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Islam and polygamy – Affidavit and other documents submitted by Mohammad H. Fadel to the Supreme Court of British Columbia

Original address: <http://www.scribd.com/doc/48230405/Affidavit-of-Prof-Mohammad-Fadel-re-Islamic-law-WRT-polygamy>

In 2010, Mohammad Fadel was asked by the attorney general of British Columbia to address the relationship between polygamy and Islam. On this occasion he submitted various documents to the Court. They are all reproduced below:

Affidavit – Fadel mentions his qualifications for giving an opinion on the issue of polygamy and Islam and lists the specific questions that he was asked to address by the Court. He describes two attached exhibits.

Exhibit A – Fadel's curriculum vitae

Exhibit B – A 69-point report on the relationship between polygamy and Islam. In this report, Fadel mentions at section 54 having attached an appendix containing a model Islamic marriage contract and a marriage kit that was published by the Canadian Council of Muslim Women. His submission of the CCMW kit to the Court constitutes an endorsement of its content.

Industry Canada: Canadian Council of Muslim Women (File [868337593RC0001](#))

Appendix A – Model Islamic marriage contract and CCMW Q&As about Islamic marriage

In this Appendix (page 52/page 13 in the kit), the *Umdat al-Salik* (Reliance of the Traveller) is endorsed and referred to as “the famous *Umdat al-Salik*”. This manual of sharia was written by Ahmad ibn Naqib al-Misri (1302-1367). Its English translation is also [endorsed](#) by the International Institute of Islamic Thought (IIIT) not only as a historical document but as a “legal reference” for use by Muslims today. The IIIT is the main Muslim Brotherhood research institute in the West,

Mohammad Fadel is specifically referred to in the BC Supreme Court decision at sections 240, 247 and 426.

Supreme Court of British Columbia (November 23, 2011): [Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588](#)

**Affidavit #1 of Mohammad Fadel
Sworn July 22, 2010
No. S-097767
Vancouver Registry**

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF:

THE CONSTITUTIONAL QUESTION ACT, R.S.B.C. 1996, C.68

AND IN THE MATTER OF:

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

AND IN THE MATTER OF:

A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL SET OUT IN
ORDER IN COUNCIL NO. 533 DATED OCTOBER 22, 2009 CONCERNING THE
CONSTITUTIONALITY OF S. 293 OF THE CRIMINAL CODE OF CANADA,
R.S.C. 1985, c. C-46

AFFIDAVIT#1 – MOHAMMAD FADEL

**Ministry of Attorney General
Legal Services Branch
1301 -865 Hornby Street
Vancouver BC V6Z 2G3
Telephone: 604 660-5476
Facsimile: 604 660-6797**

**Craig Jones
Barrister and Solicitor**

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R.S.C. 1985, c. C-46

AFFIDAVIT

I, Mohammad Fadel, of the city of Toronto, in the Province of Ontario, MAKE OATH
AND SAY AS FOLLOWS:

1. I am currently the Canada Research Chair in the Law and Economics of Islamic Law at the University of Toronto's Faculty of Law. I graduated in 1995 from the University of Chicago's Department of Near Eastern Languages and Civilizations with a Ph.D. The topic of my dissertation was legal process in medieval Islamic law. I graduated from the University of Virginia School of Law in 1999 with a J.D. I subsequently clerked for two years for a United States District Court Judge and a United

States Court of Appeals Judge for the Fourth Circuit Court of Appeals. I have published numerous works on Islamic law, including two articles on Islamic family law and one book chapter on Islamic family law. I have also published articles on other topics within Islamic law specifically and Islamic law as it relates to liberalism generally. I have personal knowledge of the matters set out in this affidavit.

2. Attached to my affidavit and marked as Exhibit "A" is a copy of my current *curriculum vitae*.

3. I have been retained by the Ministry of the Attorney General to answer questions related to my area of expertise. In particular, I was asked by Ms. Zaltz to address the following areas:

- 1) The relationship between polygyny and Islam – a summary of the religious context in which a polygynous marriage might occur, including religious teachings/ customs/ laws pertaining to polygyny and whether entering into a polygynous marriage confers any religious or spiritual benefit or significance.
- 2) The types of situations in which polygynous marriage may occur (acknowledging that this is not an exhaustive list) – this could include discussion about Muslim men having a larger class of potential mates than Muslim women. As an example, it could also include the situation you described where a woman loses her husband and is supported by a man who is already married to another woman.
- 3) The context of Islamic marriage – the marriage contract and content, religious significance of marriage, role of a religious leader in "performing" a marriage ceremony (if any), divorce rights and process, etc.
- 4) A description of your background and qualifications (and a CV if possible).

4. I have responded to the questions posed to me by Ms. Zaltz in a report dated July 21, 2010. Attached to my affidavit and marked as Exhibit "B" is a copy of my report dated, July 21, 2010.

5. I certify that I am aware of my duty as an expert witness to assist the court, and not to be an advocate for any party. I have made the report attached to this affidavit

and have given this written testimony in conformity with that duty. If I am called upon to give further testimony, it will be in conformity with that duty.

SWORN BEFORE ME at the City of)
Toronto, in the Province of Ontario)
this 22nd day of July, 2010)

Ermelinda Nogueira)
A Commissioner for taking Affidavits)
for Ontario. Ermelinda Nogueira)
(lawyer)

M F
MOHAMMAD FADEL

Name of Notary (lawyer)
14 Prince Arthur Av.
Address and Phone Number of Notary.
Suite 309
Toronto, ON M5R 1A9
(416) 922-9566

This is Exhibit * A * referred to in the
affidavit of MOHAMMAD FADEL

Sworn before me at TORONTO
in the ~~Province of British Columbia~~ this
2nd day of JULY 2010
Emelinda Kofman
A Commissioner for taking Affidavits
within the Province of ~~British Columbia~~ Ontario

Mohammad H. Fadel
 University of Toronto Faculty of Law
 Toronto, ON M5S 2C5
 416-946-0589
Mohammad.fadel@utoronto.ca

CURRENT POSITION

- Assistant Professor and Canada Research Chair in the Law and Economics of Islamic Law, University of Toronto Faculty of Law, January 2006 – present

(faculty web page available at:

http://www.law.utoronto.ca/faculty_content.asp?profile=79&cType=facMembers&itemPath=1/3/4/0/0)

COURSES TAUGHT

- Business Organizations, The Law of International Business and Finance Transactions and Religion, Liberalism and the State: the Case of Islam.

OTHER EXPERIENCE

- Corporate Finance and Financial Institutions Associate, Sullivan & Cromwell, New York (September 2001 until December 2005)
- Clerk, The Honorable Paul V. Niemeyer, Judge for the United States Court of Appeals, 4th Circuit, 2000-2001.
- Clerk, The Honorable Anthony A. Alaimo, Judge for the United States District Court, Southern District of Georgia, 1999-2000.
- Adjunct Instructor, *University of Virginia*, Department of Government and Foreign Affairs, spring semester 1996.
- Arabic Instructor, *University of Virginia*, 1994 – 1995
- Arabic Instructor, *Middlebury College* Summer Arabic Program, 1993

EDUCATION

University of Virginia School of Law, Charlottesville, VA. J.D., 1999.

Honors

- Articles Development Editor, *Virginia Law Review*, 1998-1999.
- Editorial Board, *Virginia Law Review*, 1997-1998.
- Order of the Coif
- Robert E. Goldsten Award for Distinction in the Classroom.
- John M. Olin Prize in Law and Economics for Outstanding Paper in Law and Economics, Deregulating the OTC Swaps Market and The 'Public Interest' Requirement in the Futures Trading Practices Act of 1992.
- John M. Olin Law and Economics Scholar, 1998-1999.

University of Chicago, Department of Near Eastern Languages and Civilizations, Chicago, IL. Ph.D., 1995.

- Dissertation: *Adjudication in the Maliki Madhhab: a Study of Legal Process in Medieval Islamic Law.*

Honors

- Ph.D. *with Distinction*, 1995.
- Fulbright-Hays Dissertation Writing Fellowship, U.S. Department of Education, 1993-94.
- Recipient of Consortium for Arabic Study Abroad (CASA) full-year fellowship to study Arabic at the American University in Cairo, sponsored by the U.S. Department of Education.

University of Virginia, Charlottesville, VA. BA (Government and Foreign Affairs) with *High Honors*, 1988.
Honors

- *Phi Beta Kappa*.
- Government and Foreign Affairs Honors Program (five students in program).

LANGUAGES

- Classical and Colloquial Arabic (fluent).

PROFESSIONAL AND OTHER ASSOCIATIONS

- Member, Board of Directors, National Association of Muslim Lawyers (www.namlnet.org) and Muslim Advocates (www.muslimadvocates.org)
- New York Bar
- Advisory Board, Tanenbaum Center for Interreligious Understanding (www.tanenbaum.org)

PUBLICATIONS

Peer-Reviewed Articles

Muslim Reformists, Female Citizenship, and the Public Accommodation of Islam in Liberal Democracy (conditional acceptance at *Journal of Religion & Politics*).

Is Legal History a Viable Strategy for Islamic Legal Reform? The Case of 'Never Shall a Folk Prosper Who Have Appointed a Woman to Rule Them' (draft under peer-review at *Islamic Law & Society*).

Commentator on "The Global Importance of 'Illiberal Moderates', an Exchange: Partners in Peace to Precede a Concert of Democracies," Amitai Etzioni et al., 21,2 *Cambridge Review of International Affairs* (June 2008), pp. 165-167.

"The True, the Good and the Reasonable: the Theological and Ethical Roots of Public Reason in Islamic Law," 21,1 *Canadian Journal of Law and Jurisprudence* 5-69 (2008).

"Two Women, One Man: Knowledge, Power and Gender in Medieval Sunni Legal Thought," 29, 2 *International Journal of Middle East Studies* (1997), pp. 185-204.

"The Social Logic of Taqlid and the Rise of the Mukhtasar," *Islamic Law and Society* 3,2 (1996), pp. 193-233.

"Ibn al-Hajar's Hady al-Sari: A Medieval Theory of the Structure of al-Bukhari's Al-Jami' al-Sahih, Introduction and Translation," *Journal of Near Eastern Studies* 54, 3 (Summer 1995), pp. 161-97.

Chapters in Books

"Political Liberalism, Islamic Law and Family Law Pluralism," forthcoming as a chapter in *Marriage and Divorce in a Multi-Cultural Context: Reconsidering the Boundaries of Civil Law and Religion*, Cambridge University Press, ed. Joel Nichols.

"*Istafti qalbaka wa in afitaka al-nasu wa afituka*: The Ethical Obligations of the Muqallid Between Autonomy and Trust," forthcoming as a chapter in a Festschrift in honor of Professor Bernard Weiss, ed. Kevin Reinhart.

"Authority in Ibn Abi Zayd al-Qayrawani's *Kitab al-nawadir wa al-ziyadat 'ala ma fi al-mudawwana min ghayriha min al-ummahat*: The Case of the 'The Chapter of Judgments' (*Kitab al-aqdiya*)," forthcoming as a

chapter in a Festschrift in honor of Professor Wadad al-Kadi, The Avalon Foundation Distinguished Service Professor Islamic Studies, University of Chicago (9000 words, but remains subject to revision), eds. Jonathon Brown, Assistant Professor, University of Washington and Wen-Chin Ouyang, Associate Professor, School of Oriental and African Studies, United Kingdom.

"Too Far From Tradition," in "Islam and the Challenge of Democracy," in 28 *Boston Review: a Political and Literary Forum* 20-21 (2003).

"*Istihsan* is Nine-Tenths of the Law: The Puzzling Relationship of *Usul* to *Furu'* in the *Maliki Madhhab*," in *Studies in Islamic Law and Society*, ed. Bernard Weiss (Brill 2002), pp. 161-76.

"*Rules, Judicial Discretion and the Rule of Law in Nasrid Granada*," in *Islamic Law: Theory and Practice*, ed. Robert Gleave (I.B. Tauris 1997), pp. 49-86.

Law Review Articles

"BCE and the Long Shadow of American Corporate Law," 48 *Canadian Business Law Journal* 190 (2009).

"Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law," 8, 1 *Chicago Journal of International Law* 1 (Summer 2007).

"*Ribā*, Efficiency and Prudential Regulation: Preliminary Thoughts," 25 *Wis. Int'l L.J.* 655 (2008)

"Classical Religious Perspectives of Adoption Law," with Pollack, D., Reid, C., & Bleich, M., 79 *Notre Dame Law Rev.* 693 (2004).

"Reinterpreting the Guardian's Role in the Islamic Contract of Marriage: The Case of the Maliki School," 3 *The Journal of Islamic Law* 1 (1998), pp. 1-26.

Review Essays

"Back to the Future: The Paradoxical Revival of Aspirations for an Islamic State," 14,1 *Review of Constitutional Studies* 2009, pp. 105-123.

"Islamic Politics and Secular Politics: Can They Co-Exist?," 25,1 *Journal of Law & Religion* (2009-2010), pp. 101-118.

Articles in Non-Academic Journals

"The Challenge of Human Rights," *Seasons, the Journal of the Zaytuna Institute* 59-80 (Spring 2008).

Book Reviews

International Treaties (Mu'āhadāt) in Islam: Theory and Practice in Light of Islamic International Law (Siyar) according to Orthodox Schools, Labeed Ahmed Bsoul, 27,1 *American Journal of Islamic Social Sciences* (2010), pp. 128-132.

Original Islam: Mālik and the Madhhab of Madīna, Yasin Dutton, *Journal of Islamic Studies* (2010), pp. □.

The Islamic School of Law: Evolution, Devolution, and Progress, Edited by Peri Bearman, Rudolph Peters and Frank Vogel, *Journal of Islamic Studies* 2009 20(2):259-263.

Shari'a: Islamic Law in Contemporary Context, Edited by Abbas Amanat and Frank Griffel, 24,2 *Journal*

of Law & Religion 101 (2008-2009).

Structural Interrelations of Theory and Practice in Islamic Law: A Study of Six works of Medieval Islamic Jurisprudence, Ahmad Atif Ahmad, Studies in Islamic Law and Society, Brill, Edited by Ruud Peters and Bernard Weiss, 40,4 International Journal of Middle East Studies 680-682 (2008).

Islamic Law and the Challenge of Modernity, Edited by Yvonne Yazbeck Haddad and Barbara Freyer Stowasser, 24,1 American Journal of Islamic Social Sciences 98-102 (2007).

A History of the Early Islamic Law of Property – Reconstructing the Legal Development, 7th-9th centuries, by Hiroyuki Yanagihashi, Studies in Islamic Law and Society, Brill, Edited by Ruud Peters and Bernard Weiss, 18(1) Journal of Islamic Studies 100-102 (2007).

Law and Power in the Islamic World, by Sami Zubaida, 16 Journal of Islamic Studies No. 1, 72 – 74 (2005).

