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MUSLIMS IN A SECULAR STATE: ISLAMIC LAW AND CONSTITUTIONS

Transcript of Symposium Panel Discussion

Hera Hashmi: I want to say thank you to Professor Chibundu and Imam Suhaib Webb for an engaging dialogue, and I want to thank all of you as well for bringing your questions. This is exactly the kind of discussion that I was hoping we would have and I think will be beneficial, and so we want to keep the momentum going by starting the next panel, which is “Muslims in a Secular State: Islamic Law and Constitutions.”

And I would like to introduce the moderator for the second panel, Professor Peter Danchin. Professor Danchin is an Associate Professor of Law and Director of the International and Comparative Law Program at the University of Maryland School of Law. Before joining the faculty at Maryland, he was lecturer and director of the human rights program at Columbia University’s School of International and Public Affairs. He teaches international law, international human rights, South African constitutional law, and comparative public policy and law reform. Professor Danchin’s scholarship focuses on two main areas. The first involves competing conceptions of the right to freedom of religion and belief in international law and, in particular, tensions between liberal and value pluralist approaches. His second area of scholarship has focused on the role of human rights in international legal theory and on critical approaches to human rights discussion in particular. And I’ve had the pleasure of taking Professor Danchin’s International Law class as well as currently his International Human Rights seminar, in which we engaged in a lot of these issues, so I am really looking forward to a great panel, so Professor Danchin.

Professor Peter Danchin: Thank you very much, Hera. Welcome everyone to the second panel. I would like to first echo Professor Chibundu’s comments earlier and really congratulate Hera Hashmi and all the students involved with the journal on a terrific symposium today. It’s great to see so many people here, and I think these are really very interesting questions. In the second session, we’re going to look specifically at the question of the relationship between Islamic law on constitutions or constitutionalism. And we have two very distinguished speakers who are going to help us think through these questions. On my extreme right is Professor Nathan Brown,

who's a Professor of Political Science and International Affairs at GW. Professor Brown has written extensively on issues of Middle Eastern politics, constitutionalism, the rule of law and democracy in the Arab world. And his comments today are going to address some of those questions, particularly the constitutional systems of Arab states and the place of Islamic law in those systems.

Sitting to my immediate right is Professor Faisal Kutty, who's a visiting professor currently at Valparaiso Law School and also an adjunct professor at Osgoode at York University in Canada. Professor Kutty has practiced in a wide-array of areas of human rights and civil litigation. And he's also currently General Counsel for the Canadian Muslim Civil Liberties Association. He's going to speak today about a paper he's recently written, the title of which is "The Myth and Reality of Shariah Courts in Canada: Religions, Gender, Multiculturalism, Legal Pluralism, and the Limits of Accommodation and Delayed Opportunity for the Indigenization of Islamic Legal Rulings."

And I finally am going to speak a little bit about the right to religious freedom and how it relates to these questions of Shariah and Islamic law. So that will be a pretty full session, and let me hand it over first to Professor Brown.

Professor Nathan Brown: Thank you very much. The three of us, I think, lacking the stature of the first panelists, decided to compensate by standing while we speak. We're switching from Shariah in general now to law-specifically, but I think I've been asked to go first because I'll introduce the legal issues and constitutional issues a little bit gently. I'm going to be followed by two real law scholars, I'm a political scientist, and so I am not a law professor. But what I'm interested in is really kind of the politics of law and how it is that what happens when you try to combine a constitutional system with some democratic and liberal commitments with also a commitment to Islamic law. And my short answer would be that there might appear initially to be a contradiction, a contradiction between popular sovereignty on the rule of law on the one hand and divine sovereignty on the other hand. The problem is if you look upon those as absolutes, you certainly see some tension. The real questions, however, that come up in practice have to do less with *what* and much more with *who* and *how*; that is, *who* has the authority to sort of combine these things. And when you focus on the *who* and the *how* questions, what appears, at first, to be a logical contradiction becomes actually a tension and a tension that can often be managed. Specifically, what I want to do is to first ask why it is that this question

arises, the interaction between constitutional law, on the one hand, and Islamic law on the other hand. And why it actually becomes more pressing and more controversial over time rather than less. Second, I'll talk very briefly about what provisions actually exist, and I will be focusing basically on the Arab world. I'm aware that there are Muslim societies outside of the Arab world, but I don't know very much about them, so I won't talk about them. I'll leave those to others. And third, I'm going to ask about how those provisions are implemented. So, first, why is it a pressing question; second, what the provisions are; and third, how the provisions are implemented.

Essentially, you know you've got some kind of commitment to living a life and structuring society's political systems in accordance with Islamic principles for over a millennium. And you've got constitutional texts in the Arab world for now something like a century and a half. Tunisia was the first country. The Ottoman Empire, which governed much of what is now the Middle East, had a constitution beginning in 1876. Egypt had an organic law in 1881. So you've got a constitutional tradition that's over a century and a half old. The interesting thing is that when the first constitutions were written in Tunisia and the Ottoman Empire and Egypt, the issue of how to meld Islamic law and constitutional law did come up but not that much; it wasn't all that pressing, and if you look at the early constitutional documents, they don't say that much about Islam, and they don't say that much about religion, and they don't say too much about Shariah. Why is this? Well, partly, this is because earlier constitutions were seen as probably closer to more technical documents about how to arrange and structure states. Who is it that was going to review the budget? Who was going to serve as Minister? And they tended to focus very heavily on procedure. Over time, constitutions became invested with an awful lot more importance in the eyes of the people who were writing them and lived under them, and they became, especially by the mid-twentieth century, to be seen not simply as technically structuring internal operations of government, but really defining a people and their core values. And when you did that, all of a sudden all kinds of issues enter the fray. So that if you look at, for instance, the early constitutional documents in the Arab world, they could have very little ideological content. By the 1960s, they're getting longer and longer and longer and take on this kind of attitude of you know there's going to be socialism, there's going to be justice, there's going to be freedom, there's going to be dignity, there's going to be Islam, and so forth and so on. In that context, Islam gets introduced

and, not only that, there's a second operation that goes on as well. States begin to, in a sense, almost out-bid each other.

