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Fostering Inclusivity Through Recognition: Enforcing Islamic Marriage Contracts In New York

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Introduction

Marriage is one of the oldest recognized institutions integral to the family unit. It has traditionally defined the structure of a family, the rights afforded to women and children, and the familial financial arrangements. In the United States, marriage is typically regarded as a fulfillment legal, social, or religious duty, but in Islam, marriage is viewed as a contractual relationship. In the seventh century, Islam afforded women certain rights as decreed by God, delivered to the people of Arabia through revelations sent to the Prophet Muhammad (SAW).¹ Some of these rights include the right to own property, receive inheritance, own businesses, and retain any property owned when entering or exiting a marriage.² Islam was revolutionary for women in Arabia, first by banning the common practice of burying female infants alive after birth³, then by granting women autonomy over their bodies, their livelihoods, and their decision-making abilities. After the revelations granting them these rights, the practice of marriage was transformed to be more equitable for Muslim women by requiring them to grant consent for marriage, appointing a male guardian to oversee that the marriage agreement was in her best interests, and allowing women to keep any money, career, or property she brought into the marriage. The marital rights are asymmetrical in the favor of women so as to level the playing field in an equitable manner. When getting married, the rights granted to Muslim women are formalized through the process of an Islamic marriage contract because in Islam, marriage is considered a civil contract.

This paper will make comparisons between the state of New York and the country of Indonesia. Indonesia is the largest Muslim country in the world, comprising over 200 million

¹ SAW is an abbreviation of “SalaAllahu alayhi wasalam,” meaning “Peace Be Upon Him.” It is an honorific term sending peace and blessings to the Prophet Muhammad used whenever Muslims say his name.

² Quran 4:3, 4:7, 4:34

³ Quran 89:8-9, 16:58-59

Muslims (roughly 13% of the global Muslim population).⁴ The country is governed by a tripartite combination of law.⁵ It uses customary law that was created pre-colonization that is based on common Islamic practices.⁶ It also uses Dutch-Roman civil law, which was created and implemented throughout the 350 years of Dutch occupation.⁷ Lastly, it uses modern Indonesian law, which is a mixture of leftover Dutch law and newly created Indonesian laws.⁸ Since gaining independence in 1945, Indonesia has mostly modified existing customary Islamic law and Dutch laws to correspond with their views on state sovereignty and in response to the wants and needs of Indonesian citizens.⁹ The Indonesian Marriage Law provides for the implementation of Islamically granted rights for women in marriage, including divorce, property ownership, and guardianship, thus making Indonesia an ideal comparison state.¹⁰

In the United States, widespread failure to recognize Islamic marriage contracts as legally valid simply because the motivation for signing the contract is religious based results in a disservice to Muslims, especially Muslim women.¹¹ Many instances of mahr disputes in United States courts have been in New York because New York City has the largest number of Muslims in the United States. Muslim women sometimes do not realize that if their marriage is unregistered with the government, they will not have legally enforceable rights such as divorce,

⁴ Sensus Penduduk 2010 - Badan Pusat Statistik, <https://sp2010.bps.go.id/b> (last visited April 13, 2021).

⁵ Savitri Reni and Juven Renaldi, UPDATE: The Indonesian Legal System and Legal Research, *GlobaLex* (Nov./Dec. 2019), https://www.nyulawglobal.org/globalex/Indonesia1.html#_Reform_Era

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Kelly Buchanan, *Indonesia: Inter-religious Marriage*, Global Legal Research Directorate Law Library Of Congress, (July 2010), at p. 1, <https://www.loc.gov/item/2018298837>

¹¹ Julie Macfarlane, *Understanding Trends in American Muslim Divorce and Marriage Healthy Family*, Institute for Policy and Understanding 1, 12 (2013). (The study analyzes the Islamic approaches to marriage, reconciliation, and divorce and the significance they have for Muslims in North America.)

child custody, inheritance rights, alimony, and more.¹² Thus, anyone who signs an Islamic marriage contract should then be able to have it legally enforced.¹³ The lack of uniform recognition of the Islamic marriage contract endangers the economic stability and ability to seek legal recourse for Muslims. Therefore, Islamic marriage contracts should be recognized and enforced in New York courts.

This paper is structured as follows: Part I is an overview of the importance of recognizing the Islamic marriage contract. Part II offers a historical background to the origin of Islamic marriage practices and the requirements necessary for a valid Islamic marriage. Part III explores the requirements for marriage in the state of New York and the country of Indonesia. Part IV provides contemporary examples using laws that govern or touch upon the right to marriage, guaranteed by international law and domestic laws of New York and Indonesia. This section also discusses the foundations of contract law in United States courts, international laws regarding marriage, and the pushback posed by the fervent anti-sharia and Islamophobic sentiment in the United States and New York. Finally, Part V presents a policy proposal for how courts in the New York and the surrounding metropolitan area can become more receptive (within limitations) to Islamic marriage practices in order to foster a more inclusive environment and fairer access to the legal system.

¹² Ann Laquer Estin, *Marriage and Divorce Conflicts in the International Perspective*, 27 *Duke J. of Comp. & Int'l Law* 485, 493 (2017). (“Broad recognition for marriage is important because of the many legal rights and obligations that flow from marital status.”)

¹³ Macfarlane, *supra* note 11, at 12. (“Legal recognition of the nikah and its promises would allow for certainty for Muslim men and women and ensure that their marriage contracts were treated in the same way as any other pre-nuptial agreement.”)

Part I: Importance of the Islamic Marriage Contract

In the United States, the Supreme Court recognizes marriage as a fundamental right protected by the Fourteenth Amendment.¹⁴ “Courts in Canada and much of Europe have frequently turned to proportionality analysis to determine what provisions ought to be allowed for individuals’ religious liberty. In contrast, in the United States, courts have historically attempted to leave such decisions to legislators.”¹⁵ If a religious marriage ceremony is performed but not registered, the marriage is considered invalid in the eyes of the law.¹⁶ The invalidity of Muslim marriages means that people who get married solely in a religious ceremony lack access to basic American spousal rights. This impacts their ability to bring issues related to marital disputes and custody before a court of law. However, if a couple without a state registered marriage has an Islamic marriage contract in place, it can help to close the gap between an unregistered marriage and marital rights granted to those with registered marriages.

Financial rights that were granted to Muslim women in the seventh century were granted to American women in the 1970s. Until that point, women in America were not allowed to have a bank account or credit card in their name, and property ownership and inheritance rights were restricted. This severely limited their movements and opportunities, in the same way that Muslim women are being disadvantaged when courts refuse to consider the mahr and terms specified in their Islamic marriage contract valid and enforceable.

¹⁴ *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). (The court acknowledged that the Due Process Clause of the Fourteenth Amendment protects the right to make personal decisions regarding marriage.)

¹⁵ Beydoun, Chapter 7.

¹⁶ Leslie C. Griffin, *Marriage Rights and Religious Exemptions in the United States*, Oxford Handbooks Online, p. 2 (2017).

In the Muslim community, it is common for recent converts or reverts looking to embrace the faith and “fulfill half their [faith]”¹⁷ by getting married, sometimes only through a religious ceremony. Women who immigrate to the United States specifically for marriage are sometimes not aware of the rights granted to them under Islamic law and under American law. They do not know how to go about asserting those rights or realize the importance of registering their marriage with the states. This is made easier by the fact that it is far simpler to perform a religious marriage ceremony than it is to obtain a license and register a marriage with the state. Like most situations where women are being taken advantage of, it is common to find that many women who are talked into solely religious marriages are usually those who are undereducated (either Islamically, academically, or both), in financial distress, living in a tenuous home situation, or are otherwise in need of help.

