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This dissertation entitled

TREATMENTS OF ISLAMIC LAW "SHARIA" IN CALIFORNIA STATE COURTS

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Anthony Marcus

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Faculty of Fuller Theological Seminary.

Sherwood Lingenfelter, Mentor

David Johnston, Committee Member

Umeyye Isra Yazicioglu , Outside Reader

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Abstract

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This study examines the treatment of the Islamic Law in the United States Courts for selected areas of the law pertinent to the *Sharia* application within the State of California. The study contrasts the application of the *Sharia* by the American judges and compares the outcome to the Islamic law rules. The data comes from the California Superior and Appellate courts' records, a combination of the published and the unpublished cases that interacted with the Islamic law on one level or another, directly or indirectly. This led the California court to explore the factual allegation of the Islamic law topics presented in the process of understanding the evidence submitted.

The study uses comparison based methods to analyze the data in order to understand how the American courts treat the Islamic law with the First Amendment of the United States Constitution in mind. The main finding of this study supports my central argument that the United States judges do not analyze or apply the rules of *Sharia*, but they are equipped to protect the Constitution from any foreign or demotic religious law.

The outcome of the clash between the two legal systems impacts the Muslim immigrants to the United States on many different levels: it deprives them from the application of their divine law, impacts their religious practice, and impacts them

socially, based on whether they assimilate or resist the United States legal system.

This study contributes missiologically by bridging understanding to each side of the two competing legal systems by explaining one to the other. This understanding promotes peacemaking initiatives in the light of a lucid view to the role of *Sharia* in the lives of our Muslim neighbors in contrast to the stereotype promulgated by the media about *Sharia* and Muslims, and in turn this clarity will encourage the American society to extend hospitality to our Muslims neighbors.

Mentor: Sherwood G. Lingenfelter 333 Words

Dedication

This is dedicated to all who seek to understand the importance of *Sharia* on the lives of Muslim immigrants who have settled in the United States!

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First, and foremost, I thank the Lord Jesus Christ for providing me with the guidance and determination to complete this study.

I dedicate this dissertation to my brother and sisters who are immigrants everywhere and especially in the United States. May our Lord Jesus grant you the right path in this life to find justice, wisdom, and peaceful life in your diaspora.

I would like to express my heartfelt appreciation to my mentor Dr. Sherwood Lingenfelter and the rest of my dissertation committee Dr. David Johnston who guided me throughout this process, encouraged me, and prayed for my success.

Thank you; you have supported, advised, and encouraged me in every aspect throughout the years. I am forever indebted to your wisdom, assistance, sincere generosity, and unwavering kindness in helping me to fulfill my mission calling. I am deeply grateful to Dr. Johnston, who has guided me by his knowledge and expertise in the field of Islamic law. To my Mentor Dr. Lingenfelter whose academic integrity and spiritual guidance has tremendously impacted my own spiritual growth and walk with the Lord. I'll always remember your kind words and support throughout my years at Fuller Seminary.

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Introduction

The forefathers of the United States founded the principles of the nation on freedom of religions. The American people are all linked to many years of continuous immigration movements that brought people from all over the world for the cause of this very freedom. Lately, during the Twentieth Century, the United States opened its doors to immigration waves from Muslim nations. Unlike United States law as a pure product of men, the Islamic law in contrast is esteemed and understood to be guided by the sacred text and *sunna*. Hence, the Islamic law is expected to apply in an environment that does not separate between religion and government. Muslims expect to see their religious law applied by the state; however, this expectation clashes with the separation of church and state, which is fundamental to American legal theory and practice.

This clash between the expectations of Muslim litigants and American legal principles is the springing point where my research comes to play; given the disconnect between the two legal systems, this research examines how Muslim litigants seek justice in California courts, and how California judges make decisions that affect their personal, social, and religious expectations. Since the *Sharia* court does not exist in the United States, Muslim immigrants have chosen to take civil cases to the US and CA State courts. In these cases, Muslim attorneys have often made arguments based on *Sharia* law, arguments that would not have been addressed if the Muslim lawyers had not presented them. The American judges have considered those arguments, but generally such consideration falls within the prohibitions of the Constitution and the mandates of the First Amendment. Because the Constitution limits the courts' interaction with Islamic

law, the Muslim litigants are not fully satisfied with the outcome and the court treatments of *Sharia*. Albeit the American courts aim to accommodate Muslim immigrants, their hermeneutic of *Sharia* "sacred" law is not fully accepted by Muslims.

When I came to the United States I saw the interaction between the two legal systems, and how the understanding of *Sharia* is lost in the translation between the two. Since I have lived among Muslims for much of my life and studied *Sharia* because of the mandatory legal system where I grew up, I was moved by public stories of how the California courts responded to their Islamic law. Based on that knowledge and my love for Muslims, I felt compassion for them, even to the point of walking alongside them and putting myself in their shoes. I felt compelled to interpret to Americans the *Sharia* legal system, which I knew growing up in close proximity to my friends who practiced it, and to interpret the American legal system to Muslims, which I now embrace in my new home.

In this research I will investigate the inconsistency and divergent hermeneutic of the California State judges and highlight the responses of Muslim litigants and Muslim academics on the question of the role of *Sharia* for adjudication of conflicts between Muslims litigants in California. This research will be educational for the Christian-audience regarding Muslims' responses to the treatment of the *Sharia* in the California State Courts. Despite many Christian movements for peacemaking in different disciplines with Muslims, the discipline of legal studies is untapped by Christians.

My goal in this research is to articulate possible steps toward reconciliation between these conflicting value paradigms. This research will contribute a tool to Christian communities to build bridges between Muslims and Christians based on *Sharia* discourse. It is my hope that the results of this research will be used to stimulate peacemaking initiatives by Christians, who may identify with Muslims from the social aspect of Muslims living in a foreign land.

Statement of the Problem

In this research I investigate the divergent treatments and interpretations of California State judges, the social impact on the Muslim litigants, and the response of the Muslim academics on the question of the role of Islamic law for adjudication of Muslim vs. Muslim conflicts, as evidenced in the decisions of the California courts, with the goal of possible steps toward reconciliation between these conflicting value paradigms.

Sub-problems and Propositions

Sub-problem 1: What are the differences between the treatments of *Sharia* cases adjudicated by California judges in comparison to the treatments that would be followed if the presiding judge were a Muslim?

- Proposition 1: The foundational principle of separation of church and state compels the California courts to treat *Sharia* cases from a secular perspective according to American law.
- Proposition 2: The California Courts have decided similar Islamic factual cases in inconsistent manner.

Sub-problem 2: What are the social impacts on the Muslims litigants and their community in relation to the local courts treatment of *Sharia* cases?

- Proposition 3: Most of the Muslim litigants and their community are not fully satisfied concerning the *Sharia* cases that were adjudicated by the California courts.
- Proposition 4: Most of the secular treatments of the California courts to the *Sharia* cases constitute obstacles for Muslim litigants to keep the *Sharia* traditions in the United States.

Sub-problem 3: What are the academic responses of the jurisprudence scholars to the California courts' decisions in relation to the Muslim community and the principle of separation of the church and state?

- Proposition 5: Jurisprudence scholars are divided in their opinions about the treatments of *Sharia* in the United States Courts while attempting to accommodate the emerging needs of the Muslim immigrant community.

- Proposition 6: Jurisprudence scholars implement new approaches in an attempt to resolve the differences between the Islamic law and the American principle that separates religion from State.

Sub-problem 4: What is the missiological significance this research aims to accomplish based on the findings?

- Proposition 7: This research is an attempt to extend accommodation and hospitality to our Muslim neighbors in support and solidarity to their presence in the United States as their new home.

- Proposition 8: This research is attempting to explain the United States Courts' mechanism to our Muslim neighbors in light of the conflicting value paradigms between Islamic law and American law.

Delimitations of the Research

1. In this research I do not consider data or decisions from any contemporary Muslim courts on cases similar to the ones examined throughout this research.

2. This research only contrasts the treatment of the American courts to the Islamic law cases against the opinions of the Muslim jurists in the United States regarding the factual issues in these cases.

3. This research focuses only on the social impact on the Muslim community that immigrated to and lives within the State of California.

4. This research is limited to cases that were subject to the California State and appellate courts' jurisdiction.

5. This research excludes any Federal cases that were subject to the Federal Circuit Courts and/or any of its Divisions in or outside of California.

6. This research does not focus on the traditional Islamic law rules of jurisprudence practiced outside the United States, that is, Europe or any western countries.

7. This research does not examine any other Islamic legal trends or schools of thought such as moderate or liberal views of the *Sharia* application in or outside the United States.

Definitions of Terms

Sharia: God's blueprint for an ideal human society and a roadmap for how to worship God aright, as taught in the Qur'an and as expanded in the life and words of Muhammad, Islam's Prophet.

Fiqh: Includes the principles of Islamic jurisprudence and what Muslims use to interpret the *Sharia* when answering certain facts or circumstances. The interpretation is usually done by appointed Muslim judges '*quḍā*', or scholars *'ulamā*'.

Umma: The Arabic word for nation or community that can be a title as such without the need for any common geographical land or for the same descent (first and foremost, the global Muslim community), or can refer to any group that shares common beliefs.

Adjudicated: From the Latin word '*adjūdicāre',* to award something to someone, or to act as a judge or arbitrator between litigants.

Social Impact: How the courts' actions affect the litigants' life as traditional Muslims in the community. Social impact can refer to areas such as religion lifestyle, health, familial life, businesses, social life, and community.

Sunna: Body of traditional social and legal customs and practices of prophet Muhammad that constitute proper observance of Islam.

Ulama: Refers to the educated class of Muslim legal scholars engaged in the field of Islamic studies. They are well versed in legal jurisprudence '*fiqh'* and are considered the authorities of *Sharia* law and Islamic lawyers.

Quḍā: The Islamic judges, which have special training in interpreting the Islamic Law from its original sources.

Sharia Cases: Cases between Muslim litigants in California, which trigger and require an Islamic law analysis, assuming there is no other legal system that could answer the litigants' request for adjudication effectively.

Value paradigms: The ideology that a country chooses to govern its nation, such as either by a secular state that is separate and distinct from any religion , that is, the United States, or religious state where the religion is an essential part of the law.

Ijtihād: An Arabic word means 'effort' to reinterpret the Islamic law for new circumstances. The independent or original interpretation of problems not precisely covered by the Quran or the Hadith.

Assumptions

I present the research based on the following assumptions:

- The United States Courts are not "Christian" legal entities, even though they may have some cultural heritage of Christianity.
- The United States courts are bound by the separation of church and state as mandated in the United States Constitution.
- There is not a current or foreseeable Congressional petition or law proposal to ban *Sharia* law in California courts.
- There is not a current or foreseeable Federal law prohibiting the application of *Sharia* law in the United States courts.
- There is not a current or foreseeable Supreme Court decision prohibiting judges from decision-making based on *Sharia*.
- The United States will not change or amend the United States Constitution regarding the separation of church and state.

- The movement of immigration of Muslims to the United States is a continuous movement.

- The secular treatments of *Sharia* cases in the United States courts will continue to grow as there are more Muslim immigrants coming to the United States.

Importance and Missiological Significance

As many other people who desired a better life, Muslims from different nations come to the United States for that very reason. Notwithstanding the tight immigration regulations, Muslims from different nations increasingly gain residency and call the United States their home. This increasing influx allows Christians to live near their Muslim neighbors and interact with them and their needs in a foreign land. There is much research that aims at building peace, however, none of it utilizes the Muslims divine law to interact with their sensitive needs in that area as a peacemaking bridge to reconciliation.

In this research I will seek to; provide a lucid understanding of the Muslim experience with the application of the *Sharia* rules in the United States, shed light on the application of the *Sharia* in the lives of Muslims as religious practice, examine the treatment of the United States courts to the rules of *Sharia* for the Muslim litigants, give a close up picture of the social impact of the United States courts' ruling on the Muslim litigants, and provide a new reconciliation device to be used by Christians in their interaction with their Muslim neighbors. In so doing to accomplish, common understanding, harmony, and respect while using a new type of the intercultural legal dialogue that did not previously exist. Of course sharing a meal or engaging in social conversation can facilitate relationships, but dialogue that touches the very meaning of life for our Muslim neighbors demands deeper understanding. This research on *Sharia* law offers an additional approach for Christian interaction with our Muslim neighbors.

In this research I will also contribute to the academic debates in America and Europe about the applicability of *Sharia* law in national and state courts to litigation between Muslim and Muslim immigrants. The research will investigate case histories of the tensions that surface and the reaction of different Muslim and Christian scholars about the way judges in the California State courts treat the *Sharia* cases arising from Muslim vs. Muslim litigation. This research addresses the divisions among the American scholars, Muslim scholars, and European scholars with reference to how national and state courts deal with Muslim vs. Muslim litigation.

Finally, through this research I aim to contribute an understanding of the larger cultural issues of Muslim immigration in two ways. First, by examination of Muslim litigants' responses to American court decisions, the research will help American society to understand the importance of *Sharia* in the lives of Muslims and correct common stereotyping of Muslims. Second, it will help American Muslims in their struggles to live in their new home by representing their struggles to the larger society, with the hope that greater understanding will replace hostility with hospitality.

Chapter 1

The Debates—"*Sharia*" Islamic Law vs. Secular Law

While one cluster of the American scholars; Adams, Charles J., Wael B. Hallaq, and Donald P. Little (1990), Sonne (2015), and Hanshaw (2010) argues that US courts do not apply *Sharia*. The other cluster; Fournier (2010), Sizemore (2010), Yerushalmi (2014) and Bradford (2015) contends that some American courts uphold and apply *Sharia*.

Similarly, Muslims scholars are divided in their interpretation of how the American courts treat Islamic law. Quraishi and Miller (2012), Naim (2014), and Emon (2005) view the issue from a secular perspective based on the prohibitions of the US Constitution. Whereas Abed Awad (2012, 2014) and Al-Hibri (1995) urge the American courts to understand Islamic law and apply it according to the litigants' original intentions and expectations.

Finally, in Europe the scholarly debates revealed similar developments with Cesari (2010), Bowen (2010) and Bowen (2012) opposing the application of *Sharia* and taking the negative view against its existence in Europe, and Nielsen, Jorgen S., and Lisbet Christoffersen (2010) suggesting possible integration of *Sharia* and secular law.

The Debate among American Scholars

My focus of this research is on the treatment of *Sharia* in the California State Court. There is a lengthy debate between scholars of different groups regarding this issue. A cluster of American scholars argues that the American courts do not apply *Sharia*, but

apply secular American law; however, the other cluster argues that American courts apply *Sharia* law, and in so doing, violate the US Constitution.

The first cluster of the American scholars, including Bernard Weiss, James Sonne, and Mark Hanshaw, argue to different degrees that the American courts treat the Islamic law from a secular perspective according to the American legal methodology of litigation, which stems from the concept of separation of church and state (Adams, Charles J., Wael B. Hallaq, and Donald P. Little 1990; Sonne 2015; Hanshaw 2010). The argument rests on the separation between religion and state and this influences their legal hermeneutic. The meeting of the minds between religion and state is limited by the Constitution in the American legal system. Consequently, we can only find a secular outcome, in contrast to the meeting of minds between religion and state in the Islamic legal system, which is seen as restored godly truth or divine principle. However, Sonne (2015) and Hanshaw (2010) arrived at the secular outcome based on examining the similarities between the two legal systems. In this instance Sonne and Hansahaw argue that the heart of *Sharia* is achieved by utilizing secular legal methods.

The second cluster of the American scholars argue that American courts upheld and apply *Sharia*. Pascale Fournier (2010), Chelsea Sizemore (2010), David Yerushalmi (2014), and Kelly Bradford (2015) contend that the American courts treat *Sharia* from a religious perspective in violation of the Constitution and against the principle of separation of church and state. Pascale Fournier and Chelsea Sizemore argue for a religious outcome, based on partial observation on how the American courts deal with Islamic cases when the facts present more than one Islamic doctrine.

If the court adjudication is similar to the opinion of any of the Islamic doctrine, their conclusion is that the court upheld one Islamic doctrine over the other and consequently, the court endorsed one sect of Islam over another and violated the Establishment Clause of the Constitution. In contrast, David Yerushalmi and Kelly

Bradford, based on an agenda to ban *Sharia* from the United States, argue that honoring Islamic foreign court decrees or consulting the legal schools of Islamic law to understand the facts of the Muslims' case is equivalent to allowing *Sharia* to trump the protected constitutional rights (Yerushalmi 2014) (Bradford 2015).

The Debate among Muslim Scholars

The Muslim scholars also split into two subgroups, one subgroup seeing the American courts treat *Sharia* from a secular perspective, while the other subgroup sees or encourages the American court treat *Sharia* from a religious perspective.

In the first Muslim scholars subgroup, Asifa Quraishi, Najeeba Miller, Anver Emon, and Ahmed An-Naim argue that the American courts treat the Islamic law from a secular perspective based on the prohibitions of the US Constitution. Quraishi and Miller argue that notwithstanding the American court adjudications are similar to those of *Sharia* courts, the American courts follow their own secular methodology. The *Sharia* does not influence or dictate the American courts' decisions, but because of the similarities found in the two legal systems concerning the basic human needs, the results are similar. However, the process followed by the American courts is according to the American secular legal system (Quraishi and Miller 2012).

In that respect An-Naim joins Quraishi and Miller in asserting that, no matter what *Sharia* might say, domestic courts almost universally apply the secular aspect of the law while dealing with Islamic law issues. Further, An-Naim asserts that application of *Sharia* depends on the agreeable principles found in the foreign legal host. Accordingly, no matter what the *Sharia* says, the domestic law will always preempt *Sharia* when it clashes with the public policy. While the American courts adjudicate Islamic legal issues when they are similar to the American law, nonetheless, that application will never achieve the heart of *Sharia* (An-Naim 2014).

Anver Emon asserts that the American judges fall short of achieving the result of the religious divine law imbedded in *Sharia*. He argues that certain Islamic rights and obligations are determined by God and revealed through jurisprudence and that this fact shores up the authority of the Muslim judges and scholars (*ulama*) and stifles both challenge and change. A natural law tradition in Islamic jurisprudence stands in contrast to the positivist tradition that dominates most Western legal systems which argues that man-made reasoning, however sophisticated or enlightened, cannot arrive independently at the law of God (Emon 2005).

In the second Muslim scholars subgroup, Abed Awad and Aziza Al-Hibri argue and support the application of Islamic law within the United States courts, urging the American courts to understand Islamic law and apply it according to the litigants' original intentions and expectations (Abed Awad 2012 and 2014) and (Al-Hibri 1995). In contrast to the former Muslim scholars, Abed Awad urge the American courts to interpret Islamic law since the *Sharia* is as any other international law in our era of globalization.

> Marriages, divorces, corporations, and commercial transactions are global, meaning that US courts must regularly interpret and apply foreign law. Islamic law has been considered by American courts in everything from the recognition of foreign divorces and custody decrees to the validity of marriages, the enforcement of money judgments, and the awarding of damages in commercial disputes and negligence matters … our legal system is well equipped to balance conflicts between church and state (Awad 2012 and 2014).

While this is the notion of Awad, Aziza Al-Hibri accused the American court of confusing the Islamic legal doctrine with other Islamic legal doctrines. Her works indirectly point to the notion of interpreting the Islamic law by the American judges in support of the religious outcome (Al-Hibri 1995).

The Debate among European Scholars

Similarly, in Europe Jocelyne Cesari and John Bowen revealed similar developments to the application of *Sharia* as to its American counterpart. Cesari states that while Muslims negotiate their freedom in court, they compromise their *Sharia* and strip it from its official meaning that is found in their original Islamic societies; and thus, they end up with secular outcomes (Cesari 2010). Bowen, for his part, asserts that English law already provides answers to the *Sharia* cases apart from Islamic law based on the common sense of reasoning and integrated knowledge of social practices. Consequently, it appears that the Muslim cases are resolved according to *Sharia* rules, but the reality is that English law is providing solutions on similar issues. These shared principles between Islamic jurisprudence and civil law are not only found in the English courtroom, but also found today in England's Islamic *Sharia* Councils (Bowen 2010b) and (Bowen 2012).

Finally, Jorgen Nielson describes the scholarly body of Muslims and Christians in England, which is spilt into two trends. One advocates applying *Sharia* and pursues the religious outcome, while the other advocates applying English law and pursues the secular outcome (Nielsen, Jorgen S., and Lisbet Christoffersen 2010).

The Opportunities of This Research

My research suggests understanding and clarifying the application of the *Sharia*. As many scholars tapped into reconciliation from different aspects such as how Muslims should freely worship (Magdy 2016), I want this research to be the tool that bridges the gap between the legal differences of the two legal systems. Exploring the treatment of *Sharia* in the American courts and comparing and contrasting the two legal paradigms by an Arab Christian lawyer offers a new kind of reconciliation initiative and provides a new level of understanding Islamic law in the American context.

Seeing Christians coming to their aid, Muslims may have a sense of appreciation and experience a renewing of trust. Standing beside Muslims in their struggles concerning *Sharia* is an enormous act of sympathy. Engaging the voice of an Arab Christian about American concerns regarding Islamic law would open the door to a new level of dialogue to bridge the gap between American legal scholars and American society in general, and the Muslim immigrant legal scholars.

As an attorney, I will intermingle two different legal paradigms/discourses into the common point of understanding where reconciliation between the two legal systems is possible (Abu-Nimer, Khoury, and Welty 2007). Once the two legal paradigms are illuminated and two legal systems are reconciled on similar issues, a common dialogue will establish helpful conversation where legal scholars will be able to reflect and understand each other's values and resolve the differences in the legal dialogue. Consequently, in this research I will aid Muslim immigrants to be understood by the wider American society, including Christians, by means of explaining the *Sharia* to the American legal mind and renew the trust between the two groups.

Potential Cultural Bridges between Christian and Muslim Communities

In looking into various kind of interreligious dialogue which scholars are trying to undertake, my research suggests to me that there is a potential for dialogue between Muslim and Christian legal scholars around the issue of Islamic law. This is not an interreligious dialogue to proselytize Muslims or to get the Muslims to agree on a Western worldview, but rather I am examining what type of dialogue could happen between individuals who are scholars and legal practitioners from the two legal systems. I I explore the following samples of conceptual interreligious dialogue to determine their applicability to my research in an attempt to use the general ideas that were explored in them in this project.

Mohammed Abu-Nimer defines dialogue as "a safe process of interaction to verbally and non-verbally exchange ideas, thoughts, questions, information, and impressions between people from different backgrounds (race, class, gender, culture, religion and so on)" (Abu-Nimer, Khoury, and Welty 2007, 8). Dialogue clarifies misunderstandings and illuminates areas of both convergence and divergence through mutual sharing and listening. As such, it helps rebuild trust and provides a space for healing and reconciliation. Abu-Nimer's interreligious dialogue framework takes different forms. Intellectual dialogues are centered on exchange of information and aim to provide a learning opportunity about the faith of the "other." Affective dialogues focus on building relationships and concentrate on sharing stories, experiences, feelings, and thoughts. Collaborative dialogues emphasize working together to address common concerns.

Hasan Askari is an interfaith dialogue scholar who tries to overcome barriers within one belief by engaging the other in dialogue. His scholarship deals with Christian-Muslim relationships and urges both communities to create space within their own sets of beliefs to achieve an effective dialogue. His interreligious dialogue framework identifies religious, political and cultural barriers between Christians and Muslims. He identified isolation between the two communities as a barrier and found that reconciliation lies in the honest and clear dialogue to achieve the common grounds of understanding via the interreligious dialogue.

To accomplish this, he recommends that each of the two communities must begin by discussing interreligious dialogue from within their own theological structure, and then going forward and trying to reach for a wider structure that includes the other community. To understand this process, he analyzed the Bible and the Quran and he concluded that Christianity and Islam share a common ground in the person of Christ in the Quran. The separateness between the two communities does not denote two areas of

conflicting truths, but different dialogical views. Throughout the Quran Muslims relate to Christians and this is even more necessary today. Askari applies the scriptures for building a better society. He never utilizes the scriptures to criticize the practices of other religions. Understanding the scripture of others for Askari was the trajectory to create more space within his own beliefs to dialogue with others (Askari 1977).

Hubert Hermans' theoretical framework highlights the nature of the self that enables man not only to have relationship with others but with himself. He observes that the more the self, within itself, is dialogical, the more its external world becomes dialogical. Hermans explains the connection between dialoguing with the self and others by differentiating between the 'I' and 'Me'. The 'I' negotiates with the self as to what it should accept and espouse as part of the self and what it should reject. The 'Me' is seen as the observing component that relates to the external world, thus the self has internal and external features to communicate with the individual and the world and relate one to the other. The self is found in the external world, as it relates to others and the other is found within the self, as they take on different positions and voices. This is the "dialogical self" concept which summarized Hermans' framework and explains the connection between the self and others (Hermans 2001 and Hermans and Konopka 2010).

Finally, Maurice Magdy conducted interviews with Muslims from different Islamic regions. Magdy compared what he understood about Islam and Muslim religious' belief. Appraising the spiritual expressions of the Muslims interviewed, he summarized his framework by stating that in dialogue with others concerning the Divine, one should be empowered to practice the tri-aspects of dialogue: dialogue with the self, dialogue with the Divine, and dialogue with others. Dialoguing with the self and others regarding God without being able to dialogue with Him directly and freely examine one's religious beliefs strategically restricts the space of dialogue that is left for the self and others. It establishes a mode of an unquestionable monologue that obstructs the practice of

dialogue and prevents the participants from reflecting and moving freely from one 'I' position to another to solve the inherent contradiction between the different belief systems involved in dialogue (Magdy 2016).

These interreligious dialogue frameworks inform my own research and augmented my idea of intercultural legal dialogue. Although they all aim to contribute to interreligious dialogue, they do not completely fit the intercultural legal dialogue framework I envision. A combination of Abu-Nimer and Askari frameworks is closer to my intended framework than Hermans's and Magdy's. The former inquire more into the intellectual substance of my, nature of the laws, research, while the latter inquire more into the human spirituality, nature of God. Employing Abu-Nimer and Askari's interreligious dialogue frameworks for the sake of 'an intercultural legal dialogue' or the nature of laws, this research will arrive at and accomplish a new level of understanding from each group to the other, the Muslim legal scholars and the American legal scholars. The goal is that each side better understand the differences in the other's legal paradigm and find new ways to communicate from a point of trust and understanding.

Discerning the Impact of the American Judges' Ruling on the Muslim Litigants via the American Muslim Scholars' Publications

The Muslim Scholars' publications is a key part of the cultural issues involved. These publications represent the voice of the Muslims expressing their frustration, discontentment, fear, and concerns in their diaspora (Quraishi and Syeed-Miller 2004) and Oman (2010). It is the lifeline and the link to the missiological aspect of this research, testing how the Muslim community feels about the treatment of Islamic law in the California courts and reveals the Muslim community's struggles to maintain the normative aspect of *Sharia* rules in their lives and in those of their community (Al-Hibri 1995). This research investigates whether or not Muslim immigrants accept or reject the California ruling on *Sharia*. In this research I will show how the viewpoints in these

publications highlight the points of conflict for different areas of Islamic law and between the two legal systems. The conflicting areas will be measured by the Muslim community's struggles over the variations of the California judges from *Sharia* rules. This examination will be used as an integral part of this research to build bridges between Christians and Muslims.

Chapter 2

Research Methodology

In this research I will examine seventeen cases of Muslim litigants bringing civil cases to the California State Courts between 1986 and 2018 and using some form of *Sharia* law to advocate for justice. This research is qualitative research—investigating each case in detail, and comparing the arguments of the prosecution, defense, and the decisions of judges for each case on a given topic. The data analysis and comparison focuses on three primary issues: (1) the nature of the courts' decisions for the involved litigants; (2) the diversity of the Muslim scholars' academic traditions pertinent to the court cases; and (3) the pertinent legal presuppositions used by the courts in the State of California to make their decisions.

Case Selection

All of the cases selected have substantial intersection between American civil law and Islamic law. Obviously, the cases for this research are the result of the Muslim immigrants seeking to resolve civil conflicts through the American legal system. Many Muslim litigants turn to the American courts without any intent to apply *Sharia* law, but they feel satisfied with the application of American law. Those litigants who are nominally Muslims are easily acculturated within the society and assimilated to the American legal system's secularism while seeking to build up their wealth and settle here more comfortably. Those categories of Muslims demand little or no reference to Islamic law.

Nevertheless, some of those nominal Muslims may resort to the application of Islamic law if and only if they will benefit from its outcome. However, there are some Muslims in the United States who approach the American courts with a misconception that the court will apply the Islamic law in their cases, not because they want to impose their divine law on a foreign court, but because their only experience is with the *Sharia* courts where they came from, and they were never exposed to an American court. Hence, they have a misunderstanding regarding the characteristics of the American court as a secular, separate, and neutral entity.

The cases selected for this research all encompass litigants, lawyers, expert witnesses, and fact patterns that lead the American judges to touch on the intersection between American law and Islamic law, and where an "intercultural legal dialogue" between the two legal systems can be seen. The litigants in those cases represent a wide selection of the Muslim immigrant population from nominal to conservative sectors, who sought justice from the State of California Superior Courts. Because *Sharia* is a comprehensive body of law and covers all aspects of the Muslims' life and belief, it was difficult for this research to envision covering all types of cases.

The subject matter of the selected cases point to a variety of pressing and essential issues in the lives of the Muslim immigrants, which include marriage, divorce, dowry, child custody, child illegitimacy, inheritance, use of DNA in proofing paternity, religious Islamic diets '*Halal*', the essential components of the Muslims prayers in comparison to Ramadan prayers '*Taraweeh*', use of incense as a method of worship, and the connectedness of Islam as religion and/or its separation from state power.

Of course, those issues address just a small sample of the body of the Islamic law; however, they represent the frequent issues that were submitted by the Muslim litigants to the California Superior courts. Those essential topics surfaced for me after my unrelenting survey of hundreds of California cases publication that indicated Islam as a

topic or Muslims as litigants. The initial research allowed me to see the frequency of the Islamic issues facing the California courts, and in turn led me to classify and organize the topics that have been pressing to the Muslim community in California.

To gather more samples for selection I searched for those topics in the published California cases as well as the unpublished. In doing that I found hundreds of cases. Some were focused purely on American law, while some dealt with the intersection between the American legal system and the Islamic one. The last category corresponded with the interest of this research to examine how American judges interpret and apply Islamic law while they accommodate the Muslim litigants' needs for judicial intervention to redress any injustice they experience while living in California. The facts of these cases also gave me the opportunity to observe the social impact of the American judges' treatment of Islamic law on the lives of the Muslim litigants.

Arriving to this point it became apparent to me that there were few cases that scrupulously met the goal and target center-point of the research. Hence, from the hundreds of cases I ended up selecting seventeen cases (see Table 1) from the last 30 years of the court records from 1986 to 2018. I selected those seventeen cases, and rejected the rest, because they were the most promising for my research question, and furnished data from which to test my propositions, and they have the most details concerning Islamic law.

In many of the cases I encountered in my survey, and rejected, the litigants were Muslim; however, none of them asked for any application of Islamic law, but they were satisfied with the application of American law. These cases were limited in scope as related to my research problem, to investigate the intersection between *Sharia* and American legal systems. Although there were other cases prior to 1986 that address the main point of my research, those cases are very old and their facts are obsolete as they

related to the Muslim community of time past, people who are not currently shaping the fabric and life-force of recent Muslim immigrant communities.

Table 1: Overview of Research Cases

Name of Case	Topic of Case	Year
Hassan	Marriage	2008
Fereshteh	Marriage	1988
Dajani	*Mahr* – Dowry	1988
Shaban	*Mahr* – Dowry	2001
Turfe	*Mahr* – Dowry	2018
Malak	Child Custody	1986
Nada	Child Custody	2002
G.A.S.	Child Custody	2007
Nurie	Child Custody	2009
Said	Illegitimate Child / Inheritance	2007
Britel	Illegitimate Child / Inheritance	2015
Washington	*Halal* Diet	2004
Menefield	*Halal* Diet	2009
Moore	*Halal* Diet	2008
Chaudhry	Religion Discrimination	2015
Khan	Religion Discrimination	2010
Foote	Religion Discrimination	2001

Process of Data Analysis

The next issue was to develop a pattern to analyze the seventeen cases revolving the center-point of the intersection between American law and Islamic law. To undertake this task, I read the cases carefully and took notes of what is pertinent to my research concerns, such as, the allegation of each Muslim litigant, the facts they asserted according to the *Sharia*, and what they are trying to accomplish by invoking it; how the American court understood and interpreted the facts, by which lens they look at the facts, and what law they sought to decide the case as a counterpart to the *Sharia* or enacted to remedy the issues brought by the Muslim litigants.

These steps affirmed the most important point in these cases—the overlapping between Islamic law and American law. It showed me where the courts have split or agreed, and how the courts accepted or rejected the Muslim litigants' arguments. It also

revealed how the judges apply their own rules based on the evidence and how every judge does it differently.

For each topic of Islamic law mentioned above, I gathered two, three, or four cases together as one group corresponding to that given topic as shown in Table 1. Although I conducted a case-by-case analysis, I also compared these analyses to each of the similar cases within each group.

Sects of *Sharia* Law

Islam has many sects and the law differs from one sect to the other, however none of the litigants come to the American courts stating that his or her sect is Sunni, Shite, or otherwise; rather they invoked certain sets of rules, those rules sometimes are distinguishable and only applicable in their sects. In each case the litigants contend for a view—my argument presents the right application of the law—that must apply to their dispute to resolve the conflicted facts introduced to the American court. In order to identify the sects of the litigants accurately, I relied on the primary and secondary sources that revealed the sources of the rules or the Islamic School of Law advocated by the Muslim litigants, the *Sharia* expert witnesses, and the lawyers.

Blueprint for Case Analysis

These series of observation enabled me to develop a blueprint to guide me throughout my examination of the seventeen cases. The blueprint was as follows:

(1) Identify the main facts pattern in a comparable fashion between each group of cases that belong to one of the topics of the Islamic law identified above.

(2) Identify the American law that corresponds with the litigants' complaints within the given case.

(3) Identify the rules of *Sharia* that the litigants, the lawyer, the expert witnesses are advocating within each case and make a distinction as to what Islamic School of Law they belong to.

(4) Identify what the American courts' ruling was on the main issues requested by the Muslim litigants concerning *Sharia*.

Delving further while I executed this method of research, I aimed first, to look at two aspects involving every case. I identified what area of law had been invoked by the Muslim litigants concerning Islamic law; once I pinpointed the area, I then resorted to the primary and secondary resources of Islam to ascertain the elements that constitute the Islamic law pertinent to that specific area, then crafted a summary of its components in the overview table in each chapter.

Following this analysis of *Sharia* preferences among litigants, I identify what area of American law corresponds with the Islamic law based on the opposition invoked by the litigants of the opposite side, or from the courts' tentative assertion in its initial analysis of the facts submitted. The latter discovery of the American law allowed me to further explore all the statutes and case law involving that area of American law, and that in turn strengthened my understanding of the trajectory of how the American court undertook its analysis and how it arrived at the adjudication.

This last step was very important to refute the allegations of some Muslim scholars that the American courts are applying the Islamic law, when the American court arrived at a similar result to that mandated by the Islamic law. Hence, following the steps the courts took in arriving to those results allowed me to explain to the readers the similar results, the different legal methodologies taken by the American courts, and in some instances I was able to explain what would happen if the American courts followed the Islamic law methodologies. In turn this specific investigation dictated my conclusion that

the American courts do not apply Islamic law, but ostensibly use the American legal system methodologies and purely apply the substantive American law.

In the chapters that follow, I will apply this blueprint for analysis to each of the six sets of cases identified in Table 1; marriage, dowry, child custody, legitimacy and inheritance, *Halal* diet for prisoners, and religious discrimination. Some of the cases analyzed have been discussed in the literature on this topic by other scholars, and I engage those discussions after presenting my data analysis. In all of the chapters, I will discuss and compare how California courts adjudicated the cases, and then reflect on the social implications of those decisions.

Chapter 3

Muslim Marriages in California Courts: Two Cases

In this chapter I will inquire into two selected cases of the California State Courts. Each case encountered a different kind of Islamic marriage.

- First case, People v. Hassan, adjudicated Hassan's claim of his Sunni marriage validity;
- Second case, Fereshteh v. Speros adjudicated Fereshtech's claim of her Shite marriage validity.

Marriage is governed by the social and religious norms of every society. The principles of marriage differ from one society to the next, and from one religion to the next. Islam is known to have a significant amount of regional and cultural variations between its population of 1.8 billion worldwide and 3.3 million in the United States. The reason for those variations is that Islamic law is comprised of different schools of law '*madhhabs'* which often leads to vast differences in interpretation. The interpretation of the law that an official might use to make a marriage contract may differ based on several factors, including but not limited to regional, cultural, ethnic, and ideological differences (Thompson and Yunus 2007, 370). With immigration of people around the globe, these differences give one marriage that was officiated in a religion-based-community a different view to that officiated in a secular-based-society.

In this chapter I will analyze the two marriages, one is based on the principles of Sunni schools of law and the other is based on the principles of Shite School of Law. The analysis will take into consideration the validity of the marriages from these two viewpoint, and the interpretation of the American judges relative to each of them. However, these cases are complex, because they involve Muslims marrying non-

Muslims, and thus create situations of cross-cultural misunderstanding and conflicting rules of jurisprudence.

Elements of Different Marriages According to Sunni and Shite

The Islamic marriage contract has dual sides; it can be seen as a civil contractual agreement and, according to traditional Islamic jurisprudence, as a sacred and sacramental covenant[1]. Islamic law recognizes several forms of the marriage contract. The most widespread form of marriage in the Sunni sect as well in the Shiite sect is called the permanent marriage '*nikah*' (Al-Habri 2005).

There are four essential common elements between the Sunni and Shite marriages: (1) the bride and groom must be of capacity to enter into a marriage contract. (2) Offer by the man to a woman to duly wed '*ijab*,' (3) Acceptance by an adult mature woman to be married '*qubul'*, or her guardian '*wali*' if she is virgin '*bikr',* and (4) the payment of the dowry *mahr* by the groom to the bride or her guardian. However, the Sunni and Shite marriages differ in their additional elements.

The Sunni Marriage

Sunni marriage requires two additional elements, (1) the acceptance of the woman's guardian *wali* of the groom's marriage proposal, and (2) presence of the witnesses who are of good character or publicizing the marriage in lieu of the presence of the witnesses.

Secret marriage *'urfi* 'is a type of Sunni marriage that is conducted in secret and without any publicity, but it is only valid if it meets additional elements such as the guardian '*wali*' is involved if the women is virgin '*bikr'*, and the marriage is conducted in

[1] Quran 4: 21

the presence of two witnesses. This type of marriage is not registered civilly or religiously as it is kept secret.

Traveler's marriage *'misyar'* is a Sunni marriage that is close in kin to the Shiite temporary marriage '*muta'*. In traveler's marriage a Muslim male who is traveling can marry for a temporary period of time without dowry *mahr*, without supporting the wife financially, without living with the wife, but they only see each other in sporadic visitations. This type of marriage does not have a fixed duration at which time the marriage would end.

The Shiite Marriage

The Shiite temporary marriage contract '*muta'* has two additional requirements: (1) A specific duration of time and (2) negotiated dowry to be paid. The *muta* marriage can be performed by a mosque leader imam, or by the parties themselves; however, the majority of *muta* marriages are done privately.[2] The temporary marriage contract can have any period of time even if it is one day. However, the temporary contract will be rendered void if the groom does not pay the dowry *mahr* to the bride (Nasir 2009, 56). In the case of omitted duration of time in the temporary marriage, it is converted to be a permanent marriage (Nasir 2009, 74). The temporary marriage is terminated by the lapse of its specified time; hence, no divorce is needed in the temporary marriages. The husband is able to end the temporary marriage early, but he must pay the entire dowry (Nasir 2009, 74). Additionally, all children born to a temporary marriage are legitimate and allowed to inherit from both parents. In temporary marriage, the wife is not entitled to maintenance unless it is specified in the contract.[3]

[2] https://www.academia.edu/17917762/Muta (Utsav Bhagat, Mut'a Marriages – Fmaily Law I, academia.edu, 2015, page 8) (accessed May 2017)

[3] http://humanhandstogether.com/library/Muslim%20Law.pdf at page 18. (accessed May 2017)

Temporary marriage permits a man to marry as many women as he desires, while he can be permanently married to a maximum of four wives. In contrast women can only marry temporarily to one Muslim man at a time, with a waiting period of two-menstrual cycles before she can marry again after it is terminated. The rationale behind the waiting period is to identify the paternity of any child resulting from the relationship.

It should be noted that, the majority of Sunni jurists reject the authenticity of the Shiite *muta* marriage. However, a few of the Sunni Hanafi School of Law believe in its genuineness, but ultimately it results in permanent marriage (Nasir 2009, 74).

Validity of the Two Marriages: Sharia and CA Court Perspectives

With this overview of the different types of Islamic marriages along with their elements, I will turn to the two California cases that adjudicated the validity of Islamic marriage. First, I will analyze the validity of the two cases from the *Sharia* perspective, and second, I will examine the California Courts treatment of the two types of *Sharia* marriages and if the court interpreted, applied, or considered the Islamic law in their analyses.

Case #1 Hassan—Sunni Marriage

Although the facts in Hassan's case, (see Table 2) give the reader a basic indication of the primary elements of any Sunni marriage; the mutual agreement of an offer and acceptance *Ijab* and *Qubul* by the bride and the groom, the required capacity of the bride and groom[4], and the assumption of the groom paying a dowry '*mahr*' to the bride.

[4] http://humanhandstogether.com/library/Muslim%20Law.pdf at page 16 (accessed May 2017)

Table 2: Overview of Two Contested "*Sharia* Marriage" Cases

Marriage Application	**Hassan Case** People v. Hassan	**Fereshteh Case** Fereshteh v. Speros
Facts	DA charged Hassan with fraud and a forged Islamic marriage certificate in support of his immigration case. Hassan asserted that he and Deleon were living together as husband and wife according to Islamic law, though they did not live in the same house. He introduced her as his wife and he believed they were married before God. In response to the DA's charge, he arranged an American marriage, and moved in with Deleon.	Fereshteh filed for divorce and spousal support, after Speros left her to marry another woman. She asserted that she and Speros performed a private Islamic "*Muta"* marriage ceremony in her LA apartment. Speros assured Fereshteh, and she believed that the private Islamic "*Muta*" marriage was binding in America. Fereshteh was unfamiliar with the requirements of California marriage law. When she filed for divorce, Speros contested the validity of the marriage.
CA Law	**Section 500: Marriage by cohabitation**: "Living together as husband and wife, is required for a valid confidential marriage" **Section 500:** "When two unmarried people, not minors, have been living together as spouses, they may be married pursuant to this chapter by a person authorized to solemnize a marriage under Chapter 1 (commencing with Section 400) of Part 3."	**Section 4452: Good Faith/Putative Spouse** "Whenever a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall declare the party or parties to have the status of a putative spouse …" If the party is declared to be putative spouse, will be entitled to spousal support.
Islamic Law	**Sunni Marriage Law** Sunni marriage requires an offer, acceptance of the woman or her guardian *wali*, signing the contract before two witnesses accompany by paying the *mahr* dowry, and publicizing the marriage.	**Shite Marriage Law** *Shite Muta* marriage requires an offer, acceptance of the woman to a certain period accompany by paying the *mahr* dowry. There is no requirement for a guardian (*wali*), witnesses, or publicizing of the marriage.
Court Decision	**The court held**: We reject Hassan's argument based on Islamic law that he needs not to have been cohabiting in order to be living together as husband and wife to validate the marriage in support of his immigration case.	**The court held**: "The woman's belief that private "*Muta*" marriage ceremony conformed to precepts of Islamic faith was insufficient to warrant relief under the Putative spouse doctrine.

Although some jurists see the *mahr* as merely a token of respect for the women and it is not absolutely essential to the validity of the marriage.[5] The case is silent concerning the presence of the required two male witnesses and the consent of the

[5] http://ijsard.org/wp-content/uploads/2016/11/Madhumita-Acharjee-Fakhrul-Islam-Choudury-4ijsard-volume-2-issue-2.pdf at page 31. (accessed May 2017)

guardian '*wali',* but it does give us some indirect facts that can supplement those missing elements.

