacted how multiculturalism is shaped and instituted in the state.[142] A key consideration that arises in discussions around

[137] Chappell discusses this idea of "nested newness" in terms of the "new" institution of the International Criminal Court, noting that new institutions operate within (and continue to be influenced by) the spatial and temporal contexts from which they emerge. Chappell, *The Politics of Gender Justice at the International Criminal Court*, 3.
[138] Chappell and Waylen, "Gender and the Hidden Life of Institutions," 607.
[139] B. Guy Peters, Jon Pierre and Desmond S King, "The Politics of Path Dependency: Political Confliect in Historical Institutionalism," *The Journal of Politics* 67, no. 4 (2005): 1287.
[140] Chappell, *The Politics of Gender Justice at the International Criminal Court*, 34 – here, Chappell notes that institutions are "nested in time".
[141] Wolfgang Streeck and Kathleen Thelen, "Introduction: Institutional Change in Advanced Political Economies," in *Beyond Continuity*, ed. Kathleen Thelen and Wolfgang Streeck (Oxford: Oxford University Press, 2005), 6-7; and Fiona Mackay, "Nested Newness, Institutional Innovation, and the Gendered Limits of Change," *Politics and Gender* 10 (2014): 553.
[142] Elsa Koleth, "Multiculturalism: a review of Australian policy statements and recent debates in Australia and overseas," *Department of Parliamentary Services*, Research Paper No. 6 (8 October 2010), 2;

accommodation of minority cultural and racial groups must also consider questions of recognition of Indigenous groups in each state. Recognition of Indigenous Australians and the First Peoples of Canada has historically been such a widely debate matter in terms of status afforded, as well as the general welfare and treatment of these groups.[143] With Indigenous groups still seeking appropriate levels of recognition in Australia, the prospects for accommodation of Islamic religious laws are, not surprisingly, grim. In fact, discussions around legal pluralism and the incorporation of minority cultural laws have only considered Indigenous Australian customary law, with no mention of minority religious laws, like Sharia.[144] Similarly, with the slow move towards recognising Indigenous groups (in Australia) it becomes clear that state policies, including multiculturalism, cannot truly escape historical political policies and "White Australia" sentiments. Essentially, there is a "remembering" of "old" legacies from the past. This is also seen through the increasing criticism of multiculturalism and rise of Islamophobia, which also reflect sentiments from the era of assimilation policies.

A similar debate taking place in Britain around the "failure" of multiculturalism indicates a shift back towards ideals of "Britishness" from the pre-multiculturalism era (the recent Brexit debate and focus on the "immigrant problem" is illustrative of this).[145] However, the significance in size of the Muslim population in the UK makes this reversion back to "Britishness" and assimilation sentiments a lot more difficult than the "retreats" occurring in Australia, and even Canada. UK multiculturalism policies are built on a history of Britain as a colonial power. Dealing with post-colonial migration, and addressing imperial traditions, along with a historical practice of implementing legislation on British nationality matters, have all had a significant impact on the political process and evolution of policies of multiculturalism in the

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Christian Joppke, "The retreat of multiculturalism in the liberal state: theory and policy," *The British Journal of Sociology* 55, no. 2 (2004): 247.

[143] Koleth, "Multiculturalism," 2.

[144] Australian Law Reform Commission, *Recognition of Aboriginal Customary* Laws, ALRC Report 31 (1986).

[145] This "failure of multiculturalism" is illustrated in statements by political leaders, notably former PM David Cameron who criticized state multiculturalism during a speech on radicalization and Islamic extremism. See BBC News, "State multiculturalism has failed, says David Cameron," *BBC News*, February 5, 2011, http://www.bbc.com/news/uk-politics-12371994 (accessed on June 5, 2015); and Nasar Meer and Tariq Modood. "Islam and British Multiculturalism," *Global Dialogue* 9, no. 3-4 (2007): 87.

UK.[146] This has led to the creation of a unique British Muslim identity, whereby British Muslim communities have found a space for themselves as being an inherent part of the British identity and nationality. Thus, with multiculturalism more "de-centred" and localised, any shift, or retreat, from multiculturalism to civic integration is one that is based on British values that are not particularly British (from a traditional, older understanding of British identity).[147] Instead, as outlined in the Cantle Report, British values are about respecting differences, non-discrimination and valuing gender equality.[148] The creation and incorporation of diverse British cultural identities within the "national identity" disrupts the "path dependency" of old historical institutional legacies (such as 'Britishness' which was inherently "white"). The obligation to accommodate those the British once ruled, has developed a different norm that informs the "logic of appropriateness" developed in multicultural discussions. Like Australia and Canada are influenced by their "settler" histories, the UK is similarly influenced by its colonial past. However, the legacy of colonialism has developed a different approach and outcome of multiculturalism, with a unique British identity and landscape of accommodating and integrating of minority groups into British society.

By contrast, Muslim communities in Canada and Australia have not been given the same status or space for political engagement. Whilst Canada has very specific and entrenched multicultural policies (which are often heralded as being some of the most positive multicultural provisions) the reality is one where certain groups are given a "lesser status", and are kept in a position of dependence through the constant emphasis of differences; and through this they are disarmed from posing any kind of threat to the "dominant" group.[149] This argument casts light on the furore that arose around requests for Islamic arbitration in Ontario, where religious arbitration had been taking place for years by Jewish and Christian communities under the flexible provisions of the *Arbitration Act*. The differences between Muslim groups and other religious groups appear to be constantly fixated upon, particularly post-9/11 with the

[146] Joppke discusses this idea of the history of Britain introducing legislation on nationality matters, noting that there is a "British-style" civic integration. This is a "national framing of multiculturalism" that appears in immigration and nationality laws, and significantly contributes to the "non-coercive" nature of multiculturalism and integration in the UK. See Christian Joppke, "Limits of Integration Policy: Britain and Her Muslims," *Journal of Ethnic and Migration Studies* 35, no. 3 (2009): 462.
[147] Joppke, "The retreat of multiculturalism in the liberal state," 249 and 253.
[148] Ted Cantle, *Community Cohesion: A Report of the Independent Review Team*, (London: Home Office, 2001), 9; and Joppke, "The retreat of multiculturalism in the liberal state,"253.
[149] Hyman, Meinhard and Shields, "The Role of Multiculturalism Policy in Addressing Social Inclusions Processes in Canada," 9.

rise of Islamophobia. In Australia, a "retreat" from multiculturalism appears to have started with the Howard Coalition government abolishing key agencies, like the Department of Multicultural Affairs, and reducing access to welfare benefits for new migrants, as well as cutting funding to cultural community organisations.[150] This highlights the lack of similar opportunities for community engagement in the political process, compared to the UK; where minority cultural groups have long been given space to be involved in policy discussion – including discussing Sharia in the public sphere. Even the Ontario debate allowed Muslim groups and Muslim women, along with other groups, to participate in a public discussion of Sharia. In Australia, state multicultural policies and strategies appear to have shifted more towards management of communities to "manage existing and potential tensions surrounding events like terrorist attacks and the 2003 war in Iraq"[151] – illustrating the influence of Islamophobia and fear of the global terrorism threat on policy. Although perhaps this "retreat" is not a retreat per se, as Australian multiculturalism was never able to truly escape the historical context from which it developed – the "path dependency" of the institution of state multiculturalism inherently intertwined with the purpose of forming national identities, for instance.[152] An example of this historical legacy/context is the 1989 policy document on multiculturalism, which noted the importance of Australia's British history, and that multiculturalism would help to "fix" Australia's identity as "white" and "British".[153] This implies that one purpose of multiculturalism was to address the apparent "image problem" of Australian identity, more so than focusing on accommodating cultural groups.

Ultimately, multiculturalism in Canada (though this is applicable to Australia as well) is used as a means for "cultural regulation and reinforcement of existing hegemonic hierarchies"[154] – harking back to past institutional legacies, including those from a pre-multicultural policy era. Multiculturalism in the UK can be viewed as a "negotiated order" of sorts, where through debates around accommodation (previously around other religious groups, and more recently Muslim groups) the bounds of law and

[150] Koleth, "Multiculturalism," 12-13.
[151] Ibid., 15.
[152] Joppke, "The retreat of multiculturalism in the liberal state," 246.
[153] Ibid., 244.
[154] Yael Machtinger, "Socio-legal gendered remedies to *get* refusal: top down, bottom up," in *Women's Rights and Religious Law*, eds. Fareda Banda and Lisa Fishbayn Joffe (Milton Park: Routledge, 2016), 227.

politics shift.[155] There is a "cultural voluntarism" that appears to be an integral part of the British political tradition when considering the requests of minority groups to be accommodated and recognised.[156] Whether this will change with the increasing lack of sympathy towards and "othering" of Muslims, is yet to be seen. What is clear is that multiculturalism ultimately highlights the competing institutional and group belongings within society. New formal institutions, like multiculturalism, become sites for the contradictory and competing interests of minority groups and the "dominant" group; and the extent of accommodation is influenced by past institutional legacies (illustrated through the inability to truly escape previous assimilationist policies within recent political rhetoric and movements). While these institutional legacies could be argued as having always been competing in the background, with the rise of Islamophobia, there appears to be a more obvious turn back towards past historical political movements and sentiments.

Islamophobia and Multicultural Policies in a post-9/11 World

Alongside past institutional legacies, like policies of assimilation, the experience of 9/11 in the US has been a defining global moment, and turning point that has changed the political and social landscape. The effect it has had, illustrates that state multicultural policies (like all institutions) can be changed by politically-defining historical events. Defining global events like this can have a significant influence in shaping the "logic of appropriateness" that develops and evolves within institutions.[157] In the years since 9/11, the rise of Islamophobic sentiments in the West has led to movements supporting "retreats" from multiculturalism within state policies and agendas. There appears to be a "remembering of the old", a reversion to political attitudes and policies towards race

[155] Grillo, *Muslim Families, Politics and the Law*, 279.
[156] Ibid.
[157] This idea that institutions may be shaped by significant political events like 9/11, draws on the broader discussion in HI around "critical junctures" (where it is argued institutional change may occur). These junctures that bring about change may be due to actors within institutions drawing on "moments of political and social fluidity" (the critical junctures) to further a particular agenda within the institution. Through exploiting the uncertainty, actors can "manipulate the preferences of important social groups through the strategic promotion of change in the relevant social norms." [Giovanni Capoccia, "Critical junctures and institutional change," in *Advances in Comparative-Historical Analysis*, eds. James Mahoney and Kathleen Thelen (Cambridge: Cambridge University Press, 2015), 148-150]. This has also been discussed in the guise of "conversion", where political actors draw on the broader context within which the institution operates and "redirect institutions or policies towards purposes beyond their original intent." - Jacob S Hacker, Paul Pierson and Kathleen Thelen, "Drift and conversion: hidden faces of institutional change," in *Advances in Comparative-Historical Analysis*, eds. James Mahoney and Kathleen Thelen (Cambridge: Cambridge University Press, 2015), 180-181.

and cultural accommodation that were prominent in the time before multiculturalism. There has been a shift in multicultural policies, where they no longer discuss minority cultures generally, but appear to specifically focus on Muslims. Questions around accommodation are now about Muslim communities and Sharia above anything else. This is clearly evidenced in Australia, compared to the UK and Canada. Despite a shift towards civil integration in the UK, a "retreat" is little more difficult, as the development of the British Muslim identity came about before policies of multiculturalism, and poses a more "solid" competing interest to this call for a "retreat" from multiculturalism, and attempts to throwback to assimilationist policies and behaviours. Following 9/11, Australia has developed the most extensive anti-terrorism regime in the world, which means engagement with Muslim groups tends to be one of "management" (as discussed above), explaining why the opportunities for Muslims to engage closely with the political process has not really developed, as seen in the UK. Also, this can explain to some degree, why the Sharia debate has not occurred on the same level (in parliament) as it did in Ontario and Britain. Instead, the discussion has largely been restricted to media and social commentary debates. The media has been quite influential in representing Muslims (and not always in a positive light), influencing the policy arena, and having a significant impact and voice in the discussions around multiculturalism and accommodation.[158] The impact of the media, along with the post-9/11 "fear" and rising Islamophobia was also seen in the Ontario debate – with the media having a huge influence in propelling forward the "no Islamic arbitration" movement.[159] Amendment of arbitration legislation in Ontario shows that multicultural policies are not always all embracing, particularly with the strength of anti-Islam and anti-Sharia movements and sentiments arising in the post-9/11 era. There appears to have been a return to "othering" of Muslims – a historical stance arising from centuries old Muslim world versus the West sentiments, underlined by colonialism that was viewed as a "civilising mission".[160] This idea is one that is supported by the fact that there is significant discussion, both socially and politically, around Islam and Sharia in the UK – in fact, the term Islamophobia first arose in the

[158] Grillo, *Muslim Families, Politics and the Law*, 7.
[159] Katherine Bullock, "'The Muslims Have Ruined Our Party': A Case Study of Ontario Media Portrayals of Supporters of Faith-Based Arbitration," in *Debating Sharia: Islam, Gender Politics, and Family Law*, ed. Anna C Korteweg and Jennifer A Selby (Toronto: University of Toronto Press, 2012), 257.
[160] Christine Ho, "Muslim women's new defenders: Women's rights, nationalism and Islamophobia in contemporary Australia," *Women's Studies International Forum* 30, no. 4, (2007): 294.

British context.[161] However, the presence and place of Muslims as the second largest faith, and the development of unique British Muslim identity has perhaps contributed to creating a space for Muslim groups to openly establish and maintain Sharia councils within communities.

