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REPORT



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SHARI'A LAW: COMING TO A COURTHOUSE NEAR YOU?

What Shari'a Really Means to American Muslims

by Dr. Julie Macfarlane, ISPU Fellow



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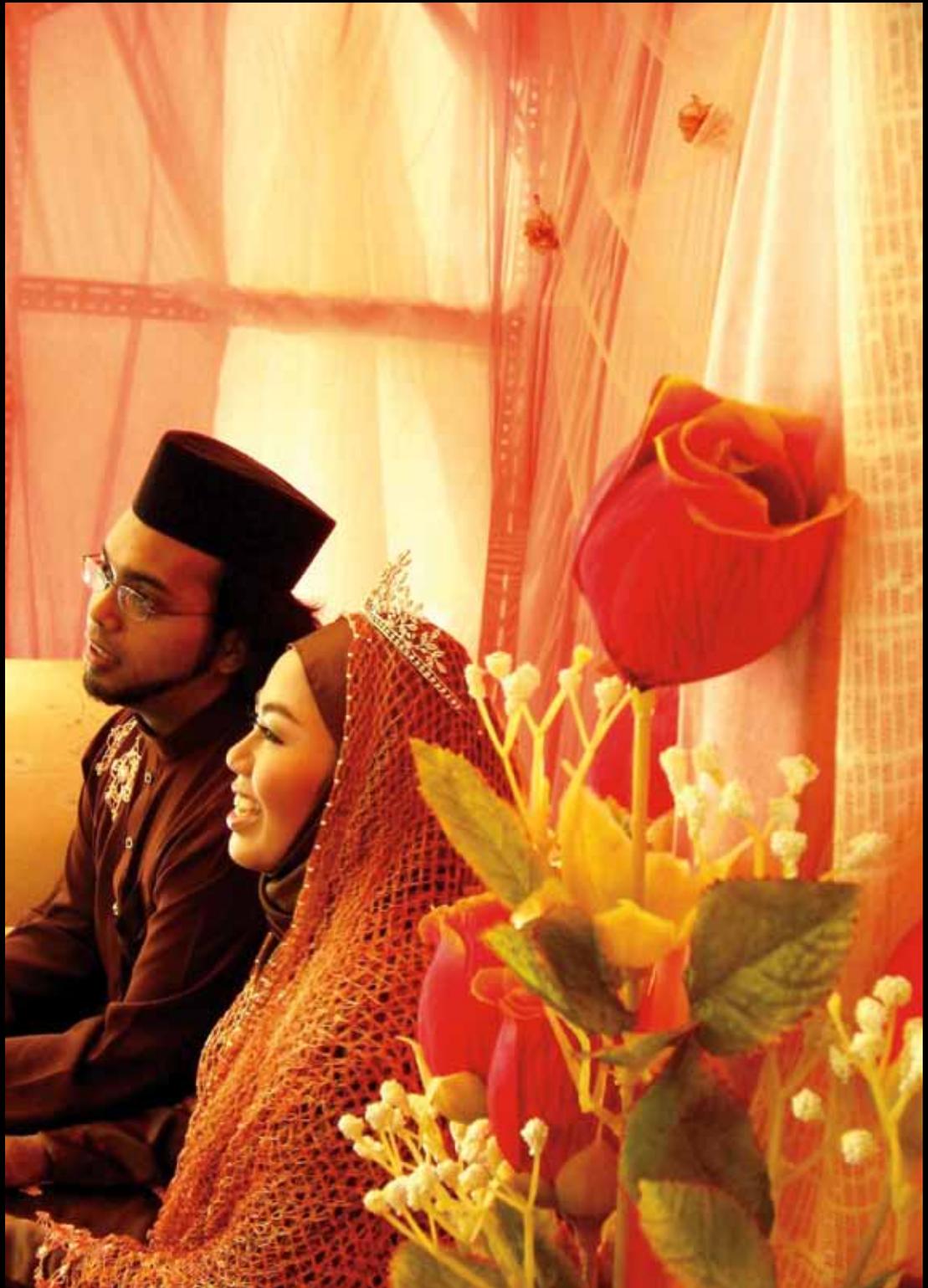
Dr. Macfarlane is an active mediator and consults regularly on conflict resolution design and training. This is her first study of Islamic dispute resolution processes.

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Executive Summary

This is the first empirical study to ask North American Muslims what *shari'a* means to them in their everyday lives. The study demonstrates that the present “moral panic” over *shari'a* and its alleged impact on American legal and social culture is wildly overblown. For most American Muslims *shari'a* represents a private system of morality and identity, primarily focused on marriage and divorce rituals. None of the American Muslims interviewed for this study expected American courts to enforce *shari'a*. Just like other Americans, they will access the courts for adjudication according to American family law if they cannot make a private agreement (relating to divorce) that meets their needs and values.

American courts are sometimes asked to adjudicate disputes that have been originally adjudicated in a Muslim country overseas, and/or refer to Islamic law or *shari'a* derived principles. American courts will not recognize either the order of a Muslim court in another country or a private agreement referring to Islamic law or *shari'a* principles if this violates public policy principles of fairness and due process, does not meet the standard for a legally enforceable agreement (e.g. clarity, consensuality), or involves the court in the interpretation of religious dogma. As a result American courts approve very few cases involving Islamic law (usually marriage contracts, divorce settlements, and occasionally private commercial contracts).

This *status quo* is widely accepted by American Muslims who, in common with other religious groups, regard their faith-based practices as a private matter and the courts as a place for adjudication according to the principles of American law. The vast majority of respondents in this study saw no incompatibility between their Islamic obligations and their recourse to the civil courts.

The public discourse, however, contains great confusion about the relationship among the courts, the state, and *shari'a*, a reality that is being exploited for political purposes and expressed in increasing anti-Muslim hostility. Inaccurate and sometimes hateful claims about the way American Muslims understand their religious obligations and cultural norms mask the complex relationship between private religious and cultural choices and universal state protections.

