Transit and Translation: Islamic Legal Transplants in North America and Europe

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Comparative law traditionally defines itself as a discipline capable of "comparing" national legal regimes as distinct and coherent bodies of knowledge. This article investigates whether comparative law has produced State law as a homogeneous category in its interactions with religion and gender. It will focus specifically on adjudication in Canada, the United States, France and Germany relating to the Islamic concept of Mahr – or "the gift which the bridegroom has to give to the bride when the contract of marriage is made and which becomes the property of the Muslim wife".[1] The migration of Mahr to Western liberal courts unfolds at the crossroads of several doctrinal fields and disciplinary boundaries—contract and family law, constitutional and Islamic law, public policy and private ordering, (majoritarian) public order and (minority-based) identity politics. Although liberalism is one possible way of framing emancipatory claims by minorities in Western societies, it is argued below that this has become the dominant approach underlying how Western liberal legal systems deal with claims made by Muslims in general and Muslim women in particular.

In approaching issues of faith and culture, Western liberal courts have captured Mahr in three different ways: the Legal Pluralist Approach, the Formal Equality Approach, and the Substantive Equality Approach. These three disciplinary discourses are framed within the wider expression of liberalism because they share the same commitment to autonomy and liberty of the individual in both their normative and descriptive dimensions. However, the three camps have opposing views on the importance of Mahr for the legal subjects involved. The Legal Pluralist Approach views Mahr as central to cultural and religious recognition; the Formal Equality Approach considers Mahr to be merely a secular contract; and the Substantive Equality Approach[2] projects feminist principles into its regulation.

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[1] *The Encyclopaedia of Islam* (New edn.), ed. Bosworth, Donzel, Lewis, and Pellat (1991), VI.

[2] For details on the Substantive Equality Approach see P. Fournier, "Deconstructing the East/West Binary: Substantive Equality and Islamic Marriage in a Comparative Dialogue", in Susan H. Williams (ed.), *Constituting Equality: Gender Equality and Comparative Constitutional Rights* (2009), pp. 157-172.

The article will address the specificity of each approach by presenting the conditions under which these forms of adjudication have emerged, and exploring the Western decisions that have enforced or refused to enforce Mahr according to each school. How are the diverse and contradictory conceptual themes around Islamic law and Islamic theory received in or brought to Western liberal courts? What are the modes of influence in the selection and imposition processes of Mahr as a legal transplant? Does the reification of religion by courts simultaneously fragment Mahr as rules move across borders? Does the way Mahr travels affect subjectivity, in both productive and reactive terms?

Three parts will follow Mahr's trajectory upon its departure from Islamic family law as it embarks on a cross-jurisdictional journey to Western liberal courts. The first part identifies Mahr's place of residence and the Islamic web of legal rights and duties to which it is religiously attached under classical Islamic law. The second part provides a comparative review of contract law, family law, constitutional law and private international law in Canada, the United States, France and Germany. The third part discusses the actual "Legal State of Play" in the (Liberal) Reception of Mahr. The three liberal strands, although differing in their ideological commitments and the subject-matter of their political concern (Legal Pluralism: the Muslim group; Formal Equality: the individual party; Substantive Equality: the Muslim woman), nevertheless share the same unpredictability and inconsistency in outcomes (the enforcement/non-enforcement of Mahr). This is so, it is believed, because judges choose among a wide pool of conflicting considerations to perform and justify their judicial role.

DEFINITION OF MAHR UNDER CLASSICAL ISLAMIC LAW

Mahr being the Islamic legal concept whose international migration forms the basis of this study, it is necessary to more fully define the concept before delving into relevant case law. Generally speaking, Mahr is treated as a system which has its own distinct institutional structure – sharply separated from other components of Islamic family law. Below are the most important legal aspects of Mahr, as drawn from the four sources of Sunni Islamic law (The Qur'an, the Sunnah, Qiyās, and Ijmā), as well as the internal feminist debate over Mahr's symbolic and actual meaning for Muslim women. The resulting "static" definition of Mahr is subsequently animated through case law analyses.

Mahr

Mahr, meaning "reward" ("ajr") or "nuptial gift", also designated as "sadaqa" or "faridah", is the expression used in Islamic family law to broadly describe the "payment that the wife is entitled to receive from the husband in consideration of the marriage".[3] *Mahr* is usually divided into two parts: that which is paid at the time of marriage is called prompt *Mahr* (*muajjal*), and that which is paid only on the dissolution of the marriage by death or divorce or other agreed events is called deferred *Mahr* (*muwajjal*). In more fully elaborating Mahr, Dr. Wani respects the corpus of Islamic dogma, norms and prescriptions for interpretation: "the content of Mahr" is thus revealed first by the text of the Qur'an and

[3] J. L. Esposito with Natana J. DeLong-Bas., *Women in Muslim Family Law* (2d ed.; 2001), p. 23 (hereinafter: Esposito & DeLong-Bas).

second by the auxiliary sources of the Sunnah, Qiyās, and Ijmā. These sources combined provide the most complete definition of Mahr.

The Qur'an

As the very words of God for Muslims, the Qur'an forms the primary source of Islamic law and contains general as well as specific legal principles.[4] Whereas Verse 24:32 encourages men and women to marry, Surah 4:24, 4:25 and 5:5 specify that a Muslim man may marry a woman from among either believers, slave or not, or people of the book, but only on condition of paying her Mahr (The Qur'an, Verse 24:32; Surah 4:24, 4:25, and 5.5). The sole exception to the obligatory nature of Mahr is the marriage of a Muslim man to an atheist, a "non-believer" (Qur'an, Verse 60.10). Mahr being viewed as a "right granted to the woman as a result of *Quranic* prescription",[5] it may be waived by the woman (Qur'an, Verse 4:4) or the amount can be adjusted by both parties (Verse 4:24), but the husband can never take Mahr back unilaterally once it has been given to the wife (Qur'an, Surah 4:19, 4:20, and 4:21). In cases where the wife is divorced before the consummation of marriage, the *Qur'an* provides that she is entitled to one-half of Mahr (Surah 2:237), and in cases where Mahr has been agreed upon, an "equitable compensation" is due to her (Qur'an, Surah 2:236).

The Sunnah

The Sunnah refers to the normative model behavior of the Prophet Muhammed and forms the second source of Islamic law. As God's Messenger, the sayings and practice of the Prophet Muhammed are seen as a further expression of Allah's will regarding the way Muslims should live their lives. Where the Qur'an is silent, jurists have looked to this source for additional guidance. Reports of the Prophet's sayings and actions on Mahr include the obligatory nature of Mahr,[6] the amount of Mahr when it has not been agreed upon,[7] the subject matter of Mahr (addressing issues such as Mahr in the form of teaching the Qur'an[8] or offering to the woman a pair of shoes[9]) Mahr and *Khul* Divorce,[10] and Mahr and Li'an.[11]

[4] See Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (1991), pp. 30, 33 ("The Qur'anic legislation on civil, economic, constitutional and international affairs is, on the whole, confined to an exposition of the general principles and objectives of the law").
[5] Esposito & DeLong-Bas, note 3 above, p. 23.
[6] David S. Powers, *Studies in Qur'an and Hadith: the Formation of the Islamic Law of Inheritance* (1986), p. 81.
[7] In cases where the husband dies before the consummation of marriage and before fixing Mahr, the wife is entitled to a Mahr similar to that of women of her same status, Abdur Rahmān I. Doi, *Shari'ah: the Islamic Law* ([1984]), p. 160 (hereinafter: Doi); see Abu Daud, ch. 12, Hadith 31.
[8] While the Qur'an was vague as to the content or minimal amount of Mahr, the hadith literature is precise in this regard. For instance, it is said that in the case of an extremely poor man wanting to get married, the Prophet requested him to teach his wife the Koran as her Mahr. Doi, note 7 above, p. 163.
[9] A pair of shoes as Mahr was considered sufficient only in so far as the Muslim woman consents to the gift, Ibid; narrated by Ahmad, Ibn Majah and Thirmidhi.
[10] M. Afzal Wani, *The Islamic Institution of Mahr: a Study of its Philosophy, Working & Related Legislation in the Contemporary World* (1996), p. 45.
[11] Ibid.

Qiyās

Qiyās, the third source of Islamic law, is a "means of applying a known command from the Qur'an or Sunna to a new circumstance by means of analogical reasoning".[12] It is based on the idea that when the rationale behind a command is understood, it can be applied to new circumstances not dealt with by either the Qur'an or Sunna. This process of trying to "discover" the law is referred to as "ijtihad", meaning "personal reasoning or interpretation". For instance, by using an analogy between the Qur'anic penalty for theft (amputation of the hand) and the "theft" of the wife's virginity, Qiyās was used to fix the minimum amount of Mahr.[13] More specifically, the amount was established according to the value of stolen goods for amputation to be applied as a penalty in Kufa and Medina, two cities central to the development of Islamic civilization.

Ijmā

Ijmā, the fourth source of Islamic law, refers to the consensus of qualified legal scholars of a given generation on a point of law.[14] Its authority is derived from the famous hadith of the Prophet Mohammed who was deemed to have said: "My community will never agree on an error".[15] While the Qur'an and Sunna are generally thought to enjoy preeminence over ijma, many Islamic scholars contend that only those interpretations of the Qur'an and Sunna that have passed the test of ijma are authoritative.[16]

The Internal Feminist Divide

An interesting debate takes place among Islamic feminist scholars over the symbolic nature of Mahr for Muslim women: Mahr is seen as a complex and controversial institution structured by a series of characteristics which can be described as paired opposites. On one hand there are strong proponents of Mahr, the "Islamic feminists" who claim through a historical and emancipating narrative that Mahr came into Islam as the first symbol of women's empowerment.[17] Mahr is conceptualized in this literature as marking the shift from the "wife as an object of sale"[18] under the pre-Islamic era to the "wife as a contracting

[12] Daniel Brown, *A New Introduction to Islam* (2004), p. 124.
[13] Esposito & DeLong-Bas 2001, note 3 above, p. 7.
[14] Keith Hodkinson, *Muslim Family Law: A Source Book* (1984), p. 4.
[15] Esposito & DeLong-Bas 2001, note 3 above, p. 7.
[16] See Hodkinson, note 14 above, arguing that ijma is the most important source of Islamic source in practice because it infuses interpretations of Qur'an and Sunna with authority. See also Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation* (1990), mentioning at 23 that ijma is a crucial influence on the development of Islamic law because it determines the interpretation and application of the Qur'an and Sunna.
[17] The "Islamic feminists" claim not only that Islam provides a liberating worldview for women but also that the "the Qur'an's epistemology is inherently antipatriarcal". Asma Barlas, *Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur'an* (2002), p. 2. With the revelation of Islam through the Prophet Mohamed, the Qur'anic scripture is presented as offering a radical departure from the patriarchal customs of pre-Islamic Arabia and ensuring an authoritative basis for the emancipation of *all* Muslim women.
[18] Zainab Chaudhry, "What is Our Share? A Look at Women's Inheritance in Islamic Law", *Azizah Atlanta*, III, no. 3, (August 2004), p. 14: "Before the revelation of the Qur'an, women in pre-Islamic Arabia had no hope of inheritance. Rarely were they allowed to control holding or disposal of their possessions. In fact, in that political and social structure, women themselves were considered as property, subject absolutely to the men of the family and tribe, as any other possession".

party in her own right"[19] under Islam. One of the greatest empowerments given to women by Islam lies in her right to property.[20] This independent legal entity in the eyes of the law[21] and deserving of dignity, love, and respect in the eyes of men is "symbolized by making Mahr obligatory for her and binding upon men".[22] Expressions such as "mark of respect for the wife",[23] "honour to the bride",[24] "free gift by the husband",[25] or symbol of the "prestige of the marriage contract"[26] are ambiguously being used to describe the very *raison d'être* of Mahr: the recognition of the dignity of Muslim women.

Opposing them are the "liberal secular feminists"[27] who condemn Mahr as the expression, at the time of marriage, of the sale of the Muslim woman's vagina.[28] The main aim of the "liberal secular feminists" is to understand "revelation as both text and context",[29] i.e. as "an interpretation of the spirit and broad intention behind the specific language of the texts".[30] The liberal secular conception of Mahr is accompanied by images of the

[19] See David Pearl and Werner Menski, *Muslim Family Law* (3d ed., 1998), p. 4: "The second major reform of the Qur'an is found in family law generally, changing the status of women in particular. Thus, much of the legal material in the Qur'anic verses concerns the very real attempt to enhance the legal position of women. In customary law, women were treated as an object of sale. A woman could be fully exploited by her father; she could virtually be sold in marriage to the highest bidder, as shown in the pre-Islamic form of the bride-price. The husband was entitled to terminate the contract of marriage on any occasion and for any whim. Various Qur'anic provisions transformed this position, for example the revelation directing the husband to pay a dower (mahr) to the wife (Qur'an, Sura IV, verse 19), which involved the wife as a contracting party in her own right".
[20] Sabiq al-Sayyid, *Fiqh al-sunnah* (1969), p. 155.
[21] M. Afzal Wani, *The Islamic Law on Maintenance of Women, Children, Parents & Other Relatives: Classical Principles and Modern Legislations in India and Muslim Countries* (1995), p. 194: "(…) Mahr is a symbol of propriety rights of Muslim women which have been conferred upon her by Islam. This makes her position equitably strong in society and before law. She retains her legal identity even after marriage. On marriage her personality does not, in law, get merged into that of her husband as was the concept elsewhere".
[22] al-Sayyid, note 20 above, p. 155.
[23] See Pearl & Menski, note 19, p. 179: "Mahr is often discussed also in terms of a sum paid to the wife as a mark of respect to her". See also A. Rahim, *The Principles of Muhammadan Jurisprudence: According to the Hanafi, Maliki, Shafi,i and Hanbali Schools* (1911): "(Mahr) is not a consideration proceeding from the husband for the contract of marriage, but it is an obligation imposed by the law on the husband as a mark of respect for the wife (…)".
[24] Wani, note 21, p. 193: "Mahr in its broader perspective means something lovable, or things having reference to love as a bone in the upper part of the breast, or gristles of the ribs; or something presentable as a gift like a pearl; and doing of something in a right way with skill. Under Muslim law it denotes a gift spontaneous to be presented by the husband to the wife on marriage with a willing heart. This is an honour to the bride from the husband. By so doing he makes a manifestation of his love for the wife and eagerness to respect her rights to his fullest possible capacity".
[25] Doi, note 7 above, p. 159. Mahr's character as a "free gift by the husband to the wife, at the time of contracting the marriage."
[26] Jamal J. Nasir, *The Islamic Law of Personal Status* (3d ed.; 2002), p. 43, suggests in the words of a Hanafi jurist that "dower has been ordered to underline the prestige of the marriage contract and to stress its importance".
[27] For a general view of the secularization movement of Islamic law, see Aharon Layish, "Contributions of the Modernists to the Secularization of Islamic Law", *Middle Eastern Studies*, XIV (1978), p. 263.
[28] Ironically, classical jurists have often employed similar language to describe Mahr. Shaykh Khalil, a Maliki jurist, writes: "Dower is analogous to sale price, that is, dower comprises the same fundamental conditions as those attached to sale. When a woman marries, she sells a part of her person. In the market one buys merchandise, in marriage the husband buys the genital arvum mulieris". In F. H. Ruxton, *Maliki Law: A Summary from French Translations of Mukhtasar Sidi Khalil* (1916). Muúaqqiq al-Hilli, the most prominent Shi'a jurist, similarly states: "[M]arriage etymologically is uniting one thing with another thing; it is also said to mean coitus and to mean sexual intercourse. In shar', there have been various interpretations of it. It has been said that it is a contract whose object is that of dominion over the vagina, without the right of its possession". in Muúaqqiq al-Hilli. *Sharayi' al-Islam*, Persian translation by A. A. Yazdi, compiled by Muhammad Taqi Danish-Pazhuh (1985), II, p. 428.
[29] Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-fiqh*, (1997), p. 231.
[30] Ibid.

