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Muslim Marriage in Western Courts

Lost in Transplantation

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List of Abbreviations

CLS	critical legal studies
LLPA	liberal–legal pluralist approach
LFEA	liberal–formal equality approach
LSEA	liberal–substantive equality approach

List of Cases

Canada

France

Germany

United States

Foreword

This book takes up one of the most perplexing questions of our time: how should Western states receiving an influx of Muslim immigrants deal with the unfamiliar, seemingly alien rules under which their new residents and citizens formed their marriages—the Islamic rules of marriage? But in getting ready for decisions about that, Pascale Fournier here relentlessly pursues one of the highest injunctions of legal realist analysis: get to "Ought" after you've spent a long time on "Is." What do Western courts do in fact? What is the Islamic law which plaintiffs argue Western judges should transplant into their legal toolkit? What are the options open to a Western judge trying to decide whether to transplant, and if so, how so? What do the various options on the judges' actual table mean for the wives and husbands whose divorces end up in their courts? How do actual husbands and wives strategize in light of the range of possible outcomes in Western courts?

It is virtually unknown to see work on the encounter between Islamic law and Western liberal legal systems lavish so much attention as Fournier does here on the realistic possibilities as manifested by what has actually already happened. Instead, we debate women's equality versus their choices, the value of recognizing minority cultures versus the value of integrating all citizens into liberal values, the authenticity of experience and the trap of false consciousness, etc. Across all these big questions, we see theory load itself with prescription before it even begins to describe. Fournier has managed to suspend moral judgment, to defer principled determination, to avoid polemical conclusion so that she can describe the field of judicial options and marital outcomes that are *actually* within the scope of her big question.

The surprising result is that a judge's principle is rarely if ever a sure warrant of outcome. Fournier shows with pellucid clarity how Canadian, American, German and French courts pursuing the same principle can still produce a systematically broad range of diametrically opposed outcomes. And through the ingenious device of an imagined typology of Muslim wives embroiled in Western divorces from their Muslim husbands—Fournier will be famous for her wonderfully depicted Leilas and Samirs—she shows that courts inevitably transform Islamic family law rules when they attempt to recognize them, and transform Western family law rules even when they don't—in part because that's the fate of legal transplantation, in part because the Leilas and Samirs are constantly busy transforming the law in the books into the scintillating paradoxes of law in action. These Leilas and Samirs never get pure equality or pure recognition. They do, however, produce the startling effect of orderly complexity.

Fournier's initial idea was that constitutional principles would both describe and resolve the problems faced by Muslim women seeking or resisting divorce in Western states. I well remember a conversation in which she expressed her disconcerted awareness as she discovered their almost bottomless indeterminacy. A yawning void faced her then: how to proceed outside the constitutional cocoon? A leading hypothesis of legal realism stepped in to end the feeling of analytic free fall that she was then experiencing: just as Woodward and Bernstein guided themselves through the Watergate maze by heeding the maxim "Follow the Money," she could find her way forward in uncharted ground under the motto "Follow the Background Rules." This book achieves its realism by observing how the problematic rule that enjoys the spotlight—should Western courts recognize the *mahr* promised to the Muslim bride by the Muslim groom as a condition of valid Islamic marriage—*actually works* as it sits in the nest of background rules in which it operates. Islamic law itself makes the *mahr* a complex object of human contention; so does choice of law; so does translating *mahr* into Western doctrine of, say, antenuptial contact; so does the seemingly independent questions of separate or community property between the spouses, property division and alimony. If we are lawyers following Oliver Wendall Holmes's path of the law, it is only in the context of these background rules that can *mahr mean anything at all.*

Finally, Fournier gives us a new focus for work on legal pluralism within the family law of Western states. Yes, the Islamic rules and the American, Canadian, French and German rules are different if we put them on a chart and compare them, as if they operated alone. But set into the matrix of the background rules, and then contextualized into the rhetorical and material strategies available to the judges and the parties in particular divorces, myriad outcomes offer themselves for analysis and assessment. Is it fair for a poor woman to get her *mahr* and not her half-share in the marital property? Is it fair to order a poor husband to pay them both? This question is not about recognition; it is about distribution. In Fournier's capable hands, what is plural is not only normative orders or sources of law, but also *pathways to decision, strategies, and outcomes*. The hard normative work can begin afresh.