However, a distinction needs to be made between the stereotypical portrayal of Muslim women by mass media as oppressed, helpless, and in need of saving, and the reality in which many women are merely unaware of the significant ramifications that result with failure to register their marriage with the state. Muslim women who are married in a *nikkah* (Islamic marriage ceremony) alone, without a civil ceremony or registration of marriage are left in a precarious position if their spouse divorces them or dies.¹⁸ They have no paperwork that indicates they were ever truly married in the eyes of American courts, so they can be left with almost nothing. If the bank accounts/assets are solely in the husband’s name, or if the husband

¹⁷ At-Tirmidhi Hadith 3096. A hadith (recording of Prophet Muhammad’s words and actions) says that “When a man marries he has fulfilled half of the ‘deen’ [faith].” Marriage in Islam is encouraged for reasons such as companionship, faithful intercourse (so as not to be tempted into pre-marital or extramarital sex), and procreation.

¹⁸ Macfarlane, *supra* note 11, at 12. (“If the marriage is not legally registered, both spouses may face some practical problems if the marriage ends or if they separate. For example, it may be difficult to obtain an order for financial relief or equitable property division.”)

deferred a portion of the mahr, it can be an uphill battle trying to regain possession of those assets if inheritance is disputed.

Courts largely do not recognize the nikkah ceremony as legally binding in marriage. Therefore, before the matter can be adjudicated in courts, the court must first determine the validity of the marriage. A couple could say that their marriage qualifies as a common law marriage if their marriage fits those criteria, but this still involves settling the issue in a court of law. This may pose a financial barrier to some women, especially if their financial status hinges upon the inheritance or deferred mahr they expect to receive after the passing of their spouse. Having widespread recognition of Islamic marriage contracts as a binding, legally enforceable document would go a long way in alleviating some of the hardships posed by not having a state registered marriage. Recognizing the nikkah ceremony as a legal marriage is a more complex and procedurally complicated goal to accomplish, but if the marriage contract part of the ceremony is recognized as binding, then it helps grant validity to court proceedings that typically require an established marital status (such as divorce, child custody, alimony, inheritance, tax disputes, etc).

Part II: Historical Origins and Requirements of Islamic Marriage

The significance of an Islamic marriage contract is that it contains express protection for Muslim women's rights in the marriage. Islamic laws vary by sect and by school of thought, but while the details may change, the major principles are usually the same. For the purposes of this paper, I will be using Sunni Islamic laws because Sunni Muslims comprise over 85% of the

world's Muslims.¹⁹ In Islam, the supreme law first comes from the Quran, then from the *hadith* (words and sayings of the Prophet Muhammad), *sunnah* (teachings of the Prophet Muhammad) and lastly, in some circumstances, *fatwas* (rulings from various Islamic councils or courts regarding a specific matter).²⁰ In Islam, the term *sharia* is often associated with Islamic law. Sharia is the law and methodology of ascertaining divine meaning based on principles of Quran and sunnah.²¹ It forms a moral and legal anchor of a Muslim's life, as Muslims view Islam as not just a religion but rather, a lifestyle. Classical interpretation of sharia largely disappeared with the emergence of nation-states, but modernized forms of sharia still impact legislation in Muslim majority states to varying degrees.²² Sharia does not resemble the entirety of any of the countries that claim to embrace and legislate using principles of sharia (e.g., Saudi Arabia or the special region of Aceh in Indonesia). Sharia is merely the methods through which Muslims find meaning and establish their lifestyles in accordance with the Quran and sunnah.

Prior to the advent of Islam in Arabia, women could be married off without their consent or knowledge to men years or decades older than them.²³ After the reintroduction of Islam to the area, rights were expressly granted to Muslim women regarding marriage and the family unit. Before these rights were given, any property (monetary, land, jewelry, etc) belonged to her father or guardian, and then to her husband after she was married.²⁴ Islamically, these rights were granted through Quranic revelations from Allah to the Prophet Muhammad (SAW). The Quran

¹⁹ JOHN L. ESPOSITO, SUNNI ISLAM, 114, THE OXFORD DICTIONARY OF ISLAM (ed. 2014).

²⁰ Murtagha Mutahhari, Jurisprudence and Its Law, 8 (Mohammad Salman Tawhidi trans. 1981).

²¹ *Id.*

²² For example, the westernmost region of Indonesia, Aceh, is governed according to their interpretation of sharia law. Aceh formally introduced sharia as the ruling law in 2003. *News, Q&A: What you need to know about sharia in Aceh*, Jakarta Post (Mar. 4, 2018), <https://www.thejakartapost.com/news/2018/03/04/qa-what-you-need-to-know-about-acehs-sharia-law.html>

²³ Lone, Naveed and Bashir, Hurmat and Karima, Yousfi, Status of Women in Islam: A Perspective, *Global Islamic Econ. Mag.*, Vol. 43, 61, 63 (Dec. 2015).

²⁴ *Id.*

contains the word of Allah, not the Prophet, and was revealed over a period of 25 years.²⁵ Some of the verses within are very direct, whereas others are vaguer so as to allow for broader interpretation. The verses were revealed in relevance to the current hardships or trials the Muslims were facing at the time (e.g., ending the practice of female infanticide, granting women property rights, rules of warfare, etc). After these revelations, Muslim women were given the right to exercise control over property they owned prior to the marriage for their sole use. A divine revelation revealed that a Muslim woman was not required to spend any of her property on her husband or children, and that her property was hers to do with as she liked.²⁶

When getting married, a Muslim couple must sign a marriage contract before their marriage can be recognized.²⁷ Like a simple contract, an Islamic marriage contract should have mutual consent.²⁸ A valid marriage requires an official offer and acceptance, and most Sunni scholars require this take place in front of witnesses. The bride and groom must be of consensual age and of sound mind. The contract can be delivered orally or in writing, but written contracts are strongly preferred over oral so as to discourage mahr disputes. Both bride and groom must consent to the marriage.²⁹ The role of the male guardian (*wali*) is important both practically and socioeconomically, because the wali is responsible for looking out for the woman's best interests (financially and otherwise) when entering the marriage.³⁰

²⁵ Nathan B. Oman, *How to Judge Shari'a Contracts*, WM & MARY FAC. PUB., UTAH L. REV. 287, 297 (2011).

²⁶ Benjamin G. Bishin, and Feryal M. Cherif, *Women, Property Rights, and Islam*, 49 CUNY J. COMP. POL., no. 4, 501, 506 (2017). ("Prevailing legal interpretations hold that men and women are endowed with equal rights to acquire, manage, and dispose of property.")

²⁷ Azizah al-Hibri, *The Nature of the Islamic Marriage Contract in Covenant Marriage in Comparative Perspective*, 182, 199 (2005).

²⁸ *Id.* at 203.

²⁹ *Id.* at 204.

³⁰ *Id.* at 210.

The marriage contract is similar to the basic common law contract in that it contains an offer, acceptance, and consideration. The offer is one of marriage, the acceptance has to be given by both parties, and the consideration comes in the form of a mahr. Before delving into the details of a marriage contract, it is important to understand what a mahr is and why it is important. A mahr is an essential part of the Islamic marriage ritual. It is an obligatory bridal gift, usually of money or possession with a monetary value, given by the husband to his wife for her exclusive use and ownership at the time of marriage.³¹ In most patriarchal societies, especially in the seventh century when Islam was being spread across Arabia, women often did not or could not work and earn money, so the mahr was essentially an insurance plan provided to her at marriage to provide for her in times of distress, divorce, or death of her husband.³² Thus, there is a minimum amount for a mahr (three to ten *dirhams*, equivalent to about three to ten USD) but no maximum limit.³³ The amount should be proportional to the woman's qualifications and social standing, and sufficient for the woman to be able to survive independently if her husband dies or divorces her.³⁴

Today, a mahr continues to be an essential part of the Islamic marriage contract. The amount and nature of the mahr must be clearly specified in Islamic marriage contracts.³⁵ Failure to do so often results in a marriage contract that Western courts refuse to enforce for ambiguity of terms. Many lawyers and Islamic scholars recommend that couples consult a lawyer or legal jurist and be fully transparent when discussing their finances with each other when drafting an

³¹ Quran, 4:4 “And give to the women (whom you marry) their Mahr (obligatory bridal money given by the husband to his wife at the time of marriage) with a good heart, but if they, of their own good pleasure, remit any part of it to you, take it, and enjoy it without fear of any harm (as Allah has made it lawful).” Translation by Muhsin Khan.

