Sharia Law in American Courts

American Family Law and Sharia-Compliant Marriages

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Note from the Editor:

This paper analyzes cases in which American courts and judicial systems in other countries have dealt with issues arising from marriages compliant with Sharia law. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about Sharia and the American court system. To this end, we offer links below to different sides of this issue and invite responses from our audience. To join the debate, you can e-mail us at info@fed-soc.org.

Related Materials:

- Sharia in America, The Role of Shari'a Law in U.S. Courts: http://shariainamerica.com/
- John L. Esposito & Natana J. DeLong-Bas, Women in Muslim Family Law (2001): http://books.google.com/books/about/Women_in_Muslim_family_law.html?id=MOmaDq8HKCgC
- The Alwaleed Bin Talal Center for Muslim-Christian Understanding: http://cmcu.georgetown.edu/
- Nathan B. Oman, *How to Judge Shari'a Contracts: A Guide to Islamic Marriage Agreements in American Courts*, 2011 Utah L. Rev. 287: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1969077
- Ann Laquer Estin, *Toward a Multicultural Family Law*, 38 Fam. L.Q. 501 (2004).

Introduction

The purpose of this American family law survey of cases that have addressed Sharia law-based customs is to explore the nature of potential conflict between the Islamic Sharia socio-religious practices and American family law traditions. This article considers the challenges and potential results of evaluating Muslim family law practices in American family law courts.

It is important to first contemplate the family structure, as the repository of cultural values, in respect to both Western or American and Islamic orientations.

Next, it is helpful to consider the process of negotiating and solemnizing marriages when a secular law-based society asks of an insular, clerically-dictated system respect for individual rights to bargaining, contracting, dividing property, and sharing custody of children.

This paper then presents significant cases where Islamic practice was adopted, either by the trial court or the appellate court, along with a listing of notable cases that provide reasoning for rejecting the Sharia terms.

In conclusion, there are references to the reactions and legislative responses of other Western countries as they confront similar cultural and legal dilemmas.

Western Versus Islamic Orientation to the Family

A civilization's social and cultural priorities are reflected in the laws that give structure to families. These laws regarding the organization of families are usually designed to reflect the family's role as the most important purveyor of core cultural values. Edmund Burke, one of Western civilization's most respected philosophers, called love for the "little platoon" we belong to in society "the first principle (the germ as it were) of public affections." He identified this fundamental sense of family as "the first link in the series by which we proceed towards a love to our country, and to mankind."[1]

When a Western-oriented culture with a constitutional compact based upon equal status of individuals before the law, as well as between each other, begins to accommodate familial cultural practices that assume the inferior legal and social status of one of the marital partners—based solely on gender—the commitment to equal treatment for any in the society comes into question.

Such signs now come from American family law courts as judges accept Islamic family agreements that disadvantage women. In the name of *comity*, an expectation judges will extend legal courtesies to agreements made in other states or nations, some courts are following what they see as a sense of multicultural sensibility. This reach for comity conflicts with the prohibition of judicial consideration of legal agreements that are in violation of core American public policy prescriptions. Adoption of Islamic practices or Sharia law to the result of institutional discrimination against women is in conflict with American laws, constitutional protections, and public policy.

United States Supreme Court Justice Robert Jackson, also chief United States prosecutor at the Nuremberg Trials, wrote this about Islamic law:

> In its source, its scope and its sanctions, the law [i.e., Islamic Law, Sharia] of the Middle East is the antithesis of Western Law . . . . Islamic law . . . finds its chief source in the will of Allah as revealed to the Prophet Muhammad. It contemplates one community of the faithful, though they may be of various tribes and in widely separated locations. Religion, not nationalism or geography, is the proper cohesive force. The state itself is subordinate to the

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> Qur'an, which leaves little room for additional legislation, none for criticism or dissent. . . . It is not possible to separate political or juristic theories from the teachings of the Prophet, which establish rules of conduct concerning religious, domestic, social, and political life. This results in a law of duties, rather than rights . . . .[2]

Ayaan Hirsi Ali, former Somali Muslim who became a member of the Dutch Parliament, warns that "Holland's multiculturalism . . . was depriving many women and children of their rights. Holland was trying to be tolerant for the sake of consensus but the consensus was empty." As a translator in Holland for immigrant families who sought state support, Hirsi Ali observed that "[t]he immigrants' culture was being preserved at the expense of their women and children and to the detriment of the immigrants' integration into Holland."[3] Ms. Ali also posits that the biggest obstacle to Muslim assimilation into Western cultures is the "subjugation of women" and the greater control of female sexuality in Muslim families beginning with compliance "with their father's choice of a mate," then to devotion "to the sexual pleasures of their husband(s)," and "a life of childbearing."[4]

Historian and Western culture commentator Victor Davis Hanson observes, "[M]ulticulturalism is a good reminder that when standards are relative, there are no standards at all."[5]

Foundations of Islamic Law

It is important to understand the general origins and scope of Islamic law—what is commonly called Sharia law—before considering how Sharia may be included in American family law court decisions.

First, Islamic law differs from a secular legal system that recognizes consensual government based upon self-rule. Islamic law derives its legitimacy from Allah, not agreement among citizens to be ruled by laws as enforced by accountable state police power. Thus, power is concentrated in the religious adjudicators of the doctrine. This consolidation of power can invite arbitrariness, especially when violations of the law are not merely an infringement of the social order, but transgressions against God that are often punished in both the current life and afterlife.

World-recognized Islamic historian and scholar Bernard Lewis writes:

> The idea that any group of persons, any kind of activities, any part of human life is in any sense outside the scope of religious law and jurisdiction is alien to Muslim thought. There is, for example, no distinction between canon law and civil law, between the law of the church and the law of the state, crucial in Christian history. There is only a single law, the shari'a, accepted by Muslims as of divine origin and regulating all aspects of human life: civil, commercial, criminal, constitutional, as well as matters more specifically concerned with religion in the limited, Christian sense of that word.[6]

Lawrence Wright, author of *The Looming Tower*, points out that Islamists believe that "the Sharia cannot be improved upon, despite fifteen centuries of social change, because it arises directly from the mind of God."[7] While Wright also notes that contemporary Islamic modernists argue that the "stringent Bedoin codes of the culture that gave birth to the religion are certainly not adequate to govern a modern society," reform efforts would have to challenge the systemic belief that "the five hundred Quranic verses that constitute the basis of Sharia are the immutable commandments of God."[8]

There are four sources of authoritative Sharia law, although regional schools express generalized interpretations: the Quran (word of Allah), *Sunna* (actions and sayings of the prophet), *ijma* (consensus of scholars), and *qiyas* (reasoning by analogy).[9] Clerical guidance or *ijtihad*, interpretive pronouncements by Islamic scholars as *fatwas*, is incorporated into Sharia jurisprudence.

Sharia rules have undergone little reform over the ages. As religiously ideological societies, Muslim cultures are typically intolerant of dissent and critical inquiry. Efforts to target "the Shari'a, as it governs personal status and family law" by the United Nations' Women's Convention initiatives have yielded little progress.[10]

As an example of Sharia's attitudes, Iranian Ayatollah Mutahari, creator of the policy on women in the workplace after the Iranian Revolution, described as recently as 1999 the limited role of women as "to marry and bear children. They will be discouraged from entering legislative, judicial, or whatever careers may require decision making, as women lack the intellectual ability and discerning judgment required for these careers."[11]

The degree to which Middle Eastern Muslim women accept male misogyny is revealed in responses to a 2002 survey of 356 Jordanian women showing that "Jordanian women often blamed the wife for violence against her." Almost half of the women questioned in this relatively liberal Muslim society agreed that in most cases "a husband beats his wife due to her mistaken behavior, such as squandering money or neglecting the house and children," or that "the wife's behavior toward her husband or children is the cause of violence against her."[12]

There are schools of thought that justify preventing women from receiving an education on the religious rationale that "learning the written word protects their religious purity and honor."[13] When some forms of Sharia law address the entire range of human behavior from "how to respond to someone who sneezes" to "the permissibility of wearing gold jewelry,"[14] such mandates will be met with great resistance by Americans who have a broad view of individual liberty and freedom of conscience.

It is then no surprise that American and strict Islamic family cultural codes are clashing in U.S. family law courts. The comprehensive 2009 Emory Law School family law survey *No Altars: A Survey of Islamic Family Law in the United States* affirmed that "many Muslim couples are asserting their Islamic legal rights in American family courts . . ." for the reason that "[Muslim] religious identities [are] important enough not to sacrifice at any secular altar." These researchers then expressed satisfaction that "the law surrounding Muslim marriages is becoming an important and complicated part of the American legal landscape."[15]

Sharia and American Family Law

Family law has been called the heart of the Sharia and has been given "pride of place"[16] in the Koran as "eighty percent of

Koranic rulings [that] are devoted to regulating marital relations and the conduct of women."[17]

The Sharia socio-religious emphasis on the family structure and place of women in the family poses problems on many levels for American family law courts. First, just the act of consulting Sharia religious codes calls into question important First Amendment constitutional prohibitions against judicial inquiry into religious doctrine. Furthermore, Supreme Court rulings preclude judicially-sanctioned coercion of religious practices, and judges are prohibited from ruling according to doctrinal mandates unless there is an independent legal ground for the determination. Thus, judicial entanglement in disputes over religiously-dictated Sharia is improper, from the attempt to decode extra-contractual marital terms to calling on a Sharia cleric as an expert witness to provide context.[18]

Judges are constrained from straying into the religious hazard zone by the boundary that calls for them to adjudicate disputes or marital dissolutions according to "neutral principles" of law. Yet some judges have justified incursion into this territory by claiming that the case entails "*undisputed points of religious doctrine*," where the determination ostensibly does not "involve consideration of doctrinal matters, rituals, or tenets of faith."[19] When used to justify interpreting Sharia-based family arrangements, this claim usually fails first on the assertion that anything about Sharia is undisputed since, as the practitioners and analysts of Sharia readily admit, the various interpretive schools of Sharia are evidence of differing approaches to marital terms. Second, Sharia regulations are by nature a "doctrinal matter" since Sharia does not exist if the religious origin and authority are eliminated.

