

Brittany Landorf
Macalester College
Grinnell Peace Studies Student Conference Spring 2012

The Recognition of Shari'a: An In-depth Analysis of Islamic Custody Cases

Introduction:

*Hadana*¹, child custody in Islam under *shari'a*, disputes reflects the many conflicts exhibited between *shari'a* and American secular law. *Shari'a*, literally translated, means 'the way.' It is Islamic religious law, guiding every aspect of Muslim life. In Islam, religion and law are intertwined unlike the American separation of church and state. *Shari'a* encompasses both the rituals of Islamic marriage and the laws and precedents governing them. In non-Islamic countries, *shari'a* is similar to Jewish *Halaka* law and operates in concurrence with secular law. Multiple levels of complexity characterize international *hadana* cases tried in the U.S. American courts challenge the jurisdiction of *shari'a* and *fiqh*, Islamic jurisprudence, in family law because of the misinterpretations and negative associations of *shari'a* in the U.S. Furthermore, seventeen states in the U.S. have currently passed or are in the process of passing legislation to ban *shari'a*.

International *hadana* cases involve several systems of laws: domestic and foreign *shari'a*, American law and the legal codes of the International Covenant of Civil and Political Rights. The freedom to practice religious rituals is protected by the U.S. Bill of Rights and the ICCPR, thus Islamic rituals governed by *shari'a* should be guaranteed in U.S. Courts. As noted by General Comment 22, "The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in

¹ Islamic terms referenced in this essay are defined in full in an appendage at the end. Definitions have been compiled from modern and classical interpretations of *shari'a* as they are applied to the United States.

article 4.2 of the Covenant.” Given the current political tensions in the United States, the protection of Islamic religious rights in American civil courts is precarious and is determinant on the court’s understanding of *shari’a*. These cases are further complicated when foreign *shari’a* is introduced, causing courts faced without an established legal precedent, to make sweeping judgments about the legality of *shari’a*.

The conflict of religious and secular law in civil court challenges the religious definition of marriage as a pact between two people under their God with the civil definition, which categorizes marriage as a contract between a couple and the state. Courts must walk a fine line between respecting religious rights and upholding civil law. American courts have difficulty defining the cultural and religious practices of *shari’a*, thus oftentimes inhibiting them.

(Welchman) Furthermore, *hadana* disputes are ruled by a case-by-case basis, preventing a precedent from being established.

Hadana Customs in America

Hadana disputes constitute the most complicated cases of *shari’a* brought before American courts due to a myriad of causes. At the heart of these complications is Islamic pluralism in America. Caused by a changing Muslim demographic in the U.S., it has created an *ikhtilaf*—a structure of simultaneously valid different opinions—that complicates interpretation of *shari’a* in America. (Zamin) The lack of formal training for *imams* in America further contributes to the confusion surrounding *hadana* rulings, “Individuals can choose between the guidance of local Muslim scholars, community leaders, activist organizations, or their own personal interpretive efforts on a given question.” (Welchman) The Muslim community’s confusion over *shari’a*

contributes to the disputes of the legality of *nikah*, the Islamic marriage contract negotiated by an *imam* or religious leader, and *talaq*, husband initiated divorce. Furthermore, Islamic pluralism makes it difficult for American courts to interpret the varying opinions on *shari'a*. If the court determines the *nikah* and *talaq* to be valid, the court must then to decide whether to follow *hadana fiqh* in *shari'a*. (Zamin) This leaves the U.S. court to determine the true content of Islamic law.

Modern interpretations of *hadana* customs in America are a compilation of foreign *shari'a* practiced in Islamic countries and traditional *shari'a* composed by the Quran and the example set by Muhammad in the *Sunnah*. Traditionally, *hadana* is given to the father in *shari'a*, unless the *nikah* or separation agreement comes to a separate conclusion. The wife must rescind her custody once the children turn of age², with the male child coming of age earlier than the female. (Syeed-Miller) Under the mother's custody, it is expected that the children be raised in Islam. A mother will lose custody before the children come of age if she remarries or has other children. The *nikah* is imperative in regulating *hadana* terms and represents a woman's rights in marriage. If the *nikah* states provisions other than normally dictated by *shari'a*, these provisions transcend *shari'a* customs and are enforceable under contract law in court. (Syeed-Miller)

In international cases involving foreign *shari'a* law, American cases must decide what constitutes child abduction. According to classical schools of *shari'a*, the mother of the child cannot remove the child from the father without permission and is illegally abducting the child if she does so. (Syeed-Miller) This becomes a substantial conflict when the mother or court issues

² The age of the child varies dependent on which school of *shari'a* is followed. (Syeed-Miller)

an Order for Protection against the father. Furthermore, the child's standard of best interest does not always lie with the father, even if religious law automatically grants custody. U.S. courts must reconcile foreign *shari'a* with domestic *shari'a* and domestic civil law to determine: jurisdiction, custody of the child, and whether abduction occurred.