Outcomes for Muslim Women

The politics of Islamophobia has had an impact on multiculturalism, by reframing the discussion and "purpose" of multicultural policies to focus on Muslim communities in particular; which has specifically filtered through to effect Muslim women. So, whilst feminists may argue multiculturalism is bad for women, the development of an underlying Islamophobic attitude that develops suspicion and fear of Islam within state multicultural policy discussions, and argues for a move away from multicultural accommodation, also has an adverse effect on Muslim women. Islamophobia as an informal norm constrains and shapes actors, in this case Muslims and Muslim women, and particularly the agency of Muslim women. This political contestation that has arisen around multiculturalism in each state highlights a "critical juncture" within the institution of state multicultural policies, with the seeming retreat from multiculturalism in some states, illustrative of the idea that institutions can operate as constraints (in this case on Muslim actors within society).[162] The constraint on Muslim women is the placement or labelling of them as either "victims" or "suspects" (but never really agents with a voice and ability to represent themselves in the multicultural discussions). This works to reinforce imperial gender hierarchies – i.e. "needing to save the women from the East/the Orient", along with the general othering of Muslims, and ideas of Muslims being "barbaric" and "uncivilised". Essentially, there is the reinforcement of historical ideas and notions of colonialism, where the "barbaric", "brown men" are seen as oppressing their women.[163] In doing so it also emphasises

[161] The term "Islamophobia" was notably used in a Runnymede Trust report titled *Islamophobia: A Challenge to Us All* in 1997, it had not been employed popularly before then - Grillo, *Muslim Families, Politics and the Law*, 233.
[162] Kathleen Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, The United States, and Japan* (Cambridge: Cambridge University Press, 2004), 31; 290-292 ; and Vivien Lowndes, "How Are Things Done Around Here? Uncovering Institutional Rules and Their Gendered Effects," *Politics and Gender* 10, no. 4 (2014): 685 (Lowndes discusses the idea that institutions distribute power in ways that constrain and enable actors differently).
[163] Ho, "Muslim women's new defenders," 294.

ideas where "agency" is attributed as being male, while women are always placed as the victim, without any agency or voice.[164]

This focus on women is evident in the effects that counterterrorism laws and policies have on Muslim women. For instance, in the UK former PM David Cameron proposed language programs that specifically targeted Muslim women.[165] The proposal suggested that Muslim women are uneducated (and need saving) but even more than that, as the "guardians" in the private realm of the home, they also have a responsibility to prevent terrorism (by becoming educated and being able to speak and read English). So, they become implicated in the issue and problem of the radicalisation of Muslim youth. Their responsibility to help prevent radicalisation places a blame of sorts on them where they do not speak English and are not seen as actively working to stop their sons (or daughters) from joining terrorist groups. Essentially, they become victims because they are oppressed and confined to the domestic realm (and thus assumed to be uneducated, and unable to read), but they also become suspects because they are the "mother" and "wives" with a duty of sorts to help the state in counter-terrorism efforts. Ultimately, "women's interests" (in this case Muslim women's interests) are defined and constructed against a political and institutional context.[166] In this case, state multiculturalism, and the developing informal norms of political Islamophobia define their interests as "needing saving", victims of their patriarchal religion, deprived of freedom and choice; or alternatively need to be reformed/prevented from becoming "suspects". Both definitions and iterations of Muslim women's interests fails to involve them in the process of defining the interests. This reinforces the inherent gendered hierarchies and biases within state institutions (in this case policies of accommodation and citizenship). Ultimately, this discussion links back to traditional multiculturalism-feminism arguments (discussed in Chapters One and Four) about the agency of Muslim women. These state policies around multiculturalism and nationalism are underlined by a "racialized paternalism", where "defending" the nation in a time where there is a threat of terrorism is targeted through controlling and policing Muslim

[164] Ibid.
[165] Rowena Mason and Harriet Sherwood, "Cameron 'stigmatising Muslim women' with English language policy," *The Guardian*, January 19 2016, https://www.theguardian.com/politics/2016/jan/18/david-cameron-stigmatising-muslim-women-learn-english-language-policy (accessed June 13, 2016).
[166] Francesca Gains and Vivien Lowndes, "How is Institutional Formation Gendered, and Does it Make a Difference? A New Conceptual Framework and a Case Study of Policy and Crime Commissioners in England and Wales," *Politics and Gender* 10 (2014): 529-530.

women (this ties into the hijab debates, and placement of veiled Muslim women as the "symbol" of the "other").[167]

Conclusion

Examining formal institutions offers a new perspective into the religious accommodation discussions, and the experience with Sharia in each state. The ways in which freedom of religion is positioned in comparison to gender equality provisions in each states' legal structure has a significant impact on the possibilities for greater religious accommodation, and shapes the Sharia debates. The state structure along with policies of multiculturalism influence the means and opportunities available for minority religious groups (in this example, Muslim groups) to engage with the state. In terms of outcomes for women, the state structure also impacts the opportunities for women's groups to interact with the state in furthering their agenda. The formalism of gender equality in Canada, contributes to the preference given to gender equality and women's rights over greater religious freedom. The effectiveness of women's groups engagement with the state in Canada (compared to the UK, for instance) is illustrated by the amendments to Ontario's arbitration laws following the Sharia debate and the strong feminist opposition to religious arbitration. This notion of formal institutions (laws, constitutions, for example) may seem counterintuitive to some feminist arguments where the law is viewed as not being "good" for women. However, it is arguable that the formalisation of equality within the constitution and laws within Canada has offered a significant starting point for women's movements in Canada, and has helped in resisting matters, like religious arbitration.

Whilst the state is often positioned as neutral and pro-gender equality, and thus the "best" alternative for Muslim women seeking dispute resolution to family or personal law matters, the outcomes for women are not always so positive or equal, and they may differ between different state structures (all of which claim to be neutral). The shift towards privatisation in family law, with a focus on mediation or arbitration, allows gender hierarchies and historical legacies of bias to filter through – with many of these legacies shaped by conservative Christian ideals surrounding marriage and the idea of the family. Thus, the secular law is not truly secular (an idea that is discussed in

[167] Ho, "Muslim women's new defenders,"294.

more detail in the next chapter) and this idea of neutrality is a fallacy. Despite reforms and movements towards formal equality (in the area of family law) the privatised mediation procedures do not ensure equality and protection of women's rights. Therefore, in positioning this as the better alternative to the apparently oppressive, patriarchal principles of Sharia, for Muslim women, they are then faced with the gender biases within this secular" institution.

Policies of multiculturalism have also had a significant role in shaping the experience with Sharia in each state. The "localised" nature of multicultural policies in the UK, compared to Australia and Canada can perhaps account for the key difference in ability for Muslim groups to engage with the state and seek greater accommodation. This has allowed the establishment of visible Sharia councils within society, as opposed to Australia and Canada where any comparable arbitration councils and tribunals are pushed underground to operate "in the shadows". The different experiences and development of multiculturalism have also been shaped by historical legacies – there are "path dependencies" that these policies follow, as they are affected by the circumstances from which they emerge, as well as influential events, like 9/11. Post-9/11 multiculturalism in each state has shifted the focus to Muslim groups, more than any other minority group. This has been accompanied by the rise of Islamophobia, which has significantly impacted Muslim women. In terms of outcomes for Muslim women, Islamophobic attitudes and an increased focus on counterterrorism efforts have influenced the behaviour of political actors in creating policies that draw Muslim women into the centre of focus. They are framed as either "victims" or "suspects", which in many ways draws on and returns to colonial attitudes that viewed Muslim women as being oppressed by their religion and cultures. However, in doing so, Muslim women are silenced and further oppressed, not just by their communities or families, as commonly claimed in arguments opposing Sharia, but also by the state. There is a reinforcement of implicit gender hierarchies and biases within the state, where women's agency is denied and they are excluded from partaking in discussions and definitions of their interests. This leads to a "double-bind" of sorts, where minority women (in this case study, Muslim women specifically) face inequalities within their religious groups but also via the state.

CHAPTER TEN

Church-State Relations and Informal Networks

In Chapter Nine, I examined two formal institutions – state policies of multiculturalism and the legal and political structure of the state – in order to give context to the institutional background and landscape within which the Sharia debate is framed in each country. This also highlighted the ways in which historical (and often gendered) legacies shape these formal state institutions, leading to particular outcomes in terms of multicultural and religious accommodation. In this chapter, I extend this discussion of institutions to look at two informal institutions. Informal institutions operate alongside formal institutions, and are considered the unwritten "rules" that are established and operate outside "official" formally sanctioned channels (of state-enforced formal institutions).[1] They are more social in nature, derived from "shared expectations" about the "official rules of the game".[2] Informal institutions are more difficult to define; in discussing them the focus is on customs and norms. Informal institutions tend to be centred on "traditions, customs, moral values, religious beliefs and all other norms of behaviour that have passed the test of time".[3] Based on these definitions of informal institutions, in this chapter, I will first be discussing the dominant church/es in Australia and Canada as informal institutions – focusing on the influence religious beliefs and the moral values have had (and continue to have) on the formal institutions of state policies and laws. By examining these informal institutions (as with the formal institutions discussion in the previous chapter) it is possible to better understand the ways in which they have shaped the Sharia debate in each state and therefore accommodation of Sharia tribunals and councils and the outcomes for women in seeking justice in personal law matters.

There is a historical legacy of Christian groups having a significant role in shaping the public policy debates in all three countries, particularly those concerning women. However, whilst there is no established church in Canada or Australia, discussing the

[1] Gretchen Helmke and Steven Levitsky, "Informal Institutions and Comparative Politics: A Research Agenda," *Perspectives on Politics* 2, no. 4 (2004): 726-727.
[2] Julia R Azari and Jennifer K Smith, "Unwritten Rules: Informal Institutions in Established Democracies," *Perspectives on Politics* 10, no. 1 (2012): 39.
[3] Svetozar Pejovich, "The Effects of the Interaction of Formal and Informal Institutions on Social Stability and Economic Development." *Journal of Markets and Morality* 2, no. 2 (1999): 166.

established church in Britain potentially poses a slight problem, as it could possibly be classed as a formal institution (as it is established by the state). However, as the Church itself does not directly create laws and policies, or implement them within society, it could also be considered informal. Particularly as, in recent years, the role of the Church is often downplayed as being more of a "figurehead" and "tradition"; with claims that the Church no longer has great influence in relation to policies (despite holding seats in the House of Lords). With no established church in Australia and Canada, the dominant churches within society more clearly operate at a more informal level – conforming to the idea that religion and culture are informal institutions. While the place of churches in Australia and Canada is a little clearer, the hybrid of formal and informal in the UK goes a long way to explaining how and why Sharia tribunals and councils may have found "space" to establish and grow. Ultimately, I will be discussing the church as an informal institution, primarily because it does not establish "formal rules" through directly creating public policies or law, despite having a position within the British House of Lords. It does, however, influence and shape the rules that are formed in other more formal state institutions.

Examining the influence of "the Church" in each state illustrates the gender legacies that are carried over into formal institutions, like public health policies or the definition of marriage in law. This underlying influence in shaping law, for instance, challenges the claims that laws are "secular" and "neutral", and free of gender biases or patriarchal traditions, as they operate in the background through the inheritance of Christian ideals and morals. Thus, when positioned as the more "just" alternative for minority women, they too can reinforce oppressive, patriarchal ideals. The second informal institution I will look at is the informal networks (of men) that exist within the policy realm, and the way these operate in the Sharia debates. This informal institution establishes and reinforces unwritten "rules" within formal institutions that illustrate the norms that have been created around the participation of minority women. In this case, Muslim women within debates and discussions that directly affect them. Finally, I will consider the Sharia Councils in the UK. This is not a focus of the discussion of informal institutions, but does offer some insight into the ways in which these bodies employ gendered, patriarchal understandings of family, particularly when encouraging reconciliation. As such, I will offer a brief consideration of the way these religious arbitral bodies are inherently shaped and influenced by the institutional

landscape in which they emerge, and are influenced by the gender hierarchies and legacies that underlie formal state institutions – which are shaped by other informal institutions (like "the Church" and informal networks).

Informal Institution One: The Church/dominant religions

Debates around the accommodation of Sharia within Western liberal democracies tend to present Sharia tribunals and councils, like those in the UK, as an intrusion on the secular nature of the state. However, closer examination of the historical and contemporary roles of the Christian churches within each country indicates that this assumption is misleading; with all three countries failing to completely sever ties with their Christian heritage. State policies and laws are "nested" within legacies of the past, and a particularly influential legacy is that derived from these Christian churches. It is important to consider the history behind political issues, and through "placing politics in time" it is possible to trace the path that has led to a particular outcome.[4] Placing the politics of religious freedom "in time" can help to explain how the place of the Church/churches within society has, or has not, created a space for Sharia. What is particularly interesting is the role of the established Church in the UK, and the way in which this has created a greater dialogue around religious freedom and interaction between the state and minority religious groups. In each jurisdiction, there is also evidence that the common law has reinforced religious norms and moral values (highlighting the influence the church has on state policies and laws). As a result of this influence, when arguing that Sharia is "bad" for women, we need to consider (as with family law) that law and policies are embedded within particular contexts, and have path dependencies that draw on historical legacies. In this case: the legacy and influence of the Church. From this influence, gendered structures and hierarchies filter through, impacting the outcomes for all women (which obviously includes Muslim women), in particular policy areas where Church influences the definition of "women's interests" in debates; which include, for example, family matters, and abortion. The dominant Church(es) within each state have had a significant impact on the creation and implementation of public policies – and have been supported and upheld by key

[4] Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton: Princeton University Press, 2004). Pierson presents a seminal work on the idea that institutions be examined within their temporal context, in order to understand the "path dependency" and outcomes that emerge.

political actors within government (for example, in Australia, former Prime Ministers Howard and Abbott). Even where there are claims that society is "secular", informal religious institutions and gender norms are not necessarily eliminated. With rules developing against a background of historical traditions derived from the church, it creates a "gendered logic of appropriateness". As such, despite moves by the state towards promoting gender equality, there is a throwback to religious norms, as well as the inherent gender biases and hierarchies that exist within the religious realm (which are not that dissimilar to patriarchal attitudes and norms stemming from Sharia).

Church-State Relations

The status of church-State relations in each jurisdiction has an impact on the space that has been created for religious freedom and accommodation of other religious groups – like Muslim groups in the UK. Outside of this discussion of religious freedom, "the Church"[5] (or dominant religion in the state) has been influential in the shaping of state institutions – in particular, public policies and laws. It is suggested that secular law is founded upon Christian values.[6] Increasing arguments that countries like Australia and Canada are "secular", deny the religious roots of these societies; significantly ignoring the fact that historically there is a tradition of a majority of citizens relating to "something other than the domestic legal system".[7] In these Western states, Christianity has a historically privileged position, where it was once given significance by the state – and as such, still maintains a privileged role, which points back to the "history and authorisation of state power" even if it is not a state institution in itself.[8] The established Church in the UK complicates this a little, as it appears more like a formal state institution. However, as an informal institution, the "state established" nature of the church just makes the influence of the church stronger. Ultimately, the religious roots of each state have a significant impact on the

[5] When referring to "the Church" in the British context this is referring to the state-established religious institution, the Church of England. In the Australian and Canadian contexts, this refers to the influence of dominant Christian religious groups, particularly Anglican or Protestant and Catholic groups.
[6] Paul Babie, "The Place of Religion in Australian Sociolegal Interaction," in *Religion after Secularization in Australia*, ed. Timothy Stanley (New York: Palgrave Macmillan, 2015), 93.
[7] Jean-Francois Gaudreault-DesBiens, "Religious Courts' Recognition Claims: Two Qualitatively Distinct Narratives," in *Shari'a in the West*, eds. Rex Ahdar and Nicholas Aroney (Oxford: Oxford University Press, 2010), 61.
[8] Kathleen McPhillips, "Whose Rights Matter? Women's Rights, Anti-discrimination Legislation, and the Case of Religious Exceptions," in *Religion after Secularization in Australia*, ed. Timothy Stanley (New York: Palgrave Macmillan, 2015), 130.

current evolution of formal state institutions, with these past institutional legacies unable to truly be "forgotten" or "escaped". The ongoing influence of the Christian churches means that the patriarchal traditions that are inherent to these churches influence the practices of the state – and are reflected in public policies that reflect Christian morals, or laws that derive meaning and definitions from Christian ideals and values. This influences the outcomes available for women when seeking equality and recognition by the state, or redress in family law matters. Thus, when the state's "secular" legal system is positioned as the "neutral" and "best" option for Muslim women seeking justice in matters such as divorce and property settlement, there are inherent gender biases that emerge (because of the Christian influence in this area of the law).