For purposes of legally—in distinction to religiously—dissolving a union, marriages are treated as a contract between husband and wife. When American judges attempt to apply contract terms to Islamic marriages, they often find that there rarely is complete conformity with American civil expectations for a recorded marriage license and officiants are often not registered; sometimes they are not even imams. Also, Islamic marital negotiations are regularly conducted by a male representative and without the bride's participation. Sometimes the bride is underage. In many cases these practices violate American expectations for basic fair bargaining interests in contract creation. The agreement may be considered legally unconscionable if so unfair to the weaker party that a court should refuse to enforce the terms. Also, some of these marriages may qualify to be considered void *ab initio* (invalid from the start) or voidable.

Finally, there is a backstop—albeit a soft one—which is supposed to block foreign law that is at odds with American constitutional standards from creeping into judicial decisions. As judges extend comity—recognition of agreements made outside of a court's jurisdiction—conformity with sound American public policy is the do-not-cross bright line. Therefore, a judge should not approve an agreement originating in the legal terms from another culture if it is "injurious to interest of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with public welfare or safety, or if it is at war with interests of society and is in conflict with public morals."[20]

When deferring to Sharia-cognizant family arrangements, the "not offensive to public policy" instruction asks judges to uphold constitutional, moral, and cultural imperatives like a woman's freedom to choose her marriage partner, her right to equal property distribution, due process standards requiring notice and process, and her interest in a fair custody determination.

If a judge's interest in accommodating a Muslim party's religious or cultural sensibilities overrides express American public policy standards, there is danger that such default rulings will undermine legislative will. The human rights prerogatives at stake involve "cultural accommodations or legal concessions to polygamy, forced marriage, the marriage of prepubescent girls, unilateral divorce by husbands, and the ban against Muslim women marrying non-Muslims (even though Muslim men are allowed to marry outside their faith)."[21]

Complicating matters further, when American judges recognize religious divorce terms that are at odds with American legal standards, the marital partner who files the divorce papers is invited to leverage forum advantages. Since it is customarily the husband who initiates the divorce proceeding in a Muslim marital dissolution, case histories show that he will often try to exploit the advantages offered by the religious interpretation of the marital contract. When this option is foreclosed by consistent enforcement of American contract and constitutional protections, both parties know what to expect when appearing before a civil judge for a hearing.

An initiative to fortify and harmonize state public policy baselines called American Law for American Courts (ALAC) has been adopted in four states.[22] The ALAC measure precludes the state courts from giving effect to foreign laws or foreign judgments when the application of those would deprive a party of an essential constitutional right or liberty like due process or equal protection. In other words, a state court might very well apply Sharia or the law of England, as courts do all of the time in the appropriate circumstance (i.e., the parties agree to such laws in a contract), as long as the particular aspect of Sharia or the law of England does not undermine American state and federal constitutional protections in the matter being adjudicated.

As states enact family law according to constitutional health, safety, and welfare prerogatives, this study demonstrates that it would be useful for legislators to consider providing basic requirements for the licensing of marriages, registration of officiants, and prenuptial agreements. This threshold at least asks the marital partners to obtain civil recognition of the union. Unions not in compliance with the registration and solemnization standards are then on notice that potential defects in licensing, officiating, bargaining, or nuptial negotiations may mean that the judges must defer to common-law community property standards of equitable asset distribution, spousal maintenance, and best interests of the child.

A. Sharia-based Marriage Practices

In order to understand Muslim marriages, the key terms below should be defined:

Nikah Nama/Muta—Marriage:

The marriage, or *nikah*, is usually negotiated for the bride by her parents, or a relative as representative, called a *wali*. The marriage contract is often arranged once the woman is considered to have reached puberty. While practices vary by region, some girls as young as nine have been considered eligible for marital commitment.[23] Protestations by brides are rare since much familial esteem is invested in women as the "repositories of family honor"[24] and a bride resisting an arranged marriage could be viewed as "highly disrespectful and would risk permanent ostracism from her family and community and may even risk death."[25]

Lindsey Blenkorn, who dedicated an entire study to *mahr* agreements, wrote that "tears, and sullen silence by the bride are deemed a sufficient sign of acceptance, not a refusal to marry the groom." Worse, she noted cases of coercion and observed that "marriages contracted . . . under duress are given effect."[26]

Talaq—Husband's Power to Verbally and Unilaterally Divorce

Talaq is the method utilized by the husband of divorcing his wife by repeating three times "I divorce you." In typical Sharia cultures, a woman can only sue for divorce based on one of four reasons: the husband cannot consummate the marriage, has a venereal disease, has leprosy, or is insane.[27] Even if the husband pronounces *talaq* while drunk, it is often still enforceable. Also, the husband has the luxury of three months, during which time he can reconsider. Anytime during these three months, the husband can take his wife back and thus cancel his repudiation. If he does take her back, she has no choice but to accept and become his wife again, bearing the duty of sexual relations with the man who has just threatened to get rid of her.[28]

Idaa—Revocable Divorce

This has become a perfunctory three-month waiting period expected of the wife during which the husband may decide to reinstate the marriage. Originally, the period was calculated to anticipate a sufficient number of menses to ensure that the male parent of any offspring produced after the cessation of a *nikah* would be known.

Mahr/Sadaq—Dower

The *sadaq*, or marriage contract, includes the *mahr*, which acts as a deferred dower to be paid in the event of divorce or death. The *mahr* is thought to deter the husband from divorcing his wife by making divorce an expensive prospect. The deferred dower is also viewed as compensation to the wife for the man's unilateral right to divorce.

Although American courts struggle to apply the *mahr*'s terms within a marriage contract—either viewed as pre-nuptial or ante-nuptial—it functions as neither if analyzed according to legal contract standards. As noted above in the discussion on the marriage negotiation, the bride has little or no representation in agreeing to the terms of the deferred dowry, or *mahr*. In fact, Blenkhorn's research found potential for "harmful physical consequences they might suffer were they to refuse or protest, ranging from familial fratricide—so-called dowry deaths, where the bride's in-laws kill her for protesting or failing to provide money to her new family."[29]

As imagined, women are often destitute at the point of divorce since Sharia is often interpreted to forbid women from working outside the home or continuing their education. Also, in a strict Sharia culture the prospect of remarriage for a non-virgin is virtually nill. Predictably, families do not welcome the return of their now unmarriageable daughters.

Polygamy—Men Can Have up to Four Wives

Polygamy is allowed in some Sharia-based Muslim cultures, but with the limitation of four wives at one time. The husband is admonished to treat them all equally. If the man is unable to treat each equally, he must restrict himself to only one wife.[30] Polygamous Muslim marriages in the U.S. are increasing, with current estimates showing that 50-100,000 Muslims in the U.S. now live in a polygamous family.[31]

Child Custody

The Islamic Sharia Council of the United Kingdom's website offers an updated "Perspective on Child Custody After Divorce" that counsels maternal custody for young children with choice of parent occurring generally at age seven.[32] The directive stresses that "Islamic upbringing" is required "to ensure that the child's welfare is properly cared for" and advises that "the child be given to the next eligible custodian" for enforcement purposes.[33]

B. Examples of Sharia-based U.S. Family Law Rulings

The family law cases below only represent court decisions that contemplated Sharia elements. Some cases listed are noted as "unpublished," which means that the judge or judges do not offer them for official citation but they are included here for the purpose of noting compelling judicial reasoning. Trial court-level cases are not usually published in retrievable databases since the rulings do not have precedential value. Therefore, unless a ruling was appealed by one of the parties, it would not likely appear in one of the legal databases for purposes of this survey.

The cases are summarized for a succinct presentation of the Islamic marital terms, divorce actions, custody arrangements, and the court's determination. Some significant judicial dicta rejecting Sharia practices on the basis of non-compliance with public policy interests is shown in italics for emphasis.

The first section contains cases where the trial court implemented Sharia terms in the marital dissolution as well as cases where the appellate court affirmed the Sharia elements. The second section lists cases where the appellate court rejected Sharia terms of the cases and reversed the lower court's incorporation of the Sharia factors. Finally, the last section features family law cases that offered rationales as to the legal basis for rejecting Sharia elements in family law rulings. Cases are listed in alphabetical order.

