

**Part III**

No Altars: a Survey of Islamic Family  
Law in the United States

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## Introduction

§ THE family unit has long served as an organizing system for both social and legal regimes. The mechanisms to contract a marriage, raise one's children, or dissolve a family are now basic elements of any well-developed legal framework. Central to the establishment of a family law system is the recognition that it will be invoked most often when a conflict occurs between those who are related to each other through the family unit. Indeed, those who focus on family law issues find that 'the legal system is perhaps the most obvious manifestation of the value which society places on institutionalized mechanisms for conflict resolution' (Kressel 1997: 48). Religion has also played a role in defining family interactions and their social consequences. In addition to preserving the future of a religious tradition, the concept of the family contributes to the development of religious law, because the complex financial, social and legal relationships in the family structure demand constant attention and regulation. Moreover, the intimate nature of family relations often triggers the desire for religious sanction of one's actions, and most religions have filled this need well. Islam is no exception. Muslim jurists' *fiqh* addresses critical aspects of family life in various detail, from the requirements of a valid marriage to mechanisms for divorce, and a variety of questions in between.

Muslims in the United States are in a complex position when it comes to applying family law, because they are governed by two sets of relevant rules, one religious and the other secular: Islamic law governs the family relations of those Muslims who want to validate before God their most intimate relations, while, simultaneously, United States law binds them through simple territorial sovereignty.<sup>1</sup> Considering their religious identities important enough not to sacrifice at any secular altar, many Muslim couples are asserting their Islamic legal rights in American family courts and, as a result, the law surrounding Muslim marriages is becoming an important and complicated part of the US legal landscape.

Part III surveys the application and perception of Islamic family law in the United States, and the impact of living in this intersection of legal authority on Muslim families and communities. In the first chapter, 'Islamic Family Law in American Muslim Hands', we address the intellectual and social discourse of US Muslims on Islamic family law topics, paying special attention to key issues of concern and debate and providing a brief overview of the sources of information available. In the following chapter, 'The Muslim Family in the USA: Law in Practice', we examine the practices of Muslims in conducting their marital lives

in the USA, leading to a review in Chapter 12 of court cases involving Muslim marriage and divorce litigation in the United States, drawing general conclusions where possible with regard to the attitudes of US courts. The final chapter puts this study in broader context by addressing the theoretical roots of the current US Muslim experience. Special attention is given to uniquely US-based efforts to interpret and apply Islamic norms and values in everyday lives. Looking at both academic and grassroots work, this review also points the reader in the direction of future trends and goals, including potential community-based efforts to address Islamic family law issues not satisfactorily resolved in formal American court-rooms.

This section will stand out from the overall project (surveying global Islamic family law and directed by Abdullahi An-Na'im) of which it is a part, because it deals with Muslims as a minority population in a non-Muslim state, presenting findings about the use of Islamic family law in places where it is not officially enforced by the state. The reader should thus keep in mind that most family issues involving Islamic law in this minority population are handled informally through internal mechanisms (family, community leaders, close friends, etc.), because Islamic law *per se* is not enforceable by state authority in the USA. Some cases do rise to the level of formal litigation in US courts, as will be seen, but the cases discussed in Chapter 12 may be unrepresentative of all applications of Muslim family law even within the formal court system, and are most probably not representative of applications of Islamic family law in the country as a whole. Nevertheless, despite its limitations in terms of space and scope, this study aims to provide the reader with a basic overview of how Muslims in the USA discuss topics of Islamic family law, the way it impacts on their lives directly, how the judicial system addresses its Muslim minority in these most intimate family issues, and, ultimately, what might be expected in the future from this unique community.<sup>2</sup>

## TEN

# Islamic family law in American Muslim hands

### Authority figures

§ TO understand the wide variety of applications of Islamic family law that we will encounter in this study, it is important first to realize that the Muslim population in the USA is made up of a complex and continuously changing demographic. Of the estimated 6 to 8 million Muslims in the United States, about half are immigrants from Asia, the Middle East, Africa, Europe – literally, all over the world.<sup>3</sup> The other half is indigenous – meaning not only African Americans and European Americans, but also Native Americans and Latinos, as well as second- and third-generation children of immigrant parents. Moreover, of all the above ethnicities, any number can be converts to Islam or raised in the faith from birth.

This wide range of backgrounds is fertile ground for the pluralism of Islamic law (its *ikhtilaf* structure of simultaneously valid differing opinions)<sup>4</sup> and results in a healthy diversity of ideological perspectives among Muslims in the USA. Thus, we find Muslims on all sides in debates around topics such as polygyny, gender roles and adoption, to name just a few.<sup>5</sup> In finding a legal opinion to apply in their own lives, individuals can choose between the guidance of local Muslim scholars, community leaders, activist organizations, or their own personal interpretive efforts on a given question. Obviously, this plurality of sources creates a wide variety of applications of marriage and divorce procedures in the Muslim community – applications surveyed in more detail below.

Another wrinkle in US Muslim family law practices stems from the structure of authority in Islamic jurisprudence. Because there has never been an official church certifying individuals to speak on behalf of the religion, the field is open for any dedicated Muslim to seek to act as imam and lead a community. In a large Muslim society, there are usually societal checks to help maintain a sufficiently qualified cadre of these spiritual leaders. Even further, in Muslim countries with a formal system of *shari'a*-based family law in place, as well as private pious and learned individuals available to guide the individual petitioner, there are likely to be state-recognized and sometimes state-appointed muftis to issue guidance on issues of law, and state-appointed judges to apply it. In the USA, however, where there are no such checks, the quality of imams tends to run the gamut, and many take their place with little or no training in critical leadership areas (such as

Islamic jurisprudence, relevant US law and the workings of the US legal system, or counselling and mediation skills).<sup>6</sup> The impact of this phenomenon on the application of Islamic family law in the United States is significant, because it is to these imams that many go for Islamic marriage and divorce proceedings – proceedings that end up having varying validity under both US and Islamic law, depending on the imam. For example, many imams will not officiate at an Islamic marriage ceremony unless the couple has a valid state marriage licence first, or the imams will themselves be qualified to officiate marriages under the laws of the state, thus ensuring the secular validity of the Muslim marriage, but not all imams concern themselves with secular law and procedure. New Jersey attorney Abed Awad (interviewed in 2000) reports that some mosques in New York and New Jersey officiate Muslim marriages without any civil marriage licence, and in some cases even issue divorce and alimony orders where, arguably, Islamic law would not justify it. Maryland attorney Naima Said reports the same phenomenon in the Washington DC area (Said 1998). Similarly, Cherrefe Kadri (interview, 2000), a lawyer based in Toledo, Ohio, comments on the sharp difference between family dispute resolution processes undertaken under the authority of an untrained imam and those, for example, of an imam not only knowledgeable about Islam but also with experience as a social worker in the West. In the former, disregard for US marriage and divorce certification often prevails, not to mention frequent gender bias cloaked under the name of Islam.

Looking more specifically at what happens in family disputes, we first see that, as is true worldwide, many cases are resolved outside any formal process, whether a court or an imam. In the USA as elsewhere, Muslims often prefer to keep family conflicts within the family, and will turn first to relatives as arbitrators and mediators. One Muslim marriage counsellor himself reports that he advises Muslim couples to go first to parents, uncles or aunts before approaching him (Chang 1990). It might be noted, however, that this is often more difficult for immigrants, whose extended family is most likely to be overseas. Alternatively, where there are Muslim attorneys or social workers, these professionals often act as informal mediators, drawing client confidence from their expertise in the Western legal system combined with an understanding of Muslim concerns and, sometimes, their bilingual language skills. For example, Los Angeles attorney Sermid al-Sarraf (interview, 2000) reports that, in family dispute cases, he often first describes to clients what is likely to happen in full litigation in an American family court (including the accompanying high cost), and then assists the parties to try to reach an amicable settlement that avoids this costly approach. Similarly, Toledo attorney Cherrefe Kadri (interview, 2000) notes that she uses her mediation and Arabic-language skills to assist trust-building with clients attempting to resolve disputes out of court. Al-Sarraf (interview, 2000) also notes that he has an arrangement with a local Muslim scholar for reference on Islamic legal issues if any arise. He states that he has seen Islamic law referred to occasionally by the parties during these negotiations (for example, one party asserting things such as

'under Islam, you would get nothing'), albeit sometimes inaccurately. Usually, however, his experience is that the reality of the US legal system is what drives the ultimate resolution of these cases.

### Intellectual resources

Muslims in the USA have a plethora of sources from which to learn about Islamic law, and Islamic family law in particular. A remarkable number of English-language books, articles, magazines, scholars, conferences, and now websites on this topic are available. They range in accessibility from the most readily available mainstream bookstores and popular Muslim magazines to more obscure academic pieces in scholarly journals and research encyclopaedias. The information available in these sources covers not only expositions and translations of classical doctrine, but also reformist and practical guides for the lay Muslim.

Among the more readily available resources are books such as those by Esposito (1982), Doi (1984, 1989) 'Abd al-'Ati (1977) and al-Qaradawi (n.d.), which include fairly thorough summaries of classical Islamic jurisprudence relating to marriage and divorce. The first two also include examinations of the application of Islamic family law in certain modern Muslim states, which are of considerable interest; for Muslims in the United States, however, it is the classical jurisprudence that is of the most relevance, as they seek to abide by Islamic law in the absence of state enforcement.

Other resources on Islamic family law are books written as historical and sociological resources for a primarily academic audience. These books include works like Amira el-Azhary Sonbol's *Women, the Family and Divorce Laws in Islamic History* (1996), a collection largely made up of empirical studies giving a sense of family law issues as they played out in Muslim history, with some special focus on contradicting the claims that Muslim women were prisoners of Islamic family law. The academic works, whether monographs or articles in legal and professional journals, may be less accessible to the lay reader, and offer for example critiques of legal reasoning in a particular school of thought or a particular legal issue, or presenting the law in a social or historical context. An example of an academic work with particular relevance for the USA is Mohammad Fadel (1998), who undertakes a detailed legal analysis of the doctrine of the guardian in Maliki law, not only explaining the legal theory behind the rule allowing a minor to be contracted in marriage by his or her guardian, but also critiquing what he determines is a basic legal error in the Maliki doctrine of emancipation for girls. He also makes the innovative argument that a local Muslim community should play the role of legal guardian for Muslims living as a minority in a non-Muslim country such as the United States, enabling them to adjust for these sorts of discrepancies in classical doctrine. Other works investigate the parameters of the Hanafi doctrine permitting a woman to contract herself in marriage without a guardian (Siddiqui 2000; Ali 1996). Azizah al-Hibri (1997) has also taken up the

question of the right of a Muslim woman to contract her own marriage, as well as questions of a wife's duty to obey her husband and to initiate divorce.

Another aspect of considerable scholarly study is the Muslim marriage contract and its various elements. Works here include Farah (1984), Rapoport (2000), Shaham (1999) and el-'Alami (1992). Azizah al-Hibri (1993) compares Muslim marriage contracts with prenuptial agreements in an inter-faith symposium article and Mohammed Tabiu (1990–91) addresses the implications of defects in Muslim marriage contracts.

Finally, the complicated area of dissolution of marriage is also a subject of considerable academic writing, such as by el-Arousi (1977), Carroll (1996) and Quick (1998). The latter addresses this subject in the particular context of Muslims in North America, and reviews the efforts and actions taken by Muslim organizations in the West to achieve dissolution of marriage by an Islamic authority.

For those seeking a more practical resource on Muslim marriage, there are works such as the pieces by Maqsood (1998) and al-Khateeb (1996) which take a conversational tone to offer guidance based on Islamic law and principles to Muslim married couples. Works like these are not legal references on Islamic family law, but rather are focused on translating the basic Islamic rules of marriage for the average Muslim in plain language. Maqsood, whose book offers frank advice on the emotional, spiritual and sexual aspects of married life, has been called 'the John Gray of the Muslim world'.<sup>7</sup> A similar book by Mildred M. el-Amin (1991) begins each chapter with 'Dear Couple' or 'Dear Sister/Brother'. Al-Khateeb's article includes a sample marriage contract, examples of stipulations, and a short list of Islamic legal rules affecting marriage (see 'Terms of the contract', in Chapter 11 for further discussion of the resurgence of interest in Muslim marriage contracts).

Resources on Islamic family law often overlap with literature on the continually popular topic of women and Islam, as is evident from the number of Muslim family law works including the word 'women' in their titles. Many of these authors seek to critique classical Islamic family law with an eye to a women's empowerment, sometimes urging new interpretations of old texts.<sup>8</sup> Specifically US examples of this are included among the essays in Webb's *Windows of Faith: Muslim Women Scholar-Activists in North America* (2000) by well-known American Muslim legal scholars Azizah al-Hibri and Maysam al-Faruqi. Al-Hibri's piece, 'An Introduction to Muslim Women's Rights', includes an overview of marriage relations in Islam (e.g. contractual terms, guardianship, maintenance, divorce procedures) emphasizing how Islamic principles promote women's liberty in a way contrary to how these principles were applied and interpreted in patriarchal Muslim societies, ultimately leading to biases in the law itself. Maysam al-Faruqi's chapter, 'Women's Self-Identity in the Qur'an and Islamic Law', focuses on particular Qur'anic verses often cited on the subject of women's rights (e.g. male superiority over female, obedience of wives, beating), providing a critical analysis of juristic interpretation of each. Articles and collections like these testify to the emergence of a new

contribution to the field of women and Islamic family law: the contribution of a specific US Muslim scholarly literature written by women. Gisela Webb says in her introduction to *Windows of Faith* that such works are 'evidence of the lively, creative, critical, and self-critical discussions currently taking place in the academy and in Muslim communities and professional organizations in the United States, raising issues of religious pluralism, democracy, gender, and modernity as they relate to Islam and Muslim identity' (Webb 2000: xii). Khaled Abou el Fadl's *Speaking in God's Name: Islamic Law, Authority and Women* (2001) similarly takes up issues of Islamic family law in the context of his critical analysis of authority and authoritarianism in Islamic law and society.

Consistent with Webb's observation, Muslim organizations are also a rich source of information on Islamic law, and Muslim women's organizations are especially interested in disseminating information about family law, often with a progressive look at well-known issues. For example, the Muslim Women's League, 'a non-profit American Muslim organization working to implement the values of Islam and thereby reclaim the status of women as free, equal and vital contributors to society', includes among its many position papers those titled 'An Islamic Perspective on Sexuality' and 'An Islamic Perspective on Divorce'.<sup>9</sup> Another example is Karamah: Muslim Women Lawyers for Human Rights, an organization which defines its objectives as seeking to 'increase the familiarity of the Muslim community with Islamic, American, and International laws on the issues of human rights', and 'provide educational materials on legal and human rights issues to American Muslim women'.<sup>10</sup> Karamah's website lists publications for further study, including family law titles such as 'Family Planning and Islamic Jurisprudence', and 'Marriage and Divorce: Legal Foundations', both by Azizah al-Hibri, founder of Karamah.

Of course, not all Muslim organizations take a progressive, reformist attitude towards the subject of Islamic family law and women's rights. Many Muslims advocate more traditional interpretations such as encouraging wifely obedience (in all but directly anti-Islamic behaviour), the primacy of motherhood and discouraging public careers involving cross-gender interaction. Examples of this end of the ideological spectrum can be found on websites such as that of Alsalafoon, which posts pieces such as 'The Duty of a Woman to Serve her Husband',<sup>11</sup> and in books like Muhammad Abdul-Rauf's *Marriage in Islam* (1995), which, for instance, describes household management as the wife's primary responsibility, though acknowledging that individual couples may agree on other arrangements.