Janet Halley
Royall Professor of Law, Harvard Law School

Acknowledgements

The six chapters of the book capture six different locations and languages—borrowing from a variety of disciplinary fields and techniques that I, in turn, experienced as deliciously stimulating, profoundly disturbing and impossibly frustrating. I never thought I could one day assemble these conflicting terminologies into one dialect and read it as a whole. I could not have endured the challenge of the journey without Janet Halley's intellectual presence in my work, translated into a rigorous and enriching space that she had constructed for us to meet, every week, on Sunday night! Years have gone by ... and my project mysteriously developed out of conversations we had about desires, identities, constraints and the "spin" that we could discover in discursive encounters if only we were willing to walk through uncertainties and envision in advance disenchantment. Can I thank her enough? Because of her, I learned to cherish the joy and the pain of writing, as well as develop a surprising confidence in "my hunch"—master these sites of "unknown knowledge," organize them, pursue them in a regulatory fashion. This is no small accomplishment. Duncan Kennedy has been a precious mentor and generous friend. Through animated discussions and numerous readings, he significantly enriched my understanding of distributive analysis, identity politics and legal transplants in the context of globalization. As time goes by, your Critical Legal Studies (CLS) imprints will remain au coeur de ma paume. Merci mon très cher.

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with real world application. As a Trudeau scholar, I benefited enormously from the friendship and rigour of the Trudeau Foundation's "family" members, in particular Robert Leckey, Jillian Boyd, Sophie Thériault, Margarida Garcia, Bettina B. Cenerelli, Josée St-Martin, Stephen Toope and Pierre-Gerlier Forest. I would like to express my gratitude to Stephen Wiles, the excellent librarian at Harvard Law School, for the overall research; Prakash Shah at Queen Mary University of London, for his enthusiasm and generous support; and Miro Kaygalak for the original book cover. Anna R. Dekker and Janet MacMillan have been absolutely magnificent in reading and editing the manuscript. I cannot thank them enough.

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Some of the ideas and parts of the text of this book have previously been published elsewhere, in different and shorter forms. I thank the editors of these journals and collections, and acknowledge them here. Parts of Chapter 1 were

originally published in 2006 as "In the (Canadian) Shadow of Islamic Law: Translating Mahr as a Bargaining Endowment" in volume 44, number 4 of the *Osgoode Hall Law Journal*, and was also included in a collection of essays entitled *Law and Religious Pluralism in Canada* edited by Richard Moon and published by the University of British Columbia Press in 2008. Parts of Chapters 2 and 3 appeared in 2009 as "Transit and Translation: Islamic Legal Transplants in North America and Western Europe" in volume 4, number 1 of *The Journal of Comparative Law* and "Comparative Law at the Intersection of Religion and Gender" in one of the European University Institute's Robert Schuman Centre for Advanced Studies Working Paper Series. This article was selected by the Harvard–Stanford International Junior Faculty Forum 2008. Parts of Chapter 4 appeared in 2007 as "La femme musulmane au Canada: profane ou sacrée?" in volume 19, number 2 of the *Canadian Journal of Women and the Law*. Parts of Chapters 4 and 5 were published in 2010 as "Flirting with God in Western Secular Courts: *Mahr* in the West" in volume 24, number 1 of the *International Journal of Law, Policy and the Family*, published by Oxford University Press. This article won the Quebec Bar Foundation prize for "best law review article" in 2009 and honourable mention by the Canadian Association of law Teachers Scholarly Paper Award in 2010. Parts of Chapter 3 and 4 appeared in 2009 as "Deconstructing the East/West Binary: Substantive Equality and Islamic Marriage in a Comparative Dialogue" in *Constituting Equality: Gender Equality and Comparative Constitutional Law*, edited by Susan H. Williams and published by Cambridge University Press, and in 2008 as "L'égalité substantielle comme école buissonnière du droit? À propos du caractère indéterminé du droit comparé religieux" in *Rapports sociaux de sexe/genre et droit: repenser le droit*, edited by Louise Langevin and published by the Éditions des archives contemporaines in Paris.

