

## THE EVOLUTION OF SHARIA DIVORCE LAW: ITS INTERPRETATION AND EFFECT ON A WOMAN’S RIGHT TO DIVORCE

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INTRODUCTION: WHAT IS <i>SHARIA</i> LAW .....	421
I. <i>SHARIA</i> DIVORCE LAW .....	424
II. TYPES OF DIVORCE ( <i>TALAQ</i> ) .....	425
III. A WOMAN’S RIGHT TO A DIVORCE OR ANNULMENT .....	428
A. Talaq Tawfiq (Delegated Divorce) .....	429
B. Faskh or Tafriq—Annulment or “Separation” of the Marriage with the Participation of the Judicial System.....	430
C. Khul’a—The Woman’s Right to Divorce .....	435
IV. <i>SHARIA</i> DIVORCE LAW EVOLVES, GIVING WOMEN THEIR BASIC RIGHT TO AN EASIER AND MORE ACCESSIBLE DIVORCE.....	437
V. CASE STUDY: <i>SHARIA</i> DIVORCE LAW IN THE UNITED STATES— AMERICAN MUSLIM WOMEN AND DIVORCE .....	439
CONCLUSION .....	444

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INTRODUCTION: WHAT IS *SHARIA* LAW

*Sharia* law in America has been at the crux of much controversy. For instance, many view *Sharia* law not only as a source of persecution of women—limiting their rights and subjecting them to the control of men—but also as a source of terrorism.<sup>1</sup> Though the phobia of *Sharia* has been widespread, it is an unfortunate reality that the phobic-majority do not know what *Sharia* law really is, and as such, merely exaggerate the law and its influence on Muslims and the western world. This conundrum is best observed in the context of Muslim women and the failure to appreciate their rights. Contrary to belief, “the deterioration of women’s rights in many Islamic countries” and amongst Muslim communities is not derived from the Islamic teachings or Islamic nature, but rather is attributable to gender inequalities resulting from a cultural mindset that preserves male-dominated practices over women.<sup>2</sup>

To begin, the word *Sharia* is derived from the Arabic word *sari’a* which means “the path which has been prepared, the divinely appointed path.”<sup>3</sup> *Sharia* law is based on several sources including: the *Quran*, *Sunna* of the Prophet Muhammad (Peace Be Upon Him, hereinafter PBUH), *Ijma* (consensus), *Qiyas* (application by analogy), and *Ijtihad* (“deducing legal norms from the secondary sources of *Qiyas* and *Ijma*”).<sup>4</sup> The first two sources of *Sharia*—the *Quran* and *Sunna* of the Prophet—are considered divine; whereas, the other three sources—*Ijmaa*, *Qiyas*, and *Ijtihad*—are man-made.<sup>5</sup> Thus, in a sense, the latter’s man-made characteristics render *Sharia* law an evolving law.

The first source of *Sharia* law is the *Quran*. The *Quran* is the

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<sup>1</sup> See Omar Sacirbey, *Sharia Law in the USA 101: A Guide to What it is and Why States Want to Ban it*, HUFFPOST RELIGION, July 29, 2013, [http://www.huffingtonpost.com/2013/07/29/sharia-law-usa-states-ban\\_n\\_3660813.html](http://www.huffingtonpost.com/2013/07/29/sharia-law-usa-states-ban_n_3660813.html); Scott Shane, *In Islamic Law, Gingrich Sees a Mortal Threat to U.S.*, N.Y. TIMES, Dec. 21, 2011, at A22.

<sup>2</sup> Amira Mashhour, *Islamic Law and Gender Equality—Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, 27 HUM. RTS. Q. 562, 564 (2005) (quoting Cf. M.B. Hooker, “Shari’a,” *EP*, IX, pp. 321–28, under 1.1).

<sup>3</sup> See Mathias Rohe, *Application of Shari’a Rules in Europe—Scope and Limits*, 44 DIE WELT DES ISLAMIS 323, 324–25 (2004); Sacirbey, *supra* note 1.

<sup>4</sup> See Javid Rehman, *The Shari’a, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, 21 INT’L J.L. POL’Y & FAM. 108, 110–12 (2007) (discussing the sources comprising *Sharia* Law); Mashhour, *supra* note 2, at 566.

<sup>5</sup> Mashhour, *supra* note 2, at 566.

religious book followed by Muslims.<sup>6</sup> According to Muslim belief, the *Quran* “represents the accumulation of the verses revealed by God to Prophet Muhammad” (PBUH).<sup>7</sup> It is believed that the *Quran* is the divine word of God and cannot be challenged.<sup>8</sup> The *Quran* was revealed in different stages throughout the life of the Prophet.<sup>9</sup> Throughout that time, the *Quran* was “noted down” by Muslims.<sup>10</sup> During the time of its revelation, it solidified “progressive principals” for both men and women.<sup>11</sup> The *Quran* is glorified for giving women marriage rights, inheritance rights, and ownership rights that were nonexistent at the time of pre-Islamic Arabia.<sup>12</sup> “It advanced such values as compassion, good faith, justice and religious ethics . . . .”<sup>13</sup> The *Quran* was produced as a text during the time of the third Caliph Uthman Ibn Affan.<sup>14</sup> The *Quran* is a guide of standards for a Muslim society to follow and live by.<sup>15</sup> Though it is seen as a guide, the *Quran* is not a legal document; it does not contain legal prescriptions.<sup>16</sup> Out of over six thousand verses, only eighty verses have strict legal content.<sup>17</sup> The *Quran* is supplemented by other sources such as *Qiyas*, *Ijmaa*, and *Ijtihad* to form the basis of *Sharia* law.<sup>18</sup>

The second source of *Sharia* law is the *Sunna* of the Prophet (PBUH).<sup>19</sup> *Sunna* is “the tradition and practice” of the Prophet, and Hadith is the “memorization and transmission of the *Sunna* into a literary form . . . .”<sup>20</sup> “The *Sunna* . . . represents model behavior and is referred to as the tradition and practices of” the Prophet Mohammad.<sup>21</sup> “The term *hadith* with the meaning ‘occurring, taking place’ represents the ‘report’ of Prophet

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<sup>6</sup> See Rehman, *supra* note 4, at 110.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See Rehman, *supra* note 4, at 110; Mashhour, *supra* note 2, at 564 (stating the *Quran* subscribed “equal religious duties, rewards, and punishments before God” for men and women).

<sup>12</sup> *Id.*

<sup>13</sup> Rehman, *supra* note 4, at 110.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Mashhour, *supra* note 2, at 566.

