

CHOICE OF LAWS OR CHOICE OF CULTURE: HOW WESTERN NATIONS TREAT THE ISLAMIC MARRIAGE CONTRACT IN DOMESTIC COURTS

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The topic of Islamic family law is one of controversy and much debate among Muslims and non-Muslims alike. All Muslims are in agreement, however, that Islamic law, or *shari'a*, is the law of God and that it is obligatory upon Muslims to “obey its divine provisions.”¹ Except for municipal regulations, Islamic law is not made by the state; it is created by God and merely enforced by the state.² Shari'a law “covers all aspects of life and every field of law—constitutional, international, criminal, civil, and commercial—but at its very heart lies the law of the family.”³ Given the centrality of family law to shari'a, it is understandable why this area is a source of ardent debate among Muslims. It also lends an understanding as to why many Muslims living under the ostensibly secular legal systems of Western nations continue to abide by Islamic family laws.

The fact that shari'a law is directly based in religion, coupled with the specific prohibition of Western courts from using religious doctrine or practice in making decisions, creates serious choice of law difficulties when courts are faced with a case involving an Islamic marriage contract. These courts struggle with the tension between their desire to separate religion from civil law, and therefore limit interference with individual freedoms, and the desire to uphold the right of

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¹ DAWOUD EL ALAMI & DOREEN HINCHCLIFFE, *ISLAMIC MARRIAGE AND DIVORCE LAWS OF THE ARAB WORLD* 3 (1996).

² Bernard Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 AM. J. COMP. L. 199, 201 (1978).

³ EL ALAMI & HINCHCLIFFE, *supra* note 1, at 3.

individuals to live according to the rules governing their particular faith.⁴ “Religious accommodation requires the state, the believer, and the religious community to compromise in order to reconcile fidelity to the secular ideals that make religious freedom possible.”⁵ It is clear to Western readers, then, that there are numerous inherent differences between Western and shari’a legal systems. These differences are most strongly felt by the minority Muslim populations of Western nations.

This Article sets out to explain the difficulties Muslim family issues present to courts in the West, particularly those of the United States and Canada. We believe it is important that the United States and Canada find a way of normalizing treatment of Islamic legal issues in domestic courts. Currently these issues are treated differently depending on the jurisdiction. This diversity fails to create certainty or consistent standards for other courts to employ when approached with Islamic legal issues. It also fails to provide any predictability for Muslims who wish to pursue legal action in these nations. To contrast the judicial skirting of Islamic family law issues in U.S. and Canadian courts, this Article also examines the English legal system’s more inclusive approach to Islamic family law.

This Article is divided into five parts. Part I provides a brief overview of the concepts of marriage, *mahr* (dower) and divorce in Islamic Law. Part II explores legal pluralism and choice of law issues in the United States and Canada. Part III examines how courts in the United States and Canada treat the *mahr* provisions of Islamic marriage contracts in their domestic courts. Part IV asks how these same courts handle Islamic divorces. Part V delves into the presence of Muslims in England and its effect on the ways in which the English legal system handles Islamic divorces.

⁴ Laureve Blackstone, Note, *Courting Islam: Practical Alternatives to a Muslim Family Court in Ontario*, 31 BROOK. J. INT’L L. 207, 207 (2005).

⁵ *Id.* at 208.

I. FAMILY LAW UNDER SHARI'A LAW: AN OVERVIEW OF MARRIAGE, MAHR, AND DIVORCE

A. THE CONCEPT OF MARRIAGE IN ISLAM

An analysis of marriage and divorce systems in Islamic nations must begin with an explanation of the concept of marriage in Islam. Marriage is a central tenet of Islam.⁶ It is an act that is highly encouraged as Islam considers the family (the result of a marriage) to be the “nucleus of Islamic society.”⁷ The shari'a regards marriage as a “contract lawfully concluded between a man and a woman, the ends of which are, *inter alia*, the formation of a family based on love, compassion, co-operation, chastity of the two spouses and the preservation of legitimate lineage.”⁸ The validity of the contract is contingent upon three things: “(1) The contract must not contain anything which indicates that it is intended for a fixed period. (2) The contract must be made known. This condition is fulfilled by the presence of two witnesses. (3) There must be no impediments of relationship or religion which would forbid the marriage.”⁹

While marriage in Islam is not regarded as a sacrament, as it is in the Christian tradition, the Islamic marriage contract does possess “spiritual and moral overtones and undertones.”¹⁰ It is regarded as an act of faith and is addressed in various verses of the *Qur'an*.¹¹ Verse 16:72 reads, “Allah has made for you your mates of your own nature, and made for you, out of them, sons and daughters and grandchildren, and provided for you sustenance of the best.”¹² Because marriage, and in turn the

⁶ Abdur Rahman I. Doi, *Marriage*, <http://www.usc.edu/dept/MSA/humanrelations/womeninislam/marriage.html> (last visited Mar. 17, 2007).

⁷ *Id.*

⁸ ALAMGIR MUHAMMAD SERAJUDDIN, *SHARI'A LAW AND SOCIETY: TRADITION AND CHANGE IN SOUTH ASIA* 195 (2001).

⁹ *Id.* at 196.

¹⁰ *Id.*

¹¹ The *Qur'an* discusses marriage and, in turn, family as being the center of Islamic society. “And among His signs is this, that He created for you mates from among yourselves, that you may dwell in tranquility with them, and He has put love and mercy between your hearts. Undoubtedly in these are signs for those who reflect.” THE HOLY QUR'AN 30:21, *available at* <http://www.usc.edu/dept/MSA/humanrelations/womeninislam/marriage.html> (last visited Aug. 22, 2006); *see also* Doi, *supra* note 6.

¹² THE HOLY QUR'AN, *supra* note 11, at 16:72; Doi, *supra* note 6.

creation of future generations, is central to Islamic society, the Prophet Mohammad

insisted upon his followers entering into marriage. The *Shari'ah* prescribes rules to regulate the functioning of the family so that both spouses can live together in love, security, and tranquility. Marriage in Islam has aspects of both *'ibadah* (worship) of Allah and *mu'amalah* (transactions between human beings).¹³

The contractual nature of the Islamic marriage makes it binding once it is entered; however, it is also subject to dissolution for various causes ranging from physical or mental abuse to a religious conversion in which one spouse leaves Islam for another faith.¹⁴

B. THE MAHR

The mahr, or dower, is an integral part of the Islamic marriage contract. The mahr is recorded in the contract and, in some countries, on governmental forms as well.¹⁵ It constitutes the major difference between the Islamic marriage contract and the Western civil marriage license. Mahr is defined as “property given by the husband to indicate his willingness to contract marriage, to establish a family, and to lay the foundations for affection and companionship.”¹⁶ Contrary to popular Western belief (and the usual understanding of words such as “dower” or “dowry”), the mahr is not a price paid to the bride’s father in exchange for her hand; rather, it is a specific sum paid by the husband and held in trust for the bride, payable upon divorce or death of the husband.¹⁷ The wife is the sole recipient of the mahr¹⁸ and its use is decided by her alone.¹⁹ She cannot be forced by her husband, for example, to use her mahr to buy items for the home or even to help him escape from debt.²⁰

¹³ Doi, *supra* note 6.

¹⁴ See generally K.N. AHMAD, THE MUSLIM LAW OF DIVORCE (1978) (for an in-depth exploration of Muslim law of divorce).

¹⁵ MUSLIM WOMEN’S RESEARCH AND ACTION FORUM, LEGAL LITERACY BOOKLET NO. 1: MARRIAGE 11-12 (2001) [hereinafter MARRIAGE BOOKLET]; see Lindsey E. Blenkhorn, *Islamic Marriage in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189, 200 (2002) (“If the marriage contract does not specify the amount of the *mahr*, the wife is entitled to a ‘dower of equivalence.’”).

¹⁶ Blenkhorn, *supra* note 15, at 199 (footnotes omitted).

¹⁷ *Id.* at 199-200.

¹⁸ *But see id.* at 199 n.67 (describing rare circumstances where someone other than the bride received the mahr).

¹⁹ *Id.* at 200.

²⁰ *Id.*

The mahr can be money, property, valuables, stock, or “anything that can be valued in money.”²¹ A part of it is generally paid at the time of the marriage, while the remaining portion, known as the “deferred mahr,” is paid upon the parties’ separation at death or divorce.²² The deferred portion serves as a kind of insurance so that women, who are forbidden from working outside the home in many Muslim societies, have some money to help support themselves once their husbands no longer provide for them.²³ The size of the mahr varies according to the wealth of the husband, and it may not be reduced once the contract is signed.²⁴ For example, if the husband is upset with his wife, he is prohibited from reducing the amount of the mahr to punish her.²⁵ He also may not withhold payment after a divorce. Payment of the dower is treated like a deferred debt in Islamic law, and the husband can be jailed for nonpayment.²⁶ If the wife has not requested the mahr within three years of the divorce, however, she forfeits her right to any amount that has not been paid.²⁷

The only way that the mahr may be reduced is through the consent of the wife. She may, at any time during or after the marriage, refuse to accept it.²⁸ This might be done as proof of her commitment to her husband or for any reason at all; the only provision is that the decision must be specifically agreed to by the wife.²⁹ Another rule

²¹ *Id.* Some examples of actual *mahr* clauses that have been written into marriage contracts in the United States and Canada include:

\$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.

Asifa Quraishi & Najeeba Syeed-Miller, *No Altars: A Survey of Islamic Family Law in the United States*, in *WOMEN’S RIGHTS & ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM* 177, 189 (Lynn Welchman ed., 2004).

