

Faith-Based Dispute Resolution

Julie MACFARLANE*

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* Professor, Faculty of Law, University of Windsor, Windsor, Ontario.

When the so-called *Shari'a* debate broke out almost exactly two years ago in Ontario, my response as a non-Muslim and as someone who knew absolutely nothing about Islam or Islamic law at that point, but as a dispute resolution researcher, was how astonishingly confirmed everybody was in their opinions, despite the absence of reference to any empirical data about what these procedures involved and who was using them.¹ This lack of knowledge extended beyond non-Muslims commenting on the debate to some of the commentary by Muslims—they could reference no public record, no available data, no information on what was actually happening in mosques when Islamic divorce processes are conducted. Aside from those with direct personal experience of divorce in a Canadian mosque—and in the press reports at the time, there was no word from these first-hand witnesses, which was also interesting—there appeared to be no available information on which to base any kind of an opinion. We did hear the stories of women in Muslim countries whose experiences were in many cases very compelling and very alarming, but these did not take place in Canada or the United States. It seemed to me that extrapolating from these experiences to the experiences of North American Muslims was both complex and unreliable.

This prompted me to ask SSHRC (the Social Science and Humanities Council of Canada) to support an empirical project on this topic, which they generously agreed to do. I am now one year into a four-year research project. This afternoon I am going to talk briefly about the information I have gathered on how these processes are conducted, and I offer a few preliminary observations on what I am learning, bearing in mind that I am just one year into a four-year project.

I am conducting lengthy—at least one hour or more—personal interviews with three major subject groups: the Imams who conduct the

¹ While faith-based dispute resolution and Islam are both new areas of research for me, I see this topic as closely related to the work I have done for the last 15 years on the use of private, informal and unregulated dispute resolution.

processes, the Muslim men and women who choose to use these processes (I call this group “the participants”), and thirdly, a group I describe as “community leaders and specialists”—Muslim lawyers, scholars of Islamic law, social and community workers in the Muslim communities, and others who work on issues of family conflict within those communities. At this point I have completed around 65 interviews.²

I should say at the outset that I do not use the expression “*shari’a*” to describe these processes for the same reasons that Professor Bakht outlined in her paper.³ Aside from IFL being a more accurate and precise description of the rules that govern family relationships in Islam, IFL is also a far less emotive description than “*shari’a*.” While *shari’a* is the core of Muslim beliefs and life choices—it has also become associated, especially for non-Muslims but for some Muslims also, with oppressive regimes and, in particular, brutal criminal punishment. It is in fact quite misleading to attach the term “*shari’a*” to the criminal law of, for example, Saudi-Arabia and parts of Nigeria, since none of these punishments can be found in the Qur’an, and most Muslims would be appalled at the suggestion that they are part of *shari’a* as they understand it. However, the widespread use of this expression (especially by the Western media) has collapsed important distinctions and I learned very early in this project that it was important that I not compound these misconceptions.

My research experience confirms individuals have many different reasons for choosing private ordering, and a particular private ordering system. I assume there are important reasons for these choices, and further, that it is imperative to excavate these from the stories of the individuals who make these choices. The purpose is not to evaluate whether or not the choice of Islamic divorce is a good or a bad thing, or if the existence and continuation of these processes is positive or negative. My goal is to understand better why people are making the choices that they do, and what they mean to them.

² At the time of going to press (October 2008), I have completed 134 interviews.

³ See Natasha Bakht “Were Muslim Barbarians Really Knocking on the Gates of Ontario?: The Religious Arbitration Controversy – Another Perspective,” this volume.

I. THE PHENOMENON OF ISLAMIC DIVORCE

Let me now turn to some basic facts about the use of Islamic divorce in North America. First of all, Islamic divorce processes are extremely common amongst Muslim men and women in both Canada and in the United States. This does not mean that every Muslim who is divorced has obtained or gone through an Islamic divorce process but that it is not at all unusual. These processes are usually conducted by Imams in mosques and occasionally by other individuals who are seen as credible in their community as third party arbitrators. I should also note that I have already observed—and this is a topic of active debate among Muslims—a wide range of training and qualifications among Imams in relation to leadership in their communities, and in advising Muslims on IFL.

