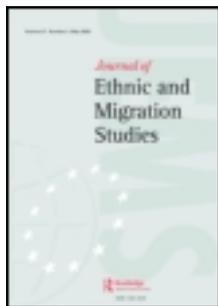


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### Muslim Marriage in Western Courts: Lost in Transplantation

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## Review

Pascale Fournier, **Muslim Marriage in Western Courts: Lost in Transplantation** Farnham: Ashgate, 2010, 228 pp., £55.00 hb (ISBN 978-1-4094-0441-5), eBook (978-1-4094-0442-2)

Western societies are all multicultural, notably in terms of the diversity stemming from the immigration and settlement of workers and refugees. Yet currently there is acrimonious debate about difference and its limits, and a key question is whether, and if so how, legal systems should make room for 'other' values and practices which some migrants and members of settled minority groups may seek to maintain and which may be 'problematic' so far as the law is concerned. 'Some' should be emphasised, and it should be noted that legal problems arise as much from what is happening *within* migrant and minority families (for example in changing relationships between genders and generations) as from what happens *between* minority and majority institutions and values. Moreover, multi-sited living, e.g. families organised across borders, may bring people into contact, and perhaps conflict, with multiple jurisdictions, as in the case of someone married in one, divorced in another, and resident in yet a third.

The implications of such diversity for the law and legal practice is now a major field of scholarship in Belgium, France, Germany, Italy, the Netherlands, Scandinavia, the UK and North America, linking legal practitioners with researchers in anthropology, political science and legal studies. Although Muslims are by no means the only 'others', much of this work has focused on the interaction between Western legal systems and Islamic law (*shari'a*), notably in matters pertaining to marriage and divorce and financial settlements. This is where Pascale Fournier's book makes a major contribution.

Fournier, a Canadian lawyer trained at the Harvard Law School, focuses on the institution of *mahr*, sometimes misleadingly referred to as 'dowry', though, as she points out, it is akin to 'dower', or what anthropologists working in

Sub-Saharan Africa traditionally called 'bride-wealth'. *Mahr*, which forms part of a Muslim marriage contract, is money and/or valuables transferred from husband to wife in two parts: a small 'prompt' sum paid immediately, and a larger 'deferred' sum. These sums provide for the wife if the husband dies or divorces her, when she is entitled to keep the *mahr* or demand it if it has not been paid. If the wife herself institutes divorce proceedings then the *mahr* should be returned (a *khul'a* divorce).

Fournier examines what happens when divorce settlements involving Muslims come before Canadian, French, German and US courts, and judges must determine whether—and if so, how—to deal with claims about *mahr*. She shows that, although in legal terms the four jurisdictions may be different, there are similarities in the way they handle *mahr* claims. She argues that underlying judicial decisions, and cutting across the jurisdictions, are three ideological approaches: Liberal-Legal Pluralist, Liberal-Formal Equality and Liberal-Substantive Equality. The first, multiculturalist approach, recognises the Islamic principles behind *mahr*, and takes them into account in financial settlements, though sometimes judges may decline to enter the 'religious thicket'. The second approach sets aside the religious aspects of a Muslim marriage and treats *mahr* as a financial agreement, valid or not according to the neutral principles of contract law. The third approach is concerned with what *mahr* says and does about equality and fairness, especially as regards women and gender rights. These different approaches are particularly important in *khul'a* divorces when what is at stake is the *mahr*, and whether or not it should be returned in accordance with Islamic principles, and wives argue that it is theirs by right whoever instituted divorce proceedings.

Court decisions, says Fournier, reveal inconsistency and unpredictability across the various ideological approaches. They also share numerous contradictions. In its Islamic context *mahr* is 'complex, contradictory and shifting', but when it

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is treated as a static, homogeneous 'Muslim' thing, as may happen with the pluralist approach, or disassociated from its social, cultural and religious context, when seen simply as a contract, it becomes something different and hybrid: 'Lost in Transplantation'.

Fournier complements her analysis through the device of a hypothetical Muslim couple ('Leila' and 'Samir') thinking about divorce. Using a form of rational choice theory, she assesses the options open to them in using the courts to end the marriage to their own advantage. Here she reveals sensitivity to the social and emotional as well as financial costs and benefits of following one path rather than another, drawing on anthropological and other empirical and ethnographic studies (as well as actual court cases) to provide the necessary evidence.

A short review cannot do justice to this valuable addition to Ashgate's series, beautifully produced with a striking cover, which, *inter alia*, provides summaries of the background constitutional and legal regimes and decisions, and of the status of *mahr* in *shari'a* and in selected Muslim countries. The 'Foreword' by Prof. Janet Halley, Fournier's supervisor at the Harvard Law School, draws our attention to 'one of the highest injunctions of legal realist analysis: get to "Ought" after you've spent a long time on "Is"'. This book is an outstanding example of that approach.

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