

HAWWA

Journal of Women of the Middle East and the Islamic World

HAWWA

Journal of Women of the Middle East and the Islamic World

Aims & Scope

Hawwa publishes articles from all disciplinary and comparative perspectives that concern women and gender issues in the Middle East and the Islamic world. These include Muslim and non-Muslim communities within the greater Middle East, and Muslim and Middle-Eastern communities elsewhere in the world. Articles dealing with men, masculinity, children and the family, or other issues of gender shall also be considered. The journal strives to include significant studies of theory and methodology as well as topical matter. Approximately one third of the submissions focus on the pre-modern era, with the majority of articles on the contemporary age. The journal features several full-length articles and current book reviews. The majority of *Hawwa's* articles are in English. However, articles submitted in French will also be considered.

Editor-in-Chief

Amira Sonbol, Georgetown University, Washington DC

Associate Editors

Moneera Al-Ghadeer (University of Wisconsin), Khalid Abou El Fadl (University of California at Los Angeles), Randi Deguilhem (Centre National de la Recherche Scientifique, France), Sabah Ghandour (University of Balamand, Lebanon), Shahla Haeri (Boston University), Madeline C. Zilfi (University of Maryland)

Book Review Editors

Lisa Pollard, University of North Carolina at Wilmington
Mona Russell, University of Massachusetts, Amherst

Advisory Board

Leila Ahmed (Harvard University)—Margot Badran (Georgetown University)—Miriam Cook (Duke University)—John Esposito (Georgetown University)—Elizabeth Fernea (University of Texas, Austin)—Yvonne Haddad (Georgetown University)—Sondra Hale (University of California Los Angeles)—Mervat Hatem (Howard University)—Jean Makdisi (Bahithat, Beirut)—Afaf Marsot (University of California Los Angeles, Professor Emeritus)—Ruth Roded (Hebrew University)—Hoda El-Sadda (Women and Memory Forum, Cairo)—Barbara Stowasser (Georgetown University)

Correspondence and Instruction for authors

Contributions should be sent to: Editor-in-Chief Amira Sonbol, Professor, Center for Muslim-Christian Understanding, Georgetown University, U.S.A. E-mail: Hawwa@georgetown.edu

For detailed instructions, please refer to the fourth page of the Volume prelims or visit the journal's website at brill.nl/haww

HAWWA (print ISSN 1569-2078, online ISSN 1569-2086) is published three times a year by Brill, Plantijnstraat 2, 2321 JC Leiden, The Netherlands, tel +31 (0) 71 5353500, fax +31 (0) 71 5317532

HAWWA
*Journal of Women of the
Middle East and the
Islamic World*

Volume 8 (2010)



BRILL

LEIDEN • BOSTON

NOTES FOR CONTRIBUTORS

Contributions

Contributions should be sent to: Editor-in-Chief Amira Sonbol, Professor, Center for Muslim-Christian Understanding, Georgetown University, U.S.A. E-mail: HAWWA@georgetown.edu

Contributions should be original work which has neither been simultaneously submitted for publication elsewhere nor published previously. The primary language of the Journal is English.

Manuscripts should be submitted in duplicate, double-spaced throughout (including quotations, notes, bibliography) with notes at the end, and all pages consecutively numbered. They should be accompanied by a disk in WordPerfect, Microsoft Word, or ASCII formatting.

Articles should include an abstract of not more than 150 words that clearly defines the thesis and the sources quoted. The full address of the author should appear at the end of the manuscript.

Manuscripts should be submitted in final publishable form. Full and consistent bibliographical annotation is required (suggested systems are the Chicago Manual of Style and Modern Language Association) and consistent and appropriate transliteration of Arabic names and terms (suggested systems are *International Journal of Middle East Studies* and Library of Congress). Authors will be required to supply camera-ready copy of any Arabic texts to be included in their articles.

In accordance with standard academic practice, articles submitted for publication in *Hawwa* are subject to a process of peer review.

Regrettably, manuscripts that are not accepted for publication cannot be returned.

Authors of articles receive three complimentary issues of the journal (for multi-authored contributions issues are sent to the first-named author).

Authors of book reviews receive one complimentary issue.

Production

Authors of accepted contributions receive two sets of proofs for proofreading. These should be returned promptly within the period requested, with no corrections marked other than those made in the conversion process. In the event of a multi-authored contribution, the proofs are sent to the first-named author unless otherwise is requested.

BRILL
LEIDEN • BOSTON

© Copyright 2010 by Koninklijke Brill NV, Leiden, Boston
Koninklijke Brill NV incorporates the imprints Brill, Hotel Publishing, IDC Publishers,
Martinus Nijhoff Publishers and VSP.

All rights reserved. No part of this publication may be reproduced, translated, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission of the publisher. Authorization to photocopy items for internal personal use is granted by Brill provided that the appropriate fees are paid directly to The Copyright Clearance Center, 222 Rosewood Drive, Suite 910, Danvers, MA 01923, USA. Fees are subject to change.

Divorce in an Islamic American Context: Muslim Lebanese-American Women Navigating Religious and Civil Legal Systems

Moulouk Berry

*University of Michigan Dearborn
mberry@umd.umich.edu*

Abstract

This essay discusses divorce and Islamic law in the United States. Specifically, it examines the Shi'i Muslim Lebanese-American community in Detroit, Michigan, and the way different actors such as women, local imams, judges, and lawyers are working to bridge the differences that exist between secular and religious laws in issues pertaining to divorce and the concomitant complexities involved. In particular, the essay highlights the contingent character of Islam, and the ways in which Muslim-Americans are working to navigate the nuances and find innovative legal solutions for marriage and divorce that take into consideration American civil law, Islamic law, the ethnic Lebanese subculture of the Lebanese Shi'i community as well as the wider American culture.

Keywords

Islamic law; islamic divorce in America; muslim marriage contract; divorce between islamic law and American law; American Lebanese muslim women and divorce; muslim divorce practices among American Lebanese muslim shi'i community in Dearborn, Michigan

Introduction

Like many religious groups in the United States, Muslim-Americans address legal family matters via two main juridical traditions: the religious and the civil-secular. In attempts to work out the nuances of both sets of laws, different actors—imams, judges, individual family members and lawyers—join efforts to find creative ways to solve family conflicts. Islam's contingent factor allows for multiple interpretations that provide alternative ways for Muslims to conduct their lives as both Muslims and Americans. Furthermore, the U.S. has a number of constitutional provisions

that respond to the rights of religious minority groups. In addition to the two legal traditions, culture and subculture also play important roles in the dynamics of the law and its practice, albeit informally. In light of the aforementioned, this article examines the main point of contention between the two systems—civil and religious—that centers on the historic inability of women to gain a Muslim divorce judgment without the sole and explicit permission of the husband. The long and difficult history of women undergoing traumatic experiences due to this religious prohibition is not unlike that of any other religions (such as Orthodox Jews and Roman Catholics), for the difficulty of divorce is compounded by women being forced to surrender their rights to custody of their children and property, among others, in order to obtain their divorce. The tragic consequences of this prohibition are vividly illustrated in the seminal Egyptian film “In Search of a Solution” (“*Uridu Hallan*”); and in similar fashion in the classic French film “*Madame X*”. I argue that it’s important to examine how marriage and divorce have been dealt within Islamic Shi‘a Islamic law and whether the law accommodates the realities of Lebanese-Muslims living in the U.S. I also explore how Shi‘i Lebanese-American women, when dealing with divorce, have attempted to deal with Islamic laws vis-à-vis the wider U.S. culture, the Lebanese subculture and the American secular-civil family legal system.

