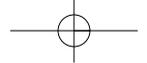


Part III

Shari'a, Family Law, and Activism



Chapter 9

Women and Men Put Islamic Law to Their Own Use: Monogamy versus Secret Marriage in Mauritania

Corinne Fortier

In recent years, several Muslim countries have instituted significant legislative reforms, especially with respect to marriage and divorce. In Mauritania, the government introduced the first personal status code in 2001. This code recognizes women's right to monogamy. But this code has not brought about a sociojuridical revolution, because these rights have long been recognized and enforced in the Moorish society of Mauritania.¹ They are juridically and religiously legitimized in the classic Maliki legal texts that govern Moorish juridical practice. The right to monogamy is found in the classical texts of Islamic law (*shari'a*), which form the legal basis of this society.

Moorish women did not wait for the introduction of a personal status code that guaranteed their right to monogamy. The situation of Moorish women in this regard is different from that of Moroccan women, who in 2004 gained the right to monogamy through the reform of the family code, the *Mudawana*, which permits a woman to add a clause to her marriage contract giving her the right to divorce if her husband takes another wife. Un-

like women elsewhere in Africa and the Middle East, Moorish women in Mauritania have traditionally contracted monogamous marriages. However, their ostensibly monogamous marriages have been undercut by the widespread practice of secret marriage engaged in by men. In this chapter, I look at both monogamy and secret marriage.

The Practical Application of Islamic Jurisprudence (*Fiqh*)

Moorish women in Mauritania function in a unique sociocultural context. Mauritanian Moorish society, made up of speakers of Hassaniyya, a dialect of Arabic, is culturally highly homogenous. This region was first Islamized by the Almoravids, who introduced the Maliki school of jurisprudence in the eleventh century.

Moorish society is made up of Bedouin tribes, many of which are now sedentary and concentrated mainly in the capital city of Nouakchott. Nevertheless, their members generally do not have recourse to state tribunals to arbitrate their lawsuits, which are thus settled internally, sometimes by a local *qadi*. If the French colonization of Mauritania modified the local political landscape, it did not fundamentally change the local judicial structure, especially in the area of the family, where reference to Islamic jurisprudence remained primary.

The Mauritanian code of the family of 2001, based on Islamic jurisprudence, is in conformity with the classical Islamic texts used locally, while it also takes into account conventional social practice in Moorish society. The Moors have habitually used Maliki texts as their legal basis.² These include the *Risala* of al-Qayrawani (tenth century), the *Mukhtasar* of Khalil (fourteenth century), and the *Asmiyya* of Ibn 'Asim (fourteenth century).

Moorish judicial practice, which has long recognized women's right to monogamy, contradicts the widespread notion that a society's use of classical Islamic judicial sources must necessarily be detrimental to women. This belief underestimates the importance of the social context in which these texts are used. My research shows that knowledge of these sources as well as local gender relations are the main determining factors of both the use made of the legal texts and their application in social practice.

The Moorish population displays a familiarity with religious texts.³ In addition to showing an awareness of the subtleties of Maliki jurisprudence,

Moorish society reveals a grasp of *usul al-fiqh*, or the foundations of jurisprudence; that is, they demonstrate an understanding of how *fiqh* is constructed and applied. Knowledge of the letter of the law, and the spirit of the law, facilitates the application of the texts in daily life in a dynamic and enlightened manner.

Moorish society is a nomadic entity in which oral memorization is highly developed, especially in the area of religious knowledge, which is greatly valued.⁴ In general, men from the *maraboutic* tribes (*zwaya*) in Mauritania have more knowledge of Islamic jurisprudence than men from warrior (*has-san*) or tributary tribes (*znaga*), or men who are blacksmiths (*m'allmin*), bards (*iggawan*), or former slaves (*haratin*). However, the legal codes related to the obligations of daily life are known through oral tradition by all members of society, including the women, as well as by specialists in Islamic jurisprudence, who are called for only in cases of litigation.

It is neither necessary, nor indeed customary, to engage a judge (*qadi*) to effect the legal-religious marriage ceremony, which essentially involves agreeing to the contract (*'aqd*) before the marriage feast. The only case where a judge might be present is when the marriage involves a member of a *maraboutic* tribe, and if a *qadi* is a member of the family and proposes to seal the union with a written contract. Otherwise, the marriage contract is purely oral. Because testimony by witnesses (*'udul*) serves as legal proof in Islamic jurisprudence, the oral nature of the marriage contract does not diminish its legally binding character.⁵

In Mauritania, boys and girls do not have equal access to learning. Traditionally, girls and boys attended Qur'anic schools, where they mainly learned by rote verses of the Qur'an necessary for prayers. Literate women remain the exception in Mauritania; however, women play an important role in the oral transmission of the history of the Prophet Muhammad (*sira*) to their children. Mothers also instill in their daughters an awareness of their religious rights, especially with respect to monogamy.

Moorish women display an understanding, passed down orally from mother to daughter, of certain principles and provisions of *fiqh* as understood in the Maliki school, that enables them to take initiatives to protect their wishes and interests when contracting and dissolving a marriage. Their ability to claim these rights does not owe to the influence of any local feminist movement but to a careful balancing of their knowledge of the relevant Islamic law related to marriage and of their culture's social realities. Most Moorish women are unaware of the existence of a feminist movement

within Islam or in the West. However, they can be seen as engaging in everyday acts of feminism or “everyday feminism,” as Margot Badran calls it,⁶ without the label or necessarily a “feminist consciousness.”