²² Quraishi & Syeed-Miller, *supra* note 21, at 189.

²³ Blenkhorn, *supra* note 15, at 200-01.

²⁴ *Id.* at 200.

²⁵ *See id.*

²⁶ *Id.* at 201.

²⁷ MARRIAGE BOOKLET, *supra* note 15, at 12.

²⁸ *See id.* at 11.

²⁹ *See id.*

common in most Islamic legal systems is that the dower is automatically forfeited if the wife initiates the divorce.³⁰

The mahr is “absolutely necessary” for the valid completion of a marriage contract.³¹ This provision was originally intended to protect women in the case of divorce or the death of the husband.³² The mahr was meant to reduce the number of divorces in Islamic societies by making it expensive for the husband to break the marriage contract despite the facile manner in which a divorce may be initiated.³³ A husband may unilaterally and permanently divorce his wife by pronouncing three times the words, “I divorce thee.”³⁴ This right is unlimited and may occur under any circumstance. Moreover, in most Islamic legal systems this type of divorce does not require any formalization, witnesses, or judicial sanction.³⁵ The mahr was, thus, a kind of “security deposit” for married women.³⁶ In modern times, however, many Muslims—especially those living in Western states—do not put much stress on the importance of the mahr, seeing it instead as a relic of history.³⁷ As a result, some marriage contracts don’t include more than a pittance mahr as a mere token required by Muslim law.³⁸

³⁰ Blenkhorn, *supra* note 15, at 201.

³¹ MARRIAGE BOOKLET, *supra* note 15, at 11.

³² Blenkhorn, *supra* note 15, at 200.

³³ *Id.* at 201. See also *infra* § I.C. for a more complete explanation of Islamic divorce.

³⁴ Blenkhorn, *supra* note 15, at 201. This is known as *talaq*, and although it takes many forms in different countries, the one described above is the most common. MUSLIM WOMEN’S RESEARCH AND ACTION FORUM, LEGAL LITERACY BOOKLET NO. 2: DIVORCE 4 (2001) [hereinafter DIVORCE BOOKLET]. The wife may also divorce her husband with or without his consent, and there are very specific rules governing the circumstances that would allow this (including failure/inability to maintain, impotence, desertion, or ill-treatment), as well as potential implications on the wife. See *id.* at 7-11 for details.

³⁵ Blenkhorn, *supra* note 15, at 202; see also *infra* Part I.C.

³⁶ Blenkhorn, *supra* note 15, at 202.

³⁷ Quraishi & Syeed-Miller, *supra* note 21, at 189-90.

³⁸ *Id.*

[S]etting 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 had 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* [husband-initiated] divorce . . . which is accomplished by a high deferred dower.

MARRIAGE BOOKLET, *supra* note 15, at 12

C. THE UNCODIFIED ISLAMIC LAW OF DIVORCE

A termination of marriage can occur in one of three ways in accordance with shari'a law: "(i) by the act of the husband, called *talaq*, (ii) by mutual agreement, known as *khula* or *mabarat* and (iii) by a judicial decree of separation at the instance of the husband or the wife."³⁹

The *talaq*, according to shari'a law, is "the dissolution of a valid marriage contract forthwith or at a later date by the husband, his agent or his wife duly authorized by him to do so, using the word *talaq*, a derivative or a synonym thereof."⁴⁰ Unlike a *talaq*, a *khula* divorce is usually initiated by the wife, while a mutual agreement to dissolve the marriage constitutes the third type of divorce, the *mabarat*.⁴¹ These three forms of marriage dissolution are entirely action based, allowing for the complete absence of judicial involvement.⁴² Among the three, the *talaq* is by far the most controversial because it allows the husband to terminate the marriage unilaterally, either orally or through a written document.⁴³ According to Sunni jurisprudence, the *talaq* is divided into two categories: (i) *talaq al-sunna*, a *talaq* given in accordance with the *sunna*, or recorded words and actions of the Prophet Mohammad,⁴⁴ and (ii) *talaq al-bida*, a *talaq* not in accordance with the *sunna* but rather is one of "innovation."⁴⁵ The latter is more commonly known as a "triple *talaq*"—a situation, as previously mentioned, in which a husband simply tells his wife that he is divorcing her by pronouncing the word "talaq" three times.⁴⁶ Though this method is disapproved of in Islam—in fact, it is considered religiously abhorrent—it is nonetheless recognized under shari'a law.⁴⁷

Talaq al-sunna, the other form of *talaq* that allows unilateral termination of the marriage by the husband, is divided into two categories: (i) *ahsan*, the most common approved form of divorce, and (ii) *hasan*, a lesser-used but still approved form. The *ahsan talaq* takes

³⁹ SERAJUDDIN, *supra* note 8, at 198.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 199; EL ALAMI & HINCHCLIFFE, *supra* note 1, at 22.

⁴⁴ Muslims believe that Mohammad was the messenger who brought down Islam from God. Muslims do not worship Mohammad, but rather regard him as the last prophet to bring God's word to Earth.

⁴⁵ EL ALAMI & HINCHCLIFFE, *supra* note 1, at 22.

⁴⁶ SERAJUDDIN, *supra* note 8, at 200.

⁴⁷ See HAMMŪDAH ABD AL AṬĪ, THE FAMILY STRUCTURE IN ISLAM 232-36 (1977).

place when the husband “pronounces a single repudiation during a period of *tuhr*, that is, when the wife is in the period between two menstruations and when intercourse has not taken place.”⁴⁸ Upon this repudiation, the wife will enter a state of *iddah*, or a waiting period of sorts, in which she must wait three menstrual cycles before the divorce becomes final.⁴⁹ The purpose of this is to prevent either spouse from remarrying immediately after the repudiation in the event the couple chooses to work out their differences or discovers that the wife is pregnant.⁵⁰ The *talaq* can be revoked during this period.⁵¹

The *hasan* form of *talaq* involves three repudiations by the husband—one in three consecutive “periods of purity,”⁵² or three consecutive periods in which the wife is not menstruating.⁵³ Upon the third repudiation the divorce becomes final, though the husband has the option of revoking his pronouncement of *talaq* before the final declaration of divorce; however, should he not exercise that option, he is not permitted to remarry his wife unless she first remarries and divorces another man.⁵⁴ The purpose of this type of *talaq* is to force the husband to think long and hard about the declaration of divorce and feel certain that he wants it.⁵⁵ Both forms of *talaq al-sunna* are meant to “give [the] opportunity and time to the parties and their families and friends for bringing about a reconciliation between the parties.”⁵⁶ Perhaps a major reason for Islam’s insistence on reconciliation is its emphasis on maintaining a secure family life and preventing children from having to endure the legal drama that divorce has the potential to create.

Divorce is treated as a private matter in Islam, and as such, the grounds for obtaining one are not required to be disclosed publicly.⁵⁷ The reason for not requiring disclosure may have something to do with the idea that “such grounds are probably entrusted to the individual’s conscience.”⁵⁸ Perhaps Hammūdah ‘Abd al ‘Aṭī best summarized the

⁴⁸ EL ALAMI & HINCHCLIFFE, *supra* note 1, at 22-23.

⁴⁹ *Id.* at 23.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² SERAJUDDIN, *supra* note 8, at 200.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 199.

⁵⁸ ‘ABD AL ‘AṬĪ, *supra* note 47, at 224.

reasons for not requiring disclosure, as well as Islam's attitude towards divorce in general, when he wrote:

[T]he Qur'an seems to assume that the normal Muslim, man or woman, in most cases and most of the time will act responsibly, conscientiously, and God-mindedly. It assumes, further, that with dutiful authorities, sensitive publics, and sound characters divorce will be used as the very last resort. It is highly unlikely that rational, conscientious individuals will lightly take the separation from their loved or lovable ones, the breaking of their homes, and the inconveniences of divorce.⁵⁹

II. LEGAL PLURALISM AND CHOICE OF LAWS: THE UNITED STATES AND CANADA

Muslims living in the United States and Canada are governed by both Islamic religious tenets and secular laws. "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."⁶⁰ These Muslims seek to uphold Islamic law in their own daily lives and practice, but at the same time there is no direct, formal secular enforcement of those laws by the state.⁶¹ Thus, many Muslim couples attempt to assert Islamic legal rights in secular courts because they are unwilling to sacrifice that portion of their identity in favor of secular law. As a result, Western courts are forced to address new and unfamiliar laws.⁶²

Even within Muslim communities in Western nations, the differences between interpretations of Islamic law can be quite vast. Because each community is comprised of diverse groups of people from many different countries and backgrounds, opinions on each given point of law can vary widely.⁶³ Individuals can choose between "a healthy diversity of ideological perspectives" when seeking the guidance of imams or other community leaders on family law questions.⁶⁴ As a result, private arbitration of similar issues can end up with vastly

⁵⁹ *Id.*

⁶⁰ Quraishi & Syeed-Miller, *supra* note 21, at 179.

⁶¹ *Id.* at 183.

⁶² *Id.* at 179.

⁶³ *Id.* at 181.

⁶⁴ *Id.*

different results. Western courts, on the other hand, strive for a certain amount of predictability in the law as it is easier and more efficient to enforce a law that is static than one that can change at a moment's notice. This seeming dichotomy between a community diverse in belief and practice and a legal system seeking consistency in its decision-making leads to constant struggles within U.S. and Canadian courts.⁶⁵

In addition to the ideological diversity that characterizes Muslim communities in North America, another difficulty plagues Western courts regarding shari'a law. Even within the larger framework there are variations in religious and customary family laws and in the interpretation of these laws.⁶⁶ This problem arises because Islamic law is comprised of different schools of thought, known as *madhhabs*, which sometimes lead to vast differences in interpretation.⁶⁷ Therefore, the interpretation of the law that an official might use to make a marriage contract may differ based on several factors, including regional, cultural, ethnic, and ideological differences.