This report considers two potential strategies for ameliorating some of these concerns and enhancing the *status quo*. Many respondents felt that the courts presently operate with little or no knowledge of Islam or Islamic law and without regard or respect for their beliefs. Without

For most American Muslims shari'a represents a private system of morality and identity, primarily focused on marriage and divorce rituals.

making structural changes, this problem could be addressed by enhanced education for both judges and Muslim religious leaders that deepens their understanding of each system and promotes co-operation between the facilitators of Islamic processes and the courts. There are already signs of mutual influence between the two systems, with many imams incorporating civil law principles into their advice on marriage and divorce agreements, and the courts increasingly asked to consider the lived-experiences of Islamic marriage and divorce as part of the context of a marital dispute. A stronger base of knowledge among judges of Islamic family law traditions would enable the development of jurisprudence that understands and respects these processes.

A second strategy suggested by this research is the promotion – by Muslim leaders and organizations - of Islamic family services that focus on the community’s needs and reflect the values and expertise of its own professionals. A family services marketplace could offer family services both inside and outside the mosques, deploying the skills of a range of professionals, reducing pressure on the imams, and providing broader and more inclusive programs and services. Another far more radical approach often debated in the media is the establishment of a parallel independent Islamic tribunal with jurisdiction over family law. Although widely discussed in scholarly literature and media reporting, this study found virtually no support for such an approach among American Muslims. Assessing and choosing an appropriate policy approach is critical for navigating not only issues related to American Muslims, but all religious groups.

“Shari’a Law Is Coming”: Public Fear and Political Capital

Such claims are commonplace on the Internet, among politicians, and even on highway billboards. Signs of preoccupation with the “threat of Islam” are so omnipresent that we barely register them. It is perhaps inevitable that the terror of 9/11 excited our fear of an unknown “Other.” However during the last ten years, public figures and popular culture have increasingly conflated that terror with ordinary Muslims and their way of life.

Stereotypes of Muslims as violent and opposed to peaceful democracy are increasingly entrenched in American public culture. New conflicts emerge almost every week: the location of a Muslim community center in Manhattan,¹ efforts to amend state law to proscribe the application of *shari’a* by state courts,² Qur’an burning stunts,³ and general hostility toward women wearing the *hijab* (a headscarf) or *burkah* (a full-length gown and head covering). Central to this public fear is the term “*shari’a*,” (literally “The Way”, or guidelines for appropriate Muslim

conduct) which raises deep fears among non-Muslims in the West due to its association with the violent extremist movement that has “stolen” the public understanding of Islam.⁴

A recent Center for American Progress report described a systematic campaign by particular organizations and politicians to convince Americans to be afraid of the Muslims who live and work alongside them.⁵ This scapegoating builds on the fear that *shari’a* threatens the country’s social fabric and that American Muslims wish to impose their code of behavior on non-Muslims. The actual content of *shari’a* in this discourse remains vague, but constantly hints at brutal criminal penalties, intolerance of contemporary life, and misogyny. Some politicians and religious leaders are promoting this factually incorrect and highly divisive message for political capital.

The study described in this Report set out to explore the real meaning of *shari’a* to ordinary American Muslims by talking to them about how they understood the role of *shari’a* in their everyday lives. It was conceived following the 2003–05 Ontario, Canada “*shari’a* debate,” which arose out of a highly publicized appeal by the Islamic Institute for Civil Justice⁶ for a formal Islamic tribunal in Ontario to arbitrate family matters. This event sparked widespread public alarm and divisions within the Muslim community. As one journalist commented, the public appeared to believe that “Muslim barbarians [were] knocking on the gates of Ontario.”⁷

The study shows clearly that other than religious observance, the practice of *shari’a* for the vast majority of American Muslims is focused on family matters, primarily marriage and divorce. For many respondents, following what they understand as the Islamic rules on marriage and divorce represent the most significant aspect of their Muslim obligations aside from formal religious observances such as prayer, fasting, and the celebration of religious festivals. Respondents in this study understood their personal choices of Muslim marriage and divorce processes as separate from the formal legal system, regarding them a private matter relating to religious duty or (equally common) an affirmation of cultural identity. The accounts of hundreds of Muslims and their understanding of the principles of Islamic marriage and divorce demonstrate the mundane normality of their family life, its many similarities to non-Muslim family life, and the groundlessness of the hysteria over “the coming of *shari’a* law.”

None of the 212 respondents—including many imams, legal scholars, Muslim lawyers and others working in the legal system—suggested that the courts should directly apply Islamic law to Muslims (or non-Muslims). Just three imams (of 41) proposed the creation of a parallel Islamic family tribunal, with the vast majority rejecting this idea in favor of recourse to the

civil courts. Many Muslims see the civil courts as “man’s law,” in contrast with *shari’a* which is “God’s law,” but are equally clear that they are required to obey the law of the land – this was emphasized over and over again, and see no incompatibility.⁸ Moreover, the study data shows clearly that a preference for *shari’a* based approaches to divorce does not prevent Muslims from using the courts to obtain a formal legal divorce (as each divorcee dissolving a legal marriage did) or from using dispute resolution in cases of conflict.

Study Methodology and Sample

The study used a qualitative, interview-based approach to document how North American Muslim communities understand and enact their Islamic values and duties in their management of marital conflict and divorce. Between 2006-10, 212 imams, social workers, therapists, lawyers, and divorced men and women were interviewed about their experiences of marriage and divorce from both a personal and a professional perspective. Information was also collected on how they understood the influence of *shari’a* on their beliefs and lifestyle choices, the relationship between *shari’a* and the formal legal system, their recourse to the legal system in the event of marital conflict and divorce, and their use of private conflict resolution drawing on *shari’a* principles. Further data was acquired during larger group conversations held in mosques and Islamic community centers. The resulting data provide a window into the evolution of a western *shari’a* dominated by questions of family life and relationships, as American Muslims adjust not only to life here, but also to systemic changes in societal norms.

Interviews were conducted face-to-face in Dearborn (MI); Orange County and Los Angeles (CA); Omaha (NB); and Toronto, Windsor, London, and Ottawa (ON, Canada); and by telephone with individuals in American and Canadian cities. Approximately 75% of the data was collected from respondents in the United States, and 25% from Canada. No pervasive differences were noted between the two jurisdictions, and the analysis presented here does not distinguish between the United States and Canada.