With the development of the modern nation state it is argued that secularization and a distinct separation of church and state would follow. Samuel P Huntington stated that the "birth of the modern state" would bring with it "the subordination of the church".[9] The separation of church and state (and relegation of religion to the private sphere) has come to be seen as an intrinsic feature of the modern political development of states.[10] This notion of a separation of church and state grew out of the Enlightenment. However, such a separation of church and state is not as straightforward, and theories of secularization of the state fail to recognise the ongoing interaction between church and state, and the influence the church continues to have on state politics and institutions. Whilst the legacy of the Enlightenment may mean religion has been (relatively) moved out of the public sphere, public debates on policy matters and the underlying ethical ideals that are often discussed and employed "retain a Christian heritage".[11] For example, the "secularization" of Australia from the 19th century is not so much a complete abandonment of religion (namely, Christianity) but more a "rechannelling" of religion into other forms.[12] What this means for the institutions of the modern state is that they have evolved from religious traditions that used to be publically significant within the state. Laws and policies in this "new" secular modern

[9] Samuel P. Huntington, *Political Order in Changing Societies* (New Haven: Yale University Press, 1996), 95.
[10] Anthony Gill and Arang Keshavarzian, "State Building and Religious Resources: An Institutional Theory of Church-State Relations in Iran and Mexico," *Politics and Society* 27, no. 3 (1999): 432.
[11] Stephen A Chavura and Ian Tregenza, "A Political History of the Secular in Australia, 1788-1945," in *Religion after Secularization in Australia*, ed. Timothy Stanley (New York: Palgrave Macmillan, 2015), 5.
[12] Ibid., 4.

state are essentially embedded within the religious historical context from which they emerge. As such, they may "remember the old" by embodying religious values, morals and ethics (for instance, definitions within laws around marriage, or what constitutes a family – but also through the continued granting of special privileges to churches).

The UK has an established Church, the Church of England, which is given a pre-eminent role within British society. In addition to this, there is a "quasi-established" Church in Scotland, which is independent of the state.[13] The establishment of an "official" state church has a long history, emerging from the *Articles of Religion* issued by King Henry VIII – who declared that the Pope's authority did not apply to England.[14] This essentially nationalised and placed the Church of England as the "spiritual arm of the English state", and Parliament was able to appoint the clergy, as well as debate religious matters.[15] The monarch under this arrangement (confirmed in the 1559 *Act of Supremacy*) is situated as both the head of state and the head of the Church. The *Act of Union* in 1800 united the Church of Ireland and the Church of England, to be known as the United Church of England and Ireland. Bishops from the Church of Ireland join bishops from the Church of England in the House of Lords. The "quasi-established" Church of Scotland was similarly recognised by law through the *Act of Union* in 1707, where it was agreed that a single, unified parliament could be founded provided that the Church of Scotland was allowed to remain as a national (Presbyterian) religious institution.[16] Whilst the public role and significance of the Church may have waned over the years, particularly with the rise of modern concepts of secularisation, the Church of England remains the constitutionally established religious institution in the UK. By contrast, Canada and Australia – whilst both majority Christian states with religious traditions derived from Britain and the Church of England – have had different historical experiences with religion and the state. In Australia, the growth and influence of the Catholic church and the long-standing debates over secular schooling (also ever present in Canada) have had an important role in church-state discussions.

[13] Linda Woodhead, "Liberal religion and Illiberal secularism," in *Religion in a Liberal State*, eds. Gavin D'Costa et al. (Cambridge: Cambridge University Press, 2013), 108.
[14] Tom Frame, *Church and State: Australia's Imaginary Wall* (Sydney: UNSW Press, 2006), 23.
[15] Ibid.
[16] David Fergusson, *Church, State and Civil Society* (Cambridge: Cambridge University Press, 2004), 141.

Canada does not have an explicit separation of church and State, but unlike the UK, does not have an established Church. Nowhere is such a separation stated in any constitutional document, and the state has not been entirely neutral in regards to religion.[17] In fact, the Preamble of the Charter of Rights even recognises the "supremacy of God", in addition to the rule of law.[18] Canadian public policy has been seen to privilege the majority-Christian population over the years.[19] The history of Christianity in Canada has had a significant role in the fact that there has never been a single state-sponsored Church. The long history of French, then British rule, in Canada has seen an ongoing tussle between Protestant and Roman Catholic communities and religious institutions, for dominance in the public sphere. As such, public debates have often emerged about the religious and cultural identity of Canada, because of this "duality of French Roman Catholicism and British Protestantism".[20] The rivalry between the two religious groups is inherent in constitutional provisions – for example, section 93 of the Constitution in 1867 (that concerned religious schools) highlighted a denominational competition between Catholic groups and Protestant groups in receiving funding for their respective religious schools.[21] Except for the provision around the funding of these religious schools, the Canadian Constitution does not mention particular religions. [22] Regardless, the long standing issues and rivalry between the two prominent Christian groups in Canadian society, led to the Bi-Bi Commission in the 1960s, that was tasked with examining the Canadian national identity, and later influenced the debate around multiculturalism. Both Christian groups and churches have had a key role in shaping national life, and in influencing social and political issues.[23] In terms of religion and the Constitution, the Canadian

[17] David Schneiderman, "Associational Rights, Religion and the *Charter*," in *Law and Religious Pluralism in Canada,* ed. Richard Moon (Vancouver: UBC Press, 2008), 67.
[18] *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act 1982*, Preamble.
[19] Jennifer A. Selby, "Construing the Secular: Implications of the Ontario Sharia Debate," in *Debating Sharia: Islam, Gender Politics, and Family Law*, eds. Anna C Korteweg and Jennifer A Selby (Toronto: University of Toronto Press, 2012), 352.
[20] Margaret H. Ogilvie, *Religious Institutions and the Law in Canada*, 3rd ed (Toronto: Irwin Law Inc, 2010) 47.
[21] Ibid., 48; and, Schneiderman, "Associational Rights, Religion and the *Charter*," 67 – Here Schneiderman states that this a form of pluralist accommodation, and that these rights protecting denominational schools are relatively unaffected from scrutiny under the Charter's others provisions. Per section 29 of the *Charter of Rights and Rights*, which explicitly states "Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools".
[22] Ogilvie, *Religious Institutions and the Law in Canada,* 96.
[23] Ibid., 32

Constitution Act of 1867 does not mention religion and where jurisdiction may lie in religious matters, except for the funding of religious schools' provision in section 93.

Like Canada, Australia does not have a state religion, and it is often claimed that there is a more explicit separation between church and state. However, the Australian Constitution, like the Canadian Charter, mentions "God" in the preamble, noting that the people of the five states humbly rely "on the blessing of Almighty God" in coming together in federation.[24] This draws on the history of Australia as being a predominantly Christian society. With European colonisation in 1788, the Church of England was established within society and enjoys special privileges.[25] Despite there being no explicit mention of it being the state church, in a High Court decision in 1949, Justice Dixon noted that the general opinion appeared to be that the Church came to New South Wales (NSW) as an established church; however, over time it has no longer been regarded as established.[26] In the decades following British settlement in Australia, all Christian denominations were represented within Australian society, which led to the *Church Act* in 1836 being implemented by the Governor of NSW, Sir Richard Bourke, to acknowledge the plurality of religion (in the form of the different denominations).[27] In fact, the large number of Irish convicts meant that there was a rising presence of Roman Catholics within Australia – with 30% of the population being Irish (many of whom were Catholic) by 1828.[28] In contemporary Australian society, the Catholic Church has grown to become the largest Christian church in Australia. In 2011, the Australian Bureau of Statistics stated that 25.3% of the Australian population was Catholic.[29] This history (and size) of the Catholic church in Australia has meant that it has had (and continues to have) great influence, as an informal institution, on debates around state policies and laws.

The drafters of the Australian Constitution demonstrated the long history of religion having a special and rather public place with Australian society by including the

[24] *Commonwealth of Australia Constitution Act 1900,* Preamble.
[25] Frame, *Church and State: Australia's Imaginary Wall*, 48.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Australian Bureau of Statistic, "Cultural Diversity in Australia," *Reflecting a Nation: Stories from the 2011 Census,* Catalogue no. 2071.0, http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013 (accessed on March 6, 2016).

reference to "Almighty God". This reference reflects the sentiments espoused by Sir Henry Parkes, who played a key role in the federation of Australia, when he stated that Australian people are "pre-eminently a Christian people, and our laws, our whole system of jurisprudence, our Constitution" is based upon "our Christian belief".[30] Outside of the initial reference to religion, the only other time it is referenced is in section 116 of the Constitution – which provides for a freedom of religion. Whilst this provision does not accord special privilege and rights to worship for religious groups, it offers a broad protection of the freedom to practise religion.[31] The debate around the freedom of religion, and the extent to which the state should promote or support religion has continued throughout the years, as illustrated in cases emerging based on the interpretation of section 116. The *DOGS case* is a particularly significant case concerning section 116, where taxpayers in Victoria challenged the funding of religious schools by the state government. Ultimately, the High Court stated that section 116 of the Constitution does not establish a clear separation of Church and State, and that this was never the purpose of that provision.[32] Thus, the common law interpretation of this constitutional provision creates a "logic of appropriateness" whereby the judicial actors follow that there is not a separation of church and State.

In all three countries, there is a long history of "the Church" being involved in the provision of social services, such as welfare, employment, health and disability care, and education, to the community.[33] This creates norms that operate alongside the formal rules of state institutions, and imbues them with religious-based moral values; creating a "logic of appropriateness" within this realm of social services that follows a Christian ideal/legacy. With the devolution of governmental structure under a more neoliberal approach, religion has maintained a public role (both politically and economically) in carrying out these services in Australia.[34] This draws on the status that churches have been given in Western states over the centuries, as central national institutions, guiding the values and structure of society. In the UK, this is seen with the enduring presence of local parish churches that continue to work closely in

[30] Saeed, "Reflections on the Establishment of Shari'a Courts in Australia," 230.
[31] Frame, *Church and State: Australia's Imaginary Wall*, 52.
[32] Ibid., 54-55; and Attorney-General (Vic) (ex rel Black) v Commonwealth ("*DOGS case*") (1981) 146 CLR 559.
[33] Fergusson, *Church, State and Civil Society*, 145.
[34] McPhillips, "Whose Rights Matter?" 122-123.

communities in carrying out public services.[35] Whilst this role of the churches within society could be viewed as entering the realm of a "formal institution", in many cases the partnership with the state is voluntary, or for the benefit of the church to receive special privileges in return. They may receive funding or support but are not state run, and merely operate alongside formal state institutions. Thus, I would argue they are more informal than formal in nature.[36]

The close involvement within communities means that religious institutions have a space and opportunity to shape social values and actively participate in moral debates on public issues. Religion has also had a significant role in shaping public policies, through offering up a set of social ideals and moral codes upon which governments may base these policies. A fact which is exacerbated by the reality that many political representatives openly subscribe to and affirm their Christian values, and membership to conservative Christian groups.[37] Ultimately, the church can, and does, hold an important and influential public role, even where there is no established, state sponsored church.[38] With religious groups continuing to have a significant role, through the state outsourcing social services to them, an issue arises in terms of their compliance with anti-discrimination and equality provisions. Religious service providers are able to operate under exemptions or exceptions to such legislative provisions, which means that individuals (notably women and individuals from the LGBTI communities) are unfairly disadvantaged.[39] This demonstrates that even with the move towards secularisation in the three states, the historical legacy of "the Church" cannot be completely erased or removed. The continuing importance that is ascribed to Christian religious institutions within each jurisdiction, along with the privileges accorded, means that religious ideals (including patriarchal values and norms) remain inherent to both formal and informal institutions within the state. This underlying influence means that the supposedly secular state is embedded within a

[35] Fergusson, *Church, State and Civil Society*, 141.
[36] Despite performing services (such as welfare services) on behalf of the state, Christian churches and organisations do not have the same level of accountability as state institutions when carrying out these public services. This difference in accountability could perhaps be considered another marker between the formal and informal institution – reaffirming the idea that religious organisations are informal rather than formal state institutions.
[37] McPhillips, "Whose Rights Matter?" 123.
[38] Fergusson, *Church, State and Civil Society*, 167.
[39] McPhillips, "Whose Rights Matter?" 128.

religious context, with the "path dependency" of new "secular" laws and policies unable to truly "escape" the legacies of the church.

Religious Exemptions and Privileges accorded to "The Church"

In each jurisdiction, Christian groups have a history of being granted religious exemptions, or special privileges, which in many cases have later been extended to other religious groups. In the UK, with an established church, it is no surprise that the Church of England has, and continues to, enjoy special privileges granted to it by the state. These privileges are predominantly tax exemptions, as the Church in the UK (but also in Canada and Australia) has traditionally been involved in supporting and carrying out community services, like welfare and education, on behalf of the state.[40] Across all jurisdictions, governments have also provided funding to religious schools. This is evident in the provisions under section 93 of the Canadian Constitution, which provides funding to Roman Catholic and Protestant schools.[41] In Australia, both the Commonwealth and state governments have provided financial support to religious schools. However, this has been controversial, and the funding of the National School Chaplaincy Program by the federal government was challenged in the 2012 High Court case of *Williams v Commonwealth*.[42]

In addition to funding for religious schools, and privileges such as tax exemptions, the Church/dominant Christian denominations in each state have enjoyed exceptions from anti-discrimination legislation. These exemptions and exceptions[43] have been extended to other religious groups, but the most significant cases challenging the exceptions in Australia (as well as the other two jurisdictions) have focused on institutions run by one of the denominational churches – for example, Catholic schools run by the Roman

[40] Fergusson, *Church, State and Civil Society*, 168.
[41] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, s.93.
[42] Babie, "The Place of Religion in Australian Sociolegal Interaction," 97-98. The decision in Williams v Commonwealth (2012) 288 ALR 410 found that the Commonwealth government did not have the power to fund the program. However, the court dismissed arguments on the basis of freedom of religion, and thus the judgment focused primarily on the question of executive power.
[43] The terms exemptions and exceptions are often used interchangeably. In the Australian context, religious exemptions often refer to tax exemptions, as it does in other jurisdictions. However, when referring to the provisions under anti-discrimination laws that "allow" religious organisations to legitimately discriminate in certain circumstances (in areas such as employment, for instance) there is no uniformity in the use of the terms exemptions and exceptions. As such, when referring to the Australian context I will employ the term exception (as that is used in the legal precedents), but in the Canadian and UK contexts I will use exemption, as that is the term employed in the legislative provisions.

Catholic Church in Australia. Ultimately, religious institutions have been given a wide scope in their ability to choose who can and cannot participate in their realm of religious life and organisation.[44] Key examples of the protected exclusionary practices include: preventing participation or involvement by gay clergy in religious services, or the rejection of employment applications by unmarried women, who may be single mothers or in de facto relationships.[45] The justification for these exceptions is that to comply with anti-discrimination legislative provisions, or other equality provisions in the state, would compromise their commitment to religious requirements and obligations.[46] These exceptions offer religious institutions a space to "opt-out" of legislative requirements, like non-discrimination in employment matters (namely, hiring or firing).[47] These special privileges, in the form of exemptions and exceptions granted to the dominant churches within each state, highlight an institutional legacy that would appear to defy claims of secularism; whereby space is created for religion within the formal institutional landscape, and the state institutions have a significant role in reinforcing this "space" given to religion.

