

CHAPTER SIX

COULD CIVIL MARRIAGE HELP “PRESERVE RELIGION” IN MUSLIM-MAJORITY COUNTRIES?

INGRID MATTSON

Since the early Islamic period, the right of non-Muslims to practice their religion has included the right to adjudicate marriage, inheritance, custody, and other aspects of what is known as “family law” in the modern era. By definition, family law regulates relationships into which an individual is born (“blood” relations) as well as those contracted through marriage and affirmed through such practices as adoption. In case of disputes over the rights and responsibilities inherent in such relationships, a regulating authority is required to interpret the rules and enforce compliance. Since family law was understood as part of religious practice by early Islamic rulers, it was the religious leaders of minority communities who were recognized as having authority in these matters.

In most Muslim majority countries, except for a very few that have established civil marriage, the authority of minority religious leaders over family law continues until today. The right of religious authorities to regulate family relationships within their communities is seen by many, even in the modern era, as a necessary and important aspect of religious freedom. Others, however, view the enforcement of the authority of religious leaders over family law as a violation of individual freedoms. This is especially true of advocates for women’s rights, who wish to bypass the patriarchal structures of their religious communities (the heads of the Christian churches are literally “patriarchs”), as well as others who have moved away from traditional interpretations of their faiths.

Without the option of civil marriage, some religious minorities declare themselves to be Muslims in order to enjoy rights granted by Islamic law, such as the right to divorce, denied them in their religious family law codes. This is not solely a modern phenomenon. Such cases have been documented in the pre-modern era as well, as I shall discuss below. Another type of case that has been noted in the pre-modern and modern era is the conversion of a non-Muslim man to Islam for the sake of marrying a Muslim woman. This is necessary because while traditional Islamic law permits, with some conditions, the marriage of a Muslim man to a woman from the “People of the Book” (*ahl al-kitāb*)—primarily Christians and Jews—it prohibits the marriage of a Muslim woman to a non-Muslim man.

Such conversions, enacted for the sake of legal expediency or passion, can be ephemeral and abandoned when an individual seeks to return to his or her original religious community. This abandonment can be seen as an act of apostasy by the Islamic courts, with serious consequences. The penalty for apostasy without repentance in traditional Islamic law is death, while in the modern era, many scholars have distinguished religious apostasy from political treason, deeming the former a sin and only the latter a capital offense. Surprisingly, as I shall discuss below, there are historical cases of reverts to Christianity seeking the death penalty from Muslim rulers as a means of purification for what they consider their sin in having abandoned Christianity for Islam. In the Coptic Church, where martyrdom is seen as a pillar of communal identity, the execution of the Christian revert by Muslim rulers affirms a historical narrative and strengthens collective identity. In either case, apostasies have a detrimental effect on the Muslim community as well. Where religious apostasy is treated as a capital offense, Islam is rightly criticized as violating the basic right to religious freedom. Where religious apostasy is classified as a sin, it is nevertheless demoralizing to Muslims to see someone they have come to accept as a brother or sister in faith rejecting Islam and the Muslim community. Given this context, I argue in this chapter that civil marriage can help the “preservation of religion,” an Islamic ethical-juridical concept which will be explained below.

The Political Context for the Development of Minority Status

In 622 CE, when the Prophet Muhammad assumed political leadership of the oasis town of Yathrib (soon to be known as *al-Medina*—“the City”), he drew up an agreement among the refugees from Mecca and all the tribes of Yathrib, both Muslim and Jewish. Known as the Covenant (or Constitution) of Medina, the document bound the parties to the mutual defense of the new city-state and the recognition of Muhammad as the head of state. The tribes

agreed that “no party may wage war without the permission of Muhammad” and that they all “must help the other against anyone who attacks the people of this Covenant” (Ibn Hisham, n.d., 1:501–504).

The Covenant of Medina established a state that gave sole authority to its leader to wage war and demanded mutual loyalty above all other collectivities among the residents of this multi-tribal, multi-religious *umma*. One of the notable features of the Covenant is the prominence of the collective identities of the parties. The tribes had authority over their internal affairs, were authorized to act according to their existing customs, and had collective responsibilities toward their members in such things as paying ransoms and compensation in blood feuds. The Jews are mentioned in the document as a distinct group as well as members and allies of various Arab tribes. Among other things, the document says, “the Jews have their religion (*dīn*) and the Muslims have theirs.” The new collective identity that was formed by the Covenant, that of citizens of Medina, therefore only added to, without replacing, the tribal and religious identities that came before. The early city-state of Medina might therefore be considered a kind of federalist state.

