

# Competing Authorities: Islamic Family Law and Quasi-Judicial Proceedings in North America

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## Abstract

North American Muslims seeking to resolve their private disputes confront multifaceted access to justice issues. Since Islamic marriage and divorce laws do not always align with North American family legislative schemes, Muslims are burdened with trying to simultaneously meet their obligations toward both legal systems. Unlike secular law, Islamic divorce proceedings require either the husband's eventual consent or the availability of a Muslim judge. They also prescribe substantive obligations and rights for

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divorcees that are comparable to corollary relief provided by family law statutes. The absence of religious quasi-judicial dispute resolutions poses barriers to Muslims obtaining a religious divorce or annulment, and to acquiring subsequent relief, such as financial settlements and custody, in accordance with their religious beliefs. To respond to these overlapping barriers, this paper analyzes forms of Islamic legal authority to grant religious divorce or annulment, and to mediate or arbitrate corollary relief using religious law. The paper concludes with recommendations for a holistic framework to settle family disputes in compliance with Islamic law and in a legally enforceable manner.

## Introduction

North American Muslims in contested divorce cases are limited to obtaining court-ordered divorces (which may not fulfill the requirements of Islamic divorce), or soliciting the help of religious leaders, such as imams, religious counselors, or Islamic organizations (who may not have the binding legal authority under either Islamic or secular law).<sup>1</sup> Muslim communities in North America largely view their religious leaders (imams and religious scholars) as voluntarily-appointed mediators and arbitrators.<sup>2</sup> Families seek unofficial assistance from religious leaders to solve marital disputes, resulting in a largely unregulated “ad hoc system of individual imams and arbitrators reaching unreported decisions.”<sup>3</sup> Such ‘private ordering’ causes numerous problems including unclear legal authority or religious legitimacy, inaccurate and inconsistent decisions, underqualified decision-makers, and even potential abuse.

Secular laws differ in allowing, restricting, or banning the enforceability of faith-based arbitral awards, especially when processed based on Islamic law. On the other hand, Muslim spouses face challenges in seeking to enforce their Islamic-based marital contracts (marriage and separation agreements) due to judicial inconsistency in interpreting their religious terms. The presumed state neutrality limits the legislative and judiciary from intervening in interpreting religious principles or resolving religious issues. Consequently, North American Muslims pursue

alternative dispute-resolution mechanisms to settle their private affairs outside of courts in a context that is more adept to their needs.

Islam views the institution of marriage in a sacred manner, with the Quran (the primary source of law) considering it to be a sign from God<sup>4</sup> and the practice of prophets.<sup>5</sup> Despite this religious frame of marriage, Islamic law, compared to other canonical laws, may be the first to transform marriage from a “status” to a “contract.”<sup>6</sup> It treats the marital union as a binding religious agreement and civil act between two legally and morally responsible individuals who pledge to fulfil a religious duty.<sup>7</sup> This social and religious contract automatically embeds Islamic law’s enforceable terms and binds both parties by its religious rules, even if not explicitly stated.

Religious recognition of civil divorces is constrained by Islamic law’s exclusion of non-Muslim judges from having judicial authority, especially in family law matters. Even if civil proceedings were to align with religious practices, the civil judge’s faith identity determines the Islamic legitimacy of their judgments. This theological and legal matter is central to classic Islamic law, the function of family courts in most Muslim countries today, and the practice of many North American Muslims. The development of Islamic legal theories on judicial authority during periods of Muslim diaspora grants flexibility to legally characterize the state of Muslim minorities residing in non-Muslim countries, and to provide alternative family dispute resolution mechanisms in the absence of Muslim judges.

The most utilized marriage dissolution methods under Islamic law that do not require the involvement of any judicial decision-maker are: *ṭalāq* and *khulʿ*. *Ṭalāq* is “a verbal or written unilateral divorce issued by the husband, explicitly or implicitly signaling his intent to divorce.”<sup>8</sup> *Khulʿ* is “a verbal or written bilateral divorce initiated by the wife, denoting divestment. It is a contractual agreement that fiscally compensates the husband in exchange for his release of the marital bond.”<sup>9</sup> Notably, there is no inherent equivalency between Islamic and civil methods of marriage dissolution:

Only in limited circumstances can a civil divorce or annulment be treated as *ṭalāq* or *khulʿ*. A wife who is granted a civil divorce

or annulment despite the husband's contest must independently acquire a religious marital dissolution. To facilitate marital dispute resolutions in Canada, Islamic legal authority is needed to: (1) grant a religious divorce or annulment complementing a civil divorce, and (2) mediate or arbitrate corollary relief using religious laws and principles.<sup>10</sup>

In reality, North American imams are involved in the process of *ṭalāq* or *khulʿ* as mediators. In cases when the husband withholds *ṭalāq* or his contest to *khulʿ*, imams differ in their approaches. Some imams assume the role of a judge to be able to grant an annulment (*faskh*) or order a divorce (*ṭalīq*). Both of these methods do not require involving the unreasonably contesting husbands. Other imams refrain from intervening in dispute resolution, fearing serious consequences.

## Family Law in the Modern Muslim World

Islamic law (*fiqh/sharīʿah*) is not a product of state legislation; it is the outcome of juristic analyses of primary divine sources. Nonetheless, political, social, and institutional dynamics influenced the development and application of Islamic law. These dynamics in which jurists function necessitated coherent sets of legal doctrines and juristic methodologies, which have been adopted by legal schools of thought (*madhhab*, pl. *madhāhib*). *Madhāhib* have material differences in their substantive doctrines, including their approaches to the regulation of the family unit.<sup>11</sup> They commonly endorse a gendered and hierarchal structure of the family in their positions on foundational and financial issues. This may be “to the benefit of the husband ... but with a strong underlying element of transactional reciprocity of obligations.”<sup>12</sup> Even so, the profound differences of *madhāhib* affect the applications of rights and remedies under Islamic family law.

*Madhāhib* systematically developed with jurists applying primary sources to emerging issues through hermeneutic and legal reasoning methods, creating different interpretive communities documented in treatises, legal opinions (*fatāwā*, sing. *fatwā*), and judicial decisions. Islamic

jurisprudence continued to evolve over stages, including the developments of multi-genre and interdisciplinary scholarship, codification of legislation, and establishment of legal institutions and state judiciary.