First: Although there is no mention of whether Deleon and Hassan's marriage was conducted in the presence of two male witnesses, the fact indicated that Hassan introduced Deleon as his wife, (see Table 2) (Hassan 318). The Quran is silent on the issue of witnesses for a Muslim marriage.[6] In the Maliki School of Law, the presence of the witnesses is recommended but not mandatory, provided sufficient publicity is given to the marriage.[7] Hence, the introduction by Hassan of Deleon as his wife may supplement the non-presence of the two witnesses or act in lieu of, and satisfy the publicity required to validate the marriage within the Sunni Muslim community.[8]

Second: There is no mention about whether Deleon the bride, who is non-Muslim, was represented by her guardian *wali* or not. The traditional Islamic law based on the Hadith Narrated by al-Tirmidhi mandated that "There can be no marriage without a guardian" (Nasir 1990, 54). However, Azizah Al-Habiri argues that the requirement of the guardian *wali* is only a voluntary option special for a mature woman and suggested that progressive Islamic law permits such a woman to wed herself (Al-Habiri 1997, 11-12, 17) and (Al-Habiri 2000). Also, The Hanafi ruling on this matter is that a woman can enter into a marital contract by herself without consent from a guardian. The Hanafi opinion appears to be as close as possible to the Quran,[9] which also does not stipulate that a woman requires permission from a guardian to get married.[10] In light of that, Deleon is a

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[6] http://www.mwnuk.co.uk/go_files/resources/MWNU%20Marriage_Divorce%20Report_WE2.pdf at page 15. (accessed May 2017)

[7] http://humanhandstogether.com/library/Muslim%20Law.pdf at page 10. (accessed May 2017)

[8] Hadith "Announce marriages." Reported by Imaam Ahmad; classed as Hasan in *Saheeh al-Jaami'*, 1027 also, "Shaykh al-Islam Ibn Taymiyah said: There is no doubt that a marriage which is announced publicly is valid, even if it is not witnessed by two witnesses.

[9] Quran 8:72, 18:44

[10] http://www.mwnuk.co.uk/go_files/resources/MWNU%20Marriage_Divorce%20Report_WEB2.pdf at page 15-16, 25. (accessed May 2017)

non-Muslim mature woman, and as such, is qualified to enter into a marital contract by herself without a guardian. Consequently, if the above elements were present during Hassan and Deleon's ceremony, the marriage would appear to be valid.

Case #2 Fereshteh—Shiite *Muta* Marriage

Similarly, the facts in the Fereshteh case, (see Table 2) only give the reader the statement that, "at her Los Angeles apartment, Fereshteh performed a private marriage ceremony. According to Fereshteh, the marriage conformed to the requirements of a time-specified "*Muta*" marriage, authorized by the Moslem sect of which she was an adherent" (Fereshteh 715). The majority jurists agree that in *muta* marriage, no guardian *wali* is required in the marriage of a discreet female, and the presence of witnesses is not necessary (Mittra 1902, 26). However, for a *muta* marriage contract to be valid, two conditions must be met, the duration of time should be fixed and a dowry should be specified (Nasir 1990, 58). Here, the facts in the case alluded to some of the Shiite necessary elements of the *muta* temporary marriage such as, the mutual agreement of an offer and acceptance *Ijab* and *Qubul* by the bride and the groom, the required capacity of the bride and groom,[11] a time-specified, but one element is missing, the fact is silent as to the payment of a dowry *mahr* to the bride. Thus, if Speros did not pay the dowry *mahr* to Fereshteh, the temporary contract may be rendered void for non-payment of the dowry (Nasir 2009, 56) and (Nasir 1990, 58).

Albeit the payment of the dowry is unknown, some jurists can justify this type of defect,[12] but the chief defect of this *muta* temporary contract is that a Muslim woman is prohibited from marrying a non-Muslim man by the agreement of all schools of law and

[11] http://humanhandstogether.com/library/Muslim%20Law.pdf at page 16. (accessed May 2017)

[12] Some jurists see the *mahr* as merely a token of respect for the women and it is not absolutely essential to the validity of the marriage. http://ijsard.org/wp-content/uploads/2016/11/Madhumita-Acharjee-Fakhrul-Islam-Choudury-4ijsard-volume-2-issue-2.pdf at page 31. (accessed May 2017)

all the jurists. The fact clearly stated that Speros is non-Muslim since he was a "non-practicing member of the Greek Orthodox Church" (Fereshteh 715). The fact stated that, "Fereshteh believed the *muta* ceremony created a valid and binding marriage" (Fereshteh 715), certainly the fact that Speros is a non-Muslim male casts doubt on Fereshteh's good faith belief as to the validity of her Shite marriage.

Therefore, as decreed by the appellate court and as discussed below, the center of Fereshteh's case revolved around the misrepresentation of what she argued as a good faith belief as a putative spouse in order to collect spousal support and get half of Speros' community assets. Additionally, a *muta* wife shall not be entitled to maintenance (Nasir 1990, 59). Hence, even if we assumed that Speros paid the dowry *mahr* and Fereshteh's *muta* marriage was valid, the *muta* marriage will only end at the end of the time-specified without divorce and consequently Fereshteh is not entitled to spousal support or division of Speros community property assets.

California Courts Treatment to the Two Cases

In this section I will discuss the above two cases collectively from the American legal system viewpoint while comparing the differences and pointing to the similarities of the American judges' responses to the Muslim immigrant claims on the validity of their marriages. To determine if an Islamic marriage contract is enforceable in the California court judges look for comparisons with the United States legal principles, while consulting with experts in the *Sharia* field to gather the factual basis that support the validity of the marriage contract.

In both cases, Hassan and Fereshteh argued that their Islamic marriages are valid and therefore they should attain the benefit of being married. Hassan alleged the validity of his Sunni *nikah* or *urfi* marriage with Deleon to support his immigration case and become a permanent resident, while Fereshteh alleged that her Shite *muta* marriage to

Speros was valid and at her divorce she must be awarded spousal support and division of marital properties. Both Hassan and Fereshteh asked the California court to give full faith and credit to marriages that were executed on the soil of the State of California, yet according to Hassan and Fereshteh's 'colorable claims',[13] they were performed under the precepts of the Islamic legal system.

In both cases there were factual/legal questions that the American judges answered based on their legal training and experience after understanding the facts of the cases. Nevertheless, the American judges answered both factual questions purely from the American legal system perspective without regard or inquiry into the Islamic law.

While the Hassan court dealt with the factual/legal meaning of the cohabitation issue for confidential marriage, the Fereshteh court dealt with the factual/legal meaning of the good faith belief for void/voidable marriage, which qualifies the innocent party to the marriage to hold the putative spouse status.

In Hassan, the appellate court argued against his shortcoming in explaining the Islamic meaning of the term "living together," stating "Hassan argues that the parties need not have been cohabiting in order to be "living together as husband and wife." Hassan refers us to no authority supporting this claim, nor have we found any" (Hassan 319).

In Hassan, the court pointed to the Family Code § 500[14] and the codified meaning of "living together" or "cohabitation" while Hassan pointed to the religious meaning of "cohabitation". After his fraud accusation by the DA (see Table 2), Hassan, conducted a second marriage before minister Aguilera, which he called "the American marriage"

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[13] Definition: A plausible legal claim. In other words, a claim strong enough to have a reasonable chance of being valid if the legal basis is generally correct and the facts can be proven in court. The claim need not actually result in a win. https://www.law.cornell.edu/wex/colorable_claim. (accessed May 2017)

[14] Section 500: Marriage by cohabitation:
"When two unmarried people, not minors, have been living together as spouses, they may be married pursuant to this chapter by a person authorized to solemnize a marriage under Chapter 1 (commencing with Section 400) of Part 3."

(Hassan 318). Although minister Aguilera explained to Hassan and Deleon that a confidential marriage requires the parties to be "living together as husband and wife," Hassan understood to the term "living together" from a cultural/religious stance.

The meaning of "living together" was not clearly argued to the appellate court from an Islamic perspective by Hassan as a simple Muslim, nor by his two American attorneys, Brian Lerner and Christopher Reed, who mainly practice Criminal law and were unfamiliar with the rules of Islamic law and were also unable to explain the meaning of "living together" to the appellate court from a Muslim perspective as Hassan understood it and retained a pre-notion about its meaning from a cultural/religious stance.

The Quran explains this misunderstanding. The Quran allows a man to marry four wives,[15] and additionally, he can marry another woman on a temporary *muta* marriage according to the minority of the Sunni Hanafi School of Law.[16] In most cases the man will not live or cohabitate with a temporary *muta* marriage wife, but will have frequent visitations without permanently cohabitating with her. This is the overarching meaning of "living together" especially, in a predominant Shiite culture/religious society and the Sunni minority of the Hanafi School of Law.[17]

Dialogue Between the Two Legal Systems

The dialogue between the two legal systems was as follows: Hassan understood the term "cohabitation" as "there is no indication that the term 'living together as husband

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[15] And if you fear that you will not deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or those your right hand possesses. That is more suitable that you may not incline [to injustice]. *4:3*
وإن خفتم ألا تقسطوا في اليتمى فأنكحوا ما طاب لكم من النساء مثنى وثلث وربع فإن خفتم ألا تعدلوا فوحدة أو ما ملكت أيمانكم ذلك أدى ألا تعولوا

[16] See (Nasir 2009, 74) "a few of the Hanafi School of Law believe in its genuineness, but ultimately it results in permanent marriage".

[17] 319 B. Appellant Hassan's contentions "there is no indication that the term 'living together as husband and wife' requires that both the unmarried man and the unmarried woman be living together under the same roof." He argues that he and Deleon were married in a religious ceremony … and believed they were married in the "eyes of God," (Hassan 2008).

and wife' requires that both the unmarried man and the unmarried woman be living together under the same roof." Hassan further argues that he and Deleon were married in a religious ceremony and believed they were married in the "eyes of God" (Hassan 319). However, the California Court of Appeal judge cited his understanding by stating: "'we construe the language of the statute according to its plain meaning', the words "living together" are unambiguous. Their plain common sense meaning is cohabitating. "The settled meaning of cohabitation is "'living together as husband and wife.'" Further, the court supported its understanding by stating: "If the Legislature had intended the term "living together as husband and wife" to mean that the parties did not have to live in the same dwelling together, it could have said so."

This rebuttal by the judge of the appellate court portrays the epitome of the clash between the American legal system and the Islamic legal system. Certainly, Hassan was not disputing the American legal system meaning of "cohabitation", he was just asserting his understanding of its meaning according to the Islamic law. Likewise, the California appellate court was clearly expounding on the American legal system and did not reference or debate with the *Sharia* arguments.

In Fereshteh, the trial court held that, "Fereshteh had the status of a putative spouse" (Fereshteh 714). The trial court based its holding on the finding that "On March 14, 1982, in Los Angeles, California, Fereshteh performed a private religious marriage ceremony between herself and Speros which conformed to the requirements of a Muslim *Mota* marriage" (Fereshtech 316). In essence the trial court believed in the credibility of Fereshtech's statement on her behalf that "she believed in good faith that a valid marriage existed as a result of the ceremony. The trial court concluded that Fereshteh has more credibility than Speros because Speros admitted to the court that he expressly consented to the marriage and assured Fereshtech that the private Islamic ceremony they conducted confirmed and is equivalent to any valid California marriage (Fereshteh 316). The trial

court evaluated these circumstances in the light that Fereshteh was newcomer to the United State as she was a visiting professor at the Center for Near Eastern Studies at UCLA (Fereshteh 715), but Speros had lived in California much longer.

In reversing Fereshteh trial court's decision, the appellate court analyzed the above facts in a more rigorous scrutiny in light of the Civil Code § 4452 [18] requirements, meanings, and interpretations. The center of the appellate court's finding fell on the factual/legal meaning of the "good faith belief" for a void/voidable marriage, which qualifies the innocent spouse to hold a putative status. The appellate court further pointed that, the application of the Civil Code § 4452 in fact required an objective good faith believe in a lawful California marriage not an Islamic marriage. Adapting this interpretation, the appellate court held: "In the instant case, the purported marriage was plainly defective and the requisite state of mind must be a good faith belief in a valid and lawful California marriage not an Islamic *muta* marriage … Albeit Fereshteh's sincerity, her belief was subjectively unreasonable and therefore not in good faith" (Fereshteh 721).

Scrutinizing the trial and appellate court's language does not denote that the trial or the appellate court inquired into the Islamic law. The center analysis from both courts targets the interpretation of Civil Code § 4452 without regard to any Islamic jurisprudence doctrine of *muta* temporary marriage. In short, the Fereshteh court only applied the California Family Law. In awarding Fereshteh the status of putative spouse, the trial court implicitly established its holding on that Fereshteh relied on Speros' assuring her that their private ceremony is a valid California marriage (Fereshteh 715), thus the trial court focus on Fereshteh's good faith beliefs in a lawful California marriage.

[18] Civil Code § 4452 "Whenever a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall declare the party or parties to have the status of a putative spouse, and, if the division of property is in issue, shall divide, in accordance with Section 4800, that property acquired during the union which would have been community property or quasi-community property if the union had not been void or voidable. The property shall be termed `quasi-marital property'."

Likewise, the appellate court explicitly stated that the trial court erred in awarding Fereshteh the status of putative spouse (Fereshteh 719). The Appellate court further argued:

> While Fereshteh needed a sincere objective good faith beliefs, she nonetheless had subjective good faith beliefs that she had a valid California marriage. Moreover, Fereshteh's subjective good faith belief focused on an invalid and non-lawful California marriage, which is required by California Civil Code § 4452 (Fereshteh 720).

Thus, in overruling the trial court decision, the appellate court pointed to two requirements to upheld the putative spouse status:

- The good faith beliefs must be a faith in a lawful California marriage that satisfies the Civil Code § 4452.
- The interpretation of good faith beliefs described in § 4452 is found when the marriage indicia causes a reasonable person to sincerely believe in the existence of such marriage (Fereshteh 721).

Based on the above analysis, both courts, the trial and the appellate, only inquire into the California Family Law.

Karen Lugo argues that the "Trial court accepted a Shiite ceremony that signifies 'temporary marriage' as valid and considered her a putative spouse for purposes of spousal support and property rights" (Lugo 2012, 82, 88-89). As indicted above, the trial court focused on the interpretation of § 4452 regardless of whether Fereshteh had a good faith belief in an Islamic marriage or in a California marriage or not (Fereshteh 724).[19] This finding was supported by the appellate court basing its reversal on the lack of any evidence that any lawful marriage was validly formed (Fereshteh 720). The Trial court along with the appellate court focused on one issue, namely that Fereshteh indeed formulated the objective mental status that she reasonably believed the marriage she

[19] "Our overview discloses the doctrine requires a belief a marriage is lawful within the meaning of the Civil Code" (Fereshteh 724).

attempted to enter was a void/voidable California marriage within the meaning of the Civil Code (Fereshteh 723).

Conclusion and Social Implications

Collectively, in both of these cases, the state of mind of Hassan/Deleon [20] and the state of mind of Fereshteh/Speros [21] were at issue. In both cases, the judges sought the objective state of mind to be the reasonable consideration. In analyzing the facts, both judges utilized the American legal methodology examining whether Hassan/Deleon and Fereshteh/Speros had an objective state of mind or subjective state of mind. Both issues of the two cases were cohabitation and putative spouse status. While the American law requires an objective state of mind over those issues in order to be admissible valid evidence for the issue of the marriage's validity, the Islamic law looks at both issues from the subjective state of mind of the parties involved. Hassan believed that cohabitation meant to marry in the eyes of God without living with Deleon and that alone is his indigenous beliefs in this type of cohabitation or living in 'separate houses' in his mind counted as a valid marriage that would allow him to become a permanent residence. However, Fereshteh believed that her private *muta* marriage ceremony is equivalently valid to any American marriage as she was assured by Speros, and hence, even if it was void or voidable, it would give her the status of putative spouse and allows her to receive spousal support and division of the community property.

[20] "It is not sufficient for the couple to believe themselves to have been married before God prior to the confidential marriage" (Hassan 315), and "Before that ceremony, he thought he and Deleon were living together as husband and wife, though they did not live in the same house. … She nonetheless believed that they were living together after October 4, 2000, but in different houses." (Hassan 318).

[21] "A proper assertion of putative spouse status must rest on facts that would cause a reasonable person to harbor a good faith belief in the existence of a valid marriage" (Fereshteh 721).

California Courts apply only California Process and Legal Methodology

Examining the research Sub-problem 1; What are the differences between the treatments of *Sharia* cases adjudicated by California judges in comparison to the treatments that would be followed if the presiding judge were a Muslim judge?

> Proposition 1: The foundational principle of separation of church and state compels the California courts to treat *Sharia* cases from a secular perspective according to the American law.

The truth of the matter is, in both cases the California appellate courts explored the parties' state of mind as evidence, but did not take the state of mind of the parties' subjective beliefs into consideration while reaching their decisions. To the contrary, the subjective believe of Hassan and Fereshteh were nothing but refutable evidence by the courts' analyses. Notwithstanding the subjective beliefs of Hassan and Fereshteh, which touched on and inquired into two different Islamic law doctrines, the courts did not inquire into any Islamic law doctrine or use any Islamic methodology to arrive at their decisions, but analyzed both cases from the lens of the American legal system delving only into the California Family Law in the light of the facts presented to them. Indeed, the laws applied to the facts presented by the parties were purely the California Family Law.

The California courts reach their decisions using the California process and legal methodology. Examining both decisions, I suggest that that neither decision would have been reached if the judges applied the *Sharia*. If the appellate court had sustained Hassan's subjective state of mind that cohabitation does not mean to live in the same house with Deleon, he would not have been convicted of fraud, but would have been able to obtain his permanent residency via his colorable claim of marriage. Likewise, if the appellate court in Fereshteh had sustained her subjective state of mind as having "good faith beliefs", which was built on a voidable private *muta* marriage ceremony that is equal to a voidable California marriage; she would have received spousal support and

half of Speros' community property assets via her voidable Islamic marriage *qabl ll-ebtal*. Indeed as Abed Awad stated: "our legal system is well equipped to balance conflicts between church and state" (Awad 2012)[22]. Likewise, the California Appellate Courts are long trained under the First Amendment to protect the United States Constitution from any religion intrusion and protect any religion from the coercion of the government.

Muslim-American Diaspora and Islamic Marriage Jurisprudence

Examining the research Sub-problem 2 Propositions 3 and 4, this chapter points us to an essential issue of how Muslim immigrants look on the American society's dictates if they are enjoying all the benefits and protection the American legal system can offer them.

- Proposition 3: Most of the Muslims litigants and their community are not fully satisfied concerning the *Sharia* cases that were adjudicated by the California courts.
- Proposition 4: Most of the secular treatments of the California courts of the *Sharia* cases constitute obstacles for Muslim litigants to keep the *Sharia* traditions in the United States.

A Muslim immigrant who gets married in the United States most probably needs to have two wedding ceremonies; one that follows the *Sharia* principles and another that solemnizes the marriage civilly. Muslims ought to obey the law of the land wherever they live, whether that land is governed by Muslims or non-Muslims. This is by the command of the Quran and Hadith.[23] However, some Muslims ignore these commands and only

[22] http://www.thenation.com/article/168378/true-story-sharia-american-courts (accessed May 2017)

[23] O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result. Quran 4: 59 – Hadith: Sayyiduna Abd Allah ibn Umar (Allah be pleased with him) narrates that the Messenger of Allah (Allah bless him and give him peace) said: "It is necessary upon a Muslim to listen to and obey the ruler, as long as one is not ordered to carry out a sin. If he is commanded to commit a sin, then there is no adherence and obedience" (Sahih al-Bukhari, no. 2796 and Sunan Tirmidhi). http://www.daruliftaa.com/node/5852 (accessed May 2017)

follow an Islamic marriage without seeking any civil marriage to prove their marital status and any rights that result from the marriage contract.

Julie Macfarlane conducted research among 212 Muslim leaders, individuals who were divorced, and social workers where she concluded that 95 percent of the Muslims who were married had two types of marriage contracts, an Islamic contract and a civil contract. However, she also discovered that 3 percent neglected to obtain a civil marriage to their detriment, particularly if the marriage ends in divorce (Macfarlane 2010). On the opposite end of the spectrum, some Muslims in United States ignore the Islamic marriage altogether and only pursue the American civil marriage (Quraishi and Syeed-Miller 2004).

Muslim immigrants in the United States have dual-alliance, one to Allah and the obedience of Islamic law, while the other is to obey the laws of the land. Respecting and following the percepts of the California laws are not counted as disobedience against Allah, but to the contrary are commended by the Quran and Hadith. The example of the above two cases in Hassan and Feresshteh is a great illustration of the divine text's command to obey the law of the land because it benefits the Muslim community. Applying western law that aimed to the general welfare of all people is not something aimed to corrupt Muslims' beliefs in their diaspora, but is aimed to protect all people including the Muslim immigrants who obey that law.

Muslim family law has always represented the very heart of the *Sharia*, for it is this part of the law that is regarded by the Muslims as entering into the very core of their religion. Hence, it is no surprise that marriage in Islam is often considered a religious function. Nonetheless, the *Sharia* does not prescribe any particular form of marriage ceremony (Khadduri 1978, 213).

Marriage among Muslims is not only a sacred contract, but also a civil contract; and while it is solemnized generally with a recitation of the Quran, the Islamic law does

not clearly suggest any specific formula to the marriage. Although there are many types of Islamic marriage, there is one common ground to all of them and that rests on the spiritual in the heart of the Muslims couple. It is the inward faith that the marriage is founded on the covenant between the Muslim spouses toward each other and toward Allah. However, in a societal sense the marriage is also a civil contract that must yield to the human law that governs the society.

Today's societies are not small villages where marriages will be noted without declaration. Hence, the validity and operation of marriages in such environments depend upon the civil declaration of such marriage to all people. Using the civil method of declaration does not defeat the sacramental attribute of the Islamic marriage but augments its validity. In Hassan's case he chose to only take the *Sharia* way of marriage while living in the American society. Hassan sought the benefits of being married without using the civil declaration. His action or lack thereof disrupted his sacramental sense of his Islamic marriage. Had he had a civil declaration which he called an "American marriage", he would have preserved his sacred Islamic marriage and gained the benefits that comes with obeying the law of the land.

In the absence of an Islamic tribunal, Muslim immigrants have no choice but to seek justice from the American legal system. To the surprise of many, the American legal system does not function under the precepts of the *Sharia* law. The American judges are prohibited from applying any religious law in obedience to the mandates of the First Amendment.

Despite this truth, there are thousands of Muslims who are married without obtaining any marriage license. Abed Awad argues that many men intentionally marry without a marriage license to circumvent the applicability of … divorce and equitable-distribution law (Awad 2006). Further, Lugo asserts that, "unions not in compliance with the registration and solemnization standards are then on notice … that the judges must

defer to common-law (Lugo 2012, 81). In response to Lugo's argument, Awad contends that a marriage entered into without a license would not re-institute common-law marriage, but merely would be voidable and the party seeking to validate the marriage would have the significant burden to cure the absence of the license (Awad 2006).

Consequently, it is not a deviation from the Islamic faith for Muslims to declare their Islamic marriages by yielding to the civil procedures where they live and ultimately seek to obtain the benefits of such society. Obtaining an American marriage license is not disapproved or abhorred *makruh* or *haram,* but it is an act that is encouraged since obtaining a civil marriage license will preserve and confirm the Muslim's religious marriage where they live.

The analyses of Hassan and Fereshteh cases make it clear that the American courts are not trained to apply the divine law, but the civil code. Muslim immigrants will do well in America to abide by the wisdom of the divine text for all Muslims to obey the law of the land by pursing both kind of marriages, the religious and civil ones in order to enjoy all the benefits and the protections the American legal system will offer.

Chapter 4

Muslim Dowry '*Mahr*' in CA Courts: Three Cases

In this chapter I aim to inquire into three selected cases of the California State Courts regarding the issue of the Islamic dowry (*mahr*). The principles of Islamic dower *mahr* differ from one Islamic School of Law to the other, since each school of law requires different elements in order to consider a given *mahr* to be valid. Consequently, the definition and purpose of the *mahr* vary, based on the school of law adhered to by the parties of the marriage.

The first case, the re-marriage of Dajani, the California court refused to enforce the written dowry *mahr* clause holding that it violates the public policy since *mahr* agreement promotes divorce and allows the wife to obtain monetary award upon divorce. Consequently, the Dajani court examine the Islamic *mahr* agreement under the California Family Law in according with the principles of California Prenuptial Law, but invalidated it based on violation of the public policy.

The second case, the re-marriage of Shaban, the California court refused to enforce the unwritten agreement concerning the dowry *mahr,* which the husband claimed is comparable to an American Prenuptial Agreement, since it violates the principles of the California Contract Law that states any marital promise must be in writing to be enforced according to the Statute of Frauds. Consequently, the Shaban court examined the *mahr* agreement under the California Contract Law.

The third case, the re-marriage of Turfe, the husband contested the validity of the marriage based on the defective element of the *mahr,* and as he alleged, the wife entered into the marriage with fraudulent intent to induce the husband to marry her. The California court concluded that the *mahr* agreement did not satisfy the statutory

requirements for a premarital agreement. The Appellate court affirmed the decision pointing to the similarity with the Shaban case, stated that the *mahr* agreement was unenforceable as a premarital agreement.

In this chapter I will analyze these three different *mahr* cases, examining what *Sharia* School of Law each litigant adopted or argued to achieve the desired judgment. The analysis will take into consideration the validity of the *mahr* from each viewpoint, the Sunni schools of law, the Shiite schools of law, and the interpretation of the American judges relative to each of them.

General Overview: Mahr in the Sunni and Shiite Sects

Although *mahr* can vary from a symbolic to a substantial value or large amount of money, Muslim scholars unanimously agree on the obligatory nature of the *mahr* on the husband unless the wife freely waives her right to it. The husband's obligation survives his death, and hence, if the husband dies without paying the *mahr,* it is a debt against his estate and takes a priority to all other debts secured and unsecured attached to all his assets. This overall obligation on the husband is the common denominator between the Islamic schools of law, but they differ regarding the *mahr's* definition and purpose.

***Mahr* According to the Sunni Law**

The Hanafi School defines *mahr* as the amount of money given by the husband to his future wife in return for her staying home. Malikis and Shafi'is, view *mahr* as part of an exchange due to the prospective wife in return for sexual enjoyment. The Hanbalis, on the other hand, define *mahr* as the money paid by the husband for the purpose of marriage *nikah*.

Sunni Law according to the Hanafi, Shafi'is, and Hanbalis Schools mandate that a minimum of ten *dirahms*—equivalent to ten US dollars—be given to the wife as her owed right and it is outright. But validity or existence of the *mahr* is not necessary to the

validity of the marriage, hence the *mahr* is an obligation and not a condition to validate the marriage. Further, the Hanafi School of Law maintains that if the wife initiated the divorce, she loses her right to the *mahr*.

However, the Malikis School only considers the minimum of three *dirahms*—equivalent to three US dollars—and holds *mahr* as essential to the validity of the marriage contract. According to the Malikis, the *mahr* as a proper dower has no maximum limit; nonetheless, unlike the Hanafis, the Malikis advocate that the wife gets the *mahr* from her husband upon divorce or death regardless if she initiated the divorce or not, since it is hers outright and is part of the exchange for the marriage contract *nikah.*[1]

If dower was not decided or marriage was done on condition that no dower will be paid, a comparable dower *mahr al-mithāl* will be paid to the wife according to the parties' status in the community. The dower shall be payable if the marriage is dissolved by divorce or death, irrespective of whether the marriage was consummated or not. If a marriage agreement is missing the dowry clause, the marriage is void. In most Islamic practice, *mahr* has two parts, prompt *muqaddam* and deferred *mu'akhar*. The prompt *mahr* is usually symbolic, but the deferred *mahr* is mostly a large amount of money or property to deter the husband from exercising his unilateral Islamic right to divorce his wife.

Mahr According to the Shiite Law

Shiite schools of law defines *mahr* as part of an exchange due to the wife in return for the contractual *nikah* and sexual enjoyment. Shite law does not mandate minimums

1 "And when you divorce women and they have [nearly] fulfilled their term, either retain them according to acceptable terms or release them according to acceptable terms, and do not keep them, intending harm, to transgress [against them]. And whoever does that has certainly wronged himself. And do not take the verses of Allah in jest. And remember the favor of Allah upon you and what has been revealed to you of the Book and wisdom by which He instructs you. And fear Allah and know that Allah is Knowing of all things" (Quran, Surat Al-Baqarah 2:231).
وإذا طلقتم النساء فبلغن أجلهن فأمسكوهن بمعروف أو سرحوهن بمعروف ولا تمسكوهن ضرارا لتعتدوا ومن يفعل ذلك فقد ظلم نفسه ولا تتخذوا إيت الله هزوا واذكروا نعمت الله عليكم وما أنزل عليكم من الكتب والحكمة يعظكم به واتقوا الله واعلموا أن الله بكل شيء عليم

on *mahr* obligation, likewise there is no maximum cap on the amount of *mahr*. The obligation to pay the *mahr* only arises if the marriage was truly consummated. Otherwise, there is no obligation to pay the *mahr*. Unlike the Sunni law, Shiite law considers the whole amount of *mahr* as prompt. Further, in the case of the temporary marriage contract *muta*, the marriage will be rendered void if the groom does not pay the dowry *mahr* to the bride (Nasir 2009, 56) [2].

With this overview of the different types of Islamic definitions of *mahr*, along with their purposes, I will turn to the three California cases that adjudicated the validity and enforceability of Islamic *mahr*. First, I will analyze the validity/enforceability of the three cases from the *Sharia* perspective, and second, I will examine the California Courts treatment to the *mahr* and if the court interpreted, applied, or considered the Islamic law in their analyses.

Validity of Mahr: Sharia and CA Court Perspective for Three Cases

In the three cases the Muslims litigants present the dowry or *mahr* as the center of their cases (see summary in Table 3).

[2] https://www.al-islam.org/rights-women-islam-ayatullah-murtadha-mutahhari/part-eight-dowry-and-maintenance#f_3acd239a_1 (accessed October 2015)

Table 3: Overview of Three *Sharia Mahr* 'dowry' Cases

***Mahr* Application**	***In re Marriage of Dajani***	***In re* Marriage of Shaban**	***In re* Marriage of Turfe**
Facts	In a marital dissolution the couple pointed to the dowry agreement conducted in Jordan under which wife receives *mahr* at dissolution, death of husband. The husband contends that the wife is not entitled to *mahr* since she initiated the divorce, the wife countered that the *mahr* is hers outright and she is entitled to it regardless of who initiated the divorce. The trial court finds for the husband. Wife appealed. Judge Crosby held that the agreement was void as against public policy.	In a marital dissolution the husband sought to introduce a document, claiming a prenuptial agreement drafted as part of Egyptian marriage. The trial court denied a prenuptial agreement and applied state community property law to the parties' earnings and acquisitions. In appeal judge Moore held that: phrases "in Accordance with his Almighty God's Holy Book and the Rules of his Prophet" bore too attenuated a relationship to any terms or conditions of a prenuptial agreement to satisfy the statute of frauds.	In annulment case husband argued *mahr* is essential to an Islamic marriage, contending wife defrauded him, falsely promising a copy of the Quran at divorce as her deferred *mahr* based on Islamic law. Parties disagree as to whether the *mahr* agreement precluded wife from obtaining any other property in a divorce. Expert testimony at trial in conflict with proper interpretation of the *mahr* agreement—the maximum or the minimum and a symbolic amount the wife can receive at divorce.
CA Law	**Public Policy**: Prenuptial agreements which facilitate divorce or separation by providing for a settlement only in the event of such an occurrence are void as against public policy.	**Statute of Frauds:** To satisfy the statute of frauds applicable to prenuptial agreements, writing must evidence with certainty the terms of the prenuptial agreement. **CA Family § 1611:** ["A premarital agreement shall be in writing and signed by both parties"].	**CA Family § 1600 et seq.:** **(a)** "Premarital agreement" means an agreement between prospective spouses made in contemplation of marriage and effective upon marriage. **(b)** "Property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.
Islamic Law	**Sunni *Mahr* Law** Hanafi, Shafi'i, and Hanbali schools set a minimum (10 *Dirhams*), Maliki a minimum (3 *Dirahms*) wife outright, usually split to prompt and deferred. Maliki states: No marriage without valid *mahr*. Hanafi: *mahr* is lost if wife files for divorce.	**Sunni *Mahr* Law** Hanafi, Shafi'i, and Hanbali schools minimum (10 *Dirahms*), Maliki minimum (3 *Dirahms*) wife outright, usually split to prompt and deferred. Maliki states: No marriage without valid *mahr*. Hanafi: *mahr* is lost if wife files for divorce.	**Shiite *Mahr* Law** Shia law has no minimum or maximum *mahr* amount. Obligation to pay *mahr* only arises if marriage is truly consummated. The whole *mahr* is paid as prompt without regard to divorce to eliminate restraint on the husband's right to divorce.

Court Decision	**The trial court**: Found valid *mahr* agreement concluded, the wife forfeited her right to receive the *mahr* by initiating the divorce. The Appellate court reversed stating: The *mahr* is void as against public policy.	**The Trial court**: No prenuptial agreement, apply CA community property law to parties' assets. Appellate court: The terms, conditions of alleged prenuptial agreement *mahr* didn't satisfy the statute of frauds.	**The Trial court**: *Mahr* agreement did not satisfy the statutory requirements for a premarital agreement. Appellate: Pointed to (Shaban) similarity, stated that *mahr* unenforceable as a premarital agreement.

The *Sharia* Argument: Dajani Case

In the Dajani's case, the dowry was a written clause and part of the Islamic marriage for the Jordanian couple. The wife attested that the *mahr* was contracted according to the custom, where she received a prompt token dowry of one *dinar* and the deferred *mahr* was in the amount of 3,000 Jordanian *dinars*, plus an additional 2,000 *dinars* in cash or household furniture. She further introduced a testimony of an Egyptian lawyer as her expert witness who asserted their belonging to a minority sect of the Jordanian Maliki School of Law, which maintains that the deferred *mahr* is due to the wife regardless of who initiated the dissolution proceedings (Dajani 1390).

However, the husband's expert witness who was an Imam asserted the majority position of the Jordanian Hanafis School of Law that, although the *mahr* belongs to the wife outright, nevertheless she forfeited her right to the dowry when she initiated the dissolution proceedings (Dajani 1390). Despite the disputed positions over the right of the wife to receive the *mahr* if she initiated the divorce, there are enough facts that point the reader to the elements of the *mahr* and that the *mahr* would appear to be valid according to either the Malikis or Hanafis School of Law since the total amount of the *mahr* exceeded the ten US dollars.

The *Sharia* Argument: Shaban Case

In the Shaban case (see Table 3), the marriage was conducted in Egypt. The deferred *mahr* clause was written in a single piece of paper in the Arabic language. The *mahr* refers to as a 500 Egyptian pounds and 25 piasters due from the husband to the

wife's father who was her representative. The Arabic piece of paper states that a token portion of the dowry (the 25 piasters) had already been paid, with the balance due at nearer maturity (divorce or death) to which the husband's lawyer indicated that it is now worth about $30 US dollars (Shaban 866-867). This clause followed by common language found in most Egyptian marriage contracts,

> The above legal marriage has been concluded in accordance with Almighty God's Holy Book and the rules of his Prophet to whom all God's prayers and blessings be, by legal offer and acceptance from the two contracting parties. (Shaban, 867)

The majority of Egyptians follow the Hanafi School of Law, which requires that the wife receive her *mahr,* which is usually measured by the minimum of ten *dirhams* equivalent to ten US dollars. The wife usually receives prompt *mahr,* which is mostly symbolic[3] and at divorce or death the wife will get the deferred *mahr* stated in the contract. As the facts informed the reader, the piece of paper introduced by the husband at trial stated that the wife had already received via her father the token amount of 25 piasters as her prompt *mahr* and the balance of the 500 Egyptian pounds is due at divorce or death. Notwithstanding that the Shaban court concluded that the Arabic piece of paper introduced by the husband was only a marriage contract. The fact clearly revealed that the elements of the Islamic *mahr* (prompt *muqaddam* and deferred *mu'akhar*) according to the Hanafis School of Law existed. Thus, the husband established a valid *mahr* according to the *Sharia* precepts.

The *Sharia* Argument: Turfe Case

In the Turfe case (see Table 3), the issue of the *mahr* was disputed as to the value of the deferred *mahr.* The parties disagreed as to whether the *mahr* agreement precluded the wife from obtaining any other property in the event of a divorce, and the experts'

[3] http://ijsard.org/wp-content/uploads/2016/11/Madhumita-Acharjee-Fakhrul-Islam-Choudury-4ijsard-volume-2-issue-2.pdf at page 31. (accessed October 2015) Some jurists see the *mahr* as merely a token of respect for the women and it is not absolutely essential to the validity of the marriage.

testimonies at trial were in conflict with respect to the proper interpretation of the *mahr* agreement. However, both experts agreed that *mahr* is an essential element to any Islamic marriage and that they will not perform an Islamic wedding absent a *mahr* agreement.

The *mahr* agreement in Turfe case provided the short-term portion or the prompt *mahr* as being five gold coins and the long-term portion or the deferred *mahr* was a copy of the Quran (Turfe 318). The husband contends that, the *mahr* agreement limited the wife's property rights only to the maximum, which is written in the agreement and nothing more. The wife contends that the *mahr* is traditional and figurative and does not limit her property rights; in fact, it is only representing a symbolic minimum amount to what she is entitled to.

Examining the litigants' claims in light of the *Sharia* precepts, it is clear that the husband is advocating the Maliki School of Law position, which mandates, if the marriage agreement is missing or lacking one of the dowry's elements, the marriage is null and void. Here, the husband contends that the element of meeting of the minds between the bride and the bridegroom was defective; he asserted that the wife defrauded him by falsely promising at the time of the marriage to be bound by the "*mahr* agreement" that they entered into in accordance with Islamic law (Turfe 317). It is plausible that the husband was attacking the formation of the *mahr* to escape his obligation to perform on the *mahr* that, in all probability, would be measured according to the California Community Property.

But we must look further to examine the elements that constructed the *mahr* in this case. The *mahr* agreement in Turfe case provided five gold coins as prompt *mahr* and a copy of the Quran for the deferred *mahr* (Turfe 319). According to the Hanafi, Shafi'is, and Hanbalis schools of law, the minimum of (ten *Dirahms*) or ten US dollars must be considered to constitute a valid *mahr*. Further, according to those schools the extent of the *mahr* is not necessary to the validity of the marriage. Indeed, five gold coins exceed

ten US dollars and hence, the amount requirement is met. Furthermore, according to the Maliki School of Law the amount required is three US dollars and the Shiite law does not mandate minimum on *mahr* obligation, likewise, the Malikis do not require a maximum cap on the amount of *mahr*.

Consequently, the *mahr* appears to be valid according to the overall Islamic traditions and both arguments of the husband and the wife were an attempt to achieve their litigation goals to avoid the *mahr* limitation, that is, a copy of the Quran (the wife) or avoid losing half of the Community Property according to California Family Law (the husband).

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California Courts Adjudicating the Three Cases

In this section I will discuss the above three cases collectively from the American legal system viewpoint while comparing the differences and pointing to the similarities of the American judges' responses to the Muslim immigrant claims on the validity of their *mahr*.

To determine if an Islamic *mahr* contract is enforceable in the California court, judges look for a comparable concept within the United States legal principles, while consulting with experts in the *Sharia* field to gather the factual basis that support the validity of the *mahr* and how that may be assimilated into the American legal system. Judges were not bound by an Islamic contract, they examined the facts and the intents of the parties at the time they entered into their contractual agreement, and sought to match

it as close as possible to a comparable American legal theory while adjudicating the litigants' complaints.

In the three cases, Dajani, Shaban, and Turfe, the parties argued that there was an Islamic *mahr* agreement that should control the marital property division at the time of the divorce according to the Islamic law. First, in the Dajani, the wife argued that she entered into the *mahr* and her action initiating the divorce has no bearing on her rights to receive the said deferred dowry. Hence, the California court must honor the said provision, denying that the dowry is an unjust result and against public policy, that is, the Islamic public policy. Second, in the Shaban case, the husband introduced a piece of paper written in Arabic and argued that it is an Islamic dowry equivalent to a prenuptial agreement. He also attempted to introduce *Parol* evidence[4] in the form of an Islamic expert witness' testimony to supplement and explain the language of the paper in order to divide the marital assets according to the Islamic law, but his attempt was rejected by the court. Third, similar to the Shaban case, in Turfe, the husband argued that he entered into a *mahr* agreement that is a valid and enforceable premarital agreement, which would limit the property to which the wife would be entitled in the event of a divorce.

In the three cases there were central factual/legal questions that the American judges answered based on their legal training and experience after understanding the facts of the cases. Nevertheless, the American judges answered the factual questions purely from the American legal system perspective without regard or inquiry into the Islamic law as basis for their decision-making.

[4]The parol evidence rule applies to written contracts to safeguard the terms of the contract. The courts assu me by the parol evidence rule that contracts contain the terms and provisions that the parties specifically i ntended and lack those provisions that the parties did not want. https://legal-dictionary.thefreedictionary.com/Parol+Evidence (accessed October 2015)

Applying Statutory Requirements without Interpreting Islamic Law

In the three cases the Dajani, the Shaban, and the Trufe, the courts dealt with the factual/legal issue of the Islamic *mahr* agreement. The Dajani treated the Islamic *Mahr* as an agreement that rewarded the wife for initiating the divorce and thus was against public policy. The Shaban treated the Islamic *mahr* that was introduced and alleged by the husband to be a prenuptial agreement, as lacking any substantial terms and conditions of a prenuptial agreement and did not satisfy the statute of frauds that requires an agreement in writing. The Turfe treated the Islamic *mahr* that was introduced by the husband as a premarital agreement, which did not satisfy the statutory requirements of a premarital agreement, in that the court pointed to the similarity and unenforceability of the *mahr* in the Shaban case as a premarital agreement.

The Dajani Court Argument

The Dajani[5] court argued against the validity of the *mahr* since the purpose of the agreement is to reward the wife who destroys the sanctity of the marriage. To understand the evidence, the judge heard two competing Islamic views on the method of awarding the Islamic dowry *mahr.* The husband Hanafi's view opposed the wife receiving any dowry since she requested the divorce, while the wife Maliki's view maintained, filing for divorce is irrelevant to her right to receive the dowry, since she receives the dowry regardless who initiated the divorce (Dajani 1389-1390).

The court heard the expert witnesses to prove or disprove the claim of each party, and it was not the judge's intent to interpret the Islamic law. Further, in the Dajani, the expert witnesses' presentations were considered from an American legal system lens.

The court's interpretation indicated that the wife's expert revealed that she entered into an agreement, which by its very terms encouraged her to seek dissolution in order to "benefit" the dowry. Clearly, this is not an Islamic interpretation even if it gives

[5] *In re Marriage of Dajani*, 204 Cal. App. 3d 1387 (1988)

a similar result to the husband Hanafi's view. Indeed, both the Hanafi and the American views would have the same result, but each has different basis of disallowing the dowry. The Hanafi's view would disallow the *mahr* as a forfeiture for the wife who asks for divorce without one of the enumerated causes for divorce according to the Hanafi teaching, while the American view would disallow the *mahr* based on the understanding that giving the wife monetary award in the event of divorce would encourage her to seek the divorce and disrupt the sanctity of marriage.

Undoubtedly, the Dajani court did not interpret *Sharia* as evidenced by the language of the court that showed it did abandon the Islamic law all together. There, the court rejecting the idea of applying foreign dowry in violation of public policy: "foreign dowry agreement which benefited wife who initiated dissolution of marriage facilitated divorce or separation and was thus void as against public policy" (Dajani 1388). To emphasis the basis of its adjudication, the court further stated: "Prenuptial agreements which facilitate divorce or separation by providing for a settlement only in the event of such an occurrence are void as against public policy" (Dajani 1389). The court words in these two quotations were very illumining. In the first quote the court started with "foreign dowry agreement" and in the second quote the court began its sentence with "prenuptial agreements". What the court was doing here was to say that any agreement, foreign or domestic that gives an incentive to destroy the sanctity of the marriage is void as against public policy. Thus, if the agreement is void as against public policy no evidence that rebuts its invalidity that is, (Islamic expert witnesses) would stand or be taken into consideration. Nonetheless, the court must make sense of the evidence provided, and the experience in any courtroom proves that the court would hear the evidence and analyze it before it objects to its admissibility.

The Shaban Court Argument

The Shaban[6] court argued against the validity of the *mahr,* which the husband introduced as comparable to a prenuptial agreement that limits what the wife would be entitled to in the event of divorce. The court there utilized the American Evidence Code to examine if there was in fact a valid prenuptial agreement and concluded that the prenuptial agreement was lacking and attenuated to be valid.

The husband attempted to remedy the deficiency of the prenuptial agreement and introduced *parol* evidence via his Islamic expert witness to explain and supplement the shortage of the prenuptial agreement, however, the court refused to allow the expert witness (Shaban 866) stating,

> An agreement whose only substantive term in any language is that the marriage has been made in accordance with Islamic law is hopelessly uncertain as to its terms and conditions….Had the trial judge allowed the expert to testify, the expert in effect would have written a contract for the parties. (Shaban 866)

The court supported its finding by quoting the translation of the Arabic piece of paper[7] submitted by the husband and stated: "It bore too attenuated a relationship to any actual terms or conditions of a prenuptial agreement to satisfy the statute of frauds" (Shaban 864). Although, the Arabic piece of paper stated the total *mahr* is 500.25 Egyptian pounds, the prompt token *mahr* was 25 piasters, and the deferred *mahr* was due at nearer maturity, divorce, or death (Shaban 867). Regardless of the presence of these purely Islamic elements of the *mahr,* the court invalidated that piece of paper using the American legal methodology to examine the facts presented by the litigants measured by the American prenuptial agreement requirements without delving into the Islamic law.