In later years, however, as other lands and people came under Medinan rule, the character of the state began to change. While most Arabs converted to Islam, and some Christian Arabs joined the federation without leaving their religion, some hostile Jewish tribes defeated in war negotiated protection without reintegration in the federation as full members. Upon the death of the Prophet Muhammad, Medina was ruled for four decades by a succession of his companions who clashed with the regional imperial powers—the Sassanians and the Byzantines—and inevitably had to adopt aspects of their imperialism to rule over lands they won and the people who negotiated surrender or were defeated in war. After less than four decades, the Medinan state was no longer the centre of political power but became part of a minor province incorporated into a new Muslim dynasty established in Damascus. From the establishment of the Umayyad dynasty (mid-seventh to early eighth century CE) until the fall of the Ottoman dynasty in the early twentieth century CE, the majority of Muslims accepted caliphs who were established through dynastic succession.

Within a few decades of the death of the Prophet Muhammad, his successors had accomplished the remarkable feat of defeating the two regional superpowers. The Sassanian dynasty was utterly vanquished, while the Byzantines were driven out of lands east of the Mediterranean (remaining perennial rivals to a succession of Muslim dynasties until their final overthrow by the Ottomans in the fifteenth century CE). Each time new lands came under the control of the Muslim rulers, either through capitulation or conquest, new religious communities were incorporated into the growing empire. Communities that had been affiliated with the defeated dynasties—such as the Greek churches of Byzantium and the Zoroastrian priests of Iran—lost status, leadership, and privileges, while other communities that had suffered oppression under the pre-Islamic dynasties, such as the Jews and Nestorian Christians, flourished after the initial conquests. Within a short time, the Islamic empire encompassed Syriac, Armenian, Greek, and Coptic Christians, in addition to Jews, Zoroastrians, and others. In all cases, religious communities were represented by leaders whose authority over their people was affirmed by Muslim rulers as long as they expressed loyalty to the new regime (Levy-Rubin 2011, 42–57).

With the military conquest of lands where there were no Muslims, the distinction between Muslims and non-Muslims widened, and political status became almost completely conflated with religious identity. Unlike in the Covenant of Medina, in the Islamic law and political theory that developed within the empires, non-Muslims were not normally expected to participate in military service that, by this time, was framed as a religious obligation for Muslims (although, in reality, the commanders of empires often shifted to relying on professional foreign or slave soldiers who had few loyalties to Muslim citizens). Non-Muslims who had no part in the protection of the state were “protected people”—*dhimmi*s. A *dhimmi* was “protected” by the law, the shari‘a, in his or her person and property, and, like Muslims, was protected from external aggression by means of the state army supported by taxation. Anver Emon convincingly argues that “the intelligibility of the *dhimmi* rules is premised on the premodern jurists’ pre-commitment to an imperial mode of governance, whether real or imagined” (Emon 2012, 21).

Muslim rulers were clearly influenced by the practice of previous empires in their adoption of an official state religion and in their formulation of *dhimmi* status. Both the Byzantines and the Sassanians had official state religions—Christianity and Zoroastrianism respectively. Milka Levy-Rubin (2011), in her compelling historical study of the changing fortunes of non-Muslims in early Islamic law and society, characterizes the *dhimmi* as having a kind of “resident alien” status similar to what existed for religious minorities in almost all ancient Near Eastern and classical societies. For example,

Jewish communities under Roman rule were given wide-ranging autonomy. This included judicial autonomy headed by a Patriarch; the right to collect taxes; the right to excommunicate members of the community; the exemption from duties

entailing the profanation of the Sabbath and holidays; the special privilege of circumcising their children (an act that was generally prohibited throughout the empire, as it was considered mutilation); and more. (Levy-Rubin 2011, 116)

The Byzantines, in contrast to the Romans, added a significant number of laws “aimed at restricting the Jewish community’s autonomy and rights, and segregating them from Christian society” (Levy-Rubin 2011, 116). One restriction was a prohibition on marriage between Jews and Christians. Unlike the Byzantines, the Sassanians had no legal codes pertaining to the status of religious minorities; their policy “was volatile, and often shifted between tolerance and intolerance” (Levy-Rubin 2011, 120).

While the existing practice of pre-Islamic empires set the context for an Islamic law of religious minorities, there are other factors that gave the shari‘a its distinctive approach to the regulation of marriages between Muslims and non-Muslims as well as its approach to the regulation of minority religious communities.

The Shari‘a and the Regulation of Family Law

The right for non-Muslims, especially *ahl al-kitāb*, to practice their religion is well-established in traditional Sunni legal texts. The word “traditional” here signifies the Islamic legal literature employing methodologies and discourses developed in the first few centuries after the rise of Islam that resulted in the major Sunni schools of law. This law is based on the Qur’an and on the teachings of the Prophet Muhammad—the sunna—but cannot be reduced to either. While traditional Sunni legal texts were composed in the pre-modern period, many scholars continue to follow this methodology and reproduce pre-modern discourses until today. A characteristic feature of traditional Sunni law is its diversity in methodology and conclusions, resulting in multiple schools of thought and practice that mostly recognize the other schools as authoritative and within the bounds of orthodoxy. Among the Shi‘ites, the Ja‘fari (“Twelver”) school diverges from traditional Sunni family law in some significant areas, although there are many overlapping rulings and principles. Because Shi‘ite legal epistemology is quite different from the Sunni tradition, this study will focus primarily on traditional Sunni law, which we can also call, for reasons explained below, “the shari‘a.”