The legislative provisions that offer exemptions to religious organisations from anti-discrimination laws are relatively similar in each jurisdiction. In the UK, the *Equality Act 2006* provided religious exceptions to anti-discrimination provisions, in addition to the *Employment Equality (Religion or Belief) Regulations 2003*, which specifically dealt with discrimination in the realm of employment and the provision of goods and services.[48] These legislative provisions were replaced by the *Equality Act 2010* ('The Equality Act'). The Equality Act notes general exceptions in Schedule 23, with specific exceptions for organisations where it relates to religion or belief outlined in section 2 (where it notes that it applies to organisation that practise, advance, or teach the practice or principles of religion).[49] The Act specifically offers exceptions regarding educational appointments in faith-based schools.[50] Exceptions for organised religion

[44] McPhillips, "Whose Rights Matter?" 100.
[45] Ibid., 128; and Babie, "The Place of Religion in Australian Sociolegal Interaction," 100.
[46] McPhillips, "Whose Rights Matter?" 124.
[47] Babie, "The Place of Religion in Australian Sociolegal Interaction," 100.
[48] *Equality Act*, 2006, c.3; and *Employment Equality Act (Religion or Belief) Regulations*, 2003, No.1660.
[49] *Equality Act*, 2010, c.15, Schedule 23, s. 2.
[50] Ibid., Schedule 3, Part 7, s.29(1) (a): which states that "A minister does not contravene section 29, so far as relating to sex discrimination, by providing a service only to persons of one sex or separate services for persons of each sex if – the service is provided for the purposes of an organised religion". Also, s.193(5) which states that it is not a contravention of the Act to require members or persons

are also available under the UK's *Sex Discrimination Act 1975*, with the anti-discrimination provisions not applying to "employment for purposes of an organised religion where the employment is limited to one sex" in complying to religious doctrines.[51] Under these employment provisions, there have been cases where employers that are religious organisations (for instance, Catholic employers) have discriminated against divorced employees as it contravenes the religious tenets concerning marriage.[52]

Canada also offers exceptions to anti-discrimination and equality provisions, one case that considered the validity of religious organisations exercising exemptions from constitutional equality protections is that of *Walsh and Newfoundland Teachers' Association v Newfoundland (Treasury Board)*.[53] In this case Walsh, a teacher, was dismissed from his job at a Catholic school in Newfoundland, as he had joined another religion. Since the duties as teacher included providing religious instruction, the Newfoundland Court of Appeal upheld the dismissal, noting that it was not unreasonable, as he had rejected the faith he had been employed to teach.[54] Similarly, in the case of *Caldwell v Stuart*,[55] the Canadian Supreme Court upheld a decision by a Roman Catholic School in British Columbia to not renew the teaching contract of an employee who had entered into a relationship with a divorced man.[56] These employment cases are the most common arena in which religious exemptions or exceptions to anti-discrimination laws have been considered in Canada (but also Australia). Highlighting the implicit privileged position that is accorded to religious organisations.

In Australia, anti-discrimination laws are governed by each state and territory, as well as the federal government (and will be discussed below using the example of New South Wales and Victoria). Within the various states' laws there are exceptions to anti-discrimination law offered to religious groups. These exceptions (like the exemptions

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wishing to become members to make statements asserting membership or acceptance of religion or belief, and for this purpose restricting access by members to benefits, facilities or services.

[51] *Sex Discrimination Act*, 1975 c. 65, s. 19.

[52] Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005), 305.

[53] Walsh and Newfoundland Teachers' Association v Newfoundland (Treasury Board) and Federation of School Boards of Newfoundland (1989) 53 DLR (4^{th}) 161.

[54] Ahdar and Leigh, *Religious Freedom in the Liberal State*, 314.

[55] Caldwell v Stuart [1984] 2SCR 603.

[56] Ahdar and Leigh, *Religious Freedom in the Liberal State*, 316.

offered in the Canadian and UK contexts) further illustrate the ways in which these religious bodies take advantage of the exceptions available to them, and the way in which this privilege is reinforced by formal state institutions. It also highlights the way in which the formation of laws, along with their interpretation by the courts, creates a "logic" that recognises and upholds the significant place of the church within society. In particular, section 56 of the NSW *Anti-Discrimination Act* 1977 explicitly outlines that the provisions of the Act do not apply to "any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherent of that religion".[57] Application of section 56 was considered in the *Wesley Mission* case, where the NSW Court of Appeal ultimately held that the discrimination by the religious institution (in refusing a same sex couple foster caregiver status) was valid under the exception.[58] Whilst the exceptions quite clearly apply to religious institutions, and the *Wesley Mission* case is oft-cited in supporting a claim for "justified discrimination", in Victoria this privilege has been extended to individuals as well. Section 84 of the Victorian *Equal Opportunity Act* 2010 allows individuals to discriminate (on the grounds of sexual orientations, marital status, gender identity, or religious belief) if it is believed that doing so is "reasonably necessary" for the individual to "comply with the doctrines, beliefs or principles of their religion".[59] This creates an interesting situation, where on the one hand the state prohibits discrimination on the basis of religion (in order to protect religious groups) but then allows the same religious groups to discriminate against others (predominantly women and LGBTI individuals) in order to uphold their beliefs. The way the privileges have been applied and upheld by the courts reinforces a "logic" that is contrary to the apparently "secular" nature of laws and policies that is argued to be established within formal rules and institutions.

Secularity of the States

It is often argued that all three states are secular, that their laws have evolved away from the influence of religion into ones that are secular in nature, and it is this presumed secularity of the state and its laws that are central to the anti-Sharia debate.

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[57] *Anti-Discrimination Act 1977* (NSW), s. 53.
[58] Babie, "The Place of Religion in Australian Sociolegal Interaction," 101.
[59] *Equal Opportunity Act 2010* (Vic), s.84; and Babie, "The Place of Religion in Australian Sociolegal Interaction," 101,

However, with the interactions between the state and religious institutions (like the Church of England or Catholic Church) the separation of church and state is not so clear, and thus does not subscribe to the classification of "radical secularism".[60] This version requires absolutely no contact between state and religious institutions. In modern Britain, religion continues to have a significant role in shaping the public sphere, even if the role of the Church of England has seemingly been in decline in recent years.[61] The Church continues to be involved in supporting state provision of services (such as education, welfare, and healthcare).[62] Similarly, the Church of England has a place in parliament, with the Archbishop holding a seat in the House of Lords. As such, there is a significant role that religion has through this representation in government, in shaping parliamentary matters (specifically, creation of laws and public policies). Whilst there is no explicit religious representation in the governments of Australia and Canada, religious groups (notably Christian groups) have had a strong voice in ethical and political debates (such as abortion, same-sex marriage, environment etc.) over the years.[63] This religious voice that appears in ethical debates has an impact, illustrated through the difficulties faced in both states in changing laws around matters like abortion; and more recently in the strong opposition to same sex marriage that arose in the Australian context.

Thus, whilst it is argued that all three states do not have a strict separation between church and state, and therefore are not truly secular in nature, there is a clear privileging of "the Church" (and Christian versions of religion). This privileging of Christianity also reiterates the influence of religion on state institutions, as there is a clear bias towards Christian ideals in interpreting the law. Australian laws do not, on the surface, appear to privilege the Anglican faith over other religions.[64] However, many of the laws draw on moral values found within the Anglican faith, inherited with the British legal and political system that has been transplanted to Australia. A good example in Australia, is the High Court's definition of religion in the landmark *Scientology* case that concerned the question of "what constitutes a religion" under section 116 of the Constitution. The Court determined that religion was a "belief in a

[60] Woodhead defines radical secularism as belief in the complete absence of religion from politics and severance of church from the state - Woodhead, "Liberal religion and Illiberal secularism," 108.
[61] Woodhead, "Liberal religion and Illiberal secularism," 109.
[62] Ibid., 108.
[63] Babie, "The Place of Religion in Australian Sociolegal Interaction," 92.
[64] Frame, *Church and State: Australia's Imaginary Wall*, 8.

supernatural Being, Thing or Principal" and "the acceptance of canons of conduct in order to give effect to that belief".[65] In offering a definition that excludes religions that are not monotheistic in nature, the High Court appears to subscribe to ideals derived from Protestant Christianity – a "protestantization" of religion.[66] Under the Howard Coalition Government (1996-2007), there was a growth of the religious right, with churches involved in debates around moral issues, and the reinforcement of "traditional", religiously derived family values.[67] Whilst there appears to be Protestant ideals adopted by the courts, under Howard and then former PM Tony Abbott (2013-2015), who brought with him a Catholic conservatism, the influence of the Catholic church increased in shaping political debates – especially discussions on abortion and euthanasia. In Canada, the public debates (and subsequent governmental action taken) around the possibility of Sharia arbitration in Ontario (when Orthodox Jews and other Christian groups had been using arbitration system for many years), as well as the debates around government funding for religious schools, indicate a privileging of a "Christo-Secular paradigm" – where the so-called "secular" state is inherently Christian.[68]

Influence of the Church in formation of public policy and law

The Christian heritage of Australia and Canada has influenced the development of family laws, particularly marriage in terms of "what constitutes a marriage?" which is rarely acknowledged in anti-Sharia debates. There are a number of definitions within the formal institution of the law that draws on informal norms derived from Christian beliefs and ideals, creating and reinforcing a "logic" within these areas that is religious in nature. The definition of marriage up until the introduction of the Canadian *Civil Marriage Act* in 2005, was instituted through the common law as being the "voluntary union for life of one man and one woman, to the exclusion of all others".[69] This reflected a Christian definition of marriage, which is similarly reflected in Australia. The definition of marriage in Australia is stated in the 2004 amendment to the

[65] Church of the New Faith v Commissioner of Payroll Tax (Victoria) (1983084) 154 CLR 120; and McPhillips, "Whose Rights Matter?" 122.
[66] McPhillips, "Whose Rights Matter?" 122.
[67] Marion Maddox, *God Under Howard: The Rise of The Religious Right in Australian Politics* (Crows Nest: Allen and Unwin, 2005).
[68] Selby, "Construing the Secular," 352.
[69] Hyde v Hyde and Woodmansee (1866); and Ogilvie, *Religious Institutions and the Law in Canada,* 367-368.

Commonwealth's *Marriage Act* of 1961 as being a "union of a man and women, to the exclusion of all others".[70] The Act also outlines what is not considered to be a union for the purposes of the legislation governing marriages, including unions between a man and another man.[71] This inclusion of an explicit definition of marriage highlights a prevailing Christian approach to unions in Australia, as that definition is one held firm, and consistently reiterated, by Christian denominations within Australia. Old informal gender legacies come through in this "remembering" and reincorporation of Christian religious ideals within these matters of personal and family laws.

In the UK, the continuing presence of an established Church has a similar influence on the law. In the UK context, Anglican canon laws, as well as other denominational laws (for example, Roman Catholic laws) have been taken into account when deciding cases, particularly in matters of inheritance.[72] Outside of the common law consideration of religious principles, Christian religious institutions are included in policy consultations and the creation of public programs, which links back to their key role in providing social services to communities.[73] This involvement has seen the expression of religious opinions within ethical debates in issues, such as those surrounding abortion.[74] In fact, the slow change to abortion laws, as witnessed in NSW Australia, illustrate the pull that religious voices have in these debates.[75] Similarly, the influence of the Church is seen within recent same-sex marriage discussions, and in the Australian context the resistance within the government could also be put down to religious ideals. States often look to religion for a "moral compass" of sorts, and in Christian dominant societies the social values are obviously derived from these dominant religious group.[76] In Australia, the referral back to Christian principles was espoused by former Prime Minister John Howard, amongst other prominent political

[70] *Marriage Amendment Act 2004* (Cth), s.5(1). Marriage Amendment Act 2004
[71] Ibid., s. 88EA.
[72] Woodhead, "Liberal religion and Illiberal secularism," 110.
[73] Fergusson discusses this in the European/UK context. Fergusson, *Church, State and Civil Society*, 145.
[74] Woodhead, "Liberal religion and Illiberal secularism," 108.
[75] In NSW, abortion may be unlawful under sections 82-84 of the *Crimes Act 1900*, provisions that are inherited from English law. The only exception to the criminal offence of abortion was determined in the 1971 case of *Wald* where abortion may be allowed if it is deemed necessary by a doctor due to risks posed to a woman's life or health. In September 2015, Greens MP Mehreen Faruqi introduced a bill decriminalising abortion into NSW Parliament, which was blocked by the two main political parties (Labor and Liberal), reflecting the socially conservative nature of the NSW Parliament. In May 2016, Faruqi publically released a draft exposure the *Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016*, which was introduced to Parliament in August 2016.
[76] Margaret Thornton and Trish Luker, "The Spectral Ground: Religious Belief Discrimination," *Macquarie Law Journal* 9 (2009): 73-74.

figures. Howard stated that "Australia [has] a core culture as an offshoot of western civilisation with a heavily Anglo-Saxon identity and Christianity as the great moral shaping force".[77] This illustrates the fact that actors within political institutions, whether it be a Prime Minister or a judge, may follow and subscribe to the norms that stem from informal institutions (like "the Church"). Consequently, gender equality within laws and policies may be challenged by the inherently patriarchal ethical stance of actors, who are influenced by their personal religious views, or the broader religious influences within the state.

It is undeniable that the values of the dominant culture (in this case Christian moral values) are implicitly reflected in the states' laws and public policies.[78] Even where law defines religion as being non-political, it allows the patriarchy of religion to seep through as "a tradition", positioning it as a privileged institution that is "an essential category of human life".[79] The claim that family law is secular is problematic. The reality of Christian values influencing the law, and influencing judicial decisions and interpretations of family law – for instance, in definitions of marriage – highlights the institutional legacy of the Christian influence and history in Australia. The continuing established Church in the UK renders a similar outcome in public policies being shaped by religious ideals. There is a reinforcement of patriarchal norms around what constitutes a marriage, and even extends to the place of men and women within family disputes. It creates an inherent gender hierarchy, whereby traditions are maintained implicitly through the law and policies referring to the Judeo-Christian ideals that first shaped concepts such as, marriage, divorce, inheritance, and family more generally. Many legal rules also have an underlying moral content that is derived from religion. For example, moral propositions that marriage is between a man and a woman, or even moral judgements around murder, that killing is wrong.[80] The path dependencies within the law and policies that concern ethical matters or the family, may evolve but do not "escape" these historical traditions and morals. Rules ultimately develop in response to history and are embedded within historically determined gender

[77] "Fed: Howards backs Costello over Sharia law comments," *AAP Newsfeed*, February 24, 2006, cited in Saeed, "Reflections on the Establishment of Shari'a Courts in Australia," 229.
[78] Sarah Song, *Justice, Gender and the Politics of Multiculturalism* (Cambridge: Cambridge University Press, 2007), 61.
[79] McPhillips, "Whose Rights Matter?" 131.
[80] Peter W. Edge, *Religion and Law: An Introduction* (Aldershot: Ashgate Publishing, 2006), 3.

hierarchies, which in this case are derived from the religious history and traditions of each state.

How has this influence of the Church allowed "space" for Muslim arbitration in the UK?