<sup>19</sup> Rehman, *supra* note 4, at 111.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

Muhammad's Sunna."<sup>22</sup> The *Sunna* has been preserved for generations through the means of *Hadith*.<sup>23</sup> It is believed by Muslims to be the second source of guidance after the *Quran*.<sup>24</sup>

The third source of *Sharia* law is *Qiyas*, the application of law by analogy or deduction.<sup>25</sup> "Analogy (Qiyas) is a restricted form of Ijtihad . . ."<sup>26</sup> "Qiyas [is] defined as 'establishing the relevance of a ruling in one case to another case because of a similarity in the attribute (reason or cause) upon which the ruling was based.'<sup>27</sup> The fourth source of *Sharia* is *Ijmaa*. *Ijmaa* means "consensus among Muslim scholars" and "agreement[s] reached on the decisions taken by the learned [scholars] . . . on various Islamic matters."<sup>28</sup> "[Ijmaa] developed after the death of [the Prophet] and the consequent loss of his guidance in legislative matters."<sup>29</sup> It "derived its authority as a source of law from the *hadith* that records the Prophet as saying, 'My Community will never agree on an error.'<sup>30</sup>

Finally, the last source of *Sharia* law is *Ijtihad*, or reasoning by analogy.<sup>31</sup> "*Ijtihad* literally means 'strenuousness' and technically means an effort or an exercise to arrive at one's own judgment."<sup>32</sup> It is usually used when the *Quran* and *Sunna* are silent and do not provide answers for a specific issue or question.<sup>33</sup> The principal of *Ijtihad* was "a dynamic element in Islamic law" making.<sup>34</sup> "Unfortunately, the gates of [I]jtihad were closed soon after the decline of the Abbasid Empire in AD 12th Century"; it was during this time that *Sharia* law began to be thought of as immutable.<sup>35</sup>

*Sharia* law is further broken down into four schools of

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *See id.* at 110–11 ("While maintaining its characteristics, the application of Prophet Muhammad's Sunna took on board a more profound spiritual and religious meaning. It was to be, after the word of God, the most revered source of knowledge and legal acumen.").

<sup>25</sup> Rehman, *supra* note 4, at 112.

<sup>26</sup> Mashhour, *supra* note 2, at 566.

<sup>27</sup> *Id.* (quoting JOHN L. ESPOSITO, WOMEN IN MUSLIM FAMILY LAW 7 (1982)).

<sup>28</sup> Mashhour, *supra* note 2, at 566.

<sup>29</sup> JOHN L. ESPOSITO, WOMEN IN MUSLIM FAMILY LAW 7 (2nd ed. 2001).

<sup>30</sup> *Id.*

<sup>31</sup> Mashhour, *supra* note 2, at 566.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> ASHGAR ALI ENGINEER, THE RIGHT OF WOMEN IN ISLAM 7 (2d rev. ed. 2004).

<sup>35</sup> *Id.* at 7–8.

thought.<sup>36</sup> The “Quran and Sunna[] were given shape and direction by Islamic Scholars . . . during the second and third centuries of the Muslim calendar.”<sup>37</sup> These Islamic scholars developed and applied *Ijmaa*, *Qiyas*, and *Ijtihad* to make their interpretations and rulings on Islamic Law.<sup>38</sup> The four schools of thought are named after the four jurists who codified *Sharia* law: Abu Hanifa, Malak ibn Anas, Muhammad ibn Idris al-Shafi, and Ahmad Hanbal.<sup>39</sup> For the purposes of this article, a deep explanation of the development and theory of each school will not be included as that is beyond the scope of the present query.

### I. *SHARIA* DIVORCE LAW

Divorce in Islam is looked upon as abominable; nonetheless, it was, and still is, a part of life in the Muslim community.<sup>40</sup> A number of *Hadith* record the Prophet’s attitude towards divorce and his cautionary statement that “[o]f all the permitted things divorce is the most abominable with God.”<sup>41</sup> “[T]he Quran originally gave man the right to divorce, [its verses emphasize] the importance to be just, to fear God in any decision, and to . . . [do so] on equitable terms or separate with kindness.”<sup>42</sup> “Islam gives women the right to divorce on several grounds if [the relationship] between the spouses become[s] unbearable and impossible.”<sup>43</sup> “Islam [overly] encourages reconciliation . . . rather than severance of their marriage.”<sup>44</sup> “Both the Quran and the Sunna[] . . . present negative attitudes towards [divorce.]”<sup>45</sup> But, as mentioned above, the *Quran* is not a text of law. It is a text of guidance, and given this, *Sharia* divorce law was highly influenced and fashioned by the four jurists.<sup>46</sup>

The four schools of thought—Hanafi, Hanbali, Shafi’i, and

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<sup>36</sup> Rehman, *supra* note 4, at 112.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> JUDITH E. TUCKER, *WOMEN, FAMILY, AND GENDER IN ISLAMIC LAW* 84–85 (2008).

<sup>41</sup> *Id.*

<sup>42</sup> Mashhour, *supra* note 2, at 576.

<sup>43</sup> *Id.* at 571.

<sup>44</sup> *Id.*

<sup>45</sup> Rehman, *supra* note 4, at 118.

<sup>46</sup> See ENGINEER, *supra* note 34, at 11 (stating that the scholar Muhammad Mujib “calls Shari’ah an ‘approach to Islam’ rather than a law”); Mashhour, *supra* note 1, at 565–66.

Maliki—were developed in the second and third centuries of the Islamic calendar.<sup>47</sup> Each school of thought has been named after its founder, and each has its opinion on the various options for divorce found in Islam.<sup>48</sup> The four jurists established legal principals in accordance with their own subjective understanding of Islam and crafted their interpretation within the political and societal circumstances of their time.<sup>49</sup> “[T]he difficulty faced by subsequent Islamic societies is that . . . [questioning and] reviewing established norm[alcy created by the four jurists] has been treated as being tantamount to heresy.”<sup>50</sup> Thankfully, the evolution of *Sharia* law and change in interpretation by later Muslim scholars and governments has slowly altered the said link to heresy.

## II. TYPES OF DIVORCE (*TALAQ*)

Equality is advocated between husband and wife in the marital relationship throughout the *Quran* and Islamic teachings.<sup>51</sup> The development of *Sharia* principals were “influenced by the prevailing social, economic, and political conditions [which] granted significant advantages to husbands over wives in the process” of divorce.<sup>52</sup> Under the interpretations of the four jurists, men enjoyed overwhelming power over their wives through the control of setting and declaring the divorce; women had no control or ability to consult once their husband declared himself divorced.<sup>53</sup> “Men [had] almost unlimited powers to divorce their wives . . . .”<sup>54</sup> They “could employ the oath of divorce to secure compliant behavior from their wives or even add emphasis to promises they made to their wives” and could add emphasis to promises they made to other people.<sup>55</sup> As will be discussed below, there are three types of *Talaq*: *Talaq Ahsan* (best), *Talaq Hasan* (good), and *Talaq al bid’a* (innovation).

*Ahsan* is a type of divorce where the husband pronounces that

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<sup>47</sup> See Rehman, *supra* note 4, at 108, 112.

<sup>48</sup> See *id.* at 112.

<sup>49</sup> *Id.* at 108, 112.

<sup>50</sup> *Id.* at 112.

<sup>51</sup> *Id.* at 118.