Bernard Weiss, a keen interpreter of Islamic law, calls the shari‘a “a kind of Platonic vision” (Weiss 1978, 205). Shari‘a is distinguished from *fiqh*, literally, “understanding,” which signifies the human understanding of the law. While the distinction between the two terms is important, it should not be overstated. Legal scholars often conflate the terms and consider their *fiqh* to have authority only because their understandings are justified by the theological precepts of the shari‘a which oblige the scholar to seek God’s law through God’s word—the Qur’an—and through the authenticated teachings of God’s messenger, that is, the Prophet Muhammad.

The gap between shari‘a and *fiqh* is admitted by the legal scholars’ profession of humility in their ability to find, as opposed to seek, God’s law. In most cases, scholars have to evaluate multiple, sometimes conflicting sources (different Qur’anic verses and a vast corpus of Prophetic hadith of varying reliability and ambiguity), in addition to making rational, intuitive, or custom-based assessments of the public interest and social priorities. Much of legal reasoning, therefore, results in conclusions that, according to Muslim jurists themselves, are speculative (*ẓannī*), potentially incorrect and, hence, subject to correction or re-evaluation. Legal judgments have traditionally concluded with an acknowledgement of the human limitations of discovering God’s law, epitomized by the pious statement, “And God knows better.” This is not to say that a speculative conclusion can be whimsical or improbable, for only opinions that the jurist holds to be probably correct are authoritative, even if they are potentially flawed.

Family law is not a topic per se in traditional Islamic legal texts; rather, separate chapters within *fiqh* books are devoted to the regulation of relationships and wealth within the family. A typical text has major chapters on marriage, divorce, inheritance, maintenance, and foster children. Many of these topics are addressed explicitly and frequently in the Qur’an and the sunna. In contrast, the family life of non-Muslim communities is given almost no attention, except in the case of intermarriage with Muslims.

Religiously mixed families were a pervasive reality while the Qur’an was being revealed because the Prophet’s community was comprised exclusively of converts to Islam. Given the hostility of the Meccan polytheists to the Muslims, it is not surprising that marriage between Muslims and polytheists was outlawed (Qur’an 2:221). At the same time, the Qur’an makes distinctions among non-Muslims, elaborating, in particular, a special relationship between Muslims and *ahl al-kitāb*. The preference given to *kitābīs* (individuals from the *ahl al-kitāb*) in communal

relations is evident, among other things, in the Qur'anic permission for marriage between Muslim men and *kitābī* women (Qur'an 5:5).

Importantly, jurists did not extend the permission to marry *kitābīs* to Muslim women. One could argue that this is because the Qur'an gives permission for such an interfaith marriage only to men; therefore, the jurists were simply faithfully following the Qur'anic text. This answer is not completely satisfactory because many Qur'anic rulings which address a particular class of persons are generalized to other classes. For example, the legal protection which the Qur'an (24:2) gives to women who are slandered is extended by jurists to men. So if it is not Qur'anic hermeneutics that blocks the extension of the permission to marry *kitābīs* to women, what is it? What we find in traditional Sunni law are two principles that directly impact this ruling. The first is that a believer should never be under the total authority of an unbeliever, lest the latter interfere with the former's religious obligations. It was for this reason that non-Muslims were prohibited from owning Muslim slaves (just as non-Christians were prohibited from owning Christian slaves in Byzantine law [Levy-Rubin 2011, 117]). The other principle is that a woman must be obedient to her husband. A marriage of a Muslim woman to a *kitābī* man would therefore place a believer under the authority of a non-Muslim—an intolerable situation according to traditional Sunni law.

What we see here is that broader political and social considerations affected the way traditional Sunni jurists interpreted family law and set boundaries for interaction with non-Muslims. In addition to the concerns already mentioned, jurists also had to exercise some pragmatism when defining relations with other religious communities. In the absence of military conflict, political authorities were keen to promote stability and wanted a smooth integration of new lands in their territories. To this end, it was politically desirable to find ways to include communities other than Jews and Christians within the preferred *ahl al-kitāb* category. In addition to political pragmatism, other factors contributed to a liberal interpretation of who could be included among the *ahl al-kitāb*. Since the polytheist Arabs had no scripture whatsoever, the fact that religious traditions other than Judaism and Christianity which Muslims encountered as they moved outside of Arabia, such as Zoroastrianism, did reference ancient scriptures, justified their inclusion, at least marginally, in the *ahl al-kitāb* category. Communities that had been marginalized before Islam, such as Manicheans and Sabians, were often savvy, but not always successful, in presenting themselves in a way that would gain them acceptance in the Islamic communal hierarchy (Berkey 2003, 99–100). Still, Muslim jurists noted that even the Zoroastrians did not “behave like” *kitābīs*, so they made a distinction between offering them *dhimmi* status, which they permitted, and marrying their women and eating their food, which they prohibited (al-Shafi'i 1989, 4:246–247).