Between the State and Islam, Charles E. Butterworth and I. William Zartman, eds., Middle East Studies Association Bulletin (Summer 2002), pp. 62-63.

Studies in Modern Islamic Law and Jurisprudence, by Oussama Arabi, 9 Islamic Law and Society 423-25 (2002).

Analogical Reasoning in Islamic Jurisprudence: a Study of the Juridical Principle of Qiyas, by Ahmad Hasan, 15 Journal of Law and Religion 359-62 (2001).

The Rule of Law in the Middle East and the Islamic World: Human Rights and the Judicial Process, Eugene Cotran and Mai Yamani, eds., 18 American Journal of Islamic Social Sciences No. 4 167-171 (2001).

Ibn Rushd wa kitabuhu al-muqaddimat, by al-Mukhtar b. al-Tahir al-Talili, Al-'Usur al-Wusta: the Bulletin of Middle East Medievalists 6, 1 (1994), pp. 23 – 24.

Muhadarat fi tarikh al-madhab al-maliki fi'l-gharb al-islami, Al-'Usur al-Wusta: the Bulletin of Middle East Medievalists 6, 1 (1994), pp. 24 – 25.

Encyclopedia Articles

"Murder," *Encyclopaedia of the Qur'an*, ed. Jane Damen McAuliffe (Brill).

"Punishments and Chastisements," *Encyclopaedia of the Qur'an*, ed. Jane Damen McAuliffe (Brill).

"Islamic Law," *Encyclopedia of Islam in America*, ed. Jocelyn Cesari (2007).

"Law and Jurisprudence," *The Encyclopedia of Medieval Islamic Civilization*, ed. Joseph W. Meri (Routledge) (2006).

"Schools of Jurisprudence," *The Encyclopedia of Medieval Islamic Civilization*, ed. Joseph W. Meri (Routledge) (2006).

"Treason, or Hiraba," *The Encyclopedia of Medieval Islamic Civilization*, ed. Joseph W. Meri (Routledge) (2006).

"Public Authority (Sultan)," *Oxford Encyclopedia of Legal History*, ed. Stanley N. Katz (Baber Johansen, Islamic Law editor).

"Public Law and Private Law," *Oxford Encyclopedia of Legal History*, ed. Stanley N. Katz (Baber

Johansen, Islamic Law editor).

"Proof and Procedure in Islamic Law," *Oxford Encyclopedia of Legal History*, ed. Stanley N. Katz (Baber Johansen, Islamic Law editor).

"Forum, Exterior (Zahir), and Interior Forum (Batin)," *Oxford Encyclopedia of Legal History*, ed. Stanley N. Katz (Baber Johansen, Islamic Law editor).

"Torture," *Oxford Encyclopedia of Legal History*, ed. Stanley N. Katz (Baber Johansen, Islamic Law editor).

"Arbitration," *Encyclopedia of Islamic Political Thought*, ed. Gerhard Böwering (forthcoming).

"Contracts," *Encyclopedia of Islamic Political Thought*, ed. Gerhard Böwering (forthcoming).

"Collective Obligations," *Encyclopedia of Islamic Political Thought*, ed. Gerhard Böwering (forthcoming).

"Judicial Courts," *Encyclopedia of Islamic Political Thought*, ed. Gerhard Böwering (forthcoming).

"International Law, Regional Developments: Islam," *Max Planck Encyclopedia of Public International Law*, ed. Frauke Lachenmann.

Miscellaneous Publications and Media Appearances

Islamic Law Consultant for Human Rights Watch's report "Perpetual Minors: Human Rights Abuses Stemming From Male Guardianship and Sex Segregation in Saudi Arabia," April 2008.

Business News Network:

"Home Depot and Private Equity Deals," August 27, 2007.

"KKR Going Public," July 4, 2007.

"Behind the Scenes of Private Equity," April 24, 2007.

"Nortel Ex-Execs Face SEC Fraud Charges," March 12, 2007.

"Image Consulting," January 8, 2007.

"Internet Gambling Law," October 2, 2006.

"Did CIBC Settle Too Soon?," September 8, 2006.

Talking Philosophy: Secularism, "Ideas with Paul Kennedy," Canadian Broadcast Corporation, April 19-20, 2010.

Reasonable Accommodation, Canadian Broadcast Corporation, April 19, 2010.

"The End of History?" at 20, "The Agenda with Steve Paiken," Feb. 12, 2010.

Censorship and Forbidden Reading, "The Agenda with Steve Paiken," Dec. 9, 2009.

Jihad, "The Agenda with Steve Paiken," Jan. 22, 2009.

Islamic Finance, "The Agenda with Steve Paiken," May 16, 2008.

Free Speech, Hate Speech, and Human Rights Commissions, "The Agenda with Steve Paiken," January 21, 2008.

"Income Trusts and the Diversified Investor," *The Financial Post*, November 9, 2006.

"In the Name of God", *Legal Times*, December 22, 2003 50-51.

"Fatwas and Social History," *Al-'Usur al-Wusta: the Bulletin of Middle East Medievalists* 8, 2 (October 1996), pp. 32-33, 59.

PUBLIC PAPERS AND CONFERENCES

"Strategies for Building a Coalition for Gender Egalitarianism in the Muslim World," Karamah: Muslim Women Lawyers for Human Rights, Law and Leadership Summer Program, Washington, D.C., June 8, 2010.

"Criminalization of Polygamy? Constitutional or Not?", David Asper Centre for Constitutional Rights, University of Toronto Faculty of Law, March 23, 2010.

"Islam and the West: the Use and Abuse of Comparison," Centre for Ethics, University of Toronto, March 12, 2010.

"The *Shari'a* and the Rule of Law," presentation at the Department of Near and Middle Eastern Civilizations, University of Toronto, March 11, 2010.

"The Idea of the Islamic State as Rational Commitment," presentation to the faculty, Santa Clara Law School, Feb. 23, 2010.

"The Impact of Islamic Law on Economic Development," Karamah: Muslim Women Lawyers for Human Rights, Feb. 16, 2010.

Islamic Finance Seminar, Rotman School of Business, Jan. 29, 2010.

"Who Needs an Islamic State? The Implications of Muslims Living in Liberal Democracies for Contemporary Islamic Constitutional Theory," Muslim World League and the Department of Fiqh and Usul al-Fiqh, International Islamic University of Malaysia, Conference: Jurisprudence of Minorities in the Light of the Objectives of Islamic Law: Identity and Integration, Kuala Lumpur, Malaysia, Nov. 9-11, 2009.

"Islam and the Regulation of Markets," Hamline University School of Law, Symposium: The Global Economic Crisis, Law and the Religious Traditions, Oct. 15-16, 2009.

Discussant, "The Diversity of Islam in Eurasia," *Tenth Annual Conference of the Central Eurasian Studies Society*, University of Toronto, Toronto, ON, October 11, 2009.

"Islam, Liberalism and Democracy," Cornell University School of Law, The Clark Initiative for Law and Development in the Middle East and North Africa (September 11-12, 2009), Ithaca, New York, September 11, 2009.

Discussant and Chair, "Comparative Political Theory Applied: Change and Hybridity in the Study of Political Thought," Annual Meeting of the American Political Society Association, Toronto, ON, September 4, 2009.

"Which 'Islamic Law'? Theorizing an Islamic Law of Conflict in the Absence of a Dar al-Harb," Institute for National Security and Counterterrorism, Syracuse University, Islam-International Humanitarian Law Initiative, April 17, 2009.

"In Praise of Public Reason: Theological and Political Restraint in Islamic Theology," University of Wisconsin, presented at the Fourth Annual Conference of the Lubar Institute for the Study of Abrahamic Religions: Religion and the State, co-sponsored by Center for the Study of Liberal Democracy, March 28, 2009.

"Recognition of Islamic Concepts Under Canadian Law: Possibilities and Obstacles," University of Ottawa Faculty of Law, presented at *The Idea of Legal Interaction Between Islamic Law and Other Legal Systems*, co-sponsored by the World Legal Systems Research Group and The Muslim Law Students Association, March 20, 2009.

"Authority in Ibn Abî Zayd al-Qayrawânî's *Kitâb al-nawâdir wa al-ziyâdât 'alâ mâ fi al-mudawwana min ghayrihâ min al-ummahât*: The Case of the 'The Chapter of Judgments (*Kitâb al-aqdiyya*),' Presented at the Annual Meeting of the American Oriental Society (Islamic Near East Section), Albuquerque, NM, March 14, 2009.

"Does Islamic Finance Offer Any Lessons for the Global Financial Crisis?" McGill University Faculty of Law, March 10, 2009.

"The Reception of Islamic Finance Formalism in Secular Courts: *Murâbaḥa* and *Bay' bi-thamin âjil* Contracts in the UK and Malaysia," Islamic Law and Finance Symposium, Fordham University School of Law, Feb. 26, 2009.

"The Scope for Reform in Traditional Fiqh with Reference to Qiwwa and Wilaya," presented at *Guidelines for Islamic Family Law: Women's Equality, Male Guardianship, and Legal Objectives*, sponsored by the Oslo Coalition, Norwegian Centre for Human Rights, Cairo, Egypt, Jan. 9-11, 2009.

"No Folk That Appoints a Woman to Lead Them Shall Prosper," as part of the "Muslim Historiography in Islamic Legal Reasoning" panel at the annual conference of the American Society of Legal History, Ottawa, ON, Canada, Nov. 15, 2009.

"Islamic Theology and Public Reason," Duke University, November 5, 2008 (workshop sponsored jointly by the Department of Philosophy and the Duke Islamic Studies Center).

Respondent, for the panel "At the Crossroads of Religion, Law, and Society: Fatwas as Sites for the Study of Islamic History and Legal Authority," Meeting of the American Association of Religion, Chicago, IL, Nov. 1, 2008.

"Islamic Law and International Human Rights Law: Non-Muslims and Apostates," presented at the "Is There a Role for Shari'a in Modern States" Conference, hosted by the al-Waleed Center for Muslim-Christian Understanding, Georgetown University, October 23, 2008, Washington, D.C.

"*Istafti qalbaka wa in aftâka al-nasu wa aftûka*: The Ethical Obligations of the Muqallid Between Autonomy and Trust," presented at the Alta II Festschrift conference in honor of Professor Bernard Weiss, Alta, Utah, September 26, 2008.

"Regulating Shari'a Advisors: the Role of Banking Regulators," presented at The Canadian Institute's *Islamic Banking and Finance*, June 2, 2008, Toronto.

"Islamic Ethics, Moral Controversy and Islamic Law," Fordham University School of Law, May 22, 2008 (As part of Fordham's *Religious Values and the Practice of Law*, 2007-2008 Speaker Series – Religious Controversies and the Practice of Law).

Participant, *Reason and Authority in Islamic and Jewish Law*, University of Toronto, May 11-13, 2008.

Commentator at workshop, "Who Belongs? Immigration, Democracy and Citizenship?", manuscript of Joseph Carens, University of Toronto Centre for Ethics, May 7, 2008.

"Abd al-Razzaq al-Sanhuri and the 'Possibility' of a Modern Islamic Law," April 23, 2008, University of Arizona, Dept. of Near Eastern Studies.

"*Islamic Law and Free Speech*," March 25, 2008, sponsored by the Muslim Student Association, University of Toronto, St. George Campus.

"*Religion, Autonomy, and Equality: Striking the Right Balance*," presentation to Eleventh Annual Conference for High School Students in Gifted Programs, hosted by the Toronto Catholic District School Board and the University of Toronto Faculty of Arts and Sciences, February 19, 2008.

"*Islam and the Law*," as part of *Manufacturing Islam: Muslim Identities in the 21st Century*, St. John's College, University of British Columbia, February 2, 2008.

"*Liberal Commitments, Islamic Commitments and Public Reason: Strategies for Principled Reconciliation*," Dean's Lecture, Yale Law School, December 10, 2007.

"*The True, the Good and the Reasonable: the Theological and Ethical Roots of Public Reason in Islamic Law*," presented at "Islam and Liberal Citizenship," Yale University, MacMillan Center, December 7-8, 2007.

"*Islamic Perspectives on Multi-Tier Marriages*," University of St. Thomas School of Law (Minneapolis), as part of *The Multi-Tier Marriage* roundtable conference, November 16, 2007.

"*Islamic Commitments, Liberal Commitments, and Public Reason: Strategies for Principled Reconciliation*," Cornell University, presented as part of "Islamic in the World," a week-long series of lectures, October 26, 2007.

"*Knowledge, Power and Gender in Medieval Islamic Legal Thought*," presented as part of the University of Toronto Faculty of Law's *Law, Religion and Society* program, October 17, 2007.

Presenter, "*Islamic Law: Revelation, Piety and Law*," presented at "Sacred Texts in Law and Religion: Authorizing and Constituting Professional Identity" at Vanderbilt University Law School, October 5 – 6, 2007.

Panelist, "Faith-based Schools in Ontario?", University of Toronto, Multifaith Centre, September 25, 2007.

Presenter, August 16, Fourth Annual University of California Humanities Research Institute Seminar in Experimental Critical Theory, *Cartographies of the Theological-Political*, University of California, Irvine, August 6 – August 17.

Presenter, June 12, 2007, "Sarbanes-Oxley, Efficient Capital Markets, and Protecting Investor Welfare: a Look at the Buy-Side," presented at STILE, Sienna, Italy.

"*The True, the Good and the Reasonable*," presented at "Islam and Muslim Citizens in Liberal Democracies" at Michigan State University, April 20-21, 2007.

"*The Implications of Normative Pluralism for Islamic Reform*," presented at "Re-Imagining Muslim Ethics" at Duke University, April 5-6, 2007.

"*Loyalty to God and Country: Can Muslims Meet the Moral Obligations of Citizenship?*", March 15, 2007, sponsored by the Muslim Students Association, University of Toronto, St. George Campus.

"Riba, Efficiency and Prudential Regulation," presented at "Islamic Law in a Globalized World: Implications for Contemporary Finance Law" at the University of Wisconsin Law School, March 2, 2007.

"Islamic Law and the Banning of the Burqa in the Netherlands," February 19, 2007, sponsored by the Muslim Students Association, Emory University, Atlanta, Georgia.

"Islamic Thought and Citizenship," presented at "Islamic Law in the West: Theory, Doctrine and Practice," at the American University Washington College of Law, Washington, D.C., February 3, 2007, sponsored by the Washington College of Law Islamic Legal Forum.

"An Introduction to Islamic Law," presented at "Islamic Law in the West: Theory, Doctrine and Practice," at the American University Washington College of Law, Washington, D.C., February 2, 2007, sponsored by the Washington College of Law Islamic Legal Forum.

Commentator at workshop on the *"Future of Shari'a,"* Abdullahi an-Na'aim, Emory University School of Law, January 27-28, 2007, Atlanta, Georgia.