In Moorish society, women know how to assert themselves in dealings with men. It is indeed easier for women to make their voices heard in a society, like the Moorish one, in which segregation by gender is not absolute and where women are not threatened by physical violence from men than in a society in which women are totally excluded from discussion and where the threat of confrontation and coercion by men hangs over them. In Moorish society, women participate in discussions with their husbands. Men also respect an ancient code of Arab chivalry (*futuwwa*) called *muruwwa*, which commends courtly behavior toward women.⁷

Moorish women know how to exploit the social importance of their rights to monogamy, supported as they are by their own families. One must remember that in Mauritania tension between men and women exists within the context of an equally important structural tension between families united by marriage. This double tension is evident when a marriage contract is drawn up and two groups confront one another: the women of the family of the future wife, and the men of the family of the future husband. It is the mother of the girl, accompanied by her female relatives, who demands of the father and other male relatives of the prospective husband that the monogamy clause be included. The right to monogamy in Moorish society must be renegotiated for each marriage. This shows the fragility of this right, which must be defended from generation to generation by women, lest it be denied by men.

The Clause (*Shart*) of Monogamy

According to conventional readings, the Qur’an (4:3) allows a man to take four wives as long as they are treated equally (*al-‘adl fi al-mu‘amala*): “Marry such women as seem good to you, two, three, four; but if you fear you will not be equitable, then only one, or what your right hands own; so it is likelier you will not be partial.”⁸ Against this right granted to men by the Qur’an, the most sacred reference source for Muslims, Moorish women assert their dignity as women through their refusal of polygamy. This claim to dignity is transformed into law by the fact that Moorish women impose monogamy in their marriage contract.

Monogamy is a long tradition in Mauritania. Moorish women, in contrast to women in many other African Muslim communities, especially in

the Sub-Saharan region, will only accept polygamy in exceptional cases, such as being married to the head of a Sufi brotherhood (*shaykh*) who is felt to be blessed with *baraka* (blessings). In 1999, the tradition of monogamy was challenged by an isolated Islamist movement, comprising not only men but also women who agreed to be married as a second wife in order “to set an example.” However, this movement met with little enthusiasm in Moorish society and did not survive.

How can we explain the institution of monogamy in Moorish society? Moors’ traditional mode of life linked to nomadism might appear to explain this practice. But I do not find this explanation very satisfying. The Bedouin lifestyle does not necessarily imply monogamy, as evidenced by the existence of polygamous Bedouin communities in, for example, Egypt and Arabia. The more likely explanation is related to the position of women in Moorish society. For example, divorced Moorish women—like those in the Tuareg society of Algeria, Mali, or Niger—can easily remarry, in contrast to women in North African and Middle Eastern societies that place a high value on women’s virginity. The remarriage of Moorish women—even three to five times nowadays—is not only widespread but is also perceived favorably as an indication of a woman’s charm and femininity.⁹

Moorish women know how to use the subtleties of Islamic jurisprudence to legally enforce their insistence on monogamy. One method is to include it as a condition (*shart*) in the marriage contract. The husband must respect this condition, or the marriage may be dissolved by the women by means of *faskh*. Islamic jurisprudence permits the addition of clauses (*shurut*) to the marriage contract that are related to the reciprocal rights and obligations of the spouses.¹⁰

Maliki jurists allow two categories of additional clauses to the marriage contract, both of which are compatible with the laws governing marriage. The first is restricted to clauses stipulating the obligations within marriage, for example, the husband’s financial responsibility for the wife and abstention from any mistreatment. These conditions are nevertheless rarely insisted upon, because they are already stipulated in the legal act of marriage in Maliki Islam, and are therefore considered to be redundant.

The second category of clauses allowed in Maliki jurisprudence are those that, while compatible with the general laws pertaining to marriage, nonetheless modify the normal rights and responsibilities of the spouses. The frequently invoked condition in Moorish marriage stipulating that the husband not take another wife is part of this category of clauses; if he violates this clause, the woman will have the right to a divorce.

This stipulation is embedded in the phrase “neither preceding nor following” (*la sabiqata wa la lahiqata*). The term “preceding” indicates that if the man is already married, he must repudiate his wife. This condition applies to both official wives and unofficial wives. In Moorish society, however, as mentioned above, outside official marriage there exists another form of marriage called “secret marriage” (*as-sirriyya*), with which I shall deal in the second half of this chapter. Thus the implicit formula “neither preceding nor following” is sometimes replaced by a more explicit formula: “He will not marry someone else or practice secret marriage” (*la tizawaj ‘aliha wa la yatasarra*).

When a marriage is contracted, the mother of the bride, accompanied by middle-aged female relatives, requests on behalf of her daughter, who is absent for reasons of modesty, that the clause prohibiting polygamy be added to the contract. This request is made in front of a group of men that includes the older notables of the community as well as the father or guardian (*wali*) of the bride and the father or representative (*wakil*) of the groom, who is also absent for reasons of modesty. In addition to showing the oppositional relationship between the two families, this ceremony most fundamentally reveals the power relations between the sexes.¹¹

The acceptance of this clause by men is characteristic of a society where masculine identity is not defined by control over women and their autonomy but rather by a kind treatment of women and a recognition of their rights. In Moorish society, it would be inappropriate for a man to refuse this clause because his agreement to it is a measure of his respect for his wife. However, in practice, the husband will not accept the clause of monogamy unless the mother, who presents the request in the name of her daughter, agrees to a reduction in the bridewealth (*sadaq* or *mahr*). Women, therefore, must buy this right from men; only by giving up a part of their marriage compensation will they persuade men to surrender their right to marry more than one woman.