What's Love Got to Do with It? Transgressing and Restoring Communal Purity

The politics of communal relations in pre-modern Islamic civilization are complex. Muslim rulers were always keen to ensure that diverse populations lived together peacefully so that the sources of the state's wealth—trade, agriculture, and taxation—continued without interruption. Muslim rulers differed, however, in their interest in religious ideology and identity. Levy-Rubin argues that in the early period of Islam, when Muslims were living as small groups in their own settlements apart from conquered populations, they had little interest in regulating the boundaries of communal identity. By the end of the first century of Islam however (early eighth century CE), non-Muslims had moved into the settlements while Muslims had moved into the cities and towns. Now Muslims and *kitābīs* were living and working alongside one another and, significantly, sharing public space. This was not a comfortable situation for many. Christians and Jews had longstanding prohibitions on marriage to those outside their faith, as well as dietary regulations that limited inter-religious conviviality. The purpose of these rules was to keep believers within the faith. Apostasy was deterred by the establishment of severe penalties. When Christians or Jews had political power, the punishment was death. Lacking such power in the Islamic empire, non-Muslim religious leaders had to settle for enforcing a kind of social death on apostates, prohibiting believers from giving them any support.

For Muslims, the Qur'an not only permitted marriage to *kitābī* women, but in the same verse, permitted sharing food with them. In the Arabian context of the Prophet's time, *kitābīs* were outnumbered by Muslim converts; in contrast, *kitābīs* outnumbered Muslims in the territories outside of Arabia for at least the first few centuries of Islam. In this context, inter-religious mingling diluted Muslim solidarity and made transgressions of Islamic law easier. In order to fortify communal boundaries, Muslim rulers began issuing a series of edicts that confined religious activities to certain zones and regulated personal identity markers. Muslim men and women were obliged to dress in a certain manner (and could be punished for “imitating” non-Muslims in dress and hairstyles); similarly, Christian

and Jews had their distinctive dress, hairstyles and other identity markers. In some cases, the regulations went beyond the goal of differentiating the various communities and were intended to privilege Muslims over non-Muslims.

Despite the efforts of officials from all religious communities to create firm communal boundaries, it is clear that many people simply did not care about such things. Alexandra Cuffel, who researched shared festivals and rituals of intercession by Jews, Christians, and Muslims living in Egypt, Syria, Andalus, and the Maghrib in the medieval period says that historical sources show “a fairly easy, friendly relationship between Muslims and their non-Muslim neighbors, in which little if any effort was expended to recognize and maintain community divisions” (Cuffel 2013, 120).

Officials from all religious communities employed a variety of strategies to dissuade their members from what they perceived to be a dangerous lack of concern to maintain communal boundaries and purity. Muslims had an advantage over other religious communities in being able to go beyond preaching to invoke the law to prevent and punish apostasy. Lacking the coercive power of the state, non-Muslims had to be more creative and compelling in their rhetorical efforts to dissuade communal transgression. The Egyptian Copts, who had suffered a major decline in their numbers by the thirteenth century CE, drew on visceral themes of lust and bloodshed to create a dramatic deterrent to apostasy with martyrdom literature, of which one of the most famous is *The Coptic Martyrdom of John of Phanijoit* (hereafter referred to as *The Martyrdom*).

The Martyrdom tells the story of a Coptic man named John who converted to Islam in order to marry a Muslim woman. The text asserts that John’s motivation was lust. Jason Zaborowski notes that “the underlying moral polemic disparages conversion to Islam, portraying John’s change of faith as a moral corruption” (Zaborowski 2005, 6). The Muslim woman whom John marries thus stands as a kind of synecdoche for Islam. Later, John regrets his apostasy and wants to return to his community of birth. He goes to a village where the Muslim governor protects those who want to return to Christianity. John is free to practice Christianity but is plagued by guilt and wants “purification” which can only be achieved through martyrdom. John decides that he must take a public action that will be an act of service to the Christian community. Consequently, he travels to the court of the sultan to whom he says, “Purify me with your sword.” The sultan is portrayed as reluctant to execute John, but the latter persists, a zeal which *The Martyrdom* exalts. In Zaborowski’s words, martyrdom “functions as a solution for the pollution of assimilation” and is an “identity-shaping” device “used by a community seeking to distinguish against an Other” (Zaborowski 2005, 6).

While some might focus on the legal enforcement of the prohibition of apostasy as the cause of John’s martyrdom, I wish to highlight three other important factors that contributed to the crisis. The first is the fact that traditional Sunni law did not extend permission to Muslim women to marry *kitābī* men. If that permission had been in place, John would not have needed to convert to Islam to marry the woman. The second factor is the lack of a secular or civil marriage. While it is anachronistic to think about this in the context of the thirteenth century CE, this is not the case in the modern era, a time when a law against apostasy is seen as a violation of individual right to religious freedom. When such crises have surfaced in the modern era, they have created scandals and are used as evidence of Muslim intolerance and an argument against legitimizing the shari‘a as a source of law in the modern era. However, if John and the Muslim woman, or their modern equivalents, had been able to secure a civil marriage, once again, the apostasy scandal would never have happened.