Further complicating the judicial systems' inclusion of Islamic law is the religious origin of Western laws. Though the current marriage laws in Western nations are presented as secular codes, they began as Christian religious tenets that fell under the tutelage of secular courts with the forced separation of church and state.⁶⁸ As a result of the Christian beginnings of the Western norms of marriage, courts have traditionally upheld Christian ideals as law.⁶⁹

Despite their origins in religious tradition, Western courts treat these Christian-based norms as secular and universally applicable.⁷⁰ Instead of applying the laws of marriage by referring to different religious traditions, courts look to documents like the First Amendment of the United States Constitution, which specifically provides for the

⁶⁵ See *id.* at 181-83.

⁶⁶ Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 549 (2004); Weiss, *supra* note 2, at 199-200.

⁶⁷ See Estin, *supra* note 66, at 549-50.

⁶⁸ See, e.g., JOHN WITTE, FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 154, 202-04 (1997); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 66 (1985); Estin, *supra* note 66, at 542-45.

⁶⁹ Estin, *supra* note 66, at 545-48. For example, "Western lawmakers will not grant cultural accommodations or legal concessions to polygamy, forced marriage, the marriage of prepubescent girls, unilateral divorce by husbands, and the ban against Muslim women marrying non-Muslims." John D. Snethen, *The Crescent and the Union: Islam Returns to Western Europe*, 8 IND. J. GLOBAL LEGAL STUD. 251, 265 (2000)

⁷⁰ Estin, *supra* note 66, at 547.

separation of church and state.⁷¹ The United States Supreme Court has ruled that American courts may resolve religious disputes using secular legal principles, such as the law of contracts or property, but they are specifically forbidden to make decisions based on religious doctrine or practice.⁷²

In Canada there is no codified separation of church and state.⁷³ The Canadian Charter of Rights and Freedoms, passed in 1982,⁷⁴ codifies fundamental freedoms—similar to the United States' Bill of Rights—and subjects these freedoms to “reasonable limits.”⁷⁵ The Charter recognizes “the freedom of conscience and religion” as one of the fundamental freedoms afforded to citizens, but unlike the First Amendment to the United States Constitution, it does not include an establishment clause.⁷⁶ Instead, the Charter “provides for free exercise [of religion] for individuals without prohibiting the government’s actions.”⁷⁷ Section 27 of the Charter, moreover, requires that all aspects of the document must be interpreted according to the “multicultural heritage of Canadians.”⁷⁸

Although family law in the United States and Canada appears to reflect a secularization of religious tenets, particularly in light of the codified rights of religious freedom, their laws still retain the religious heritages of each country.⁷⁹ This can result in Western practices not always fitting with customs from different traditions,⁸⁰ thus creating tension between religious traditions and secular law, especially when the questions of marriage and divorce are concerned.

⁷¹ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”); see also *MAGNA CARTA: TEXT AND COMMENTARY* 36 (A.E. Dick Howard ed., 1998) (1215) (“[T]he English Church shall be free [from governmental control] and shall have her rights in their integrity and her liberties untouched.”).

⁷² Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998).

⁷³ Blackstone, *supra* note 4, at 231.

⁷⁴ Part 1 of the Constitution Act, 1982, Schedule B to the Canada Act 1982, ch. 11 (U.K.), available at <http://laws.justice.gc.ca/en/charter/index.html> (last visited Aug. 8, 2007).

⁷⁵ Blackstone, *supra* note 4, at 230-31.

⁷⁶ *Id.* at 231; Part 1 of the Constitution Act, *supra* note 74, sec. 2.

⁷⁷ Blackstone, *supra* note 4, at 231.

⁷⁸ *Id.* at 230; Part 1 of the Constitution Act, *supra* note 74, sec. 27.

⁷⁹ Ann Laquer Estin, *Toward a Multicultural Family Law*, 38 FAM. L.Q. 501, 502 (2004). For example, in a British Columbia case involving the question of whether the court would uphold a polygamous marriage as legal, the opinion quotes a British Lord: “We do not hold the marriage to be void because it is contrary to the law of God, but because our law has prohibited it on the ground of its being contrary to God’s law. It is our law which makes the marriage void, and not the law of God.” *Yew v. British Columbia*, [1923] B.C.R. 109, 113.

⁸⁰ Estin, *supra* note 79, at 502.

However, the incorporation of Islamic law into Western domestic legal systems need not implicate the portentous “culture clash” or the demise of the separation of church and state. Islamic law could be recognized by Western courts as foreign law, an area that they are more experienced, though short of confident, in addressing. The question of foreign law arises in American courts when one of the parties to a suit claims a legal right based on a foreign law or judgment.⁸¹ Unless there is a treaty specifically stating the contrary, American courts are not required to apply foreign laws.⁸² When determining whether to apply foreign law in a certain case, American judges, for example, turn to the choice of law rules in sources such as the Restatement (Second) of Conflict of Laws, which provides for an assumption of acceptance of decisions made in foreign courts.⁸³ Specifically, this document states that “[a] valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned.”⁸⁴

When American courts do recognize foreign laws, they have typically done so based on the principle of comity.⁸⁵ Although its application is not required, “domestic courts apply principles of comity and recognize foreign law as a matter of custom.”⁸⁶ American courts, however, may deny the application of foreign law in domestic settings “if [the law] comes from an ‘uncivilized’ legal system, [or] if it is contrary to domestic public policy or good morals”⁸⁷

Although one might assume that American judges would in many cases deem shari’a law “uncivilized,” no American judge has ever

⁸¹ David F. Forte, *Islamic Law in American Courts*, 7 SUFFOLK TRANSNAT’L L.J. 1, 2 (1983).

⁸² *Id.*

⁸³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971).

⁸⁴ *Id.*

⁸⁵ Forte, *supra* note 81, at 2-3. “Comity . . . is not a rule of law, but one of practice, convenience, and expediency. Although more than mere courtesy and accommodation, comity does not achieve the force of an international imperative” *Id.* at 3 n.10. Comity is defined as “the informal and voluntary recognition by courts of one jurisdiction of the laws and judicial decisions of another,” and “the courtesy and friendship of nations marked especially by mutual recognition of executive, legislative, and judicial acts.” Merriam-Webster Online Dictionary, <http://www.m-w.com/dictionary/comity> (last visited Aug. 15, 2007). Courts are not required to apply it. “Whether recognition will be granted on comity depends on whether the decree conforms to the public policy and good morals of the state in which recognition is sought; and it is exclusively for the courts of that state to make such determination.” 27C C.J.S. *Divorce* § 1215 (2007). For a list of the factors courts use when determining whether to apply this principle to the judgment of a foreign court, see *Hilton v. Guyot*, 159 U.S. 113, 124 (1895).

⁸⁶ Forte, *supra* note 81, at 3.

⁸⁷ *Id.*

refused to enforce a law from an Islamic nation on that basis.⁸⁸ According to some scholars, “what most prevents application of Islamic law in American jurisdictions is the fear the American judges have in confronting a different legal system of apparently baffling complexity.”⁸⁹ It is rare that Islamic law is pled in American courts (thus further limiting judicial exposure to this unfamiliar legal system) and in cases where it has been done, no plaintiff has ever actually recovered on that basis.⁹⁰ Instead, judges tend to listen to the testimony of expert witnesses and make their decisions based on law they know—United States law.⁹¹

Although there are traces of legal pluralism in some Western legal systems,⁹² for the most part they remain committed to their respective interpretive processes. According to one scholar, due to the differences between Western and Islamic legal systems and the unfamiliarity of most American judges with Islamic law (or foreign law in general), it is reasonable to conclude that it will “continue to be an entity inaccessible to American courts.”⁹³

III. DO WESTERN COURTS UPHOLD MAHR PROVISIONS?

As U.S. and Canadian courts have resisted incorporating Islamic law into their decisions, the next question is whether and under what laws or conditions courts in Western nations uphold the mahr provisions in Islamic marriage contracts. It must first be noted, however, that although the mahr is meant to provide for the wife after divorce, courts in many Muslim nations will also award spousal support,⁹⁴ child support,⁹⁵ and in some cases an additional lump sum to help the divorced wife support herself.⁹⁶ Whether the wife will receive these additional funds,

⁸⁸ *Id.* at 10.

⁸⁹ *Id.*

⁹⁰ *Id.* at 31.

⁹¹ *Id.*

⁹² The United States and Canada give some recognition to the customary laws of their native populations, but these laws are not directly applied by the courts, nor are they enforced by the state. Estin, *supra* note 66, at 550.

⁹³ Forte, *supra* note 81, at 33.

⁹⁴ DIVORCE BOOKLET, *supra* note 34, at 12-14.

