

CHAPTER

1

Meeting the Muslim Client

Islam is the world's second-largest religion. Its followers, known as Muslims, come from diverse countries, cultures, and socioeconomic backgrounds. The largest Muslim populations live in Indonesia, the Indian subcontinent (Pakistan, India, Bangladesh), and Africa, while only about one-fifth of the world's 1.8 billion Muslims hail from the Middle East.¹ Millions more reside in North America and Europe, with Islam currently ranking as the second-largest religion in Canada and Europe in terms of number of adherents.

The United States is home to the most diverse Muslim population in the world, one that is expected to double in size by the year 2050.² While the vast majority of American Muslims are concentrated in large urban centers, Muslims constitute the largest non-Christian group in twenty states.³ This includes Muslims whose ancestors have lived in this country for hundreds of years, converts to the faith, recent immigrants seeking a

1. JOHN ESPOSITO & DALIA MOGAHEH, WHO SPEAKS FOR ISLAM?: WHAT A BILLION MUSLIMS REALLY THINK (2007).

2. An estimated 37 percent of voting-age Muslims in America are under 30, and 80 percent are under 50. Emma Green, *American Muslims Are Young, Politically Liberal, and Scared*, THE ATLANTIC (Mar. 21, 2017), <https://www.theatlantic.com/politics/archive/2017/03/american-muslims-demographics/520239/>; see also Michael Lipka, *Muslims and Islam: Key Findings in the U.S. and around the World*, PEW RESEARCH CTR. (Aug. 9, 2017), <http://www.pewresearch.org/fact-tank/2017/08/09/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world>.

3. Jahnabi Barooah, *Most and Least Muslim States in America* (PHOTOS), HUFFPOST, http://www.huffingtonpost.com/2012/06/27/most-and-least-muslim-states_n_1626144.html (last updated Dec. 7, 2017).

better life, and their children and grandchildren who are born and raised in cities and towns throughout the United States.

The American Muslim community is also perhaps the most racially diverse in the world. Thirty percent of American Muslims identify as white, 23 percent as black, 21 percent as Asian, 6 percent as Hispanic, and 19 percent as other or mixed race.⁴ In terms of education and wealth, Muslims possess the second-highest level of education among major religious groups in this country. A higher-than-average percentage have graduated from college. In fact, an estimated 10 percent of all physicians in America are Muslim.⁵

Globally, Muslim consumer spending on food and lifestyle reached \$1.8 trillion in 2014 and is projected to reach a staggering \$2.6 trillion by 2020.⁶ It is estimated that the American Muslim community enjoys around \$100 billion of disposable wealth, a large percentage of which is expected to pass to the next generation in the next 20 to 30 years.⁷

As one examines the diversity of American Muslims, it is easy to recognize how many disparities must exist culturally, economically, and politically within the group. While Muslims follow the same faith, their sheer diversity makes it impossible to paint an image of Muslims with broad strokes. Nonetheless, in the pages that follow, we provide some generally agreed-upon principles of the faith in an attempt to introduce these concepts to the reader.

A. An Introduction to the Islamic Faith

Muslims believe Islam is a continuation and culmination of the Abrahamic faith traditions. Muslims worship one God, *Allah*, and believe that Muhammad is the last and final messenger of God. The word *Allah* is related to the Aramaic and Hebrew names for God, *Allaha* and *Elohim*.

4. *Muslim Americans: No Signs of Growth in Alienation or Support for Extremism*, PEW RESEARCH CTR. (Aug. 30, 2011), <http://www.people-press.org/2011/08/30/section-1-a-demographic-portrait-of-muslim-americans/>.

5. Hesham Hassaballa, *Muslims Don't Contribute to America? Think Again*, (Jan. 31, 2014), <http://www.chicagonow.com/midwestern-muslim/2014/01/muslims-dont-contribute-to-america-think-again>.

6. *State of the Global Islamic Economy Report 2015*, DINARSTANDARD, <http://www.dinarstandard.com/state-of-the-global-islamic-economy-report-2015> (last accessed Sept. 19, 2018).

7. *The Muslim Green: American Muslim Market Study 2014/15*, DINARSTANDARD, http://www.dinarstandard.com/wp-content/uploads/2014/11/American_Muslim_Executive-Summary-2014_DinarStandard.pdf (last accessed Sept. 19, 2018).

Muhammad is revered as the final messenger in a long line of messengers sent by God, beginning with Adam and including Noah, Abraham, Moses, and Jesus.

