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Religion-Based Claim in Abuse Case Wisely Pierced by Appeals Court

By Abed Awad

On its face, a case working through New Jersey's courts would seem to pit a defendant's religious beliefs against the state's law against domestic violence. Fortunately, the Appellate Division has seen through that argument and reversed the denial of a restraining order.

The three-judge panel held on July 23 in *S.D. v. M.J.R.*, A-6107-08, that the defendant's nonconsensual sexual intercourse with his wife was "unquestionably knowing, regardless of his view that his religion permitted him to act as he did."

The ruling is a good first step toward undoing a misperception that Muslim culture condones violence against women. In fact, the ruling is consistent with Islamic law, which prohibits spousal abuse, including nonconsensual sexual relations. For example, there are reported cases where a wife was acquitted of murdering her husband because she acted in self-defense in an abusive relationship.

In the case at hand, the plaintiff-wife sought a final restraining order against her husband, alleging that his nonconsensual action constituted physical abuse. She testified that her husband told her repeatedly that, according to his religion, she was obligated to submit to his sexual requests.

The trial judge refused to issue the order, finding that the defendant was operating under the religious belief that he was entitled to have marital relations with his wife whenever he wanted. Thus, he did not form the criminal intent to commit the crime.

A minority of Muslims mistakenly believe that a husband can discipline his wife with physical force in the interest of saving the marriage and avoiding divorce. It is a misplaced perception anchored in cultural norms similar to the common-law "Rule of Thumb" doctrine that permitted an angry husband to chastise and whip his wife into obedience as long as the rod was no larger than his thumb. This is not based on religious law. And it runs against the weight of substantial historical evidence.

Although our current notions of gender equity, community property and equitable distribution are a modern development, historically and until recently Muslim women fared far better than their European counterparts in marriage and divorce, property

ownership, education and societal influence.

With the advent of Islam in the seventh century, Muslim women had the legal capacity to enter into contracts; they inherited and bequeathed property; they could not be disinherited by will; and they owned, managed and disposed of property.

Since then, Muslim women have been entitled to request the dissolution of their marriage in the face of physical abuse. If a court finds abuse, it has the authority to dissolve the marriage and award the wife divorce financial rights, including damages for harm caused by the assault.

And until the early 20th century, the financial rights of Muslim women in divorce were extensive. The wife was entitled to support for three months (and if pregnant, until she delivered); payment of past maintenance; child support; and payment of loans due from the husband (as women had property from mandated inheritance laws, they regularly lent money to their husbands).

Many Muslim women became well-known jurists, excelled in business, were participants in the real estate economy and were active players in waqfs — charitable endowments dedicated for purposes such as education, health care and feeding the poor.

Muslim women knew their legal rights and used them to obtain justice. They sued for civil damages, for remedies against defamation, fraudulent conveyances, physical assault and a variety of matrimonial claims.

As Wael Hallaq, professor of Islamic law at Columbia University, wrote in his book last year, *Shari'a: Theory, Practice and Transformations* : "[W]hen they lost or won, it was not necessarily because they were women, but rather because they were full legal persons responsible — morally and otherwise — for their actions. They no doubt lived in a patriarchy, but the inner dynamics of this patriarchy afforded them plenty of agency that allowed them a great deal of latitude."

Unfortunately, while such rights to a certain extent continue to be enjoyed by Muslim women in Muslim-majority countries, these rights have not kept pace with modernity and changes in society.

The irony is that the egalitarian and progressive foundational authority to articulate a modern jurisprudence of gender equity was present in Muslim societies a thousand years before ours. However, cultural prejudices and preconceived notions of gender inequity with a persistent medieval patriarchy detached from the moral foundations of the Quran, and progressive juristic reasoning fuels the misperception held by a minority of Muslims that justifies violence against women under certain circumstances.

The Appellate Division's legal analysis in *S.D. v. M.J.R.* was sound and correct: the defendant violated New Jersey law. The same secular reasons under New Jersey law for which such horrific abuse was outlawed would absolutely justify the entry of the final restraining order under Islamic law. It is not Islam that abuses women, it is the men who carry it out.

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