<sup>52</sup> *Id.*

<sup>53</sup> TUCKER, *supra* note 40, at 91.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

he is divorced when his wife is between menstrual cycles.<sup>56</sup> Once it is pronounced, it is said that he should not have sex with his wife for three menstrual cycles, also referred to as the waiting period.<sup>57</sup> The waiting period in this sense is provided “for reconciliation and reconsideration of the husband’s decision.”<sup>58</sup> Within the waiting period, a husband is given the option to “change his mind about the divorce . . . and resume [his] marriage[.]”<sup>59</sup> Once the waiting period has concluded, with no reconciliation or reconsideration, the parties are pronounced “formally divorced.”<sup>60</sup> Nonetheless, if the couple decided to remarry after the declared divorce, it would be treated as if they were marrying for the first time, hence, a new marriage contract and dowry would be required.<sup>61</sup>

*Hasan* divorce is where “a husband utters three separate pronouncements of divorce in three consecutive periods between menstruations.”<sup>62</sup> The divorce takes effect only with the final pronouncement, and then the wife is required to go into the “waiting period before she is completely free of her marital bonds and can remarry.”<sup>63</sup> “This type of divorce is irrevocable[,] . . . the husband cannot change his mind after the third iteration of the divorce.”<sup>64</sup> In addition, “the couple [cannot] remarry [each other] unless the wife has married another man in the interim” and divorces him or becomes a widow.<sup>65</sup> The reasoning for this comes from the *Hadith* of the Prophet which states that “she must ‘taste the sweetness of another’ before she could be lawful again to her first husband.”<sup>66</sup>

The “third type[,] talaq al bid’a, [where] . . . the husband simply pronounces three divorces at once” (i.e. I divorce you, I divorce you, I divorce you) “while his wife is not menstruating[.]”<sup>67</sup> Once the third pronouncement is made, the wife immediately enters the “waiting period” for three menstrual cycles, and once the waiting

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<sup>56</sup> *Id.* at 86.

<sup>57</sup> *Id.*

<sup>58</sup> Mashhour, *supra* note 2, at 573.

<sup>59</sup> TUCKER, *supra* note 40, at 86.

<sup>60</sup> *Id.*

<sup>61</sup> Mashhour, *supra* note 2, at 573.

<sup>62</sup> TUCKER, *supra* note 40, at 86.

<sup>63</sup> *Id.* at 86–87.

<sup>64</sup> *Id.* at 87.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 88.

<sup>67</sup> TUCKER, *supra* note 40, at 87.

period concludes, she is free of her marital ties and can remarry.<sup>68</sup> This type of divorce is also irrevocable like *Talaq Hasan*.<sup>69</sup> Hence, the husband cannot change his mind and reenter the marriage, and the couple cannot remarry each other without the wife marrying another man and divorcing him or becoming widowed. This form of divorce has no support in the *Quran* and *Sunna* because its process gives no opportunity for reconciliation.<sup>70</sup> “The allowance of [this form of divorce] directly contradicts the *Quranic* prescription: ‘If you divorce your women, divorce them when they have completed their menstrual period. Calculate the period and fear God, your Lord . . . Those are the bounds of God. He who transgresses the bounds of God has surely wronged himself.’”<sup>71</sup>

The four jurists had mixed feelings about the subject of divorce and the moral and ethical constraint that it brings.<sup>72</sup> “Most jurists favored [a] more gradual revocable divorce . . . because [of] the possibility of reconciliation” between the parties . . . . They openly encouraged women to [use] their charm to win back their husbands.”<sup>73</sup> The Hanafi school of thought believed that once a Muslim man reached the age of puberty, he had the “absolute right to divorce his wife without having or citing any reasons” for doing so.<sup>74</sup> Hanafi also believed that the man could pronounce his divorce “in the absence, and without the involvement of, his wife[.]”<sup>75</sup> The Maliki school of thought, on the other hand, believes that only *Ahsan* divorce is valid;<sup>76</sup> the Shafa’i school of thought “accepted all three types of [divorce] on the grounds that divorce . . . is a legal act and the Prophet [did] not object[] when a man, in his presence, had divorced his wife three times with one iteration.”<sup>77</sup> The Hanafi school of thought ruled “that the act of intercourse alone, or even lustful kissing and caressing, nullified the divorce and reestablished the marriage[.]”<sup>78</sup> This position was accepted but was not preferred by the Maliki and Shafa’i schools

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Mashhour, *supra* note 2, at 573.

<sup>71</sup> ESPOSITO, *supra* note 27, at 31.

<sup>72</sup> TUCKER, *supra* note 40, at 87.

<sup>73</sup> *Id.*

<sup>74</sup> Rehman, *supra* note 4, at 118.

<sup>75</sup> *Id.*

<sup>76</sup> TUCKER, *supra* note 40, at 87.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*



of thought. Both Maliki and Shafa'i "insist[] on a formal statement by the husband of his intention of resuming the marriage and forbade him to [be] with his wife until he made one."<sup>79</sup>

All jurists agreed that as long as the waiting period did not expire "in a revocable divorce, [i.e. Ahsan divorce] a husband could choose to return to his wife regardless of her wishes."<sup>80</sup> However, "[i]f she were to claim that she had experienced three menstrual [cycles] since the pronouncement of divorce" her statement would be accepted as true and her husband could not take her back.<sup>81</sup> Hence, the wife was given a "small veto power over her husband's" power of *Talaq*.<sup>82</sup>

### III. A WOMAN'S RIGHT TO A DIVORCE OR ANNULMENT

From an Islamic perspective, women are given the right to a divorce. Many scholars rely on the following verse to give women a variety of options to petition for a divorce: "[a]nd women have rights equal to what is incumbent upon them according to what is just (2:227)."<sup>83</sup> "The process of divorce is explained in some detail in more than twenty" verses in the *Quran*.<sup>84</sup> "Islam [was] probably the first religion in the world" to recognize the right of a woman to divorce.<sup>85</sup> According to a Muslim scholar, divorce was more accepted at the time of the Prophet (PBUH) than it is now within the Muslim community.<sup>86</sup> An *imam* of a *mosque* simply stated that divorce could be for the simplest reason that a wife is not attracted to her husband, but people no longer follow that reasoning.<sup>87</sup> According to the four jurists, women had to raise certain bases to petition for divorce. The four schools of thought differ on the grounds women had to prove for an annulment or divorce.<sup>88</sup> Between the four jurists, the Hanafi jurisprudence is thought to be the most restrictive and the Maliki jurisprudence is

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> TUCKER, *supra* note 40, at 87.

<sup>83</sup> ESPOSITO, *supra* note 29, at 32.

<sup>84</sup> JULIE MACFARLANE, ISLAMIC DIVORCE IN NORTH AMERICA: A SHARI'A PATH IN A SECULAR SOCIETY 141 (2012).

<sup>85</sup> ENGINEER, *supra* note 34, at 162–63.

<sup>86</sup> MACFARLANE, *supra* note 84, at 142.

<sup>87</sup> *Id.*

<sup>88</sup> ESPOSITO, *supra* note 29, at 33–34.

known to be the more “liberal” school of thought.<sup>89</sup> Below, the various options given to women will be analyzed along with the four jurists’ interpretations and views.