Currently, American courts have not established a unified precedent for *hadana* cases. The court's decision is dependent on whether it chooses to recognize *shari'a* or American jurisdiction. There decision also must rest upon the recognition of the *nikah* agreements and enforcement of the *mahr*, the dower or bridal gift promised by the husband to the wife. (Welchman)

In Protection of Religious Rights: the ICCPR and the First Amendment

Islamic religious rituals and rights are challenged by the conflicts between *shari'a* and American law. American courts, which do not recognize the legality of *shari'a*, also dismiss the legality of Islamic marriage and divorce practices. (Syeed-Miller) In *hadana* cases, the courts ignore the religious and cultural import in determining the child standard of best interest when they invalidate *shari'a* jurisdiction.

The first Amendment to the Constitution of the United States of America and the International Covenant of Civil and Political Rights protect the freedom of religion. While the U.S. is party to the ICCPR, it has declared that it views the ICCPR as a non-self executing treaty. By viewing the ICCPR as non-self executing, the U.S. does not have to implement articles 1-27 (including Article 18) into domestic law even though the treaty is considered binding international law. This provision gives U.S. courts to rule on international law as it applies to domestic law, but

domestic law still protects the freedom of religion and protection of religious practices through the First Amendment.

Thus when the American court inhibits the religious practices of *shari'a*, it violates the freedom of religion as guaranteed both nationally and internationally. Furthermore, state legislation banning *shari'a* law that negatively affects the ability of American Muslims to practice their religion is also a violation of the ICCPR and first amendment, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” (Bill of Rights) As a result, the Tennessee bill proposed in early 2011, which bans “any and all recourse” of the practice of *shari'a*, violates the American Muslims religious rights.

When American courts disregard religion as a determinant of the child standard of best interest in *hadana* cases, they violate Article 18(1) of the ICCPR. Article 18(1) details the right to the “observance and practice of religion or belief.” (General Comment 22) The child’s religion is an important component of *shari'a* when deciding *hadana*. General Comment 22 also asserts this religious right may be observed “either individually or in community with others and in public or private” and includes “participation in rituals associated with certain stages of life.” Muslims recognize these rituals to be identified in *shari'a* as *nikah*, *mahr*, and *talaq*. The court infringes upon these religious practices when it misinterprets *shari'a*, forgetting that it is equally a legal and a religious body. By invalidating *shari'a* jurisdiction it exhibits an ignorance of the importance of these Islamic practices, for example, refusing to enforce the *mahr* strips a Muslim woman’s right to define her marriage and receive compensation if it fails. (Al-Hibri)

Hadana: The Custody Conflict

Shari'a fiqh governing child custody practices is a contentious legal topic in America. U.S.

courts are faced with a divisive conflict of jurisdiction when correlating *shari'a* and secular law during custody battles. They must decide how much influence religion and culture have on determining the child standard of best interest. (Zamin) *Hadana* disputes crossing international lines face more intricate jurisdiction guidelines. These cases must navigate between *shari'a* in Islamic countries, American *shari'a* and American civil law in order to determine the child standard of best interest. Courts employ legislation regulating child abduction in the U.S., the Uniform Child Custody Jurisdiction Act and its replacement the Uniform Child Custody Jurisdiction and Enforcement Act, to determine the case's jurisdiction. The interpretation of these acts varies court by court. In some instances, the court may acknowledge a foreign country's jurisdiction. While there is not an established precedent regarding *hadana* disputes, courts generally follow *shari'a* jurisdiction when it does not come into conflict with American law. (Syeed-Miller) Misinterpretations of *shari'a* and its role in Islamic religious life adversely affect the courts' consideration of its validity.