Much of the data for this article is drawn from interviews with Muslim Shi‘i Lebanese-American women living in the U.S., specifically those living in Dearborn, Southeast Michigan, the hub of Arabic-speaking communities in the United States. From 1994–2009, I conducted forty-four open-ended interviews with local state judges, Shi‘i Lebanese-American women, and male clerics from local mosques in the Detroit area.¹ The names of the women mentioned in the article, and some of their personal information, have been altered so as to protect their identity.

This paper is divided into five sections: The first section will examine Islamic marriage contracts and recent developments in marriage contracts and divorce. The second section presents two representative cases of Shi‘i Lebanese-American women undergoing divorce. The third and fourth sections address American civil family laws and their impact on Islamic divorces, particularly in Michigan. The fifth section examines the creative ways in which pertinent community members and organizations have and

¹ Some of the interviews conducted with local state judges were conducted by Hoda Berry-Zasa, Esq.

continue to deal with divorce. The final section investigates the question of whether there is a theoretical possibility of reconciling both legal systems in an effort to guarantee the rights of Muslim-minority women.

Islamic Marriage Contracts: Theoretical and Practical Considerations

Unlike the U.S. secular family law system (as differentiated from marriages celebrated in churches and synagogues), whose laws grant in theory both parties the right to divorce, equal rights to child custody, and equal division of property, Islamic law has a number of long established family traditions, despite the diversity of legal opinions on these issues. There are three types of Islamic divorces: 1) *Revocable* divorce (*raj'i*), wherein a man initiates the divorce and the wife is financially supported and remains in the couple's home for three waiting periods (three menstrual periods) at which time, the husband can change his mind and by simply changing his mind, the marriage resumes; 2) *Irrevocable* divorce (*khul'*), wherein the wife initiates the divorce and, more often than not, has to give up her deferred bridal gift and many other rights to convince the husband to divorce her. A husband may also request a larger sum of money from his wife beyond the deferred bridal gift in exchange for the divorce. The wife, in this case, has the sole right to reconcile with her husband or to decide otherwise; 3) *Divorce by consensus* (*mubarat*),² takes place when both parties agree to divorce and both surrender the same amount of money to each other; the amount surrendered or requested should equal the amount of the deferred bridal gift or less. In this type of divorce both parties would have to legally remarry each other should they wish to reconcile.³

On a theoretical level, these aforementioned provisions favor men and create an imbalance of power between husbands and wives. Though a Muslim man may initiate divorce for any reason and retain his rights and custody of his children (if the children are beyond a certain age), a Muslim woman who wants to retain her rights is only able to initiate the divorce if the husband has broken the marriage contract,⁴ or if her husband agrees

² On the different types of divorces in Islamic law see Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Law: Iran and Morocco Compared* (London and New York: I.B. Tauris & Co Ltd, 1993).

³ Imam Berry (The Islamic Institute of Knowledge, Dearborn, Michigan), Phone interview by the author, October, 2009.

⁴ Such as through physical or verbal abuse and harm, not providing for her financially,

to the divorce. Within the context of Islam, is there a legally acceptable way to end an unsatisfactory marriage if a woman wants to retain both her rights *and* wants to remain within the good graces of her community and her faith? Imams, judges, and Muslim women are working together to answer this question and find acceptable solutions that bypass the prohibition of a divorce and a husband's approval in some cases.⁵

On a practical level, however, the contingent nature of Islam and its ability to provide different rulings for different realities—be they social, cultural, economic and so forth—have been instrumental in attempting to protect the rights of women and balance power between the spouses. Muslim and non-Muslim scholars, activists and women in general have actively sought to raise these issues in the higher legal-religious sphere, pointing out the fact that possibilities exist for alternative interpretations of primary legal sources, such as Qur'anic verses and hadith literature dealing with gender issues, thus challenging traditional interpretations.⁶ In their turn, Shi'i Muslim scholars have responded by rethinking gender constructs either through written literature or oral public pronouncements, which has culminated in revisions of some of the major jurisprudential gender rulings in many different areas of Islamic law. Examples include but are not limited to the wife's equal right to her husband's sexual services, the right to judge, and the right to leave the house as the wife pleases without her husband's consent.

These changes are largely due to the dynamic process of legal interpretation (*ijtihad*) in Islamic Shi'i law,⁷ to the renewal of its methodologies

lack of sexual services, drug or alcoholic abuse. In these instances, the woman may initiate the divorce with the assistance of an imam.

⁵ In Egypt, for instance, the Law No 1. of 2000 on Certain Issues and Procedures in Personal Status Matters “approves *Khul'*, which gives the wife the unilateral right to terminate her marriage contract in exchange for a waiver of her financial rights to deferred dower (*mahr*) and financial maintenance under the law” see, Mona Zulficar, “The Islamic Marriage Contract in Egypt” in Asifa Quraishi and Frank E. Vogel (eds), *The Islamic Marriage Contract: Case Studies in Islamic Family Law* (Boston: Harvard University Press, 2008), 240.

⁶ For further discussion on this subject see Moulouk Berry, “Gender Debates in Lebanon: Muslim Shi'i Jurisprudence in Relation to Women's Marital Sexual Rights,” *Hawwa: Journal of Women in the Middle East and the Islamic World*, vol. 4, nos. 2–3 (2006): 131–158.

⁷ I would like to note here that Shi'i *ijtihad* has given an expanded space for clerics to deal with newly arising issues. Due to the closing of the door to *ijtihad* in mainstream Sunni Islam, Sunni scholars have used the objectives of the law (*maqasid al-Shari'ah*) as a very creative tool to aid Muslim Sunni scholars to deal with contemporary issues. An

(*al-tajdid al-fiqhi*) to adequately assist jurists in dealing with the complexities of contemporary life and society; and as a response to the changed socio-economic realities of women that prompted clerics to delve into the juridical sciences in search of answers to gender concerns and inquiries directed to them by lay Muslim women and men. Thus, the shift in legal rulings involved changes in a number of areas in the law. These changes can be found in *mu'amalat* (transaction) contracts and in the elaboration of the theories and methodologies of juristic principles or legal maxims (*al-qawa'id al-fiqhiyyah*), such as the “no harm and no harming” (*la darar wa la dirar*) principle, to further widen their theoretical implications and practical applications. The emergence of new rulings dealing with gender and family laws are considered responsive to women’s aspirations and needs.