#### A. *Talaq Tawfiq (Delegated Divorce)*

According to the four jurists, *Talaq* (divorce) was conceived as a man’s divorce, available to the husband at any time and in any place.<sup>90</sup> “A woman did not have [the same] right of [a] unilateral divorce, but she could acquire the ability to choose divorce if” it was delegated to her.<sup>91</sup> A delegated divorce is where the wife has the right to divorce only if the husband delegated the right to her.<sup>92</sup> Delegation can occur before or after the marriage takes place and it can be included in the marriage contract.<sup>93</sup> This right is one which permits the wife to divorce the husband at her own will, but this right does not deprive the husband of his right to proclaim a divorce or *Talaq*, as discussed above.<sup>94</sup>

Delegated divorce was a controversial topic between the jurists. “[T]he effectiveness of any blanket delegation” for divorce was “limited by most Jurists.”<sup>95</sup> Pursuant to the Hanafi school of thought, a husband had to tell his wife that she could choose to acquire the right to divorce him and the delegation was effective only in the immediate time and place; the right could lapse unless the condition of the delegation extended for a period of time.<sup>96</sup> Similarly, the Hanbali school of thought states that “the wife’s option of divorce did not last beyond the event or time the delegation took place, although it was also argued that the delegation was valid until the husband reconciled with his wife by having sex with her.”<sup>97</sup> The Maliki school of thought kept the power of delegation with the husband; the “delegation remained in [full] force until the husband canceled it.”<sup>98</sup> An exception to the rule was that the cancelation of a delegation could not occur if it was “tied to a condition such as marrying a second wife.”<sup>99</sup>

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<sup>89</sup> *Id.* at 33.

<sup>90</sup> TUCKER, *supra* note 40, at 91.

<sup>91</sup> *Id.*

<sup>92</sup> Mashhour, *supra* note 2, at 574.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> TUCKER, *supra* note 40, at 92.

<sup>96</sup> *Id.* at 91.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 91–92.

<sup>99</sup> *Id.*

*B. Faskh or Tafriq*<sup>100</sup>—Annulment or “Separation” of the Marriage with the Participation of the Judicial System<sup>101</sup>

*Faskh* is the court procedure in which a wife, her family, or her husband could request that a marriage be declared defective and petition for its annulment.<sup>102</sup> *Tafriq*, on the other hand, simply means separation; and for the purpose of this section, the process of *Tafriq* is the same as *Faskh*. Under the Shafa’i and Hanbali schools of thought, all forms of divorce, except for the unilateral *Talaq*, fall under the category of *Faskh*.<sup>103</sup> Here, the power of the judge to annul a marriage on the wife’s petition is a difficult task because “[t]he grounds that are available” to the wife are limited and “difficult to prove;” whereas a man is not required to cite any grounds for his petition.<sup>104</sup> The four schools of thought have different grounds in which a wife can base her petition for annulment.<sup>105</sup> The general grounds for annulment include: [1] the husband’s impotence,<sup>106</sup> [2] the husband is missing and/or his whereabouts are not known,<sup>107</sup> and [3] mutual oath swearing regarding allegations of a wife cheating on her husband.<sup>108</sup>

The first ground of annulment is the husband’s impotence. In Islam, a wife has the right to sexual intercourse within the marriage, and when a husband is not able to satisfy his wife’s right to sex, the marriage is invalidated.<sup>109</sup> In order to prove this ground, the wife must go through an examination to determine whether she had been deflowered (if this was her first marriage that is), or the husband could take an oath stating that their marriage had not been consummated.<sup>110</sup> His oath takes precedence within the evidence provided.<sup>111</sup> According to the Hanbali school of thought, the burden of proof was on the husband.<sup>112</sup> He needed to prove that he could in fact produce

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<sup>100</sup> *Id.* at 92.

<sup>101</sup> See ENGINEER, *supra* note 34, at 163.

<sup>102</sup> TUCKER, *supra* note 40, at 92.

<sup>103</sup> Ron Shaham, *Judicial Divorce at the Wife’s Initiative: The Sharia Courts of Egypt, 1920–1955\**, 1 ISLAMIC L. & SOC’Y 217, 222 (1994).

<sup>104</sup> ESPOSITO, *supra* note 29, at 33.

<sup>105</sup> Rehman, *supra* note 4, at 118.

<sup>106</sup> TUCKER, *supra* note 40, at 92.

<sup>107</sup> *Id.* at 93.

<sup>108</sup> ESPOSITO, *supra* note 29, at 33.

<sup>109</sup> TUCKER, *supra* note 40, at 92.

<sup>110</sup> *Id.* at 92–93.

<sup>111</sup> *Id.* at 93.

<sup>112</sup> *Id.*

semen and to do so, he was to produce semen in a private room and present it to the judge.<sup>113</sup> To prove that the substance was in fact semen and not a similar looking substance, such as egg whites, the collected semen was thrown into a blazing fire.<sup>114</sup> If the alleged semen solidified it was declared to be egg whites and it was concluded that the husband was impotent and hence the marriage was annulled.<sup>115</sup> On the other hand, if the semen did not burn up, the wife's petition for annulment was stricken and the marriage was declared valid.<sup>116</sup> The remaining three jurists agreed with the aforementioned reasoning. Furthermore, the Hanafi school of thought declared that as long as the purpose of the marriage, i.e. sexual intercourse, could be fulfilled, an annulment could not be granted.<sup>117</sup> Hence, if the husband was insane, had leprosy, or scrofula, the marriage could not be annulled.<sup>118</sup>

The second ground for an annulment is if the husband is "*mafqud*," or has gone missing and his whereabouts were unknown.<sup>119</sup> The differences between the jurists on this point are interesting. They each linked the wife's right to petition for a divorce from a missing husband to her right to enjoy intimacy in her marital relationship, but they did not dwell on the lack of the husband's marital support as a defining reason for an annulment.<sup>120</sup> The Maliki school of thought has "a clear procedure for a wife who wished to be released" from the bounds of marriage for this specific ground.<sup>121</sup> If the wife did not hear from her husband, receive news about him, or from him, the wife may appear in front of a judge and ask that she initiate her "waiting period" of four years.<sup>122</sup> If the husband did not appear or send news within the waiting period, the wife would be given a divorce.<sup>123</sup> If the husband returned before the waiting period expired and/or before she remarried, she could be sent back to her husband.<sup>124</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> TUCKER, *supra* note 40, at 93.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> TUCKER, *supra* note 40, at 93.

<sup>120</sup> *Id.* at 94.

<sup>121</sup> *Id.* at 93.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> TUCKER, *supra* note 40, at 93.