Early Islamic legal history embodied different forms of legal pluralism beyond its modern conception (which emerged in response to legal centralism)<sup>13</sup>. One instance of intra-Islamic pluralism is demonstrated by the historic *madhāhib* diversity of judicial appointments to occasionally accommodate various educational and cultural backgrounds. Moreover, non-Islamic faith-based adjudication was recognized to accommodate Abrahamic religious minorities. Indeed, these demonstrations of legal pluralism were often subject to domestic politics across dynasties and between competing legal cultures;<sup>14</sup> they illustrate the development of legal institutions under complex relationships of law, politics, and society. Historic examples of legal pluralism, as influenced by communal applications of Islamic law, are necessary to understand the development of the modern legal pluralism of Islamic family courts.<sup>15</sup>

The recognition of non-Islamic conceptions of marriage is part of Islam's commitment to family law pluralism. Arguably, this resembles the space modern liberalism creates for private matters and secular family law.<sup>16</sup> Islamic family law pluralism is framed by four principal factors: 1) the impossibility of resolving the differences resulting from the human interpretation in the law-finding process, 2) the contractual nature of Islamic family law and its mix of mandatory and permissive rules, 3) the non-judicial religious regulation of the family providing parties an opportunity to depart from the default terms of Islamic law, and 4) the willingness of Islamic law to give limited recognition to marriages under non-Islamic family law systems pursuant to the principle of granting non-Muslims autonomy over their religious affairs.<sup>17</sup>

Despite ongoing secular influence during the post-colonial era, the codification of law in Muslim countries generally preserved religious principles. In particular, secularization had the least effect on Islamic family law, which is largely preserved throughout the Muslim world. Although areas relating to penal, financial, and administrative laws were modified, "the law of personal status, of which certain parts relating to marriage and inheritance were directly derived from the

Quran, remained virtually intact until modern times.”<sup>18</sup> The different Islamic-based codification projects, including the extensive *Majalla*, codified topics of financial transactions, wills and estate, and testimonial evidence,<sup>19</sup> but did not include any family law matters. In 1917, the first attempt to draft a comprehensive Islamic family code arose: the *Ottoman Family Law* code was intended to centralize power and standardize legal rules.<sup>20</sup> This code was adopted by multiple Middle Eastern countries for a long period, with some contemporary states, such as Lebanon and Jordan, still implementing parts of it today.<sup>21</sup> A key reason behind the effective application of this code is its juristic flexibility of basing its rulings on multiple *madhāhib*, contrary to the *Majalla*. This inspired Muslim countries to rely on vast legal literature in legislating family codes and reforming legal culture.

The emphasis on the supremacy of Islamic law in family matters is dealt with in contemporary jurisprudence and explicitly mentioned in case law. For example, in 1979, the Egyptian Court of Cassation stated that all policies must be “[b]ased on a purely secular doctrine ... to which society in its entirety can adhere and which must not be linked to any provision of religious laws.”<sup>22</sup> However, while secularizing general policies, the Court explicitly maintained “the established jurisprudence of this court that the Islamic Shari’a ... applies as a matter of principle to the rules of *family relations*.”<sup>23</sup> Despite the general preservation of Islamic family law, it has not remained stagnant. It has underwent remarkable changes over time and continues to bring forth new and sometimes controversial modifications.

Currently, most family law systems in Muslim countries make room for legal reforms to re-examine classic juristic codes.<sup>24</sup> In this capacity, legislation encompasses legal doctrines beyond common orthodox schools and responds to evolving social dynamics.<sup>25</sup> These reforms offer women additional rights in complex cases such as the guardian’s right to conduct a marriage, spousal and child support, custody of children, and judicial dissolution of marriage. For example, marital dissolution by judicial annulment or court-ordered divorce is typically available in most Muslim countries based on a selective preference for one of the orthodox schools of law:

judicial dissolution ... a Maliki doctrine, is applicable today in most Muslim countries ... the classical Hanafi law practically does not allow a wife to demand dissolution of her marriage on any other ground. But in Pakistan, though with a majority of Hanafi followers, The Dissolution of Muslim Marriages Act of 1939 entitles a wife to demand dissolution for fourteen other causes as well.<sup>26</sup>

Despite acceptance for legal reform across several countries, only Turkey is considered to have abolished *shari'ah*, with Tunisia partially abandoning it by abolishing polygamy.<sup>27</sup> Most Middle Eastern and Arabian countries follow *shari'ah*, in both procedural and substantive law, and adapt it to modern social changes without substantially changing its basic principles.

## The Religious Authority of a Non-Islamic Judiciary

Access to justice is influenced by the forum of adjudication. Two authoritative positions guide the judiciary: the legal scholar (*mufti*) and the judge (*qāḍī*). The distinct difference between them is that a *mufti* issues a non-binding *fatwā*, while a *qāḍī* issues an enforceable judgement (*ḥukm*). Accordingly, religious normative rulings are classified into two categories: 1) what can be obtained only through a *fatwā*, such as issues related to acts of worship including prayer and fasting rituals, and 2) what can be obtained through either a *fatwā* or a *ḥukm*, such as issues related to contractual agreements including marriage and divorce.<sup>28</sup>

Although the Islamic concept of the judiciary has several definitions, they all relate to the authority of a *qāḍī* and their *ḥukm*. In essence, a *ḥukm* is a legally and morally binding judgment issued by a legitimate authority based on a divine source that irrevocably resolves a conflict.<sup>29</sup> Notably, a *ḥukm* not only binds the litigants but also morally obligates any third parties, such as jurists who may hold contrary views.<sup>30</sup> A *ḥukm* is authoritative “not because it accords with one specific legal rule or another, but because of the imperium tied to [the *qāḍī*’s] institutional position” within the legal system.<sup>31</sup> The religiously binding nature of a judgment necessitated Muslim

jurists to develop strict eligibility conditions for judicial appointments. The vast majority of *madhāhib* require a *qāḍī* to have obtained a high level of scholarship in Islamic law<sup>32</sup> and be: a Muslim, recognized by the current political authority,<sup>33</sup> upright and of good manners, and physically competent and mentally stable.<sup>34</sup> Other conditions are disputed between the *madhāhib*, such as the *qāḍī*'s gender<sup>35</sup> and lineage.<sup>36</sup> Additional conditions propounded by specific theological groups also exist.<sup>37</sup>

The Islamic legal system's evolution was not solely a result of its codification, but also involved the systemization of court systems, the requirement of judicial appointments, and legal training.<sup>38</sup> The shift from the traditional ruling system to the nation-state, coupled with secularization and codification, influenced the shape and character of the judiciary. The qualifications for judges have changed, for example, from a particular level of Islamic scholarship to the modern credentials of law schools.<sup>39</sup> Though these changes may be justified by the reduction of judicial discretion that accompanied the codification of Islamic law, they eroded the religious nature of the judicial position and its societal and theological expectations. Nevertheless, even after secularization, the religious authority of judges and the exclusivity of Muslim judges in family courts remain part of the Islamic family law rules.<sup>40</sup>

### *Exceptions to Conditions of Judicial Appointment*

A fundamental Islamic objective is to provide justice for all and maintain social stability. Hence, Islamic law considers the appointment of judges to be a communal responsibility.<sup>41</sup> Therefore, if no functioning judicial system is established, all of society will be held religiously accountable. Al-Juwaynī ranked “establishing adjudication among Muslims, relieving the oppressed from the oppressors, and resolving conflicts between litigants” to be one of the fundamentals of the Islamic faith and among the most critical communal obligations.<sup>42</sup> Other Shāfiʿī scholars held that accepting the position of a judge, if the conditions are met, is more important than participating in *jihād*.<sup>43</sup> The communal duty of ‘enjoining good and forbidding evil’<sup>44</sup> demands community members to assist the judiciary by upholding social justice and by securing individuals’ rights



through testimonial duties.<sup>45</sup> Judgeship itself is considered a means of enjoining good and forbidding evil.<sup>46</sup> Religious and worldly interests are attained by its establishment.<sup>47</sup>