Section One: Trial or appellate decisions implementing Sharia terms

Afghahi v. Ghafoorian, Unpublished, No. 1481–09–4, WL 1189383 (VA Ct. of Appeals 2010).

Husband and wife were married in Iran and executed an Islamic deed of marriage. The agreement showed that husband would give to wife "the gift of a tome of Holy Koran valued at 50,000 Rials. a bar of rock candy, and the pledge of 514 gold coins." Coins were worth approximately $141,100 U.S. dollars.

The trial court ruled that the contract was a premarital agreement although the "marriage portion" was referred to as both a "gift" and an "obligation" with no due date in the contract. The court awarded all promised property to the wife.

The appellate court affirmed the lower court decision by enforcing the marriage contract (*mahr*) as a premarital agreement. The contract was considered binding according to Virginia law, where "parties are permitted to enter into premarital agreements, which are akin to contracts, in which they can 'contract with respect to . . . any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.'"

Aghili v. Saadatnejadi, 958 S.W.2d 784 (Tenn. Ct. of Appeals, Mid. Sect., Nashville 1997).

Husband negotiated a marital agreement (*sadaq)* with wife's father in accordance with Islamic custom. In this contract, husband agreed that wife's dowry (*mahr*) would be 1400 Iranian gold coins and that he would pay wife 10,000 Iranian gold coins if he violated any provision of the contract. Because Islamic law permits a man to have four wives, husband also agreed that he would not marry anyone else if the parties ever returned to live in Iran. The couple obtained a marriage license, and an Islamic blessing was given in the presence of four witnesses. The couple and the Islamic official signed an Islamic marriage certificate that was filed with the mosque in Nashville. Months later, husband informed wife that he would not record their marriage license with the county unless wife would agree to relinquish her dowry and earlier marriage contracts. Husband then filed for divorce five months after the Islamic marriage ceremony.

The trial court concluded that the marriage was void, finding that the officiant was not qualified to perform the Islamic marriage and the license was not properly filed.

The Tennessee Court of Appeals held that an Islamic marriage ceremony or "blessing" qualified as a legal marriage, allowing for a partially completed and late-filed marriage license. The appellate court reversed the trial court's summary judgment that the Muslim ceremony without registration of the marriage or imam was void.

Comment: There is a key admission in this case by an expert witness, a professor of religion at Boston University and specialist in Islamic Studies, who compares the societal norms under Christianity and Judaism to the Islamic sense of a unified religious culture: "In contrast to Western religious teaching and practice Islam from its inception to the present *has consistently rejected the distinction between clergy and laity*."

Finally, it is interesting to note that Tennessee law was changed the year after this case was decided to require that all who "solemnize the rite of matrimony: a minister, preacher, pastor, priest, rabbi, or other spiritual leader must be ordained or otherwise designated in conformity with the customs of a church, temple, or other religious group or organization, and such customs must provide for ordination or designation by a considered, deliberate, and responsible act." T.C.A. § 36-3-301(a)(2) (added by 1998 Public Chapter 745).

Ahmed v. Ahmed, 261 S.W.3d 190 (TX Court of Appeals, 14th Dist. 2008).

Husband and wife married in a civil ceremony in 1999. The marriage was arranged between the parties' families. They also had an Islamic ceremony in New York in 2000. At that time, the parties signed an Islamic marriage certificate that included a *mahr* provision of $50,000.

The appellate court considered that the *mahr* was signed six months after the civil ceremony and decided that it could not be considered a *pre*nuptial agreement. Since the record was devoid of any evidence as to whether or not the parties intended the *mahr* payment to come from Amir's separate property or from the community property, the court ruled that the *mahr* was unenforceable. The appellate court remanded the case back to the trial court to determine if the *mahr* agreement was enforceable on other grounds.

Comment: The appellate court did not accept the *mahr* as a prenuptial agreement but gave the wife opportunity to pursue an alternate legal theory when the case was reconsidered before the trial court. See comment in dissent below:

Dissent (from the appellate decision): "I respectfully disagree with the majority's conclusion that, on these facts, the interests of justice are served by allowing [wife] the opportunity to re-characterize the *mahr* and re-litigate its enforceability under another theory."

Aqel v. Aqel, Unpublished, No. 2004-CA-001531-MR (KY Ct. of Appeals 2005).

Husband, a citizen of Jordan who was in the U.S. as a permanent resident, and wife, an American citizen, married in 1996 in Kentucky. Husband was previously married in Jordan and had initiated a divorce that was not finalized. Thus, the marriage in Kentucky was annulled. Husband re-filed for divorce in Jordan and proceeded with an Islamic divorce called an *idda* that entails a three-month revocation period. In 1997, husband and wife re-married in Kentucky before the three-month period for revocation of Jordanian divorce had expired. Wife filed for an annulment in 2001 on the grounds that husband was still legally married in Jordan at the time of his 1997 marriage to her.

The trial court determined that the Jordanian divorce of first wife was effective from the day it was filed even though Islamic experts for each party testified that a woman must wait until the expiration of the *idda* period before remarrying. (However, this requirement does not apply to a Muslim husband since men are generally permitted to have four wives.)

The appellate court upheld the trial court's ruling, referring to a non-binding Board of Immigration Appeals

determination (Matter of Hassan (11 I. & N. Dec. 179 (BIA)) in a similar matter, and recognized the validity of the Jordanian divorce based upon the fact that husband did not reclaim his Jordanian wife during the three-month *idda* period.

Comment: The case is flagged as one where the appellate court adopted provisions of Sharia law since the analysis to determine if husband's divorce was final turned on whether he re-claimed the previous wife during the waiting period as provided by Jordanian Islamic law. Although the result likely would have been the same, state law could have been applied since the Sharia policy was arguably offensive to state public policy standards. Also, wife complained on appeal that Islamic law was arbitrary and should not apply in American courts. She also made an equal protection claim. However, she raised neither of these complaints in the trial court, so they could not be considered on appeal.

Akileh v. Elchahal, 666 So. 2d 246 (FL Dist. Ct. of Appeal 1996).

Husband and wife were married in Florida in 1991. The wife's father negotiated the marriage, and wife had no previous association with any other man outside the presence of her family. They both signed a *sadaq* with a *mahr* (described by court as an antenuptial or postponed dowry) agreement that husband would pay wife $50,000 at time of divorce. Husband never discussed the meaning of a *sadaq* with the wife or her father. The wife filed for divorce in 1993 after contracting a sexually transmitted disease from husband.

The trial court ruled that the *sadaq* of $50,000 was unenforceable. Husband contended that *sadaq* was waived if wife initiated the divorce, but he acknowledged that spousal abuse would be grounds for a wife to retain the *sadaq*. Islamic experts who testified also presented an interpretation of *sadaq* that favored the wife's position. The trial court found the agreement invalid according to contract law requirements including the determination that there was no meeting of the minds.

The appellate court found what it considered to be secular terms of the *sadaq* valid and enforceable, saying that "courts may use 'neutral principles of law' to resolve disputes touching on religious concerns."

Aziz v. Aziz, 488 N.Y.S.2d 123 (1985).

Husband and wife married in New York in 1981 according to an Islamic ceremony. They agreed to a *mahr* of $5032 ($5000 deferred payment and $32 prompt payment) as signed by an imam. Husband filed for the divorce that was granted on grounds of constructive abandonment. Wife claimed that the *mahr* was a religious document and not enforceable as a contract.

The court issued a second decision (original withdrawn) and upheld the *mah*r agreement, "in the interest of judicial economy," enforcing the payment of $5000. The court cited New York's General Obligation Law, saying that the contract's "secular terms are enforceable as a contractual obligation, notwithstanding that it was entered into as part of a religious ceremony."

Comment: The Islamic marriage contract was upheld, but essential facts are not presented that would reveal how the contract was negotiated and whether New York laws governing licensing, contract negotiation, and notice were followed.

Chaudry v. Chaudry, 388 A. 2d 1000 (N.J. Super. Ct. App. Div. 1978).

Husband and wife were married in Pakistan in 1961 and moved to the U. S. in 1963. The *mahr* agreement was negotiated for wife by her parents and included $1500, or 15,000 rupees, in the event of divorce. In 1968, wife and children returned to Pakistan. Husband resided in New Jersey, but wife testified that husband prevented her from returning to the U.S. Wife filed for divorce in a New Jersey court, alleging that her husband had abandoned her. Husband answered the divorce suit by stating that he had already been granted a divorce under Pakistani law and that the trial court was without jurisdiction to divide the marital estate.

The trial court ruled that "there was an essential injustice in the defendant accepting all the benefits of living in New Jersey and earning a substantial income here while requiring his wife and family to live in Pakistan and be circumscribed by their law which is far less beneficial to them than the American law would be." The trial judge invalidated the Pakistani divorce and opened the process to wife "to prove by proper evidence that she would be entitled to certain support by way of separate maintenance." Trial judge opined that wife "had to waive, give up or not claim support or alimony in the event of a divorce, and it cannot be said that with that choice she chose to do it, because there was no choice involved."

The appellate court upheld the Pakistani divorce and determined that the wife was not entitled to equitable distribution by reason of the ante-nuptial agreement (*mahr*). The court found that although it limited her rights to some $1500, or 15,000 rupees, there was no proof that the agreement was not fair and reasonable at the time it was made. The appellate court ruling affirmed the Pakistani divorce according to (1) the Pakistan citizenship of the parties, (2) the wife's residence there, even though it may have been against her will and by reason of the husband's acts, and (3) the judgment of the appellate court in Pakistan that validated the divorce.