[6] *In re Marriage of Shaban*, 88 Cal. App. 4th 398 (2001)

[7] "In accordance with his Almighty God's Holy Book and the Rules of his Prophet" and "two parties [having] taken cognizance of the legal implications" (Shaban 866)

The Shaban court applied the California Family law §1611.[8] The Arabic piece of paper however, was signed by the husband and the wife's father as her representative and therefore was invalid to bind the wife as a prenuptial agreement since it lacks her signature. Further, the court also applied the Statute of Frauds requirement that, the writing must evidence with certainty the terms of the agreement. Here, the court did not recognize the terms of the *mahr* as equivalent to the terms of any American prenuptial agreement, but concluded that the piece of Arabic written paper was only a marriage certificate and not a written prenuptial agreement, hence, the court entered a judgment applying the California Community Property law dividing the husband's medical practice worth 3 million US dollars equally between him and his former wife as the community property estate accumulated during the marriage (Shaban 868).

Turfe Court Argument

Similar to the Shaban, the Turfe[9] court argued against the validity of the *mahr* as the secondary issue before the court in order to adjudicate the annulment of the Islamic marriage of Turfe. The husband based his allegation on the fact that his wife defrauded him when she falsely agreed to be bound by the deferred *mahr* as a copy of the Quran. The husband's contention at the trial level was that the *mahr* agreement was enforceable as a premarital agreement limiting the maximum property to be received by the wife in the event of divorce to the item identified therein (Turfe 320).

Judge Egerton heard two competing Islamic views on the method of awarding the Islamic dowry (*mahr*). The husband's expert witness opined that the wife cannot take more than what is prescribed in the *mahr* agreement; however, the wife's expert witness opined an opposite view that the *mahr* is merely symbolic and traditional and does not preclude the wife from getting more property in the event of divorce. Notwithstanding the

[8] §1611: "A premarital agreement shall be in writing and signed by both parties."
[9] In re Marriage of Turfe, 233 Cal. App. 3d 315 (2018)

Islamic expert witnesses' disagreement, they agreed on one thing, namely that they would not perform an Islamic wedding without the existence of a *mahr* clause in the agreement; an Islamic marriage contract missing the *mahr* clause is void[10] (Turfe 319).

The Turfe court disagreed with the Islamic expert witnesses since *mahr* and/or premarital agreement are not an essential requirement to validate a marriage according to American law, in contrast with the Islamic law[11]. Notwithstanding that the annulment of the marriage is the husband's goal, he argued to invalidate the most important Islamic element, that the Islamic marriage is built on the *mahr!* The husband thought by alleging his wife defrauded him by falsifying her intent to be bound by the deferred *mahr* and receive only a copy of the Quran in the event of the divorce, it would sway the American court to invalidate his Islamic marriage.

Examining the Islamic expert witnesses, the court concluded that the *mahr* agreement at hand is similar to the Shaban case[12] and in accordance with Family Code § 1600 et seq.,[13] it did not satisfy the statutory requirements to constitute a valid premarital agreement. Further, in the husband's amended response, he denied the existence of any community property and requested that all his earnings and accumulations during the purported marriage be confirmed as his separate property in accordance with the precepts of Islamic law (Turfe 318). The court responded to that by applying the California

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[10] http://ijsard.org/wp-content/uploads/2016/11/`Madhumita-Acharjee-Fakhrul-Islam-Choudury-4ijsard-volume-2-issue-2.pdf page 31 (accessed October 2015). Some jurists see the *mahr* as merely a token of respect for the women and it is not absolutely essential to the validity of the marriage.

[11] "If accepted, his argument would invalidate the parties' marriage based solely on something required by his religious beliefs but not required under California law. Annulment on such grounds is prohibited by section 420, subdivision (c): "A contract of marriage, if otherwise duly made, shall not be invalidated for want of conformity to the requirements of any religious sect."

[12] In re marriage of Shaban (2001) 88 Cal.App.4th 398, 406–407, 105 Cal.Rptr.2d 863

[13] CA Family § 1600 et seq: (a) "Premarital agreement" means an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage. (b) "Property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.

community property to all the assets and acquisitions of the couple. In doing so the court disregarded any Islamic reasoning the husband's expert may have presented.[14]

However, Judge Egerton stated his reasoning according to the California contract law that the parties simply did not have the meeting of the minds required in any valid contract at the time they entered into the *mahr* agreement [15]. The appellate court also pointed that, "The trial court properly concluded that the parties simply had different understandings with respect to the interpretation of the *mahr* agreement, and that the husband made the assumption that the wife shared his interpretation" (Turfe 323). The assumption of the husband gives the impression that there is a general consensus between the Islamic jurists, however the evidence in the Turfe case showed otherwise, namely that Muslim scholars also disagree on that issue of the *mahr* from one region to another, and from one Islamic School of Law to another.

The Intercultural Legal Dialogue Between the US Courts and the Litigants

Collectively, in the three cases, the dialogue between the two legal systems was as follows: The Muslims litigants resorted to the American courts to enforce a purely Islamic dowry (*mahr*) that is part of their Islamic marriages. The *mahr* signifies the Islamic belief and intention to balance the unilateral right of the Muslim husband to divorce his wife. In most cases *mahr* represent the justice expected to support the weaker party to the marriage/*mahr* agreement, the wife. However, the American courts also aim to accomplish the pursuit of justice for all, but in doing that, the American courts follow the American legal procedures.

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[14] "Imam Qazwini acknowledged that he did not tell wife at the time of the wedding that she would be limited to a copy of the Quran upon divorce, but explained that it is implied, it does not need to be worded that way" (Turfe 322).

[15] "Imam Qazwini, who officiated at the wedding, never told the wife that if there was a divorce, she would get the Quran and [husband] would keep everything else." It was not until the dissolution proceedings that the parties learned of their discordant understandings of the *mahr* agreement" (Turfe 323).

Hence, the Muslims litigants came requesting justice from the American courts, as they understand it, and the American courts granted justice as they understand it. The vivid example of this is found in the Dajani court's transcript. The wife argued that denying the dowry because she initiated the dissolution is unjust and against public policy, while the appellate court agreed with the public policy argument, but not the one urged by the wife (Dajani 1390). Here, each party was talking about the same end result, but each saw it from different perspectives.

A deeper inspection of the Dajani court's reasoning reveals its understanding of the public policy the wife Awatef was referring to in her argument, as the court stated: "The Court agreed that a public policy argument was appropriate, but not the one urged by Awatef" (Dajani 1390). The public policy referred to by Awatef was in fact an Islamic public policy, which is mandated to remedy the harm of a disadvantaged wife because the husbands have the upper hand in the marital contract. The Quran clearly gave the right of no-fault divorce only to the husband[16].

The Muslim husband has an unrestricted right to divorce his wife without obligation to give any reason. Islamic law does not require the existence of any fault or matrimonial offence, as an excuse for divorce '*talq*'. The court pointed to a different public policy, the American public policy, that maintains any contract or agreement that encourages divorce or separation destroys the marriage sanctity and is void without any effect on the agreement. This communication thus directs the court to fall back on the

16 "And when you divorce women and they have [nearly] fulfilled their term, either retain them according to acceptable terms or release them according to acceptable terms, and do not keep them, intending harm, to transgress [against them]. And whoever does that has certainly wronged himself. And do not take the verses of Allah in jest. And remember the favor of Allah upon you and what has been revealed to you of the Book and wisdom by which He instructs you. And fear Allah and know that Allah is Knowing of all things."
(Quran 2:231)
وإذا طلقتم النساء فبلغن أجلهن فأمسكوهن بمعروف أو سرحوهن بمعروف ولا تمسكوهن ضرارا لتعتدوا ومن يفعل ذلك فقد ظلم نفسه ولا تتخذوا إيت الله هزوا واذكروا نعمت الله عليكم وما أنزل عليكم من الكتب والحكمة يعظكم به واتقوا الله واعلموا أن الله بكل شيء عليم

general rules of the California Family Code and distribute the marital assets according to California Community Property Law.

A similar misunderstanding of the legal dialogue occurred in Shaban and Turfe. In Shaban, the husband communicated that the *mahr* in his understanding is equivalent to a prenuptial agreement. The court examined such a claim, responding that according to the California Family Code §1611, the wife did not sign the agreement, and likewise, the requirement of the Statute of Frauds is that for a prenuptial agreement to be valid, the terms must be written with certainty. The communication between the husband and the court targeted different legal methods. While the husband stated the methodology according to Islamic law, that is, *mahr* is a prenuptial agreement and complies with the precepts of *Sharia*, the court methodology replied: that might be the case according to the *Sharia*, however the agreement you are submitting does not stand or neither complies with the California prenuptial requirements nor shows the writing with the certainty required by the Statute of Frauds.

Similarly, in Turfe, the husband and the expert witnesses communicated to the court that an Islamic marriage that is missing the *mahr* agreement is an invalid Islamic marriage. In reply, the court measured the husband's claim against the California Family Code § 420 subdivision (c), which mandates that an annulment on a pure religious sect requirement is prohibited. The husband further communicated his understanding to the court that the *mahr* in his case is comparable to a premarital agreement, and the court responded to the *mahr* claim by invoking the Family Code § 1600 et seq. that detailed the requirements of a California premarital agreement. Thus the court found that the husband's contention that the *mahr* was comparable to a premarital agreement did not satisfy the statutory requirements to be valid under California Family law.

Conclusion and Social Implication

I present my conclusion and social implication in two areas: (1) Examining the research propositions 1 and 2, the courts above dealt with one Islamic issue, the *Mahr*, but have resolved it in two different ways while aiming to protect the constitution of the United States. (2) Muslims living in the United States often migrated as a married couple, some of them choose to conduct a second marriage according to the American civil law; however, they do not include in such process the issue of the marital property division in anticipation of a potential divorce.

California Courts apply only California Process and Legal Methodology

Examining the research propositions 1 and 2, the courts dealt with one Islamic issue, the *mahr*, but have resolved it in two different ways while aiming to protect the constitution of the United States. In the Dajani case, the court construed the *mahr* to be an invalid prenuptial agreement and applied the California community property law. In the Shaban and Trufe cases the courts construed the *mahr* to be a contractual agreement and applied the California contract law holding that according to the Statute of Fraud, the agreement must be in writing and signed by the party to be charged. By that approach, the Turfe court determined that the contract introduced and claimed to be a premarital agreement was lacking the statutory requirements.

This summary supports my research propositions 1 and 2, Proposition 1: The foundational principle of separation of church and state compels the California courts to treat *Sharia* cases from a secular perspective according to the American law. Proposition 2: The California Courts have decided similar Islamic factual cases in an inconsistent manner. In that the United States courts are compelled by the principle of separation of church and state to treat *Sharia* cases from a secular perspective, as they protect the mandate of the constitution. Meanwhile, the courts mentioned understood the facts

introduced by the Muslim litigants. The end-result of their assessment and adjudication differs, even though the Islamic issues in the three cases are similar.

Obviously, the courts and the litigants are not talking the same language. Indeed, there is a dialogue, but the meaning is lost in translation, and while the two legal systems are aiming to accomplish justice, each one has a different understanding of how to achieve justice. Scrutinizing the trial and appellate courts' language does not denote that the trial or the appellate courts inquired into the Islamic law. The center analysis from the three courts targets the interpretation of American public policy and the Family Codes § 1600, § 1611, and § 420 without regard to any Islamic jurisprudence doctrine of an Islamic dowry, or *mahr*. Accordingly, and based on the above analysis, the three courts on both levels, the trial and the appellate, only inquire into California Family law and California contract law.

The California courts reached their decisions using the California process and American legal methodology. Examining these three decisions indicates that none of the decision reached by the American courts would have been reached if the judges applied *Sharia*. If the American judges applied Islamic law, in Dajani, the wife would have received only 5000 Jordanian Dinars. In Shaban, the wife would have received 500 Egyptian Pounds equal to $30 US Dollars. In Turfe, the wife would have received only a copy of the Quran. Indeed, the American courts granted equitable justice to the wives in these cases, applying the California Community Property law and dividing the earnings and assets acquired during the purported marriages equally between the spouses.

Muslim-American Diaspora and Islamic *Mahr* Jurisprudence

Muslims living in the United States often migrated as a married couple, some of them choose to conduct a second marriage according to the American civil law; however, they do not include in such process the issue of the marital property division in anticipation of a potential divorce. The mere fact that Muslims marry according to

American law does not in itself help the spouse whose earning is more or he/she is the sole working spouse in the relationship. In this situation the California courts do not uphold their original *mahr* agreement, but treat it from a secular perspective as shown in the above cases, a result which supports the research's sub-problem 2, proposition 3 and 4.

Proposition 3: Most of the Muslims litigants and their community are not fully satisfied concerning the *Sharia* cases that were adjudicated by the California courts. Proposition 4: Most of the secular treatments of the California courts to the *Sharia* cases constitute obstacles for Muslim litigants to keep the *Sharia* traditions in the United States. This can easily be remedied by entering into a prenuptial/premarital agreement that conforms to the American law. Indeed, it is not totally equivalent to the religious *mahr* agreement, but in many cases it accomplishes the overall purpose to divide the marital property in equitable fashion.

Waiting until the time of divorce and calling the *mahr* a premarital agreement does not help to divide the assets according to Islamic law, but in most cases that appear in California courts, the tribunals decree the *mahr* to be invalid and the assets end up divided in accordance with the California Community Property. From the outset a Muslim might see that *mahr* is the counterpart of an American prenuptial/premarital agreement. However, the formation and the procedures are totally different. While the *mahr* is simple and is practiced as part of the Islamic marriage, the prenuptial agreement is not as simple, but it safeguards the assets that spouses need to keep as their separate property regardless if the assets were earned before or during the marriage. Hence, if the spouses agreed to such a premarital agreement, it lessens the disputed issues in the event of a divorce and takes away the hostility of litigation over the marital property. This in turn is a satisfactory route in lieu of the unsatisfactory result of the California courts'

adjudication. Muslims who agreed to such a premarital agreement will be able to keep the tradition of the Islamic law as well as the spirit of the *Sharia* in their diaspora.

Although one party to the Islamic *mahr* is unsatisfied and cannot keep the *Sharia* tradition, in a changing world, the *mahr* has little to benefit a working wife with a flourishing career. In very rare cases nowadays do we find women becoming destitute after having been divorced from their husbands; to the contrary, sometimes we see that women pay their husbands alimony because their earning exceeds their husbands' earning. Such cases are not found only in the United States for any wives who are married in the majority of Muslim countries are educated and have a substantial earning capacity; they are not waiting to be fed by their husbands, or their divorce would cause them to immediately become destitute. The onetime payment of the deferred *mahr* is almost a token of a symbolic value in comparison to the cost of living of the 21st century. Many wives will have the same outcry as Turfe's former wife: "The *mahr* is tradition and symbolic".

Unfortunately, the amount of *mahr* in many cases no longer accomplishes the justice for which it was commanded. This is precisely on point concerning the wives who were uprooted from their society and brought by their husbands to the United States to be staying-at-home wives. Muslim former wives in the United States who are not capable of earning cannot live by receiving a copy of the Quran, 500 Egyptian pounds, or even 5000 Jordanian Dinars. May the voices of those wives be a call for a change to achieve the justice they deserve, once granted to the wives and encapsulated in the spiritual meaning of the *mahr.*

Chapter 5

Four Muslim Child Custody Cases in CA Courts

It is indisputable that different regions, cultures and religious traditions use different legal concepts. These differences appear most prominently when a decision about child custody arises. When courts adjudicate child custody cases, the common ground between all courts in all countries is the concept of the child's best interest (Estin 2004, 595-596). But, the components of the "best interest" will differ, depending on the understanding of the cultures and the guidance offered by a given society's religious tradition. Put in other words, the concept of the "child's best interest" is not measured objectively but subjectively (Macfarlane 2012, 194). The 'best interest' is evaluated from the viewpoint of the person deciding the custody. Consequently, the assessment of the "child's best interest" will differ, depending on whether it was decided in a country that is governed by the *Sharia* legal system or in a country that is governed by a secular legal system. A decree adjudicated as in the "child's best interest" based on religion may not turn out to be in the best interest of the child according to another religion. Similarly, the interpretation of the best interest concept by different legal systems will yield different outcomes.

Further, the best interest of a child custody decree issued by an Islamic tribunal certainly mandates the application of Islamic law and discourages some American courts from honoring a foreign child custody adjudication to avoid being entangled with Islamic law. While some American courts would reject foreign decrees regardless if they were based on religious doctrine or not, some other American courts would embrace foreign child custody decrees, provided the foreign decrees were issued with the best interest of

the children in mind. The question is, what are the measurements, or by which lens can the American court determine the best interest of the child? Does religion play a role in that determination? And if it does, could the consideration of Islam as one factor of the "child's best interest" stain the American legal decision-making? Does honoring an Islamic decree constitute a violation of the Establishment Clause? Does a consideration of Islam equate to the American courts applying Islamic law?

These are questions that must be explored to illuminate the scholarly trends regarding the treatment of the California State Courts of the Islamic child custody decrees. The questions also frame the analysis here of the response of the California State Courts on how they adjudicate Islamic child custody cases from a civil secular perspective.

Child Custody According to the Sunni and Shite Sects

The Quran mandates that children are in need of their mother in the beginning of their lives more than their need for the father. This wisdom is found in the divine text[1]. This verse not only mandates that the mother care for the children at their young age, but also commands divorced couple to reach an agreement and mutual consent regarding the custody and the welfare of the children, "And if they both desire weaning through mutual consent from both of them and consultation, there is no blame upon either of them." Hence, the Quran leaves such issues to the adult parties' mutual agreement. However, agreement is not reached in almost all divorce cases. This is where the *figh* of the Islamic

[1] Quran 2: 233: Mothers may breastfeed their children two complete years for whoever wishes to complete the nursing [period]. Upon the father is the mothers' provision and their clothing according to what is acceptable. No person is charged with more than his capacity. No mother should be harmed through her child, and no father through his child. And upon the [father's] heir is [a duty] like that [of the father]. And if they both desire weaning through mutual consent from both of them and consultation, there is no blame upon either of them. And if you wish to have your children nursed by a substitute, there is no blame upon you as long as you give payment according to what is acceptable. And fear Allah and know that Allah is Seeing of what you do.
والولدت يرضعن أولدهن حولين كاملين لمن أراد أن يتم الرضاعة وعلى المولود له رزقهن وكسوتهن بالمعروف لا تكلف نفس إلا وسعها لا تضار ولدة بولدها ولا مولود له بولده وعلى الوارث مثل ذلك فإن أرادا فصالاً عن تراض منهما وتشاور فلا جناح عليهما وإن أرتم أن تسترضعوا أولدكم فلا جناح عليكم إذا سلمتم ما إتيتم بالمعروف واتقوا الله واعلموا أن الله بما تعملون بصير.

schools of law helps to promote the welfare of the children through their specific formula regarding the children custody, transfer age, and the fitness of the parents or relatives to receive custody. Table 4 gives an overview of relatives who qualify to be custodians according to the *figh* 'rule' given by each Islamic school. And again, we examine the differences in Sunni and Shi'a communities.

Table 4: *Figh* 'rule' of Islamic Schools re: Custody of Children

School	Transfer age	#1 Custodian	#2 Custodian	#3 Custodian
Hanifi (Sunni)	Boy 7 Girl 9, Marriage	Boy: either Parent Girl: father	Mother's mother Father's mother	Mother's Sister
Shafa'I (Sunni)	Boy 7 Girl 7	Either Parent	Mother's mother Father's mother	Mother's Sister
Maliki (Sunni)	Boy 15 Girl Marriage	Grandmother	Mother's mother Mother's sister	Father's Mother
Hanbali (Sunni)	Boy 7 Girl 7	Either Parent	Mother's mother Father's mother	Mother's Sister
Ja'fari (Shia)	Boy 2 Girl 7	Father	Father's Father	Paternal Next of Kin

As illustrated in Table 4, the age at which a child custody may be given in Sunni schools is typically age 7 for boys and girls. However, the Hanifi and Maliki schools make special provision for a girl when she marries. The Maliki school also sets the age of transfer for a boy at 15 years. The Shi'a school in contrast will permit custody of a boy as early as 2 years of age.

Custody rights also vary from Shi'a and Sunni schools. The Shi'a limit custody to the father, the father's father, and then to the next of paternal kin. The Sunni schools, in marked contrast, grant first rights of custody to both or one parent, except in the Maliki school that designates a grandmother. Second rights of custody are granted to either mother's mother, or father's mother, recognizing the important role of women in the life of the child. Further, third rights of custody are given to mother's sister, the child's aunt[2].

[2] https://www.al-islam.org/marriage-according-five-schools-islamic-law-allamah-muhammad-jawad-maghniyyah/custody-al-hidanah (accessed April 2016).

The details of obtaining child custody are complex, and vary by school. For the Shi'a, if the father dies or becomes insane after he has taken the child's custody, the custody right reverts to the mother even if she has married a stranger. If the parents are not there, then the paternal grandfather, then to the next relatives that are in order of inheritance. If there is more than one relative of the same class, such as the maternal and paternal grandmothers, the matter will be decided by drawing lots in the event of contention and dispute. The person in whose name the lot is drawn becomes entitled to act as the custodian untill his/her death or untill he/she forgoes the right[3].

It should be noted that the custody is distinguished from the guardianship '*al-walia',* which is a bit different since this right is the unqualified Sunni Islamic right of the father[4]. Shiite law, however, gives the grandfather joint guardianship with the father (Nasir 1990, 206). Thus, the mother has only physical custody in comparison to the father and his family who have the sole legal custody in addition to the physical custody when the mother is unavailable (Nasir 1990, 185) and/or at the age of transfer. Further, according to most of the Sunni Schools, the mother's custody can be stripped away if she becomes an apostate or marries a stranger or even a relative who is not habilitated to have a relationship with the daughter. This rule is contrasted in the Shite Schools, as the latter stripes the custody from the woman if she marries any man while the husband is alive and capable of being a qualified custodian (Nasier 1990, 172-173).

The father also can be declared disqualified as custodian by the *Sharia* court if he was cruel to the wife or children, committed a felony, committed adultery, if he has an

[3] https://www.al-islam.org/marriage-according-five-schools-islamic-law-allamah-muhammad-jawad-maghniyyah/custody-al-hidanah (accessed April 2016).

[4] "According to the principles of established Muslim jurisprudence, father is the natural guardian (*Wali*) of the person and property of the minor child ...Whereas custody (*hidhanat*) is a right of the child and not of either of the parents" (Aayesha Rafiq 2014, 268). http://www.ijhssnet.com/journals/Vol_4_No_5_March_2014/29.pdf (accessed April 2016).

unfit character and conduct, if he intends to go out of the jurisdiction of the court or abroad, and if the he apostatizes from Islam (Ibrahim 2018, 145)[5].

Validity of Child Custody: Sharia and Court Perspectives

The following section is an examination of the four cases treated in this chapter to determine the Muslim litigants' factual allegations and validity of their claims from the Islamic law perspectives.

Muslim Litigant Perspectives on Child Custody Disputes

In this section I will interact with each case separately according to the Islamic Law and Islamic School of Law followed in each Muslim country.

Case #1 Lebanese Child Custody[6]

A Lebanese couple (see Table 5) has two children—Fadi, born September 20, 1972, and Ruba, born January 25, 1977. In 1982, without her husband's consent, the wife took the two children from UAE and went to the United States to live with her brother and filed for separation (Malak 1022). At the time the wife filed for separation, the boy's age was 10 years old and the daughter's age was 5 years old. Consequently, according the Hanafi Sunni School of Law, the major school in Lebanon, the mother's physical custody of the boy ended at age 7 years old and was due to be transferred to the father. However, if the mother has no disqualification issue to assume the role of a custodian when she filed for separation, the daughter will remain in her custody until the age of 9 or until marriage. If the daughter reached the age of 9 by the end of the appeal, the daughter also is due to be transferred to the father with her brother. Accordingly, the appellate court in the Malak case reached a similar result to a custody decision-making that a *Sharia* court would have issued based on the Hanafi school formula. Nonetheless, the American

[5] http://shodhganga.inflibnet.ac.in/bitstream/10603/132616/12/12_chapter%206.pdf (accessed April 2016).
[6] In *Re Marriage of Malak, 182 Cal.App.3d 1018 (Cal..Ct. App. 1986).*

appellate court reached its adjudication based on the "secular best interest of the children" examining the secular requirements as discussed below.

Table 5: Overview of *Sharia* Child Custody

Child Custody Application	***In re Marriage of Malak***	***In re Nada***	***G.S.A. v. G.Y.S.***	***In re Marriage of Nurie***
Facts	Lebanese couple married overseas. Wife moved with their two children to the US and filed for separation. Husband filed for child custody in Lebanon and the UAE and later he thought to enforce the custody foreign decrees in the US.	Abdulaziz, a Saudi Arabian citizen, and Maria, a permanent United States resident, married and resided in both the US and Saudi Arabia had two daughters. Husband obtained a divorce and child custody of the two daughters. Later husband was arrested while he was in Florida US after hitting his daughter Nada. The mother took the two daughters to CA. Child Services declared them dependents and placed them in the mother's custody.	Jordanian couple has three children, son L. 18 Ys, daughter S. 17 Ys, and son B. 7 Ys who are Jordanian and American citizens. Wife sues for separation due to domestic violence, was awarded legal and physical custody. After father purchased tickets for S. and L to fly to Jordan, mother filed TRO to stop travel and to relinquish passports. Trial court rejected mother's TRO for lack of emergency, and appellate court reversed.	Pakistani/American marries a Pakistani wife; Islamic rite in Pakistan; civil rite in US where both resided. Later, mother took son to Pakistan intending not to return. Husband obtained legal and physical custody from CA. Wife obtained non-removal of son from Pakistan court, but husband brought son to CA. Wife registered the Pakistani Custody in attempt to enforce it in CA. She also filed an order to show cause to modify the CA custody.
CA Law	**California Civil Code § 5162:** The courts of this state shall recognize and enforce … decree of a court of another state" **California Civil Code § 5172** "Recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody	**(UCCJEA) § 105:** (a) A court of this State shall treat a foreign country as if it were a State of the United States. (b) Except as otherwise provided in subsection (c), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional	**CA. Family Code § 3064:** other than stipulated orders, ex parte orders regarding child custody and visitation will be granted only upon a clear showing of immediate harm to the child or immediate risk that the child will be removed from the State of California." Family Code section 3064 prohibits the court from making any order "granting	**California Family Code § 3011:** "In applying the best interest of the child, the courts shall consider these factors:(a) Health, safety, and welfare of the child. (b) Parent history of abuse. (1) If child related by blood or affinity; (2) Other parent history; and (3) Parent's current spouse, or cohabitant.

	rendered by appropriate authorities of *other nations if reasonable notice and opportunity to be heard were given to all affected persons"*	standards of this [Act] must be recognized and enforced. (c) A court of this State need not apply this [Act] if the child custody law of a foreign country violates fundamental principles of human rights.	or modifying a custody order on an ex parte basis unless there has been a showing of immediate harm to the child or immediate risk that the child will be removed from the State of California."	(c) Child contact with both parents. (d) Parents use of controlled substances.
Islamic Law	**Sunni Child Custody Law** Hanafi: Mother until boy 7 Ys and girl 9 Ys. Then transfer. Shafi: Mother until boy and girl 7 Ys. Then transfer. Maliki: Mother until boy 15 Ys and girl until marriage. Then transfer. Hanbali: Mother until boy and girl 7 Ys. Then transfer. * Some schools require custodian to be Muslim to care for the child.	**Sunni Child Custody Law** Custodian's disqualification: The scholars unanimously agree that a custodian must be sane, chaste, trustworthy, not adulterer/ess, wine drinker, violent, or oblivious to childcare. All Sunni schools agree: If mother marries a foreign person, her right to custody terminated, unless that husband is the child's kin.	**Sunni Child Custody Law** Custodian's disqualification: The scholars unanimously agree that a custodian must be sane, chaste, trustworthy, not adulterer/ess, wine drinker, violent, or oblivious to childcare. All Sunni schools agree: If mother marries a foreign person, her right to custody terminated, unless that husband is the child's kin.	**Shite Child Custody Law** Shite: Mother until boy 2 Ys – girl 7 Ys. Then transfer. Custodian's disqualification: The right to custody terminates with woman's marriage irrespective of whether the man is related to the child or not. A non-Muslim has no right to the custody of a Muslim. Custodian must be free from any contagious disease.
Court Decision	**Trial court:** Rejected the Lebanese child custody decree as not with the child's best interest in mind and awarded custody to the mother. **Appellate court:** Awarded the child custody to the father stating: Lebanese Court properly considered the best interests of the children.	**Trial court:** Orange County Juvenile Court declared the children dependents and placed them in the physical custody of their mother. **Appellate court**: Husband appealed the decision and Appellate court denied his petition and maintain the mother's custody.	**Trial court:** Allowed father to take S. to Jordan, ordered mother to deliver S.'s American passport to father's counsel. **Appellate court**: reversed trial court on grounds it violated mother's procedural rights.	**Trial court:** Give father legal and physical custody. **Appellate court**: Rejected the Pakistani's decree and affirmed the father's custody.

Case #2 Saudi Child Custody

In the Nada case[7], the couple has two children; Nada was born in 1989, in California. After the father returned to Saudi Arabia to work, the wife, Maria, and Nada moved to Saudi Arabia to join him in late 1992. In late 1993, a second daughter, Reema, was born. In August of 1995, Maria moved to Orange County alone. Abdulaziz unilaterally obtained a divorce and was awarded custody of both children from the Al Khobar Supreme Court, Kingdom of Saudi Arabia. Saudi Arabia adheres to the Wahhabi Islamic sect, a strict form of Sunni Islam, which mandates that child custody after divorce entails transferring girls, seven or older, to the father and permits boys, nine or older, to choose[8].

In 1995, at the time the father obtained the divorce from the Al Khobar Supreme Court, Kingdom of Saudi Arabia, Nada was about to be six and half years old, and Reema was two and half years old. Although they did not reach the age of transfer according to the Wahhabi's teaching, Al Khobar Supreme Court awarded the custody to the father. The reasons behind this deviation are based on the disqualifications found in the mother and thus the court there found her to be an unfit custodian, the mother is not a Muslim, the mother is married to a foreign man (Nada 1172)[9], and the mother lives primarily in the US far from the father who is the only guardian '*wali*' of his two daughters. Although Islamic law confirms that a child should have access to both parents, this cannot be guaranteed in practice, especially in the Nada case based on the previous reasons.

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[7] *In Re Marriage of Nada,* 89 Cal.App.4th 1166 (Cal. Ct. App. 2002).

[8] https://www.hrw.org/report/2016/07/16/boxed/women-and-saudi-arabias-male-guardianship-system# at 202 (accessed April 2016).

[9] The Hanafi, the Shafi, the Imami and the Hanbalí schools say: If the mother is divorced by the second husband, the disqualification is removed and her right to custody reverts after its clear termination due to her marriage. http://fiqh.huquq.com/2012/02/custody`-al-hadanah.html#.Vr0h2pMwjUo (accessed April 2016).

Case #3 Jordanian Child Custody

In the G.A.S. v. G.Y.S. case,[10] a Jordanian couple has three children; son L. 18 years, daughter S. 17 years, and son B. 7 years. Consequently, according the Hanafi Sunni School of Law, the major School in Jordan, the custody of the three children should be transferred to the father. However, because the father is found to be violent toward the mother and there is risk that such violence will affect the children, the father was disqualified on the basis of violence and all the children should be awarded to the mother's custody. Also, the father's violence is coupled with a potential kidnapping of the daughter S. and her older brother L. to Jordan where the daughter will be under the father's guardian authority until marriage (G.A.S. 2).

The wisdom of *Sharia* dictates that both parents should have access to all the children, and aims to accomplish the welfare of the children. Because of the violence of the father, an exception applies regarding the sons who are over 7 years and the daughter who is over 9, and thus, instead of transferring the custody to the father at the couple's separation, the custody was awarded to the mother.

Case #4 Pakistan Child Custody

In the Nurie case[11], the couple married in Pakistan based on *Sharia* and in the United States according to California law. In September 16, 2002, their son was born in San Ramon, California. In early 2003, the father filed for custody of the son in California and in late 2003, the mother filed for custody in Pakistan. At that time, the son was merely one and half year old. The majority of Pakistan where the couple came from follows the Hanafi School of Law. According to the Quran mandate above, the son should remain with his mother for the first two years, however, according to the Hanafi teaching the son should stay in his mother's custody until the age of 7, then custody will

[10] *G.A.S. v. Superior Court*, Cal.App.3d (Cal. Ct. App.2007).
[11] *In Re Marriage of Nurie,* 176 Cal. App. 4th 478, 98 Cal. Rptr. 3d 200 (Cal. Ct. App. 2009).

be transferred to the father. The battle over the custody continued until January 2008, when the son was only 6 years and 4 months old.

At this point the custody was supposed to stay with the mother, unless there were any disqualification to prevent her from being a custodian. Although the fact of the case is silent of disqualification, the California court awarded the husband both physical and legal custody of the son.

California Courts Adjudication of the Muslim Child Custody Cases

In this section I will discuss the four cases in Table 5 collectively from the American legal system viewpoint while comparing the differences and pointing to the similarities of the American judges' responses to the Muslim immigrant claims of right over their child custody. To determine if an Islamic child custody decree is enforceable in the California court, judges look for comparisons with the United States legal principles, that is, the secular principle of the "child's best interest". Further, the judges gather all factual bases that support the child custody decrees with the secular concepts in mind. To that extent, the overview in the four California State court cases either acknowledged child custody foreign decrees through the concept of comity or adjudicated child custody for Muslim immigrants by the American trial court without letting the prior foreign decrees influence its decision-making.

Case #1 Lebanese Child Custody in CA Courts

In Malak, the trial court evaluated two foreign decrees introduced by the father, one from UAE that awarded the custody to the father without detailing its basis, and the second from Lebanon that awarded the custody to the father and detailed its bases that point to the welfare of the children. The trial court rejected the UAE decree in its entirety, and concluded that the Lebanese decree violated due process of the mother since she did not have notice or an opportunity to be heard. In scrutinizing the trial court's decision

regarding the Lebanese adjudication, the appellate court examined the procedural and substantial approaches.

Procedurally, the appellate court found that the notice and opportunity to be heard "were substantially more than provided" (Malak 847). The appellate court pointed out the trial court's misinterpretation of the facts and concluded that the wife had had adequate notice of the Lebanese *Sharia* court's decree. The husband served the wife's brother in person and then served the wife herself in person, and finally mailed the Lebanese custody decree to the wife's attorney coupled with an explanation of the wife's right to oppose the custody decree within 15 days. Clearly the husband afforded the wife adequate notice and gave her enough opportunity to oppose the custody decree. Nevertheless, she forfeited her right to contest the Lebanese custody decree.

The appellate court in Malak clearly stated that the record, in its view, does not support the conclusion of the trial court (Malak 845). Obviously the Malak court did not apply the *Sharia* rules of child custody, but clearly followed the California Civil Code section 5162; "The courts of this state shall recognize and enforce…decree of a court of another state" and section 5172;

> Recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody rendered by appropriate authorities of *other nations if reasonable notice and opportunity to be heard were given to all affected persons.* (Malak 846, emphasis added)

Substantially, the appellate court in Malak inquired into the bases on which the Lebanese court found its custody decree and enumerated those bases finding them not substantially different from those prescribed by the State of California Family Law[12]

[12] **California Family Code Section 3011:** In making a determination of the best interest of the child in a proceeding described in Section 3021, the court shall, among any other factors it finds relevant, consider all of the following: (a) The health, safety, and welfare of the child. (b) Any history of abuse by one parent or any other person seeking custody against any of the following: (1) Any child to whom he or she is related by blood or affinity or with whom he or she has had a caretaking relationship, no matter how temporary. (2) The other parent. (3) A parent, current spouse, or cohabitant, of the parent or person seeking custody, or a person with whom the parent or person seeking custody has a dating or engagement relationship.

(Malak 848). The appellate court extensively described the factors of the best interest of the two children[13].

Case #2 Saudi Child Custody in CA Courts

Similar to Malak's rejection of the UAE child custody decree, the appellate court in *Nada* not only rejected the child custody decree from the Saudi Arabian *Sharia* court, but adjudicated the case based purely on the secular "best interest and welfare of the children".

The Orange County appellate court accepted the case on an emergency jurisdiction based on Family Code section 3424 (a)[14] and retained jurisdiction thereafter based on the ongoing risk of harm to the children (Nada 1175). The appellate court upheld the trial court's exclusion of the father's proffered testimony of the expert on Saudi Arabian matrimonial law based on the discretion given to it by Evidence Code section 352[15]. The father argued that it was extremely relevant to the determination of the ultimate placement of the children according to Islamic law (Nada 1177).

(c) The nature and amount of contact with both parents, except as provided in Section 3046. (d) The habitual or continual illegal use of controlled substances, the habitual or continual abuse of alcohol, or the habitual or continual abuse of prescribed controlled substances by either parent. (e) (1) Where allegations about a parent pursuant to subdivision (b) or (d) have been brought to the attention of the court in the current proceeding, and the court makes an order for sole or joint custody to that parent, the court shall state its reasons in writing or on the record.

[13] *Malak* court's factors were:

- Lebanon constitutes a great part of the children's life, which they still call home.
- Lebanon presents numerous ties such as, environmental, traditional, social, moral, and cultural.
- The children's native tongue is the Arabic language and their religion is Islam.
- The court spared the children from living in a strange place away from their true home.
- The court considered the education of the children and their Muslim practice.
- Finally the court deemed the father's financial situation in Lebanon is well established to ensure the desired future for the children, in contrast to the situation of the mother in a foreign land without a job or permanent home (Malak 848).

[14] Family Code section 3424 (a) "A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to, or threatened with, mistreatment or abuse."

[15] Evidence Code section 352. The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

The court in Nada treated the *Sharia* court decree of the Saudi Arabia just as it had the *Sharia* court decree from Abu Dhabi in the Malak court. The Nada court concluded that the mother was not afforded due process since she did not receive notice of the decree nor was given an opportunity to be heard and contest the custody. The custody process of the Saudi Arabian court was carried out totally in the absence of the mother, and was adjudicated based on the *Sharia* law of the Saudi Arabia family code, which is similar to the Abu Dhabi code that grants automatic custody to the father regardless of his fitness to take such a role in the lives of his children. Though Nada and her sister Reema were residents of Saudi Arabia, the court acknowledged their presence in the United State and exercised jurisdiction over their custody.

Further, looking at the totality of the circumstances in assessing the issue of the "best interest," the California court acknowledged the father's alcohol problem, violence, and his denial of neglecting his daughter and failing to protect her from sexual abuse. All these circumstances were "clear and convincing evidence that the child will be exposed to the risk of serious physical and emotional harm if released to the father" (Nada 1182).

It should be noted that the California court is obligated to give comity to any valid foreign custody decree according to Section 105 of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA)[16]. However, since the Saudi Arabia court denied the wife her due process and did not afford her notice and opportunity to be heard, the California trail court was not obligated to take into consideration the Saudi Arabia custody decree.

[16] Section 105. International Application of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA): (a) A court of this State shall treat a foreign country as if it were a State of the United States for the purpose of applying [Articles] 1 and 2. (b) Except as otherwise provided in subsection (c), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this [Act] must be recognized and enforced under [Article] 3. (c) A court of this State need not apply this [Act] if the child custody law of a foreign country violates fundamental principles of human rights.

Case #3 Jordanian Child Custody in CA Courts

The case of G.A.S. is distinguished from the other three cases, since in G.A.S. there was not a foreign decree, but the California court acted as the adjudicating court from the filling to the final decision by the appellate court. Further, the court did not directly analyze the "best interest of the children", but the appellate court adjudicated according to the best interest of the minor daughter to protect her from been abducted by her father who was notorious for disobeying the court's orders. At the trial court level, the mother and her attorney motioned the court to allow an expert in the *Sharia* to explain the danger of the minor daughter traveling to Jordan, where as a Jordanian citizen, she will be under the guardianship of her Muslim father until marriage. Hence, there was a strong probability she would never return (G.A.S. 3), especially since Jordan is not a signatory to the Hague Convention on Child Abduction[17]. The mother argued before the trial court to apply the exception of the *Sharia* rules on the child custody, since the father was violent toward the wife and that has an impact on the children, evidence that the mother was awarded physical and legal custody of three children (G.A.S. 2).

However, the trial court "refused to prohibit the father from taking his daughter S. to Jordan, and ordered her mother to deliver S.'s American passport to the father's counsel" (G.A.S. 3). Despite the trial court undervaluation of the looming danger by the father and the possibility of kidnapping the daughter, the appellate court reversed and issued a decision to the best interest of the minor daughter. The appellate court found an actual emergency and an impending danger if the father was allowed to travel with S. The appellate court applied the mandate of the Family Code § 3064,[18] since removing the

[17] https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/hague-abduction-country-list.html (accessed April 2016).

[18] California Family Code Section 3064: "Ex parte orders regarding child custody and visitation will be granted only upon a clear showing of immediate harm to the child or immediate risk that the child will be removed from the State of California."

daughter from California to Jordan constitutes an immediate harm in violation of the "best interest of the child" concept.

Case #4 Pakistan Child Custody in CA Courts

Similar to Nada and G.A.S., the California court in the Nurie case indirectly accomplished the secular "best interest of the child" via contesting the jurisdiction of the Pakistani Guardian Court. The California court indicated that only it has exclusive jurisdiction of this case. California never lost the jurisdiction over the child custody even when the parties and the child left California and lived in Pakistan for three years, where they engaged in litigation over the child custody under the Pakistani jurisdiction. During this period the husband clearly consented to submit to the jurisdiction of the Pakistani Guardian Court.

The California court stated: "Husband's litigation in Pakistan did not divest California of continuing, exclusive jurisdiction" (Nurie 506). The California court based its jurisdictional ruling first and foremost on the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) principles as a result of the mother concealing the California custody order from the Pakistani court. Indeed, the California court had already decided the custody of the child in the first instance and thus had primary rights over the custody of the child. The California court distinguished between the jurisdictional standards and the substantive standards relating to child custody and visitation based on the statutory language of UCCJEA (Nurie 492).

There might be an issue with the fact that UCCJEA has language for procedural 'best interest of the child' that is different from the substantive 'best interest of the child', but in reality the most important role of any court is to accomplish the forthright welfare of the child regardless of how both parents see or interpret the 'best interest' in their view. A parent might state that this country or that region has the best interest of a child,

but most of the time this assessment is tainted with their emotion as parent or might be tainted by a desire to retaliate against the other parent as illustrated in the case of Nurie.

However, the goal of any neutral court is not the jurisdiction over custody. The jurisdiction is nothing more than a tool the court uses to guarantee the welfare of the child. This conclusion was attested by the Nurie court, "we are not unconcerned with the child's best interests" (Nurie 492). Although the issue of jurisdiction seems to be the center of the trial court discussion, it is not the end-result the Nurie court aimed to achieve. The Nurie court in the latter assertion was answering the mother who was contesting the American court's authority and it stated that it was the appropriate tribunal to advocate for the 'best interest of the child'. The mother urged the California court to consider the overriding interest of the child in making its decision on jurisdiction. She asked the court to take into account some essential factors[19].

The realities of the mother prayers here focused on the 'best interest of the child' not the 'California court's jurisdiction'. However, in order for the California court to adjudicate the "best interest of the child," it must first establish its valid 'procedural' subject matter jurisdiction over the minor custody. Because 'the best interest of the child' is the lifeline of any custody litigation throughout all its stages, the California court in Nurie could not avoid pointing to certain factors at the heart of the 'substantive' legal issue. This was the implicit discussion between the mother and the court.

However, the mother also engaged in the explicit discussion regarding the procedural issue of the jurisdiction to substantively determine the 'best interest of the child' based on her viewpoint. In so doing she argued that the husband failed to register and enforce the California dissolution judgment and custody order with the Pakistanis *Sharia* Court (Nurie 509). The husband "bought a house in Pakistan and lived there

[19] Factors the mother in *Nurie* requested from the court to consider: The trauma the child must have suffered in being torn away from his mother, his familiar culture, i.e., Pakistan, his extended family in Pakistan, and where he had spent most of his first five years (Nurie 492).

almost continuously for three years" (Nurie 487). Further, the "husband had "surrendered" or "submitted" to the Pakistan's jurisdiction" (Nurie 507). Unlike "personal jurisdiction", consent and absence from the jurisdiction of the forum court does not waive the "subject matter jurisdiction", since the latter is the right of the court affixed by the legislature and does not depend on the parties' actions.