The condition of monogamy in the marriage contract is found in other Muslim societies as well as in Kabyle society in Algeria.¹² A similar clause was used by certain Jews of Morocco, because polygamy was also authorized within certain limits by Talmudic law.¹³ It is not clear in these other instances whether acceptance of this clause was also accompanied by a reduction of the bridewealth. In the Moorish practice, it is the bridewealth that allows the woman to negotiate certain rights. This is in accordance with the spirit of Islamic jurisprudence.

Other Marriage Clauses

In the past in Mauritania, when Moorish men took part in long-distance caravan trade, the mother of the future bride would impose a second condition on the marriage: The husband could travel only for a certain period of time, generally a year. This condition is in part foreseen in the marriage contract, because Maliki jurisprudence allows a woman whose husband has not been to the conjugal home for two years to ask for a dissolution of the marriage.¹⁴ Another condition related to the question of marital fidelity appears to have existed in the past, although it seems to have been rarely imposed, stipulating that a husband is not allowed to leave his home during the night.¹⁵

Although exceptional, a condition concerning the couple's mode of residence may also be stipulated. In Moorish society, the couple generally lives in the encampment of the husband's family. This may also be the residence of the wife's family if the spouses are near cousins. When required by the husband's professional activities, the couple might not live near the husband's family. In addition, a woman may demand that her husband live near her parents. This condition, however—referred to as “the corner post of the tent” (*ajamj al-khalva*)—is exceedingly rare.

Because it is highly unusual for a man to accept this condition, which would insult his honor, it remains exceptional and is used instead as a dissuading clause imposed by families that do not want to give their daughters in marriage to other tribes. The *maraboutic* tribe of the Idaw'ali from the oasis of Tijikja in the Tagant region, for example, used this clause at the beginning of the twentieth century to avoid the transfer of their palm groves to strangers through the marriage of their daughters to men from other tribes.¹⁶ The condition is also imposed in certain cases, especially when the wife is the only female child and wishes to stay near her parents in order to help them in their old age.

Some may theorize that the practice of a married couple living close to the wife's parents is of Berber origin and is opposed to the practice of a married couple living close to the husband's parents, as is the rule in Arab society. The Berber expression (*znaga*) used to denote the practice in *Hasaniyya* points toward this conclusion. In addition, in certain Berber regions like the Kabyle region of Algeria, a woman may stipulate in her marriage contract that she will continue to reside with her mother and father; if her husband refuses to join her, she may reclaim her liberty after asking the *qadi* to certify that the clause was not respected.¹⁷

But it is not satisfactory to oppose Berber cultural practices to Arab practices; this clause, for instance, can be found in other cultural contexts that contain no Berber influence, such as Iran.¹⁸ Extending the field of comparison to non-Maghreb Muslim societies underlines the irrelevance of a supposedly explanatory dualistic opposition that systematically attributes certain ethnographic features common to North African societies to either “Berber” or, by default, “Arab” influence.

To what extent is the husband bound by the clauses added to the marriage contract? According to Islamic jurisprudence, stipulations that do not contradict the law are legally binding.¹⁹ In addition, the Arabic axiom “The condition takes precedence over the law” (*shart yaghlab al-hukum*) seems to be especially applicable to marriage contracts. The Prophet Muhammad is said to have insisted on following the conditions agreed to in the marriage contract. According to one *hadith*, “Conditions that must be respected above all are those that are related to marriage.”²⁰

Although, for certain Sunni jurists, stipulations of this type added to a marriage contract are reprehensible (*makruh*), they are nevertheless acceptable if the husband submits to them of his own accord.²¹ In Moorish society, the only conditions the husband is legally obligated to uphold are those that are compensated for by a reduction in the bridewealth, such as the condition insisting on monogamy. He is not bound by those imposed without financial compensation, as is shown by the term used to designate such a clause: “unrealized [literally “absent”] clause” (*shart al-maffrud*).

“Secret Marriage” (*As-Sirriyya*)

If, as I have argued, the nomadic lifestyle is one explanation for the practice of monogamy in Moorish society, it may also be seen as encouraging secret marriage among Moorish men who clandestinely marry women in different places. If most men accept women’s demand for monogamy, they also engage in the practice of secret and clandestine polygamy. Men in Moorish society also know how to take advantage of the ambiguities of the law, which enable them to circumvent women’s demands for monogamy—to which they agreed—by entering into multiple marriages secretly.

Secret marriage in Mauritania is called *sirriyya*, an Arabic word for “secret.” Secret marriage is not legally recognized in the personal status code recently enacted by the Mauritanian government, doubtless because of the taboo associated with this form of marriage, because of disagreement re-

garding its religious legality, and because in recent years its prevalence has decreased.

In Mauritania, secret marriage is a long-standing practice linked to the constant movement of Moorish men far from their encampments, whether to graze their herds or for commercial reasons. In the past, commercial movement was part of the caravan trade; today, many men may own a small shop in another African country. It was not uncommon, therefore, for a man to have secret wives he regularly visited in a number of different places. The clandestine nature of these marriages was made possible in Mauritania by the geographic distance between wives. But the practice of secret marriage appears to be declining in Mauritania, because the end of nomadism and the trans-Saharan trade have made the prolonged absence of men more rare.

Other societies practice similar forms of secret marriage.²² Moorish secret marriage, in my view, may be compared with the customary marriage (*'urfi*) practiced in Egypt or even the temporary marriage (*mut'a*) widespread among Shi'i, especially in Iran. In the following, I seek to place secret marriage in a comparative context through a systematic examination of phenomena observed in Moorish society as they relate to those observed in other societies.