The first constitution that made some provisions for Shariah that I can find, is a Syrian Constitution of 1950, which mentions Shariah being a source of law. Other countries begin to imitate this and when they write their constitution, people who are drafting them say, "Wait a second. If this is Syrians that did that and they are kind of a secular society, certainly we're better Muslims than they are." And you have kind of a ratcheting-up almost of auction effect going on. The other thing that's going on, and why it is that this question becomes a little bit more pressing, is that states become much more important in what they do. So that, and I'll talk more about this at the end of my talk as well, what happens in the mid-twentieth century, is that states take on all kinds of welfare and education functions, which a century previously they hadn't done. So all of a sudden it becomes a lot more important what the state is doing in all kinds of realms of human and social affairs, where it wasn't before. So the question of how to meld Islamic teachings with a constitutional norm became more important.

What are the provisions that result? Early on, they were actually fairly limited. Some constitutions, especially in the early-twentieth century, begin to say, "Okay, personal status law (that is, law of marriage, divorce, and inheritance), should be done in accordance with a person's religious community." This was the status quo as existed in Middle Eastern states, and so it ratified the status quo, and it was also the area of law, which at the time was probably most informed by a religious teaching. So whether you are a Christian, Muslim, or Jewish, you were going to be governed in these intimate affairs by the laws of your religious community, and that was encoded in constitutional text. There were sometimes provisions that said that the Head of State had to be a Muslim. And, again, this is drawing from (there was a reference earlier before to) medieval jurisprudence on the question of the qualifications of a ruler. And so some constitutional provisions required that the Head of State be a Muslim, some did not. And it was very often the case that Islam would be declared the official religion. Exactly what this meant, you look at the Islamic legal tradition; there is nothing that says that Islam has to be declared the official religion. It's not clear what the meaning of that is, what a state does to have to be Islamic. So it seems to be just a very strong symbolic gesture in the direction of Islam. But, again, not one that has very clear legal or constitutional implications. And then the provisions begin getting a little bit more specific, and they begin getting into the

area of legislation. As I mentioned, the Syrian Constitution of 1950 introduced the idea that Shariah shall be a source of law. And when that started happening, other states started writing Shariah into their legal order. And let me give you just a few examples. In Kuwait, for instance, the principles of Shariah shall be a source of legislation. Saudi Arabia, and I am quoting (this is the Saudi basic law of 1994 I believe), “The courts will apply the rules of the Islamic Shariah in the cases that are brought before them, in accordance with what is indicated in the Book and the Sunnah, and statutes decreed by the Ruler, which do not contradict the Book or the Sunnah.” Iraq, the recent Iraqi Constitution:

Islam is the official religion of the State and is a foundation source of legislation. No law may be enacted to contradict the fixed elements of the rulings of Islam. No law may be enacted that contradicts the principles of democracy. No law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution. This Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights to freedom of religious belief and practice of all individuals, such as Christians, Yazidis, and Mandaean Sabians.

This sounds like it’s a provision drafted by a comedian; in fact, it was. And a comedian that didn’t necessarily see eye-to-eye on all issues. So it’s basically sort of saying you should go to Islam to get some ideas of legislation, and you can’t contradict anything that’s fixed in Islamic law. What are those fixed principles? Who determines what they are? Who’s going to which books, and why? And, by the way, you can’t contradict democracy or rights at all. This is a little bit dizzying in its implications. The Egyptian Constitution in 1971 was written to say the principles of the Islamic Shariah shall be a principle source of legislation and then amended in 1980 to say the principles of Islamic Shariah shall be *the* principles of legislation. And you listen to this and you think:

Okay, first, even if I know what the Islamic Shariah is, and that is something that is debated, what are the principles of the Islamic Shariah? How do those differ from the Shariah itself? What do you mean to say they shall be or they are or whatever? Is this a statement of fact? Is this telling legislators when you draft a law, you should go to those books first? What exactly does this mean?