Finally, the California court in Nurie indirectly enumerated some secular 'best interest' factors similar to the factors held by the Malak court[20].

Conclusion and Social Implication

This concluding section with propositions 1, 2, 3, and 4 in mind will give an overview of the California courts' treatment and adjudications on the four *Sharia* cases, as well as point to the social implication of those adjudication on the Muslim litigants and their communities.

California Courts apply only California Process and Legal Methodology

Glancing through all these case factors, the process of the American court in all four cases support this research sub-problem one, propositions 1 and 2, Proposition 1: The foundational principle of separation of church and state compels the California courts to treat *Sharia* cases from a secular perspective according to the American law. Proposition 2: The California Courts have decided similar Islamic factual cases in inconsistent manner. Since they adhered to the Constitution of the United States and have dissimilar outcome to the same issue of the custody, in that they inconsistently rejected and accepted to extend comity to foreign child custody decrees that were adjudicated under the rules of Islamic law.

[20] Factors of the "best interest of the child" considered by the *Nurie* court: The child was born in the state of California (Nurie 485). California is the home state and the habitual residence of the minor (Nurie 506). The child was at the center of a criminal investigation and California retained a legitimate concern for his welfare (Nurie 510).

The factors considered by American courts and foreign courts in adjudicating child custody are all equivalent to the factors a California judge would consider in evaluating a decree from another American state. They all focus on a secular aspect of the child's life and ultimately do not advocate any religious law. The reason they are considered by the American courts is because they are secular in nature, do not violate the separation between church and state, and comport with the mandate of the First Amendment of the United States Constitution.

The counterargument to my conclusion might be: if any factor considered by the court advocates Islam as the religion to the children, that will constitute enough entanglement with religion and violate the Establishment Clause of the United States Constitution. The Judge might support one spouse's religion over that of the other spouse. While that might be the case in another custody scenario, it is not the case in *Malak*. The court there found the majority of the Malak children's life spent in Muslims countries, that is, Lebanon and United Arab Emirates, where Islam is the predominant faith. Additionally, the father and the mother in Malak are Muslims. Thus, when the judge considered Islam to be the religion of the children, it was a mere affirmation of the actual religion of the children, and not supporting one spouse's religion over the other. Further, based on the above analyses the California State Court in Malak focused on the important aspect of the case, which is balancing the welfare of the children.

The only counterargument that opposes my conclusion could be that the Malak court considered Islamic practice as part of the welfare of the children and decided that it should not be one of the factors when the American judges adjudicate foreign custody cases. To the contrary, context is of course important in assessing a child's best interests, and religious background and upbringing are not ignored. Indeed, religious factors can be an integral part of the analysis (Sonne 2015, 735).

Therefore, when the Malak court considered Islam as factor, it followed the Free Exercise Clause of the United States Constitution. Thus, in so doing, the California court reached to the heart of the United States Constitution and respected the freedom of the children to practice their own religion. Consequently, the only explicit consideration of Islam increased the court's obligation to protect the constitutional rights of the people and did not trump the United States Constitution by using Islamic law. In this case it is fair to say with Eugene Volokh that, all we see here is the application of the American secular law (Volokh 2013, 435).

The precise assessment here is that the court did not incorporate *Sharia* into the California legal system, but acknowledged the similar result that the California appellate court would have arrived at if it had adjudicated the Malak custody as the original trial court without the existence of any foreign decrees. This conclusion is well-defined in the court statement,

> The evidence described above, on the other hand, demonstrates that the best interests of the children were important considerations in the award of custody by the Lebanese court and *the criteria were not substantially different from those prescribed in this state*. (Malak 848, emphasis added)

Indeed, the prohibition of the Establishment Clause of not to apply *Sharia* or any religion for that respect by the American Constitution, did not encompass prohibition to advocate the interest of the innocent children. The California court in Malak transcended the letter of the Constitution to reach the spirit behind the Constitution. Therefore, the California court did not apply *Sharia*, but upheld the best interest of the children delivered by the *Sharia* court after examining the foreign decree against the secular principle of "best interest of the children." This examination was within the normative classifications of the American law and public policy.

In the Nada case the court against all odds of the Islamic law application, instead of declaring the mother to have forfeited her custody rights by remarrying a foreign man

(Hallaq 2009, 287), it awarded the custody to the mother who remarried in Orange County and allowed the female children to live with a strange stepfather[21]. Clearly the California court's action in Nada highlights its focus on adjudicating the custody according to the 'secular best interest of the children' without any regard for the rules of *Sharia* or consideration of any Islamic policy.

Assuming the Saudi decree was valid and California was considered the children's home state, in this case the California court would have conducted a secular best interest test to evaluate the Saudi custody decree. The most plausible result of that test based on the Malak case is that the Nada court would have awarded the mother permanent custody without unification with the father based on his risky lifestyle of drinking, violence, and neglecting to protect his child from sexual abuse according to the secular principles of the American law.

The more dramatic outcome would have been anticipated if the Saudi custody decree was valid in California, as the facts in Nada case show that California was not the home state of the children. In this case, the California court would have been obligated to give priority to the Saudi custody decree under UCCJEA Section 105 unless the custody decree or the custody law of Saudi Arabia violates the fundamental principles of human rights.

Although the *Sharia* implicated by the husband's claim and augmented by his request to have a Saudi Arabian expert assist the court to understand the right of the wife according to *Sharia*, the California court rejected such a request. Ostensibly, the Nada decree utilized the American legal system and refused to honor the Islamic law foreign decree and blocked any comity request by the husband since the Saudi court neglected to give the wife notice and an opportunity to be heard.

[21] See Hallaq 2009, 287 Footnote on stranger '*ajnabi*' 101. Also, wife right to custody, "right is restored upon dissolution of the marriage" from the non-relative husband.

Further, in the G.A.S. case it can be argued that the appellate court implicitly applied the *Sharia* disqualification exception to strip the father of his custodianship, since he was violent toward the mother and his action affected the children; however, this very concept is clearly found in the California Family Code § 3011, subsection (a) and (b)[22]. Hence, the appellate court only applied the American law without regard to the application of *Sharia* child custody rules or its exceptions. Indeed, the *G.A.S* .case abides by the secular best interest principles of the United States law.

Similar to all the three cases above, examining the Nurie decision in the light of the precedent in Malak leads us to conclude that in Nurie there is no place for the application of Sharia child custody since the California court applied its jurisdictional procedures. The Nurie decision clearly applied the California Family Code § 3011, the secular "best interest of the child", and the American legal system totally eclipsed the Islamic law foreign decree and blocked any comity request by the wife based on the prohibition of the UCCJEA § 105, subsection (b) and (c)[23]. This is a vivid example of the California courts penalizing any forum shopping [24] by parties involved in a child custody, where the party aims to accomplish that party's motivation or retaliation not the "best interest of the child". The California courts purposely and primarily look to accomplish the secular "child best interest" according to the pure American law principles in adherence to the spirit of the Constitution.

Most notably in the cases discussed, the two legal systems dialogued and paralleled on some issues, one of which being the best interest criterion. It seems that the

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[22] California Family Code § 3011: Among the factors that are relevant, consider all of the following: (a) The health, safety, and welfare of the child. (b) Any history of abuse by one parent.…

[23] (b) Except as otherwise provided in subsection (c), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this [Act] must be recognized and enforced.

[24] Forum shopping is a practice adopted by litigants to get their cases heard in a particular court that is likely to provide a favorable judgment. Foreign litigants are attracted to the U.S. because of its wide acceptance of personal jurisdiction and favorable litigation environment. https://definitions.uslegal.com/f/forum-shopping/ (accessed April 2016).

foreign child custody law in part is based on *Sharia*; nevertheless, it has a human secular aspect that allows the American court to extend comity to it without getting entangled in the religious aspect of the Islamic custody law and maintaining the secular application of the United States Constitution.

Muslim-American Diaspora and the Islamic Child Custody Jurisprudence

In these four cases, the American court consistently deviated from the application of Islamic law. For instant, in Malak, while the two decrees submitted by the husband were from *Sharia* courts, the American court rejected the UAE decree, but espoused the Lebanese decree since it was in line with the secular principles. In Nada, the court gave full custody of the minor female to the mother who remarried a foreign man in Orange County. In G.A.S., against the *Sharia* rules, the court gave the mother's attorney's argument priority that S. as a minor daughter should not be under the legal authority of her farther according to the *Sharia* law and should not come under his custody until she is married, because if she goes to Jordan, the father will undeniably restrict her travel back to the United States. Also, in Nure, the American court gave the minor son's custody to the father ignoring the custody age of the minor son who was supposed to be in his mother's custody until the age of transfer, the American court also ignored the Pakistani court's order giving the son's custody to the mother by the mandate of the *Sharia* rules.

These departures from the mandate of Islamic law shown in each of the four cases are meant to prove the present research sub-problem 2 and its Propositions 3 and 4. The Muslim litigants, who believed that Islamic law was supposed to apply to their situation, were disappointed to see that secular American law applies instead of their divine law. Indeed, the fact that American law overrides Islamic law precluded the Muslim litigants from keeping the Islamic tradition in the United States.

- Proposition 3: Most of Muslims litigants and their community are not fully satisfied concerning the *Sharia* cases that were adjudicated by the California courts.

- Proposition 4: Most of the secular treatments of the California courts to the *Sharia* cases constitute obstacles for Muslim litigants to keep the *Sharia* traditions in the United States.

For many the subject of Islamic child custody seems like rugged rules incapable of functioning in other legal systems since it is based on Islamic law. The truth of the matter is that Islamic child custody may be adjudicated in *Sharia* courts based on a certain Islamic formula, but this formula was not prescribed to frustrate the main purpose of maintaining the child's best interest.

As all rules, Islamic child custody law has exceptions, and those exceptions work to complement the rules and not to eclipse them. The Quran emphasized the need of the child to be with its mother for the first two years[25], but there are many instances of the mother being unavailable as result of death, illness, abandonment, or even imprisonment. In these situations, the custody will go to the person next in line to assume such responsibility, and sometimes the father will undertake the custody.

Likewise, regarding the Islamic guardianship, though it is assigned to the father, nonetheless there are many instances of the father being unavailable or disqualified to undertake his responsibility to care for the child soul and monitor his interests. The guardianship in these situations most probably will be given to the mother who assumes the dual position of custodian and guardian. The latter hypotheticals of custody and guardianship do not follow the traditional mainstream rules of Islamic child custody or guardianship, but accomplish the 'Islamic best interest of the child'.

It appears, then, that both legal systems, the Islamic legal system and the American legal system, identify common ground in the field of child custody; that both seek after the "best interest of the child". However, sometimes lawyers trying to interpret

[25] See Footnote 1 above, Quran 2: 233.

a foreign legal system are misled by linguistic and cultural factors. When that happens, it is natural for the American court to state that a decree by the *Sharia* court is in violation of American public policy, since it awards automatic custody to the father.

In Malak this very misunderstanding occurred when the California judge reviewed the holding of the Abu Dhabi decree and found it conclusory[26] in its communication. This is because the judge lacked the *Sharia* court reasoning and basis to award custody to the father. It might be argued that the Abu Dhabi court did not foresee that an American tribunal would review its decree, since it was applying the Islamic custom of child custody for a Muslim couple and felt no need to explain what is known and familiar in any Muslim society.

While this is true and acceptable within the jurisdictions of Abu Dhabi and Lebanon, it does not make sense to an American judge who is neither Muslim nor knowledgeable about Islamic law. Indeed, the cover of a book does not always reveal its content. The American court in Malak made the best effort to reconcile and harmonize the bases of the Islamic adjudications with those of the American legal system under the acceptable parameters of American public policy. In doing so, the California court was obligated to reject Abu Dhabi's decree, notwithstanding its similarity to the Lebanese's decree, since the latter was a verdict containing a meaningful explanation, while the former was a verdict built on the assumption of what is known about the Islamic custom in the Arab world.

Further, since the parties in Malak had resided in many countries like many Muslims nowadays, the Islamic court is not a court of limited jurisdiction but a court which acts on the basis that its community is neither bound by the Lebanese borders or the UAE borders. The *Sharia* court is a universal court since its community is no more

[26] Definition of conclusory: consisting of or relating to a conclusion or assertion for which no supporting evidence is offered conclusory allegations. https://www.dictionary.com/browse/conclusory (accessed April 2016).

clustered within one country, but a worldwide community that is enjoined to keep the Islamic custom while living in the secular state beyond the origination of Islam. Hence, reformation is inevitable not only in the *Sharia* courts' homeland, but also where reformation is needed the most, that is, where the community of Muslim immigrants live.

Sharia courts should play a central role in explaining Islamic law to non-Muslims and continually educating the Muslim community universally, and American Muslim imams or Islamic organizations that lead Muslims in their diaspora should take the lead on this. This role is the lifeline to sustain the continuity prescribed in the *Sharia* throughout history, which still applies in the shadow of modernity. Once the *Sharia* court executed its role correctly as the Lebanese court in Malak did, we will see change in the understanding of the American court based on the spirit of Islam, which will dissipate the current negative stereotype among Westerners. Inevitably some of the *Sharia* rules will be deemed incompatible with the American society and irreconcilable and incapable of harmonizing with the American legal system. This is where to some extent the private Islamic arbitration will be the medium of reconciliation between the two legal systems. Of course, the arbitration will only work if, and only if the parties to the dispute agree to submit their case to the Imam or other Islamic entity to meditate and issue a binding decision.

The American courts are uncertain about Islamic law. On the one hand, some of these courts embrace the Islamic foreign decrees. On the other hand, some courts reject Islamic law in its entirety. Malak represents a unique example since the court there did both, rejected Abu Dhabi's decree, while embracing the Lebanese decree. The court should understand that both decrees stem from the operation of Islamic law, but in fact it noticed that the Lebanese court identified and highlighted the secular bases on which it articulated its child custody decree.

This dual-observation about the Malak court supports the notion that American courts are neither against Islam nor against Muslims. The American courts are neutral tribunals with a vision for justice, which looks for what is right within the boundaries of American public policy. Further, when the American courts extend comity to a foreign decree that implicates religion, they do so while segregating the secular from the religious as this research argued in sub-problem one, proposition 1. This is the American courts' obligation to guard and protect the Constitution that aims ultimately to protect the people and all religions from government intrusion as described in the First Amendment. Thus, the position of the American courts is to extend just 'comity' to foreign decrees, while balancing that against the protection of the Constitution and keeping the American public policy intact. The American judicial officers search for the reconciliation point that can dialogue with the American legal system and that can allow them to extend comity to these foreign decrees.

However, just because the courts are established the procedural comity's requirements, it does not mean they adopt the foreign decrees. Sometimes the court will conclude that despite the existence of all the comity's requirements, they might conclude that the foreign decree does not advocate the "best interest of the child". Hence, even if the court finds comity procedurally, this does not mean that the court automatically sees that the foreign custody decision is in the best interest of the child substantially.

Consequently, the best interest of the child trumps the finding of the comity. This later observation further indicates that the California courts are not applying or advocating any foreign decree or religious laws, but simply put, their ultimate goal is to follow American public policy represented in the secular principle of the "child's best interest". Therefore, while the American courts sometimes are aware of *Sharia* foreign decrees and their Islamic basis, they are not concerned with the *Sharia* rules or its

application in the American legal system, but are concerned with the justice produced by the *Sharia* courts to afford the welfare of the children.

Chapter 6

Case of an Illegitimate Child and Muslim Inheritance "*Mirath*"

Illegitimacy of a child born out of wedlock raises a major issue in the practice of American family law as it does in the practice of Islamic law. Although there are differences between the two legal systems, modern/progressive trends indicate that both systems follow the pursuit of vindicating the innocent child despite the adultery offense of his/her parents. On the one hand, the majority of traditional Islamic jurists denies any legitimacy to a child born out of wedlock and prohibits the use of DNA to prove the contrary, but a minority of Islamic jurists have opined otherwise, provided that the father confesses his offense (Ibn Rushd 1999, 300); additionally, they allow the use of DNA as secondary evidence to legitimatize the child.

On the other hand, to remedy the illegitimate child situation, the American legal system introduces evidence to prove the decedent father in question "openly held out the child as his own" during his lifetime[1]. Additionally, American family law presents a presumption that the child is legitimate if was born within 300 days after the termination of the marriage [2]. The openness of the American legal system to use scientific evidence, in the use of DNA, is not as widely accepted as reliable evidence to prove the paternity of a person to a child born out of wedlock. The more widely admissible evidence, however, is that the father openly declared the child as his own during his lifetime.

[1] Probate Code § 6453(b)(2)
[2] Family Code § 7611 subdivision (a)

Illegitimate Child According to the Sunni and Shiite Sects

This chapter aims to examine two Muslim cases within the California State Courts that addressed the issues of the illegitimate child's inheritance and the use of DNA as evidence to prove paternity to link the child's blood lineage or consanguinity '*nasab*' to his alleged father. The analysis will take into consideration each viewpoint—the Sunni schools of law and the Shite School of Law—on the issues of legitimacy and the period of gestation, and the admissibility of DNA data to prove paternity.

Legitimacy and the Period of Gestation[3]

Both Sunni and Shi'a schools of law consider a child born within six months of the marriage as illegitimate. However, the modern trend considers the father acknowledgement '*iqrār*' as a remedy in some regions. A child born after six months of the marriage is legitimate, unless the father disclaims it by oath of condemnation '*li'an*'[4].

In Shiite law, a child born after the termination of marriage is legitimate if born within 10 lunar months. However, Hanafi Law considers a child legitimate if born within 2 lunar years, and Shafi'i or Maliki Law extend that period to within 4 lunar years (Eliade 1987, 452-453).

Admissibility of DNA in the Islamic Procedures to Prove Paternity

The principle "the child belongs to the bed" is an irrebuttable presumption and supersedes any DNA result. *The Islamic Jurisprudence Council of the Islamic World*

[3] http://shodhganga.inflibnet.ac.in/bitstream/10603/137137/8/08_chapter_03.pdf (accessed April 2019)

[4] Mutual repudiation. A Quranic institution governing cases in which a husband accuses his wife of adultery without supplying witnesses. *Quran* 24:6–9 explicitly instructs the husband to swear four times that his accusation is true, followed by a fifth oath in which he invokes the wrath of God upon himself if he is lying. The wife may then neutralize this claim by responding with four oaths of her own, the fifth of which calls upon herself the wrath of God if her husband is telling the truth. If she refuses to take the oath, she is presumed guilty and subject to the punishment for adultery. If she takes the oath, she is declared innocent and permanently divorced from her husband. Her husband, in turn, forfeits any paternity claims over children born subsequent to their sworn oaths. See http://www.oxfordislamicstudies.com/article/opr/t125/e1345 (accessed April 2019).

League has decided: "It is forbidden to use DNA fingerprinting in paternity (lineage) disputes, which should not precede the oath of condemnation (the sworn allegation of adultery committed by one's spouse)." [5] This is the traditional means by which paternity is proven through mutual oaths of condemnation '*li'an*' that not only negate paternity but also terminate marriage irrevocably if there was a lawful Islamic marriage relationship (Shabana 2013, 159).

Muslim Litigant Perspectives on Sharia and Child Legitimacy and Inheritance

In this section I will interact with each case separately according to the Islamic Law and Islamic School of Law followed in each Muslim country.

Case #1 Said: A Saudi's Claim of Legitimacy

In the Said case[6], see Table 6, Saudi Arabian national Fouad Said divorced his wife Henrietta Jegan in December of 1977. A year and half from the divorce Jegan gave birth to a son, Samir Said and named her ex-husband as the father on the birth certificate. In 2003, Fouad filed a petition to remove his name from Samir's birth certificate, alleging that he was "erroneously" listed as the father. In 2004, the mother Jegan filed a motion to compel Fouad to submit to DNA testing. Fouad responded, he and Jegan did not live together or have sexual relations after their divorce. He was in Saudi Arabia when Samir was conceived and born.

[5] http://ambassadors.net/archives/issue20/selectedstudy11.htm (accessed April 2019).
[6] *Said v. Jegan* (2007) 146 Cal. App. 4th 1375 53 Cal. Rptr. 3d 661

Table 6: Overview of Two Contested Inheritance "*Sharia* Mirath" Cases

DNA and *Mirath* Application	**Said v. Jegan**	**Estate of Britel**
Facts	The illegitimate son was born a year and half after the divorce of the Saudi father from his wife. Nonetheless, the wife named the ex-husband the father of the child; father disagreed and wife counter requested him to submit a DNA test.	After the death of the father, the mother claimed that she had a child with him out of wedlock and motioned the court to administrate his estate and declare the daughter as an heir. The father never saw or supported the child. The court admitted DNA test, but later did not rely on it.
CA Law	**Family Code § 7611 subdivisions (a) and (d):** **(a)** A man is presumed to be the father of a child born during, or within 300 days after the termination of, his marriage to the child's mother. **(d)** The presumption arises if the man "receives the child into his home and openly holds out the child as his natural child."	**Probate Code § 6453 (b)(2):** A non-marital child may establish that he or she is the natural child of an intestate decedent by proving the decedent "openly held out the child as his own." **Family Code § 7611 subdivision (d):** The presumption arises if the man "receives the child into his home and openly holds out the child as his natural child."
Islamic Law	**Illegitimate child in Shia and Sunni Law:** Shia law mandates no inheritance from either the father or the mother. Sunni law however, allows the illegitimate child to inherit from his mother's side, but Sunni law also mandates that the illegitimate child has no right to claim inheritance from his putative father. **DNA:** Traditional Islam rejects the idea of genetic testing to prove paternity. However, the modern trend considers it as secondary evidence at best and it only applie in certain Muslim regions.	**Impediment to Succession - illegitimacy:** A child is considered illegitimate if he/she a result of an extra-marital sexual relationship (*zina*). A child born in less than six months or more than two years from the date of marriage would be illegitimate. Such a bastard child (*Waladuz-zina*) or (*Walad li'an*) cannot be legitimized. A majority of jurists hold that an illegitimate child cannot inherit his father, for he is a by-product of adultery (*zina*). Likewise, the father cannot inherit the illegitimate child. The prophet said: The child belongs to one on whose lawful bed it is born. **Acknowledgment:** A majority of jurists hold that an acknowledgement of paternity or subsequent marriage of the parents cannot confer legitimacy; a minority, however, holds that acknowledgement is a remedy.
Court Decision	**The court held**: The trial court: Issued a summary judgment denying the husband's petition to determine that he is not the father of Samir Said on the ground that he lacked standing as a presumed father to maintain such an action.	**The court held**: The trial court: Jackie S. did not carry her burden of establishing by clear and convincing evidence that Amine Britel openly held out A.S. as his own child in accordance with § 6453(b)(2). "The evidence presented to suggest that Amine

The appellate court: The husband presented sufficient evidence to show he might qualify as the presumed father (Fam. Code, § 7611 (d)); it held that the trial court erred and reversed the judgment.	Britel held out A.S. as his own child is thin, at best...." The Appellate court: Affirmed the trial court's judgment.

The son in question was born a year and half after the ending of the marriage. Consequently, based on the Shite law because the child was born after more than 10 lunar months, he is an illegitimate son. In contrast and according to the Shafi'i and Maliki laws, which require that in order for a child to be legitimate the child must be born within 4 lunar years, the child is legitimate since it was born a year and half after the ending of the marriage. Further, Hanafi law legitimates the birth of the child in this current case since it was born within 2 lunar years.

The facts stated that the child was born in 1979 and the couple separated in 1975, the facts only specify the years without mentioning the months in which the event occurred. The reader is left with the notion that the father is only claiming that he and Jegan did not live together or have sexual relations after their divorce for 4 years until the birth of the child. Further, he was in Saudi Arabia when the child was conceived and born. The facts did not give a clear-cut statement of whether there was a sexual relationship within the 4 lunar years subsequent to the divorce, except for the father's allegation that he did not have sexual relations with her after the divorce.

Additionally, the child was conceived during the father's living away from the mother in Saudi Arabia; this can prove a lack of any sexual relationship, but such proof is not conclusive if the reader assumes that the father visited the mother at some point during the 4 years. It is an argument, which the father must prove in order to negate the inference of the Hanafi, the Shafi, and the Maliki laws that the child was born within two or four lunar years after the divorce. The mother made the argument that the child in this case is legitimate and the burden of proof is on the father to rebut such an allegation by

clear and convincing evidence that he did not have sexual relationship with the mother for over 4 lunar years after the ending of the marriage.

Case #2 Britel: A Moroccan Claim of Legitimacy

The facts in the case of Britel[7], see Table 6, dealt with a non-marital relationship that allegedly resulted in the birth of a daughter to Amine Britel who is a Muslim Moroccan national who died intestate in 2011. Appellant Jackie S., the mother of A.S., the child born out of wedlock, petitioned to administer Amine's estate and for A.S. to be declared Amine's heir. Amine was not listed as the father on A.S. birth certificate. In 2000 Jackie told Amine that she was pregnant. He responded that it is contrary to his Muslim religion to have a child out of wedlock. Prior to Amine's death, Jackie never sought a paternity order to determine if Amine was the father. Amine never provided financial support to A.S. or met her, or communicated with her. Over respondents' objection, the court admitted into evidence a DNA test showing a 99.9996 percent probability that Amine was A.S.'s father, but later did not rely on it as primary evidence to prove paternity.

The facts demonstrated the strongest denial by Amine to the birth of the child since it is against his Muslim religion to have a child out of wedlock; moreover, Amine never provided support to the child, never acknowledged her during his lifetime, never communicated with her, or even met her once. The girl may be the child of Amine, but she is a product of an extra-marital relationship '*zina*' and therefore is categorized as girl out of wedlock '*Bintuz-zina*', who cannot be legitimized and according to the majority of jurists cannot acquire any inheritance from the father since the prophet said: "the child belongs to one on whose lawful bed it is born".

[7] *Estate of Britel* (2015) 186 Cal. Rptr. 3d 321 236 Cal. App. 4th 127.

What is controversial in the opinions of those majority schools of law is that although the daughter in this case cannot inherit from her father, the same jurists who hold this position insisted that the biological father, the adulterer '*zanni*', cannot marry his daughter who resulted from his *zina* with the unmarried woman. This prohibition, not to marry the out-of-wedlock girl to the *zanni,* in itself is an admission that the girl is the daughter of the adulterous father.

In my opinion this is a disconnect in these jurists' logic between their prohibiting the *zanni* from remedying his sin by honoring his child daughter and admitting the child's lineage from him and thereby allowing the child's portion of his estate. On the flipside of this view, all Muslim jurists, including the majority who invoke the disinheritance of the illegitimate children, prohibit the adulterer to marry his daughter based on Surat al-Nisa 4:23, "Prohibited to you [for marriage] are your mothers, your daughters…" because in actuality the child daughter is the product of his sperm.

The counterargument of this majority is rebutted by minority scholars in a trend led by Ibn Taymiyyah who asserts: "The establishment of parentage does not require the validity of the marriage in itself; rather the child belongs to the *firāsh* bed, or the rightful owner of the bed as the Prophet said: 'The child belongs to the *firāsh*, and the adulterer gets the stone.'" This view looks primarily at the interest and welfare of the children regardless of the faults of their parents.

In my view, the minority's opinion is substantiated by the Quranic verse:

ولا تزر وازرة وزر أخرى

"That no bearer of burdens will bear the burden of another" (53: 38).

Hence, the sins of the parents are not imputed to their children which results in the children being disowned and disinherited without logical justification.

DNA Testing in the These Cases

In these two cases the mothers requested the fathers to submit to DNA testing in order for the court to determine the paternity of the children. The mothers here were only using the American legal system to prove the children's legitimacy in order to inherent from the fathers. However, according to the mainstream opinion, and according to the Islamic Jurisprudence Council of the Islamic World League, DNA testing is superseded by the presumption of "the child belongs to the bed". Notwithstanding the mothers using the American system's method, the fathers could have used the *Sharia* legal system's method of taking the oath of condemnation '*li'an*' route to deny his paternity to the child at least in the case of Said since the couple was married before the child was born.

In the Britel case the DNA test showed a result of 99.9996 percent probability that Amine was A.S.'s father. Nonetheless, the American judge chose not to use it, following the narrow interpretation of the Probate Code § 6453 (b)(2). This rejection is not an indication that the judge was applying the *Sharia* rules of prohibiting use of DNA according to the majority of Muslim jurists, but the court there followed the American legislature instruction.

California Courts Treatment to the Two Cases

In this section I will discuss the two cases collectively from the American legal system viewpoint while comparing the differences and pointing to the similarities of the American judges' responses to the Muslim immigrant requests for allowing their illegitimate children to inherit from their alleged fathers.

When the American judges encounter an issue that touches and concerns a child directly or indirectly, the judge takes on an extra layer of scrutiny to secure the welfare of the child within the limitation of the controlling principles of American law on the issues at hand. To determine an issue of a child's inheritance, the California court judges seek to

determine if the requesting parent is truly seeking the benefit of the child rather than using such request to gain his/her own benefit.

In both cases there were common factual/legal questions that the children should be acknowledged as the heirs of their alleged fathers. The American judges answered this factual/legal question based on their legal training and experience after understanding the facts of the cases and answered this factual question purely from the American legal system's perspective without regard or inquiry into Islamic law.

Case #1 CA Adjudication re: Said and Claims of Legitimacy

The trial court's analyses in the Said case revolved around the presumptions provided in California Family Code § 7611, subdivisions (a) and (d). The former section presumes that the husband is the father if the child was born within 300 days after the termination of the marriage with the mother, while the latter section presumes that the husband is the father if the father receives the child into his home and openly holds out the child as his natural child. Similarly, the Britel trial court centered its analyses around the meaning of Probate Code § 6453(b)(2), which states: "A non-marital child may establish that he or she is the natural child of an intestate decedent by proving the decedent "openly held out the child as his own."

The Britel court supplemented its analyses by the directive described in the California Family Code § 7611, subdivisions (d) of what it means to openly hold out the child as the father's own. The legislature established the two sections in the California Family Code and the Probate Code following the mandate of the United States Constitution concerning the Equal Protection Clause to not differentiate between a child seemingly born out of a valid marriage, as in the case of Said, and a child out of wedlock, as in the case of Britel. However, the notion here is that both children are similarly situated and deserve the protection of the law. To that end both sections accomplish the

same result by examining if the father, "openly held out the child as his own or as his natural child."

Following the legal logic, both courts above followed the reasoning of allowing the inheritance only if the father held the child as his own natural child. In Said's case, the trial court misconstrued the application of the California Family Cod § 7611(d) by assuming that the only situation where the father will have standing[8] is if he invokes that he is a presumed father with the intention to prove that he is the father. However, the appellate court showed that the application of § 7611(d) does also extend to the situation where the alleged father wants to prove the opposite, namely, that he is not the father, or (non-paternity). But the other party (the mother) claimed him to be so; the same applies in the case of Said. The mother claimed that he is the father to build up a case of inheritance for her son Samir. There, the trier of facts[9] concluded that since the father's sworn statements attested to the lack of any relationship with Fouad precluded him from establishing that he was Fouad's presumed father. Consequently, he lacks standing. Hence, there is basis to grant a summary judgment over the father's request to examine whether "he might qualify as the presumed father (Fam. Code, § 7611, subd. (d)" (Said), in order to prove that he is in fact not the father.

In reversing the Said trail court's decision, the appellate court stated that because the mother contended in her complaint that her ex-husband is the alleged father of her son, and her contention was also evident by listing the ex-husband as the father on Samir's birth certificate, therefore, the ex-husband in this case is an interested party and has the right to at least rebut such allegation. Further, the alleged father contended that he

[8] "Standing" is a party's right to make a legal claim and is a threshold issue to be resolved before reaching the merits of an action. (Librers v. Black (2005) 129 Cal.App.4th 114, 124 [28 Cal.Rptr.3d 188] (Librers).)

[9] The judge or jury responsible for deciding factual issues in a trial. If there is no jury the judge is the trier of fact as well as the trier of the law. https://dictionary.law.com/Default.aspx?selected=2165 (accessed April 2019).

is not the father since he was erroneously listed as such on the child's birth certificate. This was evident by the lack of relationship with the mother after the divorce, he neither lived together with her, nor had a sexual relationship with her. Furthermore, Samir was conceived and born while the father was residing in Saudi Arabia.

Consequently, and based on Family Code §§ 7630 and 7611, the father is an interested party who obviously has standing and is entitled to a determination on the merits, which is calculated to show that he never "received the child into his home and did not openly hold out Samir as his natural child." (§ 7611(d)). Accordingly, the process of disproving paternity in the face of an allegation that the ex-husband is supposed to be the father is in fact the basis on which a standing can be shown to dispel the alleged paternity action for the purpose of inheritance[10]. To that extent, the Said's Appellate Court held: "when an interested party seeks to prove he is not a child's father under § 7630(b), application of the Librers rule (stated above) must necessarily mean that he need only allege facts showing he might be the presumed father, then go on to disprove those facts at trial."

Case #2 CA Adjudication re: Britel and Claims of Legitimacy

In the case of Britel, the analysis revolved around the legal/factual question of whether the father "openly holds out" the child as his own daughter during his lifetime. The trial and appellate courts there held that the argument of mother Jackie was not sufficient to satisfy the requirements of § 7630(b)(2), since she invoked that Britel privately held out A.S. as his daughter, however, § 7630(b)(2) essentially required the standard of an "openly hold out" to put all people on notice that the child is the offspring of the father.

[10] *Miller v. Miller* (1998) 64 Cal.App.4th 111[74 Cal.Rptr.2d 797].

In interpreting the evidence which Jackie introduced, the Appellate court relied on how the requirement of "openly holds out" stemming from § 7611(d) was construed by the precedents of other courts. The appellate court observed and differentiated between the term "acknowledge" and the term "openly hold out." This analysis concluded that acknowledgement could be private, but clearly the requirement of § 7630(b)(2) and § 7611(d) mandates a public display indicating that the father is openly and widely announcing his fatherhood relationship to his child. Examples of these public displays are shown from the presence of the father in the important events of the child's life, such as a birthday, or the mother introducing her ex-boyfriend or ex-father to the world as the biological father of the child, while the father has known about it and has not objected, or the father listing himself as the father on the child birth certificate, and/or the father living with the child in his house for a period of time and maintaining this relationship with the child even after separating from the mother.

Measuring the totality of the evidence introduced by Jackie against the standard of "openly hold out", the evidence showed: Amine made it clear, in a private e-mail message to Jackie, that he could never tell his parents about the pregnancy; in other words, that he would conceal it from them. The court found Amine "maintained a close, open and loving relationship with his family." Yet, he never told them about the pregnancy or, later, the child. He told his best friend Choukri that Jackie had had an abortion, and never mentioned the matter again to Choukri. There is no evidence that after A.S.'s birth, Amine acknowledged paternity in any way. Indeed, in late 2006, less than four and half years before his death, Amine told Jackie not to contact him again and that he wanted nothing to do with her or A.S. (Britel). Consequently, the totality of the evidence supports the court's finding Amine did not openly hold out A.S. as his child.

Collectively in the above cases, the mothers demanded the father to submit to a DNA test to prove the alleged paternity relationship toward the children. In Said's case,

the trial court initially granted the mother's request of the DNA evidence. However, later it reversed its ruling giving priority to the application of § 7611(d) inquiring if the father openly held out the child as his own over a DNA testing. Similarly, Britel's court gave priority to the application of § 4653(b)(2), examining whether the father openly held the daughter as his child over the DNA test that was introduced by the mother and showed a 99.9996 percent probability that Amine was A.S.'s father. Nevertheless, the court there concluded that this result was irrelevant against the primary proof by clear and convincing evidence that the father held the child openly as his own and this requires an unconcealed affirmative representation of the father's paternity in open view during his lifetime.

At the end of its analyses, the Britel's appellate court informally concurred with Jackie's argument that the application of § 4653 is outdated in comparison to the accuracy of DNA tests nowadays. However, the court admitted that its authority to interpret the statute is curtailed by the law's intent, which does not include proving paternity by a DNA test. In that the court invited the legislature to adopt the modern and new advantage of scientific genetic testing, provided that, the father, during his lifetime, acknowledged fathering the child, regardless of whether he publicly or openly held out the child as his own (Britel).

Conclusion and Social Implication

Based on the foregoing a clear dialogue can be established between the American legal system and the Islamic legal system in at least two areas concerning the method of establishing the children legitimacy and their ability to inherent from their fathers: On the one hand, the Islamic law minority of jurists holds that an acknowledgement '*Iqrar*' of the father remedies the status of an illegitimate child and allows him/her to inherent from his biological father. On the other hand, the American law requires that in order for a

child to be eligible to inherit from the father, the father must "openly hold the child as his own".

In both systems, if the traditional evidence was not sufficient to establish paternity, it is seldom to rely on the DNA. The general modern Islamic trends by the statement of The Islamic Jurisprudence Council of the Islamic World League, it is forbidden to use DNA in paternity cases to trump the oath of condemnation, and even the modern tends only use DNA as secondary evidence. Similarly, the American law still relies on application of Family and Probate Codes to establish paternity even if the DNA introduced an undeniable proof of paternity, the majority of the American courts will not consider the DNA to trump the standard of review found in the statutory requirements, which rarely rely on a scientific or genetic testing.

California Courts apply only California Process and Legal Methodology

Examining the trial and appellate courts' responses to the litigants does not convey that the trial or the appellate courts inquired into the Islamic law. The central analysis from both courts support this research's sub-problem one, proposition 1, in that the courts target the interpretation of Family Code § 7611 and the Probate Code § 6453, without regard to any Islamic jurisprudence doctrine of illegitimate children, DNA, or the Islamic law of inheritance '*mīrāth'*. Proposition 1: The foundational principle of separation of church and state compels the California courts to treat *Sharia* cases from secular perspective according to the American law.

In response to the mother's allegation that the child is legitimate within the Hanafi Sunni, the Said court applied Family Code § 7611 (a) requiring the child to be born within 300 days after the termination of the marriage for a legitimate presumption to stand. In Britel, the court reached a result similar to the Islamic minority sect, but in doing that its main consideration was that the father did not openly hold the child as his

own during his lifetime. Thus, to a minority Muslim reader this might be received as the American court using the minority doctrine of *iqrār*, but in actuality the court analysis cited § 6453(b)(2) within the meaning of § 7611(d).

Finally, in both cases, the mothers invoked the DNA method, nevertheless, both fathers followed the Islamic direction of not relying on a genetic test in determining the paternity of a Muslim father, whereas the oath of condemnation evidence supersedes any accurate DNA test. In that American law agrees with Islamic law, but from a different view. On the one hand, while Islamic law sees the use of DNA as prohibited, the American law sees it from the lens of an old legislation that was enacted at a time where the genetic testing did not mature to the accuracy seen in our modern time as in the case of Britel.

In both cases, Jegan and Jackie argued that they gave birth to legitimate children evident by the fathers' alleged involvement in the children's lives. However, the fathers and/or their estate argued otherwise and the American courts, while using the American legal methods of litigation, agreed with the father and the estate that the mothers failed to reach their burden of proof that the father "openly held the children" in their lifetime. In both cases there were central factual/legal questions that the American judges answered based on their legal training and experience after understanding the facts of the case. Nevertheless, the American judges answered both factual questions purely from the American legal system's perspective without regard or inquiry into Islamic law.

Thus, the action of both courts bolster this assertion of the present research that the foundational principle of separation of church and state compels the California courts to treat *Sharia* cases from a secular perspective according to the American law.

Muslim-American Diaspora and the Islamic Jurisprudence Rules on Illegitimacy

It is formidable to imagine oneself in a position of a child scarred because he is stigmatized as a child out of wedlock. Those scars do not stop there, but they have a domino effect on the child's family, community, and society.

The application of Islamic law clearly supports the mother's position in the case of Said to declare the child legitimate, but obviously the American court did not heed her allegation, but applied the American law and ruled that the child is illegitimate. In turn, this result supports the present research sub-problem 2, propositions 3 and 4. Proposition 3: Most of the Muslims litigants and their community are not fully satisfied concerning the *Sharia* cases that were adjudicated by the California courts. Proposition 4: Most of the secular treatments of the California courts to the *Sharia* cases constitute obstacles for Muslim litigants to keep the *Sharia* traditions in the United States.

The mother was not satisfied with the American court's decision, particularly with the clear remedy concerning the legitimacy of the child that can be proven by applying the *Sharia* rules of the Hanbali Sunni Wahhabi sect, by which a child is legitimate if he or she was born within 2 lunar years. Because the court must adhere to the Constitution of the United States, the result was altered by the American court which required 300 days instead of 2 lunar years. Hence, the mother who searched for justice from the American court ended up unsatisfied and unable to keep the tradition of *Sharia* in the United States.

Although the plight of illegitimate children is shared by all societies, some Muslim scholars and American judges call upon the legislature to adopt the new accuracy of the DNA test (Said)[11]. This is a movement advocating a new resolution to vindicate the innocent children in light of such a difficult situation.

[11] The statute "must be given a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the Legislature, practical rather than technical in nature, and which, when applied, will result in wise policy rather than mischief or absurdity" (Said).

To that extent, in 2018, Ida Lim, a prominent Malay journalist published an article showing that most of these children end up having the common name "servant of Allah's son" '*Bin Abdullah*'[12] instead of their biological father's name, a name which stamps them with a badge of shame as illegitimate children and condemns them to be shunned by their society as the children of nobody.

The questions that are always begging an answer are: Whose fault or sin is it? Is it the parents or the child's fault? Why is it that the children always carry the blame of their parents' sin? The Quran clearly does not impute the guilt of one person on another (53: 38), nevertheless most Muslim societies treat those children in a dehumanizing way without regard to the Islamic concept stating: "All people are judged by their own action". For example, the senior cleric of Malaysia states: "Allowing a Muslim child conceived out of wedlock to take his or her father's name is akin to permitting adultery" [13]. The pressing issue here is how can we protect innocent children from suffering the consequences of their parents' deviation from following the precepts of the *Sharia* by having extra-marital relationships?

The Quran answers this dispute in chapter 30 verse 30[14]. This verse centered on the word '*fiṭra'* to which one of its interpretation is "sinless" or "state of inherent virtue" that resembles Adam's status at the point of creation. Thus, according to Islamic theology, like Adam all children are born uncorrupted and sinless. Therefore, imputing the sin of the parents' adultery on the child undeniably clashes with the precepts of the Quran. Some legal opinions '*fatwa*' explain why a child carries the guilt of his parents

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[12] https://www.malaymail.com/news/malaysia/2018/02/07/why-muslim-parents-are-fighting-to-name-their-illegitimate-children-after-t/1571533 (accessed April 2019)

[13] https://www.straitstimes.com/asia/se-asia/allowing-illegitimate-child-to-take-fathers-name-akin-to-permitting-adultery-perak (accessed April 2019)

[14] "So direct your face toward the religion, inclining to truth. [Adhere to] the fitrah of Allah upon which He has created [all] people. No change should there be in the creation of Allah. That is the correct religion, but most of the people do not know."
فأقم وجهك للدين حنيفا فطرت الله التي فطر الناس عليها لا تبديل لخلق الله ذلك الدين القيم ولكن أكثر الناس لا يعلمون

and elaborate that adultery is like a disease and the child inherits it at birth[15]. This is clearly a major deviation from the Quranic meaning that every child is born sinless.

The Quran also commands Muslims in (76:8)[16] to help the needy and the orphan. This in my opinion stands at odds with the trend of denying a man's own child support or inheritance just because the child is out of wedlock while the same man is boasting in the Muslim community to be helping the needy and orphan. This invitation does not only target the Muslim community but also the American community at large, since both the American and the Muslim community in America are bound by the interpretation of the American Family Code § 7611 and the Probate Code § 6453 as they live together in obedience to the law of the land. Both ought to advocate for their offspring by "openly holding them as their own children" during their lifetime to afford them the acknowledgement *iqrār*, which is needed to help the innocent children and shield them from the guilt from an act they did not commit.

Consequently, it is not a deviation from the Islamic faith for Muslims to acknowledge their offspring in the society where they live, to hold them as worthy to carry their name and recognize them as their own children according to the civil law of the United States. In doing so, they will truly have helped the needy and cared for the orphan who are their immediate family. To some extent the western culture as the Islamic culture gave the man the role of leadership in most aspects of life. Forthwith, the remedy of injustice to the innocent children falls on the mn's shoulders in both milieus to remedy and restore the children's social lives as equal and within the normative environment of any childhood. A child should not be called "Bin Abdullah" or "Bin Fatima" to avoid the linage of his progenitor, but should be called in love by his/her father's name.

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[15] https://www.al-islam.org/philosophy-islamic-laws-nasir-makarim-shirazi-jafar-subhani/question-15-why-illegitimate-children (accessed April 2019).