One of the major differences between secret marriage and official marriage (*zawaj* or *nikah*) in Muslim societies where both are practiced consists in the fact that the first concerns two individuals but the second involves two families in addition to two individuals.²³ Also, a woman united with a man in a secret marriage does not have the right to support from the husband (*nafaqa*)—which is, in principle, guaranteed in an official marriage—or the social recognition granted a legitimate wife. In addition, if she has children, proof of their paternity depends entirely on the goodwill of their father.

Secret marriage is less restrictive for the man than official marriage, because he is not bound by the duty of *nafaqa* for his secret wife, although in Moorish society the man usually does offer her a few gifts. The minimal economic investment involved in secret marriage, because men are not obliged to provide support or housing as they are for an official wife, is the reason that in Egypt married men prefer secret marriage to polygamous marriage.²⁴ The rise in *'urfi* marriages in Egypt in recent years is widely attributed to the high cost of state-sanctioned, socially recognized marriage; many young people resort to it as an alternative to de facto polygamous unions.²⁵ As a result, while Egyptians use *'urfi* marriage to avoid the financial burden of polygamy, Moors contract secret marriages instead of

polygamous marriages, which are practically forbidden. Unlike in Egypt,²⁶ polygamy in Mauritania, though not regulated by state law, is not widely practiced and indeed began to decline early in the twentieth century. Polygamous marriages in Egypt are highly frowned upon.

The religious ceremony for secret marriage in Mauritania is the same as that for official marriage, except that the condition of monogamy is never demanded by a woman accepting this type of marriage. The woman, having in most cases been married before, is no longer subject to the matrimonial constraints imposed by her father. Because her father does not attend the marriage ceremony, the groom may participate in person rather than through a representative, as is the custom for reasons of modesty when his future father-in-law is present.

The marriage takes place in private, in the presence of the couple and two witnesses (*'udul*), who agree to keep the union secret. These witnesses are generally trusted relatives or friends of the man, or people passing through who are completely indifferent to the union. A third man pronounces the legal formula, which states the names of the two partners, the amount of the brideprice, and the first verse of the Qur'an (*al-fatihah*).

This is the final step of the marriage ceremony, because in contrast to an official marriage, a secret marriage is never followed by a ceremony (*'ars*) that would make it public. For it is the lavish ceremony attended by many guests that makes a couple's union official; even their sexual union as the consummation of the marriage usually occurs at the time of this ceremony. Without such a ceremony, there is no public recognition of secret marriage, although it is sanctioned by a certain legal recognition within the framework of Islamic jurisprudence.

Given the absence of a public ceremony, Moorish secret marriage is comparable both to *fatihah* marriage, practiced in Morocco,²⁷ and to ambulant marriage (*al-zawaj al-misyar*), practiced in the Nadj region of Saudi Arabia,²⁸ and which has spread to other countries in the Gulf and elsewhere, including Egypt.²⁹ It is also in some respects comparable to *mut'a* marriage, practiced in Iran.³⁰ In Shi'i jurisprudence, the procedure is much simpler than for the other rites, because there is no need for two witnesses.³¹

Because of its secret nature, this form of marriage in Mauritania is theoretically different from *'urfi* marriage in Egypt, which requires publicity.³² But in practice, secret marriage in Mauritania is also similar in certain ways to *'urfi* marriage in Egypt, which is usually conducted in great secrecy because only two witnesses sign the paper that serves as sole evidence of the marriage.³³ Because *'urfi* marriages resemble secret marriages, the distinc-

tion made by some Egyptian theologians (*'ulama'*) between the former, considered to be legal, and the latter, equated with adultery,³⁴ seems in reality of little significance.

The issue of secrecy (*sirr*) is also the most problematic one for Maliki jurists. Theoretically, secret marriage (*nikah as-sirr*) is invalid in Maliki jurisprudence because of the very fact that it remains secret. On this point, Ibn 'Asim, a jurist from the end of the fourteenth century, argues: "One should avoid contracting a marriage in secret, even by asking the witnesses to keep the silence. The annulment of such a contract is obligatory."³⁵ Nevertheless, Maliki jurists do not unanimously agree that secrecy should render a marriage void.³⁶ The same can be said of Moorish jurists, one of whom argues: "If, after contracting a marriage, one keeps it secret, this does not render it invalid; one should be wary of the apparent meaning of the texts."³⁷ Therefore, a number of rulings (*hukum*) by Moorish jurists recognize this type of marriage as valid, arguing that because it requires witnesses, it is not in fact "secret."

The Functions of Secret Marriage

The common denominator in these various forms of parallel marriage—Moorish secret marriage, Iranian *mut'a* marriage, Saudi ambulant marriage,³⁸ and even Egyptian *'urfi* marriage—is that they permit a man to have legitimate sexual relations with a woman other than his wife and without her knowledge. Historically in Mauritania, because the secret was generally well guarded, the marriage was often revealed only if the husband had a child with his secret wife. In most cases, the "official" wife would not insist on a divorce, as permitted by the "neither preceding nor following" clause, but instead would ask her husband to repudiate what to her was an intruder but to her husband was a legal additional wife. More generally, secret marriage in Mauritania, like *'urfi* marriage in Egypt³⁹ or ambulant marriage (*misyar*) in Saudi Arabia,⁴⁰ is entered into by men who want to have legitimate sexual relations with a woman outside of marriage. Thus, in this case, these forms of marriage resemble pleasure marriage (*zawaj al-mut'a*) which is allowed by Shi'is but proscribed by Sunnis⁴¹ even though it can be practiced by Sunnis in Lebanon.⁴²

However, in the case of Moorish secret marriage or *'urfi* marriage in Egypt, a specific time limit is not set in the marriage contract, as it is in the case of *mu'ta* marriage, also called temporary marriage (*mu'aqqat*), or in

ambulant marriage (*misyar*). In the *mu'ta* marriage or the *misyar* marriage there is no need for divorce because the contract expires with the lapse of its duration.⁴³