³² Lone, *supra* note 23, at 63.

³³ *What is Mahr*, Karamah.org (2020), <https://karamah.org/wp-content/uploads/2020/07/answer-to-what-is-mahr.pdf>

³⁴ Al-Hibri, *supra* note 27, at 207.

³⁵ Raja El-Habti, *Mahr in the Context of the Islamic Marriage Contract*, Karamah.org, (2020), <https://karamah.org/wp-content/uploads/2020/04/Mahr-in-the-Context-of-The-Islamic-Marriage-Contract.pdf>

Islamic marriage contract. However, disclosure of assets is not a requirement under Islamic law when drafting a marriage contract. The payment of mahr is an obligatory duty upon the husband once the marriage is contracted; the only exception is if the wife expressly waives his duty to pay.³⁶ He can deliver on the terms of the mahr in full at the contracting of the marriage, or he can defer a portion depending on the agreement the couple has arranged.³⁷ The option of a deferred mahr paid out at death of a husband or dissolution of a marriage is increasingly common in many Muslim-majority states, because it is seen as an iron-clad way for a woman to secure her financial stability; however, it is not as common with first and second generation American Muslims.³⁸

There is a common misperception that a mahr is equivalent to a dowry. Traditionally defined, a dowry is “the property which a woman brings to her husband in marriage.”³⁹ To characterize the mahr as a dowry would be to alter the purpose and nature of the requirement from protecting women’s rights with a monetary gift from the husband to the wife into something entirely opposite, thereby negating the point of the granting the right and security to Muslim women. There are certain Muslim societies that demand a dowry from the bride to the groom, but this practice is contrary to the teachings of Islam.⁴⁰ Centuries of evolving culture and patriarchal standards have conflated religion and culture to a point where one is almost inextricably intertwined with the other. This has led to misinterpretations of religion, including, in some societies, the original intent and application of mahr. It is important to note that in order for an Islamic marriage contract to be valid, it must conform to accepted standards of Islamic law

³⁶ El-Habti, *supra* note 35, *id.*

³⁷ El-Habti, *supra* note 35, *id.*

³⁸ El-Habti, *supra* note 35, *id.*

³⁹ *Dowry*, Black's Law Dictionary (10th ed. 2014).

⁴⁰ Dowries are common practice in South Asia, notably the Indian sub-continent, and in some Central Asian countries such as Afghanistan, Iran, Turkey, and Azerbaijan.

according to the school of thought and sect that a person belongs to. While some sects or schools of thought may permit a more liberal definition or payment plan for the mahr⁴¹, there is no sect or school of thought that defines a mahr as an amount or possessions the *bride* must pay to the *groom*.

Though the mahr is an essential element of an Islamic marriage contract, the contract, much like any other contract, can have as many terms as the parties see fit. Many marriage contracts explicitly state what kind of Islamic divorce is allowed for either party. Islamically there are three types of accepted divorce. The husband is exclusively entitled to one type unless otherwise expressly stated in the marriage contract. The contract can also include terms detailing the newlywed's living arrangements. Due to the conflation of culture and religion, it has become an accepted cultural practice in many Muslim societies to force wives to live with her in-laws and fulfill the duties of a housekeeper or defer to the in-laws on every decision.⁴² This is not a religious duty imposed by the Quran⁴³, the teachings of the Prophet Muhammad (SAW), or any religious texts; nonetheless, somehow over the years this practice has become commonplace.

Marriage contracts are used to detail inheritance and alimony rights, and for financial and economic purposes. Disclosure of debt and assets individually and jointly owned is typically declared on the marriage contract to avoid uncertainty and ensure that each person has rights over their property. Marriage contracts can also contain terms regarding the raising of children, provisions for treatment of in-laws and other family members, purchases of large amounts, etc. A common clause in marriage contracts in Western countries is one declaring that the husband will

⁴¹ For example, instead of a monetary gift to the bride, the husband may recite a chapter of the Quran in Arabic, an act for which there is no monetary equivalent.

⁴² Macfarlane, *supra* note 11, at 21

⁴³ Quran 65:6

not take up another wife, as polygamy is legally banned, but also because Muslims are increasingly finding the polygamous aspect of Islam to be incompatible with modern day society.

To be considered fully married under Islamic law, the couple must complete the *nikkah*⁴⁴, the Islamic marriage ceremony. There are four primary requirements: consent, guardian, witnesses, and mahr. This is typically followed by a wedding celebration, *walima*, to publicize and celebrate the wedding.⁴⁵ A *nikkah* usually involves a short Quranic recitation and a short sermon in which advice is given to the newlyweds.⁴⁶ The woman is required to have a male guardian present, usually someone related by blood such as a father, brother, uncle, etc.⁴⁷ The imam or person conducting the ceremony will usually have the groom ask the father for his permission to marry his daughter (or vice versa). The father of the bride will state his permission of the union and the agreed upon mahr. The imam then asks the groom if he is entering into the marriage willingly, and after he responds, the imam asks the same question to the bride. In some circumstances, silence on the part of the bride is taken to indicate consent, but vocalized consent is always preferred.⁴⁸

Consent is a crucial part of the Islamic marriage ceremony because in keeping in line with women's rights in Islam, a woman has to consent to marriage. In many places in the world, the United States included, forced marriages or marriages in which consent was granted under duress is fairly common. This is a direct violation of the Universal Declaration of Human

⁴⁴ Another word for *nikkah* is *katb el-kitab*. In most Arab countries, the *katb el-kitab* is conducted separately from the *walima*, sometimes days or even weeks before the *walima*. In Arab cultures, Muslims are not considered fully married until after the *walima*, so that is an additional stipulation for marriage dictated by culture, not necessarily religion.

⁴⁵ Hadith 5159, 5166, 5167, 5177 (Sahih al-Bukhari) (The emphasis for having a public *walima* comes from the sunnah of the Prophet.)

⁴⁶ Hadith 5146 (Sahih al-Bukhari) (Though recommended, Quranic recitation and sermon are optional, but encouraged, activities based on the sunnah.)

⁴⁷ Al-Hibri, *supra* note 27, at 210

⁴⁸ Al-Hibri, *supra* note 27, *id.*

Rights⁴⁹ and is even regarded as human trafficking in some instances. By requiring consent on the part of the bride and the groom, Islamic law ensures that neither party is being coerced into a marriage.⁵⁰ Furthermore, Sunni schools of thought require that there be two witnesses to a marriage ceremony for enhanced protection of rights.

There are many rights spouses owe to each other under Islamic law, most notably provisional and sexual rights. According to the Quran, men and women owe each other specific obligations.⁵¹ Men are the protectors over their wives and children.⁵² They must provide financially for their wife and children, including basic provisions such as food, clothing, and education, emotional support to the wife and also domestic help in a manner consistent with the lifestyle appropriate to the social status of the wife.⁵³ Sources of hadith and sunnah mandate duties for the wife such as providing companionship and sexual access (under certain conditions) to their husband, as well as raising their children under the teachings of Islam.