⁹⁵ *Id.*

⁹⁶ *Id.*; J.N.D. ANDERSON, ISLAMIC LAW IN THE MODERN WORLD 56-57 (1959); *see also* JAMAL J. NASIR, THE ISLAMIC LAW OF PERSONAL STATUS 88-93 (3d ed. 2002); Quraishi & Syeed-Miller, *supra* note 21, at 204.

and their amounts, depends on the country in which she lives and the school of thought (*madhhab*) governing the court's decision.⁹⁷ In many Muslim nations, the wife forfeits her right to the mahr (or it is considered to be a payment to the husband) if she initiates the divorce.⁹⁸ This is especially the case if she initiates a divorce before the marriage is consummated.⁹⁹ Where the marriage is dissolved not by unilateral action on the part of one of the parties, but rather through legal action taken in a court of law, there is no clear and absolute rule regarding mahr payment. This is so even within Muslim countries.¹⁰⁰ Instead, judges "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 her *mahr*."¹⁰¹ If the terms of the contract are clear, secular Western courts can indeed find a way to enforce them using, for example, the rules of contract law.

A. THE UNITED STATES

To date, there is no standardized treatment of the mahr provision in American courts. As more and more Muslims seek to have this provision enforced, however, it is likely that a more consistent treatment will emerge, especially within jurisdictions with large Muslim populations. So far, American courts have dealt with the mahr provision in Islamic marriage contracts either as pre-nuptial agreements or as contracts, though they sometimes choose to reject the mahr terms as "uncertain" due to its religious references.¹⁰²

In the case of *Dajani v. Dajani*,¹⁰³ the court turned to California law regarding prenuptial agreements and declared the contract to be "void as against public policy."¹⁰⁴ It reached this result by examining precedent that stated: "[p]renuptial agreements which 'facilitate divorce or separation by providing for a settlement only in the event of such an occurrence are void as against public policy.'"¹⁰⁵ The court then

⁹⁷ ANDERSON, *supra* note 96, at 56-57; DIVORCE BOOKLET, *supra* note 34, at 12-14.

⁹⁸ Quraishi & Syeed-Miller, *supra* note 21, at 190.

⁹⁹ DIVORCE BOOKLET, *supra* note 34, at 7-11; NASIR, *supra* note 96, at 93-94.

¹⁰⁰ Quraishi & Syeed-Miller, *supra* note 21, at 190.

¹⁰¹ *Id.*

¹⁰² Quraishi & Syeed-Miller, *supra* note 21, at 207.

¹⁰³ 251 Cal. Rptr. 871 (Cal. Ct. App. 1988).

¹⁰⁴ *Id.* at 871.

¹⁰⁵ *Id.* at 872 (citations omitted).

determined that the marriage contract clearly provided for the wife to profit from the divorce, an outcome which the court refused to allow.¹⁰⁶

Many scholars feel that to construe the Islamic marriage contract as a prenuptial agreement “has created a serious warping of American judicial understanding of Islamic law as well as a hindrance to providing justice to US Muslim litigants.”¹⁰⁷ They note the inherent differences between Western prenuptial agreements and mahr agreements, pointing out that they treat property differently.¹⁰⁸ For example, prenuptial agreements usually seek to preserve the separate quality of property brought to the marriage or to “define the character of any property acquired during the course of the marriage.”¹⁰⁹ The mahr, on the other hand, gives money to the wife in an effort to reduce potential inequalities in marital law.¹¹⁰ These scholars also claim that the mahr is not consideration for the contract, even if part of it is paid upon signing, but that it is instead an effect of the contract and should be upheld as such under contract law.¹¹¹

Current U.S. divorce law shows a tendency towards procedural fairness to both parties and a concern for the protection of statutes.¹¹² As a result, it is relatively easy for American courts to understand the mahr as a provision of a contract signed between two parties, thereby placing a religious concept into a secular context.¹¹³ In *Shaban v. Shaban*,¹¹⁴ the court applied California’s Uniform Premarital Agreement Act (enacted in 1985), noting that California has a Statute of Frauds provision for prenuptial agreements.¹¹⁵ The court then applied contract law (the Statute of Frauds) to the marriage agreement, examining the contract itself for the required evidence of certainty in its terms.¹¹⁶ It found that a term

¹⁰⁶ *Id.* Interestingly, the trial court attempted to apply Islamic law to the case. After listening to experts for both sides, the judge decided that the wife was not entitled to her mahr because she initiated the divorce. *Id.* This is, of course, an oversimplification of an extremely complex legal rule. The appellate court’s decision was even more superficial, in that it rejected the idea of mahr entirely, claiming instead that it inherently “facilitated divorce.” *Id.*; see also Quraishi & Syeed-Miller, *supra* note 21, at 202.

¹⁰⁷ Quraishi & Syeed-Miller, *supra* note 21, at 201; see also Blenkhorn, *supra* note 15.

¹⁰⁸ Blenkhorn, *supra* note 15, at 202-03.

¹⁰⁹ *Id.* at 203.

¹¹⁰ *Id.*

¹¹¹ Quraishi & Syeed-Miller, *supra* note 21, at 201.

¹¹² Estin, *supra* note 66, at 558.

¹¹³ Quraishi & Syeed-Miller, *supra* note 21, at 201.

¹¹⁴ 105 Cal. Rptr. 2d 863 (Cal. Ct. App. 2001).

¹¹⁵ *Id.* at 867. “A premarital agreement must be in writing and signed by both parties.” *Id.* at 868.

¹¹⁶ *Id.*

requiring that the contract be addressed according to “Islamic law” was too broad to have any real concreteness, and therefore the terms of the contract were too uncertain to enforce.¹¹⁷ Consequently, it distributed the marital assets equally between the parties. This resulted in an award of \$1.5 million to the wife instead of the mahr, which was worth about thirty dollars.¹¹⁸ The court effectively began with the law of prenuptial agreements and ended up using the law of contracts to decide the case.

In *Habibi-Fahnrich v. Fahnrich*,¹¹⁹ the New York Supreme Court also looked to the Statute of Frauds to determine whether an Islamic marriage contract was valid, specifically in terms of its mahr provision.¹²⁰ It found that the material terms of the agreement were too vague and that no agreement existed at the time the contract was signed with regard to the specific meaning of the mahr clause: “[a] ring which is advanced and the postponement of one half of the husbands [sic] possessions.”¹²¹ According to the court, this clause left too many questions unanswered, for example: “Postponed” for how long? Half of the husband’s possessions calculated at which point during the marriage?¹²² As a result, the agreement could not be upheld under American contract law.

American courts do sometimes uphold mahr provisions using contract law if they conform to the requirements of the Statute of Frauds. For example, in *Aziz v. Aziz*,¹²³ the New York Supreme Court upheld a mahr provision, stating that “its secular terms are enforceable as a contractual obligation, notwithstanding that it was entered into as part of a religious ceremony.”¹²⁴ The court in this case looked solely to the terms of the contract, enforcing them as written while ignoring their religious aspect.¹²⁵ Like the courts in *Shaban* and *Fahnrich*, the court refused to apply “Islamic law,” instead choosing to stay within the comfortable secular law of contracts.

¹¹⁷ *Id.* at 869. “The court flatly rejected [the defendant’s] 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.” Quraishi & Syeed-Miller, *supra* note 21, at 203.

¹¹⁸ *Shaban*, 105 Cal. Rptr. 2d at 870.

¹¹⁹ No. 46186/93, 1995 WL 507388, at *1 (N.Y. Sup. Ct. July 10, 1995).

¹²⁰ *Id.* at *1-2.

¹²¹ *Id.* at *3.

¹²² *Id.* at *2-3.

¹²³ 488 N.Y.S.2d 123 (N.Y. Sup. Ct. 1985).

¹²⁴ *Id.* at 124.

¹²⁵ *Id.*

Similarly, the New Jersey Superior Court used contract law to address the mahr provision in *Odatalla v. Odatalla*.¹²⁶ Here, the court outlined specific conditions for upholding such an agreement: 1) It must be enforceable according to “‘neutral principles of law’ and not on religious policy or theories.”¹²⁷ 2) Once these “neutral principles” are applied, the agreement in question must conform to the usual state standards.¹²⁸ Here the court looked immediately to the principles of contract law in order to address the mahr agreement.¹²⁹ It determined that the mahr in this case was indeed a valid agreement despite its religious aspect, stating: “[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?”¹³⁰ The court asserted its right to uphold any contract that is performed according to state law, determining that an offer, an acceptance, and consideration in the form of the advanced portion of the mahr did in fact exist.¹³¹

In summary, while U.S. state courts have typically turned to the law of contracts when addressing mahr provisions, the domestic legal principles are applied unevenly because of the awkward fit of unfamiliar Islamic religious concepts and language with the Christian-tailored specificities of Western laws.

B. CANADA

As with the U.S. legal system, Canada’s judicial system has yet to achieve a consistent approach in adjudicating the provisions of Islamic marital contracts. Canadian courts typically treat the Islamic marriage contract as an agreement between the parties at the time of marriage.¹³² Like some American courts, they look at the contract as distinct from the marriage itself in that they address the two questions separately. While Canadian courts have shown consistency in characterizing Islamic marriage contracts as agreements, their ultimate treatment of such agreements has diverged due to the contracts’ religious nature.

¹²⁶ 810 A.2d 93 (N.J. Super. Ct. Ch. Div. 2002).

¹²⁷ *Id.* at 95-96.

¹²⁸ *Id.* at 97.

¹²⁹ *Id.* at 97-98.

¹³⁰ *Id.* at 95.

¹³¹ *Id.* at 97.

¹³² The scholarship on this topic is minimal. As a result, this Article will attempt to fill in the gaps.