family, sexuality, and the significance of marriage that seek to distinguish between Islam as a pure religion and religious doctrine as a socially constructed phenomenon subject to human context.[31] Here, marriage is often portrayed as a "fundamentally unequal social institution".[32] This feminist literature further suggests that Mahr, in valuing the existence of virginity, perpetuates "patriarchal domination remained most entrenched in the family".[33] In fact, "it was usual that the dowry of a virgin be higher than that of a divorced woman."[34] On this view, not only is Mahr intended to serve male interest and desire; it also reflects "the social position of the bride's father's family as well as her own qualifications, such as those cited in the *Hedaya*: age, beauty, fortune, understanding, and virtue."[35] Hence, Mahr is not, as claimed by classical Islamic law and Islamic feminists, a universal and equal symbol of dignity, love, and respect for *all* women despite differences of income and status: it is rather determined *as a marketplace value*, for *that* woman, daughter of *that* man, at this *particular* moment of *her* history. Moreover, if no Mahr has been agreed or expressly stipulated by the parties, the marriage contract is still valid but "proper Mahr" (*mahr al-mithl*) will be determined by comparing "the *mahr* paid to other female members of the wife's family, for instance sisters, paternal aunts and female cousins."[36]

Although both discourses come to opposite ethical conclusions as to whether or not Mahr should be recognized and valued, they share similar ideological assumptions: that Mahr as an institution represents a contract, for the first a contract in which the Muslim woman is an independent and consenting party; for the latter, a contract signed under duress or marked by false consciousness. However contradictory, both discourses treat Mahr formalistically, without offering a complex view of its shifting dynamic capacity as well as its possibly perverse use by Muslim women in the context of the marriage.

COMPARING LEGAL REGIMES IN CANADA, THE UNITED STATES, FRANCE AND GERMANY

The background legal rules differ considerably in Canada, United States, France and Germany. The Supreme Court of Canada has on numerous occasions stressed the importance of freedom of religion,[37] a freedom that, with the adoption of the *Canadian*

[31] See generally Yvonne Yazbeck Haddad, "Islam and Gender: Dilemmas in the Changing Arab World", in Y. Y. Haddad and J. Esposito (eds.), *Islam, Gender and Social Change* (1988).
[32] Homa Hoodfar, "Circumventing Legal Limitation: Mahr and Marriage Negotiation in Egyptian Low-Income Communities", in Homa Hoodfar (ed.), *Shifting Boundaries in Marriage and Divorce in Muslim Communities* (1996), p. 124.
[33] Margot Badran, *Feminists, Islam, and Nation: Gender and the Making of Modern Egypt* (1995), p. 124.
[34] Abdal-Rehim Abdal-Rahman Abdal-Rahim, "The Family and Gender Laws in Egypt during the Ottoman period," in Amira El Azhary Sonbol (ed.), *Women, the Family, and Divorce Laws in Islamic History* (1996), p. 103.
[35] Esposito & DeLong-Bas, note 3 above, p. 24.
[36] See Pearl & Menski, note 19 above, p. 180: "As concerns the unspecified dower, it is discussed and treated as the "proper" dower and its size is to be determined in view of the socio-economic conditions of the parties involved. If no mahr has been agreed or expressly stipulated by the parties, the contract of marriage is still valid. (…) In these circumstances, what is known as the "proper dower" (mahr al-mithl) becomes due. It is worked out on the basis of the mahr agreed for women of a similar social status to the wife. Particularly relevant will be the mahr paid to other female members of the wife's family, for instance sisters, paternal aunts and female cousins".
[37] See *R. v. Big M Drug Mart* (1985), 18 D.L.R. (4th) 321 (S.C.C.), at pp. 336-37 ("*Big M Drug Mart*"): "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest

Charter of Rights and Freedoms,[38] "has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise".[39] Religious freedom is thus closely allied with the *Canadian Charter*'s commitments to religious equality in s. 15[40] and to the preservation and enhancement of Canada's multicultural heritage in s. 27.[41] "An important feature of our constitutional democracy", the Supreme Court suggests in the opening remarks of *Amselem*, "is respect for minorities, which includes, of course, religious minorities".[42] The concept of equal religious citizenship has recently been extended beyond the traditional realms of freedom of belief to include the right to engage in religious practices without interference.[43] Although the Supreme Court often explores and defines the role of religion in the public sphere, i.e. in relationship to "a multiethnic and multicultural country like ours"[44] or "a free society built upon a foundation of diversity of views (…) that seeks to accommodate this diversity to the greatest extent possible"[45], religion also manifests itself as a private matter through affiliation in the family.

In Canada, the federal and provincial levels share jurisdiction over family law. In Canadian constitutional law, provinces have jurisdiction over "property and civil rights"[46] while the federal level has jurisdiction over "marriage and divorce".[47] The federal *Divorce*

religious belief by worship and practice or by teaching and dissemination. But the concept means more than that. . . . Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience".

[38] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11. ("Charter of Rights and Freedoms")

[39] *Big M Drug Mart*, note 37 above, at p. 351; See also Edwards Books and *Art v. R.* (1986), 35 D.L.R. (4th) 1 (S.C.C.). The Canadian Charter's preamble states that: "Canada is founded upon principles that recognize the supremacy of God and the rule of law". As William Klassen points out in "Religion and the Nation: An Ambiguous Alliance", *University of New Brunswick Law Journal*, XL (1991), p. 95: "To mention God with a capital letter in the preamble to the Charter and then to go on to say that the Charter provides a fundamental freedom of conscience and religion, is a contradiction which even a theologian, to say nothing of all the lawyers, must surely recognize".

[40] Section 15 reads: "Equality Rights 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Charter of Rights and Freedoms, note 38 above.

[41] Section 27 reads: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." Ibid.

[42] *Syndicat Northcrest c. Amselem*, 2004 SCC 47, at Par. 1 (upholding the right of Orthodox Jewish owners of condominiums to build succahs (temporary shelters) on their balconies during the Jewish festival of Succot.). Iacobucci J. further emphasized at Par. 1 that "respect for and tolerance of the rights and practices of religious minorities is one of the hallmarks of an enlightened democracy".

[43] See Bruce Ryder, "Equal Religious Citizenship in Canada", forthcoming in *Religion and Citizenship in Canada* (2008).

[44] *Amselem*, note 42 above, at para. 87.

[45] *Ross v. New Brunswick School District No. 15*, (1996) 1 S.C.R. 825

[46] *The Constitution Act 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92(13), reprinted in R.S.C. 1985, App. II, No. 5. Article 92(13) grants provinces exclusive jurisdiction to legislate "Property and civil rights in the province". In practice, this power is interpreted expansively, according provinces authority over a number of areas such as commerce, workplace relations and consumer protection.

[47] According to Article 91(26), the federal Parliament may adopt any law relating to marriage or divorce. However, provinces may maintain power over the celebration of marriages (Article 92(12)). This may present problems

Act[48] structures the situation for married couples who would like a divorce as well as other questions related to divorces such as support payments for a spouse or children, custody and access rights. Provincial laws govern all other aspects of family law such as the separation of married or non-married couples, custody, visitation rights, restraining orders, support, division of property and all questions related to the protection of children. In this legal structure, support is considered incident to divorce and thus under federal competence whereas matrimonial regimes are under provincial family law jurisdiction. Such jurisdictional distinctions may influence the internormative interpretation of Mahr, a legal institution potentially conceptualised as a form of alimony under federal law in the first case or as a gift derived from the marriage contract under provincial jurisdiction in the second.

In the United States a proper respect for both the *Free Exercise*[49] and the *Establishment*[50] *Clauses* compels the State "to pursue a course of 'neutrality' toward religion".[51] The First Amendment provides dual protections: it guarantees government neutrality towards religion and provides for the individual's liberty in choosing and practicing a religion.[52] Though the Court has narrowed the opportunity to obtain religious exemptions from generally applicable laws, it has not totally closed this door.[53] In matters touching upon religious concerns in the specific context of contract law and family law, courts are not precluded from resolving a dispute simply because it involves a religious organization but they cannot "declare orthodoxy in matters of religion."[54] The judicial involvement

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with certain laws concerning marriage and divorce. For example, the Divorce Act, of federal jurisdiction, has effects on custody of children, a topic generally considered to be under provincial competence due to their jurisdiction over "civil rights" under Article 92(13) and "matters of a private nature" (Article 92(16)), Ibid.

[48] *The Divorce Act*, L.R.C. 1985, c. 3 (2[e] suppl.).

[49] The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.... " U.S. Const., Amdt. 1.

[50] The Establishment Clause of the First Amendment has erected a "wall of separation" between church and state. In *Everson v. Board of Education*, 330 U.S. 1 (1947), Justice Black emphasized the need for absolute separation: "That wall must be kept high and impregnable. We could not approve the slightest breach.", at p. 18. See also *Wallace v. Jaffree*, 472 U.S., at 60, 105 S.Ct., at 2491 (referring to "the established principle that the government must pursue a course of complete neutrality toward religion"), and *Abington School District v. Schempp*, 374 U.S. 203, 226, 83 S.Ct. 1560, 1573-74, 10 L.Ed.2d 844 (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality").

[51] See generally *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-793, 93 S.Ct. 2955, 2975- 76, 37 L.Ed.2d 948 (1973).

[52] *Cantwell v. Connecticut*, *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940)): "Free exercise embraces two concepts-freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. The freedom to act must have appropriate definition to preserve the enforcement of that protection although the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." See also *In re Marriage of Goldman*, 554 N.E.2d 1016, 1022-1024 (Ill. App. Ct. 1990) (finding the husband's free exercise claim to be without merit); Lawrence C. Marshall, Comment, "The Religion Clauses and Compelled Religious Divorces: A Study in Marital and Constitutional Separations", *Northwestern University Law Review*, LXXX (1985), pp. 204, 215 (1985).

[53] The Supreme Court has denied such exemptions from generally applicable law in *Employment Div. v. Smith*, 494 U.S. 872 (1990) (upholding the denial of unemployment benefits to a drug counsellor who was fired because of his drug consumption at a religious ceremony.); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Reynolds v. United States*, 98 U.S. 145 (1879). However, there have been some cases in which the Court has provided an exemption under the Free Exercise Clause, namely *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

[54] *Zummo v. Zummo*, 574 A.2d 1130, 1134-1135 (explaining that enforcement of antenuptial religious-upbringing

in religious disputes is constitutionally limited to the neutral principles of law: a secular interpretation entails a commitment not to "rely on religious precepts… (or) resolve a religious controversy".[55] American family law falls primarily under state jurisdiction.[56] Consequently, each American state has distinct laws on marriage, divorce and all other aspects of the matrimonial regime of people domiciled in that state.

In Canada and the United States, family law rules apply regardless of whether an individual is a citizen or a resident, whereas the application of family law is directly tied to citizenship in France and Germany due to the application of those countries' international private law rules[57] and bilateral accords.[58] Consequently, German and French courts, as well as the public policies of those countries, recognize the applicability of Islamic family law in personal status matters, as long as the application of such laws does not contravene public policy.[59] French and German courts seem to have reached similar conclusions when clarifying the limits of French or German "public policy": religious Islamic marriages have no enforceable legal effect if the wedding took place on French or German soil; the unilateral repudiation of a Muslim wife by her husband by the *talaq* is not recognized as a legitimate form of divorce; and polygamous marriages are legally valid only if concluded in a country that permits polygamy.[60] Although the legal systems mentioned above and how they incorporate Islamic law differ considerably, this appears to have little effect on

agreements would be contrary to the Establishment and Free Exercise Clauses of the First Amendment).

[55] *Jones v. Wolf*, 443 U.S. 595, 604 (1979) (holding that a civil court could resolve a church property dispute where church documents contained secular language upon which the court could resolve the dispute, without considering matters of religious doctrine). See also *Avitzur v. Avitzur*, 58 N.Y.2d 108, 115 (1983) (holding that the enforcement of a Jewish Ketubah could be decided solely upon the application of neutral principles of contract law, without reference to any religious principle) and *United Methodist Church v. Super. Ct. of Cal*., 439 U.S. 1369 (1978) (commenting that it may also be appropriate for a secular court to resolve religious issues where fraud or breach of contract is alleged).

[56] 27A C.J.S. Divorce § 11.

[57] In Germany, Private International Law Rules are regulated by the Second Chapter on International Private Law in *Einfuehrungsgesetz zum Buergerlichen Gesetzbuche* (Article 3, EGBGB) (Prologue, the Civil Code). In France, stipulations of international private law include Article 3, al. 3, Article 5 and Article 310 of the French *Civil Code*.

[58] Bilateral agreements in Germany and France provide that it is not the law of domicile but rather the law of the parties' citizenship that is applicable in family law matters as well as the law of succession. For instance, Iran and Germany have ratified a treaty that assures the application of Iranian personal status law for Iranian citizens in Germany and vice versa for German citizens residing in Iran. See *Niederlassungsabkommen zwischen dem Deutschen Reich und dem Kaiserreich Persien* of 17 December 1929, Reichsgesetzblatt Jg. 1930, Teil II, p.1002, at p. 1006. Confirmed by the Federal Republic of Germany on 15 August 1955, BGBl. Teil II, No. 19, 25 August 1955, p. 829. With regard to France, see *la Convention entre la République française et le royaume du Maroc relative au statut des personnes et de la famille et a la coopération judiciaire*, Décret n° 83-435 DU 27 mai 1983, (publié au J.O du1er juin 1983, p. 1643). In family law matters, France and Germany have ratified the *Convention of 24 October 1956 on the law applicable to maintenance obligations towards children* (Hague Conference on Private International Law), the *Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations* (Hague Conference on Private International Law), as well as the *Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes* (Hague Conference on Private International Law).