Many societies and cultures dictate that women should do all household chores and take care of the children (a trend not unique to Islamic societies).⁵⁴ However, none of these obligations have a firm basis solely in religion. Nowhere in the Quran does it expressly state that a woman has to take on these household roles, but in many circumstances societal pressures both

⁴⁹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Article 16 (Dec. 10, 1948) (“Marriage shall be entered into only with the free and full consent of the intending spouses.”)

⁵⁰ Lindsey E. Blenkhorn, Note, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189, 224 (2002). (“[M]ost [Islamic legal scholars] agree that a “pure” reading of the Qur’an indicates that duress-based consent in marriage is wholly against its basic principles.”)

⁵¹ Quran 2:228, 4:34

⁵² Lone, *supra* note 23, at 66.

⁵³ Quran, 4:19

⁵⁴ This ideology is not constrained to Muslims in underdeveloped countries; married American women with children spend twice the amount of time doing household and child rearing tasks as compared to married American fathers. Aliya Hamid Rao, *Even Breadwinning Wives Don’t Get Equality at Home*, THE ATLANTIC, (May 12, 2019), <https://www.theatlantic.com/family/archive/2019/05/breadwinning-wives-gender-inequality/589237/>

encourage and expect the wife to adopt these roles. Another important right spouses owe to each other is that of Islamic divorce. A fundamental principle of Islamic divorce is that it must not leave the wife without financial means.⁵⁵ Islamic divorce comes in three major forms. Each type of divorce has a different set of alimony and mahr payouts, and in some cases, a difference of asset distribution after death or dissolution of a marriage.

The first type of Islamic divorce is *tafriq*, a judicial divorce requiring sufficiently compelling grounds for court to dissolve a union (also known as *taliq* or *faskh*).⁵⁶ If the couple fails to resolve their issues through formal mediation or family intervention, the court or decision-making body is required to give a decision that assigns fault for the dissolution of the marriage and financial consequences. Under *tafriq*, a spouse has the right to seek divorce based on a violation of the terms of their marriage contract. This type of divorce is typically exercised by the wife. For example, if the marriage contract expressly prohibits the husband from taking another spouse but he does so anyway, the wife has automatic grounds for the wife to initiate *tafriq* divorce proceedings. Under this type of divorce, the wife is entitled to take with her any property and belongings she brought into the marriage, any property or possessions she acquired in the marriage (titled solely in her name), and her mahr.⁵⁷ If her mahr was partially deferred, the deferred portion would have to be delivered in full at the time of the divorce.⁵⁸

The second type of Islamic divorce is *khul*, a wife's exclusive right to remove herself from a marriage. This is a contractual dissolution in which the wife offers to divorce her husband

⁵⁵ Quran 2:241

⁵⁶ WAEL B. HALLAQ, SHARI'A: THEORY, PRACTICE, TRANSFORMATIONS 279-80 (2009) (discussing the requirements and function of *tafriq*).

⁵⁷ Pascale Fournier, *Flirting with God in Western Secular Courts: Mahr in the West*, 24 INT'L J.L. POL'Y & FAM. 67, 70 (2010).

⁵⁸ *Id.*

in exchange for a small monetary compensation, typically foregoing her mahr.⁵⁹ Khul must be done voluntarily and without coercion, but requires the husband's consent.⁶⁰ If the husband deliberately creates a hostile or abusive environment to force the wife to seek his permission for a khul divorce, the divorce is considered invalid. The husband cannot force or coerce his wife to ask for a khul divorce in order to extract financial gain by not paying out her full mahr.

The third type of Islamic divorce is *talaq*. Talaq is often discouraged by jurists and Islamic scholars because of the potential for abuse by husbands seeking divorce.⁶¹ Talaq is the husband's exclusive right to divorce his wife by verbally repudiating her thrice (i.e., "I divorce you" uttered three times). In the interest of fairness in the marriage, a husband can assign or transfer his right to talaq to his wife.⁶² Usually this will be expressly stated in the marriage contract, but it does not have to be written; a husband can tell his wife at any point in the marriage that she has this right.⁶³ The issue with an oral accession to this right, as with all oral utterances, is that the husband can simply deny that he ever assigned his talaq rights to his wife. Without witnesses, it becomes almost impossible to prove this right was ever granted to the wife unless it was recorded in some way. Modern jurisprudence requires talaq to be in front of witnesses for it to be considered valid.⁶⁴ Some American jurists on Islamic law and even American courts consider talaq to be invalid under American law for varying reasons.⁶⁵

⁵⁹ *Id.* (The financial compensation cannot exceed the mahr amount, but the wife usually forfeits her mahr.)

⁶⁰ Oman, *supra* note 25, *id.*

⁶¹ HALLAQ, *supra* note 55, at 114. ("[W]omen are vulnerable in marriage to the man's privilege to execute a 'talaq' divorce.")

⁶² Oman, *supra* note 25, *id.*

⁶³ *Id.*

⁶⁴ *Id.* at 304

⁶⁵ See cases cited *infra* note 117 (talaq obtained in Pakistan under Pakistani law was deemed contrary to state public policy), and *infra* note 118, (talaq done in India violated the wife's right to due process).

Finally, the last rights spouses have under Islamic law mentioned here are financial rights for themselves as individuals and financial obligations to each other. Each party's assets upon entering the marriage remain their assets upon the dissolution of the marriage, as Islamic law does not recognize the concept of community property.⁶⁶ Under Islamic law, the property title determines ownership, but if the wife contributes to the marital estate, she deserves equitable distribution of estate plus any inheritance she is entitled to receive. During the marriage, a wife is to be provided for by the husband in a manner in which she has been accustomed to. Any assets, wealth, properties, etc that she brings to the marriage or gains during the marriage is hers alone and she is not obligated to spend it on her house, her husband, or her children. Now that common society allows for women to pursue higher education and work independently, some women now negotiate terms in their marriage contract in addition to mahr and divorce. This includes, but is not limited to, restrictions on moving from the agreed upon marital home, permission to regularly visit family and provide financial support to her parents, and titling any property acquiring during the course of the marriage jointly. Anything that does not violate Islamic laws is considered valid to include in a marriage contract.

Part III: Requirements for Marriage in New York and Indonesia

There are requirements for marriage that are common in most legal societies, whether it be ruled by common law, civil law, or religious law. For a marriage to reap the benefits of marital status, it must be legally recognized as valid according to that society's laws and customs. This section will present the requirements for a legally valid marriage and the rights

⁶⁶ This should not impact the divorce settlements of legally married Muslims Americans because Islamically, Muslims should follow the "law of the land in which they live" so if they live in a community property state, in divorce their assets can be divided in accordance with those laws.

associated with marriage according to marital laws in the state of New York and the country of Indonesia. There are three basic elements behind a marital union that are standard across United States law, Indonesian law, and Islamic law: the parties must: 1) legally able to marry each other, 2) mutually consent to the marriage, and 3) sign a contract as required by law.⁶⁷

United States: New York

In the United States, marriage is regulated on a state level, not a federal level; thus, requirements for marriage vary from state to state. Typically, an age minimum is set; one or more witnesses must be present; and some sort of identification is necessary to proceed. The basic structure and commonalities in legally recognized marriages in the United States share many characteristics with requirements in Islamic marriages and Islamic marriage contracts. Currently, courts make determinations on the validity of Islamic marriage contracts on a case-by-case basis.