One example is *Khan v. Khan*,¹³³ a case in which the parties conducted an Islamic marriage ceremony—which included the signing of a marriage contract (here called a *nikah*)—in Pakistan.¹³⁴ The court assumed that the marriage was valid, even though one of the parties was in Canada at the time of the Pakistani ceremony, because it was recognized as legal in Pakistan.¹³⁵ The Canadian court went on to apply domestic principles of contract law to determine whether the contract itself contained the elements necessary for it to be legal under Canadian law.¹³⁶

In reaching its decision, the *Khan* court was undeterred by the religious aspects of the case: “The court is prepared to enter the ‘thicket’ and find that this document represented more than mere religious significance to the parties and that it did bind them civilly.”¹³⁷ The court listened to the opinions of Islamic law experts,¹³⁸ but went on to use Canadian law to determine that the marriage contract was indeed a valid contract and that every aspect of it—including the mahr—should be treated as such.¹³⁹ In so doing, the court overlooked the fact that the contract expressly stated that a certain school of Islamic law was to be applied, instead relying exclusively on Canadian law to determine the validity of its provisions.¹⁴⁰

This handling of the contract’s religious character contrasts with the approach taken in a similar case where the court found the religious

¹³³ [2005] 15 R.F.L. (6th) 308 (Ont. Ct. of Justice).

¹³⁴ *Id.* ¶¶ 8-9.

¹³⁵ *Id.* ¶¶ 10-11. The court was applying the principle of comity; *see supra* note 85 and accompanying text.

¹³⁶ *Id.* ¶ 31. “It contains the essential elements of basic contract law and conforms to the requirements set out in section 55 of the [(Canadian) Family Law] Act, in that it is made in writing, signed by both parties and witnessed.” *Id.*

¹³⁷ *Id.* ¶ 32.

¹³⁸ *Id.* ¶ 47.

¹³⁹ *Id.* ¶ 31.

¹⁴⁰ *Id.* ¶¶ 46-48. The *Khan* court also addressed the possibility of mistreatment of some parties within the minority group—especially women—if the law specified in the contract were applied to the letter. For the court, Canadian law better served the public good:

[D]eference should be given to the religious and cultural laws and traditions of all groups living in Canada. If, however, cultural groups are given complete freedom to define family matters, they may tread on the rights of individuals within the group and discriminate in ways that are unacceptable to Canadian society.

Id. ¶ 52. This was especially pertinent in this case, where the wife had little financial prospects and had lived during the marriage on the earnings of the husband; therefore, she was entitled to spousal support. *Id.* ¶¶ 58-60.

nature of the agreement insurmountable. In *Khaddoura v. Hammoud*,¹⁴¹ the Ontario Court of Justice, General Division listened to the testimony of *muftis*—again like American courts, relying upon expert testimony to address uniquely Islamic issues—in order to determine the nature of the mahr provision in an Islamic marriage contract.¹⁴² The court in this case stressed the importance of “agreement between the parties” as to the terms of the contract.¹⁴³

Upon satisfaction that both parties were in agreement at the time the contract was made—as required under Canadian contract law—the court progressed to the more difficult question of whether the mahr constitutes a religious obligation, one that cannot be decided in civil court.¹⁴⁴ In its analysis, the court stated:

The Mahr and the extent to which it obligates a husband to make payment to his wife is essentially and fundamentally a religious matter. Because Mahr is a religious matter, the resolution of any dispute relating to it or the consequences of failing to honour the obligation are also religious in their content and context.¹⁴⁵

The court went on to explain that Canadian courts will only address issues with religious aspects if they can be “resolved according to generally applicable legal principles.”¹⁴⁶ It equated the mahr to an obligation in a Christian marriage “such as to love, honour and cherish, or to remain faithful.”¹⁴⁷ The court then refused to use the limited information it was able to obtain from the expert testimony and declared that since the court was not equipped to deal with matters that are based in religion, it would not address the issue of whether or not the mahr is an enforceable provision of a legal contract.¹⁴⁸

In deciding to dismiss the case, the court abandoned its previous analysis of the mahr as a contractual provision in line with Canadian law. It instead chose to place mahr provisions into the unstable realm of “religious matters” where secular legal institutions refused to tread.¹⁴⁹ In doing so, the court paid a sort of homage to Islamic law by noting that it

¹⁴¹ [1998] 168 D.L.R. 4th 503 (Ont. Ct of Justice, Gen. Div.).

¹⁴² *Id.* at 507-08.

¹⁴³ *Id.* at 508-09.

¹⁴⁴ *Id.* at 510.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 511.

¹⁴⁷ *Id.* at 510.

¹⁴⁸ *Id.* at 512.

¹⁴⁹ *Id.* at 510-511.

is multi-layered and not generally applicable and by specifically stating its reluctance to deal with an issue it was ill-equipped to address.¹⁵⁰ The court explicitly refused to apply any amount of religious doctrine to the matter, expressing a clear desire to keep church and state separate both under the law (specifically mentioning the United States Constitution) and for the sake of public policy.¹⁵¹

Although the court's disinclination to interpret unfamiliar law or adjudicate religious matters is understandable, this reluctance strongly affects the Muslim minority population's ability to obtain redress through the civil court system. It creates a rift between the majority and a minority by weakening the minority's belief in the authority of the legal system. As a result, these Muslims are forced to seek help elsewhere, which creates its own problems and may in time weaken the system itself.

Yet, there is an alternative to refusing jurisdiction over Islamic family law—if majority populations in Canada and the United States are willing to adjust their views in order to recognize the Islamic minority, both groups may find satisfactory redress in the courts, as they are intended to do. If the legal systems expanded to include a consistent recognition of certain aspects of Islamic law, they could respond to the demands of increasingly multicultural societies while at the same time maintaining their strength and effectiveness.

IV. DO WESTERN STATES CONSIDER ISLAMIC MARRIAGES AND DIVORCES VALID?

Another important family law question to examine when considering the relevance of Islamic law in Western courts is divorce. In Islam, divorce is “the most repugnant of all things allowed by Allah,”¹⁵² and it should be used only as a last resort.¹⁵³ Many Muslim couples seek mediation and counseling from family and clergy members before turning to the civil courts.¹⁵⁴ As a result, the legal system becomes a last

¹⁵⁰ *Id.* at 511.

¹⁵¹ *Id.*

¹⁵² DIVORCE BOOKLET, *supra* note 34, at 1.

¹⁵³ Zawaj.com, Fatwa—Divorce Should be the Final Resort, http://www.zawaj.com/articles/divorce_final_resort.html (last visited Mar. 5, 2006).

¹⁵⁴ See James Thornback, *The Portrayal of Shari'a in Ontario*, 10 APPEAL 1, 5-6 (2005); see also Blackstone, *supra* note 4, at 229-30; Quraishi & Syeed-Miller, *supra* note 21, at 182.

resort for spouses whose difficulties have withstood intra-community efforts for reconciliation.

As mentioned earlier in this Article, the husband in an Islamic marriage retains a unilateral right to divorce his wife at any time.¹⁵⁵ This type of divorce is the very thing the mahr provision is meant to protect against. A talaq divorce circumvents the civil court system entirely. While it is enforceable under shari'a law, it is a difficult proposition for Western courts. Some Muslim nations allow the wife to appeal the divorce in court and be awarded compensation if she can show that she was financially harmed by it.¹⁵⁶ Others have gone further and allow only civil divorces—those that have been effectuated in a court of law—to be legally recognized.¹⁵⁷ This is rare, however, and the husband's unilateral right to talaq is still considered legal in most Muslim nations (and therefore is also recognized as law by most Muslim immigrants to other countries).¹⁵⁸

A. THE UNITED STATES

As explained earlier, much of American law has its base in Christian tradition. Historically, divorce was impossible under Christian law, and this legacy has in turn influenced the United States' legal system.¹⁵⁹ The federal government reserves the power in the states to legislate their own individual rules regarding divorce¹⁶⁰ and all American courts are obligated to uphold a divorce if it is legal in the place where it was performed.¹⁶¹ When a divorce is sanctioned by an international judgment, such as a talaq divorce that took place in another nation, United States courts generally apply the principle of comity.¹⁶² Consensual foreign divorces are usually recognized by American courts without question, unless they were obtained by American citizens seeking to avoid strict U.S. divorce laws by obtaining a simpler one

¹⁵⁵ DIVORCE BOOKLET, *supra* note 34, at 3-4. *See supra* § I.C.

¹⁵⁶ DIVORCE BOOKLET, *supra* note 34, at 8.

¹⁵⁷ *Id.*

¹⁵⁸ NASIR, *supra* note 96, at 107.

¹⁵⁹ Estin, *supra* note 66, at 508.

¹⁶⁰ U.S. Department of State, *Divorce Overseas*, http://travel.state.gov/family/family_issues/divorce/divorce_592.html (last visited Jan. 11, 2007).

¹⁶¹ Estin, *supra* note 79, at 508.