The state, in offering certain cultural or religious groups support over others, often creates advantages and privileges for those groups in economic and political matters.[81] This privilege is expressed through drawing on the values and ideals of the group's customs or religion in shaping the state's practices, policies and law. In the case of Australia, Canada and the UK, it appears this prominent position is bestowed upon Christian groups. However, whilst this implicit support of particular groups may mean that less dominant groups are disadvantaged and unable to attain the same privileges, the UK has shown that even with an established Church there appears to be "space" created for other religious groups to flourish and freely practise their faith. The historical engagement between the State and Church of England in terms of welfare initiatives and schools could perhaps be seen as contributing to the development and implementation of the more "localised" approach to multiculturalism that has developed in the UK, by creating a culture of close engagement (primarily through ministerial consultations) with religious groups.[82] In the realm of religious schooling and education policies, Muslim groups in the UK have been able to take advantage of provisions to receive state funding for private religious schools, that have historically been granted to Christian groups, as well as Jewish groups. Under the Blair Labour government (1997-2007), the first Muslim state primary schools were established.[83] The extension of religious freedom and privileges to other groups has led to a long history of Orthodox Jewish communities using arbitration to resolve family disputes in the UK. The failure of Baroness Cox's Bill could be partly attributed to the threat this posed to other "favoured" religions, for example, Jewish groups. Though, more significantly the failure of the Bill suggests that the scope for religious freedom within the UK is far more accommodating – allowing space for informal institutions of

[81] Song, *Justice, Gender and the Politics of Multiculturalism*, 62

[82] Bodies like the Communities Consultative Council have been established to improve communication between government bodies and religious communities. Paul Weller, "Interreligious Cooperation," in *Understanding Interreligious Relations*, eds. David Cheetham, Douglas Pratt and David Thomas (Oxford: Oxford University Press, 2013).

[83] Joel S Fetzer and J. Christopher Soper, *Muslims and the State in Britain, France, and Germany* (Cambridge: Cambridge University Press, 2005), 46.

religious arbitration to flourish.[84] The existence of an established Church, ultimately allows other religious groups to exploit the religious freedom provisions and receive similar benefits from the state – making it easier to argue for increased state accommodation of minority religious practices.[85]

The established Church of England within the UK has also played a significant role in opening up space for multicultural accommodation, which may be surprising as it is often assumed that with an official state church there would be no room for other religious groups. However, the Church has been an ally to Muslim groups in their quest to be accommodated by the state and receive similar privileges enjoyed by Christian and other religious groups; sometimes this support is more overt than other times.[86] Examples of this include, the Church working closely in political alliances with other religious communities, including Muslims, to critique and oppose government policies – for example, the Cantle Report that recommended changes to religious schools following race riots in 2001.[87] In Canada, whilst exemptions afforded to Christian groups have been extended to other religious groups, this has not been carried out to the same degree as in the UK.[88] The history of a slow move towards religious accommodation of other religious groups (such as the Jewish and Seventh Day Adventist communities) illustrates the challenge of religious accommodation mirroring those historical challenges of accommodation experienced from settlement (between Catholic and Protestant groups).[89] This history suggests that it would be difficult for Muslim groups to carve out a space for religious laws in the same way that Muslim groups have established informal Sharia institutions in the UK. Similarly, despite the "multi-faith" and "multicultural" claims in Australia, the reiteration of a separation of church and state (despite the inherent Christian roots and influence in the legal and political system) means that questions of accommodation of Muslim groups would also be more difficult than the UK. The smaller population of Muslims, coupled with the inherent importance and favour given to dominant Christian groups and ideals, all contribute to this.

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[84] Ralph Grillo, *Muslim Families, Politics and the Law: A Legal Industry in Multicultural Britain* (Surrey: Ashgate, 2015), 157-158.
[85] Fetzer and Soper, *Muslims and the State in Britain, France, and Germany*, 60.
[86] Ibid., 57.
[87] Ibid., 58.
[88] David Schneiderman, "Associational Rights, Religion, and the *Charter*," in *Law and Religious Pluralism in Canada,* ed. Richard Moon (Vancouver: UBC Press, 2008), 67.
[89] Ogilvie, *Religious Institutions and the Law in Canada,* 53.

With the influence of religion in law and public policies, the marginalisation of women within religious traditions can often filter through to these formal state institutions and their practices. Legal traditions can reflect the male-oriented version of traditions inherited from the history of church-state relations.[90] The state in creating an "ideal, unified subject" upon which law and rights discourses rely upon, to some extent imitates the "ideal, religious subject" which is often "white, male and Protestant".[91] Furthermore, the granting of special privileges and exemptions to religious groups works towards reinforcing discrimination and oppression of women. For instance, the exemptions to anti-discrimination provisions allows religious groups, in both their private institutions and in their capacity as service providers, to discriminate based on gender and sexuality.[92] There are a set of "protected attributes" that religious groups may take exception to, including pregnancy and marital status – meaning that women are often unfairly hampered in pursuing employment or training provided by one of these groups.[93] There are many instances of women being dismissed, or rejected in the hiring process, by Catholic schools over one of the "protected attributes".[94] The fact that many state social services are handed over to religious groups for provision and support, means that the state implicitly reinforces the patriarchal structures of these groups, and the general inequality towards women. Similarly, in making accommodation for religious groups, the state gives them a "moral power" to influence social issues in the public sphere.[95] A key example of this, is the influence of the Catholic Church in the abortion debate in Australia. The amount of influence and power given to the Church in each Australian state is reflected in the experience and length of time it took to reform abortion laws in each jurisdiction.[96]

Family laws and the legal system more broadly, cannot truly escape historical traditions. This is witnessed through the continuing influence of the Church and

[90] McPhillips, "Whose Rights Matter?" 120.
[91] Ibid., 121.
[92] Ibid., 124.
[93] Ibid.
[94] Ibid., 128.
[95] Ibid., 127.
[96] Karen Coleman, "The Politics of Abortion in Australia: Freedom, Church and State," *Feminist Review*, no. 29 (1988).

Judeo-Christian ideals in forming the basis of laws and shaping its meanings – for example, "what constitutes a marriage". The inclusion of dominant religious groups in public policy consultations and debates around legal accommodations (as seen in the same sex marriage debate) highlights this reliance on religion. For women, this means that the influence of the Church embeds patriarchal norms and traditions in the legal system when it comes to matters such as divorce and marriage, but even areas of reproductive rights. For Muslim women, this means that where the apparently "secular" law is positioned a gender equal and "neutral" from any biases, they still face patriarchal traditions and gendered hierarchies that have been inherited from the Christian values and inform the law and public policies. In many ways, these are not dissimilar from the inherent patriarchal structures within Islamic law and traditions. Regardless of how many "pro-gender equality" provisions are introduced into the law, the basis of definitions and key concepts in family law will remain shaped by the initial and ongoing interactions with the Church and dominant Christian groups. Ultimately, family law is embedded in historically determined gender hierarchies, with key concepts and ideals based on Christian values and ideas of family. Even where new formal rules may be introduced, the religious biases of actors (as seen through the practices of conservative Christian MPs) often continue to follow the informal institutions developed over time. This may include judges, who, in interpreting the law and deciding cases (such as what constitutes a marriage, or what is considered a marriage contract) "remember the old" and follow the norms stemming from this informal institution of Christian practices, values and morals. This creates a gendered "logic of appropriateness" that is contrary to the claims that the formal rules are "pro-gender equality" and not patriarchal in nature. This "logic" is difficult to unsettle as the actors within both state and religious institutions continue to perpetuate gender biases and inequalities, as they "embody and reflect existing norms and beliefs".[97] In this case, not only do Christian groups engage closely in debates over family and personal laws, but political representatives in parliament bring their Christian beliefs into debates and policy proposals. For example, the conservative Christian right in the Australian Liberal party, such as Senator Corey Bernardi and former PM Tony Abbott, who openly espouse their Christian beliefs and values. Within political debates over social issues and public policies, "women's interests" are often defined by politicians, and religious

[97] Louise Chappell, "Comparing Political Institutions: Revealing the Gendered 'Logic of Appropriateness'," *Politics and Gender* 2, no. 2 (2006): 225.

groups lobbying the government. However, with an underlying "gendered logic" that is shaped by Christian values, the definition of these interests can inherit patriarchal norms. As this would affect the characterisation of "women's interests" broadly, Muslim women's interests would similarly be limited by these gendered ideals that seep into debates.

Informal Institution Two: Informal Networks

In exploring the Sharia debates as they have been shaped by both formal and informal institutions in each state, informal networks are also an important source of insight. Informal networks operate in the background, influencing formal institutions and shaping the opportunities available to women to engage with the state. By examining the informal political networks in the context of Sharia, it is possible to glean further insight into the ways in which Muslim groups have been able to interact with the state in the UK, but not so effectively in Australia or Canada. More importantly, it can help us to understand the opportunities available for Muslim women to participate in the Sharia (and accommodation) debates, particularly the barriers that these informal networks can and do establish. Informal networks can dictate the resources available to mobilise groups in seeking greater political representation or accommodation. A key resource strength is the ability for organisations to form, represent group interests, and engage with the state. Muslim groups in the UK have been more successful in creating a role for themselves within the informal political networks, which can explain the greater accommodation compared to Australia and Canada. Through these informal networks, British Muslims have risen to positions of political authority. However, these networks can be implicitly gendered, which affects the outcomes for Muslim women. Feminist institutionalist scholars consider the role of informal networks in contributing to the norms that govern formal institutions. These informal norms may manifest in the form of networks of men or "old boy's networks", with women being kept out of, or on the periphery, of these "informal power networks".[98] Similarly, informal norms may emerge out of the women's groups that also form part of the informal political networks within the state. These networks differ in the expression and explicitness of their aims, leading to different outcomes for women. Ultimately,

[98] Susan Franceschet, "Gendered Institutions and Women's Substantive Representation: Female Legislators in Argentina and Chile," in *Gender, Politics and Institutions: Towards a Feminist Institutionalism*, eds. Mona Lena Krook and Fiona Mackay (London: Palgrave Macmillan, 2011), 62.

access to state institutions can be controlled by "gendered power networks",[99] which significantly restricts women's participation in influencing state policies. The roles ascribed to men and women within society can impact whether their "voices" are heard, and thus contribute to the inherent gendering of "elite political networks".[100] In terms of debates around religious accommodation and Sharia, Muslim women tend to be excluded from the discussion – even where they are drawn on as a "reason" why Sharia should not be accommodated, and in being assigned the label of "victims" of the patriarchal religious traditions.

Informal networks can be successful in influencing positive change within the state. For example, in Canadian gender equality and women's rights movements, women's groups (as informal networks) have been able to engage with and influence formal state institutions. Most notably, women's lobby groups have been able to positively influence and introduce a gender perspective into the *Charter of Rights and Freedoms*.[101] Women's lobbies form explicit informal networks that differ significantly from other informal networks that are dominated by men; most notably in the fact that they are clear and upfront in their goals – i.e. that they are representing women, and seeking greater rights and recognition. Informal networks of men (which, for example, may consist of politicians and community groups leaders, such as Islamic religious groups) operate more implicitly and often claim to represent everyone – whether this be the constituents within the state, or the members of minority/community groups. However, whilst they may claim to represent and work towards protecting the interests of all, this can work to mask their true agenda or intentions. The claim of "neutrality" and being representative of all, risks silencing women, and tends to predominantly represent the interests of men. This pretence of "neutrality" is the most significant problem with informal networks that are dominated by men. This aligns with similar issues that arise when discussing state family laws as neutral institutions; which is a fallacy as underlying hierarchies emerge, shaped through other (often Christian) norms, traditions, and historical legacies. With these informal networks of men masking their true intentions (of representing men) it

[99] Susan Franceschet and Jennifer M. Piscopo, "Sustaining Gendered Practices? Power, Parties, and Elite Political Networks in Argentina," *Comparative Political Studies* 47, no. 1 (2014).
[100] Ibid., 86.
[101] Louise Chappell, *Gendering Government: Feminist Engagement with the State in Australia and Canada* (Vancouver: UBC Press, 2002), 179.

makes it harder for women to challenge them and the hierarchies they create, and the influence they establish within more formal institutions.

Ultimately, the existence and operation of informal networks highlights the limitations placed on women generally, but particularly Muslim women when it comes to Sharia debates and discussions around their supposed "oppression" by their religion. The access (or lack thereof) to political power networks and the ability to participate in discussions shapes the possibilities for Muslim women to have a voice or exercise any agency. Where women are excluded more broadly, it is more difficult for minority women to even consider having a chance. There are many Muslim women rising to representative positions – both politically and within the religious communities. However, it is too simplistic to consider this as a "success" in achieving representation of women within these political power networks. These representatives may not always work towards feminist goals, as they may find themselves constrained by the institution – as they ultimately need to abide by "the rules" (that are typically gendered).[102] In the UK, there are more Muslim women in representative roles, along with a larger number of Muslim women's (feminist) organisations. This perhaps can be argued as contributing to the emergence of Muslim women run mosques and Sharia councils. However, as "new" religious institutions they are still embedded within gendered contexts, and must compete with male networks both generally and religiously. That is not to say it is impossible to re-gender institutions and successfully promote the interests of Muslim women – however, it is necessary to be mindful of the context within which they are situated, and the fact that organisations are gendered.[103]

In the UK, there has been a close engagement between Muslim groups and the state, from the earliest years of multiculturalism, but particularly in the post-9/11 era. This has contributed to the space for Sharia councils and tribunals to establish and grow, as the groups are able to possess political resources that can aid in their mobilisation and development.[104] It was estimated in the late 1990s that there were more than 950

[102] Francesca Gains and Vivien Lowndes, "How is Institutional Formation Gendered, and Does it Make a Difference? A New Conceptual Framework and a Case Study of Police and Crime Commissioners in England and Wales," *Politics and Gender* 10 (2014): 529-530.
[103] Emma Crewe, "Ethnographic Research in Gendered Organizations: The Case of the Westminster Parliament," *Politics and Gender* 10, no. 4 (2014): 677. Crewe notes that organisations are never gender neutral. See also
[104] Fetzer and Soper, *Muslims and the State in Britain, France, and Germany*, 48.

Muslim organisations in the UK, and some of these were formed with encouragement from the Labour government – most notably the Muslim Council of Britain (MCB).[105] This state encouragement illustrates that Muslim groups have been able to find a place within informal political power networks – which in turn, assists in giving them the resources to mobilise and become an influential group and voice within the political realm (particularly when seeking greater accommodation). Whilst there is some engagement between Muslim groups and the government in Australia and Canada, it is not at the same level as this. This engagement with the state is often by self-appointed, male religious leaders. In the UK, with state support, there are some Islamic groups that appear to be "preferred" by the government. For example, the MCB, which has often been called upon to comment and consult on matters concerning the Muslim communities.[106] This preference also extends to the realm of the media, which can work to bias the representation through engagement with certain Muslim groups – for instance, engaging with select bodies like the MCB for statements and press releases.[107] A contributing factor to the engagement between Muslim community groups and organisations with the state is also shaped by the difference in Muslim representation within government bodies. In the UK, there is a far greater number of Muslim members of parliaments and local council. For example, there are several Muslim members of the House of Lords; and on the local level, the first Muslim Mayor of London, Sadiq Khan, was elected in 2016.[108] While Australia and Canada have (or have had) Muslim MPs, they are fewer in number when compared to the UK where there are many Muslim political representatives on a local as well as higher parliamentary level.[109]

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[105] Ibid., 49.