Three slightly different semi-structured interview formats were used for the three respondent groups (imams, divorced men and women, and community specialists such as social workers and lawyers). Interviews lasted between 45 and 90 minutes and were noted contemporaneously, producing approximately 170,000 words (or 680 pages) of data. This data was analyzed using thematic analysis software⁹ as well as the development of respondent summaries and typologies. In addition, case law was analyzed to establish the extent to which courts in the United States and Canada refer to Islamic law and chart the developing relevant jurisprudence. This information was supplemented by interviews with litigants and their lawyers.

Shari'a and American Muslim Family Life

This study reveals that the concept of *shari'a* is meaningful to Muslims of all levels of observance. Muslims believe that it explains how to live as “good” Muslims and sets standards for justice, fairness, and moral behavior. There is no consensus on the substance of one’s *shari'a* obligations; this remains the subject of endless debate among the global Muslim community’s scholars, jurists, and religious leaders. Many imams and scholars noted that the diverse practices understood as *shari'a* reflect the Muslim diaspora. Unlike media portrayals, which frequently characterize *shari'a* as rigid and inflexible, it has been continuously adapted to life in non-Muslim countries since the seventh century. Respondents repeatedly described their adherence to *shari'a* as a private experience that reflects their conscience. Interpretations of expectations and efforts to satisfy them operate at a deeply personal level regardless of their own level of religiosity. In this way *shari'a* represents both Islam’s unity (“Without *shari'a*, Muslims would not be Muslims”) and extraordinary diversity (“There is a *shari'a* for every ... Muslim”).

Nevertheless, there are some clear core principles. For example, 95% of respondents believed that it was very important to sign both a *nikah* (an Islamic marriage contract) and obtain a civil marriage license. In addition, many wished to obtain religious permission as well as a civil decree for divorce. But the manner in which they understood and how they discharged these obligations varied widely depending upon their level of religiosity, ethnic and cultural group, and where they were born and raised.

A key finding of this study is that American Muslims turn to *shari'a* to mark life’s most important passages: birth, marriage, divorce, and death. When faced with critical transitions, it is commonplace for individuals to feel that they must “get it right” by resorting to traditional practices that they and their families believe ensure that they have met their religious and moral obligations, both outwardly and inwardly. Historically, many immigrants maintain both their ethnic and socio-cultural connections via their religious and cultural traditions, and their communities take pride in continuing these traditions which represent their history and roots. American Muslims are by no means the only religious and cultural community for whom such traditions remain important. Other examples include the tea ceremony in a Chinese marriage ritual, the Jewish divorce agreement or *get*, or simply the very large, multi-day celebrations of marriage which are customary in some cultures. This study shows that among American

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Muslims Islamic marriage and divorce processes have remained constant and vibrant through several generations, and across a wide spectrum of ethnic and class variables.

How Islamic Family Law Developed out of Shari'a

One aspect of the present moral panic is the nature of the relationship between *shari'a* and Islamic law, terms which are often conflated but have different meanings.

Muslim jurists (*ulama*) formulated Islamic law in an attempt to practicalize the principles of the Qur'an and the Sunna (accounts of the life of the Prophet) in daily life. *Fiqh* (literally, "understanding") or laws is a sub-set of *shari'a*. The *ulama*, who developed *fiqh*, focused on social and family obligations, for not all of the *shari'a* was meant to become law. Many aspects of *shari'a* relate to one's personal relationship with God. Where the duty is owed to God (e.g., fasting at Ramadan), atoning for any breach takes place between the individual and God. When *shari'a* creates a social obligation to others, such as a father's obligation to financially maintain his family, it may be enforced by law.

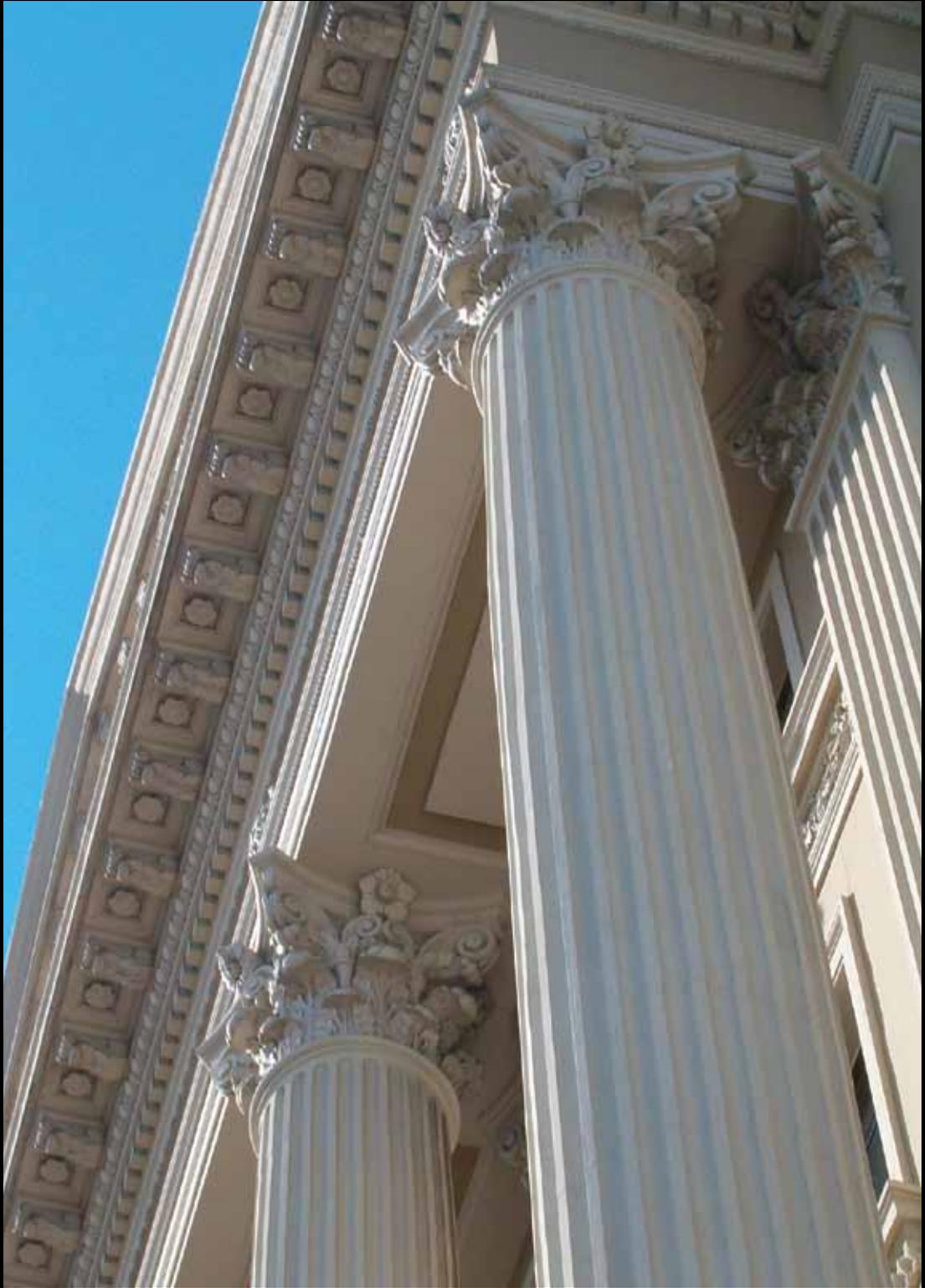
As in any other country, the development of these laws reflects the existing internal sociopolitical forces, including the aspirations of the most powerful actors. Iran and Saudi Arabia, constantly cited by the press as examples of "*shari'a* law" countries, are theocracies characterized by authoritarianism and entrenched interests. Numerous aspects of Islamic law as it is practiced in these two countries are incompatible with modern legal systems, especially the brutal penal sanctions and extreme restrictions on women. In addition, areas of northern Nigeria, Somalia, Afghanistan, and Pakistan that are outside central government control have promulgated similar laws. Media attention to these examples means that these extreme and oppressive laws have come to represent what most non-Muslims assume to be the norm when they hear "*shari'a* law." Most Muslims regard these governments as aberrations, distortions of what they understand to be *shari'a*, just as most Christian Americans would regard fundamentalist (LDS) Mormon polygamists as a marginal group who do not represent mainstream, monogamous Christianity. Muslims in North America are placed in the difficult position of having to defend their faith and values in the face of widespread Islamophobia and public ignorance, while simultaneously distancing themselves from those extremists whom many non-Muslims believe represent the "real" face of Islam.