In *shari'a*, a child born of an Islamic father must be raised Muslim. American courts must decide whether religion is important in determining the child standard of best interest in *hadana* cases, keeping in mind the establishment clause of the First Amendment. At the present time, courts are deciding this on a case-by-case basis, generally ruling according to the separation agreement between spouses rather than the *nikah* agreed upon before marriage. (Welchman) "Agreements between divorcing spouses with respect to the religious upbringing of their children will be upheld by the courts only when incorporated into separation agreements, court orders, or signed stipulations...In the absence of a written agreement, the custodial parent...may determine the religious training of the child." (*Jabri v. Jabri, 1993*) Courts often misinterpret *shari'a*

jurisdiction and rule against it, thus refusing to enforce a father's right to raise his children Muslim, which is an important religious provision in *shari'a*. (Syeed-Miller)

Identifying whether child abduction has occurred in *hadana* cases is difficult and emphasizes the conflict of secular and religious legal jurisdiction. While under *shari'a*, the father is granted paternity rights over any child produced by marriage, U.S. law decides custody based on the child's best interest and does not always honor the religious paternity of the father. (Syeed-Miller) The U.S. State Department highlights the concerns involving *hadana* disputes and paternal rights in *shari'a* in a report warning of the consequences of Muslim marriages.

Although the report aims to be informative, it provides only a brief sketch of Islamic custody law and does not explain essential provisions of *shari'a*, such as the three different forms of divorce: *talaq*, *khul'*, and *tafriq*, "The wife may be divorced by her husband at any time with little difficulty and without a court hearing." (U.S. State Department) The report's language contributes to negative associations of *shari'a* as well as adds to misconceptions of important aspects of *shari'a* family law.

Jurisdiction: Ali v. Ali (1994)

Ali v. Ali was a *hadana* case concerning a foreign country and Gaza *shari'a* jurisdiction. In 1993, the plaintiff [the wife] in the case filed a complaint against the defendant [the husband] for a divorce, sole legal custody of the child from the marriage and permission to resume her maiden name. From Gaza, the defendant filed a motion against the complaint, stating as reasons, "lack of *in personam jurisdiction* over the defendant." (*Ali v. Ali*) He argued that the New Jersey court was entitled to enforce the divorce granted to him by the *shari'a* court in Gaza. The court

ruled against his motion and held up the original complaint. Basing the supremacy of its jurisdiction over the Palestinian courts in Gaza according to the UCCJA and *parens patriae*³, a New Jersey court ruled that *shari'a* was an inadmissible argument. In its conclusion, it stated, “the law of the Sharia Court is undeniably arbitrary and capricious and cannot be sanctioned by this court.” The court clearly exceeded its boundaries in this statement as it only needed to say that it is not consonant with the laws of New Jersey.

This case points out the conflicting determinants of the child standard of best interest as well as the fear of child abduction and *shari'a*. While the UCCJA was an act passed by the U.S. government, courts also used it to apply to foreign custody cases. In *Ali v. Ali*, the court used the UCCJA to assume jurisdiction over the Gaza *shari'a* court. It denied the jurisdiction of *shari'a* court. The importance in this case lies in its summary judgment, which issues the warning that, “circumspect of foreign custody decrees based on Islamic law because it is mechanical, formulaic and should not be followed.” (Welchman) This judgment effectively dismissed *shari'a* on the grounds that it was overtly traditional and inapplicable to American law in all contexts.

Jurisdiction: Amin v. Bakhaty

The decision in *Amin v. Bakhaty* (2001) further accentuates the importance of jurisdiction in determining the admissibility of *shari'a* legal arguments in court. This case highlights the controversy of *shari'a* and child abduction—is it a crime if a mother and her children leave the country without the father’s permission?

³ Jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents

In 1998, Ms. Amin traveled to America with her minor son to visit her sisters and meet her husband who resided in New Jersey for the majority of the year. Her husband, Dr. Bakhaty, brought charges against Ms. Amin, who was then his wife, in Egypt for leaving the country with their minor child. Ms. Amin subsequently filed suit for divorce in Louisiana while Dr. Bakhaty filed for divorce and custody in Egypt. After Dr. Bakhaty received the divorce granted by Egypt, he filed a Petition for Civil Warrant in Louisiana.

Citing the UCCJA, the court “declined to recognize Egypt as the child’s home state.” (*Amin v. Bakhaty*) Furthermore, the court asserted that the UCCJA does not, “mandate recognition of a foreign ‘state’ for purposes of determining jurisdiction without regard to the best interest of the child.” (*Amin v. Bakhaty*) Thus, in this case, the Louisiana court ruled that the child standard of best interest should be determined by Louisiana law and declared the father’s paternal right to custody under *shari’a* to be an inadmissible.