Ghassemi, 998 So.2d 731 (LA Ct. of Appeal, 1st Circuit 2008).

Husband and wife married in Iran in 1976. Husband went to the U.S. on a student visa and married again "to enhance his legal status." He then divorced the American wife. Husband married another American wife in 2002. Husband arranged for Iranian son to join him in the U.S. in 1995 and in 2005 son arranged for Iranian wife (his mother) to enter the U.S. as a permanent resident. She settled in Louisiana, where she filed suit for divorce. Husband claimed that the Iranian marriage was invalid according to Iranian law since wife was a blood relative (first cousin) of husband.

The appellate court, striving to "uphold the validity of marriage," stated, "like the foregoing courts, we too find that although Louisiana law expressly prohibits the marriages of

first cousins, such marriages are not so "odious" as to violate a strong public policy of this state. Accordingly, a marriage between first cousins, if valid in the state or country where it was contracted, will be recognized as valid." Yet, Iranian law forbids marriage "with the brother and sister and their children, or their descendants to whatever generation."

Hosain v. Malik, 671 A.2d 988 (Md. Ct. Spec. App. 1996).

Husband and wife were married in Pakistan in 1982. Their daughter was born in 1983. Mother left the marital home with daughter in 1990. Father obtained a custody decree in his favor in Pakistan. Wife and daughter left for the U.S. during the custody proceedings, traveling on wife's student visa. Father tracked down wife and daughter in Maryland in 1992.

This case was complicated with concerns about jurisdiction and removal of the child to the United States but was ultimately resolved by the Court of Special Appeals of Maryland, sitting en banc. The appellate court essentially considered 1.) whether the Pakistani court applied the best interest of the child standard; 2.) whether the trial court's determination should focus on the particular culture, customs, and mores of Pakistan and the religion of the parties, or, alternatively, whether the best interest standard was to be determined based on Maryland law, i.e., American cultures and mores.

The appellate court decided that applying relevant Pakistani customs, culture, and mores was appropriate and that the Pakistani court had sufficiently considered the best interests of the child. The majority reasoned that it was "beyond cavil that a Pakistani court could only determine the best interest of a Pakistani child by an analysis utilizing the customs, culture, relgion, and mores of the community and country" of origin. The court also posited that "the well being of the child and the child's proper development is thought to be facilitated by adherence to Islamic teaching . . . ." since the family was from the Pakistani culture.

Note: Wife/mother stated that she did not appear at the custody hearing in Pakistan to present her "best interests of the child" case for the reason that she feared punishment for committing adultery. She claimed that, if convicted, her punishment could be public whipping or death by stoning. The appellate court determined that as long as the mother was given notice and opportunity to be heard—and that as long as the Pakistani court applied a child welfare test—no further process was due the mother. The court was satisfied that she participated in the Pakistani hearings through her counsel and her father, who acted as attorney-in-fact.

Comment: Studies indicate that "the subordination of women in Pakistan is effectively written into the law."[34] When American courts recognize a legal system "comprised of 'tribal codes, Islamic law, Indo-British judicial traditions and customary traditions' that have created an 'atmosphere of oppression around women, where any advantage or opportunity offered to women by one law, is cancelled out by one or more of the others,'" it is debatable whether any system would not be granted comity under this standard.[35]

***In re* Marriage of Malak**, 182 Cal.App.3d 1018 (Cal. Ct. App. 1986).

Husband and wife were married in Lebanon in 1970. Wife brought children to the U.S. in 1982 to live with her brother in California, without husband's permission. She then filed for legal separation in 1982, and husband was served while in San Jose. Husband commenced separate custody proceedings in Lebanon and the UAE (where the family had also resided). Husband then sued in California for enforcement of judgments granting him custody from the Lebanon and UAE courts.

The trial court declined enforcement of the child custody order of the Sherei Sunnit Court of Beirut, Lebanon on the ground that due process had been denied wife, with the added finding that the Islamic court did not appear to hold the "best interests of the child" as a central consideration in the determination of custody.

The appellate court reversed and awarded custody to the father, disregarding concerns that the Lebanese Court would prefer the father's custodial claim, and saying that the Lebanese Court did properly consider the best interests of the children. This determination was based in part upon the Lebanese Court finding of "the impossibility of obtaining the [I]slamic education and exercise of its rituals [in the U.S.A.]." The court also considered

> the interest of the two children with regard to the material side, because the father has properties and work opportunities in Lebanon . . . and in particular that their divorced mother might not be able to provide them proper life with any means of subsistence because she is unemployed and it is quite possible that her stay in the U.S.A. is illegal, shakey [sic] and uncontinuous. . . . and she will not be able to bring them up properly in a strange country where the children have no relatives and are away from the protection, affection and tenderness of their father.

Odatalla v. Odatalla, 810 A.2d 93 (Superior Ct of New Jersey 2002).

Husband and wife were married in New Jersey in 1996 in a videotaped Islamic marriage ceremony with an Islamic marriage license. Wife sued for divorce, claiming extreme cruelty, and asked that the *mahr* agreement providing $10,000 as postponed dower be enforced. Husband counterclaimed extreme cruelty.

The Superior Court of New Jersey granted a dual judgment of divorce and enforced the *mahr* agreement with equitable distribution and alimony dispositions, after applying this two-part test: (1) the agreement was capable of specific performance under neutral principles of law, and (2) once those neutral principles of law are applied, agreement meets state's standards for those neutral principles of law.

Comment: The court called for constitutional flexibility to dismiss the First Amendment prohibition against judicial inquiry into a religious issue:

> In order for laws, indeed, constitutional principles, to endure, they must be flexible in their application to the

facts of the case presented. The community we live in today is vastly different from the community of the late 1700's when our Constitution was drafted by the founding fathers. Rather, the challenge faced by our courts today is in keeping abreast of the evolution of our community from a mostly homogenous group of religiously and ethnically similar members to today's diverse community.

This quote from Justice William Brennan was used to support constitutional adaptation to this diversity imperative:

> We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be: what do the words of the text mean in our time? For the genius of the constitution rests not in any static meaning it may have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.[36]

Rahman v. Hossain, Unpublished, 2010 WL 4075316 (NJ Superior Court, Appellate Div. 2010).

Husband and wife were married in Maryland in 2006. The marriage was an arranged Islamic union, and parties agreed to a *sadaq* of $12,500 in the event of divorce. Husband filed for divorce in 2007 and provided an Islamic expert witness to testify that *sadaq* could be voided if wife were proven to be at fault for the divorce.

The trial court, relying specifically on the uncontroverted testimony of the expert, found that the ex-wife's "undisclosed mental illness constituted an impediment to the marriage under Islamic law." The appellate court cited *Alicea v. New Brunswick Theological Seminary*, 128 N.J. 303, 313 (1992) to support the proposition that "relevan[t] religious customs and principles in certain civil disputes, particularly with respect to contractual promises" can aid in the application of "neutral principles of law." The appellate court upheld trial court's ruling that wife was not entitled to the $12,500.

Comment: Wife's pleadings were suppressed, and she defaulted in a separate hearing on her counterclaims regarding the mental illness question.

Sherif v. Sherif, 76 Misc.2d 905 (NY Family Court 1974).

Husband and wife married in Egypt in 1971 in an Islamic ceremony. They moved to the United States after the marriage and traveled back to Egypt in 1973, where husband filed for divorce. Wife then petitioned for support in New York. Husband countered that the Egyptian divorce should be recognized and that he was no longer married so not obligated to support wife.

The family court validated the Egyptian divorce based upon the practice of comity saying that it is a "firmly established principle of Anglo-American law that foreign judgments, subject to a few exceptions, are not open to re-examination on the merits before a local forum." The court defined the practice of comity as not an act "of mere courtesy and good will, upon the other, it is the legislative, executive, or judicial acts of another nation." While the court recognized that "Egyptian laws with regard to matrimony do not by any means meet with the approval of this Court," accepting the facts and circumstances of the particular divorce "was not considered offensive to the public policy of this State." The family court determined that "it [was] not shocking to 'the conscience to conclude that people who marry under a certain set of laws may expect to be bound only so long as that set of laws required it.'"

S.I. v. D.P.I., Unpublished, No. CN04-09156 (DE Family Court, New Castle Co. 2006).

Husband and wife were married in 2006 in Bangladesh. The Islamic marriage was arranged by wife's sister-in-law and included a *sadaq* providing for about $17,000 to wife. Wife came to the U.S. in 2004, and husband arrived several months later. The parties were divorced in Delaware in 2005. Husband claimed that the contract should not be enforced since he thought that the agreement presented to him at the time of marriage allowed for a dowry of "a small amount" and that he signed it only for traditional purposes.

The family court considered whether the marriage contract was negotiated in an unconscionable manner and said that the party claiming so "must prove that there was 'an absence of meaningful choice and contract terms [are] unreasonably favorable to one of the parties'" and that the contract "terms must be so one-sided as to be oppressive." The court decided that husband provided no testimony or other evidence to support his argument that the agreement was unconscionable and should not be enforced.