As a matter of practical adaptation, Islamic law, across its different schools and throughout history, accommodated a wide range of exceptions when conditions of judicial appointment could not be met. Almost all *madhāhib* suggest circumstantial flexibility that permits waiving some conditions to protect civil rights, ensure social security, and provide alternative dispute resolution avenues. Aḥmad ibn Ḥanbal commented on the importance of access to justice not being compromised by strict compliance to the qualifications: “there has to be a judge [available for people] lest that their rights will be violated.”<sup>48</sup> Hence, Ḥanbalī jurists state that the conditions, in general, are to be satisfied as much as possible, giving priority to the best available candidates.<sup>49</sup>

Concerning the condition of legal knowledge, the Mālikī school permitted the appointment of a *muqallid* or an unknowledgeable candidate with the stipulations that the former only abide by the verdict of their *Imam of the madhhab*,<sup>50</sup> and the latter consult scholars before issuing a judgment.<sup>51</sup> In discussing the condition of religious uprightness, many Ḥanafī jurists legitimized the appointment of impious (*fāsiq*) judges, while prohibiting the political authority from initiating their appointment, to facilitate access to justice.<sup>52</sup> Otherwise, “there will be no legitimate judicial system, especially in our times.”<sup>53</sup> Moreover, Ḥanafī jurists legitimized Muslim judges appointed by a non-Muslim authority if the Muslim community in their jurisdiction approves of them.<sup>54</sup>

Regarding the condition of being recognized by a legitimate Muslim authority, Shāfi‘ī jurists discouraged judges from resigning because the incoming ruler was unjust or otherwise illegitimate. They also discouraged the public from de-appointing “unqualified” judges,<sup>55</sup> to prevent the greater harm of social disturbance against the political ruling system. The Twelver Shia school also permitted some exceptions related to the judge’s level of scholarship and uprightness, despite the school’s strict stipulation of validating judicial appointments by the ‘Imam.’<sup>56</sup>

This wide range of exceptions created distinct legal doctrines particular to some of these schools. The term ‘judge of necessity’ (*qāḍī al-ḍarūrah*)

was coined and most developed by the Shāfi‘ī school.<sup>57</sup> The word ‘necessity’ refers to the societal need to increase access to justice, which supersedes the importance of satisfying individual prerequisites for a judicial appointment: the appointee’s decisions are “implemented because of *necessity*, so as not to vitiate people’s concerns and interests.”<sup>58</sup> The emphasis on necessity also reinforces the circumstantial nature of these appointments, which are only permissible as an exception to the rule thereby preserving the stipulation that the original qualifications of a *qāḍī* should be met whenever possible.<sup>59</sup> This approach is reflected in the circumstantial authority granted to a judge of necessity. Specifically, the authority of such a judge is contingent on their scholarly consultation, prior to issuing a judgment, which ensures the use of sound legal reasoning.<sup>60</sup> Additionally, the judgments must explicitly refer to supporting evidence such that litigants can question its strength as well as the credibility of any witnesses.<sup>61</sup> Such rules demonstrate the complexity of justifying the legitimacy of a judge of necessity, assessing the scope of their role, and mitigating the risk of procedural abuse.

### *The Community Replacing Legal Authorities*

Muslim communities living under the governance of a non-Muslim legal system are guided by Islam’s framework of communal responsibility (*farḍ kifāyah*) to further implement its higher objectives.<sup>62</sup> Specifically, in the absence of an appointment process for *qāḍīs*, Islamic law entrusts community leaders<sup>63</sup> with the responsibility to appoint the most qualified judges available. Notably, the communal facilitation of marital resolutions has been explicitly recognized: “it is permissible for the wife of an absent husband [who cannot be located] to raise her issue [for divorce] to the [Muslim] judge, the [Muslim] ruler ... or the Muslim community.”<sup>64</sup> Although these rulings can be found in all *madhāhib*,<sup>65</sup> they are most prominent in the Ḥanafī and Mālikī schools.

Some of these juristic rulings emerged during the expansion of non-Muslim authorities over Muslim lands. For example, the 15<sup>th</sup> century Ḥanafī Ibn al-Humām stated that Muslim communities residing in Cordoba, Valencia, and some parts of Ethiopia, where non-Muslim authorities have taken over, should appoint a ruler and a judge to the best of their capabilities.<sup>66</sup>

Communally-appointed judges were also mentioned in the 16<sup>th</sup> century by al-Wansharīsī in *al-Mi‘yār al-Mu‘rib*, which cites numerous Mālikī jurists’ opinions outlining the methods in which the community can independently function in minority situations in the absence of Muslim judicial authorities. An early explicit mention of minority Muslims was made by the 19<sup>th</sup> century Ḥanafī jurist Ibn ‘Ābidīn, “in lands of non-Muslim authorities, it is permissible for Muslims to establish congregational prayers and Eids... an appointment of a judge will be legitimate by the Muslim communal approval.”<sup>67</sup> He added that Muslims should request such facilitation from the authorities of these lands.

The recent history of Indian Muslims also highlights the development of access to justice discourse under the British colony. The 20<sup>th</sup>-century Indian scholar Ashraf Tahānawī recognized the extreme difficulty in applying Islamic family law or following all the resolutions of the Ḥanafī school, the most dominant school in the sub-continent under the restrictive British rule. In his *al-Ḥila al-Nājiza*, he discussed the legal ways Muslim women may get a divorce in complex scenarios where husbands are not consenting to it.<sup>68</sup> His scholarship is considered part of the long struggle of Indian Muslims against the Anglo-Muhammadan Law, developed by the British to deal with their Muslim subjects.<sup>69</sup>

### *Islamic Dispute Resolution Laws*

Among multiple Alternative Dispute Resolution (ADR) models in classical Islamic law, three are relevant to family matters in North America: community-led adjudication (*qaḍā al-darūrah*), private settlement (*ṣulḥ*),<sup>70</sup> and arbitration (*taḥkīm*).<sup>71</sup> The first model regulates community-appointed judges as a temporary alternative to the absence of official judges. A key criterion of the faith identity of the original or alternate judging authority being Muslim is a matter of consensus in classical Islamic law.