Major developments in *mu'amalat* contracts have helped women secure and enforce certain conditions in their marriage contracts. In *mu'amalat* or transactions law, jurists were able to honor any form of contract, old or new, in accordance with a general Qur’anic principle: “Fulfill your contracts.” This principle became instrumental in ratifying modern contracts. Such modifications are possible as long as they do not contradict the general principles set forth by the Shari’a. In a similar manner, marriage contracts could be ratified by applying the general principle, “The believers are held accountable by their own conditions except for a condition that makes licit that which is illicit, or makes illicit that which is licit” (*al-mu'mininuna 'inda shurutihim illa shartan ahalla haraman aw harrama halalan*).⁸

Muslim women may choose to stipulate any conditions they wish in the marriage contract. Although this mechanism in the law is a long established ruling, it hadn’t gained much public attention among contemporary Muslims until the beginning of the nineties. This recent awareness came about as a result of global gender awareness on the heels of growing international

exception can be found in the works of Ibn Tyamiyyah, particularly his work on *ijtihad* which differs from mainstream Sunni interpretations in his call to revisit all original sources and not simply accept the opinion of the four legal schools as final, an idea similar to Shi’i *ijtihad*. Shi’i *ijtihad* differs, however, in some of its methodology and sources of law, a topic outside the scope of this paper.

⁸ Imam Musa Al-Sadr, “al-Islam wa Thaqafat al-Qarn al-’Ishrin” in *Minbar wa Mibrab: al-Imam Musa al-Sadr 1960–1969 bi al-Kalimah wa al-Surah*, 2d ed. (Beirut: Dar al-Hawra’, 1987), 52.

concerns over gender equality, specifically within Islamic contexts.⁹ However, there are several sticky points. The main point of contention involves the nature of such conditions and whether there is room for a wife or husband to negotiate terms of their marriage contract that are in contradiction with the substance of Shari'a (e.g., conditions that forfeit men's rights to polygamy, divorce, primary child custody and so forth). Jurisconsults often disagree on the type of stipulations allowable and whether they contradict the substance of the contract.

There is also no jurisprudential consensus about what elements are considered fundamental to the substance of the contract, beyond the spousal right to sexual services. For instance, some scholars prohibit a woman from stipulating conditions by which she can gain power of attorney on her husband's behalf in order to divorce her husband or that prevent the man from contracting additional marriages.¹⁰ Other scholars,¹¹ however, permit the wife to stipulate conditions preventing the husband from taking additional wives. The question arises: *If a condition to the marriage contract opposes an incident of the marriage contract, can it be considered one that contravenes a ruling?* If a man has an inalienable right to take additional wives, how could the wife prevent him from doing so without contradicting another significant principle in the law of contracts? "The believers are held accountable by their own conditions except for a condition that makes licit that which is illicit, or makes illicit that which is licit"? It is then left to the scholars to interpret the question of what is considered licit.

Scholars such as Abu al-Qasim al-Khu'i, have resolved the pre-marital settlement agreement controversy by looking outside marriage contracts to avoid legal problems with the question over what is considered fundamental or incidental to the marriage contract. Al-Khu'i argued that the woman might negotiate such terms under a separate contract called *musalahah*—an idea similar to an American settlement/pre-nuptial agreement (though a pre-nuptial agreement is strictly financial) or an *addendum* to the marriage contract. The couple may attempt to settle any issues

⁹ Radio, television, newspapers, and international conferences dealing with women's issues have hastened this process.

¹⁰ See for instance, Muhammad Jawad Mugniyyi, "Shurut al-Zawajah 'ala al-Zawj" in *al-Zawaj wa al-Talaq: 'Ala al-Madhab al-Khamsah al-Ja'fari, al-Hanafi, al-Maliki, al-Shafi'i, al-Hanbali* (Beirut, Dar al-'Ilm lil Malayin, 1960), 16–17.

¹¹ See for instance, Al-Sayyid Abu al-Qasim al-Khu'i, *al-masa'il al-Muntakhabah: al-'Ibadat wa al-Mu'amalat*, 12th edition (Iraq: n.p., 1979).

arising in the future before they enter the marriage. As a result, a wife can stipulate, from the outset, her primary right to child custody, herself as head of the household, her right to half of his property, or to accept the American (civil) legal judgment as final in cases of divorce. Additionally, she can prevent the husband from exercising his right to polygamy.¹² If she chooses to exercise this right, a wife's list of protections is powerful. Through a personal communiqué, I learned about a bride's future father-in-law, who upon hearing the imam read the bride's long list of stipulated conditions during the marriage ceremony in Dearborn, screamed aloud, asking whether his son is getting married or going to prison.

Although these changes in Islamic law exist and may benefit women, it seems that for many reasons they have not found much resonance with Shi'i Lebanese-American women. Social stigma, similar to the stigma associated with prenuptial agreements in the U.S., is a primary factor. According to Imam Baqer Berri:

It is due to cultural pressure, whereby many families may shy away from them. Such settlements in the minds of these families cast doubt upon the couple's compatibility and the trust between them. Such practices, however, seem to have gained momentum among *divorced* Lebanese-American Shi'i women remarrying or women marrying men with a past history of drug use or criminal activities.¹³

Sheer ignorance as to the existence of these settlement contracts may also account for women not using such legal tools to their advantage. When asked why the mosques or imams don't educate couples coming to be married about settlement contracts, local imams in Dearborn responded that they do try to educate their constituency about these issues through their sermons during special religious events and occasions such as Ashura and Ramadan: "The families' connection to religion is very weak; the lack of their religious education is due to their absence from religious institutions", said Imam Qazwini.¹⁴ Imam Abdul Latif Berry, for instance, has a

¹² If a husband violates any of these conditions, the marriage continues to be valid but the husband have violated the pre-marital contract but suffers loss of rights as a result, including the right to the wife's sexual services in which case the husband is considered incalcitrant (*nashiz*).

¹³ Imam Baqir Berri (Islamic Institute of Knowledge, Dearborn, Michigan), interview by author, October 2009.

¹⁴ Imam Hassan Qazwini (Islamic Center of America, Dearborn, Michigan), interview by author, October 2009.

monthly publication called *al-Asr* with a Q&A section dealing with marriage, divorce, and other legal and social issues. Imam Muhammad Berro has similar publications on marriage and women in Islam but he said: “most people don’t read these publications”.¹⁵ Imam Berro has contracts ready at his Islamic Council of America, and he also reiterated that, “families are not receptive to these kinds of contracts.” Imam Hassan Qazwini adds that “Not all families are interested in these contracts. They think that we [clerics] are interfering with their private lives.” Nonetheless, Imam Qazwini has witnessed, “. . . a shift recently and more families are interested in knowing about these contracts”.¹⁶

Thus, the inevitable question arises: What happens in the case of divorce when a woman opts out of the *musalahah* agreement and proceeds with a traditional religious contract (in addition to marrying civilly, thus fulfilling the state’s marriage license requirements)? In this case, should she wish to divorce, the divorce must also be affected both religiously and civilly. Here, the entanglement of Islamic and American law may lead to long and complicated proceedings over issues related to religious and civil divorce, child custody, property division, and the bridal gift (*mahr*).

Islamic Divorce Amongst Shi‘i Muslim Lebanese-American Women: Two Case Studies

The following stories are representative of a larger segment of Muslim women who did not opt for a pre-marital settlement/addendum agreement. In both case studies, the women are Muslim Shi‘i Lebanese-Americans living in Michigan. In situations similar to theirs, wherein women have chosen not to establish pre-marital contracts, they often resort to the U.S. courts for divorce in order to secure concessions on the religious legal front, or vice versa, as a way to obtain their rights; working out the nuances of being Muslim, Lebanese, and American in the process.