Comment: The court applied state contract requirements to the dispute; however, the court noted the absence of "comparative evidence about similar marriage agreements in the Bangladeshi community" to accomplish a more detailed analysis.

Section Two: Trial court decisions that incorporated Sharia elements but appellate court reversed

Farah v. Farah, 429 S.E.2d 626 (Va. Ct. App. 1993).

Husband was a citizen of Algeria, and wife was a citizen of Pakistan. Proxies of both met in London to conduct a ceremony that married them. The ceremony did not conform to the formalities required of marriages by English law. The couple lived in Virginia and never had a civil marriage performed in the United States. Wife subsequently filed for divorce.

Trial court accepted as valid a marriage not performed according to law in the United Kingdom, the place where the marriage occurred. The trial court found that a valid marriage existed because the London proxy ceremony was valid under Islamic law and the law of Pakistan. The trial court reasoned that Virginia should grant comity and recognize the marriage because it was valid under the laws of Pakistan.

The appellate court reversed the trial court and held that the marriage was invalid. The *validity of a marriage in Virginia*, said the appellate court, is dependent on whether the marriage was valid in the place where the ceremony occurred, *not whether the marriage was religiously valid under Islamic law*.

Hammoud v. Hammoud, Unpublished, No. 302619 (MI Wayne Circuit Ct., Fam. Div. 2012).

Husband appealed divorce terms where couple was married according to Islamic terms and where wife's father

evidently agreed to marital contract for wife. Included in the issues on appeal, husband complained that spousal support award was excessive and was imposed as a sanction for his refusal to grant wife an Islamic divorce.

The trial court imposed spousal support for an indefinite period unless terminated by plaintiff's receipt of an Islamic divorce by defendant, her death, or remarriage.

The appellate court reversed this part of the decision after determining that the trial court's ruling appeared to be pressuring husband to grant wife an Islamic divorce "despite the trial court's acknowledgement that it had no authority or jurisdiction over the parties obtaining a religious divorce." The appellate court considered the award of spousal support for "an indefinite duration" as apparently "designed by the trial court to force or pressure defendant to agree to an Islamic divorce" and so called it "improper."

Also of note, husband wanted to enter a document into the proceeding to show that wife waived rights to marital property if she filed for divorce. The appellate court agreed with the trial court's finding that the document was not properly certified and appeared to represent an agreement made by wife's father with husband, on wife's behalf, at the time of marriage. The appellate court concluded: "*A parent has no authority merely by virtue of the parental relation to waive, release, or compromise claims by or against his child*," citing 67 CJS, Parent & Child, § 58, at 764, and *Schofield v Spilker*, 37 Mich App 33; 194 N.W.2d 549 (1971).

Habibi-Fahnrich v. Fahnrich, Unpublished, No. 46186/93 (NY Supreme Ct., Kings County York 1995).

In 1983 American husband and Iranian wife were married in a civil ceremony in Brooklyn. Subsequently they were married in an Islamic religious ceremony officiated by an imam. Prior to signing the *sadaq* husband was given a one-hour explanation of the Islamic religion by the imam. Husband claimed that he signed the *sadaq* to appease wife's family. Less than one year after the marriage, wife filed for divorce and enforcement of the *sadaq*.

The trial court found that the *sadaq* was enforceable.

The division appellate court disagreed. The Supreme Court for Kings County ruled that the *sadaq* was not sufficiently specific to illustrate agreement when it did not define "postponed" or "possession" and "one half of the possessions." The court determined that the *sadaq was unenforceable on three different points of law.* "*The pertinent points of law include materiality, specificity, and insufficiency.*"

Husein v. Husein, Unpublished, No. 2001CA00015 (OH Ct of Appeals, 6th Dist. 2001).

Husband and wife married in Palestine in 1970. Same year, the couple moved to Ohio. In 1992, Husband went to Palestine for three weeks and obtained a divorce.

Wife was not served with the divorce certificate. Husband then returned to Ohio and re-married in 1995. At this time first wife was made aware that husband had divorced her in Palestine at a Sharia Court in Ramallah.

In April 2000, husband was murdered in Arkansas not far from a convenience store he owned. In August 2000, one of husband's sons filed a probate action to determine the legal heirs.

The trial court granted comity to the Palestinian divorce, meaning that the marriage to subsequent wife was also valid.

The appellate court reversed and held that the Palestinian divorce decree was not entitled to comity. The court reasoned that without expert testimony regarding Palestinian law on residency requirements, the court was to assume that Palestinian law would have similar residency requirements as Ohio. Since Ohio law required plaintiff to be a resident of Ohio for at least six months before commencing an action for divorce, husband's religious divorce in Palestine was not valid. The appellate court remanded for further proceedings consistent with its decision.

***In re* Marriage of Obaidi and Qayoum**, 226 P.3d 787 (Wash. Ct. of Appeals, Div. 3 2010).

Husband and wife, both children of Afghan immigrants, signed a *mahr* agreement written in Farsi during an engagement ceremony known as a *nikah* ceremony. Husband, who did not speak, read, or write Farsi, did not know about the *mahr* until fifteen minutes before he signed it. Wife later filed for divorce.

The trial court concluded that wife was entitled to the $20,000 *mahr*, and accepted it as a prenuptial agreement based on Islamic law that provided an immediate and long-term dowry to the wife.

The appellate court called the lower court's consideration of Islamic law erroneous when the court validated wife's petition for divorce and said that the determination could not be reached by using neutral principles of law. The appellate court emphasized that "Islamic beliefs or policies" were not legally admissible and noted that a *contract must be based on a* "*meeting of the minds on essential terms*." The appellate court ruled that the *mahr* was invalid under contract law: there was no term promising to pay and no term explaining why or when the $20,000 would be paid to wife; husband was not told that he would be required to participate in a ceremony that would include the signing of a *mahr* until fifteen minutes before he signed the *mahr*; husband was unaware of the terms of the agreement until they were explained to him by an uncle after the *mahr* had been signed; and agreement was written in Farsi, which husband did not read, write, or speak.

***In re* custody of R**, 947 P.2d 745 (Wash. Ct. of Appeals, Div. 2 1997).

Couple was married under Muslim rights in Malaysia. Husband divorced wife by *talaq* in the Philippines. Philippines court recognized the *talaq* divorce and awarded custody to the father.

The trial court gave full faith and credit to the Muslim Sharia Court order and granted custody of R. to father, with reasonable visitation to mother. During the hearing mother feared that she had offended the judge and asked, "Are you mad at me, your honor?" The judge responded, "I don't like what you did. You took his son with the intent of never telling him where he was. We don't like that as judges."

The appellate court reversed the trial court ruling and remanded the case to the trial courts to be reheard before a different judge, declaring that "Washington courts presented with custody judgments of foreign country should consider strong public policy favoring the best interests of the child" and "even if foreign court had jurisdiction, mother was entitled to an opportunity to prove that the court proceedings *were not conducted in a manner contrary to Washington state law and public policy* . . . ."

S.D. v. M.J.R., No. A-6107-08T2 (Sup. Ct. of New Jersey, App. Div. 2010).

Husband and wife were married in Morocco when wife was seventeen years old. Husband and wife did not know each other before marriage. The couple moved to New Jersey, where wife filed first complaints of abuse in 2008. She requested a restraining order against husband while the divorce proceeded.

During the trial an imam testified that Islamic law requires a wife to comply with her husband's sexual demands, because the husband is prohibited from obtaining sexual satisfaction elsewhere. After acknowledging that this was a case in which religious custom clashed with the law, and that under the law, wife had a right to refuse husband's advances, and finding that domestic violence and assault did occur, the judge ruled that the husband did not act with a criminal intent when he repeatedly insisted upon intercourse, despite wife's contrary wishes.

> This court does not feel that, under the circumstances, that this defendant had a criminal desire to or intent to sexually assault or to sexually contact the plaintiff when he did. The court believes that he was operating under his belief that it is, as the husband, his desire to have sex when and whether he wanted to, was something that was consistent with his practices and it was something that was not prohibited.

The appellate court reversed after performing an extensive analysis of American religious belief/action jurisprudence: "The case thus presents a conflict between the criminal law and religious precepts. In resolving this conflict, the judge determined to except defendant from the operation of the State's statutes as the result of his religious beliefs. In doing so, the judge was mistaken." And, "[husband's] conduct in engaging in nonconsensual sexual intercourse was unquestionably knowing, regardless of his view that his religion permitted him to act as he did."

Comment: This example of a judge excusing criminal behavior because the person committing violence justified his action under Sharia is not unique to the United States. A recent study of 78 honor killing cases by the German Max Planck Institute for Foreign and International Criminal Law revealed that "[i]n 15 cases, the judge even deemed the 'honor' motive as a cause for leniency" and—an interesting statistic to note considering the German law enforcement practice of officially classifying hate crimes—"[i]n around 40 percent of cases, the honor killing aspect wasn't even addressed."[37]

Tarikonda v. Pinjari, No. 287403 (Mich. Ct. App. 2009).

Husband and wife were married in India. Husband obtained an Islamic summary divorce by verbally performing a *talaq* renunciation against his wife. The wife, possibly without knowing about the *talaq*, filed for divorce in Michigan. Husband filed a motion requesting that the Michigan trial court recognize the *talaq* divorce and dismiss wife's divorce complaint.