And this brings me to the overarching point that I’m trying to make—that you really have to look at these provisions and ask yourself, and these are really getting to the questions of *who* as much as *what*. At first glance, what these provisions seem to do is setting up an

authority for law outside of the constitution. That's where you get the argument often that there's a contradiction between these provisions and democracy and the rule of law. Well, I don't think that's really all that safe to say because any constitution is often, any constitution that can be amended acknowledges that there is a source of authority outside of itself. What these provisions seem to be saying is that there is a source of authority outside the constitution and it lies in the realm of divine instructions, but it gives very little guidance about how to follow those instructions or who's supposed to do the following. So what happens when these constitutions hit the realm of constitutional legal practice? The Egyptian provision has been around for long enough that we've actually seen some effect. Interestingly enough, Egypt, at the same time that it amended its Constitution in 1980 to make the principles of the Islamic Shariah *the* principle source of legislation, at about that same time, gave birth to a constitutional court who was probably more independent than any constitutional court in Arab history. So they develop a jurisprudence on this; people start bringing cases to the court in the 1980s and 1990s saying we finally got an independent judicial actor that's willing, at some point, to declare more than half the laws that are brought before it constitutional, is willing to do all kinds of bold actions. And we're going to take provisions that we think violate the Islamic Shariah, take them to the constitutional court and get them struck down. And the court develops a jurisprudence on this question, which I sort of want to talk about very specifically and then talk a little bit more about the general implications of this. The court, and you'll recognize I think some of the themes the court developed from some of the things you already heard this morning, the court basically says, "Okay, when you look at the Islamic Shariah, there are two kinds of rules: there are rules that are absolutely certain in their authenticity in meaning." That's a very small number. But if it says, "You can't eat pork," pages and pages and pages of interpretation aren't going to get you out of that. That's very, very clear. But in the vast majority of rules, there's flexibility and interpretation and so on. And they say it is up to the people who've been entrusted with the affairs of the community to pick the interpretation that is most appropriate for the interests of the society. They also say that the Islamic Shariah provides not simply rules, but there are also general principles. And that you have to keep in mind those general principles while applying those. But those, again, are extremely general and kind of give you some basis on how to inspire interpretations, but they give you a very poor basis in order to say that's unconstitutional, that's a violation of the Shariah and this

is consistent with the Shariah. So essentially what they're doing is developing a jurisprudence, which says that the way to apply this and to understand how the Shariah shall be applied in Egypt, is not outside the constitutional order but through regular constitutional institutions.

Who is the one who is supposed to be deciding? Scholars can write what they want, but ultimately it's going to be the courts authorized by the constitution; it's going to be the parliament that's drafting law; it's going to be executive departments, ministers who are going to be actually issuing administrative regulations. When they do that, they should do so in a way that takes whatever they find in the Islamic legal heritage that is helpful, but applies it in accordance with the needs of the community. Again, the Shariah, rather than operating outside of the constitution, operates through regular constitutional principles. The interesting thing is that this approach that I've sort of talked about as one of the constitutional courts, is one that is now very widely accepted in Egypt. I've heard it from many members of the Muslim brotherhood who say constitutional court opinion is fine. I've heard it from state officials, from parliamentarians and so on.

Let me close with an observation about what seems to be going on. On the one hand, this would appear to be what I might call, and it's an ugly word, a "statification" of the Shariah. It's telling [that] the Islamic Shariah for all of its history has been the scholarly discourse that takes place among academics and scholars; the key mode of transmission of Islamic legal teachings through the years has been the writings of scholars, not legislative texts, not court decisions; it's what scholars say. If you want to study Islamic law traditionally, that's what you study. It's saying, no, [] Islamic law is what the political authorities say it is. And that sounds like it's getting into, as I say, "statification" of the Shariah. My time is up, but I'm not going to end on that note because that's not the only thing that is going on. I'm going to steal one minute in violation of the law in order to say what else is going on. What also is going on is an incredible democratization of Shariah discourse within the society. Yes, the state is asserting this role and setting up all kinds of institutions that interpret what the Shariah is. But, at the same time, you have increasing literacy and education. And you have a society that has all kinds of pious people in it who say, "Yes, of course, if you want to know what the law is in this particular place you have to go to the state." But it's still incumbent on every Muslim to understand the religion that it is teaching. It is up to each individual Muslim to find out the correct interpretation of Islamic law. You have this cacophony of voices, in which (I'm going to be slightly flippant here) the main

authority for what Islamic law is is not the state and it's not scholars, it's Google. You want to know what to do as a Muslim, you consult all kinds of sources. Some of those are web-based. Sometimes you go to scholars. Sometimes you get into Internet discussion groups. If I am a traditional Muslim religious scholar, I'm looking at this, and I'm incredibly ambivalent. On the one hand, what I see is a great flowering of the Shariah. Everybody's talking Shariah, and this is wonderful. Everybody's trying to live their life in accordance with Islamic teachings. On the other hand, you don't conduct brain surgery this way. There still has to be some role of expertise and some training. An opinion of somebody who [has] studied for twenty years at the right places with the right people is probably, not necessarily authoritative or binding, going to be a little bit better than a high school student reading a Wikipedia article on the subject. There is a real ambivalence on the part of religious scholars about this. But what it results, therefore, is this incredible cacophony within the society. Everybody's talking Shariah, but they're not all saying the same thing. At the same time as the state is trying to come up with its own binding interpretations of Shariah. I think there's nothing that can be more democratic and constitutional in its implications than that kind of society. Thank you.

Professor Faisal Kutty: Good morning. Thank you very much for inviting me and organizing this event. It's coming at an extremely important time when you have all this debate and discussion on Islamic law, Shariah, Muslims in American, etc. I come from Canada. I'm teaching currently three days a week in Indiana, but I am Canadian and spend four days a week in Canada. So I will be speaking about the Canadian experience and how it kind of fits into what you will see in the United States or what you are starting to see in the United States. And if you don't mind waving one of the jumping jacks in front of me on two minutes because I have a problem with continuing to talk once I start going; a problem some of us lawyers have.