The question of ending a secret marriage is treated differently in various societies. In Moorish society a secret marriage can be dissolved in the same way it was contracted, without ceremony and upon the woman's as well as the man's initiative. In Morocco *fatiha* marriage is also terminated without divorce, often on the husband's initiative.⁴⁴ However, in Egypt, most likely because of the gender relations peculiar to this society and given the fact that *'urfi* marriage sometimes has a more public character, divorce pronounced by the man is required in order to end the marriage, or else the woman risks spending her life unable to remarry.⁴⁵

Another reason for a Moorish man to enter into a secret marriage is the absence of progeny. In Mauritania, generally when a man cannot have children with his wife, he will choose to contract a secret marriage with a woman of his choice, usually of inferior social status such as a descendant of a slave (*hartaniyya*), rather than repudiating his wife and remarrying. In this way he hopes to have children whose paternity will be connected to him by the legal act of the secret marriage. Because the secret marriage is considered by the Moorish jurists to be legal, a child born from this union is legally recognized as legitimate.

The husband's decision to take a secret wife in order to produce children may be made with his official wife's agreement, as she would prefer this arrangement to repudiation. Secretly marrying other women is therefore often a way for a man to increase his progeny, and therefore his social influence. In this case Moorish secret marriage is distinguished from pleasure marriage (*mut'a*), in which procreation is not the aim. Nevertheless, men in Iran sometimes contract a *mut'a* marriage to increase their progeny or to produce sons if their official marriage has yielded only girls.⁴⁶

In Mauritania, the reasons that lead women to accept marriage as a secret wife are either emotional or economic, as the brideprice represents some financial gain for the woman or for her family. Secret marriages, therefore, involve primarily women of inferior social status. In the same way, women who accept *'urfi* marriage in Egypt⁴⁷ or *mut'a* marriage in Iran⁴⁸ are usually in difficult socioeconomic situations. When Moorish marriage involves a young woman still under her father's authority, it is often her family that forces her to contract a secret marriage with a wealthy man for economic reasons. This situation is found also in Egypt where extremely poor women are forced by their fathers to contract *'urfi* marriages with rich men from the Gulf.⁴⁹

In Mauritania, if the marriage is not in order to procreate, it can also involve women of noble classes who are widowed or divorced. When the secret marriage is not meant to produce children and a pregnancy results, the woman cannot establish the paternity of the child if the legal-religious marriage ceremony (*'aqd*) took place in the presence of witnesses she does not know. In this case, only a woman who had a written contract drawn up at the time of her secret marriage can oblige the man to recognize the child as his own.

As is the case with secret marriage in Mauritania, establishing the paternity of a child born from a *fatiha* union in Morocco, a *mut'a* union in Iran, or an *'urfi* union in Egypt presents problems, because recognition of paternity in Islamic jurisprudence depends on prior recognition of the marriage. In Morocco, because legal proof is lacking, the fate of the woman in a *fatiha* marriage and that of her children depend on the good will of the man.⁵⁰ The situation is quite similar in Iran because a contract of *mut'a* marriage requires no witnesses or registration; however, it is difficult to prove the identity of the child's father.⁵¹ In Egypt, it is also the man's prerogative to recognize or reject the child, and to honor or conceal the written proof of the marriage.⁵² However, according to the new Egyptian personal status code, along with classic evidence such as the contract, witnesses, and letters, a judge may now order proof by DNA test.⁵³

But recently the practice of secret marriage in Mauritania has declined among married men. Now that divorce has become commonplace, men today are less hesitant to repudiate their wives and remarry the woman of their choice. In addition, secret marriage, which was traditionally the prerogative of married men desirous of sidestepping women's demand for monogamy, now involves a different category of men: young unmarried men. In practice, secret marriage is used by young people as a means of legalizing premarital sexual relations. This new kind of secret marriage creates a new problem in that it takes place without the consent of the girl's family. According to Maliki jurisprudence, it is illegal for a young woman to marry without her legal guardian (*wali*), and the practice is condemned in Mauritania.

A similar situation exists in Egypt, where *'urfi* marriage has recently spread among students.⁵⁴ But the reason is different, because in Egypt the *'urfi* couples want to marry conventionally but either lack the financial resources or familial approval.⁵⁵ This marriage is condemned by Egyptian theologians for the same reason as in Mauritania: the absence of a woman's guardian.⁵⁶ Another reason put forth by the Egyptian *'ulama'* in condemning this kind of marriage concerns the worthiness of the witnesses (*'udul*),

but this argument seems less fundamental than the preceding one because it could just as easily be advanced to condemn secret marriages contracted by married men.

Conclusion

This study shows that although religious sources, chiefly the Qur'an and the *hadith* as well as *fiqh*, serve as the foundation of social and religious organization for various Muslim societies, how these sources are put to use is often tied to local custom, as shown by the insistence on monogamy in Moorish society. This method of adapting Islamic jurisprudence by integrating specific practices of the society does not contradict the spirit of the law.

In addition, this study has shown that different groups, especially different gender groups whose interests may diverge, can legally use the subtleties or ambiguities of Islamic jurisprudence to make their wishes prevail, even when they may be contradictory. Thus Islamic jurisprudence is variously understood and permits the coexistence of divergent rights, as shown in the case of men's right to polygamy authorized in the Qur'an and the Islamically recognized right of a woman to demand monogamy in the marriage contract. Finally, it is clear that the corpus of Islamic jurisprudence, as it has been constituted since its origins, grants a rather large margin of freedom to the members of Muslim societies who refer to it, allowing them room to negotiate within its bounds.