"Islamic Law and International Human Rights Law: Strategies for Reconciliation," at Pace International Law Review Symposium "Interpreting Islam for the Western World," January 26, 2007, White Plains, New York.

"Jihad in the Modern World: a Look at 20th Century Egyptian Views on Jihad," presentation at the "Understanding Jihad, Deconstructing Jihadism" Conference, hosted by the al-Waleed Center for Muslim-Christian Understanding, Georgetown University, November 30, 2006, Washington, D.C.

"The True, the Good and the Reasonable: the Islamic Roots of Public Reason," University of Toronto Faculty of Law Faculty Workshop, October 30, 2006.

"Islamic Banking and Finance: What's in it for Canadian Companies," presented at Export Canada, Ottawa, October 16, 2006.

"Islamic Law and the Prospects for Constitutional Governance," presentation as part of panel *Democratization of the Muslim World*, sponsored by *Shuruq*, New York University, March 30, 2006.

"Islamic Law and Gender Equity," New York University School of Law, March 30, 2006.

"Future of Shari'a: Islam, Nations and Constitutions," University of Pennsylvania Law School, March 23, 2006.

"Freedom of Religion or the Obligation of Inquiry? Reflections on the Concept of Inquiry as the First Moral Duty," *Religious Liberty and Relativism*, Gregorian University, Rome, Italy, December 10, 2005.

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Panelist, "Public Enemy #1: Terrorism, Civil Liberties or Islam? The constitutional, racial and religious casualties of 9/11," Yale Law School, November 27, 2001.

Panelist, "Law and Religion After September 11th: Perspectives on Islam and Islamism," New York University School of Law, November 6, 2001.

Moderator of Panel "Shari'a: Islamic Jurisprudence and Minority Rights in Muslim Countries," *Islam and Religious Freedom*, United States Department of State, November 14, 2000.

"Islamic Perspectives on the Practice of Law: Common Ground for All of Us." Fordham University School of Law in conjunction with the Auburn Theological Seminary, October 17, 2000.

"The Regulation of Financial Risk in Islamic Law, the Common Law and Federal Regulatory Law." Fourth Harvard University Forum on Islamic Finance, Cambridge, MA. September 30 – October 1, 2000.

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Discussant, "*The Marriage Contract: A Historical and Comparative Perspective*." Conference on The Islamic Marriage Contract, sponsored by the Islamic Legal Studies Program, Harvard Law School, Jan. 29-31, 1999.

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"*Substance and Procedure in Maliki Law*." Annual Meeting of the Middle East Studies Association (MESA), Washington, DC, December 1995.

"*Judicial Discretion and the Rule of Law in the 14th-15th Century Muslim Granada (Spain)* [revised]."

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"Taqlid and the Rule of Law in the Maliki Madhhab." National Meeting of the AOS, Salt Lake City, UT, March 1995.

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"Kingship and Caliphate in al-Ghazali's Political Thought." The Middle East History and Theory Workshop Annual Spring Conference, University of Chicago, May 1991.

"Nature and Culture in Qasida 71 of Abu Tammam." The Middle East History and Theory Workshop Annual Spring Conference, University of Chicago, May 1990.

This is Exhibit " B " referred to in the
affidavit of MOHAMMAD FADEL

Sworn before me at TORONTO

In the Province of British Columbia, this

22nd day of JULY, 2010

Lincoln Dugan

A Commissioner for taking Affidavits
within the Province of British Columbia ONTARIO

EXPERT REPORT OF PROFESSOR MOHAMMAD FADEL

1. I am currently the Canada Research Chair in the Law and Economics of Islamic Law at the University of Toronto's Faculty of Law. I graduated in 1995 from the University of Chicago's Department of Near Eastern Languages and Civilizations with a Ph.D. The topic of my dissertation was legal process in medieval Islamic law. I graduated from the University of Virginia School of Law in 1999 with a J.D. I subsequently clerked for two years for a United States District Court Judge and a United States Court of Appeals Judge for the Fourth Circuit Court of Appeals. I have published numerous works on Islamic law, including two articles on Islamic family law and one book chapter on Islamic family law. I have also published articles on other topics within Islamic law specifically and Islamic law as it relates to liberalism generally.
2. I am aware that in giving this opinion to the Court, I have a duty to assist the Court and not be an advocate for any part to the proceedings herein and I attest that I have prepared this report in conformity with that duty.
3. You have asked me to render an expert report regarding the status of polygyny within Islamic religious beliefs (theology), Islamic law and the practices of Muslims in Canada. I derive my knowledge pertaining to the first two issues from my close familiarity with the theological and legal tradition of Sunni Muslims, as established in historically authoritative treatises of Islamic theology and law. Any information I have regarding actual practices of Muslims in Canada or anywhere else derives only from my personal experience as a Muslim living in Canada and other societies, but is not based on scholarly research.
4. Islamic religious and legal doctrines are ultimately derived from revelatory sources. Islamic doctrines, whether theological or legal, are usually not set forth explicitly in Islamic revealed sources, but rather are derived from them through a process of interpretation conducted by group of trained scholars known as the 'ulamā'.
5. This process of interpretation is known as *ijtihād*, and because there is no ecclesiastical authority in Islam, the differences of opinion that result from the exercise of *ijtihād* are generally considered equally legitimate interpretations of Islam, provided they do not violate certain core teachings that are deemed to be universally accessible without resort to interpretation. These core teachings are limited to a handful of theological and ethical dogmas, such as God's oneness, the obligation to perform the five pillars of Islam, i.e., to testify publicly that there is no god except for God and that Muhammad is God's messenger; to pray five times a day; to fast during the daylight hours of the month of Ramadan; to pay a tax on one's wealth in favor of the poor and needy; and to perform the Pilgrimage to Makka, once in one's lifetime, if one has the means.

6. In Sunnī Islam, the revelatory sources are three: the Quran, the practice of the Prophet Muhammad (known as the *sunna*), and the consensus of the community (*ijmā'*). In Shī'a Islam, the teachings of the "Imams" who followed the Prophet Muḥammad after his death are also authoritative.
7. Because of the centrality of interpretation in developing secondary Islamic doctrines, and the presumptive legitimacy of all such interpretations, Islamic law historically developed various schools, or traditions of interpretation. The five most important such traditions are the Ḥanafīs; the Mālikīs; the Shāfi'īs; the Ḥanbalīs; and the Imāmī Shī'a.
8. Historically, the Hanafis dominated 'Irāq, Central Asia, Turkey, Eastern Europe and the Indian Subcontinent. Given the large numbers of Canadian Muslims from South Asia, it is reasonable to assume that Hanafi teachings remain particularly influential among this group of Canadian Muslims.
9. The Malikis traditionally dominated North Africa and sub-Saharan Africa. Accordingly, it is reasonable to assume that Maliki teachings continue to influence Muslim immigrants to Canada from those regions of the world.
10. The Shafi'is were traditionally well-represented in Egypt, Syria and Palestine, Yemen, East Africa and Southeast Asia (Indonesia, Malaysia, and Singapore). Accordingly, it is reasonable to assume that Shafi'i teachings continue to influence Muslim immigrants to Canada from those regions of the world.
11. Hanbalis were historically the least significant school of Islamic law in terms of numbers of adherents, but because of the fortuity of oil-wealth, combined with the adherence of the Kingdom of Saudia Arabia to Hanbali law, it has enjoyed a renaissance since the 20th century.
12. Imami Shi'a are located primarily in Lebanon, 'Iraq, Iran and the Indian subcontinent. To the extent that large numbers of Canadian Muslim immigrants come from these countries, it would be reasonable to assume that Imami Shi'i teachings on marriage continue to be relevant for members of those communities.
13. Prior to the 20th century, it would have been fair to assume that the practices of most Muslims in the world would more or less conform to the teachings of the prevailing school of Islamic law in their region. Beginning in the 20th century, however, as a result of numerous theological, legal and political reform movements, more and more Muslims, especially those who are not formally trained as religious scholars, tend to "pick and choose" among the various teachings of all the legal schools without regard to maintaining doctrinal consistency in all aspects of their life. Accordingly, they might follow a Maliki rule regarding prayer, a Hanafi rule regarding fasting, a Shafi'i rule regarding Pilgrimage, etc. The same ad hoc attitude also applies to their approach to Islamic

transactional law (see paragraph 27 below).

14. Modern Islamic family law, to the extent it is applied by various nation states, is almost always based on the doctrine of a single school of Islamic law, e.g. the Maliki school in Morocco or the Hanafi school of law in Egypt, but reformed through the adoption of rules taken from other schools of Islamic law. Modern legislation based on Islamic law is thus consistent with modern Muslims' ad hoc approach to Islamic law as described in paragraph 13 above.
15. It is important to note that unlike jurisdictions in which Islamic law is part of the formal law of a nation-state, Muslims in Canada adhere to Islamic law only to the extent that they voluntarily wish to do so, based on their individual religious consciences. They also may adhere to the rules of Islamic law for other reasons, e.g., a desire to maintain good standing in their social community. It is of course impossible to determine the extent to which adherence by Muslims in Canada to the norms of Islamic law is solely a result of their conscience or pressure to conform to community norms and expectations.
16. Muslim scholars of jurisprudence classify all human actions into one of five ethical categories: the obligatory; the forbidden; the recommended; the disfavored; and the indifferent.
17. In Islamic moral theology, these rules are known as "the rules of obligation (*aḥkām al-taklīf*)" insofar as they describe the moral consequences of the acts of morally responsible human beings (*mukallaḥūn*) before God.
18. An act that is obligatory merits punishment if it is omitted and reward if discharged.
19. An act that is forbidden merits punishment if performed and reward if omitted.
20. An act that is disfavored does not merit punishment if performed, but earns reward if avoided.
21. An act that is recommended merits reward if performed but does not merit punishment if omitted.
22. An act that is indifferent merits neither reward nor punishment.
23. In each of these cases, reward or punishment is deserved or not deserved from the perspective of God. Accordingly, the rules of obligation are, in the first instance, a theological judgment regarding the acts of morally responsible human beings.
24. Islamic law also uses another system to categorize acts which is more narrowly legal. Muslim jurists call this system of classification "the positive rules (*al-*

aḥkām al-waḍ'īyya)” to contrast them from the rules of obligation.

25. Unlike the rules of obligation, which entail either actions or omissions from a morally-responsible person before God, the positive rules set out the secular consequences of particular acts within a system of secular, this-worldly justice. Accordingly, while rules of obligation presuppose a rational and mature person as the objects of their commands, the positive rules can apply to minors, the insane or others, even animals, who may not be subject to the rules of obligation, whether as a result of a temporary impediment, e.g. minority, or permanent impediment, e.g. permanent insanity.
26. The positive rules include determinations of the validity of an act, including a ritual, a marriage contract or a commercial contract; whether an act is binding or merely gives rise to an option as to future performance; whether an act is invalid but nevertheless results in some legal consequences, or void *ab initio*. These rules do not, in the first instance, seek to answer the question of how God will judge these acts in the next life, and for that reason, they are functionally different from the rules of obligation.
27. Traditional Islamic law also broadly divides the law into two broad categories, ritual law (*'ibādāt*) and transactional law (*mu'āmalāt*). The former is distinguished from the latter primarily by the fact that the validity of any ritual act requires a religious intention (*niyya*) while the validity of transactions do not depend upon the existence of such an intention.
28. Marriage law is a part of Islamic law's transactional law, not its ritual law, even though marriage is subject to numerous religious beliefs.
29. Traditional works of Islamic law typically begin a legal discussion by first noting the moral status of the act under consideration, i.e. whether religion deems the act obligatory, forbidden, recommended, disfavored, or permitted, and then proceed to a detailed discussion of the positive legal consequences of the act in question.
30. Marriage (*nikāḥ*), all things being equal, is considered a recommended act from the perspective of Islamic religious doctrine, i.e., the rules of obligation. That is, a person who marries merits reward from God, but does not earn sin if he or she does not.
31. Islam also teaches that the married life is a good life, and that a celibate life is a bad life. Accordingly, there is no religious tradition of celibacy in Islam. While temporary periods of celibacy are permissible, a commitment to perpetual celibacy would be considered irreligious.
32. Marriage, however, can take other moral rulings in different circumstances. Accordingly, it may be religiously obligatory for a person who fears commission of illicit intercourse (*zinā*) to marry. Conversely, marriage may be prohibited

with respect to a person who knows that he or she is unable to satisfy the *positive legal* obligations attendant upon a marital relationship, e.g. if a man knows he lacks the financial resources to maintain his wife appropriately or any children that may result from a contemplated marriage.

33. As a matter of religious doctrine, Sunni Muslims, as well as Imami Shi'i Muslims, agree that polygyny, i.e., the marriage of a Muslim man to more than one wife, up to four, simultaneously, is not morally forbidden.
34. This conclusion is based on texts of the Quran that appear to allow a man to marry more than one wife simultaneously; the normative practice of the Prophet Muhammad as well as other authoritative members of the early community; and the consensus of the community.
35. Islam as a religious matter also permits divorce, thereby giving rise to the possibility of *serial* monogamy; however, divorce is considered morally disfavored, and accordingly should only occur when all other options are exhausted.
36. In addition to the moral/religious status of marriage and divorce in Islamic law, marriage formation, the marital relationship, marital dissolution and child custody are subject to an extensive body of positive rules governing the secular aspects of these aspects of family law.
37. Because the Quran conditions its permission of polygyny on the husband treating his wives fairly, and declares it to be either difficult or impossible for a man to do so, Muslim jurists concluded that the simultaneous marriage of a male to more than one female is religiously disfavored with respect to the man. In other words, as a matter of morality and religious scruple, all things being equal, it is morally disfavored, but not forbidden, for a man to marry more than one woman simultaneously.
38. Generally speaking then, a polygynous marriage is not considered religiously meritorious, and may in fact be religiously blameworthy, even if it is not sinful.
39. Should a man marry a second woman without divorcing his first wife, however, the second marriage, all things being equal, would be a legally valid marriage from the perspective of Islamic law's positive rules. Accordingly, a polygynous marriage, even if religiously disfavored, creates under the positive rules of Islamic law mutual rights and obligations that are equivalent to the rights and obligations arising out of the first and pre-existing marriage.
40. For example, should the male in a polygynous relationship pre-decease his wives, Islamic inheritance law would assign to each living wife an equal share of inheritance. Likewise, the children of each wife are also given equal shares in the estate of the deceased father with no favoritism either to the first wife or her

children relative to the second wife and her children.