The second model, *ṣulḥ*, is encouraged by the Quran and Sunna as a means for disputants to resolve their disputes. *Ṣulḥ* is broadly defined to include mediation, negotiation, and conciliation: a “settlement grounded upon compromise negotiated by the disputants themselves or with the help of a third party.”<sup>72</sup> Since *ṣulḥ* entails waiving or compromising rights, it can only apply to the domain of the ‘rights of people,’ as opposed to the

non-negotiable ‘rights of God’ (i.e. ritualistic acts and some prescribed penalties). In the context of marital discord, the Quran exhorts couples by stating that “*ṣulḥ* is the best.”<sup>73</sup>

The Islamic concept of dispensing justice in society encourages individuals to seek *ṣulḥ* as opposed to publicly litigating disputes.<sup>74</sup> Judges are recommended to extricate themselves from their judicial duties by commanding disputants to attempt *ṣulḥ* first.<sup>75</sup> The development of classical *ṣulḥ* laws extended to early codification in the 16<sup>th</sup> century, the Ottoman *Majaua* in the 19<sup>th</sup> century,<sup>76</sup> and to the Malaysian *Shariah Civil Procedure Act* of 2011 mandating parties to attempt *ṣulḥ* with trained officials before proceeding with the court.<sup>77</sup>

*Ṣulḥ* is categorized by Muslim jurists into different types of settlements based on the nature of the dispute and the relationship between the parties. The categories include agreements: between a Muslim and non-Muslim state (i.e. international treaties, truces, and amnesty to combatants or prisoners of war); between disputants over property, indemnification, businesses, or financial agreements; and between a husband and a wife over divorce and its relief settlements. Couples generally have inherent authority over marriage breakdown without a necessary need for judicial acknowledgement.

The third model of dispute resolution in classic Islamic law is voluntary binding arbitration (*taḥkīm*). While some Muslim scholars consider this form of dispute resolution to be exemplified by the verse Q. 4:35, other modern legal practitioners view it to only signify a particular form of court-appointed arbitrators who do not substitute a judge in granting a final binding judgment.<sup>78</sup> Nonetheless, all agree on the widely accepted practice of arbitration.<sup>79</sup> Islamic substantive law provide details of the topics that may be arbitrated, the required qualifications of arbitrators, their duties, termination of arbitration or the arbitrator’s mandate, and different remedies. Aside from the requirement of the arbitrator to be a Muslim (especially in family arbitration), most of these laws and procedures can be integrated within secular arbitration schemes that support freedom of contract.

*Taḥkīm* is a contract wherein the parties agree to arbitrate, instead of resorting to *qadā*, on the appointment of an arbitrator and the process commencing the proceeding through the issuance of the award.<sup>80</sup> Thus, the essential elements of *taḥkīm* in Islamic law are: the parties, the

arbitrator, the written or verbal consent of the contract, the subject matter, and the award. Regarding the subject matter, the majority of jurists limit arbitration to transactional matters that are normally within the private rights of people.<sup>81</sup> Similar to *ṣulḥ*, *taḥkīm* cannot decide on the ‘rights of God,’ especially pertaining to penalties and punishments. Subject to procedural differences among the *madhāhib*, *taḥkīm* is allowed in family disputes.<sup>82</sup> The authority to grant a religious divorce without the consent of the couple is a matter of disagreement among the *madhāhib* limited to the scope of the court-appointed arbitrators in their mediation-arbitration process.<sup>83</sup> Arbitration is terminated by disqualification or withdrawal of the arbitrator(s), withdrawal of consent by either party, the loss of legal capacity of a party, or pronouncement of the award.<sup>84</sup> In the case of more than one arbitrator, their unanimous opinion on the award is required.

Islamic law limits the power of judicial review of arbitral awards. The enforcement of the award is considered to be indisputable provided that certain conditions are met: 1) it is issued by a qualified arbitrator, 2) on a valid subject matter of *taḥkīm*, 3) in accordance with the principles of Islamic law, and 4) with the unrevoked consent of the parties throughout the entire process.<sup>85</sup> Modern legal systems in the Muslim world regulate arbitration processes in light of the above classical Islamic law rules, the freedom to contract, and the facilitation of binding agreements outside the court at a reasonable cost and in a timely manner.<sup>86</sup>

## Modern Islamic Jurisprudence on Family Minority Issues

In the absence of a functioning Islamic ruling system, diverse legal doctrines allow the community to either recognize temporary adjudicators or replace them. However, the issue of the judge’s faith identity remains a contentious point in contested simple divorce proceedings initiated by the wife. Facing theological, legal, and social challenges in attempting to reconcile religious obligations under two independent frameworks (Islamic and secular legal systems) prompted the emergence of the genre Law of Minorities (*fiqh al-aqalliyyāt*)<sup>87</sup> in the 1990s.<sup>88</sup> It typically addresses issues related to marriage, divorce, food, clothes, political engagement, and financial transactions to facilitate non-contentious implementation of *sharī‘ah*

in such personal affairs.<sup>89</sup> However, *fiqh al-aqalliyāt* primarily produces jurisprudence that can be described as the ‘exception to the rule’ by relying on an unsolidified definition of ‘Muslim Minority’ and juristic principles that operate within a temporary frame of exigency.

To posit diasporic contemporary issues within traditional Islamic law, *fiqh al-aqalliyāt*’s legal reasoning primarily grapples with the demarcation of a ‘Muslim minority’. This term can be traced back to the emergence of Muslim communities in Europe following the end of Islamic Spain in 1492,<sup>90</sup> and extends to the contemporary circumstances of Muslim communities across North America.<sup>91</sup> However, the term was not commonly used by Muslim jurists, historians, theologians, or even writers of political thought before the 20<sup>th</sup> century.<sup>92</sup> Today, the term has yet to acquire a fixed definition outside of international law’s definition of ‘religious minority’.<sup>93</sup> Instead, it generally refers to the socio-legal status of Muslims living among a society governed by non-Muslim political and legal systems. This fluid concept is confused by the hybrid secular and theocrat nature of most modern legal systems in the East, creating a distinction between a Muslim state and an Islamic state.

*Fiqh al-aqalliyāt*’s exception to the rule jurisprudence provides solutions to matters of living in a morally alien society<sup>94</sup> by employing three legal principles: (1) the traditional taxonomy of the globe according to Islamic international law;<sup>95</sup> (2) the implied contractual obligations and rights of citizenship to non-Muslim governance; and (3) the juristic maxims of necessity (*darūrah*), public interest (*maṣlaḥa*), and need (*hājah*). These three principles collectively impute an ongoing state of contingency for Muslims in the West, which problematically contradicts the current American Muslim emphasis on belongingness and political engagement. Thus, *fiqh al-aqalliyāt* may fall short of providing practical and consistent answers to recurrent pressing questions, let alone providing a vision for the future of Muslims in the West.

Although addressing audiences in the West, the majority of *fiqh al-aqalliyāt* literature is originally authored in Arabic, illustrating the controversial privileging of “contributions of scholars in the Arab world at the expense of the quotidian practices and attitudes of Muslims actually living under Western secularism.”<sup>96</sup> Such privilege triggers cultural challenges among

diverse ethnicities by amplifying certain voices in the representation of religious leadership. Despite globalization's influence on cross-pollinating intellectual discourses, Western and Middle Eastern Islamic scholarship continue to be competing voices of authority for minority Muslim communities.