The trial court granted comity to the *talaq* verbal divorce husband pronounced in India and dismissed wife's complaint.

The appellate court reversed the trial court, holding that the *talaq* violated wife's right to due process because: (a) she had no prior notice of the *talaq* pronouncement, (b) she had no right to be present at the pronouncement and did not have an attorney, and (c) the *talaq* provided no opportunity for a hearing. The Michigan appellate court also held that the *talaq violates equal protection* because women do not also enjoy the right to pronounce *talaq*. Additionally, the appellate court held that the *talaq violates Michigan public policy* because, upon divorce, Islamic law allows women to recover only the property that is in their names, while *Michigan law provides for an equitable division of the marital estate*.

Tazziz v. Tazziz, 533 N.E.2d 202 (Mass. Ct of Appeals 1988).

Father and mother were married in Massachusetts according to an Islamic ceremony. Husband was Jordanian, and wife was a dual citizen of Jordan and the U.S. They then moved to Israel and lived for twenty-two years in East Jerusalem. Wife returned with minor children to Massachusetts and filed for custody of the children in state court. Husband wanted custody determined in Jerusalem by an Israeli Sharia Court.

The trial court deferred to the jurisdiction of the Israeli Sharia Court.

The appellate court returned the matter to the trial court with instructions to address several concerns, including "the nature and the composition of the Sharia Court and of the substantive law and principles which would be applied," and "the wishes, intentions, and purposes of each of the parties and of each of their minor children with respect to their continued residence in Massachusetts and in the United States." The appellate court instructed the lower court to inquire as to "whether and to what extent the law which the Sharia Court should apply is consistent with Massachusetts law . . . (in addition to due process requirements concerning such procedural matters as notices, representation by counsel, and opportunity to be heard)."

***In re* Marriage of Vryonis**, 202 Cal. App. 3d 712 (Cal. Ct. App. 1988).

Wife participated in what she believed to be a temporary Shiite marriage ceremony with husband, a member of the Greek Orthodox faith. Husband continued to date other women. After husband told wife that he decided to marry another woman, wife filed for divorce. Wife claimed that she had a good-faith belief that she and husband were married; and that her good-faith belief in their alleged marriage entitled her to

spousal support and property rights as a putative spouse under California law.

Trial court accepted a Shiite ceremony that signifies "temporary marriage" as valid and considered her a putative spouse for purposes of spousal support and property rights.

Appellate court reversed. On appeal, the California Court of Appeals held that a person could not successfully claim that he or she is a putative spouse by virtue of having performed a *muta* ceremony because *muta* is insufficient to allow a person to form a good-faith belief that he or she had entered into a *legal California marriage*.

Yaghoubinejad v. Haghighi, 384 N.J. Super. 339 (Superior Court of New Jersey, Appellate Division 2006).

The parties were married in 2001 in New Jersey. Couple signed an Islamic marriage certificate but did not obtain a marriage license. They executed the document before two witnesses and an ostensible officiant. When the wife filed for divorce in 2005, husband claimed they were never legally married.

The trial court held that the marriage was valid and granted the wife a divorce, saying that the surrounding circumstances of the marriage ceremony cured any defect in the marriage.

The appellate court reversed, saying that "the pleadings reveal no more than a ceremonial union" and holding that the "ceremonial marriage of purported spouses was absolutely void, as they failed to obtain a marriage license prior to ceremony, as required by statute."

The New Jersey statute in question (N.J.S.A. 37:1-10) accomplished three things according to the appellate court: "First, it abolishes common law marriage. Second, it requires that a license to marry be procured before the ceremony. Third, it requires that the marriage be solemnized by an authorized person or entity." The opinion cited a New Jersey Supreme Court case where the statute was applied and the court called all non-conforming marriage "absolutely void," stating that "*[i]t is axiomatic that a void act has no validity from the beginning,* and this is a fortiori true where an act is declared 'absolutely void' by a mandatory command of a statute." Dacunzo v. Edgye, 19 N.J. 443, 450 (1955).

Comment: Muslim attorney Abed Awad, an advocate for court recognition of Sharia marriage practices, complains that courts should have more flexibility to recognize off-record marriages as he notes that Muslim husbands intentionally marry without obtaining a license in states where such marriages are considered void:

> In our private practice, we regularly see Muslim women with marriage contracts who never procured a marriage license. There are probably thousands of Muslim marriage contracts in existence in New Jersey without the parties' first having obtained a license. Unscrupulous husbands are well aware that without a marriage license, their financial exposure in case of separation will be limited or nonexistent. Many intentionally marry without a marriage license purposefully to circumvent the applicability of New Jersey divorce and equitable-distribution laws.[38]

Section Three: Cases of note that offer compelling rationale for rejection of Sharia terms

***In re* Marriage of Altayar**, 139 Wash. App. 1066 (WA Ct. of Appeals 2007).

Husband and wife were married in Jordan in 2000. The marriage was arranged by family representatives after a three-day meeting, and bride's dowry was negotiated by her brother. At the time of the marriage, husband had been living in the U.S. for at least eighteen years. The couple resided in the U.S. after the marriage. The marriage certificate was issued under Islamic law and included a dowry (*mahr*) to wife consisting of one Quran and nineteen pieces of gold in the event of divorce or death. In 2001, wife—who had limited English language skills and testified that husband threatened to kill her—signed a quitclaim deed transferring her community property interests in the family home and husband's service garage to husband's brother. Husband divorced wife by saying "I divorce you" three times according to Islamic custom (*talaq*). Wife filed for divorce in 2005 in Washington State, alleging that husband beat her.

The trial court applied state law and found that the Islamic marriage certificate and dowry did not constitute a prenuptial agreement and that the quitclaim deed was signed under duress.

The appellate court affirmed the lower court's decision that the prenuptial agreement was invalid. The three-judge panel found that the exchange of nineteen pieces of gold for wife's equitable property rights under Washington law was not fair and that there was no evidence that wife received any independent advice during the three days between their initial meeting and marriage. The court rejected husband's argument that wife had an opportunity to seek independent advice because she anticipated an arranged marriage throughout her life: "*The court must first determine whether the agreement was substantively fair and reasonable for the party not seeking to enforce it. If so, the court analyzes whether the agreement was entered into voluntarily and with full knowledge*."

Aleem v. Aleem, 175 Md. App. 663 (Maryland Ct. of Special Appeals of Maryland 2007).

Husband and wife were married in 1980 in Pakistan. The couple eventually moved to Maryland, where wife filed for divorce in 2003. Husband then went to the Pakistani Embassy in Washington, where he performed *talaq* divorce, repeating three times "I divorce you" before witnesses. Husband asked that the Pakistani divorce terms according to Pakistani law apply.

The trial court refused to give the Pakistani divorce comity. The appellate court affirmed and stated that the "conflict is so substantial that applying Pakistani law in the instant matter would be contrary to Maryland public policy." The judge noted that the "'default' under Pakistani law is that the wife has no rights to property titled in husband's name, *while the 'default' under Maryland law is that the wife has marital property rights in property titled in the husband's name*."

Betemariam v. Said, So.3d 121 (FL Ct. of Appeal 2010).

In 2004 couple was married in Virginia according to Islamic ceremonial standards although wife was not Muslim.

The couple received a marriage certificate, written in Arabic and signed by husband's father and uncle as witnesses. No marriage license was obtained before their religious ceremony, nor was a marriage certificate filed with any clerk of court.

The appellate court upheld the trial court's ruling that the marriage was not valid in Virginia for lack of compliance with law requiring marriage license. The court noted *that neither party could claim lack of knowledge of the marriage license requirement and said that both parties were equally responsible for the invalidity of the marriage. Thus the court had no authority to award alimony or order equitable distribution of assets*. The court ruled that the unlicensed marriage was void *ab initio*.

Chaudhary v. Ali, Unpublished, No. 0956-94-4 (VA Ct. of Appeals 1995).

Husband and wife were married in 1982 in Pakistan and signed an Islamic marital agreement.

The appellate court upheld the trial court's ruling that the marriage agreement, *nikah nama,* was not valid according to Virginia law. The facts revealed that the agreement signed by the parties was not negotiable and required no disclosure of assets and, furthermore, custom demonstrated that parties do not receive legal counsel prior to signing the agreement. Finally, there was no evidence wife received independent advice prior to signing the agreement.

The appellate determination was based upon Virginia law and court precedent that defines a valid ante-nuptial agreement as including "a fair and reasonable provision therein for the wife, or—in the absence of such provision—there must be full and frank disclosure to her of the husband's worth before she signs the agreement, and *she must sign freely and voluntarily, on competent independent advice, and with full knowledge of her rights*."

Ellehaf v. Tarraf, Unreported, No. 257222 (MI Ct. of Appeals 2006).

Husband and wife were married in Michigan. Wife said she filed a marriage certificate in Lebanon, but there is no evidence that the parties ever traveled together to Lebanon to solemnize the marriage. The only evidence presented to support wife's claim that her marriage was valid in Lebanon was a registration that she unilaterally applied for four years after the marriage ceremony, after she had been granted two religious divorces from husband, and either shortly before or shortly after husband legally married another woman in Michigan.