In order to obtain a New York marriage license, both parties intending to marry must go to the office together and at the same time.⁶⁸ Every state has an age minimum requirement to receive a marriage license. In New York, the minimum age to procure a marriage license without involving parents, guardians, or the courts is eighteen.⁶⁹ Applicants between ages sixteen to eighteen can obtain a license with parental consent and those between ages fourteen to sixteen also require a written approval from Judge of the Supreme Court or Family Court.⁷⁰ No one

⁶⁷ *Marriage*, Wex, Legal Information Institute, <https://www.law.cornell.edu/wex/marriage>

⁶⁸ New York State Marriage License Requirements, U.S. Marriage Laws, <https://www.usmarriagelaws.com/marriage-license/ny-new-york>

⁶⁹ *Id.*

⁷⁰ *Id.*

under the age of fourteen can be married.⁷¹ Every state requires identification be presented; New York requires one of eight forms of a government issued photo ID.

Residency in the state in which you would like to get married is not always a requirement. A marriage license granted in a state will be accepted anywhere within that state, but it is common for restrictions to be imposed by the county or city for nonresidents. In New York, there is no residency requirement, but there is a waiting period of twenty-four hours. This means that the license only starts being valid twenty-four hours after obtaining it. Before a couple can apply for a marriage license, all divorces, annulments, and dissolutions must be finalized. New York requires there be at least one witness to the marriage ceremony over the age of eighteen. Proxy marriages are not valid in New York, but consanguineous cousin marriages (marriages between blood relatives) are legal.

There are numerous advantages to being legally married in the United States. There are economic advantages, such as having a joint bank account, joint credit cards (which can help improve credit scores), better insurance rates on your home and vehicles, shared Social Security benefits⁷² and retirement accounts, and tax benefits⁷³ and deductions that decrease how much a couple pays in taxes.⁷⁴ A huge benefit in the United States of having a legally recognized marriage is that it allows a couple to share health insurance benefits.⁷⁵ Health insurance benefits given by public and state employers in New York are mandatory for all married couples (same

⁷¹ *Id.*

⁷² Retirement Benefits, Social Security Administration, <https://www.ssa.gov/benefits/retirement/planner/applying7.html>

⁷³ Married couples in New York can file joint state tax returns, take spousal deductions on state income taxes, exclude employer contributions for spousal health insurance from taxable income for state taxes, exempt property inherited from spouses from state estate tax, and receive tax benefits when transferring interests in property.

⁷⁴ 7 Tax Advantages of Getting Married, TurboTax (2020), <https://turbotax.intuit.com/tax-tips/marriage/7-tax-advantages-of-getting-married/L1XILCh0m>

⁷⁵ Marriage and Health Insurance: Everything You Need to Know, eHealth (Feb. 25, 2021), <https://www.ehealthinsurance.com/resources/individual-and-family/health-insurance-work-marriage>

sex couples included) which can dramatically alter the access to medical services one has with insurance. Spouses are also allowed to take advantage of specific types of employment absences, such as family and health related leaves. They can take time off for maternity/paternity leave, and to care for an ailing spouse or family member. Being legally married also allows one to sponsor their spouse for immigration purposes, a complicated and typically lengthy procedure.

Being married is beneficial in circumstances involving the death of a spouse. A married person can take time off of work for bereavement leave. Having a joint financial account proves advantageous, as it reduces the amount of paperwork a surviving spouse needs to file in order to gain access to the deceased spouse's financial accounts. It also allows a surviving spouse to bring suit for wrongful death if necessary, and to continue collecting disability, Social Security, or military benefits. Being legally married also eases the transition of asset distribution during and after a marriage, as spouses do not need to pay taxes on any transfer of property between themselves.⁷⁶ This also applies to couples who are recently divorced.⁷⁷ A benefit to obtaining a divorce is the divide of assets and, in some cases, child custody, after the dissolution of a marriage. Being legally married allows a spouse to take legal recourse if the other spouse refuses to comply. It also benefits spouses who are victims of intimate partner violence or living in abusive situations because it allows them to remove themselves from the harmful environment while protecting the best interests of themselves and any children involved. Additionally, spouses can refuse to produce evidence containing confidential communications⁷⁸ and, in criminal proceedings, refuse to testify against their spouse.⁷⁹

⁷⁶ I.R.C. § 1041(a)

⁷⁷ I.R.C. § 1041(a)(2)

⁷⁸ *Trammel v. United States*, 445 U.S. 40 (1980)

⁷⁹ FED. R. EVID. 501

Indonesia

In Indonesia, prior to 1974, marriage was regulated through various laws for citizens of European and Chinese descent, for Indonesian Christians, and for Indonesian Muslims.⁸⁰ After 1974, a marriage law came into existence in order to codify the regulation of marriage and improve the status of women. When crafting the Indonesian marriage law in the 1960s and 1970s, a serious consideration was the status of women and how they were impacted by marriage recognition (or lack thereof). The 1974 Indonesian Marriage Law codifies the legal standard that governs marriage and divorce in Indonesia.⁸¹ The Marriage Law allows polygamous marriages and prohibits interreligious marriage. The ban on interreligious marriage includes a Muslim man marrying a non-Muslim woman.⁸² This is significant because in most accepted Sunni Islam jurisprudence, a Muslim man marrying a non-Muslim woman is acceptable⁸³ (provided she is a “woman of the book”, i.e., Christian or Jew).⁸⁴

In addition to the 1974 Marriage Law, marriage is regulated by the Civil Code. A marriage is legal if it is performed according to the respective religion and beliefs of the parties concerned.⁸⁵ Muslim couples wanting to marry must go to the Office of Religious Affairs and have their marriage recorded in a Marriage Book (*Buku Nikah*); however, they should also register their marriage with the Civil Registry office.⁸⁶ Every marriage is required to be

⁸⁰ Buchanan, *supra* note 10, at 1.

⁸¹ *Id.*

⁸² Buchanan, *supra* note 10, at 3.

⁸³ This is due to the patriarchal notion and common practice in seventh century Islam that children born to parents following different religions would be raised in the religion of the father, so any children born to a Muslim father would be raised according to the practices of Islam.

⁸⁴ Quran 5:5

⁸⁵ INDONESIA CODE CIVIL [C. CIV.] [CIVIL CODE] art. 2 ¶ 1

⁸⁶ *Legal Requirements for Weddings in Indonesia*, Translayte (Dec. 21, 2020), <https://translayte.com/blog/indonesia-marriage-requirements>

registered according to the applicable regulations⁸⁷, including interreligious marriages.⁸⁸ The law also provides the requirements for dissolution of marriages through annulments or divorce, specifies the obligations spouses owe each other, and discusses foreign marriage, among other topics.⁸⁹ Voluntary consent is required by both parties to enter into marriage.⁹⁰ The minimum age for marriage for both men and women is nineteen.⁹¹ Interestingly, individuals under age twenty-one must seek parental consent before legally being able to marry.⁹²

The Civil Code also imposes restrictions on marriage. Certain members of a family are prohibited from marrying each other, such as a husband and his sister-in-law, a wife and her brother-in-law, an uncle and niece, or aunt and nephew.⁹³ This stems from Quranic law that prohibits specific family members with certain blood ties or living degrees of relatives from marrying one another.⁹⁴ A woman who has dissolved her marriage is prohibited from marrying within the subsequent 300 days⁹⁵ and individuals convicted of adultery are barred from ever legally marrying the person with whom they were in a relationship.⁹⁶

Under the Indonesian Marriage Law and the Indonesian Civil Code, husbands and wives are obligated to uphold the household because it is viewed as a “basic foundation of society.”⁹⁷ Legally, the rights and position of the wife are balanced with the rights and position of the

⁸⁷ INDONESIA C. CIV. ch. IV, § 1, art. 26

⁸⁸ Article 61 ¶ 1, Indonesian Marriage Law

⁸⁹ https://www.law.cornell.edu/women-and-justice/resource/law_no_1_of_1974_marriage_law