The third factor which contributed to the crisis was the need of the Coptic Church for dramatic consequences to apostasy and an exemplary sacrifice to atone for the grave sin. Since Christianity was not the official state religion, the Copts did not have the power held by the Muslims, nor the Roman Church for that matter, to execute an apostate. Martyrdom, a kind of execution by proxy, was, however, an option. According to Randall Henderson, martyrdom has been a critical part of Coptic identity since its founding, as is demonstrated by the fact that the Coptic “calendar of the martyrs” begins in 284 CE with the reign of the Roman emperor Diocletian who engaged in a brutal persecution of Christians (Henderson 2005, 155). For the Coptic Church, martyrdom has two salutary effects: it purifies the individual of sin, and it contributes to communal solidarity. According to Sidney Griffith, “all the accounts of the neomartyrs written by Christians living within the world of Islam had the potential to reaffirm and shore up the sense of Christian solidarity in times and places in which their public confessional identity was almost submerged under the social and cultural weight of Islam” (Griffith 2010, 151). What this means is that the Coptic Church needed and even sought martyrdom at times to strengthen group loyalty and commitment. Consequently, if martyrdom could have been avoided in cases like John’s through the existence of civil marriage, or if traditional Sunni law had been reinterpreted to permit the marriage of a Muslim woman to a *kitābī*, then other tactics, possibly

as disruptive to the social order, might have to be found to prevent intermarriage and engender group loyalty. One of these tactics was to publicly revile Islam and insult Muslims, a tactic employed at times by Christians seeking martyrdom in Muslim empires (Griffith 2010, 149).

What all of this demonstrates is that it is difficult to isolate and reform family law in a context of heated communal tensions where religious identities and loyalties are invoked. A change to traditional Sunni family law might help avert apostasy scandals but does not guarantee an absence of conflict among religious communities.

The Authority and Limits of *Kitābī* Communal Authorities

Incidents such as the Coptic martyrdoms are an exception to the usual state of more or less peaceful coexistence in the Islamic empires. Neither Muslim officials nor *kitābī* religious leaders had their primary interests served through confrontation and communal strife. Where actual court documents have been examined, rather than books of legal theory, as it is possible to do for certain periods of Ottoman rule, it has been shown that the state often turned a blind eye to religious apostasy, prosecuting only political treason. (Interestingly, it is precisely this distinction that most contemporary Sunni scholars make in arguing that there should be no legal penalty for apostasy from Islam, but only for treason against the state [Saeed 2004]). Sabrina Joseph elaborates that the Ottomans “had always been concerned to prevent forced conversions, often requiring that suspected cases be examined directly by the Porte in Istanbul. Ultimately, such incidents jeopardized the state’s relationship with the local population and its efforts to maintain order” (Joseph 2009, 342).

The most important strategy Muslim empires employed to keep social order in the religiously diverse societies they ruled was to give as much autonomy to local communities as possible to govern their affairs. This strategy was generally used for Muslims as well, whose legal schools were not only divided along Sunni and Shi’ite lines, but also by adherence to a number of different schools of law, each of which further permitted a significant degree of local custom to be incorporated into applications of the law (Hallaq 2009).

Autonomy for non-Muslim communities meant that they determined their own systems of authority and theological doctrines, had the power to excommunicate members, administered their distinctive family law codes, and generally enforced customary regulations that kept good order. Religious officials were responsible for collecting taxes from their community members and paying an annual tribute to the state. Of course, there never was just one “Islamic state” or empire, and arrangements between various bureaucracies and the *kitābī* communities differed. Under the Ottomans, who had the most centralizing and developed bureaucracy of any Islamic empire, *kitābī* communities were well integrated into the state and their officials were honoured and treated as state officials. All recognized Jewish and Christian communities—which included the Armenian, “Roman” (Orthodox), Syriac, and Coptic Churches, among others—had strong hierarchies, a system that usually benefited the state. Ottoman officials “sought to protect the integrity of the church hierarchy when the latter was threatened by local priests who sought to bypass central church authorities . . . [T]he state preferred, whenever possible, not to disrupt the workings of existing hierarchies or completely displace existing institutions” (Joseph 2009, 337).