The final arena of readily accessible resources on Islamic family law is the internet. This modern technology has created several avenues for the dissemination and exchange of information on Islam, and Islamic family law is no exception. These fora range from discussion groups (e.g. members of the 'sisters' list moderated from Queens University in Canada<sup>12</sup> often discuss the legal and social parameters of Muslim marriage and divorce) to online universities (e.g. the College of Maqasid Shari'a<sup>13</sup> offers a twenty-credit 'Introduction to Family Law' course)

and websites devoted to education of family law-related issues, such as <www.zawaj.com> which describes itself as 'a complete portal site for information and resources regarding Muslim marriage, weddings, family relationships, and parenting'. On its website are posted articles describing the proper relationship between spouses, raising Muslim children, sexuality and Muslim cases in the courts. There is even a list of recommended scholars to contact for *fatwas* (Islamic legal opinions), complete with their email addresses.<sup>14</sup> Another site, called 'Loving a Muslim', includes a summary of Islamic family law in its effort to address the 'non-Muslim woman in a loving relationship with a Muslim man'.<sup>15</sup> Finally, <beliefnet.com>, the popular inter-faith site on religion, includes several links to family law issues in its Islam section.

Reviewing all these sources in the context of current discourse in the United States, one aspect of Islamic family law stands out as being of particular interest: the concept of the Islamic marriage contract. This subject has attracted recent and continuing attention, stemming largely from the fact that the jurisprudential importance of marriage as a contract makes drafting a marriage contract an important tool to particularize individual marital relationships, and has in fact been used as such throughout Islamic history. As Sharifa al-Khateeb puts it in her 1996 article in a Muslim women's magazine: 'The Islamic marriage contract is meant to solidify the [purposes of an Islamic marriage] and specify stipulations important to the woman and man.'<sup>16</sup> Interest in the Islamic marriage contract is growing, prompting a full weekend conference at Harvard Law School,<sup>17</sup> a panel at the 2001 national conference of the Islamic Society of North America (see Lieblich 2001), numerous Muslim magazine articles, and website discussions, all of which have contributed to educating the public (both Muslim and non-Muslim) about this now underutilized *shari'a* tool (ibid., p. 1). These efforts highlight the fact that Muslim marriage contracts can contain a myriad of additional clauses, from a promise of monogamy and a wife's delegated right of unilateral divorce, to equal participation in household chores and the right to complete one's education.<sup>18</sup> Some note that Islamic schools of thought differ over the enforceability of these clauses, though these details are not always fully explained in the Islamic law summaries available for the layperson's practical use.<sup>19</sup> Finally, addressing the question of the Muslim marriage contract in the United States, the Karamah organization lists among its projects 'drafting a model Islamic marriage contract which meets the objections of those American courts that have found Islamic marriage contracts unenforceable'<sup>20</sup> – a project whose importance will become apparent in Chapter 12, summarizing the treatment of Muslim marriage contracts by US courts.

Islamic law on divorce is also a popular topic among American Muslims, as the divorce rate rises and Muslims seek to understand their marital status under both religious and secular law. The lay Muslim's knowledge about divorce generally includes awareness of *talaq*, the husband's unilateral right to divorce by oral declaration, but details on its practical application (terminology, revocability,

voidability) are less well known. Alternative methods of divorce such as *khul'* (divorce for remuneration conducted through mutual consent) and *faskh* (judicial dissolution) are further from public consciousness, and the situation becomes more complicated when one adds in the potential for a wife to include a delegated *talaq* right in the marriage contract.<sup>21</sup> Besides analyses of divorce law in the literature mentioned elsewhere in this review, some contributions by Muslims and Muslim organizations in the USA go beyond the classical Islamic law on the subject, offering instead non-mainstream interpretations. For example, the Muslim Women's League position paper, 'An Islamic Perspective on Divorce', after explaining the basic elements and types of divorce in classical jurisprudence, goes on to comment: 'The controversy with divorce lies in the idea that men seem to have absolute power in divorce. The way the scholars in the past have interpreted this is that if the man initiates the divorce, then the reconciliation step for appointing an arbiter from both sides is omitted. This diverges from the Qur'anic injunction.'<sup>22</sup> With this argument, the Muslim Women's League critiques the established *fiqh* allowing unilateral husband-initiated divorce, by appealing to the Qur'anic verse stating 'if you fear a breach between them, then appoint two arbiters, one from his family and the other from hers; if they wish peace, God will cause their reconciliation' (Qur'an 4: 35).

Whether it is in the form of summaries of classical mainstream jurisprudence or progressive interpretations of original religious texts, there is significant information on Islamic family law for Muslims in the USA seeking to educate themselves, either in the basics or the more complicated nuances of Islamic jurisprudence. The average Muslim carries around some understanding of the basics and very little of the jurisprudential nuances, but how he or she applies these Islamic laws in the context of US society varies widely, due somewhat to the varying levels of individual knowledge, but also because of ideological differences and simple practicalities. This variety in the practical application of Islamic family law is the subject of the next chapter.

## ELEVEN

# The Muslim family in the USA: law in practice

### Solemnizing the union

§ THE intersection of US and Islamic law becomes important right at the formation of the family unit – the creation of the marriage itself. Each state of the USA requires a civil marriage licence for every marriage created within its borders. Details on the specific requirements for these licences vary from state to state, but generally they require an official signature of the person performing the wedding, qualified by the state to do so, and those of witnesses to the ceremony. Islamic wedding requirements, consisting of an offer and acceptance and witnesses to the event, do not conflict with this if the person officiating the wedding is registered with the state as having this authority. In the United States, many Muslim leaders and lay individuals have this state authority, thus making the Muslim ceremony over which they preside simultaneously legal under the laws of the state, provided all necessary forms are filed. However, because not all Muslim marriage officiants carry such qualifications, Muslim weddings in the USA take a variety of forms. Many conduct one Muslim ceremony with a state-qualified imam, but many others have two events: a Muslim ceremony as well as a civil ceremony through state channels.<sup>23</sup> Still others have only a Muslim ceremony and never bother with state registration requirements,<sup>24</sup> a risky practice under US law because, barring a finding of common law or putative marriage, the parties and their children have no state-enforceable legal rights upon each other, thus affecting inheritance, health insurance, taxes and even immigration issues.

### Terms of the contract

As for the contents of these Muslim marriage contracts, most Muslims in the USA seem to consider only one thing really important that would not otherwise be included in a standard civil marriage licence: a provision regarding the wife's bridal gift or dower (*mahr/sadaq*). The majority of classical Muslim jurists hold dower to be an automatic result of the marriage contract, to the effect that even if no dower is stipulated, or it is stated that there will be no dower, the wife is entitled to claim a 'proper dower', assessed by her peers and those of her individual standing (Esposito 1982: 25; Welchman 2000: 135–6; Ali 1996: 159). Customarily

the dower is divided into one part payable immediately on the marriage (the 'prompt dower', sometimes only a token amount or symbol) and another part deferred to a later date, either specified or more usually payable on the termination of the marriage by death or divorce (Rapoport 2000; Welchman 2000: 144; Moors 1995: 106–13). Written documentation of Muslim marriages thus routinely includes mention of the dower arrangements, and in the USA, many mosques and imams include a fill-in-the-blank provision in standard marriage contracts (Kadri, interview, 2000). Case law of Muslim marriage litigation in the USA reveals that Muslims do generally include *mahr/sadaq* provisions in their contracts, their nature varying with the financial status and personal preferences and aspirations of the parties.<sup>25</sup> Some examples of actual *mahr/sadaq* clauses in the USA and Canada are: \$35,000, a Qur'an and set of *hadith*, a new car and \$20,000 (Canadian), a promise to teach the wife certain sections of the Qur'an, \$1 prompt and \$100,000 deferred, Arabic lessons, a computer and a home gym, a trip around the world including stops in Mecca, Medina and Jerusalem, a leather coat and a pager, a wedding ring as immediate *mahr* and one year's rent for deferred *mahr*, and eight volumes of *hadith* by the end of the first year of marriage and a prayer carpet by the end of five years of marriage (al-Khateeb 1996).<sup>26</sup>

One case vividly illustrates the significance vested by some Muslims in their dower agreements: in *Aghili v. Saadatnejadi* (1997), the husband threatened not to record the Muslim marriage contract with state authorities unless the wife first agreed to relinquish that contract and sign a new one. The original contract included a dower of Iranian gold coins to the value of \$1,400 and a provision for a payment of \$10,000 as damages for any breach of contract by the husband. The husband's threat suggests that he felt bound by the *mahr* terms of the initial contract. Also, Los Angeles attorney Sermid al-Sarraf comments that he has seen, in informal divorce negotiations, a husband's recognition of the *mahr* amount, prompting the parties to include in their settlement an offset of this amount with other property (interview, 2000). Other Muslims tend not to consider the dower important at all, and include a clause about it (often only a token dower) in their contracts only because the Muslim officiating the ceremony tells them it is required (Kadri, interview, 2000).<sup>27</sup>

Discussions among US Muslim women include debates over the importance of the *mahr/sadaq* in the first place – some rejecting it as putting a monetary value on the bride, others advocating it as a financial protection for women in the event of death or divorce and sometimes as a deterrent against divorce (especially powerful where there is a large deferred dower).<sup>28</sup> There is indeed a dilemma presented by the institution: setting the *mahr* very high may provide good financial security for the wife and (where deferred) a good deterrence against husband-initiated divorce, but on the other hand, it burdens wife-initiated *khul'* divorces, which are usually negotiated with an agreement by the wife to forfeit her *mahr*, with the significant financial cost of waiving the outstanding amount and returning whatever prompt dower has already been paid. Setting the *mahr*

low, or as only a token gift, has the reverse double-edged sword effect. That is, there is not as much to be lost in returning the *mahr* if the wife wants to negotiate a *khul'* divorce, but she also loses the deterrent effect on *talaq* divorce by the husband which is accomplished by a high deferred dower. Where the divorce occurs not through extra-judicial *talaq* or *khul'*, but rather judicial dissolution by third-party arbiters, the impact on *mahr* payment does not follow an absolute rule. Rather, the arbiters assess blame and harm caused by the spouses and allocate costs accordingly. Where there is no harm by the wife, she generally keeps all of the *mahr* (el-Arousi 1977: 14; Quick 1998: 36–9; Ali 1996: 125).<sup>29</sup>

As elsewhere in the Muslim world, additional stipulations (e.g. stipulations of monogamy, delegated right to divorce, wife's right to work outside the home, etc.) further defining the marital relationship of the new couple seem to be much less utilized than dower provisions,<sup>30</sup> presumably because the dower is obligatory whereas additional stipulations are not only optional but also a subject of little public awareness, and some clauses are even controversial in classical jurisprudence and local community attitudes (Kadri, interview, 2000). Nevertheless, the idea of particularizing one's Islamic marriage contract is gaining attention among the US Muslim population. Encouraged by Muslim women's organizations and activists seeing the use of additional stipulations as a tool for women's empowerment, more and more US Muslims are educating themselves about how to use the Muslim marriage contract. Says Sharifa Al-Khateeb of the North American Council for Muslim Women: 'The contract is a tool to help men and women design their future life together so there are no surprises ... and so women won't be saying "I can't do this because my husband won't let me"' (Lieblich 1997).

Far from considering it a new, reformist feminist tool, many see the proactive use of the Islamic marriage contract as a way of protecting their basic Islamic rights. It is for this reason that Karamah reports it is working on a model marriage contract, grounded in classical Islamic legal principles, to be used by Muslims worldwide. One visitor to the Karamah website praises a friend for drafting her marriage contract to include clauses on monogamy and equal right to divorce (among others) and comments that many Muslim men unfortunately have a negative attitude towards drafting a marriage contract, considering it an 'insult to their ability to behave as model Muslims' and that they 'forget that in times of imminent divorce, men and women do become irrational and make demands that are hard to agree upon'.<sup>31</sup>

The empowering potential for women in the Islamic marriage contract has also attracted scholarly interest among academics. According to John Esposito, Islamic marriage contracts were originally intended to raise the status of women because, being party to the agreement, women could add stipulations of their own (Lieblich 2001). Carol Weisbrod (1999) notes: '[t]here is considerable interest among Islamic women in the idea of using the contractual aspects of Islamic marriage to protect women's rights.' Of course, such use of the contract stipulations presumes that the woman has the awareness and education necessary to

utilize it. This is often not the case and, as Lynn Welchman has pointed out, the Islamic marriage contract system leaves 'the protection – or clarification – of rights such as education and waged employment for women out of the law per se and subject to the knowledge, ability and initiative of the individual women not only to insist on the insertion of a stipulation but to phrase it in a manner that gives it legal value' (Welchman 2000: 180). On the other hand, the marriage contract remains a very valuable tool because its grounding in classical law gives a 'clear indication of the acceptability of the changing of the more traditional parameters of the marriage relationship' (ibid., p. 180). It is for this reason that many activists take the need for education on the topic of marriage contract law so seriously, and their efforts largely focus on simply making women aware of this tool.<sup>32</sup>

Women's empowerment is not the only motivation, however. Those advocating the use of additional contractual stipulations focus not only on their potential to equalize gender-based advantages, but also as a way for both spouses proactively to express partnership in their new, unique union. Ayesha Mustafaa of the Muslim American Society says: '[i]t forces conversation on important issues: where you are going to live, whether your wife is going to work, whether she accepts polygamy' (Lieblich 2001).<sup>33</sup> Similarly, Kareem Irfan, of the Council of Islamic Organizations of Greater Chicago, says: '[t]he contract forces the bride and groom to have a reality check before marriage' (ibid.). What form this reality check takes depends upon the ideologies of the individual couple. For some, it may mean a reaffirmation of traditional roles, such as that the wife won't go to college or work after the couple has children (ibid.). But for others, especially non-immigrant Muslims whose image of married life is very different from the traditional one, arrangements such as monogamy and equal access to divorce are more or less presumptions in the structure of marriage, and these men are not threatened by a woman's interest in including these (and other rights-specific terms) in the marriage contract. Indeed, in many cases it is the groom as well as the bride seeking to have such stipulations included.<sup>34</sup> The attitude of many of these couples is exhibited in the following statement of one Muslim bride: 'I love him ... and I can't see him [taking a second wife], ever. But we put it in the contract because you never know' (ibid.). These young Muslims tend to view the contract drafting process not only as an allocation of rights and duties, but also as an exercise in learning to express their new identity as a couple, and, even more importantly, as a way to open up discussion (and determine compatibility) on important family issues (career, children, finances, residence location, etc.) that might otherwise be postponed to more stressful times (Quraishi 1999).<sup>35</sup> In other words, among a growing proportion of the American Muslim population, there is an interest in drafting more detailed, personalized Muslim marriage contracts – documents that are not a generic stamp of mere legal status conferred by some external authority, but rather, full, detailed expressions of the way each couple defines itself.