41. Consistent with the Quran's requirement that a man in a polygynous marriage treat his wives equally, Muslim jurists held that a man with more than one wife is required to treat them equally with respect to various terms of the marriage, primarily, in the requirement to spend equal time with each of them (usually, alternating nights and days), to provide each her own marital home, and to provide each with equal maintenance.
42. There are various motives that theoretically might lead a Muslim man to seek a second wife, including: the desire for another sexual partner without incurring sin, whether or not his relationship with his first wife is a happy one; an unsatisfactory relationship with his first wife, combined with a reluctance to divorce her and then remarry out of consideration for either religious or customary concerns which make divorce shameful, or both; or, a desire to act as a husband for an otherwise unmarried woman with few prospects for another match, e.g., an older divorcee or widow, especially in communities where social life revolves around families.
43. This last example *might* constitute a religiously-motivated reason for a second marriage; a clearer example of a religiously-motivated second marriage by a Muslim man would be the hypothetical case of a man who claims that despite being married, he needs a second wife to avoid committing adultery.
44. The theoretical motivations for a Muslim woman to enter a polygynous marriage, or to accept a polygynous marriage after having been in a monogamous marriage, are likewise manifold.
45. We can assume that an unmarried Muslim woman in the first instance seeks a monogamous marriage as her ideal; however, we might also reasonably believe that if she concludes that her prospects of contracting such a marriage are slight, she might be willing to marry a Muslim man who is already married given the religious superiority of the married life over the single life. Such a woman might also be unwilling to demand that her prospective husband divorce his first wife because she believes that such a demand is either religiously sinful or disfavored.
46. Such a woman might also believe that socially and personally she is better off in a polygynous marriage than she would be as a single woman. She would be able to enjoy religiously legitimate sexual relations; have the opportunity to bear and raise children; and participate in a communal social life that often revolves around families and not individuals.
47. We can likewise assume that already married Muslim women in the first instance do not desire to be involved in polygynous marriages. An already married Muslim woman, however, might continue in a polygynous marriage rather than demand a divorce for various reasons. She might have no objections to the

husband taking a second wife, although I assume that would be rare. More realistically, she might believe that life in a polygynous marriage is better than life as a divorcee, given the religious taboo against divorce and, depending upon the community in which she finds herself, the negative social ramifications of divorce upon herself and perhaps her children. She might also find that as a practical matter, economic circumstances render life as a single woman undesirable, or that her prospects of remarriage are remote and therefore a polygynous marriage is better than no marriage at all.

48. The various theoretical motives for entering or maintaining a polygynous marriage described in paragraphs 42-47 are based on reasonable theoretical conjecture; however, I have no basis for determining empirically the number of actual Muslims in Canada who might have such motives.
49. Because Islamic law recognizes that a polygynous marriage is disadvantageous from the perspective of the first wife, it refers to subsequent wives using the term *ḍarra*, which is derived from the Arabic root meaning "to harm."
50. Accordingly, the positive rules of Islamic law contemplate various legal protections to women in polygynous marriages that are not available in monogamous ones. For example, the Maliki school of Islamic law provided that if a man married to two wives sexually preferred one over the other, the disfavored wife could seek a judicial divorce on those grounds. This contrasts to the rule that applies to a woman in a monogamous marriage, in which case the wife is entitled to seek divorce on grounds of sexual abandonment only after substantial time had elapsed, typically four months, during which the husband refused to engage in marital relations with her.
51. Maliki law also criminalized "secret marriages," i.e. marriages in which the parties to the contract conspired to conceal the marriage from any other person. While this rule of criminal law is not explicitly stated as being for the protection of first wives, it is often the case that men attempt to hide the fact of their second marriage from the first wife.
52. Islamic law also permitted women to protect themselves from the possibility that her husband might take a second wife contractually. The standard contractual clause was known as *tamlīk*. Pursuant to this clause, the husband would delegate to the wife what was ordinarily his power to divorce so she could either divorce herself or divorce the second wife, in the event that the husband should take a second wife while still married to her.
53. Hanafi law also permitted wives to obtain a delegated power of unilateral divorce from their husband as a matter of contract, thereby allowing wives the power of divorce at will.

54. Many ordinary Muslims are unaware either of the detailed positive rules governing the Islamic laws of marriage and divorce, the sometimes profound differences that exist with respect to the various schools of Islamic law pertaining to the rights and obligations of the parties, and the right of the parties to insert binding conditions to the marriage contract. In this regard, it is noteworthy that the Canadian Council of Muslim Women has recently published on its web site a model Islamic marriage contract which provides for many optional clauses in the Muslim marriage contract, including, clauses limiting the right of the husband to engage in polygamy, along with explanatory comments thereto, both of which are attached as Appendix A (and available on line at http://www.ccmw.com/activities/act_Muslim_Marraige_Contract_Kit.html).
55. As stated in paragraph 28, marriage law is part of Islamic transactional law and not its ritual law. Accordingly, it is structured as a contract the legal formalities of which are minimal.
56. The legal formalities of the Islamic marriage contract are the two parties, a male and a female; a guardian (*walī*); an offer of marriage from one of the parties (or his or her duly appointed representative) and an acceptance by the other party (or his or her duly appointed representative). If the parties to the marriage enjoy full legal capacity, they must enter the contract willingly. (While traditional Islamic family law permitted the guardian to enter into binding marriage contracts on behalf of his minor children, the marriage of minors among North American Muslims does not seem to occur, as far as I know. The vast majority of nation-states that apply Islamic family law either do not permit or do not recognize the marriages of minors).
57. The contract is valid if the female is eligible to marry, i.e. she is not currently married or in a waiting period (whether from a prior marriage or as a result of widowhood); the male is eligible to marry, i.e. marriage to this woman would not result in a fifth wife. The parties must also agree to a dower (*ṣadāq* or *mahr*) that the husband pays, or will pay, to the wife.
58. Customarily, the dower is divided into two portions, the prompt dower and the deferred dower. The former is paid prior to consummation, while the latter is paid sometime thereafter.
59. The groom must also be a Muslim if the bride is a Muslim, but if the groom is a Muslim, the bride may either be Muslim, Christian or Jewish. Finally, there must generally be either two male witnesses or one male and two female witnesses to the contract.
60. The fact that a Muslim woman can only marry a Muslim man, while a Muslim man can also marry Christian and Jewish women, may contribute to a relative shortage of eligible male marriage partners in the Muslim community, thus

making a polygynous marriage relatively more attractive to Muslim females.

61. A religious sermon (*khutba*) on the religious significance of marriage is recommended, but its absence does not affect the validity of the marriage.
62. The marriage contract may take place anywhere, but as a matter of custom, it usually takes place either in a mosque or in the home of one of the parties. As a matter of custom, only the closest family members and friends usually attend the marriage contract, in contrast to the marriage party, which is relatively lavish and typically includes guests far in excess of those invited to the legal marriage ceremony.
63. A religious figure, often called an "Imam" in the North American context, will preside over the marriage contract, but his role is only to confirm that all the legal formalities have been satisfied, and to give the recommended sermon. The "Imam" does not marry the parties; the parties marry themselves pursuant to the marriage contract that comes into existence by virtue of a valid offer of marriage followed by a valid acceptance in accordance with the conditions for a marriage's validity as described summarily above. Accordingly, the presence of an Imam is irrelevant to whether an Islamic marriage has taken place, although the risk of a legal error is heightened if parties attempt to marry without expert advice on the constituent elements of the Islamic marriage contract.
64. In a state that applies Islamic family law such as Egypt, marriage contracts between Muslims are supervised by a public official called the "*ma'dhūn*," a term that literally means "the one whose permission is taken." The *ma'dhun* represents the Egyptian state and it is his responsibility to ensure that the legal formalities of the marriage contract are satisfied and to register the marriage with the state. He is almost inevitably religiously-trained, however, and is capable, if the parties so request, to give a religious sermon at the time of the contract.
65. The legal formalities of the marriage contract in traditional Islamic law do not differ depending on whether the marriage is monogamous or polygynous. Modern Islamic statutory law, however, may impose additional formalities in the case of a polygynous marriage, e.g., a requirement of formal notice to the first wife; permission of a judge; or, permission of the first wife.
66. To the best of my knowledge, polygyny exists to a limited extent among Muslims in Canada. It is generally taboo, not only on account of the current prohibition in Canadian criminal law, but because it is considered in one way or another to be shameful. Accordingly, it is difficult to determine the extent to which polygyny is currently practiced among Muslims in North America.
67. Among the most important factors that lead to polygynous marriages are divorce; widowhood; and conversion to Islam. Women who convert to Islam may be more prone to enter polygynous marriages than women born Muslim on account of the

social isolation that often results from conversion, the lack of a strong network of family and friends within the Muslim community, and a strong desire to integrate as quickly as possible into their new religious community.

68. Immigrant Muslim women may be more likely to acquiesce in polygynous marriages in Canada than they would in their home countries because of the relative social isolation that results from immigration. Whereas in her home country she could safely divorce and return to her extended family, that option might not be available to her in Canada where she probably lacks the support of an extended family and probably lacks the means to support herself independently.
69. The greatest issue facing the Muslim community with respect to polygynous marriages is their secrecy. In many cases, they are even kept secret from the first wife, something that is completely inconsistent with the spirit of Islamic religious teachings and the requirements of Islamic law.

Dated: July 21, 2010

APPENDIX A

Canadian Council of Muslim Women

**Sample Marriage Contract and
Explanatory Booklet**

Sample Marriage Contract



Confirmation of a contract of marriage based on mutual consent and agreement between

_____, born _____ and of marriageable age according to
[full name of wife] *[day, month, year]*

Canadian civil law, and _____, born _____ and of marriageable age
[full name of husband] *[day, month, year]*

according to Canadian civil law, concluded on _____ at _____
[date] *[place of wedding ceremony/signing of contract]*

In the presence of _____ and _____
[full names of two witnesses]

The citizenship of the bride is _____. The citizenship of the groom is _____.

The place of intended residence of the couple is _____.
[country or jurisdiction]

The parties intend that this contract is a domestic contract under the terms of _____.
(name of statute)

We know that Canadian civil law applies to married couples, and we understand that signing this contract does not take away civil rights. In particular we know that Canadian family law with respect to custody, access and child support must be followed regardless of the content of this marriage contract.

Signature of wife: _____

Signature of husband: _____

Signature of witness: _____

Signature of witness: _____

Declarations Relating to Marriage

We, _____ and _____,
[full name of husband] [full name of wife]
each declare that today we are not married to any other person. We declare that we are not married by
civil marriage, *nikāh* or any other type of Muslim marriage in any country or jurisdiction.

Signature of husband: _____ Signature of wife: _____

We, _____ and _____,
 [full name of husband] *[full name of wife]*
each declare that as of today we have not promised to marry any other person in any country or jurisdiction.

Signature of husband: _____ Signature of wife: _____

We, _____ and _____,
[full name of husband] [full name of wife]

each declare that as of today we are not involved in any action related to either civil marriage or Muslim divorce. We also declare that any divorce proceedings we may have been involved in, both civil and Muslim, have been completed before we sign this contract. We declare that any divorce we had outside of this jurisdiction is valid where we plan to live as husband and wife.

Signature of husband: _____ Signature of wife: _____

We, _____ and _____,
 [full name of husband] *[full name of wife]*
each declare that we will not try to marry any other person by either civil or Muslim marriage of any kind
while this marriage exists and while that each of us can exercise a right of divorce.

Signature of husband: _____ Signature of wife: _____

We, _____ and _____,
[full name of husband] [full name of wife]

confirm and agree that our marriage is the regular Muslim marriage, known as *nikāḥ*. We agree that the marriage will confer the full rights of a *nikāḥ* and will last through time unless one of us ends the marriage by divorce. This marriage is not a "marriage with intent to divorce."

Signature of husband: _____ Signature of wife: _____

We, _____ and _____,
 [full name of wife] *[full name of husband]*
agree on a *mahr* as follows: _____

Signature of wife: _____ Signature of husband: _____

Signature of wife: _____ Signature of husband: _____

1. The first part of the document is a title page. It contains the title "The Role of the State in the Development of the Economy" and the author's name "John Doe".

2. The second part of the document is an abstract. It provides a brief summary of the main points of the paper.

3. The third part of the document is the introduction. It discusses the importance of the state in the development of the economy and the role of the state in the development of the economy.

4. The fourth part of the document is the main body of the paper. It is divided into several sections, each discussing a different aspect of the role of the state in the development of the economy.

5. The fifth part of the document is the conclusion. It summarizes the main findings of the paper and provides some final thoughts on the role of the state in the development of the economy.

6. The sixth part of the document is the bibliography. It lists the sources used in the paper.

7. The seventh part of the document is the appendix. It contains additional information related to the paper.

8. The eighth part of the document is the index. It provides a list of the topics covered in the paper.

9. The ninth part of the document is the endpaper. It contains some additional information related to the paper.

10. The tenth part of the document is the back cover. It contains the title and author's name.

Signature of wife: _____ Signature of husband: _____

We, _____ and _____,
[full name of wife] [full name of husband]

do not believe that obedience of a wife to her husband is part of an ideal Muslim marriage. We promise
to build a relationship based on equality and respect for each other. We promise that we will consult with
each other and that neither one of us will have special authority or power over the other.

Signature of wife: _____ Signature of husband: _____

We, _____ and _____,
 [full name of wife] *[full name of husband]*
each declare that we will not use violence of any kind in the marriage and that we will not use force or
pressure in our personal relations. We also confirm that each of us has a full right of choice in matters
having to do with intimate relations.

Signature of wife: _____ Signature of husband: _____

We, _____ and _____,
[full name of wife] [full name of husband]
agree that _____ will complete _____, education to
[name of wife, husband, or both] [his/her/our]
the level of _____ and that we will do the best to support each others'
[degree or other details of study]
learning and that each of us has the right to work as we choose.
Signature of wife: _____ Signature of husband: _____

We, _____ and _____,
 [full name of wife] *[full name of husband]*
agree in principle and in a spirit of open cooperation that we will divide housework equally. We will take
into account the duties each of us has outside the home, such as those related to work and education. We
each agree that we will be respectful and constructive if we need to talk about any inequality or unfairness.

Signature of wife: _____ Signature of husband: _____

Declarations Relating to Religious Divorce

We, _____ and _____,
[full name of husband] [full name of wife]

pledge that if either of us is considering a Muslim or civil divorce, the parties will contemplate seeking reconciliation before drawing up the written declaration of divorce, in accord with the word of God in the Quran (4:35): "If you fear a breakdown between them, send arbiters, one from his side and one from hers; and if they wish to reconcile, God will bring them together...."

Signature of husband: _____ Signature of wife: _____

We, _____ and _____,
 [full name of husband] *[full name of wife]*

pledge that if either of us wants to have a Muslim divorce, the person divorcing will write up a paper document that is signed, dated, and notarized or commissioned. They will write, sign and notarize or commission the statement of divorce as soon as the divorce is started and make sure that it is delivered to the spouse being divorced within ____ days of that date. We understand that this declaration does not make or begin a civil divorce and that we must take other action to get a civil divorce.