Anyway, the topic that I am here to address is really the dynamics between a secular legal system and Islamic law. I want to bring the discussion away from Shariah because, as was mentioned, it's far more comprehensive. It involves the economic, social, political aspects as well. We're limited to discussing the Islamic legal rulings, and I'd like to narrow my discussion to that *fiqh* [Islamic jurisprudence]. So not necessarily the broader general principles, which were talked about earlier, but essentially the dynamic nature of *fiqh*, which is what we've been discussing and has been introduced.

Imam Suhaib Webb did a wonderful job of giving you some context and perspective on that.

Into that context, in Ontario, we had what's known as the Arbitration Act, which essentially allowed parties to privately contract, to privately have their matters resolved. In other words, in line with the practice of Alternative Dispute Resolution, which is a growing trend, people can opt out of the legal system and have individuals determine their legal, contractual disputes. Of course, none of the penal sanctions, the Hudut principles that were mentioned, for instance, none of the criminal law, nothing to do with the state. It had to do with private contractual relations. In Ontario, the legislation with respect to family law is the Family Law Act and the Divorce Act. The Divorce Act there is a federal jurisdiction, and Family Law Act, which governs support court custody access, property divisions, etc. is a provincial mandate. Parties can actually opt out of that legislation. In other words, a party can do a marriage contract at the time of marriage or a "prenupt," contracting out of those provisions. In the event of divorce or separation, parties can enter into a separation agreement. And parties can have their matters arbitrated, mediated, etc. This is happening for some time.

All of a sudden this Muslim group wanted to implement this. So they instituted Islamic Civil Justice, which was founded by a retired lawyer. He publicized this initiative to say we're going to resolve disputes using, and he used the term, "Shariah courts," which is a big mistake. Because when you use that terminology, automatically the defense goes up. Irrationality, hysteria. What you saw in the case of the Oklahoma "Save Our State" measure that was just passed by 17-30. That same reaction when he announced this, what happened was he invited members, leaders of the community to attend, to participate. Most of us really skipped it because just coming after the events of 9/11, Muslims in Canada had bigger issues, bigger priorities and not very many people really wanted to arbitrate or mediate. It wasn't a big concern for the community, so people avoided it.

But he invited a media outlet there, and the media ended up writing about it a positive article basically saying that Muslims will be implementing Alternative Dispute Resolution using Islamic legal principles. Of course, it made it onto the web, the blogosphere, especially the extreme right-wingers in the United States all of a sudden became, "Shariah courts coming to Canada, "Women will be stoned to death," "Hands will be chopped off;" completely outside areas that can be arbitrated/mediated. The Arbitration Act would not apply. But, of course, when the media reports these things it got

carried away, and the reaction was very swift. The initial reaction from the government was, "Well, if people can arbitrate and mediate, they can opt out of the Family Law Act as long as parties do it willingly, and if the two parties are in agreement, they can do that." That was the initial government position.

But because [of] the public outcry, the government appointed a retired Attorney General to look into the matter, and she investigated, and she came out with a one hundred fifty page report basically saying, "Yes, as long as certain checks and balances are in place to make sure that no parties are coerced, that there is no unconscionability, the various contractual principles were followed and the law of the land is respected in terms of entering into contracts, it's fine." But contrary to those recommendations, and that's when the Muslim community got involved, and at that time I was engaged by five other national Muslim organizations to start advocating on the issue and to start talking and looking at this issue. Unfortunately, the discourse, the hysteria, the alarmist rants, were so overwhelming that the government had to kind-of come down and oppose it. To me, it's the whole irrationality. This was one of the events that actually got me engaged in the whole issue of Islamic law. Prior to that, I had been practicing for a number of years primarily in the Muslim community, and we were doing all kinds of contractual arrangements. We were getting involved in legal disputes where people were trying to live in accordance with secular law but also consistent with the understanding of Islamic principles. But people were doing it in the private realm. All of a sudden it became a public issue.

I remember when the decision was made by the government at the time to "ban Islamic law (Shariah law)" from application in private disputes. I got a call from Professor Mohammed Fadel who [is] an American, he had just been appointed as Professor of Islamic Law at the University of Toronto, and he called me and the first question he asked me was, "What's wrong with Canada?" I said, "What?" He said, "You don't believe in freedom of religion and freedom of contract?" And I said, "Yes we do." "So what's with this decision of faith-based arbitration. What happened?" Now it's funny I can ask the same question to you guys. "What's happening with the irrationality when it comes to Islamic law?" The measure in Oklahoma, it may sound very theoretical, but really think about it. At the end of the day, it will preclude even, for instance, private parties who want to engage in certain things within contractual bounds. Are you saying that it can't be enforced? There's going to be a lot of constitutional scholarship on this and debate and discussion on this. But essentially you're

preventing parties from entering into agreements that they both willingly want to enter into. But you're being told, "We don't agree with your choice because it's not the choice I would make." So who made it possible for other people to dictate what I will do?

As a practicing lawyer, I was doing separation agreements, marriage contracts for parties, and I would advise them you're entitled to this, and I'm talking about non-Muslims and Muslims. I would say you're entitled to this under the Family Law Act. But he or she, my client, could tell me, "I know I'm entitled to this, but I want to do this." Am I as a lawyer now supposed to say, "No you can't because you're Muslim, and I need to protect you"? The state, we need to protect you in this case with our paternalism and say, "You're a Muslim woman; you will not be able to make the right choice." I saw a lot of this in Canada in my practice, where Muslim women would come and they would agree to a settlement. And during this controversy, a lot of lawyers would not give them independent legal advice because the fear was they're being coerced or that there was social pressure being imposed on them to accept something they should not accept. But who am I or who is the state to do that? To tell a party what they should accept or not? Especially given the fact that the legal system itself allows parties to opt out, again provided these protections were in place. I think what we need to see in the next little while is more education.

