Family Dispute Processes among North American Muslims

Sorting reality from fake news

By Julie Macfarlane

Many Muslims in North America continue to use an “Islamic imagination” in approaching life’s transitions. Like those in other cultural communities all around the world, they continue to practise traditional rituals to help members of their community navigate the critical passages of birth, marriage, divorce, and death.

In Canada, where I live, reports of this in the early 2000s caused near-hysteria among some observers, leading to headlines such as “Life under shari’a in Canada?” and “Legal Jihad?” and even “Religious Law Undermines Loyalty to Canada.”¹ This led to the Liberal government in Ontario withdrawing all forms of religious arbitration from the Ontario Arbitration Act.² There have been similar instances of public alarm in the United States, prompting an organized movement promoting state referenda on “banning” the use of “shari’a law” in state courts since 2010.³

Because much of my work as a researcher, teacher, and practitioner focuses on dispute resolution, I decided to learn how these processes actually worked “on the ground,” to understand the motivations of both the users and the facilitators of processes for marital counseling and divorce, and to chart the wide range of variations in procedure and practice. Put simply, I wanted to get behind the headlines.

From 2005 to 2008, with a grant from the Social Science and Humanities Research Council of Canada, I conducted interviews in the United States and Canada with almost 200 imams, religious scholars, social workers, and divorced men and women from Muslim communities. The result is a picture of private dispute resolution — or “private ordering” — that occurs frequently, informally, with little consistency.

As a non-Muslim, with no starting knowledge of Islamic family law and no previous experience studying religious dispute resolution, I had a lot to learn during my four years of immersion in this project.
and wide variations in procedure and practice, and with minimal data collection or formal monitoring either inside or outside Muslim communities. My research data — written up in my 2012 book *Islamic Divorce in North America: A Shari’a Path in a Secular Society* — reveals a picture of the continuing practice of traditional processes animated by both religion and culture that lie at the heart of notions of Muslim identity and Islamic family values in 21st century North America.

Few of my starting assumptions about this research project proved to be correct. As a non-Muslim, with no starting knowledge of Islamic family law and no previous experience studying religious dispute resolution, I had a lot to learn during my four years of immersion in this project. Let me share some of the most important of these lessons here.

**For marriage and divorce, a system of “private ordering”**

By far the most common way in which North American Muslims continue to practise “laws” or rituals are limited to marriage and divorce. I found that this commitment to tradition was present among both religious and secular Muslims and both native-born Americans and immigrants.

Family law is in fact all that is left of original Islamic legal systems in many countries colonized by the United Kingdom, France, and other Western powers that supplanted the native models of commercial and property law with their own common-law models. Likewise, in North America, there is rarely community adjudication on commercial disputes. When we read about *shari’a* for North American Muslims, what we are really reading about are marriage and divorce processes, and occasionally inheritance principles.

Recourse to processes of Islamic marriage (by contract, or *nikkah*) and Islamic divorce (release from the vows made in the *nikkah* contract) is an example of a system of private ordering, running parallel to (but outside of) the formal system of laws and courts. Systems of private ordering are common in every country, community, and organization. They may in fact have as great, or even greater, an impact on the lives of those who choose to use them as the state-sanctioned system, especially if they represent meaningful principles and processes not available in the state system. In common with other systems of private ordering, Islamic divorce depends on the commitment of those who use it — rather than the state — for its authority and legitimacy.

The expression “*shari’a courts*” is misleading. The dispute processes that were the subject of my research could not be described as formal courts. Moreover, the procedures I collected data on could not be compared to what we know as arbitration. The private ordering system that I uncovered in my fieldwork is largely confined to the work of individual imams, some of whom have limited knowledge of Islamic jurisprudence. Their “permission” for divorce is more closely related to their internal biases and assumptions regarding marriage and especially the role of women than it is to any principles of Islamic family law (which I studied in order to undertake the research).