Similarly to Maliki, the Hanbali school of thought also had a four-year waiting period for the wife.<sup>125</sup> But Hanbali “gave the missing husband full marital rights if he returned,” regardless of whether the wife had remarried or how long the husband had been gone.<sup>126</sup> The husband had the right to choose to restore his marriage or he could simply recoup the dowry that he paid and allow the annulment to stand.<sup>127</sup> Hanafi, on the other hand, believed that the marriage was valid and she could not annul it if the husband was missing.<sup>128</sup> The only way she could annul the marriage is if she received confirmed news that her husband “divorced her legally, died, or changed his religion and became [an] apostate.”<sup>129</sup> Otherwise, the wife remains shackled into the marriage regardless of how long the husband was absent.<sup>130</sup>

The third ground for annulment is *lian* or mutual oath swearing.<sup>131</sup> Here, the husband must allege “without legal proof that [the] wife has committed adultery.”<sup>132</sup> The wife “is entitled to file suit to bring about a retraction of [the] husband’s statement or require him to swear an oath that she is guilty of adultery.”<sup>133</sup> Once both parties made their oaths, the husband is allowed to divorce his wife.<sup>134</sup> “If he refuse[d] to do so and the parties [did] not agree” to continue the marriage, “the court must [instantly] dissolve the marriage.”<sup>135</sup>

According to the Hanafi school of thought, women had the following grounds to petition for a *Faskh*, (other than the three previously mentioned general grounds): [1] when the wife was married as a child and petitions at the time she reaches the age of puberty, “on the condition that [the marriage] was contracted by someone other than her father or grandfather,”<sup>136</sup> and [2] when the husband is missing and he is at least ninety years old.<sup>137</sup>

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<sup>125</sup> *Id.* at 94.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> See Gabriel Sawma, *Annulment of Islamic Marriages*, INT’L L. BLOG (Oct. 6, 2009, 5:02 PM), <http://gabrielsawma.blogspot.com/2009/10/annulment-of-islamic-marriages.html>.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> ESPOSITO, *supra* note 29, at 33.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Shahan, *supra* note 103, at 222–23.

<sup>137</sup> *Id.* at 223.

Besides this, under Hanafi law, a wife cannot free herself from a marriage unless there is a mutual agreement for divorce.<sup>138</sup> Classical Hanafi jurisprudence does not allow a wife to divorce or annul the marriage “even in cases of [abuse,] maltreatment, cruelty or the husband’s inability to support her.”<sup>139</sup> Hanafi jurisprudence justifies its stance with the following verse,

Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth. So righteous women are devoutly obedient, guarding in [the husband’s] absence what Allah would have them guard. But those [wives] from whom you fear arrogance—[first] advise them; [then if they persist], forsake them in bed; and [finally], strike them. But if they obey you [once more], seek no means against them. Indeed, Allah is ever Exalted and Grand.<sup>140</sup>

Hanafi law was practiced in the Ottoman Empire and was criticized for its highly restrictive approach.<sup>141</sup> The Maliki school of thought (which inspired the Egyptian statutory regulations) had four additional grounds for annulment, which include: [1] Husband’s defect and disease; [2] Husband’s inability to support the wife; [3] Absence of the husband; and [4] Injury to the wife.<sup>142</sup>

The first ground, the husband’s defect and disease, is a basis for *Tafriq* or separation, which in Islamic law is synonymous to divorce.<sup>143</sup> According to Maliki, the wife is entitled to claim separation if the husband becomes afflicted with a chronic defect that “is either incurable, or curable only after a long period of time” that would harm the marital relationship.<sup>144</sup> The exception here is if: [1] the husband was afflicted with the defect or disease prior to the marriage, and the wife was aware of it; or [2] the wife “consented, explicitly or implicitly . . . to live with him” in his circumstances.<sup>145</sup>

The second ground, the husband’s inability to support his wife, is comprised of different laws depending on the circumstances of the wife.<sup>146</sup> The first is based on the presence of the husband. Maliki believes that if the husband is present, the wife must

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<sup>138</sup> *Id.*

<sup>139</sup> Rehman, *supra* note 4, at 118.

<sup>140</sup> *The Noble Quran* 4:34.

<sup>141</sup> Rehman, *supra* note 4, at 118.

<sup>142</sup> *See* Shaham, *supra* note 104, at 223–25.

<sup>143</sup> *See id.* at 223.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *See id.* at 224.

petition the court for her divorce.<sup>147</sup> She must state that the husband “fails to support her and . . . has no known property with which to maintain her,” and that her demand should be granted unless her husband can prove otherwise.<sup>148</sup> The grace period for the husband to prove his ability to support his wife in this instance is no longer than a month.<sup>149</sup>

The second law is based on the husband’s absence.<sup>150</sup> If the husband is absent, his whereabouts are known, he is not “far away,” and he has no known property, then the court must warn him that his wife will be judicially divorced unless he either sends his wife material support or he returns and supports his wife within the prescribed time period.<sup>151</sup> The second law also has a provision addressing when the husband’s whereabouts are unknown. If the husband cannot be contacted, he is “far away,” his whereabouts are unknown, and it is established by the judge that he has no known property, the wife is immediately divorced.<sup>152</sup> The definition of “far away” or the distance that would be defined as “far away” for the mentioned rule of law is not clear. All judicial divorces are revocable in the above-mentioned grounds.<sup>153</sup> A “husband may reinstate his wife if he proves” that during the wife’s waiting period he gained the ability to support her, and if he fails to do so, the reinstatement is invalid and the “divorce becomes irrevocable after the expiration of the waiting period.”<sup>154</sup>

In another ground for divorce, the husband’s mistreatment of his wife is a valid ground if the wife proves that the husband’s mistreatment is so extreme that it is impossible for the wife’s social standing to continue.<sup>155</sup> The wife may petition the judge to separate them, and the judge may thereafter grant her an irrevocable divorce if reconciliation is impossible.<sup>156</sup> If the husband denies the wife’s petition, and she subsequently repeats her complaint without demonstrating mistreatment, pursuant to

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<sup>147</sup> Shaham, *supra* note 103, at 224.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Shaham, *supra* note 103, at 224.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 225.

<sup>156</sup> *Id.*

4:35 of the *Quran*,<sup>157</sup> the judge appoints two arbitrators and has a family council appointed.<sup>158</sup> The family council is formed to investigate the complaints of each of the parties and to attempt to reconcile the husband and wife.<sup>159</sup> If reconciliation is impossible, the arbitrators pronounce an irrevocable divorce, “except when the wife is solely responsible for the dispute, in which case dissolution [of the marriage] shall not be granted.”<sup>160</sup> If there is a disagreement between the arbitrators, then the judge will instruct them to reinvestigate the case.<sup>161</sup> If the disagreement continues, then the court will appoint another council of arbitrators who will then submit their decision to the judge and the judge will confirm his verdict.<sup>162</sup>

### C. *Khul’a*—The Woman’s Right to Divorce

*Khul’a* “literally means to disown or to repudiate, [as] a woman can repudiate her marriage.”<sup>163</sup> *Khul’a* is a type of divorce that can be obtained by the wife with the consent of the husband, and it must be done through judicial decree.<sup>164</sup> In order to obtain a *Khul’a*, the wife is required to give back all or part of her dowry.<sup>165</sup> “[T]he wife is not required to establish specific grounds for divorce, other than . . . irreconcilable differences.”<sup>166</sup> *Khul’a* is deduced from 2:229<sup>167</sup> and 4:128<sup>168</sup> of the *Quran*. Additionally,

<sup>157</sup> *Id.* at 225–26; *The Noble Quran* 4:35 (“And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Acquainted [with all things].”).

<sup>158</sup> Shaham, *supra* note 103, at 225–26.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 226.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> ENGINEER, *supra* note 34, at 163.