*Case One: Nawal*¹⁷

Nawal is a 28-year-old Lebanese-American woman who considers herself both a devout and observant Muslim. Aside from the scarf covering her

¹⁵ Imam Muhammad Ali Berro (The Islamic Council of America, Dearborn, Michigan), interview by author, October 2009.

¹⁶ Imam Qazwini.

¹⁷ Nawal, interview by author, June 1998.

hair, which she has worn since she was nine years old, Nawal is very much an American girl with American expectations of the nature of married life. However, she grew up in a Muslim Shi'i traditional family in which religious proscriptions—no matter how difficult they are—take precedence over anything else. For Nawal, her rights end where religion decrees. Nawal married a young Muslim Lebanese man who was on a student visa to the U.S.; however, things did not go well in the marriage. Her husband was always busy, absent from their home, and did not share in the care of their two young children, among many other issues. At first, Nawal was patient and tried to resolve their issues peacefully, visiting the local imam in one of the mosques in the area for consultation. Her husband refused to cooperate and the marriage degenerated into a condition of desperate unhappiness for Nawal. She finally requested a divorce from her husband in addition to custody of their children and half of the marital property.

In the absence of a *musalahah* agreement in which she could have stipulated her right to initiate her own divorce, the matter was left unilaterally to her husband. Her husband refused to grant her divorce unless she granted him custody of their young children and forfeited her right to the marital property and deferred bridal gift. To avoid this, a friend advised her to secure her right to child custody through the Michigan family court and she initiated civil divorce proceedings. Nawal was able to secure custody of her children through the state court divorce proceedings but later had to rescind it in order to prompt her husband to grant her a religiously acceptable divorce when she realized that he may never capitulate unless she do so.

The husband has since taken the children and moved to Lebanon and as a result she has not seen them for several years, with the exception of a brief period one summer when she unsuccessfully attempted to find a job in Lebanon in order to resettle there. Because her parents and siblings all live in the U.S., she had no family support in Lebanon, thus making her attempt to resettle all the more difficult. This has been a tragedy for Nawal, and obviously remains very painful and traumatic.¹⁸

¹⁸ This is not a rare case and happens quite often. Arab courts have been dealing with this and in the case of Egypt they now apply Shari'a law giving custody to the foreign wife even if she is living abroad with the children.

*Case Two: Lena*¹⁹

Lena is a 24-year-old Shi'i Muslim Lebanese-American woman who is not observant. She married her husband in Lebanon in an Islamic religious ceremony, which is recognized by the Lebanese state, but the marriage was not solemnized in the civil courts in the United States. She initiated divorce in the Michigan courts for equal share of property, custody of their children and child support. Although Michigan law does not acknowledge common law marriage, it accepted the religious marriage (contracted outside the U.S.) as legitimate and ordered in favor of Lena. The U.S. courts consulted with an imam in the community to confirm her religious marriage. Once the imam confirmed their marriage, the court judged in her favor. However, she remained religiously married for a very long time because she did not have a valid reason to effect divorce sans the husband's approval and did not want to cede rights afforded her by the court in exchange of her divorce. She was unable to remarry after that until her husband agreed to grant her an Islamic divorce when he decided to remarry.

A Muslim Shi'i Lebanese-American woman may proceed with an American civil divorce only to find herself forfeiting her right to child custody and her half of the marital property, won through the court's rulings, in exchange for her religiously legal divorce, as in Nawal's case. Or, she may accept the legal ruling of her state, in this case Michigan, on child custody and divorce only to find that she remains married under Islamic law and in the eyes of the community. A man with a unilateral right to divorce may not accept the divorce and could keep his wife religiously married to him indefinitely. A wife with no desire to reconcile has no choice but to suffer and wait, subjugating herself to her spouse's whims, as in Lena's case. The husband, meanwhile, could easily remarry religiously, since polygamy is accepted in Islam (though frowned upon in the community), and civilly in the United States, as he secured a civil divorce from the state. It is complicated, but it happens and needs to be flushed out. A Muslim woman may find it difficult to follow the two contradictory systems of Islamic law and American civil law, especially as neither fulfils her request in terms of allowing her to truly end the marriage while keeping her rights.

¹⁹ Lena, interview by author, July 2006.

The Impact of American Family Laws on Islamic Divorces

So, how did the aforementioned women leverage the courts to rule in their favor? How did Michigan courts deal with the Muslim-Lebanese women who brought their complex family and religious-based issues forward to them? What are the different approaches that Muslim clerics and key community members are taking to bring a resolution to these marital conflicts, thus bridging the gap between Islamic law and American family law? Are there theoretical possibilities for lasting change and the resolution of such power imbalances between the two legal spheres?

A number of fundamental principles in the American legal system allow for accommodating both civil and religious family laws. U.S. law uses federal constitutional principles that bear on religious marriage contracts, such as the First and Fourteenth Amendments, the Free Exercise Clause, the Establishment Clause, the Due Process Clause and the Equal Protection Law.²⁰ Similarly, the Due Process Clause, the Equal Protection Clause, and the Right to Remarriage are all protected under the U.S. Constitution. Furthermore, the Supreme Court has extracted constitutionally protected rights that form “fundamental rights” as Due Process Clause of the Fourteenth Amendment,²¹ which deserve special scrutiny.

²⁰ The First Amendment mandates that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” see U.S. Constitution, Amend.1. The Free Exercise Clause calls for the protection and reasonable accommodation of religious freedoms while the Establishment Clause requires neutrality. Although there is an obvious tension between these two clauses, the general principle derived from this is that a state can advance secular state interests as long it avoids favoring any religion and entanglement in religious activities.

Two specific cases have addressed the aforementioned tension: *Lemon v. Kurtzman* (1971) addressed whether a state action constitutes a violation of the Establishment Clause and set forth a three-prong test to that end. According to the test, the Establishment Clause requires that any governmental action, including a court order: (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not lead to excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

In *Wisconsin v. Yoder* (1972), the court held that the Free Exercise Clause requires that states accommodate religious beliefs as to avoid imposition of undue burdens on the free practice of religion. The court articulated a two-prong test that must be met to raise a claim for a violation of the Free Exercise Clause: (1) a “sincere” religious belief or practice must have been violated; and (2) the violation must be the result of a governmental action. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

²¹ John E. Nowak and Ronald D. Rotunda, *Constitutional Law*. 4th ed. (St. Paul: West Group, 1991), 568.