Signature of husband: _____ Signature of wife: _____

I, _____, pledge that if I wish to divorce my wife through my own
 [full name of husband]
 pronouncement of *talâq*, I will only follow the best practice (Sunnah) of the Prophet. This means I will
 pronounce divorce only once, in a time of "purity" (*tuhr*, i.e. the time between menstrual periods), during
 which I will not have intercourse with my wife. It also means that the divorce will become final after a
 "waiting period" (*iddah*) of three menstrual cycles if my wife is menstruating, or after three lunar months
 if she is not. Following Quran 2: 228, "*Divorced women shall wait, watching over themselves, for three
 periods,*" my wife will count her own menstrual periods and I will respect her count.

Signature of husband: _____

Signature of husband:

Signature of husband:

Signature of husband:

Signature of husband:

Signature of husband: _____

We, _____ and _____,
[full name of husband] [full name of wife]
pledge to seek and complete any civil divorce in the jurisdiction of _____

Signature of husband: _____ Signature of wife: _____

We, _____ and _____,
[full name of husband] [full name of wife]
pledge to facilitate and grant a divorce in a foreign jurisdiction where our marriage may continue to exist
after our civil divorce is final.

Signature of husband: _____ Signature of wife: _____

C) HUSBAND'S SUNNAH DIVORCE UPON CIVIL DIVORCE

I, _____, agree to pronounce a divorce according to the best
[full name of husband]

Sunnah of the Prophet when the civil divorce is completed. I understand that any remaining *mahr* will be due upon divorce.

Signature of wife: _____ Signature of husband: _____

If you choose this option, strike A, B, D.

D) DIVORCE UPON VIOLATION OF STATED CONDITIONS

I, _____, place the power and option of divorce in the hands
[full name of husband]

of my wife if any of the conditions agreed to below are violated. We understand that any remaining *mahr* will be due upon divorce. We understand that the wife's options for Muslim religious divorce are not limited to the agreed conditions. Agreeing to allow the wife to divorce if these conditions are broken does not affect other measures available in Muslim law such as negotiated (*khul*) or judicial (*faskh*) divorce.

Signature of husband: _____ Signature of wife: _____

If you choose this option, strike A, B, C and sign the conditions you agree to below.

i. Condition of monogamy

I, _____, agree not to contract a civil marriage or Muslim
[full name of husband]

marriage of any kind, including mutah, while I am married to _____
[full name of wife].

Signature of husband: _____

ii. Condition of no harm

I, _____, agree not harm my wife physically or psychologically.

[full name of husband]

I understand that a claim of harm by my wife does not require her to show physical evidence or bring witnesses.

Signature of husband: _____

iii. Condition of having intimate relations only with the spouse

I, _____, pledge that I will not have intimate relations with other

[full name of husband]

persons while I am married, in accord with Quran 24:3, *"The adulterer cannot be married to anyone but an adulteress or idolatress, and the adulteress cannot be married to anyone but an adulterer or idolater."*

Signature of husband: _____

iv. Condition of not being away for long periods unless both spouses agree

We, _____ and _____,
[full name of husband] *[full name of wife]*

each agree not to live apart from the other for more than _____ without having our spouse agree to that absence before we go.

Signature of husband: _____ Signature of wife: _____

OTHER CONDITIONS RESULTING IN OPTION OF DIVORCE FOR THE WIFE:

[illegible]

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Pre:

Why CCMW created this kit



The Canadian Council of Muslim Women (CCMW) created this kit so that couples can respectfully use their heritage to define their marriage. It includes information that is useful to anyone who wants to learn more about the religious background to their marriage.

In Muslim law, contracts are used to define relationships and protect rights. This kit builds on that tradition by suggesting what can be included in a Muslim marriage contract. The kit includes a marriage certificate, a sample Muslim marriage contract and explanatory notes on what each clause means. For ease of use, the marriage certificate and the sample marriage contract are provided as separate inserts.

The kit also suggests ways to increase equality between a wife and husband in case of divorce. In traditional Muslim law, men are free to divorce and women do not have much power to begin a divorce. This inequality can sometimes lead to husbands refusing to grant a religious divorce after the couple has been legally divorced. The sample contract in this kit shows different ways to give a wife the power to divorce her husband. When both husband and wife have the ability to divorce, their relationship can be more equal.

You may use the information in this kit and the sample contract to draw up a contract that suits what you want and need. Talk to your partner about what could be in your contract. After you agree, each of you should get advice from a lawyer about the contract. When you have a contract that suits your needs, both of you should sign each clause that you agree to.

WHO SHOULD USE THIS KIT?

The kit may be used both by couples who are getting married soon and by those who are already married. It should not be used for a religious marriage without a civil marriage. Do not only get married in a religious marriage. The best way to protect your civil rights is to have a civil marriage.

WHAT IS THE KIT BASED ON?

The civil examples in the kit are based on the law in Ontario, Canada. We offer this information only as an example. If you would like to use the model outside of Ontario or Canada, remember that the civil law may be different in other parts of Canada and in other countries. **Remember that this kit is for information: it does not offer legal advice.**

We have used traditional Arabic books of the five main law schools to develop the sample marriage contract included in the kit. The kit gives some fairly detailed information about this traditional law so that users can realistically assess it and be aware of both its potential and limitations. Even if you do not consider yourself strictly bound by the old law, this information can help you to see how the sample contract is rooted in the Muslim legal tradition. Understanding that tradition can give us a link with the past so that we can evaluate it and build on it. (Some of the suggestions included in the Contract and Kit have been used by Muslim couples through the centuries to define their marriages, and have also been legislated by governments in Muslim-majority countries.)

BEFORE YOU SIGN ANYTHING, TALK TO A LAWYER!

Please remember that this kit is only for information. It cannot replace the advice you will get if you talk to a lawyer.

Be very careful about giving away your rights in Muslim law or in civil law. If you want to use any of the ideas in the kit, you should speak to a lawyer. If you are in a conflict, you should speak to a lawyer.

Two:

What is a Muslim marriage contract?



Muslims see marriage as a bond of affection and commitment. However, marriage is also a contract that the bride and groom formally offer and accept. Their acceptance of the contract indicates that they agree to certain rights and obligations. In the West, a Muslim marriage contract is a private document that has religious and moral power in a couple's private life.

A Muslim marriage contract does not have to be written on paper. The contract can be made simply through oral agreement. However, it has become common for people to get a marriage certificate that confirms their contract. These certificates usually include the signatures of the bride, the groom, and the people who witness their agreement. Some certificates also say how much dower (*mahr*) the groom will give to the bride. This is a basic Muslim marriage contract.

A basic Muslim marriage contract may be expanded. It can draw on Muslim law to include additional declarations about the rights and obligations in the marriage. Expanded contracts define and protect the rights and obligations of each spouse more fully than a simple basic contract. Muslim marriage contracts that are more expanded are especially useful in helping to protect the rights of the wife.

In the past, Muslim women have used expanded marriage contracts to define some of the terms of their marriage. Families have used expanded marriage contracts to guarantee rights for their daughters. Expanded contracts are widely used today, both privately and in the legal systems of many Muslim-majority countries. The right to draw up an expanded Muslim marriage contract is sometimes considered one of the "rights of women in Islam."

HOW IS RELIGIOUS MARRIAGE DIFFERENT FROM CIVIL MARRIAGE?

A civil marriage is one that is registered with the government. Governments define and can enforce the legal rights and responsibilities of civil marriages. A couple that is legally married has rights that other couples do not have. A religious marriage cannot replace a civil marriage.

HOW CAN I MAKE SURE I ALSO HAVE A CIVIL MARRIAGE?

In many places, religious marriages can be carried out by people who can register marriages with the government. If your marriage is conducted by someone who has this power, make sure that you sign two documents: the Muslim marriage contract and the civil marriage documents. This is the best way to protect your rights under civil law.

HOW CAN A MUSLIM MARRIAGE CONTRACT BE USEFUL?

A Muslim marriage contract may help in pre-marriage counseling. Talking about the terms of the marriage contract with your fiancé allows you to explore what you each expect and to define parts of your relationship before you are married. Many Muslim marriages in the West are between a bride and groom from different cultural and ethnic backgrounds. In these relationships the spouses may have very different ideas about marriage, so talking about your expectations is even more important. If you are already married, the contract allows you and your husband to talk about your ideas about marriage and divorce.

A Muslim marriage contract can also help a woman to get a religious divorce by having the husband and wife agree beforehand that she will have this power, just as the man does. Not all women believe that they need a religious divorce in addition to the civil divorce. They may consider that being legally divorced means that they are also divorced in the eyes of God. But if a woman does feel that a religious divorce is important, the contract can give her peace of mind and also allow her husband to demonstrate his trust and respect for her at the outset of their marriage.

In most Muslim-majority countries, the law that now exists is a reformed version of the traditional law. This law is accepted by most of the population as Islamic and is administered by the governments of these countries. Muslims in the West are in a different position. For us, Muslim law is a private religious matter. It is not controlled by the government, except when it conflicts with local laws such as those that forbid polygamy. The lack of control by the government means that we Western Muslims have a great deal of freedom to follow our own conscience about religious standards and laws. This freedom is strengthened by the fact that Muslim law itself originally gave individuals, including women, the power to learn about different opinions and to follow the ones that we consider the most correct.

In this atmosphere, it is possible for each couple to create a marriage contract that reflects the principles of their religion. Perhaps the main restriction of Muslim law is the rule that the contract should not give unfair advantage to either spouse or reduce the rights of either person.

The contract you create may inform and inspire others. Ultimately, the legal practice of Muslims in the West may influence developments in the Muslim-majority world.

WILL MY MUSLIM MARRIAGE CONTRACT BE ENFORCEABLE BY A COURT?

In most countries, private documents like the Muslim marriage contract do not have much power. Instead, courts base their decisions on what the civil law says about divorce and child custody.

Some countries do recognize marriage contracts and prenuptial agreements, but the legal power of these agreements is different in different places. Even in many countries that recognize marriage contracts, the courts may not pay much attention to the contracts or enforce them. Sometimes, courts will not enforce the contract if it includes anything that does not agree with the civil law of that jurisdiction. For example, in Canada, a marriage contract (Muslim or not) is not legal if it says anything about what will happen to the children if the marriage ends. This is because civil law does not permit marriage contracts to address this issue.

Your Muslim marriage contract is more likely to be recognized by the courts if you also have a civil marriage. To protect yourself, make sure you know your rights and responsibilities according to the civil law where you live. Speak to a lawyer or visit your local family court.

WHEN SHOULD I AVOID A MUSLIM MARRIAGE CONTRACT?

If someone offers to marry you in a religious marriage but not a civil marriage, **do not agree**. The best way to be sure that your rights are protected is to also have a civil marriage.

SHOULD WE TALK TO A LAWYER WHEN WE DRAW UP OUR MUSLIM MARRIAGE CONTRACT?

Yes. Hire a lawyer who has experience with family law. Consider the marriage contract carefully. Make sure that it does not ask you to sign away any of the rights you have under civil family law, such as your financial rights as a wife. **You and your spouse should each hire your own lawyer.**

A Muslim marriage contract is a private contract, but it may potentially become relevant in court proceedings, just like any other private agreement. A court might see it as a legal document and consider what it says. This could happen even if you never planned for the contract to be a legal document. For example, a court could look at the contract if the marriage ends and one of you asks the court to enforce the contract, or if one of you asks for compensation because your spouse did not follow a condition in the contract. Even if a court does not directly enforce any part of the contract, the declarations and agreements in the contract may become relevant to mediation ordered by the court or to other legal matters.

The Muslim marriage contract may also be ignored by the courts. For example, in Western countries many Muslim women undergoing divorce have taken legal action to try to enforce the *mahr* term of their marriage contract. Some of these actions have been successful, but some have not. This area of the law is still developing, and a wife cannot be sure that she will receive her *mahr* even if it is specified in a contract.

IF I HAVE A RELIGIOUS DIVORCE, DO I NEED A CIVIL ONE?

Having a religious divorce does not legally end your marriage. **Every couple that gets a religious divorce must also get a civil divorce.** If you do not get a civil divorce, the law considers that you are still married and you will not be able to legally remarry.

You must get a formal court order for a civil divorce. You **cannot** negotiate a civil divorce through an agreement such as the Muslim marriage contract.

In a civil divorce, your husband may have to give you money in addition to the *mahr* in your Muslim marriage contract, and you may have other rights and responsibilities. Talk to a lawyer. A lawyer can tell you about your rights under family law. A lawyer can help you get a civil divorce.

Three:

What parts of Muslim law suggest that wives can divorce?



In traditional Muslim law, husbands have the power to divorce freely whenever they wish. Women, however, have a very restricted right to divorce in traditional law. Fortunately, parts of the Quran and *hadith* as well as some parts of traditional law suggest ways of allowing women to begin a divorce. According to some opinions in traditional law, a man may give full power of divorce to his wife when they marry or at any other time. Some traditional law also allows the couple to include conditions in the contract. If any of these conditions are not followed, the wife can divorce the husband. Conditioned marriage contracts have been used in the past by families who wanted to secure a better marriage with more rights for their daughters. In some Muslim-majority countries, conditioned contracts have been introduced into the law in order to give women greater rights.

WHAT DOES THE QURAN SAY ABOUT DIVORCE?

Some parts of the Muslim scriptures suggest that both the husband and wife have the right to begin divorce. Quran 4:128 says: "If a woman fears bad behaviour (*nushūz*) or neglect from her husband, it will not be any sin for them to peacefully agree [to separate], for peace is better."

However, the traditional Muslim law finally decided to make it difficult for the wife to get a divorce. To get a divorce, she would have to go before a Muslim authority such as a judge and cite grounds. The grounds for divorce were usually very limited, but one school, the Málíkí, did allow a woman to ask for divorce if the marriage was causing her some kind of "harm" (*darar*) or if the marriage had come to a point of a "breakdown" (*shiqāq*). This was based on Quran 4:35: "If you fear a breakdown [in marriage] between them, send arbiters, one from his side and one from hers; and if they wish to reconcile, God will bring them together...."

A wife could also negotiate a divorce with her husband through the *khul* (also spelled in English *khula*). However, a *khul* divorce usually involved the wife giving up some or all of her *mahr* and other benefits. The traditional law also decided that it was up to the husband whether or not to accept negotiations and to grant the divorce.

Most governments of modern Muslim-majority states have reformed the law so that women have more opportunity to divorce through the courts. Although this has improved the situation, it can still be difficult for women to end troubled marriages.

It can be even more difficult for Muslim women to get a religious divorce in Western countries. This is because husbands are not obliged to follow the reformed laws that are enforced in Muslim states. Instead, they might choose to rely on some of the traditional rules that allow them to refuse a divorce. The Quran (2:229) says that a man should either "live together in a decent fashion" with his wife or "let her go in the best possible way". Most Muslim men will follow the best standard of their religion and quickly grant a religious divorce when the marriage has broken down. But this is not always the case. Some Muslim women in the West have been denied religious divorce. Women who want a religious divorce in addition to their civil divorce can also try to find someone who will judge their case, confirm that they have valid reasons and give them a religious divorce. But it can be difficult to find someone who will do this, since community leaders are often unwilling to grant divorces.