[59] For a general study of the exception of "public policy" in international private law, see R. Libchaber, "L'exception d'ordre public en droit international privé", in B. Beignier et al. (eds.), *L'Ordre public à la fin du XXe siècle. Recueil, thèmes et commentaires* (1996), p. 65ff. In Germany, the legal principle of public policy is defined at Art. 6 EGBGB and §138 sect. 1 BG, which reads: "A legal transaction which offends good morals is void". (Einfuehrungsgesetz zum Buergerlichen Gesetzbuch [Introductory Act to the Civil Code]).

[60] For a more detailed analysis of the interaction between private international law and Islamic family law in France and Germany, see P. Fournier, "The Reception of Muslim Family Laws in Western Liberal States", *Women Living Under Muslim Laws*, Dossier 27 (2005), pp. 65-79.

the unpredictable nature of legal pluralism, formal equality and substantive equality as interpretative approaches to Mahr in all four of the countries in question.

TREATMENT OF MAHR IN WESTERN LIBERAL LEGAL SYSTEMS

The case law analysis in this section deals with liberalism and religion, and how the specific legal institution of Mahr is understood, reconstructed or erased by the legal system and broader spectrum of liberal ideology permeating it in Canada, the United States, France, and Germany.61 Working through examples, it will be demonstrated that objective legal rules and norms often mask an exercise of choice involving ideological predispositions.[62] This section unveils the road to ideology and brings back into focus the numerous and often competing considerations that have colored the underlying legal regime upon which adjudication took place.[63] The first part introduces the Legal Pluralist Approach form of adjudication and outlines the Canadian, American, French, German and Quebec cases that fall under this ideological strand. The legal pluralist decisions are divided along the lines of recognition: courts that have manifested many different routes to Mahr as "cultural family recognition", and enforced it on that basis; and those that have refused to recognize Mahr because this Islamic institution was deemed too "foreign" from the standpoint of the Western State. The second part defines the Formal Equality Approach and shows how the secular understanding of Mahr has produced either the enforcement of Mahr-as-contract (a marriage agreement; an anten uptial agreement; a legal debt or a contractual condition of marriage), or the non-enforcement of Mahr as an exception to contract law (grounds of vagueness; lack of consent and consideration or abstractness). The third part is dedicated to the Substantive Equality Approach: it offers the conditions under which this form of equality has emerged, and presents the Quebec and German decisions that have enforced Mahr while applying gender equity standards, as well as the Quebec, German, Canadian, American and French cases that have refused to enforce Mahr according to fairness principles.

[61] In order to obtain the cases that have adjudicated Mahr, research has been conducted in the available Anglophone, francophone and German databases, using key words such as Mahr, Sadaq, la dot, dower, Maher, etc. Trial court decisions that have been overruled on appeal have been included because there are few cases directly adjudicating Mahr and the trial court decisions often present an interesting alternative approach along the spectrum of ideology.

[62] See Duncan Kennedy, "From the Will Theory to the Principle of Private Autonomy: Lon Fuller's Consideration and Form", *Columbia Law Review*, C (2000), p. 105: "When choosing a legal norm to cover a case, rational decision making selects from the continuum of normative possibilities the one that best accommodates (balances, maximizes, mini-maxes, or whatever) the conflicting considerations as they play out more or less strongly in the fact situation of which the case is an instance".

63 See generally Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (1997).

Legal Pluralism	Formal Equality	Substantive Equality
Western State views *Mahr* under the umbrella of Islamic family law The Western judge welcomes the imam as an expert witness: multiculturalist understanding of *Mahr* *Mahr* is the expression of religious identity	Western State views *Mahr* under the umbrella of Western contract law The Western judge pictures the legal system as devoid of representative role for the minorities: secular understanding of *Mahr* *Mahr* is a contract irrespective of race, gender, or religion	Western State views *Mahr* under the umbrella of Western family law The Western judge engages in sexual identity politics: gendered understanding of *Mahr* *Mahr* is a religious custom which has an effect on substantive equality
Mahr is enforceable as an Islamic custom. It is recognized on the basis of: • Manifestation of identity (Canada) • Islamic custom (France and Germany) • Related to a Khul divorce (Quebec and U.S.) OR *Mahr* is not enforceable because it is too "foreign" to be adjudicated by a Western (non-Muslim) judge. It is not recognized on the basis of: • Being utterly foreign (Canada)	*Mahr* is enforceable as a contract. It is recognized on the basis of: • Marriage agreement (Canada) • Antenuptial agreement (U.S.) • Legal debt (Germany) • Contractual condition of marriage (France) OR *Mahr* is not enforceable because it speaks to contractual exceptions. It is not recognized on the basis of: • Vagueness (U.S.) • Lack of consent (U.S.) • Abstractness (Germany)	*Mahr* is enforceable, but its amount must respect Western family law rules of equity. It is recognized on the basis of: • Readjusted alimony (Germany) • Being due even though the wife initiated the divorce (Quebec) OR *Mahr* is not enforceable because it violates gender equality: the equal division of community property upon dissolution of the spouses' marriage is applied. It is not recognized on the basis of: • Equity (Quebec) • Unjust enrichment (Germany) • Substantial justice (Canada) • Public policy (France and U.S.)

Canada: M.(N.M.) v. M.(N.S.) (2004); Nathoo v. Nathoo (1996); M.H.D. v. E.A. (1991); Kaddoura v. Hammoud (1998); I.(S.) v. E.(E.) (2005) France: Cour de Cassation, 1978-000137 (1978) Germany: OLG Bremen, FamRZ 1980, 606; Kammer-gericht (Berlin), Fam RZ (1988, 296); OLG Koeln IPRAx (1983, 73) United States: Akileh v. Elchahal (1996); Dajani (1988)	Canada: Amlani v. Hirani (2000) United States: Odatalla v. Odatalla (2002); Akileh v. Elchahal (1996); Aziz v. Aziz (1985); Habibi-Fahnrich v. Fahnrich (1995); Shaban v. Shaban (2001) Germany: Hamm FamRz (1988, 516); Amtsgericht Buende, 7 F 555/03 (2004); IPRax 1988, 109-113, BGH (1987) France: Cour de Cassation, Dec.2, 1997 (Pourvoi)	Germany: IPRax, OLG Koeln (1983, 73); OLG Cell, FamRZ (1998, 374) Canada: M.H.D. v. E.A. (1991); M. F. c. MA. A. (2002); Vladi v. Vladi (1987) France: Arrêt de la Cour d'appel de Douai, January 8, 1976: N. 76-11-613 United States: Dajani (1988)

LEGAL PLURALISM: THE MULTICULTURALIST UNDERSTANDING OF MAHR

The Legal Pluralist Approach is a critique of the traditional idea of law as the representation of the State—consisting of law-making, adjudication, interpretation, precedents, customs, and so on. For the legal pluralist, law is not defined as rules imposed top-down, but rather as rules emerging from the accommodations of human interaction. For the centrality of state law, the legal pluralist substitutes a variety of competing legal orders which mutually influence the emergence and operation of each other's rules, processes, and institutions.[64] The legal pluralist explores and analyzes the many diverse manifestations of non-State law *as* sites of legal regulation: the family, the child, the socio-cultural community, the religious space,[65] the public institution,[66] the neighborhood,[67] the law school,[68] the workplace, and others.

[64] See M. Reisman, *Law in Brief Encounters*, (1999) and Daniel Jutras, "The Legal Dimensions of Everyday Life", *Canadian Journal of Law and Society*, XVI (2001), p. 47. For a review and analysis of the literature on legal pluralism see S. E. Merry, "Legal Pluralism: A Literature Review", *Law and Society Review*, XXII (1988), p. 869; J. Griffiths, "What is Legal Pluralism?" 24 *Journal of Legal Pluralism and Unofficial Law*, XXIV (1986), p. 1; M.-M. Kleinhans and R.A. Macdonald, "What is a Critical Legal Pluralism?", *Canadian Journal of.Law and.Society*, XII (1996), p. 43.

[65] For a legal pluralist understanding and use of the concept of "space" more generally, see H. Lefebvre, *The Production of Space*, transl. Donald Nicholson-Smith. (1991); Juhani Pallesmaa, *The Eyes of the Skin* (1996); M. Taussig, *Mimesis and Alterity* (1993); S. M. Low, et al. (eds.), *The Anthropology of Space and Place* (2003).

[66] For an analysis of the "implicit and inferential normativity" in organizations and public institution, see R. A. Macdonald, "Vers la reconnaissance d'une normativité implicite et inférentielle", *Sociologie et Societe*, XVII (1986), p. 37; R. A. Macdonald, "Les vieilles gardes", in J. G. Belley (ed.), *Le droit soluble* (1996), p. 233; R. A. Macdonald, "The Acoustics of Accountability", in A. Sajo. (ed.), *Judicial Integrity* (2004), p. 141.

[67] See Shauna Van Praagh, "View from the Sukkah: Religion and Neighbourly Relations", in Richard Moon (ed.), *Law and Religious Pluralism in Canada* (2008), pp. 21-41.

[68] See Shauna Van Praagh, "Stories in Law School: An Essay on Language, Participation, and the Power of Legal Education", *Columbia Journal of Gender & Law*, II (1992), p. 111.

The conceptual apparatus of legal pluralism is closely associated with the development of identity politics as a way of framing human societies, especially in modern, western, multicultural and multiethnic states.[69] Not only does (official) state law need to reflect (unofficial) indigenous, customary laws, but it must also be attentive to its own pluralism—the diversity of rules, processes and institutions as well as the multiple sources of legitimacy within any given legal system. Roderick MacDonald describes the legal pluralist inquiry in the following manner: "More succinctly the legal pluralist query may be phrased in this way: "what are the internormative trajectories between *local law* – which is said to be located in the actual practices of local culture – and *universal or cosmopolitan law* – which is said to be grounded in the aspiration to give rational content to the notion of human dignity?"[70] For the purposes of the following analysis, we will ask: how would the Legal Pluralist Approach envision the internormative trajectories between *Islamic law*—located in the actual practice of Muslim culture—and *Canadian, American, French or German law*—grounded in the aspiration to multiculturalism and religious freedom?

The Many Different Routes to Mahr as Cultural Recognition

This subsection is dedicated to Canadian, French, German, Quebec and American case studies that have used the language and theoretical aspirations of the Legal Pluralist Approach to culturally recognize Mahr, either through enforcement or non-enforcement. In these cases we will see that many different routes to Mahr as cultural recognition—Mahr as a manifestation of identity, Mahr as an Islamic custom, Mahr as related to a *Khul* divorce—all adopt a formalist view of Islamic family law. They either stress the homogeneity of Mahr as a legal institution , or (over)emphasize the tolerant nature of the Western legal regime while refusing to address the complexity of the Islamic legal order to which Mahr is connected.

(a) The enforcement of Mahr as a manifestation of Identity: Canada

In *Nathoo v. Nathoo*[71] and *M.(N.M.) v. M.(N.S.)*.[72], two Canadian cases from the British Columbia Supreme Court, Mahr is represented as the religious and cultural expression of the Muslim minority group, one that Canadian society must respect in the name of multiculturalism. In many ways Mahr stands precisely as the project and fantasy of legal pluralism: it is different, differing; it speaks from the standpoint of the local, the indigenous; it talks back to the universal, universalist Canadian family law.

[69] See Charles Taylor, "The Politics of Recognition", in A. Gutman (ed.), *Multiculturalism: Examining the Politics of Recognition* (1994), p. 25. For the study of law as a manifestation of culture, see P. Kahn, *The Cultural Study of Law* (1999). For Pierre Legrand, law is itself a cultural phenomenon like society. See Pierre Legrand, *Fragments on Law as Culture* (1999). For a discussion between Legrand and Watson on legal transplants, see Pierre Legrand in "The Impossibility of Legal Transplants", *Maastricht Journal of European and Comparative Law*, IV (1997), p. 111 and A. Watson, Legal Transplants: An Approach to Comparative Law (1974); A. Watson, "From Legal Transplants to Legal Formats", *American Journal of Comparative Law*, XLIII (1995), p. 469.

[70] See Roderick A. Macdonald, "Pluralistic Human Rights; Universal Human Wrongs", 1 November 2006 (on file with author), at p. 11 .

[71] *Nathoo v. Nathoo*, [1996] B.C.J. No. 2720 (S.C.). ("*Nathoo v. Nathoo*").

[72] M.(N.M.) v. M.(N.S.), 2004 CarswellBC 688; 2004 BCSC 346, 26 B.C.L.R. (4th) 80. ("M.(N.M.) v. M.(N.S.)").

In *Nathoo*, the trial court concluded that "the statutory equality of division would be unfair"[73] under the *Family Relations Act*[74] and awarded Mrs. Nathoo $37,747.17 upon reapportionment of family assets.[75] Instead of considering the enforcement of Mahr as part of family assets, the Court begins the analysis of Mahr as a "marriage agreement" under s.48.[76] Expressing a clear commitment to legal pluralism and multiculturalism, Justice Dorgan introduced his interpretation of s.48 of the *Act* as one that "acknowledges cultural diversity"[77] and which is "respectful of traditions which define various groups who live in a multi-cultural community".[78] The court explored the manifestation of non-State law—the traditions of the Ismaili community—as a privileged site of legal regulation, one that should penetrate and colour Canadian family law. The voice of the Muslim community, it was expected, would give meaning to Mahr as a marriage agreement: Karim and Fahra, who "both attend Mosque regularly and adhere to the tenets of their faith",[79] agreed on the sum of $20,000, says the Court, "after taking advice from elders within their community and negotiating with each other". Moreover, they "met and courted for approximately two years prior to their marriage".[80] Their marriage agreement was therefore not simply, as would be with other (secular) litigants, "an agreement entered into by a man and a woman before or during their marriage to each other".[81] Rather, suggests the Court, it is an act performed in "the traditions of the Ismaili community, the most significant of which, for the purposes of this litigation, is the marriage contract or "Maher" signed by the parties on 6 November 1994, the day of their marriage".[82]

Having thus redefined the issue of Mahr as a unique and autonomous domain guided by sacred religious principles, Justice Dorgan concluded that it would *not* "be unfair to

[73] *Nathoo v. Nathoo*, note 71 above, at Par. 18.

[74] Family Relations Act, R.S.B.C. 1979, c. 121.

[75] The following reasons were specified by the court: "In this case the parties lived together for approximately 9 months. They lived in the matrimonial home which is registered in the name of Mr. Nathoo and was acquired, clear title, by him prior to the marriage. During their marriage each party contributed to his and her financial needs and those of the family unit according to their respective resources. Mr. Nathoo had more significant earnings and paid a greater proportion of the parties' joint expenses as a consequence. Nathoo v. Nathoo, note 71 above, at Par. 19.