<sup>164</sup> Rehman, *supra* note 4, at 118.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *The Holy Quran* 2:229 (“Divorce is twice. Then, either keep [her] in an acceptable manner or release [her] with good treatment. And it is not lawful for you to take anything of what you have given them unless both fear that they will not be able to keep [within] the limits of Allah. But if you fear that they will not keep [within] the limits of Allah, then there is no blame upon either of them concerning that by which she ransoms herself. These are the limits of Allah, so do not transgress them. And whoever transgress the limits of Allah - it is those who are the wrongdoers.”).

<sup>168</sup> *Id.* at 4:128 (“And if a woman fears from her husband contempt or evasion, there is no sin upon them if they make terms of settlement between them – and settlement is best. And present in [human] souls is stinginess. But if you do



there are two cases noted during the time of the Prophet (PBUH), where women divorced their husbands through the process of *Khul'a*. The first case involved Jamilah, the wife of Thabit ibn Qais. She was dissatisfied with her marriage and stated that she and her husband did not fight amongst each other, and, furthermore, she did not find any fault with her husband in regard to his morals or religion; she simply admitted to outright hating him.<sup>169</sup> The Prophet allowed the divorce provided she could return the orchard, which was her dowry given to her by her husband.<sup>170</sup> The second case involved a woman by the name of Burairah who married a man named Mughith.

When she decided to obtain a '*Khula*', [her husband] wept bitterly, [with] tears rolling down his cheeks into his beard. The Prophet address[ed] ibn' Abbas, his companion, [and] said, "don't you wonder about Mughith's passionate love for Burairah and her equally passionate hatred for him?" The Prophet asked Burairah whether she [would] take Mughith back. Burairah . . . asked the Prophet, "Are you ordering me?" [The Prophet] said, "No, I am only recommending Mughith's case to you. Burairah . . . said[,] "I do not need him" [and] persisted in asking for '*Khula*'.<sup>171</sup>

Both these cases illustrate how easy it was for women to divorce their husbands during the Prophet's time; in fact Burairah, turned down the Prophet's recommendation to take back her husband and exercised her right to a divorce.

Pursuant to Maliki, *Khul'a* must be: [1] initiated by the wife; [2] the wife must compensate the husband with an equal or greater amount of their dowry; [3] the husband must consent to the wife's request for divorce; and [4] the divorce is irrevocable.<sup>172</sup> The Hanafi school of thought, on the other hand, states that *Khul'a* "is the end of a martial relationship . . . [which is concluded from] the utterance of the word [*Khul'a*] or [a word] that has the same meaning."<sup>173</sup> Shafi'i defines it as "the separation with something given in return" through the utterance of the word *Khul'a*.<sup>174</sup> Shafi'i also states that it "can be achieved

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good and fear Allah – then indeed Allah is ever, with what you do, Acquainted.”).

<sup>169</sup> ENGINEER, *supra* note 34, at 163.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Oussama Arabi, *The Dawning of the Third Millennium on Shari'a*, 16 ARAB L.Q. 2, 8 (2001).

<sup>173</sup> Mashhour, *supra* note 2, at 575.

<sup>174</sup> *Id.*

through mutual agreement of [both] parties or . . . the order of [a judge]” once the wife has paid the husband a certain amount of her dowry.<sup>175</sup> Hanbali defines *Khul’a* with the following rule: [1] “the woman loathes the man;” [2] she “does not want to disobey God [by] preventing” her husband from having sexual relations with her; [3] she must “ransom herself” from her husband;<sup>176</sup> [4] “[t]he settlement [should] not exceed the amount [the husband] originally paid [for her dowry];”<sup>177</sup> and [5] if the wife pays more than her dowry, then it is “reprehensible, but the [divorce] would nevertheless be legally effective.”<sup>178</sup>

#### IV. SHARIA DIVORCE LAW EVOLVES, GIVING WOMEN THEIR BASIC RIGHT TO AN EASIER AND MORE ACCESSIBLE DIVORCE

“The first changes in [Sharia divorce law began with] the Ottoman Empire in 1915.”<sup>179</sup> There were “two imperial edicts [which] grant[ed] women the right to sue for divorce in cases of desertion [and for] . . . a husband’s contagious disease” which would make life with him dangerous.<sup>180</sup> The edicts were followed by the *Ottoman Law of Family Rights* of 1917, which was the first officially adopted codification of Muslim family law in modern times.<sup>181</sup>

Furthermore, intellectuals of the late nineteenth and early twentieth century moved to change *Sharia* divorce law “closer to the original intent of justice and fairness for both men and women . . . .”<sup>182</sup> “[T]hey focused . . . on divorce and honed in on some of the abuses and injustices that . . . crept into [the practice of divorce].”<sup>183</sup> A helpful example of reformation of women’s rights to divorce occurred in Egypt; and its laws regarding women

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<sup>175</sup> *Id.*

<sup>176</sup> Arabi, *supra* note 172, at 14. The second principal is based on Hanbali Jurist Ibn al-Banba (eleventh century) refers to the prophetic precedent: “Jami’ la b. Sallul approached the Prophet (p.b.u.h.) and said: ‘By God, I see no fault with Thabit, neither in his religion nor in his morals, but I hate to disobey (the rules of) Islam’. He asked her: ‘Would you give him back his garden? She said: ‘Yes.’ The Prophet said to Thabit: ‘Take it and nothing more . . . .’”

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> ESPOSITO, *supra* note 29, at 53.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> TUCKER, *supra* note 40, at 111.

<sup>183</sup> *Id.*

continue to evolve as their revolution and its aftermath continues.

“The initial attempts to reform . . . Hanafi law in Egypt were conducted under the Ottoman [Empire and] through the Ottoman Law of [Family] Rights in 1917.”<sup>184</sup> “The juristic basis for th[e] change was [through] the doctrine of *takhayyur* or ‘selection.’”<sup>185</sup> *Takhayyur* is defined as the “ability of an individual to go outside his own personal school of [thought] and select a [solution] to a specific problem from the remaining three” schools of thought.<sup>186</sup> The Egyptian legislators used this principal and moved from the Hanafi jurisprudence and adopted the Maliki jurisprudence.<sup>187</sup> Furthermore, significant reforms were brought by the Egyptian Law No. 25/1920 and No. 25/1929.<sup>188</sup> These laws established additional grounds for divorce.<sup>189</sup> The original “Hanafi rule of 90 years of disappearance of [the] husband was [ruled to be] extremely harsh and was replaced by a continuous absence of one year.”<sup>190</sup> Furthermore, Law No. 25/1929 established the ground of “irreconcilable differences as a consequence of the husband’s maltreatment or harm (*darar*)” towards his wife.<sup>191</sup> “Additional laws were introduced in 1979, which” included the “compulsory registration” of divorce “and the requirement that the wife be given notice of the [divorce,]” while failure to give notification would result in an invalid divorce.<sup>192</sup> The law also “obliged [the husband] to notify the wife of any of his polygamous marriages which . . . entitle[d] her to petition for divorce.”<sup>193</sup> It was set that the “[f]ailure to obtain permission” from the wife to engage in a polygamous marriage would amount to a basis for the wife to seek a divorce.<sup>194</sup>

President Anwar Saddat introduced the enactments of 1979.<sup>195</sup> The enactments “were struck down by the Egypt[ian] Supreme Court in May 1985” when the Supreme Court based its ruling on the argument that the enactments were “*ultra vires* to the

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<sup>184</sup> Rehman, *supra* note 4, at 119.