The *right to marry* is specifically recognized in the Constitution under the Bill of Rights' guarantee to the right of privacy. This is an important and subtle point, as divorces effected civilly but not religiously prevent the woman from remarrying legally in the eyes of Shari'a, thus denying the woman a right she holds according to the Bill of Rights. Courts must give those rights special deference to preserve the due process guarantee of the Fourteenth Amendment. The right to privacy,²² a fundamental right, has been interpreted by numerous Supreme Court decisions to include freedom of choice in marital, family, and sexual matters.²³

The Equal Protection Clause of the Fourteenth Amendment provides that "No state shall deny to any person within its jurisdiction the equal protection of the laws."²⁴ The Equal Protection principles and the freedom to remarry can be mobilized as compelling state interests in allowing courts broader authority in equitable divorce settlements that do not overburden one party's right to remarriage under the Due Process Clause by achieving state interests through neutral means. However, there are significant limits to religious accommodation in American law. For instance, constitutional principles constrain a court's ability to enforce religious contracts. In addition to these principles, legal scholars have observed norms that effectuate "protective function" of family law. Not all religious provisions may be contracted out because of the public policy goals of law in "protecting citizens against harms done to them by other citizens."²⁵ These harms include not only physical harms brought about by spousal and child abuse but also "non-physical" harms, especially "economic wrongs and psychological injuries."²⁶

Although not directly related, U.S. statutes that define property rights and child support obligations, particularly in the event of divorce, guarantee Muslim-American women certain basic rights that religious provisions do not provide in the absence of an Islamic pre-marital agreement.

²² *Ibid.*, 505.

²³ *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 564 (1989); *Pierce v. Society Sister*, 268 U.S. 510 (1952).

For further elaboration on the right to remarry and divorce see *Boddie v. Connecticut*, 401 U.S. 371 (1971). On the right of privacy in protecting the right to remarry, see *Zablocki v. Redhali*, 434 U.S. 374 (1978).

²⁴ U.S. Const. amend XIV, § 1

²⁵ C.E. Schneider, "The Channeling Function in Family Law," *Hofstra Law Review*, vol. 20 (1992): 497.

²⁶ *Ibid.*

Hence the conflict between those statutes and Islamic legal traditions usually ends up benefiting Muslim-American women. Statutes that provide basic protections against physical and emotional abuse will also bear on a court's consideration of child custody and the division of assets, whereas religious contracts are subject to substantive limits and heightened scrutiny for procedural fairness.²⁷ In the same vein, while arbitration and alternative dispute resolution are encouraged, civil courts maintain final authority to decide matters of child custody, visitation, and child support. Custody and child support decisions must further the child's best interests.²⁸ However, as seen in both of the cases shown, although the civil court rules in the interest of the woman and decides in her favor, this has little or no bearing on the religious marriage, and the woman remains unable to finalize her termination of the marriage.

Michigan Courts: Expansion and Limitations

Given the space for religious freedoms to maneuver in the U.S. legal system, contradictions arise between entanglement and religious freedom for which there is not an established set of precedents. In an attempt to allow for religious freedoms while maintaining women's rights in the state legal system on issues of marriage and divorce, judges often come to different conclusions. Michigan Courts attempt to avoid excessive entanglement with religion. Unlike courts in California and New York, there seems to be less activism on the parts of the judiciary in interpreting and enforcing religious provisions. This is certainly true at the appellate level where there is scarce law on this point. At the trial level, Michigan courts usually refer family disputes involving religion to religious arbitrators for parties to agree on a proper settlement that the court will later enforce.²⁹ In this way, courts avoid entanglement in religious doctrine while at the same time making space for religious freedoms.

²⁷ Marjorie M. Shultz, "Contractual Ordering of Marriage: A New Model for State Policy," *California Law Review*, vol. 70, no. 2 (March 1982): 214,218–19, quoted by Ann Laquer Estin, "Embracing Tradition: Pluralism in American Family Law" in *Maryland Law Review*, vol. 63 (2004): 6.

²⁸ *Ibid.*

²⁹ Judge Linda S. Hallmark (Circuit Court Judge, Oakland County, Michigan), interview by Hoda Berry-Zasa, Esq., December 2004.

In some instances Michigan courts will take into account a husband's refusal to grant a religious divorce as a factor under equitable principles, known as "General Principles of Equity" in the court system, affecting property division and spousal support.³⁰ This area of law also allows judges to take into consideration the hardships endured by women when a husband refuses to grant a religious divorce, as was evident in both Lena and Nawal's case.³¹ There are instances in which the court's ruling may effectively include pressure on the husband to grant a religiously recognized divorce. However, Imam Qazwini has responded to these orders by explaining to the state judges that the divorce is not valid if done under duress. A man has to choose to divorce on his own initiative unless there are juristic restrictions on his power, such as with cases of wife abuse (in which case, a husband could also be threatened by being incarcerated for refusing to divorce his wife). Of course, this type of threat could only be carried out in Islamic countries.

On the other hand, some judges do not consider the refusal to grant a divorce under religious law as burdening the right to remarriage guaranteed in U.S. law because both parties are free to remarry under American law.³² What happens in cases where women are not free from religious and cultural pressures, despite an official civil divorce, and who also had not stipulated protective conditions in their religious marriage contracts, as in Lena's case? If the husband refuses to divorce his wife, she would not be able to remarry in her community, even if granted a civil divorce by the state of Michigan. This is often true for both observant and non-observant Shi'i Muslim Lebanese-American women.³³

³⁰ In the area of spousal support, the Michigan Statute of Spousal Support, for which the leading case is *Parrish v. Parrish* (1984), lists 11 criteria for determining spousal support, the final one of which is "General Principles of Equity." *Parrish v. Parrish*, 138 Mich App 546, 554, 361, NW2d 366 (1984).

There are similar standards in property division, for which the leading case is *Sparks v. Sparks* (1992), where the court lists nine factors considered in property division the final one being "General Principles of Equity." *Sparks v. Sparks*, 440 Mich 141, 485 NW2d, 893 (1992).

³¹ Judge Richard M. Skutt, (3rd Circuit Court Judge, Wayne County, Michigan), interview by Hoda Berry-Zasa, Esq., December 2004.

³² Judge Hallmark, interview by Hoda Berry-Zasa, Esq.

³³ Although atheists, leftists, and secular women may not care to solemnize their marriage religiously, some will do despite their ideological differences. This may be due to the fact that they may identify with Islam on a cultural level. Also, the strength of kinship ties and familial pressures, wherein acts of individual members often reflect on the entire

If a woman chooses to remarry civilly, thus ignoring the need for a religious divorce, she tarnishes not only her reputation but also her that of her family. Her future children from another marriage would be considered illegitimate in Islamic law and would not be able to inherit in the Islamic tradition (only through the mother by U.S. law).³⁴ Women are then forced to either abandon their faith or exit their community. Thus, a Shi'i Muslim Lebanese-American woman has to face her cultural-religious identity and choose between the two traditions: one as an American with full equitable legal rights and one as a Muslim woman with less rights in terms of marriage and divorce in Islamic law but who may not wish to abandon her faith or community. In Lena's case, she opted to pursue her legal rights to divorce and custody under American law. This type of situation, however, has left many Muslim women with a sense of bitterness, feeling themselves forced to either give up their rights or their future freedom. The goal, thus, is to obtain a divorce that is recognized both civilly and religiously.

Solutions: Muslim Clerics and Key Community Members

Due to the sensitivity of this issue and in response to questions about this specific concern, local, Detroit-based imams have adopted different strategies to deal with those husbands who refuse to grant a religious divorce. For Imam Baqer Berri:

We try our best at the Islamic Institute to resolve marital conflicts peacefully. I always encourage the husband to divorce his wife [if she requests one]. If, in some cases, a man does not wish to divorce and would rather reconcile his differences with his wife, we encourage the wife to give him a last chance. In order to also protect the rights of the wife, the imam could contract an additional *post-marriage contract*, in instances, between him [the imam] and the husband in which the husband promises in writing not to violate any of the conditions set by the wife for accepting reconciliation.

family, in many instances would necessitate religious marriages. For example, an atheist friend of mine did solemnize her marriage to respond to family pressures.