[76] I reproduce section 48 because the definition of "marriage agreements" under the *Family Relations Act* differed at the time of *Nathoo*. Section 48 read:

> 48. (1) This section defines marriage agreement for the purposes of this Part and this definition applies to marriages entered into, marriage agreements made and to property of a spouse acquired before or after this section comes into force.
>
> (2) A marriage agreement is an agreement entered into by a man and a woman prior to or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for
>
> (a) management of family assets or other property during marriage; or
>
> (b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.
>
> (3) A marriage agreement, or an amendment or rescission of a marriage agreement, must be in writing, signed by both spouses, and witnessed by one or more other persons.
>
> (4) Except as provided in this Part, where a marriage agreement is made in compliance with subsection (3), the terms described by subsection (2)(a) and (b) are binding between the spouses whether or not there is valuable consideration for the marriage agreement.

[77] *Nathoo v. Nathoo*, note 71 above, at Par. 25.

[78] Ibid.

[79] Id at Par. 8.

[80] Id at Par. 5.

[81] See s. 48(2), Family Relations Act, R.S.B.C. 1979, c. 121.

[82] *Nathoo v. Nathoo*, note 71 above, at Par. 8.

uphold the provisions"[83] of the agreement, given that "the parties chose to marry within the Ismaili tradition",[84] knowing "full well that provision for Maher was a condition of so doing".[85] The British Columbia Supreme Court, instead of evaluating the criteria of fairness set in s.51 of the *Act* (as it did for the division of family assets), chose to reexamine the law, and then to reform radically its content in light of the fact that the parties were Muslims. This reasoning is extremely bizarre, given that the family law rules in British Columbia provide that a marriage agreement within the meaning of s. 48 is "subject to variation under s. 51 of the *Act*".[86]

It seems obvious from the case law[87] that the fairness of a "marriage agreement" is measured by comparing the disposition of family property in the agreement with the various factors enumerated in s. 51 of the *Act*. In fact, the Muslim husband in *Nathoo* had argued that the effect of Mahr's enforcement should be considered in the general division of assets, i.e. subtracted from the initial amount due to Mrs. Nathoo.[88] Rejecting his claim, the Court found that the equal division of property between Mr. and Mrs. Nathoo was unfair, but that the enforcement of an additional $20,000 in accordance with the marriage agreement was fair. As a result, the Court chose to view Mahr as a penalty: it added $20 000 to the previous $37,747.17 owed by Karim to Fahrah: "Mr. Nathoo will pay to Ms. Mawani the total sum of $57,747.17 in satisfaction of the claims raised in this litigation".[89] The Court's insistence on the differences between the division of family assets, on the one hand, and the enforcement of Mahr, on the other, further indicated a legal pluralist vision of religion as a separate entity.

This conception of Mahr as an exceptional penalty was similarly developed in *M.(N.M.) v. M.(N.S.)*, a British Columbia case decided eight years later. In a specific action for the enforcement of a "marriage contract" under the British Columbia *Family Relations Act*, the Muslim wife claimed that she was entitled to $51,250 as deferred Mahr upon divorce. Although the marriage agreement clearly provided that the Muslim husband undertook to pay the amount of Mahr "in addition and without prejudice to and not in substitution of all my obligations provided for by the laws of the land",[90] he testified that for him Mahr "was symbolic only and that the laws of the province alone would govern in the event of a divorce".[91] The wife's father, whose evidence was not challenged in cross-

[83] Id at Par. 25.
[84] *Id* at Par. 24.
[85] Ibid.
[86] See *Minckler v. Minckler* (1984), 59 B.C.L.R. 123 (C.A.), at p. 127: "I think the judge was correct in concluding that this was a marriage agreement within the meaning of s. 48, and subject to variation under s. 51 of the Act."
[87] In *Gold v. Gold*, the court concluded that s. 51 gives the power to override a spousal property agreement if it is "unfair", i.e. to "order that the property covered by (…) the marriage agreement (…) be divided into shares fixed by the court." *Gold v. Gold*, 1993 Carswell BC 215, British Columbia Court of Appeal, 1993, at Par. 30. See also Par. 36: "s. 51 provide the grounds upon which a finding of unfairness must be based, but such a finding need not lead inevitably to an equal redistribution. In many cases, equality may be the only fair result. There will, however, be other cases, with or without a marriage agreement, where only an unequal division of family assets in favour of one spouse or the other will be fair." and Par. 38: "[T]he intent of s. 51 is to permit the court to remedy unfairness, by a reapportionment of property which would be fair".
[88] Par 21 reads, in *Nathoo v. Nathoo*, note 71 above: "Mr. Nathoo argues that, considering both the division of assets and the effect of the Maher, Ms. Mawani's claims amount to no more than $10,000. Ms. Mawani argues that she is entitled to approximately 15% of the value of the family assets, together with Maher of $20,000".
[89] *Nathoo v. Nathoo*, note 71 above, at Par. 27.
[90] *M.(N.M.) v. M.(N.S.)*, note 72 above, at Par. 26.
[91] Ibid.

examination, argued that the Mahr document was presented and explained by an Islamic religious authority and that "the parties read the printed form"[92] and agreed to it prior to the marriage ceremony. From the wife's perspective, it should therefore be treated as a mere contract under the *Family Relations Act*. Echoing *Nathoo*, the Legal Pluralist Approach in *M.(N.M.)* emerges in a reference that the British Columbia Supreme Court makes about what is "required by the tenets of the Ismaili faith"[93] and what Canadian society should do about it. Specifically, Justice Joyce emphasizes that "both parties wished to marry in the Ismaili faith and they understood and accepted that a condition of doing so was to agree to the Maher".[94]

(b) The enforcement of Mahr as an Islamic custom: France and Germany

In accordance with international private law rules, the French and German decisions outlined in this section have applied Islamic family law when translating and enforcing Mahr. These Legal Pluralist case studies have attempted to recreate Mahr as a legal transplant and have thus portrayed its movement as the autonomous transfer of a legal institution from one (Islamic) legal milieu to another Western-based one. Such translation process has produced the following spectrum of possibilities: Mahr as an integral part of the Islamic marriage contract; Mahr as a substitute for post-divorce maintenance and division of the surplus of marital profits; and Mahr as *Mahr al-mithl*.

In a 1978 one-page decision, the French *Cour de Cassation* upheld Mahr as an Islamic custom.[95] Applying international private law rules, it concluded that Mahr was an integral part of the Islamic marriage contract, the enforcement of which did not contravene French public policy. Two years later, in 1980, the German Higher Regional Court of Bremen in *OLG Bremen*[96] similarly viewed Mahr as a family law matter. As such, Iranian family law would apply because the parties were Iranian citizens. Since the wife "had no claim under Iranian law at the time to post-divorce alimony or to her share of the profits accruing to the marital property",[97] Mahr was understood as a substitute for post-divorce maintenance and division of the surplus of marital profits. Hence, the Higher Regional Court of Bremen attempted to enforce Mahr *as if it were in Iran* and *for Iranians*.

Kammergericht[98], a 1988 decision from Berlin, similarly embarked on the exercise of transferring Mahr from Iran to Germany, while emphasizing the unique particularity of Islamic law as an autonomous legal regime. Here, the German *Family Law Chamber* applied Iranian Islamic family law to the enforcement of 42,000 DM [22,000 Euros] as Mahr.[99] The

[92] *Id* at Par. 27. It should be mentioned that *M.(N.M.)* relies extensively on *Nathoo*.
[93] *Id* at Par. 7.
[94] *Id* at Par. 28.
[95] Cour de Cassation Chambre 01, Décision du Mardi 4 avril 1978, 1978-000137, *Bulletin des arrêts de la Cour de Cassation*, Année 1978, (Paris : Imprimerie nationale, 1979), at p. 110. The case does not mention the names or origins of the parties, nor the amount of Mahr.
[96] OLG Bremen, FamRZ 1980, 606.
[97] Christina Jones-Pauly, "Marriage Contracts of Muslims in the Diaspora: Problems in the Recognition of Mahr Contracts in German law", forthcoming in Asifa Quraishi and Frank E. Vogel eds., *The Islamic Marriage Contract: Case Studies in Islamic Family Law* (2008), p. 9.
[98] *Kammergericht* (Berlin), FamRZ 1988, 296.
[99] The parties had agreed to a Mahr of 1,500,000 rials, calculated, according to the exchange rate at the time of the agreement, to be worth 42,000 DM [22,000 Euros], plus interest.

court rejected the wife's claim that she was entitled to an additional 4% interest because such result would "violate the basic Iranian sense of justice (*ordre public*)".[100]

The next case offers interesting insights into the phenomenon of influence and borrowing between legal systems, specifically the emergence of a potential resistance of the borrowing legal system towards the transplanted rule. In *IPRax 1983*[101], an Iranian divorced wife living in Germany claimed the enforcement of Mahr in the absence of a written contract. She had received, upon marriage, "a symbolic Mahr consisting of a Qur'an and a piece of sugar cane candy symbolizing the sweetness of married life."[102] The wife claimed 150,000 DM [75,000 Euros] plus 4% interest as *Mahr al-mithl*, a form of "proper Mahr" which is determined by comparing "the *mahr* paid to other female members of the wife's family, for instance sisters, paternal aunts and female cousins."[103] The wife argued that, given her privileged socio-economic status, she was entitled to 75,000 Euros according to Islamic family law. The husband replied that a lower Mahr should be granted to the wife "because she was thirty-four years old at the time of marriage, thus reducing her worth as a child-bearer."[104]

After having classified Mahr as a family law matter, the Hamburg Court attempted to understand the Islamic institution of *Mahr al-mithl* according to the family law provisions of the *Iranian Civil Code*, which were applicable based on the German conflict of law rules. In determining the exact amount of *Mahr al-mithl*, however, it used "the criteria for an award of maintenance to the average divorced German citizen living in Hamburg, as the parties were planning to stay in Hamburg".[105] *Mahr al-mithl*, now technically integrated into the German legal order, was thus invested with a German-specific meaning which could vary from that of Iran. Criteria such as "the young age of the woman, the absence of children, and her good prospects for getting a job as a translator in about ten months"[106] were taken into consideration. Given her high social status, "a monthly amount of 2,000 DM [1,000 Euros] was deemed appropriate for securing her according to her social status until she got her job in ten months".[107] Although the enforcement of 20,000 DM as *Mahr al-mithl* (2,000 x 10 months) was done by comparing the similarly situated German woman, the acceptance of *Mahr al-mithl* as a legitimate Islamic legal institution surely represents a legal pluralist move.

The Legal Pluralist Approach presents itself as committed to the recognition of minority citizens' cultural and religious differences. However coherent it may seem as a political vision, this approach cannot offer the tools to predict the practical outcomes that will flow from it in the adjudicative process. The next cases adopt the same liberal framework and commitment to legal pluralism while producing an opposite outcome: the waiver of Mahr as related to *Khul* divorce.

100 Jones-Pauly, note 97 above, p. 9.
101 See IPRax 1983 (Praxis des Internationalen Privat- und Verfahrensrechts), 74-77 and 64-65.
102 Jones-Pauly, note 97, p. 11.
103 Pearl and Menski, note 19 above.
104 Jones-Pauly, note 97 above, p. 11
105 Id at p. 12.
106 Ibid.
107 Ibid.

(c) The waiver of Mahr as related to Khul divorce: Québec and the United States

A *Khul* divorce dissolves the husband's duty to pay the deferred *Mahr*.[108] The Québec and American cases introduced in this section adopt the Legal Pluralist Approach in adjudicating Mahr: in all of these cases, the wife is the one asking for divorce and, in response, courts adopt the internal logic of the Islamic law regime in applying the waiver of Mahr. These cases exemplify the Legal Pluralist Approach because they explicitly pluralize their own legal regime.

In *M.H.D. v. E.A.*[109], a 1991 Canadian Court of Appeal decision from Québec, the wife filed for divorce in Montreal and claimed the enforcement of deferred *Mahr*.[110] In applying Syrian law (Syrian law is derived in part from Islamic law) to the marriage contract according to private international law rules,[111] the appellate Court concluded that the wife had to waive *Mahr* because she initiated the divorce and therefore embarked on a *Khul* divorce. Furthermore, the principles established by Syrian Islamic law in general and *Khul* divorce in particular did not, according to the court, violate any provision of the Canadian Charter.[112]

Fifteen years later in Québec, the same basic reasoning and outcome was used in *I. (S.) v. E. (E.)*[113], a decision which did not borrow from the framework of international private law rules but rather incorporated the Legal Pluralist Approach to a purely Quebec family law dispute. In 2005, divorce was granted on the basis that both parties lived apart for over one year,[114] as well as on grounds of "physical cruelty" toward the wife only and for the harm she suffered during "the parties' 21 years of life together".[115] The court concluded that, given the peculiar and traumatic circumstances of the case, this was an exceptional situation "where injustice would result if there were to be equal shares"[116] in the division of the family patrimony. After having decided in the wife's favor on the partition of the family patrimony,[117] the court turned to the issue of the Islamic religious divorce, presented to the court as a clear bargaining scenario between the husband and wife.[118] Agreeing to

108 For an analysis of this form of Islamic divorce, see P. Fournier, "In the (Canadian) Shadow of Islamic Law: Translating Mahr as a Bargaining Endowment", *Osgoode Hall Law Journal*, XLIV (2006), pp. 649-677. Khul divorce can be initiated by the wife with the husband's prior consent; however, the qadi must grant it, and divorce by this method dissolves the husband's duty to pay the deferred mahr. Khul divorce is therefore the exchange of mahr for "freedom," a form of divorce that has "often proved very costly indeed". See Dawoud Sudqi El Alami and Doreen Hinchcliffe, Islamic Marriage and Divorce Laws of the Arab World (1996), at 27-28.

109 *M.H.D. v. E.A.*, Québec Court of Appeal, Droit de la famille – 1466, 23 septembre 1991, No 500-09-001296-896. ("*M.H.D. v. E.A.*")

110 The marriage contract provided for a prompt *Mahr* of 10 Syrian pounds and a deferred *Mahr* of 25,000 Syrian pounds. The marriage was performed in Syria in April 1985, and the parties moved to Canada seven months later.

111 In the province of Quebec, as opposed to other parts of the country, civil law applies. International private law rules (conflict of laws) thus follow the French model. *M.H.D. v. E.A.*, note 109 above, at Par. 7 and 8.

112 *M.H.D. v. E.A.*, note 109 above, at Par 33.

113 *I. (S.) v. E. (E.)*, Cour supérieure du Québec, 2005 Carswell Que 8765. ("*I. (S.) v. E. (E.)* ").