Both the trial and appellate courts found that it was undisputed that the parties never obtained a marriage license from the clerk in the county in which both parties resided. Review of the record indicated that wife had translations of the marriage certificate and a letter by the imam notarized, but there was no certification of these documents by the Secretary of State. The appellate court denied validity of the marriage for failing to meet statutory requirements to form a legal marriage in the State of Michigan stating that *the law "does not include an exception for substantial compliance*."

Hage-Sleiman v. Hage-Sleiman, Unpublished, No. FA104033567S (CT Sup. Ct 2011).

Husband and wife married in Lebanon in 2003. They later moved to Connecticut, where wife filed for divorce in 2011. She petitioned for court enforcement of a prenuptial agreement that provided her $50,000 upon the termination of the marriage. Wife requested financial support and equitable distribution of property. Husband challenged the court's jurisdiction, arguing that a divorce action had been filed and completed in Lebanon.

The court declined to give comity to the divorce filed in Lebanon since Connecticut law required that at least one party be domiciled where divorce occurred. Both husband and wife were represented by power of attorney.

The court then evaluated whether practical recognition should be given to the divorce in the interest of equity. Since there was no evidence that declaring the Lebanese divorce invalid would "upset relationships or expectations formed in reliance upon the divorce" the court was not compelled to give practical recognition to the Lebanese divorce terms.

Comment: The court acknowledged that comity should be determined according to whether the divorce "was obtained by a procedure which denies due process of law in the real sense of the term, or was obtained by fraud, or where the divorce offends the public policy of the state in which recognition is sought, or where the foreign court lacked jurisdiction." In the context of divorce proceedings, "*an internationally foreign decree will be accorded treatment similar to a judgment of one of our sister states, unless it is found to be repugnant to some basic public policy of the state*."

Maklad v. Maklad, Unpublished, No. FA000443796S (CT Sup. Ct. 2001).

Husband and wife married in 1984 in Egypt. The couple later moved to Connecticut. In 2000 husband took their three children to Egypt without notifying wife. Husband then obtained a divorce in Egypt in 2000, also without notifying wife. Husband claimed that they both participated in a religious ceremony in 2000 in Connecticut during which he divorced wife pursuant to the tenets of Islam. Wife filed for dissolution of the marriage in Connecticut.

The trial and appellate court denied the validity of the Egyptian certificate of divorce because the decree was obtained by husband *without affording due process* to the wife. "*Comity does not countenance a court judgment that the plaintiff had no prior notice of and no opportunity to contest*." The court also found no compelling grounds upon which to recognize the divorce for reasons of equity.

Mir v. Birhandi, Unpublished, Nos. 2006 CA 63, 2006 CA 71, 2006 CA 72 (Ohio Court of Appeals, 2d Dist. 2007).

Husband and wife were married in Iran in 1982. After they emigrated to the U.S., husband filed for divorce in Ohio. While the husband's divorce action was pending, wife went to Iran and obtained a divorce there.

The trial court ruled that Ohio courts had jurisdiction to rule on the divorce disputes by determining that the Iranian divorce decree was not binding upon the Ohio court.

The appellate court also ruled that the Iranian divorce would not be recognized by comity:

> The term "comity" refers to an Ohio court's recognition of a foreign decree, and it is a matter of courtesy rather than of right. The several states of the United States are empowered, if they freely elect to do so, to recognize the validity of certain judicial decrees of foreign governments where they are found by the state of the forum to be valid under the law of the foreign state, and where such recognition is harmonious with the public policy of the forum state, taking into consideration all of the relevant facts of the particular case. A decree of divorce will not be recognized by comity where it was obtained by a procedure which denies due process of law.

This case quoted ***Rahawangi v. Alsamman***, No. 83543 (Ohio Court of Appeals, 8th Dist. 2004) where the Ohio trial court and appellate court also denied comity to a Syrian divorce because both courts found husband's divorce service of process (notice) defective:

> *A decree of divorce will not be recognized by comity where it was obtained by a procedure which denies due process of law in the real sense of the term, or was obtained by fraud, or where the divorce offends the public policy of the state* in which recognition is sought, or where the foreign court lacked jurisdiction.

Moustafa v. Moustafa, Unpublished, 166 Md.App. 391 (MD Court of Special Appeals 2005).

Husband and wife were married in 1976 in Egypt. Couple moved to the U.S. in 1978 and divorced in Egypt in 1985. This divorce decree was adopted by the State of Maryland in 1987. In 1985 husband married another woman, telling his first wife that he only married second wife to become a U.S. citizen. Husband and first wife were re-married in Egypt in 1986. Husband divorced second wife in 1989. Husband claimed that he was divorced from second wife at time of re-marriage to first wife. He then told court that he had obtained a divorce from first wife in Egypt in 2002. The Maryland courts considered whether it was proper to apply Egyptian law to the annulment issue in deciding whether it must grant an annulment to first wife on the grounds that husband committed bigamy when he re-married her.

The appellate court recognized the trial court's determination that wife neither was notified nor participated in the Egyptian divorce proceeding and concluded that she was not afforded due process. The Egyptian divorce was not validated.

The appellate court declined to apply Egyptian law to the annulment issue since husband was required by Maryland law to (1) provide notice of his intent to rely upon that law, and (2) prove what that law is. Even if husband had complied with these requirements, the appellate court stated: "Although foreign judgments are entitled to a degree of deference and respect under the doctrine of comity, *courts will nonetheless deny recognition and enforcement to those foreign judgments which are inconsistent with the public policies of the forum state*."

Mussa v. Palmer-Mussa, No. 10A12 (N.C. Sup. Ct., 2012).

In 1997 wife married husband #1 in North Carolina according to an Islamic ceremony. The couple did not obtain a marriage license. The religious ceremony was performed by a truck driver who was not an imam and who was not licensed to perform marriages. Wife and husband #1 lived together but claimed they never consummated the marriage. Later that year, wife performed an Islamic verbal divorce from first husband.

Later in 1997, wife married Mussa (husband #2) in North Carolina with benefit of a marriage license. In 2008, wife filed for divorce, after couple had 3 children. The district family court awarded her child and spousal support. Mussa filed for an annulment based on bigamy, alleging his marriage to wife was void because she was still legally married to first husband at time of their marriage. The family court dismissed Mussa's request for an annulment, holding that the wife was never legally married to first husband due to non-compliance with laws governing marriage formalities. Therefore, the second marriage (the subject of the dispute) was valid.

The court of appeal ruled that the wife's first Muslim marriage was voidable, but had not been voided. The appellate court then decided that the Islamic divorce that wife performed to end the first marriage was not valid since it had never been submitted for legal judgment. The holding quoted North Carolina law to say that there is *no authority supporting the dissolution of a marriage by religious means* that can be deemed to be the equivalent of a judicial determination regarding the validity of a marriage. Based upon the legally flawed divorce, the appellate court decided that the second marriage was bigamous and not valid.

The North Carolina Supreme Court did not get to an analysis of the Islamic divorce since the court found agreement with the family court that the first religious marriage was not valid based upon legal requirements that marriage officials had to be authorized ministers or magistrates. This final determination upheld the validity of the second marriage by agreeing that wife's first marriage was not valid.

Comment: In a footnote, the North Carolina Supreme Court echoed the district family court's "concern[] about the unfairness of the Plaintiff's inconsistent positions in the earlier proceedings" as to the validity of his marriage to defendant, "especially in light of record evidence that suggests plaintiff may have been aware of defendant's [prior] relationship." This footnote indicates that both courts were aware of the potential leverage available to husband if he produced the bigamy claim to the end of evading support obligations.

Rahawangi v. Alsamman, Unpublished, 2011 WL 6034745 (OH Ct. of Appeals 2004).

Husband and wife were married in 1991 in Syria. The couple then moved to Ohio. In 1999 husband filed for divorce in the Spiritual Court of Syria. Wife had no notice of those divorce proceedings and did not participate. Husband did not personally attend the proceedings, but was represented by a

family member. Husband then remarried and did not inform first wife.

The trial and appellate court found that the wife did not receive actual or constructive notice of the divorce proceedings in Syria. The trial court noted that Syria was not a signatory to the Hague Convention in considering what kinds of process might be provided to wife. The husband sent notice of the divorce proceedings to the wife's mother's house in Syria, with full knowledge that the wife was in the United States. Both courts found that this lack of due process fatally flawed the Syrian divorce proceeding and thus refused to uphold the Syrian divorce decree.

The appellate court affirmed that the practice of comity commends consideration of a foreign decree and is a *matter of courtesy rather than of right*. The opinion recognized that states "are empowered, *if they freely elect to do so*, to recognize the validity of certain judicial decrees of foreign governments where they are found by the state of the forum to be valid under the law of the foreign state, and *where such recognition is harmonious with the public policy of the forum state*, taking into consideration all of the relevant facts of the particular case."

People v. Benu, 87 Misc.2d 139 (New York City Criminal Court 1976*).

Wife testified that in 1975, when she was 13 years old, she was taken by her brother to her father's house. A young man that she recognized to be 17 was also picked up and rode with them to the father's home. Father informed wife that she was to be married to the 17-year-old, and a marriage ceremony was performed. Wife never consented. Officiant claimed that he had performed many marriages and spent much time at the mosque but was not an imam.