For those who choose to include specific stipulations in their marriage contract there are many insightful ideas from which to choose. Islamic history attests to Muslim marriage contracts including stipulations in which the husband promises not to marry additional wives (usually with the remedy that the wife may obtain a divorce, or even force a divorce of the second wife, if this promise is breached), delegates his *talaq* right to the wife, agrees not to relocate the family without the wife's consent, agrees never to prevent her from visiting her relatives, and to provide her with servants for household work as is befitting her accustomed lifestyle, among many others (Rapoport 2000: 14; Fadel 1998: 24–6; al-Hibri 2000: 57). Muslims in the United States have already taken advantage of the creativity allowed in these provisions and have included stipulations limiting visits from in-laws, that the wife will not be expected to cook or clean, protecting the wife's overseas travel required by her profession, and custody of the children upon death of either spouse (Lieblich 2001, 1997).<sup>36</sup> Many clauses affecting the ongoing marital relationship (such as rearing the children as Muslims, providing household services, allowing a wife to attend school, and location of the home) are included despite a realization by the couple that a US court would probably not intervene to enforce such terms (discussed further below). Other terms, such as a promise not to marry additional wives, have little effect in the USA for a different reason: the action is already prohibited by US law. Nevertheless, these couples feel it important to include such terms for religious reasons (i.e. thus preventing even a non-civil but nevertheless Muslim marriage to an additional wife), as a protection in the event they relocate to a jurisdiction that does allow such activity, and also as a mutual expression of the nature of their partnership. Finally, some marriage contracts use stipulations to provide for remedies in the event of a breach of other contractual terms (e.g. a monetary value or a wife's right to immediate divorce upon occurrence, etc.).<sup>37</sup>

### Within the marriage

So far we have predominantly discussed areas where Islamic and US law are different, but not directly conflicting. There are, however, other practices where some might regard the two laws as in direct opposition, and Muslims fall on both sides of the question of which law takes precedence. Polygyny is one of these areas. Because classical interpretations of Islamic law allow men to marry up to four wives, some Muslims believe that the US prohibition of polygamy directly violates their freedom of religion and, believing that Islam supersedes secular law, proceed to become part of a polygynous marriage. Thus, we see for example, in *N.Y. v. Benu*, a husband giving custody of his children to his wife after he married a second woman, and other reports of Muslim polygynous marriages (Little 1993; Taylor, interview, 2000). Aminah Beverly McCloud relates the dilemma faced by many US Muslim women whose husbands take a second wife – they feel religiously bound not to object to a practice God has permitted. She notes that even some

Muslim leaders engage in this practice, leading to 'marriages of years of devotion fall[ing] into chaos' (McCloud 2000: 141–2). Generally, the first wife in these marriages is recognized as legal under US law, but any subsequent wives and their children are not. These later wives are 'married' to the husband in Muslim ceremonies either in the USA by imams willing to do so, or in ceremonies overseas where polygyny is legal. Because of the religious dilemma, however, McCloud states that many of these women file charges not for bigamy but for some sort of fraud. She also states that 'all of the potential legal consequences of the practice of polygamy in the American context have not yet appeared, but ... are bound to find their way into the courts as more and more women seek alimony and child support' (ibid., p. 142).

Clearly, the majority of the population does not engage in polygynous marriages, but views on the practice differ, as can be seen in a book by Abu Ameenah Bilal Philips and Jameelah Jones entitled *Polygamy in Islam* (1985), providing a lengthy social and legal justification for the practice. Moreover, many Muslims themselves committed to monogamous marriages nevertheless recognize Muslim marriages involving more than one wife as Islamically valid. Thus, in an online Muslim advice column responding to a woman wondering how to marry a man already legally married in the USA, the columnist does not question the Islamic legalities of such a marriage, but nevertheless advises against it because of the woman's uneasy feelings and apparent lack of knowledge of the first wife (Hanifa 2000). Others, on the other hand, argue strongly against Muslims participating in such marriages in the United States, urging that the Qur'anic norm is monogamy and pointing to classical juristic arguments constraining the institution of polygyny (al-Hibri 1993: 66–7). For example, Azizah al-Hibri cites classical Islamic scholars stating that if marriage to a second wife causes the first wife harm, it is forbidden, and also notes Islamic schools of thought allowing the couple to include a clause in the marriage contract barring the husband from taking more wives. Similarly, Amina Wadud (1999), in addition to critiquing several traditional justifications for polygyny, undertakes her own textual interpretation of the relevant Qur'anic verses and sets forth an alternative reading of the permission for the practice, emphasizing its specific limitation to the just treatment of orphans. The Muslim Women's League makes the additional argument that because the subsequent wives are not legally recognized under the laws of the state, then by definition they cannot be treated equally, a requirement of Islamic law in polygynous marriages.<sup>38</sup> That is, subsequent wives in the United States not only do not have any rights to general spousal benefits (such as insurance benefits and inheritance) but they also necessarily lack any avenue of enforcing their spousal rights if a husband chooses to abuse or divorce them, since the marriage will have no validity in the US courts. There is also the possibility of a prosecution for bigamy if the authorities are so inclined. Another argument against American Muslim men marrying more than one wife relies on the simple Islamic jurisprudential principle that one must obey the laws of the land where one chooses to live, as long as they

do not prevent one from performing one's religious obligations. Since polygyny is at most permitted in Islamic law, rather than being an obligation, it is held that US laws requiring monogamy should be respected.

Another area of potential conflict in types of allowable marriages lies in the question of inter-religious marriages. Classical Islamic law allows Muslim men but not women to marry non-Muslim monotheists, those who belong to religious communities recognized as 'people of the book', whereas US law puts no religious restrictions on spousal partners (Esposito 1982: 20; Doi 1984: 36). Given the melting-pot nature of life in the USA, many Muslims, both men and women, do indeed marry non-Muslims (Haddad and Lummis 1987: 148).<sup>39</sup> While those who criticize Muslim women marrying non-Muslim men find a basis in standard *fiqh* positions, some object also to Muslim men marrying non-Muslims, on the basis that this constitutes an unfair double standard or results in a reduced number of Muslim men whom Muslim women may marry (Haddad and Lummis 1987: 146; Marquand 1996).<sup>40</sup> Others argue that the allowance is limited to those living under Muslim rule and therefore does not apply in places like the United States.<sup>41</sup> Azizah al-Hibri makes a *shari'a*-based argument against both Muslim men and women marrying outside the faith, arguing that the original reason (*'illa*) for the Islamic prohibition of women marrying non-Muslim men has now changed in our context. That is, the reason classical Muslim jurists denied a woman the option of marrying a non-Muslim man was to protect her from the husband's potential denial of her free exercise of her religion (acknowledging the patriarchal nature of marriage, and the fact that Christianity and Judaism prohibited inter-faith marriages at the time). Al-Hibri concludes that this *'illa* still exists, but argues further that additional realities of the American Muslim context (i.e. the likelihood of a Muslim man losing custody of his children and/or being unable to fulfil the Islamic obligation to raise them as Muslims if divorce from his non-Muslim wife occurs) mean that Muslim men also deserve the protective attention thus far granted to Muslim women, and, thus, the prohibition of inter-faith marriage should be extended to them (al-Hibri 2000: 68–9). Nevertheless, marriages in which the husband is Muslim and the wife Jewish or Christian are generally accepted by most US Muslims. For women marrying non-Muslim men, on the other hand, there is usually a stigma, or worse. Many Muslims follow Islamic *fiqh's* rejection of women marrying outside the faith, and most respected imams will not officiate at such ceremonies (Haddad and Lummis 1987: 145).<sup>42</sup> Muslim women's reactions range from disregard of the rule and consequent critical attitudes, to full support and justification of the *fiqh* position as beneficial to society and family. In between are many who reluctantly accept the rule, and perhaps seek alternative interpretations.<sup>43</sup>

Some inter-religious marriages involving Muslims are inter-cultural marriages between indigenous US citizens and immigrants. When the immigrant is the husband, mainstream US culture has developed the fear that the husband will ultimately abscond with his children (and perhaps the wife) to his country of

origin, depriving the wife of all spousal rights recognized in the USA. The 1987 book and corresponding film titled *Not Without My Daughter*<sup>44</sup> arguably largely created and certainly entrenched this fear in the wider US public (Baker 2002), resulting in particular attention in the State Department information on 'International Parental Child Abduction'.<sup>45</sup> A piece featured on its travel website titled 'Islamic Family Law' is posted to 'make clear the basic rights and restrictions resulting from marriages sanctioned by Islamic law between Muslim and non-Muslim partners', noting that 'for Americans, the most troubling of these is the inability of wives to leave an Islamic country without permission of their husbands, the wives' inability to take children from these countries, and the fact that fathers have ultimate custody of the children'.<sup>46</sup> While it appears to be a sincere effort to summarize Islamic family law for those living in the United States, the State Department's narrow focus on only Muslim–non-Muslim marriages skews the tone of its report and the reality of these issues. Clearly, the problems addressed (inability to leave without permission of husbands, barriers to custody) are faced by all women living under Islamic law, whether Muslim or non-Muslim. The State Department's limited view perpetuates the *Not Without My Daughter* stereotype that Muslim men are a particular threat to non-Muslim American women. Moreover, stereotypes in the dominant US culture that portray Arabs and Muslims as violent fundamentalists oppressive to women further fuel distrust of inter-cultural Muslim marriages in the non-Muslim population.<sup>47</sup> As will be seen in the next chapter, this distrust sometimes extends to Muslims and Islamic law generally, and has a direct impact when Muslim marriages end up in divorce courts.<sup>48</sup>

Stereotypes also frequently confuse religion with culture, again leading to mistakes about what exactly is part of Islam and Islamic family law. For example, though arranged marriages (in various forms, ranging from complete parental control against the wishes of their children to family-arranged meetings of a potential couple) are found in many Muslim cultures (Haddad and Lummis 1987: 149–51), Islamic source texts do not require third-party intervention as a necessary or even preferred process of finding a spouse. Muslim scholars in the USA, such as the late Fazlur Rahman among others, point out that there is nothing in the Qur'an or *hadith* 'asking Muslims to have arranged marriages' (Iqbal 1987). This is true even in the face of much of classical Muslim jurisprudence requiring guardian involvement in marriage negotiations for minors and even for adult women, reasoning (among other things) that this is necessary for their protection. Some Muslim women activists emphasize the non-Qur'anic basis for these guardian rules in arguments for reform beyond patriarchal interpretations in Islamic law (al-Hibri 2000: 60; Fadel 1998). Similarly, wedding particulars, from clothing and food to where the bride and groom sit, all vary from culture to culture, none of which commands Islamic official sanction, but may often be confused as such (Chang 1990).<sup>49</sup> It is not just non-Muslims who confuse culture with religion. Some Muslims assume cultural practices that have been within their families for generations are actually required by Islamic law. Thus, many debates within US

Muslim families, whether they are inter-generational or inter-cultural, often superficially seem to be about religion, but are really based on a mixture of cultural and religious/legal norms. These debates include, for example, arguments over the level of parental involvement in choosing one's spouse (and participation in wedding formalities themselves), the amount of pre-marital contact future spouses may have, the nature and amount of dowry, allocation of household responsibilities (financial and physical), and spousal activities and work outside the home, to name just a few. Many of these issues do appear in juristic discussions (both classical and modern), but usually in the context of what role custom plays in law-making, as these issues are not specifically addressed in the Qur'an and *hadith* (see 'Intellectual Resources' in Chapter 10). As the community evolves and migrates, discussions of these topics become complicated as the line between law and culture blur for the average Muslim.

Male superiority within the hierarchy of the family is one culturally validated but also often religiously justified ideology (Marquand 1996).<sup>50</sup> Many US Muslims believe in a patriarchal final authority over family matters, and look to Qur'anic verses in support of this belief. Others resist this notion as an antiquated cultural preference, and look instead to Qur'anic and Islamic concepts of partnership and equality of the sexes (Wadud 1999, 2000; al-Hibri 2000; al-Faruqi 2000; Barazangi 2000; Muslim Women's League, 'Gender Equality', n.d.). Both philosophies, and variations in between, can usually support harmonious and successful families. However, the idea of male superiority sometimes is used to justify physical and mental abuse of other family members, especially women and children, as a Muslim male's right, presented as somehow endorsed by the *shari'a* (Kadri, interview, 2000; Winton 1993).<sup>51</sup> In the words of Kamran Memon (1993), an attorney and one of the first in the US Muslim community to write publicly on the subject:

Tragically, some Muslim men actually use Islam to 'justify' their abusive behavior ... considering themselves to be Islamically knowledgeable and disregarding the spirit of Islam, they wrongly use the Qur'anic verse that says men are the protectors and maintainers of women to demand total obedience and order their wives around ... These men misinterpret a Qur'anic verse that talks about how to treat a disobedient wife and use it as a license for abuse.<sup>52</sup>

Even worse, as Memon and other Muslims note, is when battered Muslim women accept these religious claims and suffer the abuse, believing it to be some sort of religious duty on their part, and are unfortunately supported in this belief by Muslim community members, even leaders (Kadri, interview, 2000).<sup>53</sup>

This attitude, of course, disrupts the family unit with its acceptance of violence and general instability, and even more seriously if it drives the wife to flee the household or causes social workers to remove children from a dangerous family setting. Recently, members of the Muslim community have begun to recognize the problem of domestic violence, publicly speak against it,<sup>54</sup> and take proactive steps

inspired by Islamic principles to respond to the situation (Nadir 2001: 78; al-Khateeb 1998: 17; Syed 1996; Memon 1993). For example, the Peaceful Families Project, a programme funded with a \$76,000 grant from the US State Department and spearheaded by Sharifa al-Khateeb, has held conferences in several major American cities dedicated to educating and advising the American Muslim public to combat domestic violence in Muslim families (Kondo 2001). Moreover, a number of Muslim organizations have been established specifically to assist battered Muslim women, or have developed programmes targeted at this objective, through education, creation of shelters and providing legal and counselling assistance.<sup>55</sup>

### **Dissolution of American Muslim marriages**

Most Muslims pursuing divorce are careful to follow local state rules in order to ensure its recognition under US law. Sometimes Islamic family law does arise in these civil divorce proceedings, usually in the form of a claim for payment of the *mahr/sadaq* amount. Family law attorney Abed Awad reports, for example, that he sees a trend of husbands resisting dower payments, sometimes using the *shari'a*-based argument that wife-initiated divorces entail the wife's forfeiture of the *mahr* (interview, 2000). Another Muslim attorney, Sermid al-Sarraf, describes one case where the spouses turned to Islamic law to assist in determining the custody of their children, each consulting different Muslim legal scholars on the question. In the end, however, other issues, such as competency and capability of support, played a stronger role in the custody decision (interview, 2000). In general, US Muslims facing divorce disputes seem to seek advice and assistance on both their Islamic and secular legal rights; and as the number of Muslim legal professionals and legal organizations in the USA grows, more and more experts become available who can assist with both simultaneously.

In a minority of cases, Islamic divorces are conducted outside the American system altogether, either by a husband's private *talaq* declaration or through a third-party determination by local Muslim arbiters, and the parties fail to file any divorce documents under state rules.<sup>56</sup> Such divorces would lack validity under US law, and the parties may be faced with complications in any subsequent attempts to marry in the United States (Little 1993).<sup>57</sup> They would also present obstacles to either spouse attempting to enforce any terms of an Islamic divorce settlement, such as the distribution of property or custody of children, in the event that the other spouse breaches the deal. Some case law, discussed in the next chapter of this report, reflects efforts by the courts to deal with these extra-judicial divorces.