The authority of *kitābī* officials was limited, nevertheless, by a number of factors. First, if there was any intercommunal dispute or capital crime, the shari’a courts had jurisdiction. Second, the shari’a courts, unlike the non-Muslim communities, had at their disposal the ample human and bureaucratic resources of the state to ensure proper registration of documents and expertise in all areas of law. Third, the shari’a judges made themselves available to anyone, including non-Muslims, who presented to them with a dispute. What this meant is that Christians or Jews who were unsatisfied with the way they were treated by their own officials could easily find a way to circumvent their authority by resorting to the shari’a courts. This was not an infrequent occurrence. Women in particular often found the shari’a rulings more supportive of their interests. In most Christian denominations, divorce was prohibited, and in Judaism only the husband could end a marriage. In the shari’a court, on the other hand, a woman could obtain a judicial divorce on certain grounds. Many non-Muslims, men and women, also found the shari’a rulings on inheritance more favourable (Gradeva 1997; al-Qattan 1999).

Not surprisingly, non-Muslim officials were distressed when their members bypassed their authority and sought justice from the shari’a court. Gradeva cites the Bishop of Kampania who declared in the late eighteenth century, “Christians who are not satisfied with the decision of the church court and turn to an ‘alien’ court should never have their cases resolved by the church courts. They should be rejected and hated . . . and punished by the Church” (Gradeva 1997, 44). There is no doubt that when *kitābīs* took their internal and personal affairs to the

shari‘a courts, it undermined the authority of *kitābī* religious officials. Gradeva shows that this concerned Ottoman officials to the point that they forbade Muslim judges from being involved in Christian family disputes and they repeatedly confirmed “the exclusive authority of bishops in these and other religious issues” (Gradeva 1997, 58). Nevertheless, Christians continued to appeal to the shari‘a courts whose judges felt an obligation to respond.

In interfaith family law disputes, Christians were clearly disadvantaged in the shari‘a courts. Joseph discusses the case of a Christian woman who divorced her Muslim husband and went to court seeking custody of their young children. According to traditional Sunni family law, the mother has the right to custody of children who are under seven years old. In this case, the judge told the Christian mother that she could only access that shari‘a right if she were a Muslim. Given a chance to convert to Islam, the mother did so and was given custody of her children (Joseph 2009, 346–47). Here we see a strong possibility of an insincere religious conversion that might have been abandoned later in life when circumstances changed (i.e., when the children were grown or were transferred to the custody of the father). If this woman later apostatized, the consequences could have been severe to her, traumatic for her family, and demoralizing to the Muslim community as well.

The place of *kitābī* communities in the legal and political landscape of the pre-modern Islamic empires is complex and we cannot overgeneralize from specific eras and cases. Nevertheless, there are three behaviours which reappear in various times and places. The first is that Muslim political authorities tend to uphold the authority of *kitābī* officials over their communities. The second behaviour is that of *kitābīs* who defy their religious officials to seek their individual interests in shari‘a courts. While these people may still identify with their religious communities, the bonds of communal solidarity are not strong enough for them to forgo what they see as their personal interests. The third behaviour is religious conversion for the sake of obtaining equal justice or another need. Those who convert for such reasons are more susceptible to apostasy, which can lead to grave consequences and social upheaval.

The tension between communal solidarity and individual interests is one that continues from the pre-modern period into modernity. While the last Islamic empire ended in the early twentieth century, the model of religious *millets* having authority over religious and family law persisted in most Muslim nation states. Egypt is one of the nations where these tensions continue to play out. As we shall see in the case of Mr. Naguib, implementing the principle of religious freedom in a society where minority communities feel embattled is not easy.

Who Has Authority over a Religious Tradition?

Should a divorced man who wishes to remarry have the right to do so? In 2010, the Egyptian Supreme Administrative Court responded to this question affirmatively and ordered the Coptic Church to issue a marriage license to a man who had previously divorced his wife. The Church’s attorney, Nabil Gabriel, protested saying, “Can the Court oblige the Al-Azhar Grand Imam to make prayers (six) times a day instead of (five)? Why does the Court intervene in religious rituals of the Copts which stem from the Bible?” (Abdelmassih 2010).

Ordering the Coptic Church to act in violation of its religious law seems, on the face of it, a clear breach of religious freedom. Yet the situation in Egypt cannot be reduced to a simple conflict between church and state, as Ron Shaham (2010) discusses in an article analyzing the ongoing case before 2010. In the first place, Mr. Naguib, the man seeking remarriage, had been granted his divorce by the national courts on grounds permitted by the family law code issued in the early twentieth century by the Coptic Orthodox Supreme Communal Council. The Council was one of a number of such bodies recognized by the state at that time as representative of non-Muslim religious minorities. As in Ottoman times, these organizations had authority over family law within their communities. The contemporary Church, however, denies that the lay leadership of the Council ever had the authority to issue laws pertaining to marriage and divorce. The Church, which convinced President Sadat to abolish the Council in 1962 and cede to itself all authority over communal affairs, has since severely restricted grounds for divorce. In the Naguib case, the court justified compelling the Church to issue a marriage license in terms of rights saying, “the right to family formation is a constitutional right, which is above all other considerations.”