Child Standard of Best Interest: Hosain v. Malik

Hosain v. Malik differs from the cases detailed above. While this *hadana* dispute also involves a foreign country and several different jurisdictions, the appellate court of Maryland found *shari’a* to identify the child standard of best interest.

In 1990, the wife left her husband, taking their child with her. After the father sued for custody, the mother fled to America with the child, eventually moving into the home of a man. While in America, she was represented by counsel in Pakistan but refused to appear or produce the child.

Ruling according to *shari'a*, the Pakistani court awarded custody to the father. The father then journeyed to America to find the child, searching for two years. At this time, the wife filed for custody in Baltimore.

The court upheld the circuit court's ruling, which stated that the Pakistani court ruled in favor of the child's best interests, taking into account the "particular culture, customs, and mores of Pakistan and the religion of the parties." (*Hosain v. Malik*) This case articulates judicial consideration of religion in an analysis of the child standard of best interest. (Syed-Miller) It is also important to highlight that the Maryland court did not view classical Islamic custody rules as contrary to public policy, "we are simply unprepared to hold that this longstanding doctrine...is repugnant to Maryland public policy." (*Hosain v. Malik*)

Conclusion

Shari'a is an expansive legal and religious code, which is not easily interpreted. Legislation prohibiting the practice of *shari'a* in America denies Islamic religious rights because *shari'a* encompasses the Islamic religious life. *Nikah*, *mahr*, *talaq*, and *hadana* are religious rituals governed according to *shari'a* and are rights protected by the ICCPR and the Constitution of the United States. When courts misinterpret *shari'a*, they affect the rights of American Muslims. *Hadana* cases that do not include religion as a factor in the child standard of best interest question the jurisdiction of *shari'a* and the right of Muslims to practice Islam in the U.S.

The wide spectrum of court judgments concerning *shari'a* jurisdiction in the U.S. is exhibited by *hadana* court cases. These cases highlight the conflict of recognizing and respecting Islamic

religious practices in accordance with American secular legal precedent. They identify the complications of foreign *shari'a* in custody conflicts and the question: should cultural and religious factors be considered when establishing a child's best interest. Often, these court cases violate Islamic religious rights when they do not understand *shari'a* family precedents and are not equipped to pass judgment. (Zamin) The U.S. has not established *shari'a* tribunals, in contrast to other western countries such as Canada and Britain. (Zamin) In 2006, the Muslim Council in Canada established a *Shari'a* Council made up of *imams* and Islamic scholars. The practice of *shari'a* in Britain has resulted in the creation of several *shari'a* courts that work in tandem with secular courts, becoming a hybrid legal construct. In order to ensure the protection of Islamic religious rights governed by *shari'a*, the U.S. should establish *shari'a* tribunals that combine secular law and *shari'a*.

The growth of an Islamic contingency in the U.S. necessitates an understanding of their religious and legal practices. U.S. courts must be able to level an informed decision on *hadana* cases, free of misconceptions and presuppositions about the Islamic religion. *Hadana* disputes are often complicated cases with multiple levels of jurisdiction, but it is the court's duty to protect the religious rights of Muslim Americans in these instances. Thus the courts must navigate the legal parameters of determining the child standard of best interest in civil law with respect to the religious practices that are inherent in *shari'a*.

Relevant Terms

Shari'a: It is primarily a compilation of the precedents set forth in the Quran with the teachings and actions of the prophet Muhammad in the *Sunnah*. Secondary sources of authority for *shari'a* come from the consensus of religious scholars (the *ijma*) and analogy from the Quran and *sunnah* through *qiyas*.

Talaq: A husband's unilateral right to divorce by pronouncing 'talaq' three times.

Mahr: Dower promised to the wife in the *nikah*. It is usually paid in partial up-front and the remainder would be received at the dissolution of the marriage unless the wife initiates divorce through *khul'*.

Sadaaq: Dower or bridal price received by the wife in the *nikah*.

Khul': Divorce for remuneration conducted through mutual consent.

Tatliq/tafriq: Divorce initiated by the wife. There must be significant reason for a divorce (SUCH AS...) A wife may sometimes forgo her right to receive the rest of her dower in *khul*.

Faskh: Judicial dissolution of a marriage.

Nikah: The Islamic marriage contract negotiated by the wife and husband before entering into marriage. Also interpreted as 'marriage.'

Mut'a: Temporary marriage under the *shia* school of *shari'a*.

Hadana: Custody of child in Islam under *shari'a*.