Furthermore, Islamic jurisprudence is not fixed but is actually the source of numerous debates among the jurists themselves. Their disputes over the understanding of a term may have major legal consequences, as seen in the discussion of the secret nature of a marriage that takes place before witnesses. This argument can be used to render legal a type of marriage that was not a priori allowed in the foundational sources of Maliki jurisprudence.

Juridical debates regarding its legitimacy notwithstanding, secret marriage does exist, with slight variations and different terminology, in several Muslim societies. If, in Moorish society, secret marriage allows men to realize their desire for polygamy, it also allows them in other societies where polygamy is more accepted to have sexual relations with one or with several women without incurring certain obligations of marriage such as financial support of the wife (*nafaqa*) and the duties of paternity.

The detailed study of monogamy or of secret marriage has also shown how the material goods constituting the wife's brideprice and those con-

tributing to her support are central to the process of male appropriation of women's sexuality. This process of appropriation of the female body as well as of her progeny, though relative in secret marriage, is absolute in official marriage.

In Muslim societies, as in other societies, the bridewealth given to a woman's family by her future husband and the support it is intended to ensure are the necessary conditions for acquiring control over her sexuality—sexuality being understood also in the sense of procreation. Indeed, in many societies, including Western ones, an exchange of goods typically precedes the sexual exploitation of a woman's body, both within and outside the conjugal context (e.g., in seduction or even prostitution). The endurance of such practices in culturally diverse societies proves that the woman's body is considered a potentially alienable entity, whether in a legal and familial context such as marriage or in a more informal and individual one such as seduction or prostitution.⁵⁷ These social practices obviously pose the important and universal issue of male presumption of the alienable nature of the female body.

Notes

1. In Mauritania, alongside the arabophone Moorish society, one finds Halpulaaren and Soninke communities. I conducted intensive fieldwork in different regions of Mauritania, in the desert (*bâdiyya*) and in the capital city Nouakchott, for eighteen months from 1996 to 1998, living with families and interacting with both men and women of different ages, social statuses, and tribal origins. On the Mauritanian status code in 2001, and the role of bridewealth in women's divorce or *khul'*, see C. Fortier, "Le droit au divorce des femmes Maures du point de vue du droit musulman (*khul'*)," *Maghreb Review: La Mauritanie contemporaine—Enjeux de mémoire et nouvelles identités* 35, nos. 1–2 (edited by Pierre Bonte et Sébastien Boulay) (2010): 179–93. And for a comparison with *khul'* in Egypt, see C. Fortier, "Le droit au divorce des femmes (*khul'*) en islam: Pratiques différentielles en Mauritanie et en Égypte," in *Droit et Cultures: Actualités du droit musulman—Genre, filiation et bioéthique* 59, no. 1 (edited by Corinne Fortier) (2010): 55–82.

2. On the subject of legal texts known and taught in Mauritania, see C. Fortier, "Mémorisation et audition: L'enseignement coranique chez les Maures de Mauritanie," *Islam et sociétés au Sud du Sahara* 11 (November 1997): 85–105. On an elementary level, the first work of Islamic jurisprudence studied in the Qur'anic school is *al-Akhdari* (Algeria, sixteenth century). Then comes *Ibn 'Ashir* (Morocco, seventeenth century), in which the first chapter treats dogma (*'aqida*); the second, law (*fiqh*); and the third, mysticism (*tasawwuf*). Also, girls are initiated to a slim collection of *hadith* (*ahadith*), called *Dala'il al-khayrat* (Les voies menant aux bonnes oeuvres), of al-Djazuli (Morocco, fifteenth century). Between the ages of ten and fifteen years, students first study the *Risala*

of al-Qayrawânî (Tunisia, tenth century). Then, between the ages of fifteen and twenty, they study the *Mukhtasar* of Khalîl (Egypt, fourteenth century) and, after age twenty, the *‘Asmiyya* of Ibn ‘Asim (Andalouisia, the end of the fourteenth and beginning of the fifteenth centuries). Next, more profound legal works are gradually added to this corpus, such as that of *az-Zaqqaq* (Morocco, sixteenth century), as well as commentaries (*shuruh*) on fundamental legal texts. The explanations of *Ibn ‘Ashir* frequently consulted are those of Mayyara (Morocco, seventeenth century) and in Chinguetti (Adrar), those of Ahmad Bashir wuld Hanshi, a learned Moor of the nineteenth century belonging to the Laghlal tribe. In Mauritania, the best-known commentaries of *Khalil* are those of ad-Dasuqi (Egypt, the end of the eighteenth and beginning of the nineteenth centuries), ‘Abdal al-Baqi (Egypt, seventeenth century), al-Hattab (Libya, sixteenth century), al-Bannani (Morocco, eighteenth century), Ibn Ghazi (Egypt, fifteenth century), al-Mawwaq (Andalouisia, fifteenth century), and at-Tata’i (Egypt, sixteenth century).

3. On this subject, see C. Fortier, “Soumission, pragmatisme et légalisme en islam,” *Topique*, no. 85, *Les Spiritualités* (2003): 145–61.

4. In Moorish society, Islamic scholarship is still highly valued, although in some milieus money is becoming even more important. An ignorant person sets out to acquire knowledge from one who knows more, rather than remaining ignorant or pretending to know. Unfortunately, this attitude is not always shared by certain members of other Muslim societies, who are considered well versed in Islam though their knowledge of it is, in reality, fragmentary and rigid, a situation contributing sometimes to perpetuating false ideas and even a certain obscurantism.