How can we characterize this disagreement between the Coptic Church and the Egyptian court (as well as Mr. Naguib)? Is this a clash between civil rights and religious freedom? The rights articulated in this case do not quite fit into this dichotomy. After all, Mr. Naguib is a Coptic Christian who seeks a marriage license from his church. The only other way he could obtain a marriage license in Egypt would be to convert to another Christian denomination

or to Islam. The religious freedom of Mr. Naguib, in addition to his civil rights, is therefore at issue in this case. The Church, on the other hand, sees this as interference by the state in its internal affairs.

It would seem reasonable that the Church, in order to meet the court's concern that no one be denied the right to marry, while still maintaining its authority over Christian family law, would support the establishment of secular marriage and divorce. This way, individuals who violate the Church's teachings (at least in the eyes of the Coptic Patriarch) could still have access to civil marriage. However, conservative members of the Coptic Church have long opposed the recognition of secular marriage. Church leaders fear that this will lead to a further weakening of the Church's influence over Egyptian Christians, an acceleration of the secularization of society, and greater intermarriage between Christians and Muslims, contributing to the already precipitous demographic decline of their community.

In the area of family law therefore, freedom of conscience and freedom of religion exist in some tension for Coptic Christians because of the conviction many Egyptians hold that religious freedom is an empty right if the religious community disappears through lack of cohesion. For this reason, many Coptic leaders support the continuation of parallel family law systems for different religious communities in order to establish communal boundaries to protect their sometimes tenuous existence (Scott 2007).

The situation is similar in Syria:

Although many Christians (especially Greek Orthodox) voice criticism of at least parts of their personal status law and the way the church courts function, they still ambivalently support their own exceptional status. The exemptions from 'state law' for the various recognized Christian churches, many claim, today acts to safeguard the continued survival of Christian communities in Syria. (Rabo 2012, 87)

While one might assume that in the modern era religious minorities want "equality," what they often want most is the ability to retain a viable communal life, and this often means retaining or developing restrictions for their own community members to prevent them from assimilating into the majority culture. In many nations that are heirs to the Ottoman Empire, there is the complicating factor of an embedded patriarchal culture that stifles reformist movements. Some argue that this patriarchal culture exists in a symbiotic relationship with authoritarian governments, making religious reform as difficult as political reform. As Grafton notes,

the Armenian, Syrian, and Coptic Orthodox churches are instinctively patriarchal and hierarchical systems. The role of the bishop or Patriarch thrives within the Arab social milieu. Essentially, Patriarchs function as tribal *shaykhs* by providing honor for their communities and acquiring the loyalty of the members of their churches by providing services and gaining opportunities for the community. (Grafton 2012, 24)

However, this is not just an Arab or Islamic issue. Until today, Orthodox rabbis have a monopoly on the enforcement of Jewish law in Israel, an heir to the Ottoman *millet* system, despite the objections of Reform and Conservative Jews as well as secularists who abhor what they see as violations of women's rights and dignity in Orthodox family law.

What Kind of Law "Preserves Religion" Best?

It is widely agreed upon by legal scholars, both Sunni and Shi'ite, that the shari'a serves to promote and preserve a few fundamental interests. The "goals of the sacred law" most commonly articulated are: religion, life, property, intellect, and lineage.

In traditional Sunni law, "preserving religion" to a large extent meant establishing and supporting religious institutions and authorities, punishing blasphemy and apostasy, and generally finding ways to secure Islam's place in society. In this context, the establishment of secular or civil marriage would seem on the face of it to be undermining of religion. If people could have a civil marriage, then Muslim women could marry non-Muslim men and there would be no requirement for the children of such a union to be Muslim. Indeed, in Lebanon, where civil registration of marriage was introduced in 2013, the Sunni Grand Mufti Shaykh Mohammed Rashid Qabbani issued a fatwa against it, saying, "any Muslim with legal or executive authority in Lebanon who supports the legalization of civil marriage is an apostate and outside the religion of Islam" (*Al Arabiya* 2013b). Similarly, as I have shown, most Christian and Jewish religious officials in Muslim-majority nations and Israel also feel that civil marriages will defeat their attempts to "preserve religion."

A reformist view of the shari‘a, which departs from traditional Sunni law, looks at the goals of the shari‘a somewhat differently. In the first place, beginning with the early modern scholar Ibn ‘Ashur, reformists have added “freedom” to the goals. Further, since the establishment of modern Muslim nation-states, reformist scholars who have seen the tremendous capacity of the modern state for interference in personal matters have tended to shift from a paternalistic model of the state to one based on personal liberty (Kamali 1997; Sachedina 2001). While the goals of the shari‘a are the same, the proper role of the state is now seen as providing a secure environment in which individuals can pursue their understanding of these interests, as long as they do not violate the rights of others.

Most importantly, we have seen that if Muslim, Jewish, and Christian communities wish to retain their right to interpret their own family laws, especially if their interpretations are traditional, there will continue to be individuals who seek their own interests above orthodoxy and communal solidarity. These individuals will bedevil the system through court shopping and insincere conversions, leading, at times, to apostasy scandals. False conversions undermine trust in a community. Apostasy scandals create trauma and can trigger human rights violations. This undermines, rather than preserves religion. There is little doubt that the establishment of civil marriage will cause a growth in the secular sector. At the same time, perhaps those who adhere to their religious communities will have more sincerity—a valuable quality in any faith.