The process usually involves a meeting with a woman who is seeking permission to divorce, and occasionally a follow-up meeting with both husband and wife. In a few places, the heat that an individual imam might experience from his community if he looks as if he is being “too permissive” about divorce is eased by a panel of two or three local imams who take collective responsibility for decisions. I found no examples of these decisions forming any type of precedent, nor of any calling for and testing of evidence.

**The flaws of private ordering**

Like any private ordering system, this one is dominated by the most powerful forces within that order and subject to the usual biases of power. For example, only men are presently permitted to be imams (although Muslim women are beginning to mount a strong resistance to this assumption) and therefore approve Islamic divorce; moreover, divorce in Islam is traditionally an asymmetric process, one
in which the husband can simply decide he wishes to be divorced, while the wife must ask permission — from her husband, or, in a non-Islamic country, her imam (although I found many imams who refused to approve divorce on this basis and some Islamic legal systems are reforming this rule\textsuperscript{11}).

The personal stories of North American Muslims that I have documented include experiences that are both positive and negative, along with outcomes that are sometimes highly satisfactory to participants — and sometimes less so. These processes, flawed as they might be, have meaning for many North American Muslims that goes well beyond a doctrinal religious belief. Like many private ordering processes, Islamic marriage and divorce are symbols of commitment to a community and a culture as much as to a faith. Like many traditional family processes, they are also something that many Muslims born and raised in North America use mostly to please their parents — just as many of us do at important life events.

**Not a substitute for legal divorce**

Islamic divorce is not a legal divorce in any part of North America, and all the imams I interviewed know this. Interestingly — and at odds with a widely held public perception — the vast majority of them also had no interest in changing this status quo, seeing the processes they went through with community members as satisfying their personal conscience rather than requiring recognition in the legal system.\textsuperscript{12} Both the imams and the men and women seeking Islamic divorce are clear that this is not a substitute for obtaining a legal divorce in the courts. Islamic divorce is therefore in addition to, and not a replacement for, a legal divorce. Instead it is seen as an important element of ritual and commitment that relates back to the original vows taken in the nikah or marriage contract. In order to break these vows, there must be a sanction that recognizes those vows (also not legally binding) and releases the parties from them.

For the devout, the motivation is to meet one’s religious commitments. One respondent explained that for some Muslims, Islamic divorce allows them to feel that:

“(T)hey closed all the gaps in their faith, they have done everything that they could do, and they have something from an imam or religious scholar that says that they have done everything they could have done and they are free and clear.”

For the secular, the motivation to seek a formal community sanction for their divorce is different, but no less important:

“To retain an Islamic identity, it is often necessary to … accept the traditions, because of the need to be part of that identity space … many Muslims reject the religious commitment but retain the cultural commitments.”

I also found that disputes over support, property, and children were settled by the parties in courts of law.\textsuperscript{13} Where there was an agreement between the parties, sometimes negotiated with the assistance of the imam, this was submitted as a consent order. More often, however, the imam’s intervention was limited to providing permission (or not).

The relationship between an Islamic divorce and a legal divorce — since all my respondents obtained both — was explained to me as follows:

“The common law allowed me to feel practically and cognitively divorced — the Islamic process allowed me to feel spiritually divorced.”

**What might this mean for dispute resolution professionals?**

Every imam, religious scholar, lawyer, community leader, and social worker I interviewed in the Muslim community believes that divorce is increasing rapidly among North American Muslims. Almost unheard of and certainly unspoken of two generations earlier, divorce is now a relatively common phenomenon that Muslim communities all over North America are confronting.\textsuperscript{14} The imams receive little, if any, training to prepare them for dealing with serious conflicts, especially where there is violence or abuse in the marriage.