### **Deliberately opting out of US default rules**

Some Muslims are proactively interested in ways to legitimately opt out of United States legal norms that potentially conflict with their Islamic preferences. For

example, in community property states some Muslims are concerned that a community property distribution of half a wife's property to her husband infringes on the Muslim woman's right to full and exclusive ownership of her property.<sup>58</sup> Others believe that community property distributions should not be given to Muslim women in addition to their *mahr*, which they hold already to fulfil the need sought to be resolved by community property statutes.

But community property is not absolutely mandatory, even in community property states. One can opt out of community property by executing a valid pre-nuptial agreement to that effect, but few couples have the knowledge or foresight to arrange this.<sup>59</sup> A complicating concern is the possibility that the *mahr* agreement will be insufficient or not ultimately enforced, and therefore opting out of community property distribution will leave a Muslim woman with neither *shari'a*-based nor secular-based adequate support. Ironically, there are historically established financial compensation norms in Islamic law aimed at responding to the same problem to which community property laws are addressed. Azizah al-Hibri (2000: 57) points out in this respect that under classical Islamic law, wives who perform household chores are entitled to financial compensation from their husbands for this work or, where the woman is accustomed to it in her social circles, to have paid help to do it for them because such work is not a religious obligation. While some Muslim countries today are seeking to revive this principle in practical terms in financial distributions upon divorce,<sup>60</sup> the doctrine remains unknown among most lay Muslims, in the United States and worldwide. Of course, enforceability of this Islamic doctrine in the United States is dependent upon voluntary compliance by ex-spouses, as it is unlikely to be applied by United States courts without some compelling reason to do so.

## TWELVE

### Islamic family law in US courts

§ WE now turn to the question of how Muslim marriages have fared in the US courts.<sup>61</sup> There is fairly little awareness in the US Muslim community about this subject, and consequently many mistaken assumptions are made. Much confusion surrounds the question of the validity of the marriage contract itself, as many assume that the law of pre-nuptial agreements will safeguard the enforcement of Muslim marriage contract clauses.<sup>62</sup> As will be seen in this chapter, Muslims seeking to enforce their marriage contract as a pre-nuptial agreement have actually had varying success in the courtroom. One essential question that will be addressed is whether David Forte's prediction that there will be difficulty in 'pleading Islamic law in American courts' has been fulfilled (Forte 1983: 31). In this chapter, we will review the treatment of Muslim marriage in published US case law, and review the thoughts of Muslim attorneys working in this field.

#### The validity of Muslim marriages

The question begins at the beginning – whether a Muslim marriage will be recognized as valid under domestic US law in the first place. As mentioned in Chapter 11, this is only a real concern where the couple did not also follow secular state rules in registering their marriage. But even where there is only a Muslim marriage ceremony, the courts have not rejected such marriages outright, but rather undertake their own inquiry into whether the marriage was valid under the laws of the place in which it was conducted. For example, *Farah v. Farah* was a 1993 Virginia case involving the proxy marriage in England of two Pakistanis (with a subsequent wedding reception in Pakistan) who subsequently moved to the United States. Because the proxy marriage did not follow English requirements for a valid marriage, the Virginia court held that it could not recognize it as a valid marriage, stating that the fact that the proxy wedding complied with general Islamic family law rules (which would be relevant in Pakistan) was irrelevant. Conversely, in a more recent case, *Shike v. Shike* (2000), a couple married in a Muslim *nikah* (marriage) ceremony in Pakistan and subsequently documented it in Texas by having a Texas imam sign a standard Texas marriage licence. Though the couple initially believed their *nikah* to be only an engagement,<sup>63</sup> the court's inquiry revealed that the parties' public representations were that of a married

couple and therefore the court found the marriage valid under Texas law, even though performed outside Texas. Finally, in *Aghili v. Saadatnejadi* (1997), the Tennessee Court of Appeals held that an Islamic marriage ceremony, followed by later compliance with state marriage licence law, qualified as a legal marriage, reversing the trial court's summary judgment that the Muslim marriage 'blessing' did not qualify as a solemnization ceremony.

When there is no documentation of a marriage at all, Muslim or secular, then the court is faced with the difficult question of determining whether there was a 'putative' marriage (or in some states, a 'common law' marriage). This is what happened in *Vryonis v. Vryonis*, a 1988 case in California in which a couple entered into a private *mut'a* marriage (a marriage for a temporary period of time recognized under Shi'i but not Sunni Islamic jurisprudence) with no written documentation or witnesses. The court of appeals rejected the trial court's inquiry into the wife's reasonable belief in the validity of her marriage under Islamic law, and instead inquired into whether she had a reasonable belief of a valid marriage under California law. In the end, with no evidence of public solemnization, no licence, and no public representations of the couple as a married unit, the court answered the question in the negative. In reading *Vryonis*, it is interesting to note two elements considered by the court as persuasive against the existence of a real marriage: that (1) the wife kept her own name and (2) maintained a separate bank account. Commenting on this case, Azizah al-Hibri points out that, among Muslims, these facts would carry no persuasive weight against the existence of a marriage because the changing of the wife's family name on marriage is not required by *fiqh*, and indeed has not been a characteristic of most Muslim communities. And second, Muslim women often keep separate bank accounts to protect their right under Islamic law to exclusive control over their personal property (Muslim Women's League and Karamah 1995).<sup>64</sup>

Finally, there have been some cases of marriages held invalid by the courts where the Muslim parties are found to have violated basic norms of justice as recognized in the USA. For example, where a Muslim parent forces a minor to marry against his or her will, the courts have brought criminal charges against the parent.<sup>65</sup> In such cases, parental cultural defences are unsuccessful and held simply to violate public policy and the constitutional rights of the minor.

### **The enforceability of specific marriage contract provisions**

The question of judicial enforcement of the terms of marriage contracts is important to Muslims because, as a minority community in a secular legal system, the only authority with physical state power to which individual spouses can turn when their partner breaches a marital agreement is the domestic courts. While local Muslim authorities (scholars, imams, family elders) are widely used to assist conflicts internally, these authorities ultimately rely on voluntary compliance by the parties; they do not have the police power necessary to force compliance

against a recalcitrant spouse. However, courts interpreting complex personalized Muslim marriage contracts face a dilemma because there is a judicial preference not to interfere in an ongoing marital relationship (Rasmusen and Stake 1998: 484).<sup>66</sup> Thus, clauses that demand compliance during the life of a marriage (such as a spouse's right to complete an education, a promise of monogamy, or the nature of raising the children), even if they do not offend public policy, are rarely the subject of judicial oversight. If the marriage is at the point of breakdown, however, the court may be willing to include breach of marital agreements in its calculation of damage remedies for the violated spouse. This is often frustrating for those who would have preferred to maintain the marital relationship as agreed, rather than receive damages for its dissolution. As American legal scholar Carol Weisbrod (1999: 51) puts it: 'In many family law cases, money is not an adequate remedy ... [but] other more direct remedies may be barred because, for example, personal services contracts are not specifically enforceable and the United States Constitution guarantees the "free exercise of religion," with all the complexities of that idea.' As will be seen, this may have serious consequences for those relying on agreements regarding the religious upbringing of the children.

Provisions regarding the *mahr/sadaq* in a Muslim marriage contract are somewhat easier for the courts to handle because they are usually already defined in terms of a monetary amount payable upon dissolution of the marriage – a secular concept understandable to US judges. In the most recent case to take up the question, *Odatalla v. Odatalla* (2002), a New Jersey court treated the Muslim marriage contract in question under standard contract law and ultimately upheld the \$10,000 postponed *mahr* as binding in a US court. Said the New Jersey judge: '[W]hy should a contract for the promise to pay money be less of a contract just because it was entered into at the time of an Islamic marriage ceremony? ... Clearly, this Court can enforce so much of a contract as is not in contravention of established law or public policy' (Odatalla 1995). What is unique about this case is that, contrary to the predominant approach of most US courts up to this point, it did not analyse the *mahr* as a pre-nuptial agreement, but rather under neutral principles of contract law.<sup>67</sup> Abed Awad, who litigated the case on behalf of the prevailing wife, insists that the misconstruction of *mahr* agreements as pre-nuptial agreements under US law has created a serious warping of American judicial understanding of Islamic law as well as a hindrance to providing justice to US Muslim litigants.<sup>68</sup> As urged by Awad in the *Odatalla* litigation, *mahr* is not consideration for the contract, but rather an effect of it – an automatic consequence whenever a Muslim couple marries (Awad 2002). This is borne out by classical jurisprudence on the subject and the fact that Muslim jurists would assign an equitable *mahr* to those wives whose contracts did not specify one (Welchman 2000: 136, 140; Rapoport 2000: 14).<sup>69</sup> Thus, enforcement of Muslim marriage contracts, says Awad, should be by simple contract law principles, and not by the more particularized rules of pre-nuptial agreements that vary from state to state and generally carry heightened scrutiny (Awad 2002).

The characterization of Muslim marriage contracts as pre-nuptial agreements is not exclusive to US judges. Many lay Muslims, unaware of the legal distinctions between pre-nuptial agreements and simple contracts, often refer to Muslim marriage contracts as pre-nuptial agreements, and moreover some actively advocate the employment of this legal tool by US Muslims.<sup>70</sup> Attorney Abed Awad points out that these Muslims are often unaware of the technical requirements attached to valid pre-nuptial agreement drafting, and also that such agreements are assumed to override all other standard laws regarding dissolution of marriage, such as inheritance, community property, alimony and so on (Awad, interview, 2001). In Islamic law, however, these are separate questions – a Muslim wife is entitled to both her *mahr* and her standard inheritance portion – and Awad points to this as another proof that the Muslim marriage contract should not be seen as a pre-nuptial agreement.

A California case illustrates what happens when pre-nuptial agreement analysis meets an incomplete understanding of Islamic law in a US court. In *Dajani v. Dajani* (1988), the California Court of Appeals interpreted the *mahr* in a Muslim marriage contracted in Jordan to be a pre-nuptial provision ‘facilitating divorce’ because the 5,000 Jordanian dinars became payable to the wife only upon dissolution of the marriage. In California, as in most states, a pre-marital agreement may not ‘promote dissolution’ and thus a promise of substantial payments upon divorce may be interpreted to invalidate that clause.<sup>71</sup> The court thus considered the *mahr* windfall to be potential ‘profiteering by divorce’ by the wife and against public policy, and held the provision unenforceable, causing Mrs Dajani to lose her expected *mahr*. Azizah al-Hibri has critiqued this court opinion, showing it to reflect a basic misunderstanding of Islamic law and the institution of deferred dower, particularly since deferred dower is also due upon the death of the husband (al-Hibri 1995: 16–17).<sup>72</sup> It might also be pointed out that, under Islamic law, if a woman initiates divorce extra-judicially through *khul'*, then she is likely to forfeit her *mahr*.<sup>73</sup> Thus, a *mahr* clause in this situation acts as a deterrent to (not a facilitator of) no-fault divorce by the wife – a result quite opposite from the ‘profiteering’ assumptions made by the California Court of Appeals.

The whole life of the *Dajani* case, from trial to appeal, illustrates mistakes that can be made when US judges attempt to adjudicate matters of Islamic law. At trial, for example, Muslim experts testified to the *Dajani* judge regarding the forfeiture of the dower upon divorce initiated by the wife, and, based on this testimony, the trial court concluded that the wife must forfeit her *mahr* because she initiated the divorce, an oversimplified understanding of Islamic law on the matter. (Unfortunately, the court did not undertake an analysis of *faskh* dissolution in Islamic law where an inquiry into harm is made, distinguishing it from extra-judicial *khul'*.) But when it got to the Court of Appeals, the inquiry into Islamic law was even more superficial: it went straight to rejecting all *mahr* provisions generally as ‘facilitating divorce’.

Demographic distribution may play a role in the ability of US judges fully to understand minority religious practices affecting family law rights. For example, the *Odatalla* case originated in New Jersey, in an area with a significant Arab-American population. Similarly, New York family courts dealing with Muslim litigants have relied on their experience with the Jewish *ketuba*, a custom carrying many parallels with Muslim marriage contracting. Thus, in *Habibi-Fahnrich v. Fahnrich* (1995), the New York Supreme Court, though a bit confused in its usage of terms,<sup>74</sup> specifically stated: 'The *sadaq* is the Islamic marriage contract. It is a document which defines the precepts of the Moslem marriage by providing for financial compensation to a woman for the loss of her status and value in the community if the marriage ends in a divorce. This court has previously determined that *sadaq* may be enforceable in this court.' In this case, the court ultimately ruled the *sadaq* at issue to be unenforceable, but it did so in a way that is more instructive to Muslims. In *Fahnrich* (1995), the New York court had difficulty giving effect to the *sadaq* provision in the Muslim marriage contract simply because the terms were too vague under basic contract principles. The clause '[t]he *sadaq* being a ring advanced and half of husband's possessions postponed' left too many financial calculation questions unanswered (e.g. half of which possessions calculated at what point in the marriage? Postponed until when?). Thus, it was a violation of the Statute of Frauds, not public policy, which doomed this *mahr* provision. In fact, these same criticisms would be likely to be raised under an Islamic investigation of the terms of the contract (Rapoport 2000: 5–21). In both jurisdictions, Muslims would be wise to pay more attention to writing clear terms in their marriage contracts.<sup>75</sup>

The need for clarity arises in another clause often included as standard in Muslim marriage contracts, stating something to the effect that the marriage is governed by Islamic law. These sorts of clauses have been found by one court to be insufficiently clear to warrant court enforcement of its terms. In *Shaban v. Shaban* (2001), the California Court of Appeals rejected a husband's attempt to enforce the *mahr* (the equivalent of \$30) listed in his Egyptian Muslim marriage contract, instead awarding the wife \$1.5 million in community property. The marriage contract included a clause stating that the 'marriage [was] concluded in accordance with his Almighty God's Holy Book and the Rules of his Prophet', and the husband asserted that this meant that the dissolution should be governed by 'Islamic law'. The court flatly rejected this attempt to incorporate Islamic law by reference, stating that 'Islamic law' was such a broad, abstract concept that brought too much uncertainty into the terms of the contract. Pointing out the many manifestations (schools of thought, state legislation) of Islamic law, the court concluded: 'An agreement whose only substantive term ... is that the marriage has been made in accordance with "Islamic law" is hopelessly uncertain as to its terms and conditions.'<sup>76</sup> Thus, the Statute of Frauds, requiring clear contract terms, prevented its enforcement. Interestingly, the court did not even get to the question of whether the *mahr* clause was against public policy (as they had in

*Dajani*, and as the trial court had done in this case). Said the court: 'It is enough to remark that the need for parole evidence to supply the material terms of the alleged agreement renders it impossible to discuss any public policy issues. After all, how can one say that an agreement offends public policy when it is not possible even to state its terms?'