⁹⁰ INDONESIA C. CIV. ch. IV, § 1, art. 28

⁹¹ U.S. State Dept., INDONESIA 2020 HUMAN RIGHTS REPORT, p. 26 (2020), <https://www.state.gov/wp-content/uploads/2021/03/INDONESIA-2020-HUMAN-RIGHTS-REPORT.pdf>

⁹² Indonesian Marriage Law, ch. II, art. 6(2)

⁹³ INDONESIA C. CIV. ch. IV, § 1, art. 31(1)(2)

⁹⁴ Quran 4:23

⁹⁵ INDONESIA C. CIV. ch. IV, § 1, art. 34

⁹⁶ INDONESIA C. CIV. ch. IV, § 1, art. 32

⁹⁷ Law Number 1 of Year 1974 on Marriage [Indonesian Marriage Law], ch. I, art. 1

husband “in domestic life and in coexistence in society⁹⁸,” but the husband is singled out as the head of the family, whereas the wife is the head of the household.⁹⁹ Spouses are obligated to love, respect, and faithfully provide to each other care for their mental and physical wellbeing.¹⁰⁰ Any property owned prior to the marriage or received directly as inheritance or gifts is to be controlled solely by that individual.¹⁰¹ However, any property acquired during the marriage is regarded as community property.¹⁰² Each person can do as they wish with their own property, but decisions about community property must be made with the consent of both parties.¹⁰³

Indonesian Law provides three reasons for dissolution of a marriage: death, divorce, or by court order.¹⁰⁴ Before granting a divorce, the law mandates that the couple first try to reconcile.¹⁰⁵ Divorce in Indonesia cannot happen by mutual consent in the eyes of the court; one person must be at fault. Divorce may be granted for four reasons: adultery, abandonment, a prison sentence lasting five or more years, or abuse inflicted by one spouse on another.¹⁰⁶ In Indonesia, women have to have their husbands permission before leaving the house, so women who are in the midst of a divorce may petition the court to leave her husband’s residence.¹⁰⁷ The court will then designate another residence where the wife is required to reside.¹⁰⁸ During this time, the husband could be made to provide financial support to his wife, but if she leaves the court-appointed residence without permission, she may forfeit all rights to financial support and

⁹⁸ Indonesian Marriage Law, ch. VI, art. 31(1)

⁹⁹ Indonesian Marriage Law, ch. VI, art. 31(3)

¹⁰⁰ Indonesian Marriage Law, ch. VI, art. 33

¹⁰¹ Indonesian Marriage Law, ch. VII, art. 35(2)

¹⁰² Indonesian Marriage Law, ch. VII, art. 35(1)

¹⁰³ Indonesian Marriage Law, ch. VII, art. 36

¹⁰⁴ Indonesian Marriage Law, ch. VIII, art. 38

¹⁰⁵ Indonesian Marriage Law, ch. VIII, art. 39(1)

¹⁰⁶ INDONESIA C. CIV. ch. X, § 3, art. 209

¹⁰⁷ INDONESIA C. CIV. ch. X, § 3, art. 212

¹⁰⁸ *Id.*

if she is the plaintiff, she could even be declared unfit to continue legal proceedings.¹⁰⁹ The spouse against whom the divorce has been granted loses all benefits granted to them by the other spouse in the course of the marriage¹¹⁰, but if a spouse does not have sufficient income, they can petition the court to allocate payment or financial support from the other spouse.¹¹¹

After granting divorce to a couple, the court then determines who receives custody of children based on testimony of the parents and family members, provided they have not already been relinquished of child custody.¹¹² Custody cannot be determined earlier than the date of official divorce, and the parent not granted custody has thirty days in which to file an appeal to the court's ruling.¹¹³ The court may amend the custody ruling at the request of one of the parents.¹¹⁴

Married Indonesian couples also experience advantages of marriage similar to Americans. This includes spousal inheritance rights, tax breaks, and access to joint financial accounts. Wives wishing to obtain a court order for her husband to provide for her after a separation and spouses wanting to claim civil service pensions must show proof of a registered marriage.¹¹⁵ Additionally, married couples under the age of seventeen are treated as adults and can legally vote.

¹⁰⁹ INDONESIA C. CIV. ch. X, § 3, art. 213

¹¹⁰ INDONESIA C. CIV. ch. X, § 3, art. 223

¹¹¹ INDONESIA C. CIV. ch. X, § 3, art. 225

¹¹² INDONESIA C. CIV. ch. X, § 3, art. 229

¹¹³ *Id.*

¹¹⁴ INDONESIA C. CIV. ch. X, § 3, art. 230

¹¹⁵ Mark Cammack, Lawrence A. Young and Tim Heaton, *Legislating Social Change in an Islamic Society – Indonesia's Marriage Law*, 44 AM. J. COMP. L., Winter, 45, 65 (1996).

Part IV: Contemporary Examples

“A contract or agreement is where two or more persons enter into engagement with each other by a promise on either side.”¹¹⁶ Under American law, a valid contract requires an offer, acceptance, consideration, mutual assent, and capacity. Since marriage recognition and validity varies at the state level, we must look to New York state courts and laws under which to determine whether Islamic marriage contracts are enforceable. For states with a large population of Muslims, such as New York, recognition and enforcement of the Islamic marriage contract is a more pressing issue than it would be in states with a smaller Muslim population.

Basic principles of contracts law should be considered when determining whether a case has standing based on an Islamic marriage contract. In 1996, the Florida District Court of Appeals in *Akileh v. Elchahal*¹¹⁷ determined that a mahr agreement between a couple was in effect an Islamic antenuptial contract that was both valid and enforceable based on neutral principles of contract law. In this case, the previously agreed upon mahr – part paid upfront, part deferred – was included in the certification of marriage.¹¹⁸ The certification was dated and signed in the presence of two witnesses and an Imam on the day of the marriage ceremony.¹¹⁹

The couple decided to divorce a year later, but the husband refused to pay the deferred amount of mahr, arguing that a woman who sought divorce thus forfeited her right to the deferred mahr under these circumstances. According to Florida law, marriage itself is sufficient

¹¹⁶ *Contract*, Black's Law Dictionary (10th ed. 2014).

¹¹⁷ *Akileh v. Elchahal*, 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996). *See also*: *Jones v Wolf* 443 U.S. 595 (1979) (Per the Supreme Court, there are no First Amendment violations if the court can decide the issue based on neutral principles of law and not religious policies or beliefs); and *Odatalla v. Odatalla*, 355 N.J. Super. 305; 810 A.2d 93 (Ch. Div. 2002) (A mahr agreement is enforceable if it is based on neutral principles of law and if it meets the state's requirements for the neutral principles of law).

¹¹⁸ *Akileh*, *supra* note 115, at 247.

¹¹⁹ *Id.*

consideration for a valid antenuptial agreement and the wife fulfilled her contractual obligation to enter the marriage.¹²⁰ The court concluded that the mahr was enforceable as a contract and found in favor of the wife, requiring the husband to pay the deferred mahr.¹²¹ The court relied on *Schwartz v. Schwartz*¹²² as precedent that a court may use neutral principles of law to resolve disputes with religious undertones.¹²³

Additionally, as an Islamic marriage contract expressly relates to marriage, the Statute of Frauds comes into play. In the case *Habibi-Fahnrich v Fahnrich*, the Supreme Court of New York found that the marriage contract in their case (referred to as a *sadaq*) did not satisfy the requirements under New York contracts laws for vague terms.¹²⁴ The couple in question were married in a New York civil ceremony. On the marriage certificate (not a separate marriage agreement), they included a line for a mahr that read: “The [mahr] being: a ring advanced and half of husband’s possessions postponed.” In less than a year, the wife requested a divorce and enforcement of the postponed mahr, but the husband argued that it did not meet the requirements necessary under the Statute of Frauds and New York contracts law. There were three requirements that needed to have been met: materiality, specificity, and insufficiency. The agreement had to be written, contain all material terms, be specific enough that anyone could understand the terms of the contract, and not be facially insufficient. The court determined that none of these requirements were met because terms such as “one half,” “possession,” and “postponed” were too vague and lacking detail. Therefore, the court refused to enforce the mahr,

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Schwartz v. Schwartz*, 153 Misc. 2d 789, 583 N.Y.S.2d 716, 718 (Sup. Ct. 1992)

¹²³ *Akileh*, *supra* note 115, at 248.