WHICH HADITHS INDICATE THAT WOMEN MAY DIVORCE?

Some *hadiths* (stories of the statements and actions of the Prophet) describe the Prophet as allowing women to initiate divorce. One of these tells how the wife of Thábit ibn Qays ibn Shammás came to the Prophet and said, "O Messenger of God! I do not blame Thábit for any defect in his character or religion, but I am afraid that I may commit unbelief [by behaving badly or getting angry at God because of dislike of her husband]." The Prophet then said to her: "Will you return his garden?" "Yes," she said. So she returned his garden to him, and the Prophet told him to divorce her (Bukhárí, *Kitáb al-Taláq*, *Báb al-Khul wa-kayf al-taláq fi-hi*; also in the *Báb al-Taláq* of al-Nisá'í and Ibn Májah).

Another *hadith* concerns a woman called Barírah and her husband Mughíth. The Prophet's Companion and cousin Ibn Abbás remembered how Mughíth used to follow Barírah around, weeping so that his tears flowed down over his beard. The Prophet said to Abbás: "Are you not astonished at Mughith's love for Barírah and her intense dislike of him?" He then said to Barírah, "Why don't you go back to him?" She said, "O Messenger of God! Are you ordering me to do so?" No, "the Prophet said, "I am only interceding for him." Barírah then declared: "I have no use for him" (Bukhárí, *Kitáb al-Taláq*, *Báb shafá'at al-nabí fi zawj Barírah*; also in Abú Dáwúd, *Kitáb al-Taláq*; Tirmidhí, *Kitáb al-Ridá*; Nisá'í, *Kitáb Ádáb al-qudát*, and other canonical collections).

A third *hadith* tells about a young girl, apparently still a virgin, who came to the Prophet and informed him that her father had married her to her cousin against her will. The Prophet allowed her to choose for herself [i.e. to divorce if she wished]. She then said: "I accept what my father did, but I wanted to make it known to women that fathers have no say in this matter" (Abú Dáwúd, *Kitáb al-Nikáh*, *Báb fi al-isti'már*).

While these three *hadiths* might seem to clearly indicate that women should have the right to initiate divorce, this is not easily accepted in the old tradition. For instance, some of the commentary and titles given to the *hadiths* by the authors of the *hadith* books suggest that the stories were tied to special circumstances, e.g. that Mughith was a slave and Barírah's right to reject him was related to his slave status (there is in fact a dispute about whether he was a slave or not; see e.g. Sháfi'i, *Umm*, V: 131-2). What finally happened is that the traditional law did not grant women the right to divorce without consent of the husband, except through petition to a judge on the basis of rather limited grounds. Nevertheless, the survival of such texts in Islamic literature along with provisions of Muslim law which facilitate divorce tells us that there have been voices arguing for the right of divorce since long ago.

WHAT DOES TRADITIONAL LAW SAY ABOUT ADDING CONDITIONS TO MARRIAGE CONTRACTS?

As in many matters having to do with Muslim law, there are differences of opinion between and even within the law schools concerning conditioned marriage contracts. This "diversity" (the Arabic term is *ikhtiláf*) is recognised and accepted as part of the law, which resembles an ongoing debate more than a fixed set of rules. The diversity of legal thinking has been preserved in this brief discussion so that you will have a fuller idea of what the Muslim legal heritage contains and be able to reflect and make your own decisions.

It is the traditional **Hanbalite** school of law that accepts conditions in a contract most easily. The Hanbalite Ibn Qudámah says that conditions that confer some kind of benefit on the woman are allowed. The examples he gives are that the woman stay in her own house or country, that she not have to travel with the man, and that he not marry anyone else or take a concubine. These types of conditions, Ibn Qudámah insists, must be honoured by the husband, and "if he does not, she can get a divorce from a judge." They are binding, says Ibn Qudámah, because they do not interfere with the basic requirements of marriage, just as if a woman asked for a larger dower. Nor, he argues, do they violate the law by arbitrarily forbidding what it allows. The man is still free to do all that the law allows; it is only that the woman may from her side dissolve the marriage if he does certain things (*Mughní* VII, 448).

According to Ibn Qudámah, certain conditions are automatically invalid when a spouse tries to add them to a marriage contract, although the marriage itself will still be valid. Examples of conditions that are automatically invalid are that a wife does not get *mahr* (dower) or support, that the husband not have full intercourse with her, or that he spends more or less time with her than with his other wives. These conditions are invalid, says Ibn Qudámah, because they take away rights before the contract is even concluded and are therefore contrary to its intended effect. Even if such invalid conditions are added, however, the marriage itself remains valid since the rejected conditions are considered superfluous additions that do not affect the basic soundness of the contract (*Mughní* VII, 450). In addition, if a woman agrees on a certain amount of support as part of the marriage contract, it is not binding and she can go back on the agreement, according to Ibn Qudámah (*Mughní* VII, 450-51). This is because full support according to what the man is able to provide is a basic right of the wife which cannot be taken away.

The other law schools, that is the **Hanafites**, **Sháfiites**, **Málikites** and **Shiites**, are traditionally reluctant to allow conditions, apart from those which are already in accord with the contract such as the amount of *mahr* and the schedule of *mahr* payment. These four schools do, however, agree with the Hanbalites that conditions that affect the wife's rights such as limitations on support, non-payment of *mahr*, or limitations on inheritance are automatically void, with the contract remaining valid (see for example Sháfi'i, *Umm* V, 79-80; Hilli, *Tahrir* II, 34).

Despite some reluctance on the part of traditional law to allow conditions in a marriage contract, many Muslims today regard a conditioned contract as one of the "rights of women in Islam," and some modern Muslims states use the contract in their legal systems as a way to give women greater rights.

WHAT DOES TRADITIONAL LAW SAY ABOUT DELEGATING A POWER OF DIVORCE TO THE WIFE?

The action through which a groom or husband transfers his power of divorce to his bride or wife is variously called *tawkil* "power of attorney", *tafwid*, "delegation," *tamlík* "complete transfer of power" or *takhyir*, "choosing." These different expressions, which have somewhat different meanings, come up in discussions about what the precise nature of the action of delegating divorce is in technical legal terms. *Tafwid* is probably the most common term, and the English equivalent "delegation" is used in this discussion for convenience.

Delegation of divorce grows out of the fact that traditional law does not give women independent power of divorce, leaving them with limited opportunity to get out of unsuitable marriages. It seems that this strict law did not adequately answer the social requirements of mediaeval Muslim society. One of the solutions of the scholars was to have the groom or husband delegate his power of divorce to his wife. The husband does this of his own free will, while still retaining his own right to divorce. Divorce can be delegated at the time of marriage or sometime after.

Delegation gives the woman a power of divorce that she can use independently without having to depend on any court or authority. Delegation also has the advantage over a right of divorce activated by violation of conditions that the woman does not have to tie the divorce to particular circumstances mentioned in the contract. This is important because she might some day have reasons for divorce that she could not foresee when the contract was drawn up. Even though allowing the wife to divorce through a conditioned contract is widely known and discussed among Muslims today, there is actually more agreement in the traditional law on divorce through delegation.

This does not mean that delegation of divorce to the wife is easily allowed in traditional law or that everyone agrees that it is valid. As in most matters having to do with Muslim law, there are differences of opinion between the law schools concerning aspects of delegation and even different opinions within individual schools. This "diversity" (in Arabic, *ikhtiláf*) is recognised and accepted as part of the law, which resembles an ongoing debate more than a fixed set of rules. The diversity of Muslim legal thinking has been preserved in this brief

discussion so that you will have a fuller idea of what the legal heritage contains and be able to reflect and make your own decisions. Note, however, that there are still many more opinions and nuances than those mentioned below. Although there are not many translations of Muslim law books into European languages, we mention translations wherever we can so that readers can find them in libraries and explore the discussions further for themselves.

Differences of opinion about delegation of divorce among the traditional scholars revolve largely around legal technicalities. But they also reveal a tension between desire to facilitate divorce for women on the one hand and reluctance to allow them independent power on the other. Some legal scholars and schools seem to want to give women the right to divorce, while others allow delegation but place limits on it that reduce its impact or even empty it of meaning. Nevertheless, the existence of lengthy and very specific discussions of delegation in the traditional legal books indicates that the need and right of women to sometimes take the decision to divorce gained some recognition in Muslim law and that some women actually did hold a delegated power of divorce. Many reformists today also favour delegation.

Three key questions arose in discussions of delegation. One was whether the delegation was revocable, that is whether the husband could withdraw it before it was used, or not. A second question was how long the delegation could last. A third question was whether the husband was delegating one divorce or more. The significance of this point was that one or two pronouncements of divorce can be retracted by the husband, whereas three pronouncements make the divorce definitive and final, leaving the husband with no more opportunity to take his wife back. Different opinions on these questions either strengthened or weakened the woman's power.

The **Hanafites** (the most widespread school of law in Muslim-majority countries today) granted the most power. The Hanafites settled on a method of delegation that ensured that the husband could not withdraw it, made the delegation last permanently, and allowed for delegation of three divorces or a final divorce of some other kind.

The Hanafites made delegation irrevocable by insisting that the action of a husband giving his wife the power to divorce herself from him possibly against his will could not logically be described as a mere revocable "power of attorney" (*tawkil*). Rather, they classed the action as true delegation (*tafwid*) or even "complete transfer of power" (*tamlík*), which are not revocable. This, however, raised another problem. The legal actions known as *tafwid* and *tamlík* are limited to the "session" (*majlis*) in which they are discussed. Thus they expire once the couple parts company, or even when the subject of conversation is changed. That problem was solved by extending the delegation beyond the session into the indefinite future through verbal formulas expressing the husband's intent to do so. The law books sometimes discuss delegation under the headings of those formulas; for example, "the affair in the hand." Finally, triple or final divorce was secured through allowing the husband to specify it in his delegation, either explicitly or through words reasonably alluding to that intent, e.g. "your affair is in your hand" (*amruki bi-yadiki*). These Arabic formulas for permanent delegation of divorce approved by the Hanafite school are used in the Sample Marriage Contract included in this kit.

These strategies allowed by the Hanafites point to the desire of the traditional scholars not only to give women power to divorce, but also to allow husbands to cooperate with their wives in arranging the couple's relationship between themselves.

Before reviewing the positions of the other schools, we present short excerpts illustrating the principles just outlined from two Hanafite law books available in English (for a full account of Hanafite doctrine in the original Arabic, see Sarakhsí, *Mabsút* VI, 196-223). Marghínání (12th century) says in the chapter on delegation of divorce in his famous *Hidáyah* ("Guide"):

If he says to her, "Divorce yourself whenever you like," then she has the right to divorce herself within the session and thereafter (p. 600) and If he says to her, "You are divorced as many times as you like," or "what you like," then she can divorce herself as she likes [i.e. with one or two divorces, which would allow the husband to take her back during the waiting period if he wished, or with three, which would make the divorce immediately final] (p. 605).

The 17th-century scholar al-Haskafi says in his *al-Durr al-Mukhtár* ("Choice Pearl"):

She cannot divorce herself after that, i.e. after the meeting [session], except when he had added to his saying "Divorce thyself" [talaq nafsaki] and similar expressions [for example] the words "Whenever thou desirest" [matta shi'ti] or "As long as thou desirest" [matta má shi'ti]. In such a case the exercise of the power is not limited to the same meeting and it is not valid for the husband to retract (p. 172).

Readers looking further into either of these translations will see that most of the discussion is taken up with pointing out circumstances that would give the wife something less than a final divorce whenever she wanted it, for example the wife interrupting a session in which an offer of delegation is made or the husband offering less than one divorce or not specifying the number of divorces. The authors make it clear that this can be avoided by clearly specifying these matters, as has been done in the sample marriage contract.

The **Málikites** also allow delegation. The *Mudawwanah* of Sahnún, a key Málikite work recording answers to legal questions said to have been given by Málik himself, devotes a substantial chapter to the subject.

The strongest kind of delegation in Málikite law is *takhyír*, "choosing." Choosing is in general irrevocable, that is the husband cannot withdraw the choice he has given. The Málikites also say that choosing will almost certainly result in a final divorce, even if that is not specified. Málik states in the *Mudawwanah* that if a husband invites a wife to "choose herself" (*ikhtár nafsaki*) and she takes up the option by replying that she does choose herself, she is completely divorced and the husband cannot deny it by claiming that he meant only one or two (and therefore retractable) divorces. The reason given by Málik for the basic finality of divorce through choosing and inability of the husband to deny it is that real choice has to include the ability of the wife "either to stay with or permanently separate from him [the husband]" (II, 373-4).

Traditional Málíkite authorities are generally reluctant, however, to make delegation last indefinitely. Although they do not limit delegation to the “session” in which it is given, there is a feeling that it should be used within a short time. There is even talk – as far as we know, unique in Muslim discussions of delegation – of need for intervention of a judge, the function of the judge being to question the woman about her decision as soon as it becomes known that divorce has been delegated. It is said that the couple must then be separated until the woman gives her answer (which should, again, be very soon) in order to prevent intercourse taking place between the couple while the status of the marriage is in doubt. Málík himself is said to have had a different opinion, ruling that the wife retains the right of divorce delegated to her without any time limit unless the couple has intercourse (*Mudawwanah* II, 377; also in French in Bousquet’s translation of the *Mukhtasar* of Khalíl, p. 92). In either case, the Málíkite traditional law, or at least the Málíkite opinions surveyed for this account, do not see divorce delegated to a wife as a very durable power.

The Málíkites, however, also use power of attorney (*tawkiḷ*) to secure the right of a woman to divorce. A power of attorney in Muslim law is normally revocable, which makes it less than ideal for this purpose. But the Málíkites say that if the power of attorney is linked to a “right given to the woman in addition to the power of attorney, such as preventing him from marrying another wife”, he cannot revoke it (*Háshiyat Dasúql*, II, 405-6). Traditional scholars often give taking a second wife as an example of a reason a woman would divorce using the power gained through delegation or a conditioned contract. One receives the impression that a desire on the part of women or the parents of brides to escape polygamy was an important incentive for the legal scholars to devise legal means for women’s divorce.

The tension between wishing to place time limits on a wife’s delegated divorce, as if the delegation were related to some temporary disturbance between the couple, and wanting to extend delegation into the future is also evident in Sháfiite discussions. Reviewing the various opinions of the school, al-Malibárí al-Hindí reports the view that a woman’s reply of “I divorce myself” to the phrase “divorce yourself if you wish” has to come “immediately” or at least “after a [very] short time.” Others (Malibárí names three scholars, though he disagrees with them) said that “immediacy is not required in the case of [the man adding] ‘whenever you wish’ [*matta shi’i*], and the woman may divorce when she wishes” (*Fath* IV, 25; a brief statement from the famous ‘*Umdat al-sálik*’ of Ibn al-Naqíb agreeing with this opinion is found in English translation in Keller, *Reliance* p. 557).