There are two major sects in Islam, the Sunni and Shia, whose division is based upon a historic disagreement regarding the successor to the Prophet Muhammad. Although there are a few notable differences between the two sects, particularly with respect to inheritance law, they both agree on the core tenets of the faith.

B. The Pillars of Faith

Islam is founded upon five basic pillars: (1) stating the testimony of faith, (2) performing daily prayers, (3) fasting in the month of Ramadan, (4) giving mandatory alms, and (5) performing a once-in-a-lifetime pilgrimage to Mecca.⁸

1. Stating the Testimony of Faith (*Shahada*)

The foundation of a Muslim's belief is rooted in the *Shahada* or testimony of faith, which states: "I bear witness that there is no god but God [*Allah*] and I bear witness that Muhammad is the messenger of God."

2. Performing Daily Prayers (*Salah*)

Muslims observe five daily prayers to reconnect with God at regular intervals throughout the day: before sunrise, around noon, in the afternoon, at sunset, and in the evening.

3. Fasting during Ramadan (*Siyam*)

Ramadan is the ninth month of the Islamic lunar calendar. During this month, Muslims abstain from all food, drink (including water), and sexual relations from dawn to dusk for thirty days and are encouraged to be increasingly charitable toward those in need. The month ends with *Eid al-Fitr*, or the Feast of Celebration.

8. See Sahih Al-Bukhari, Vol. 1, book 2, hadith 8, available at <https://sunnah.com/bukhari/2/1> (last accessed Oct. 4, 2018).

4. Giving Alms or Mandatory Charity (*Zakat*)

The Quran repeatedly instructs Muslims to donate a portion of their wealth to the less fortunate. The term “*zakat*,” which literally means “purification” or “increase,” is a requirement for financially able Muslims to annually contribute 2.5 percent of their liquid assets to the poor, suffering, or sick. *Zakat* is due each year on the net balance of the following classes of assets, after subtracting basic needs (e.g., a personal residence, furniture, clothing, vehicles, etc.) and debts: (a) gold and silver, (b) cash and liquid investments, (c) business assets, (d) livestock, and (e) agricultural production.

Sadaqah, or voluntary giving beyond the 2.5 percent *zakat* requirement, is also highly encouraged. Notably, for this reason, many Muslim clients will choose to include charitable bequests in their estate plans.

The Ithna Ashari sect of Shia Islam also has an additional charitable requirement of *khums* (one-fifth), which is described further in Chapter 5.

5. Performing a Pilgrimage to Mecca (*Hajj*)

The *Hajj* is a once-in-a-lifetime pilgrimage to Mecca for Muslims who are financially and physically able to make the journey. Estate planning and the pilgrimage tend to be linked. Given its significance, Muslims preparing to embark on the *Hajj* are encouraged to first pay off debts, seek forgiveness from family and community members, and create an estate plan before they depart on the trip.

C. Islamic Law and Its Sources

The term “*Sharia*,” often used interchangeably with “Islamic law,” literally means “a way to the watering-place” or “a path to seek felicity and salvation.”⁹ It encompasses the moral, ethical, social, and political codes of conduct for Muslims, ranging from personal acts of devotion and ritual worship to financial ethics, domestic relations, estate planning, and even criminal law.

In many respects, Islamic law is similar to Jewish law. Both religions contain divinely revealed legal systems that govern all dimensions of an adherent’s life from the private to the public sphere. Just as devout Jews adhere to kosher laws, observe the Sabbath, and have distinct rules relating

9. MOHAMMED HASHIM KAMALI, *SHARĪAH LAW: AN INTRODUCTION* (Ch. 2) (2008).

to marriage and divorce, Muslims observe analogous dietary restrictions known as *halal*, attend congregational prayers every Friday, and follow traditional guidelines pertaining to domestic relations. For Jews, these rules are codified in what is known as the *Halakha*. For Catholics, these regulations are represented by Canon Law. For Muslims, the sacred law is known as the *Sharia*.

At its core, the *Sharia* is comprised of principles that are in consonance with, and protected by, the U.S. Constitution. The recognized *maqasid*, or objectives and principles of the *Sharia*, are debated by religious scholars but include items such as

1. preservation of life;
2. freedom of religion;
3. preservation of mind and intellect, including freedom of conscience and thought;
4. preservation of lineage and family; and
5. protection of private property.¹⁰

D. Sources of *Sharia*

The *Sharia* is derived from two primary sources and two secondary sources. The two primary sources are (1) the Quran and (2) the *Sunnah*. The secondary sources are (3) *Ijma*, or scholarly consensus, and (4) *Qiyas*, a process of analogical deduction that religious scholars use to derive new Islamic legal rulings.