I see that Islamic law, even in the United States context, one of the first references you see is Justice Felix Frankfurter in a decision *Terminiello v. City of Chicago* case, you see how they view Islamic law. He makes a comment in the decision that here in the United States we're enlightened; we don't do "palm tree justice" or caudally justice. Basically saying, they just sit under the tree, anyone just sits under the tree and makes a decision. There's no rationality; it's an irrational system of law. That's how Islamic law is perceived. Contrary to that, Islamic law is very, very dynamic. As was mentioned, the evolutionary concept, Islamic law is based on the Qur'an, the Sunnah, but also ijtehad, independent reasoning, ijma, consensus, and qiyas analogical reasoning. All of these can function to bring about changes and transformations in Islamic law. The article that they mentioned I finished writing, really came out of my involvement as legal counsel and more theoretical engagement with this issue. My argument was that this opportunity in Ontario was a good way for us to see how liberal democracy and Islamic law can co-exist within a multi-cultural situation because we can't see what happens in the Muslim world and say that's what would happen here. It wouldn't. My argument is that

this allowed us the opportunity within the system to indigenize Islamic legal ruling; that's already happening. It's already happening as you see the scholarship in North America is pushing the boundaries when it comes to gender relations, when it comes to interaction with other communities. This was an opportunity to see that being pushed. In fact, much of the re-considered scholarship on this is arguing the same point.

An interesting point. I was invited during this controversy to speak at various secular Muslim group forums. They're basically there to attack any kind of "Islam-creeping" Shariah. I remember the lawyer who had written a report on behalf of various feminist groups. This debate, unfortunately, the feminist groups in Canada were well intentioned but misguided and misinformed on this issue. What ended up happening was this particular lawyer who did this report, she was a law professor at University of Ottawa, Muslim; she wrote a report on behalf of the Canadian Council of Muslim Women and various feminist groups basically saying, arguing the same points I made that the existing mechanisms were there to protect somebody who opted for this. Because, for instance, concern about children being taken away, the courts had the apparent jurisdiction to intervene. If there was bias in the decision, the courts could intervene. So they're all these mechanisms there in place, so she elaborated on all this. But she concluded because of separation of church and state, it should not be allowed. But interestingly, to her credit, a few years after the debate, she's come out with a new article, which basically she makes the point that she was also kind-of, they were well-intentioned but also misguided. Her new article is titled, "Were Muslim Barbarians Really at the Gates of Ontario?" You can Google that, or go onto SSRN. It's a very interesting take because she was the one who initially made the recommendation, did the legal work for these groups to basically come out and oppose. Everyone was opposed.

The Premier at the time, McGuinty, on September 11th, 2005, September 11th was the date, he basically came out, he said he "banned" Shariah, he said "one law for all." It wasn't "one law for all" because the law of the land allowed parties to settle their disputes as they deemed fit. Basically, because they feared a Muslim would use this and use Islamic principles, effectively they tried to ban it. You can't ban it because it still happens. Mosques are doing Alternative Dispute Resolution; just that there's no oversight now. So those who wanted to protect women, protecting them from religion failed in this because if they really believed that Shariah is always necessarily

oppressing women, it's still happening. There's no mechanism to oversee it now.

Anyway, in this particular context, a week before the decision, and this is when for me I became engaged in looking at this issue of how the Muslim community, how Islam is being treated in the legal system and the political system. That's why I kind-of left my practice part-time to kind of look at these issues because from a practicing lawyer's perspective, I was seeing all of these kind-of barriers and restrictions and hypocrisy and double-standards when it comes to the treatment of Muslims.

A week before the decision of the Premier, I was called by the Attorney General to ask my opinion, since I was representing the five national Muslim organizations, including ISNA, ICNA, CAIR, MAC (Muslim Association of Canada) and various other coalition groups. They wanted to know my opinion if the government came out and said, "What if we said that we would treat an Islamic arbitral agreement in the same way we treat a marriage contract, a separation agreement, and a 'prenupt?' What would your position be?" I said:

My understanding and my discussions with Islamic scholars is that we have to respect the laws of the land. So if you say that an Islamic arbitral decision will be treated, will be tested using the same ideas of consent, duress, unconscionability, the same standards that apply in this context would apply to an arbitral agreement, I have no problem selling this to my clients.

I hung up the phone, and I called my clients at the time and said:

I think I know where the government is going with this. They're going to basically give us what we want and go along with the former Attorney General Marilyn Boyd's recommendations, which is to continue to allow it with these checks and balances.

But a week after that conversation, a coalition of feminist groups, again I said they were well-intentioned but misguided, ostensibly to protect Muslim women from religion, went and marched on the State Capitol or the provincial Capitol: "Don't roll-back all women's rights;" "Protect Muslim women." And there was a huge rally led by very, very prominent activists. They made this protest, and they wrote a bunch of op-eds, and there were international demonstrations, international protests. Because of that, the government comes in the next day on September 11th and basically says, "We're not going to allow it." This, to me, is irrationality, is fear, where their own reports and their legal department, their Attorney General's Office had made recommendations. This is the kind of irrationality

that I see when it comes to Islam and Islamic law, and that's what you are seeing now more so in the United States. Those protests were so powerful because I remember meeting with the opposition leaders.