[106] Post 9/11 and post 7/7 terrorist attacks, Bano notes that the state "chose to engage" with the MCB to discuss matters of security and counter-terrorism. Samia Bano, *Muslim Women and Shari'ah Councils* (Basingstoke: Palgrave Macmillan, 2012), 33.

[107] See for example, The Guardian newspaper focusing on the activities of the MCB. [Vikram Dodd, "Muslim Council of Britain to set up alternative counter-terror scheme," *The Guardian*, October 20, 2016, https://www.theguardian.com/uk-news/2016/oct/19/muslim-council-britain-set-up-alternative-counter-terror-scheme (accessed on December 1, 2016); and Aisha Gani, "Muslim Council of Britain takes out advert denouncing Paris attack," *The Guardian*, November 19, 2015, https://www.theguardian.com/world/2015/nov/18/muslim-council-britain-advert-paris-attack (accessed on December 1, 2016)].

[108] In the House of Lords there are at least four members who are Muslim: Baroness Sayeeda Hussein Warsi, Baron Khalid Hameed, Baron Mohamed Iltaf Sheikh, and Baron Lord Nazir Ahmed.

[109] It should be noted that the Canadian city of Calgary elected a Muslim mayor, Naheed Nenshi in 2010. Nenshi is still in office and extremely popular (having been dubbed in the media as having "rock-star status in Canadian politics"), and is currently campaigning for re-election in the upcoming municipal election on October 16, 2017 [See Kelly Cryderman, "Naheed Nenshi faces real competition in next Calgary mayoralty race," *The Globe and Mail*, May 26, 2017,

Muslim women in parliamentary roles are outnumbered by Muslim men, which is also paralleled in the community religious groups that tend to be male dominated. In discussing multicultural accommodation, through consultation with these "preferred" groups, like the MCB which has consistently had a male leader,[110] informal (gendered) networks are formed, which largely exclude Muslim women from the discussion, despite claims to represent religious group more broadly. By silencing Muslim women (contrary to the claims of being "neutral" and representing both men and women), these informal networks reinforce patriarchal norms, and understandings within these religious groups.[111] This is idea which is then adopted and reflected by the media in their representation of these Muslim groups, in presenting stereotypes of Muslim women as the powerless, silent, "victims". According to Ralph Grillo, there is a "legal industry of Muslim law" in the UK, which consists lawyers, expert witnesses, imams, and sharia councils (to name a few).[112] This network of individuals and groups involved in discussing Sharia, and representing the interests of the community are generally dominated by men. Imams are the self-appointed male religious leaders, and Sharia councils are predominantly run by men. There are some women who have publicly assumed roles within Sharia councils. However, their involvement and influence would be constrained by the overwhelming male membership of these institutions. Examples of female members and counsellors engaging in the operations and representation of Sharia councils include Amra Bone, a member of the Islamic Shariah Council; and the Birmingham Central Mosque has a female doctor, Wageha Syeda who conducts counselling with Muslim women approaching the council for mediation or arbitration.[113] While these female representatives may appear to be a part of the conversation, they are ultimately operating within a "male space", constrained by the institution and the need to abide by "rules" that are gendered.

In Australia, there are Muslim women's organisations, like the Muslim Women's National Network, who work as a lobby group.[114] However, these groups have to

https://www.theglobeandmail.com/news/alberta/naheed-nenshi-faces-real-competition-in-next-calgary-mayoralty-race/article35135852/ (accessed on July 13, 2017)].

[110] The current secretary general is Harun Rashid Khan (as at February 10, 2017).

[111] Grillo, *Muslim Families, Politics and the Law*, 7.

[112] Ibid., 8.

[113] Ibid., 128.

[114] Kais Al-Momani, et al., *Political Participation of Muslims in Australia* (Sydney: Centre for Research on Social Inclusion, Macquarie University, June 2010), 20.

compete against the traditional leadership of Muslim communities, which are typically male dominated and conservative, and are the "leaders" who speak to media and the government about "the community".[115] The Muslim Women's National Network works with the Muslim Community Reference Group, which is the group that consults closely with the government on matters concerning the religious community.[116] However, whilst this group attempts to diversify beyond the "old guard" of male religious leaders, the ratio of female representatives to male is still unequal.[117] The UK has far more Muslim NGOs run by women, however, many of these groups are unsuccessful in lobbying the government, even when supported by a female political representative like Baroness Cox, which was illustrated in the failure of Cox's Bill against religious arbitration. These groups often feel they are unfairly treated and disadvantaged when they are engaging with the state, particularly with the rise of counter-terrorism strategies that focus on Muslim women. A prominent example is seen in the resignation of Shaista Gohir, from the government-established National Muslim Women's Advisory Group – who noted upon exiting that the government's approach to engaging with Muslim women did not lead to empowering or inclusive discussions.[118] This illustrates the constraints that are placed on women, where informal social norms and gendered hierarchies govern the bounds for participation by Muslim women.

Discussions around multiculturalism and freedom of religion in the realm of informal political networks are often dominated by men. The movements supporting a shift away from multiculturalism creates a bias in the "rules of the game" to favour the dominant group. However, this does not necessarily offer more equal outcomes of minority women – even though it is framed as the more "just" alternative. Muslim women's engagement with the state is bound with limitations, as opportunities to engage are framed within particular social and political contexts from which they emerge. For example, the conversation around accommodation tends to be between political representatives and religious leaders, who are predominantly male. The informal networks that form between the political representatives and the predominantly male (self-appointed) religious leaders can work to reinforce the limitations placed on women generally, when trying to "break through" and participate

[115] Ibid., 21.
[116] Ibid.
[117] Ibid.
[118] Therese O'Toole, et al., "Governing through Prevent? Regulation and Contested Practice in State-Muslim Engagement," *Sociology* 50, no. 1 (2016): 173.

in political discussions. If women's access to political power networks are limited in the wider sense, the possibility and space available for Muslim women to participate and have a voice (as minority women) would presumably be equally as limited (including where the discussions surround Sharia and the "oppression" they face by their religious community and practices). Even where female representatives are involved in Sharia councils, they are not truly able to overcome the access to justice issues faced by Muslim women, who are trapped in the bind of culture/religion versus state obligations. While the councils open up an alternative option for dispute resolution, the distribution of these opportunities are framed by patriarchal religious traditions reiterated by the councils – drawn from both religious tradition and patriarchal norms in the state more generally. Thus, they are not empowering for minority women – even if there appears to be involvement of Muslim women (with a small level of informal agency being exercised).

Similarly, where women are in power, this does not mean that they will always be working towards feminist goals. Women are constrained by the environment in which they are operating, and in regards to Muslim women, they may not be able to freely outline and represent their interests. There has been the development of women-run mosques in the UK with female religious leaders,[119] but they have drawn much criticism from Muslim communities, and scepticism from the state and the broader community (in terms of why Muslim women would "choose" Islam when it is supposedly oppressive). It is difficult for them to compete in a climate where there are other political actors reinforcing the idea that Muslim women are "imperilled" by "dangerous Muslim men" and need saving, denying their agency and silencing them.[120] Ultimately, the discussion of what is best for Muslim women is conducted by male representatives, or women who are constrained by the male-dominated networks. Framing Muslim women as "victims" who need saving, reinforces historical ideals and legacies of colonialism – particularly the idea of "white men saving brown women from brown men".[121] To remedy this, there needs to be greater opportunities, and access to political networks, for Muslim women, in order to engage with the state and represent

[119] Radhika Sanghani, "The truth about 'patriarchal' mosques and their women problem," *The Telegraph*, August 11, 2015, http://www.telegraph.co.uk/women/womens-life/11790681/Muslim-women-problem-unveiled-within-patriarchal-mosques.html (accessed on September 5, 2015).
[120] Christine Ho, "Muslim women's new defenders: Women's rights, nationalism and Islamophobia in contemporary Australia," *Women's Studies International Forum* 30, no. 4, (2007): 294.
[121] Ibid.

themselves, and to be able to negotiate a more "equal" and "just" outcome. It is not enough to simply be advocating for the inclusion of women in parliament, there needs to also be a recognition and inclusion of the voices of minority women. This needs to occur against a backdrop of recognising the gendered hierarchies that are inherent within state institutions, which work to exclude women from political participation. As new institutions, these Muslim women-run mosques or councils are embedded within particular contexts that are imbued with gender hierarchies – as well as being up against informal male power networks both politically and religiously.

Sharia Councils in the UK

With Muslim women forming the majority of applicants seeking advice and recourse through these Sharia councils and tribunals that have emerged in the UK, it is important to consider the way in which gendered norms emerge and guide the mediation and arbitrations that take place within these religiously-based institutions. As these institutions are centred upon Islamic legal principles, the religious conceptions around the role, rights, and responsibilities of men and women (particularly in relation to marriage and divorce) will presumably filter through and guide these institutions in resolving application for Islamic divorce. Muslim legal opinions in the area of gender relations often reinforce certain notions of "womanhood" (where women are viewed as less than men), as well as privilege males over females in rulings on divorce, personal rights and freedoms, and inheritance (to name just a few areas considered under Sharia).[122] The focus of dispute resolution in Islamic family law, and therefore the Sharia councils and tribunals, is on reconciliation - emphasising the religious obligations on Muslims to seek mediation/arbitration when necessary to settle matters.[123] However, with particular responsibilities assigned to men and women, and the vast differences in the ease of divorcing for Muslim men and women, it is clear that the processes of Islamic mediation and arbitration within these councils would inevitably be gendered. These institutions are male-dominated spaces that adopt and reinforce conservative, religious interpretations of women

[122] Celene Ibrahim, "Family law reform, spousal relations, and the 'intentions of Islamic law'," In *Women's Rights and Religious Law*, eds. Fareda Banda and Lisa Fishbayn Joffe (Milton Park: Routledge, 2016), 109.
[123] Samia Bano, *Muslim Women and Shari'ah Councils* (Basingstoke: Palgrave Macmillan, 2012), 102.

(primarily as mothers, wives and daughters).[124] Sexual autonomy thus becomes an intrinsic part of Sharia councils, in the adoption of particular views of women as wives, mothers and caretakers in the family – and these ideas that underlie the model of reconciliation that is employed. Furthermore, the "space" that is created for arbitration (and the attempts at reconciliation) are often dominated by men. The religious leaders are typically men, and the family members and witnesses that participate within the discussions are also typically male.[125]

The model of reconciliation in Sharia arbitrations within the councils and tribunals in the UK typically reinforce the idea of the "obedient wife" who must fulfil the husband's needs within the family. This is seen in many examples of Sharia mediations observed and reported, where women are encouraged to put more effort into their "wifely" duties, or asked if they were satisfying their husbands needs (sexually).[126] The language employed in reconciliations expresses a gendered hierarchy and power relationship, particularly where women are reduced to merely being a wife, and by emphasising the wife's duty "to stabilise marriage and family relations".[127] Those taking up the role of councillors within these Sharia bodies draw on "common understandings" of gender relations, and the role of women within families and the community, and these often "frame the terms of the discussion on which the basis for reconciliation is sought".[128] Notions of family honour and shame are drawn upon in imploring women to reconcile, and to encourage an Islamic path in disputes (and avoid the civil law system). This idea of the "Islamic path" is one of the driving factors behind the continuity and existence of Sharia councils in the UK, and the reason many women may turn to Sharia councils in matters of divorce, over the civil legal system.[129] The gendered hierarchy that emerges within Sharia arbitrations via these councils and tribunals in some ways parallels the gender biases that persist within civil mediation and arbitration encouraged in the realm of state family law. The privatisation of family law (as

[124] Samia Bano, "Muslim Family Justice and Human Rights: The Experience of British Muslim Women," *Journal of Comparative Law* 2, no. 2 (2007): 59.
[125] Samia Bano, *An exploratory study of Shariah councils in England with respect to Family Law* (University of Reading: University of Reading and Ministry of Justice, 2012), 140.
[126] Panorama, "Secrets of Britain's Sharia Councils," *BBC TV* (broadcast April 2013); and Ashley Nickel, "Abusing the System: Domestic Violence Judgements from Sharia Arbitration Tribunals Create Parallel Legal Structures in the United Kingdom," *The Arbitration Brief* 4 (2014): 111.
[127] Samia Bano, "Muslim Family Justice and Human Rights: The Experience of British Muslim Women," *Journal of Comparative Law* 2, no. 2 (2007): 58.
[128] Bano, *Muslim Women and Shari'ah Councils*, 79; and cited in Grillo, *Muslim Families, Politics and the Law*, 115.
[129] Bano, *Muslim Women and Shari'ah Councils*, 84.

discussed in Chapter Nine) continues to place women in negotiations where they come in with unequal bargaining power – which also occurs in this informal religious institution, where Muslim women are placed in disadvantageous bargaining positions; negotiating within a patriarchal, male-dominated framework. The increasing move towards privatisation in family law, which encourages mediation, opens up opportunities for Sharia councils to "fill the gap" and thrive.

Muslim Women's Experiences with Sharia Institutions

The experiences of Muslim women when engaging with Sharia councils vary, and whilst examples of mediations within these bodies have demonstrated that they have the potential to reinforce inequalities and further disempower some women (who are already in disadvantageous positions within their families and communities),[130] it is important to consider the way in which power is exercised, controlled, and distributed within these institutions. Within FI scholarship, it is widely acknowledged that power is not uniformly dispersed. As discussed in Chapter Nine, within institutions of private dispute resolution there can be implicit patriarchal hierarchies, and these frameworks produce gendered power relations within these institutions and their processes.[131] However, that is not to say that there may not be "sites of resistance" to challenge the unequal distribution of power. Samia Bano, for instance, argues that within Sharia councils there are occasions where the authority of the predominantly male religious scholars is challenged by female participants within the institutions - for example, female counsellors who may lobby for alternative interpretations and outcomes in a dispute mediation.[132] The problem with such "resistance" is that it is shaped by the gendered structures and hierarchies within the institution. The processes within the councils may control these challenges and resistance through various means – such as, relegating female counsellors to the "periphery of the disputing process", or reducing their roles "to one of observer rather than active participant".[133] Despite challenges by some Muslim women within their communities, the strategic positioning of male

[130] Trina Grillo, "The Mediation Alternative: Process Dangers for Women," *Yale Law Journal* 100, no. 1545 (1991).
[131] This is an idea that is also considered in Samia Bano, "Agency, Autonomy, and Rights: Muslim Women and Alternative Dispute Resolution in Britain," in *Gender and Justice in Family Law Disputes*, ed. Samia Bano (Waltham: Brandeis University Press, 2017), 66.
[132] Ibid.
[133] Ibid.

religious scholars within these institutions means that gendered cultural practices are promoted to reinforce the idea that women must remain in certain subordinated positions within the family and community.[134] Thus, the potential for challenging patriarchal structures and processes both within these councils and the community is ultimately limited, as is the possibility to re-gender these institutions to make the processes pro-gender equality and balanced.