The criminal court judge noted that the officiant's lack of authorization to perform a marriage and the failure to obtain a license caused the validity of the marriage to be voidable but not void, but declared that the possible invalidity of the marriage was not a defense to the criminal charges. The judge said that "the public policy of this state is to discourage early marriage, or, at best, to demand that the parents of certain underage children consent to their assuming the responsibilities of matrimony," also noting that "persons of [this age] lack the awareness of the obligations and responsibilities owed by partners to a marriage to each other, to society, and to their children." The court "unreservedly" adopted language from *State v Gans,* 168 Ohio St. 174 (1958), to affirm the "general rule, *whenever and wherever the scope of a 'wife's' activity is limited by custom, tradition or law merely to consortium and childbearing, she is looked upon as nothing much more than a chattel -- a piece of personal property to be treated and dealt with as such*." The father was found guilty of endangering the welfare of a child.

*This was a criminal law case.

***In re* Ramadan**, 153 N.H. 226 (NH Sup. Ct. 2006).

Husband and wife were married in 1986 in Lebanon. Prior to their marriage, the couple entered into an Islamic marriage contract where husband promised a deferred dower (*mahr*) payment of 250,000 Lebanese liras. Husband was, at the time, a resident of the United States, and the couple settled in the U.S. shortly after they were married. In 2003, wife filed for divorce in New Hampshire where they resided. Wife said that the day before she filed for divorce husband performed *talaq* and said "I divorce you" to wife three times. Husband then traveled to Lebanon to sign divorce papers. Husband claimed that the Lebanese divorce prevailed and that the United States proceeding should be dismissed.

The trial court found that no valid judicial process was instituted by husband in Lebanon prior to the date wife filed for divorce. Appellate court affirmed and denied that comity should be given the Lebanon divorce action: "*Comity is a discretionary doctrine that will not be applied if it violates a strong public policy of the forum state, or if it leaves the court in a position where it is unable to render complete justice*."

***In re* Marriage of Shaban**, 88 Cal.App.4th 398 (Cal. Ct. of Appeal, 4th Dist., Div. 3 2001).

Husband and wife married in 1974 in Egypt. The marriage agreement was signed by the husband and the father-of-the-bride. At time of divorce in California, husband offered three translations of the *sadaq*, which the court deemed lacking any substance. Husband claimed that they conveyed the couple's intent to "follow Islamic law" if there was a divorce.

The trial court held that the contract was unenforceable since "a writing must state with reasonable certainty what the terms and conditions of the contract are." The court of appeals upheld the trial court and said that the *sadaq* was not written in a manner that could be adjudicated according to American contract legal standards: "An agreement whose *only substantive term in any language is that the marriage has been made in accordance with "Islamic law" is hopelessly uncertain as to its terms and conditions*."

Zawahiri v. Alwattar, Unpublished, No. 07AP-925 (OH Ct. of Appeals, 10th Dist., 2008).

In 2006, the parties were married in Ohio and obtained a marriage license. They entered into an Islamic marriage contract that included a *mahr* provision. A Muslim imam solemnized the marriage. The *mahr* was divided into two parts: (1) requiring the husband to make an immediate payment of a ring and gold; and (2) deferring the payment of $25,000 to a later date. Husband filed for divorce in 2007. Husband and wife used the words *mahr* and dowry interchangeably during ceremony. However, the court noted that "unlike a dowry, a *mahr* is not money or property that a wife brings her husband." Instead, the Islamic agreement entails a "specific sum that a husband owes to his wife, which is payable upon divorce or death of the husband."

The appellate court affirmed the trial court's refusal to enforce the *mahr* provision on two grounds: (1) the Establishment Clause of the Ohio Constitution prohibited court-ordered enforcement of a contractual provision requiring performance of a religious act, i.e., the payment of the *mahr*; and (2) the parties entered the marriage contract under circumstances that rendered the contract invalid and unenforceable as a prenuptial agreement.

Before considering whether the prenuptial agreement met Ohio legal requirements, the court engaged in a required preliminary analysis of whether the agreement met the standards of an ordinary contract. "*Prenuptial agreements must include all the elements of a contract, including an offer, acceptance, contractual capacity, consideration, and manifestation of mutual assent*."

Then the court analyzed the terms of the prenuptial according to Ohio law: (1) the parties entered into it freely without fraud, duress, coercion, or overreaching; (2) there was full disclosure, or full knowledge and understanding of the nature, value, and extent of the prospective spouse's property; and (3) the terms do not promote or encourage divorce or profiteering by divorce.

The appellate court found that the husband entered into the *mahr* as a result of overreaching or coercion by his wife. The imam had raised the issue of including a *mahr* provision in the contract only two hours prior to the ceremony, and the husband agreed to a postponed *mahr* of $25,000 because he was embarrassed and stressed. Also, the husband did not consult with an attorney prior to signing the *mahr*.

C. European Encounters with Sharia Family Law and Arbitration Tribunals

The United Kingdom's Sharia Law Tribunals

A 2009 study by Civitas Institute for Civil Society[39] revealed that the United Kingdom now has more than eighty-five Sharia tribunals that settle financial and family disputes. Public officials, commenting on the study, highlighted the same conflicts with public policy and civil rights warned of by American commentators. Philip Davies, Tory MP, said: "[These courts] do entrench division in society, and do nothing to entrench integration or community cohesion. It leads to a segregated society." Davies also confirmed the potential for leveraging legal options when alternatives offer advantage to one party: "We can't have a situation where people choose the system of law which they feel gives them the best outcome. Everyone should be equal under one law."[40]

There are also findings that suggest specific Sharia determinations in violation of basic civil rights:

> Examples set out in his study include a ruling that no Muslim woman may marry a non-Muslim man unless he converts to Islam and that any children of a woman who does should be taken from her until she marries a Muslim. Further rulings according to the report, approve polygamous marriage and enforce a woman's duty to have sex with her husband on his demand.[41]

The House of Lords, in a 2008 unanimous ruling, said that there was no place in Sharia for the equal treatment of the sexes. Lord Hope of Craighead said that the right to non-discrimination was a core principle in the protection of human rights. "Sharia law as it is applied in Lebanon was created by and for men in a male-dominated society . . . . There is no place in it for equal rights between men and women," he said.[42]

The European Court of Human Rights in Strasbourg has also weighed in, saying that it is "difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on Sharia, which clearly diverges from Convention values."[43]

Great Britain's Home Affairs Committee has commissioned several studies on the incidence of arranged marriage in the country. Results from three reports showed the number of *reported* arranged marriages to be between 5000 and 8000,[44] with 1500 cases *reported* in 2011.[45] In response to the increasing frequency of forced marriages as well as the revelation that the subjects are "much younger age than previously thought," a measure to criminalize forced marriage has been introduced.[46]

The Baroness Caroline Cox of the UK House of Lords has introduced a measure to address this two-track legal system. According to Cox, "The Arbitration and Mediation Services (Equality) Bill[47] will seek to stop parallel legal, or 'quasi-legal,' systems taking root in our nation." Cox has expressed concern "about the treatment of Muslim women by Sharia Courts" and wants to assure that women who come to a Western culture like the United Kingdom will not say, "[W]e came to this country to escape these practices only to find the situation is worse here."[48]

The UK Ministry of Justice attempted to evaluate the Sharia Court outcomes to determine the extent of divergence from UK law, but the investigation was canceled for lack of cooperation from the Muslim courts.[49]

Sharia Conflict Resolution in Germany

German journalist Joachim Wagner recently investigated Islamic "shadow justice" for his new book on Sharia parallel arbitration procedures. Responding to an interview for *Der Speigel*, he described Islamic mediations as secret and "outside the German justice system." He noted that the settlement "compromise" was "often achieved through violence and threats." After nine months of study, he concluded that "Islamic arbitrators aren't interested in evidence when they deliver a judgment."[50]

Sharia Law Court in Belgium

The first Sharia court in Belgium is located in Antwerp's Borgerhout district, and it proposes to mediate family law disputes for Muslim immigrants in Belgium. "The self-appointed Muslim judges running the court are applying Islamic law, rather than the secular Belgian Family Law system, to resolve disputes involving questions of marriage and divorce, child custody and child support, as well as all inheritance-related matters."[51]

France Has Banned Sharia Divorce Adjudication

In 2004, the French Cour de Cassation ruled that Islamic divorces are in fundamental contravention of French public policy since they infringe the principle of equality between spouses that is mandated by the European Convention of Human Rights (Article 5, Protocol VII).[52]

Dutch Legislature Proposes Ban on Forced Marriages and Curbs on Multicultural Policies

The Dutch government has announced that it will stop offering special subsidies for Muslim immigrants, and new

legislation is expected that will outlaw forced marriages and will also impose tougher measures against Muslim immigrants who lower their chances of employment by the way they dress. The government will impose a ban on face-covering Islamic burqas as of January 1, 2013.[53]

Greece Moves to Deny Sharia Family Law Authorities

Greece has initiated family law reforms designed to address Muslim polygamy and male-only divorce concerns. The Mufti will no longer have judicial authority and will "only be a religious leader." Greek marital, child, and heredity issues will be resolved according to Greek laws.[54]

Endnotes

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