[16] "And they give food in spite of love for it to the needy, the orphan, and the captive" (76:8).
ويطعمون الطعام على حبه مسكينا ويتيما وأسيرا

Indeed, this action by the fathers will promote and reinforce their family structure, support a healthy community, and produce a harmonious society that flourishes with all humans seeking God's path of peace and love.

Chapter 7

Discrimination Against Muslim Prisoners re: Diet '*Halal*'

Muslims are cautious about the food they consume and always inquire about how their food is prepared. They abide by specific standards when it comes to the food that must be regarded as permissible, or '*Halal'*. Considering the meat to be *Halal* depends on the way the animal is slaughtered and how the meat is prepared. This dietary regulation is directly commanded by the divine text, the *Quran.* Surah 2: 173 states:

> He hath only forbidden you dead meat, and blood, and the flesh of swine, and that on which any other name hath been invoked besides that of Allah.
>
> But if one is forced by necessity, without willful disobedience, nor transgressing due limits, then is he guiltless. For Allah is Oft-forgiving Most Merciful

This is the authority that Muslims draw on to guide their dietary lifestyle. It is a way of obedience to *Allah.* This guideline is akin to the Jews dietary laws. Similar to the Jewish dietary laws, the Muslim dietary guidelines are proven to have preserved the people against sickness and frailty and kept them purified to worship God. A person who is incarcerated needs this guideline the most, since the time of incarceration is a time of rehabilitation and remorse for what the prisoner had done. Rehabilitation by imprisonment often draws the Muslim prisoners closer to God and brings the desire to manifest obedience to the divine laws.

Many Muslim prisoners go through rehabilitation under the California penal system and sincerely seek God's forgiveness and a second chance from society. As Islamic law affords those Muslim inmates ways of rehabilitation and reconciliation with God and others, so does the law of the United States afford Muslim inmates similar

rehabilitation under the Free Exercise Clause, provided the jail and prison administrations do not abuse the discretion they enjoy in managing the correction facilities to keep the safety and security balance.

Islamic Halal Meals According to the Sacred Texts

The sacred text describes what is permissible to eat and what is not permissible to eat for Muslims. The *Quran:* Surah 6: 118 and 121 states:

> So eat of (meats) on which Allah's name hath been pronounced, if ye have faith in His signs. (6:118)
>
> فكلوا مما ذكر اسم الله عليه إن كنتم بإيته مؤمنين
>
> Eat not of (meats) on which Allah's name hath not been pronounced: That would be impiety. But the evil ones ever inspire their friends to contend with you if ye were to obey them, ye would indeed be Pagans. (6:121)
>
> ولا تآكلوا مما لم يذكر اسم الله عليه وإنه لفسق وإن الشيطين ليوحون إلى أوليآئهم ليجدلوكم وإن أطعتموهم إنكم لمشركون

Beside these direct instructions regarding how to prepare *Halal* meat, Islamic jurisprudence '*fiqh',* added certain rules that must be followed in ordered for the meat to be *Halal* for consumption.

Guideline for *Halal* Slaughtering of Animals General *Sharia* Rules

For the slaughtering '*dhabh'* to be permissible or *Halal*, there are certain procedures that must be followed. It is important to follow the requirement of the sacred text, "Eat not of (meats) on which Allah's name hath not been pronounced".

The first step in the procedures is the invocation of the name of *Allah*. Since the Creator is the granter and taker of life, a member of the Muslim faith must say the name. '*Tasmiyyah'* or invocation means pronouncing the name of God by saying in the name of Allah '*bismillah'* or in the name of God, God is Great '*bismillah Allahu akbar'* before cutting the neck. Opinions differ somewhat on the issue of invocation, according to three

of the earliest jurists. According to Imam Malik, if the name of God is not mentioned over the animal before slaughtering, the meat of such animal is forbidden '*haram'*, whether one neglects to say *Bismillah* intentionally or unintentionally.

According to the jurist Abu Hanifa, if one neglects to say *bismillah* intentionally, the meat is *haram*; if the omission is unintentional, the meat is *Halal*. According to Imam Shafi'i, whether one neglects to say *bismillah* intentionally or unintentionally before slaughtering, the meat is *Halal* so long as the person is competent to perform the slaughtering '*dhabh*'. Thus, the majority of the tradition emphasizes that the pronouncing of God's name is a widely known matter and an essential condition of *dhabh* (Riaz and Chaudry 2004, 19).

The second issue of the procedures is that a competent Muslim must accomplish the slaughtering. Only Muslims who reached puberty are allowed to slaughter animals after saying the name of *Allah* and facing Mecca. The third issue is the condition of the knife used. The knife must be sharp, to minimize the time and the animal's pain. The knife must not be sharpened in front of the animal because it may cause stress to the animal. Also the slaughtering is done by cutting the throat of the animal or by piercing the hollow of the throat to lessen the pain. Finally, the blood must be completely drawn from the animal's body (Saud, 1989). This is how Muslims prepare *Halal* meats, and it is on this basis that Muslim inmates are requesting accommodation from the correction facilities, based on the Free Exercise Clause.

Distinction Between the Islamic *Halal* Meals Cases and Other Cases

It is important to distinguish the inmates' cases requesting *Halal* meals from other *Sharia* cases. Unlike any other area of the Islamic law, Muslim prisoners litigate the issue of *Halal* diet cases against the government and not against each other like for the child custody cases and other areas of Islamic law. Although there are some differences

between the Islamic schools of laws regarding what is considered *Halal* foods[1], the Muslim prisoners do not discuss those differences, as we have seen in the dowry '*mahr*' and the child custody '*ḥaḍāna*' cases. Muslim prisoners do not dispute *Halal* cases based on the Maliki, Hanifi, Hanbali, or Shaf'i's teachings and opinions; neither do they differentiate between Sunni or Shia ways of slaughtering, but they request *Halal* diets according to the consensus '*ijmā'* of Muslims on what is considered *Halal* in general among all Islamic schools. This consensus is more apparent in the Muslim diaspora than where Islam originated. Thus, what the Muslims are pointing to are the potential violations by the jail and prison administrators to the application of the United States Constitution, which protect the prisoners' religious rights during their incarceration.

With this overview in mind I would like to review three cases that treated the issue of *Halal* diets for Muslim inmates. The cases either reflected on a decision-making that allowed or denied the Muslim inmates access to *Halal* meals or they offered an alternative way of accommodation.

Three Cases re "Sharia Halal Meals" in CA Prisons

In this section I will examine the chief facts in each case separately according to the parties' allegation, specifically the Muslim litigants' allegation on what is considered *Halal* meals and permitted for consumption.

Washington

The appellant had been receiving no-pork meals, however he was informed that a new policy had been enacted that only inmates who obtained a court order will receive such meals. He filed an internal grievance requesting a "*Halal*" diet. Sergeant Stetson asked the appellant to describe what food was acceptable to him. The appellant requested

[1] See Riaz 2004.

peanut butter sandwiches at lunch, and fish, soybean or vegetable patties at dinner. The appellant was given peanut butter at lunch and the usual hot meal at dinner non-*Halal*. The complaint alleges that, in practice, there was no effort to provide him with a substitute for the pork, and the meat sometimes touched other food on his plate, making that food unfit for him to eat.

Menefield

The plaintiff argued that the California Department of Corrections and Rehabilitation (CDCR) has an official policy of ignoring the dietary prescriptions of Islam. While kosher meals are provided to qualifying Jewish inmates, no similar accommodation is made for Muslim inmates. The plaintiff requested to participate in the kosher diet program provided by the CDCR since it is similar to *Halal* foods. When he received his Religious Diet Card, it listed his religious diet as "Islam," which permitted him only vegetarian meals instead of kosher meals. The prison chaplain informed him that state regulations did not permit him to approve Muslim inmates for kosher meals.

Moore

The appellant filed an action alleging that he requires a special religious diet but respondents failed to transfer him to another prison facility that is equipped to accommodate his religious dietary needs. The respondents filed a motion for summary judgment at the trial level that was granted since respondents did not have a mandatory duty to transfer an inmate. Moreover, the appellate complaint was barred for failure to exhaust administrative remedies before filing a civil lawsuit. Notwithstanding that, Moore filed an internal grievance and the doctor recommended special diets that were repeatedly ignored by the prison dieticians.

American Courts Adjudicating Cases on Muslims Halal Meals

In this section I will discuss these three cases collectively from the American legal system viewpoint while comparing the differences and pointing to the similarities of the American judges' responses to the Muslim inmates' request for dietary accommodation of *Halal* meals or its counterpart such as the Jewish kosher meals.

Case #1 Adjudicating "Washington" on *Halal* Meals

The California court in the case of Washington [2] (see Table 7), applied the law of *Monell v. Department of Social Services* [3], which mandates that a Civil Rights plaintiff must establishes a nexus between the alleged violation of rights and a governmental policy or custom. Further, under *Hansen* and section 1983, the violation must be committed personally by the defendants or their agents and directly cause constitutional deprivation of the plaintiff's constitutional rights [4]. If one of these causes of actions is lacking or the plaintiff fails to prove it, his complaint did not state a cause of action to which a relief can be granted; consequently, the complaint will suffer a demurrer. Generally, *Monell* requires a nexus between the violation and the policy. In Washington, however, the nexus can be drawn from the policy change that resulted in discontinuing Washington's accommodation. The court's comment on giving Washington a peanut butter sandwich instead of the religious meals received before the new policy states: "No facts are alleged to suggest that this decision was part of an official policy or custom. To the contrary, it can only be characterized as an ad hoc attempt by Sergeant Stetson to deal with the particulars of the appellant's situation" (Washington 2004). It might be a creative idea by an agent of the correction institution, but the scope of examining the

[2] *Washington v. County of Santa Barbara,* (2004) WL 1926131 (Cal. Ct. App. 2004
[3] *Monell v. Department of Social Services* (1978) 436 U.S. 658, 694.
[4] *Hansen v. Black* (9th Cir.1989) 885 F.2d 642, 646.

Table 7: Three Cases "*Sharia Halal* Meals" in CA Prisons

***Halal* Meals App.**	**Washington v. County of Santa Barbara**	**Menefield v. Cate**	**Moore v. Rimmer**
Facts	Appellant had been receiving no-pork meals, however, he was informed, a new policy enacted, only inmates who obtained a court order will receive such meals	Plaintiff argues that the California Department of Corrections and Rehabilitation ("CDCR") has an official policy of ignoring the dietary prescriptions of Islam.	Appellant filed an action alleging that he requires a special religious diet but respondents failed to transfer him to a facility to accommodate his dietary needs.
CA Law	**(RLUIPA) Religious Land Use and Institutionalized Persons Act**: "no government shall impose a substantial burden on the religious exercise of a person … confined to an institution, unless the government demonstrates that the burden on that person is in furtherance of a compelling governmental interest and is the least restrictive means available."	**The Equal Protection Clause:** requires any correctional facility to treat prisoners equally regardless of their religion, race, gender, or origin. **Strict scrutiny:** (1) Government must prove that its conduct furthers a compelling interest (2) Government must prove conduct necessary and the least restrictive means available.	**Free Exercise Clause:** "A free exercise clause claimant must satisfy the three standard preliminary requirements that apply throughout constitutional law, that is: (1) the government harmed the claimant enough (2) to create a justiciable claim (3) that is within the jurisdiction of the court to redress".
Islamic Law	***Halal* Slaughtering Rules:** 5 principles; Invocation, Muslim slaughters, *dhabh,* sharpened knife, blood drawn	***Halal* Slaughtering Rules:** 5 principles; Invocation, Muslim slaughters, *dhabh,* sharpened knife, blood drawn	***Halal* Slaughtering Rules:** 5 principles; Invocation, Muslim slaughters, *dhabh,* sharpened knife, blood drawn
Court Decision	**The court held**: Appellate court upheld a lower court's decision in favor of the defendant. Plaintiff had not alleged facts sufficient to support Section 1983 claims since there was no personal involvement against defendants, nexus between violation and governmental policy, and plaintiff's 'Religious Land Use and Institutionalized Persons Act' RLUIPA claims also failed because the facts stated had not amounted to a substantial burden on religious practice.	**The court held**: Appellate court upheld the lower court's decision in favor of plaintiff. Defendant Cate is hereby ORDERED to provide Plaintiff Menefield with access to the kosher meal program. If and when the State succeeds in implementing its proposed *Halal* option, and is prepared to provide Plaintiff with access to that program.	**The court held**: Trial court granted summary judgment on the ground that respondents did not have a mandatory duty to transfer an inmate to another facility to accommodate the inmate's religious diet. Appellate court affirmed the trial court's decision.

nexus is not from the policy to the new accommodation, but it is supposed to be the new policy's effect on the existing accommodation given the prisoners.

The court's examination did not take into consideration that the new policy directly cuts off the benefit of Washington in continuing to get his religious meals. The evaluation of the nexus is not meant to circumvent the denial of the current benefit and focus on the new mediocre accommodation of pork tainted peanut butter sandwich. The evaluation must go to the heart of what benefits were denied to the prisoner as a direct result of the new policy. If that were the analysis of the court, surely, the nexus would be found between the policy of the local government and the deprivation of Washington by not being able to maintain his religious *Halal* diet. Consequently, the law in Monell would apply to this case in order to preserve the appellant's Free Exercise Clause.

The heart of the law in Hansen and its section 1983 dictate that in order for the defendants to be liable for civil rights violation, the defendants must personally be involved in the constitutional deprivation. The court analysis in the current case states:

> Although the complaint asserts that Peterson formulated a policy requiring inmates to obtain a court order before they would be allowed to receive a religious diet, appellant was never required to seek such an order and it does not appear this policy affected his treatment in any way. (Washington 2004)

To the contrary, before the new policy was enacted, surely appellant was not required to seek such an order, but the order was required after Peterson decided to implement the new policy of requiring a court order before any inmate would be provided with a special religious diet. Forthwith, after the new policy was in place, Washington was required to obtain a court order to get his Islamic diet of *Halal* meats.

Accordingly, the new policy implemented by Peterson directly burdened the appellant's religious rights to obtain his Islamic meals, and offered him only a mediocre and weak nourishment of peanut butter tainted with pork or pork-byproducts. Further, the

court asserted that: "Sergeant Stetson was directly involved in the decision to provide the appellant with the meals … her action simply does not show that she directly deprived him of his constitutional right to freely practice his religion" (Washington 2004). Albeit she did not impose a peanut butter tainted with pork on the appellant because she was not personally involved in preparing or serving the food to him, she was in a position to oversee the preparation and distribution of the food to all the inmates where the appellant was one of them. Because of her action or lack there off, Washington was left with little or no choice to eat pork tainted food or starve in order to maintain his religious purity and devotion to the divine law. Religious choice to avoid certain food should not insulate the food policy from challenge. Instead, the fact that a religious inmate is forced to choose between food and religion should by itself suggest that the administrators acted with deliberate indifference (Liu 2004, 1169).

RLUIPA provides that, "no government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution." The government must demonstrate that any new policy is in furtherance of a compelling interest and it is the least restrictive means to accomplish that end.

Examining Peterson's new policy under RLUIPA and the Free Exercise Clause shows that the government created a new burden on appellant's rights to exercise his Islamic obligation to maintain his diet within the scope of *Halal* meals. The court was supposed to examine the new policy under the strict scrutiny clause and show that the burden on Washington was necessary to further a governmental compelling interest and there was no other alternative means available to accomplish that compelling interest. Thus, what is the compelling interest that motivated Peterson to implement the new policy? Why must the inmates obtain a court order before obtaining their religious diets? Why stop the current accommodation of receiving *Halal* meals?

Could it be the financial burden on the correction institution? If it was the financial burden on the prison, it is never a satisfactory reason to meet the compelling interest requirement. Surely, the religious meals will not cost much for the prison to prepare[5], but a monetary reason is never a legally compelling interest. In fact, the smallest burdens by the government on the exercise of religion are subject to a strong presumption of unconstitutionality and violate the Free Exercise Clause. And is especially considered in the light that most of those inmates are indigent and cannot afford to hire an attorney to represent them in this kind of case. Inmates come to the court as "pro per"[6] representing themselves such as in this case and in a weak position to understand the law. The holding of this case espoused the law and analysis in Weir v. Nix [7] which states:

> For a burden to be 'substantial' within the meaning of RLUIPA, the challenged governmental action must significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion. (Washington 2004)

Mr. Washington produced prima facie evidence to support his claim of the alleged violation to RLUIPA and Free Exercise Clause. He introduced two exhibits: the first was the discontinuation of *Halal* meals, the second was the evidence that his alternative accommodation of peanut butter sandwich was tainted by pork residue on the same tray the sandwich was served, which makes it unfit for Washington to consume. The two exhibits therefore demonstrated that the new policy constituted substantial burdens on

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[5] About 3,200 inmates are also receiving *Halal* meals at a daily cost of $3.20 per day. The budget for kosher meals — $8.50 a day per inmate, compared with $2.90 per day for the general menu — is assured by the Religious Land Use and Institutionalized Persons Act of 2000, Verke said. "It's something the CDCR takes very seriously," http://www.shmais.com/component/zoo/item/california-s-fiscal-crisis-affects-jews-in-jail (accessed November 2016)

[6] Adj. short for "propria persona," which is Latin for "or oneself," usually applied to a person who represent s himself/herself in a lawsuit rather than have an attorney. See: in pro per, in propria persona, propria persona http://legal-dictionary.thefreedictionary.com/pro+per (accessed November 2016).

[7] *Weir v. Nix* (8th Cir.1997) 114 F.3d 817, 820.

Washington's practice of his religion while incarcerated. His choices were to eat the pork tainted food and commit sin in the sight of *Allah* or abstain from eating any food while incarcerated to keep his religious purity and maintain the acceptance by the almighty. He might eat sometimes when he got the peanut butter sandwich without any pork on the tray, but still how can he determine if that sandwich was not touched or comingled with any pork or its byproducts?

The burden on Washington was concrete when he had seen the residue of the pork on the tray he was served. It was also a potential fear or doubt of eating what God forbade him to eat when he doubted how the sandwich was prepared or what the sandwich might have touched based on the previous incidents. Clearly those moments constitute substantial burdens within the meaning of RLUIPA, since it constrained and curtailed Washington's freedom to adhere to his faith by consuming only *Halal* meals. In fact, the new policy forced Washington knowingly or unknowingly to eat what the divine law forbids (Quran 3:2). The court analysis states:

> Complaint does not amount to a 'substantial burden' on appellant's ability to practice his Muslim faith. Accepting as true the allegation that appellant was sometimes presented with some food at dinnertime that would have violated his dietary proscriptions had he eaten it, he was routinely given a peanut butter sandwich substitute to accommodate his religious requirements. (Washington 2004)

Here, the court indirectly advised Washington not to eat the forbidden food, which he was often served. The court then relied on the existence of the alternative accommodation of peanut butter sandwiches. In essence the duty of the court at that point according to RLUIPA is to construe the appellant's contention that those sandwiches were tainted with pork and unfit as a dietary accommodation to be "in favor of a broad protection of appellant's religious exercise, to the maximum extent permitted by the Constitution."[8] Nonetheless, the court did not follow the RLUIPA instruction to favor the

[8] 42 U.S.C. § 2000cc-3(g)

protection of religion, but sided with the government instead. RLUIPA suggests that courts must always use the strict scrutiny test when assessing the legitimacy of prison regulations that burden inmates' religious exercise. RLUIPA was drafted with the intent of enabling religious exercise in prison, and courts are not free to ignore them (Liu 2004, 1197-1198).

Case #2 Adjudicating Menefield on *Halal* Meals

Unlike the Washington case, the court in Menefield[9] (see Table 7) recognized the violations committed by the correction facility based on the Equal Protection Clause, Free Exercise Clause, and RULIPA. In examining of the Equal Protection Clause the Menefield court espoused the law in Freeman v. Arpaio [10]: "prison officials cannot discriminate against particular religions" (Menefield). The court here addressed the different treatment rendered by the prison administration toward Islam. While the Jewish prisoners were getting the kosher meals, the Muslim prisoners were denied the *Halal* meals and given a substitute of vegetarian meals. The prison administration denied Menefield kosher and/or *Halal* meals while the kosher meals were readily available with a minimum additional cost added to the standard prison fare. The court interpretation of the facts submitted by Menefield is that the financial burden on the prison was not substantial and does not constitute a safety issue to outweigh or justify the denial of kosher or *Halal* meals if and when *Halal* meals are available to Menefield.

The court further reiterated in its view of a good faith accommodation of Menefield's rights its requirement for defendant (correction facility) to grant, at minimum, Plaintiff's request for a kosher meal. Such an option is provided to Jewish inmates, and the prison presented no practical consideration that advocates against

[9] Menefield v Cate C 08-00751 CRB (PR). (E.D. Cal. Oct. 2, 2009).

[10] 125 F.3d 732, 737(9th Cir. 1997), rev'd on other grounds by Shakur v. Schriro, 514 F.3d 878 (9th Cir. 2008).

providing the same option to Menefield. Consequently, the prison's regulations in Menefield's case explicitly differentiate on the basis of religion and it must be subject to strict scrutiny review by the court. Under strict scrutiny review, the prison regulation considered the class of religion, which is a suspect classification, the standard of review being whether the use of the classification (that is, religion) is narrowly tailored to achieve a compelling government objective. In the current case, the prison administration did not have a compelling or a legitimate objective. Withholding kosher meals from a prisoner because his inmate religious card categorized him as a Muslim does not compromise the security of the prison and the only burden on the prison administration is a trivial additional cost above the standard prison fare.

Furthermore, if the prison administrators had shown a compelling interest that for some miraculous reason the *Halal* meals would jeopardize the prison safety, they cannot use a suspect classification (that is, religion of Islam) if there are any other means available to the government to achieve its compelling objective. Therefore, because the kosher meals were readily available and served regularly to the Jewish inmates, there is an alternative means by which the government can satisfy the equal protection clause without incurring any risk at all. Hence, Menefield is entitled to kosher meals in the absence of *Halal* meals, and would surely be given *Halal* meals once the prison implemented a plan to provide *Halal* meals to Muslim inmates, as they similarly accommodate the Jewish inmates with kosher meals.

Examining the Free Exercise Clause, the court adopted the law in Ward v. Walsh[11] stating that inmates "have the right to be provided with food sufficient to sustain them in good health that satisfies the dietary laws of their religion." A free exercise clause claimant must satisfy the three-pronged test, that is: (1) the government harmed claimant enough (2) to create a justiciable claim (3) that is within the jurisdiction of the

[11] Ward v. Walsh, 1993 1 F.3d 873, 877 (9th Cir. 1993).

court to redress. Once these three prongs are present, the government in response must be able to satisfy the strict scrutiny by proving that the burdens on the constitutional rights are necessary to further a compelling interest, and the action taken by the government was the least restrictive alternative available for furthering the interest.

While these constitutional rights can be restricted to achieve legitimate penological goals and maintain prison security, the prison administration in the Menefield case did not show how the plaintiff's request for kosher meals posed a threat to the correction facility. Clearly withholding the kosher meals because the plaintiff inmate's religious card identifies him as a Muslim is not calculated to achieve a compelling interest, and/or to maintain the correction facility's security or its safety. Additionally, Menefield's request for *Halal* meals or an alternative to kosher meals is rooted in the Islamic faith and Menefield is a sincere Muslim who aims to obey *Allah.*[12]

Menefield explains that "vegetarianism is utterly foreign to the religion of Islam (Menefield)," and that the standard meals include meat that has not been prepared according to the prescriptions of his religion. Since the prison administration did not invoke a reasonable argument to refute the sincerity of Menefield's belief or give reasons why his request is compromising the safety of the correction facility (and none of the state arguments satisfy the strict scrutiny standard), the court decision favored the request of Menefield and kosher meals were granted until the prison could implement the *Halal* meals program.

Likewise, the examination of RLUIPA violation by the court established that the prison administration imposed a substantial burden on the religious exercise of Menefield by denying him the accommodation of *Halal* or kosher meals and forced him to eat food that does not comport with his sincerely held religious beliefs while residing in the correction facility.

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[12] *Lewis v. Ryan,* 2008 WL 1944112, at 18 (S.D. Cal. May 1, 2008).

Case #3 Adjudicating Moore on *Halal* Meals

In the case of Moore[13] (see Table 7), the facts differ from Washington and Menefield, since the prison facility that housed Moore was not equipped with religious diets accommodation. Hence, the prison did not discriminate between Moore and the other prisoners in the same facility, but between Moore and the other religious prisoners who were housed in other facilities that were equipped to provide religious diets. Although most of the trial and appellate courts' arguments rested on the issue of transferring Moore to a facility that is able to provide him with religious meals, the actual issue was denying him an Islamic *Halal* diet for over two years or giving him an alternative kosher meal in lieu of it. Moore argued that denying him religious diets and/or refusing to transfer him to another facility to accommodate his religious dietary needs was a violation based on California Code of Regulations, title 15, section 3054, subdivision (b), which impose a mandatory duty on the prison to transfer him to another facility that is capable to accommodate his Islamic diet[14] (Moore 3).

The Free Exercise Clause and Monell law's application in Moore is similar to the Washington case. In Moore, a direct nexus is found between the prison's refusal to transfer Moore from one facility to another that is equipped to serve him *Halal* meals, which in turn precluded him from practicing his sincere beliefs under the constitutional right to freely exercise his religious mandate as a Muslim, which requires him to consume only *Halal* meals and abstain from eating pork or pork-by products. Moore also explained that, "it is against his religious tenets of Islam to be a vegetarian" (Moore 2).

Further, in Moore, section 1983 and Hansen law's application are part of the nexus between the prison personnel's action of denying Moore his transfer to another prison facility and the policy required by the law given in section 3054. Indeed, refusal of

[13] Moore v. Rimmer, et al. 2008 WL 2656122 (Cal. Ct. App. 2008)

[14] California Code of Regulations, title 15, section 3054, subdivision (b) states: "Inmates with special religious dietary needs may be transferred to another facility that is equipped to accommodate them."

the prison personnel to transfer Moore to another facility to provide him with *Halal* meals arises to the level of deliberate indifference treatment since Moore has suffered from malnutrition for the period of two years. Although the respondent in this appeal argued that the appellant forfeited his right to file even a complaint at the trial court level because he failed to exhaust his administrative remedies through the prison grievance process. Nonetheless, the appellant fulfilled his obligation of the pre-filing by submitting many internal grievances through the administrative channels. Furthermore, the application of section 3054 is not a discretionary but a ministerial response to the inmates' requests and part of the prison staff's administrative duty. Finally, the Moore court ignored the application of RLUIPA, where its obligation is to assess the facts to the maximum extent permitted by the Constitution to alleviate the burden imposed on the inmates.

Conclusion and Social Implication

For Muslims, food is not only a dietary system, but it is also part of their purification in that Allah's name must be invoked and honored during the slaughtering. Islam has similar requirements to Judaism and Christianity to purify the food before eating it. In Judaism the custom is to eat only what is fit, proper, or correct, and this is where the root of the word kosher or kashrut came from 'כשר' or 'רו֣ת, שׁ֣כ'. In addition to the type of animals, which are permissible, there is a way to prepare the food according to the Jewish law[15]. In Christianity the custom of praying over the food and thanking God

15 Ritual slaughter is known as *shechitah*, and the person who performs the slaughter is called *a shochet*, both from the Hebrew root Shin-Chet-Tav, meaning to destroy or kill. The method of slaughter is a quick, deep stroke across the throat with a perfectly sharp blade with no nicks or unevenness. This method is painless, causes unconsciousness within two seconds, and is widely recognized as the most humane method of slaughter possible. Another advantage of *shechitah* is that ensures rapid, complete draining of the blood, which is also necessary to render the meat kosher. The *shochet* is not simply a butcher; he must be a pious man, well-trained in Jewish law, particularly as it relates to *kashrut*. In smaller, more remote communities, the rabbi and the *shochet* were often the same person. http://www.jewishvirtuallibrary.org/jsource/Judaism/kashrut.html. (accessed November 2016).

for his provision constitutes the purification and cleansing[16]. Similarly, the Islamic slaughtering ritual '*dhabh*' must be followed, otherwise the meat is not *Halal* and therefore unfit for Muslim consumption[17].

Consequently, the inmates demand for *Halal* meals only has a religious meaning and is not a challenge or a threat to the jail or the prison administrations. A prisoner's request for *Halal* meals is an act of self-preservation in order to maintain his or her religious purity (Liu 2004, 1173). Some of the important religious struggles in prison have had to do with concerns over safety and riots. However, *Halal* food does not constitute a security issue. It can be argued that preaching on Friday or *Jumu'a* prayers, the Muslim's weekly community gathering might incite riots and rebellions, but *Halal* food will never cause a riot. To the contrary, lack of *Halal* meals might cause rebellions and challenges against the jail and prison administrations.

California Courts apply only California Process and Legal Methodology

Collectively, in these three cases, the three inmates sincerely requested accommodation with *Halal* meals and the state courts judges utilized the American legal methodology to examine whether state prisons have utilized their authority to provide or deny the religious diets. The actions of the judges in these three cases further confirmed the present research's sub-problem 1, proposition 1. Proposition 1: The foundational principle of separation of church and state compels the California courts to treat *Sharia* cases from secular perspective according to the American law.

In doing so, the courts assessed the facts in the light of the United States Constitution in light of the Free Exercise Clause, RULIPA, and the Equal Protection Clause. In the three cases the California courts explored the parties' petitions, but did not delve into the Islamic diet laws or what constitutes *Halal* meals. To the contrary, the

16 Titus 1: 15; Matthew 14:19-21; Luke 24:30; Acts 27:35; Acts 10: 9-16; and Luke 11: 39-41
17 Quran: Surah 2: 173 and Surah 6: 118 and 121.

courts focused on the analyses of the Constitutional rights of each inmate to have received or denied Islamic diets as any other religious inmate. Collectively the courts' analyses exhibited neutrality based on the American legal system's methodology without regard to the religious impact on the inmates if they do not eat *Halal* meals. The only goal of the court was to uphold the constitutional rights of the inmates wherever such rights were violated. Accommodation was owed whenever there was no contradiction to the letter of the Constitution, and such accommodation clearly was not a yield of the American courts to the rules of *Sharia* regarding the *Halal* meals, but rather a matter of following the mandates of the Free Exercise Clause when the facts of the case allowed the court to do so.

The three courts encounter the same issue, the request of *a Halal* diet by a Muslim inmate. However, only the Menefield appellate court granted his request for kosher meals until the state initiated a program for *Halal* meals. In Washington and Moore, the courts there granted the petition of CACR by denying the provision of the *Halal* meals on bases that do not outweigh the necessity of the *Halal* meals to the Muslim inmates. Indeed, this inconsistency confirms the present research's sub-problem 1, proposition 2. Proposition 2: The California Courts have decided similar Islamic factual cases in inconsistent manner.

Muslim-American Diaspora and the Muslim *Halal* Diets

Rehabilitation and real change come by affording the freedom and respect for the prisoners' beliefs. Obviously withholding a simple accommodation of *Halal* meals presents a measure of dissatisfaction for the Muslim inmates and their communities. The term rehabilitation in a sense means yielding and returning to the correction provided by the divine law and obeying its rules. Muslims believe that purifying oneself is not only by prayers, fasting, and giving, but also by not eating what is not permitted by the Quran.

Hence, the lack of *Halal* meals accommodation leads to frustrating Muslims and hindering their rehabilitation. In fact, Muslims in this situation feel that they are far from God, since they are not obeying the Islamic law concerning their diets. This fell squarely within the parameters of the present research in sub-problem 2, propositions 3 and 4. Proposition 3: Most of the Muslims litigants and their community are not fully satisfied concerning the *Sharia* cases that were adjudicated by the California courts. Proposition 4: Most of the secular treatments of the California courts to the *Sharia* cases constitute obstacles for Muslim litigants to keep the *Sharia* traditions in the United States.

Notwithstanding, the Muslim inmates are convicted with crimes, and the purpose of the correction facilities are to rehabilitate them, yet rehabilitation is best accomplished when the inmates see no difference in treatment between them and inmates from other religious traditions. Difference in treatment absolutely hinders the inmates' desire to change and seek spiritual closeness to God. Difference in treatment is a stumbling block in the path of their remorse and rehabilitation. Indeed, the United States Constitution mandates the equal treatment of all and guarantees the protection of all religions and religious practices, especially in the correction facilities. Attorney Daniel Quick stated: "One measure of a civilized society is how it treats its prisoners. This victory (i.e. serving *Halal* meals) is not only a win for thousands of inmates of faith, but it is a victory for everyone who believes in our Constitution."[18]

It appears that the violations against Muslim inmates are not the product of the law, but the product of some individuals who are supposed to execute the law. The different treatments vary on a case-by-case basis. Some will be justified based on monetary purpose, some on security motivations, and in some situations, it will be blamed purely on discrimination by some government personnel. The prison

18 Published on November 21, 2013 http://www.arabamericannews.com/news/news/id_7848 (accessed November 2016).

administrations have progressed from 1970 where only kosher meals were provided in any correctional facility and no *Halal* meals at all (Haddad 2014, 295). However, today the serving of *Halal* meals is spasmodic. It does exist upon request and recommendation of an Islamic chaplain; and even if takes sometime, it is offered in the end.

Based on the ruling in Washington, Menefield, and Moore, to succeed in a suit for *Halal* meals, a Muslim inmate must show his religious sincerity. However, the court cannot inquire into whether or not the *Halal* meals request is generally accepted by the Islamic faith without running afoul of the Establishment Clause. Finally, the cost is not an issue so long as it is not excessive.

In the course of our discussion we have noted some constitutional issues that almost always crop up when an inmate initiates a cause of action regarding the *Halal* diet. First, equal protection demands prohibit dissimilar treatment in providing religious diets. Thus, the correction facilities should not provide kosher meals to Jewish inmates and capriciously refuse to serve *Halal* meals to Muslim inmates. It can be argued that since *Halal* meals are costly and sometimes require tight security to provide, Muslims can rely on their divine text in Surah 2: 173, "But if one is forced by necessity, without willful disobedience, nor transgressing due limits,- then is he guiltless. For Allah is Oft-forgiving Most Merciful." This is true if there was a real necessity, but in jail or prison there is at least the possibility of kosher meals or the option of transfering an inmate to another facility that is able to accommodate.

Thus, the Quranic text does not condone Muslims consuming non-*Halal*-meals such as, vegetarian, peanut butter, or food mix with pork or pork-byproducts based on the doctrine of necessity while kosher meat is served to the next cell Jewish inmate. Just because the jail or the prison policy mandates that only Jewish are served kosher meals, this policy does not amount to a real necessity to absolve Muslims from eating non-*Halal*-meals. Susan Van Baalen, the Executive Director at Prison Outreach Ministry in

Washington D.C., argues, in fact, that even serving the Muslim inmate kosher meals is not an equitable solution to the reasonable request of *Halal* meat or meals free from pork (Haddad 2014, 296).

Incarceration places some necessary limitations on the prisoners' rights to practice their religions, but only if the prison administrations can prove that those limitations are the remedial measure taken by them to balance the safety of the prisons from any potential dangers associated with the day-to-day managing of the correction facilities. Hence, only when those genuine security concerns exist, the jail and prison administrations will be able to burden the Equal Protection Clause, the Free Exercise Clause, and the RLUIPA to protect public interest among the correction facilities population. Surely, providing *Halal* meals in the process of rehabilitating Muslim inmates is not one of those genuine concerns.

Chapter 8

Cases of Discrimination Against Muslim Religious Practice

In this chapter I inquire into three selected cases of the California State Courts regarding three different aspects of Islam as a religion.

- The first case, Chaudhry v. California Department of Correction, adjudicated Chaudhry's claim that his right to conduct special '*Taraweeh*' prayers was denied and hence, he was discriminated against as a Muslim officer employed by the CDCR.

- The second case, Khan v. Jamaat-Ul Islam of America, the court adjudicated Khan and Hussain's lawsuit to overturn the religious board's decision expelling them from membership and redressing the issue by reinstating them.

- The third case, People v. Foote, Foote's claimed that burning incense is part of worship and selling incense does not require a vending permit. Although the latter case adjudicated a Christian person's claim of burning incense as worship, nevertheless, in examining if burning incense is an act of worship, the court relied on a precedent case from New York that adjudicated a similar issue of burning incense in Islam with a full extent analysis of how Islamic law views the issue of burning incense.

The principle of Islam as a religion is different in each one of these cases, but the common point in all of them is the concept of separation of church/religion and state. The concept of unity/separation between religion and state plays an important part of this research, since the majority of Islamic law doctrines and Muslim scholars advocate the unity between Islam as religion and the Muslim state. Notwithstanding that the majority of the Muslim scholars uphold such unity, there is a minority that maintains that Islam, state and politics are separate but interactive (Na'im 2011). From this perspective, this chapter aims to examine how the Muslim community diaspora in the United States

invokes the unity concept while seeking justice from the American courts with a special attention to the mandate of the United States Constitution in the First Amendment concerning the Free Exercise Clause and the Establishment Clause.

Although the three cases in this chapter exhibit the clash between religion and state, the second case of Khan v. Jamaat-Ul Islam of America vividly showed the intensity of such clash and how the California court navigated its analysis between accommodating the Muslim litigants' claims while maintaining the quintessence of the United States Constitution.

Separation Between Religion and State in Islam:

Despite the overall modern movement toward separation between religion and state in the Muslim world, the majority of the Muslim countries are pro-unity between religion and state, which is evidenced by the fact that today only 22 out of 49 Muslim-majority countries have constitutionally secular states[1]. Those 22 countries have variations in how they interpret the concept of separation between religion and state. The unity concept remains the major influencing point to the trajectory of politics in most of those Muslim countries[2]. As Sheikh Yusuf al-Qaradawi states: "Islam does not accept the rule 'leave to Caesar what is Caesar's and to God what is God's.' In Islam, Caesar and what he owns belong to God, the One" [3].

Nevertheless, the notion of separation existed in the Muslim regions since the 1920s as it is detailed in the writing of some Muslim thinkers, such as Ali Abdel Razek who argued that religion-state separation was integral to the main message of the Quran

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[1] http://www.cambridgeblog.org/2019/06/is-religion-state-separation-possible-in-islam/ (accessed October 2019).

[2] http://www.cambridgeblog.org/2019/06/is-religion-state-separation-possible-in-islam/ (accessed October 2019).

[3] https://www.academia.edu/22858663/ISLAM_AND_THE_CONCEPT_OF_THE_SEPARATION_OF_RELIGION_AND_THE_STATE (Jeremy Gunn, Islam and the Concept of the Separation of Religion and the State, academia.edu, 2013, page 281) (accessed October 2019).

and the Prophet's legacy [4]. The notion of separation still exists in our current time and advocated by scholars such as Abdullahi Ahmed an-Na'im (Na'im 2011) and others.

Validity of the Muslims' Claims in Light of the Sharia

In this section I will examine the validity of Muslim litigants in each case separately according to the Islamic Law and Islamic School of Law.

Case #1. Rule of *Sharia* on the Rest Prayers '*Taraweeh'*

Taraweeh are prayers preformed in the month of Ramadan. It is done by taking rest between every four-unit of prayer according to the agreement of the scholars. The pious companions and successors of the prophet followed these prayers; however, there is no harm in leaving them out, as they are not obligatory prayers.

A *hadith* states: "Whoever stood in prayer in Ramadan with faith (*imān*) and hope for its reward will have his sins forgiven." (Agreed upon). This is a voluntary prayer and is not considered to be an obligation since the Prophet prayed it with his companions for two or three nights then left it saying: "I left it out of fear that it would become obligatory upon all of you and then you would be unable to perform it."[5]

The facts in Chaudhry's case (see Table 8), showed that Chaudhry argued that he was a correctional officer employed by California Department of Correction and Rehabilitation (CDCR) and a practicing Sunni Muslim who is *obligated* to observe fasting during the month of Ramadan and the *Taraweeh* prayer that is performed during Ramadan after sunset, and lasts roughly two to four hours, which is held at the mosque every night and combined with recitations of the entire Quran, and completed over the

[4] http://www.cambridgeblog.org/2019/06/is-religion-state-separation-possible-in-islam/ (accessed October 2019).

[5] https://www.islam21c.com/current-affairs/167-the-fiqh-of-taraweeh/ (accessed October 2019).

month. He further argued that under California Fair Employment and Housing Act, he has a right to perform his *mandatory* religious duties (Chaudhry).

Table 8: Overview of Three Contested "Islamic Religion" Cases

Islamic Religion Application	**#1 Chaudhry v. Cal. Dept of Corr.**	**#2 Khan v. Jamaat-Ul Islam of America**	**#3 People v. Foote**
Facts	Chaudhry, a Sunni Muslim correctional officer in CDCR, requested and was denied a shift change to allow him to attend *Taraweeh* prayers during Ramadan. He sued, and CDCR moved for summary judgment because Chaudhry could not establish a case of discrimination or conflict between Chaudhry's religious observance and his work requirements. Additionally CDCR reasonably accommodated his religious observance.	M. A. Khan and M. I. Hussain appeaedl an order of the Superior Court denying petition for writ of mandate to overturn the determination of their religious board of directors of Fiji Jamaat Ul-Islam of America (Fiji Jamaat) expelling them from membership and to compel the Board to reinstate them.	Defendant was found guilty in the Superior Court, Los Angeles County of vending without a permit. He appealed, arguing that prior cases of similar issue ended in acquittal. The Superior Court, Appellate Division, held that the defendant's solicitation of money for incense did not raise any First Amendment free exercise of religion or freedom of speech protections.
US Constitution And California Law	**First Amendment: Free exercise of religion California Fair Employment *and* Housing Act and Government Code, § 12940 states:** An employer may not discriminate against an employee "in compensation or in terms, conditions, or privileges of employment" based on "religious creed."	**First Amendment:** First Amendment bars courts from resolving disputes on the basis of religious doctrine … Secular courts must not entangle themselves in disputes over church doctrine or infringe on the right to Free Exercise of Religion.	**First Amendment: Free exercise of religion, Santa Monica Municipal Code:** § 6.36.040(a): No person may vend in the city without first obtaining a license. § 6.36.020(c): "[r]equests for donations in exchange for merchandise also constitutes vending."

Islamic Law	**Rule of *Sharia* on the *Taraweeh* prayers:** Sunnis and Shiites agree just like any other prayer. However, they disagree about how to preform it. The Shiite contend it must be performed individually. A majority of Sunni scholars require its performance in mosque.	**Separation Between Religion and State in Islam:** **Traditionalists**: Argue for an Islamic state - "*tawheed*" requires unity of religion–state **Modernists**: Argue separation between religion and state, but with no separation between religion and politics.	**Rule of *Sharia* on the Use of Incenses:** Islam does not require the burning of incense in religious rites and ceremonious. However, it is encouraged to perfume the mosque as commanded by the prophet but not obligatory '*wajib*'.
Court Decision	**The court held**: The trial court: Found CDCR met its burden of showing that Chaudhry could not establish a prima facie case for religious discrimination. The appellate court found no triable issues of material fact as to conflict between Chaudhry's religious observance and work requirements, thus affirmed.	**The court held:** The trial court concluded that there was no violation of due process rights, and that the Board made a fundamentally religious, ecclesiastical decision. The board's decision did not involve a vested property right to the moving parties Appellate: Affirmed	**The court held**: Trial court: there is nothing about the sale of incense that ties it "inextricably" with a religious or other message. Appellate: There is nothing about the sale of incense that ties it "inextricably" with a religious or other message. The Judgment is affirmed.

What is distinctive in Chaudhry's allegation is that he categorized the performance of *Taraweeh* as mandatory and obligatory, and his allegation generally clashes with the long history of the Sunni Muslims' traditions regarding the non-obligatory practice of *Taraweeh,* which is evident by the agreed upon *hadith* stating that the prophet "left it out of fear that it would become obligatory … and then you would be unable to perform it." Obviously, Chaudhry sought to gain extra credit with Allah by performing the *Taraweeh* prayers, but he also sought to earn it against the commands of the Quran[6] by circumventing his work obligation in obedience to his commanders and in line with his work duties.

Discernibly, Chaudhry thought invoking the name of religion might earn him special treatment that set him apart from his CDCR co-officers to gain two or four hours

[6] O you who have believed, obey Allah and obey the Messenger and those in authority among you (5: 59).
يأيها الذين امنوا أطيعوا الله وأطيعوا الرسول وأولى الأمر منكم

of rest every night after a long day of fasting, but his action deviates from the precepts of the Quran. Hence, in his view altering the desirable prayers by calling it a mandatory was the solution to gain such time at night in order to cope with a long month of devotion to Allah. Further, Chaudhry argued that the *Taraweeh* prayers must be performed in the mosque according to the majority of the Sunni tradition, the prayers must be performed in the congregation. Nevertheless, gaining extra acceptance in the sight of Allah does not give a devoted Muslim the justification to avoid his work duties.