³⁴ There are, of course, no cultural or religious backlashes in the community against women who opt to remarry civilly even in the absence of a religious divorce. There is, however, a general silent disapproval for members who choose to do so. Usually, these women remarry non-Muslim men. Generally speaking, most men in the Lebanese-American Muslim community would not remarry a woman civilly if they know she has not secured her religious divorce.

Should the husband violate any of the conditions stipulated in the post-marriage contract, the imam, only in his capacity as a religious authority (*hakim Shar'i*),³⁵ could then effect the divorce sans the husband's approval. This is one of the most innovative ways in Classical Islamic law that Muslim-American Shi'i scholars³⁶ are applying in Dearborn today, especially in cases where abuse, alcohol, and drugs are concerned.³⁷

There are other principles in the field of jurisprudence that are further explained through Islamic theoretical elaboration, expansion, and application of jurisprudential principles (*al-qawa'id al-fuqahiyya*). One very important juristic principle is of "no harm and no harming" (*la darar wa la dirar*). Under this principle, Muslim clerics could grant a divorce without the husband's consent should a wife provide evidentiary proof of harm that is beyond hardship (*haraj*), defined as any decrease (*nuqsan*) in one's self, finances and property on any level whether social, economic, physical or emotional (such as verbal abuse). The difference between harm and hardship is best illustrated by the following example: fasting all day may create a hardship for the person fasting but may not lead to illness. Fasting is a hardship and requires a great deal of effort; however, harm would be the illness caused by the fasting. Under the "no harm principle", the imam gives several warnings to the husband to remedy the situation. Should the husband ignore the warnings and continue to harm his wife, the imam, in his capacity as *hakim Shar'i*, could effectuate the divorce.

Should a wife want a divorce because she dislikes or no longer loves her husband, she has no grounds to initiate a divorce while keeping her full rights according to the majority of Muslim Shi'i scholars, with the exception of Ayatollah Muhammad Ali Al-Husain al-Rawhani,³⁸ who has

³⁵ In order for a local imam to act in his capacity as a *hakim Shar'i*, he has to have the following qualifications: 1) has attained high degree in deducing legal rulings (*ijtihad*) and is considered to be *mujtahid*, or one who has attained a level of legal knowledge enough to deduce his own specific rulings and 2) has a specific certificate (*ijazah*) from the Supreme Shi'i Jurisconsult (*marji'*) in which the jurisconsult invests the local imam with the power of attorney to act on behalf of the jurisconsult in the community on all legal matters, including effecting a divorce sans the husband's approval.

³⁶ There are certain rulings and ways in dealing with certain issues in Islamic law that date back to the pre-modern era. Muslim scholars sometimes resort to pre-modern and classical jurisprudential rulings in order to find solutions to modern day problems. In Shi'i law as long as these classical rulings are valid in the eye of modern day Shi'i jurists, then nothing should prevent scholars from resorting to them.

³⁷ Imam Berri.

³⁸ Imam Qazwini.

granted the wife the right to define for herself “harm”. According to Ayatollah al-Rawhani, a wife who is properly maintained by her husband, and whose husband does not suffer from any mental or physical disabilities, could still have legal grounds for divorce. Unfortunately, such a view is rare because the majority of community members either follow the juristic rulings of al-Sistani or Sayyid Muhammad Husain Fadl Allah. The common view, instead, is that the wife has to convince the husband to divorce her by forfeiting her right to her deferred bridal gift, marital property, and child custody. Even then, according to al-Sistani, if the husband does not want to divorce, he cannot be forced; whereas Fadl Allah obliges a man to divorce his wife should his wife forfeit all of her aforementioned rights in exchange for divorce. The two previously mentioned, diametrically opposed legal views also represent two historic trends in the history of Shi‘i jurisprudence. Nevertheless, a man who chooses to divorce his wife because he dislikes her or no longer loves her will always have that right. Of course, in this case, he has to pay the wife her full bridal gift, including the advanced bridal gift (if wasn’t paid at the beginning of the marriage) as well as the deferred one. In this case, the wife also retains custody rights if the kids are under a certain age.

Most imams, however, would not affect a divorce without the husband’s approval in cases where there is no clear indication of abuse, hardship, or harm. Obtaining a civil divorce and remaining married religiously often has the unwanted stipulation of making it impossible for the woman to re-marry or pursue further relationships while remaining in her community. Obtaining a civil divorce and remarrying outside of the community, thus breaking with one’s faith and causing distress to ones family, is not an acceptable third option. In these cases, could the *hakim Shari‘* effect the divorce without the husband’s approval?

Imam Abdul Latif Berry notes:

If a woman is properly maintained and fairly treated by her husband but is feeling emotionally and psychologically *pressed* by her situation, maybe out of boredom, for instance, she and her husband [in the absence of a pre-marital agreement], could contract and additional contract, *post marriage*, called a *sale’s contract*, (*‘aqd bay’*),³⁹ which a man is obliged to honor. This “sale’s contract” must be contracted in the presence of the imam due to its serious and restrictive conditions. In a sale’s contract,

³⁹ This is a regular sale’s contract in Islamic law. It is used in this context as a way to find a legal way for a wife to stipulate conditions post her marriage and in the absence of a marriage contract in the absence of stipulations in the marriage contract.

a wife tells her husband that she will sell him this book for five U.S. dollars *on the condition* that he [the husband] invest her with the power to divorce herself on his behalf anytime she [the wife] wishes.

Imam Berry has performed such a contract a number of times “such an approach has been helpful in alleviating the pressures women may feel in their marriages maybe due to the lack of having the right to divorce should they wish.”⁴⁰ In effect, contracts such as these act as a pre-nuptial agreement, contracted post-marriage. If a woman was not aware of her right to stipulate such a clause in or as an addendum to the original marriage contract, this offers a solution for that missed opportunity. Of course, the man must agree to such a contract. Imam Muhammad Berro at the Islamic Council of America also takes this approach.⁴¹

Some women complain that they fear committing adultery should they remain in the relationship, at which point the cleric would have a strong legal reason to affect the divorce. Unless this amounts to harm, the wife has no recourse but to initiate the *irrevocable* divorce or to convince her husband to agree to an additional contract, such as a post-marriage sale’s contract. If the husband refuses, she has no recourse if she does not follow the legal opinion of al-Rawhani. Imam Berro adds, “If we effect the divorce sans the husband’s approval, in many instances, we risk our reputation. There are many conservative men who would attack us if we dare to divorce their wives without their approval in cases where there is no clear indication of abuse.”⁴² Imam Berry adds that clerics so far have been successful in solving and granting all divorce cases—even the most difficult ones.⁴³ Apparently, some cases may take longer than others due to the complexities involved. Imam Qazwini writes to the major jurisprudential centers and defers difficult divorce cases to them.⁴⁴

Theoretical Possibilities for Reconciliation between Two Family Legal Systems

As made clear throughout this essay, there are a number of complexities in dealing with divorce, marriage, and child custody issues between Islamic

⁴⁰ Imam Berry (The Islamic Institute of Knowledge, Dearborn, Michigan), Phone interview by the author, October, 2009.