Almost all Muslim couples who divorce also obtain a civil divorce in the civil courts. However those who characteristically obtain both a civil divorce and go through an Islamic divorce process tell me very clearly and emphatically that it is the Islamic process which is meaningful to them. Part of the explanation for this is practical—because Islam law is very clear that Muslim women cannot remarry unless they have been Islamically divorced. The core of the need to obtain an Islamic divorce appears however to be a simple matter of faith—that this is the way that a Muslim should behave and this is the means to closure. For example:

“This is my life ... It was common sense to me to go the Imam and I could not imagine any other way.”⁴ “I refer everything to what pleases Allah ... I do not want to sacrifice my afterlife, for something small in this life.”⁵

Some Imams—and fatwas—suggest that a civil divorce in the courts can be seen as equivalent to an Islamic divorce in Islamic jurisprudence. This is not widely known, or widely accepted, but if it were, this would obviate the need for people of faith to turn instead to the Imam for a divorce. But the issues here are cultural as much as they are religious, and reflect the community’s attitudes and traditions towards divorce. So a woman who divorces her husband only in the civil courts still faces the problem that her community may not necessarily understand her as being divorced unless she is Islamically divorced. Most important

⁴ Participant 13 27/07/07.

⁵ Participant 18 30/01/08.

of all, her husband may not understand her as being divorced from him unless she has also been Islamically divorced.⁶

Another important point to note is that there are some Muslim couples in our communities in Canada who have not been civilly married, and instead have gone through an Islamic marriage ceremony which is, for them, the most meaningful ceremony. Some of the negative public reaction to the idea that Muslim couples might prefer Islamic divorce overlooks the fact that some of these men and women don't have a civil marriage certificate; therefore, they cannot go to the civil courts for a divorce. Early on I did try once or twice asking an Imam whether a Muslim couple might present themselves as a common law couple under the Ontario *Family Law Act*.⁷ I very quickly realized that an observant Muslim couple would not understand their relationship in that way. So for these individuals, they are married, although not according to the laws of the land, and the only practical and logical option they see for themselves is for an Islamic divorce process.

II. RELATIONSHIP WITH THE LEGAL SYSTEM AND THE STATE

Conceptually, my understanding of Islamic divorce processes is as another form of private ordering: the private reaching of an agreement and an effort to resolve conflicts between consenting adults outside of the courts. In other words, this is related to the secular practice that we know occurs when couples who are divorcing sit down across their kitchen tables and they come to some kind of an arrangement. This also means, of course, that such processes cannot be banned and the widespread reporting of Premier McGinty planning to “ban” *shari'a* arbitration is inaccurate—Ontarians and other Canadians cannot be prohibited from making their own private arrangements. You might not like how other people arrive at their agreements, and you may be critical of their content, but you cannot stop people from making their own private arrangements.

One of the things that quickly became apparent to me as I began to conducting interviews for this project was that for most of the Muslim men and women with whom I was speaking, the legal status of Islamic divorce in civil law was unimportant. Initially, I began the interviews by asking participants “Are you aware of what the legal status of your

⁶ For example, Participant 1 13/11/07, Participant 17, 2/01/08.

⁷ R.S.O. 1990, c. F.3.

Islamic divorce is and does that concern you?” but this question did not “compute” or make sense for my respondents. It was not that these individuals did not understand the question, rather they did not understand why it would be relevant. For them, the Islamic divorce is one in the eyes of God and that is what is important to them. Its formal legal status is, frankly, irrelevant. I think that this is born out by the facts. In the 18 years during which the old *Arbitration Act* was in force and allowed appeals from religious tribunals, there was not one single instance of an appeal from a Muslim arbitrator, although (interestingly) there were a number of appeals from the Beth Din and the Jewish Appeals Tribunals. It is important that those of us who work within the formal justice system recognize this disconnect—and I already have a great deal of more complex data on this point, because it has an influence on how we understand the remainder of the issues in the debate.

