

CULTURAL DIVERSITY AND LAW



ASHGATE

Muslim Marriage in Western Courts

Lost in Transplantation



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PASCALE FOURNIER
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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

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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 contract; 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.

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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* (*mu’ajjal*), 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