5. This is also the case in other Muslim countries, where the administration is more developed than in Mauritania: “Formal procedures of registration have generally been legislated in Muslim states, but do not necessarily affect the validity of marriage or divorce not so registered, in deference to the continuing currency of the ‘classical rules.’” E. Fawzy, “Muslim Personal Status Law in Egypt: The Current Situation and Possibilities of Reform through International Initiatives,” in *Women’s Rights and Islamic Family Law: Perspectives on Reform*, edited by L. Welchman (London: Zed Books, 2004), 16–91; the quotation here is on 9.

6. This expression is Margot Badran’s (personal correspondence).

7. Concerning the courtly tradition in Arab culture, see B. Farès, *L’Honneur chez les Arabes avant l’Islam* (Paris: Maisonneuve, 1932). This ancient Arab value has been adopted by Islam: “*Muruwwa* is the sister of the faith” (*muruwwa akhtu din*). For more details on the courtly tradition of the Moors, see C. Fortier, “Épreuves d’amour en Mauritanie,” *L’Autre: Cliniques, cultures et sociétés* 4, no. 2 (2003): 239–52.

8. A. J. Arberry, trans., *The Koran Interpreted* (London: George Allen and Unwin, 1980), 100.

9. For more details on this subject, see C. Fortier, “Séduction, jalousie et défi entre homes: Chorégraphie des affects et des corps dans la société maure,” in *Corps et affects*, edited by F. Héritier and M. Xanthakou (Paris: Odile Jacob, 2004), 217–34.

10. R. Charles, *Le Droit musulman*, Collection *Que sais-je?* no. 702 (Paris: PUF, 1956), 50.

11. I have shown elsewhere the extent to which the festive marriage ceremony that follows the legal-religious one is a performance of the power relations between sexes; see C. Fortier, “Le rituel matrimonial maure ou la mise en scène des rapports sociaux de sexe,” *Awal* 23 (April 2001): 51–73. After Evans Pritchard, I use the term “bridewealth” to underline the social and economic dimension of the exchange between two families,

and the term “brideprice” when this exchange concerns strictly two individuals. Evans Pritchard, “An Alternative Term for ‘Bride-Price,’” *Man* 31, 1931: 36–39. About the role of the bridewealth in Muslim jurisprudence, see C. Fortier, “Le droit musulman en pratique: Genre, filiation et bioéthique,” in *Droit et Cultures: Actualités du droit musulman—Genre, filiation et bioéthique* 59, no. 1 (edited by Corinne Fortier) (2010): 11–38.

12. For Kabyle society, see J.-P. Charnay, *La vie musulmane en Algérie, d’après la jurisprudence de la première moitié du XX^e siècle* (Paris: PUF, Collection Quadriga, 1965), 44. Margot Badran notes that writing particular stipulations into marriage contracts, such as monogamy, occurred in urban society in late-nineteenth-century Egypt but was not common. See *Harem Years: The Memoirs of an Egyptian Feminist, Huda Shaarawi*, translated and introduced by Margot Badran (New York: Feminist Press, 1987), 142 n. 23.

13. H. Zafrani, *Deux mille ans de vie juive au Maroc* (Paris: Maisonneuve & Larose, 1998), 81.

14. Charles, *Le Droit musulman*, 52.

15. This condition seems to have been quite rare, however, for I had not heard of it until coming across a reference to such a clause in a manuscript from the ancient city of Chinguetti (dated 1900–1901 CE) in the possession of a family from the *maraboutic* Laghlal tribe.

16. A. Ould Khalifa, *La Région du Tagant en Mauritanie* (Paris: Karthala, 1998), 205.

17. Charnay, *La vie musulmane en Algérie*, 46.

18. In Iran, it is possible for the woman to add a clause of residence in the marriage contract, but not of monogamy: “For example, a woman may insert a clause in her marriage contract requiring that she not be taken out of her place of residence. On the other hand, a woman cannot legally demand that her husband refrain from marrying a second wife while still married to her. This condition, the ‘*ulama*’ claim, is against the explicit Qur’anic text that allows a man to make contracts of permanent marriage with four women simultaneously.” S. Haeri, *Law of Desire: Temporary Marriage in Shi’i Iran* (Syracuse: Syracuse University Press, 1989), 38.

19. Charles, *Le Droit musulman*, 50.

20. A. D. Eldjazairi, *La Voie du musulman*, trans. M. Chakroun, 3 vols. (Paris: Maisson d’Ennour, 1996), vol. 3, 91. *Hadith* are sayings of the Prophet Muhammad, and also his deeds, as well as the words or deeds of the prophet’s companions that were not contradicted by him. All these items constitute the *Sunna*, the second source of reference for Muslims after the Qur’an. It is well known that many *hadith* in circulation are of questionable provenance.

21. M. Ibn ‘Asim, ‘*Asmiyya*, translated by L. Bercher (Algiers: Institut d’Études Orientales-Faculté des Lettres d’Alger, 1958), 304 n. 311.

22. Citing the Talmud, Patai writes that this form of marriage was legal “among the Jews of Babylonia in the third century,” and that “even sages and rabbis when visiting in another town used to practice this custom” (quoted by Haeri, *Law of Desire*, 219 n. 2).

23. From this point of view, Moorish secret marriage is indeed comparable to the Shi’i *mut’a* marriage: “Although both types of Shi’i marriage involve the exchange of some form of valuables, in the case of a contract of permanent marriage the stress is on its symbolic exchange and long-term reciprocities, whereas temporary marriage rests on immediate exchange and the commercial aspects of the contract.” Haeri, *Law of Desire*, 65.