Halaka: Jewish religious law.

Iktilaf: Structure of simultaneously valid different opinions. (Welchman)

Bibliography

- The Case for Banning Sharia Law in America by JanSuzanne Krasner
- "PEOPLE v. BENUÂ -Â May 13, 1976." *Leagle Home* . N.p., n.d. Web. 11 Dec. 2011.
<http://www.leagle.com/xmlResult.aspx?page=8&xmldoc=197622687Misc2d139_1189.xml&docbase=CSLWAR1-1950-1985&SizeDisp=7>.
- " - AGHILI v. SAADATNEJADI - TN Court of Appeals." *FindLaw: Cases and Codes*. N.p., n.d. Web. 11 Dec. 2011. <<http://caselaw.findlaw.com/tn-court-of-appeals/1322326.html>>.
- " Creeping Sharia." *Creeping Sharia*. N.p., n.d. Web. 11 Dec. 2011.
<<http://creepingsharia.wordpress.com/>>.
- " Who's Behind The Movement To Ban Shariah Law?." *Fresh Air* . NPR . 9 Aug. 2011. Web. Transcript.
- "Ali v. Ali, 652 A. 2d 253 - NJ: Superior Court, Chancery Div. 1994." *Google Scholar*. N.p., n.d. Web. 10 Dec. 2011.
<http://scholar.google.com/scholar_case?case=6518652102774090943&hl=en&as_sdt=2&as_vis=1&oi=scholar>.
- "Amin v. Bakhaty, 798 So. 2d 75 - La: Supreme Court 20." *Google Scholar*. N.p., n.d. Web. 11 Dec. 2011.
<http://scholar.google.com/scholar_case?case=4590415366527786188&hl=en&as_sdt=2&as_vis=1&oi=scholar>.
- Courts, promoting American Laws for American, and we are preserving individual. "American Laws for American Courts | American Public Policy Alliance." *American Public Policy Alliance*. N.p., n.d. Web. 11 Dec. 2011. <http://publicpolicyalliance.org/?page_id=38>.
- Emon , Anver . "Banning Shari'a ." *The Immanent Frame* . SSRC , n.d. Web. 8 Dec. 2011.
<blogs.ssrc.org/tif/2011/09/06/banning-shari%27a/>.
- "Hosain v. Malik, 671 A. 2d 988 - Md: Court of Special Appeals 199." *Google Scholar*. N.p., n.d. Web. 10

Dec. 2011.

<http://scholar.google.com/scholar_case?case=13345154354945640474&q=hosain+v.+malik&hl=en&as_sdt=2,24&as_vis=1>.

- "Islamic Family Law & International Parental Child Abduction." *Welcome to Travel.State.Gov*. N.p., n.d. Web. 9 Dec. 2011. <http://travel.state.gov/abduction/resources/resources_557.html>.
- Kedar, Mordechai, and David Yerushalmi. "Mapping Shari'a." *Mapping Shari'a*. N.p., n.d. Web. 11 Dec. 2011. <<http://mappingsharia.com/>>.
- Leichter , Alexandra . "THE EFFECT OF ISLAMIC FAMILY LAW ON NORTH AMERICAN FAMILY LAW ISSUES." *IAML Law Journal* ? (2009): n. pag. *IAML Law Journal* . Web. 9 Dec. 2011.
- Quraishi , Asifa , and Najeeba Syeed-Miller . "No Altars: A Survey of Islamic Family Law in the United States." *Emory Law* . N.p., n.d. Web. 6 Dec. 2011. <www.law.emory.edu/ifl/cases/USA.htm#part2>.
- "Shariah in American Courts." *Shariah in American Courts*. N.p., n.d. Web. 11 Dec. 2011. <<http://shariahinamericancourts.com/>>
- "UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (1997)." *Penn Law*. N.p., n.d. Web. 11 Dec. 2011. <<http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/uccjea97.htm>>.
- "University of Minnesota Human Rights Library." *Twin Cities - University of Minnesota*. N.p., n.d. Web. 11 Dec. 2011. <<http://www1.umn.edu/humanrts/gencomm/hrcom22.htm>>.
- Welchman, Lynn. *Women's rights and Islamic family law: perspectives on reform*. London, UK: Zed Books ;, 2004. Print.
- Zamin , Saminazz . "Amrikan Shari'a : The Reconstruction of Islamic Family Law in the United States." *South Asia Research* 28.2 (2008): 185-202. *SAGE* . Web. 9 Dec. 2011.