Case #2. Employment in an Islamic Organization

The facts in Khan's case, (see Table 8), showed that the organization's bylaws state that the Board shall manage the affairs of the Jamaat, acting in accordance with traditional Islamic *Sharia* and consistent with the articles of incorporation and the bylaws. It appears that both plaintiffs in this case were under the impression that the judicial system of the United States is similar to any of their judicial systems and is designed to resolve their religious employment problem. Unbeknownst to them, there is an added layer of separation between the church and the state in the United States.

Given the fact that both plaintiffs grew up in legal systems that adhere to the unity between Islam as religion and the state, their expectation was that such a legal system model would not change in a country that they call home and have many other Muslims living around them who also form part of the fabric of American society. Additionally, reading the Jamaat's bylaws, which also follow the precepts of the traditional Islamic *Sharia* in the affair of its members, It can be argued that both plaintiffs filed their case without any ill-will, but ignorance of the American law, where they assumed that resolving religious employment is within the jurisdiction of the American courts.

Case #3 Rule of *Sharia* on the Use of Incenses

The general consensus among Muslim scholars suggests that Islam does not require the burning of incense in religious rites and ceremonious[7]. However, it was narrated from Aishah that the Messenger of Allah commanded that places of prayer be established in villages and that they be purified and perfumed. (Sunan Ibn Majah)[8] Nevertheless, while the Prophet Muhammad did burn incense to make his house and masjid (mosque) smell nice, it wasn't specified to have been on Fridays' prayers. The non-obligatory tradition indicates that it's preferred to burn incense or oil any day of the week, so long as the burning of incense is not in association with any false beliefs about protection from evil. Further, the consensus in the Islamic practice shows that there is no evidence that the Prophet specified Friday or another day, whether in congregational practice, or solely require the burning of incense as an obligatory ritual.

The facts in Case #3 (see Table 8) showed that Foote contended he belongs to a religious organization and incense was a very important part of his religious beliefs. Therefore, he is exercising his constitutional right to vend incense, an action which is exempt from obtaining a prior permit from the city because Foote subjectively believed that it is mandated by his religion and constitutes an essential part of his prayers and worship to God. Further, Foote contended that all encyclopedias stated that incense was a religious item and burning it communicates prayers to the gods (Foote).

Although Foote is a Christian individual, the court in resolving his contention, resorted to a precedent from New York on a similar issue that was stated in the case of Al–Amin v. City of New York.[9] In that case four African American Muslims were

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[7] https://www.researchgate.net/publication/282748639_Frankincense_Myrrh_and_Balm_of_Gilead_Ancient_Spices_of_Southern_Arabia_and_Judea (accessed October 2019).

[8] http://aboutislam.net/counseling/ask-about-islam/sunnah-burn-incense-fridays/ (accessed October 2019). https://www.ummah.com/forum/forum/family-lifestyle-community-culture/islamic-lifestyle-social-issues/95693-incense-according-to-quran-and-sunnah (accessed October 2019).

[9] Al–Amin v. City of New York, 979 F. Supp. at p. 171.

arrested and issued summons for unlawful vending of incense. The defendants in that case argued the law violated their free exercise of religion and free speech.

The New York court concluded based on the opinion of an Islamic expert witness of the City of New York that incense is only recommended by Islamic law and is not mandatory to perform the Islamic ritual prayer, and consequently the city of New York did not violate the defendants' free exercise of religion.

Acting similarly, the city of Santa Monica followed the same legal analysis in its prosecution of the action of the Christian defendant in the case at hand. Thus, the California court concluded that the prayers in Christianity do not require the burning of incense and there was no violation of the defendant's free exercise of religion or his free speech.

Did the California Courts Apply Sharia to Adjudicate the Three Religion Cases?

In this section I will discuss the three cases collectively from the American legal system's viewpoint while comparing the differences and pointing to the similarities of the American judges' responses to the Muslim immigrants on their religious claims.

In order for the American courts to determine if it can adjudicate a case without violating the Constitution, the American courts examine if the case touches and concerns religious issues such as in those three cases at hand. In essence, those three cases represent the quintessential core of this research. Nevertheless, I am examining different levels of how the American courts interact with Islamic law in general. Throughout this research I am observing how the United States courts resolve the application of Islamic law introduced to them by the Muslims litigants in various areas of Islamic law disputes.

In all three cases the litigants argued that their rights to be redressed hinged on religious issues, and therefore, they are subject to: an excuse from employment duties based on the free exercise clause; that there is no difference between the Constitutional

treatment of secular employment disputes versus religious employment disputes; or an exemption from following the law and regulations based on the free exercise of religion and freedom of speech.

Case #1 Conflict between Religious Observance and Work

In the case of Chaudhry, the California Department of Corrections and Rehabilitation CDCR argued that, "Chaudhry could not establish a prima facie case of discrimination because there was no conflict between Chaudhry's religious observance and his work requirements" (Chaudhry). To that extent the trial court found that CDCR met its burden of proof that Chaudhry could not establish a prima facie case for discrimination and could not establish the existence of triable issues of material fact. The California appellate Court held that, "there are no triable issues of material fact as to the existence of a conflict between Chaudhry's religious observance and his work requirements" (Chaudhry).

In arriving to this adjudication, the California court adopted the burden-shifting test established by the United States Supreme Court for trying claims of discrimination based on a theory of disparate treatment. Thus, in analyzing Government Code §12940 application, the court required the claimant in this case, Chaudhry, to prove the elements of the discrimination he alleged based on the mandate of §12940(I). Those elements are as follow: "The employee sincerely held a religious belief; the employer was aware of that belief; and the belief conflicted with an employment requirement"[10] (Chaudhry). However, from these three elements, CDCR only challenged the third contending that there was no conflict between Chaudhry's belief and his employment requirement, and if there was, he received sufficient reasonable accommodation. Therefore, there was no religious discrimination against Chaudhry.

[10] Housing Com. v. Gemini Aluminum Corp. (2004) 122 Cal.App.4th 1004, 1011.

The most important issue to point out here is that the California courts in general examine the claim within the scope of the complaint, and the answer by the opposing party here is the CDCR. Hence, California courts did not have the option or the liberty of evaluating the first element of §12940, which stated: "The employee sincerely held a religious belief". This was the only element that has potential to encroach on the borderline between the two legal systems by imposing a religious issue on the American legal system. Although a court is not allowed to examine the sincerity of a person's belief, it can be argued that investigating the obligatory versus non-mandatory doctrine of *Taraweeh* could result in some inference that the court might inquire into the Islamic law rule of the application of *Taraweeh.* Obviously, the courts did not have the liberty to delve into that issue since it was constrained by the four corners of the complaint and the third element challenged by CDCR as to the question at issue, if Chaudhry was afforded a reasonable accommodation to observe his religious belief.

The courts' own analysis supports the above conclusion. The courts did not find any reasonable trier of fact that could infer by any of the admissible evidence the existence of a conflict between Chaudhry's religion obligation and his CDCR's work duties. This inference was clear from Chaudhry's own cause of action and it is more likely inferred that there was no conflict if any at all. Additionally, Chaudhry received some reasonable accommodation by the CDCR since he was afforded the swap of privileges with any other officer from other shifts if Chaudhry saw it necessary and was granted exemption from the mandatory overtime. "These actions constitute good faith efforts by CDCR to accommodate Chaudhry's requests as a matter of law" (Chaudhry).

Additionally, Chaudhry admitted that the latest time the *Taraweeh's* start is at 10:00 pm and it lasted for one hour. Assuming that the prayers start at that latest time, Chaudhry would finish at 11:00 pm and would have a complete hour to travel from the mosque to his work to start the first shift at midnight. An hour between the mosque and

his work location is sufficient to allow him to start the first shift on time, and therefore, there is no conflict between Chaudhry's religious observance and his work requirements.

Case #2 Employment in a Religious Organization

In contrast to the Chaudhry's court encountering an indirect religion question, in the Khan case the court encountered a direct religion question regarding the two clergymen's relationship to their religious organization. The Khan court abstained from delving into the purely religious issue regarding the two Muslim clergies' request to redress and reinstate them in the ecclesiastical positions within their religious organization.

To that extent the appellate court sustained the trial court's holding that there was no violation of the appellants' due process rights, and that the Board made a fundamentally religious, ecclesiastical decision which absolutely precluded the court from examining the reasons for the expulsion (Khan).

The court followed the law stated by the Supreme Court in the case of Erickson v. Gospel Foundation of California[11]. Because the Islamic religious organization's bylaws espoused the Islamic law into their day-to-day operation, the court concluded that inquiring into the decision to expel its two clergymen was an absolute entanglement with a religious decision, and thus, its inquiry would run a foul with the mandates of the First Amendment of the United States Constitution.

Additionally, the court relied on the precedent law stated in Erickson supra, and therefore, it evaluated the due process of the Muslim litigants from the given facts to determine if there was any violation or any concrete civil and/or property rights to justify its involvement which will be limited to that civil and/or property rights without entanglement with any religious law.

[11] Erickson v. Gospel Foundation of Calif. (1954) 43 Cal.2d 581

However, the court found that the Islamic organization Fiji Jamaat abided by the terms of its bylaws while terminating the two clergymen's membership, the organization provided adequate notice of the charges brought against the litigants, and afforded them an opportunity to be heard (Khan). To that end, the scale tipped in favor of the organization which indeed followed the precepts of its bylaws in affording its members the due process sought before expelling them. This finding by the court negated any infringement of the Islamic organization on the two-clergymen's civil and/or property rights. Hence, the litigants' argument that the court failed to examine the violation of their due process by their organization was erroneous in the light of the organization's actions taken during the process of terminating them.

Further, the litigants argued that there is no difference between the court's jurisdiction to adjudicate secular or religious employment violation. The court's power should be extended to both equally (Khan). The court rejected this argument since the litigants did not support it by any case law and they only invoked a bare factual argument that carries no legal backbone. The court responded to this latter argument by pointing out that the expulsion decisions were the result of a deliberative process, religious in nature, since it involved the consideration of what is the religious tradition and belief of the Islamic faith.

Therefore, the court was only empowered to review the issue of the due process while carefully avoiding any religious allegation that might cross the boundaries of the Establishment Clause and the Free Exercise Clause. This is the line prescribed by the United States Constitution since the role of civil courts in litigation involving religious institutions is severely circumscribed by constitutional restrictions protecting freedom of religion[12]. Consequently, the American courts have their hands tied when it comes to any

[12] New v. Kroeger (2008) 167 Cal.App.4th 800, 801.

religious aspect in any case before them. This has been long relied on as a controlling legal authority that all the American courts abide by[13].

Finally, because membership in a religious organization by itself does not count as vested property rights, the court in *Khan* found itself facing a purely religious issue that is out of bounds, based on the limitation imposed on the judicial branch as the extended arm of the United States, and therefore it must refrain from any clear violation of the Constitution.

Case #3 Selling Incense without Vendor Permit

Similar to the court in Khan, the court in Foote grappled with Foote's assertion of a religious doctrine. The issue here was an allegation that incense is considered an essential part of worship and should be exempt from regulation, based on the protection afforded by the Free Exercise of Religion and Free Speech.

After Foote was cited for vending without a permit, he contended that he was a religious organization, that incense was a very important part of his religious beliefs, and he had constitutional right to sell incense. The defendant further asserted that incense is communicative in nature since when they burn it, they go to heaven and make the prayers to gods (Foote).

The court in response to his allegation, distinguished between items that are inherently communicative such as newspapers/pamphlets and the incense. The former have nominal value apart from the communication and could be sold without a vending license, while the latter did not have these characteristics, and could not be sold without a vending license. Foote's response to this was, "the incense offered in exchange for

[13] '[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them. See Serbian Orthodox Diocese v. Milivojevich (1976) 426 U.S. at p. 710.

donations is "inherently communicative and has nominal utility apart from its communication" (Foote).

Although Foote is a Christian, his contention that incense is essential to prayers prompted the court to search the issue nationwide, and in doing so, it relied extensively on Al-Amin[14], a precedent from New York State where a similar issue of selling incense without a license was adjudicated for a complaint filed by the plaintiffs who were four African American Muslims. In the New York case, the court accepted the declaration of an Islamic law expert witness hired by the city to decipher the validity of the four plaintiffs' claim. The expert witness opined: "such items were only recommended by Islamic law" (Foote). This expert opinion entirely eradicated the veracity of the plaintiffs' contention that, "perfume, oils, and incense were important to the practice of Islam" (Khan), and persuaded the court in California to follow the enlightenment offered by the *Sharia* expert witness that burning incense is not a necessary item to offer prayers in any religion, but only recommended.

The courts in both cases concluded that, although to some extend the religions practitioners, whether Muslims or Christians, considered incense to be significant. According to the Supreme Court stated law in Smith[15], the action of selling incense does not raise a Free Exercise of Religion claim (Khan), because the mere action of sale is not intertwined with conveying the religious message. Thus, the sale of recommended religious items does not shield the seller from violating the law.

This trajectory taken by the California court was clearly influenced by the Al-Amin's holding that "an individual's religious beliefs [cannot] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate…Although incense may aid in spiritual activity, it is not, in itself,

[14] Al–Amin v. City of New York, (1997) 979 F. Supp. at p. 168.
[15] Employment Div. v. Smith (1990) 494 U.S. 872, 878–879.

communicative" (Al-Amin). Thus, the California court arrived to an agreement to its counterpart in New York holding that solicitation of money for incense had no religious connection whatsoever!

Courts Examined the Validity of Litigants' Claims

In the three cases, the litigants expected the California courts to deal with their religious contention. However, in each case, the courts preliminarily interacted with the facts as an initial examination of the evidence to determine the validity of each litigant's claim.

In Chaudhry, although the facts pointed to the Islamic issue of *Taraweeh,* the court only examined the circumstances of these facts to determine if any discrimination occurred based on the California Fair Employment and Housing Act and Government Code, § 12940. The court did not interact with the *Taraweeh'*s theological argument, and it did not discuss the majority nor the minority views of the Islamic ritual of *Taraweeh.*

The analysis of the court was limited to the circumstances introduced by Chaudhry's factual allegation and impartially interacting with those circumstances to examine Chaudhry's ability to conduct his duty as a CDCR correctional officer and if such duties did interfere with his religious performance as a devoted Muslim. Further, the court sought to determine whether the CDCR afforded him reasonable accommodation to perform his religious obligations or not. The court did not examine Chaudhary's account to the *Taraweeh* prayers from an Islamic view[16], since there was no need to delve into its meaning or its Islamic application. The court's analysis focused on § 12940, seeking to examine the veracity of the alleged discrimination if any, and whether the CDCR afforded Chaudhry reasonable accommodation or not. To that end, the court agreed with

[16] "The Taraweeh prayer takes place inside a mosque after sunset. Sunni Muslims may be excused from performing his or her Taraweeh prayer only under extreme circumstances. The Taraweeh prayer starts after the last of the five usual prayers and lasts about one hour" (Chaudhary).

the CDCR stating, "CDCR claims the undisputed evidence establishes there was no conflict between Chaudhry's religious observations and his work schedule; therefore, Chaudhry could not establish a prima facie claim of discrimination" (Chaudhry).

In comparison to the case of Chaudhry, the court in Khan distinctly refused to entangle itself with any religious issue. Notwithstanding that the litigants on appeal tried to circumvent the religious issue arguing that the court erred in denying the writ petition without examining whether the trial court stated reasons for expulsion presented a fundamentally religious question, by emphasizing that there is no difference between secular and religious employment reviews.

In response, the court differentiated between its power to review the due process issue, and its limitation to examine the religious issue that is a fundamental ecclesiastical decision, because if it had reviewed the latter, it would have clearly violated the spirit of the Establishment Clause of the First Amendment. In supporting this position, the court cited the Supreme Court law in the Serbian Orthodox case[17], and further showed that this local court has taken this pattern in many other cases such as the case of Singh,[18] where this very court adjudicated that, "courts cannot intrude into a religious organization's determination of religious or ecclesiastical matters such as theological doctrine, church discipline, or the conformity of members to standards of faith and morality." Thus, the court in *Khan* preserved the long-standing protection of the free exercise of religions to which the First Amendment was founded on. A deviation from this position would surely have altered the logic and efforts behind the United States Constitution to protect every faith and religious belief from any government intrusion.

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[17] "[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." Serbian Orthodox Diocese v. Milivojevich (1976) 426 U.S. 696, 710.

[18] Singh v. Singh (2004) 114 Cal.App.4th 1264, 1293.

Finally, the court in Foote had shown the many layers of how the United States courts treat religions in general, how they do not differentiate between any religion, and how when it comes to applying the civil secular law there is no difference between Islam, Christianity, or any other religion. The court here truly depicted a "blind lady justice" image while examining the facts of Foote. Although Foote is a Christian defendant, the court examined his allegation that incense is essential to his prayers by relying completely on Al-Amin, a precedent from the State of New York adjudicating the same issue for four African American Muslims. There, the court admitted the New York City's *Sharia* expert witness' declaration on the question of what general religious standard the incense was deemed essential or not.

The Foote court took such an opinion without any regard for whether incense is used in Islam or Christianity. The court in Foote also observed the facts with a neutral lens, in that it examined the act of selling the incense by separating it from any religious concern, and thus it conveyed that: "Defendant's solicitation of money for incense had no religious connotations and did not raise any First Amendment free exercise of religion or freedom of speech protections for purposes of validity of conviction for vending without a permit" (Foote). Although the court relied completely on a case dealing with four Muslim defendants' allegation regarding the sale of incense, the analysis in Foote was not focused on incense in Islam or in Christianity, but whether the sale of incense in itself was a communicative action that carried the message of any religion.

Despite Foote's argument that incense is communicative, as he alleged, "you burn incense, and they go to the heavens. And you make the prayer to the gods" (Foote). The court determined that it is not communicative as compared to selling newspapers or distributing pamphlets with religious content, and if the defendant's argument is true, the same argument could have been made if he had been selling Marlboro cigarettes (Foote). What is certain is that the court set aside any religion doctrine examination regarding the

burning of incense and focused on the defendant's action of selling it without a vending permit in exchange for money.

No common sense examination of the action of handing out merchandise of any kind in exchange for money will construe the selling of incense a religious act. As is well known, incense is commonly bought and sold by people who have no religious beliefs whatsoever. Moreover, incense is used as air freshener apart from any religious connotation. This conclusion is also clear from the teaching of Islam, as it is only recommended and non-obligatory in any worship rites.

Conclusion and Social Implications

In this concluding section with Propositions 1, 3, and 4 in mind, I will give an overview of the California courts' treatment and adjudications on the three *Sharia* cases, as well as pointing to the social implication of those adjudication on the Muslim litigants and their communities.

California Courts apply only California Process and Legal Methodology

Collectively in the three cases mentioned, it can be argued that the American courts adapted some Islamic considerations as to the *Taraweeh* prayers when the court stated that they were only recommended and not obligatory. As to the internal religious employment dispute, that can only be resolved by an Islamic religious committee. Finally, the court expounded on the use of incense as only recommended and not obligatory in Islamic rituals.

The American judges answered the three factual questions as discussed supra purely from the American legal perspective, without regard or inquiry into Islamic law or its theological doctrines. Therefore, the totality of the American courts' actions comports with the present research sub-problem one, proposition 1 that the American courts are limited to the American law and obligated to keep a separation between church and state

in obedience to the Establishment Clause of the United States Constitution. Proposition 1: The foundational principle of separation of church and state compels the California courts to treat *Sharia* cases from a secular perspective according to the American law.

Consequently, in view of the American safeguard of separation between the church and the state, the dialogue between the two legal systems was as follows: In Chaudhry, on one end, Chaudhry invoked the majority of the Sunni view of the Taraweeh prayers and that it must be performed in the mosque, but on the other end, the American court questioned whether there was any form of discrimination according to the Constitutional law of the United States against Chaudhry and whether the CDCR afforded him reasonable accommodation or not.

Khan, on one end, invoked that both secular and religious employment should be treated the same, but on the other end, the American court even disagreed that is the case in the Muslim world, namely that a *Sharia* court would deal with both types of employment. In any case, the American courts cannot treat both kinds of employment in the same way, since the kind introduced by Khan certainly open the door for the American court to entangle itself in a religious employment case and that would violate the United States Constitution by forcing it to deal with religious law.

Foote, on one end, invoked the fact that the sale of incense is communicative and should be exempt from certain regulations such as obtaining a vending permit, but on the other end, the American court disagreed and refused to categorize the sale of incense as an act of religious worship and as such does not deserve the protection of the Free Experience Clause. Nor does it have any communicative aspect to it since it is merely exchanging incense for money and does not convey any religious message. Therefore, the American courts' responses to these litigants vindicate the present research assertion in sub-problem one, proposition 1 to the maximum extent possible.

Scrutinizing the trial and appellate court's language does not denote by any means that the trial or appellate court inquired into Islamic law. The center analysis from the three courts targets the interpretation of the California Fair Employment and Housing Act and Government Code § 12940. Secular courts must not entangle themselves in disputes over church doctrine or infringe on the right of Free Exercise of religion, and the Santa Monica Municipal Code § 6.36.040(a) and § 6.36.020(c) regarding obtaining a license for vending. None of the courts' analyses use any Islamic jurisprudence doctrine in resolving the legal/factual disputes presented by the litigants. The courts only applied the American law.

Muslim-American Diaspora and the Muslims Practice of Religion

Most Muslims in the United States subconsciously assume that the application of *Sharia* is part of the law when they encounter an issue of injustice in the United States and desire to redress the issue through the institution of the judicial system available to them within the land. This insight is shown in Chaudhry's action asking the court to find discrimination based on his alleged duty to perform the *Taraweeh;* in Khan's requesting the court to intervene in a religious institute firing him; and in Foote asking the court to delve into the aspect of his worship via his incense ritual. To the three Muslim litigants and many of their communities' surprise they discover that *Sharia* does not apply in the United States courts.

This finding is especially affirmed from my experience as a Christian attorney among my clients, who often question why *Sharia* is not applicable in the US. Indeed, the litigants above, along with my clients, serve as a sample of the rest of the Muslim community in the United States, are dissatisfied with the California courts' adjudication of their *Sharia* cases precisely because the courts did not give them their prayers or reach a favorable outcome for them. To that extent, the decrees issued by the California courts

to a certain degree constitute an obstacle for Muslim litigants to keep the *Sharia* traditions in the United States.

This end-result in turn affirmed the present research insight found in sub-problem two, Propositions 3 and 4. Proposition 3: Most of the Muslims litigants and their community are not fully satisfied concerning the *Sharia* cases that were adjudicated by the California courts. Proposition 4: Most of the secular treatment by the California courts of the *Sharia* cases constitute obstacles for Muslim litigants to keep the *Sharia* traditions in the United States.

By conversing with this sample of the Muslim community, one can sense both their sincerity and their naïveté. Obviously, they are seeking what they were used to before coming to the United States. Engaging in conversation with Muslims shows the lack of any ill will. However, there are a few Muslims who try to use the differences between the two legal systems to gain favor or special treatment.

Nevertheless, there is a long line of American judicial officials guarding the inviolate character of the United States Constitution, and they will absolutely shield justice proceedings from any breach of the Constitution's integrity at all cost. Those few attempts to breach the Constitution yield no benefits to those who try to circumvent the law or use the differences between the two legal systems for temporal benefits, and in actuality it does not benefit them at all, but they end up tarnishing the image of Islam and the overall reputation of the Muslim diaspora in the United States. A layperson observing those few cases who has no knowledge of Islam will absolutely judge the book by its cover and conclude that this is Islam, this is *Sharia*, this is how Muslims in general act while living in the United States. Muslims, who aim to please Allah in their diaspora, ought to be extra devoted.

It has been said that a bad act brings shame and generalizes rapidly to all, but a good deed benefits only its doer and not the general public. Changing an image that is

tarnished by a few acts of carelessness requires long and hard work to regain the trust of the public who do not understand the highs and lows of a religious community. May the Muslims who truly desire to please Allah work diligently in devotion to the precepts of Islam and the commands of its *Sharia*!

Chapter 9

Justice for Others: Missiological Reflections

> When an alien resides with you in your land, you shall not oppress the alien. The alien who resides with you shall be to you as the citizen among you; you shall love the alien as yourself, for you were alien in the land of Egypt: I am the Lord your God. (Lev. 19: 33-34)

Searching for an unsullied illustration of "love," as Christians our minds immediately recall the sacrificial love of Christ, which led him to offer his life on the cross to all humankind. As revealed in John 3:16, this holistic love toward all humankind regardless of their ethnicity, color, beliefs, or even their hatred-attitude toward God or other groups of people. This unique love that Christ himself bestowed and is bestowing on the creation on a daily basis stems out of the communion love found in the Trinitarian God. Likewise, the commandment in Mark 12:31 aims to accomplish the "κοινωνία" *koinonia,* communion between humanity when followers of Christ love their neighbors as themselves. "There is an inseparable connection between "extending hospitality to strangers" and the Lord's commend of "loving your God and loving your neighbor" (Mark 12:28-34)" (Koyama 1993, 284). Likewise, the love of neighbors is also presumed to capture the love that is required from a follower of Christ toward God (Mark 12:30). It is the type of love that tends to jointly serve our neighbors' body and soul, not one without the other.

Scott Sunquist along with David Johnston advocate the view that as followers of Christ, our reflection of God's love encompasses both the evangelism and justice,

proclamation and service, not one without the other as both spring simultaneously from the undivided love of Christ (Sunquist 2013, 320-1) and (Johnston 2017, 23).

Accordingly, it appears that seeking the justice of others is not a parallel element or "partner" to evangelism, but doing one fulfills the other simultaneously. Therefore, a follower of Christ cannot serve his neighbors by advocating their justice without proclaiming the gospel and cannot spread the good news while ignoring his neighbors' justice. Since we are the reflection of Christ's love, we participate in the same service while we are proclaiming the good news as his followers. Jesus came to proclaim the kingdom of God coupled with justice.[1] The Lord showed us the way to do justice in many biblical stories,[2] which all aim to accomplish the goal of the kingdom of God and fulfill God's will of reconciling people to himself and to one another. It is the Lord's proclamation 'Κηρύγματα' '*kerygmatic'* approach, which he delegated to us to accomplish on earth in obedience to his commends "loving our God and loving our neighbor".

In a similar manner, this idea of neighborly love has a counterpart in Islamic theology. Our Muslim neighbors live to do the will of God and pursue what is pleasing to him by following the Islamic law's purposes[3] as his servants and viceregents on earth.[4] In

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[1] Luke 4: 18-19 "The Spirit of the LORD *is* upon Me, Because He has anointed Me To preach the gospel to *the* poor; He has sent Me to heal the brokenhearted, To proclaim liberty to *the* captives And recovery of sight to *the* blind, *To* set at liberty those who are oppressed; [19] To proclaim the acceptable year of the LORD"; And Isaiah 42:1"Behold, My Servant, whom I uphold; My chosen one in whom My soul delights. I have put My Spirit upon Him; He will bring forth justice to the nations.

[2] Matt. 15:21-28, Matt. 25:31-46, and Luke 16:19-31.

[3] See (Johnston 2007, footnote 24). "Many Muslim writers identify the purposes of sharia as the empowering and guiding of humankind in their divine mandate to manage human society in God's stead in harmony with the earth's resources for the benefit of the entire human race."

[4] (Q 2: 30) "And [mention, O Muhammad], when your Lord said to the angels, "Indeed, I will make upon the earth a successive authority." They said, "Will You place upon it one who causes corruption therein and sheds blood, while we declare Your praise and sanctify You?" Allah said, "Indeed, I know that which you do not know." Also see (Johnston, 2010, 513-14) where he built on Seyyed Hossein Naser's works enhancing the human dignity and the duality of their status as servants and vicegerents: "As servants human beings must remain in total obedience to God and in perfect receptivity before what their Creator wills for them. As vicegerents they must be active in the world to do God's will here on Earth."

doing God's will, Muslims follow the precepts of the *Sharia*, the divine law that is given to them through the sacred text and the *sunna*. In this manner, the Muslims' theology of representing God as his deputies on earth in obedience to his commands intersects with the Christian theology of doing God's will on earth by "loving your God and loving your neighbor" (Mark 12:30-31). Hence, it appears that Muslims and Christians see God as the Creator who has put human beings in charge of this earth in order to manage it, that is, preserve its resources, protect the environment, and care for all the people on it in a just and compassionate way. In light of this ultimate communality, Christians have an obligation to care for their neighbors of all other faiths, including but not limited to their Muslim neighbors.

One of the most important aspects of care is rendering justice and hospitality to others who are oppressed or unable to seek justice to vindicate their position or life. For our minority Muslim neighbors, especially those who are devoted to their beliefs and the application of *Sharia* while living in their United States diaspora, the application of *Sharia* in their lives is the ultimate representation of justice which carries with it righteous living in obedience to the precepts of *Sharia* [5]. Further, redressing someone's rights by any judicial system or justice entity is the central issue to promoting justice to Christians alike as it is to Muslims since all people by virtue of being human are entitled to basic and inalienable rights. To that end and to the heart of promoting justice to all humankind, Johnston argues—because moral philosophy remains at the heart of the human rights enterprise—human rights discourse is reinforced by the central tenets of both Islam and Christianity (Johnston 2014 - A, 900-920).

With this overview in mind, I will examine what is the meaning of justice in multicultural societies or legal pluralism, what it means to love our Muslim neighbors,

[5] See Johnston 2007 at footnote 28, "for the Muslim His Will is expressed in the Sharia, and to live according to this Will on earth is, first of all, to practice the injunctions of the Divine Law."

what hospitality means to Christians, and finally what a reasonable accommodation entails. Before I delve into these areas, I will briefly explain the purposive approach to Islamic law, "*Maqasid Al-Sharia*" according to a majority of Muslim scholars.

Understanding Muslim Law—Maqsid Al-Sharia

Although the statement, "human rights discourse is reinforced by the central tenets of both Islam and Christianity," is fundamentally true, it may raise the objection of the American readers when it comes to its legal application within the American courts. Application of human rights or any other juridical issue in the American courts must be neutral and secular. The First Amendment of the United States limits the American judges' interaction with religious law[6]. An American judge is prohibited from interpreting, analyzing, or applying any religious law. Although the American legal system is built on some Christian principles, it is not per se a religious system.

While Thomas Jefferson and others sought to found the nation apart from any particular religious dogma, they acknowledged a creator God and common human rights. Hence, the American system operates in a non-religious sphere, but maintains the common human rights, which are applied through secular thinking in order to serve the diversity of people without differentiation. Indeed, the American law collectively represents the general ethos of the American nation and is far from any definition of Christianity. This latter understanding is what this research aims to clarify to our Muslims neighbors in proposition 8. Proposition 8: This research is attempting to explain the US Courts' mechanism to our Muslims neighbors in light of the conflicting value paradigms between Islamic law and American law.

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[6] See https://lawshelf.com/courseware/entry/freedom-of-religion-and-the-establishment-clause (accessed December 2017). The three-part Lemon Test asks: Does the law have a secular purpose? If not, it violates the Establishment Clause. Is the primary effect either to advance religion or to inhibit religion? If so, it violates the Establishment Clause. Does the law foster an excessive governmental entanglement with religion? If so, it violates the Establishment Clause.

To contrast this understanding of the nature of the American law with the nature of the Islamic law, I first describe briefly what is the purposive approach to Islamic law (*Maqasid al-Sharia*, or "the objectives of *Sharia*") to reveal its nature and aim. *Sharia* is a religious system revealed by God to all Muslims through the injunctions of the sacred text, the Quran and Sunna.

The purpose of *Sharia* is to fulfill the general welfare "*Maslaha*" of the Muslims community "*umma*" (Johnston 2007, 169). Some of the *Sharia* commandments are clear from the sacred text; however, new cases in the modern area are not clearly spoken to in the injunctions of the text. In those cases the text is silent, leading Islamic scholars such as al-Ghazali (d. 1111) and al-Shatibi (d. 1388), collectively—with some variations—contended that there are three levels of *maslaha* for those cases, which are not covered by an explicit command or prohibition in the sacred text. First, the "essentials," guarantee the preservation of the five categories of human existence (life, religion, mind, progeny, property). Second, the "needful benefits", which, without being essential are nevertheless necessary in order to achieve people's overall wellbeing. Third, the additional needs, the meeting of which contribute to the refinement of human life; Johnston 2007, 160, Nielsen, Jørgen S, Lisbet Christoffersen, and Danish Institute in Damascus. 2016, 5-6, and Johnston 2014 - B, 43, 55, 58.

Therefore, if the *Sharia*'s main purpose is the welfare of humankind, how can the idea of the punishments '*hudud*'—lashings for the consumption of alcohol, cutting of hands, and stoning an adulterer—be justified? Many of the progressive Muslim scholars such as Tariq Ramadan and Khaled Abou El Fadl advocate an indefinite suspension of the application of *hudud* until there are circumstances that truly call for their fair application (Abou El Fadl 2014, 291), considering that those circumstances to a certain degree do not exist in most modern Islamic states. Further, the *hudud* application, if it is exercised in a Muslim modern state, is not exercised by any governmental agencies but

by families in rural areas, tribes, or political groups in the name of Islam. Although there is a historical rationale behind the application of the *hudud,* in most cases the circumstances that demanded its applications no longer exist.

Notwithstanding the change in circumstances, the sacred text is not a dead corpus, but it is infused with rich layers of meaning that go beyond the literal meaning of the words. Take *jihad*, for instance, a word many Americans have heard in news reports. Unfortunately, certain Muslim groups use the wrong type of *jihad* to accomplish their own political agenda[7]. In my view the true *jihad* is the Muslims diligent *Ijtihad* to excavate deeper beneath the sacred text's surface to pursue equity and justice for all humankind. The core-purpose of *Sharia* is manifested in the duty of humanity as trustees of the Creator, and their duty is summed up when they safeguard what God created and strive to establish justice on earth[8].

Quoting Ibn Qayyim al-Jawziyya (d. 1350), Johnston maintains that the ultimate purpose of *Sharia* as designed by God is the objective "to establish justice among his creatures. Thus, any path that is opened by means of justice and righteousness, that is religion" (Johnston 2014 - B, 47-48). By the same token, *maslaha* which is in line with the rules of *Sharia's* and its purposes is in essence an extension of God's law and rightly fulfills the justice expected from the application of *Sharia*. Consequently, Islamic law is not a rigid law, but adaptable to all times and places, and, in order to accomplish the divine will, seeks to offer equity and justice to all.

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[7] "In a sense, at many different levels, there has been a militarization of Islam. Individuals, however, who use the law to buffer themselves from the need to feel or make conscientious judgments have a most superficial knowledge of Islamic jurisprudence because they only focus on the positive commandments of the law while ignoring its ethical motivations and also ignore the processes and procedures that seek to establish equity and alleviate human hardship and suffering" (Abou El Fadl 2014, 199).

[8] "As Muslims, as a part of our covenantal relationship of vicegerency with God, we have been charged with the duty of striving to safeguard the wellbeing and dignity of human beings, and we have also been charged with the obligation of achieving justice" (Abou El Fadl 2014, 196).

Justice in Multicultural Societies—Legal Pluralism

The United States is a combination of many subcultures. Examining the Muslims community in their American diaspora, we also find a collection of different subcultures within the large Muslim community. Studying what justice means in a multicultural society such as the United States requires an examination of a case within a case, in essence, multiculturalism within multiculturalism. Multiculturalism is the undeniable reality of the Muslims community in their diaspora as they have come from different countries and different Islamic sects. If this is the situation of the Muslims diaspora, then how can we as Christians understand our Muslim neighbors' law? How can the secular multicultural judicial system afford our Muslim neighbors justice? And what constitutes justice in an American court of law?

Although God is not a God of confusion (I Corinthians 14:33), God mercifully confused the Babylonians' tongues to draw them near to his loving presence (Gen 10:32-11:9). God alone understands people individually and collectively in their groups, clan, societies, and nations. He invited them to dialogue with him differently. Gradually, searching humanity found different ways to relate to God. It is all sincere search in finding our creator. However, from the time of Babel to date, humanity has had difficulty communicating with each other as diverse groups.[9] This difficulty was manifested on a grand scale recently in Europe when the German Chancellor Angela Merkel stated, "multiculturalism has failed and failed utterly" (Bowen 2012, 17).

Amos Yong suggests that only by the same Spirit that scattered the Babylonians, manifested through the church and a pneumatological theology of hospitality (Yong 2007, 64; Yong 2008, 62), will humanity be able to re-dialogue with each other. Pentecostal theologian Jean-Jacques Surmond (1995, 198-203) suggests that the

[9] See Yong 2014, Chapter 2 "as the Spirit gives utterance."

outpouring of the Spirit made it possible for human beings to encounter one another as "authentically other" rather than as projections of and for the self (Yong 2007, 64).

It seems that Muslim scholars also call for promoting dialogue and advocating justice for all. Rashid al-Ghannushi[10], a Tunisian politician who was jailed in the 1980s for founding an "Islamic" political party, asserts that,

> Islam calls for people to live together, to cooperate and to engage in dialogue in order to strengthen and support those values of freedom, democracy, and justice. These are human values, not just Muslim values. (Johnston 2007, 172)

Truly, we will never have a complete understanding concerning our ways of relating to God unless the Holy Spirit reconciles our thoughts. A harmonious relationship with each other is only granted if we first have intuition to God's divine plan.[11] *Sharia* is a way in which our Muslim neighbors relate to God, and the breadth or progressiveness of its application is determined by our Muslim neighbors. Although *Sharia* has its own diversity, this diversity is in line with the starting point in Babel. As Christians can see the act of God's mercy in confusing the Babylonians who were rebellious, it is not difficult for us to imagine how each subculture of the Babylonians strived to relate to God in their own sincere ways.

Likewise, Muslims are divided between different schools of law as a form of relating to God in their progressive search for truth and justice from different views and understandings. This fact is not dissimilar to Christianity where there are many sects and denominations with their differences of doctrine, practices, and church government. Indeed, the similarities are surprisingly close even to the extent where some Christians

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[10] Ghannushi wrote an influential book mostly while in prison, *The Public Freedoms of the Islamic State*, which was translated by David L. Johnston in English and published in 2020 by Yale University Press in their series World Thought in Translation

[11] See Yong 2007, 65, "Pentecostal and pneumatological orientation is much more ambiguous than exclusivistic and pluralistic theologies of mission because it requires constant attention to context along with spiritual vigilance in attending to what the Holy Spirit might be saying and doing."

deem some denominations as heretical or cultish; likewise, Muslims will call some Islamic sects the equivalent of heretical '*Mu'tazila*'. The point here is not the divisive interface of human beliefs per se, but to ask why the divisions exist in both faiths? As human progress from Babel to date, they are in constant search for truth and justice. To some extent, each faith would have within its denominations consensus on some issues, but would passionately differ on others.

Affording Muslims Justice?

With this brief overview in place, I turn to my first questions, how can we as Christians understand our Muslim neighbors' law and why must we afford them justice in multicultural societies? As stated, the majority of progressive Muslim scholars abhor the *hudud* punishments if there are no circumstances to warrant its application. In fact the purposes of *Sharia* revolve around the preservation of life, religion, mind, progeny, and property. Those are the essential protections for every person, and not only for Muslims. Indeed, those represent the common ground between Christians and Muslims. We all as humans care for these basic elements in our lives by virtue of God creating us. This is the springboard from which Christians can understand and view the Muslims' theology at the grassroots. It is the basic principles that tie us all as trustees of God on earth to accomplish justice for others who are around us, regardless of their faith or how they progressively relate to God. Further, *Sharia* in this balanced perspective is the inevitable way of life for Muslims to live in a pleasing life before God and in harmony with the rest of creation.

Consequently, as we received the love and mercy of Christ, how can we withhold the blessing from our neighbors who want to live a peaceful life while managing their trusteeship on earth by preserving its resources, protect the environment, and care for all the people on it in a just and compassionate way to all? Absolutely, there is a certain

amount of pluralism within *Sharia* doctrines which can allow the Muslim community to sort out the divine rules from the different human viewpoints. The Synoptic Gospels inform us as Christians on this point, we understand the one message of the gospel from different outlooks. Although it is the one message of our Savior, the writers took into consideration the culture and the languages of different groups such as the Jews, the Greeks, the Romans, and the Gentiles. The message still speaks to all humanity regardless of their cultures or languages.

The natural conclusion is that diversity in understanding the message is God's way of conveying his mercy toward all humanity. To that extent Johnston quoted Muhammad Amara, a moderate Islamist, stating that,

> a certain amount of pluralism is necessary in the Islamic community, as long as it conforms to the general welfare of the *umma*, that is, (preserving life, religion, mind, progeny, and property), which is the essential purpose of *Sharia.* (Johnston 2007, 169)

Although Ámāra rather curtails the universal benefit of diversity by focusing only on the Muslims community, Khaled Abou El Fadl unfolded the full range of the benefits accruing from the diversity humankind, stating:

> Muslims have no alternative but to embrace the universal and to study and explore the meaning of human diversity as a manifestation of divine mercy. This is not alien to Muslims … The Qur'an, however, makes the wisdom of this maxim applicable not just to Muslims but to humanity at large. (Abou El Fadl 2014, 196) [12]

If this is our Muslim neighbors' stance in using the purpose of *Sharia* in a diverse setting, what is our obligation as Christians commanded by our Lord to "love our God and love our neighbor" (Mark 12:28-34)?

[12] "To each of you We have given a law and a pattern and way of life. If God would have pleased, He surely could have made you into a single nation and people, but God wished to try and test you according to what He has given each you. So excel all together in good deeds. To God you will return in the end, and God will tell you about that which you were at variance." Qur'an 5:48

If we come to understand the true intention of the misunderstood, the weak, and marginalized among us, we ought to pursue their justice. Our duty as a host is to extend hospitality to our neighbors in obedience to God's commandments. *Sharia* as a balanced, progressive way of life for Muslims aims to accomplish the essentials to benefit all humankind. As Christians supporting our Muslim neighbors seeking to live by the ethical edicts of their divine law, we are deeply moved by the love and grace we received from our Lord Jesus Christ and in turn we are willingly motivated to love and obey our Lord by loving our neighbors. In essence our love for others flows out as an extension of the Lord Jesus Christ's love for the whole creation.

United States Courts and the Universal Ethics of Justice

At this point, I will examine my second compound question, how does the secular multiculturalism of our judicial system afford our Muslim Neighbors justice? What constitutes justice in an American court of law?

The dedicated mission of the United States court is to serve the multiculturalism of its nation, by assuring "equal protection under the law"—the principle from which congress framed the 13th Amendment to the constitution in 1864-5. The court fulfills this mission by utilizing a neutral secular justice, intentionally built on the secular philosophy of the law to serve the cultural blend that makes up the DNA of the United States as an immigrant nation.

The justice that is expected from the US Court has no divine tone or sacred lens, but it has a legal secular philosophy to vindicate human dignity. In the absence of an Islamic tribunal, Muslim immigrants have no choice but to seek justice from the American legal system. To the surprise of many Muslims, the American legal system does not function under the percepts of the Islamic law, as American judges are

prohibited from applying any religious law in obedience to the mandates of the First Amendment.

Therefore, to determine if an Islamic legal issue is enforceable in the California court, judges look for comparisons with the United States legal principles, while consulting with experts in the *Sharia* field to gather the factual basis that supports or negates the Islamic petition (Bowen 2012, 102)[13]. After surmising the center factual/legal questions, the American judges answer the petition based on their legal training and experience, and based on their understanding of the facts of the cases. However, the American judges answer the factual questions purely from the American legal perspective without regard or inquiry into the Islamic law doctrines.

This finding is the common pattern in all the cases previously mentioned. In the marriage Nikah cases, the courts measured the idea of living together based on the letter of the California Family Code, § 500 to interpret the allegation of the litigants. In the dowry Mahr cases, the courts looked at the idea the Islamic dowry within the confines of the California premarital agreement. In the child custody Hadana cases, the courts only adopted the secular best interest of the child requirements, and ignored the Islamic requirements if they were against the best interest prescribed in the American law.

The court also ignored the Islamic formula of transferring the child at the age of transfer. In the inheritance Mirath cases, the court looked at the issue of presumption of a father from the perspective the California Family Code, § 7611 (d) and only acknowledge that notion if the father openly held out the child to be his from the perspective of California Family Code § 6453 (b)(2). In the religious *Halal* meals cases, the courts outweigh giving the Islamic meals against the jail and prison security or its monetary

[13] See Bowen "The judges made their decisions based on U.S. jurisprudence, and appellate courts either affirmed or overturned those decisions … enforceability of an Islamic marriage contracts … were decided according to the standard U.S. contract law" (Bowen 2012, 102).

inclination. In the cases of Muslims practicing their religion's rituals '*ibadat*', the court trumped the Muslims' requests against the Establishment and the Free Exercise Clauses.

Furthermore, the courts do not inquire into any Islamic legal theory or use any Islamic methodology to arrive at their decisions, and when there is need to analyze, interpret, or apply Islamic law, the court rejects the whole case and refuses to adjudicate it. The vivid example of this assertion is shown in the case of Khan vs. Jamaat–Ul Islam of America, there, the court abstained from redressing the issue of expelling the Muslim clergymen from their religious position in their religious institute and cited the case law invoking the ministerial exception to the First Amendment of the United States Constitution.