Modern *fatāwā* vary in their approaches towards the validity of a secular court-ordered divorce (i.e., issued by a non-Muslim judge) contested by the husband. *Fatāwā* issued by fifteen governmental and non-governmental bodies across the globe between 2000 to 2021 were analyzed.<sup>97</sup> Fourteen of the fifteen *fatāwā* strictly hold that a court-ordered divorce obtained by the wife without the verbal or written religious divorce granted by the husband is not religiously binding. Only one *fatwā* holds otherwise. Many of the *fatāwā* propose that Islamic centers and mosques, represented by their Imams, should be religiously authorized to legitimize civil divorces and certain legal settlements among community members. Although all *fatāwā* advocate for adjudicating disputes through Islamic institutions or religious leaders, none precisely demarcate the scope of religious or legal authority they would be granted nor establish procedural rules to secure sound religious practices and legal compatibility. The majority of religious scholars and *fatwā* institutions, and the practices of many North American imams, still uphold the view that court-ordered divorces ordered by non-Muslim judges, when contested by the husband, are not inherently binding.<sup>98</sup>

Driven by doctrines of the state of minority, traditional exceptions to the conditions of judicial appointment, binding implications of contract law, considerations of wider conceptions of social contract theories, and facilitation of access to justice, contemporary Muslim scholars differ on the religious legitimacy of a civil divorce and whether it qualifies as an 'Islamic divorce' or not. Despite *fiqh al-aqalliyāt*'s emphasis on family law, North American Muslims have much to do to transform the pre-modern Islamic legal tradition into a workable body of rules that satisfies the requirements of political liberalism.<sup>99</sup>

## Conclusion: Recommendations for Islamic ADR in North America

Three classical Islamic models of dispute resolution are applicable to different circumstances unique to the North American Muslim community.

*Qāḍī al-ḍarūrah* can resolve *faskh* cases to remove religious barriers to divorce for Muslim women. It “may be successful” where one of the concerned parties refuses to acknowledge or resolve a dispute, and where there is broad community support for one or more qualified individuals to serve in this capacity.”<sup>100</sup> *Ṣulḥ* can be a means to reach marital contracts involving *ṭalāq*, *khulʿ* and their reliefs (spousal support, child support, parenting, contact, division of property, and *mahr*). If *ṣulḥ* fails, *taḥkīm* can instead be used to award *ṭalāq*, *khulʿ* and their reliefs (spousal support, child support, parenting, contact, division of property, and *mahr*).

Compared to the other two forms of settlement, the conditions for *taḥkīm* are easier to be fulfilled and pose little risk of abuse.<sup>101</sup> However, the viability of its success depends on both the religious community and secular legal system. Mandated by communal responsibility, Muslim scholars should develop an ADR model that conforms with Islamic law and is adept to the North American context. On the other hand, the secular legal system should ensure the enforceability of the arbitral awards without bargaining civil rights or compromising state neutrality towards religion.

The following chart proposes family ADR services that can be offered by a diverse group of Muslim scholars and legal practitioners through the lens of both Islamic and secular procedures:

		Husband Consenting to Marriage Dissolution		Husband Contesting Marriage Dissolution (if Mediation / Arbitration fails)
ADR Method	Islamic	<i>Ṣulḥ</i>	<i>Taḥkīm</i>	Community-appointed judges
	Secular	Mediation/ Negotiation	Arbitration	N/A
Outcomes	Islamic-compliant Civilly-enforceable Corollary Relief	Domestic Contract / Separation Agreement	Arbitral Award	Inform wife of Islamic rights to be obtained under the respective legislative scheme
	Islamic Marriage Dissolution	Convince husband to grant a Religious Divorce ( <i>ṭalāq</i> ) or consent to it ( <i>khulʿ</i> )		After a civil divorce is granted, a hearing will determine the grant of Religious Annulment to the wife ( <i>faskh</i> )



The institutionalization of family ADR services would enable parties to holistically end their marriage through a *ṭalāq* or *khulʿ* as well as create a morally and legally binding instrument arranging their separation rights and responsibilities, either in the form of a contractual agreement or an arbitral award, depending on the procedure used and the jurisdiction's applicable laws. In addition to facilitating marital dissolution and securing Islamic-compliant corollary relief through the med-arb procedures outlined in the above chart, parties may also seek assistance in drafting civilly enforceable prenuptial contracts upon entering the marriage in compliance with Islamic law.

Perhaps most importantly, where husbands unjustly withhold *ṭalāq* or consent to *khulʿ*, the institutionalization of ADR services will help address the crucial need for quasi-judicial authority to grant *faskh*. Although *faskh* should be addressed by the community-appointed judges independent from the legal system and the arbitration scheme, a holistic ADR body is best situated to investigate allegations and issue proper Islamic solutions. In some *faskh* cases, as the chart describes above,

the wife would be informed of her rights within the Shariʿah and advised to bring her case to the local courts so that she can obtain these rights. After the case has been settled in court, the arbitration institute can issue a document attesting to the finality of the divorce, explain the basis for the decision, and indicate that the non-Shariʿah court was used as a means to obtain what the Shariʿah had already granted, and that the woman is free to remarry once she completes her waiting period. Such a solution honors the primacy of Shariʿah while respecting the local law.<sup>102</sup>

In this scenario, involving a secular court is limited to enforce rights that are pre-approved by Islamic law (i.e., executing a judgment rather than making it).

Stringent measures must be taken to avoid risks of unqualified self-appointed adjudicators conducting informal ADR services, processes prone to power imbalances and conflicts of interest, and decisions lacking uniformity or legal or religious enforcing authority. These measures

include standardizing necessary Islamic qualifications and legal training for community-appointed judges, procedures for granting *faskh* (including guidelines for admissible evidence), and procedures for applications, submissions, hearings, and documentation. The proposed institution should ensure Islamic jurisprudential and cultural diversity in the composition of its decision-makers and establish mechanisms of maintaining administrative oversight and combating religious or social abuse. Its decision-makers may also serve as court expert witnesses to answer Islamic law-related questions in a scholarly and culturally appropriate manner. As such, the proposed body would contribute to the potential of vibrant Islamic-North American family ADR, functioning in coherence with the existing legal system and in harmony with the ethos of multiculturalism.

The three adaptive frameworks of *ṣulḥ*, *taḥkīm*, and *qāḍī al-ḍarūrah* inform the work of the Muslim community to facilitate religious annulments for Muslim women and establish representative entities that provide dispute resolutions mechanisms. Institutionalizing Islamic ADR services can address Muslim community issues regarding religious divorce or annulment, Islamic-compliant corollary relief, and assistance with pre-nuptial or separation agreements incorporating Islamic principles. Resolving family disputes through religious law is imperative for North American Muslims to protect their religious beliefs, family values, and the spiritual dimension of arranging their personal affairs.