Malibárí also points out, however, that the man may revoke his delegation. This view, which is quite the opposite of that held by the Hanafites, seems to be widespread among the Sháfiites (e.g. Shīrbīnī *Mughnī* III, 286); but some Sháfiite scholars do disagree and hold that delegation of divorce to the wife cannot be revoked (Nawawī, *Majmú’*, XVII, 89, mentioning an opinion with which the author, however, does not agree). The difference may be due to whether delegation is defined as true *tafwid* or merely a power of attorney (see Linant de Bellefonds II, 333).

Similar to the Málíkite doctrine, some Sháfiites also say that a husband may not revoke delegation of divorce to his wife if the delegation is attached to a condition. Malibárf gives the interesting example of a condition that the wife may divorce if the husband hits her without provocation (in which case the burden of proof that he was provoked would fall on him) (*Fath* IV, 25). *Note that Canadian law does not allow physical abuse for any reason, including supposed provocation. Physical abuse is always illegal and may be prosecuted.*

The Sháfiites say that a delegated divorce is final if at least one of the spouses makes it explicit that it includes three divorces while the other spouse intends three, even if he or she does not state that explicitly (Nawawí, *Minhaj* trans. Howard, 329).

The **Hanbalites** go some way toward making delegation last and making the divorce that results from it final. Buhúti speaks of a consensus of the school that power of divorce delegated to the wife through the phrase "your affair is in your hand" is not limited to the session, but may be taken up at will (*Kashsháf* V, 291). Regarding delegation through "choosing" (*takhyír*), Ibn Qudámah also says that even though the power of divorce issuing from it normally has to be used right away (*Mughní* VIII, 294), it may be made to last by a phrase such as "when you like" or "whenever you like", (*matta-má shi'ti*) (ibid., 296). However, the husband may retract both kinds of delegation by either canceling them verbally or having intercourse with his wife (ibid. 296 and 287-8; *Kashsháf* V, 292; but Linant de Bellefonds II, 331, speaks of some Hanbalite opinion allowing true cession).

Here we see relaxing of one limitation, i.e. the duration of the woman's power to divorce, emptied of meaning by insistence on another, i.e. the right of a husband to revoke that power. This is a common problem with delegation of divorce outside the Hanafite school, where it is not a very sure or reliable power. The Hanbalite Ibn Qudámah does, however, acknowledge another strategy for women's divorce sometimes seen in Muslim law. This involves a man promising to grant a divorce in the future in exchange for a certain sum (using a phrase such as "whenever you give me"), in which case, according to Ibn Qudámah, the promise is binding and may be taken up by the wife either immediately or later as she likes (*Mughní* VIII, 200.)

On the question of whether a delegated divorce may be final or not, Ibn Qudámah says that the statement of a woman who holds the power of divorce through delegation (*tawki'l*) that she "divorces herself" is necessarily a general one, covering the whole of the matter it refers to, so that it must count for three divorces. Thus the man's claim that it means only one divorce cannot be accepted, since it is contrary to what the statement clearly means (ibid, 291, 298). Ibn Qudámah confirms that a woman's divorce based on delegation established by the phrase "your affair is in your hands" also automatically results in three divorces (ibid. 297). Buhúti adds that Ibn Hanbal himself "repeatedly gave his opinion to this effect" and that the same reasoning is applicable when the husband tells his wife to "divorce yourself whenever you wish" (*Kashsháf* V, 292).

Twelver **Shiite** traditional law seems to have had the least favourable attitude toward delegation of divorce to the wife. This may be because the Shiites are more cautious than the other schools about divorce in general, as seen in their insistence that a man's divorce be witnessed and their forbidding of the quick triple and all other *bida* divorces. There is even controversy in the school about whether "choosing," the generally least radical kind of delegation, is admissible. Some allow it (al-Sharīf al-Murtada is a strong advocate; see *Rasā'il* I, 241), but many do not (see the summaries of Tūsī in *Khilāf* IV, 469 and 'Allāmah Hillī in *Mukhtalaf* V, 338).

The Shiites, however, have a special attitude toward their traditional law. The crucial factor for a Shiite believer in determining a legal standard is not the old books, but rather the edicts of a number of living Ayatollahs recognised as qualified authorities. Ayatollah Sīstānī, the most prominent Shiite jurist in the world today, says that if a woman "lays a condition at the time of marriage that if her husband goes on a journey or, for example, does not give her support for six months, she will be his *wakīl* (authorised deputy) for her own divorce, the condition is in order" (www.sistani.org). Here Ayatollah Sīstānī, similar to the Mālikites and Shāfiites and probably also in accord with a part of the old Shiite tradition, secures the right of a woman to divorce through a power of attorney (*tauwkīl*) tied to particular conditions. Note that Ayatollah Sīstānī's opinion does not necessarily represent all modern Shiite views. Other authorities may have different views on powers of attorney and delegation, since the opinions of Ayatollahs can vary widely and it is possible for fresh opinions to appear as new figures emerge.

Persons wanting to move forward on the basis of Muslim law are evidently faced with sorting out, selecting and building on traditional opinions. The sample marriage contract in this kit depends on this approach. In the case of delegation of divorce, for instance, the solution offered draws most directly on Hanafite law, though it also resembles parts of the doctrine of other schools.

Moving forward on the basis of Muslim law may also be facilitated by participating in an existing reform movement. For instance, creating a modern marriage contract acceptable to the Muslim community is made easier by the fact that expanded contracts have already been in use for some time in a number of Muslim-majority countries. Delegation of divorce (*tafwīd*) is included in a marriage contract issued by the government of Pakistan (reproduced in Carroll, 50-52) and a contract recently issued by "The Muslim Institute" in Britain (http://www.musliminstitute.com/pdfs/Muslim_Marriage_Contract.pdf). One phrase of the delegation clause of the sample contract in this Kit is actually drawn from the Pakistani document, and parts of the contract relating to *mahr* depend on the language of an *Acknowledgement of Sufficiency of Maher* document in use by the Canadian Ismaili community.

These strategies may not, however, be sufficient to overcome basic problems deeply embedded in the traditional law. The problem in the case of delegation of divorce is that even though the woman is given the ability to independently divorce, it is derivative. She depends on the man's consent to that ability, so complete equality is not achieved. Some women's groups in Pakistan have tried to address this problem by suggesting that the official contract assume delegation and include a clause for the husband to sign only if he wants to *refuse* to delegate divorce (Carroll, 52). Others (Carroll, 10-11) have approached the problem of women's divorce by referring not to the law but the Quran alone, citing as a model the Prophet's offer of divorce to his wives mentioned in Surah 33, verses 28-29. This may or may not address the derivative nature of delegated divorce; but the Prophet's offer of divorce, in any case, is partly the inspiration for discussion of delegation in the traditional law, and the traditional law generally views the episode as pointing to a choice requiring an answer in a very short time rather than a durable power.

We know of no discussion of delegation of divorce to the wife and issues relating to it in English, although the French scholar Linant de Bellefonds does touch on it briefly in his *Traité de droit musulman comparé* (vol. 2, pp. 331-33 & 358-9). For those who know Arabic, al-Khafif's *Muhádarát* and al-Jaziri's *Fiqh* cover more. Fareeha Khan's article "Tafwíd al-Taláq: Transferring the Right to Divorce to the Wife" reviews historical instances of *tafwid* and the pro-*tafwid* opinion of a traditional Indian scholar in the early 20th century. For details of these works, see the Bibliography at the end of the Kit.

WHERE CAN I LEARN MORE ABOUT TRADITIONAL LAW?

The Muslim part of the Canadian Council of Muslim Women's *Muslim and Canadian Family Laws: A Comparative Primer* (Toronto: CCMW, 2006) is a quick reference for many aspects of the traditional laws mentioned in this kit. The Primer includes citations from many of the best known traditional law books of the four Sunnite and Jafari (i.e. Twelver Shiite) schools.

Four:

Explanatory Notes

This section explains what is in the marriage certificate and in each clause of the sample contract. Read it carefully. Think about how you want to use the sample contract. You may want to use the contract as it is, sign some parts of it and cross out others, or write your own version. Talk to your partner about what could be in your contract. After you agree on what you want, get advice from a lawyer. Remember that you and your partner should each talk to your own lawyer.

MARRIAGE CERTIFICATE

The writing in Arabic calligraphy on the certificate is from the Quran and is verse 21 of Súrat al- Rúm. Here is an English translation of this verse:

God created for you spouses from among yourselves in order that you may have tranquility and contentment with one another, and God placed in your hearts love and care for each other. Surely in this there are signs for people who reflect.

The certificate confirms the contract between you and your husband. The paragraph on this certificate says the contract is something you have both agreed to. It states the full name, date of birth and citizenship of both the bride and groom. It says where the marriage took place and who witnessed the wedding. To show where the contract will take effect, it states where the couple plans to live. The final statement on the certificate says that you both know that you have civil rights in family law and signing the contract does not take away those rights.

Important note about the law: A person who is dishonest about their name, age or citizenship can be charged with fraud in criminal court.

SAMPLE MARRIAGE CONTRACT

Part 1 Declarations relating to marriage

The first part of the contract includes nine declarations about the rights and obligations of the husband and wife. It includes declarations that say that each person is free to marry and promises to be monogamous. This section also includes clauses that define the marriage and the *mahr*. Finally, it outlines how the spouses will treat each other.

Declaration that we are free to marry

When you sign this declaration, you are saying that:

- you are not married in any way to another person in any other place,
- you have not promised to marry anybody else in any other place,
- you are not involved in a divorce,
- any past divorce is complete before you sign this contract, and
- if you were divorced in the past, your divorce is valid in the place where the couple plans to live.

Important note about the law: A person who is dishonest when they sign this section can be charged with fraud in criminal court.

Declaration of monogamy

When you sign this declaration, you are saying that:

- you will not marry any other person while this marriage exists and while you are able to exercise a right of divorce.

Note that the traditional Hanbalite law school freely allowed a condition of monogamy in the marriage contract. Other schools allowed the wife a power of attorney for divorce that was tied to a condition of monogamy – for more information about this right, refer to page 13. The Prophet Muhammad had no other spouse while he was married to his first wife Khadijah, and Ali ibn Abi Talib, the husband of the Prophet's daughter Fatimah, also took no other wife while she was alive.

Important note about the law: The sample contract says "while each of us is able to exercise a right of divorce" to protect women. If a contract includes this phrase, a woman who is denied a Muslim divorce will not be prevented from remarrying.

Declaration of type of marriage

This declaration says that the marriage is a *nikāh*, or regular Muslim marriage.

When you sign this declaration, you are saying that:

- the marriage is not meant to last only for a fixed term, as in a *mutah* marriage, and
- the marriage is not one of the "lesser contract" marriages such as clandestine (*sirrī*), itinerant (*misyar*), or customary (*urfi*) marriage.

A *mutah* marriage involves specific words and procedures different from those of a *nikāh*. A *mutah* marriage contract states exactly how long the marriage will last and the amount of money to be paid immediately to the *mutah* wife, so it should be obvious if the marriage is really a *mutah*.

When you sign this declaration, you are also saying that:

- neither the husband nor wife is secretly planning to divorce at some later time.

Most scholars have forbidden marrying with a hidden intention of divorce (Arabic: *al-zawāj bi-nīyat al-talāq*), and almost all Muslims regard it as unethical and un-Islamic. But the matter continues to be discussed. When people talk about marrying with intention to divorce, they often use the example of a Muslim man marrying a citizen in order to immigrate to or study in a foreign country.

Declaration of mahr – amount

This is the place in your marriage contract to say what *mahr* you have agreed to. A Muslim marriage contract always includes a *mahr*. Even if the contract does not mention *mahr*, it is still part of the contract and the husband must pay a reasonable amount. If the contract does not say how much the *mahr* will be, the couple may agree on it after they are married.

Muslim legal scholars say that agreements about *mahr* are automatically void if they say that:

- the wife must give up *mahr*,
- an arbitrator will decide the amount of the *mahr*, or
- one spouse can decide by themselves how much the *mahr* will be.

If an agreement about *mahr* is declared void, the contract itself and the marriage are still valid.

According to Muslim law, contracts should clearly state the amount of the *mahr*. Description of the *mahr* should not be vague or ambiguous. Most opinions of the traditional legal schools also say that the *mahr* should be substantial and something tangible, with real value. Some of the Muslim legal schools set a minimum dower in the currency of their times. No legal maximum is set by any school, although it is also recommended that the wife not ask for too much. The husband may raise the amount of the *mahr* after marriage, if the wife agrees.

Both traditional and modern authorities insist that the *mahr* is not part of an exchange and not a sign that the marriage contract is a contract of sale. Still, some Muslims feel that the *mahr* looks like an exchange, and so they choose to agree on a small, symbolic amount of *mahr* or a symbol such as a ring.

Couples who want the *mahr* to have legal power should talk to a lawyer. Here are some possible reasons why courts might not enforce the *mahr* in your marriage contract:

- the legal system where you live does not recognize the contract as a legal document,
- the judge or courts consider that *mahr* is a religious matter,
- a husband believes that what he paid his wife in the civil divorce covers the *mahr*, and
- the judge does not believe that women should get any more money than they get in the civil divorce award.

Muslim law includes a very strong principle that a woman owns and controls her own property, including her *mahr*. However, in many Western civil courts it is possible that a *mahr* that was paid before divorce may be counted as part of the joint marital assets. To preserve the woman's ownership of the *mahr*, you should make it clear that it belongs only to the woman. The *mahr* should not be mixed with other family assets. To achieve this, we suggest that you use wording such as: "Both parties agree that the *mahr* is to be considered property or an asset owned by the wife prior to the marriage, not divisible if a divorce occurs." Talk to a lawyer about how to word this so that it is more likely to be effective in the court system where you live.

When you sign this declaration you are saying that:

- the amount of the *mahr* was freely agreed to by both of you,
- the wife can take the husband to court if he does not pay the *mahr* agreed to in the contract, and
- the *mahr* belongs only to the wife.

Declaration of mahar – time of payment

The *mahr* is considered to be owed to the wife by the husband. Traditional Muslim law says that the entire *mahr* is due upon marriage and may be claimed by the wife at any time, unless the couple has made other arrangements. This declaration says what the couple has agreed to about when the husband will pay the *mahr*. Some couples agree that some of the *mahr* will be paid immediately and that the rest will be due at some later date or when the marriage ends by divorce or death. Your contract could also say that all of the *mahr* will be paid immediately, that it will be paid in installments, or that it will not be paid unless the couple divorces or the husband dies.

If the husband dies and any of the *mahr* has not been paid, traditional Muslim law counts the unpaid *mahr* as a debt against the husband's estate, separate from the wife's inheritance. If you want to say this, add a sentence to this part of the contract.