References

- Abdelmassih, Mary. 2010. "Coptic Church Protests Egyptian Court Ruling on Marriage License." *Assyrian International News Agency*, May 30. <http://www.aina.org/news/2010053016089.htm>.
- Al Arabiya*. 2013a. "Lebanon's First Civil Marriage Registered, Agency Says." April 25. <http://english.alarabiya.net/en/News/middle-east/2013/04/25/Lebanon-s-first-civil-marriage-registered-National-agency-says.html>.
- . 2013b. "Lebanon's Top Cleric Issues Fatwa against Civil Marriage." February 13. <http://english.alarabiya.net/en/News/2013/02/13/Lebanon-s-top-cleric-issues-fatwa-against-civil-marriage.html>.
- Berkey, Jonathan P. 2003. *The Formation of Islam: Religion and Society in the Near East, 600–1800*. Cambridge: Cambridge University Press.
- Cuffel, Alexandra. 2013. "Environmental Disasters and Political Dominance in Shared Festivals and Intercessions among Medieval Muslims, Christians, and Jews." In *Muslims and Others in Sacred Space*, edited by Margaret Cormack, 108–146. Oxford: Oxford University Press.
- Emon, Anver M. 2012. *Religious Pluralism and Islamic Law: Dhimmīs and Others in the Empire of Law*. Oxford, UK: Oxford University Press.
- Gradeva, Rossita. 1997. "Orthodox Christians in the Kadi Courts: The Practice of the Sofia Sheriat Court, Seventeenth Century." *Islamic Law and Society* 4, no. 1: 37–69.
- Grafton, David D. 2012. "The Arab *Shaykh*: Authority in Christian and Muslim Communities, and Questions of Social-Political Reform." *Islam and Christian-Muslim Relations* 23, no. 1 (January): 19–30.
- Griffith, Sidney H. 2010. *The Church in the Shadow of the Mosque: Christians and Muslims in the World of Islam*. Princeton, NJ: Princeton University Press.
- Hallaq, Wael B. 2009. *Shari'a: Theory, Practice, Transformations*. Cambridge: Cambridge University Press.
- Henderson, Randall P. 2005. "The Egyptian Coptic Christians: The Conflict between Identity and Equality." *Islam and Christian-Muslim Relations* 16, no. 2 (April): 155–166.
- Ibn Hisham, 'Abd al-Malik. n.d. *al-Sira al-Nabawiyya*. 2 vols. Beirut: Dar al-Khulud.
- Joseph, Sabrina. 2009. "Communicating Justice: Shari'a Courts and the Christian Community in Seventeenth- and Eighteenth-Century Ottoman Greece." *Islam and Christian-Muslim Relations* 20, no. 3 (July): 333–350.
- Kamali, Mohammad Hashim. 1997. *Freedom of Expression in Islam*. Cambridge: The Islamic Texts Society.
- Levy-Rubin, Milka. 2011. *Non-Muslims in the Early Islamic Empire: From Surrender to Coexistence*. New York: Cambridge University Press.
- Qattan, Najwa al-. 1999. "Dhimmis in the Muslim Court: Legal Autonomy and Religious Discrimination." *International Journal of Middle East Studies* 31: 429–444.
- Rabo, Annika. 2012. "'We are Christians and We are Equal Citizens': Perspectives on Particularity and Pluralism in Contemporary Syria." *Islam and Christian-Muslim Relations* 23, no. 1 (January): 79–93.
- Sachedina, Abdulaziz. 2001. *The Islamic Roots of Democratic Pluralism*. New York: Oxford University Press.
- Saeed, Abdullah. 2004. *Freedom of Religion, Apostasy and Islam*. Burlington, VT: Ashgate Press.
- Scott, Rachel M. 2007. "Contextual Citizenship in Modern Islamic Thought." *Islam and Christian-Muslim Relations* 18, no. 1 (January): 1–18.
- Shafi'i, Muhammad ibn Idris al-. 1989. *al-Umm*. 8 vols. Cairo: Dar al-Ghada al-'Arabi.
- Shaham, Ron. 2010. "Communal Identity, Political Islam and Family Law: Copts and the Debate over the Grounds for Dissolution of Marriage in Twentieth-Century Egypt." *Islam and Christian-Muslim Relations* 21, no. 4 (October): 409–422.
- Weiss, Bernard. 1978. "Interpretation in Islamic Law: The Theory of Ijtihad." *The American Journal of Comparative Law* 26, no. 2 (Spring): 199–212.
- Zaborowski, Jason R. 2005. *The Coptic Martyrdom of John of Phanijoit: Assimilation and Conversion to Islam in Thirteenth-Century Egypt*. Leiden: Brill.