The California court's attitude in *Shaban* is significantly different from the New York Supreme Court's treatment of a similar clause in *Aziz v. Aziz* (1985), in which it found a Muslim marriage contract, with its *mahr* provision of \$5,000 deferred and \$32 prompt, to be judicially enforceable despite its being part of a religious ceremony, because it conformed to the requirements of New York general contract law. This is true even though the contract apparently stated that it united the parties as husband and wife 'under Islamic law'. The concerns of 'Islamic law' by incorporation so central to the California *Shaban* court apparently did not bother the New York Supreme Court. In the words of the court: 'The document at issue conforms to the requirements of [state contract law] and its secular terms are enforceable as a contractual obligation, notwithstanding that it was entered into as part of a religious ceremony.'<sup>77</sup>

There are two interesting aspects of *Shaban* that are relevant for our study here. First, the court's rejection of the entire contract because of a clause stating it is governed by 'Islamic law' is important to Muslims because most, if not all, Muslim marriage contracts include this type of statement. This is true even of marriage contracts drafted in the United States. Since the court appeared particularly frustrated with the lack of any other substantive terms in the contract besides this one and the *mahr* provision, it may be that by individualizing and embellishing their marriage contracts with many substantive stipulations, Muslim couples may be able to avoid a result like the one in *Shaban*, but there is no guarantee. In addition, as will be seen in more detail later, other states have found their way to enforcing Muslim marriage contracts despite such references.

The other interesting thing about the California court's treatment of *Shaban* is its absolute lack of interest in investigating the permutations of Islamic law if it were to govern the agreement. They are justifiably concerned about the complexity and diversity of 'Islamic law' and their reluctance to engage it is understandable. Nevertheless, one is left with the impression that the court took for granted the husband's version of Islamic law – i.e. that the wife would be limited to \$30 *mahr* under Islamic law, and that the obviously fairer thing to award the ex-wife of a now-wealthy American doctor after twenty-seven years of marriage is her community property entitlement of \$1.5 million. But if the court had decided to make a deeper investigation of Islamic law in such a situation, they might have found that the stipulated *mahr* is not always the end of the story for a Muslim court – she might have been given an adjusted *mahr mithl* if the stipulated *mahr* was out of proportion to women of her peer group, and she might even have been awarded *muta* maintenance (equivalent to alimony) in an amount close to the community property award (Rapoport 2000). Further, Islamic legal precedent establishing that

women have no obligation to do housework or even to nurse children (and thus should be compensated for it if they choose to do so),<sup>78</sup> points to an awareness of the very problem that community property laws in the modern West seek to remedy (al-Hibri 2000; Walter 1999). It is a mistake to assume that awards under Islamic law are necessarily going to be worse for the wife than under US law. In fact, it appears that most spouses attempting to enforce Muslim marriage contracts in US courts are wives (not husbands), attempting to enforce rather high *mahr* amounts.<sup>79</sup>

An interesting aspect of these cases is that they show, in general, that for those courts that do undertake the effort, they have been fairly good at understanding the relevant Islamic jurisprudence defining the nature of a Muslim marriage contract, in order to discern which elements it can enforce as a secular court. These judicial understandings are largely from their own research as well as Muslim expert witnesses presenting courtroom testimony. Though they often disagree with each other in a particular case and frequently leave out jurisprudential details, the outcome of the cases indicates that, by and large, these experts have served to give the judges a rather good idea of the important elements at work. In one case, an appellate court even corrected its trial court in understanding the nature of Muslim wedding officiants. In *Aghili v. Saadatnejadi* (1997), the Tennessee Court of Appeals, citing expert testimony, explained:

In contrast to Western religious teaching and practice (particularly in Christianity, both Catholic and Protestant, but also to some extent Judaism) Islam from its inception to the present has consistently rejected the distinction between clergy and laity. Islamic law stipulates quite precisely that anyone with the requisite knowledge of Islamic law is competent to perform religious ceremonies, including marriage. One is not required to have an official position in a religious institution such as a mosque (*masjid*) in order to be qualified to perform such ceremonies.

This understanding of Muslim wedding officials (and imams in general), though it overstates the facts in assuming there is a need for an officiant at all (Islamic law does not require one), is still instructive in accurately trying to appreciate the different structure of religious authority in Islamic law as compared to other religions, and does so in a respectful way. There is here an appreciation that a Muslim marriage does not have to look like a Christian one, and need not have an altar or a minister in order to be valid. In this case, the court's awareness resulted in its rejection of the husband's claim that his marriage was not valid because the officiant was not a real 'imam'. Said the court, his 'right to bear the title imam is irrelevant'. Of course, the education of judges is not uniform across the USA (as the *Dajani* case exemplifies), but this review of the case law indicates an overall positive picture, especially in those states that have more experience with minority religious legal traditions, such as New York.

The lesson for American Muslims from these cases is that, even though a

Muslim marriage contract serves a religious function, if its terms are clear, an American court might find a way to enforce those terms serving a 'secular' purpose, such as the financial *mahr/sadaq* awards due upon dissolution. But a final note on secular court understandings of *mahr/sadaq* clauses: it is worth noting that Muslim jurisprudence, classical and modern, identifies a number of functions fulfilled by the institution of *mahr*, whether in its status in the contract or more broadly in the social life of the wife in particular. A number of these functions have been identified by US courts in the cases described above.<sup>80</sup> These include: (1) it serves the purpose of financial security for the wife in the event of a divorce;<sup>81</sup> (2) it may serve as a deterrent to the husband declaring a unilateral *talaq* divorce;<sup>82</sup> (3) it constitutes a form of compensation to a woman unjustly divorced by the husband's unilateral *talaq*; (4) it is the husband's consideration for entering the marriage, under basic contract law principles; or, lastly, (5) it is simply a gift from the husband to the wife.<sup>83</sup> Each of these functions of *mahr* might prompt a different analysis by a secular court attempting to understand it in secular terms, and there is consequently the potential for inconsistencies between courts and frustration by Muslim litigants who may interpret the purpose of their *mahr* differently than that focused on by the court. For example, if the *mahr* is merely a gift, then why does Islamic law treat it as a debt owed by the husband if he chooses not to pay it? (Esposito 1982: 25; Rapoport 2000: 10). If it is compensation for unjustified unilateral divorce by the husband, then what if the divorce at issue was initiated by the wife instead? If it serves as financial support for the wife after divorce, then does the initiator of the divorce (i.e. whether it is *khul'* or *talaq*) really matter, and can secular alimony and child support payments be substituted instead? Rapoport's review of the evolution of the deferred *mahr* suggests that that institution did act as a substitute for alimony, but this does not speak to the rationale of the prompt *mahr* (Rapoport 2000). Further complicating all these analyses are the myriad variations on what *mahr* amount is payable up-front and what amount is deferred – i.e. if it is substituted for alimony, then should Muslim women start asking for a large amount up-front instead of a large deferred amount, to protect themselves against the possibility that a court will award them neither alimony nor their deferred *mahr*? And then there is the question of how to treat dowers that are not specified in monetary terms at all. All of these questions remain unanswered, and perhaps there is no uniform answer that applies to the situation of every woman (i.e. while one might need financial security, another might need deterrence against her husband's unilateral divorce). Nevertheless, as these cases demand more and more judicial attention, they will also draw the eye of Muslim legal experts in the USA to focus on basic Islamic jurisprudence on the subject, its appropriate interpretation in the context of modern-day USA, and then address how to present these conclusions to the judiciary.

At present, US Muslim attorneys differ over the viability of pursuing the enforcement of *mahr/sadaq* provisions in the courts. Some believe it to be generally

a losing proposition, citing local cases they have seen where the *mahr* was denied (Kadri, interview, 2000). Others are optimistic about the future of *mahr* recognition in the United States and encourage those pursuing these cases (al-Sarraf, interview, 2001). Indeed, in the cases reviewed above, spouses asserting the enforceability of a Muslim marriage contract as a pre-nuptial agreement did not always succeed. In both California cases dealing with *mahr* claims as pre-nuptial agreements, *Dajani* and *Shaban*, the court ultimately refused to honour the contract. In New York and Florida, the parties fared a bit better: in *Aziz* (NY) and *Akileh* (FL) the Muslim dower provisions were upheld, though the language of the Florida court indicates that they perceived the *sadaq* to be the husband's consideration for entering into the contract, an analysis with which Awad would strongly disagree.

Reviewing the history of the subject in general, it appears that interest in enforcing *mahr* provisions in the courts has taken particular hold in the Muslim community over the past five years or so. In earlier years, Muslim couples apparently tended to opt for informal recognition, voluntarily enforced through internal channels. As more and more Muslims draft formal Muslim marriage contracts in the United States, the courts will presumably see more litigation of *mahr* clauses. It remains to be seen whether there will be consistent treatment of these cases by state family law courts, and whether that treatment will be to review these cases as pre-nuptial agreements, seek to reject them as contracts with uncertain terms due to their religious references, or analyse them under straight contract law.

As for the enforceability of contractual stipulations other than the dower, there is much less case law because, as noted earlier, these sorts of stipulations are less popular in Muslim marriage contracts, and have even less frequently become the subject of full litigation ending up in published case reports. One stipulation many Muslims wonder about is a clause regarding the religious upbringing of the children, a relatively popular clause in inter-religious marriages. Specifics vary from state to state but, generally, agreements that a child will be raised in a particular religion are not enforceable in a pre-nuptial agreement, but if included in a separation agreement (when the marriage is ending) are usually recognized. For example, in *Jabri v. Jabri* (1993), a New York court held: 'Agreements between divorcing spouses with respect to the religious upbringing of their children will be upheld by the courts only when incorporated into separation agreements, court orders, or signed stipulations ... In the absence of a written agreement, the custodial parent ... may determine the religious training of the child.' And in *Arain v. Arain* (1994), the New York Supreme Court rejected for lack of supporting evidence a custody-change request based on a claim that the wife had violated her agreement to 'raise the child pursuant to the Muslim faith'. Muslims will note that this is in contrast to standard Islamic law rules on custody, which would hold that a non-Muslim's wife failure to raise the children as Muslims would cause her custody of the child to lapse at least once age of

discrimination is reached. This US judicial policy is based on several reasons, including the unconstitutional judicial promotion of a particular religion, and avoidance of judicial interference in an ongoing marriage (*Zummo v. Zummo*, 1990). As a result, Muslim marriage contracts including a religion-of-the-child clause are unlikely to be enforced because these contracts are usually likened to pre-nuptial agreements in order to be enforced. However, upon divorce, if such an agreement is possible (either through divorce mediation, or informally between themselves), the parties may be able to accomplish this goal, if the agreement is included in their documented separation agreement. In any case, religious upbringing of the children is a complicated and risky business, and (as discussed earlier) is one of the reasons some Muslims today warn against marriage to non-Muslims (al-Hibri 2000).

### The validity of Muslim divorces

The basic rule governing the validity of divorces in US courts is *lex domicili*, that is, the validity of the divorce is dependent upon the law of the domicile of the parties (Reed 1996: 311). Thus, where it is sought to enforce Muslim divorces conducted outside the United States, the court will look to the law of the foreign state. For example, in a case as old as 1912, *Kapigian v. Minassian*, the Supreme Court of Massachusetts held as valid the Turkish law of the time which automatically nullified the marriage of a non-Muslim woman to a non-Muslim man upon the wife's conversion to Islam, and therefore upheld the divorce of a Turkish Muslim woman convert whose husband was then living (and remarried) in the United States.

Of further interest to the Muslim community is the treatment of domestic non-judicial divorces – those accomplished by verbal *talaq* or through formal approval by a local Muslim imam. These have not fared well. In *Shikoh v. Shikoh* (1958), the federal Court of Appeals for the Second Circuit held that a religious divorce granted by a local shaykh failed to constitute a 'judicial proceeding', which was required for all legitimate divorces under New York law, and held the divorce invalid. Said the court, *lex domicili* still applied: 'where the divorce is obtained within the jurisdiction of the state of New York, then it must be secured in accordance with the laws of that state'. And even where the domicile is a Muslim country, the US courts have demanded a judicial proceeding. Thus, in *Seth v. Seth* (1985), the Texas Court of Appeals refused to recognize a *talaq* divorce conducted in Kuwait as valid because there was 'no factual showing [that] any official state body in either India [where they were married] or Kuwait ... had actually executed or confirmed the divorce and marriage'.

Looking over these cases as a whole, we might notice that they reflect a basic Western assumption built into the judicial reasoning – i.e. that a divorce has to be somehow officially recognized by some official body, even in a Muslim country, in order to be legitimate. However, Islamic laws of divorce do not follow this

same premise, as private declarations of divorce (*talaq*) or private mutually-consented divorce agreements (*khul'*) are nevertheless given legal validity in Islamic *fiqh*. Of course, modern Muslim countries, with variations on classical Islamic law as their legislated codes, often require something more for legal recognition of a divorce, even if only a registration of an extra-judicial divorce with the authorities. The question that has apparently not yet reached a US court is whether it would recognize an extra-judicial *talaq* or *khul'* divorce if it had been registered with the state as a divorce deed, and therefore perfectly valid as a divorce in that particular country (as is the case in Egypt or Pakistan, for example) but not the subject of a 'judicial proceeding' as required by this US case precedent. If the question is ever raised and the court is willing to undertake a study of Islamic law in order to answer it, the argument might be made that the rationale behind the 'judicial proceeding' requirement is the due process principle of notice and the right to be heard,<sup>84</sup> and therefore *khul'* divorces (obtained extra-judicially but with mutual consent of both parties) should be recognized but *talaq* divorces (whereby a husband merely declares the divorce with no necessary consent by or even notice to the wife) should not. This level of Islamic law awareness and analysis, however, can only be hoped for, as the cases summarized thus far illustrate the serious misunderstandings of Islamic law upon which some of these cases have been adjudicated.

The divorce cases requiring 'judicial proceedings' and other cases where Islamic legal norms are rejected for violation of public policy, tend to reflect the presumption that the secular rules which override religious laws are somehow better, fairer, and reflect more progressive views on women, children and human rights. Yet, US Muslim scholars might take issue with this presumption, pointing out that in some cases, Islamic law is more progressive and beneficial to women than its secular counterpart. For example, the institution of *khul'* divorces, allowing a woman to end a marriage (usually for the price of her *mahr*) without having to go through the long and often painful process of divorce litigation, might be seen as a very useful tool for women. Moreover, the right to a *mahr* is so central to Muslim consciousness that it is usually the only marital stipulation Muslim women are aware they must include in their marriage contracts. Many see the deferred *mahr* as meaningful deterrence against a hasty divorce by the husband, and the prompt *mahr* as a means of ensuring financial security and independence to women who may or may not have an outside income. When a US court strikes down a *mahr* provision (whether as too religious or against public policy), many Muslim women believe this is a step backwards, not forwards, for women. Many assert that some of these cases do a serious injustice to Muslim women and to the aspects of Islamic law that protect their interests (al-Hibri 1995). Other woman-affirming aspects of Islamic law as yet unaddressed by US courts include the recognition that a woman's household work is financially compensable, that her property is exclusively her own, and the ability personally to tailor a marriage contract. These are all illustrations of Islamic jurisprudential progressiveness, some

of which have only recently been paralleled in the West. Comparing different legal systems, therefore, must be undertaken with care, and it is dangerous to assume that a comity-based recognition of an alternative norm is always a concession to the lesser law. Sometimes it may be a step forwards.