When the American courts find there might be an excessive entanglement with any religion, whether it is Christianity, Judaism, or Islam, that is where they draw the line (Bowen 2012, 104-5).[14] The American courts analyze the cases from the lens of the American legal system as I have shown in this research, delving only into the California legal system in the light of the facts presented to them. Indeed, the law that applies to the Islamic cases presented by the parties or their attorneys is simply the law of the State. This reality is what caused Abed Awad to state: "our legal system is well equipped to balance conflicts between church and state" (Awad 2012). Likewise, Bowen argues that, "the multi-tiered structure of the US judicial system produces results that should satisfy even the most strongly anti-Islamic observers" (Bowen 2012, 105). Rightly, the California trial and appellate courts are long trained under the First Amendment to protect the United States Constitution from any religious intrusion and protect any religion from the coercion of the government.

[14] See Bowen "In some cases the court refused to take action on grounds that doing so would involve excessive entanglement with religion in violation of the First Amendment … as other courts have concluded regarding Jewish marriage law or Christian church regulations (Bowen 2012, 104-5).

In other words, applying any American law that aims for the general welfare of all people is not something designed to corrupt Muslims' beliefs in their diaspora, but it exists to protect all people. For example, in the cases of Hasan and Fereshteh on marriage in chapter 3, the analysis demonstrates that when Muslims yield to the requirements mandated by the law of the land (the civil marriage), the court protects their rights and preserves their Islamic marriages in their immigrant status. With this type of general welfare law, the American legal system may sometimes yield rulings that are aligned with the adjudication of any *Sharia* court.

This was demonstrated by the Malak court in the child custody Chapter 5, where the California court found that "the children's best interest of the Lebanese *Sharia* court" was stated with specificity and aligned with the secular best interest principles. Also, the Dajani case in the Mahr Chapter 4, the court decree favored the husband, but not because the wife filed the divorce and forfeited her dowry, but because the court determined that the Mahr clause was against public policy. Notwithstanding, the methodology used by the American courts is broader than the *Sharia* legal methodology, vindicating the dignity of both Muslims and all humanity.

This being said, sometimes the American courts' adjudications drastically differ from the expected normative rulings of any *Sharia* court. These are the situations where the American justice will not serve the stated purpose of *Sharia*. This undesirable outcome contrary to the *Sharia* rules was exhibited in the decree of the American court in the child custody Chapter 5, where the court awarded the mother her minor daughter custody, even though the girl will live with a stepfather who is foreign to her.

When the American court of law arrives at results acceptable or similar to any *Sharia* tribunal, it is a mere incidental adjudication and in no way intends to base it on *Sharia* or its principles. These incidents of similar rulings happen because both legal systems, the Islamic legal system and the American legal system, identify common

ground in different legal areas, such as marriage contracts, child custody, dowry, and child support. This observation in my view caused James Skillen to ask,

> Is it conceivable that in the name of religious freedom and diversity some aspects of Muslim law could be recognized by, or incorporated into, the governance systems of a European country or of the United States? (Ahdar, Rex, and Nicholas Aroney 2013, 91)

Notwithstanding those partial similarities, inevitably some of the *Sharia* rules are deemed incompatible with American society and irreconcilable with the American legal system. This is clearly shown in the facts of the Mahr Chapter 4 (Shaban), specifically regarding the amount of the late dowry awarded to the women in accordance with the Islamic Mahr rules. In that case, if the *Sharia* was applied, the women would have taken only a copy of the Quran, 500 Egyptian pounds, and 5000 Jordanian Dinars according to the Islamic law, an outcome that does not stand to reflect justice in the eyes of the American legal system or of any sensible human.

Sharia Alternatives to US Civil Law?

Even if some European countries agree to incorporate some of the similar legal areas of *Sharia* into their law or the governance system, I find it inconceivable that it will happen in the United States, because of the clear and definitive prohibition of the First Amendment of the United States Constitution in order to separate the church from the state. Thus, if the United States courts only afford our Muslim neighbors the type of justice, which I call an "incidental justice", how can a permanent immigrant Muslim obtain justice in our multicultural society? This is where to some extent the private Islamic arbitration committee will be the medium of reconciliation between the two legal systems. Of course the arbitration will only work if, and only if the parties to the dispute agree to submit their case to the *imam* or other Islamic entity to meditate and issue a binding decision.

This view is in agreement with the suggestion of the Archbishop of Canterbury Rowan Williams that: "anyone in Britain, not just Muslims, should be free to belong to non-state organizations. He opposes a 'monopolistic' conception of 'universal secular law' that would force people to choose between 'cultural loyalty' and 'state loyalty'". The Archbishop's directive suggestion is that,

> pluralism of that kind is already recognized in British law, so the law may simply need to be refined to expanded slightly within the British legal system to accommodate some new types of non-government organizations such as mosques and Muslim schools. (Ahdar, Rex, and Nicholas Aroney 2013, 93)

I will add that, in our American multicultural society we have to fill this gap within the United States courts, and make sure our governance system allows our Muslim neighbors to redress their rights and obtain their justice alternatively by allowing a binding arbitration committee to serve that end. What we are vouching for is allowing our Muslim neighbors to redress their basic rights in areas such as their family law, their dietary law, and their financial system. It is the basic rights that the American legal system is already giving to many other religious groups such as Christians and Jews[15]. Certainly giving our Muslim neighbors their arbitration committee will not violate the Establishment Clause, but will uphold the non-arbitrary spirit of the United States Constitution.

Christian Responses to Sharia

"Islam, Muslims, *Sharia*" are words many of us in the West will look on with fear, confusion, misunderstanding, and misconception. Before we utter our evaluation, we must see and understand clearly the meaning and implication they carry. A violent act

[15] See the experience of Jews and their arbitration courts in the US. Explored in these links https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/26/making-religious-arbitration-work-in-america-the-jewish-experience/ (accessed December 2017). And https://www.pewforum.org/2013/04/08/applying-gods-law-religious-courts-and-mediation-in-the-us/ (accessed December 2017).

is not solely associated or attributed to one group of people, one type of religion, a certain ethnicity, or nationality. Throughout human history we hear of violent acts among many different groups of people. Examining the reasons behind human violence is a major field, but the basic reasoning points us to words like conflict, misunderstanding, and disharmony between different people, or just a mentally ill person's breakdown within that same society. Hence, violence was never the sole proprietary of one group of people or the shadow of a specific type of religion; it is a phenomenon that exists wherever we find fallen humanity.

From October to November of 2017, we learned about three incidents of violence: in Las Vegas, an American gunman killed 58 incent Americans who were peacefully attending a concert; in New York, 8 cyclists from different nationalities died when an Uzbek drove a flatbed pickup into them as part of an ISIS-inspired terrorist operation; and in Egypt, militant Muslims killed 305 Muslims at a Sufi Mosque. Violence at the hands of human beings results from many complex causes, such as, criminal activity, wrong religious motivation, or the acts of a mentally ill person. The question thus arises: can we accuse all Americans, all Egyptians, and all Muslims of being terrorists? Of course not! Many Muslim progressive scholars such as Abou El Fadl urge Muslims to rethink whether violence and tragedies are the products of Islam or not, and without blaming the West and recalling imperialism and colonialism, he states:

> In my view, confronted by such extreme acts of ugliness, there is no alternative for a Muslim who is interested in reclaiming the moral authority of Islam but to confront the quintessential questions of: Is this Islam? Can this be Islam? And should this be Islam? It is simply too easy to shift responsibility for extreme acts of ugliness to … blame everything and everyone else but refuse a confrontation with one's own conscience … A Muslim ought to critically evaluate the prevailing systems of belief within Islam and reflect on the ways that these systems of belief might have contributed to, legitimated, or in any way facilitated the tragedy. In my view, this is the only way for a Muslim to honor human life, dignify

> God's creation, and uphold the integrity of the Islamic religion. (Abou El Fadl 2014, 201)

Further, the traditional operation of the *Sharia* indirectly is comparable to the United States political mechanism of checks and balance. Consulting the *Sharia* was a delicate balancing act between the executive authority of the caliph and the jurisprudence of the scholars '*ulama',* and the interpretation of a qualified judge. This *Sharia* operation in James Sklillen's opinion entailed more checks and balances, more rigors and care than we in the West might imagine. In fact, Skillen argues that those who have responsibilities to discover and apply the *Sharia* must follow the same balanced paradigm (Ahdar, Rex, and Nicholas Aroney 2013, 96).

Fear or Love?

> And why do you look at the speck *in your* brother's *eye*,
> but do not perceive the plank *in your* own *eye*? (Luke 6: 41).

If those are the samples of how the Muslim scholars in the West see *Sharia* [16], then, what causes a Muslim born and raised in the West to commit violent acts against his homeland in the West? In answering this question, John Bowen argues that one of the primary causes of the "homegrown" terrorists in the West is not because the individual Muslims are separated from the mainstream culture, but because they become isolated individuals without a social or culture base. Also, Oliver Roy and American

[16] See *Shari'a As Discourse: Legal Traditions and the Encounter with Europe:* "Unlike radical Islamists, modernists tend to emphasize the application of the intent and overall objective *maqasid* of the religious law more than its literal injunctions, especially when the literal understanding of a specific dictum in a particular circumstance would result in unusual hardship or violation of inviolable broader moral imperative. Modernists argue that since Sharia must upheld certain ethical values such as justice and mercy at all times, specific legal injunctions may never violate these fundamental objectives in any given historical and social circumstance." (Nielsen, Jørgen S, Lisbet Christoffersen, and Danish Institute in Damascus. 2016, 40) and (Ramadan 2004, el-Fadl 2001, Sachedina 2001, Khadduri 1984).

counterterrorism expert Marc Sageman each paint a picture of young men who suffer from a lack of ties with others in their communities (Bowen 2012, 26).

Reflecting on this finding, we can see the commonality between all the people who commit violent acts. They are rejected by their own communities and ostracized for one reason or another. Indeed, they suffer from a lack of social nourishing and equal treatment by the rest of the community members. These are the people behind the tragedies. Because they look different from the rest of the community, they are not considered part of the community. American communities tend to look upon their Muslim neighbors with fear that has no basis, the news puffery infuses an artificial fear, which alters the notion of peace, leaving people to expect the worse harm from their Muslims neighbors. Their American neighbors within their community scorn them for no just reason. When the community treats its Muslim neighbors with an unloving attitude, that attitude implants the feeling of being strangers and cut off from the rest and in turn as strangers they expected to be harmed and opposed.

This feeling of isolation can be avoided and overcome by the community's acts of friendship and hospitality (Koyama 1993, 284). The majority of Muslims in the United States are immigrants, people who came to live in their diaspora in search for a better life. They seek their daily bread and mind their own business while trying to please God in a new land they no longer call house of war '*dar el harb'* but house of safety '*dar el aman',* for them and their children. Some if not most of them left their homeland because of the unfair treatments and the unrelenting persecutions they suffered. This is at the heart of why the alien has come to reside among us in our land, the foreigner whom we must love as ourselves (Lev. 19: 33-34). Indeed, this is the law that we must observe while caring for God's creation.

This overview has established that the true source of violence has little or nothing to do with *Sharia* but a lot to do with fallen human relationships. The balanced purposes

of the *Sharia* are not the cause of violence, but the fear that keeps us from loving our neighbors is. In that respect Noah Feldman argues that *Sharia* early on in Islamic history commands the right and forbids the wrong (Ahdar, Rex, and Nicholas Aroney 2013, 96).

The moral virtue of *Sharia* functions as a tool used by Muslims to come closer to God through mercy, compassion, and justice during their life on earth (Abou El Fadl 2014, 198). This is the rightful function of *Sharia*, which challenges us to offer our Muslim neighbors the love we owe to them as we are commanded by our lord, "love your neighbor as yourself" (Mark 12: 31). Consequently, love changes people and equips them to live in peace and harmony.

At the end of 2010, the Arab Spring revolution in Egypt specifically broke out in "Liberty Square," where violence did not differentiate between Muslims or Christians as we watched the killing of innocent individuals from both sides at the hand of so-called other Muslims. While violence was not selective about whom it hit, love also was not selective about whom it embraced. While many ran and closed their doors in fear for their lives, one church happened to be less than one mile away from where the killing and violence occurred. That church is Qasr el Dobara Evangelical Church, which is led by pastor Sameh Maurice who opened its doors and admitted all injured to its small clinic where there were a few Christian doctor who volunteered to care for all the wounded including their Muslim neighbors. This extraordinary act of love and care took the Muslim neighbors by surprise, transforming their misconception about Christianity into a new respect and mutual brotherly love.

Not long after that act of kindness by Qasr el Dobara church, in 2011 another round of violence broke out across town with Muslims collectively aiming to destroy buildings, churches, and stores in protest against the Mubarak regime. The protesters destroyed most of the churches on their way and no one stopped them, but when they came to attack Qasr el Dobara church, the individuals and their families who had been

treated by the Qasr el Dobara clinic risked their lives and stood between the rest of the protesters and the doors of the church forming a hedge around the church while shouting, "Not this church, not this church! They cared for us, they are our friends and neighbors."

All humans are capable of doing good and evil. Indeed, any human can have the stature of a preacher who is holding the sacred text to proclaim God's love, while another can have the stature of a soldier who is holding a deadly weapon to kill and destroy. Our love as followers of Christ is a wise love. Our love follows the scriptures; we are wise as serpents and humble as doves.[17] We offer loving balanced hospitality to all of our neighbors regardless of their faith or their cultures differences. It is the golden rule that we aim to protect our neighbors from any injustice as we protect our own from any harm. Simply put, how can our neighbors love us if they fear they might be harmed, or under the threat of imminent harm?

Qasr el Dobara's ideal example of hospitality in the midst of the impending harm and even death encapsulated the power of love that met their Muslim neighbors' fear and drowned it by the love of Christ. These acts of kindness and other examples during the revolution bound most of the Egyptians together, to the extent that we saw Muslim and Christian clerics join forces in anti-government protests against the injustice of a dictatorship.

Hospitality?

Only when we wash peoples' feet, will we understand their journey and know the substance of their identities. Helping to provide justice to strangers cannot be accomplished until we invite them to our tents and extend the love and hospitality of the one who calls us to his presence inside his dwelling place. As we encounter people of other faiths, we wrestle with the question of the nature of justice in the light of our

[17] Matthew 10: 16

theology, our prayer and our humanity in Christ, and how it is part of the Church's missional calling (Bevans and Ross, eds. 2015, 119). Receiving the gift of grace from our Lord Jesus is not meant to be our exclusive possession, but it is an invitation for us to bless others with this eternal grace. It is a participation covenant between the purchased and redeemed Church (offeree) and the owner lamb (offeror). The acts of obedience and participation go in different directions according to the will of the Holy Spirit.

It is not up to us to decide who is worthy of the Lord's mercy and grace and who is not. We extend hospitality in different ways to other Christians, to Jews, and even people who do not believe in God. If we gave to the Christians, the Jews, and others their own arbitration panels in the United States, then we must give the Muslims their own arbitration panel to apply their Islamic law concerning the basic issues that allow them to be in close relationship with God. Johnston contends,

> we could go further to accommodate Muslim needs in the US, which are varied and sometimes contentious among Muslims themselves. We have done this for a variety of Christian churches, and for Jews especially, since they as Muslims rely heavily on their religious law for righteous living. (Johnston 2017, 27)

While most of our society looks at Muslims as a monolithic block, we as Christians must differentiate between the majority of Muslims who follow a progressive interpretation of the sacred text and only seek their basic needs in this life and the Salafi minority who follow an archaic ways of the past to serve their radicalized political agenda and increase their power over others. As mentioned, our love is a wise love. Our love follows the scriptures; we are wise as serpents and humble as doves.[18] We offer balanced hospitality to all of our neighbors regardless of their faith or their cultures differences. This is the rule that we must have in mind while living on this earth to pursue peace as much as possible with all.

[18] Matthew 10: 16

We are not advocating a foolish hospitality by caring for radical Muslims, whose real scheme is to kill other Muslims, Christians, and Jews in order to accomplish their own political agenda. What we are asking here, simply put, is to afford our Muslim neighbors their basic needs which, as has been shown, will not bring any harm to our communities. This latter view is the meaning behind proposition 7 of this research. Proposition 7: This research is an attempt to extend accommodation and hospitality to our Muslims neighbors in support and solidarity to their presence in the United States as their new home.

The parable of the Good Samaritan differentiates between the legalistic Jew who passed by the injured person and did nothing to aid him and the Samaritan who tended to the injured's needs and extended love and hospitality to him. Surely, the Samaritan's love demonstrated a higher love than the Jew who was supposed to reflect the love of God to the injured who was left alone to suffer from his wounds. Our proclamation of the kingdom is not a cut and dry spewing of the word of God, but it is a demonstration of our Lord love in action.

Amos Yong, in the process of adapting the work of David Bosch[19] argues that the mission of the church is not only to announce and practice the forgiveness of sins, but also to restructure relationships between the rich and the poor, between Jew and Gentile, between male and female, and between the socially accepted and the socially marginalized (Yong 2007, 63). Yong's statement aims to encourage and motivate us as Christians to tend to the basic needs of our Muslim neighbors who are socially marginalized and unwelcome by the rest of society around us. If not us, then who, since as Christians we are our Lord's representatives, participants in his great commission, and the executors of his justice?

[19] Bosch 1991, Chapter 3.

But how can we as followers of Christ do justice to our Muslim neighbors? As followers of Christ, we cannot serve our neighbors only by advocating their justice without proclaiming the gospel; and conversely, we cannot spread the good news while ignoring our neighbors' justice. This is the rule that our deeds proclaim the kingdom of God, and the kingdom of God affords all the creation justice. If we follow this formula, we will encourage others to be hospitable not only toward us, but to everyone around us. All Christians can and should bear witness to Jesus the Christ in word and in deed, while listening to, observing, and receiving from the hospitality shown them by those of other faiths (Yong 2007, 66). We are encouraged to be initiators of this cycle of blessings that is yielded as we offer our hospitality.

As we host our neighbors as our guests, we transform them to become in turn hosts, and consequently we will also receive the blessings of their hospitality. This environment cannot exist, however, if we harbor any judgment against our Muslim neighbors. Our attitudes must be devoid of hypocrisy; we cannot have unfounded judgment that leads to fear while we are trying to love our guests. Hence, Christians' understanding of the religious "other" begins with their own repentance. Only when we repent can we truly "extend hospitality to strangers" (Koyama 1993, 291).

Reasonable Accommodation?

The objective of this chapter is to allow us to turn our lens to the focus mode where we can clearly see the basic needs of our Muslim neighbors, who have, by virtue of their permanent immigration or by their birth in the United States, become part of the very fabric of the American nation and deserve all the rights and benefits due to all citizens who are part of this society. In order to decide whether a demand for accommodations is appropriate, there is no choice but to introduce the minority's views

about justice into the mix of the general democratic debate, along with all the other views about justice in the society (Ahdar, Rex, and Nicholas Aroney 2013, 112).

Thus the question, what is a reasonable accommodation in our Muslim neighbors' view? To answer that, we must inquire into what they are seeking collectively as a reflection of their backgrounds, what spiritual journey they had, the circumstances that surrounded their immigration, and the spiritual life style they undertake in their diaspora. Most Muslims in the United states came to this country for one of these reasons: searching for a better life, fleeing religious or sectarian persecution, fleeing political persecution, or simply to spread Islam in other nations[20]. Those groups collectively share a common ground as Muslims; however, they differ in their spiritual understanding and lifestyles.

The first group represents Muslims who live a secular life, and as nominal Muslims will be satisfied with any justice system, such as the justice that an American court would afford them. As Pew Research states in one of its recent reports, "Muslim Americans have not become disillusioned with the country. They are overwhelmingly satisfied with the way things are going in their lives (82 percent) and continue to rate their communities very positively as places to live (79 percent excellent or good)."[21] Also MacFarlane indicates that no one in her study was promoting or desired the establishment of formal *Sharia* tribunals or courts (Applying *Sharia* in the West, 2013 Turner and Richardson, 60). Likewise in England, most moderate Muslims, from spokespersons to those in humble walks of life, said that the issue of Shari'a was of little relevance to them (Ahdar, Rex, and Nicholas Aroney 2013, 45).

The second group, the Muslims who flee political or sectarian persecution who lived their life as moderate devoted Muslims, will to a certain degree seek to live by the

[20] https://cis.org/Muslim-Immigrants-United-States (accessed December 2017)
[21] Pew Research Foundation, 2011.

precepts of *Sharia* and might have some dissatisfaction from what they see as partial justice, or a lack of justice in the United States courts' decision-making relative to their Islamic cases. This group's accommodation will require what the Archbishop of Canterbury called in his *Sharia* Lecture "parallel jurisdictions." This is a separate jurisdiction with no relation to the state or the American court jurisdiction. This is how Jeremy Waldron put it:

> The idea of devolution and regional autonomy, with different legal systems, is in principle separable from the idea of accommodations within the framework of a single overarching legal system associated-importantly herewith a single state in control of the legitimate means of coercion. (quoted in Ahdar, Rex, and Nicholas Aroney 2013, 104)

The third group is represented by those few within the Muslims minority who are likely to request an actual *Sharia* court. This group follows the Salafi teaching, and they are more likely to abuse women's rights as defined in international, UK and United States law (Johnston 2017, 27). As an illustration of the third group, Mark Hanshaw interviewed the Muslim group leader Imam Yusef Kavakchi, the spiritual leader of the Islamic Association of North Texas, who insists on the integrated nature of the entirety of the Muslim system of faith, including its system of religious law[22]. Hanshaw asserted that, "Kavakchi advocates the necessity of the establishment of a specially designated court, with trained personnel, designed to handle cases involving claims of Muslim litigants" (Hanshaw 2010, 155). Many Muslims of the first and second groups fled their own land to avoid the excessive authority of the judicial setting likely to be demanded by the strict Islamic theology of the third group.

This overview of the three Muslim groups leads us to the logical conclusion that open-ended accommodation will harm our Muslim neighbors and Americans alike.

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[22] "In Islam, creedo, belief and the ethical system are one. Actions cannot be separated from creed. They are one. And wherever they live, in a ditc h, under the ocean, on Mars, on Sputnik, these things cannot be compromised…. It is not divisible…. You cannot lessen the value of or belittle any aspect of the Muslim law system" (See the script conducted by Mark Hanshaw in Dallas, Texas, July 6, 2006).

Nonetheless, out of hospitality, there is room for balanced accommodation for our Muslim neighbors. However, this accommodation requires the guest to help the host implementing the accommodation while protecting the rest of the Muslims (the guest) in the first and second groups and the American nation (the host). This cooperation naturally will build an antidote to the growing Islamophobia. Hence, the reasonable accommodation will take the shape of affording our Muslim neighbors their own *Sharia* arbitration committee. However, calling the committee that adjudicates *Sharia* by its real name "panel or arbitration committee" will help to provide a trusting environment for our Muslim neighbors. The term "court" carries with it the authority that an American court has to establish legal precedents and the power given to it by the US Constitution to enforce its decrees, but "panel" or "arbitration committee" has no authority to establish legal precedent or enforce judgment.

This way of proceeding will ward off any worry of threats to the American nation or give the slightest sense that the American legal system is being taking over by the fundamentalists. So long as this committee gives the needed hospitality to our Muslim neighbors, the goal of accommodation is accomplished without any encroachment or the threat of an encroachment on the American legal system or its sovereignty. If our Muslim neighbors can accept the contextualization of parts of *Sharia* within America as a pluralistic society, which denies the *Sharia* any public legal authority, then there is room for this balanced accommodation (Ahdar, Rex, and Nicholas Aroney 2013, 100).

This does not mean that the American legal system is suppressing Islam in violation of the Free Exercise Clause of the Constitution or eliminating the rule of *Sharia* in the lives of our Muslim neighbors, but to the contrary, it supports their rightful desire for justice and reaches the boundaries of freedom for all. This is consonant with the vision Rashid Al-Ghannushi has of Islam:

> All in all, the theory of freedom in Islam rests upon the granting of freedom to the individual in all things, as long as it does not interfere with the right or welfare of the society. But if it goes beyond, it becomes an aggression that must be stopped and strictly contained. (Johnston 2007, 175)

Embarking on a form of reciprocal justice for all requires the examination of the guest and the host's views of honor and justice to harmonize between the giving and receiving (Hershberger 1999, 120-134). That said, Jeremy Waldron argues that the decision as to whether to accommodate the minority within the fabric of a certain society depends on the general consensus of the overall population, that is, citizens, legislators, and judges, in that they must make their decision in the light of the best they see as to the fairness and reasonableness of accommodations and of whatever criteria of justice seem true or right to them. However, he ended altering his statement to "the members of the minority—with their distinctive views—must play a full and complex part in that debate at least" (Ahdar, Rex, and Nicholas Aroney 2013, 111-112).

First, in my view Waldron's statement tends to give the impression that the minority do not have an equal voice in deciding their justice, and second, it also opens the door to a one-sided-justice or "subjective justice". Affording justice to the minority is more complicated than that, as it should be an "objective justice" that by all respects aims to vindicate the dignity of the guest, and not simply extending the definition of justice from the host's point of view. If we are as Christians to love our Muslim neighbors as ourselves, we must vouch that they will be treated as we are treated. This later trajectory requires us as the host to give a full opportunity to the guest to implement their own view of justice within the purview of not encroaching on the general consensus of justice as it is practiced by the host society. In this way the host truly afforded the guest the full scope of justice and hospitality.

As an example of the one-sided-justice or imposition of what the host sees proper as justice on the guest, Waldron argues that the prenuptial agreement is a common theme

in three different cultural/religious settings—secular materialistic, Christian, or *Sharia* prenuptial agreement all can be served by the California Family Code (Ahdar, Rex, and Nicholas Aroney 2013, 109). Many Muslim scholars such as Aziza Al-Hibri contradicted this statement with disapproval of the American court's interpretation to the dowry *mahr* as a prenuptial agreement [23]. In my view this is a striking example of the American legal system dictating its view of justice; as a host of the Muslim's community, it contradicts what the guest understands as justice.

Waldron's conclusion concerning the prenuptial agreements is a misconception of the Islamic dowry. Although the dowry *mahr* can be confused with the American prenuptial agreement, which is gender-neutral, the Islamic *mahr* is gender-specific as it exists as part of the Islamic law only to protect the wife from the unilateral divorce decision given to the husband according to *Sharia*. In this case the "*mahr* letter" is activated at divorce to vindicate the financial need of the non-working wife in contrast to the American prenuptial agreement which aims to protect either spouse's financial interest. It should be noted that by contrasting the Islamic dowry with the American prenuptial agreement, I am not advocating any encroachment by the Islamic perspective of justice on the general view of justice as it is understood by the American legal system. I am vouching for the Islamic justice from the understanding of our Muslim guests to be accepted and implemented only when it does not conflict with a clear prohibition or mandate of the American Constitution.

In sum, Waldron's conclusion[24] assumes the supremacy view of the host's justice in all situations. That is where my analysis differs, as it must be taken on a case-by-case

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[23] Construing the Islamic marriage contract as a prenuptial agreement "has created a serious warping of American judicial understanding of Islamic law. http://www.ajurry.com/vb/showthread.php?t=39097 (accessed December 2017).

[24] "If so, is this unfair to the minority-representing yet again the hegemony of the majority's view? No. Something like this is morally to be expected. We cannot be required, in the name of accommodating cultural and religious minorities, to abandon what we really care about, nor what matters to us in the way of justice, fairness, and fights, and concern for all of those who are vulnerable to decisions being made in

basis and not as a collective view of the host's holistic justice. Although Waldron asserted that the guest's view of justice must be considered in the mix and at least involved in the debate, he did not give the guest an equal opportunity or voice when it is possible to afford the guests justice from their own understanding without any conflict with the American constitution.

Advocating Justice for Muslim Immigrants

Our understanding of *Sharia* and how Muslims rely heavily on their religious law for righteous living will determine our attitude of hospitality toward our Muslim neighbors. Our mission is to continue the Abrahamic blessings, "I will bless you … and you shall be a blessing" (Gen. 12: 2). Only through God's eyes can we truly see God's creation in a compassionate way and identify with them in different aspects of life. Our spiritual rebirth and the love that we received in our Lord Jesus Christ oblige us to advocate for our neighbors' justice and the protection of every person's basic human dignity as a bearer of God's image. Our love for humanity expresses the caring for their soul and their worldly needs. We are called to evangelism and service, proclamation and justice. We do so because truth without grace is a shortcoming, and grace without truth is an empty act. A complete love is holistic like its source, Jesus the author of unconditional love. Jesus healed the blind, fed the hungry, resurrected the dead, all acts of momentary service, however, his main goal while serving others was to offer eternal life to all. His service was the conduit to the salvation he offers. Likewise, our evangelism, which stems from our loving service to our neighbors, carries with it the unspoken testimony of Christ's holistic love.

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this area. Those concerns ought to inform our laws anyway. And they ought equally to inform our receptiveness to other customs, particularly if those customs are going to be upheld and enforced in our name" (Ahdar, Rex, and Nicholas Aroney 2013, 113).

To advocate justice for a minority that is unable to vindicate themselves is a tangible form of love form of love, especially if they do not follow our faith or belong to our culture. It is a sign of obedience to the person who manifested the definitive example of love on the cross. As followers of Christ we deal with the consequences of the inhumane deeds of this world committed against our foreign neighbors with our hospitality. In doing so we meet their exodus and flight from darkness with our exodus beyond our fear and in dependence on the God who sent us. It is our participation in the divine intervention manifested through the leading of the Holy Spirit in our hearts to win and redeem a lost world to his eternal love. Standing for the weak and marginalized to receive justice and be acceptable in the sight of God is the ultimate form of love.

Although some Muslims show satisfaction with the "incidental justice" they receive from the American courts, there are some who are genuine about their spiritual life as Muslims abiding by the precepts of the Islamic law. Affording Muslims their own *Sharia* arbitration panel to adjudicate the basic legal issues does not endanger the safety of our lives or open the way for a takeover of our legal system. The arbitration is a separate substandard legal venue, although it has the connotation of being unreliable, even untrustworthy to a certain extent, but it allows Muslims to exercise their divine legal rules in a private setting. My contention is that denying Muslim-Americans their own *Sharia* arbitration panels clashes with the mandate of the Free Exercise Clause of the United States Constitution. The latter suggestion supports this research proposition 7. Proposition 7: This research is an attempt to extend accommodation and hospitality to our Muslims neighbors in support and solidarity to their presence in the United States as their new home.

To that end, I am in agreement with Johnston's three-prong recommendation.[25] As Christians, we ought to stand by our Muslim neighbors in solidarity to support their

[25] See Johnston 2017, 22-29.

divine yet also basic need to have a reasonable and practical application of the *Sharia* in their lives since they desire to live according to the precepts of its wisdom. Though I advocate affording our Muslim neighbors their own *Sharia* panel, I believe it should not be named "court" or "tribunal," and this for two reasons: first, for the sake of social reconciliation, and second, for the sake of legal correctness. First, in order to promote reconciliation, any American hearing the word "*Sharia* court/tribunal" will immediately think of what and how the media portrays the *Sharia*, causing her to fear for her life and for the ruin of the American liberty.

This plainly came out of the debates and contentions that when Muslims tried to call a *Sharia* panel in Dallas-Fort Worth, Texas a "*Sharia* tribunal."[26] Naming this committee by its actual name, "panel," is very useful to lessen the impact for the sake of reconciliation between the Muslim community and the American nation. It also clearly indicates that the purpose of the *Sharia* panel is only for accommodation and not infiltration into the legal system, or creating legal precedents to undermine the American justice system. This appropriately will complement Johnston's first prong recommendation above to educate the American nation about the pluralistic nature of Islamic law in particular, and that the Muslims only desire to follow the divine law to honor God in their diaspora.

Second, there is a major legal difference between the court in United States and a mere panel or an arbitration committee. On the one hand, the court is empowered to enforce its decision-making without the need for any other entity to enforce it on its behalf. On the other hand, a mere arbitration panel is only advisory in nature and cannot bind a party to its decision-making unless that party agrees beforehand to be bound. However, parties to a nonbinding agreement can ask a United States court to certify the

[26] http://www.politifact.com/texas/statements/2015/jul/16/chain-email/chain-email-muslims-tried-open-nations-first-shari (accessed December 2017).

arbitrator's decision to be enforced. As P. F. Kirgis put it, "Without question, arbitration depends heavily on the support of the state courts both to compel arbitration and to enforce arbitral awards" (Kirgis 2007, 107). My suggestion here is to name the panel by its accurate name to avoid scaring people and to combat Islamophobia as well as showing that the notion that *Sharia* is not a tool to take over the American legal system. This is one step closer to the understanding of what *Sharia* is to our Muslim neighbors, [as it is clearly a spiritual tool and not a polemical instrument against their American host.] and for Christians to advocate for these arbitration panels alongside their Muslim brethren is one way to tangibly express the love that Christ has for them.

Chapter 10

Theoretical Conclusion

The problem for this research was to investigate the divergent treatments and interpretations of California State Judges, the social impact on the Muslim litigants, and the response of Muslim academics on the question of the role of Islamic law for adjudication of Muslim vs. Muslim conflicts, as evidenced in the decisions of the California courts, with the goal of possible steps toward reconciliation between these conflicting value paradigms.

Summary of Research Findings

After deep analysis and comparison of seventeen cases of Muslim litigants bringing civil cases to the California State Courts between 1986 and 2018, the research has tested the eights propositions guiding the research.

Proposition 1: The foundational principle of separation of church and state compels the California courts to treat *Sharia* cases from a secular perspective according to the American law.

The research confirmed this proposition to be true for all seventeen cases, documenting for each case the arguments made by Muslim attorneys and plaintiffs of the validity of their claims based upon *Sharia* law, and how the American judges in each case made their decisions based upon the United States black letter law, and case law using only the American legal methodology without regard to the Islamic law or its methodology.

Proposition 2: The California Courts have decided similar Islamic factual cases in inconsistent manner.

The research confirmed this proposition to be true only for three areas of Islamic law cases. Those cases dealt with Mahr, Child custody and *Halal* diet for prisoners in California. However, for the rest of the cases of the other areas of Islamic law, the American courts adjudicated them in a consistent manner based on the American black letter law and case law in its ruling to resolve the litigants' disputed issues.

Proposition 3: Most of the Muslims litigants and their community were not fully satisfied concerning the *Sharia* cases that were adjudicated by the California courts.

The research confirmed this proposition to be partially true for all seventeen cases, but, there was also an ambiguity in the cases because of the complexity of human life in general. This complexity is documented in each case; because the application of *Sharia* law often involved two different sects interpreting *Sharia*, to which each School of Law has its own rules, and the American courts' decisions in each case rejected all *Sharia* arguments as demonstrated in proposition number one, or resulted in similar outcome to one of the Islamic sects while applying the American law. On those coincided results and the similarities outcomes between the two legal systems, the Muslims litigants were satisfied to get a similar result to the Islamic law, which in turn helped them to be devoted to *Allah*. Nevertheless, in most of the seventeen cases at least one or both parties were partially unsatisfied and/or spiritually convicted since they were precluded to follow the Islamic law precepts. Additionally, those dissimilar outcomes negatively affected the communities around those litigants.

Proposition 4: Most of the secular treatments by the California courts of the *Sharia* cases constitute obstacles for Muslim litigants to keep the *Sharia* traditions in the United States.

The research confirmed this proposition to be partially true for some of the seventeen cases, documenting it for each case. In all the cases the American court did not considered or give much attention to the rules of *Sharia*, but treated it from a secular

standpoint and consequently resulted in secular outcomes. Despite that the American courts followed the secular methodologies, some of their adjudications arrived to an outcome that comport with the spirit of the Islamic law. Those similar results, I view them as incidental similarities, allow some Muslims to keep the *Sharia* traditions in the United States. Nevertheless, in most of the other outcomes, the American courts did not comport with the rule of Islamic law and in most cases gave the opposite result which Muslims were not pleased to follow since it is not in harmony with the principles of Islamic law. And in those cases, the Muslims litigants were unable to keep the *Sharia* traditions in the United States.

Proposition 5: Jurisprudence scholars are divided in their opinions about the treatments of *Sharia* in the United States Courts while attempting to accommodate the emerging needs of the Muslim immigrants' community. The research confirmed this proposition to be true as explained in detail in the next section of this Chapter.

Proposition 6: Jurisprudence scholars implement new approaches in an attempt to resolve the differences between the Islamic law and the American principle that separates religion from State. The research confirmed this proposition to be true as explained in detail in the next section of this chapter.

Proposition 7: This research is an attempt to extend accommodation and hospitality to our Muslims neighbors in support and solidarity to their presence in the United States as their new home. The research confirmed the goal of this proposition and explained it in detail in Chapter 9.

Proposition 8: This research is attempting to explain the US Courts' mechanism to our Muslims neighbors in light of the conflicting value paradigms between Islamic law and American law. The research confirmed the goal of this proposition and explained it in detail in Chapter 9.

My primary motivation for this research is to analyze, shed additional light, and bring understanding between the two legal systems. Toward that end, it is essential to examine and critique the scholarly works in this field in general and to examine and critique the specific Islamic law areas encountered in these cases. By deeper reflection on these scholarly works, it is my goal to highlight the different trends and competing works responding to those specific areas of Islamic law. Further understanding may come by investigating the general debates between American and Muslim scholars.

In this chapter I will continue by examining the general debate among scholars about *Sharia* and secular law. Faced with the predicament of the American courts' treatments of the Islamic family law, the jurisprudence scholars voiced divided opinions while attempting to reconcile the differences between the Islamic law and the American principle of separation between church and state as suggested in sub-problem 3 Propositions 5 and 6: Proposition 5: Jurisprudence scholars are divided in their opinions about the treatments of *Sharia* in the United States Courts while attempting to accommodate the emerging needs of the Muslim immigrants' community. Proposition 6: Jurisprudence scholars implement new approaches in an attempt to resolve the differences between the Islamic law and the American principle that separates religion from State.

In the pages that follow I examine the literature and test these two propositions in the material that follows. I then follow this broad discussion of the literature by doing a critical review of the specific schism between scholars about the interpretation of the courts' decisions on the specific areas of *Mahr* and child custody cases analyzed in this research. Finally, I conclude the chapter with a brief overview of the findings of the research, followed by reflections on how the findings of this research have enabled me, a practicing attorney, to serve the Muslim immigrant community in Southern California.

Critical Reflections about Sharia and Secular Law

The third sub-problem of the research seeks to answer the question: what are the academic responses of the jurisprudence scholars to the California courts' decisions in relation to the Muslims community and the principle of separation of the church and state? I begin by addressing the general schism between the jurisprudence scholars about whether the American courts apply *Sharia* or apply the secular American law and whether the American courts defeat the original intent of the litigants or accomplish it. I see three distinctive views among those scholars—accommodating Muslim litigants, allowing *Sharia* to trump constitutional rights, and applying a secular hermeneutic to neutralize *Sharia* arguments. I then follow with a critical analysis of the jurisprudence scholars' debate with reference to litigation on *Mahr* "dowry" and child custody cases.

Accommodating Muslim Litigants?

Pascale Fournier and Chelsea Sizemore argue that the American courts are attempting to accommodate the Muslim litigants by bypassing the religious concept of the legal issue at hand if they can form a neutral means of the issue, and hence convert them from a religious to a secular one to allow the secular courts to interact with the so called religious issues without offending the United States constitution.

Sizemore gave an example from Jones v. Wolf [1] affirming how the courts convert a religious issue to civil to avoid any entanglement with religious while adjudicating a religious case. Their argument against that is that the courts in doing so just ignore the religious aspect and search for some similar issue in the American law. This of course mutes any religious issue, however, the religious issues are still existing and according to

[1] "In Jones, the Court decided that civil courts may resolve disputes involving the ownership of church property, but only by using "neutral principles" of law. The Court reasoned that applying neutral principles of contract law was a better alternative than automatically deferring these sorts of disputes to an authoritative church tribunal. The Court stated that as long as civil courts made no inquiry into religious doctrine and applied secular laws, civil courts would not violate the First Amendment in adjudicating church property disputes. *Jones v. Wolf* 443 U.S. 595 (1979).

those scholars, the American courts adjudicated them anyway. In doing that the courts bring disfavored results that contradict the initial intent of the parties, contravenes the divine meaning the parties actually set their mind to accomplish, and violate the Constitution of the United States (Fournier 2010) and (Sizemore 2010).

Contrary to this argument, the American courts, can only offer accommodation within the boundaries of the Constitution while bringing justice as close as possible to the parties' original intent without running afoul of American public policy. While the courts' adjudications can be seen to contravene the original aspect of the parties' ideologies, it can also be seen as near as possible to the parties' intentions, though a holistic result cannot be precisely accomplished.

While Fournier and Sizemore contend that the American courts have transformed the *Mahr* into either a bonus or a penalty for the contracting parties (Fournier 2010) and (Sizemore 2010), I view it as an accomplishment of justice that indirectly renewed the *Sharia* rules to accomplish its original intent. This can be illustrated in the Islamic reasoning behind a concept such as the *Mahr,* irrefutably enacted to protect the weak party to the marriage contract in the light of the husband's unilateral right to divorce his wife who lacks any earning capacity. With this notion in mind, the jurisprudence never considered the change in value of the currency, but hold on to the letter of the law. This was clear from the three cases in the *Mahr* Chapter 4.

Separation of church and state is very essential concept of the law. Truly it has been proven that interference of religion into the government or the other way around brings nothing but a defeat to the purpose of pursuing justice. To that end, the American judges are not in the business of holding onto an archaic notion that lost its flavor or missed its intended end-result, but doing what is needed to be done to protect the Constitution. In my view the notion of "neutral principles of law" refutes its own allegation that the court eventually applies or uphold Islamic law. The American court in

fact uses a filtering method that separates the religious from the secular to accomplish justice for those who need it the most, the weak, the unjustified, the harmed, and the destitute. Accordingly, the mechanism of the American courts does not violate the Establishment Clause of the Constitution, but maintains the balance that preserves the integrity of the American law while extending justice inclusively to everyone from its secular legal lens.

Sharia Trumps Constitutional Rights?

Similar to Fournier and Sizemore, David Yerushalmi and Kelly Bradford argue that when the American courts honor Islamic foreign court decrees or consult the legal schools of Islamic law to understand the facts of the Muslims' case, this is equivalent to allowing *Sharia* to trump the protected constitutional rights in violation of the United States Constitution (Yerushalmi 2014; Bradford 2015). The main question the reader must ask is, what is the meaning of the word "entanglement" the original legislators meant in writing the Establishment Clause? Does it mean to understand it or enact it? The obvious answer is the latter, since understanding of some issue does not means supporting it or upholding it. This is what the American courts limit when they encounter Islamic issues. They seek to understand them. This is not a mechanism reserved only to the Islamic issues, but to all issues of controversy of any kind.

An American judge sitting to adjudicate pure American family law consults the evidence submitted to discern the issue and proceed to resolve the dispute. Likewise, even more, when judges are faced with an Islamic law issue they never heard of or understood before, they must comprehend it before attempting to resolve it, otherwise there is a miscarriage of justice. As mentioned above, the American judge employs a filter mechanism to resolve all disputes that touch on a religious issue. This is coupled with the facts that any evidence that is unknown to the tribunal must be understood by expert people in the field such as scientific evidence to a lay person. Likewise, an Islamic

issue that comes before an American non-Muslim judge, he/she needs to be carefully studied. Hence, an American judge employing an American process of allowing evidence using an American method of litigation is nothing but an accounting process that allows the judge to comprehend the foreign concept at hand.

The laws that govern all humans, whether secular or religious, are enacted to help them accomplish the common social communities of all human life. Thus, it is no surprise to see commonality between all types of law, especially when it comes to their family life such as their marriages, rearing a child, or supporting a dependent. Although there is communality, there will also be distinctions that might be manifested in the religious law. To that end a decree that is issued by a religious foreign tribunal adjudicating a family law matter obviously will have some similarities with the requirements of a secular law. Hence, a judge separating the secular from the religious will filter out any religious issue. Applying the method of filtering, a judge will screen for those secular elements required to accomplish the secular justice as if the tribunal was the original trial court. When those requirements are found in a foreign decree, the American court will apply the concept of comity to give the same faith and credit to a decree as if the decree was issued by a sister state in the United States.

This operation, therefore, is not aimed to allow *Sharia* to trump the protected constitutional rights in violation of the United States Constitution, and it is not an absolute obligation that burden the American judges to award comity once the elements of comity are proven. Applying the international concept of comity is nonetheless limited by the concept of the public policy. Hence, a *Sharia* foreign court might issue a decree that is comity worthy since it has all the elements required under Civil Code § 5172 and § 105 as previously explained in the child custody chapter. However, when an additional circumstance considered by that foreign tribunal stands against the American public policy, the California courts rejected the foreign decree in its entirety—as shown in the

case of Malak (Chapter 5) assessment of the Abu Dhabi's decree—to preserve the integrity of the United States Constitution and the spirit of its public policy.