In my own trajectory, I have been exceptionally fortunate to receive so much love and encouragement from my parents, Monique and Gilles Fournier. They gave me the most precious gift of all, so beautifully illustrated by the following passage from Antigone: "La vie n'est pas ce que tu crois. C'est une eau que les jeunes gens laissent couler sans le savoir, entre leurs doigts ouverts. Ferme tes mains, ferme tes mains, vite. Retiens-la. Tu verras, cela deviendra une petite chose dure et simple qu'on grignote, assis au soleil." With a generosity that I cannot even begin to describe, they sat aux premières loges of my many confusing and unpredictable projects, departures and journeys. From as far back as I can remember, they have always been at the Montréal airport waiting for me—with pride, tears of joy and food! They have also kindly accepted to accompany me to Iran, Italy, Egypt and Costa Rica, to share some of my fascinations throughout these years of powerful work. I embarked on this adventure because of them.

My younger and only sister Rosalie has been ma complice préférée for every step along the way. In moments of discouragement, she would simply look at me with her superb green eyes and say: "N'oublie jamais de demeurer réaliste et de demander l'impossible!", one of Che Guevara's reactionary slogans that she surely had adopted for herself while dangerously and modestly living in Congo,

Uganda, Equador and the Chiapas. The quest that she has tirelessly pursued since her early adolescence, and the promising avenue that she has established for understanding refugees here and abroad, have brought light to my own project in surprising ways.

Finally, I could not have survived the road without the love, confidence and positive disposition of my husband Xavier M. Milton, who closely witnessed many "drama queen" episodes and always responded with his classic "built for life" inclination and strength. He provided me with a calm and loving bubble to embrace at times of chaotic production, like a rock against the sky. Two beautiful baby boys, Charles and Pierre, came to the world since I started this book. Xavier made it possible for me to nourish both my passion for writing and my devotion to the children, simultaneously, as part of the same commitment. On multiple occasions, he convinced me that I did not have to choose or compromise either the private or public spheres of my life. I could hold both, with pride in my movements, and it was my duty to do so. I will always remember this one night spent in a hotel away from home, presenting at a conference that I did not want to miss despite Charles's very young age. As I unpacked my luggage, thinking of mes deux amours miles away from me, I found this note from Xavier. It read: "My dearest love, you may be asking yourself why am I here in this city, in this hotel, at this conference, in this moment, when I could be with my husband and beautiful boy? The answer is that you stand as a role model for Charles, who will grow up to be a confident, intelligent, and progressive man whose contribution to society will be equally praised. We are proud of you." For this and for so many other precious moments, I thank Xavier.

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Contents

Introduction

If liberalism is committed to the individual and individual choice, it is also conventionally taken to be committed to freedom and equality. Giving effect to such principles will often create tensions: the "free" acts of individuals will sometimes produce inequality; and state enforcement of equality will likely reduce individual freedom. Moreover, when faced with the claims of subordinated groups, liberalism typically is asked to make concessions by which these collisions intensify and multiply. In fact, even if the mandate to address the rights or interests of groups is not perfectly consistent with liberalism's commitment to individuals, it may be *necessary* if individuals *in* groups are to be treated liberally (that is, accorded freedom *or* equality). And the mandate to address the subordination of groups generates a new collision of freedom with equality: *de facto* freedom for subordinated groups may require their specific regulation; and equality of their members may require active distributions in their favour. The "politics of recognition" called upon by subordinated groups within liberalism is thus a tensely contradictory project. Nations that are consciously, sometimes constitutionally, committed to protecting the rights of individuals and groups cannot shy away from these potentially irreconcilable differences.

These contradictions operate in the specific context of the "politics of recognition" invoked by Muslim groups in Western states. I focus on Canada, the United States, France and Germany, where members of Muslim communities have claimed recognition of their religious particularity, their autonomy and their law-making capacity *vis-à-vis* the monopoly of the state. Legal terms and concepts rooted in Islamic family law have thus penetrated these Western legal systems through one of two routes: first, in accordance with international private law rules (conflict of laws), which often directly incorporate Islamic family law (as in Germany and France); second, through the interpretation of secular domestic laws (as in Canada and the United States). These various approaches clearly affect the lives of and choices available to Muslim women who find themselves in the throes of a collapsing marriage.

This book seeks to understand the politics of transnational Islamic family law through the migration of one particular legal institution: *mahr*, "the gift which the bridegroom has to give to the bride when the contract of marriage is made and which becomes the property of the wife" (Bosworth 1991: 78). *Mahr* is usually divided into two parts: that which is paid at the time of marriage is called prompt *mahr* (*muajjal*), and that which is paid only on the dissolution of the marriage by death or divorce or other agreed events is called deferred *mahr* (*muwajjal*). The issue of *mahr* typically presents itself in times of crisis: married Muslim