Ultimately, the structure of Muslim families, and Muslim communities more broadly, are ones built on unequal distributions of power between men and women, that are driven by historical legacies and norms derived from culture and religion.[135] The negotiations for divorce (amongst other matters) take place within a gender hierarchy that draws on the "gendered constructions of Muslim identity and female responsibility".[136] Examples of this are seen in the mediations and arbitrations that were observed in the BBC One Panorama documentary titled "Secrets of Britain's Sharia Councils", where women were quizzed by council leaders over the fulfilment of their wifely and familial duties.[137] Women's voices are silenced within mediation meetings in these Sharia councils and tribunals, and they are often burdened with blame and guilt over the breakdown of their marriages.[138]

The growing evidence from mediations within Sharia councils suggests that the needs and interests of Muslim women are not well-served by these bodies, as there is a primary focus on "exercising control over female autonomy and policing the boundaries of religious and community affiliation".[139] By emphasising and prioritising reconciliation, even when this conflicts with gender equality, means that the experiences of Muslim women engaging with these councils have been overwhelmingly negative.[140] Whilst it is acknowledged that many Muslim women turn to these bodies, often voluntarily, as they value the need to seek religious counsel

[134] Ibid.
[135] Pragna Patel, "Faith in the State? Asian Women's Struggles for Human Rights in the U.K.," *Feminist Legal Studies* 16, no. 9 (2008): 29.
[136] Grillo, *Muslim Families, Politics and the Law*, 128.
[137] Panorama, "Secrets of Britain's Sharia Councils."
[138] Patel, "Faith in the State?" 29.
[139] Pragna Patel, "The Growing Alignment of Religion and the Law: What Price Do Women Pay?" in *Gender and Justice in Family Law Disputes*, ed. Samia Bano (Waltham: Brandeis University Press, 2017), 88.
[140] Ibid.

when navigating issues around divorce and separation;[141] this does not mean that the outcomes are always positive or what they anticipate. Bano's 2012 empirical study demonstrates that many women who participated in religious mediation within these councils felt "pressure, obstacles, discrimination and hostility" when trying to get a resolution.[142] This is the case whether it is a mediation within the Sharia councils or the MAT. The MAT is argued to follow a "pattern of decision making similar to that of the Sharia councils".[143] Like the councils, it is a body of private dispute resolution, and despite claiming to have authority under the UK's *Arbitration Act*, there is nothing that suggests it is significantly different, or more accountable and balanced in its practices compared to the more informal councils. It too focuses on reconciliation "as a moral duty" and "religious obligation", and evidence shows that arbitrations through this institution are also profoundly unequal, and violate the rights of women.[144]

Sharia Councils and the State Legal System

Comparing institutions of religious dispute resolution, like the MAT or Sharia councils, to the state legal system may be challenged as futile – or even perhaps oversimplifying what is a complex area of personal law matters. Whilst many Muslim women navigate both institutions when seeking a divorce and do not simply "choose" to turn to one over the other, both the formal state law and these informal institutions are competing for space despite disparities in size and structure – particularly with some Muslim communities establishing the councils and attempting to resolve dispute with as little state intervention as possible.[145] As such, exploring the issues of power, accountability, and transparency within both these institutions is both necessary and useful, as both institutions are inherently patriarchal, albeit in different ways. The concern with religious mediation in the councils and arbitration via the MAT, is that there is a limited or complete lack of due process available to Muslim women when participating in these institutions – namely, the protections available under the rule of law:

[141] Rehana Parveen notes that many Muslim women do not accept civil divorce alone as a proper religious divorce [see Rehana Parveen, "Do Sharia Councils Meet the Needs of Muslim Women?" in *Gender and Justice in Family Law Disputes*, ed. Samia Bano (Waltham: Brandeis University Press, 2017), 160]
[142] Patel, "The Growing Alignment of Religion and the Law," 88.
[143] Ibid.
[144] Ibid, 89.
[145] Bano, "Agency, Autonomy, and Rights," 63.

accessibility, transparency, impartiality, and procedural fairness (to name a few).[146] Essentially, mediators, whether religious or not, lack neutrality – just as judges in the court system also bring their own biases to cases, which can significantly shape outcomes (as was considered in Chapter Five). There are also issues surrounding the "qualifications" of imams and religious scholars who are leading dispute resolution processes within these bodies, as they have no formal training in mediation or arbitration; essentially there is no centralised system of assessing what qualifies a person to be a mediator or arbitrator in this context.[147] Additionally, there is no means for appeal, and with these processes occurring in private without the presence of "partisan lawyers",[148] this raises concerns around the lack of transparency and accountability.

While the family law system may be viewed as more transparent and impartial due to its formal nature, the inherent patriarchal hierarchies within the state institutional network are also present and embedded in various ways within the family law framework. As discussed in Chapter Nine, women do not come into state-sanctioned family law mediations or arbitration on equal ground. They face issues of financial aid and access to resources, as well as limited recognition of the unequal distribution of domestic labour. Furthermore, state legal processes are based on patriarchal norms and values, where emotion and care are often attributed to women and viewed as less-worthy ideals.[149] This is where mediation, including religious mediation is, by contrast, viewed as being a positive alternative within women's lives. Decisions handed down by courts within the state legal system can restrict women via the "gendered limitations of legal remedial norms",[150] as they are implicitly shaped by the gender norms and legacies that underlie state institutions. Regardless of any transparency or accountability offered by the family law system, in comparison to religious-based mediation or arbitration, it is larger and more powerful due to its formal nature. As Wendy Kennett argues, there appears to be a double standard in privatised dispute

[146] Patel, "The Growing Alignment of Religion and the Law," 102.
[147] Saher Tariq, "Muslim Mediation and Arbitration: Insights from Community and Legal Practice," in *Gender and Justice in Family Law Disputes*, ed. Samia Bano (Waltham: Brandeis University Press, 2017), 134.
[148] Bano, "Agency, Autonomy, and Rights," 60.
[149] Carol Smart, "The Woman of Legal Discourse," *Social and Legal Studies* 1 (1992).
[150] Rachael Field, "Using the Feminist Critique of Mediation to Explore "The Good, The Bad and The Ugly" Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia," *Australian Journal of Family Law* 20, no. 5 (2006): 51.

resolution – between that "sanctioned" by the state, and that carried out by the oft-critiqued religious bodies. This double standard consists of mediation and arbitration outcomes within the secular system being viewed as "free choice" when accepted by women, but when religious in nature it is deemed to be "oppression".[151] Ultimately, both institutions, whether informal or formal, are patriarchal in varying ways, and the challenge is whether they can be reconciled to work in a way that is positive and beneficial to Muslim women.

In aiming to keep families together through reconciliation, the aims of the Sharia councils are not too dissimilar from the aims of civil family mediation and arbitration. Even through reforms and shifts in attitudes in the broader society, the definitions of family and marriage have long been influenced by Christian moral values and norms (as discussed above) and thus, the lingering patriarchal gendered legacies within state family laws are not that dissimilar from the gendered ideals of family and marriage expressed by minority groups, as in Sharia councils. By drawing on state arbitration provisions, in order find a space for the establishment of Sharia councils, Muslim groups are positioning themselves within the growing "privatised" alternative dispute resolution of the state. In doing so, they inevitably draw on the norms that surround civil law provisions of family dispute resolution, and thus any gender biases that exist within that framework (which they do in the continued disadvantage of women in bargaining power in mediation discussions and settlements) will be reinforced in this informal religious institution. If the state's law is not completely gender-bias free these informal religious bodies have the potential to be even more gender biased – justifying their own patriarchal norms with those that are inherent within state institutions.

A particular area of concern, that arises in relation to Sharia councils is that of domestic violence, as the reconciliation emphasis of many divorce cases and mediations often encourage women to return to physically abusive partners.[152] One of the aims of Baroness Cox's failed Equality Bill was to bring awareness to the issue of domestic violence in minority communities, that it claimed would be exacerbated by

[151] Wendy Kennett, "Religious Arbitration in North America," in *Gender and Justice in Family Law Disputes*, ed. Samia Bano (Waltham: Brandeis University Press, 2017), 199-200.
[152] Examples of this are highlighted in the documentary - Panorama, "Secrets of Britain's Sharia Councils."

allowing religious arbitration.[153] However, the effectiveness of eradicating domestic violence in minority groups, whilst a noble aim of the Bill, was unrealistic. Such change required the issue to be addressed effectively within the broader community. Thus, reform suggestions of the Bill do not solve the problems of gender in Sharia courts, and, it could actually push them into the "shadows" of the law. This raises issues for Muslim women, who, when encouraged to go to the state legal system solely for recourse, will be met with the same inequalities that are faced by women generally, for example access to resources. However, this would be in addition to cultural differences, and language barriers. Like religious mediation within the councils, civil mediation and arbitration may also sometimes bring women face-to-face with perpetrators of abuse, as state laws and institutions are not bias free (as was explored in Chapter Nine). Thus, while there are distinct differences between how domestic violence is addressed in British courts and Sharia councils, the fact is that there are gender hierarchies and biases still present within the British legal system. While the state legal system is positioned as the more promising, more "just" alternative for Muslim women, it has its own problems of disadvantage that need to be addressed. Essentially, there needs to be a greater awareness of the ways in which "majority and minority cultures interact in hierarchy-reinforcing ways" and recognise that "[m]ajority norms and practices also pose obstacles to the pursuit of gender equality within minority cultures".[154] A driving factor behind self-definition employed in minority groups and institutions like Sharia councils, is the "politically charged external stereotyping", minority groups members will be influenced by this but also help to influence the external perception.[155] As such, the lack of voice given to minority women in external formal and informal institutions, where their interests may be defined for them, contributes to the lack of realisation of agency in society generally, but also internally within their communities (and particularly within religious institutions, like the Sharia councils). There is a pressure on Muslim women to conform to the "secular vision" of gender equality and women's rights, which ultimately creates more barriers to their access to justice and equality than helping empower.[156]

[153] Nickel, "Abusing the System," 110.
[154] Sarah Song, "Majority Norms, Multiculturalism, and Gender Equality," *American Political Science Review* 99, no. 4 (2005): 474.
[155] Amelie Rorty, "The Hidden Politics of Cultural Identification," *Political Theory* 22, no. 1 (1994): 158.
[156] Grillo, *Muslim Families, Politics and the Law*, 128-132.

There have been suggestions of alternative ways in which religious arbitration could be incorporated in the state legal system, without creating a completely separate, parallel system of law. One such suggestion is that of "joint governance" by Ayelet Shachar, where power in personal law dispute resolution is divided between the state and the institutional structures of minority groups – with women able to choose between the state or their religious dispute resolution body (like a Sharia council) in resolving a dispute.[157] However, the problems that arise from this model is that it assumes "free choice" is available to minority women, which is not always the case. Ghena Krayem also suggests that there is the possibility for Islamic family law to be more greatly recognised and incorporated in the privatised dispute resolution of family disputes.[158] Additionally, whilst there may be greater transparency around religious arbitration if formally accommodated by the state in some way, this does not resolve the problems that arise due to a lack of centralised agreement on what Sharia law is, and which religious norms and principles should be incorporated within religious arbitration practises.[159] The limitations with these suggestions is that any creation of a religious dispute resolution alternative/option will not only incorporate the inherent gender hierarchies within religious groups and state laws, but it will also have to contend with the issue of "nested newness". Any institution of religious dispute resolution would emerge from and be embedded within particular institutional contexts, where state institutions of family law and dispute resolution are also implicitly gendered. That is not to say it is impossible to "re-gender" institutions, however, this would require a strong feminist presence and involvement in the development of the institutions in order to keep them "just" and accountable.[160] There would also be a need to address the issues that arise from the informal networks of men that operate in the institutional landscape, where there is a "silencing" of women, and definition of their interests (without consultation or involvement with women) under multicultural policies. As discussed in Chapter Nine in relation to state structures and laws, new rules are founded in part on old "informal" rules and practices, with new actors often absorbing old ways of operating. They adopt former "logics of appropriateness" rather than creating new ones, and this poses problem for Sharia accommodation in the form

[157] Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001).
[158] Ghena Krayem, *Islamic Family Law in Australia: To Recognise or Not To Recognise* (Carlton: Melbourne University Publishing, 2014).
[159] Kennett, "Religious Arbitration in North America," 200.
[160] Meryl Kenny, "A Feminist Institutionalist Approach." *Politics and Gender* 10, no. 4 (2014): 683.

of "joint governance" proposed by Shachar, as the "logic" underlying any joint governance structure may follow the "gendered logic" of both religious groups and state institutions. Similarly, the privatised nature of the institution, will impact on gender outcomes, as discussed in Chapter Nine in relation to the increasing privatisation of family law. Whether a law operates in the public or private realm shapes the hierarchies and relationships that are created between individuals and the institutions – in this case, the place for women in terms of access and equal bargaining.

Conclusion

It is important to consider the role of informal institutions that operate alongside and influence formal state institutions. In the context of the Sharia debate, these informal institutions play a significant part in the "space" that is made available for Muslim groups to engage with the state, as we have seen with the establishment of Sharia councils and tribunals in the UK. The continuing influence of Christian churches on the state is evident in the realm of public policy discussions and formation, as well as the law where Christian moral values are embedded and continue through definitions and legal ideals (i.e. definitions of marriage). While it is often argued that there is a neutrality within formal state institutions (like the law), the underlying Christian values challenge this assumed secularity and neutrality. The special privileges afforded dominant Christian groups within each society, in the form of exemptions and exceptions, have been extended to other religious groups over time. In the UK, the extension of these religious privileges and protections to minority religions (including Muslim groups), along with the "localised" approach to multiculturalism that was discussed in the previous chapter, have contributed to creating an environment in which Sharia councils have flourished. By contrast, Canada appears to place a greater emphasis on equality over religious freedoms, despite the implicit religious influence of the dominant Christian churches, and the lack of a clear state-church separation in constitutional documents. This preference of equality over religion helps to explain the difference to the UK experience with the Sharia debate. Similarly, the political environment in Australia has not fostered the same level of accommodation of other religious groups. However, regardless of the differences in level of accommodation of minority religious groups in each state, the claim of secularity of laws and policies is a fallacy. The implicit influence of Christian values within policies and laws, the

outcomes and opportunities for women in seeking equality or justice are then constrained by the patriarchal values, hierarchies and legacies that filter from the informal institutions into formal ones.

Similarly, the informal political networks that arise within the state affect women's participation in political discussions, in addition to more broadly influencing state policies. Whilst women's groups can form a network that can sometime engage effectively with the state in lobbying for greater women's rights and equality (as seen in the Canadian context), often networks of men operate in the background to "shut out" women. So, even where there are equality reforms, and these male-dominated networks claim to represent both men and women, the "neutrality" of these groups and networks mask the fact that they are implicitly representing men. In discussions of multiculturalism and accommodation of Sharia, the discussions, more often than not, take place between men – male politicians and male religious/community leaders. There is an exclusion of women, but even where women are in positions of political significant, they operate within the constraints of the informal networks, and the "rules" shaped by these networks (which are commonly patriarchal in nature). This is not dissimilar from the patriarchal structures that are often found within the Sharia councils that operate in the UK. Ultimately, Muslim women are often silenced within discussions that outline their "interests". However, the informal networks of women's groups are significantly more positive in their efforts to influence change in formal institutions, and present a better alternative for Muslim women engaging with the state, as they clearly outline their intentions and goals in representing women (compared to the informal networks dominated by men). It is difficult to challenge the biases expounded by male-dominated groups and networks as they disguise their true intent and inherent privileging of men's interests over women.