¹⁶² U.S. Department of State, *supra* note 160; *see also supra* note 85 and accompanying text.

abroad.¹⁶³ People who are domiciled in the United States are usually required to obtain a divorce domestically if they intend for it to be valid under U.S. law.¹⁶⁴

Divorce by talaq carries no weight in U.S. courts on its own; however, in most cases, American courts uphold such divorces when they are obtained abroad, so long as certain other procedural requirements are satisfied.¹⁶⁵ For example, in *Seth v. Seth*,¹⁶⁶ a district court in Texas refused to uphold a divorce performed by talaq in Kuwait and therefore invalidated the husband's subsequent marriage.¹⁶⁷ In applying Texas law, the court relied on precedent to show that a "most significant relationship" test should be applied instead of the static set of factors attached to a comity analysis.¹⁶⁸ Although both parties were citizens of India, the court chose to apply Texas law because they had lived in that state for nearly ten years and had acquired real property there.¹⁶⁹ Because Texas law did not allow divorce by talaq, the court found there was no divorce.¹⁷⁰

Another example of an American court refusing to acknowledge a talaq divorce is that of *Shikoh v. Murff*.¹⁷¹ In this case, the husband obtained a divorce from his wife, who was still living in Pakistan, by consulting a cleric in New York who declared him divorced.¹⁷² The procedure did not, however, comply with the laws of the state of New York.¹⁷³ The court declared, "There can be no doubt that the actions of the appellant before the [cleric] in Brooklyn failed to constitute a judicial proceeding within the meaning of the laws of the state."¹⁷⁴ In its explanation, the court explicitly refused to uphold the validity of a religious divorce that was obtained within the United States.¹⁷⁵ Although

¹⁶³ Estin, *supra* note 79, at 509-10. "A state may not recognize a quick divorce obtained by its citizens on overnight trips to foreign countries where the attitudes and philosophies of the courts, as well as the concepts of substantive and procedural due process, are entirely unknown and probably inconsistent with our own." 27C C.J.S. *Divorce* § 1215 (2007).

¹⁶⁴ U.S. Department of State, *supra* note 160.

¹⁶⁵ Estin, *supra* note 79, at 511.

¹⁶⁶ 694 S.W.2d 459 (Tx. Ct. App. 1985).

¹⁶⁷ *Id.* at 459.

¹⁶⁸ *Id.* at 462.

¹⁶⁹ *Id.* at 463.

¹⁷⁰ *Id.* at 459.

¹⁷¹ 257 F.2d 306 (2d Cir. 1958).

¹⁷² *Id.* at 307.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 308.

¹⁷⁵ *Id.* at 308-09.

both parties were citizens of Pakistan, the American court was able to assert its jurisdiction because the husband, believing he was divorced from his Pakistani wife, subsequently married a United States citizen and applied for citizenship.¹⁷⁶

In comparison, *Chaudhry v. Chaudhry*¹⁷⁷ is an example of a case in which a talaq divorce was actually upheld by a United States court because it was accompanied by an affirmation from a Pakistani court.¹⁷⁸ In this case, the husband, who was living in New Jersey, effectuated a divorce through the Pakistani consulate in New York and mailed a document of talaq to his wife, who was still residing in Pakistan.¹⁷⁹ The court distinguished this case from *Shikoh v. Murff* by noting that here the divorce was confirmed by a court in Pakistan after being contested by the wife.¹⁸⁰ This recognition by a foreign court prompted the New Jersey court to accept the divorce according to the principles of comity.¹⁸¹

Based on the above examples, it appears as though American courts are likely to use the principle of comity to uphold divorces obtained abroad by whatever means unless one or both of the parties have a significant presence in the United States. If there is some connection with the United States—if the parties live there, own property there, are married to United States citizens, or are themselves citizens—American courts will require couples to comply with state laws in order to divorce. One caveat, as seen by the example of *Chaudhry v. Chaudhry*, is that a religious divorce obtained inside or outside the United States will be upheld by American courts under the principle of comity if it has been confirmed by a court of law in another nation.¹⁸²

B. CANADA

Canadian courts recognize divorce in much the same way as American courts; as a general rule, they uphold divorces that were legal in the place in which they were obtained.¹⁸³ Courts in Canada, however, go a step further than their American counterparts. In the last fifty years

¹⁷⁶ *Id.* at 307.

¹⁷⁷ 159 N.J. Super. 566 (1978).

¹⁷⁸ *Id.* at 569.

¹⁷⁹ *Id.* at 574.

¹⁸⁰ *Id.* at 575.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ JOHN SYRTASH, RELIGION AND CULTURE IN CANADIAN FAMILY LAW 93 (1992).

or so, Canada has re-examined its laws and policies regarding divorce, and as a result, it tends to recognize foreign divorces “in a more liberal and extensive fashion than the assumption of jurisdiction to grant domestic divorces.”¹⁸⁴ Canada has codified its common-law following of precedent in terms of divorce. According to the Divorce Act of 1986,¹⁸⁵

A divorce granted . . . pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so shall be recognized for all purposes of determining the marital status in Canada of any person, if either former spouse was ordinarily resident in that country or subdivision for at least one year immediately preceding the commencement of proceedings for divorce.¹⁸⁶

In contrast to American courts, Canadian courts look to domestic legislation, such as the Divorce Act quoted above, rather than strict precedent, to determine whether a divorce is valid if obtained abroad. The case of *Bhatti v. Canada*,¹⁸⁷ for example, addresses a divorce that was obtained in Pakistan. The couple was married in Pakistan and immigrated to Canada.¹⁸⁸ They subsequently separated, and the husband obtained a talaq divorce while spending a month in Pakistan.¹⁸⁹ Shortly thereafter he married another woman, and upon his return to Canada he obtained a divorce certificate with respect to his first marriage from the Ontario Superior Court of Justice.¹⁹⁰ This certificate was issued after he married for the second time. The court addressed the validity of the divorce in order to determine the legality of the second marriage.

Canadian courts have expanded the Divorce Act’s requirement of “ordinary residence.” According to the *Bhatti* court, “for a foreign divorce to be legal in Canada, the parties must ordinarily reside in the foreign jurisdiction for one year before applying for a divorce or the petitioner must have a real and substantial connection to the foreign jurisdiction for the one-year period before divorce proceedings begin.”¹⁹¹ The court went on to conclude that Mr. Bhatti did indeed have a “real and substantial connection” to Pakistan since he had friends and relatives

¹⁸⁴ *Bhatti v. Canada*, 2003 CarswellNat 4866, ¶ 14 (Imm. & Refugee Bd., App. Div.) (Can.), available at 2003 WL 23507121.

¹⁸⁵ Divorce Act, R.S., ch. D-3.4 (1985) (Can.).

¹⁸⁶ *Id.* § 22(1) (quoted in *Bhatti*, 2003 CarswellNat 4866, ¶ 13).

¹⁸⁷ *Bhatti*, 2003 CarswellNat 4866, ¶ 14.

¹⁸⁸ *Id.* ¶ 3.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* ¶¶ 2-3.

¹⁹¹ *Id.* ¶ 6.

there, owned property, and planned to move there upon his retirement.¹⁹² Because the divorce was legal in Pakistan when it was obtained, the court declared it to be legal in Canada as well.¹⁹³

Interestingly, the court specifically stated that if Mr. Bhatti had chosen to obtain a talaq divorce in Ontario rather than in Pakistan, it would not likely be recognized under Canadian law as the Divorce Act specifically covers the procedure for obtaining a divorce in Canada.¹⁹⁴ The court also refused to address the issue of whether a Canadian divorce would allow Mr. Bhatti to remarry according to his faith.¹⁹⁵ These two facts suggest that although the court acknowledged its liberal application of Canadian law, there are limits as to what the court will consider.

Canadian courts' liberalism in accepting talaq divorce was further limited in *Siddiqi v. Canada*.¹⁹⁶ In that case, the court refused to recognize a talaq divorce that was pronounced in Pakistan: "This divorce is not considered a legal divorce in Ontario as it was not pronounced by a court of competent jurisdiction."¹⁹⁷ The court found that Mr. Siddiqi was a resident of Ontario when he pronounced talaq against his wife during a trip to Pakistan, and as a result, "Canadian law [took] precedence and therefore the . . . divorce decree from Pakistan [was] not considered to be a legal divorce."¹⁹⁸ This is a vivid example of the Canadian counterpart to the American rule that citizens are not allowed to obtain religious divorces abroad in order to evade civil divorce proceedings.

In comparison with *Bhatti*, the *Siddiqi* court—like the U.S. courts—refused to allow parties living in Canada to obtain a divorce abroad. The biggest difference in analysis between the court in *Bhatti* and that in *Siddiqi* is that the latter did not choose to apply the substantial connection test. This is not speculation on whether the outcome would have been different if the court had chosen to apply that test, however it is an example of the same court deciding two similar cases within two years of one another and applying two different analyses.¹⁹⁹

¹⁹² *Id.* ¶¶ 30-31.

¹⁹³ *Id.* ¶ 33.

¹⁹⁴ *Id.* ¶ 29. This procedure does not include talaq divorces.

¹⁹⁵ *Id.*

¹⁹⁶ 2001 CarswellNat 4374 (Imm. & Refugee Board, App. Div. 2001) (Can.).

¹⁹⁷ *Id.* ¶ 2.

¹⁹⁸ *Id.* ¶ 6.

¹⁹⁹ The *Siddiqi* hearing took place in two parts: June 29, 2000 and March 29, 2001. Between the two hearings, Mr. Siddiqi obtained a Canadian civil divorce from his first wife and then remarried his second wife. At the second hearing, the court upheld the recent Canadian proceedings. *Id.* ¶¶ 6-9.

It appears that courts in the United States and Canada are moving towards a more normalized treatment of the Islamic traditions of marriage and divorce, however a clear standard does not yet exist. It may be useful for these two nations to look to the United Kingdom to learn another way of dealing with these difficult issues, especially in terms of divorce.