And I'll wrap-up with this, the Premier, of course, the government is going to go along with the majority. You would think in a constitutional democracy, they would not go with the majoritarianism. But, unfortunately, they're worried about their votes and they went with the majoritarianism. But you would think that the opposition parties would be on the side of the part[y] that's disadvantaged. I remember meeting with the leaders of the opposition party, and they both told me, "Never in the history of Ontario, any legislative matter in Ontario, had they received so much international mail and correspondence to protect women from Islam." And that's why they said, "Sorry Faisal, we know it's irrational," but really at the end of the day, they couldn't even be on our side on this issue, basically which was championing the right to choose. Not saying that all Muslims had to go and do this; it was just an option available with the protections.

I would also end with just saying that I would get a copy of this if you are interested in this issue, there's a new book out, it's called *Muslim and American? Straddling Islamic Law and U.S. Justice*. It's just published. I've started to look at it; it seems interesting, so I would recommend this. And my article on this issue, which gets into a little bit of the details will be posted on SSRN, so you can go ahead and download it from there probably next week. Thank you very much for your time.

Peter Danchin: Thank you very much Professor Kutty. My comments this morning are going to focus on the Shariah in the context, of what I think, is a quite interesting decision of the European Court of Human Rights in 2003. What I want to really address is the relationship at a conceptual level between liberal constitutionalism, liberal rights of the kind we just discussed in Canada and the notion of pluralism or pluralist authority. I see my comments falling, I guess, into Professor Chibundu's third discourse that he described for us addressing the question as the limits of toleration. But unlike, I think both Professor Chibundu and Professor Kutty, what I want to actually talk about is the state. Not just the question of private contracts or arbitration as we saw in Canada. I want to take on what I think is the harder question actually of the relationship between Islam, Islamic law, and the state itself.

Let's turn to the case, this is a case that many of you may have heard: the *Refah Partisi* case in Turkey in 2003. In this case, the Grand Chamber of the European Court upheld a ban on the largest political party in Turkey, the Welfare Party, on the basis that the party violated the constitutional principles of secularism and democracy. The Court followed the reasoning of both the Turkish Constitutional Court as well as the third section of the chamber of the court in holding the following, and I need to quote the words for you exactly, "Shariah is incompatible with the fundamental principles of democracy." I just want to pause on that for one moment. This is the European Court of Human Rights, by the way:

Shariah is incompatible with the fundamental principles of democracy as set forth in the European convention because it is a stable and invariable religion in which principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place.

Now that passage is what I really want to make the basis of my remarks. Of course, the first panel, I think, is very helpful in contextualizing those comments. I believed Professor Chibundu asked whether we could say that Islam creates an invariable structure for political order. And his answer was absolutely not.

So why is it that the European Court makes such a strong pronouncement of this? The Welfare Party was found further in the judgment, to have plans to establish a regime based on Shariah within the framework of a plurality of legal systems. The idea was that there would be different types of legal systems for citizens of different religions and certain statements of the party's leaders, so the Court was said not to rule on the use of force to achieve these aims. Even in the absence of such threats, however, the Court found that Shariah and the very notion of plural, religiously-based legal systems where, even if democratically adopted, and this of course was the party that came to power through democratic elections inherently incompatible with the European convention and its concomitant notions of democracy and the rule of law. The Court held that a regime of plural religious orders ran contrary to the guarantees of equality and the rule of law itself. I heard something of that in what we just heard about Canada, certainly notions of gender equality are what often animate these discussions. This was because it was said it was such a system [that] would undeniabl[y] infringe the principle of non-discrimination between individuals as regards the enjoyment of their freedoms. Now in taking this line, scholars have noted that the Court adopted the concept of what has been called "militant democracy": the notion that a

democracy might find it necessary to sacrifice democratic rights and freedoms in order to sustain itself. Interestingly, however, a number of judges on the Court disagreed strongly with these findings. At least three of the judges in the chamber disagreed on basic findings of fact. They saw little on the factual record to support the idea that the Welfare Party was seeking to either undermine secular society or take [an]other type of political action contrary to both the legal and democratic order of Turkey. Indeed, the Welfare Party had just won a democratic election. In the Grand Chamber, Judge Kovlar entered a separate concurring opinion where he rejected a number of the majority's findings regarding both Islamic law and legal pluralism. He stated that he was "bothered by the language used by the majority. In places they use unmodulated terms, especially as regarded to sensitive issues raised by religion and its values. I would prefer an international court," he said, "to avoid such terms borrowed from political, ideological discourse, such as Islamic fundamentalism, totalitarianism movements, threats to the democratic regime whose connotations," he said, "might be too forceful in this context."

Now, there was one passage from Judge Kovlar that I wanted to read to you because I believe it is quite a remarkable statement by a judge on the Court. He said that he

regretted that the majority had missed an opportunity to analyze, in more detail, the concept of a plurality of legal systems, which is linked to that of legal pluralism, which is well established in both ancient and modern legal theory and practice. Not only legal anthropology but also modern constitutional law accepts that under certain conditions members of minorities of all kinds may have more than one type of status. Admittedly, this pluralism, which impinges mainly on an individual's private and family life, is limited by the requirements of the general interests or public order. But it is, of course, more difficult in practice to find a compromise between the interests of the communities concerned and civil society more broadly, than to reject the very idea of a compromise from the outset.