<sup>185</sup> ESPOSITO, *supra* note 29, at 54.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Rehman, *supra* note 4, at 119.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Rehman, *supra* note 4, at 119.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

constitution.”<sup>196</sup> The Law of Personal Status of 1985 withdrew the wife’s automatic entitlement to petition for divorce as a consequence of the husband’s polygamous marriage.”<sup>197</sup> Under this law, women “had to establish that they suffered ‘harm’ as a result of [their husband’s] polygamous marriage.”<sup>198</sup> The law was again reformed by President Hasani Mubarak in the year 2000.<sup>199</sup> The reformation allowed a wife “to petition for divorce on the grounds of ‘incompatibility’ within marriage without her having to establish evidence of ‘harm’.”<sup>200</sup> The petitioner, however, must agree to forfeit any right to dowry and return any and all gifts received at the commencement of the marriage.<sup>201</sup> Additionally, the husband’s consent to divorce was not a requirement.<sup>202</sup> Furthermore, women’s rights were recognized by the 1980 Amendment of Egypt’s Constitution.<sup>203</sup> Women could divorce their husbands without providing evidence of maltreatment.<sup>204</sup> The wife’s waiting period was six months if she had children from the marriage, but if no children were involved, her waiting period was three months.<sup>205</sup> If no reconciliation occurred, the judge would grant the divorce provided that the wife returned all the “money, property, and gifts that she received during the marriage and [agreed not to] receive alimony.”<sup>206</sup>

#### V. CASE STUDY: SHARIA DIVORCE LAW IN THE UNITED STATES—AMERICAN MUSLIM WOMEN AND DIVORCE

For this section, I contacted Arab American Family Services (“AAFS”) and other professional contacts with the hope of having a number of their divorced clients interviewed. Though AAFS and my professional contacts attempted to reach out and recruit interviewees for my article, it was unsuccessful. I was warned by

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 119–20.

<sup>198</sup> Rehman, *supra* note 4, at 120.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> See CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 SEPT. 1971, *as amended*, May 22, 1980, art. 11, art. 40 (marking a shift toward a wider range of civil rights, including women’s rights).

<sup>204</sup> *Egypt: Divorce Law Changed*, 30 OFF OUR BACKS 3 (2000), available at <http://www.jstor.org/stable/20836559>.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

AAFS that many Muslim American Women will not speak out about their divorce because it is not a topic that is usually discussed and is looked down upon within the community. Given this, I will be basing my case study on a few surveys conducted throughout the years and relevant case law. I hope this article will provide a foundation where Muslim American Women will not feel the need to hide their stories of divorce, but rather feel empowered to speak about their experiences so others may learn and seek inspiration from them.

No recent studies exist for the rate of divorce amongst Muslim Americans; however, there is a belief “that divorce has substantially increased in the last twenty years.”<sup>207</sup> According to a “study conducted by Dr. Ilyas Ba-Yunus, the overall divorce rate among Muslims in North America over the previous ten years stood at 32 percent . . . .”<sup>208</sup> In the United States, many Muslims who obtain a civil divorce also obtain a divorce pursuant to *Sharia* law in order to fulfill their Islamic obligations.<sup>209</sup> The “significance of the religious divorce for some Muslim[s] . . . is evident among both newer immigrants and those born in the United States or Canada . . . regardless of their level of education and assimilation into a secular society.”<sup>210</sup> Respondents of a study conducted by the Institute for Social Policy and Understanding (ISPU) described the significance of Islamic divorce as both “believing Muslims, and as members of their cultural community[,]” stating that these processes represented their Islamic identity.<sup>211</sup>

An Islamic divorce cannot be obtained in the United States without a civil dissolution of a marriage, and is not legally recognized without a civil divorce<sup>212</sup> as established in *Shikoh v. Murff*.<sup>213</sup> In *Shikoh v. Murff*, an appellant, who was a native of India, “came to the United States as a non-immigrant student in 1947.”<sup>214</sup> He was married to an Indian native who remained in Pakistan.<sup>215</sup> “On August 22, 1955, appellant appeared before the

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<sup>207</sup> MACFARLANE, *supra* note 84, at 142.

<sup>208</sup> *Id.*

<sup>209</sup> JULIE MACFARLANE, INST. FOR SOC. POL’Y & UNDERSTANDING, UNDERSTANDING TRENDS IN AMERICAN MUSLIM DIVORCE AND MARRIAGE 5 (2012).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> See MACFARLANE, *supra* note 84, at 144–45.

<sup>213</sup> *Shikoh v. Murff*, 257 F.2d 306, 309 (2d Cir. 1958).

<sup>214</sup> *Id.* at 307.

<sup>215</sup> *Id.*

Reverend Sheikh Dauod Ahmed Faisal, Spiritual Head and National Director of the Islamic Mission of America, Inc.,” in Brooklyn, New York.<sup>216</sup> The appellant asked to be declared divorced from his wife; the appellant signed his name on a document declaring his marriage dissolved under the Islamic law and the law of the United States of America.<sup>217</sup> The court held that the divorce was not valid in the United States because “[w]here the divorce is obtained within the jurisdiction of the State of New York, it must be secured in accordance with the laws of that State.”<sup>218</sup> This case emphasizes that a divorce is only valid if it is done pursuant to state law. Hence, mere religious divorces alone are not valid and are not recognized by law in the United States.

The process of obtaining a religious divorce is fairly simple in essence; the divorce proceedings are usually done in a *mosque* in the *imam* (leader of a *mosque*) office.<sup>219</sup> It is usually conducted by a single *imam*; there are a number of *imams* that are approved by self-styled arbitrators, and other *imams* have a panel to oversee divorces.<sup>220</sup> There is no uniform practice adopted amongst *imams* for conducting a divorce proceeding, but they all emphasize the discussion of reconciliation within the proceeding.<sup>221</sup> If an *imam* is approached by the wife alone, the *imam* will require contact with the husband before approving the divorce.<sup>222</sup> There are *imams* that believe that they have the discretion to approve a divorce for a wife who is unwilling to continue on with the marriage; they will divorce the wife without the husbands consent.<sup>223</sup> “[F]or many women, access to religious approval for divorce depends on where they live and” whom they go to for guidance.<sup>224</sup> The ISPU study shows that men usually followed the required procedure for giving *Talaq* (divorce) and women usually obtained permission for divorce either from their husband or an

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 309.

<sup>219</sup> INST. FOR SOC. POL’Y & UNDERSTANDING, *supra* note 209, at 33–34. See, e.g., Natasha Dado, ‘*Imam Shopping*’—Muslim Women’s Long Road to Islamic Divorce, ARAB AMERICAN NEWS, Sept. 23, 2013, <http://www.arabamericannews.com/news/index.php?mod=article&cat=Community&article=7475>.