## Endnotes

- 1 For an examination of how family law disputes in the Canadian Muslim community are understood and addressed in both cultural and legal contexts, see Yousef Aly Wahb, "Faith-Based Divorce Proceedings: Alternative Dispute Resolutions for Canadian Muslims," *Canadian Family Law Quarterly* 40, no. 2 (2022).
- 2 Zahela Kamarauddin, Umar A. Oseni & Syed Khalid Rashid, "Transformative Accommodation: Towards the Convergence of Shari'ah and Common Law in Muslim Authority Jurisdiction," *Arab Law Quarterly* 20, no. 3 (2016): 257.
- 3 Julie Macfarlane, *Islamic Divorce in North America: Choosing a Shari'a Path in a Secular Society* (Oxford: Oxford University Press, 2012), 262.
- 4 Quran 30:21.
- 5 Quran 30:38.
- 6 Majid Khadduri, "Marriage in Islamic Law: The Modernist Viewpoints," *American Journal of Comparative Law* 26, no. 2 (1978): 213.
- 7 "The [A]rabic word 'uqud' covers the entire field of obligations, including those that are spiritual, social, political, and commercial. In the spiritual realm 'uqud' deals with the individual's obligations to Allah; in social relations the term refers to relations including the contract of marriage." Noor Mohammad, "Principles of Islamic Contract Law," *Journal of Law and Religion* 6, no. 1 (1988): 116.
- 8 Wahb, "Faith-Based Divorce Proceedings," 111.
- 9 It is prohibited for the husband to compel his wife to agree to *khul'* as an alternative to his grant of unilateral divorce; otherwise, he would be disentitled to *khul'*s financial compensation. *Ibid.*, at 110-113.
- 10 *Ibid.*, 112.
- 11 *Ibid.*, 175-76.
- 12 Lama Abu-Odeh, "Modernizing Muslim Family Law: The Case of Egypt," *Vanderbilt Journal of Transnational Law* 37, no. 4 (2004): 1070-1073.
- 13 John Griffiths, "What is Legal Pluralism?" *Journal of Legal Pluralism & Unofficial Law* 18, no. 24 (1986):1-2.
- 14 Sherman A. Jackson, "The Primacy of Domestic Politics: Ibn Bint Al-A'azz and the Establishment of Four Chief Judgeships in Mamlūk Egypt," *Journal of the American Oriental Society* 115, no. 1 (1995): 53-56.
- 15 Aron Zysow, "Islamic Law and Political Authority," *Harvard International Review* 7, no. 6 (1984): 44.
- 16 Mohamed Fadel, "Political Liberalism, Islamic Family Law and Family Law Pluralism" in *Marriages and Divorce in Multi-Cultural Context: Reconsidering the Boundaries of Civil Law and Religion*, ed. Joel A. Nicholes (Cambridge University Press, 2010), 165-66.

- 17 Ibid., 175-193.
- 18 Khadduri, "Marriage in Islamic Law," 214.
- 19 For more about codification projects that involved diverse *madhāhib* and more legal areas, see Fatima El-Awa, *ʿAqd al-taḥkīm fi al-sharīʿah wal-qānūn* (Beirut: al-Maktab al-Islāmī, 2002), 105-127.
- 20 Kristen Stilt, Salma Waheedi & Swathi Griffin, "The Ambitions of Muslim Family Law Reform," *Harvard Journal of Law & Gender* 41 (2018): 308.
- 21 El-Awa, *ʿAqd al-taḥkīm*, 92.
- 22 Hussein Ali Agrama, "Sovereignty, Indeterminacy: Is Egypt a Secular or Religious State?" *Comparative Studies in Society and History* 52, no. 3 (2010): 506.
- 23 Maurits S. Berger, "Secularizing Interreligious Law in Egypt," *Islamic Law & Society* 12, no. 3 (2005): 406 (emphasis added).
- 24 Syed Naqvi, "Modern Reforms in Muslim Family Laws: A General Study," *Islamic Studies* 13, no. 4 (1974): 235.
- 25 For a survey of divorce schemes in modern Muslim states, see Abdullah An-Naʿim, *Islamic Family Law in a Changing World: A Global Resource Book* (London: Zed Books, 2002).
- 26 Ibid., 240.
- 27 Khadduri, "Marriage in Islamic Law," 217.
- 28 Shihāb al-Dīn Aḥmad ibn Idrīs al-Qarāfī, *al-Furūq*, ed. Muḥammad Sirāj & ʿAlī Jumʿa, 1<sup>st</sup> ed., 4 vols. (Cairo: Dār Al-Salām, 2001), 1:1182.
- 29 See the term *ʿQaḍāʾ* in *al-Mawsūʿah al-Fiqhiyyah al-Kuwaitiyyah* (Kuwait: Dār al-Safwa 1995), 33:291-93.
- 30 Shihāb al-Dīn Aḥmad ibn Idrīs al-Qarāfī, *al-Iḥkām fi tamyiz al-fatāwā ʿan al-ahkām wa taṣarrufāt al-qāḍī wal-imām* (The Criterion for Distinguishing Legal Opinions from Judicial Rulings and the Administrative Acts of Judges and Ruler), translated by Mohamad Fadel (Yale University Press, 2017), 14.
- 31 Anver Emon, "Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation," *Canadian Bar Review* 87, no. 2 (2008): 400.
- 32 For the distinct requirements by each Sunni school, see *al-Mawsūʿah al-fiqhiyyah*; Ghulam Murtaza Azad, "Qualifications of a Qāḍī," *Islamic Studies* 23, no. 3 (1984): 249. For a discussion on the conditions in the Shia school, see Muḥammad Ḥasan al-Najafī, *Jawāhir al-kalām fi sharḥ sharaʿiʿ al-Islām*, ed. Ḥaidar al-Dabbāgh, 2<sup>nd</sup> ed, 44 vols. (Iran: Muʿssasat al-Nashr al-Islāmī, 2012), 41:12-95.
- 33 *Al-Mawsūʿah al-fiqhiyyah*.
- 34 Shams al-Dīn Muḥammad ibn Aḥmad al-Khatīb al-Shirbīnī, *Mughnī al-muḥtāj ilā maʿrifat maʿānī alfāz al-minhāj*, 4 vols. (Cairo: Muṣṭafā al-Bābī al-Halabī, 1985), 4:375.