⁴¹ Imam Berro.

⁴² *Ibid.*

⁴³ Imam Berry.

⁴⁴ Imam Qazwini.

and American family laws. More often than not, in our bid to accommodate religious minorities in the U.S., the rights of women in minority groups are lost. Shi'i Muslim Lebanese-American women are losing basic rights afforded them by U.S. courts in terms of child custody, spousal support (in some cases), and equal share to property among others in order to secure a religiously-recognized divorce so they may be free to remarry within their community. This is indeed a serious problem that needs to be dealt with immediately. A number of Michigan state judges have met with local imams, members of the Arab American Center for Economic and Social Services (ACCESS), and other key community organizations and figures to relay their concerns over such issues and the need for novel ways to deal with these issues between Islamic law and American law.

Currently, women have two options for securing their rights and bridging certain gaps between their religious personal status laws and Islamic law:

- 1) Muslim women must opt for a *pre-marital* agreement (such as the addendum I mentioned previously in the aforementioned) to guarantee rights in Islam that are guaranteed by default in American civil law; such provisions in pre-marital contracts may not, however, always be upheld or enforced by the civil courts. There are a number of cases in different states in which judges ruled against the wife's rights to property and bridal gift due stipulated in the marriage contract due to constitutional constraints.⁴⁵ And the fact that different judges may arrive at different conclusions, constrain the wider applicability of such contracts.
- 2) Muslims could adapt the pre-marital religious contracts to the requirements of the secular civil laws of contracts. This way, parties could guarantee the legal enforceability of their contract in the courts. However, this process may involve modification of certain traditions; thus, not all conditions may be contracted out in this pre-marital agreement.⁴⁶

⁴⁵ For such cases, see Estin, 10–13. Also see Asifa Quraishi and Najeeba Syeed-Miller, “No Altars: A Survey of Islamic Family Law in the United States” available on <http://www.law.emory.edu/ifl/cases/USA.htm>.

⁴⁶ Estin, 38.

Islamic law is a dynamic law that interfaces and works with reality. Historically, it has adapted itself to many different historical, political, economic, local, and regional contexts. Taking that into account, there exists the possibility of a *third approach* that would bring Islamic personal status laws in line with American civil family law. This abridgment between religious and civil laws is possible and it is rooted in the Science of Jurisprudence (*usul al-fiqh*). The importance at this juncture lies in its wider implications and practical application within this context. Islamic law from its inception has honored certain traditions and cultures (such as customs related to bridal gifts, the type of love between spouses, the kind of dress and so forth) and criticized and changed others (such as the right to marry the stepmother that was practiced by Arabs before Islam). Therefore, some local traditions and practices (*'urf*),⁴⁷ have become informally accepted by Muslim communities in different countries as legally binding. For instance, in Islamic law, when two people solemnize their marriage contract, the man is legally obliged to provide residence and financial support for his wife and, in return, he has the right to her sexual services. In Lebanon, however, local custom among the Shi'i community is that a woman who had solemnized her marriage but not yet moved to her marital home has the right not to allow the husband to consummate the marriage. At the same time, the husband is not expected to provide for her or to support her financially until she moves in. In Iraq, in Shi'i communities, regardless of who initiates the divorce, the husband always pays the deferred bridal gift upon divorce. Here social customs and local traditions have the equivalent force of the law are referred to as "*'urf*". Thus, *'urf* be considered a source of law and it could act in a contract as one of its conditions. These issues are very important and in need of a thorough examination. I will, however, limit my discussion in this paper to the most important aspect of *'urf* and conditions in order to clarify my point. Although social practices or *'urf*⁴⁸ is considered a source of law in some legal schools in Sunni Islam,⁴⁹ it has not been considered a source of law in and of itself in Shi'i Muslim law. In Shi'i law, "reason", "the agreement of reasonable people" or "customs based on reason" called "*al-mabna la-*

⁴⁷ Based on the Qur'anic exegetical works by both Sunni and Shi'i scholars of the word "*'urf*" in verse 199; for more, see Mawil Izzi Dien, *Islamic Law from Historical Foundation to Contemporary Practice* (Edinburgh: Edinburgh University Press LTD, 2004), 60–62.

⁴⁸ Of course, Muslim scholars differentiate between regular *'urf* and legal *'urf*. Here reference is made to legal *'urf*.

⁴⁹ For more, see *Ibid.*

'uqala', or *mabani al-'uqala'*"⁵⁰ is actually considered a source of law as long as it does not contravene Islamic texts. Then, should local customs and practices be consistent with what is considered reasonable and do not contravene Islam, then they could be considered a source of law. Thus, in Shi'i jurisprudence it has to be "*'urf al'uqala'*" ("practices that are consistent with reason" and do not contravene Islamic texts); therefore, not all types of *'urf* are considered a legitimate source of law because many of these customs are not based on reason (based on consensus) but on simply cultural heritage or sometimes on socio-political factors.⁵¹ There are, however, a number of issues that Islam does not deal with in detail, such as hospitality, the viability of products and so forth. Muslim scholars consider the silence of the Law-Giver in providing much needed detail as a license to defer to local customs and variations in this regard. There are also other issues that by textual injunction, Islam defers to local customs. For example, Islam enjoins "good and fair relationships between husbands and wives" and "spousal financial support" but defers details to local practices. In light of the above mentioned, could Muslims opt to adopt American legal family practices into their Islamic law? Could that be elevated to a level of a local tradition (*'urf*) based on "*mabna al-'uqala'i'*" and have the same force of law in Islam? Muslims in the U.S. live within a particular legal tradition. Islamic marriages could include the civil legal marriages adopted in the U.S. In other words, the legal principle, "The believers are held accountable by their own conditions except for a condition that makes licit that which is illicit, or makes illicit that which is licit" (*al-mu'mininuna 'inda shurutihim illa shartan aballa haraman aw harrama halalan*) could push American civil family laws to amount to the level of implicit conditions of a Muslim marriage contract for Muslim Americans living and marrying in the States. In other words, "it is possible to transform a number of customs or traditions that are clear and widely accepted in contracts as *implicit conditions* that are widely and conclusively accepted in a given society."⁵² Thus, when a given oral custom (*'urf*) that is derived from "logical and rational people" is elevated to the level of a written condition, it acts as an implicit condition in the contract and takes precedence

⁵⁰ In the Shi'i Jurisprudence this source is referred to in many different ways such as: "the practice of the rational people" "*adat al-'uqala'*", "*sirat al-'uqala'*", and "*irtikaz al-'uqala'*" among others.

⁵¹ Imam Berry.