The attitude of the state toward private ordering process is very important. Politically it is important in terms of inclusivity and recognition of people’s choices within their cultures, and within their communities, to process certain disputes in particular ways. I think that we heard today about some examples of that in relation to our First Nations communities, and we have already started to think about that. It is also of symbolic importance, because the recognition or the legitimacy afforded to private ordering processes outside the state system says a great deal about the respect and the regard in which communities are held within our mosaic. Finally, it is important for legal reasons because we have to decide upon the relationship between private ordering processes and the state.

Generally where we see the suppression of private ordering processes, it is because they are regarded as threatening in some way to the state power. Or in some way usurping, or taking over, illegitimately taking the place of some state-determined authority. It is certainly true that some private ordering processes, sometimes called non-state justice systems in the literature, are developed expressly to do that; to challenge state authorities, to challenge state control of decision making and legal power. I think some people interpreted what happened in Ontario two years ago in this way, as a direct challenge to the authority of the civil courts, in particular, the family courts. I actually think that was a misunderstanding of what the Muslim community was asking and certainly a misunderstanding of the reasons ordinary Muslim women would choose to use these processes. Nobody yet has told me that they want to do this in order to overthrow the state. Instead I think it is more

accurate and fair to understand this choice by some Muslims as an assertion of a particular identity, either religious or cultural, and as an expression of another loyalty they hold as Canadians.

III. ISLAM AND DIVORCE

Another aspect of this debate which non-Muslims may not understand as well as they could is just how established and how integrated principles that allow divorce for both men and women are within Koranic and Islamic traditions. Islam has always permitted divorce. The Koran actually describes it as “the most hated, permitted thing.”⁸ Few in other religions would disagree with that sentiment, I think. Many Muslims will tell you with some pride that Islam has permitted divorce in an understanding and tolerant way for far longer than has Christianity. There are a number of stories in the Koran in which the Prophet Muhammad permits divorce and some of them are in circumstances that might seem somewhat trivial. There is, for example, a story of a woman who comes to the Prophet Muhammad (Jamilah) and asks for a divorce, saying that she just doesn’t like her husband much any more. He has not done anything to hurt her or mistreat her or fail to take care of her, but she just isn’t interested in him anymore. The Prophet says that she should return to her husband the property that he has given her as a marriage gift, but he allows the divorce. The opposition towards divorce which we see in some Muslim communities is a product of culture and tradition, rather than Islam. Culture pervades attitudes among Muslims towards these processes and within the processes themselves. As one Imam told me, “The negative attitude from Muslims towards divorce is a matter of culture not religion.”⁹

Aside from the generally permissible nature of divorce, there are other core principles established by Islamic jurists as *fikh* (law) which are fundamental to Islamic Family Law and which date from the 7th and 8th centuries. The first is that men have a unilateral right of divorce known as ‘*talaq*’ whereas women have to ask their husbands—or in their absence, a third party such as an Islamic judge or *qadi*—for permission to divorce. Over centuries of jurisprudence and up to the present day, many grounds have been developed by jurists upon which women can ask for divorce, but their right to divorce is not unilateral, as their husbands’ is. As well,

⁸ Hadith of Abu-Daud, verse 13 : 3.

⁹ Imam 9 06/12/06.

divorce for women often (although this depends on the reasons for the divorce) means returning any gifts or monies that were given on marriage. In contemporary Canada, and in the absence of Islamic courts, some Imams are developing annulment procedures to grant women divorce even where their husbands do not agree—for example where the husband has abandoned the family or is living abroad.¹⁰ There is a range of practice and some Imams are clearly more liberal and generally sympathetic towards women seeking divorce than others (further discussion below). This results in the phenomenon of “Imam shopping” among many of the Muslim women whom I have interviewed thus far.

A second core principle relates to support. Men, not women, are financially responsible for their children. However, women are not entitled to spousal support beyond the *iddath* (3 months). Instead her husband is expected to pay to her the *mahr* (which would have been agreed at the time of her *nikkah* or marriage contract). The assumption is that she will be financially supported by her male relatives—perhaps a reasonable assumption in 7th century Arabia but not in contemporary society. Related to this, it is important to understand that there is no concept of blended property in IFL—a woman retains any earnings and independent property. Again, this appears somewhat unrealistic in contemporary Canada where women are commonly working and share the costs of the household with their husband—or they may be the primary breadwinner. But it also means that for some women they would do very much worse than they do in Islamic divorce processes than they do under the Ontario *Family Law Act* or the equivalent in other jurisdictions. In summary, the principles that determine the financial adjustments that take place between husband and wife at the end of their marriage are different, perhaps less clear-cut and certainly less familiar to us than the hard-won equality principles of the family courts, but this does not mean there are no principles of support and financial adjustment in Islam.