In most parts of the Muslim world, modern Islamic law primarily focuses on family matters—marriage, divorce, and inheritance. In the nineteenth century, most Islamic lands adopted a version of a common or civil law code for commercial and property laws, but retained the corpus of Islamic family law. As a result, marriage and divorce proceedings continue to be regulated by modified versions of classical Islamic law with some late twentieth- and twenty-first-century reforms designed to enhance the rights of women.¹⁰ It is this framework of laws and their attendant traditions, among them the signing of a *nikah* contract and the seeking of religious approval for divorce, that remain important to many American Muslims. They are concerned with applying Islamic law only in relation to family matters and, occasionally, making financial decisions.¹¹

Do American Muslims Want Shari'a Enforced in America?

Misconceptions over the real meaning and effect of *shari'a* on the everyday lives of American Muslims are compounded by the often-repeated claim that Muslims want to impose and enforce “*shari'a* law” in America via the courts. None of this study’s 212 participants agreed with this claim. Respondents consistently distinguished between God’s law (a matter of personal conscience rather than public adjudication) and the law of the land or “human law.” While many described the importance of being able to appeal to the formal legal system when necessary (particularly to enforce private agreements), respondents wanted continued access to their Islamic traditions in an informal family setting. All understood their private family law-related choices as separate from the formal legal system. Even among imams, who sometimes complain that their advice can be easily disregarded since it cannot be enforced in courts, there is almost no support for a parallel Islamic tribunal system. The community appears content with a private informal system that offers spiritual, emotional, and social comfort for some of its members.

Respondents also rejected the assumption that any Muslim support for *shari'a*-compliant behaviors represents an aggressive antagonism toward local laws and norms. Rather, they spoke about their strong attachment to their right to access formal legal institutions and their belief that identifying as Muslim does not diminish their identification as American citizens. In addition, almost all of them had obtained a civil marriage license when they signed their *nikah*, as well as a civil decree at or around the time of their quest for a religious divorce. These findings challenge the assertion that such practices somehow make them “disloyal” citizens.¹²



How American Courts Relate to Islamic Law

The impetus behind more than two dozen state bills to prohibit their courts from applying “shari’a law”¹³ is the belief that American courts are applying Islamic law. This is both inaccurate and misleading. Consideration of other legal systems, including but not limited to Islamic law, occurs in just two, somewhat exceptional, circumstances; where the parties have specified this as the law to govern their private contract, or where the court is asked to review an order made by a Muslim court overseas. The analysis in the next section shows that far from applying “shari’a law,” the courts may in fact be imposing a higher threshold in these cases compared to their consideration of any other system of laws or principles.

The most common areas of *fiqh* or Islamic law raised in American courts in domestic lawsuits relate to divorce (e.g., securing the promised *mahr* [bride gift]) and domestic commercial transactions (e.g., when a private contract specifies the use of *shari’a* principles to resolve disputes or *shari’a*-compliant financing¹⁴). If the court is to enforce such an agreement, it must consider *fiqh* in order to clarify the context and intention, just as it would for any other contract. A claim for enforcing such contracts is subject to the usual legal requirements: voluntarism, fairness, and no breach of any public policy or constitutional principles (e.g., equality provisions).

Another reason for American courts to refer to the laws of other legal systems is to determine the validity of an order that is made in another jurisdiction. In addition, choice of law provisions allow contracting parties (usually commercial entities) to choose a legal framework for the resolution of trans-state and trans-national disputes over contract and tort. The principle of “comity” or legal reciprocity¹⁵ enables interaction with other legal systems where an individual may have previously resided. For example, an American couple who divorce in Canada and obtain an order there for financial support and custody would not expect to be treated as if they were still married by an American court, or to have that order reopened without good reason (for example, a significant change of circumstances). The basic premise of comity is that a procedure that follows the rules of one jurisdiction will be recognized as legally valid in a second jurisdiction.