<sup>220</sup> INST. FOR SOC. POL’Y & UNDERSTANDING, *supra* note 209, at 34.

<sup>221</sup> *Id.* at 35.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

*imam*.<sup>225</sup> The ISPU study shows that some women were motivated by a strong sense of religious duty and went through great lengths to obtain religious approval for divorce.<sup>226</sup> Some women spent months, and in some cases, years returning to the same *imam* or simply went *imam* shopping in order to obtain approval for their divorce.<sup>227</sup> Others that led more secular lives stated that they only obtained a religious divorce due to pressure from family and friends;<sup>228</sup> but for others, a religious divorce was done so they can be released from their vows and marital obligations in the eyes of God.<sup>229</sup>

According to the research done by Julie Macfarlane, five percent of the people interviewed said that they rejected the idea of consulting an *imam* for their divorce,<sup>230</sup> whereas much of the rest identified their need to divorce pursuant to *Sharia* law to fulfill their religious obligations.<sup>231</sup> She found that the motivation for many Muslims, religious or not, to seek religious divorce “is the need for closure.”<sup>232</sup> Many women stated that they did not feel “free” to engage other suitors until they went through their religious divorce.<sup>233</sup> A number of women suggested that if they did not get a religious divorce, their former husbands would “behave as if they were still married.”<sup>234</sup> Consequently “[m]ost imams agree that the wife usually approach[ed] them alone” without the husband’s participation regarding the divorce.<sup>235</sup> “One imam suggested that about 90 percent of his divorce cases” began with the wife solely approaching and asking for a divorce.<sup>236</sup>

According to the ISPU study, “[m]ore than half of the marriages in the study lasted for less than five years” and ninety percent of these marriages were childless.<sup>237</sup> “Only one in three women whose marriages lasted five years or less received their deferred [dowry] in part or in full [whereas] the rest gave up their

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<sup>225</sup> INST. FOR SOC. POL’Y & UNDERSTANDING, *supra* note 209, at 33.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *See id.*

<sup>229</sup> MACFARLANE, *supra* note 84, at 144.

<sup>230</sup> *Id.* at 148.

<sup>231</sup> *Id.* at 148–49.

<sup>232</sup> *Id.* at 153.

<sup>233</sup> *Id.*

<sup>234</sup> MACFARLANE, *supra* note 84, at 154.

<sup>235</sup> *Id.* at 157.

<sup>236</sup> *Id.*

<sup>237</sup> INST. FOR SOC. POL’Y & UNDERSTANDING, *supra* note 209, at 37.

claim.”<sup>238</sup> Women who were in marriages that lasted between five and twenty years “reported that their imam told them that if they asked for the divorce, they were not entitled to their [dowry].”<sup>239</sup> A third of marriages “lasted between 5 and 15 years, and 17% [lasted] more than 15 years.”<sup>240</sup> The divorces involving marriages lasting beyond fifteen years “usually involved complex family and financial issues.”<sup>241</sup> These couples were more likely to go directly to the court system rather than an *imam*.<sup>242</sup> One in three of the marriages that lasted between five and fifteen years “made an agreement by consent” with the help of an *imam* and the remainder resolved their issues with a court order.<sup>243</sup>

Women who were in these marriages “expressed a strong sense of entitlement to a reasonable financial settlement.”<sup>244</sup> The women in long marriages who received a court order for spousal support were told by others that their actions were “unislamic.”<sup>245</sup> There was a small group of women who insisted on not wanting anything from a court order that they could not receive pursuant to *Sharia* law.<sup>246</sup> In one example, a woman paid her ex-husband back any and all court ordered spousal support because she reasoned that she received her dowry.<sup>247</sup>

An online survey conducted by Sound Vision in 2010 had 405 respondents, which included 31.63 percent married, 56.55 percent divorced, and 11.82 percent separated individuals.<sup>248</sup> The aftermath of a divorce for some women can have negative social consequences such as shunning, and very few cases include relocating to escape community judgment.<sup>249</sup> Men, on the other hand, “experienced some, but far less, negative social judgment than their former wives.”<sup>250</sup> The stigma of being divorced amongst Muslim communities is one of “failure.”<sup>251</sup> Some women

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> INST. FOR SOC. POL’Y & UNDERSTANDING, *supra* note 209, at 37.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> Taha Ghayyur, *Divorce in the Muslim Community: 2010 Survey Analysis*, SOUNDVISION.COM (July 22, 2010), <http://www.soundvision.com/info/marriage/conflict/muslimdivorcesurvey2010.asp>.

<sup>249</sup> INST. FOR SOC. POL’Y & UNDERSTANDING, *supra* note 209, at 38.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*



expressed that once they were divorced “they were seen as a threat to [other women] . . . and even regarded as sexual predators looking for a new husband.”<sup>252</sup> Though the stigma is an extreme label given to divorced women, it is recognized that the stigma is declining as divorce is becoming more common.<sup>253</sup>

Additionally, the survey found 47.06 percent of men remarried while only 26.78 percent of women remarried.<sup>254</sup> This finding reinforces the negative stigma for divorced women in the Muslim community, as it is harder for women to remarry once they are divorced.<sup>255</sup> Furthermore, the survey found that the community response to the divorce was 24.84 percent negative, 12.74 percent positive, and 31.85 percent felt a neutral community response.<sup>256</sup> It is important to note that 30.57 percent of the participants did not announce their divorce in their community, which could explain the high number for a neutral response.<sup>257</sup> It is also important to point out that an overall 90.61 percent said they were happier today than when they were in the marriage.<sup>258</sup>

#### CONCLUSION

Though *Sharia* law has been a controversial topic in America, as this article illuminates, *Sharia* law, in fact, does not pose a threat; rather it is a law that is rooted in logic and reasoning. *Sharia* law has evolved, especially after the death of the Prophet. As seen above, the four jurists have played a pivotal role in interpreting *Sharia* law through *Qiyas*, *Ijmaa*, and *Ijtihad*.<sup>259</sup> *Sharia* divorce law has evolved from the second and third centuries until now. The evolution can be seen as the following: the starting point began when women were granted the right to a divorce during the Prophet’s time, then that right was later constrained and made difficult under the various interpretations of the jurists, and finally, *Sharia* divorce law was re-interpreted, with the help of the jurists’ reasoning, to give women more access to divorce.<sup>260</sup> Even with this evolution of *Sharia* divorce law, it is

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<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> Ghayyur, *supra* note 248.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> Rehmand, *supra* note 4, at 111–12.

<sup>260</sup> *See supra* Part II–III.

**2014] THE EVOLUTION OF SHARIA DIVORCE LAW 445**

unfortunate to find that women, whether in the Middle East or America, are stigmatized by the process and status of being divorced.<sup>261</sup> Muslim women need to speak out regarding the negative stigma so that the Muslim community can come to terms with the reality: divorce happens; sometimes marriages do not flourish; and the inevitable dissolution of marriage does not, and need not, be synonymous with the faults of either husband or wife. Only after the Muslim community accepts this truth will women fully realize their equal footing to men.

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<sup>261</sup> INST. FOR SOC. POL'Y & UNDERSTANDING, *supra* note 209, at 9, 33, 38.