Those were the words that I want to focus on to reject the very idea of a compromise from the outset.

"Shariah," said Judge Kovlar, "constitutes the legal expression of a religion whose traditions go back more than a thousand years and which has its fixed points of references and accesses like any other complex system" (the idea of trial and error that I think Imam Webb was talking about on the first panel). This, then, is somewhat of a puzzle, as some scholars have noted, the depiction of Shariah that the Grand Chamber adopts in *Refah Partisi* is the very depiction of

Islamic law as fundamentalist or totalitarian that is attributed to extremist movements. It's very hard to square the Court's understanding of Shariah with what we heard earlier about a normative system, the primary to axioms of which are to bring benefit and to prevent harm to persons.

What's going on in all of this? This has really been the subject of my work for the last decade or so. What I think is really interesting as a legal matter in the European Court is that the Court relies on the non-discrimination principle, *a priori*, to rule out notions such as legal pluralism as threats to individual freedom. In doing so, and I think it's important for us to see this, the Court obscures the degree to which these types of claims are competing claims not to some different system but to freedom, autonomy, and self-determination, as I think Professor Kutty just made the point before. The claim is a claim to liberty that is being advanced in these types of cases; it's just a different conception of what freedom means, in this case, freedom of religion.

At a second level, I think the Court's analysis misconstrues the true nature of what's going on at a political level in Turkey, which quite apart from the question of liberal rights and freedoms, really centers on the place of Islam as a source of political legitimacy as between different elite groups in the context of Kamalism as a state-building project in that country. Secular elites in Turkey have traditionally sought to use and control Islam in utilitarian terms in the context of Kamalism as a state-building project. Secular elites, I'll just give two examples of this. Article Twenty-Four of the Turkish Constitution of 1982 provides that teaching and education in religion and morals are conducted under the guidance of the state. The Ministry of Religious Affairs founded in 1924 has the authority to instruct citizens on correct Islamic practices in the face of divergent interpretations. In this respect, Turkish secularism does not entail a mutually exclusive sphere separate from Islam. The founding elite made religions subject to the republican state. And I think this was Professor Chibundu's point earlier when he discussed the history of Christianity. They made it subject to the republican state in order both to build a uniform nation state on the Western model and to eliminate religion as a rival, autonomous source of legitimacy. What we start to see in the 1980s, however, is that the monopoly of this Kamalist state elite on both capital and political power is being challenged democratically by a rising Islamist elite, which makes a counterclaim on the very religious fear which the republicans have tried to control and monopolize as a source of political legitimacy. If I am right about

these two points, we need to look a bit more skeptically at what the European Court is doing in these types of cases. They are, in effect, taking the notion of religious freedom, which has always been seen as a protection against the abusive state authority and interpreting it as an exercise, which threatens substantive conceptions of democracy within a constitutional order. In other words, there's a very particular question here about the relationship between religion and state power and how religious freedom is being reframed as a threat to the state itself, which I think is quite interesting.

The critical question about cases like this is the extent to which freedom of religion and belief as it is enshrined in modern constitutions, of course, famously in the First Amendment of the United States Constitution, is premised on, what I would call, a liberal conception of the right, which excludes from its scope, a priori, without the need for compromise; these will collective ideas, collective good, and collective identity.

What I've argued in my work is that this type of reasoning is what we might call "liberal anti-pluralism." If we look around the world today, both normatively and factually, the reasoning that the majority adopts in *Refah* is simpl[y] erroneous. Indeed, many secular constitutions, many secular democratic constitutions around the world today recognize the collective claims of right of religious, ethnic and linguistic communities to use the language of the Article Twenty Seven of the UN Covenant on Civil and Political Rights. Consider just two. Consider, for example, India, one of the most vibrant, modern democracies in the world today. Their religious freedom consists [of] the state giving various religious groups juridical autonomy, not simple a space in the private sphere for private arbitration, but actually juridical autonomy in the form of autonomy regimes, which allow for the adjudication of family affairs (divorce, marriage, succession, and so on) according to personal status laws. Accordingly, Hindus, Muslims, Sikhs, Christians, Buddhists, Jains and Parses all are legally recognized as both addresses and bearers of claims of right in India. These claims extend not only to individual notions of conscience but also to the collective aspects of religious freedom and to the protection of separate, both majority and minority, religious and cultural identities.

You might say India is a long way from a Western, liberal democracy. Let's consider South Africa, one of the newest democracies with a very proud liberal constitution. If we look at the 1996 South African Constitution, you'll find a full array of norms, constitutional norms on self-determination, minority rights, freedom of

religion, and substantive equality. And I want to draw your attention to one provision in particular. The freedom of religion provision in the South African Constitution, Section Fifteen explicitly provides that the Constitution “does not prevent legislation recognizing marriages concluded under any tradition, or a system of religious, . . . [or] personal. . . law; or,” and this is what I wanted to focus on, “systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.”

Now quite unlike the situation in Canada, which has gone in the opposite direction, in the last ten years in South Africa, for the first time in that country’s history emerging from decades, half a century, of apartheid and repression of claims to freedom, we see extensive law reform efforts underway now, democratic efforts to redress past discrimination by addressing the claims of different religious communities. In fact, we now have a bill before the South African Parliament, which would officially recognize Muslim marriages under South African law and it sets-up quite a complex set of mechanisms and procedures by which those claims can be adjudicated within the context of the law itself. And this is the point I wanted to make. I’m not talking about private arbitration, I’m talking about state recognition of these types of collective claim[s].