In order to even consider *shari’a* as context, the court must be satisfied that the principles are easily comprehensible to the court and do not require expert knowledge of religious doctrine. The First Amendment bars courts from interpreting and ruling on any question of religious

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doctrine, in order to ensure the separation of church and state. If any such determination is necessary, the First Amendment prohibits the courts from considering *fiqh* at all.

Are American Courts Enforcing Shari'a?

This confluence of factors presents an extremely high bar to accepting *fiqh*-based arguments in American courts. As a result, most claims for the payment of *mahr* are dismissed on the grounds that the agreement was not sufficiently consensual or clear, that the judge cannot enforce the promise without a more complete understanding of Islamic law, or that the contract is void for public policy reasons because it is of a “religious nature.”

Nonetheless, a well-organized campaign is promulgating the view that American courts are enforcing *shari'a*. One source for this claim is a report by the Center for Security Policy (CSP) which cites fifty reported trial and appellate level state decisions in which, it asserts, *shari'a* was “relevant or highly relevant.”¹⁶ This sample is then reduced to twenty “highly relevant” cases considered to be most indicative of the application of *shari'a* by American judges.

A closer examination of these twenty cases, however, reveals that in most of them the American court rejected an interpretation or ruling that accepts Islamic law. Nine of the twenty cases involved consideration of an order made by an overseas court, which the principle of “comity” (above) generally presumes that an American court will accept. Analysis of these and other cases in which comity is argued reveals that American courts are particularly nervous about accepting orders made in Muslim jurisdictions. Of the nine cases highlighted here, the American court accepted the orders previously made in only three (two involving child custody and one a divorce settlement), having satisfied themselves that the overseas courts had ruled in a manner acceptable to American courts, such as considering the “best interests” of the children. In the other six cases, the American judges either overrode the order—rejecting an order made by a Muslim court and substituting American law – or remanded the case for further consideration by a US court because of concerns about the incompatibility of the decision-making process with American values.

Eight cases involved contracts or agreements that either implicitly or explicitly referred to Islamic law (most commonly a *nikah* and various business agreements). The court was asked to rule on the legality of these agreements in the usual way, that is, by assessing the clarity, intentionality and meaning of the contract to the parties – and adopting the general principle of “laissez faire” (maximizing freedom of contract) which allows adults to agree to whatever they choose unless the agreement offends against public policy (e.g., an agreement to break the law or a grossly unfair bargain). Analysis reveals that the American courts take a particularly exacting approach to contracts that refer to Islamic law principles. In four of these eight cases, sufficient clarity and intention was found and the contracts were upheld. In the other four cases, (three marriage contracts and a contract of employment between an American mosque and an imam) the courts refused to recognize and enforce the contract.

In two further cases, both involving female plaintiffs (a personal injury claim and an inheritance dispute), an American court pre-empted the overseas court’s jurisdiction and made their own order, acting on concerns that the plaintiffs would not be fairly treated.

The twentieth case, a criminal law case decided by a New Jersey criminal court in 2010, understandably attracted a great deal of media attention when the trial court judge refused to issue a restraining order for a violent husband on the grounds that he believed he had the right to non-consensual sex with his wife. Attracting far less attention, this order was reversed on appeal and a restraining order issued.

In summary, an analysis of the 20 cases considered most significant in evidencing the danger of American courts enforcing *shari’a* reveals that in most of them, no Islamic element of an earlier order or contract was recognized or enforced. American courts apply the same principles in these cases as they do to any other legal code of relevance in relation to either an overseas order or a domestic contract. If anything, the courts appear to apply a stricter standard to these cases (probably because of their insufficient knowledge of Islamic law and political sensitivity), than they do to other legal systems and norms.

The paucity of evidence in these “top 20” cases for the claim that US courts are enforcing *shari’a* is consistent with the experiences of respondents in this study. Of the nine women who

sought payment of their *mahr* in court, only one was successful (this pattern is borne out by a more extensive analysis of recent cases). This jurisprudence creates personal hardship for women who cannot persuade their husbands to pay them the *mahr* they have promised in the event of divorce, and usually results in a court action for spousal support.

A number of other women respondents described hardships that result from inconsistent decision-making regarding comity.¹⁷ In these cases women who brought petitions for divorce in the United States (having been abandoned by their husbands for second wives overseas) found their applications for support and a fair property division blocked by the claim of their husbands that they had already “divorced” them in a Muslim country. In some of these cases, the American court eventually agreed that the Muslim divorce was a ruse to escape financial obligations and substituted its own orders for support; however, it is extremely difficult for Muslim women to find lawyers qualified to take these cases, and many of them languish in a state of limbo and without financial support.

How American Muslims Use the Courts

This study shows that American Muslims expect to be able to use the courts to resolve disputes over marriage and divorce according to American family law principles. Further, where the court refuses to enforce an Islamic agreement such as the *mahr*, litigants will ask for an alternative civil law remedy (in the case of *mahr*, an order for spousal support.)

The more than one hundred divorces in the study sample reached outcomes that are fairly consistent with non-Muslim divorces and followed similar patterns of deal-making. Shorter marriages without children tend to produce “clean breaks,” in which there are few if any ongoing obligations. Longer marriages give rise to larger claims for support and property distribution, despite the structural differences in how these issues are determined in Islamic and civil law. The privatization of family law has moved bargaining and resolution out of the courts and into the hands of individuals and sometimes their legal and spiritual advisors. This means that in many cases both Muslim and non-Muslim couples negotiate financial and legal outcomes in the form of a “kitchen table divorce” which is based on their own sense of fairness and expediency and yet remains “in the shadow of the law.”¹⁸ Such settlements allow Muslim

couples to incorporate what they consider to be important elements of Islamic practice, for example arrangements for childrearing, an agreement to pay the *mahr* and/or an agreement to limit spousal support to the period of the *iddat* (waiting period). Most agreements thus reflect both Islamic and civil law principles.

Some imams have developed an expertise in helping couples draft agreements that are then submitted to the court as consent orders. There is widespread recognition of the importance of legal enforceability – secured by the court approving such an agreement – beyond a voluntary agreement made with an imam or among family members.