The development of the schools of jurisprudence in Islam took place throughout the 8th, 9th and 10th centuries. During that time we see the emergence of rules which go beyond any instruction or teaching in the Koran and which have a clearly chauvinistic bias. For example, each school developed rules around the raising of children, including the notion

¹⁰ Known as annulment, or *faskh* (see for example Imam 17 (27/06/07) and Imam 18 (10/08/07) and see online: <<http://www.canadiancouncilofimams.com/faskh1.shtml>> and <<http://www.fatwa.org.za/Faskh.htm>> for information about the conditions for *faskh*).

that after a certain age boys should be seen as being in the custody of their fathers, as well as rules that prohibit stepfathers—or in other words, a new husband for the mother—from raising girls. Like many other aspects of formal IFL, my research thus far indicates that these rules about custody are not literally followed by the Imams, who tell me that instead they look at “the best interests of the children,” but there is no doubt that some of these patriarchal assumptions color those judgments. However, I have yet to hear any story of disputed custody in which children were removed from their mother. In my fairly limited data from Imams and participants so far, custody appears to routinely remain with the mother as long as she wants it.

IV. THEORY TO PRACTICE

Let me say some more now about what I am seeing of “in practice” application of the principles of IFL. First, this practice—in mosques in Canada and the United States—is very diverse and it is of course not the same as practice in other Muslim countries with formal *shari’a* court systems. I am not, however, studying what the courts do in Saudi Arabia or Iran, I am studying what the Imams do in a very practical sense within the mosques in U.S. and Canada in a number of designated cities (to date, Toronto, Windsor, London, Detroit). It is very clear that the cultures and traditions in particular communities, whether they are Middle Eastern, Indo-Pakistani, Somali, or Eastern European, also have an impact on how the various contentious issues get resolved between the couple. The Imams are a product of their own culture and they have their own particular approaches.

The most noticeable differences in practice relate to the circumstances in which an Imam will allow divorce to a woman whose husband is not co-operating or is not be found. There are further variations in the consequences an Imam will apply to *khula*—where the woman initiates the divorce—related to pressing the husband for payment of the *mahr* (which strictly speaking is forfeited in these circumstances but not all Imams take this approach)—and financial support for children. Mixed in here are attitudes towards domestic violence, male privilege and power in the marriage and towards the acceptability of divorce generally.

V. CHOICE

I want to return in more detail to the question of why Muslim men and women tell me they choose these processes—including why, in some cases, women may be choosing processes that will give them a somewhat worse financial outcome than they would likely obtain if they used a civil divorce process in the courts. Overwhelmingly the most important constellation of reasons given to me relate to faith and religious obligation. These individuals report that using Islamic principles to dissolve their marriage is intrinsic to their duty and obligations as a Muslim. They regard God’s court as the highest court of law, and see the civil and family law of the country as man-made law. They consider what they need to do as a Muslim to be not so much a matter of choice but something that they have an obligation to do. This means that they must follow through with a process in which they are guided by the Imam in what the Imam describes as the appropriate application of Islamic Family Law to their case.