1. The Quran

Muslims consider the Quran to be the actual word of God, revealed to the Prophet Muhammad in the Arabic language through the angel Gabriel over a period of 23 years.

The Quran contains a few major themes, including the oneness of God, the existence of a life after death and a Day of Judgment, Heaven and Hell, and stories of previous nations and their prophets. It also calls for universal truths such as justice and honesty and contains normative prescriptions for how Muslims should live their lives.

10. See *id.* Chapter 6 for a further discussion of the history and methodology of the *maqasid* of *Sharia*; see also Jasser Auda, *Maqasid Al-Shariah: An Introductory Guide* (2008), http://www.jasser-uda.net/new/pdf/maqasid_guide-Feb_2008.pdf (last accessed Oct. 5, 2018).

While most religious obligations are described only briefly in the Quran itself, the rules relating to inheritance law are expressly detailed in Chapter 4, titled “The Women.” These verses contain explicit instructions regarding how to distribute a decedent’s estate and are explained in Chapter 5 of this book.

2. The *Sunnah*

The *Sunnah*, or the normative tradition of the Prophet Muhammad, explains and clarifies the Quran. As a technical term, it refers to the teachings and religious practices of the Prophet Muhammad that his companions transmitted to subsequent generations.

The Quran typically addresses universal principles and contains broad prohibitions and commandments. The practical explanation of most matters of religion is found in the Prophet’s *Sunnah*. For instance, the Quran instructs Muslims to establish prayer and give alms, but the details of how and when to pray, and how much one must give in charity and which assets are exempt, are further delineated in the *Sunnah*.

Because the *Sunnah*, at least initially, was transmitted orally, scholars throughout history have held varying opinions as to the authenticity of specific traditions. In fact, disagreements relating to how subsequent generations transmitted and corroborated the *Sunnah* are one of the central causes for the rich diversity of tradition within Islam today.

3. *Ijma* (Scholarly Consensus)

Many discrete points of law are not directly addressed in the Quran or *Sunnah* but attain legal status through the unanimous consensus of Muslim legal scholars at a certain time and place. In early Islamic history, *Ijma*, or scholarly consensus, was critical in formulating the doctrine and practice of the Muslim community.

4. *Qiyas* (Deduction)

Attaining scholarly unanimity on a matter, especially in modern times, is a rare feat. Thus, in many cases, Islamic legal scholars use a process of deductive reasoning, or *Qiyas*, to extend an established ruling to another situation based on a shared legal cause. Legal jurists employ *Qiyas* in deciding many modern religious rulings relating to technology and finance.

E. *Sharia* for American Muslims

The *Sharia* is predominantly concerned with personal religious responsibilities and obligations to God rather than laws enforced by the state. Although various countries have formulated portions of their legal systems on its mandates, these components would not and could not be implemented by U.S. courts under any circumstances.¹¹

Rather, for American Muslims, fidelity to *Sharia* in the legal sense means the observance of its norms in private contracts, such as marriage, the distribution of one's estate, and mutually agreed-upon transactions among Muslims—all of which find legal protection within First Amendment jurisprudence.¹² The federal government and states have their own criminal laws that *Sharia* cannot supplant.¹³

Courts may nonetheless consider *Sharia* in civil matters, just as they do with other foreign and religious laws, and in instances where required by comity. For example, American courts routinely honor marriages officiated in foreign countries, uphold binding arbitration agreements by observant Jews before Beth Din tribunals, affirm prenuptial agreements rooted in religious traditions, and recognize the rights of parents to raise children according to their own unique religious beliefs, so long as those contracts and choices do not violate U.S. public policy.¹⁴

Nonetheless, since 2010, over two dozen states have enacted or considered measures restricting judges from consulting or considering *Sharia*. The anti-*Sharia* movement began in Oklahoma in 2010, leading to a case that actually confirmed the right of American Muslims to plan their estate consistent with their values. In *Awad v. Ziriax*,¹⁵ legislators in Oklahoma proposed a ballot measure to amend the state constitution to ban *Sharia* from state courts. The “Save Our State Amendment,” as it was called, represented a high-water mark for an overtly discriminatory campaign

11. EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* 173–74 (1992).

12. See James Sonne, *Domestic Applications of Sharia and the Exercise of Ordered Liberty*, 45 SETON HALL L. REV. 725 (2015).

13. See Jeremy Grunert, Note, *How Do You Solve a Problem Like Sharia? Awad v. Ziriax and the Question of Sharia Law in America*, 40 PEPP. L. REV. 695, 725–26 (2013) (describing statutory and constitutional limitations on the application of *Sharia*-based criminal-law provisions).