### Child custody

As in every community, many Muslim divorce cases necessitate a custody determination. Islamic family law can arise in these cases when one party asserts classical *shari'a* custody rules based on the age and gender of the children (Doi 1989: 37).<sup>85</sup> Such claims may play a large role at the informal level (mediated divorce settlement agreements, for example) in the US Muslim community, but published case law focuses mainly on the validity of overseas custody decrees from Muslim countries. There is not a huge amount of published case law on this subject, although Henderson (1997–98: 423) notes a certain recent increase, with only three cases involving state court interpretation of custody decrees from Muslim countries being reported between 1945 and 1995, while a further three were reported in the year 1995–96 alone. These cases reveal differing treatment by states towards Islamic law's custody rules, sometimes showing deference to Muslim courts and sometimes not, but always within the context of the US standard of the 'best interests of the child'. For example, in *Malak v. Malak* (1986), the California Court of Appeals evaluated one Muslim custody decision from Abu Dhabi and one from Lebanon. The Abu Dhabi decision, awarding custody to the father because of its rule automatically granting custody to fathers when the child reaches a given age, was held inconsistent with best interest standards and was rejected. The Lebanese Muslim court decree, on the other hand, was found to comply with American courts' expectations of notice and also legitimately considered 'educational, social, psychologic[al], material, and moral factors, for the purpose of insuring the best interest of the two children and their present future and in the long run'.<sup>86</sup>

Some courts have recognized the child's religion as a legitimate factor to be considered in a 'best interest' analysis, for courts in a society where religion is centrally important. Thus, in *Hosain v. Malik* (1996), a Maryland court concluded that, in Pakistan, custody determination of the best interest of the child was appropriately determined according to the morals and customs of Pakistani society. Said the court:

We believe it beyond cavil that a Pakistani court could only determine the best interest of a Pakistani child by an analysis utilizing the customs, culture, religion, and mores of the community and country of which the child and – in this case – her parents were a part, i.e., Pakistan ... [B]earing in mind that in the Pakistani culture, the well being of the child and the child's proper development is thought to be facilitated by adherence to Islamic teachings,

one would expect that a Pakistani court would weigh heavily the removal of the child from that influence as detrimental.

Judicial consideration of the religion of the child in 'best interest' analyses is not limited to review of international decisions. Some courts have found it relevant as a positive factor in their own 'best interest' evaluation, for example, where religion has been an important part of the child's life until that point; but, again, the importance given to this criterion varies widely from state to state.<sup>87</sup>

Returning to *Hosain*, it is interesting to note that the court there viewed classical Islamic custody rules as not necessarily contrary to public policy. Said the court: 'We would be obliged to note that we are simply unprepared to hold that this longstanding doctrine [*hazanat* – i.e. custody] of one of the world's oldest and largest religions practiced by hundreds of millions of people around the world and in this country, as applied as one factor in the best interest of the child test, is repugnant to Maryland public policy.'

Not all American courts are so reluctant to condemn classical Islamic custody rules outright, however. In *Ali v. Ali* (1994), for example, a New Jersey court rejected a Palestinian custody decree as not in the 'best interests of the child', commenting on the law applied by Palestinian *shari'a* courts in Gaza that automatically entitles the father to gain custody of a son at age seven in the following terms: 'Such presumptions cannot be said by any stretch of the imagination to comport with the law of New Jersey whereby custody determinations are made based upon the "best interests" of the child and not some mechanical formula.' Incidentally, this attitude also finds an audience in legal academia; Henderson (1997–98), for example, devotes an entire article to warning judges to be 'circumspect of foreign custody decrees based on Islamic law' because it is 'mechanical, formulaic and should not be followed'.

One final note on American judicial treatment of Muslim marriage litigation as a whole: the fact that many of the cases reviewed in this section involve marriages either contracted or ended in a foreign country may at first seem not directly relevant to a study of Islamic family law in the United States. However, the complex international demographic of the Muslim population in the USA means that many do not live in the same place over their entire lifetime – they may, for example, emigrate to the USA early in life, move overseas later in life, or live a dual citizenship in more than one country. Or, perhaps, because they have overseas relatives, an individual Muslim may live in the United States full-time, but have his/her Muslim wedding ceremony overseas with extended family. Cases where the marriage is executed or dissolved overseas could all end up being litigated in the US courts. As the population of second-generation and native US Muslims grows and more Muslim marriages end up in US courts for litigation, we may see more cases where the full law-related gamut of marital life occurs here in the USA. In these cases, comity to other nations will not be

at issue, and US judges will be faced with the question of how to treat Islamic family law in the context of litigants from one of their own domestic religious minorities.

## THIRTEEN

### Future trends and predictions

§ IN order fully to appreciate the current developments in the broader picture of Muslim family law in the USA, it is imperative to investigate the roots of current theories utilized by Muslim thinkers in North America. Over the past sixty years or so, Muslims in the USA, whether indigenous, immigrant or simply based in the USA for a variety of reasons, have developed a vibrant and dynamic discourse on issues of Islam and modernity. This intellectual tradition focuses on both the development of theoretical approaches to relevant problems and practical methods for resolution of those challenges.

The theoretical basis for creating a new legal methodology for Islamic family law finds its origin in the early efforts of Muslim thinkers within the Western academy. For example, scholars such as the late Ismail al-Faruqi called for the 'Islamization' process of all Western disciplines (al-Faruqi 1982). Some of the intellectual forebears of this movement include Muslim scholars such as Muhammad Abduh and Rashid Rida, from the end of the nineteenth and early twentieth centuries. Rida has been characterized by Wael Hallaq (1997: 216) as one who 'steered a middle course between the conservative forces advocating the traditional status quo of the *shari'a*, on the one hand, and the secularists who aimed to replace the religious law by non-religious state legislation on the other'.<sup>88</sup> This involved, first, the turning of the Muslim focus on to Western thought and creating an environment where Muslim scholars began to distinguish between a full-blown condemnation of all Western thought and the possibility of reconciling various forms of knowledge. Al-Faruqi's legacy is found in works that present an Islamic viewpoint on disciplines as diverse as linguistics and physics. The late Fazlur Rahman was another scholar who engaged with issues facing modern Muslims and proposed specific strategies for addressing them. One of Rahman's specific contributions was a focus on the ethics of revival and emphasizing the link between morality and legal thought (Rahman 1982). The works of these and other scholars have opened the door for many new generations of reformers and thinkers who are grounded firmly within the Muslim tradition but are able to employ also concepts from other sources. In the area of Islamic law, and specifically *usul al-fiqh* (jurisprudential theory), Muslim scholars in the USA have explored a rich variety of issues that face the local Muslim community. One scholar who focuses on applying classical *usuli* scholarship to questions of modern Islamic law in the

USA is Taha Jabir 'al-Alwani, who reviews historical perspectives on the evolution of juristic disagreement in Islam and offers a methodology of modern inclusive scholarship (al-'Alwani 1985).

Bridging the worlds of Islamic and US law, there are a number of Muslim law professors in the United States. Though few, these professors have left their mark in community building and Islamic legal education, as well as excellence in their chosen secular legal fields. For example, Cherif Bassiouni, Professor of Law at DePaul University College of Law for over thirty years, is an expert in international criminal law and human rights. His numerous publications in several languages include pieces on general criminal law and human rights as well as Islamic law on these issues (for example Bassiouni 1982, 1983, 1987) and he has been at the forefront of international and national debates on issues of human rights and Islam (including receiving a 1999 nomination for the Nobel Peace Prize), urging that human rights are not alien to Islam, and in fact are founded on Islamic principles. Similarly, Abdullahi An-Na'im, Professor at Emory University School of Law, is a significant contributor to the discussion on Islam and human rights. An-Na'im (1990, 1992) has highlighted the critical issues and areas that must be addressed by modern Muslim societies in order to form institutions that respect basic human rights and liberties.

Another Muslim law professor, Azizah al-Hibri, has contributed to the ongoing dialogue of women's rights and Islam, publishing extensively on Islamic law issues especially affecting women (al-Hibri 1993, 1997, 2000). Professor of Law at the University of Richmond School of Law, al-Hibri is also founder of Karamah: Muslim Women Lawyers for Human Rights, and frequently makes presentations in both domestic and international fora speaking on *shari'a*-based legal mechanisms to protect the human rights and welfare of Muslim women. Finally, there are diverse perspectives on the use of classical scholarship and its connection to modern interpretations. Khaled Abou el-Fadl, Professor of Law at the University of California at Los Angeles, has, among other things, examined the historical and cultural record of Muslim communities who lived in non-Muslim states and drawn upon these lessons to particularize his interpretation of Islamic law to the US Muslim environment (Abou el-Fadl 1994). Abou el-Fadl remains grounded in the classical traditions to the extent that he continues to inform his own work with discussions from classical Islamic scholarship (Abou el-Fadl 2001).

The precarious position of being a part of a minority Muslim population has informed not only Muslim legal scholars, but also another group of reformers who have focused on activism as a tool to introduce new positive and creative responses to some of the legal needs of the community. For example, the difficulties of explaining Islamic family law to domestic courts and institutions, as well as the desire to resolve intimate matters with those who share the same faith-based system of ethics and morals, has prompted some members of the Muslim community to examine the viability of establishing local faith-based tribunals. Similar efforts have been embarked upon in the United Kingdom with

the establishment of Muslim Law Shariah Councils (MLSC) whose aim it is to 'keep the identity of our community, to keep its laws, to keep it whole, while at the same time not breaking the laws of the state, having our own private language, while speaking the common language' (Shah-Kazemi 2001: 10). Muslims in the United States have begun to discuss the possibility of establishing such tribunals.<sup>89</sup> One of the differences between the US and UK experiences is that Muslims in the USA have, at least at the theoretical level, been interested in a model of marriage dispute resolution that is more egalitarian in its approach. The English MLSCs, on the other hand, seem predicated on the role of the *qadi* as mediator or judge in the process of Muslim marriage dissolution (Shah-Kazemi 2001). An example of the American approach can be seen in the work of Amr Abdalla, who calls for an Islamic model of interpersonal intervention in conflict based on three principles: (1) restoring Islam to its message of justice, freedom and equality; (2) engaging the community in the intervention and resolution process; and (3) adjusting the intervention techniques according to the conflict situation (Abdalla 2000: 153).<sup>90</sup> As the idea of establishing US Muslim tribunals evolves, it will be important to examine whether they will mimic the role of a Muslim *qadi* who is the expert, or rather will be infused with the involvement of various other Muslim professionals and community members. The choice between these two approaches will have a significant influence on the ultimate nature of decisions emerging from these tribunals.

The attitude of the US courts to the rise of these tribunals is as yet unknown, but there are indications that some judges would welcome the existence of reliable arbiters of Islamic family law issues, and may even be undertaking their own consultation with Muslim authorities in the interim. For example, in a recent divorce case in Pomona, California, a complicated *mahr* question was ultimately resolved by referral of the parties to two Muslim imams (mutually agreed to by the parties) on the *mahr* question, which was then returned to the family judge who allocated the dissolution amount accordingly (Erickson, interview, 2001). This very innovative approach honoured the parties' allegiance to Islamic law while still maintaining state jurisdiction over the case.

Muslims in the USA have a helpful precedent for these efforts in the experience of the Jewish community, which has already established an alternative dispute-resolution faith-based system. The Jewish community's *beit din* institutions play the role of arbitrators or mediators in marriage dissolution processes (Greenberg-Kobrin 1999: 364). Further, many states have adopted laws that include clergy as potential mediators or counsellors for family disputes; some now make it mandatory for couples and families to consult with some type of mediator whenever any issue of dissolution or custody arises (Lyster 1996). Muslims may find that, in addition to their imams, they can use the services of Muslim lawyers or social workers. Panels similar to *beit din* within the Jewish community might function as faith-based tribunals for various family law issues. Muslims may explore the option of naming possible mediators or arbitrators in their marriage contracts or pre-

nuptial agreements. The contract that one signs must conform to all of the standard hallmarks of contract law.<sup>91</sup> The idea of restoring Islamic values through creating an Islamic mediation model is echoed in other Muslim activist work asserting a restoration of Islam to its basic values of justice, freedom and equality. Many US Muslims see the message of reform as central to any action taken by a Muslim. They find the impetus to form social change movements inherent in the fact that they are Muslim, and hope to find a space that exists between the realm of an Islamic belief system and their US cultural milieu.<sup>92</sup>

This feeling of individual obligation has been manifested in the creation of various organizational structures seeking positive change in the form of activist, grassroots activities and education of the Muslim and non-Muslim public on issues of both Islamic and US law. One example is Karamah, noted earlier, an organization engaging both the Muslim and non-Muslim communities on the topic of human rights and women. Its activities include participation in the Fourth United Nations World Conference on Women, and inter-religious fora on women's rights issues,<sup>93</sup> as well as the model marriage contract project noted earlier. Through this work Karamah has provided a critique of mainstream secular and Islamic opinions on legal issues relevant to women.

Another organization of interest to our study and mentioned above is the National Association of Muslim Lawyers (NAML).<sup>94</sup> Initially established in 1995 as a web-based community forum for discussions and networking among Muslim lawyers, this organization has now evolved into a formal organization addressing the needs of the burgeoning Muslim legal community. Its annual conferences have covered topics of interest to those following the legal situation of Muslims in the USA, both in terms of Islamic and US law.<sup>95</sup> Moreover, the searchable online database of Muslim attorneys provided on NAML's website is a significant contribution to the Muslim community at large, providing a readily usable contact list of legal professionals who are also sensitive to Muslim family norms.

The increased use of web-based communication has greatly contributed to the formation and expansion of unprecedented and spontaneous debates on Muslim family law issues such as marriage, divorce and child custody. In addition to the domestic impact of discussion groups such as the NAML email list, the use of web-pages to disseminate various new doctrines and religious rulings has had a tremendous effect on the international discussion of Islamic family law. The active nature of the American Muslim community online has placed it in an influential position in these global discussions of Islam and Islamic law. For example, during the Bosnian war, a Muslim website based in the US, <islam.org>, posted two religious rulings on abortion. The website rulings had an impact on the question of abortion within an international context by providing differing perspectives from various sources (Watanabe 2000; <www.islam.org>). In countries where the government or a specific group of scholars control a religious hegemony and discourage divergent interpretations and views, these types of diverse perspectives accessible via the internet can revolutionize the way that individuals view a certain topic.

The US Muslim experience is contextualized in a democratic, secular society. Women have emerged as an integral part of the Muslim activist and intellectual movements, as noted earlier in this study, especially in the areas of issues involving domestic violence and abuse of women in general. Muslim women have not only served as activists and community organizers; they have also been able to offer their perspective on relevant legal issues. In the United States, scholars such as Amina Wadud are able to publish their interpretations of the Qur'an openly and share them with the wider Muslim community (Wadud 1999). Furthermore, American Muslim scholars such as Aminah Beverly McCloud present the reality of a dynamic and living form of Islam within the African-American Muslim community (McCloud 1991). With voices like these in the community, immigrant Muslims cannot limit their interpretations to those scholars who exclusively represent their country or their school of thought. A back-home focused approach is thus challenged by indigenous and second-generation communities that are already fully aware of and dealing with modern Western society.<sup>96</sup>

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### Conclusion

§ THIS survey has sought to catalogue and explain the nature and application of Islamic family law within the US Muslim community. The potential of this community is evident by the wide range and depth of its contributions in this area. This study has demonstrated that Islamic family law as manifested in the United States has been a subject of significant interest and considerable complexity, both in terms of US domestic and Islamic law, as well as their interaction. In the previous chapter, we have seen that within the United States are significant trends of reform and activism addressing Islamic family law. Yet it is important to keep in mind that these reform efforts also face several potential problems as they progress. For example, one of the main concerns that the Muslim community shares with other religious groups in the United States is the recognition that forward-thinking actions and scholarship that steer away from religious orthodoxy may lose acceptance by the mainstream faith-based system. In a parallel situation, the Jewish orthodox community has, at times, refused to accept terms that do not conform to a traditional understanding of religious rights when those rights were negotiated in a *ketubah*, or religious pre-nuptial agreement (Greenberg-Kobrin 1999: 397).