114 Ibid Par. 53: "Both parties are asking for a divorce; it shall be granted. Both parties are entitled to it on the basis of living separate and apart for over one year. …"

115 Ibid.

116 Id at Par. 100.

117 Ms. I. had requested unequal shares, whereas Mr. E. had asked for equal shares.

118 *I. (S.) v. E. (E.)*, note 113 above, Par. 65: "Ms. I. was also asking the Court to order Mr. E. to undertake, immediately after the civil judgment of divorce, to do whatever was necessary so that Ms. I. also be divorced according to their faith. On the last day of the trial, the subject came up and Mr. E. undertook to go to the Country A Consulate in Montreal and give his wife a religious divorce within seven days of a final judgment

grant Ms. I. the religious divorce immediately, before the court, "as a sign of good faith",[119] Mr. E pronounced "talaq" three times "in front of two Muslim witnesses, i.e. Ms. I. and her lawyer, Mtre Elmaraghi",[120] and undertook to fill in the necessary paperwork at the Country A Consulate. One would have expected the enforcement of Mahr as a direct consequence of the pronouncement of Talaq.[121] Instead, the court acknowledged a sworn declaration consisting of the following: in exchange for Talaq, Ms. I. promises not to claim the enforcement of Mahr or any alimony according to Islamic family law in her country of birth.[122] Although the court used the cultural and legal expression "Talaq" to acknowledge the existence of a religious divorce, the waiver of Mahr as an outcome is clearly related to the bargaining process of a *Khul* divorce.

Other examples of a court adopting the Legal Pluralist Approach to recognize the *Khul* divorce can be found in *Akileh v. Elchahal*,[123] an American 1996 trial court decision from Florida, and in *In re Marriage of Dajani*,[124] a 1988 California trial court decision. In an *obiter dictum* reproduced by the Court of Appeal, the trial judge in *Akileh* is said to have described the enforcement of Mahr as directly related to *Khul* divorce: "The court stated that even if the parties attached sufficiently similar meanings to the sadaq to show that there was a meeting of the minds, the court would find that the sadaq was meant to protect the wife from an unwanted divorce. As such, the trial court would not order the husband to pay the wife the postponed sadaq since the wife was 'the one that chose to pursue the divorce'."[125] In the final judgment of dissolution of marriage, the trial court further denied the "Wife's claim for rehabilitative alimony"[126] and "permanent alimony",[127] but held that "this Court reserves jurisdiction over these issues in the event Wife contracts cervical cancer and is unable to work, provided she can prove that the cervical cancer

in the present case. It was clear that for Mr. E., the granting or not of a religious divorce was an important bargaining tool: he knew a religious divorce was important for Ms. I. not only for religious reasons, but also for civil reasons, as it would affect her civil status in Country A, where all her family lives, i.e. father, siblings, cousins, etc., whom she had not seen for many years".

119 I. (S.) v. E. (E.), note 113 above, Par. 66.

120 Ibid.

121 According to classical Islamic family law, talaq (repudiation) is a unilateral act which dissolves the marriage contract through the declaration of the husband only. The law recognizes the power of the husband to divorce his wife by saying "talaq" three times without any need for the enforcement of his declaration by the court. What comes with this unlimited "freedom" of the husband to divorce at will and on any grounds is the (costly) obligation to pay *mahr* in full as soon as the third talaq has been pronounced. Talaq *mahr*, this "provision for a rainy day," is conceived by Islamic jurists as a powerful limitation on the possibly capricious exercise of the husband, as well as a form of compensation to the wife once the marriage has been dissolved. A wife may unilaterally terminate her marriage and without cause only when such power has been explicitly delegated to her by her husband in the marriage contract. Otherwise, she may apply to the courts either for a khul or a faskh divorce. If the khul divorce route is not desirable or available, the wife may apply for a faskh divorce, but only in so far as she can demonstrate to the court (qadi) that her case meets the limited grounds under which divorce can be granted. It is basically a fault-based divorce initiated by the wife. In the case of termination of marriage by talaq or faskh divorce, the wife is entitled to *mahr*. See El Alami & Hinchcliffe, note 107 above, p. 22; Joseph Schacht, *An Introduction to Islamic Law* (1982), p. 167; Asaf A.A. Fyzee, *Outlines of Muhammadan Law* (4th ed., 1974), p. 133.

122 I. (S.) v. E. (E.), note 113 above, Par. 117.

123 *Akileh v. Elchahal*, In the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida Family Law Division, 7549M1285, Florence Foster, J.

124 *In re Marriage of Dajani*, Superior Court of Orange County, No. D-246250, James J. Alfano, Sr., Judge.

125 *Akileh v. Elchahal*, 666 So. 2d 246 (Fla. Dist. Ct. App. 1996) at 248.

126 *Akileh v. Elchahal* 13th Ct., note 123 above.

127 Ibid p. 3., Par. B.

was caused by the genital warts and that she is unable to work because of the cancer".[128] If *Khul* Mahr had survived the journey from Syrian Islamic law to Florida law, its culture-specific meaning did not penetrate the deep structures of American family law. In fact, the division of marital assets in *Akileh* does not follow the Islamic rule of separate property at the dissolution of marriage, but the court rather proceeds to identify which items consist of marital property[129] and divides them according to the rule of "equal share of the marital funds".[130]

In re Marriage of Dajani similarly incorporates the Islamic family law rule of *Khul* divorce. In an *obiter dictum* reproduced by the court of appeal, the trial judge is said to have described the enforcement of Mahr as directly related to *Khul* divorce: "[There] is a valid dowry in existence; [] both parties are obligated to perform the conditions of the dowry. [para.] The court also finds that, based upon the testimony, the law in existence would be that of the Jordanian or Moslem law and finds that if the wife initiates a termination of the relationship, she foregoes the dowry and the court so finds that in this case the wife initiated the termination of the marriage and common sense and wisdom of Mohamed [*sic*] would dictate that she forego the dowry, unless the parties agree otherwise, and here they do not agree otherwise."[131]

Mahr as Utterly Foreign, Not Recognized and Not Enforced: Canada

By contrast, and at the opposite extreme of the Legal Pluralist spectrum, *Kaddoura v. Hammoud*,[132] a 1998 Ontario decision, refused to culturally recognize Mahr on the basis of the authenticity and purity of Islamic law. Consequently, the court failed to enforce it as a "domestic contract" under the *Family Law Act*. Far from being an expression of religious freedom that should be accommodated and regulated through an interpretation of Canadian family law, in this case the court portrays Mahr as dangerous and threatening.

In resolving the issue, Justice Rutherford of the trial court considered religious evidence in order to define the content of Muslim marriages solemnized in Canada.[133] Despite the obligatory nature of the Mahr under Islamic family law, the judge held that the agreement was not enforceable by Canadian civil courts. The judge's reasoning revealed that it is the religious dimension of the Mahr that rendered the agreement unenforceable.[134] In fact,

[128] *Akileh v. Elchahal* 13th Ct., note 123 above, p. 3., Par. B. Approximately one year after the marriage, Asma contracted genital warts from her husband and the marriage slowly deteriorated from this moment. She filed for divorce on 24 August 1993.

[129] Ibid; and see Par. 15: "The following property is marital: VCR worth $300.00, kitchen appliances worth $300.00, jewelry worth $2,500.00, Husband's 401K plan with a marital value of $700.00, 1992 Honda, and 1988 Honda. Both vehicles are of equal value. All but the 1992 Honda were taken by Husband".

[130] Id at Par. G.

[131] This excerpt reproduces a ruling announced from the bench, as quoted on appeal. See *In re Marriage of Dajani*, 204 Cal.App.3d 1387 (1988), at p. 1389. However, the trial court decision (unpublished but on file with the author) does not introduce the applicability of Islamic family law to the case at hand.

[132] *Kaddoura v. Hammoud*, (1998) O.J. No. 5054, 44 R.F.L. (4th) 228, 168 D.L.R. (4th) 503, 1998 Carswell Ont 4747, 83 O.T.C. 30 (Ont. Gen. Div.).

[133] Two expert witnesses, the imam of a mosque in Ottawa and the director of the *Institute of Islamic Learning* in Ontario, expounded in their testimony on the nature of the Mahr. According to the evidence relied upon by the court, Mahr consists of "a gift or contribution made by the husband-to-be to his wife-to-be, for her exclusive property. It is not, however, a gift in the sense that a gift is given by the grace of the giver, but in fact 'Mahr' is obligatory and the wife-to-be receives it as of right". *Kaddoura v. Hammoud*, note 132 above, at Par. 13.

[134] *Id* at Par. 25: "The Mahr and the extent to which it obligates a husband to make payment to his wife is

Justice Rutherford seems to suggest that he has no authority or legitimacy, as a (Western, non-Muslim) judge dealing with the status of a foreign (Islamic) custom in a Canadian constitutional order, to speak *for*, *on behalf of*, or *in the name of* the Muslim population of Canada.: "I don't think, even if I had received clear and complete Islamic doctrine from these experts, that I could, *as if applying foreign law*, apply such religious doctrine to a civil resolution of this dispute. Mufti Khan in particular said that only an Islamic religious authority could resolve such a dispute (…) (through) proper application of principles derived from the Holy Qur'an, the words of the Prophet and from the religious jurisprudence".[135] Such a conclusion is, ironically, faithful to the legal pluralist vision: religion is law's other, and Mahr belongs to this n on-state entity.

By so openly holding an agreement made between Muslims unenforceable because it is based on Islamic rules, the court presents its legal pluralist premises in a rather open way: Mahr represents the Otherness of Muslim citizens, and such (incommensurable) difference must be adjudicated solely through an Islamic lens. It can therefore not be a "marriage contract" under s. 52(1) of the *Family Law Act*. In *Kaddoura*, we are left with the anxious gazes that are directed at Muslim subjects, an explicit attempt not to "lead the Court into the 'religious thicket', a place that the courts cannot safely and should not go".[136] The irony lies in the fact that the Legal Pluralist Approach is often praised as "embracing diversity", not rejecting it on the very basis of identity politics.

CONCLUDING REMARKS

The cases discussed in this section emphasized the particularity of Mahr as a legal pluralist manifestation and the ethical imperative of treating such particularity with (respectful) deference to the minority group. However, the above Legal Pluralist cases adopted contradictory assessments as to the outcome of Mahr. The first camp, the "many different routes to Mahr as cultural recognition", held Mahr to be culturally and religiously "legitimate" from the standpoint of the multicultural state, yet differed as to its enforcement in cases related to *Khul* divorce. The second camp, "Mahr as utterly foreign, therefore not recognized and not enforced", found the Islamic institution too different

essentially and fundamentally an Islamic religious matter. Because Mahr is a religious matter, the resolution of any dispute relating to it or the consequences of failing to honour the obligation are also religious in their content and context. While not, perhaps, an ideal comparison, I cannot help but think that the obligation of the Mahr is as unsuitable for adjudication in the civil courts as is an obligation in a Christian religious marriage such as to love, honour and cherish, or to remain faithful, or to maintain the marriage in sickness or other adversity so long as both parties live, or to raise children according to specified religious doctrine. Many such promises go well beyond the basic legal commitment to marriage required by our civil law, and are essentially matters of chosen religion and morality. They are derived from and are dependent upon doctrine and faith. They bind the conscience as a matter of religious principle but not necessarily as a matter of enforceable civil law."

[135] Id at p. 28 (emphasis added). It is interesting to note that Justice Rutherford did grant the application for divorce even though the marriage was concluded pursuant to the Muslim faith, and had its roots in the Holy Qur'an.

[136] Ibid: "In my view, to determine what the rights and obligations of Sam and Manira are in relation to the undertaking of Mahr in their Islamic marriage ceremony would necessarily lead the Court into the 'religious thicket', a place that the courts cannot safely and should not go." Let us note that in *Khan v. Khan*, 2005 Carswell Ont 1913; 2005 ONCJ 155, [2005] W.D.F.L. 3182, 15 R.F.L. (6th) 308, the same court distanced itself from this reasoning and stated that it could consider the enforceability of a "Nikah": "The court is prepared to enter the 'thicket' and find that this document represented more than mere religious significance to the parties and that it did bind them civilly." (Par. 32)

for the Western judge invested in the very complex mission of translating the Otherness of Muslim particularity. Despite the immediate differences these two discourses exhibit, the two are much more similar than one might expect. First, they are both committed to legal pluralism as a mode of governing identity, one in which "law" is employed to speak cultures in a diverse and multiple fashion and where legal subjects are invited "to imagine themselves as legal agents".[137] Second, the two have used the Imam as the expert witness to represent the minority group, its culture, its religion, and its legal system. Third, both view Mahr as a non-state legal order which is located in the actual practices of local culture and, as such, qualifies as "law".

Formal Equality: the Secular Understanding of Mahr

The Formal Equality Approach assumes that law exists as an identifiable and autonomous entity detached from society and morality.[138] The specificity of this approach lies not only in the conception of law as determinate but also in the principles of objectivity and neutrality as the standpoint of legal language. Its basic point of departure is the very definition of law as rules of formal logic: the Parliament and legislation, courts and adjudication, government and procedures, and so on. Manifestations of positivistic doctrine, produced by the apparatus of the State, tend to present legal knowledge as a truth claim, something that one can easily access or touch.[139] The fundamental and key concept of "the individual" finds a prominent place under the Formal Equality Approach. This ultimate value of individuality—individual freedom, individual autonomy, individual responsibility—is directly connected to a vision of the state as minimally interfering with free choices. Hence, individuals can best achieve their happiness in a society where they are left free to pursue their own interests. This approach is prepared to devote special attention to equal opportunities, not to equal outcomes. Accordingly, in contract law matters, contracts are viewed as resulting from a "private ordering" which represents the will of the parties. As such, the State must enforce them without regard to the social/emotional circumstances in which the negotiation took place.[140] Because it is the consent of the contracting parties that justifies their contractual obligations, the State only acknowledges, through enforcement, the individual freedom used by the parties to bargain and choose which rule corresponds best to their personal preferences.[141]

[137] Roderick MacDonald claims: "The legal pluralist perspective invites legal subjects to imagine themselves as legal agents – to discover the constitutive potential of their own actions. The practice of legal pluralism is, consequently, foundation-building. We teach ourselves to examine our own interactions, and to learn about law, first and foremost, from ourselves". Macdonald, note 70 above.

[138] See H. L. A. Hart, "Positivism and the Separation of Law & Morals", *Harvard Law Review*, LXXI (1958), pp. 593-629 and Lon Fuller, "Positivism and Fidelity to Law", *Harvard Law Review*, LXXI (1958), pp. 630-672.

[139] Familiar critiques of legal positivism and formalism as a theoretical framework include Rudolf Von Jhering, "In the Heaven of Legal Concepts: A Fantasy", (1884) (selections), in Morris R. Cohen and Felix S. Cohen, *Readings in Jurisprudence and Legal Philosophy* (1951) and Felix Cohen, "Transcendental Nonsense and the Functional Approach", *Columbia Law Review*, XXXV (1935), p. 809.

[140] See generally Roscoe Pound, "The Role of the Will in Law", *Harvard Law Review*, LXVIII (1954), p. 1.

[141] See Lon L. Fuller and William R. Perdue, Jr., "The Reliance Interest in Contract Damages", *Yale Law Journal*, XLVI (1936), p. 373.

Mahr-as-Enforceable-Contract

In this section, we shall consider seven cases—one from Canada, three from the United States, two from Germany and one from France. All insist on the irrelevance of Islam in deciding upon the validity of Mahr. As a secular contract, Mahr is entitled to no more and no less treatment than any other civil contract. In approaching the adjudication of Mahr in this subsection, the politics of contract law will be examined as a secular domain and it will be argued that there are political stakes in treating contract law as merely the convergence of the will of the parties[142] and (religious) Mahr as just another (secular) contract.