When you sign this declaration, you are saying that:

- you both agree about when the husband will pay the *mahr* to you.

Declaration about obedience

Most societies in the world give men more power than women. The idea that a man has power over his wife is found in traditional understandings of many religions such as Christianity, Judaism, and Hinduism. It is also taken for granted by many non-religious people. This common view is also reflected in traditional Muslim law, which assumes that a wife is under her husband's authority and that she should obey him.

Traditional Muslim law says that the wife has three basic duties of obedience. It says that she:

- must live in the same house with her husband,
- must not leave the house without her husband's permission except to visit relatives, and
- should not refuse to have sexual relations with her husband if she does not have a valid excuse (such as that she is menstruating or ill).

The Canadian Council of Muslim Women believes that marriages should be based on equality and respect. We have included this declaration as one way to show that both the husband and wife want their marriage to be based on these values. We do not believe that obedience of a wife to her husband is part of an ideal Muslim marriage. We recall the example of the Prophet who is said to have consulted with his beloved wife Khadijah about his first experience of revelation and with his wife Umm Salamah about an important treaty. In some traditional Christian wedding vows the wife pledged to obey the husband, but many Christians today refuse to mention obedience.

When you sign this declaration, you are saying that:

- you want your relationship to be based on equality and mutual respect,
- both spouses should consult with each other, and
- neither of you has power over the other.

The traditional law books include long discussions of the wife's duty to obey her husband and the husband's right to discipline her (see next declaration) if she disobeys him. Some conservatives may argue that the wife's obedience is at the centre of the contract and one of the rights that cannot be taken away from husbands.

Declaration of no force or violence

Traditional law says that a husband may have the right to discipline a wife who is disobedient. He is allowed to distance himself from her or to stop supporting her. He may also hit her; although the law and a number of well-known *hadiths* define this as light hitting that does not involve physical harm. Aishah, wife of the Prophet, is reported to have declared: "The Messenger of God, peace be upon him, absolutely never hit any of his wives or any servant, and he never raised his hand against anything at all except to fight in the way of God" (*Sahih Muslim*, in the *Book of Virtues*).

When you sign this declaration, you are saying that:

- you will not use violence of any kind in the marriage, and
- you will not use force or pressure in your personal relations.

You are also saying that:

- each spouse has a full right to decide about matters of intimate relations.

Important note about the law: Canadian law does not allow physical abuse for any reason, including disobedience. Physical abuse is always illegal. People who use force or violence can be charged with a criminal offence. Canadian criminal law also prohibits rape within marriage. A man who rapes his wife can be charged with the criminal offence of sexual assault.

Declaration about education and work

When you sign this declaration, you are saying that:

- you and your spouse support each other in her or his wish to get a specific level of education.
- you and your spouse recognize the right of the other to work, including outside the home.

This clause is not relevant to every situation, but we included it because Muslim societies value education.

Declaration about household responsibilities

When you sign this declaration, you are saying that:

- you agree to share housework equally with your spouse, being considerate about all of the other burdens of daily life on your spouse, and
- you will be respectful and constructive if you feel the division of housework is unequal or unfair.

Part 2 Declarations relating to religious divorce

This part of the sample contract includes five important declarations about divorce. Read each one carefully. Make sure that you understand what each declaration means.

Declaration of seeking reconciliation before divorce

When you sign this declaration, you are saying that:

- you will try to reconcile before you start a religious or civil divorce.

This declaration builds on traditional law in several ways. The Quran encourages reconciliation. For example, Verse 4:35 says: "If you fear a breakdown [in marriage] between them, send arbiters, one from his side and one from hers; and if they wish to reconcile, God will bring them together..." Although divorce is legally allowed, several sayings of the Prophet as well as discussions in the law books condemn it, as in the famous *hadith*: "The Prophet of God, peace be upon him, said: The permitted thing most hated by God is divorce" (Ibn Mājah, *Book of Divorce* in the *Chapter on the detestability of divorce*). These warnings against hasty divorce were aimed at men, since it was men who had free power of divorce.

But the Quran also recognises that when a couple cannot establish a harmonious relationship, it may be better to end the marriage. Thus we see that in the verse cited above, reconciliation depends on the wish of both the husband and wife to continue the marriage. Quran 2:229 recommends that a man who has already divorced his wife twice should either "continue to live together with her in a decent fashion or let her go in the best way possible."

Muslim law also recognises that although divorce is generally undesirable, it may be necessary in some circumstances. For this reason, the scholars considered that the moral quality of a divorce depended on the circumstances. In one typical classification, divorce is said to be detestable (*makrúh*) "if a man divorces his wife while their relationship is going well and each is attending to the rights of another," but actually recommended (*mandúb*) if there is a "breakdown" (referring again to Quran 4:35), relations are not good and rights are not being fulfilled from either side (Túsí, *Wasláh*, 319). **Neither the Quran nor the traditional law says that a woman or a man should stay in an abusive marriage.**

Declaration of divorce in writing

In traditional law, the husband can carry out divorce by himself. He can divorce by simply saying so. The husband can divorce his wife without documents or court action. His wife does not need to be with him when he pronounces divorce against her, and he does not need to tell her immediately about the divorce. In every tradition except the Shiite school, he does not need witnesses to the divorce.

People can easily be confused about whether a divorce has actually taken place, because there are different opinions about which words result in a divorce, whether or not a divorce is valid when the man pronounces it in anger, and what words or actions prove that a man has taken his wife back during the waiting period (*iddah*).

When you sign this declaration, you are saying that:

- you will tell each other, in writing, if you start a religious divorce

This declaration says that a divorce cannot take place unless it is put in writing, is signed and dated, and is notarized or commissioned. By signing this declaration, the couple knows that they will be told explicitly and immediately if they are involved in a Muslim divorce. According to Shiite law, a divorce must be witnessed by two valid witnesses. Members of this school should add the names and signatures of the witnesses to the document confirming that a divorce has been started.

Remember that in the case of a man's Sunnah divorce, the divorce has not really taken place and become final until the end of the waiting period.

Declaration of following the practice (Sunnah) of the Prophet, peace be upon him

This declaration describes the kind of traditional divorce considered to be closest to the Sunnah. The best Sunnah divorce requires the husband to pronounce divorce once and then let the wife go at the end of a waiting period, giving her all of her *mahr*. The clause describes

- when the husband may pronounce *talâq*,
- how long the husband must wait before the divorce is final, and
- what happens if the wife agrees to return during the waiting period.

By signing each clause in this section, the husband is promising that he will:

- maintain his wife at least until the end of the waiting period, in addition to any payments due to her under civil law,
- not pronounce *talâq* if he knows that his wife is pregnant,
- only follow the Sunnah practices of divorce, and
- pay any *mahr* still due when the divorce is final.

When your husband signs this declaration, he is agreeing to follow these best practices of the Prophet, peace be upon him.

Declaration about where we will get a civil divorce

When you both sign this declaration, you are saying that:

- each of you will only seek a divorce in the place where you plan to live.

We have included this declaration to make sure that each spouse knows what laws apply to them in case of divorce. Sometimes a spouse begins divorce in a different place as a way to escape their responsibilities by paying lower amounts of support or having fewer obligations after the divorce. This can happen if a man living in a Western country tries to get a divorce in a Muslim-majority country in which the laws are less favourable to women. A man's divorce in some Muslim-majority countries may take a shorter time than divorce in the West. By signing a declaration such as this one in your contract, your husband is pledging that he will not get a foreign divorce before civil proceedings are started in the place where you live. **This declaration does not guarantee that your husband will not divorce you in another country.** It only gives you a possible argument against him in court if he does so.

Declaration about ending a marriage subsisting in another jurisdiction

When you both sign this declaration, you are saying that:

- each of you agrees that after you have a civil divorce, you will give your spouse a divorce in any foreign jurisdiction that does not recognize your Canadian divorce.

It is most likely that your civil divorce will be recognized, but there is still a small possibility that some Muslim-majority countries may not easily acknowledge foreign civil divorces. This may happen if your marriage was registered in that country. If your marriage is registered in any way outside of Canada, one way to protect yourself is to ask your lawyer to put a condition on your civil divorce settlement that requires your husband to give you a divorce overseas before the civil divorce can be completed.

Part 3 Granting power of divorce to the wife

This section of the sample contract gives you four choices about how the wife can have a power of divorce. Read the four options carefully. Each option is different, and only the first one gives the husband and wife truly equal rights to divorce. The last option is the least equal because it says that the wife can only get a religious divorce under certain conditions.

Choose the option that fits best with your own views and feelings. Include that option in your marriage contract. If you copy the sample contract from this kit, make sure that you only sign one of the four options. Strike out the three options that you do not sign.

Here is a summary of each option, from the most to the least equal:

A) Religious divorce upon civil divorce says that the husband and wife will consider that they have a religious divorce if they have a civil divorce. This option allows equal rights to divorce for both the spouses.

B) Power of divorce through delegation says that the husband can delegate his power of divorce to the wife. This is the option discussed on pages 10–16 of this Kit. It is not as equal as the first option, because it depends on the husband agreeing to give his wife the power of divorce. The sample contract includes two possible phrases: “Divorce yourself whenever you wish with a final divorce” or “Your affair is in your hand for a final divorce, or three divorces”. These are both translations of formulas specified in the Arabic law books, as discussed in the section on delegation of divorce.

C) Husband’s Sunnah divorce upon civil divorce says that the husband agrees that he will immediately divorce his wife by the Sunnah divorce if there is a civil divorce.

D) Divorce upon violation of stated conditions lists conditions that both the husband and wife agree to which would allow the wife to divorce. This option is the least equal.

We have suggested four conditions that would give the wife the right to divorce if they were violated. You may add other conditions. Remember to ask a lawyer to look at the contract before you sign it. You may agree to sign, or not to sign, any of the conditions listed in your contract. Make sure that you do not sign any condition that might affect your rights under civil family laws.

The wife will not automatically be divorced if the husband breaks one of the conditions. Rather, if the husband breaks a condition, the wife can choose to divorce her husband if she wants to. Some Muslims may say that the wife needs the help of a judge to decide if a condition has been broken. However, the conditions listed in the sample contract are obvious and do not need a judge.

If you choose the option of divorce through violation of stated conditions, you still have the right to use other measures under Muslim law such as negotiated (*khul*) or judicial (*faskh*) divorce.

The conditions listed in the sample contract are:

i. **Condition of monogamy**

The condition of monogamy is already included in the "Declarations relating to marriage" in Part One of the sample contract, but it is repeated here as a condition that gives the wife the option to divorce.

ii. **Condition of no harm**

This condition says that the husband promises not to hurt the wife physically or emotionally. He also agrees that it is up to the wife to say whether or not she has been harmed. Harm (*darar*) is a ground of divorce allowed by the Málíkite school of law. *Darar* in the traditional law was already fairly widely defined, so that it might include even psychological harm. In many Muslim-majority countries today, *darar* is allowed as grounds for divorce.

iii. **Condition of having intimate relations only with the spouse**

The sample contract has only the husband sign this condition, but the Quranic verse cited forbids adultery of both spouses. It is important to understand that the Quran and traditional law forbid a husband from being violent against his wife if he suspects or even knows that she has been unfaithful. Suspicion against a wife of adultery is addressed in Quran 24:6-9. These verses describe a formula for divorce. The husband bears witness and swears four times that his wife has committed adultery, and then the wife bears witness and swears that she is not an adulterer. No proof, punishment, or violence is involved, and the couple is immediately divorced. One well-known *hadith* suggests that it is wrong for a man to accuse his wife of adultery, even if he is certain it is true. In this *hadith*, the Prophet becomes very angry at a man who insists on making the accusation (Bukhárí, *Book of Divorce, Chapter of those who allowed three divorces*).

iv. **Condition of not being away for long periods unless both spouses agree**

This is a common condition in marriage contracts issued by governments in modern Muslim-majority countries. In Canada, we suggest that the couple agree that one year of absence leads to the option of divorce, because civil law in Canada says that this is the usual time that couples must be separated before they can divorce.

v. Other conditions

You may add other conditions, provided that they are consistent with the basic marriage contract. For example, you cannot add a condition that there will be no *mahr* or no sexual relations. If you add a condition that is not valid, your contract and your marriage will most likely still be valid according to Muslim law. For more information about adding conditions to marriage contracts, read the information on pages 9–10.

Five:

List of traditional legal works and other sources cited in the Muslim Marriage Contract Kit



Some of the works on this list were accessed through the database al-*Mu'jam al-fiqhī*, 3rd edition. In a few cases, bibliographic information not complete on the database was reconstructed using library catalogues. All websites were last accessed September 20, 2008.

Buhūfī (Hanbalite, 17th century). *Kashshāf al-qind'*. 6 vols. Beirut: Dār al-Kutub al-'Ilmiyah, 1418/1997.

Carroll, Lucy and Harsh Kapoor, eds. *Talaq-i-Tafwid: The Muslim Woman's Contractual Access to Divorce: An Information Kit*. Women Living Under Muslim Laws, 1996.

<http://www.wluml.org/english/pubs/pdf/misc/talaq-i-tawfid-eng.pdf> A French version may be available directly from the organization, Women Living Under Muslim Laws.

Clarke, L. & P. Cross. *Muslim and Canadian Family Laws: A Comparative Primer*. Toronto: Canadian Council of Muslim Women, 2006. Translated into French as *Guide comparative: Lois musulmanes et canadiennes de la famille*.

Dasūqī (Mālikite, 18th century). *Hāshiyat al-Dasūqī*. 4 vols. [Cairo]: Dār Ihyā' al-Kutub al-'Arabīyah [198-?].

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- al-Malībārī al-Hindī (Shāfiite, 16th century). *Fath al-mu'in*. 4 vols. Beirut: Dār al-Fikr, 1418/1997.
- Nawawī (Shāfiite, 13th century). *al-Majmū': sharh al-muhadhdhab*. 20 vols. Cairo: Dār al-Fikr, 1900s. [Commentaries on the *Muhadhdhab* of Fīrūzābādī Shīrāzī, 11th c.]
- _____. *Minhaj al-talibin*. Translated by E.C. Howard from the French translation and paraphrase of L.W.C. Van den Berg as *Minhaj et talibin. A Manual of Muhammadan Law according to the school of Shāfi*. London: W. Thacker & Co, 1914.
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Six:

How to Use the Sample Contract

How to use the sample contract

- You may want to use the contract as it is, sign some parts of it and cross out others, or write your own version.
- Remember that you will need two copies of your Muslim marriage contract, one for each spouse.
- Each spouse should consult a lawyer.
- When your contract is ready, both copies should be signed, dated and formally witnessed.
- Have both copies of the contract notarized or commissioned. Make sure that you follow the local laws about having a contract notarized or commissioned.
- Keep your copy of the contract in a safe place.

NOTE: For ease of use, the Sample Contract is a separate piece in this Kit.