Like other Americans, Muslims will use the courts if they cannot reach a satisfactory agreement, accepting American family law principles to resolve their disputes. Respondents see this access as their right as Americans and fully compatible with the principles of justice espoused by their faith. Just as with non-Muslim divorces, recourse to the court is far more common in longer marriages, due to the greater likelihood of children and shared property. When Muslim women who were seeking divorce felt that they could not reach a reasonable settlement with their husband and/or an imam, they turned to the courts for assistance. Notably, all but one of the marriages in this study that lasted more than fifteen years was eventually resolved in court.

While many American Muslims use the courts, they are not uncritical. Many criticize what they see as the adversarial and unsympathetic nature of court processes, as well as the tendency of the legal system to escalate conflict, and encourage greed. Many of these comments and experiences are shared by non-Muslims. Other complaints centered on a lack of respect for Muslims and Islam; a feeling that the courts are unfriendly places which do not understand Islam; and a sense among some respondents that justice system officers do not take their choices as Muslims – and the reasons for those choices – seriously, or consider them worthy of understanding.

A small group of very religious women felt strongly that they should not claim anything in court beyond their Islamic entitlement, thereby avoiding any potential “double dipping.” These women reported that their legal advisors often expressed frustration with them, suggesting “we know what is best for you.” A few women expressed concerns about receiving a court

order to pay spousal support to their husbands, as this is not provided for in Islamic law and may cause social embarrassment; however most imams, when asked, were clear that there was no problem with a woman paying support if the ruling was deemed fair, and the Muslims (both as Muslims and as Americans) were obliged to obey a court order. The vast majority of respondents saw no conflict between their beliefs and any court order. Similarly, the overwhelming majority of respondents who were unable to secure what they felt to be a fair outcome through negotiation – with their spouse and/or an imam—using Islamic principles, were comfortable turning to the court for a decision based on American family law principles.

Assessing the Status Quo

American courts adopt a “religion-neutral” standard, which generally precludes the legal recognition of all religious marriages and divorces. This standard is understood as a commitment to universalism and secularism that ensures the equal protection of all citizens, regardless of their religious affiliation. The expectation is that minority communities will subjugate their loyalties to other traditions and beliefs to the laws of the land, in order to avail themselves of state-protected rights and freedoms.¹⁹ Only these secular, universal rights are recognized and protected by law. This means that in practice, Islamic marriages and divorces remain private processes without the force of law and operating “below the radar” of state scrutiny.

As private ordering systems, Muslim marriage and divorce continue to flourish as expressions of religious, cultural, and community identity. In many respects, this bifurcated approach satisfies American Muslims with the overwhelming majority seeing no conflict between their Islamic beliefs and values and civil law codes. In common with other religious and cultural groups, American Muslims are satisfied with the private continuation of these rituals and traditions, and do not look to the courts to give them legitimacy—this comes from the community itself. As the previous section describes, American Muslims will and do use the courts for formalizing divorce, the enforcement of agreements, and sometimes the adjudication of unresolved issues between the couple. Acceptance of and access to a secular legal system does not obviate the desire for continuation of their informal community processes and traditions.

But there are problems with the *status quo*, some of which this report has already described. The courts struggle with the relationship between “religious practice” and cultural traditions, producing inconsistent case law. The assumption by many courts that religious belief is the sole reason for participation in Muslim marriage and divorce is an insufficient understanding of what motivates these traditions. The “religious practice” described by respondents is far more complex than simple observance. Not only does it encompass spiritual beliefs, cultural traditions, and a sense of Islamic identity, but it also is a personal attachment to rituals, beliefs, and hopes for the future.

Modifying our understanding of the nature of contemporary religious practice as it moves away from a public model of observance and toward a “subjective-life” experience affects how we think about the secular state’s commitment to remove any consideration of “religion” from lawmaking and judicial decision-making. The line between “religion” (excluded from judicial

As private ordering systems, Muslim marriage and divorce continue to flourish as expressions of religious, cultural, and community identity.

consideration) and “culture” (an important part of judicial interpretation and legislative context) is becoming increasingly blurred. Are Muslim marriage and divorce processes “religious practices” which the courts should not recognize – or are they expressions of a cultural or community identity which can give rise to enforceable agreements just like any other contract? The very same questions arise for other religious and cultural groups who conduct traditional marriage and divorce processes without force of law.

The blurring of the distinction between religious and cultural practice is a reflection of a wider shift in the relationship between secularism and religion, historically understood in American law and politics as opposites. Contemporary debates over minority accommodation, multiculturalism, and equality – including, for example, various forms of religious dress (in Islam, Sikhism, and Judaism), recourse to medical treatment, participation in public education, and the treatment of girls and young women in especially patriarchal cultures – illustrate the complex relationship between religious practice and secularism, and the different ways in which these terms are understood by the courts and by the public.²⁰ For example, most Americans believe that a secular state should not legislate in a manner that reflects a particular religious doctrine; at the same time, the state has a duty to protect each citizen’s right to hold and express a religious belief. The inconsistency of rulings in American courts when confronted with faith-based marriage or divorce processes in any religion reflects this tension. Is recognizing an Islamic marriage contract – or a Jewish marriage contract or *ketubah*, or any other form of faith-based pre-nuptial agreement–“legislating” in favor of “religion” – or is it protecting and respecting the identity and beliefs of religious and cultural groups?

Far from mounting a lobby to establish a system of legally recognized “*shari’a* law,” the real source of dissatisfaction among American Muslims relates to the narrow and uninformed manner in which the courts presently approach “Muslim questions” and traditional processes, or credibly assess the sincerity of motivations behind religious belief. Their sense of grievance reflects the changing role of religious practice in everyday life in contemporary society, and the need to reconsider its relationship to state secularism. Religion and secularism are no longer monolithic alternatives, and can be re- imagined in many very different ways.

Policy and Community Responses to Muslim Marriage and Divorce

Two possible approaches to moving beyond the *status quo* are related to the findings of this study.

Mutual Influence

One approach is to promote the training for judicial officers about traditional Muslim family law practices in order to enhance their ability to understand and interpret both overseas court orders and domestic contracts involving Islamic law. American courts already consider other legal systems if they are relevant to a decision. This doctrine has been subject to sustained criticism by the anti-*shari'a* movement, although many of the protagonists do not appear to understand that it allows for the consideration of *any* other relevant system of laws or beliefs and is essential to the courts' ability to determine fair outcomes that reflect the party's expectations.