(a) The enforcement of Mahr as a marriage agreement: Canada

In a 2000 Canadian case, *Amlani v. Hirani*,[143] the British Columbia Supreme Court dissociated itself from *Nathoo*[144] when reviewing Mahr as a secular contract. To the specific claim that Mahr can only be enforced in the absence of civil remedies being available to Ms. Hirani when the marriage broke down,[145] the court responded by a categorical refusal to enter the internal logic of Islamic family law. If the parties have decided to live in a country where family law remedies are available to men and women upon divorce, they cannot pretend to be bound by another site of legal regulation simply because they are Muslims. Moreover, if Mr. Amlani willingly accepted that Mahr "be in addition and without prejudice to and not in substitution of all of my obligations provided for by the laws of the land",[146] he cannot now ask the court to ignore his contractual obligations in the name of religion.[147]

Clearly, the British Columbia Superior Court closes the door to the judicial exploration of Mahr as culture. Mahr is *a contract*: it requires an offer and an acceptance; and it names an owner to whom property is vested. Under the formal equality rhetoric, Mahr-as-contract does not involve the question of whether it is deemed essential or merely accidental to the (Islamic) marriage contract, or whether it was understood by the (Muslim) parties as financially providing for the wife in the event of divorce (as opposed to alimony) under Islamic family law. In *Amlani*, Mahr is an agreement which merely corresponds to the legal definition of s. 61(2)(b) of the *Family Relations Act*.[148]

[142] See Duncan Kennedy, "The Political Stakes in "Merely Technical" Issues of Contract Law", *European Review of Private Law*, I (2001), pp.19; 14, 25.

[143] *Amlani v. Hirani*, 2000 Carswell BC 2663.

[144] *Nathoo v. Nathoo*, note 71 above.

[145] This is what Mr. Amlani claimed in his Examination for Discovery. See *Amlani v. Hirani*, note 143 above, at Par. 29 and 31.

[146] Id at Par. 30.

[147] Id at Par 31: "If the payment of the Maher/Mehr Amount only applied in the absence of civil remedies, as suggested by Mr. Amlani in his Examination for Discovery, there would have been no reason for these parties to have entered into the Marriage Contract".

[148] In deciding whether Mahr meets the requirements of a marriage agreement as described in s.61(2)(b) of the *Family Relations Act*, Justice Sinclair-Prowse reviewed each legal element separately and concluded the following: Mahr was made between Mr. Amlani and Ms. Hirani (condition a); it was entered into during their marriage (condition b); it was to take effect upon execution of the agreement (condition c); and it provides "for ownership ... in other property" (condition d). Therefore, Mahr is a marriage agreement for the purposes of s. 61 of the *Family Relations Act*.

(b) The enforcement of Mahr as an antenuptial agreement: the United States

In *Aziz*, *Odatalla* and *Akileh*, three American cases respectively from New York, New Jersey, and Florida, Mahr was portrayed and enforced on the basis of an antenuptial agreement and religious evidence was excluded in the interpretation of Mahr.

Aziz v. Aziz, a very brief 1985 decision from the New York Superior Court,[149] begins with a sharp distinction between religion and Western contract law. In an action for divorce, Justice Miller describes the parties "as husband and wife, against a mahr of $5,032 ($5,000 deferred payment and $32 prompt payment) under Islamic law",[150] and concluded that "t]he document at issue conforms to the requirements of the General Obligations Law . . . and its secular terms are enforceable as a contractual obligation, notwithstanding that it was entered into as part of a religious ceremony".[151] Although Mahr was enforced by the court, the judge made no attempt to gain an internal appreciation of the functional role of Mahr in a Muslim couple's marriage and subsequent relationship.[152] The legal question is rather thought of as one in which A, after discussions and bargaining with B, fixes the price of Mahr as a condition of marriage. What has to be decided from the perspective of the judge is, quite simply, whether this agreement respects the conditions of contract law in New York, in which case Mahr—or, rather, the contract—is enforced. In *Aziz*, Justice Miller conceives Mahr-as-Contract without incorporating the religious shape that gives it meaning and existence. Hence divorced from any particular type of private ordering, Mahr becomes a mere contractual, monetary obligation: "As a secular document it calls for the payment of $5,000 now", Justice Miller writes in his concluding remarks.[153]

In *Odatalla v Odatalla*[154], a 2002 New Jersey case, Mahr was similarly translated as an enforceable secular contract. To the argument made by the husband that the enforcement of Mahr "would violate the spirit of the separation of Church and State clause of the First Amendment of the Constitution",[155] Justice Selser categorically asserted: "Clearly, this court can enforce a contract which is not in contravention of established law or public policy. (…) Why should a contract for the promise to pay money be less of a contract just because it was entered into at the time of an Islamic marriage ceremony?"[156] Furthermore, the court affirmed that the validity of Mahr as a contract does not involve a "doctrinal issue"[157] related to religious policy or theories; consequently, there is "no constitutional

[149] *Aziz v. Aziz*, 127 Misc.2d 1013, 488 N.Y.S.2d 123 (Sup.Ct.1985). ("*Aziz v. Aziz*") The decision is only one page and a half long.

[150] Ibid.

[151] Ibid.

[152] Interestingly, the judgment in Aziz was based on a 1983 decision of the Court of Appeals, the highest state court of New York, concerning a Jewish marriage contract, or ketubah. In this case, *Avitzur v. Avitzur*, 58 N.Y.2d 108, 115 (1983), four of seven judges applied what they called "neutral principles of contract law" to avoid the religious thicket feared by the three dissenters, who refused to engage questions that, in their view, implicated "Jewish religious law and tradition". (at 119). cert. den. 464 U.S. 817, 104 S.Ct. 76, 78 L.Ed.2d 88. See Comment, "Jewish Divorce and Secular Courts: The Promise of Avitzur", *Georgetown Law Journal*, LXXIII (1984), p. 193; Warmflash, "Enforcing Religious Marriage Contracts", *Brooklyn Law Review*, L (1984), p. 229.

[153] *Aziz v. Aziz*, note 149 above, at 1014.

[154] *Odatalla v. Odatalla*, 810 A.2d 93 (N.J. Super. Ct. Ch. Div. 2002).

[155] Id at p. 95.

[156] Ibid.

[157] Id at p. 96.

infringement" at stake in enforcing Mahr.[158] Not only is the enforcement "not void simply because it was entered into during an Islamic ceremony of marriage",[159] but to embrace "the secular parts of a written agreement is consistent with the constitutional mandate for a "free exercise" of religious beliefs".[160] In *Odatalla*, the judge claimed to merely *acknowledge* a previous, pre-existing secular agreement, "though religious in appearance",[161] and hence wished to mark the irrelevance of recognizing Muslim subjectivity in contractual relations.

Explicitly resisting the husband's claim that Mahr be considered as a sacred domain of Islam impenetrable by a secular court, the Superior Court of New Jersey held that "[a] greements, though arrived at as part of a religious ceremony of any particular faith", are enforceable if they are (1) "capable of specific performance under 'neutral principles of law'"[162] and (2) if "the agreement in question meets the state's standards for those 'neutral principles of law'."[163] In applying the neutral principles of contract law, Justice Selser reviewed the definition of contract[164] and applied it to the Mahr agreement. The videotape in evidence demonstrates an offer of $10,000 on the part of Zuhair Odatalla[165] and an acceptance from Houida Odatalla in the form of a signature.[166] Insisting on the fact that each party "read the entire license and Mahr Agreement"[167], "signed the same freely and voluntarily",[168] "(t)he signatures were witnessed"[169] and "the Imam continued performing the remaining parts of the Islamic ceremony of marriage",[170] the Superior Court of New Jersey found that "all of the essential elements of a contract [were] present".[171] Further, Justice Selser reviewed the constitutive exceptions to the enforcement of contracts and rejects the positions that the Mahr Agreement "is too vague to comply with contract law",[172] that it constitutes a gift[173] or that it "is unenforceable and void as being against public policy".[174] Rather, he described Mahr as indicating a relationship of property between two contracting parties, "nothing more and nothing less than a simple contract between two consenting adults";[175] hence, Zuhair "owes to the plaintiff the sum of $10,000".[176]

In *Akileh v. Elchahal*,[177] a 1996 decision from the court of appeal of Florida, the wife challenged the lower court's ruling that the premarital agreement was unenforceable for lack of consideration.[178] The parties contracted their marriage in Florida and agreed upon

158 Ibid.
159 Ibid.
160 Id at p. 97.
161 Ibid.
162 The "neutral principles of law" approach was clearly explained in Jones v. Wolf, 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979).
163 *Odatalla v. Odatalla*, note 154 above, at p. 98.
164 Id at p. 97.
165 Ibid.
166 Ibid.
167 Id at p. 95.
168 Ibid.
169 Ibid.
170 Ibid.
171 Id at p. 98.
172 Ibid.
173 Ibid.
174 Ibid.
175 Ibid.
176 Ibid.
177 *Akileh v. Elchahal* Fla. Dist. Ct. App., note 125 above.
178 Ibid p. 247.

one dollar in prompt Mahr and $50,000 in deferred Mahr.[179] The trial court held that Mahr was unenforceable for lack of consideration and because there was no meeting of the minds.[180] Closing the door to the religious evidence, Justice Patterson followed the *Aziz* decision and held that "Florida contract law applies to the secular terms of the sadaq".[181] In rejecting the determination that the contract was unenforceable *de novo*, the appellate court held that marriage is sufficient consideration to uphold a prenuptial agreement: "the agreement was an antenuptial contract, executed in contemplation of a forthcoming marriage".[182] Furthermore, the court relied on Florida contract law in concluding that there was a meeting of the minds—so that the subsequent difference as to the construction of the contract does not affect the validity or indicate the minds of the parties did not meet. The husband's subjective intent at the time he entered into the agreement is not material in construing the contract.[183] The court also suggested that the husband did not make his unique understanding of Mahr known to the wife prior to signing the certificate of marriage. In holding that Mahr was valid and enforceable,[184] the court in *Akileh* found that the parties had agreed on the essential terms of the contract.

(c) The enforcement of Mahr as a legal debt: Germany

In Germany, the determination of whether Mahr is family alimony or a contractual debt claim has a direct impact on which law—citizenship or domicile—will be applicable to the parties. In fact, German international private law rules specify that family law matters are regulated by the law of the parties' citizenship in the *Family Law Chamber*, whereas contract law matters fall under the law of domicile and follow the jurisdiction of the *Civil Law Chamber*. In *Hamm FamRZ*,[185] a 1988 German decision involving a Tunisian citizen married to a German citizen, the *Civil Law Chamber* interpreted Mahr as a legal debt and a contractual institution in itself, rather than a post divorce alimony. Because the parties had clearly distinguished in the marriage contract between "Mahr and maintenance",[186] on one hand, and "community property",[187] on the other, the Higher Regional Court (OLG) respected the intention of the parties and enforced Mahr as separate from family law matters.

Similarly, the Court in *Amtsgericht Buende*[188] attempted to determine the intention of the parties with regard to Mahr. The Mahr contract stipulated that the husband would give to the wife "a Qur'an, cooking salt, green silk, and 140 Azadi gold coins".[189] After six

[179] Ibid.
[180] Id at p. 248.
[181] Id at p. 247.
[182] Id at p. 248.
[183] Id at pp. 248-249.
[184] Id, at p. 249.
[185] In Hamm FamRZ, 1988, 516.
[186] Jones-Pauly specifies that "if the marriage ended in divorce, the husband was obliged to pay the wife 5,000 DM [2,500 Euros] as settlement/compensation and as dower (which seems to refer to not only *mahr* but also the classical consolatory gift upon divorce, or muta')." Jones-Pauly, note 97 above, p. 19.
[187] As suggested by Jones-Pauly, "The parties did not wish to "have community property, but rather keep their fortunes separate (which also conforms to the Quranic injunction that the wife has control over her own property and earnings)". Id, p. 10.
[188] Amtsgericht Buende, 25 March 2004, 7 F 555/03, unreported.
[189] Jones-Pauly 2008, note 97 above, at 18.

years of marriage, the Iranian parties divorced and the wife claimed enforcement of 140 gold coins (exact Euro amount not determined by the court) as Mahr. The husband argued that "he had already given the wife valuable gifts, like clothes, and expensive gold jewels. He wanted the value of these gifts to be calculated against the claim for the mahr".[190] The argument according to which Mahr has the nature of a gift and therefore is a matter of civil law was accepted by the court. Consequently, it held that Mahr was enforceable as a contractual matter if the intentions of the parties were to view it as a gift. In this case, the husband had obliged himself to such a gift, and the amount of Mahr was intended to be separate from "a Qur'an, cooking salt, and green silk". He was thus ordered to pay the 140 Azadi gold coins.

(d) The enforcement of Mahr as a contractual condition of marriage: France

In a 1997 Cour de cassation decision,[191] the French court considered Mahr as a contractual condition of marriage under Islamic family law and enforced it on that basis. Ms. Kubicka, a Polish citizen, and M. Tohme, a Lebanese citizen, married in Lebanon according to Islamic law. The matrimonial regime was that of "separate property with the consideration of Mahr".[192] Upon divorce, Ms. Kubicka claimed that she did not consent to the family law regime described in the marriage contract because she did not speak nor understand Arabic and was not aware of the mandatory regime applicable to married couples in Lebanon.[193] The Cour de Cassation concluded that both parties expressed in French their intentions to adopt the regime of "separate property with the consideration of Mahr". It further concluded that the trial court correctly inferred, from the "legal formulation of a reciprocal offer and acceptance",[194] the "existence of an express will of the spouses regarding the determination of their matrimonial regime".[195]

Mahr-as-Unenforceable-Contract

The Formal Equality Approach found in "Mahr-as-Enforceable-Contract" can just as easily lead to an opposite outcome, as happened in several decisions in the United States and Germany, where Mahr was deemed unenforceable under the contractual exceptions of vagueness, lack of consent and consideration, and abstractness.

(a) The unenforceability of Mahr on grounds of vagueness: United States

In *Habibi-Fahnrich v. Fahnrich*,[196] a 1995 New York decision, the court held that Mahr generally may be enforceable as a contractual obligation which formed the basis of the marriage.[197]

[190] Ibid.
[191] Cour de Cassation, Chambre civile, December 2, 1997, (Pourvoi)
[192] I translate from the French expression used in the decision, i.e. "le régime de la séparation de biens avec clause de dot". Ibid p. 1.
[193] Id at p. 2.
[194] I translate from the French expression used in the decision, i.e. "les formules légales d'acceptation et de consentement réciproques". Ibid.
[195] I translate from the French expression used in the decision, i.e. "l'existence d'une volonté expresse des époux quant à la determination de leur regime matrimonial". Ibid.
[196] *Habibi-Fahnrich v. Fahnrich*, No. 46186/93, 1995 WL 507388, at 1 (N.Y. Sup. Ct. July 10, 1995).
[197] Ibid.