¹²⁴ *Habibi-Fahnrich v. Fahnrich*, No. 46186/93, 1995 (N.Y. Sup. Ct. 1995) (Decision is not reported, but a summary of the case can be read at <https://shariainamerica.com/cases-in-us-courts/cases-by-state/>).

citing that the one-line addition to the marriage contract was not sufficient to be a valid contract under New York contracts law.

Therefore, any marriage contract written and signed that is based on neutral principles of law should be enforceable in New York courts. The Islamic marriage contract should be written in clear, unambiguous terms. Details such as the mahr amount, whether it is being paid in full or being partially deferred, any property being brought into the marriage or acquired with the marriage, and party names must all be clearly written out. Mutual assent, or a meeting of the minds, must be present while drafting the contract. This means that both parties named in the contract must be transparent about the intent and impact of each term incorporated in the contract. A proper meeting of the minds in a marriage contract requires that both parties have the same understanding of and mutually assent to the terms of the agreement at the same time.

Furthermore, the marriage contract must fulfill all the requirements of the Statute of Frauds as well as state-specific contracts law. The Statute of Frauds requires contracts be signed and in writing when the consideration offered is marriage or the promise to marry; if the consideration is simply a mutual promise to marry each other, it does not fall within the Statute of Frauds. Since an Islamic marriage contract specifies the mahr amount and typically contains other marital terms, such as property division, inheritance, and alimony, and is signed before marriage, it is covered by the Statute of Frauds. Therefore, all marriage contracts must lay out terms in writing, and the agreement must be signed by both parties. Additionally, the contract must fulfill any other contract law requirements as determined by the state's common law contract laws.

Some courts compare the Islamic marriage contract to an antenuptial agreement. Antenuptial agreements are made between a couple before they marry and contain "provisions

for property disposal should they divorce or a partner dies.”¹²⁵ An antenuptial agreement is distinguishable from a prenuptial agreement in that a prenuptial agreement requires a party to disclose property and financial obligations.¹²⁶ The Uniform Premarital Agreement Act provides terms that an agreement for marriage may include, such as the choice of domicile, freedom to pursue career opportunities, and the particulars regarding raising children.¹²⁷ If a party does not make a fair disclosure in a prenuptial agreement, the prenuptial agreement may be void under contract if the party can prove that the other party did not reasonably disclose their property or that the aggrieved party did not have adequate knowledge of the other party’s finances.¹²⁸ Under Islamic law, parties are encouraged to be as transparent as possible regarding their finances and debt, but complete financial disclosure is not a strict requirement. The Islamic marriage contract should not be considered a prenuptial agreement and thus should not be held to the same or similar standards in a court of law.

In 2006, the New Jersey Superior Court in *Yaghoubinejad v. Haghighi* invalidated a couple’s marriage because they only participated in a religious ceremony without registering their marriage with the state.¹²⁹ On June 30, 2001, the parties married in a nikkah (religious) ceremony performed by a religious clergy person and in front of two witnesses.¹³⁰ They did not obtain a New Jersey state marriage license.¹³¹ The Superior Court found no valid reason to excuse the lack of a marriage license or reason that the couple should be excused from

¹²⁵ *Antenuptial Agreement*, Black’s Law Dictionary (10th ed. 2014).

¹²⁶ UNIF. PREMARITAL AGREEMENT ACT § 9 (2012).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Yaghoubinejad v. Haghighi*, 384 N.J. Super. 339; 894 A.2d 1173 (2006).

¹³⁰ *Yaghoubinejad*, *supra* note 129, at 340.

¹³¹ *Id.*

compliance with state marriage laws.¹³² Thus it was determined that the ceremonial marriage was void due to noncompliance with the state marriage law requirements.¹³³

Also in 2006, the Michigan Court of Appeals in *Ellehaf v. Taffaf* determined that a marriage that failed to meet statutory requirements did not qualify as a legal marriage.¹³⁴ Here, the parties were also married in a nikkah ceremony only, and without a marriage license.¹³⁵ It is undisputed that the defendant in the case had knowledge that she was not legally married because she had been previously married and had gone through the process of procuring a valid marriage license for that marriage.¹³⁶ The Court of Appeals determined that the trial court was correct in stating that there was no legal marriage between the parties because the marriage was not in compliance with Michigan marriage law requirements.¹³⁷

Therefore, for a religious marriage to be deemed legal by the state of New York, it must be performed in accordance with New York state marriage law requirements. This is comparable to the Indonesian requirements for legal marriage recognition, a lack of which makes dispute settlements (in and out of court) related to marriage a difficult task. Despite the acknowledgement of the Islamic marriage ceremony as valid, if an Indonesian couple wants to have their dispute settled in a non-religious court, they must show that their marriage is registered civilly.

¹³² *Id.* at 341.

¹³³ *Id.* at 344.

¹³⁴ *Ellehaf v. Taffaf*, 2006 WL 736561 (Mich. Ct. App. 2006). (This is an unpublished opinion, and as such, not precedentially binding.)

¹³⁵ *Id.* at 3.

¹³⁶ *Ellehaf*, *supra* note 134, at *4.

¹³⁷ *Id.*

Like marriage requirements, divorce requirements vary by state. For example, only nine states in the United States are community property states.¹³⁸ In those states, all property is jointly owned and thus is entitled to be jointly divided in a divorce. In 2001, California addressed the issue of an Islamic marriage contract not qualifying as a prenuptial agreement in division of community property in *In re Marriage of Shaban*.¹³⁹ Merely recognizing a legal divorce – without considering the religious divorce or religious implications – leaves people, especially women, vulnerable to falling through the cracks in regard to equality and equity in divorce.¹⁴⁰ The Islamic divorce form of talaq was addressed by courts in Maryland in 2007¹⁴¹ and in Michigan in 2009.¹⁴² In both cases, it was determined that talaq goes against public policy regarding equality in divorce.

In the United States, child custody is usually negotiated concurrently with divorce proceedings; however, sometimes formal custody negotiations take place after a couple has separated (before divorce proceedings) or after the divorce has been finalized. Custody arrangements include terms such as where the child will live and can also include terms for how the child will be raised while living with the other parent. An Islamic marriage contract can also include a term or even an entire section dedicated to a discussion and plan for how to raise children. In the cases *Jabri v. Jabri*¹⁴³ and *Arain v. Arain*¹⁴⁴, the courts in the 1990s examined the issue of raising children in accordance with an agreement (or lack thereof). The case *Amin v.*

¹³⁸ Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin

¹³⁹ *In re Marriage of Shaban*, 88 Cal. App. 4th 398; 105 Cal. Rptr. 2d 863 (2001).

¹⁴⁰ Ayelet Shachar, *Entangled: State, Religion, and the Family* in Human Rights The Hard Questions (Cindy Holder et al. eds., 2013).

¹⁴¹ *Aleem v. Aleem*, 175 Md. App. 663, 931 A.2d 1123 (2007).

¹⁴² *Tarikonda v. Pinjari*, 2009 WL 930007 Mich. Ct. App. (2009).