V. ENGLAND: A POSSIBLE SOLUTION?

A. HISTORY OF MUSLIMS IN ENGLAND: AN UNDERSTANDING OF MUSLIM PRESENCE AND ITS EFFECTS ON FAMILY LAW

It should first be noted that while England could potentially provide guidance for the American and Canadian legal systems with regard to family-law matters, it is also important to understand the underlying challenges that Islamic law faces in England. “Muslim law in Britain exists both on an official level where recognition is given by the legal system and on an unofficial level where the legal system refuses its recognition.”²⁰⁰ As previously mentioned, Islamic law is fundamentally pluralistic, as the concept of legal interpretation (*ijtihad*) demonstrates.²⁰¹ Applying this pluralistic system of religious law in a Western nation²⁰² can prove difficult, especially in the realm of family law. Perhaps Ihsan Yilmaz’s explanation of Islamic law in England offers a greater understanding of the complexity of Islamic law in that nation:

One can speak of legal pluralism in the English context since unofficial laws find ways to survive in an alien milieu whether the official law recognizes their existence or not. In that context, the

²⁰⁰ IHSAN YILMAZ, MUSLIM LAWS, POLITICS AND SOCIETY IN MODERN NATION STATES: DYNAMIC LEGAL PLURALISM IN ENGLAND, TURKEY AND PAKISTAN 49 (2005).

²⁰¹ *Ijtihad* is the process Muslim jurists follow when attempting to obtain answers to Islamic questions.

“[T]he *ijtihad* on which the reforms are allegedly based is of a very different nature from the conscientious reinterpretation of the original sources as practiced by the Middle Eastern reformers.” Moreover, jurists and judges generally are from Western educational backgrounds and in most cases they interpret the law not from a traditional Islamic perspective but from a point of view of legal modernity.

Id. at 130.

²⁰² Perhaps this can be said about any Western nation, but for the purposes of this section, England is the focus.

Islamic law being unincorporated, the Muslims keep control over their own law without any outside interference. At the same time the Muslims use those aspects of the official law which benefit and assist them in maintaining their unofficial law. On the other hand, both official law and unofficial Muslim law make some adjustments and modifications.²⁰³

Yilmaz goes on to claim that the settlement patterns of Muslims in England had “crucial impacts in the reconstruction of a new Islamic identity in an alien milieu” and caused “the reconstruction of Muslim laws and customs.”²⁰⁴ For that reason, it is worth discussing briefly the history of the Muslim presence²⁰⁵ in England before delving into the unique impact British law has had on Muslim divorce law.

The legal system in England is, as Yilmaz puts it, one of uniformity.²⁰⁶ However, that uniformity is in the process of being challenged by ethnic and religious minorities that are struggling to find a balance between their faiths and nationalities and the laws of their place of domicile.²⁰⁷ This challenge to the British system especially arises with regard to marriage because British law, like U.S. and Canadian law, “reflects Christian ideals and traditions [and] it is not truly secular.” This means that “parties whose religious traditions conflict with Christian traditions may find . . . that their marriages will not be recognised.”²⁰⁸ This of course pertains to divorce law as well.

The presence of Muslims in England dates back over three hundred years. In more recent history, there has been a constant stream of Muslim immigration, owing first to England’s post-World War II labor shortage. As for the makeup of the immigrant population, the 1960s saw an increase in Pakistani immigration while the number of immigrants from various African countries rose in the 1970s.²⁰⁹ Due to the immigrant-created networks in England, many immigrants were able to partially recreate their homelands there and form a strong Muslim identity in England.²¹⁰ This re-creation of the homeland contradicted the expectation of assimilation that Western societies place on minority groups:

²⁰³ YILMAZ, *supra* note 200, at 49.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 50-51.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 51 (citations omitted).

²⁰⁹ *Id.* at 55.

²¹⁰ *Id.* at 56-57.

[B]ecause of the power relationship, western societies have always expected the Muslim minority to carry the weight of adapting. In modern societies where uniformity of the legal system is claimed, ethnic minorities are expected to conform to social and legal patterns of the dominant majority. The legal system expects adherence to the mainstream culture. It is widely believed that settlers from abroad should conform to the norms of those societies in which they have decided to settle. This is ideology that assumes it is in the best interest of the ethnic minority population to be like the majority; ethnic identities should be confined to the private realm.²¹¹

The difficulty in expecting assimilation from Muslims in particular is that many of them are governed by pluralistic religious laws as well as the laws of their states of residence. With regard to family matters, there is no balance between the laws of religion and the laws of the land—religion dominates. This poses an obvious problem in non-Muslim societies, especially England, where “the purported uniformity of the English legal system . . . is challenged by the very diverse customs and laws of ethnic minorities.”²¹² This challenge has forced England to deal with “the new forms of ethnic minority laws [that] are now operating in the country.”²¹³ This is especially problematic for Muslims, who generally do not identify themselves in accordance with their ethnicity, but rather in accordance with their religion. The very definition of the word “ethnicity” “causes some problems, especially for Muslims since both the general public and the authorities define minority communities according to a variety of social variables, not according to religious criteria.”²¹⁴ The term ethnicity carries a connotation of “race,” rather than religion.²¹⁵ While an individual may identify his race as Pakistani or Saudi, it is certain that some form of Islamic law will govern his divorce.

Though attempting to govern one’s personal matters through religion while living in a secular Western society has proven to be a challenge for Muslim immigrants, attempting to incorporate Muslim citizens into a Christian-based judicial system has simultaneously proven difficult for England. In response to this challenge, England has chosen to make various adjustments to its legal system.

²¹¹ *Id.* at 50.

²¹² *Id.* at 51.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

B. ENGLISH FAMILY LAW AND ISLAMIC DIVORCES

While the British legal system confronts diversity not only due to Muslim groups but also due to societal incorporation of various other religious and ethnic groups, Muslim family law is one area where British courts are attempting to reconcile religious practices with secular state law. Though “English law has shown a marked reluctance to accept concepts of legal pluralism,”²¹⁶ the area of family law is one in which English law has made significant adjustments—an accommodation which is in line with the country’s legal history.²¹⁷ Both Jews and Quakers have “had their marriage rites protected on a statutory basis since 1753, with the enactment of Lord Harwicke’s Marriage Act, and they are exempt from the rules concerning the solemnization and registering of their marriages which are regulated by the Marriage Acts, 1949-1996.”²¹⁸

Until 1990, however, Muslims were subject to some provisions of the Marriage Act of 1949, mainly the provision requiring that marriages take place in a registered office or building.²¹⁹ This meant that Muslims could not marry in mosques that were not registered with the British government.²²⁰ However, in keeping with English law’s history of adjusting to a diversifying society, the government amended the 1949 act through the Marriage Act of 1990 and the Marriage Act of 1994, which allowed “buildings to become registered as ‘approved premises’ where a valid registration can take place.”²²¹ This amendment is significant because while Islamic law does not recognize the role of the state in a marriage, the Marriage (Registration of Buildings) Act of 1990 harmonizes the religious and civil forms of marriage.²²² This legislative history sheds light on the fact that diversity in England, particularly diversity as introduced by Muslims, has forced the laws of England to adjust to a non-uniform legal system that takes religious practices into account. While on its face this adjustment seems commendable, it is not

²¹⁶ *Id.* at 52.

²¹⁷ *Id.*

²¹⁸ *Id.* at 52-53.

²¹⁹ *Id.* at 71.

²²⁰ *Id.* In 1991 “only 74 mosques were registered buildings out of a total 452 registered as places of worship according to the 1855 Act.” *Id.*

²²¹ *Id.*

²²² *Id.* at 53.

without difficulties, as exemplified by its recognition (or lack thereof) of Islamic divorces.

Foreign divorces in England are marred with confusion, as is demonstrated in family law legislation and case law. Foreign divorces were initially subject to the Recognition of Divorce and Legal Separations Act of 1971. In 1986 the Family Law Act created new requirements for the recognition of divorces that took place overseas after April 4, 1988.²²³ The act requires that in order to be legal in England, overseas divorces must be “obtained by means of judicial or other proceedings in any country other than the British Isles [and that the divorce] be effective under the law of that country.”²²⁴ It also provides

²²³ The Recognition of Divorce and Legal Separation Act, 1971, c.53 (Eng.), *reprinted in* I. G. F. Karsten, *The Recognition of Divorces and Legal Separations Act 1971*, 35 MOD. L. REV. 299 (1972); Family Law Act, 1986, c.55, Part II (Eng.), *available at* http://www.opsi.gov.uk/si/si1988/Uksi_19880375_en_1.htm (last visited Aug. 8, 2007). The effect of the first of the requirements of the 1971 act was that:

[1] [T]here should have been some formal proceedings, either before a court or another formal body recognised by the state for that purpose (e.g. the Union Council, in Pakistan); and

[2] [T]he judicial or other body should be impartial as to the outcome of the proceedings (i.e. a meeting of family members to dissolve a customary marriage or hear the pronouncement of a talaq did not satisfy this requirement).

The International Family Law Office of Jeremy D. Morely, § 2.1.3, <http://www.international-divorce.com/d-uk.htm> (last visited Feb. 5, 2007). The 1971 Act was amended on January 1, 1974 by the Domicile and Matrimonial Proceedings Act of 1973, which provided for:

[1] [R]ecognition of other forms of overseas divorce (e.g. “bare” talaq in Kashmir), which would be recognised if both parties were domiciled in a country which permitted such a divorce; and

[2] [N]on-recognition of a divorce obtained other than by means of a proceeding in a court of law if both parties had, throughout the year immediately before the institution of the proceedings, been habitually resident in the United Kingdom.

The International Family Law Office of Jeremy D. Morely, *supra*, § 2.1.4.