- 35 Abū Bakr ibn Mas‘ūd Kāsānī, *Badā’i‘ al-ṣanā’i‘ fi tartīb al-sharā’i‘* (Beirut: Dār al-Kutub al-‘Arabi, 1974), 9:4079; Karen Bauer, “Debates on Women’s Status as Judges and Witnesses in Post-Formative Islamic Law,” *Journal of the American Oriental Society* 130, no. 1 (2010): 1.
- 36 Muḥammad al-Ḍasūqī, *Hāshiyat al-ḍasūqī ‘alā al-sharḥ al-kabīr*, 4 vols., (Cairo: ‘Īsa al-Halabī, 2004), 4:129-130; al-Najafī, *Jawāhir al-kalām*, 41:14.
- 37 For example, the Twelver Shia school requires the judge to believe in the Imams of the family of the Prophet. Hussein al-Khush, *Fiqh al-qaḍā’* (Beirut: Dar al-Malak, 2004), 102-115.
- 38 See e.g. Najibah M. Zin, “The Training, Appointment, and Supervision of Islamic Judges Malaysia,” *Pacific Rim Law and Policy Journal* 21, no. 1 (2012):115.
- 39 See Nadia Sonneveld & Ahmed Tawfik, “Gender, Islam and Judgeship in Egypt,” *International Journal of Law in Context* 11, no. 3 (2015): 348.
- 40 Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam: Amsterdam University Press, 2007), especially the chapter “Shari‘a Postulates, Statutory Law and the Judiciary”.
- 41 Abū Bakr Aḥmad ibn ‘Alī Al-Jaṣṣās, *Sharḥ kitāb adab al-qaḍī lil-imām Abī Bakr al-Khaṣṣāf* (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2012), 361-65.
- 42 ‘Abdulmalik al-Juwaynī, *Nihāyat al-Maṭlab fi Dirāyat al-Maḍhahab*, ed ‘Abdul‘azīm al-Dīb, 1<sup>st</sup> ed., 20 vols. (Beirut: Dār Al-Minhāj, 2007), 18:458.
- 43 Abū Ḥāmid al-Ghazālī, *al-Wasīṭ fi al-Maḍhhab*, ed. Aḥmad Ibrāhīm & Muḥammad Tāmer, 1<sup>st</sup> ed., 7 vols. (Cairo: Dār al-Salām, 1997), 7:287. See also al-Bayhaqī, *al-Sunan al-Kubrā* (no. 20172): the famous *tābī’ī* Masruq said, “To judge between people [with the truth] for one day is better for me than making jihad for a year.”
- 44 For a discussion on this communal duty, see Abū Ḥāmid al-Ghazālī, *Ihyā’ ‘Ulūm al-Dīn*, 1<sup>st</sup> ed., 10 vols. (Jedda: Dār al-Minhāj, 2011), 4:535–663; David Decosimo, “An *Umma* of Accountability: Al-Ghazālī against Domination,” *Soundings: An Interdisciplinary Journal* 98, no. 3 (2015): 260.
- 45 Jalāl al-Dīn al-Ṣuyūṭī, *al-Ashbāh wal-Nazā’ir*, ed. Muḥammad Tāmer & Ḥāfiẓ Ḥāfiẓ, 7<sup>th</sup> ed., 2 vols. (Cairo: Dār al-Salām, 2018), 2:722.
- 46 Abū al-Ḥasan al-Māwardī, *al-Ḥāwī al-kabīr*, ed. ‘Ādil ‘Abd al-Mawjūd and ‘Alī Mu‘awwaḍ, 1st ed., 11 vols. (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1994), 16:7; Burhān al-Dīn Ibrāhīm ibn Farḥūn, *Tabṣirat al-ḥukkām fi uṣūl al-uqḍīyah wa manāhij al-aḥkām*, ed. Jamāl Mar‘ashlī, special edition, 2 vols. (Riyadh: Dār ‘Ālam al-Kutub, 2003), 1:10.
- 47 Badr al-Dīn Ibn Jamā‘ah, *Tahrīr al-aḥkām fi tadbīr ahl al-Islām*, ed. Fu‘ād Aḥmad, 1<sup>st</sup> ed., (Qatar: Ri‘āsat al-Maḥākīm al-Shar‘iyyah wa-al-Shu‘ūn al-Diniyyah, 1985), 88.
- 48 Maṣṣūr ibn Idrīs al-Buhūṭī, *Kashāf al-qinā’ ‘an matn al-iqnā’*, 6 vols. (Beirut: ‘Ālam al-Kutub, 1983), 6:286.
- 49 *Ibid.*, 296.

- 50 Ibn Farḥūn, *Tabṣirat al-ḥukkām*, 1:21-22.
- 51 Al-Dasūqī, *Hāshiyat al-Dasūqī*, 4:129.
- 52 Muḥammad ibn ʿUmar Ibn ʿĀbidīn, *Radd al-muḥtār ʿalā al-durr al-mukhtār sharḥ tanwīr al-abṣār*, ed. ʿĀdil ʿAbd al-Mawjūd and ʿAlī Muʿawwaḍ, 1<sup>st</sup> ed., 14 vols. (Beirut: Dār al-Kutub al-ʿIlmiyah, 2011), 8:25.
- 53 Ibid.
- 54 Ibid., 5:368; Niẓām, *al-Fatāwā al-hindiyyah*, ed. Maḥmūd Maṭrajī, 6 vols. (Damascus: Dār al-Fikr, 1991), 3:307. Al-ʿIzz ibn ʿAbd al-Salām (d. 660/1262), who is a Shāfiʿī jurist, also adopted this opinion: al-ʿIzz ibn ʿAbd al-Salām, *Qawāʿid al-aḥkām fi maṣāliḥ al-anām*, ed. Nazīh Ḥammād and ʿUthmān Jumʿah, 1<sup>st</sup> ed., 2 vols. (Damascus: Dār Al-Qalam, 2000), 1:121-2. Another Shāfiʿī reference to the same opinion is attributed to Ibn al-Rifʿah (d. 710/1310) by al-Damīrī (d. 808/1405): Kamāl al-Dīn al-Damīrī, *al-Najm al-wahhāj fi sharḥ al-Minhāj*, 1st ed., 10 vols. (Jedda: Dār al-Minhāj, 2004), 10:151. However, al-Khaṭīb al-Shirbīnī (d. 977/1570) rendered Ibn ʿAbd al-Salām’s opinion inaccurate. Also see ʿAbd al-Karīm Zaydān, *Niẓām al-Qaḍāʾ fi al-Sharīʿah al-Islāmiyah* (Beirut: Al-Risala Foundation, 1989), 36-37.
- 55 Zakariyā al-Anṣārī, *Asnā al-maṭālib sharḥ rawḍ al-ṭālib*, ed. Muḥammad Tāmir, 2<sup>nd</sup> ed., 9 vols. (Beirut: Dār al-Kutub al-ʿIlmiyah, 2012), 9:103-04.
- 56 Al-Najafī, *Jawāhir al-Kalām*, 90-94; al-Khush, *al-qaḍāʾ*, 163.
- 57 Ibn Ḥajar al-Haytamī, *Tuḥfat al-muḥtāj bi Sharḥ al-Minhāj*, ed. Anwar al-Dhāghistanī, 1<sup>st</sup> ed., 10 vols. (Kuwait: Dār al-Ḍiyā, 2020), 7:219.
- 58 Ibn al-Naqīb al-Miṣrī, *The Reliance of the Traveler*, translated by Nuh Keller (Maryland: Amana Publications Beltsville, 2008), 629-30.
- 59 *Al-Mawsūʿah al-fiqhiyyah*, 13:166.
- 60 This position is agreed upon by all *madhāhib*. Ibid.
- 61 Al-Haytamī, *Tuḥfat al-muḥtāj*, 7:59.
- 62 For an overview of the legal concept of *Farḍ Kifāyah* and its applications, see Yousef Aly Wahb, “*Farḍ Kifāyah*: The Principle of Communal Responsibility in Islam,” *Yaqeen Institute*, 2021, <https://yaqeeninstitute.ca/yousef-wahb/fard-kifayah-the-principle-of-communal-responsibility-in-islam>.
- 63 In the Islamic tradition, they are called “*ahl al-ḥall wa al-ʿaḳḍ*”, the people with discretionary political and social power to enact or dissolve a pact. See al-Haytamī, *Tuḥfat al-muḥtāj*, 531-532.
- 64 Muḥammad al-Mukhtār Shinqīṭī, *Mawāhib al-jalīl min adillat Khalīl* (Beirut: Dār al-Kutub al-ʿIlmiyah, 2004), 3:210.
- 65 For the Shāfiʿī recognition of community-appointed judges, see al-Haytamī, *Tuḥfat al-muḥtāj*, 7:531-532. For Ḥanbali authorization of the community to validate judgments, see Abū Yaʿlā al-Farrā, *al-Aḥkām al-sultāniyya*, ed. Muḥammad al-Fiqī, 2<sup>nd</sup> ed. (Beirut: Dar al-Kutub al-ʿIlmiyyah, 2000), 73.