This is crucially different to a western individualist notion of rights as justice. As one Muslim woman leader explained: “The question is “Was I just?” *and not* (my italics) “Did I obtain my rights? God sees it all and the balance is created by following his rules.”¹¹

As well as the most religious individuals, there is another important group of Muslims who choose Islamic divorce. These Muslims do not attend prayers regularly and may not consider themselves to be all that “religious.” These are Muslims who, somewhat like non-practicing Christians or Jews, only go to the mosques for the important rituals in their lives; birth, death, marriage, and divorce. For these Muslims the choice of IFL, is more a matter of their cultural identity. It is important for them to be seen by their community as having been Islamically divorced, especially for the wife if she wishes to remarry (or simply to be no longer regarded as the “wife” of her ex-spouse). It is telling that of all the social workers and community workers I have interviewed so far, no matter what their views on the principles of IFL or the work of the Imams (which is sometimes very critical), each one says that it is critical that these processes continue to exist and to be accessible to people who wish to exercise their choices in this way. As one social worker told me, despite her agreement with the feminist critique of IFL and the problems

¹¹ Community Leader 31 (14/11/07).

she has with the approach taken by some of the Imams, she felt a continued “tension” about the “simplicity” of rejecting Islamic divorce altogether since it ignores those women—her own clients—who wish to use it. As a result they are “lost and insulted in this debate.”¹² The real challenge as this leader and others¹³ see it, is how to ensure that these processes are delivered in a fair way by sympathetic Imams and third parties.

In my naiveté I initially overlooked some further reasons which are important—although probably not decisive in themselves—for some individuals in preferring Islamic divorce processes. First, the Imams are free, while lawyers and court procedures are costly. Second, there is also a belief that an Islamic divorce can be obtained more quickly. Civil law requires one year of separation and, by contrast, there are no time constraints on Imams with respect to consideration of a divorce.

Finally—and for those who work in the justice system this is important—there is a fairly widespread sense within my sample group that going to court is inappropriate, that it is better to solve the problem within the community. In this framing, the civil courts are the “Other.” This feeling is stronger for some Muslims than for others. For some this may be used as a form of community pressure to dissuade a person from bringing their problem to the civil court—asking them, “so you prefer man-made law to God’s law?”¹⁴

I regularly hear that some Muslims are intimidated by the courts, unfamiliar with the language and procedures, and some believe that contact with the formal state may bring other problems down on their doorstep, for example, child welfare officials, or, even worse, the immigration department. As well, recourse to civil courts is sometimes understood as an escalation in a dispute between the parties, and may be seen as inappropriate by the wider community.

VI. LESSONS SO FAR

Many lessons are emerging from this research for policy-makers, for Muslim community leaders and others concerned about the

¹² Community Leader 39 (01/02/08).

¹³ See for example Community Leader 30 (06/10/07), Community Leader 28 (29/08/07) Participant 6 (also a Community Leader) 06/04/07).

¹⁴ Imam 5 (04/12/07).

relationship between the justice system and private ordering. I have explained that even those critical of the principles and processes of Islamic divorce still regard them as essential to the functioning of these communities but many have concerns about how they presently operate. Some of the Imams themselves are keenly aware of these criticisms and this is why we are beginning to see new procedures developing (such as annulments, to which I earlier referred). A consistent theme is the need to ensure that Muslim women have a better and deeper knowledge of their legal rights under Islamic law. They often do not know enough about their entitlements in matters of divorce—for example to support for their children, to reject domestic violence as un-Islamic, or to negotiate equal rights in divorce at the time of their marriage contract (this is encouraged by some Imams, and this contractual undertaking at the time of marriage would then override the unilateral *talaq* that otherwise operates). As well, it seems obvious that Muslim men and women need more accessible information about the significance of registering their marriages and their divorces in accordance with civil law, and just what that might mean to them and what difference that might make in addition to their Islamic processes.

I have also heard a great deal about better systems for educating and training Imams. Most of the Imams in Canada and the U.S. have come from Saudi Arabia, Iran, Yemen, Egypt where they were trained, and they are relative newcomers to this country or to the U.S. Their communities here end up educating them about issues like drugs, guns and domestic violence. There is increasing organizational activity going on within these communities and development of programs including training in Islamic law, counseling, contemporary issues for Canadian families, and conflict resolution. There is also, I think, an awareness that (as one person put it to me) “Muslims know how to get married but they don’t know how to get divorced.” The community needs to provide better pre-marital counseling.

My short time on this project has already challenged many of the preconceptions and assumptions I unconsciously brought with me to the research. I hope that this brief outline of what I am learning challenges some of your assumptions also, and gives you some sense of how much there is to be learned still about the practice of Islamic divorce in North American mosques.