It’s quite striking to me, as a scholar of these issues, how the assumptions and norms that undergird the South African discussion differ markedly from the logic of the majority in the *Refah* case, which as Judge Kovlar observed, rejects the very idea of such a compromise. By compromise, I think what he means is dialogue. Right? What we’re doing today, the idea that these questions need to be negotiated, politically contested and different communities need to reach their own accommodations. The idea in much human rights discourse and, if I can be somewhat provocative, I think the problem in these discussions is not Shariah but actually our notion of human rights. There is an assumption by many human rights advocates that these questions can be decided without discussion. That, in a sense, the right to religious freedom itself provides the answer, and it simpl[y] does not include this type of situated and embedded type of collective claims. In this respect, the tide seems to be with those advocating a broader recognition of the right. Even within European states today, we’re starting to see some interesting experiments in these regards. And, of course, as Professor Chibundu mentioned, the Archbishop of Canterbury in 2008 gave his much celebrated lecture where he said that civil and religious law in England had the space to accommodate these types of claims.

I'm out of time, so let me just conclude. Let me conclude with just one last point. And I'll have to make it fairly quickly I'm afraid. What often is obscured in these discussions when we turn to secular conceptions of law like the First Amendment, the free exercise and non-establishment clauses, is how a very particular history and culture often undergirds our interpretation of those ideas. Indeed, the Christian ethos in the United States and in much of Western Europe is such a natural background social condition that it's almost invisible today. Religion is a matter of private conscience; politic[s] and government are matters of reason. The best guarantee of freedom of conscience is for the state to remain neutral on questions of religion and neutrality is assumed against a soon-to-be invisible baseline that rests on a very particular conception of religion and religious subjectivity. Indeed, this has been so natural in the United States, that in American public life, Kathleen Sullivan observed that before 1992, not a single religious exemption claim ever reached the Supreme Court from a mainstream Christian religious practitioner. As she proceeds to suggest, mainstream Christianity does not need judicial help; the legislature is likely ready to be obliging. The steep historical and normative connections in the liberal imagination between Christianity and rights such as religious freedom, are, I think, important for American Muslims to understand in the types of rights claims that they are going to be making. In this imagination, there is conscience on the one hand, which is freely chosen, private, and disestablished. And on the other hand, there is religion, which is unchosen, adopted by custom or tradition, public and sensitive. It's this very problematic distinction between conscience and religion, I believe, which undergirds much of the legal discussion about these issues and helps to explain some of the controversy we see in cases like the Canadian case.

In this respect, these types of liberal principles, the non-discrimination principle are not neutral mechanisms for the negotiation for religious difference and remain partial to the very specific normative conceptions of religion, subject language and injury. To conclude, I think it's important to realize that this is not simply an expression of cultural prejudice on the behalf of Canadians or Americans or the English or, indeed, a result of secular malfeasance. But rather it's constitutive of the very jurisprudential tradition in which these rights are located and have been interpreted. There are necessary effect[s], I believe, that follow from the layers of epistemological religious and linguistic commitments that have been built-in to the very matrix of the liberal rights tradition. And if we start to understand the very particularity and contingency of that tradition, I think we can

start to make some headway in how we might proceed in negotiating the types of claims that American Muslims and other Muslims are making to freedom to practice their religion. Thank you.

So do we have any time for questions?

Audience member: Thank you for speaking with us today. I had a question regarding the recent Oklahoma law. I understand that the Council on American Islamic Relations there is planning on challenging it in a lawsuit based on [...] filed yesterday. So if, assumingly when this gets overturned, what is the wisdom behind overturning this at this time? Because I can imagine there be considerable public outrage if big, bad federal government is messing with Oklahoma. Could either of you comment on that?

Faisal Kutty: I'll make a brief comment based on the experience in Ontario. I think it has to be a very well thought-out strategy whether or not and how you want to go about challenging it. The particular provision from what I remember reading, it had to do with preventing not only Shariah Islamic law but also international law. From a strategic point of view, from a community perspective, especially the fall-out of the Ground Zero mosque and all these, the way that people react to Muslims and Islam. I think as a community, now I'm talking not as a lawyer but as a community activist, we need to really strategize whether we really want to push the Shariah angle on this because the moment you mention the word "Shariah," everybody is against you. You have to go and convince and educate them about the nuances; this is not what we really mean, this is what we mean about it, these are the positive aspects of it.

Yes, from a constitutional perspective, we may want to challenge this thing just like Imam Webb said about how the whole mosque issue. From a constitutional perspective, yes we can take a particular position. But I think we have to be very careful and perhaps strategically it may be better to challenge it from the perspective of international law, international human rights law, comedy of nations.

It's generally understood from a public policy perspective in the law, courts generally are expected to respect decisions that come out of other jurisdictions. And by focusing on Islamic law, I think we're taking on a battle that we may not win. Yes, when the whole arbitration controversy came out, I had all the belief that the system itself, the bureaucracy, and the people who are going to look at this are going to come out on our side. But at the end of the day, they're human beings, and they get influenced by the public reaction, and the

public outcry to something like this; I don't think the community is in the position to deal with this. I'm sure CAIR has considered some of these things. I'm talking as a former legal counsel to CAIR in Canada on this issue. I think it's something that you really need to evaluate whether or not this is a battle and how to proceed with this battle.