24. G. Shahine, "Illegitimate, Illegal or Just Ill-Advised?" *Al-Ahram Weekly Online* (Cairo), February 18–24, 1999.
25. S. Jabarti, "A Happy *Misyar* Union," *Arab News*, June 5, 2005.
26. Recent statistics provided by the National Center for Sociological and Criminological Research show that within three years of a marriage, nearly 25 percent of Egyptian husbands take a second wife. R. Leila, "Polygamous duplicity," *Al-Ahram Weekly Online*, Cairo, February 26–March 3, 2004.
27. Ziba Mir-Hosseini, *Marriage on Trial: A Study of Family Law, Iran and Morocco* (New York: I. B. Tauris, 2000), 171.
28. Oussama Arabi, *Studies in Modern Islamic Jurisprudence* (The Hague: Kluwer Law International, 2001), 147.
29. Jabarti, "Happy *Misyar* Union."
30. Haeri, *Law of Desire*, 33.
31. Mir-Hosseini, *Marriage on Trial*, 168.
32. Fawzy, "Muslim Personal Status Law," 42.
33. An *'urfi* marriage that takes place without the presence of a judge is not registered with the authorities. Shahine, "Illegitimate, Illegal or Just Ill-Advised?"
34. *Ibid.*
35. Ibn 'Asim, *'Asmiyya*, 59.
36. L. Bercher, who provides commentary on the *'Asmiyya*, gives more detail on this subject. See Ibn 'Asim, *'Asmiyya*, 303 n. 308. According to him, the prevailing opinion is that this marriage is no longer annulable if a certain time has passed since its consummation.
37. This opinion reported by Ould Bah is that of the jurist Muḥammad wuld Aḥmad Yawra, of the very *maraboutic* family the Ahal-al-'Aqil of the Awlad Dayman tribe of the region of Trarza. Ould Bah, *La Littérature juridique et l'évolution du malikisme en Mauritanie* (Tunis: Faculté des Lettres et Sciences humaines, Université de Tunis, 1981), 107.
38. On this subject, see Arabi, *Studies in Modern Islamic Jurisprudence*, 147–61.
39. M. Tadros, "Secretly Yours," *Al-Ahram Weekly Online*, May 27–June 2, 1999.
40. As Jabarti explains, "Some Gulf discussions speak of *misyaf*—summer marriage—enacted during the typical extended vacations which Saudis take abroad. To avoid illegitimate sex—sex outside of marriage—these short-term marriages are negotiated during trips abroad." Jabarti, "Happy *Misyar* Union."
41. Haeri gives the arguments advanced by the Sunni theologians in refusing to legalize temporary marriage, which is accepted by the Shi'i: "Anchoring their reasoning on the same sources, the Shi'i and Sunni '*ulama*' emerge with completely different interpretations and rationales for the Qur'anic commandments and the Prophet's Tradition. The Sunnis claim that the Qur'anic reference to *mut'a* was canceled by several subsequent verses in the Qur'an itself, namely, the *suras* of the Believers (23:5–6), Divorce (65:4) and Woman (4:3). . . . Accordingly, the Sunnis argue that *mut'a* is not marriage because intercourse is lawful only within the confines of permanent marriage or slave ownership (Q4:3, 23:6). *Mut'a* of women, they say, is neither a form of marriage, *nikah*, nor slave ownership, *milk-i yamin*. Therefore, it is forbidden. No provisions, the Sunni argument continues, exist for inheritance for the *mut'a* spouses (Q4:12); that the *'idda* of *mut'a* is undetermined since its duration is not specified in the Qur'an, and that consequently the status of children in this form of sexual union is unclear. Moreover, the Sunni '*ulama*' maintain, since the number of *mut'a* wives a man can simultaneously

marry is unlimited, and since there is no divorce in *mut'a* union, therefore, the custom of *mut'a* of women has been canceled in the Qur'an itself." Haeri, *Law of Desire*, 61–62.

42. Jabarti, "Happy *Misyar* Union."

43. Jabarti specifies that *misyar* marriages "are really are quite similar to '*urfi* marriages except that the bride knows it will end at a particular time." Jabarti, "Happy *Misyar* Union."

44. Mir-Hosseini, *Marriage on Trial*, 173.

45. Shahine, "Illegitimate, Illegal or Just Ill-Advised?"

46. Haeri, *Law of Desire*, 173.

47. Y. Fathi, "Patrimony Blues," *Al-Ahram Weekly Online*, Cairo, June 16–22, 2005.

48. "*Mut'a* is what woman has to accept, because of her social disabilities, for example her age, not being a virgin, or coming from a lower social class." Mir-Hosseini, *Marriage on Trial*, 219 n. 3.

49. Fathi, "Patrimony Blues."

50. Sometimes this refusal to recognize the child and the secret marriage that produced it occurs with the complicity of the man's family who has housed the couple but at a later date hopes that their son will be officially engaged to another woman. Mir-Hosseini, *Marriage on Trial*, 172–73.

51. Haeri, *Law of Desire*, 55.

52. "According to the most recent statistics released by the Ministry of Justice, there are at least 12,000 paternity cases currently in the courts. Legal analysts estimate that 70 to 90 percent of those cases are the result of '*urfi* marriages." Shahine, "Illegitimate, Illegal or Just Ill-Advised?"

53. Fathi, "Patrimony Blues."

54. Secret marriages between young unmarrieds have been in practice since the 1960s in Somalia, where they are called in Somalian *khubdbo-shireed*. N. Farah, *Secrets* (Paris: Le Serpent à Plumes, 1998), 349.

55. Jabarti, "Happy *Misyar* Union."

56. Tadros, "Secretly Yours."

57. On this subject, see C. Pateman, *The Sexual Contract* (Cambridge: Polity Press, 1988).