²²⁴ P.St.J. Smart, *The Recognition of Extra-judicial Divorces*, 34 INT’L & COMP. L.Q. 392, 592 (1985). An overseas divorce is defined as “one which has been obtained by means of judicial or other proceedings in any country outside the UK and which is effective under the laws of that country.” UKVisas, *Diplomatic Service Procedures Entry Clearance Vol. 1—General Instructions*, Annex 13.1 (Aug. 3, 2003), <http://www.ukvisas.gov.uk> (follow “More About UK Visas” hyperlink; then follow “Diplomatic Service Procedures Entry Clearance Vol. 1” hyperlink; then follow “Annex 13.1” hyperlink) (last visited Aug. 22, 2006) [hereinafter UKVisas].

that “an overseas divorce which took place before 4 April 1988 is recognised in the United Kingdom under the 1971 Act if at the date the proceedings started either spouse was habitually resident in, or was a national of, the country where the divorce was obtained.”²²⁵

Under the 1971 act, the Islamic talaq, whether it was a talaq al-sunna or a triple talaq, was recognized so long as “both parties were domiciled in a country or countries which recognised such divorce.”²²⁶ The triple talaq, however, was not considered to occur under judicial proceedings, which is why the domicile requirement had to be invoked in order for a triple talaq to be recognized.²²⁷ The 1986 amendment to the Recognition of Divorce and Legal Separations Act of 1971, however, only allows for the recognition of a triple talaq if:

- a. the divorce is effective under the law of the country in which it was obtained; and
- b. at the date on which it was obtained:
 - i. each party to the marriage was domiciled in that country; or
 - ii. either party to the marriage was domiciled in that country and the other party was domiciled in a country under whose law the divorce is recognised as valid; and
- c. neither party to the marriage was habitually resident in the United Kingdom throughout the period of one year immediately preceding that date; and
- d. there is an official document certifying that the divorce is effective under the law of the country in which it is obtained (or where one of the parties was at the date of the divorce domiciled in another country, there shall be an official document certifying that the divorce is recognised as valid under the law of that country).²²⁸

The amendment doesn't necessarily pose problems for divorces coming out of a country like Pakistan, where divorces are required to be

²²⁵ UKVisas, *supra* note 224.

²²⁶ *Id.*

²²⁷ *Id.* The act also stated that “[a]n overseas divorce which had been obtained other than by proceedings in a court of law cannot be regarded as having validly dissolved a marriage if both parties had throughout the year immediately before the institution of the proceedings been habitually resident in the UK.” *Id.*

²²⁸ *See, e.g.*, Family Law Act, 1986, c.55, Part II, secs. 46-48; The International Family Law Office of Jeremy D. Morely, *supra* note 223, § 2.2.2.

registered,²²⁹ so long as the divorce is initiated outside of the United Kingdom.²³⁰ As for divorces finalized in Pakistan, recognition in England is granted if the divorce is conducted in Pakistan and under the provisions of the Muslim Family Law Ordinance *and* if either spouse is “habitually resident or domiciled in that country or a national of that country.”²³¹ Because Pakistan requires that notice be given to the chair of the Union Council, divorces initiated and completed in England are generally not problematic.²³²

The confusion sets in when English courts attempt to resolve whether to recognize triple talaqs that occur in countries where there is no formal divorce system, such as Saudi Arabia. Recent case law attempted to put to rest the confusion created by contradictory treatments of triple talaqs. In a landmark decision in 2001, a London judge declared in the case of *Sulaiman v. Juffali*²³³ that the triple talaq was not valid in English courts.²³⁴ In that case, Basma Sulaiman filed for divorce from her husband, Walid Ahmed al Juffali, in London, though the two were married in Saudi Arabia.²³⁵ Both Sulaiman and Juffali were considered “nationals of and domiciled in Saudi Arabia.”²³⁶

²²⁹ YILMAZ, *supra* note 200, at 139.

²³⁰ See, e.g., Family Law Act, 1986, c.55, Part II, secs. 49(3)(a); The International Family Law Office of Jeremy D. Morely, *supra* note 223, § 2.1.4.

²³¹ See, e.g., Family Law Act, 1986, c.55, Part II, secs. 46(1)(b); The International Family Law Office of Jeremy D. Morely, *supra* note 223, § 2.6.4.

²³² For example:

There are instances purporting to be full Talaq divorces where the proceedings are started in this country with the man pronouncing Talaq 3 times here, but then completed overseas (e.g. in Pakistan) by the man writing to notify the Union Council Chairman and his wife there. It was held by the House of Lords in *Re Fatima* [1986] 2 All ER 32 that such trans-national divorces were not capable of recognition under the Recognition of Divorces and Legal Separations Act 1971 and they would not be recognised under the Family Law Act 1986. To be capable of recognition under ss.45 and 46 of the 1986 Act an overseas divorce must be instituted and obtained in the same country outside the British Isles. This view was reinforced in the case of *Berkovits v Grindberg* [1995] 1 FLR 477 which involved a Jewish ‘Get’ divorce where the proceedings took place partly in the UK (where the Get was written) and partly in Israel (where the Get was pronounced).

The International Family Law Office of Jeremy D. Morely, *supra* note 223, § 2.6.7.

²³³ [2002] 2 FCR 427 (U.K.).

²³⁴ *Id.* ¶ 45.

²³⁵ *Id.* ¶¶ 1-2.

²³⁶ *Id.* ¶ 2.

In this case, Juffali pronounced a triple talaq in England and then went to Saudi Arabia, where he registered the divorce.²³⁷ Sulaiman claimed that the divorce could not be legal in England because the talaq was pronounced there, and a simple pronouncement of talaq did not comply with the requirements of the Family Law Act.²³⁸ Juffali countered with the argument that the divorce had complied with all the formalities required in Saudi Arabia in that it had been registered there; because both parties were citizens of and domiciled in Saudi Arabia, he claimed, the divorce should be valid as performed.²³⁹

The court held that since the talaq was obtained in England without a court proceeding, it was invalid according to English law despite its validity in Saudi Arabia.²⁴⁰ While the judge declared his full respect for Islamic traditions, he refused to recognize the divorce.²⁴¹ Despite the fact that both husband and wife were considered Saudi nationals, the wife was living in London at the time of the divorce pronouncement, and the triple talaq was performed there, not in Saudi Arabia.²⁴² The decision made national news in England as it had the potential to affect many Muslims living in England. It also served to clarify the law regarding the recognition of Muslim divorces.

Despite the attention the *Sulaiman* decision received, it is important to remember that for Muslims, Islamic law is superior to British law and many Muslims “have not abandoned the traditional

²³⁷ *Id.*

²³⁸ *Id.* ¶ 45.

²³⁹ *Id.* ¶ 29.

²⁴⁰ *Id.* ¶ 45.

²⁴¹ *Id.* ¶ 47.

Before leaving this topic I should make it clear, and I trust he will accept, that my decision is not in any way founded upon any lack of respect either for the husband’s religion or for his culture. Although historically this country is part of the Christian west, and although it has an established church which is Christian, I sit as a secular judge serving a multi-cultural community of many faiths in which all of us can now take pride, sworn to do justice ‘to all manner of people.’ Religion—whatever the particular believer’s faith—is no doubt something to be encouraged but it is not the business of government or of the secular courts. So the starting point of the law is an essentially agnostic view of religious beliefs and a tolerant indulgence to religious and cultural diversity. A secular judge must be wary of straying across the well-recognised divide between church and state. It is not for a judge to weigh one religion against another. All are entitled to equal respect, whether in times of peace or, as at present, amidst the clash of arms.

Id.

²⁴² *Id.* ¶ 2.

practice of divorce.”²⁴³ This means that Muslims living in England essentially have to get married and divorced twice—once civilly and once religiously, requiring Muslims to “operate a form of unofficial legal pluralism.”²⁴⁴

The English system can serve as an example to other Western nations dealing with problems concerning conflicts between religious marital laws and the secular laws of the state. The marriage and divorce laws in England provide uniform guidelines for all residents wishing to enter into or terminate a marriage. While Islamic law does dominate the personal lives of most Muslims, adhering to the English marital laws does not interfere with their ability to seek marriages or divorces in accordance with Islamic principles.

VI. CONCLUSION

While the purpose of this Article is mainly comparative, study of this issue makes it clear that courts in the United States and Canada currently have no consistent method for dealing with Islamic family law issues. This inconsistency results in a lessening of the judicial viability of Muslims in those nations. It also leads to an inconsistency in law that makes it nearly impossible to predict the outcome of a certain types of family law cases; this in turn flies in the face of a major purpose of the common law legal system.

It is clear, then, that these two nations should examine the ways in which Islamic family law questions are treated in their courts. They should use case law and the wealth of scholarship on the topic to determine a more consistent method of dealing with these issues. Even if American federal courts left the matter to the states to decide, there could at least be some consistency within states.

In order to decide how to address these issues on a national level, the United States and Canada should look to and learn from the English example. Although the English model is not without faults, it at least remains an example of an overt attempt to deal with these important issues. The English legal system has created, at least in part, a model under which the Muslim minority can feel safe in resorting to the courts while at the same time attempting to regulate the recognition of Islamic

²⁴³ YILMAZ, *supra* note 200, at 79.

²⁴⁴ *Id.* at 80.

marriages and divorces in order to make it easier for English courts to make final decisions.

Questions such as these are not decreasing in number; in fact, quite the opposite is occurring. In the years to come, growing Muslim minority populations assure that Western courts will see more and more Islamic legal issues before them. It is vital that courts have some mechanism in place to address these complex issues, otherwise they will be left floundering, disappointing and disillusioning large portions of their populations.