Another major potential problem lies in the need to differentiate between culture and religion. Enmeshed in this particular question is the role of cultural practice and interpretation. While a cultural practice may actually protect the family rights of an individual, when the family serves as a negotiating representative in marriages, it is possible that a cultural pattern of family interaction can be more limiting than the constraints actually set by religious law (Hashim, interview, 2000).<sup>97</sup> The Muslim community will have to sift through its multi-cultural history and traditions and decide which practices will be preserved and which will be discarded if they do not fit an appropriate religious and societal agenda. Creation of a unified agenda or perspective will remain a challenge for this community. At the heart of this issue is the fact that there remain on-going internal debates in the United States' Muslim community as to who should be in charge or involved in formulation of community-wide agendas. In some instances, gender has remained a barrier to the full involvement of Muslim women. Different cultural practices are reflected in women's space in a mosque. For instance, *The Mosque in America* report notes that there is an increasing practice of separating

women in prayer from men by a hung cloth, or having them pray in another room (Bagby et al. 2001: 11).<sup>98</sup> While this is not definitive evidence that women are not a part of the general community space, it is interesting to note that there is an increasing trend towards gender segregation in the mosque environment. The study did not reach the conclusion that certain cultural groups had higher levels of segregation in their mosques. This would be a relevant topic to explore in future studies and would provide an analytical tool to differentiate between cultural variables that affect gender participation and religious interpretations that are used to justify segregation. Finally, the reality of class differences among Muslim Americans has been an ongoing divide. For instance, the actions of the immigrant Muslim community have included acknowledgement that they 'had been guilty of ignoring the persistent and social problems of the indigenous Muslims' (Dannin 2000: 26).

Another important challenge for the future of Islamic family law in the United States stems from the demographic of Muslims. This report, in talking about Islamic family law in the USA, has assumed a certain level of adherence and belief in Islam as a legitimate organizing system for one's life and society. We have mentioned the several varieties of interpretation of Islamic law among the diverse Muslims in the United States, but there is also significant variation in levels of adherence to Islam as a source for behaviour in the first place. As noted in both Haddad and Lummis and the Mosque project, Muslim practice ranges from those who are 'unmosqued' to those who attend holiday prayers, and those who are more involved in their particular communities (Lummis and Haddad 1987: 9; Bagby et al. 2001: 3). It will be a challenge for Muslim scholars and activists in America to bring together these different types of Muslims and develop a consensus, especially in the volatile area of family law that touches on intimate interpersonal relationships and deep moral values. This is the ultimate challenge for any minority faith: to adhere firmly to its values and traditions while also adapting to the social, legal and cultural contexts in which it exists.

# APPENDIX

## Table of cases

### US Supreme Court cases

*Bradwell v. Illinois*, 83 US 130 (1873)

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*Aghili v. Saadatnejadi*, 958 S.W.2d 784 (Ct. App. Tenn. 1997)

*Ahmed v. Ahmed*, 689 N.Y.S.2d 357 (Sup. Ct. NY 1999)

*Akileh v. Elchahal*, 666 So.2d 246 (Fla Ct. App. 1996)

*Ali v. Ali*, 652 A.2d 253 (NJ Sup. Ct. 1994)

*Arain v. Arain*, 209 A.D.2d 406 (1994)

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

*Habibi-Fahnrich v. Fahnrich*, WL 507388 (NY Sup. 1995)

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

*In Re Marriage of Murga*, 103 Cal. App. 3d 498 (1980)

*Jabri v. Jabri*, 598 N.Y.S. 2d 535, 537 (1993)

*Kapigian v. Der Minassian*, 99 N.E. 264 (Mass. Sup. Ct. 1912)

*Maklad v. Maklad*, WL 51662 (Conn. Super. Jan. 3, 2001)

*Malak v. Malak*, 182 Cal. App. 3d 1018 (1986)

*Mehtar v. Mehtar*, 1997 Conn. Super. LEXIS 2400

*NY v. Benu*, 385 N.Y.S.2d (Crim. Ct. NY 1976)

*Odatalla v. Odatalla*, 810 A.2d 93 (NJ Super. 2002)

*Ohio v. Awkal*, 667 N.E.2d 960 (Sup. Ct. Ohio 1996)

*Seth v. Seth*, 694 S.W.2d 459 (Ct. App. TX 1985)

*Shaban v. Shaban*, 88 Cal. App. 4th 398 (2001)

*Shike v. Shike*, Tex. App. LEXIS 2733 (April 27, 2000)

*Shikoh v. Shikoh*, 257 F.2d 306 (2d Cir. 1958)

*Tazziz v. Tazziz*, 533 N.E.2d 202 (Mass. App. Ct. 1988)

*Vryonis v. Vryonis*, 202 Cal. App. 3d 712 (CA Ct. App. 1988)

*Zummo v. Zummo*, 574 A.2d 1130 (Pa. 1990)

## Notes to Part III

Our sincere thanks to Steve Vieux and Abed Awad for their helpful research assistance, and to all those who shared their experiences and expertise in our interviews with them (see attached interview list).

1. Anglo-American family law itself has religious Christian origins, as acknowledged in *Bradwell v. Illinois*, 83 US 130 (1873), where the Supreme Court described the 'divine ordinance' of the 'constitution of the family organization' (ibid., 141; Mason 1994: 53); but this aspect of US law will not be elaborated here.

2. The research material for this study is comprised of: interviews with professionals who serve the US Muslim community, legal research of current United States federal and state case law, review of general literature (books, magazines, newspapers) addressing issues concerning Muslims in the United States, internet searches of Muslim-related sites, and the professional experiences of the authors. As the research time was constrained due to publication deadlines, the report is itself quite limited, and makes no claim to be exhaustive of all issues, resources, scholars and other elements potentially relevant to this topic. For surveys conducted by other sources, see Haddad and Lummis (1987). Haddad and Lummis studied eight mosques located in the Midwest, upstate New York and the East Coast over a period of two years. They focused on personal backgrounds and religious attitudes of the seventy to eighty participants in the study. Haddad and Lummis surveyed 346 Muslims, 64 per cent of whom were immigrants, and 16 per cent were children of immigrant parents. Thirty-four per cent of their sample were Lebanese American, 28 per cent were Pakistanis, with individuals from other Arab nations comprising the remainder of the sample. Another useful and more recent study is *The Mosque in America: A National Portrait* (Bagby et al. 2001), sponsored by a number of Muslim organizations and part of a larger study of American congregations coordinated by Hartford Seminary's Hartford Institute for Religious Research. The project included a random sampling from 1,209 mosques across the United States, based on responses from 416 mosque leaders. The new survey showed African Americans were the dominant ethnic group in 27 per cent of mosques, South Asians in 28 per cent and Arabs in 15 per cent, with the remaining mosques described as 'pluralistic' (ibid., p. 3). See <<http://fact.hartsem.edu>> for further information.

3. See American Muslim Council (1992). The number of Muslims in the USA continues to be an unsettled issue. Haddad and Lummis (1987: 3) noted that these might be between 2 and 3 million. The Mosque in America project findings reflect 2 million Muslims who attend or participate in mosques to a varying degree, with an overall estimate of 6–7 million Muslims present in the USA (Bagby et al. 2001: 3). One of the supreme challenges for counting the number of Muslims in the USA is the fact that there remains a large, as identified by Haddad and Lummis (1987: 9), 'unmosqued' proportion of the population who not have a direct and regular affiliation with a mosque.

4. See Quraishi (2001); Al-'Alwani (1993: chapter on *Ikhhtilaf*); Abou el-Fadl (1997: 18) notes the belief that 'a major contributing factor to the diversity of Islamic theological and legal schools is the acceptance and reverence given to the idea of *ikhhtilaf* (disagreement)'.

5. See Sciolino (1996) on different 'versions' of Islamic law regarding marriage.
6. See Haddad and Lummis (1987) for a discussion on imams in the United States.
7. Azam's 'The Muslim Marriage Guide', at <[http://www.beliefnet.com/story/73/story\\_7319\\_1.html](http://www.beliefnet.com/story/73/story_7319_1.html)> (reviewing Maqsood 1998).
8. See for example the articles by Raga El Nimr and Najla Hamadeh in Yamani (1996).
9. See <<http://www.mwlusa.org>> The Muslim Women's League is based in Los Angeles, California. Other Muslim women's organizations interested in similar work include the DC-based Georgetown Muslim Women's Study Project (organized to review the UN Platform for Action prior to the 1995 Beijing Fourth UN World Conference on Women), and the North American Council for Muslim Women (NACMW), based in Virginia, which was launched in 1992 with a large national conference.
10. See <<http://www.karamah.org>>
11. See <<http://www.alsalafyoon.com>>
12. The fora email is sisters@post.queensu.ca
13. See <<http://www.studyislam.com>>
14. Similarly, the Canadian Society of Muslims includes on its website many sources of Islamic jurisprudence, as well as articles on 'Family Matters' addressing such topics as birth control and abortion, adoption, custody and guardianship, polygamy, arranged marriage, and women's rights in an 'Islamic prenuptial agreement'. See <<http://www.canada-muslim.org>>
15. See <<http://www.domini.org/lam>>
16. See al-Khateeb (1996: 15). Similarly, another source says: 'The Islamic marriage contract is meant to solidify bond and specify stipulations that are important to both parties. The contract is intended to safeguard present and future legal rights of both the husband and wife, should encourage marital harmony, and should keep the family within the boundaries of the Qur'an and Sunna for the pleasure of Allah.' See 'Cont ... The Marriage Contract' at <<http://geocities.com/lailah2000/contract2.html>>
17. 'A Conference on the Islamic Marriage Contract', Harvard Law School Islamic Legal Studies Program, 29–31 January 1999.
18. For popular dissemination of this information, see al-Khateeb (1996) for a list of sample stipulations and Mills for similar suggestions. For a more detailed, academic discussion of contract stipulations, including specific examples, see Welchman (2000: 35), Shaham (1995: 464) and Abou el-Fadl (1999).
19. Compare Mills who leaves out Islamic jurisprudential differences in a list of suggested stipulations in the marriage contract with Abou el-Fadl (1999) who explains general Hanbali allowances of contractual stipulations, compared with other schools' reluctance on the same, and their use of legal devices created to accomplish similar goals.
20. See <<http://www.karamah.org/projects/index.php>>
21. See al-Hibri (1997: 28) who notes differing validity depending on school of thought; Welchman (2000: 167); and Carroll (1982: 277).
22. See the article, 'An Islamic Perspective on Divorce', at <[http://www.mwlusa.org/pub\\_divorce.html](http://www.mwlusa.org/pub_divorce.html)> Similarly, the Muslim Women's League points out that classical custody laws (deciding custody based on abstract rules of the age and gender of the child) are among those that must 'adapt to dynamic circumstances', commenting that there is 'no Qur'anic text to substantiate the arbitrary choosing of age as a determinant for custody'. The League urges similar flexibility in determining alimony awards as well.
23. See *Akileh v. Elchahal* (1996), a case involving two separate marriage contracts – an

Islamic *sadaq* and a civil ceremony the following day incorporating the *sadaq* document specifying the wife's dower; *Ahmed v. Ahmed* (1999), distinguishing religious ceremony from civil; *Ohio v. Awkal* (1996), describing two separate marriage ceremonies, civil and Islamic, on separate dates; *Dajani v. Dajani* (1988), involving a Jordanian couple married by proxy in Jordan, followed by a civil ceremony in the USA upon the wife's arrival; and the al-Sarraf interview (2000) in which the lawyer describes Muslim couples generally having a Muslim ceremony first, and then taking care of state requirements.

24. See *Tazziz v. Tazziz* (1988), a marriage ceremony in the United States, in accordance with Islamic law; *NY v. Benu* (1976), a marriage performed by a local New York City imam not authorized in a city clerk's office to perform marriages; the Awad interview (2000), in which the lawyer describes mosques in New York and New Jersey performing weddings with no state licensing; and McCloud (2000: 140) who urges Muslim women in the USA to get civil documents of both marriage and divorce. Some US Muslims, less concerned with Islamic law *per se*, may have only the civil ceremony, forgoing the Muslim one entirely, but these cases do not fall within the subject of this study.

25. See *Farah v. Farah* (1993) (deferred *mahr* of \$20,000); *Akileh v. Elchahal* (1996) (immediate *sadaq* of \$1 and deferred \$50,000; noting that when he proposed, the husband 'recognized that wife had the right to a *sadaq*'); *NY v. Benu* (1976) (sewing machine as dower).

26. See also marriage contracts on file with author (Quraishi). Islamic history verifies the use of non-monetary *mahr*. For example, a *hadith* from the Prophet explicitly validates the teaching of sections of the Qur'an (Doi 1984: 163) and the *shahada* (declaration of Islamic faith) of the groom as dower; see Ibn Sa'd (1997: 279) describing Umm Sulaim's marriage to Abu Talha, and stating that 'her dower was the Islam of Abu Talha'.

27. Kadri comments (interview, 2000) on her experience with clients whose only interest in attempting to enforce a *mahr* provision is in unfriendly divorce proceedings, with the demand for a high *mahr* being used as an opportunity to punish the husband.

28. See listserv email discussions on 'Sistersnet' (sisters@post.queensu.ca) in 1996-98 (notes on file with author Quraishi).

29. Ali (1996) comments that when divorce litigation is bitterly contested by a Muslim husband, it is often not because he does not want a divorce, but rather because he does not want to pay the *mahr*.

30. Kadri comments (interview, 2000) that brides and grooms tend simply to fill in *mahr* provision in standard boilerplate contracts and rarely add specified provisions. Similarly in interviews with four Muslim family lawyers, none reported seeing any particularized contracts of this sort (Awad, interview, 2000; al-Sarraf, interview, 2000; and Kadri, interview, 2000).

31. Email message to Karamah responding to Marriage Contract Project announcement (on file with author Quraishi). Another visitor to the website expressed dismay at not having a formal marriage contract written at her wedding, and asked if it is possible to create one retroactively.

32. See <<http://www.karamah.org>>

33. This is also the position of Mona Zulfikar, who spearheaded the marriage contract legislative efforts in Egypt. She says one of the most important aspects is to 'encourage frankness, mutual understanding and dialogue between the spouses, reduce the need to have recourse to the courts in difficult and bitter litigation procedures' (Zulfikar and al-Sadda 1996: 251; and cited in Welchman 2000: 181).

34. This is indicated by four out of the nine couples for whom one author (Quraishi) provided marriage contract information.

35. One of the brides assisted by this author (Quraishi) writes: 'It wasn't always easy to discuss the topics of our contract but in the end the entire process has brought me and ... my fiancé so much closer and we have grown stronger' (personal email on file with author).

36. Quoting Samia el-Moslimany saying: 'I put in that the burden of domestic chores was going to be shared by both of us ... My father thought it was trivial, but I wanted it in the contract.'

37. See *Aghili v. Saadatnejadi* (1997) in which \$10,000 damages was provided as a remedy to the wife if the husband breaches contract.