However, the enforceability of Mahr in this case turned on whether the requirements for a contract under the *General Obligations Law* were met.[198] Defining Mahr (or Sadaq) as "a document which defines the precepts of the Moslem marriage by providing for financial compensation to a woman for the loss of her status and value in the community if the marriage ends in a divorce",[199] Justice Rigler determined that the terms of Mahr asking for the distribution of "half of the husband's possessions" failed to conform to contract law due to vagueness.[200]

Throughout the discussion on the enforceability of Mahr, the court refused to explore the religious structure that permeates Mahr as an Islamic institution. Mahr simply refers to the market, to ownership—it is a contract, though not precise enough in this case. First, the court determined that the parties did not agree to the material terms of the contract, namely "one half interest".[201] Second, because the terms "postponed" and "one half of the possessions" were not defined, the material terms of the contract were not specific enough and, hence, the contract failed the test "that anyone reading the contract should be able to understand the dictates of the agreement".[202] Finally, the agreement was "insufficient on its face" because there was no evidence of any agreement by the parties to its terms.

Shaban v Shaban,[203] a 2001 court of appeal decision from California, similarly concluded that Mahr was unenforceable because of the uncertainty of the terms used by the parties in their premarital agreement. In *Shaban,* the parties to a premarital agreement had contracted with respect to the choice of law governing the construction of the agreement, pursuant to s. 1612 of the *California Family Code*. The document was a one-page piece of paper written in Arabic and signed by the husband and future father-in-law. Providing for an immediate Mahr of approximately twenty-five piasters (about one dollar), and a deferred Mahr equal to about thirty dollars, it specified that the marriage was made in accordance with Islamic law, more specifically that "the above legal marriage has been concluded in Accordance with his Almighty God's Holy Book and the Rules of his Prophet to whom all God's prayers and blessings be, by legal offer and acceptance from the two contracting parties".[204]

In *Shaban*, the wife claimed her share of a community estate valued in excess of $3 million despite agreeing to a Mahr of 500 Egyptian pounds (approx. $86),[205] whereas the husband introduced the Islamic marriage contract into evidence and sought to prove

[198] Id pp. 1-3. Specifically, this turned on whether the mandates of the Statute of Frauds (General Obligations Law Section 5-701(1)) requiring "the writing to contain all material terms and conditions so that one reading it can understand what the parties have agreed upon" were satisfied.

[199] Id at p. 1.

[200] Id at p. 2: "In the case at bar, the material terms of the SADAQ are not specific enough that a person reading it would be able to grasp the gist of the agreement. Areas of the SADAQ which do not appear to be specific enough include the meaning of "possession" and the definition of "one half of the possessions". The SADAQ itself does not illustrate what a possession is or how an asset would even become a possession. The SADAQ also fails to display how one half of the possessions should be determined or measured or when the determination should even take place".

[201] The Mahr document read "a ring advanced and half of husband's possessions postponed". Id at p. 1.

[202] Ibid.

[203] *Shaban v Shaban*, Court of Appeal, Fourth District, California (2001), 88 Cal.App.4th 398, 105 Cal.Rptr.2d 863.

[204] Id at p. 402. Mr. and Mrs. Shaban married in Egypt in 1974 and divorced in 1998 in the Superior Court of Orange County, after having lived in the United States for about 17 years.

[205] Ibid.

through parol evidence that by accepting Mahr, Mrs. Shaban also consented to their marriage being dissolved according to Islamic law's separate property presumption.[206] In practical effect, that would mean that "there would be no community interest in Ahmad's medical practice or retirement accounts".[207]

Embracing formal equality, the court refused to recognize Mahr and rendered the Egyptian Islamic wedding contract void primarily because it failed to satisfy the Statute of Frauds: The court concluded that an agreement whose only substantive term in any language is that the marriage has been made in accordance with "Islamic law" is hopelessly uncertain as to its terms and conditions.[208] Refusing to allow the expert to testify[209] and concluding that there was no prenuptial agreement,[210] the court entered a judgment applying California community property law to the acquisitions during the marriage and dividing what it then held was the community estate.

(b) The unenforceability of Mahr due to lack of consent and consideration: United States

In *Akileh v. Elchahal*, a case whose facts are described in the previous section, the Florida court relied on basic contract law doctrine to conclude that Mahr was unenforceable. Indeed, the "trial court held that the sadaq was unenforceable for lack of consideration and because there was no meeting of the minds".[211] Justice Foster specified, in the final judgment of dissolution of marriage, that the "Wife's claim to the sadaq is denied. The sadaq does not meet the statutory requirements of Florida law for the enforcement of a contract because there was no meeting of the minds and Wife supplied no consideration".[212]

(c) The unenforceability of Mahr on grounds of abstractness: Germany

In *IPRax 1988*[213] the German Federal High Court examined Mahr as a legal contractual debt under the *German Civil Code*[214] and concluded that it did not meet the contract law requirements. A debt under German law consists of "a naked or abstract promise to perform and a description of what is to be performed, independent of motives, economic circumstances or any legal considerations. A measure of abstractness lies in the absence in

[206] Id at p. 403: "At trial, Ahmad made an offer of proof that the phrase signified a written intention by the parties to have the property relations governed by "Islamic law", which provides that the earnings and accumulations of each party during a marriage remain that party's separate property".

[207] Id at p. 404.

[208] Id at p. 406.

[209] Id at p. 400: "It is one thing for a couple to agree to basic terms, and choose the system of law that they want to govern the construction or interpretation of their premarital agreement. It is quite another to say, *without any agreement as to basic terms,* that a marriage will simply be governed by a given system of law and then hope that parol evidence will supply those basic terms. At trial, the husband attempted to introduce parol evidence in the form of an expert witness who was prepared to testify that certain language in the document signified an intention on the part of the husband and wife to have their marriage, including property relations at the time of any divorce, governed by "Islamic law", which provides that the earnings and accumulations of each party during a marriage remain that party's separate property."

[210] The court found the document to be a marriage "certificate", not a premarital agreement. Ibid at p. 404.

[211] *Akileh v. Elchahal* Fla. Dist. Ct. App., note 125 above, p. 248.

[212] *Akileh v. Elchahal* 13th Ct., note 123 above, p. 3.

[213] BGH, 28 Jan 1987 (Bundesgerichtshof (Federal Supreme Court), IPRax 1988, 109-113 (Praxis des Internationalen Privat- und Verfahrensrechts).

[214] BGB §780.

the contract of the motive for the performance".[215] In this case, the husband had specifically included in the marriage contract the motives for agreeing to Mahr: he entered into the contract in consideration of Islamic legal rules. Consequently, the test of abstractness failed, although the wife had tried to convince the court that "the contract did not limit itself to Islamic law only. The contract gave her the alternative of applying the German divorce law, whereupon she could also claim the 10,000 DM".[216] It is on the basis of this exception to contract law that Mahr was not enforced.

CONCLUDING REMARKS

In adjudicating Mahr, the most direct expression of the Formal Equality Approach is the *secular* conception of this religious institution: deprived of its Islamic flavor, Mahr becomes a (Western) contract enforceable (or not) irrespective of race, gender, or religion. In capturing Mahr under the umbrella of Western contract law, as opposed to Islamic family law, the judge pictures the liberal system as devoid of representative role for the Muslim-ness of the parties. Contract law, s/he assumes, is not a matter of identity politics. As was apparent in this section, the judge chooses, in interpreting Mahr, between rules and standards arranged around the rule/exception or rule/counter-rule configurations specific to contract law doctrine: Mahr is enforced either as a "marriage agreement" (rule—Canada), as an "antenuptial agreement" (rule—United States), as a "legal debt" (rule—Germany) or as a "contractual condition of marriage" (rule—France) / or Mahr is rendered unenforceable because of "vagueness" (exception—United States), due to lack of consent and consideration (exception—United States) and "abstractness" (exception—Germany).

Substantive Equality: the Gendered Understanding of Mahr

The Substantive Equality Approach is concerned with power differentials—how subjects are constituted through structural and hierarchical systems of inequality, and how the law specifically (re)produces systemic conditions of oppression and can remedy or dissolve them. In such a context, treating everyone the same cannot lead to equality. Because the real world is marked by domination, the state can only deliver outcomes that are substantively equal if it examines the *effects* of legal policies. In its normative mode, the Substantive Equality Approach opposes both the Legal Pluralist and the Formal Equality Approaches. According to proponents of substantive equality, if the legal pluralists wrongly place the autonomy of the group over the autonomy of the individual, and in so doing suppresses the rights of women by promoting conservative visions of the community over progressive ones,[217] proponents of formal equality fail to take power into account in projecting a

[215] Jones-Pauly, note 97 above, p. 25.
[216] Ibid.
[217] Susan Moller Okin has attempted to show that multiculturalism and feminism cannot coexist: in a society truly committed to sex equality, multiculturalism must give way, and feminism must triumph. S. M. Okin, "Is Multiculturalism Bad for Women?" in Joshua Cohen, Matthew Howard, and Martha C. Nussbaum (eds.), *Is Multiculturalism Bad for Women?* (1999). See also D. L. Coleman, "Individualizing Justice Through Multiculturalism: The Liberals' Dilemma", *Columbia Law Review*, XCVI (1996), p. 1093; M. Minow, "About Women, About Culture: About Them", *Daedalus*, CXXIX 129 (Fall 2000); M. Nussbaum, *Sex and Social Justice*

universal, delocalized, and objective legal reality. The purpose of the substantive equality approach is thus to name, expose, and ultimately eradicate the socially and economically inferior position of oppressed groups in society. To do so, it must start from the perspective of the oppressed, and critique existing doctrines, practices and structures through the lens of subordination theory.[218] In applying substantive equality, the judge embraces a general fairness policy in enforcing contracts: because, in intimate relationships, men and women are not considered at arm's length nor as equals in bargaining power—especially with regard to issues related to the family—the state intervenes to police the outcomes. How has this policy of equity worked in the translation of Mahr in Canada, United-States, France and Germany?

The Enforcement of Mahr according to gender equity standards

In the cases below, the substantive equality approach causes the courts to see Mahr from the "public" and highly interventionist standpoint of the State. In the German and Québecois cases discussed below, courts have embraced the legitimacy of Mahr but have intervened to regulate its enforcement, an intervention that carries with it the mark of substantive equality. While Germany has modified the initial amount of Mahr to meet equitable considerations, Québec has rejected the Islamic family law logic of *Khul Mahr*[219] to welcome the enforcement of Mahr in a context where the Muslim wife is the one asking for divorce.

(a) The enforcement and readjustment of Mahr as alimony: Germany

In *OLG Koeln*,[220] a 1983 Court of Appeal decision from Cologne, the notarized marital contract between an Iranian wife and a German husband specified as Mahr a Qur'an worth 1000 rials, jewelry worth 88,000 rials, plus four million rials (42,000 DM [21,000 Euros]). Jones-Pauly notes that "The four million rials were specifically referred to as a 'debt' on the husband, payable at any time the wife wanted it".[221] The wife sought and obtained a divorce before the German *Family Law Chamber* and separately claimed the enforcement of Mahr plus interest as a legal debt before the *Civil Law Chamber*.

At the trial court level, the husband had convinced the court that the enforcement of Mahr constituted an unjust enrichment for the wife, one which would violate German public order. On appeal from the *Civil Law Chamber*, the appellate court viewed Mahr as an Islamic institution which serves as post-marital maintenance but only insofar as its enforcement meets the German standards of equity. It held that enforcing its full amount in this case—(42,000 DM [21,000 Euros])—would be repugnant to German principles of justice. Consequently, the amount would have to be counted against any maintenance which the husband might be ordered to pay. To establish exactly how much of the 21,000 Euro Mahr would be awarded to the wife, the court decided to send the matter back to the

(1999).

[218] Feminist theory is diverse, with liberal, radical, Marxist, and socialist strands. See generally J. Halley, *Split Decisions: How and Why to Take a Break from Feminism* (2006).

[219] See Abdal-Rehim, note 34 above, p. 105.

[220] OLG Koeln IPRax 1983, 73 (Cologne). ("OLG Koeln")

[221] See Jones-Pauly, note 97 above, p 10.

Family Law Chamber. Mahr was thus translated as alimony and its amount fluctuated to adapt to fairness considerations.[222]

(b) The enforcement of Mahr even though the wife initiated divorce: Québec

In *M.H.D. v. E.A.*,[223] a family law trial court decision from Quebec, the marriage contract provided for a prompt Mahr of 10 Syrian pounds and a deferred Mahr of 25,000 Syrian pounds.[224] The marriage was performed in Syria in April 1985, and the parties moved to Canada seven months later. In 1991 the wife filed for divorce in Montreal and claimed the enforcement of deferred Mahr. The Quebec trial court concluded that Syrian Islamic law could not apply in Canada through private international law rules[225] because its application would create a negative effect on Muslim wives availing themselves of the *Divorce Act*. Had the court correctly applied Syrian Islamic law, it would have refused to enforce Mahr according to the logic of the *Khul* divorce. The trial court[226] considered this outcome contrary to the *Canadian Charter*:[227]

However, this court believes that the legislation cannot be in conflict with sections of the *Canadian Charter* whereby fundamental rights and freedoms are guaranteed. The *Canadian Charter* is the supreme law of Canada. All must abide by it, including the legislator. The Divorce Act gives the opportunity to both spouses to initiate divorce proceedings, and punishing a spouse on the basis that she exercises her rights according to the Act is a violation of her freedom.[228]

The key to understanding the performance of the Muslim woman in this case is to measure the *predicted* economic gains and losses of advocating the enforcement or the non enforcement of Mahr, in relation to both Islamic family law *and* Western law. In response to the "waiver rule" of *Khul* Mahr, the Muslim woman has two options: either pretend that the "waiver rule" is *not* part of Islamic family law (the religious route); or suggest that the "waiver rule" is so discriminatory that it should be regarded as inherently contrary to "public policy" in relation to international private law rules (the secular route). In *M.H.D. v. E.A.*, the Muslim wife embarked on a "secular" argumentation and convinced the court

[222] It is worth noting that this analogy with alimony does not stand up to analytical rigor as the wife was able to claim payment at any point, even prior to divorce, according to the agreement, which is clearly not the case for alimony.

[223] *M.H.D. v. E.A.*, supra note 109.

[224] Ibid Par. 6.

[225] Through the application of Article 6 *C.C.*, the Quebec law at the time, the matrimonial regime of the domicile of the parties at the moment of their marriage is applicable and the Quebec courts have competence to decide matters regarding the existence and breadth of the rights derived from the legislation of their domicile which in this particular situation was Syria. *Id* at Par. 7 - 8.

[226] It should be noted that the analysis here does not take into account the Court of Appeal's decision which concludes that the *Canadian Charter* does not apply to Mahr because it is a donation between spouses derived from the law of obligations and, thus, constitutes an economic contractual relationship which escapes *Charter* protection.