At the same time imams should be encouraged, via education programs and outreach from the courts, to learn more about the American family law system and to consider incorporating these principles into the agreements they negotiate with couples regarding both marriage (in the *nikah*) and divorce. Some imams are already doing this in cases of divorce (e.g., deciding custody according to the child's "best interest" and applying local child support guidelines). Other researchers have noted this phenomenon among Muslims living in non-Muslim countries.²¹ Some imams had developed a hybrid practice; approving a religious divorce and then sending the parties to lawyers or the courts to resolve other consequences. In this way, each system takes responsibility for a different but essentially complimentary aspect of the divorce process.

This process of mutual influence²² might eventually (but not necessarily) extend to the legal recognition of some forms of religious marriage, and even divorce. The courts occasionally recognize Islamic and other forms of religious marriage (subject to existing laws on the legal age of marriage and bigamy) when there is evidence of a clear belief in (and reliance upon) a marital commitment.²³ Recognizing an Islamic divorce is more problematic, however, given that there is no established procedure or documentation in North America.

In order for the courts to recognize agreements for both Islamic marriage and divorce, clear and fair standards must be established for the negotiation and form of these documents and applied on a consistent basis. Legal recognition would reconcile common law rules with Islamic family processes using principles that already exist in contract law: notice, fair process, coercion, fraud, informed consent (perhaps underpinned by independent advice or a mandatory cooling-off period), as well as the possibility of voiding an agreement seen as oppressive and burdensome. If Islamic marriage and divorce agreements could pass these tests, the courts should enforce them like any other legal contract.

Subject to these safeguards, Islamic marriage and divorce practices as well as the accompanying agreements could be understood as cultural, identity-related practices rather than traditionally “religious.” This would match many of the respondents’ motivations and reflect a more nuanced understanding of the significance of such processes. It would begin to address the problem being experienced by courts in the United States, Canada, and the United Kingdom among others²⁴ that it is increasingly difficult to clearly separate “religious practice” (which is not justiciable by the courts) from cultural practices and traditions. The careful development of the law via case-by-case consideration could have the additional benefit of encouraging the development of “best practices” in Islamic marriage and divorce (e.g., explicit negotiation and acceptance of the terms of a *nikah*, giving notice for *talaq* or unilateral divorce by the husband).

In practice, legal recognition may be important in only a limited number of cases – for example where a woman seeks court enforcement of an agreement to pay her a *mahr*. In most instances respect for and greater familiarity with the principles of marriage and divorce in Islam would be sufficient to enable a judge to make a considered decision regarding, for example, an agreement upon divorce or an overseas divorce.

A Regulated “Marketplace” of Private Services

A second approach is to support and encourage the development of a network of competing Muslim family service organizations that together would constitute an institutional framework offering Muslims a choice of service providers and processes. A private marketplace model could offer a range of services: formal adjudication, counseling, assessment, mediation, and arbitration (both binding and non-binding). Premarital and marital counseling services would educate Muslim couples about their Islamic rights and duties, and crisis intervention would offer families critical practical assistance from Muslim professionals. Some professionals might offer their services as mediators or arbitrators, roles that could be undertaken by community members (other than imams), both male and female, who have the appropriate skill sets and qualifications. Marketing, as well as internal and independent monitoring, would provide Muslims with important information about access to available services. At its best, such a marketplace would enable the development of needs-based Muslim family services, enhance private ordering processes, and encourage diversity and best practices.

Such a marketplace, which has not yet emerged organically, would transform the *status quo*. Aside from a few (albeit impressive) community-based alternatives, services for couples in crisis are presently concentrated in mosques and overseen or administered by the imams. This means that power and credibility within the community in relation to marital conflict and divorce remains with traditional male authority figures who are neither expected nor required to be qualified in counseling, conflict resolution, or social work or have any knowledge of family systems, violence and abuse, or child welfare. This study shows that while some imams display professionalism, commitment, and gender sensitivity when working with couples and their families, others do not. While there are disincentives to developing an alternative system of service providers, including a general reluctance in many parts of the community to use professional family services either Muslim or non-Muslim, this study clearly shows the need for such support. Some Muslim men and especially women do not feel comfortable about asking an imam and other mosque officials for help when facing marital conflict. Given the community's concerns about the rising divorce rate among American Muslims,²⁵ a more diverse range of accessible family services is urgently needed.

If this marketplace is to emerge, Muslim community leaders must commit to opening up the debate over divorce, recognizing the particular needs of women and children, and confronting the challenges of marital conflict (including domestic abuse). There are signs that some Muslim organizations and communities are readying themselves to take on this considerable challenge. The benefits would be more than simply more accessible and diverse resources for Muslim families; in the process of developing a vibrant and professional private marketplace of family services, American Muslims could modernize and sustain their essential identity as family-oriented communities.

During the Ontario *shari'a* debate, some legal and Islamic scholars argued that a private system of Muslim family dispute resolution could not be expected to develop consistent, fair processes without an institutional context.²⁶ They proposed that allowing independent religious tribunals to determine issues of personal family religious law would address this. There was virtually no support for this option among respondents in this study (the same conclusion is reached by Ghena Krayem in her study of Muslims in Western Australia²⁷). Despite the attention given to the possibility of an Islamic tribunal in scholarly writing and in the press, the absence of interest in or support for this option among the study respondents strongly suggests that this is not an alternative that will be advocated by the community.



Conclusion

This study provides new and groundbreaking data on how American Muslims understand their relationship to their faith obligations, their families, their communities, the civil courts, and the state. Aside from formal religious observance, American Muslims relate to their *shari'a* responsibilities primarily through rituals of marriage and divorce. They see these as compatible with the civil law – almost all the respondents in this study married and divorced twice, once in Islam and once in law – and will use the courts where they cannot agree outcomes, just like any other couple.

Despite this, public opinion reflects significant misapprehension over what *shari'a* means in practice to American Muslims and fears about its imposition via the courts. Policy responses to Islamic marriage and divorce processes will influence public opinion and set a benchmark for state accommodation and tolerance of religious practices. Most American Muslims are content with the *status quo* in which they practice their marriage and divorce traditions privately and within their families and communities. Many however are concerned by the fear and hostility sometimes expressed towards them by non-Muslims who regard them as a threat, and the sense that the courts do not understand or respect their beliefs.