¹⁴³ *Jabri v. Jabri*, 193 A.D.2d 782; 598 N.Y.S.2d 535 (App. Div. 1993)

¹⁴⁴ *Arain v. Arain*, 209 A.D.2d 406, 619 N.Y.S.2d 591 (1994)

*Bakhaty*¹⁴⁵ addressed a jurisdictional issue of what was in the best interests of the child and refused to defer to foreign courts to settle the dispute.

In Indonesia, the Special Region of Aceh governs using a form of sharia law. CEDAW states that all parties should take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women.¹⁴⁶ The UN Committee on the Elimination of Discrimination against Women (CEDAW) addressed issues of consent in marriage and provides commentary on reservations to the general undertaking to take legislative action to eliminate discrimination.¹⁴⁷ The application of sharia is highly subjective, and depending on your location it can be enforced in a liberal or an extreme manner. In Aceh, sharia enforcement tends to be on the stricter, harsher side, which prompted CEDAW to express concern that the women of Aceh were exposed to laws that severely discriminate against women in regard to family relations.¹⁴⁸ Other parts of Indonesia that do not govern by special dispensation typically settle marriage disputes either through the civil court system or in Islamic forums or courts. Rulings from religious courts can be enforced through the civil court system, thus providing a reasonable compromise for those who have been married only through a nikkah but would like to have their Islamic marriage contract enforced.

¹⁴⁵ *Amin v. Bakhaty*, 798 So. 2d 75 (La. 2001)

¹⁴⁶ Convention on Elimination of All Forms of Discrimination against Women, July 17, 1980, 1249 U.N.T.S.

¹⁴⁷ LYNN WELCHMAN, *WOMEN AND MUSLIM FAMILY LAWS IN ARAB STATES*, p. 34 (2007).

¹⁴⁸ *Social Institutions and Gender Index, Indonesia, 2014*, Organization for Economic Co-operation and Development, <https://stats.oecd.org/Index.aspx?DataSetCode=SIGI2014>

Part V: Promoting Inclusivity Through
Recognition of Islamic Marriage Contracts in New York

In a legally plural, multireligious society that constitutionally guarantees freedom of religion, allowing Muslim marriages to be recognized falls under exercise of religion. This is displayed quite evidently in New York, and specifically in New York City, a known “melting pot” of ideas, cultures, and religions. Enforcing Islamic marriage contracts can be considered an advancement in marriage equality and a furtherance of exercise of religious liberties. The book *Islamophobia and the Law* explores the issue of multiculturalism and legal pluralism.¹⁴⁹ Beydoun posits that in a multicultural, legally plural society, a variety of laws and jurisprudence should be considered by courts.¹⁵⁰ Courts routinely rely on non-legal sources to make determinations, such as experts in their field and those with intimate knowledge of specific subjects. Extending the scope of this to include brief consultations regarding Islamic marriage practices in order to make rulings on Islamic marriage contracts is not out of the realm of possibility or practicality.

As a religious minority, Muslims are discriminated against in many ways. Beydoun discusses the issue of anti-sharia laws and the panic furthered by Western media around the idea of implementing sharia law in United States courts. Asking that courts recognize and enforce Islamic marriage contracts is not a request based on sharia principles, but rather one based on the enforcement of neutral principles of contract law and freedom to exercise religious practices. An article in the book highlights a passage from Judge Alexander Waugh,¹⁵¹ who “identified the threshold questions as: was the contract “a purely secular one governed by [the present of]

¹⁴⁹ CYRA A. CHOUDHURY AND KHALED A. BEYDOUN, *ISLAMOPHOBIA AND THE LAW* (2020).

¹⁵⁰ *Id.* at 113.

¹⁵¹ Judge Alexander Waugh presided over the case *Nahavandi v. Nahavandi* (MA. 1998). Although he ruled against enforcing the mahr as stipulated in the marriage contract, he said that if the wife were to receive a ruling in her favor from an Islamic tribunal or an imam, she could then enforce it through the courts.

‘neutral principles,’ or was it ‘so inextricably intertwined with the tenets of the Islamic faith that it cannot be enforced in this Court?’”¹⁵² Countering this narrative and fear of the word sharia has proven to be difficult after 9/11, and more so after Trump’s presidency. Thus, convincing New York courts to adopt a uniform view on the legal standing of adjudicating disputes concerning Islamic marriage contracts is not an easy task. This is even more significant in New York, where anti-Muslim sentiments and pushback have been a constant since 9/11.¹⁵³

Muslims are often told that they need to assimilate to American society. The recognition of the religious Muslim marriage ceremony and the Islamic marriage contract can further the inclusion of Muslims into the fabric of American society and normalize the idea of Islam being compatible with secularism. Islam is a lifestyle that is based on rules and practices of worship at almost every level. If Islamic marriage contracts were recognized in New York Courts, it would be a public display that Islam is not “incompatible” with secularism or “the West,”¹⁵⁴ and that Muslims are welcome to live their lives in America in accordance with their religious beliefs without fear of retribution, retaliation, or lack of access to the justice system.

Furthermore, the inclusion and enforcement of Islamic marriage contracts in New York courts would assist in avoiding the spread of what is known in British family law as “limping

¹⁵² Faisal Kutty, “Islamic Law” in *US Courts: Judicial Jihad or Constitutional Imperative?*, 41 PEPP. L. REV. 1059, 1061 (2014). (Citing Sylvia Whitman, *Whose Place to Decide? Islamic Family Law Issues in American Courtrooms*, Presented at the Ass’n of Muslim Social Scientists’ 34th Annual Conference: Muslims and Islam in the Chaotic Modern World: Relations among Themselves and with Others (Sept. 30-Oct. 2, 2005) (on file with author), citing *Nahavandi v. Nahavandi*, No. FM-12-2237-97, (N.J. Ch.).)

¹⁵³ For example, the NYPD has been running surveillance programs on Muslims, mosques, and universities with large Muslim student populations in the New York City and greater Newark, NJ area since 2002. This resulted in many lawsuits, some of which were settled by the city. As a part of the 2018 settlement, the department overseeing the surveillance was disbanded. See: *Factsheet: The NYPD Muslim Surveillance Program*, <https://www.aclu.org/other/factsheet-nypd-muslim-surveillance-program>; and Ed Pilkington, *NYPD settles lawsuit after illegally spying on Muslims*, *The Guardian* (April 5, 2018, 15:02) <https://www.theguardian.com/world/2018/apr/05/nypd-muslim-surveillance-settlement>.

¹⁵⁴ This vague term is often used to refer to wealthy, developed nations in North America and Western Europe with secular governments, such as Canada, the United States, the United Kingdom, France, etc.

marriage.” Limping marriage is a term used to describe a situation where a couple is divorced in a one form or place but not another; in this context, a couple would divorce in a religious ceremony, but not in a civil ceremony (or vice versa).¹⁵⁵ If a couple is married in both a religious and civil ceremony but only divorces religiously, then legally they are still married. This can prevent a spouse from collecting alimony, child support, or anything they would legally be entitled to otherwise. If the couple divorces legally but not religiously, the spouse could be denied the protection afforded to them under Islamic laws because they are still tied secularly.

Part V: Conclusion

New York courts should view Islamic marriage contracts the same way they would a simple contract between two parties that have marriage as the consideration. Recognition of the Islamic marriage contract in courts would aid those who are only married religiously. For those that have both a civil and religious marriage, recognition of their marriage contracts could act as a failsafe for enforcement of spousal rights. Through keeping an open mind towards embracing and enforcing Islamic marriage contracts, we can move the needle forward in terms of holistic, inclusive thinking and innovative approaches to nuanced legal issues involving religious law.

¹⁵⁵ Estin, *supra* note 12, at 517.