14. See Sonne, *supra* note 12, at 720 (describing examples of secular courts' deference to foreign authority); Eugene Volokh, *Religious Law (Especially Islamic Law) in American Courts*, 66 OKLA. L. REV. 431, 435 (2014).

15. *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. Okla. 2012) (*Awad II*).

that singled out Islam. Though lawmakers conceded they were unable to identify a single case in which an Oklahoma court had ever applied *Sharia*, voters overwhelmingly approved the measure, triggering a firestorm of criticism as well as a number of copycat bills around the country. A federal district court ultimately struck the bill down as unconstitutional, a decision later affirmed by the Tenth Circuit Court of Appeals.¹⁶

After voters approved the amendment, a Muslim resident of Oklahoma City, Muneer Awad, filed suit, arguing that the amendment singled out Islam and violated his rights under both the Establishment and Free Exercise Clauses of the First Amendment of the United States Constitution.¹⁷ In particular, he argued that the amendment would prevent a court from “probating his last will and testament (which contains references to Sharia law),” which constituted an excessive entanglement between the government and his religion.¹⁸

A federal district judge in Oklahoma agreed and issued a permanent injunction against the amendment, noting that the issue spoke “to the very foundation of our country, our Constitution, and particularly, the Bill of Rights.”¹⁹ The Tenth Circuit Court of Appeals unanimously affirmed the lower court ruling, holding that “the Oklahoma amendment specifically names the target of its discrimination. The only religious law mentioned in the amendment is *Sharia* law” and that, additionally, “[a]ppellants do not identify any actual problem the challenged amendment seeks to solve.”²⁰

The *Awad* case was not just a victory for advocates of religious freedom; more specifically, it affirmed the right of Muslims in the United States to conduct estate planning consistent with their values.

F. Schools of Islamic Law

Much like judges vary in their interpretation of the Constitution and analysis of applicable statutes and code, the human process of attempting to understand the *Sharia* necessarily allows for flexibility and diversity in its application.²¹

16. *Id.*

17. *Id.* at 1119.

18. *Id.*

19. *Awad v. Ziri*ax (*Awad I*), 754 F. Supp. 2d 1298, 1301 (W.D. Okla. 2010).

20. *Awad II*, 670 F.3d at 1128.

21. SHERMAN A. JACKSON, *ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHĀB AL-DĪN AL-QARĀFĪ* (1996).

Within Sunni Islam—the prevailing tradition of approximately 90 percent of the world’s Muslims—there are four orthodox schools of *Fiqh*, or jurisprudence: the Hanafi, Shafi, Maliki, and Hanbali schools, named after their respective founders. They differ slightly in their legal methodologies but are considered equally authoritative. Because Islamic inheritance law is mostly taken directly from the Quran, it is one of the few topics in the *Sharia* in which the four Sunni schools are all largely aligned.

As for the Shia tradition, there are two dominant schools of *Fiqh*: the Ithna Asharis, also known as the Ja’faris, which is by far the largest branch of Shi’ism; and the Zaidis. While Sunnis and Shias agree on most of the core principles of Islam, they do have different authoritative texts and, notably, divergent views on several key elements of inheritance law. For instance, Ithna Ashari inheritance law often grants closer female family members a higher position as legal heirs than Sunni law.²² It also rejects the concept of the extended agnatic family and the superiority of male agnates as legal heirs, both of which are key tenets of Sunni law.²³

Given the complexity of the field of Islamic inheritance law, Sunni and Shia scholars—and, to a lesser extent, jurists of the various jurisprudential schools within each denomination—naturally differ on a number of rulings. Since this book is intended as a practice guide rather than a comparative treatise on Islamic inheritance law, when referencing the Sunni positions, we have elected to rely on the positions of the Hanafi school of jurisprudence, which has a well-developed corpus of law on the subject. In particular, we rely primarily on one of the most authoritative classical Hanafi texts in the field, *Al Siraji Fil Mirath* (“*Siraji*”), first translated into English in 1792.

When referencing the Shia doctrine, we rely on the prominent positions of the Ithna Ashari school, which are quite similar to the rules for Ismaili Shias. Where notable differences exist between the various schools that may impact a client’s planning objectives, we note them as well. In doing so, our purpose is not to advocate for any particular view but to give a practitioner what he or she needs to incorporate a client’s values into an estate plan.

22. Noel Coulson, *A Comparison of the Law of Succession in the Islamic and British Legal Systems*, 26(2) *AM. J. COMP. L.* 227, 230 (1978).

23. *Id.*