Rising levels of divorce are spurring a vigorous debate in the community over how North American Muslims approach marriage, including individual versus family choice of spouse and the continuing practice of matching North American-born Muslims with partners coming from a Muslim country.\textsuperscript{15}

Dispute resolution professionals, lawyers and mediators alike, have much to gain from informing
themselves about continuing recourse to Islamic marriage and divorce processes and considering the role that they might play. Most mediators and lawyers understand the importance of satisfying their clients' cultural and religious rituals for closure in divorce. By learning more about the basics of Islamic family law — for example, the importance of a wedding promise, or mahb, in establishing ongoing support in the event of divorce — non-Muslims can be much more helpful to Muslim clients for whom this is often a symbol of Islamic identity (and can easily be accommodated within a common-law support model). The negotiation of a marriage contract, which Islamic jurisprudence states clearly can include whatever clauses the couple desire and agree on, offers many opportunities for effective couples counseling and anticipation of a life together.  

The commitment within Islamic law to resolving marital conflict wherever this is fair and possible — while permitting divorce when a satisfactory resolution is not available — offers a robust framework for mediation. Many imams expressed to me their desire for better training in mediation and conciliation work. The traditional inclusion of a wider group of family members in resolving conflict is another aspect of Islamic dispute resolution that offers challenges but also interesting possibilities for mediators skilled in managing family dynamics.  

By working with imams and other leaders within the Muslim community and building relationships with the mosques as well as secular Muslim organizations, dispute resolution professionals can create many opportunities for mutual benefit. These should replace the "fake news" that these customary rituals represent any effort by Islam to challenge and "take over" the American legal system with a fruitful collaboration and for a well-established practice of "imam shopping." Islamic Divorce at pages 160-161.

1 Islamic Divorce 88-155-156.
3 Islamic Divorce 231-232, 244-246.
4 Islamic Divorce 185-208.
5 Historically, divorce has been limited in Muslim countries by both law and societal norms. However, divorce is becoming increasingly common as social expectations and financial protections for women are enhanced. One recent study estimates the divorce rate in Kuwait at over 25% in Qatar at 38%, and in the UAE, at 46%. See Abdulaziz Alahmed, High Divorce Rates Alarm Gulf States (April 19, 2007), available at http://www1.albawaba.com/en/news/high-divorce-rates-alarm-gulf-states.
6 My study found this latter arrangement to be a frequent and significant cause of incompatibility and marital conflict. See Islamic Divorce 119-122.
7 Islamic Divorce 49-51, 68-69.

Julie Macfarlane, PhD, is a Distinguished Professor of Law at the University of Windsor, Ontario, Canada. She has received many honors, including awards for legal writing and scholarship and for her weekly blog for a non-lawyer audience. She is the author of The New Lawyer: How Settlement is Transforming the Practice of Law and Islamic Divorce in North America: A Shari’a Path in a Secular Society. She can be reached at Julie.macfarlane@uwindsor.ca.

Endnotes
1 Headlines from the Toronto Star, Vancouver Sun, and the Western Standard.
2 Originally the act permitted religious arbitration. See Ontario Arbitration Act (1991) c. 17, s. 32 (1).
6 One exception is the Ismaili community that operates a Conciliation and Arbitration Board in both the United States and Canada. See https://the.ismaili/cab-usa, http://cabcanada.org/.
7 ISLAMIC DIVORCE 40-69.
9 This leads to a well-established practice of “imam shopping.” Islamic Divorce at pages 160-161.
10 ISLAMIC DIVORCE 88 155-156.
12 ISLAMIC DIVORCE 231-232, 244-246.
13 ISLAMIC DIVORCE 185-208.
14 Historically, divorce has been limited in Muslim countries by both law and societal norms. However, divorce is becoming increasingly common as social expectations and financial protections for women are enhanced. One recent study estimates the divorce rate in Kuwait at over 25%; in Qatar at 38%, and in the UAE, at 46%. See Abdulaziz Alahmed, High Divorce Rates Alarm Gulf States (April 19, 2007), available at http://www1.albawaba.com/en/news/high-divorce-rates-alarm-gulf-states.
15 My study found this latter arrangement to be a frequent and significant cause of incompatibility and marital conflict. See Islamic Divorce 119-122.
16 Islamic Divorce 49-51, 68-69.