- 66 Al-Kamāl ibn al-Humām, *Sharḥ fath al-qadīr*, ed ‘Abdulrāziq al-Mahdī, 1<sup>st</sup> ed., 10 vols. (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2003), 7:246.
- 67 Ibn ‘Ābidīn, *Radd al-muhtār*, 8:43.
- 68 For a historic and legal background of the issue in India, see Rohit De, “The Two Husbands of Vera Tiscenko: Apostasy, Conversion, and Divorce in Late Colonial India,” *Law and History Review* 28, no. 4 (2010): 1012-1020.
- 69 Emon, “Islamic Law and the Canadian Mosaic,” 402-410 (describing the British enactment of Muslim Personal Law (Shariat) Application Act (1937) to be a failed attempt of accommodating Islamic Law and the different methodologies of its schools).
- 70 The linguistic meaning of *ṣulḥ* is ending a dispute. The legal meaning is ending a dispute through a contract.
- 71 The linguistic meaning of *taḥkīm* is designating a third party and authorising them to decide on a matter.
- 72 Aida Othman, “‘And Amicable Settlement Is Best’: *Ṣulḥ* and Dispute Resolution in Islamic Law,” *Arab Law Quarterly* 21, no.1 (2007): 68.
- 73 *Quran* 4:128.
- 74 Walid Iqbal, “Dialogue and the Practice of Law and Spiritual Values: Courts, Lawyering and ADR: Glimpses into the Islamic Tradition,” *Fordham Urban Law Journal* 28, no. 4 (2001): 1036.
- 75 Othman, “‘And Amicable Settlement Is Best,” 73-80.
- 76 The Majalla included two chapters on *ṣulḥ* and *ibrā’* (discharge of others’ liability) formulating 40 articles of their laws and procedures.
- 77 Othman, “‘And Amicable Settlement Is Best,” 72.
- 78 Mohammad Salim El-Awa, *Dirasāt fī qānūn al-taḥkīm al-miṣrī wal-Muqāran* (Cairo: Arab Centre for Arbitration, 2009), 216-17. The binding authority of the mandatory mediation is in the final judgment of the judge and not the agreement facilitated by the mediator, which is another key difference between arbitration and mediation. According to this view, the debate on whether the two family representatives of both spouses are characterized as agents (*wakīls*) or adjudicators (*ḥākims*) does not apply to the scope of arbitration discussed in this article.
- 79 *Ibid.*, 219-20.
- 80 Mahdi Zahraa & Nora Hak, “*Taḥkīm* (Arbitration) in Islamic Law within the Context of Family Disputes,” *Arab Law Quarterly* 20, no. 1 (2006): 11.
- 81 *Ibid.*, 27-29.
- 82 *Ibid.*
- 83 Jurists disagreed on whether an arbitrator can assume the power of a *qāḍī* to grant a divorce. The Mālikīs, a minority opinion among the Shāfi‘īs, and one opinion of the Ḥanbalīs grant arbitrators an authority to separate the couple without their consent.

However, the Ḥanafīs, and one opinion of the Shāfi‘īs and Ḥanbalīs consider the two arbitrators (in the scenario of being court-appointed) as only representatives of the disputants and, therefore, do not have the authority to separate them without their consent. *Ibid.*, 35-38.

84 *Ibid.*, 38-41

85 *Ibid.*, 30-31. Prior to the issuance of the arbitral award, parties can withdraw or remove the arbitrator(s). Some jurists suspend the right to withdraw once the arbitration process commences.

86 For details on the development of modern Arbitration Law in Muslim countries, see Al-Awa, *Dirasāt fī qānūn al-tahkīm*, 311-356.

87 See ‘Abdullah ibn Bayyah, *Ṣinā‘at al-fatwā wa-fiqh al-aqalliyyāt* (Rabat: Markaz al-Dirāsāt wa-al-Abḥāth wa-Iḥyā’ al-Turāth, al-Rābiṭah al-Muḥammadiyyah lil-‘Ulamā’, 2012).

88 See Andrew March, “Are Secularism and Neutrality Attractive to Religious Minorities? Islamic Discussions of Western Secularism in the ‘Jurisprudence of Muslim Minorities’ (*Fiqh Al-Aqalliyyat*) Discourse,” *Condozo Law Review* 30, no. 6 (2009): 2824-2827.

89 Zahela Kamaruddin, Umar A. Oseni & Syed Khalid Rashid, “Transformative Accommodation: Towards the Convergence of Shari’ah and Common Law in Muslim Authority Jurisdiction,” *Arab Law Quarterly* 20, no. 3 (2016): 255.

90 Amila Buturovic, “European Islam,” in *The Oxford Handbook of Global Religions*, ed. Mark Juergensmeyer (Oxford: Oxford University Press, 2006), 437.

91 Sherman Jackson, “Islamic Law, Muslims and American Politics,” *Islamic Law and Society* 22, no. 3 (2015): 270-271; Aḥmad Abū Sunnah, *al-‘Urf wal ‘ādah fī ra’y al-fuqahā’* (Cairo: Dār al-Bashā’ir, 2004), 253-254.

92 Mahmood Ghazi, “Shari’ah and the Question of Minorities,” *Policy Perspectives* 6, no. 1 (2009): 68.

93 *Ibid.*, 64.

94 March, “Are Secularism and Neutrality Attractive to Religious Minorities?,” 2825.

95 A) *dār al-Islam* (territory of Islam), b) *dār al-sulḥ* (territory of treaty), and c) *dār al-ḥarb* (territory of war).

96 March, “Are Secularism and Neutrality Attractive to Religious Minorities?,” 2837.

97 For a discussion on the modern *fatāwā* regarding secular court-ordered divorces and the related practices of Canadian imams, see Yousef Aly Wahb, “Validity of Court-ordered Divorces in Modern *Fatwas* & Family Dispute Resolution as Practiced by Canadian Imams,” *Canadian Journal of Law and Society* 38, no. 1 (2023).

98 *Ibid.*

99 Fadel, “Political Liberalism,” 198.



100 Musa Furber, “Alternative Dispute Resolution: Arbitration & Mediation in non-Muslim Regions,” Tabah Analytical Brief no. 11 (Tabah Foundation, 2011), 8-9.

101 *Ibid.*, 10.

102 *Ibid.*, 12.