Secular Hermeneutic for *Sharia* Arguments?

Bernard Weiss, James Sonne, and Mark Hanshaw, argue to different degrees that the American courts treat the Islamic law from a secular perspective according to the American legal methodology. This argument is influenced by the concept of separation between church and state (Adams, Charles J., Wael B. Hallaq, and Donald P. Little. 1990; Sonne 2015; Hanshaw 2010).

Weiss argues that the separation between religion and state influences the hermeneutic of the law and in turn dictates the secular outcome. The meeting of the minds between religion and state is limited by the Constitution in the American legal system since it follows the notion of "render therefore to Caesar the things that are Caesar's, and to God the things that are God's". Consequently, we only find secular outcomes. In contrast to the meeting of the minds between religion and state in the Islamic legal system, which is seen as restoring the godly truth of the divine principle since Caesar applies God's law. In this, Weiss's argument is built on the foundation of each legal system. On the one hand, the American legal system purposely avoids any influence by any religious dogma and maintains distance from any religious guidance to its application since it applies to all people regardless of their religious beliefs (Adams, Charles J., Wael B. Hallaq, and Donald P. Little. 1990). Although the secular outcome concluded by Weiss is true, however, the foundation is not build on the Christian beliefs, but on guarding the religion from the intrusion of the government as it guards the government from the influence of religions. On the other hand, the Islamic law is built on the notion that the law is legislated and guided by the letter of the divine scriptures.

Arriving at the same secular outcome, Sonne and Hanshaw argue that such an outcome is incidental and only occurs based on common similarities found between the

American legal system and the Islamic legal system. Hence, the heart of *Sharia* is only accomplished when these similarities align in the two legal systems (Sonne 2015) and (Hanshaw 2010). Examining this notion, I find myself in agreement that there is a similar outcome between the two legal systems. However, building on this conclusion, I must reiterate that those incidental similar adjudications are not because the American Judges follow the Islamic methodologies, but because the complexity of the human life in those areas demand the same result—as seen in the child custody cases. Hence, the spirit of any legal justice may reach similar solutions, based upon the complexity of life and ethical principles common to humans. Consequently, when an American judge accomplishes a similar outcome to the *Sharia*, that judge arrives at his adjudication without regard for the Islamic law, but the similarities are purely incidental in nature.

Academic Debate Re: Cases in this Research

In this section I give an overview of the academic debate and pay close attention to some of the Muslim scholars' observations on specific cases of the *Mahr* and the child custody. I present my reflection regarding each scholar assessment to those specific cases in light the treatment and adjudications of California court to the Muslim litigants' complaints.

Debate—*Sharia*, Dowry '*Mahr*' Cases

The findings of this research reveal a conflicted assessment of the legal paradigm between different jurisprudence scholars regarding the American judges' interpretation of the facts presented to them. In this section I first present the debate regarding dowry *'mahr'* and in the following section I then present the debate regarding child custody. Each of these illustrate the complexity of the issues and the scope of disagreement among American jurisprudence scholars on these issues.

Complexity of Interpreting *Sharia*—Blenkhorn on Dajani

Lindsay Blenkhorn, looking beyond the scope of the Dajani case, argues that the American judges have a hard time when they are faced with Islamic law cases to determine whether Muslims' claims to be changing their Islamic schools is genuine, and cannot fairly interpret *Sharia* that is, the *mahr* cases. It seems that Blenkhorn based her argument on some general Islamic information stemming from the progressive Islamic current in which Muslims are able to draw from any of the Islamic schools of law in search for the truth and in devotion to Allah (Blenkhorn 213).

There is no direct evidence in the Dajani case to support Blenkhorn's assertion that Judge Crosby had a hard time determining if the wife's change of her Islamic legal school is genuine, or if he had unfairly interpreted *Sharia*. In fact, opposite evidence is found that the court abandoned Islamic law all together. The court states: "Will a California court enforce a foreign dowry agreement which benefits a party who initiates dissolution of the marriage? *No*" (Dajani 1389). The fact that the husband Nabil invoked the Hanafi's view on *mahr,* while the wife Awatef invoked the Maliki's view, does not lend to the conclusion that Awatef changed her School of Law from the Jordanian majority Hanafi School to the minority Maliki School. Invoking a minority view of Islamic law is not in itself direct evidence of recent change from one school to the other, and neither view supports pretentious change for the purpose of litigation, nor genuine change for the sake of piety. Indeed, there were no facts in the case supporting such change at all on Awatef's part.

It appears that Blenkhorn assumed the general fact of the progressive Muslim faith to apply on the Dajani case from the mere fact that one spouse follows the Hanafi School while the other follows the Maliki. Further, the case did not indicate any specific fact supporting Blenkhorn's assertion that Awatef's recent change, if any, was in anticipation of litigation or was for her genuine faith. While Blenkhorn's assertion that the American judges might have a hard time to determine the genuineness of the change,

which makes it hard for judges to interpret *mahr* (Blenkhorn 214), this even gets harder when the judge is faced with competing Islamic views. Nonetheless, Judge Crosby undoubtedly did not interpret *Sharia* in the Dajani case as evidenced by the court rejecting the idea of applying foreign dowry in violation of public policy: "foreign dowry agreement which benefited wife who initiated dissolution of marriage facilitated divorce or separation and was thus void as against public policy" (Dajani 1388).

The Issue in the Dajani case was simply an American judge trying to understand the facts presented to him, while confirming to the United States Constitution. Judge Crosby heard the expert witnesses of the husband and the wife for the purpose of understanding the evidence presented to him. The judge heard two competing Islamic views on the method of awarding the Islamic dowry *mahr.* The husband's Hanafi's view opposed the wife receiving any dowry since she requested the divorce, while the wife's Maliki's view was that filing for divorce is irrelevant to her right to receive the dowry, since she receives the dowry regardless who initiated the divorce (Dajani 1389-1390).

The goal of hearing the expert witnesses is to reveal any facts that might prove or disprove the claim of each party, and it was not the judge's intent to interpret the Islamic law. Further, in the Dajani case, the experts' witness presentations were considered from an American legal system lens. The court's interpretation indicated that the wife's expert revealed that she entered into an agreement, which by its very terms encouraged her to seek dissolution in order to "benefit" the dowry. Clearly, this is not an Islamic interpretation even if it is similar to the result according to the husband Hanafi's view. Indeed both the Hanafi and the American views would have the same result, but each has a different basis for disallowing the dowry.

The Hanafi's view would disallow the *mahr* as a forfeiture for the wife who asks for a divorce without one of the enumerated causes for divorce, while the American view would disallow the *mahr* based on the understanding that giving the wife monetary award

in the case of divorce would encourage her to seek the divorce and disrupt the sanctity of marriage. Indeed, the Dajani court encountered conflicting Islamic views, but these competing views neither caused Judge Crosby to have a hard time to determine if one party changed Islamic legal schools in anticipation of litigation nor he interpreted Islamic law. The court in the Dajani handled the case using an American method of litigation.

Confused Analysis of *Sharia*—Aziza Al-Hibri on Dajani

Assuming that Judge Crosby has the same knowledge as any Muslim judge, Aziza Al-Hibri, a Muslim and an Islamic scholar indirectly argued that Judge Crosby knew the difference between *faskh* dissolution and *khul* dissolution (Al-Hibri 1995, 16). These specific Islamic dissolution rules are interchangeable among the Islamic schools of law and subject to lengthy debates within different regions. Expecting an American judge to know the difference between *faskh* and *khul* is an unwarranted assumption. Stating that a judge confused two different rules is assuming that this judge has the education and training to apply those rules. Thus, if in the latter assumption the judge applies the rule incorrectly, it is reasonable then to say that for some reason the judge did not apply the rules right, misunderstood, or confused them. Here, Judge Crosby hasn't had any education or training in Islamic divorce law or any *Sharia* rules for that matter. Al-Hibri stated that, "the court confused the analysis of *faskh* dissolution in Islamic law … with the extra-judicial *khul*" (Al-Hibri 1995, 16-17).

Al-Hibri's statement points to a higher expectation from Judge Crosby coupled with an expression of disenchantment. Assuming that Judge Crosby is well versed in the Islamic law, the evidence presented by the parties nonetheless limits him. As any judge's ruling must be based on the evidence and the demand of the litigants stated in the complaint, a judge cannot render adjudication outside the scope of the complaints' demands.

In the Dajani case the litigants requested neither *faskh* nor *khul* dissolution, they only litigated the validity of the *mahr* agreement and whether the wife Awatef has right to receive the *mahr* or not after initiating the divorce. The court in Dajani stated, "The primary issue at trial was husband's obligation, per the terms of the foreign proxy marriage contract, to pay wife's dowry" (Dajani 1388). Indeed, the wife filed for divorce based on irreconcilable issues. Awatef neither mentioned any harm that justify a *faskh* dissolution analysis nor did the husband prove an agreement with Awatef to keep the *mahr* in exchange for her divorce to justify a *khul* dissolution. In fact, the judge's analysis followed the American law evidenced by characterizing the *mahr* as a prenuptial agreement (Dajani 1387).

In agreement with Al-Hibri's discussion but expressing frustration about the judge applying American law instead of the Islamic law, Emily Thompson and Soniya Yunus state, "The American court confused the prenuptial agreement with concept of Islamic dowry *mahr"* (Thompson and Yunus 2007, 375). It might be that Al-Hibri, identifying with Awatef as a female, might lead her to argue *faskh* or *khul* dissolution, but the fact is clear, the reason Awatef filed for divorce was about irreconcilable issues. Awatef did not file the divorce based on harm, or on agreement with her husband to get divorce in exchange of him keeping the *mahr,* and hence the divorce cannot be analyzed based on *faskh* or *khual,* but based on the American legal system.

Court Endorsed *Sharia* Sect—Fournier and Sizemore on Dajani

In partial assessment of the Dajani case, Fournier and Sizemore argue that when the court endorsed the husband's view it endorsed one sect of Islam over another and violated the Establishment Clause (Fournier 2010, 76 and 131) (Sizemore, 1098). Indeed, a partial reading of the court's language can easily bring the readers to the conclusion that the court violated the Establishment Clause of the First Amendment based on the

Supreme Court precedent in the Presbyterian Church[2]. Any person reading the case encounters the following language:

> The court also finds that, based upon the testimony, the law in existence would be that of the Jordanian or Moslem law and finds that if the wife initiates a termination of the relationship, she foregoes the dowry and the court so finds that in this case the wife initiated the termination of the marriage and common sense and wisdom of Mohamed would dictate that she foregoes the dowry. (Dajani 1389)

The reality is that most courts write some explanations, exploration, or elaborations to understand the evidence presented by the litigants. Nevertheless, explaining the evidence does not mean that the court takes them into consideration or always based its adjudications on them. The question in this case is, did the court apply the *Sharia* or the American law? The Dajani court certainly answered this question: evidence is found that the court abandoned Islamic law all together; the court states: "Will a California court enforce a foreign dowry agreement which benefits a party who initiates dissolution of the marriage? *No*" (Dajani 1389). Both husband and wife argue a different Islamic view as mentioned above to justify the validity of the *mahr* agreement in their favor. In order for judge Crosby to have taken the husband's Islamic view over the wife's Islamic view as evidence, this evidence must be in support of a valid agreement.

Here, Fournier and Sizemore ignored this part while assessing the case. Undoubtedly Judge Crosby elaborated on the evidence of both husband and wife and indicate the logic of Islamic law presented by both parties. However, he did not found his adjudication on any of the evidence presented by the expert witnesses' testimonies. This is evidenced in the holding of the case where the court rejected the idea of applying foreign dowry in violation of public policy: "foreign dowry agreement which benefited wife who initiated dissolution of marriage facilitated divorce or separation and was thus void as against public policy" (Dajani 1388). To emphasize the basis of its adjudication,

[2] Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem, 1 Presbyterian Church, 393 U.S. 440, 449 (1969); Trumbull, *supra* note 39, at 634

the court further stated: "Prenuptial agreements which facilitate divorce or separation by providing for a settlement only in the event of such an occurrence are void as against public policy" (Dajani, 1389).

The court's words in these two quotations were very illumining. In the first quote the court started with "foreign dowry agreement" and in the second quote the court begun its sentence with "Prenuptial agreements". What the court is pointing at here is that any agreement, foreign or domestic that gives an incentive to destroy the sanctity of the marriage is void as against public policy.

Thus, if the agreement is void as against public policy no evidence that rebuts its invalidity would stand or be taken into consideration. Nonetheless the court must make sense of the evidence provided, and the experience in any courtroom proves that the court would hear the evidence and analyze it before it objects to its admission.

Therefore, Judge Crosby did not take the husband's view over the wife's, he only explored its admissibility to prove the parties' claims. However, since the agreement that the evidence could sustain was invalid, the evidence was disregarded. This in turn proves that Judge Crosby did not violate the Establishment Clause of the United States Constitution based on the precedent stated in the Presbyterian Church[3].

False Assumption—Interpreting and Applying *Sharia*?

In conclusion, the three opinions above explored the Dajani case from different perspectives, yet all of them make the common assumption about whether the American judge interpreted and applied Islamic law or not. The above exploration indicates that while Judge Crosby strove to understand the claim of both parties based on their expert witnesses' testimony, he only evaluated the evidence to determine its admissibility.

[3] The Presbyterian Church held: "An issue which requires civil courts to weigh the significance and meaning of religious doctrines, it can play no role in judicial proceedings" (Pp. 393 U.S. 444-452). *See* Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem, l Presbyterian Church, 393 U.S. 440, 449 (1969).

Notwithstanding the outward appearance that an American judge violated the Establishment Clause by endorsing one view of Islamic law or by interpreting the Islamic law, a deeper examination certainly supports my opinion that that Judge Crosby did not in fact endorse or interpret the Islamic law.

First, Blenkhorn explored the issue of complexity and hardship facing the judges while interpreting Islamic law. Her view suggested that some litigants change their Islamic sects to gain the benefits that sect might give them, or for the sake of genuine devotion to *Allah.* The important thing to point out here is that the American judges are faced with two parties in every case and the logic dictates that one of them might manipulate the facts to add momentum to the claim. The American judges, while handling all type of cases, must always keep in mind the truth of the matter asserted, while conforming to the United States Constitution. It is worthy to note that an American judge is not equipped to assess changes of Muslims litigants from one Islamic sect to the other; however, they are trained to assess and evaluate the evidence presented by those litigants without interpreting or entangling with the ideology behind the parties' claims.

Second, Al-Hibri indirectly assumed that judge Crosby is capable of understanding the different type of Islamic divorce, which in turn implicates that judge Crosby in having interpreted the Islamic law. At least in her opinion Judge Crosby interpreted the Dajani as *khul* dissolution, while the case did not bear out this fact. Al-Hibri, based on her Islamic background, evaluated Judge Crosby adjudication from an Islamic perspective. Certainly Judge Crosby did not interpret Islamic law but evaluated the Islamic expert witness testimonies to assess their admissibility. While this might appear as an interpretation of *Sharia*, it is nothing but a preliminary evidentiary evaluation and does not rise to a violation of the Establishment Clause or entanglement with religious law.

Third, Sizemore, considered judge Crosby's adjudication from its outward result without taking into consideration that the American law might have the same end-result as the husband's view. A deeper examination of the holding certainly illuminated that Judge Crosby followed the American method of litigation and did not interpret *mahr.* Consequently, even though the different assertions of each scholar above directly or indirectly point to the notion of interpreting the Islamic law, thorough examination demonstrated that Judge Crosby did not interpret *Sharia* or violate the Establishment Clause of the First Amendment.

In the three cases this research explored related to the Islamic dowry *mahr*—Dajani, Shaban, and Turfe—the American courts called *mahr* either a prenuptial agreement or a premarital agreement. The common ground between *mahr* and prenuptial agreements/premarital agreement is that they deal with a monetary award, but the major difference is that *mahr* is gender-specific in contrast to prenuptial/premarital agreement, which is gender-neutral. Pointing to this distinction between *mahr* and prenuptial agreements Lindsey Blenkhorn (Blenkhorn 2002) along with (Thompson and Yunus 2007), (Sizemore 2010), (Moore 2006 and 2010), (Hanshaw 2010), and (Spencer 2011) argue that the two agreements treat property differently.

On the one hand, a prenuptial/premarital agreement's goal is to preserve the separate characteristic of the spouses' property brought into the marriage and sometimes to delineate the characteristic of property earned during the life of the marriage as separate or community property, hence it can serve either spouse to preserve his/her assets. The *mahr*, is designed to give money to the wife acting as an affirmative subsequent remedial measure that aims to lessen any gender inequalities and deter the husband from divorcing his wife based on his unilateral *Sharia* right. Further, American prenuptial/premarital agreement is also distinguished from *mahr* agreement, since the former is completely secular in nature while the latter is absolutely religious.

Debate—*Sharia*, Child Custody Cases

The treatment of the Islamic custody cases in the United States courts is divided by the Islamic scholars to two different trends as follows: The first trend maintains that to honor a foreign Islamic custody rule is equivalent to applying the religious law of Islam by United States judges and constitutes a violation of the United States Constitution. In support of that trend and the study conducted by the Center of Security Policy, Kelley Bradford states,

> the use or consideration of *Sharia* Law conflicted with constitutional protections or state public policy … Many of the cases analyzed in the Center for Security Policy study show that state court judges have allowed *Sharia* and foreign law sources to trump constitutionally protected rights, most notably in child custody and divorce cases. (Bradford 2013, 609-610)

The second trend, as expounded by Asifa Landes Quraishi, Najeeba Syeed-Miller, James A. Sonne, and Mark Hanshaw, argues that notwithstanding the diverse opinions and treatments of the American courts toward Islam and *Sharia*, the American courts nonetheless will grant comity[4] to the foreign decrees only if the foreign custody decision-making took into consideration the "best interests" of the children (quoted in Cesari 2004, 61). This is irrespective of any presumptions related to Islamic law, and the factors considered by the foreign court are similar to the factors that would have been considered by the United States Courts (Quraishi and Miller 2004, 2100, Sonne 2015, 745, Hanshaw 2010, 127). It seems that ʻAbd Allāh Aḥmad an-Naʻīm arrives to the same conclusion and added that such application will never equate to the application of *Sharia* and if the *Sharia* clashes with the American law, the latter will always override *Sharia* (Naʻīm 2014, 149 and 158).

[4] Definition of Comity: "The legal principle that political entities (such as states, nations, or courts from different jurisdictions) will mutually recognize each other's legislative, executive, and judicial acts. The underlying notion is that different jurisdictions will reciprocate each other's judgments out of deference, mutuality, and respect. In Constitutional law, the Comity Clause refers to Article IV, § 2, Clause 2 of the U.S. Constitution (also known as the Privileges and Immunities Clause), which ensures that 'The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.'" https://www.law.cornell.edu/wex/comity (accessed November 2019).

Honoring *Sharia* Decree by Comity Violates the Constitution—Bradford

In upholding the first trend, Bradford asserts, "California Appellate courts violate the Constitution." He argued that the Appellate court in Malak enforced the Lebanese custody order giving custody to the husband even though the California trial court found that the Islamic court denied due process and did not base its ruling on the "best interests of the child" (Bradford 2013, 610). Notwithstanding the truth of Bradford's statement regarding the trial court, his analysis is short in scope, basing his opinion on the reasoning of the trial court without regard to the analysis of the Appellate court's decision. The Appellate court in Malak clearly stated that the record, in its view, does not support the conclusion of the trial court (Malak 845). Bradford's argument is threefold: denial of due process, granting custody against the best interest of the child, and in general considering that to honor the Lebanese custody decree equates to applying Islamic law in an American court.

First, with regard to the denial of due process for the wife, the Appellate court clearly followed the California Civil Code section 5162 "The courts of this state shall recognize and enforce … decree of a court of another state" and section 5172

> Recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody rendered by appropriate authorities of *other nations if reasonable notice and opportunity to be heard were given to all affected persons.* (Malak 846, emphasis added)

The appellate court stated that the notice and opportunity to be heard "were substantially more than provided" (Malak 847). The appellate court pointed out the trial court's misinterpretation of the facts and concluded that the wife had had adequate notice of the Lebanese *Sharia* court's decree. The husband served the wife's brother in person and then served the wife herself in person, and finally mailed the Lebanese custody decree to the wife's attorney coupled with an explanation of the wife's right to oppose the custody decree within 15 days. Clearly the husband afforded the wife adequate notice and

gave her enough opportunity to oppose the custody decree. Nevertheless, she forfeited her right to contest the Lebanese custody decree.

Second, Bradford argues that the Appellate court did not base its ruling on the best interests of the child. To the contrary, the Appellate court inquired into the bases on which the Lebanese court found its custody decree and enumerated those bases finding them not substantially different from those prescribed by the State of California Family Law[5] (Malak 848). The Appellate court extensively described the factors of the best interest of the two children. Those factors were:

- Lebanon constitutes a great part of the children's life, which they still call home.
- Lebanon presents lots of ties such as environmental, traditional, social, moral, and cultural.
- The children's native tongue is the Arabic language and their religion is Islam.
- The court spared the children from living in a strange place away from their true home.
- The court considered the education of the children and their Muslim practice.
- Finally, the court deemed the father's financial situation in Lebanon is well established to ensure the desired future for the children, in contrast to the situation of the mother in a foreign land without a job or permanent home (Malak 848).

[5] California Family Code Section 3011: "In making a determination of the best interest of the child in a proceeding described in Section 3021, the court shall, among any other factors it finds relevant, consider all of the following:
(a) The health, safety, and welfare of the child.
(b) Any history of abuse by one parent or any other person seeking custody against any of the following:
(1) Any child to whom he or she is related by blood or affinity or with whom he or she has had a caretaking relationship, no matter how temporary.
(2) The other parent.
(3) A parent, current spouse, or cohabitant, of the parent or person seeking custody, or a person with whom the parent or person seeking custody has a dating or engagement relationship.
(c) The nature and amount of contact with both parents, except as provided in Section 3046.
(d) The habitual or continual illegal use of controlled substances, the habitual or continual abuse of alcohol, or the habitual or continual abuse of prescribed controlled substances by either parent.
(e) (1) Where allegations about a parent pursuant to subdivision (b) or (d) have been brought to the attention of the court in the current proceeding, and the court makes an order for sole or joint custody to that parent, the court shall state its reasons in writing or on the record.
http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=FAManddivision=8.andtitle=andpart=1.andchapter=2.andarticle. (accessed November 2019)

Glancing through these factors, they are all equivalent to the factors a California judge would consider in evaluating a decree from another American state. They all focus on a secular aspect of the children life and ultimately do not advocate any religious law. Most notably the two systems are parallel on some issues, one of which being the best interest criterion. It seems that the Lebanese child custody law in part is based on *Sharia*; nevertheless, it has a human secular aspect that allows the American court to extend comity without getting entangled with the religious aspect of the Islamic custody law.

The counter-argument to my conclusion might be this: if any factor considered by the court advocates Islam as the religion to the children, that will constitute enough entanglement with religion and violate the Establishment Clause of the United States Constitution. The Judge might support one spouse's religion over that of the other spouse. While that might be the case in another custody scenario, it is not the case in Malak. The court there found the majority of the Malak children's life spent in Muslims countries, that is, Lebanon and United Arab Emirates, where Islam is the predominant faith. Additionally, the father and the mother in Malak are Muslims. Thus, when the judge considered Islam to be the right religion of the children, it was a mere affirmation of the actual religion of the children, and not supporting one spouse's religion over the other.

Finally, Bradford's overarching argument is that state court judges have allowed *Sharia* and foreign law sources to trump constitutionally protected rights, most notably those concerning child custody (Bradford 2013, 610). It appears that Abdullahi Ahmed an-Na'im disagrees with Bradford when he argues,

> Some aspects of Islamic family law can be applied by American courts when those elements are consistent with relevant state or federal law and public policy. Of course, such application may take place only as a matter of secular law, which will never be as a matter of *Sharia* as such. (Na'im 2014, 149)

Also "US laws always override the *Sharia*" (Na'im 2014, 158). Further, based on the above analyses the California State Court in Malak focused on the important aspect of the case, which is balancing the welfare of the children. Generally, the judge's position in any given case is to balance the rights of each party without an automatic trumping of either secular or religious law[6].

The only counter-argument that opposes my conclusion could be that the Malak court considered Islamic practice, as part of the welfare of the children and that shouldn't be one of the factors when the American judges adjudicate foreign custody cases. To the contrary, context is of course important in assessing a child's best interest, and religious background and upbringing are not ignored. Indeed, religious factors can be an integral part of the analysis (Sonne 2015, 735). Therefore, when the Malak court considered Islam as factor, it followed the Free Exercise Clause of the United States Constitution. Thus, in so doing, the California court reached to the heart of the United States Constitution and respected the freedom of the Children to practice their own religion. Consequently, the only explicit consideration of Islam increased the court's obligation to protect the constitutional rights of the people and did not trump the United States Constitution by using Islamic law. In this case it is fair to say with Eugene Volokh that, all we see here is the application of the American secular law (Volokh 2013, 435).

Comity Prevails to Reach the Spirit of the Constitution—Quraishi and Miller

The second trend focuses on Civil Code section 5172[7] to extend comity to foreign decrees regardless of the bases of the decrees so long as the decrees do not conflict with

[6] See Asifa Quraishi "But in every case, the job of the judge is a careful balancing of rights against each other, not an automatic trumping of religious practice by secular law or vice versa" (Quraishi 2012, 435).

[7] Civil Code section 5172 "recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to *custody rendered by appropriate authorities of other nation."* (emphasis added).

public policy or clearly contradict the United States Constitution, that is, accomplishing the secular 'best interest of the child'.

Advocating this trend, in assessing the decision of Malak, Quraishi and Miller contend that the California court differentiated between the Abu Dhabi's custody decree and the Lebanese's custody decree on the basis that the California court deciphered Abu Dhabi's policy as awarding the custody to the father based on *Sharia* rules regardless of any examination whether such a decision would serve the children's best interest or not (Quraishi and Miller 2004, 210). The common denominator between the Lebanese and Abu Dhabi courts is the application of *Sharia*.

However, the California court finds the Lebanese court's decree is in line with its local policy regarding 'the best interest of the children', while Abu Dhabi court's decree is in violation of the best interest policy. The court further rejected the mother's argument that both courts apply similar rules stating, "The laws may be entirely similar but no evidence before us says as much" (Malak 848).

A close observation indicates that both foreign courts based their decisions on the *Sharia* rules and gave the father custody, but one explained the wisdom of the *Sharia* in giving the father custody while the other awarded the custody without explanation. It can be said that if the California court adopted the Lebanese court decision, which was built on *Sharia*, thus the American court acknowledged/applied *Sharia*, as Bradford concluded above (Bradford 2013, 610).

Albeit this is the foundation of the Lebanese court, it is not the foundation of the American court. The California court was aware that both foreign decrees are built on the premise of *Sharia*, when the court indicated, "this appeal is not concerned with the child custody laws of the *Sharia* court in the UAE but with those of the Sheria court in Beirut, Lebanon" (Malak 848).

However, the precise assessment here is that the court did not incorporate *Sharia* into California legal system, but acknowledged the similar result that the California court would have arrived at if it had adjudicated the Malak custody as the trial court without the existence of any foreign decrees. This conclusion is well-defined in the court statement,

> The evidence described above, on the other hand, demonstrates that the best interests of the children were important considerations in the award of custody by the Lebanese court and *the criteria were not substantially different from those prescribed in this state*. (Malak 848, emphasis added)

Therefore, the California court did not apply *Sharia*, but upheld the best interest of the children delivered by the *Sharia* court after examining the foreign decree against the secular "best interest of the children." This examination was within the normative classifications of the American law and public policy. In that respect Sonne joined Quraishi and Miller in asserting that, no matter what *Sharia* might say, domestic courts almost universally apply the secular "best interest of the child" test in assigning custody (Sonne 2015, 735, Quraishi and Miller 2012, 248). Indeed, the prohibition of the Establishment Clause not to apply *Sharia* or any religion for that matter by the American court did not encompass prohibition to advocate the interest of the innocent children. The California court in Malak transcended the letter of the Constitution to reach the spirit behind the Constitution.

As both American lawyers Quraishi and Miller know, what the American courts are looking for in a *Sharia* foreign decree in order to extend comity, they both call upon the courts in the Arab world to formulate their decrees similar to that of the Lebanese court state: "If our Muslim courts in the Arab world and other parts of the Muslim world know about this, then they can properly formulate their decrees so that they will be enforceable and respected on the principle of comity in American courts."[8]

[8] http://www.2muslims.com/directory/Detailed/219257.shtml (accessed November 2019).

Courts Avoid Extending Comity to *Sharia* Courts—Hanshaw

In assessing the Malak case, Mark Hanshaw concludes that the American courts avoid extending comity to *Sharia* courts' foreign custody decrees. They facially justify this rejection on the grounds of the need to protect the "best interests" of the minors, and in so doing they truly protect American culture and its religious preferences (Hanshaw 2010, 138). It seems that Hanshaw is looking at the American courts as political entities, which offer a pleasing adjudication for the American population while avoiding the admission of a hidden agenda.

The argument made by Hanshaw is clearly inconsistent with the roles of the American courts concerning religion and it clashes with the Establishment Clause that prohibits promoting one religion over another. In essence if the courts excuse their rejection of *Sharia* or Islam to promote Judaism or Christianity that is a clear violation of the very prescription of the Establishment Clause[9]. The issue here is how Hanshaw explains the appellate court's decision in Malak. It seems that despite Hanshaw's assertion that the American courts avoid Islamic law decrees, he indicates that the courts sometime extend comity to some *Sharia* decrees such as the Malak's decision if and only if the "child's best interest" is contemplated by the decision, irrespective of the gender-based presumptions that are embedded in the *Sharia* court decree (Hanshaw 2010, 127).

It appears that Hanshaw arrived to the same conclusion as Quraishi and Miller, but he differs regarding his understanding of the American court's methodology of extending comity to the foreign *Sharia* decrees. On the one hand, Quraishi and Miller see the methodology of American courts as disregarding *Sharia* as the basis of the foreign

[9] "The establishment of religion clause means at least this: Neither a state nor the federal government may set up a church. Neither can pass laws that aid one religion, aid all religions, or ***prefer one religion over another***. Neither can force a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion…Neither a state or the federal government may, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'" http://www.firstamendmentcenter.org/establishment-clause (accessed November 2019).

decree and looking purely to an American law that would arrive to a similar end-result, "child custody decree based on the best interest of the child." On the other hand, Hanshaw contends that the court arrives at a similar end-result without taking *Sharia* as the basis of the child custody decree. He appeals to the fact that the Lebanese *Sharia*-based foreign decree nonetheless corresponds with the principles of the American legal system.

In essence Hanshaw is taking a middle position between Bradford's conclusion, "honoring *Sharia* foreign decree by comity is equal to applying *Sharia* in violation of the American Constitution" and Quraishi and Miller's conclusion, "Comity to *Sharia* foreign decree is transcending the letter of the American Constitution to reach the spirit of the Constitution." Hence, Hanshaw's position is 'extending comity to foreign *Sharia* decree is in part violation of the Constitution but it is a justified violation in light of the similarity of the factors considered by the American court in finding the "child's best interest."

Overview of the Research Findings

This research examined seventeen California state courts cases. The adjudication in each case reflects the American judges' understanding of the factual allegation from a presumed American secular viewpoint. Notwithstanding that the Muslim litigants ask for an adjudicating of their divine law in disputed issues, the courts kept their commitment to the First Amendment mandate of United States' Constitution to preserve the foundational principle of separation of church and state. Because the issues presented were foreign to the American judges, some outcomes seem inconsistent regarding the same Islamic law issue, but the judges did not intend to interpret or apply *Sharia* law. This inconsistency is inevitable, given that the American judges have no training or experience in the Islamic law, and ethically, the American judges are obligated not to violate the United States Constitution.

These secular outcomes were not satisfactory to some of the Muslim litigants, and in some cases were troublesome to the litigants and their communities in trying to live according to their *Sharia* traditions in the United States.

In pursuit of reconciliation between the two legal systems, the jurisprudence scholars were divided in their arguments of how the American courts arrived at these decisions. Some of the scholars such as Pascale Fournier (Fournier 2010), Chelsea Sizemore (Sizemore 2010), David Yerushalmi (Yerushalmi 2014), Kelly Bradford (Bradford 2015), and Aziza Al-Hibri (Al-Hibri 1995) argued that the courts interpret and apply *Sharia*. Their views were discussed earlier with reference to their interpretation of the Malak case in the child custody chapter and in the Dajani case in the Mahr chapter. While some other scholars such as Bernard Weiss (Adams, Charles J., Wael B. Hallaq, and Donald P. Little. 1990), James Sonne (Sonne 2015), and Mark Hanshaw (Hanshaw 2010), argue that the courts' adjudications are secular outcomes that follow the American legal methodology without regard to any Islamic law. These views were discussed with reference to the Hasan case in Chapter 3 and in the Dajani, Shaban, and Trufe cases in Chapter 4. My analysis of these literature debates supports proposition 5 of this research. Proposition 5: Jurisprudence scholars are divided in their opinions about the treatments of *Sharia* in the United States Courts while attempting to accommodate the emerging needs of the Muslim immigrants' community.

Given this predicament, a number of jurisprudence scholars proposed alternative understanding and approaches in an attempt to resolve the difference between the Islamic law and the American principle that separates religion from State. Toward that goal, some scholars such as Asifa Quraishi, Najeeba Miller (Quraishi and Miller 2012), and Ahmed An-Naim (An-Naim 2014) took the approach that *Sharia* rules will apply in the United States as the legal host system only if the two legal systems synchronize regarding the litigated issues; this view was exhibited in the *Birtal* and *Said* cases in the illegitimate

children in Chapter 6 and in Malak case in the child custody in Chapter 5; yet, the rules of *Sharia* will not be accepted if they clash with the constitution or the American public policy.

Another approach suggested the establishment of a private Muslims' arbitration board. This approach, examined by Mark Hanshaw in his 2008 dissertation, pointed to the desire of Imam Yusef Kavakchi, the spiritual leader of the Islamic Society of North Texas to have an arbitration system in the absence of the *Sharia* court in the United States to shield the independency of Islamic law from any secular influence (Hanshaw 2008). This view is shown in the Khan case in the discrimination against Muslim religious practice chapter (8) where Jamaat-Ul Isalm of America acted as the Islamic arbitration system in deciding the employment of its two clergy employees. In response to that arbitration, the American court abstained from adjudicating the case to preserve the United States Constitution. These cases and arguments support research proposition 6. Proposition 6: Jurisprudence scholars implement new approaches in an attempt to resolve the differences between the Islamic law and the American principle that separates religion from State.

Given the diverse arguments of Jurisprudence scholars with regard to some of the specific cases discussed here, and in conjunction with my analysis of the seventeen cases in this research, we can anticipate Muslim litigants will expect their disputes to be adjudicated by American judges in a manner similar to what I have found. The trends in the seventeen cases of this research suggest that Muslims will move forward to become more American in the way that they act toward Islamic law while increasingly accepting the mandates of the American law and accepting more of the American courts' adjudications and the treatment of Islamic law.

Building a Missiological Bridge

As an attorney working with Muslim clients in California, I see their desperation. My experience is that they want to see *Sharia* applying to their lives no matter where they live. Many clients ask "why does not *Sharia* apply to my case? I am Muslim and all my people are. We never lived without the application of *Sharia*. *Sharia* is our connection to Allah and applying it is a kind of worship to the God who ordained it". Listening to those clients, I felt their emotions and the sense of injustice in their voices. Because I feel a sense of mission to the people whom I grew up around and because of my education in a system that is governed by the Islamic law, I have the ability to understand my Muslim neighbors.

This ability of identifying with Muslims is coupled with my long years of working in the legal field among a predominantly Muslim nation. This feeling of empathy and solidarity has never left me. I carried it with me even after coming to the United States. As a matter fact, the feeling of empathy and solidarity for the Muslim immigrants around me has increased after coming to live in California. Because of my residence in among them, I saw and experienced firsthand how Muslims feel as a religious minority living in a secular society. I saw the decline of their spirituality and their longing to have the divine law at least apply to their family life without interference of the secular law in the most intimate area of their lives.

This is the background that drove me to conduct this research in an attempt to extend accommodation and hospitality to my Muslims neighbors in support and solidarity to their presence in the United States as their new home. My education, background, and profession as an Arab Christian lawyer in California gave me a sense of mission to explain the US Courts' mechanism to our Muslims neighbors in light of the conflicting value paradigms between Islamic law and American law. My hope and prayers that my observations discussed in this research as an attorney and a Christian neighbor will encourage both Christians and Muslims scholars to interact from the lens of the findings

and perspectives found in this research, and that both sides will build on this and develop more channels of communications based on a loving understanding of our neighbors.

Certainly on a personal note, I am inspired to use the findings of this research among my clients who seek to understand and adjust to living in California. Further, I find that as a lawyer who has voice, I am able to speak for those who have no voice, to seek justice for those who need it most, the foreign immigrants who are uprooted from their context and seek to leave in peace and follow their beliefs in how to worship God.

This research began by the examination of the academic publications of the jurisprudence scholars, such as Aziza Al-Hibri, Abed Awad, Asifa Quraishi, Najeeba Miller, and Nathan Oman, who first point to the secular treatment by the American courts of the Islamic law specifically on some aspects of the divine contracts such as the marriage contract. Second, they assert that the Muslim community struggles to keep the normative rules of *Sharia* and their struggles lead them to a deteriorating spiritual life in their diaspora.

Quraishi and Miller argue that the American courts' treatment for some aspects of Islamic law, similar to any civil contract, causes Muslim immigrants frustration because the Islamic law aspect of an agreement transcends the regular contract due to its divine nature. To that end, Al-Hibri affirms the divine notion of the Islamic contract and voiced her discontentment of how the American courts interpret those contracts in the same way that the American law does (Al-Hibri 1995).

Oman argues that some aspects of the Islamic law are essential in the life of Muslims for daily living, and misinterpreting them or dismissing them from the life of Muslims hinder the spiritual life of Muslims immigrants in their diaspora. The scholarly publications equated the secular interpretation of Islamic law to a watering down by an American judges from the divine law to a man-made law. The misunderstanding of the

Sharia hinders its provision of justice to the Muslim immigrants in the United States (Oman 2010).

Elaborating on the scholars' reaction, Emily Thompson, Soniya Yunus, and John Witte argue that the continuous clash between the two legal systems sets the basis for the frustration and discontentment of the Muslim immigrants. The sources of the problems stem from the differences that exist between the two legal systems. Although the two legal systems treat similar basic concepts of humankind, each one has different ways of implementing them based on a different legal methodology.

This is the main point of friction between the Islamic law and the American law. Most of the legal methodologies of Islamic jurisprudence follow specific formulas. In the seventeen cases that I considered and examined in this research, the Muslims litigants expected their disputes to be adjudicated in the American courts by following those Islamic law specific formulas. Muslims expect the American courts to follow the Islamic formulas, which are ordained by the sacred text. Following the Islamic jurisprudence rules, which in most instances stem from the sacred text, means devotion to the Almighty. However, the American law follows a "factors" basis, and the American legal system inquire into "worldly factors" that must be meet in order for a judge to grant or deny an award (Thompson and Yunus 2007, Witte 2005, and Oman 2010.

Without these publications' clarification and pointing out the differences between the two legal systems, we have no meeting-point and no bridging or reconciliation between the two legal paradigm values. Understanding the differences through the scholarly publications is an essential key to initiate the process of healing and achieve the meeting of the minds between the two legal systems. This new middle common ground is the zone of understanding, where the common ground is found to reconcile the two legal systems in pursuit of accomplishing justice to the Muslim immigrants by hosting their

disputes with the new perspective found in that new common ground in the American legal system milieu.

This new understanding between the academic legal scholars may have a healing effect on the communities of Muslim immigrants and their Christian neighbors in the United States and beyond. This engagement between the academic scholars through publication and public discourse serves as a communication aid to process and understand the frustration of the Muslim immigrants in California and beyond. The expression of the Muslim immigrants brings this research to represent the heart of the Muslim diaspora regarding their divine law and help them to draw near in devotion to God.

Finally, clarifying the importance of the Islamic methodology and its formulas through these publications helps Muslim immigrants and contribute to their well-being while struggling to adjust to the urban American cultural diversity. This clarification indeed lessens the stereotypes, fear, and stigmatization of the Muslim immigrants.

Muslims who come to the United States are as any other immigrants; they come with their own culture, ideological ideas, and beliefs. Clearly, most of the Muslims come to the United States seeking better life. They seek to celebrate who they are by observing their holidays, prayers, and maintain their dietary system without been scorn or fear of discrimination (Haddad 2002). Many of the Muslim immigrants who come to America is from the top tier of their societies and certainly contributes to their new home in America in many fields such as engineering, education, medicine, etc. If the American public is made aware of this fact and of the Muslims' contribution to human civilization, the discrimination surely will decrease.

The works of Mark Hanshaw examine the effect of discrimination on Muslims immigrants' adherence to Islamic law and the American social and cultural patterns shape the Muslims religious behavior (Hanshaw 2010). To fit the culture surrounding them and

not to be alienated or ostracized, Muslims must alter their adherence to Islamic law (Hanshaw 2010). Not every American understands and appreciates the culture alteration and adoption that the Muslim immigrants go through to fit the living in the United States. Even with the Muslims adaptation, they still face some discrimination and are subject to stereotype and stigmatization, which bread fear and distrust between Muslims and American. Clearly censuring minority group stand as a major hurdle for process of reconciliation (Haddad 2000).

Notwithstanding that Islamic jurisprudence permits Muslims to live away from their Muslim region '*Dar al-Islam*' provided that Muslims abide by the *Sharia* obligation; the American negative treatment to the Muslims and their divine law curtail the way Muslims could live their lives (Haddad 2000). Such atmosphere will surly change if there was an understanding and reconciliation; surely the Muslims' publications express the suffering, the struggling, and the importance of *Sharia* and its goal in the Muslims' lives.

The *Sharia* main purposes are to protect religion, human life, human minds, offspring, and property. The *Sharia* is an essential aspect of life to all Muslims. It is intended to inform the Muslims' life from the cradle to the grave (Culp 2007). (Hill 2003). This is the Muslims dilemma if they live totally abiding by their divine law, they will be subject of the American society's scorn, and if they alter their observation to the *Sharia*, they will be in disobedience to *Allah* (Haddad 1993). The employment of these scholarly publications aim to help Muslims and American to understand and afford respect to each other.

My hope and prayer is that this research will accomplish a two-prongs-goal. First, by clarifying how *Sharia* is central to Muslims' faith and life. I hope to help Americans understand the importance of *Sharia* in the lives of their Muslim immigrant neighbors and hopefully lessen the stereotype in the American milieu. Second, to help the American

Muslims in their struggles to understand the mechanism of the American legal system and live their lives in their new home by defining their future atmosphere and role in the society replacing hostility by hospitality and denial by acknowledgment.

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Vita

Anthony Marcus is the owner and founder of Anthony Marcus Law Firm in Orange County, California and has acted as managing partner since its inception and founded the law firm on the principle that all individuals deserve the best legal representation possible. He received his Juris Doctorate degree from Alexandria University, School of Law, with a concentration on criminal law and international and comparative law.

Marcus has been practicing law as an international attorney since 1989 as solo trial law practice comprised civil litigation matters in maritime law, commercial transactions, real estate, criminal, contracts, and complex business transactions. He has successfully tried more than seventy-five court cases including a two-month trial representing insurance carriers. Represented clients by drafting complaints, reviewing and analyzing case reports, conducting legal research and preparing civil and criminal court documents. The law practice included negotiating settlements between privates, companies, and government agencies. Participated in legislative conferences and proposal drafts to modify the laws that set insurer damage recovery limits in order to deter unjust enrichment. Participated in legislative drafting to represent in Sacramento to enhance the Penal Code imprisonment imposed on drug crimes.

Marcus' education includes; LLB/JD from Alexandria University School of Law in 1989. Master of Divinity from International Theological Seminary in 2002 and a PhD from Fuller Theological Seminary in 2020. He is an active member in good standing with; the State Bar of California, the United States District Court Central District of California and Southern District of California and the Supreme Court of the State of California. Marcus is professionally affiliated with the American Bar Association, the Orange County Bar Association, the Los Angeles Bar Association, and the San Bernardino Bar Association.

His experience and professional services include: Anthony Marcus Law Firm – Orange County, California – 2014 to Present. County Counsel Litigation Unit – San Bernardino County, California - 2008 to 2013. District Attorney Major Narcotics Division – Los Angeles County, California - 2006 to 2008. Wycliffe Bible Society – SIL – California - 1993 to 2009.