38. See the position paper, 'Marriage on Islam', at <<http://www.mwlusa.org>>

39. Noting that over a third of the respondents reported marriages of Muslim women to non-Muslim men in their families; and noting that the number of Muslim men marrying non-Muslim women is larger.

40. 'Some Muslim women whom we interviewed expressed the opinion that the man's freedom to marry outside the faith is neither fair nor conducive to preserving the Islamic faith in future generations born in America' (Haddad and Lummis 1987: 146). Marquand (1996) quotes a father saying: 'I will have a huge problem if my son marries a non-Muslim ... and will do everything I can do to stop it.'

41. See the article, 'Why Muslim man should not marry a non-Muslim woman', at <<http://www.soundvision.com/marriage/nonmuslimwoman>>

42. In one extreme example, Marquand (1996) reports some members of one Muslim community sought to displace a leader whose daughters had married non-Muslims, arguing that such a failure should cause him to lose his status in the community.

43. For example, says one Muslim woman, 'I love the religion with all my heart, but I don't like that the women don't have choice' (Todd 1997).

44. Mahmoody (1993); *Not Without My Daughter*, MGM Studios, 1991. This movie depicts the true story of Betty Mahmoody's escape from Iran with her daughter after her Iranian husband attempted to turn a two-week vacation into a permanent relocation of the family.

45. See <<http://www.travel.state.gov/abduct.html>>

46. See <[http://www.travel.state.gov/islamic\\_family\\_law.html](http://www.travel.state.gov/islamic_family_law.html)>

47. For more information about such stereotyping, see for example Shaheen 1997. In addition, refer to the online sources of the Council of Islamic-American Relations at <<http://www.cairnet.org>> and the Anti-Arab Discrimination Committee which can be found at <<http://www.adc.org>>

48. Betty Mahmoody (see above note 44) has herself served as an expert witness in a few cases involving Muslim marriages (Gustafson 1991).

49. Describing a 'traditional Muslim wedding in Walnut', including many things not included in other Muslim ceremonies, such as dancing, singing, bride and groom sitting side by side, and the bride's head covered.

50. Marquand (1996) quotes one Muslim saying, 'Sometimes male domination is machismo, sometimes it is genuine faith'.

51. Winton (1993) reports the story of a severely injured Muslim woman stating that her husband believed Islam allowed him to beat her.

52. Memon (1993) provides a summary of Islamic texts (including Qur'an 4: 34) used to 'justify battery, showing the misinterpretations by those who do so, and urges the American Muslim community to recognize and fight against domestic violence in their community.

53. Kadri (interview, 2000) notes a conversation with a woman complaining of her son beating her but who would not complain of such actions by her husband because she believed it was his right to do so. Attorney Kamran Memon (1993) notes that some imams tell these women to be patient and pray for the abuse to end, urging them not to leave their husbands and break up the family, and not break family privacy by talking about it to others.

54. Also featured on <<http://www.zawaj.com>>

55. These include (as a very brief sampling) the National Islamic Society of Women in America (NISWA) <<http://www.niswa.org>>; Baitul Salaam (House of Peace) <<http://alnisaar.hypermart.net>> PO Box 11041 Atlanta, GA 30310; Kamilat, <<http://www.Kamilat.org>>; Karamah: Muslim Women Lawyers for Human Rights <<http://www.Karamah.org>>; the Muslim Women's League (who co-sponsored the Los Angeles conference of the Peaceful Families Project) <<http://www.mwusa.org>>; and Muslims Against Family Violence, a project of 'Stepping Together' <<http://www.steppingtogether.org>>

56. In *Seth v. Seth* (1985), a non-Muslim male had converted to Islam after a marriage contracted under US civil law and subsequently divorced this wife by *talaq* and married a Muslim woman in a Muslim ceremony. In *Shikoh v. Shikoh* (1958), the husband, an Indian national, declared divorce before a Brooklyn imam before witnesses, signed and sent a copy of the imam's documentation of the declaration, entitled 'certificate of divorce', to the wife who was in Pakistan.

57. Little reports family lawyer Ahmed A. Patel saying that he reminds his clients who perform *talaq* divorces that they cannot remarry under US law.

58. Community property states in the USA include: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin; income and property earned or acquired during marriage is divided equally between the two spouses upon dissolution, even if one spouse was the predominant source of income. Allen (1992) quotes a Minneapolis imam stating that 'in Muslim marriages, there is no notion of community property; whatever a woman earns outside the home she may keep, but a man is obligated to support his family'.

59. One encouraging case exhibits respect by one court for a religiously-motivated provision opting out of community property laws. In *Mehitar v. Mehitar* (1997), a Connecticut court upheld a Muslim couple's pre-nuptial agreement opting out of South African community property laws (the marriage contract was executed in South Africa), stating that 'the purpose of the agreement was to comply with principles of Muslim law held by both parties' and holding that the requirement of financial disclosure usually required to validate such opt-out clauses in Connecticut 'would be unfair to apply ... to an agreement mutually sought to honour deeply held religious beliefs'.

60. Iran is a primary example. Ayatollah Mohsen Kadivar has been quoted as saying: 'a woman should be paid by her husband for working in the house, for cleaning, for breast-feeding. She can even say "I don't want to do this work, I need a servant," and her husband has to pay for this. This is in Islam, that he has to do this' (Walter 1999).

61. The vast majority of family law cases are never published, and therefore are largely unavailable as a subject of research. Thus, most of the cases discussed in the chapter are appellate court cases, which may or may not be representative of Muslim family litigation in the United States. Moreover, family law cases are almost always a matter of individual state jurisdiction and thus the case precedent of one state does not bind another. The review of the cases in this study does, however, provide a good idea of the established persuasive and precedential authority to which a judge might turn in evaluating future cases.

62. For example, without citation to case law, Amina Beverly McCloud (2000: 140)

states that marriages of Muslim immigrants to the United States 'have generally received the protection of the courts' because 'marriage contracts are understood as pre-nuptial or nuptial agreements'. Similarly, Imam Yusuf Ziya Kavakci, the imam of a Texas mosque, urges Muslims to get pre-nuptial agreements because they can be used to 'safeguard your Islamic rights within a marriage and, if necessary, in the case of a divorce'. See 'Why You Need a Prenuptial Agreement' at <<http://www.soundvision.com/weddings/prenuptial>>.

63. This attitude is probably culturally-influenced. Under Islamic law, once the offer and acceptance have been made (both usually included in a *nikah* ceremony), the couple is legally married. Because many Muslim couples sign the contract (*kitab* or *nikah*) at one ceremony but do not begin to live together until some later date, however, many believe themselves to be only 'engaged' after the *nikah*.

64. See <<http://www.Karamah.org>> (audiotape also on file with author Quraishi).

65. See *NY v. Bent* (1976) in which the mother was charged for contributing to the delinquency of her minor daughters, who were placed in foster care with a Muslim family, and the men who 'married' the girls were charged with first degree sexual assault of a child.

66. Rasmusen and Stake (1998) comment: 'even if it does not offend public policy, courts are reluctant to enforce such terms because of the costs to the courts, the difficulty of enforcement without invading the sanctity of the marital home, and the possibility that enforcement would increase conflict within the marriage'.

67. The court elaborated: 'the Mahr Agreement in the case at bar is nothing more and nothing less than a simple contract between two consenting adults. It does not contravene any statute or interests of society. Rather, the Mahr Agreement continues a custom and tradition that is unique to a certain segment of our current society and is not at war with any public morals' (*Odatella* at 98).

68. In the cases reviewed below, for example, spouses asserting the enforceability of a Muslim marriage contract as a pre-nuptial agreement did not always succeed. In both California cases dealing with *mahr* claims as pre-nuptial agreements, *Dajani* and *Shaban*, the court ultimately refused to honour the contract. In New York and Florida, the parties fared a bit better: in *Aziz* (NY) and *Akileh* (FL) the Muslim dower provisions were upheld, though the language of the Florida court indicates that they perceived the *sadaq* to be the husband's consideration for entering into the contract, an analysis with which Awad would strongly disagree.

69. Welchman (2000: 140) comments that a majority of jurists consider *mahr* to be an 'effect of the contract'.

70. For example, Al-Khateeb (1996) includes a form titled 'Islamic marriage contract/pre-nuptial agreement'.

71. Pre-nuptial agreements also generally may not include provisions relating to child custody and child support.

72. Al-Hibri points out that one might just as well interpret *mahr* provisions as facilitating murder – a conclusion just as ludicrous as the *Dajani* court's conclusion regarding divorce.

73. Of course, she may be able to keep it if she goes through judicial dissolution, in which case the question of harm will be assessed by the arbiter, but this process is generally much longer and entails a burden of proof upon her.

74. The court refers to the entire marriage contract, rather than the dower provision only, as a *sadaq*.

75. Incidentally, and unfortunately, the marriage contract at issue in this case is very similar to generic boilerplate contracts distributed and used by many American mosques (samples on file with author Quraishi).

76. The court went on to say: 'Had the trial judge allowed the expert to testify, the expert in effect would have written a contract for the parties.'

77. Later, the Florida Court of Appeals in *Akileh v. Elchahal* (1996), when first confronted with the question of enforceability of a Muslim marriage contract, cited *Aziz v. Aziz* (1985) favourably and upheld a Muslim dower provision because it found that Florida contract law applied to the secular terms of the Muslim contract. The Florida court found that, even though the husband and wife later disagreed over the meaning of the *sadaq* (the husband claimed that his understanding was that women always forfeited the *mahr* if they initiated the divorce), there was a clear agreement at the outset of the marriage that *sadaq* was to be paid if the parties divorced, and the court honoured that agreement.

For reference back to our earlier discussion of the treatment of these contracts as pre-nuptial agreements, in the reported opinion, the New York court does not refer to the contract in *Aziz* as a 'pre-nuptial agreement', but in *Akileh* (1996), the Florida court references *Aziz* as a case enforcing the *sadaq* as a pre-nuptial agreement.

78. Moreover, it might be argued that a rationale for the institution of the deferred *mahr* provision is the fact that most husbands will be better placed to pay high amounts later on in their careers, also part of the rationale for community property laws.

79. *Shaban* happened to involve a very low *mahr* amount and thus it was the husband who sought enforcement of the marriage contract. The court went so far as to say that the wife performed under the contract by entering into the marriage, and this constituted sufficient consideration on her part.

80. For a comparative view of the judicial treatment of *mahr* in Germany, see Jones-Pauly (1999). For analysis of Muslim marriage cases in the UK, see Freeland and Lau (forthcoming); and Pearl (1985–86, 1995).

81. See *Aghili v. Saadatnejadi* (1997), 786 (likening *sadaq* to maintenance); *Akileh v. Elchahal* (1996), 247 (*sadaq* is a postponed dower that protects the woman in the event of a divorce); *Dajani v. Dajani* (1988), 872 (commenting that one purpose of the dower is to provide security for the wife in the event of death or dissolution, but also can be an outright gift).

82. See *Aghili v. Saadatnejadi* (1997), 786 n. 1 (commenting that *sadaq* was meant to protect the wife from unwanted divorce); *Shaban* (2001), n. 6.

83. See *Dajani v. Dajani*, 872.

84. This assertion is supported by the court's reasoning in, for example, *Maklad v. Maklad* (2001), where the court declined to give comity to an Egyptian certificate of divorce because the wife was not present at the time the decree was issued, had no prior notice that the certificate was sought, and was given no opportunity to be heard prior to its issuance.

85. Clearly not all Muslims subscribe to this as the only legitimate means of determining custody, but classical Islamic jurists addressed custody in these terms as the safest way of determining that the child will be placed with the best custodian. Some American Muslims argue for a different rule, pointing out that this is a jurisprudential invention, not one directly dictated by the original texts (see Muslim Women's League, 'Divorce'). It is, however, the classical Islamic custody rules that are most well known and are what is at issue in these cases (though often in modified form through modern legislation in these Muslim countries).

86. See also *Adra v. Clift* (1961), where the court upheld a custody decree from Lebanon.

87. Conversely, religion has been counted as a negative influence if it harms the child; see *In Re Marriage of Murga* (1980).

88. For an extensive discussion on the precursors to modern Muslim discourse in the area of Islamic jurisprudence, see Hallaq (1997).

89. At the second 'Islam in America' conference, 9–11 March 2001, at Harvard University, one panel was titled 'Feasibility of Muslim Courts/Tribunals in the United States'. A mainstream US television network even recently presented a fictionalized version of what one of these tribunals might look like, in an episode of the television show *JAG* ('The Princess and the Petty Officer', 14 November 2000, written by Mark Saraceni).

90. Various Muslim organizations in the United States have explored conflict resolution issues within the realm of an Islamic framework, for example, the Islamic Society of North America has held annual training conferences on conflict resolution. The organization scheduled a conference titled, 'Muslim Peacebuilding after 9/11' in 2003. For more information on such efforts, see <[www.isna.net](http://www.isna.net)>

91. In particular, when one waives the right of pursuing litigation in court, the contract must be an 'objective manifestation of a party's intent to be bound by the religious court's decree and the party knowingly and voluntarily waived his rights to pursue litigation in secular court without any religious group's interference' (Weisberg 1992: 995).

92. For example, see the website, 'American Muslims Intent on Learning and Activism', at <<http://www.amila.org>> for their mission statement which states 'AMILA was formed in October 1992 by Muslims of college age and above to meet the spiritual, educational, political, and social needs of Muslims in the San Francisco Bay Area. We are working towards building an active American Muslim community with a strong commitment to spiritual enrichment, intellectual freedom, and community service.' AMILA's lectures, projects and activities reflect a progressive attitude towards claiming Islam as a vibrant American identity.

93. For example, Karamah recently participated (15 October 1999) in a panel of women of faith entitled 'Religion and World Conflict'. The event was organized by the International Women's Forum. See 'news and events' section at <<http://www.karamah.org/news/index.php>>

94. See <<http://www.namlnet.org>> There are also a few local city-based Muslim bar associations with similar focus, for example in Chicago and the DC area.

95. See <<http://www.namlnet.org>>

96. 'On the other hand is the generation of children and grandchildren who have no emotional ties to the homeland of the fathers and find little of value in their customs which are seen as counterproductive and an impediment to the progress in the society in which they are born' (ISIM 1998: 5).

97. As a teacher in a Muslim school, Hashim notes that parents from a specific cultural background would not allow female children to spend the night even for activities such as prayer outside of the home due to their interpretation of proper cultural gender roles. Eventually, she states, when parents were able to see that 'the religious teachings, in fact, promoted the practice of seeking opportunities to worship God', they did decide to allow their daughters to pursue such activities.

98. They compared statistics from 1994 with 2001 responses, noting that the proportion of mosques with separation by curtain, barrier or another room had increased to 60–66 per cent of those surveyed in 2001.

## Interviews

1. Sermid al-Sarraf, family and estate planning attorney, Los Angeles, California, 8 December 2000.

2. Abed Awad, family law attorney, Nutley, New Jersey, 14 November 2000.

3. Sydney Ericson, family law attorney, Brea, California, 1 October 2001.

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4. Jinan Hashim, teacher in an Islamic elementary school, Chicago, Illinois, 7 December 2001.
  5. Cherrefe Kadri, family law attorney, Toledo, Ohio, 5 December 2000.
  6. Tayibba Taylor, editor, *Azizah* magazine, Atlanta, Georgia, 12 October 2000.