There are a number of alternatives for policymakers both inside and outside the Muslim community in approaching the relationship between private Islamic dispute resolution and civil justice systems. Policy in this area is highly relevant to other faith groups who similarly hold to family traditions that are highly meaningful to their members, but lack the force of law. It is critical that policy decisions be based on empirical data such as that offered by this study, rather than public fear and speculation.

Endnotes

1 The Park51 project for a Muslim community center, dubbed the “Ground Zero mosque” by the media.

2 Beginning with the Oklahoma referendum, 2010. See also note 12 below.

3 See “Qur’an burning: Pastor Jones’s moment in the spotlight,” *The Guardian*, September 8, 2010.

4 What one Islamic scholar described as “The Great Theft.” K. A. El Fadl, *The Great Theft: Wrestling Islam from the Extremists* (San Francisco: Harper, 2007).

5 Center for American Progress, “Fear Inc.: The Roots of the Islamophobic Network in America,” August 2011. Written by Wajahat Ali, Eli Clifton, Matthew Duss, Lee Fang, Scott Keyes, and Faiz Shakir.

6 See muslim-canada.org/DARULQADAform.html.

7 Haroon Siddiqui, “Sharia is gone but fear and hostility remain,” *Toronto Star*, September 15, 2005, A25.

8 There are many similarities between Islamic family law and civil law. The most significant differences relate to the way in which spousal support is calculated (Islamic law does not provide for ongoing spousal support but the payment of a lump sum, the *mahr*) and the approach taken to property division (in Islam there is no blending of matrimonial property). However, the data in this study shows that many couples either negotiate an outcome that looks very similar to a common law approach or in the event of any dispute between the couple, ask the courts to impose a common law structured outcome. In the small number of cases where a respondent believed that there was a conflict between their Islamic obligations and the common law requirements – for example, women ordered to pay spousal support to their husbands – some expressed discomfort but were clear that they had to follow the law.

9 NVivo7, widely used by qualitative researchers, allows interview data to be coded and analyzed. See www.qsr.org.

10 For a review, see J. Eposito with N. DeLong-Bas. *Women in Muslim Family Law* (Syracuse: Syracuse University Press, 2001), 47-126.

11 Interest (“*riba*”) is prohibited. under *shari’a*. See The Holy Qur’an, 2:Verses 275-,276, 278-, 279.

12 See, for example, Sara Harkipal Singh, “Religious Law Undermines Loyalty to Canada,” *Vancouver Sun*, December 10, 2003, A23 and Ghammin Harris, “Shari’a is Not a Law by Canadian Standards,” *Vancouver Sun*, December 15, 2003, A15; and in the UK, “Archbishop sparks Shari’a Law Row,” BBC, February 7, 2008, http://news.bbc.co.uk/1/hi/uk_politics/723335.stm, quoting UK Member of Parliament Mark Pritchard as saying: “The Archbishop should be standing up for our Judeo-Christian principles that undermine British criminal law that have been hard fought for.”

13 Oklahoma, Tennessee, and Louisiana have passed amendments to their state constitution “banning” the courts from considering “shariah law.” Similar legislation is pending in a further nineteen states (as of March 2011), although the language has been adapted now to describe “international/foreign/religious laws.”

14 See note 10 above.

15 In the United States, see the Restatement (second) of Conflict of Laws § 98. In Canada, see the *Divorce Act*, R.S.C. 1985, c.3 (2nd Suppl), s. 22.

16 Center for Security Policy, “Shariah Law and American State Courts: An Assessment of State Appellate Court Cases,” Occasional Paper Series, May 2011.

17 Although comity is a long established legal principle, “it remains remarkably vague”. Forte, D.F. “Islamic Law in American Courts.” 7 *Suffolk Transnational Law Journal*. (1983) 1 at 3

18 Robert H. Mnookin and L. Kornhauser, “Bargaining in the *Shadow of the Law*: The Case of Divorce,” 88 *Yale Law Journal* (1979) 950

19 A. Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (Cambridge, UK: Cambridge University Press, 2001), 76-77 and S. Okin, “Is Multiculturalism Bad for Women?” *Boston Review* 22 (1997): 12-13, 22, 25-28.

20 T. Asad, *Formations of the Secular: Christianity, Islam, and Modernity* (Stanford, CA: Stanford University Press, 2003), 201.

21 See D. Pearl and W. Menski, *Muslim Family Law* (London: Sweet & Maxwell, 1998) (describing “Agrezi Sharia”) and S. Bano, “Muslim Family Justice and Human Rights: The Experience of British Muslim Women,” 1, no. 4, *Journal of Comparative Law* (2007): 1.

22 J. Macfarlane, “Commentary: When Cultures Collide,” *Intercultural Dispute Resolution in Aboriginal Contexts: Canadian and International Perspectives*, ed. by C. Bell C. and D. Kahane (Vancouver: University of British Columbia Press, 2004), 94 at 99-100.

23 For example, *Persaud v Balram* 724 NYS2d (2001) 560.

24 See for example Oliver, P., Scott, S.D. & Tadros, V. *Faith in Law: Essays in Legal Theory* Hart Publishing, Portland Oregon 2000 89

25 Thirty years ago, divorce was almost unheard of in the Muslim American community. A 1992-2002 study conducted by Dr. Ilyas Ba-Yunus estimated the North American Muslim divorce rate at 32 percent compared with a mean of 51 percent in the general population. I. Ba-Yunus, "How Do Muslims in America Divorce?" in *Muslim Family in a Dilemma: Quest for a Western Identity*, ed. By M. Akhtar (Lanham, MD: University Press of America, 2007), 11. See also I. Ba-Yunus, "Divorce among Muslims," *Islamic Horizons* (spring 2001) vol 29: 52-53.

26 A. Emon, "Islamic Law and the Canadian Mosaic: Politics Jurisprudence and Multicultural Accommodation," 87 *Canadian Bar Review* (2008): 392.

27 G. Krayem, "To Recognize or Not to Recognize, That Is NOT the Question: Family Law and the Muslim Community in Australia" (Ph.D. diss., University of Sydney, 2011).

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