[227] Charter of Rights and Freedoms, note 38 above. Textual support for substantive equality in Canada is found in s 15 of the Canadian Charter of Rights and Freedoms, which guarantees "equal benefit of the law". Part I of the Constitution Act 1982 being Schedule B to the Canada Act 1982 (UK) 1982 c 11. Section 15(1) reads: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

[228] *M.H.D. v. E.A.*, supra note 109. This is an excerpt from the court of appeal, quoting the trial court decision.

that *Khul* Mahr as a legal institution violates gender equality, which conflict of laws holds at the heart of the principle of *l'ordre public* ("public policy"). Hence, such discriminatory Islamic traditions should be formally and rigidly *rejected* by the host legal system, despite rules of international private law incorporating Syrian Islamic law:

> Finally, the respondent invoked the principle of international and Quebecois public order as a motive for the non-application of the Syrian law and regulations…We are dealing with a religion and matrimonial regime that flagrantly discriminate not only against women but against all people who, in this country or elsewhere, desire to exercise the recognised fundamental right to ask for divorce.[229]

Embracing egalitarian considerations in the interpretation of contract law, the trial court intervened in family/religious matters in order to police the outcomes. If *Khul* Mahr is seen as violating substantive equality, then the court should reject this religious institution: "With all due respect to the beliefs of the religious authority as well as to those of the husband, the court believes that such traditions, customs and doctrine put before us are not applicable to the wife, and that the court must consider the wedding present discussed above only with respect to the *Quebec Civil Code*."[230] The legal transplantation offered the following outcome: the non enforcement of Mahr *as a religious institution* but its enforcement *as a secular institution* despite the *Khul* divorce. In contradiction with the cases noted above, the performative gesture of substantive equality produces, in the cases below, the *non*execution of Mahr, as much in Quebec, Canada and the United States as in France.

The Unenforceability of Mahr according to fairness principles

In this section, the unenforceability of Mahr is attached to the application of fairness principles: *sometimes* equity towards the Muslim *man* dictates the non-enforcement of Mahr, *sometimes* equity towards the Muslim *woman* dictates such outcome. We consider here cases from the United States, Canada, France and Québec that have attempted to bring about an egalitarian outcome through the non-enforcement of Mahr.

(a) The unenforceability of Mahr on the basis of equity: Québec

In *M. F. c. MA. A.*[231], a 2002 trial court decision from Québec, the substantive equality approach judged and ultimately rejected Mahr on the basis of equity towards the Muslim husband. In 1997 Mrs. Ajabi married in Montreal at the age of twenty three, and gave birth to a son the following year. The Musulman contract of marriage reads "There is a Mahr of Holy QURAN Book, one piece Sugar Candy, one Kilo of Gold payable by the groom to the bride".[232] The marriage lasted a little less than three years and during these years Mrs.

[229] Id at Par. 34, extract from the judgment at first instance (translated from the original French).
[230] Id at Par. 27. (translated from the original French).
[231] *M. F. c. MA. A*, Cour supérieure, 11 mars 2002, N° 500-12-254264-009.
[232] Ibid par. 7.

Ajabi stayed at home to raise her son.[233] The court refused to enforce Mahr,[234] an amount that would have been worth $15,960.[235] Justice Hurtubise concluded:

> The message is clear: given what the husband has already given to the wife, he is not obliged to offer more. He has satisfied his commitment.
> Given the uncontradicted testimony of the Imam, expert on this topic, this request is denied.[236]

In applying the family law rules of the Quebec Civil Code, Justice Hurtubise divided the family patrimony equally[237] (which resulted in the wife taking $27,304.85) and determined alimony for the wife would be $150 per week.[238] In *M. F. c. MA. A.*, the court focused admittedly on distributive effects. Instead of viewing Mahr as a form of identity based on community standards or as a secular contract reflecting the intentions of the parties, the court approached Mahr through the prism of outcomes. It considered that the enforcement of Mahr would *unjustly* profit the wife and should therefore not be enforced.

(b) The unenforceability of Mahr as unjust enrichment: Germany

The next two cases examined the bargaining power existing between the marital parties and concluded that to enforce Mahr would, in these *particular* contexts, *unjustly enrich* the Muslim woman. Although the legal reasoning and outcome are similar to the previous subsection, these cases are addressed separately because they explicitly refer to the legal concept of "unjust enrichment". In *OLG Koeln,*[239] a 1983 decision from Cologne, the notarized marital contract between an Iranian wife and a German husband specified as Mahr a Qur'an worth 1000 rials, jewelry worth 88,000 Rials, plus four million Rials (42,000 DM [21,000 Euros]).[240] As mentioned earlier, the wife sought and obtained a divorce before the German *Family Law Chamber* and separately claimed the enforcement of Mahr plus interests as a legal debt before the *Civil Law Chamber*. Arguing for the non-enforcement of Mahr, the husband attempted to demonstrate that to enforce Mahr would be repugnant to German public policy due to the unjust enrichment of the wife. The *Civil Law Chamber* agreed and refused to enforce the contract. The parameters, categories and legal knowledge of the doctrine of "unjust enrichment" were similarly applied in *OLG Cell, FamRZ*,[241] a 1998 decision from Germany. In this case, the wife had already been awarded in the *Family Law Chamber* maintenance of 37,000 DM as part of the divorce proceedings. The judge concluded that the wife could not, in all equity, claim an additional 30,000 DM as Mahr.

233 Id at par. 23.
234 Id at p. 8.
235 Id at par. 32.
236 Ibid (translated from the original French).
237 Id at p. 7.
238 Ibid.
239 OLG Koeln, note 220 above.
240 Id at 73.
241 OLG Cell, FamRZ 1998, 374.

(c) The unenforceability of Mahr on the basis of substantial justice: Canada

In *Vladi v. Vladi*,[242] a 1987 decision from Nova Scotia (Canada), the court refused to enforce Mahr on the basis of "substantial justice". In 1973 Mr. and Mrs. Vladi, who were Iranian nationals residing in West Germany, married religiously and civilly in Germany. In 1978 the parties began visiting the province of Nova Scotia in Canada and subsequently became Canadian citizens. *Vladi* is an application under the *Matrimonial Property Act*[243] of Nova Scotia, made by Mrs. Vladi subsequent to a divorce granted to her husband by a West German court in September 1985. At separation, the parties had assets in Nova Scotia and elsewhere in the world. Although the wife and child had taken up residence in Nova Scotia, the parties were found to have had their last common residence in West Germany.

Pursuant to s. 22(1) of the *Matrimonial Property Act*,[244] the division of matrimonial assets in Nova Scotia is governed by the law of the place where the parties had their last common habitual residence, in this case West Germany. Since West German law would have applied Iranian law, the law of citizenship, application of the doctrine of renvoi would result in the case being decided according to Iranian Islamic family law. Justice Burchell thus considered that Mahr was attached to Iranian Islamic family law, and that under such a legal regime women could not benefit from the principle of equal sharing: "In Iran, a wife in the position of Mrs. Vladi would be entitled to minimal support and a nominal award in relation to a so-called "mahr" or "morning-gift". Otherwise she would have no direct claim against assets standing in the name of her husband".[245] Justice Burchell further wrote: "To put it simply, I will not give effect to Iranian matrimonial law because it is archaic and repugnant to ideas of substantial justice in this province".[246] Having found Iranian law inapplicable, Justice Burchell returned the matter to German domestic law instead of to the Nova Scotia internal rule. In applying West German law, Mrs. Vladi was entitled to an equal division of matrimonial assets.[247]

(d) The unenforceability of Mahr on grounds of public policy: France and United States

In 1976, a French Court of Appeal[248] refused to enforce Mahr in conformity with French public policy provisions. In applying international private law principles, the court concluded that marriage contracts requiring the existence of Mahr for forming a valid marriage contradict French public policy because they reduce marriage to a financial "purchase". Mahr itself is therefore contrary to "public policy and French morals"[249].

[242] Vladi v. Vladi, Nova Scotia Supreme Court, Trial Division, 1987 CarswellNS 72, 7 R.F.L. (3d) 337, 79 N.S.R. (2d) 356, 196 A.P.R. 356, 39 D.L.R. (4th) 563.
[243] *Matrimonial Property Act*, R.S.N.S. 1989, c. 275.
[244] Article 22 (1):
"Conflict of laws 22 (1) The division of matrimonial assets and the ownership of moveable property as between spouses, wherever situated, are governed by the law of the place where both spouses had their last common habitual residence or, where there is no such residence, by the law of the Province." Ibid.
[245] Vladi v. Vladi, note 242 above, Par. 11.
[246] Id at par. 30.
[247] Id at par. 46.
[248] *Arrêt de la Cour d'appel de Douai*, 8 January 1976: N. 76-11-613.
[249] Id at p. 110.

Public policy was similarly used in *In re Marriage of Dajani*[250], a 1988 Court of Appeal decision from California which understood Mahr to be facilitating divorce, and as such, void as against public policy.

In *In re Marriage of Dajani*, Awatef argued on appeal that the trial court decision not to enforce Mahr because she had initiated the divorce proceedings was an unjust result and against public policy.[251] The court agreed that a public policy argument was appropriate, but not the one urged by Awatef. Justice Crosby's opening remarks are very telling: "Will a California court enforce a foreign dowry agreement which benefits a party who initiates dissolution of the marriage? No".[252] The court in *Dajani* held that the Jordanian marriage contract must be considered as one designed to facilitate divorce, because "with the exception of the token payment of one Jordanian dinar ... the wife was not entitled to receive any of the agreed upon sum unless the marriage was dissolved or her husband died. The contract clearly provided for the wife to profit by divorce, and it cannot be enforced by a California court".[253]

In *In re Marriage of Dajani*, we are left with the impression that Mahr is no longer an individual, private matter incorporating Islamic family law rules: it is regulated by a *public law* doctrine; its unenforceability is the direct result of a violation of a *collective* notion of "public morals".[254] The decision welcomed substantive equality in its internal understanding of contract law and explicitly closed the door to a battle of expert witnesses on the meaning and enforceability of Mahr according to Islamic family law: "Wife devotes a considerable portion of her brief to a challenge of the qualifications of husband's expert. It is not necessary for us to enter that fray, however".[255]

CONCLUDING REMARKS

The Substantive Equality Approach operates against a background of gender sensitive and general fairness considerations: in adjudicating Mahr, there is telling reference to the equality and bargaining power *between* the Muslim husband and wife as identified by their social position and positioning. In this context Mahr is a gendered institution which has an effect on substantive equality. Because family law aims also to protect the category of formerly married women, the Substantive Equality Approach engages in liberal identity sexual politics in reviewing whether or not Mahr should be enforced. As the analysis of the case studies demonstrated, this approach has produced inconsistent outcomes in the adjudication of Mahr.

[250] *In re Marriage of Dajani* Cal. App. 3d., note 131 above.
[251] Id at p. 1389.
[252] Id at p. 1388.
[253] Id at p. 1390.
[254] "An agreement is against public policy if it is injurious to the interest of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or, as it is sometimes put, if it is at war with the interests of society and is in conflict with public morals". *Garlinger v. Garlinger*, 129 N.J.Super. 37, 40, 322 A.2d 190 (Ch.Div.1974)
[255] *In re Marriage of Dajani* Cal. App. 3d., note 131 above, p. 1389.

CONCLUSION

In its many fragmented forms—as a form of identity under the Legal Pluralist Approach, as a secular contract under the Formal Equality Approach, and as a gendered symbol under the Substantive Equality Approach—the adjudication of Mahr in Western liberal States offers a panoply of conflicting images and speaks the competing considerations pre-dating its Western judicial encounter. Through an analysis of the case law from several different Western jurisdictions, namely Germany and France (civil), Canada (civil/common law) and the United States (common law), it has been argued that once Mahr "departs" from Islamic family law and lands in a Western chamber of law, the concept is "animated" by a diverse and unpredictable set of legal constructs (concepts of multiculturalism, fairness, public policy, gender equality etc). Now being dynamically situated and interpreted beyond the pure religious and cultural contexts of "home" countries, it becomes a hybrid and transformed version of what was once described as Mahr by classical Islamic jurists.

Three conclusions stand out from the investigation of Mahr's journey to Western liberal courts. First, the "Legal Pluralist", the "Secular", and the "Gendered" understandings of Mahr have *all* produced, in inconsistent and unpredictable manners, the enforcement and non-enforcement of Mahr. Second, Canada, the United States, France and Germany, although differing in their attitudes towards immigrants and minority citizenship as well as in the scope of applicable legal rules, have *all* generated cases on the adjudication of Mahr in *every* "liberal" camp. Third, "Comparative law", as traditionally conceived, has failed to provide a setting of inquiry that could suggest or predict in which direction Mahr is likely to be displaced and interpreted in the four Western States. As a result, "Canadian Mahr", "American Mahr", "German Mahr" and "French Mahr" do not enjoy a cohesive status and thus cannot be designed as such. There may be an explanation for this. Because of the deeply ideological nature of adjudication, we arrive only at paradoxical outcomes when we study Mahr's journey in Western liberal courts.

The reason this article has concentrated on the locus of the State, on adjudication, on case law, is that courts present themselves as invested in the technical enterprise of applying the law in a non-ideological manner. This article demonstrates that Western courts respond to issues of faith and culture in ways that can be classified ideologically. Another reason why the "public" dimension of the law has been insisted upon is that many players in the "identity politics debate" developed a strong political emphasis on issues of "State" recognition as capable of addressing and possibly resolving the suffering of minority citizens in Western liberal States. Whereas Charles Taylor proposed that the liberal State affirms cultural differences in the public sphere as a remedy,[256] Nancy Fraser has argued that misrecognition harms are often increased by economic deprivations, and conversely, that economic injustices are compounded by persistent patterns of cultural

[256] Taylor, note 69 above. Taylor defines the modern identity as characterized by an insistence on its inner voice and capacity for authenticity, i.e. the ability to find a way of being that is somehow true to oneself. Proponents of the politics of recognition argue that the liberal State has betrayed its commitment to neutrality by privileging the ways of life of dominant groups. Yet because oppressed groups have distinct cultures, experiences, and perspectives on social life, the appropriate remedies on the part of Western liberal States consist of integrating these distinct perspectives on social life. See also W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995).

denigration.[257] Hence, she concludes "…justice today requires *both* redistribution *and* recognition".[258] Although the present article did not engage this debate directly, it has done so indirectly by showing that the Islamic institution of Mahr, a symbol of minority citizens' particularity and religious difference, *cannot* travel to Western liberal courts without carrying a complex interaction amongst several parties whose interests are often opposed to its recognition.

[257] Nancy Fraser, "From Redistribution to Recognition: Dilemmas of Justice in a 'Postcolonial' Age", in N. Fraser (ed.), *Justice Interrupts: Critical Reflections on the 'Postcolonial' Condition* (1997).
[258] Ibid p. 68.