CONCLUSION

In a post-9/11 climate the question of accommodation of Sharia and Muslim minorities has become increasingly topical and contested, particularly as debates around multiculturalism have shifted to focus on Muslim communities. Requests for greater accommodation of Islamic law in Western multicultural societies has led to numerous debates in recent years. This is a particularly salient issue against the background of the European migration crisis that has reshaped the geopolitical climate, and placed an emphasis on the migration and accommodation of Muslim minorities in the West. As I illustrated in Chapter One, these broad debates around Sharia are often framed within the multiculturalism versus feminism discourse that was most notably outlined in Susan Okin's essay "Is Multiculturalism Bad for Women?". However, whilst this raises interesting discussions against which the outcomes for Muslim women may be discussed, it can be problematic. Most significantly, this is because it does not consider the other factors that operate alongside culture to affect the lives and agency of women.[1] The agency of Muslim women, which was explored in Chapter Four, is often limited by the frameworks within which it is considered, not only multiculturalism and feminism, but also by dichotomies about "choice" and "force". These approaches, as Shakira Hussein notes, ignore the fact that the lived reality for Muslim women is one that consists more of a negotiation – somewhere between choice and force.[2]

Similarly, discussions around Sharia in the West are commonly considered in terms of legal pluralism, and the possibility for state legal systems to recognise and incorporate the laws of minority religious and cultural groups. However, as discussed in Chapter Two, when looking at the experience with Sharia in Australia, Canada or the UK, there may be some elements of accommodation or even what may be argued to be an "informal" legal pluralism, but these do not necessarily equate to legal pluralism. The overall concept of legal pluralism is problematic, with a wide variety of terms and understandings, that ultimately lead to circular debates about what is to be considered legal pluralism as a starting point. As such, in this context it has proven more practical to discuss Sharia in terms of reasonable (multicultural) accommodation.

[1] Leti Volpp, "Feminism versus Multiculturalism," *Columbia Law Review* 101, no. 5 (2001).
[2] Shakira Hussein, "The Limits of Force/Choice Discourses in Discussing Muslim Women's Dress Codes," *Transforming Cultures eJournal* 2, no. 1 (2007).

With the focus of these discussions often on the possibilities of legal pluralism and multiculturalism versus feminism, the central focus of this thesis has been to move beyond these frameworks to address questions of *how* and *why* Sharia councils and tribunals have been (informally) accommodated within the UK, but not so in the comparable jurisdictions of Australia and Canada. This moves away from common considerations of whether accommodation of minority religious laws (like Sharia) are good or bad for women, and instead looks to the realities of the experience with, and accommodation of, Sharia in each country. It focuses on the ways in which formal and informal institutions have interacted to influence and shape outcomes. For instance, the creation of Sharia councils, or the complete ban of religious arbitration, which then keeps religious dispute resolution processes less visible and firmly in the "shadow of the law". To answer this question of "how and why", drawing on theories of feminist institutionalism (that were outlined in Chapter Five) has been helpful to not only consider ways in which institutions are implicated in particular outcomes for accommodation of religious bodies; but also (as a secondary question) the outcomes that arise for Muslim women – both where there is, and is not, accommodation. The secular legal system is often positioned as the "better", "fair" and "equal" option for Muslim women (and women generally) in seeking dispute resolution of personal law matters (namely, divorce and property settlement). However, this argument is grounded on the notion that the law is secular and "neutral" (gender-bias free) – which is essentially a fallacy. There are inherent gender hierarchies within state institutions that work to limit women's agency; which also impacts the outcomes for Muslim women. By examining the institutional landscape in each jurisdiction with a focus on two formal institutions (the political and legal structures of each state, and the multicultural policies) it is clear to see the ways in which state multicultural policies and equality laws lead to particular outcomes in each state. Similarly, consideration of the two informal institutions (the influence of dominant Christian churches on the state, and the impact of informal networks) highlights the ways in which state institutions have absorbed gendered legacies and hierarchies from informal institutions (such as the churches/dominant Christian groups).

To provide some context to the discussion of the institutional landscape in each country, Section Two of the thesis outlined the political and legal background in Canada, the UK, and Australia. There are many similarities between the political and

legal traditions in each country, particularly as Australia and Canada have inherited many characteristics from the UK, as former British colonies. However, there are also several differences that become clear in this comparative discussion of the three states. One such difference includes the type of government, namely, the centralised government of the UK as compared to the federalist structures in Australia and Canada. As noted in the discussion of formal institutions in Chapter Nine, the fundamental nature of each government has had an influence on the interaction between informal institutions and formal state institutions. For instance, federal structures have in some instances been considered more beneficial for women's lobby groups in their engagement with the state (for example, allowing opportunities for venue shopping). This has an impact on the preferences within state institutions (specifically policies) when balancing the interests between gender equality and religious freedoms. Section Two also illustrated that whilst policies of multiculturalism developed around the same time in each state, the historical status of each state as either colonial power or colony influenced the development of multiculturalism – establishing competing interests in the conversations around accommodation. Specifically, Canada and Australia must first contend with reconciling and accommodating Indigenous rights, as a first step before discussion of accommodation turns to other minority groups. However, the most significant differences arise in terms of the provision of arbitration as a mechanism of private dispute resolution; as well as, the experience with the Sharia debate. The UK, in having visible Sharia tribunals and councils (including the MAT, which claims to have jurisdiction under English law), places it in a unique position compared to Australia and Canada, where there are no comparable bodies. That is not to say Sharia tribunals or councils may not exist in these countries, but they operate "in the shadows" of the law. In Ontario, arbitration provisions in family law were available up until 2005. However, following the public and parliamentary debate in the province, this is no longer the case. Australia, by comparison, has never had such arbitration provisions that would allow religious arbitration by any faith, and neither has there been a public controversy or debate in the way that Ontario has witnessed, or the UK has experienced in recent years.

The nuances of the difference in the Sharia experience in each state become even clearer in drawing on feminist institutionalism to discuss the formal and informal

institutions present in each country. State multicultural policies and their implementation have had a key role in creating and limiting the space available for Muslim groups to establish Sharia councils and tribunals. The "heavily localised" approach to multiculturalism in the UK appears to be central to fostering a closer engagement between minority (Muslim) groups and the state. By contrast, Australia and Canada have implemented multicultural policies through laws and structures that do not allow the same level of participation. These state policies have also been shaped by historical legacies and norms, which for Australia and Canada includes assimilation policies and attitudes, that perhaps were never truly eradicated. As "new" institutions, these multicultural policies are often not able to "forget the old". As such, past attitudes, and the "settler" history of both states (as former British colonies) have shaped multiculturalism in both states. The UK's version of multiculturalism, by comparison, has had to contend with the nation's history as an imperial power, and the post-colonial relationship with former colonies that resulted. In addition to these historical legacies that shape multicultural policies, contemporary events (specifically 9/11) have defined the era of global politics that we are currently in. The rise of Islamophobia and the focus on combatting terrorism post-9/11, has contributed to the shift in multicultural accommodation discussions to focus on Muslims in particular. This shift in multicultural policies has affected Muslim women by making them both "victims" and "suspects". A problematic binary where they are viewed as either "needing saving" from their "oppressive, patriarchal" religious communities and families, or as complicit in the development of extremism within their communities. Either way, Muslim women are denied agency by both categorisations, which constrains the space available for them to actively engage with the state and define their own interests.

The state structure is also significant, as it influences the opportunities and constraints on minority groups in engaging with the state. It is similarly significant in terms of the outcomes for women. As mentioned above, the type of governmental structure influences the opportunities available for women's groups to engage with the state in furthering their agenda. In a similar vein, the formalism of gender equality in Canada could be considered as contributing to the partiality towards gender equality over religious freedom – as was implicit in the Ontario Sharia debate, where gender equality was upheld as a significant reasoning for the legislative amendment. Whilst valuing

formal institutions as a mechanism for achieving gender equality may be counterintuitive to some feminist arguments, in the Canadian context the formalisation of equality within the constitution and laws has clearly contributed to debates over multicultural and religious accommodation. In terms of the formal institution of family law and arbitration, the shift towards private dispute resolution has meant that informal gender norms, hierarchies and legacies can filter through into this formal institution – with many of these historical legacies shaped by conservative Christian ideals (that were discussed in Chapter Ten). This challenges the neutrality of state laws, which is centred upon the notion that the state and its laws are secular. As such, where state laws are positioned as the "best" alternative within the Sharia debate, for Muslim women who are seeking justice in personal and family law, there are gender biases that emerge within the secular state legal system too.

The influence of informal institutions is similarly as significant to that of the formal institutions they operate alongside. In fact, as FI theorists note, informal institutions have an implicit role in shaping the formal institutional landscape. It is through these informal norms and customs that historical legacies (that are often gendered) may filter through to create a "gendered logic of appropriateness". A prime example of an informal institution that has shaped state laws – in particular definitions of family and marriage in the "secular" state family laws – is the influence of dominant Christian churches within each state. Of course, in the UK this is compounded by the fact that this informal institution is in fact state-sanctioned. Aside from the historical religious values and precepts that have shaped legal doctrine and definitions (and have endured, particularly in the realm of family law), there is a continuing influence of the churches on state policies. This poses an obvious challenge to the claim that state laws and institutions are "secular" and "neutral". The implicit influence of Christian moral and social values within policies and laws also means that gendered hierarchies and patriarchal values filter into formal state institutions. Alongside the influence Christian groups have had in all three states, special privileges and exemptions have been afforded to them. In all three states, these privileges and exemptions have been extended to other minority religious groups, including Muslim groups. To some degree this expansion of religious freedoms and privileges to other religious groups can account for greater accommodation. In particular, the UK appears to have a greater emphasis on religious privileges, which is presumably helped by the presence of an

official state church – as opposed to the importance placed on gender equality over religious freedom in Canada. It is this partiality towards religious freedom and protections in the UK that has seen similar privileges around religious schooling and education policies extended to Muslim groups. Combined with the "localised" approach to multiculturalism that creates a closer engagement between the state and minority groups, the UK appears far more accommodating of minority religious groups. It is this accommodation that perhaps accounts for the space available for Sharia councils and tribunals to develop in the way that they have. Whilst minority religious groups in Canada and Australia may be able to take advantage of religious exemptions, the extent of these privileges does not appear to be as broad as those that have been exercised by Muslim groups in the UK. Accordingly, there has not been a similar development of visible Sharia tribunals and councils within Muslim communities in Australia or Canada.

Like the effect dominant religious groups can have on formal state institutions, informal political networks too can have a significant influence, though more directly affecting the ability for actors to participate politically. Whilst informal networks shape political participation generally, these networks can have a significant impact on women's ability to participate in political discussions and engage with formal state institutions to influence policies – particularly where these networks resemble "old boy's networks" and are dominated by men. For Muslim women, this is problematic where their "interests" are being defined in conversations led by the state, or by religious leaders within the community, who are predominantly male. Being excluded from these political networks and conversations means that stereotypes may be reinforced, some of which are derived from historical Orientalist conceptions and understandings of Muslims and Muslim women. However, even where women can participate in positions of political significance, they are bound by the constraints of the informal networks and the "rules" that are implicitly derived from these networks; which, in being male-dominated, tend to be patriarchal in nature. This limits the effectiveness of any efforts to achieve change and bring about greater equality and protection of women's interests.

By adopting a different lens through which to examine the Sharia debates in the liberal multicultural states of Australia, Canada, and the UK it has been possible to consider

the *how* and *why*, instead of limiting discussion to whether there should be accommodation, and whether this is good or bad for women. A significant aim of this study was to expand the scope of feminist institutionalism – as it has not been employed to consider the relationship between religious institutions and the state. However, whilst there is clearly some work that needs to be done to expand FI analysis in this realm, as a starting point the discussion within this thesis shows that there is potential for it to be used in examining religion and the state. It offers insights that are not available through other more limited theories. In the context of the Sharia debates, FI theories present a means to understand the *how* and *why* behind the different experiences with Sharia law in each country. It also presents insight into the outcomes for women, based on the gender legacies and hierarchies implicit within formal institutions. From this FI analysis of Sharia in each country, it has been possible to explore the ways in which state laws are falsely assigned the labels of "secular" and "neutral", where the reality is that they too include inherited gender biases and hierarchies that affect women – including Muslim women. Thus, where they are presented as the better alternative, it is necessary to acknowledge that within these institutions there are challenges and limitations that need to be addressed. This is not to say that they are not the best alternative compared to religious laws (a question that is ultimately beyond the scope of this thesis), but it is unfair to claim that they do not hold patriarchal values. In presenting the secular law versus religious law in a simplistic, reductive way, discounts the wants and needs of Muslim women and their agency.

Drawing on FI, it is clear that the relationship between institutions is important, as they influence and shape one another, as well as the actors within them. Informal institutions can take the form of norms, values and customs. This can be as historical norms and legacies, or even defining political events, which ultimately have a significant impact on the evolution of state institutions, like laws and policies. In "new" institutions, the "nested newness" of these institutions means that they cannot truly escape or "forget the old". Based on this, recent political events around the globe will no doubt have an enduring impact on the way in which accommodation of minority groups progresses in Australia, Canada, and the UK. The effects of Islamophobia and the attitudes towards refugees and women, under the rising Far Right in the West means that institutional analysis is becoming increasingly important. Britain may be

seen as more accommodating and having created space for Sharia councils and tribunals to flourish, but this could soon change. The retreat from multiculturalism that former PM David Cameron spoke of could soon be upon the UK – with the European migration crisis, that has been further expounded by Brexit and the focus on controlling the borders and immigration. The influence of policies and events in the US have always held significant influence in global political attitudes. As such, the shifting approach towards multicultural accommodation, particularly of Muslims, with increasing anti-Muslim sentiment and a focus on immigration and borders being emphasised by the recently elected President Donald Trump will no doubt have an impact on attitudes towards multiculturalism and Muslims generally. Canada appears to be an exception to the increasing conservatism that is being witnessed in Australia and the UK (and particularly its neighbour, the US) in maintaining a liberal stance under the current Trudeau government. Prime Minister Justin Trudeau is a self-proclaimed feminist and supporter of gender equality, but has also generously welcomed Syrian refugees, and reinforced the fundamental multicultural essence of Canadian society. However, given his immense commitment to gender equality, this raises questions about what this will mean for multiculturalism. Ultimately, these recent political developments mean that the "Muslim question", when considering the bounds of multicultural accommodation and religious freedom is only going to become more topical and important. This will no doubt continue to raise the question of whether gender equality and multiculturalism are compatible. Whilst both gender equality and multiculturalism have the potential to co-exist and perhaps a balance can be sought, the challenge remains to discover this balance. Until such time, fundamental arguments between multiculturalists and feminists will most likely continue, in exploring the question of what is reasonable accommodation of minority (Muslim) groups. The continued pursuit of understanding how and why political outcomes emerge, and are shaped by institutions, is vital in this goal of furthering our understanding of these issues that surround multicultural accommodation.

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