⁵² Imam Berry, August 2007.

over the explicit condition.⁵³ For instance, there is a condition in the marriage contract where the *deferred* bridal gift is paid after twenty years of the marriage. In this case, it is a common practice among Muslims that a wife who is divorced before the twenty-year stipulated period in the marriage contract has a right to her deferred bridal gift even before the expiration of this period. The implication of such a juristic injunction (*fatwa*) is wider than the national boundaries of the U.S. It allows the possibility of adopting any legal tradition in any country in which there are Muslim minorities as long as the traditions do not contravene Islamic texts, are reasonable, clear, and have gained wide public acceptance. By virtue of being married in the U.S., the religious marriage contract would by default carry the same obligations and responsibilities an American civil marriage carries in terms of spousal support, share of property, child custody, and divorce. This is theoretically possible but would need the wider support of the Muslim community living in the U.S. in order to be accepted. If enough Muslims accept such legal marriage and there becomes a sort of an informal expectation of such legal rights and obligations, then provisions and stipulations by the wife in a pre-marital contract would cease to be necessary. Cultural marriage celebrations would remain untouched, but legal spousal obligations, rights and responsibilities would become concurrent with U.S. civil law.

Conclusion

In order to gain greater rights in Islamic divorce laws, Muslim Shi'i Lebanese-American women are trying to assert themselves in a variety of ways: Women may evoke their rights in family law in the American civil courts to leverage rights such as in Lena's case. By the same token, men may use their unilateral right to a divorce in Islamic law to demand substantial concessions from women in financial assets and child custody matters in the same manner as Nawal's case. In order to get husbands to grant a divorce, women may often surrender the financial security granted them under both civil and religious law. All of this occurs at a high social cost to the parties involved, especially women, as well as the judicial system that is often dragged into protracted proceedings.

In response to these new paths being forged by Muslim Shi'i Lebanese-American women to negotiate their rights through the religious and civil

⁵³ *Ibid.*

courts, local imams, lawyers, community family counselors, and psychologists have recently joined in an effort to solve marital disputes and divorce issues for Muslim families *informally* and outside the court room. Michigan imams have also responded to state requirements for marriage licenses as a way to combine both religious and American civil requirements for marriage and to avoid potential future problems. No longer will any local imam in Michigan solemnize a marriage without a civil marriage completed prior to the religious ceremony.

In conclusion, there are a number of observations I would like to make:

On a theoretical level, Islamic legal tradition pertaining to divorce, child custody, and maintenance favors men and disadvantages women. Such difficulties have been addressed from within the tradition of Islamic jurisprudence, and Islam's contingent nature has been instrumental in opening new possibilities for gender equality. That said, numerous examples such as the ones I mentioned above of Islamic jurisprudence show that when it comes to actual application of Islamic law, more often than not, the lived reality is taken into consideration. Thus, Muslim scholars are working to adapt their traditions to the American legal tradition; A local imam told me that what Muslim Americans need is "education in the culture of living in contemporary modern societies."⁵⁴

Secondly, there is indeed a creative interchange and a dialogue between the American legal tradition and different religious legal traditions. The cases that are emerging and the concomitant court decisions will undoubtedly define the scope of this interchange for the different legal traditions. Such interchange also opens endless possibilities among and between traditions. American Muslims can adopt their contracts to the demands of the American legal system, thus allowing for the harmonization of the two traditions.⁵⁵

The multiculturalist accommodation of different traditions should empower women and their pursuit of their rights within their cultural and religious settings. Women's voices and their persistence to secure their rights in the US courtrooms or in their religious traditions should be the ones that drive the issue to the fore. Marrying both traditions as is theoretically possible in Islam (as suggested above) would come a long way to empowering minority religious women and guarantee rights in both

⁵⁴ *Ibid.*

⁵⁵ Estin, 19–21.

traditions. This essay opens the debate and the author hopes to contribute to future endeavors in this direction.

Acknowledgements

My thanks go to my sister, Hoda Berry, Esq., for her assistance in conducting part of the interviews for this study and for her useful comments on portions dealing with the legal aspect of American family law.

Author

Moulouk Berry is an Assistant Professor and Director of Arabic Studies, University of Michigan-Dearborn. She received her Ph.D. in Near Eastern Studies at the University of Michigan in 2002.

University of Michigan Dearborn
LCC Department
4901 Evergreen Rd.
Dearborn, Mi 48128

Bibliography

- Al-Sadr, Imam Musa. "al-Islam wa Thaqafat al-Qarn al-'Ishrin" in *Minbar waMibrab: al-Imam Musa al-Sadr 1960–1969 bi al-Kalimah wa al-Surah*, 2d ed. Beirut: Dar al-Hawra', 1987.
- Berry, Imam Abdul Latif. Interview by author. 5 August 2007. Notes. Islamic Institute of Knowledge, Dearborn, Michigan.
- . Phone Interview by author. 17 October 2009. Notes. Islamic Institute of Knowledge, Dearborn, Michigan.
- Berry, Imam Baqer. Interview by author. 10 October 2009. Notes. Islamic Institute of Knowledge, Dearborn, Michigan.
- Berry, Moulouk. "Gender Debates in Lebanon: Muslim Shi'i Jurisprudence in Relation to Women's Marital Sexual Rights." *Hawwa: Journal of Women in the Middle East and the Islamic World*, vol. 4, nos. 2–3 (2006): 131–158.
- Boddie v. Connecticut, 401 U.S. 371 (1971).
- Estin, A.L. "Embracing Tradition: Pluralism in American Family Law." *Maryland Law Review*, vol. 63 (2004): 540–569.
- Hallmark, Judge Linda S., Oakland County, Michigan, Circuit Court Judge. Interview conducted by Hoda Berry-Zasa, Esq. 20 December 2004. Notes. Pontiac, Michigan.
- Lemon v. Kurtzman, 403 U.S. 602 (1971).
- Lena. Interview by author. Notes. Dearborn, Michigan. 19 July 2006.

- Nawal. Interview by author. Notes. Dearborn, Michigan. 4 June 1998.
- Nowak, John E. and Ronald D. Rotunda, *Constitutional Law*. 4th ed. St. Paul: West Group, 1991.
- Parrish v. Parrish, 138 Mich App 546, 554, 361, NW2d 366 (1984).
- Pierce v. Society Sister, 268 U.S. 510 (1952).
- Qazwini, Imam Hassan. Interview by author. 26 October 2009. Tape Recording. Islamic Mosque of America, Dearborn, Michigan.
- Schneider, C.E. "The Channeling Function in Family Law." *Hofstra Law Review*, vol. 20 (1992): 495–497.
- Shachar, A. "Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation." *The Journal of Political Philosophy*, vol. 6, no. 3 (September 1998): 285–305.
- Shultz, Marjorie M. "Contractual Ordering of Marriage: A New Model for State Policy." *California Law Review*, vol. 70, no. 2 (March 1982): 204–334.
- Skutt, Judge Richard M., Wayne County, Michigan, 3rd Circuit Court Judge. Interview conducted by Hoda Berry-Zasa, Esq. 21 December 2004. Notes. Detroit, Michigan.
- Sparks v. Sparks, 440 Mich 141, 485 NW2d, 893 (1992).
- U.S. Constitution, amend. 1.
- U.S. Constitution, amend. 14, § 1.
- Webster v. Reproductive Health Servs., 492 U.S. 490, 564 (1989).
- Wisconsin v. Yoder, 406 U.S. 205 (1972).
- Zablocki v. Redhali, 434 U.S. 374 (1978).